

High Court rejects Netcare's application



By [Leana Engelbrecht](#)

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The High Court, on 22 August 2014, released its judgment in respect of the on-going conflict of interest dispute between Netcare Hospital (Pty) Ltd, KPMG Services (Pty) Ltd and the Competition Commission.

Netcare claimed that KPMG could not act as a service provider to the Commission in respect of the Commission's inquiry into the private healthcare market. Netcare claimed that KPMG would, in acting for the Commission, breach its fiduciary duty of loyalty towards Netcare (an erstwhile client of KPMG) and that this would constitute a conflict of interest.

In essence, Netcare's concern was that the Commission would (if it had not already), through KPMG, obtain access to Netcare's confidential information, including cost, pricing and margin information, which would be relied upon by the Commission during the course of its market inquiry to the detriment of Netcare.

In October 2013 Netcare brought an urgent application to interdict KPMG from disclosing its information to the Commission, which was settled between the parties. In terms of this settlement, KPMG's systems were to be purged of Netcare's information. A dispute arose in respect of whether the order was in fact complied with and Netcare brought an application for amended relief including interdicting KPMG and, alternatively, certain KPMG employees from assisting the Commission.

Relationship ended

The court found that the relationship between KPMG and Netcare ended prior to KPMG being officially appointed by the Commission to assist with the healthcare inquiry. Accordingly, once the relationship between KPMG and Netcare ceased, KPMG no longer had a fiduciary duty towards Netcare, save for retaining confidentiality over Netcare's information. The court found that Netcare was not able to establish that it had a prima facie right which was intruded upon through KPMG's engagement with the Commission.

The court further found that Netcare did not establish a well-grounded apprehension of irreparable harm as the risk of disclosure of its confidential information was not imminent as:

- any information still held by KPMG was protected by contractual undertakings of non-disclosure in the favour of Netcare;
- the Commission provided undertakings that it would not request KPMG to divulge confidential information; and
- the Commission had statutory powers that would enable it to obtain the information through legitimate means should it wish to have access to it (either through Netcare's voluntary participation in the healthcare inquiry or by virtue of a subpoena).

The court determined that the balance of convenience was in the Commission's favour as granting the interdict would result in delays that may result in the Commission not meeting the deadline for the conclusion of the healthcare inquiry, by virtue of the Commission having to find an alternative service provided with comparable resources to assist it.

Ultimately, the court found Netcare would be able to claim for breach of contract in the event that KPMG disclosed its information and that the relief sought by it was not appropriate in the circumstances.

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