REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 348/2014

In the matter between:

NAMIBIAN ASSOCIATION OF MEDICAL AID FUNDS	**1ST APPLICANT**
NAMIBIAN MEDICAL CARE MEDICAL AID FUND	**2ND APPLICANT**
NAMIBIAN HEALTH PLAN MEDICAL AID FUND	**3RD APPLICANT**
RENAISSANCE HEALTH MEDICAL AID FUND	**4TH APPLICANT**
BANKMED MEDICAL AID SCHEME	**5TH APPLICANT**
NAMDEB MEDICAL AID SCHEME	**6TH APPLICANT**
NAPOTEL MEDICAL AID SCHEME	**7TH APPLICANT**
WOERMANN AND BROCK MEDICAL AID SCHEME	**8TH APPLICANT**
ROADS CONTRACTOR COMPANY MEDICAL AID SCHEME	**9TH APPLICANT**
NAMMED MEDICAL AID FUND	**10TH APPLICANT**

And

NAMIBIAN COMPETITION COMMISSION	**1ST RESPONDENT**
NAMIBIAN PRIVATE PRACTITIONERS FUND	**2ND RESPONDENT**

Neutral citation: *Namibian Association of Medical Aid Funds v Namibian Competition Commission* (A 348/2014) [2016] NAHCMD 80 (17 March 2016)

Coram: PARKER AJ

Heard: **26 November 2015**

Delivered: **17 March 2016**

Flynote: Competition in the Namibian market – In terms of Competition Act 2 of 2003 – Object of Act is to safeguard and promote competition in the Namibian market – Court held Namibian Association of Medical Aid Funds (NAMAF) and its constituent members (ie Funds) established in terms of the Medical Aid Funds Act 23 of 1995 are 'undertakings' within the meaning of s 1 of that Act – They carry on business for gain within the meaning of s 1 of Act 2 of 2003 – Meaning of business 'for gain' explained – NAMAF and constituent Funds subject to application and force of Act 2 of 2003 – Meaning of 'non-commercial socio-economic objective' within the meaning of s 3(1)*(b)* of Act 2 of 2003 considered – Meaning of 'activities of statutory body' explained – Court held further that although the applicants are established by statute (Act 23 of 1995) they are 'undertakings' and they have not been exempt from the application and force of Act 2 of 2003 by that Act – Court further held that the issuing and publication of 'benchmark tariff' in respect of medical services by first applicant are unlawful as they are offensive of the anti-competition provisions of Act 2003 – Consequently, such activity is not exempt from application and force of Act 2 of 2003 though carried out by a statutory body in terms of s 3(3) of Act 2 of 2003 – Consequently, application dismissed with costs.

Summary: Applicants being NAMAF (1st applicant) and its constituent members (2nd to 10th applicants) contend that being statutory bodies established pursuant to Act 23 of 1995 they are not subject to Act 2 of 2003 – Court found that each of the applicants is an 'undertaking' within the meaning of s 1 of Act 2 of 2003 and they have not been exempt from the application and force of Act 2 of 2003 by that Act – Consequently, they are subject to Act 2 of 2003 – Court found further that the issuing and application of 'benchmark tariff' by 1st applicant (NAMAF) in respect of medical services is an activity not designed to achieve a non-commercial socio-economic objective within the meaning of s 3(1)*(b)* of Act 2 of 2003 – Court found further that such activity is unlawful because it offends the anti-competition provisions of Act 2 of

2003 – Therefore the activity is not one which Act 2 of 2003, s 3(3), exempts from its application and force – Consequently, application dismissed with costs.

ORDER

The application is dismissed with costs, including costs of one instructing counsel and two instructed counsel.

JUDGMENT

PARKER AJ:

[1] The 1st to 10th applicants, represented by Mr Frank SC (with him Ms Bassingthwaighte), seek orders in terms set out in the notice of motion: I understand the applicants to claim in para 1 of the notice of motion that because they were established in terms of the Medical Aid Funds Act 23 of 1995 they are not subject to the application and force of the Competition Act 2 of 2003. The 1st respondent has moved to reject the application. The 2nd respondent has not done so. It seems probably because no order is sought against the 2nd respondent. Mr Unterhalter SC (with him Mr Coleman) represents the 1st respondent.

[2] The 1st respondent is an association established in terms of Act 23 of 1995. Act 23 of 1995 provides for the control and promotion of medical aid funds, and for incidental matters. The 1st applicant consists of all registered funds in Namibia, including the 2nd to 10th applicants. The 1st respondent is a statutory body established in terms of the Competition Act 2 of 2003. It has powers to administer and enforce the Competition Act. The powers of the 1st respondent include investigating anti-competition conduct outlawed by the Competition Act.

[3] From the pleadings, it is my view that in the determination of this application, the only burden of the court is to consider these crucial questions or issues, namely –

(a) is the 1st applicant or each of the 2nd to 10th applicants an 'undertaking' within the meaning of s 1 of the Competition Act?

(b) whether the 1st applicant or any of the 2nd to 10th applicants is exempt from the application and force of the Competition Act (para 1 of the notice of motion); and

(c) whether the issuing and publication of the 'benchmark tariff' in respect of medical services by the 1st applicant is exempt from the application and force of the Competition Act (alternative to para 1 of the notice of motion).

[4] In this regard, I underline the important point that a determination of these questions (or issues) shall dispose of this application. In this regard, it is my view that the principle of 'solidarity', relied on by Mr Frank and which is not a principle in our common law or statute law or in public international law but a principle probably in civil law of much of continental Europe, is of no assistance on the issues under consideration.

Question (a)
Is the 1st applicant or each of the rest of the applicants an 'undertaking' within the meaning of s 1 of the Competition Act?

[5] According to s 1 of the Competition Act, ' "undertaking" means any business carried on for gain or reward by an individual, a body corporate, an unincorporated body of persons or a trust in the production, supply or distribution of goods or the provision of any service'.

[6] The first sign post to look at is the interpretation and application of the definition of 'fund' in s 1 of Act No. 23 of 1995 which reads:

' "fund" means any business carried on under a scheme established with the object of providing financial or other assistance to members of the fund and their dependants in defraying expenditure incurred by them in connection with the rendering of any medical service, but does not include any such scheme which has been established in terms of an insurance policy.'

[7] The *ipssissima verba* of this provision indicate clearly that each of the 2nd to 10th applicants is a 'business'. The second sign post is to see whether the business carried on by each of 2nd to 10th applicants is for 'gain' (or reward). In his authoritive work *The Principles of Modern Company Law*, 3rd ed, pp 221-222, relying on *Armour v Liverpool Corporation* [1939] Ch 422, at 437, Professor LCB Gower states:

'It will be appreciated that the legality of these unincorporated clubs and societies depends on their not carrying on business for their own gain or for that of their members... Unless this condition is fulfilled they will be illegal if their membership exceeds twenty. The expression "business for gain" has been construed fairly widely; it will include any form of commercial undertaking, even though the distribution of profits is prohibited and indeed even if there is no intention of making a profit. Thus a mutual insurance association or a loan society will be illegal unless registered under the Companies Acts, or some other statute, since the members "gain" by being indemnified from losses or by being permitted to borrow. But the "gain" must result from a "business"; … The test appears to me to be whether that which is being done is what ordinary persons would describe as the carrying on of a business for gain.'

[8] It is worth noting that the English case of *Armour v Liverpool Corporation* is cited with approval by Nienaber JA in the South African case of *Mitchell's Plain Town Centre Merchants Association v McLeod* 1996 (4) SA 159 (A) at 167I-168A. Thus, 'gain' should be understood to mean a commercial or material benefit or advantage, not necessarily a pecuniary profit, in contradistinction to the kind of benefit or result

which a charitable, benevolent, humanitarian, philanthropic, literacy, scientific, political, cultural, religious, social, recreational or sporting organization, for instance, seeks to achieve. (*Mitchell's Plain Town Centre Merchants Association v McLeod and Another* 1996 (4) SA 159 (A) at 167I-168A) And 'business' in the context of the Competition Act is a commercial activity. (See *Concise Oxford Dictionary*, 11th ed.) And 'commercial' activity is an activity involving the purchase and sale of a thing or the supply of services, that is, the exchange of goods and services, for payment on a large scale. See G R J Hackwill, *Mackeurtan's Sale of Goods in South Africa* 5th ed, Chapter 1, *passim*. And so 'business' is any commercial activity such as one carried on regularly and systematically. (Judge R D Classen (compiler), *Dictionary of Legal Words and Phrases*, Vol 1)

[9] From the aforegoing analyses and conclusions, I find that upon the definition of 'fund' in s 1 of Act 23 of 1995, it is established clearly that the activity carried on by each of the 2nd to 10th applicants is the supply of services, ie, a commercial activity, for economic purposes, that is to carry on a 'business for gain', since the members of the Funds and their dependants gain by being provided with financial or other assistance in defraying expenditure incurred by them in connection with the rendering of medical services. (See LCB Gower, *Principles of Modern Company Law*, ibid, p 221.)

[10] In sum, the 2nd to 10th applicants are undertakings within the meaning of s 1 of the Competition Act. It matters tuppence, contrary to what Mr Frank appeared to submit, if 'no portion of any surplus realized by a fund in any financial year may be distributed to its members or any other persons'. Professor Gower, on the authority of *Armour v Liverpool Corporation* tells us that 'business for gain' 'will include any form of commercial undertaking, even though the distribution of profits is prohibited and, indeed, even if there is no intention of making a profit'. See para 7 of this judgment.

[11] I shall now extrapolate the aforegoing reasoning and conclusions in respect of the 2nd to 10th applicants to the nature and situation of the 1st applicant. Mr Frank

submitted that the 1st applicant is not an undertaking. And why does counsel so submit? It is simply this: (1) The 1st applicant 'is a non-profitable organization in that it does not exist to make profits or distribute to its members or anyone else for that matter'. (2) The 1st applicant 'does not operate in any market itself and simply exists to pursue its statutory objects'. (3) 'Its objects are clearly directed at non-commercial social economic purposes which fall within the ambit of conduct exempted from the provisions of the Competition Act as provided in sec 3(1)*(b)*' of the Competition Act.

[12] As respects ground (1) put forth by Mr Frank, I should say that counsel's argument is debunked by Professor Gower, relying on *Armour v Liverpool Corporation* (see para 7 of this judgment). In any case, 'for gain' and 'for profit' have never been synonymous. The Competition Act, s 1, refers to 'gain', not 'profit'. And I can only find the true intent and meaning of the Competition Act from the Competition Act itself (see *More v Minister of Cooperation and Development and Another* 1986 (1) SA 102 (A) at 103H); and the Act defines an 'undertaking' as any business carried on for 'gain' or 'reward', and not 'profit'. The intention of the Legislature is to use the word 'gain' not 'profit'. I do not think it is desirable for any court (or tribunal) to do that which the Legislature has abtained from doing, that is, introduce words into some statutory provision. I hold that ground (1) in counsel's reasons has, with respect, no merit.

[13] The fact that the 1st applicant exists to pursue its statutory objective cannot on that fact alone support the contention that the 1st applicant does not carry on business for gain. The 1st applicant operates in the market of medical aid schemes conducted by its constituent funds. The 1st applicant is therefore an association of undertakings within the meaning of s 1 of the Competition Act. Accordingly, I find that ground (2), put forth by Mr Frank, has no legal leg to stand on. It has no merit.

[14] As to ground (3); I have demonstrated *in extenso* below that the issuing and publication of the 'benchmark tariff' is not for non-commercial socio-economic purpose. I do not wish to rehash them here.

[15] Based on these reasons, I come to the inevitable conclusion that each of the 2nd to the 10th applicants is an 'undertaking' and the 1st applicant is an association of undertakings within the meaning of s 1 of the Competition Act and are therefore subject to the application and force of the Competition Act. This answers Question (a) (see para 3 of this judgment).

Question (b)
Whether the applicant or any of the 2nd to 10th applicants is exempt from the application and force of the Competition Act (para 1 of the notice of motion)

[16] In considering this Question (b), I should look at nowhere but at the formulation of the relief sought (ie in para 1 of the notice of motion) and the applicable provisions of the Competition Act. The first thing to look at is the interpretation and application of s 3 of the Competition Act, entitled 'Application of Act'.

[17] In statute law, whether a particular body is exempt from the application and force of a particular legislation is gathered from the particular legislation itself *only*. (Italicized for emphasis) An 'application' provision is commonplace in legislation, particularly, in regulatory legislation. See, for example, the Namibian Communications Commission Act 4 of 1992. Section 29 of that Act provides:

> 'This Act shall not apply to the Namibian Broadcasting Corporation established by s 2 of the Namibian Broadcasting Corporation Act, 1991 (Act 9 of 1991), or in respect of the broadcasting activities carried on by that Corporation.'

[18] Thus, in our statute law practice where a regulatory body is established by an Act (a 'regulatory Act') to regulate certain activities, every activity within, or connected with or incidental to, these activities is subject to the application and force of the regulatory Act in question. This is the case unless the regulatory Act by express provision exempts (a) certain named bodies from the application and force of the regulatory Act in question; or (b) certain named activities carried on by named

bodies from the application and force of the regulatory Act in question; or (c) both the bodies and the activities carried on by them. The aforementioned s 29 of the Act 4 of 1992 offered a good example. Act 4 of 1992 exempted both the Namibian Broadcasting Corporation and broadcasting activities carried on by that corporation from the application and force of Act 4 of 1992.

[19] In the instant proceeding, as I have said previously, the regulatory legislation is the Competition Act, and it is established thereunder the Namibian Competition Commission ('the Commission'). The Commission has the statutory responsibility to investigate competition infractions in order to attain the objects of the Competition Act as set out in the long title of that Act, that is, to safeguard and promote competition in the Namibian market. The Competition Act provides as the purposes of the Act the following:

'**Purpose of Act**

2. The purpose of this Act is to enhance the promotion and safeguarding of competition in Namibia in order to –

(b) provide consumers with competitive prices and product choices; …'

[20] In the instant proceeding, I do not see any express provision in the Competition Act exempting the Namibia Association of Medical Aid Funds (1st applicant) or any of the 2nd to 10th applicants from the application and force of the Competition Act.

[21] In this regard, it should be remembered that the Competition Act was promulgated some ten years after the promulgation of the Medical Aid Funds Act 23 of 1995 and yet the Legislature did not exempt the 1st applicant and any of the remaining applicants from the application and force of the Competition Act as, for

example, we have seen the Legislature did in Act 4 of 1992 and Act 8 of 2009 in relation to the Namibian Broadcasting Corporation. It is therefore, with respect, fallacious and self-serving for applicants to contend that just because the applicants are 'entities established pursuant to the Medical Aid Funds Act 23 of 1995, (they) do not fall within the ambit of the Competitions Act 2 of 2003'. The very Competition Act has not exempted them from the application and force of that Act. It would therefore, with respect, be sheer idle argument for one to say that those entities are exempt from the application and force of that Act. Only that Act can exempt them, and it has not done so. These conclusions debunk the applicants' contention. It follows that the applicants are subject to the application and force of the Competition Act.

[22] Based on these reasons, I can see no legal basis upon which it can be declared that 'the applicants do not fall within the ambit of the Competition Act'. It follows inevitably and reasonably that applicants have failed to establish any existing, future or contingent right, within the meaning of s 16*(d)* of the High Court Act 16 of 1990, which the court may protect by a declaratory order. Consequently, I refuse to grant the relief sought in para 1 of the notice of motion. This also answers Question (b) (see para 3 of this judgment) and disposes of the relief sought in para 1 of the notice of motion. And I proceed to consider Question (c) (see para 3 of this judgment).

Question (c)

Whether the issuing and publication of the 'benchmark tariff' in respect of medical services by the 1st applicant exempt from the application and force of the Competition Act (alternative to para 1 of the notice of motion)

[23] Section 3 of the Competition Act contains application provisions, and it provides:

> '3. (1) This Act applies to all economic activity within Namibia or having an effect in Namibia, except-

(a) collective bargaining activities or collective agreements negotiated or concluded in terms of the Labour Act, 1992 (Act No. 6 of 1992);

(b) concerted conduct designed to achieve a non-commercial socio-economic objective;

(c) in relation to goods or services which the Minister, with the concurrence of the Commission, declares, by notice in the *Gazette*, to be exempt from the provisions of this Act.

(2) This Act binds the State in so far as the State engages in trade or business for the production, supply or distribution of goods or the provision of any service, but the State is not subject to any provision relating to criminal liability.

(3) This Act applies to the activities of statutory bodies, except in so far as those activities are authorised by any law.'

[24] The applicants rely on the exemption provisions in s 3(1)*(b)* and those in s 3(3) of the Competition Act in support of their case; and so, it is to the interpretation and application of those provisions that I now direct the enquiry. I shall consider s 3(3) first.

[25] Section 3 provides:

'(3) This Act applies to the activities of statutory bodies, except in so far as those activities are authorized by any law.'

[26] Now, the question is: are the issuing and publication by 1st applicant of 'benchmark tariff' activities of the statutory body, ie 1st applicant, that are authorized by any law? The 1st applicant contends that the issuing and publication by 1st applicant of 'benchmark tariff' is an activity authorized by the Act No. 23 of 1995. In his submission, Mr Frank, counsel for the applicants, relies on s 10(3) of Act 23 of

1995 to support the applicants' contention which provides that the 'object of the Association (1st applicant) shall be to control, promote, encourage and coordinate the establishment and functioning of funds in Namibia'. Counsel argued further that in order to achieve the s 10(3) (of Act 23 of 1995) objective, the 1st applicant may do 'anything that is conducive to the achievement' of the objective. I agree. But I hasten to add that 'anything' that the 1st applicant must do only be 'anything' that is lawful. The omnibus provision in s 12 of Act 23 of 1995 cannot be read as authorizing unlawful acts. This view is so elementary and foundational to our jurisprudence and is so logical that I need not cite any authority in support of it.

[27] As I have said previously, the objects of the Competitions Act are to safeguard and promote competition in the Namibian market; and so, the Commission has the statutory duty to investigate activities that answer to cartel conduct which, as Mr Unterhalter submitted, is one of the most serious infringements of the Competition Act. I accept Mr Unterhalter's characterization of cartel conduct in the context of the Competition Act as conduct that creates agreements or arrangements between competitors in the Namibian market so as to stifle due competition in the Namibian market – conduct which the Legislature has declared unlawful in terms of s 23 of the Competition Act, and which the Legislature has seen it fit to extirpate by legislative means in the form of the Competition Act.

[28] Section 23 describes cartel conduct as –

> '(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…

(3) Without prejudice to the generally 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.'

[29] On the papers, I find that the first respondent has put cogent and convincing evidence tending to establish that the conduct of determining and recommending benchmark tariff in respect of medical services was unlawful on the basis that it amounts to the practice of fixing a selling price which is offensive of the Competition Act. That being the case, the applicant cannot find succour in the omnibus provision in s 12, read with s 10(3), of Act No. 23 of 1995. The issuing and publication of the 'benchmark tariff' is a thing that is unlawful in terms of the Competition Act.

[30] In any case, the 1st applicant has not established in what manner the benchmark tariff does 'control, promote, encourage and coordinate the establishment, development and functioning of funds in Namibia'. Cogent or convincing facts must be placed before the court establishing sufficiently in what manner the issuing and publication of the benchmark tariff – (a) control, (b) promote, (c) encourage and (d) coordinate the (i) establishment, and (ii) development, and (iii) functioning of funds in Namibia'; or one or more of (a), (b), (c) and (d), and one or more of (i), (ii) and (iii). No such cogent and convincing facts have been placed before the court, as I have said.

[31] I conclude therefore that s 3(3) of the Competition Act, read with s 10(3) and s 12 (the omnibus provision) of Act 23 of 1995, cannot assist the applicants. But the matter does not end there. As I have said previously, the applicants rely on the

exemption provision in s 3(1)*(b)* of the Competition Act, too; and so, it is to the interpretation and application of s 3(1)*(b)* of the Competition Act that I now direct the enquiry.

[32] The first important point I should make is that the use of the predeterminer 'all' qualifying the phrase 'economic activity', is significant. 'All' in such grammatical usage means 'the whole of'; 'every one of' (*Concise Oxford Dictionary*, ibid). It follows that the Competition Act applies to 'the whole of' economic activities, that is, 'every one of' economic activities carried on in Namibia or having an effect within Namibia.

[33] Every economic activity is caught within the purview of s 3 of the Act except an activity carried on by concerted effort and which was designed to achieve a non-commercial socio-economic objective (subsec (1)*(b)* of s 3). Thus, for the exemption to endure, the particular economic activity should be one carried on by concerted efforts, that is, the efforts of a plurality of persons 'combined together' (See *Concise Oxford Dictionary*, ibid.) The use of the words 'was designed' is also significant. It means the activity should be 'intended' to achieve, or should be for the 'purpose of' achieving' (*Concise Oxford Dictionary*, ibid) a non-commercial socio-economic objective.

[34] Furthermore, the use of the adjective 'non-commercial' qualifying another adjective 'socio-economic' indicates grammatically and syntactically that 'non-commercial' is in conjunction with 'socio-economic'; and so, the two adjectives jointly qualify the noun 'objective' (s 3(1)*(b)* of the Competition Act); and they have the following meaning: the exempted activity contemplated in s 3(1)*(b)* is an activity the carrying on of which is intended to achieve, or for the purpose of achieving, a 'socio-economic' objective, which must also be 'non-commercial' in character.

[35] What then is the meaning of 'non-commercial'? It means not involving the purchase and sale of a thing (*merx*) or the supply of services for gain or reward on a large scale; ie the exchange of goods and services for gain or reward. See GRJ

Hackwill, *Mackeurtan's Sale of Goods in South Africa*, 5th ed, p1. And what is the meaning of 'socio-economic'? First, the term 'socio-economic' is merely a contraction by combination and elison of the words 'social' and 'economic'. Thus 'socio-economic' used intertextually with the word 'activity' and qualifying the word 'objective' (s 3(1)*(b)* of the Competition Act) concerns social and economic activities whose character is social, in the sense that their objective is charitable, benevolent, humanitarian, philanthropic, literacy, scientific, political, cultural, religious, recreational or sporting. (See *Mitchell's Plain Town Centre Merchants Association v McLeod and Another* 1996 (4) SA 159 (A) at 167I-168A.) Such activities are in contradistinction to economic activities whose objective is to produce and distribute wealth. (*Concise Oxford Dictionary*, ibid)

[36] From the aforegoing grammatical and syntactical analysis of s 3(1)*(b)*, coupled with the interpretation of the terms 'non-commercial', 'economic', and 'socio-economic', I conclude that the activity that s 3(1) exempts must be an activity that is intended to achieve, or for the purpose of achieving, a socio-economic objective, and which activity at the same time does not involve the purchase of a thing or the supply of services for gain on a large scale, ie the exchange of goods or services on a large scale (*Black's Law Dictionary*, 3rd Pkt ed). Thus, the objective of such activity should be charitable, benevolent, humanitarian, philanthropic, literacy, scientific, political, cultural, religious, recreational or sporting.

[37] It seems to me clear that the object of the 1st applicant is to control, promote, encourage and co-ordinate the establishment, development and functioning of funds in Namibia (ie the 2nd to 10th applicants (in the instant proceeding) (see s 10(3) of Act 23 of 1995). What is this for? It surely is with one object, namely, the acquisition of gain by the Funds (ie 2nd to 10th applicants), members of the 1st applicant. (See *South African Flour Millers' Association v Rutowitz Flour Mills Ltd* 1938 CPD 199.) As Simonds J said in *Armour v Liverpool Corporation* [1939] Ch 422 at 437 –

'Neither business nor "gain" is a word susceptible of precise or scientific definition. The test appears to me to be whether that which is being done is what ordinary persons would describe as the carrying on of a business for gain….'

[38] From the findings I have made about the object of the 1st applicant, ie an association of undertakings, I conclude that that which is being done by the 1st applicant, that is the issuing and publication of the benchmark tariff, is what ordinary persons would describe as the carrying on of a business for gain. It cannot by any stretch of legal imagination be said that what is being done by the 1st applicant seeks to achieve a charitable, benevolent, humanitarian, philanthropic, literacy, scientific, political, cultural, religious, recreational or sporting objective. Based on these reasons, I hold that the issuing and publication of the 'benchmark tariff' is an economic activity. It is an activity whose object is to produce and distribute wealth. It is an activity in the form of commercial undertaking and, although the distribution of profits is prohibited and there may be no intention of making profit, the members gain from the activity, as I have found previously. Furthermore, the activity is not designed to achieve a non-commercial socio-economic objective. It follows inevitably and irrefragably that the issuing and publication of the 'benchmark tariff' in respect of medical services is not exempt from the application and force of the Competition Act.

[39] Having held that the applicants are undertakings and are subject to the application and force of the Competition Act and having held further that the issuing and publication of the 'benchmark tariff' in respect of medical services are subject to the application and force of the Competition Act, I refuse to grant the interdictory relief sought in para 2 of the notice of motion.

[40] From all the aforegoing reasoning and conclusions, I hold that the applicants are undertakings within the meaning of s 1 of the Competition Act; that the applicants are not exempt from the application and force of the Competition Act; that the issuing and publication of the 'benchmark tariff' in respect of medical services by the 1st applicant are not exempt from the application and force of the Competition Act. It follows that the application fails; whereupon, I make the following order:

The application is dismissed with costs, including costs of one instructing counsel and two instructed counsel.

C Parker

Acting Judge

APPEARANCES

APPLICANTS:	T J Frank SC (with him N Bassingthwaighte) Instructed by ENSAfrica|Namibia (incorporated as LorentzAngula Inc.), Windhoek
1ST RESPONDENT:	D N Unterhalter SC (with him G Coleman) Instructed by Du Plessis, De Wet & Co., Windhoek