



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 3 DECEMBER 2021

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

The Clicks Group Ltd and Others v The Independent Community Pharmacy Association and Others (644/2020) [2021] ZASCA 167 (3 December 2021)

Today the Supreme Court of Appeal (SCA) handed down judgment upholding, with costs, an appeal against a decision of the Western Cape Division of the High Court (the high court).

The issue before the SCA was whether Clicks Group had contravened the Pharmacy Act 53 of 1974 (the Act), read with regulation 6(d) of the Regulations relating to Ownership and Licencing of Pharmacies the Act, on the basis that entities within the Clicks Group owned community (retail) pharmacies while at the same time having a beneficial interest in a manufacturing company.

The first respondent is the Independent Community Pharmacy Association (ICPA). The ICPA lodged a complaint with the Department of Health against the first to fifth appellants (collectively referred to as the Clicks Group of Companies or Clicks Group). It sought the revocation of retail and manufacturing licences held within the Clicks Group on the basis that the Clicks Group contravened regulation 6(d) of the Regulations relating to the Ownership and Licencing of Pharmacies (the Regulations), promulgated under s22A of the Pharmacy Act 53 of 1974 (the Act).

The Clicks Group operates over 500 community (retail) pharmacies, with over 2 000 pharmacy staff (pharmacists and pharmacists' assistants) and 200 nursing practitioners. The third appellant, Unicorn Pharmaceuticals (Pty) Ltd (Unicorn), is a manufacturing pharmacy and a holder of 39 generic medicines under the regulatory regimes that apply to the sale of medicine. Clicks Retailers Pty Ltd (Clicks Retailers) is a leading provider of pharmaceutical services in South Africa and a leading retailer of health and beauty products. It operates approximately 470 licensed community pharmacies throughout the country. These pharmacies are part and parcel of Clicks stores that employ thousands more, both in-store and in the supply chain and corporate office infrastructure that supports the stores.

The Clicks Group corporate structure is constituted as follows:

- (a) Clicks Group is the holding company;
- (b) It holds all the shares in New Clicks;
- (c) New Clicks holds all the shares in Unicorn and in Clicks Investments (Pty) Ltd (Investments);
- (d) Unicorn owns a licenced manufacturing pharmacy;
- (e) Investments holds all the shares in Clicks Retailers;
- (f) Retailers owns licenced community pharmacies countrywide.

Of particular significance to this appeal was the finding of the high court that the Clicks Group had a beneficial interest in Unicorn as a result of its shareholding in various entities within the Group. It reasoned that New Clicks and Click Investments (Pty) Ltd (Investments) held a beneficial interest in the manufacturing pharmacy owned by Unicorn and the community pharmacies owned by Retailers and this was especially so because as shareholders, New Clicks and Investments have financial interests in Unicorn and Retailers.

The SCA held that the structure of the Clicks Group represents separate and different juristic persons. New Clicks has no beneficial interest or control of the assets of Retailers, which assets are mainly Clicks Pharmacies. Consequently, New Clicks cannot exercise the rights that derive from Retailers' community pharmacy licence.

The SCA held further that it was equally not correct to contend that because New Clicks holds shares in Unicorn or Retailers, they have a beneficial interest in the underlying pharmacies owned by them. It was clear that New Clicks and the Clicks Group did not own a community pharmacy or retail pharmacy and thus did not contravene regulation 6(d).

Makgoka JA writing the dissenting judgment, held that the fact that the assets of a company do not belong to the shareholders, does not necessarily mean that the shareholders do not have an interest in them. Therefore, Makgoka JA concluded that that the Clicks corporate structure contravenes regulation 6(d) through the beneficial interests of Clicks Investments and New Clicks in both community pharmacies and the manufacturing pharmacy.

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