REPUBLIC OF SOUTH AFRICA

REPUBLIEK VAN SUID-AFRIKA

Government Gazette
Staatskoerant

Vol. 336 PRETORIA, 24 JUNE JUNIE 1993 No. 14898

GOVERNMENT NOTICE

OFFICE FOR PUBLIC ENTERPRISES AND PRIVATISATION

No. 1136 **24 June 1993**

MINISTRY FOR PUBLIC ENTERPRISES

AMENDMENT OF NOTICE PROHIBITING A RESTRICTIVE PRACTICE IN TERMS OF SECTION 14 OF THE MAINTENANCE AND PROMOTION OF COMPETITION ACT, 1979 (ACT No. 96 OF 1979)

In terms of Notice 426 that was published in *Government Gazette* No. 14797 of 14 May 1993 I, Dawid Jacobus de Villiers, Minister for Pubic Enterprises, declared certain forms of conduct to be unlawful. This action followed upon an investigation conducted by the Competition Board into allegations of unjustifiable discriminatory practices by certain manufacturers of medicines which could eventually be sold on prescription.

There has been widespread reaction to Notice 426, much of it by persons who, for one reason or another, showed no interest in the Board's investigation or hitherto have made no submissions on the relevant issues. More particularly, comments have been received advocating certain changes to Notice 426 to cater for particular circumstances or to facilitate interpretation and implementation of the Notice. Other parties referred to the gross abuses that occur under the existing system which were mentioned in the Board's Report No. 34.

GOEWERMENTSKENNISGEWING

KANTOOR VIR OPENBARE ONDERNEMINGS EN PRIVATISERING

No. 1136 **24 Junie 1993**

MINISTERIE VIR OPENBARE ONDERNEMINGS

WYSIGING VAN KENNISGEWING WAARVOLGENS 'N BEPERKENDE PRAKTYK VERBIED WORD INGEVOLGE ARTIKEL 14 VAN DIE WET OP DIE HANDHAWING EN BEVORDERING VAN MEDEDINGING, 1979 (WET No. 96 VAN 1979)

Ingevolge Kennisgewing 426 wat in *Staatskoerant* No. 14797 van 14 Mei 1993 gepubliseer is, het ek, Dawid Jacobus de Villiers, Minister vir Openbare Ondernemings, sekere wyses van optrede onwettig verklaar. Hierdie optrede het gevolg op 'n ondersoek gedoen deur die Raad op Mededinging na bewerings van ongeregverdigde diskriminerende praktyke deur bepaalde vervaardigers van medisyne wat uiteindelik op voorskrif verkoop kan word.

Daar was wydverspreide reaksie op Kennisgewing 426, baie daarvan vanaf persone wat, om die een of ander rede, nie belangstelling in die Raad se ondersoek getoon het nie of tot nou toe geen voorleggings oor die onderhawige aangeleenthede gemaak het nie. In besonder, is kommentaar ontvang wat sekere veranderinge aan Kennisgewing 426 bepleit om voorsiening te maak vir bepaalde omstandighede of om die uitleg en implementering van die kennisgewing te vergemaklik. Ander partye het verwys na die growwe misbruike wat plaasvind onder die bestaande stelsel wat in die Raad se Verslag No. 34 vermeld word.

The Board has investigated the matter further and held discussions with a number of interested parties. In order to accommodate cogent comments and suggestions the Board has recommended that I effect certain amendments to Notice 426. To obviate any misconceptions, it must be emphasised that these recommendations do not derogate from the principal purpose of the Notice which is to outlaw discriminatory practices which are distorting competition in the market without, on the evidence presented, yielding any substantial public interest benefits.

For practical reasons the prohibition is couched in general terms which the courts in the appropriate circumstances will interpret on a case by case basis. It should be emphasised that the prohibition does not oblige manufacturers to sell medicine to all buyers at the same price, although they may choose to do so, and does not inhibit manufacturers from adopting any particular form of distribution policy.

It also does not prohibit a manufacturer from registering and/or marketing identical medicines with the same ingredients himself, or indirectly, in different pricing categories provided that he shall afford all purchasers or classes of purchasers equal access to the differently priced medicines.

I have accepted the Board's recommendations and accordingly hereby in terms of section 14 (3) of the Maintenance and Promotion of Competition Act, 1979, amend Notice 426 by making appropriate deletions and additions to it so that the substantive provisions of Notice 426 now read as follows:

"I therefore declare that it shall be unlawful for a manufacturer of medicine which can eventually be sold on prescription to sell such medicine, or otherwise dispose of it, in a manner which, directly or indirectly, discriminates between buyers, or classes of buyers, of medicine, by applying dissimilar prices and conditions to equivalent transactions thereby placing one or more buyers or classes of buyers at a competitive disadvantage vis-á-vis its or their competitors.

This prohibition shall not apply

(a) where Comed is the buyer or where the purchase has taken place under an authority granted to the buyer by the State Tender Board; or

(b) where differences in prices and conditions are objectively justifiable to provide for the difference in cost or probable cost in the manufacture and/or distribution of the medicine which may be ascribed to—

(i) the different quantities that are sold; or

Die Raad het die aangeleentheid verder ondersoek en het besprekings met 'n aantal belanghebbende partye gehou. Ten einde oortuigende kommentaar en voorstelle te akkommodeer het die Raad voorgestel dat ek bepaalde wysigings aan Kennisgewing 426 moet aanbring. Om enige wanopvattings uit die weg te ruim, moet dit beklemtoon word dat hierdie aanbevelings nie afbreuk doen aan die hoofdoelstelling van die Kennisgewing wat diskriminerende praktyke onwettig wat mededinging in die mark verwring sonder, volgens die getuienis voorgelê, om enige wesenlike voordele vir die openbare belang op te lewer.

Die verbod is vir praktiese redes in algemene terme geformuleer wat die howe in die gepaste omstandighede sal vertolk op 'n geval tot geval grondslag. Dit behoort beklemtoon te word dat die verbod nie vervaardigers verplig om medisyne aan alle kopers teen dieselfde prys te verkoop nie, alhoewel hulle mag verkies om dit te doen, en belet nie vervaardigers om enige bepaalde soort distribusiebeleid aan te neem nie.

Dit verbied ook nie 'n vervaardiger om self of onregstreeks, identiese medisyne met dieselfde bestanddele te registreer en/of te bemark in verskillende pryskategorieë nie, mits hy aan alle kopers of klasse van kopers gelyke toegang tot die verskillende geprysde medisyne sal bied.

Ek het die Raad se aanbevelings aanvaar en wysig dienooreenkomstig hiermee ingevolge artikel 14 (3) van die Wet op die Handhawing en Bevordering van Mededinging, 1979, Kennisgewing 426 deur die toepaslike skrappings en byvoegings daaraan te maak sodat die substantiewe bepalings van Kennisgewing 426 nou soos volg lees:

"Daarom verklaar ek dat dit onwettig sal wees vir die vervaardiger van medisyne wat uiteindelik op voorskrif verkoop kan word om sodanige medisyne te verkoop, of dit andersins van die hand te sit, op 'n wyse wat, regstreeks of onregstreeks, diskrimineer tussen kopers, of klasse kopers van medisyne, deur die toepassing van ongelyksoortige pryse en voorwaardes op ekwivalente transaksies en sodoende een of meer kopers of klasse van kopers in 'n mededingend nadelige posisie teenoor sy of hulle mededingers te plaas.

Hierdie verbod sal nie van toepassing wees—

(a) waar Komed die koper is of waar die aankoop plaasgevind het met die magtiging wat deur die Staatstenderraad aan die koper verleen is; of

(b) waar verskille in pryse en voorwaardes objektief geregverdig is om voorsiening te maak vir die verskil in koste, of waarskynlike koste, in die vervaardiging en/of distribusie van die medisyne wat toegeskryf kan word aan—

(i) die verskillende hoeveelhede wat verkoop word; of

(ii) different conditions of supply, including the terms of payment, that may apply.

In this prohibition the following definitions shall apply:

"Buyer or classes of buyers" include, *inter alia,* persons or organisations who or which are directly or indirectly involved in—

(a) the purchase for resale of medicine without the end user being involved; and/or

(b) the purchase for resale of medicine directly to the end user; and/or

(c) the negotiation with manufacturers for the supply of medicine directly and/or indirectly to particular end users or groups of end users

irrespective of whether or not those involved are driven by the profit motive;

"Comed" is the Co-ordinating Committee for Medical Procurement in the Department of National Health and Population Development which is responsible for the compilation of tender documents for the acquisition of medicine and on the basis of whose recommendations, the State Tender Board approves tenders for the supply of medicine to certain government institutions;

"Equivalent transactions" means transactions that require materially the same performance;

"Manufacturer" means a person described as such in regulation (1) of the General Regulations issued in terms of the Medicines and Related Substances Control Act, 1965 (Act No. 101 of 1965), and registered in terms of the Pharmacy Act, 1974 (Act No. 53 of 1974), and shall include an "applicant" described as such in regulation (2) of the General Regulations issued in terms of the Medicines and Related Substances Control Act, 1965, and registered in terms of the Pharmacy Act, 1974;

"Medicine" means scheduled substances as defined in section 1 of the Medicines and Related Substances Control Act, 1965 and taken up in Schedules 1 and higher in the said Act: Provided that if a manufacturer registers and/or markets medicine with the same ingredients himself, or indirectly, under different names and in so doing discriminates directly or indirectly between buyers or classes of buyers of medicine, such medicine shall for the purposes of this prohibition be deemed to be the same medicine; and

(ii) die verskillende leweringsvoorwaardes, wat betalingsvoorwaardes insluit, wat mag geld.

In hierdie verbod geld die volgende omskrywings:

"Kopers of klasse kopers" sluit in onder andere, persone of organisasies wie of wat regstreeks of onregstreeks betrokke is in—

(a) die koop vir herverkoop van medisyne sonder dat die eindverbruiker betrokke is; en/of

(b) die koop van medisyne vir die herverkoop regstreeks aan die eindverbruiker; en/of

(c) die onderhandeling met vervaardigers vir die verskaffing van medisyne regstreeks en/of onregstreeks aan bepaalde eindverbruikers of groepe van eindverbruikers

ongeag daarvan of die betrokkenes met 'n winsmotief handeldryf aldan nie;

"Komed" is die Koördinerende Komitee vir Mediese Bevoorrading in die Departement van Nasionale Gesondheid en Bevolkingsontwikkeling wat verantwoordelik is vir die opstel van tenderdokumente vir die aankoop van medisyne en op grond van wie se aanbeveling die Staatstenderraad tenders vir die lewering van medisyne aan bepaalde owerheidsinstansies goedkeur;

"Ekwivalente transaksies" beteken transaksies wat wesenlik dieselfde prestasie vereis;

"Vervaardiger" is 'n persoon wat aldus omskryf word in regulasie (1) van die Algemene Regulasies uitgevaardig kragtens die Wet op die Beheer van Medisyne en Verwante Stowwe, 1965 (Wet No. 101 van 1965), en geregistreer ingevolge die Wet op Aptekers, 1974 (Wet No. 53 van 1974), en sluit in 'n "applikant" as sodanig omskryf in regulasie (2) van die Algemene Regulasies uitgevaardig kragtens die Wet op die Beheer van Medisyne en Verwante Stowwe, 1965, en geregistreer ingevolge die Wet op Aptekers, 1974;

"Medisyne" beteken geskeduleerde stowwe soos omskryf in artikel 1 van die Wet op die Beheer van Medisyne en Verwante Stowwe, 1965, en opgeneem in Skedule 1 en hoër in die genoemde Wet: Met dien verstande dat indien 'n vervaardiger self medisyne met dieselfde bestanddele of op 'n onregstreekse wyse onder verskillende name registreer en/of bemark en met sodanige optrede regstreeks of onregstreeks diskrimineer tussen kopers of klasse kopers van medisyne, sodanige medisyne vir die doeleindes van hierdie verbod as dieselfde medisyne geag sal word; en

"**Price**" includes, *inter alia,* discounts, the granting of bonuses, samples and gifts which relate directly or indirectly to the sale of medicine."

I also determine that the amended Notice shall come into operation on **10 August 1993** and that the prohibition set out in Notice 426, which was scheduled to come into operation on 28 June 1993, shall forthwith lapse.

"**Prys**" sluit in onder andere, diskonto's, die toestaan van bonusse, monsters en geskenke wat regstreeks of onregstreeks verband hou met die verkoop van medisyne."

Ek bepaal ook dat die gewysigde Kennisgewing op **10 Augustus 1993** in werking sal tree en dat die verbod wat uiteengesit is in Kennisgewing 426, wat geskeduleer was om op 28 Junie 1993 in werking te tree, onmiddellik verval.

CONTENTS

INHOUD

Printed by and obtainable from the Government Printer, Bosman Street, Private Bag X85, Pretoria, 0001. Tel. 323-9731 × 263, 267 or 269

Gedruk deur en verkrygbaar by die Staatsdrukker, Bosmanstraat, Privaat Sak X85, Pretoria, 0001. Tel. 323-9731 × 263, 267 of 269