

NOTICE 817 OF 2011**NOTICE IN TERMS OF ITEM 4(C) OF PART A OF SCHEDULE 1 OF THE COMPETITION ACT 89 OF 1998 (AS AMENDED)****APPLICATION FOR AN EXEMPTION BY THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA IN TERMS OF PART A OF SCHEDULE 1 OF THE COMPETITION ACT****CASE NUMBER: (2008JAN3456)****REJECTION OF EXEMPTION APPLICATION**

Notice was given in the Government Gazette on 7 March 2008 (Government Notice 319 of 2008) and again on 29 May 2009 (Government Notice 596 of 2009)¹ that the Health Professions Council of South Africa ("the HPCSA") had, in terms of Part A of Schedule 1 of the Competition Act, 89 of 1998, as amended ("the Act"), applied to the Competition Commission ("the Commission") for an exemption from the provisions of Chapter 2 of the Act.

The application for exemption was sought in respect of the Ethical Rules of Conduct for Practitioners registered under the Health Profession Act 56 of 1974, as promulgated and published as Government Notice No. R.717 of 4 August 2006 and the amendments thereto, published as Government Notice No. R.68 of 2 February 2009 ("the Ethical Rules"). As the Ethical Rules are sanctioned by legislation, it is important to note that the Act is a law of general application which establishes the Commission to regulate competition matters in all sectors irrespective of whether the sector or industry is regulated in terms of statute or not. The Commission has jurisdiction to investigate and evaluate the competition aspects of the statutory association rules brought under cover of this exemption application.

The Ethical Rules for which an exemption was sought are as follows:

1. Rule 3(2) – Restriction on canvassing and touting

This rule states that a practitioner shall not canvass² or tout³, or allow canvassing or touting to be done for patients on his or her behalf.

2. Rule 4 - Restriction on information to be printed on professional stationery by registered practitioner

This rule restricts the type of information that a practitioner may print on letterheads, account forms and electronic stationery. This restriction does not allow the practitioners to print any other information other than what is listed in the rule⁴. This is mainly factual information regarding the practitioner and his/her practice.

¹ Supplement to the first Notice.

² Canvass - draw attention, verbally or by printed or electronic media, to one's personal qualities, superior knowledge, quality of service, professional guarantees or best practice

³ Tout - conduct which draws attention, either verbally or by means of printed or electronic media, to one's offers, guarantees or material benefits

⁴ Rule 4(1): "A practitioner shall print or have printed on letterheads, account forms and electronic stationery information pertaining only to such practitioner's – (a) name; (b) profession (c) registered category; (d) speciality or subspecialty or field of professional practice (if any); (e) registered qualifications

3. Rule 5 – Restrictive naming of practices

This rule prohibits the use of any trade name other than the name(s) of the registered practitioner(s) who are members or partners in a practice. The rule further restricts the use of the expressions "hospital", "clinic" or "institute" in the name of the practice.

4. Rule 7 - Restrictive fee sharing and acceptance and payment of commission

This rule prohibits a practitioner from accepting any commission relating to the purchase, sale or supply of any goods, substances or material used in the conduct of his or her practice or accepting any payment, benefit or material consideration intended to induce said practitioner to act, or not to act, in a particular manner. The rule also prohibits a practitioner from sharing fees with another practitioner who has not taken part in the services for which the fees are charged.

5. Rule 8(4) - Restrictive formation of other forms of practice models:

This rule stipulates that a practitioner shall not practice in any other form of practice which has inherent requirements or conditions that violate or potentially may violate one or more of the Ethical Rules or the annexure thereto.

6. Rule 8A – Restrictive sharing of consulting rooms

This rule prohibits practitioners from sharing rooms with persons or entities not registered in terms of the Health Professions Act.

7. Rule 10 – Restrictive supersession

This rule provides that, should a practitioner take over the care of patient, such practitioner has an obligation to inform the erstwhile practitioner, prior to proceeding with any treatment, of such take over.

8. Rule 18 - Restrictive employment of practitioners

This rule prohibits practitioners from being employed by employers that are not approved by the HPCSA to employ practitioners registered under the Health Professions Act.

9. Rule 23 – Restrictive participation in the manufacture for commercial purposes of medicines and medical devices

or other academic qualification or honorary degrees in abbreviated form; (f) registration number; (g) address (including email address); (h) telephone and fax numbers; (i) practice or consultation hours; (j) practice code number; and (k) dispensing licence number (if any)." The provisions of sub-rule (2) are materially similar, and apply to a group of practitioners practicing as a juristic person which is exempted from registration in terms of section 54A of the Health Professions Act.

This rule states that a practitioner shall not participate in any activity that amounts to trading in medicine. A practitioner may also not advocate the use of any medication if the said practitioner derives any consideration for such medication.

10. Rule 23A - Restrictive practice relating to shareholding in hospitals or other healthcare institutions

This rule imposes certain requirements on practitioners who have shares in private hospitals and other healthcare institutions to which they also refer patients for admission or treatment. The rule makes the restrictions on shareholding based on certain conditions regarding the purchase of such interest, returns on investment, review systems, advertising and promotion, preferential use, and endorsement by the HPCSA.

11. Annexure 6, Rule 3(2) - Restrictive formation of partnership and other permissible juristic person by a certain category of practitioners-

This rule relates to the restriction on the formation of partnerships or other permissible juristic persons in terms of Rule 8(3)⁵, amongst practitioners offering supplementary health care services through the use of high technology equipment to primary health care practitioners.

The HPCSA's application was made in terms of Item 2, Part A of Schedule 1 of the Act, which makes provision for a professional association to apply for an exemption for the rules of the association that have the effect of substantially preventing or lessening competition. In this regard the Commission is required to assess whether the restriction in each identified rule has a substantial anti-competitive effect in contravention of the Act. The Commission may exempt the rules if, having regard to internationally applied norms, any restriction contained in those rules that has the effect of substantially preventing or lessening competition in a market is reasonably required to maintain professional standards or the ordinary function of the profession.

The Commission, in analysing the Ethical Rules, looked at the following factors: the nature of the restraint on competition contained in the rules, the effects of the rules on competition, the rationale given by the applicant for any restraint; the views of interested parties and international norms.

Notice is therefore given in terms of Item 4(c), Part A of Schedule 1 that the exemption application by the HPCSA has been rejected. Our reasons are summarised below:-

1. The Commission's analysis of the exemption application found that the applicable Ethical Rules identified did not qualify to be granted an exemption as they did not meet the following requirements of Part A of Schedule 1 of the Act:

a) *Substantial prevention or lessening of competition*

⁵ Rule 8(3): A practitioner shall practice in a partnership, association or as a juristic person only within the scope of the profession in respect of which he or she is registered under the Act.

The Commission found that rules 5, 7, 8A and 10 identified in this application did not qualify for an exemption due to the fact that there was no evidence found that these rules would lead to a substantial prevention or lessening of competition. Further in relation to rules 8(4), 18, 23, 23A and 3(2) of Annexure 6 the Commission's analysis found that the broad manner in which these rules are worded did not, in and of themselves, constitute a contravention of the Act. However, the Commission found that the rules could, depending on the manner in which they are applied in the context of a given set of facts lead to anticompetitive conduct in contravention of the Act. Should the manner in which these rules are applied result in anti-competitive effects, this would be assessed and addressed on a case by case basis.

b) Reasonably required to maintain professional standards or the ordinary function of the profession

The Commission determined that the restrictions contained in rules 3(2) and 4 are not reasonably required in order to maintain professional standards or the ordinary functioning of the health profession. The Commission noted that although the objectives of the HPCSA's Ethical Rules are valid, the application of the rules themselves could have a negative effect on competition in the health professions. In this regard, the Commission was of the view that the purpose and objectives of the HPCSA's Ethical Rules could be achieved by means that are not overly restrictive on competition, while complying with the objectives of the applicable rules for purposes of maintaining professional standards and the ordinary functioning of the health profession. In this regard the Commission is of the view that there may be less restrictive means to achieving the HPCSA's objectives.

2. The Commission also considered international norms with regard to the identified Ethical Rules. The research generally indicated that there is a need to have less restrictive Ethical Rules in order to protect competition. Some of the research points out that there are in fact less restrictive means of achieving the HPCSA's objectives for each rule, for instance by introducing mechanisms that will curtail commercial, over-servicing and perverse incentives on the part registered practitioners and enforcing of personal liability for practitioners who may be employed by a corporate.
3. The Commission received submissions from stakeholders in the healthcare industry. The responses received were mixed with some parties objecting to the exemption application and others in support of the application. The Commission considered all the information provided in support of each position as received from the stakeholders.

Notice is hereby given in terms of Item 8, Part A of Schedule 1 of the Act, that the HPCSA, or any other person with a substantial interest affected by the abovementioned decision of the Commission, may appeal against the decision to the Competition Tribunal in the prescribed manner.

Notice is further given that the Commission will continue to engage with the HPCSA in relation to the further application of the Ethical Rules and provide guidance on compliance with the Act and other pro-competitive measures where applicable. In this regard the Commission and the HPCSA will continue to engage with each other on issues related to the application of the above Ethical Rules.

Any queries in this regard should be directed to: **Mr. Siphon Mtombeni**, Analyst, Enforcement and Exemptions Division, Private Bag X23, Lynwood Ridge, 0040; or at telephone 012 394 3190, facsimile 012 394 4190, citing case number **2008Jan3456**.