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General Notices

NAMIBIAN COMPETITION COMMISSION

No. 243

2016

NOTICE OF ACTION TO BE TAKEN UNDER SECTION 38:
BOKOMO NAMIBIA (PTY) LTD // NAMIB MILLS (PTY) LTD
CASE NUMBER: 2013JULY0005COMP

COMPETITION ACT, 2003
(Section 41, Rule 18(1))

1. The Commission on 31st July 2013 received a complaint against Namib Mills (Pty) Ltd ("Namib Mills"/"the Respondent") from Bokomo Namibia (Pty) Ltd ("Bokomo"). The Commission investigated the complaint and on 05th June 2014 gave a notice of its proposed decision.
2. **The Commission gives notice that it intends to take the following action under section 38:**
 - 2.1 Following an investigation in terms of section 33 of the Competition Act and following consideration of all written representations, including the written

representations made in terms of section 36 of the Competition Act and the matters raised at the conference held in accordance with section 37 of the Competition Act, the Commission has decided to institute proceedings in Court against the Respondent for an order:

- 2.1.1 declaring that Namib Mills has contravened section 26(1), read with sections 26(2)(b) and 26(2)(d) of the Competition Act;
- 2.1.2 restraining Namib Mills from engaging in the conduct of compelling bakeries to only deal (buy their wheaten flour) with/from Namib Mills to the exclusion of rivals;
- 2.1.3 directing Namib Mills to remove clause 19 from all the loan and debt acknowledgement agreements it has entered into with bakeries;
- 2.1.4 directing Namib Mills to by way of notice or circular notify all affected bakeries with which it has concluded agreements;
 - 2.1.4.1 that clause 19 of the agreements is null and void and that the Bakeries are no longer obliged to only purchase wheaten flour from Namib Mills; and further that the bakeries can exercise their choice as to whom to buy their wheaten flour from;
- 2.1.5 Seeking an appropriate pecuniary penalty against Namib Mills 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;
- 2.1.6 Ordering that Namib Mills pay the costs of the proceedings; and
- 2.1.7 Such further and/or alternative relief as the Court may consider appropriate.

Against:

- 2.2 **Namib Mills**, a company duly incorporated in accordance with the laws of the Republic of Namibia, situated at 10 Dortmund Street, Northern Industrial Area, Windhoek, Namibia.

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

- 3.1 Namib Mills being a dominant undertaking in the market for the supply and sale of wheaten flour in Namibia concluded bakery loan agreements with affected bakeries in terms of which the affected bakeries were required to only purchase wheat flour, premixes and ready-mix products from Namib Mills. If the affected bakeries failed to purchase wheat flour, premixes and ready-mix products from Namib Mills, Namib Mills was entitled to ask for full settlement of the loan within 7 days or to repose the bakery equipment from the affected bakeries.
- 3.2 The loan agreements are exclusionary in nature as they have the potential to compel bakeries to only deal (buy their wheaten flour) with/from Namib Mills to the exclusion of competitors. Such agreements of exclusivity can allow Namib Mills to increase its market shares in the market for the sale and supply of wheaten flour. Further, such agreements of exclusivity enable Namib Mills to influence prices of wheaten flour in the market. This can be detrimental to consumers, including the bakeries that are locked into these agreements.

- 3.3 Consumers (the affected bakeries) would have no choice should Namib Mills decide to increase its price and will not be in a position to source wheaten flour from a cheaper source. The nature of the agreements thus amounts to an exclusionary conduct that can exclude competitors such as Bokomo from competing for the same customers. As a result of the above, the exclusive arrangement can enable Namib Mills to enhance and preserve its market power in the relevant market.
- 3.4 The Commission's decision is premised on the fact that section 26 of the Competition Act embodies a prohibition on the abuse of dominance which does not require an analysis of the conduct's effect on competition in the relevant market. In other words, as a result of its plain wording, section 26(1) strictly prohibits certain forms of conduct by dominant firms, such as entering into exclusive supply agreements with downstream undertakings so as to restrict market access.
- 3.5 The Commission therefore finds that the conduct by Namib Mills with regard to the agreements, which are exclusionary in nature, amounts to an abuse of dominance by way of limitation of market access in violation of section 26(1) read with section 26(2)(b) of the Act.
- 3.6 Section 26(1) read with section 26(2)(d) of the Competition Act prohibits the making of a contract subject to a condition which does not form the subject matter of the contract. The Commission has found that clause 19 is not a subject matter of the type of contract, which is an acknowledgement of debt and loan, and should not have been part thereof. The Commission therefore finds that the suspensive condition, which requires bakeries to only purchase wheaten flour from Namib Mills, to also constitute a violation of section 26(2)(d) of the Competition Act.
4. Notwithstanding the above, the Commission remains open to engaging with Namib Mills with the object of settling the matter in terms of section 40 of the Competition Act and to avoid proceedings in terms of section 38 of the Competition Act.

**S. AKWEENDA
CHAIRPERSON
NAMIBIAN COMPETITION COMMISSION**

NAMIBIAN COMPETITION COMMISSION

No. 244

2016

NOTICE OF ACTION TO BE TAKEN UNDER SECTION 38: EXECUTIVE TRADING
EIGHT CC T/A LIFELINK NAMIBIA RESCUE SERVICES (PTY) LTD T/A E-MED
RESCUE 24 & SEVERAL OTHERS
CASE NUMBER: 2013FEB0002COMP

COMPETITION ACT, 2003
(Section 41, Rule 18(1))

1. The Commission on 28 February 2013 received a complaint from Executive Trading Eight CC t/a LifeLink Emergency Rescue Services ("LifeLink"). This complaint was against Namibia Rescue Services (Pty) Ltd t/a E-Med Rescue 24 ("E-Med"), Namibia Medical Care Medical Aid Fund ("NMC"), Namibia Health Plan Medical Aid Fund ("NHP"), Renaissance Health Medical Aid Fund ("Renaissance"), Nammed Medical Aid Fund ("Nammed"), The Public Service Medical Aid Scheme ("PSEMAS"), Bankmed Namibia ("Bankmed"), Namdeb Medical Scheme ("Namdeb"), Napotel Medical Aid Fund ("Napotel"), Roads Contractor

Company Medical Scheme (“RCC”), and Woermann Brock Medical Aid Fund (“WB”). The Commission investigated the complaint and on 10th November 2015 gave a notice of its proposed decision.

2. The Commission gives notice that it intends to take the following action under section 38:

2.1. Following an investigation in terms of section 33 of the Competition Act and following consideration of all written representations made in terms of section 36 of the Competition Act, 2003 (Act No. 2 of 2003) (“the Competition Act”), the Commission has decided to institute proceedings in Court against E-Med, NMC, NHP, Renaissance, Nammed, Namdeb, Bankmed, Napotel, and RCC (collectively referred herein as “the Respondents”) for an order:

2.1.1 declaring that E-Med has contravened section 26(1) read with section 26(2) (b) of the Act.

2.1.2 declaring that the Respondents have collectively contravened section 23(1), read with sections 23(2)(b) and 23(3) (e) of the Act;

2.1.3 restraining the Respondents from engaging in the conduct of entering into exclusive preferred service provider agreements that excludes competing emergency medical rescue services providers from participating in the market;

2.1.4 directing the Respondents to cease with the exclusive agreements;

2.1.5 directing the Respondents by way of notice or circular to notify all health care providers and medical aid fund members that:

2.1.5.1 All health care providers and medical aid fund members have the right to choose which emergency medical rescue services providers to use depending on preference, availability, suitability etc.

2.1.6 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;

2.1.7 Ordering that the Respondents pay the costs of the proceedings; and

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

Against:

2.1.9 **Namibia Rescue Services (Pty) Ltd t/a E-Med Rescue 24 (“E-Med”)**, a private company duly incorporated in accordance with the laws of the Republic of Namibia; with its known principal place of business at Aviation Road, Eros Airport, Windhoek. E-Med is controlled by Prosperity Africa Holdings (Pty) Ltd, a diversified Namibian undertaking with interests in healthcare, insurance, properties and tourism.

2.1.10 **Namibia Medical Care Medical Aid Fund (“NMC”)**, an open medical aid fund registered in accordance with the law of the Republic of Namibia that offers cover to Namibians against medical expenses. The Fund is managed by the NMC Board of Trustees and an appointed Principal Officer

in accordance with the NMC Rules, the Medical Aid Funds Act, 1995 (Act No. 23 of 1995) (the “MAFA”) and other applicable legislation and with its principal business address at Methealth Office Park, Maerua Park and managed / administered by Methealth Namibia Administrators.

- 2.1.11 **Namibia Health Plan Medical Aid Fund** (“NHP”), an open medical aid fund registered in accordance with the law of the Republic of Namibia, with its principal business address is Hidas Centre, First floor 21 Nelson Mandela Avenue, Klein Windhoek and managed / administered by Medscheme Namibia.
- 2.1.12 **Renaissance Health Medical Aid Fund** (“Renaissance”), an open medical aid fund, registered in accordance with the law of the Republic of Namibia, with its principal business address as Unit 2, Jan Jonker Heights Office Park, Jan Jonker Road and managed/administered by Prosperity Health Namibia.
- 2.1.13 **Nammed Medical Aid Fund** (“Nammed”), an open medical aid fund, registered in accordance with the law of the Republic of Namibia, with its principal business address at 1 John Ludwig Street, Klein Windhoek and is managed / administered by Paramount Health Care Ltd.
- 2.1.14 **Bankmed Namibia** (“Bankmed”), a closed medical aid fund registered in terms of the Namibian laws, with its principal business address at Methealth Office Park, Maerua Park, Windhoek and is managed / administered by Methealth Namibia Administrators.
- 2.1.15 **Namdeb Medical Aid Scheme** (“Namdeb”), a closed medical aid fund, registered in accordance with the law of the Republic of Namibia, with its principal business address No. 10 Dr Frans Indongo Street, Namdeb Centre, 10th Floor, Windhoek and is managed / administered by Prosperity Health Namibia.
- 2.1.16 **Napotel Medical Aid Fund** (“Napotel”), a closed medical aid fund, registered in accordance with the law of the Republic of Namibia, with its principal business address as C/o Luderitz & Daniel Munamava, Windhoek, Namibia and is managed / administered by Prosperity Health Namibia.
- 2.1.17 **Roads Contractor Company Medical Scheme** (“RCC”), a closed medical aid fund registered in accordance with the law of the Republic of Namibia with its principal business address at 140 Lazarett Street, Southern Industrial Area and is managed by Prosperity Health Namibia.

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

- 3.1 E-Med being a dominant undertaking in the market for the provision of emergency medical services for persons with medical aid in Namibia entered into exclusive agreements with NMC, Bankmed, NHP and Prosperity. It is further found that the agreement between E-med and Prosperity is entered into on behalf of Prosperity’s members who are Renaissance, Namdeb, Nammed, Napotel and RCC. The Commission also found that these exclusive agreements cover more than 40% of medical aid fund members in Namibia.
- 3.2 The Commission concludes that these agreements are exclusionary in nature as they compel medical aid members to only deal with E-med. As such they have a negative effect on competition because they give business to one undertaking at the expense

of its rivals. These types of agreements are a concern to competition law especially when they 'lock in' a large portion of the market in the hands of a dominant supplier.

- 3.3 In this matter, the Commission concludes that the exclusive arrangements between Emed and the medical aid funds enabled E-med to preserve its market power in the relevant market, the agreements further limited access of E-med's rivals to the medical aid members.
- 3.4 The Commission therefore finds the conduct of the Respondents to be in contravention of section 23(1) read together with section 23(2) (b) and 23(3)(e) and 26(1) read together with section 26(2) b) of the Act.
4. Notwithstanding the above, the Commission remains open to engaging with the Respondents with the object of settling the matter in terms of section 40 of the Competition Act and to avoid proceedings in terms of section 38 of the Competition Act.

S. AKWEENDA
CHAIRPERSON
NAMIBIAN COMPETITION COMMISSION
