REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2022/00335

In the matter between:

PHARMACEUTICAL SOCIETY OF NAMIBIA	**FIRST APPLICANT**
ULRICH ES RITTER	**SECOND APPLICANT**
LUISEN APOTHEKE	**THIRD APPLICANT**

and

NAMIBIAN COMPETITION COMMISSION	**RESPONDENT**

Neutral citation: *Pharmaceutical Society of Namibia v Namibian Competition Commission* (HC-MD-CIV-MOT-REV-2022/00335) [2023] NAHCMD 776 (30 November 2023)

Coram: CLAASEN J
Heard: **6 June 2023**
Delivered: **30 November 2023**

Flynote: Competition in the Namibian market – Competition Act 2 of 2003 – Object to safeguard and promote competition in the Namibian market – Administrative act – Competition Commission investigated alleged practice of 50 percent mark-up on prescription medicine – Competition Commission made decision that the Pharmaceutical Society of Namibia transgressed s 23(1), read with s 23(2)(a) and s 23(3)*(a)* of the Act and published its intent to take action under s 38 of the Act.

Summary: The Namibian Competition Commission had conducted an investigation and published its intent to take action under s 38 of the Act. The decision was that the Pharmaceutical Society and certain of its members transgressed s 23(1), read with s 23(2)*(a)* and *s* 23(3)(a) of the Act. The applicants approached this court to review and set aside that decision on multiple fronts, such as that the decision is flawed because of lack of fair procedure and bias, that the *audi alteram partem* rule was not complied with, that the Commission delegated its authority to investigate and abdicated its authority to make the decision. Furthermore, that the first applicant did not initiate the practice nor has it prosecuted members who does not adhere to the formula. The applicants contend that the formula of single exit price plus 50 percent on medicine is one that was agreed to between all stakeholders in the industry. Applicants furthermore contended that the relationship between the society and its members is a vertical relationship.

The Commission disagreed with that and pleaded that there was a 50 percent mark-up in force, which amounted to a horizontal relationship that entails the fixing of prices between the members, that there was no delegation of authority and that there was no violation of the *audi alteram partem* rule, as the applicants participated in the process that lead up to the Commission's decision. The

Commission also raised a point in limine that the review application is premature and that the matter is not property before court.
Held: The Commission's decision that the PSN contravened s 23(1), read with s 23(2)(*a)* and s 23(3)*(a)* of the Act is final in effect and therefore the point of prematurity is rejected.

Held further: The Secretary did not have the powers to undertake the investigations and that the Commission abdicated its decision making powers.

Held further: The determination that the applicants contravened the Act has been shrouded in secrecy with no discovery of the evidence that constitutes the purported contravention. It goes against the grain of fairness to expect a party to defend or fight the proposed decision, without having had discovery of the evidence. That in turn facilitates preparation of a defence or ability to enforce his or her rights adequately before the tribunal, which did not happen herein.

ORDER

The court grants relief as sought in the following terms:

1. Reviewing and setting aside the decision of the Respondent as published in the Government Gazette of the Republic of Namibia under General Notice No. 732, dated 20 December 2021 in which it gave notice of its intention to take the following action under section 38 of the Competition Act, 2003:
    1.1. Declaring that the Respondents have contravened section 23(1) read with section 23(2)(a) and section 23(3)(a) of the Competition Act;
    1.2. Ordering the Respondents to cease with the conduct;

1.3. Restraining the Respondents from engaging in the conduct in future;

1.4. Seeking an appropriate pecuniary penalty against the Respondents in terms of section 53(1)(a) and 53(2) of the Competition Act, taking into account the factors stated in section 53(3) of the Competition Act;

1.5. Ordering that the Respondents to pay the costs of these proceedings, such costs to include the cost of one instructing and one two instructed counsel;

1.6. Such further and/or alternative relief as the Court may consider appropriate;

1.7. Against the following undertakings/association of undertakings, as the Respondents against which relief will be sought in terms of section 38:

1.7.1. The Pharmaceutical Society of Namibia ("the PSN"), a voluntary professional association for pharmacists in Namibia, and having its business place at Office No. 14, Gecka Pharma, 32 David Hosea Meroro Drive, Windhoek, Namibia;

1.7.2. All relevant pharmacies, as indicated in the "Annexure A" document attached thereto.

2. The Respondent must to pay the costs of this application, such costs to include the cost of one instructing and two instructed counsel.

3. Matter is removed from the roll and regarded as finalized.

JUDGMENT

CLAASEN J:

Introduction

[1] The applicants approached this court to review and set aside a decision made by the respondent (hereinafter referred to as 'the Commission') as published in the Government Gazette.[1] The respondent gave notice of its intention to take action under s 38 of the Competition Act No 2 of 2003 (the Act), namely declaring that the Pharmaceutical Society of Namibia (hereinafter referred to as 'PSN') and certain of its members have contravened s 23(1) read with s 23(2)*(a)* and s 23(3)*(a)* of the Act; ordering them to cease with that conduct, restraining them from engaging in that conduct in the future, and seeking a pecuniary penalty in terms of the Act.

[2] The first applicant is a voluntary association. It represents the interests of pharmacists, pharmacist interns, pharmaceutical technicians and pharmacist assistants in Namibia who are registered in terms of the Pharmacy Act 9 of 2004.

[3] The second applicant is a registered pharmacist since 1986 and the President of the first applicant. The second applicant is the sole proprietor of the third applicant (a retail pharmacy) which he referred to as the oldest pharmacy in Windhoek.

[4] The respondent is a juristic person established in terms of s 4 of the Act with its offices located at 269 Independence Avenue, BPI House in Windhoek. The main objectives of the Commission is to administer and enforce the Act. In order to do so, the Commission was bestowed with the powers to investigate anti-competitive conduct and practices by undertakings and associations of undertakings. It is the execution of this function that brought about this matter.

[5] The Commission instituted an investigation, into what it called the mandatory PSN rule that requires its members to impose a 50 percent mark-up on medicine dispensed by the pharmacies. The investigation took approximately 3 years and culminated in the proposed decision that brought the applicants to court.

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[1] General Notice No 732 Government Gazette no 7708 dated 20 December 2021.

Background Facts

[6] During August 2017, Prosperity Health, a medical administrator in Namibia, approached the respondent for an advisory opinion on two issues, one of which was whether the mandatory rule of PSN requiring its members to impose a 50 percent mark-up on medicine is anti-competitive.

[7] During the course of September 2018, the Commission notified PSN that it was instituting an investigation into the said pricing practice. Although the investigation emanated from the opinion sought, no complaint was filed and the Commission maintains that it launched the investigation into PSN and its members of own accord.

[8] On 16 November 2018 PSN and 203 of its members, through its legal representative, filed comprehensive written submissions to respond to the notice. The submission, inter alia, covered the historical context namely that South Africa implemented amendments to its pharmaceutical price regime[2] and that the South African Minister of Health issued Regulations[3] Relating to the Transparent Pricing System for Medicines and Scheduled Substances. Namibia did not follow suit and thus does not have a Pricing Committee nor a Director General who exercises control over the pricing of pharmaceuticals in the country.

[9] The written submission stated that the medical industry has recognized the necessity for the regulation of medical services including pharmaceuticals. That led to the Namibian Association of Medical Aid Funds (hereafter called 'NAMAF')

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[2] Medicines and Related Substances Control Amendment Act 1997 which amended certain portions of the Medicines and Related Control Substances Control Act of 1965 and was eventually repealed by the Medicines and Related Substances Amendment Act of 2002.

[3] Regulations Relating to the Transparent Pricing System for Medicines and Scheduled Substances published under Government Notice No R 1102 of November 2005.

which determined 'benchmark tariffs' on behalf of all the medical aid funds in Namibia. These tariffs are applied by all the medical aid funds and medical practitioners that dispense medicine. The tariffs also include pharmaceuticals. The benchmark tariff does not apply to medicine that is dispensed in hospitals in the course of treatment nor in pharmacies that are located in hospitals.

[10] In respect of the current practice, the written submission indicated that NAMAF (and the medical aid funds under its control) as well as the Public Service Medical Aid Scheme (hereinafter referred to as 'PSEMAS') uses the 'Single Exit Price' (hereinafter referred to as 'SEP') published annually and compiled by a private company called 'Medikredit' in an electronic database and a code linked to each medicine, called a 'NAPPI' code. These codes are used by pharmacies to link with the electronic platforms of medical aid funds which enables a pharmacist to insert the details of a given member when he or she purchases medicine and process the claim. The platform automatically records the transaction with the medical aid fund or PSEMAS at SEP plus 50 percent or in the event of an exception, to that markup percentage which is applied by NAMAF for certain medicine such as anti-retroviral medicine and other expensive chronic medicine.

[11] The submission annexed certain guidelines from the World Health Organisation as well as a presentation or pharmaceutical pricing policies in Europe which PSN submitted is indicative of worldwide recognition of the need for price regulation in the medical and pharmaceutical industries. PSN asserts in the submission that the South African Constitutional Court,[4] the Namibian Supreme Court[5] and the World Health Organisation all agree that the regulation of medicine is essential, even in an open market and that there are clear considerations against a 'free market' and 'highly competitive' environment for medicine.

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[4] *Minister of Health and Another v New Clicks SA (Pty) Limited and Others* 2006 (2) SA 311 CC.
[5] *Namibian Association of Medical Aid Funds and Others v Namibian Competition Commission and Another* (18 of 2016) [2017] NASC 27 (19 July 2017).

[12] PSN express concerns that the industry would become uncontrolled if pharmacies were left to charge whatever they desire and it would enable larger chain pharmacies to take advantage of smaller community pharmacies. The submission also categorically denies that PSN enforces the 50 percent markup or that it is a requirement of PSN. It asserts that the mark-up is determined by NAMAF. PSN also submitted that it does not sanction pharmacies for deviation from the formula and that there is nothing that prevents a pharmacist from exercising his or her own discretion and charge for medicine below that formula.

[13] The Commission finalised its investigations during September 2019 and the Board of the Commission adopted the preliminary findings on 06 December 2019. On 04 March 2020 the Commission gave notice of its proposed decision that the PSN has contravened s 23(1), read with s 23(2) and s 23(*3*)(*a*) of the Act and listed 7 'grounds' on which the finding was based.

[14] The first ground was that the pharmacies submit to the authority of PSN and are liable for the infringements of the competition legislation that may arise from the conduct of PSN. The second ground was that the PSN has a mandatory rule that requires the imposition of a 50 percent mark-up on the dispensing of medicines by pharmacies and that the pharmacies use software that computes the said formula when a pharmacist dispenses medicine. The third ground was that the PSN enforces the 50% mark-up rule and warn pharmacies of possible sanctions for transgressing of ethical rules.

[15] Fourthly, that despite contentions by the PSN that the 50 percent mark-up is prescribed by other third-party entities, the evidence has revealed that it is a PSN initiative and that the PSN resisted attempts to reform.

[16] The fifth ground indicated that the 50 percent mark-up rule 'appears' to have incentivized more costly medication, even in instances where less costly alternatives are available. The sixth ground stated international health care and pharmaceutical recommendations warn that fixed mark-ups on medicines can result in higher prices and negatively influence the availability of medicine. Finally, the Commission pointed out that PSN has not sought an exemption under part III of the Act.

[17] On 30 November 2020 the Commission convened a virtual conference in terms of s 37 of the Act for oral representations. The delegation that appeared for PSN comprised of Mr Marias SC with instructing counsel Mr Ellis and members of the executive committee of the PSN. Mr Marais in his address pinpointed the main issues as whether the '50 percent markup is compulsory' and would fall foul of s 23 of the Act and whether there are enforcement of it through threats of disciplinary proceedings or other methods. He essentially denied that PSN has engaged in such conduct.

[18] Mr Marais raised the procedural point as to whether it is open to other persons to make representations or examine the arguments of the PSN at the s 37 Conference. He observed others persons logged in. According to him it was the legal representatives of Dune Pharmacy, Werhill Park Pharmacy, PAMM Pharmacy, Safmed pharmacy and Dischem Pharmacies.

[19] He also raised another preliminary procedural point which he referred to as the 'evidential level' and that a factual finding has to deal with evidence. He complained about the difficulty that the PSN was expected to answer in circumstances where it has no idea of what evidence the Commission relies on for its provisional finding. Nor has the PSN seen the 'factual backdrop' or

representations of the persons logged in and that it does not accord with the principles of Article 18 and principles of natural justice.

[20] In response to the main issue counsel emphasised that legislation should be interpreted with its purpose, text and context in mind. In this matter he, argued that the context set out in the NAMAF judgment in Namibia (referred to at para 70) and the consequences of enforcement by the Commission would be contrary to the purpose of the Act. As to what these consequences were, he gave examples of pharmacies of a small town, an after-hours pharmacy or a large chain pharmacy that could monopolize the market with exorbitant prices.

[21] He continued to refer to the 50 percent markup rule as a NAMAF benchmark tariff and that the computer system is done by MediKredit. He turned to the purported factual findings and reasons by the Commission. In respect of the first one wherein the Commission asserted that the PSN serves as an alter ego of pharmacies and that members are liable for the conduct of the PSN, he pointed out that voluntary associations has its own legal persona and that it is only in exceptional cases that liability of members would arise. Thus he respectfully submitted it was a wrong finding.

[22] He continued and dealt with the second and third grounds together, which alleges that PSN enforces such a rule and has resisted attempts to reform the rule. He argued that no such evidence was availed. As far as the fifth and sixth fact are concerned he argued that they are rather consequences and not reasons. He reiterated that a factual finding must arise from evidence and that the PSN joins issue with the Commission because the PSN has evidence to the contrary.

<u>Points in limine</u>

[23] The respondents raised two points in limine. The first point in limine related to non-joinder of NAMAF and the Dischem pharmacy, but the respondent aborted the point at the commencement of the hearing.

[24] The respondent also raised a point that the review is not properly before the court, with the main focus being that the review is brought prematurely. Counsel for the respondent, Mr Maleka SC argued that until the Commission approaches the court for a declaratory order in terms of s 38 of the Act, the proposed decision remains of no effect. The proposition was that the applicants should have waited for the Commission to give effect to its decision by launching the application in court and only then respond to that application. He called this review a pre-emptive strike and prayed that this court uses its discretion to withhold the remedy of review.

[25] Counsel for the applicants, Mr Fitzgerald SC argued that the court should not subscribe to the respondent's stance on account of this issue. He cited *Hira and another v Booysen and Another*[6] wherein it was stated that:

'Generally speaking, the non-performance or wrong performance of a statutory duty or power by the person or body entrusted with duty or power will entitle persons injured or aggrieved thereby for relief by way of common law review.'

[26] He reminded the court that the Commission has published its proposed decision and cannot go back on its decision that the applicants has contravened the Act. It is thus irrevocable and final. Furthermore that the applicants are prejudiced by the decision as published.

[6] *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 93A-B.

[27] It is instructive to briefly consider Part IV of the Act which sets out the procedures from the stage of investigations up to the final decision. The Act confers powers to the Commission to investigate anti-competitive conduct, which it can do either of its own accord or after having received a complaint.[7] Once the Commission decides to conduct an investigation, it must give written notice to the undertaking and may receive evidence or documents to assist in the investigation. The Commission may even take evidence under oath or on affirmation, be it oral or a written statement. [8]

[28] After investigations, if the Commission proposes to make a decision that infringement has taken place, s 36 of the Act requires that the undertaking(s) that may be affected be notified and invited to make written representations and oral representation, if that is preferred. If the undertaking opts for oral representations the Commission has to convene a conference for that purpose.[9]

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[7] Section 33 of the Act provides that:
'(1) The Commission may, either on its own initiate or upon receipt of information or a complaint from any person, start an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute and infringement of –
(a) The Part I prohibition; or (b) the Part II prohibition.'

[8] Section 35 provides that:

'(2) The Commission may take evidence on oath or affirmation from any person attending before it, and for that purpose any member of the Commission may administer an oath or affirmation.

(3) The Commission may permit any person appearing as a witness before it to give evidence by tendering and, if the Commission thinks fit, verifying by oath or affirmation, a written statement.

(4) A person attending before the Commission is entitled to the same immunities and privileges as a witness before the High Court.'

[9] Section 37(1) provides that:

'(1) If an undertaking indicates in accordance with section 36(2)(c)(ii) that it requires an opportunity to make oral representations to the Commission, the Commission must-

(a) convene a conference to be held at a date, time and place determined by the Commission; and

(b) give written notice of the date, time and place to-

[29] After consideration of the oral representations in terms of s 37 of the Act the Commission may institute proceedings in the High Court of Namibia for declaratory orders essentially to confirm its decision.[10] The Commission must also give notice in the Gazette of any action to be taken under s 38 of the Act.[11]

[30] In returning to the matter before me, it is clear that the decision in terms of s 38 has been gazetted. *In the matter of Hashagen v Public Accountants' and Auditors Board*[12] it was stated that:

(i) the undertaking or undertakings concerned;

(ii) any person who had lodged a complaint with the Commission concerning the conduct which was the subject-matter of the Commission's investigation; and

(iii) any other person whose presence at the conference is considered by the Commission to be desirable.'

[10] Section 38 provides:

'After consideration of any written representations made in terms of section 36(2)(c)(i) and of any matters raised at a conference held in accordance with section 37, the Commission may institute proceedings in the Court against the undertaking or undertakings concerned for an order-

(a) declaring the conduct which is the subject matter of the Commission's investigation, to constitute an infringement of the Part I or the Part II prohibition;

(b) restraining the undertaking or undertakings from engaging in that conduct;

(c) directing any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;

(d) imposing a pecuniary penalty; or

(e) granting any other appropriate relief.'

[11] Section 41 provides:

'(1) The Commission must cause notice to be given in the Gazette of any action to be taken under section 38 and of any consent agreement referred to in section 40 to be submitted to the Court for confirmation as an order of the Court.'

[12] *Hashagen v Public Accountants' and Auditors Board* 2021 (3) NR 711 SC.

'An administrative decision is deemed to be final and binding once it is made. Once made such a decision cannot be re-opened or revoked by the decision maker unless authorized by law or by necessary implication. The animating principle for the rule is that both the decision maker and the subject know where they stand. At its core, therefore, are fairness and certainty.'

[31] In my view, there is no other internal remedy available to the applicants. It will not help if the applicants go back to the Commission and it will make no difference if they wait until the Commission launches its application to court. There is no further step other than applying to court for the declaratory orders. The only other option on the table was for the PSN to 'settle', but that came with an albatross of an admission of liability. PSN made it clear that it was not prepared to accept that condition. The publishing of the decision in the government gazette constitutes the proverbial line in the sand. As such the court rejects the point of the review being premature and improperly before the court.

Arguments by parties

[32] The applicants went to great lengths to set out their position that the formula of single exit price plus 50 percent for medicine was transplanted in Namibia and that it was agreed to by all stakeholders in the industry of medical and pharmaceutical products and deposed to the allegations along the lines of the written submission made. The application is voluminous, with the affidavits and its annexures traversing 973 pages.

[33] Apart from the founding affidavit deposed by the President of the PSN, the applicants filed several supporting affidavits and a replying affidavit. The President's affidavit essentially echoed the gist of the written representations made. Due to the prolixity of most of the affidavits and annexures I will merely give a brief overview of them.

[34] There was a supporting affidavit by Mr Henry Hopker, a former President of the PSN from time to time, which spanned 10 years in total. He attested that he was directly involved and present when the regime was negotiated with NAMAF and all the Namibian medical aid funds. An affidavit was also deposed to by Mr Christiaan Heunis, a pharmacist and former executive member of the PSN who accompanied Mr Hopker to the meeting wherein the formula was deliberated and negotiated.

[35] Mr Johan Husselman also deposed to an affidavit. He is a member of Computer Kit Namibia CC that provides information technology and services to 151 pharmacies in Namibia. The services includes software that contains all the products for dispensing and the electronic system is fully integrated with all the active medical aids in Namibia. He furthermore confirms that he has read the affidavit of Ronja King and confirms the facts and conclusions therein.

[36] Ms Ronja King, also a pharmacist, deposed to a supporting affidavit. She is a member of the executive committee of the first applicant and shareholder of Auas Community Pharmacy. She deposed, inter alia, that she has conducted a practical test by procuring a certain prescribed medicine at a Dischem Pharmacy and it showed that Dischem applies the said price practice.

[37] Another supporting affidavit was done by Ms Arminda Clayton, the Chief Operations Officer at Methealth Namibia Administrators, also a pharmacist by profession with thirty years of experience. She deposed that her employer administers three medical aid funds namely Bankmed, Namibia Medical Care, and PSEMAS the largest medical aid scheme in Namibia. She confirms that the price of medicine historically followed the South African model until 2004. She further

confirms the meeting in 2004 wherein Namibian stakeholders negotiated and agreed to the model of SEP plus 50 percent on medicine.

[38] Ms Ida Terblanche, also a pharmacist and Secretary of the PSN, deposed to a replying affidavit, after the respondents made supplementary discovery. That was because the deponent to the founding affidavit was out of the country. Her affidavit, amongst others, elaborated on the allegations that the respondent delegated its investigative functions and abdicated its decision making powers.

[39] At the outset, it was clear that the applicants rely on the Supreme Court judgment *Namibian Association of Medical Aid Funds v The Namibia Competition Commission*[13] wherein the codes for medicines are explained[14] and reference was made to the benchmark tariffs for medicine that resorts under a regulatory framework in the interest of the members of medical aid funds.[15]

[40] The applicants postulated several grounds of review. I will attempt to summarise them as well as the responses thereto. Firstly, the applicants attacked the decision on account of a failure to honour the *audi alteram partem* principle, failure to afford fair treatment to the applicants, who had not been afforded

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[13] *Namibian Association of Medical Aid Funds and Others v Namibian Competition Commission and Another* (18 of 2016) [2017] NASC 27 (19 July 2017)

[14] Ibid para 20 'The entire gamut of medical services available are separately coded and updated when technological advances justify that. There is also some flexibility for new advances including medicines which are introduced during any given year, pending the forthcoming annual update. There are in excess of 30,000 codes which are constantly updated.'

[15] Ibid Para 63 'Funds are thus highly regulated in the public interest to protect their members and ensure that the business of a fund is conducted within the confines of the Act. The legislature has provided this protective framework in the interest of members. This is no doubt because of the statutorily endorsed social function funds perform where members subsidise each others' medical costs on a principle of social solidarity thus rendering access to expensive medical services as widely as possible. It is plainly in the public interest that as many people as possible enjoy the benefits of fund members (to receive assistance in defraying medical expenses) to relieve the public purse from providing those medical services to those members. The purpose of the MAF Act is not only for control to be exercised over funds but is also, according to its long title, to promote funds because of the useful societal function they perform.'

disclosure of the Commissions' evidence and that the Commission was biased against the PSN and its members. Mr Fitzgerald contended that the applicants were not afforded an opportunity to deal with the adverse responses made by the other persons whom the respondents conferred after the s 37 conference, which refers to written submissions to the Commission on 07 December 2020 about the Commissions' investigations and comments on the oral submissions of Mr Marais. Furthermore that the Chairperson continued the s 37 Conference with the legal practitioners of the beneficiaries of the PSN members who obtained leniency and exemption from the Commission's decision.

[41] As regards the unfair treatment, he pointed out that PSN was faced with a situation of not knowing what evidence the Commission relies on. He emphasized that throughout the applicants requested disclosure of the evidence on which the Commission relied, but that it fell on deaf ears. He gave an example of the Commission that stated and referred to crucial evidence by Mediclinic. According to him Mediclinic differs as it has a hospital pharmacy, with a different criteria. He thus called it an unfortunate reliance. He argued that the respondent is required to provide all proof in its possession. The respondent's stance was that it is confidential information and thus it did not allow access thereto.

[42] Counsel for the respondent countered the contentions. Mr Maleka pointed out that the applicants made written representations to the s 36 Notice and oral submissions at the s 37 Conference. Mr Maleka referred to s 37(1)(*b*) of the Act and argued that there was nothing unlawful in inviting third parties with interest to partake in the s 37 Conference as that is permitted by the Act. Furthermore that the PSN allegation that the Commission was influenced by third parties in its decision was merely speculation as the applicants had nothing to show for it.

[43] The applicants also contended that the decision is unlawful because the Commission abdicated its authority to investigate and did not exercise its discretion to make the decision. Mr Fitzgerald submitted that the Committee that was appointed for investigations did nothing else but sit in on part of the s 37 Conference. He called it 'window-dressing.' Additionally, he argued that it was the Secretary to the Commission that tabled the reports at the meetings, without any input from any of the Committee members, nor did the Secretary conduct the investigations. As regards a resolution of 2012 wherein the Commission delegated its powers to investigate to the Office of the Secretary, that it has no legal basis. He submitted that the only powers that the Commission could have delegated are those expressly described in s 12 of the Act.

[44] The Secretary to the Commission, Mr Vitalis Ndalikokule deposed to the answering affidavit and no confirmatory affidavits were filed by any member of the investigative team, nor any of the leniency and exempted applicants who appears to have been the sources of information for the investigations. Mr Ndalikokule is also the Chief Executive Officer of the Commission and it was asserted that he has knowledge of these matters as he attends Board meetings, even though he has no voting power. As for the PSN's contention that the investigations were not done by the Committee as the body appointed for that. Mr Maleka countered these on the basis that the Commission delegated its investigative powers to the Secretary to the Commission in a resolution and that he is duty bound, under s 13 of the Act, to assist the Commission to carry out its functions.

[45] Mr Maleka put forward that there is no prohibition against implied delegation of powers which may be necessary for discharge of the Commission's functions and duties, which the respondent asserts was the case herein. In the matter at hand the implied power is justified as investigations amount to an exercise of gathering information and not the decision itself. He argues that the court should

construe and ‘read-in’ a lawful delegation to the Secretariat to carry out investigative functions of the Board and said that the Secretary gathered the information and presented it to the Board. According to him, it was the Board who made the decision that applicants seek to impugn and that was no ‘unwarranted dictation‘ to anyone.

[46] The applicant also challenged the decision on account of material errors of fact and that its evidence shows that the PSN did not create nor does it enforce the rule as the member pharmacies can deviate from it. In support of that, he referred to the exclusion by the Commission of certain member pharmacies on the basis that these pharmacies which did not practice the 50 percent mark-up formula. Furthermore, that the respondent is misconceived in its stance in the answering affidavit that the applicants conceded under its Constitution that it was prohibited from that conduct. That was done without any evidence and that the Commission was relying on an outdated and revoked PSN Constitution which the Commission obtained from a Dischem attorney.

[47] Mr Maleka argued that there are no material errors of facts as even on the applicants own version, the existence of the rule cannot be disputed. Counsel for the respondent asserted that the only thing that remained unclear after both the written and oral submissions was whether the applicants’ concede that the existence of the rule was unlawful or not and whether the pharmacies had a discretion to apply it.

[48] A further ground of review was that the applicants, in as far as they were a party to any ‘arrangement,’ that it was a vertical relationship in the form of an agreement between the medical aid funds and pharmacies that render services in Namibia. The respondent countered that by arguing that the effect of the

application of the rule by the member pharmacies amounted to horizontal application.

The law and application thereof

[49] The conduct relied upon by the Commission is an agreement that amounts to price fixing in contravention of the Act. The Commission has in its decision indicated a contravention of s 23(1), read with s 23(2)(*a*) and s 23(3)(*a*) of the Act. The relevant provisions read as follows:

'(1) Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited, unless they are exempt in accordance with the provisions of Part III of this Chapter.

(2) Agreements and concerted practices contemplated in subsection (1), include agreements concluded between-

(a) parties in a horizontal relationship, being undertakings trading in competition; or

(b) parties in a vertical relationship, being an undertaking and its suppliers or customers or both.

(3) Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to any agreement, decision or concerted practice which-

(a) directly or indirectly fixes purchase or selling prices or any other trading conditions;

. . .'

[50] Section 1 of the Act defines an agreement as including a contract, arrangement or understanding, whether legally enforceable or not. Thus, for this contravention, the evidence would have to establish that there was an agreement or concerted practice, which fixes prices and that the parties are in a horizontal

relationship i.e. they are undertakings trading in competition. Furthermore, apart from these jurisdictional facts the Commission also has to show that the agreement will harm competition in the market.

[51] Given that this is a review, the court will have to probe into the manner in which the Commission reached the decision, rather than whether it was a right or wrong conclusion on the facts. Incidentally, the applicant has also raised a 'material error of facts' as one of the grounds of review.

[52] I turn to the attack on the basis that the Commission unlawfully delegated its function to investigate prohibitive conduct and merely rubberstamped the decision of the Secretary and or the third parties at the s 37 Conference.

[53] It is common ground that the Commission is a juristic entity that implements its functions through different agents and s 12(1) of the Act empowers the Commission to establish one or more committees to:

'(a) investigate and report to the Commission on any matter which the-Commission may refer to the committee for the purpose; or

(b) exercise any power or perform any function of the Commission which the Commission may delegate or assign to the committee, except the power under section 22 to make rules.'

[54] It is also clear that in this matter the Commission indeed established a committee to investigate the case herein and thereafter report to the Commission. Based on the review record the investigations for both the s 36 and 38 reports were done and supervised by persons other than the Secretary to the Commission or the committee members appointed for the investigations into this matter.

[55] In my view, the reliance on a certain resolution passed on 1 August 2012 does not assist the Commission. The preface to the resolution explained that the Secretariat expressed concerns to the Board about the investigations and adjudication functions vested in the Commission and that it will violate the common law principle of 'no man can be a judge in his own case'. For that reason, the proposal was made that the Commission delegates the power to investigate to the Secretary, as an interim measure, until the Act was reviewed. The resolution was worded as follows:

'The powers to investigate in terms of section 16(1)(f) and section 33 read with Rule 4 of the Competition Act & Rules be delegated to the Office of the Secretary to the Commission and that the adjudicative role continue to vest in the Board of Commissioners.'

[56] Generally speaking, it is imperative that delegated power must be exercised by the administrator on whom it is conferred. One of the specific functions conferred upon the Commission by virtue of s 16(f) is 'to be responsible for contraventions of this Act…' The only provision dealing with delegation of powers is provided for in s 12(1)(*b*) which refers to delegation of any function to a committee so established. Instead of following what is provided for in the Act, the Commission 'delegated' its authority to conduct investigations to the 'Secretary' of the Commission. This in my view is not supported by the enabling legislation.

[57] I am also hard pressed to accede to the argument by the respondent that there is implied authority to delegate. Though a case can be made for and against implied authority to sub-delegate, there is a rebuttable common law presumption against sub-delegation. As stated by Hoexter:[16]

[16] Hoexter, C. 2006 *Administrative Law in South Africa* Juta & Co Ltd p 238.

'The willingness of the court to approve a subdelegation will depend on factors such as the nature of the power being subdelegated. The extent to which the power is transferred, the importance of the delegee, and practical necessity.'

[58] The rationale for the purported delegation is questionable, especially since we have a system wherein the adjudicative power (at court) is separated from the investigative power and the decision making power (at the Commission).That means the Commission itself does not have an 'in-house' tribunal, which decides the cases. That seems to be the model adopted for many other countries.

[59] Furthermore, the mechanism of investigations by committees, in my view, caters for flexibility and the principle of 'checks' and balances,' rather than to concentrate and relegate those powers to the Secretary's Office. The option of committee(s) may also avail the practical benefit of choosing members with specialized skills as this area involves an interplay been law and economics. Section 13(2) of the Act provides that the Secretary is subject to the directions of the Commission, responsible for:

(a) the formation and development of an efficient administration; and

(b) the organisation, control, management and discipline of the staff of the Commission. Collectively, it points away from the existence of implied authority that the respondent proposed.

[60] The contention by the respondent was that the Secretariat gathered the evidence, presented it and merely made recommendations to the Board. It is clear that the appointed committee has not done the investigations nor compiled the investigations report.

[61] In respect of this conduct Baxter states:

'A decision maker can only be sure that he is properly apprised of the facts, circumstances, and alternative possibilities, if, in addition to making his own enquiries he has heard the submissions of the persons likely to be affected by the decision. [17]

[62] Furthermore, the minutes[18] of the meeting wherein the s 38 report was discussed reflects a telling tale:

'The Secretariat informed the Board that submissions made by the respondents to the section 12 committee in respect of the Commission's proposed decision (i.e. that there has been a contravention) was considered, and that the Secretariat is of the view that the respondents have failed to discharge the onus that there has not been a contravention of the Act.

The Secretariat stated that evidence and various submissions made to the commission prove that the respondents have contravened the act and that the next step is for the commission to institute court proceedings in terms of section 38 of the Act.'

[63] It is apparent from the record that after the s 37 Conference further written submissions were made by the legal practitioners of the leniency and exempted applicants, who commented on the submissions of Mr Marais on behalf of PSN. Thus, it is not only the Secretary who influenced the decision. It was further sourced and endorsed with the written representations of legal representatives of the leniency and exempted applicants.

[64] In this regard Baxter[19] states:

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[17] Baxter L Administrative Law 1st ed. Juta & Co Ltd. P 538.
[18] Page 901 of record para 7.1.1.
[19] Baxter L *Administrative Law'*1st ed. Juta & Co Ltd. P 415.

…'where a body which is required to reach its own decision merely 'rubberstamps' someone else's decision, this will constitute an unlawful abdication of the former's powers and a refusal to decide.'

[65] It is not apparent from the record that the decision maker sifted and analyzed the facts involved in the decision, other than merely rubberstamping what had been provided to it and passing a resolution to that effect. It does not appear that any of the 'evidence' was solidified into a statement under oath, even though that ability was conferred upon the commissioners. Whilst I am mindful that the Commission is not bound by the formalities of a court room, it goes without saying that evidence under oath is more cogent in its effect. Even more so, if the tribunal still has to come to court and the aggrieved party is likely to resist the decision with divergent evidence, under oath. It is also apparent that the decision maker did not engage in any rigorous fact finding process, other than merely indiscriminately accepted what it was presented with.

[66] Being an administrative tribunal, responsible for deciding about a contravention and endowed with the power to impose a severe penalty, the giving effect to that function called for a more meticulous approach to arrive at its decision. Thus, I find there is merit in the applicant's ground that not only was it an unlawful delegation of the powers to investigate the matter, but the Commission also abdicated its decision making powers.

[67] I briefly turn to the ground relating to lack of a fair procedure, which involved refusal to disclose to PSN the evidence that underpins the Commission's decision, bias and non-adherence to the *audi alteram partem* rule. There is a degree of overlap in some of these grounds as well as the contentions made in the previous ground.

[68] It could not be missed that the s 38 report followed and reiterated content[20] of a letter of 31 January 2020 by the legal practitioners for the excluded members. That is illustrative of the contention that the Commission indiscriminately accepted the stance of the excluded pharmacies and the leniency and exempted applicants. According to the Act, the Commission was entitled have invited other persons to attend the s 37 Conference. The record reflects that one of these parties' legal practitioners made further written submissions after the s 37 conference and inter alia commented on the matter and some of the case law cited by Mr Marais being irrelevant. The Commission accepted that and considered that in their decision making, but has not afforded PSN any opportunity to reply thereto.

[69] The applicant was also aggrieved by the notion of the Commission that it need not provide or avail the evidence on which it relied to find that PSN contravened the Act. That grievance was put forth as a point in limine at the s 37 Conference, that PSN was before the Commission to enforce its rights as regards the purported contravention of the Act, but that the evidence that underpins the finding was not disclosed at all. It was evident again in the review proceedings herein. Rule 76(6) of the Rules of the High Court provides for discovery of 'further reasonably identified documents,' after the record of the proceedings under review has been served on the applicant. The applicants

[20] "ENS is of the view that offering of discounts on the price at which its clients dispense medicine to the public, does not constitute touting, as alleged by the PSN, but it is rather an example of price competition. ENS Africa, stressed that it is evident that the PSN seeks to stifle competition in the market, causing, direct consumer harm due to the increase in price that consumers have to pay. Through the letter, the PSN has reinforced its position that its members are obliged to impose a 50% markup on the dispensing of medicine (requirement not authorised in terms of any law), failing which the PSN will seek to discipline and/or sanction pharmacies, which have deviated from the 50% markup pricing structure."

point out that under this rule they asked for certain documents[21] as follows:

> 'A factual statement is made in par 3.3 of the letter of ENS that (pharmacies that deviate from the aforementioned "50% mark-up requirement" are subjected to, inter alia, investigations and disciplinary proceedings)" and the Respondent is required to provide all documents or other proof in its possession relating to:
>
> a) any investigation done by the PSN against any of its members who deviated from the "50% mark-up requirement" and
> b) any disciplinary proceedings conducted by the PSN against any of its members in this regard.'

[70] The reply thereto was that the documents are confidential and privileged. The Commission gave the same response in the s 37 Conference about the qualm. Part 3 of the Rules[22] deals with access to the records of the Commission. Rule 10 provides that:

> '(1) A complaint and any information received by the Commission during its investigation of the complaint are regarded as confidential information.
> (2) An application and any information received by the Commission during its consideration of the application, or revocation of an exemption granted by the applicant, are regarded as confidential information only to the extent provided for in rule 11.'

[71] Rule 11 deals with the right of informants to claim confidentiality and subrule (1) states that when submitting information to the Commission, a person may identify information that the person claims to be confidential information, but must support that claim at the same time with a written statement in the form of 'Form 1' explaining why the information is confidential. It is questionable whether the Commission can rely on this as it has always maintained that no complaint

[21] With reference to page 545 on the record.
[22] Rules made under the Competition Act, Government Notice No 41 of 2008.

was laid by anyone about this issue. Furthermore, in looking for 'Form 1' amongst the letters that avails information to the Commission, I could not come across it in the record under review.

[72] Article 12 (1)(a) of the Namibian Constitution affords all persons a fair and public hearing by an independent, impartial and competent court or tribunal in the determination of civil rights, obligations or criminal charges. One of the principal tenets in a criminal trial, is the right to disclosure of the evidence intended to be used against an accused person. Similarly article 12(1)(*e*) of the Constitution inter alia provides that all persons shall be afforded adequate time and facilities for the preparation and presentation of their defence. In S v Nasser[23], the court considered the said article and stated that one has to consider from a practical point of view what kind of information an accused needs in order to be put in a position to have a fair trial. Though this was said in a criminal trial context, in my view it is an equally vital ingredient for fair determination of the matter by the Commission.

[73] I accept that there may well be instances wherein the Commission would be entitled to claim restricted access and that not every piece of information collected during the investigation may be relevant in the final determination. However, it appears that the determination that the applicants contravened the Act has been shrouded in secrecy with no discovery of the evidence that constitutes the purported contravention. It goes against the grain of fairness to expect a party to defend or fight the proposed decision, without having had discovery of the evidence which in turn facilitate preparation for a defence or ability to enforce his or her rights adequately before the tribunal. In this regard it has been said in *Paramount Mills (Pty) Ltd v Competition Commission*[24] that:

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[23] *S v Nasser* 1995 (1) SACR 212 (NM)

[24] *Paramount Mills (Pty) Ltd v Competition Commission* (112/CAC/Sep 11) [2012] ZACAC 4 (27 July 2012) at para 61.

'a party against whom a complaint has been lodged is clearly entitled to sufficient information to determine the nature of the prohibited practice.'

[74] Having said that, I conclude that the Commission's decision cannot stand and is to be reviewed and set aside. I do not regard it necessary to deal with the other grounds and belabor the judgment more than it already is.

[75] There is no reason to depart from the rule that costs follow the event. The matter was quite elaborate, which justifies the scale of cost prayed for being one instructing and two instructed counsel.

[76] In the result, the court grants relief as sought in the following terms:

1. Reviewing and setting aside the decision of the Respondent as published in the Government Gazette of the Republic of Namibia under General Notice No. 732, dated 20 December 2021 in which it gave notice of its intention to take the following action under section 38 of the Competition Act, 2003:
    1.1. Declaring that the Respondents have contravened section 23(1) read with section 23(2)(a) and section 23(3)(a) of the Competition Act;
    1.2. Ordering the Respondents to cease with the conduct;
    1.3. Restraining the Respondents from engaging in the conduct in future;
    1.4. Seeking an appropriate pecuniary penalty against the Respondents in terms of section 53(1)(a) and 53(2) of the Competition Act, taking into account the factors stated in section 53(3) of the Competition Act;

1.5. Ordering that the Respondents to pay the costs of these proceedings, such costs to include the cost of one instructing and one two instructed counsel;

1.6. Such further and/or alternative relief as the Court may consider appropriate;

1.7. Against the following undertakings/association of undertakings, as the Respondents against which relief will be sought in terms of section 38:

1.7.1. The Pharmaceutical Society of Namibia ("the PSN"), a voluntary professional association for pharmacists in Namibia, and having its business place at Office No. 14, Gecka Pharma, 32 David Hosea Meroro Drive, Windhoek, Namibia;

1.7.2. All relevant pharmacies, as indicated in the "Annexure A" document attached thereto.

2. The Respondent must to pay the costs of this application, such costs to include the cost of one instructing and two instructed counsel.

3. Matter is removed from the roll and regarded as finalized.

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JUDGE

C CLAASEN

APPEARANCES:

For The Applicants:	Michael Fitzgerald SC
	Geoffrey Dicks
	Instructed By Ellis & Partners Legal Practitioners
For the Respondents:	Vincent Maleka SC
	Sisa Namanje & Co. Inc.