

ANTI-COMPETITIVE BEHAVIOUR AND MEDICAL AID SCHEMES IN BOTSWANA – *Gorata Dibotelo* (Former Armstrongs Associate)

Anti-competitive behaviour and medical aid schemes in Botswana: an opinion. The advent of competition law legislation in Botswana has seen the dawn of a new era in the regime of law in the jurisdiction. The Competition Act (“the Act”) was promulgated in 2009 but only came into force in 2011. The Act introduced a different means of regulation in Botswana. Any form of economic activity could now be regulated by the Competition Authority (“the Authority”). In the five year period in which the Authority has been operating, ardent interest has surrounded the conduct of medical aid funds, with the Authority raising an eyebrow as regards the conduct of such funds and alleging anti-competitive behaviour.

The Law

The Authority’s complaints against medical aid schemes have been premised on suspected contravention(s) of Sections 25, 26, 27 and 30 of the Act.

Complaints against Medical Aid Schemes

The particulars of the complaints have, among others, included that the medical aid schemes:

- directly or indirectly fixed a purchase or selling price or any trading conditions for medical services as prohibited under section 25 (a) of the Act;
- are engaged in dividing markets by allocating customers, suppliers, territories or specific types of goods or services as prohibited under section 25 (b) of the Act;
- are engaged in concerted practices as envisaged under section 25 (e) of the Act;
- have entered into vertical agreements with medical practitioners to the extent that the agreements involve resale price maintenance as prohibited by section 26 (1) of the Act; and
- have denied patients access to medical practitioners who are not contracted with the medical aid scheme.

Medical aid schemes in Botswana are formed as trusts that operate on a not for profit basis. The prohibitions referred to in the cited sections relate to conduct by or between “enterprises”. Section 2 of the Act defines an enterprise as “... *a person or a group of persons whether or not incorporated, that carries on a business for gain or reward in the production, supply or distribution of goods or the provision of any services*”. Medical aids therefore do not, in our view, fall within the definition of an “enterprise” specifically as they “*do not carry out a business for gain or reward*”.

In our view medical aid schemes may be deemed to conduct non-commercial services with a “social economic objective”. As such, their activities would be excluded from application of the Act. In our opinion, on this premise alone, the complaints would be unsustainable.

In addition, the Authority faces the following challenges in respect of the complaints:

- Price fixing requires an agreement between participants in the same market to buy or sell a product, service or commodity only at a fixed price, or maintain conditions such that the price is maintained at a particular level by controlling supply and demand. This has to be proven;

- The existence of dividing markets contrary to section 25 (b) may be unfounded because Medical Aid schemes neither direct any of their beneficiaries as to which practitioner to use, nor do they have preferred practitioners;
- Some of the complaints such as resale price maintenance have little or no application to the business of medical aid schemes;
- Concerted practices contemplate actual multilateral anti-competitive conduct as opposed to any antecedent agreement or decision to engage in it. As there is no need for an agreement, verbal or written, the issue that arises is proving the existence of any concerted practice in the market of medical aid schemes. It is most unlikely that in any industry or market there will not be some form of parallel conduct by firms in that market; and
- Denial of access in competition law occurs where an enterprise creates barriers to entry for other enterprises in a horizontal or vertical market to enable it to dominate the market or continue dominating. An enquiry into market domination would therefore have to be conducted.

In our view complaints by the Authority against alleged anti-competitive behaviour by medical aids would be difficult to substantiate, and the authority looking to successfully challenge such behaviour would have to bear this in mind. Teething problems are always such a pain, don't you think?