COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 25/IR/C/Aug00
25/IR/Dec99

In the matter between:

Mainstreet 2 (Pty) Ltd t/a New United Pharmaceutical Distributors (Pty) Ltd (UPD)	**First Applicant**
Natal Wholesale Chemists (Pty) Ltd t/a Alpha Pharm Durban	**Second Applicant**
Midlands Wholesale Chemists (Pty) Ltd t/a Alpha Pharm Pietermaritzburg	**Third Applicant**
East Cape Pharmaceuticals Ltd t/a Alpha Pharm Eastern Cape	**Fourth Applicant**
Free State Buying Association Ltd t/a Alpha Pharm Bloemfontein (KEMCO)	**Fifth Applicant**
Pharmed Pharmaceuticals Ltd	**Sixth Applicant**
AGM Pharmaceuticals Ltd t/a DOCMED	**Seventh Applicant**
L'Etangs Wholesale Chemists CC t/a L'Etangs	**Eighth Applicant**
Resepkor (Pty) Ltd t/a Reskor Pharmaceutical Wholesalers	**Ninth Applicant**
and	
Novartis (SA) (Pty) Ltd	**First Respondent**
Roche Products (Pty) Ltd	**Second Respondent**
Boehringer Ingelheim (Pty) Ltd	**Third Respondent**
Bristol Myers Squibb (Pty) Ltd	**Fourth Respondent**

Abbott Laboratories SA (Pty) Ltd	**Fifth Respondent**
Schering-Berlin (Pty) Ltd t/a Berlimed	**Sixth Respondent**
Sanofi-Synthelabo (Pty) Ltd	**Seventh Respondent**
MSD (Pty) Ltd	**Eighth Respondent**
Bayer (Pty) Ltd	**Ninth Respondent**
Eli Lilly SA (Pty) Ltd	**Tenth Respondent**
Wyeth SA (Pty) Ltd	**Eleventh Respondent**
Rolab (Pty) Ltd A Division of Novartis SA	**Twelfth Respondent**
Hoechst Marion Roussel Ltd	**Thirteenth Respondent**
International Healthcare Distributors (Pty) Ltd (IHD)	**Fourteenth Respondent**

ORDER & REASONS FOR THE TRIBUNAL'S DECISION

In this case the applicants have brought an application for interim relief against the respondents in terms of section 59 of the Competition Act. At the time the application was launched the Competition Commission, in terms of a procedure provided for in its rules, had not accepted the complaint. The respondents have asked us to dismiss the application on the basis that the applicants have no standing to bring it.[1]

Background

The facts of this case are common cause. On the 11 October 1999, the applicants filed a complaint with the Commission. On the 20 December

1 Although the application currently before us to dismiss has been brought by the respondents we have of for convenience referred to the applicants and respondents as they are in the interim relief application.

1999 the applicants filed their interim relief application with the Tribunal.

On the 17th February 2000 the Commission accepted the applicants' complaint. The respondents say that they only become aware of this sometime in July 2000, when the Commission advised them in writing of the date of acceptance.

At the date of this application (15 November, 2000) the Commission has yet to refer the complaint to the Tribunal or to issue a notice of non- referral.

Discussion

The respondents' case is this. A person who brings an application for interim relief must comply with section 59 of the Act, the section that authorizes these types of proceedings. The relevant portion of section 59(1) states –

> *"At any time, whether or not a hearing has commenced into an alleged prohibited practice, a person referred to in section 44 may apply to the Competition Tribunal for an interim order in respect of that alleged practice, and the Tribunal may grant such an order if…"*

It can be seen that the essential requirement for standing in terms of section 59 is that the applicant must be "*a person referred to in section 44*". Section 44 in turn states that –

> "*A complaint against a prohibited practice by a firm may be initiated by the Commissioner, or submitted to the Competition Commission by any person in the prescribed manner."*

Reading the two sections together we can conclude that when section 59 speaks of a person referred to in section 44 it means a person whose complaint has been *submitted to the Commission in the prescribed manner.* (Our emphasis)

Prescribed of course means prescribed by regulation and the regulations in question are the Rules of the Competition Commission.

Rule 2 (f) (ii) of the Competition Commission's Rules defines a complaint as " *a matter that has been submitted to the Commission in terms of section 44 and accepted by the Commission in terms of Rule 17*."

Rule 17 of the Rules goes on to give procedural substance to the bifurcated definition of complaint. Rule 17(1) speaks to the filing of the complaint when it says

> *" A person other than the Commissioner, by filing a completed Form CC1, may submit a matter to the Commission,*
>
> *a) if the matter concerns a practice that meets both of the tests set out in Rule 16 (a) and (b);*
> *b) the submission is not frivolous; and*
> *c) the Commissioner has not initiated or accepted a complaint in respect of that practice."*

Rule 17(2) in turn provides for acceptance by the Commission.

> *"Upon receiving a submission in terms of sub-rule (1), the Commission must either-*
> *a) accept the submission as a complaint in terms of section 44; or*
> *b) notify the person who made the submission that the Commission has rejected the submission as a complaint, and provide a brief written explanation for that decision.*

It is not disputed that the applicants' complaint survives the first requirement of Rule 17(1). A complaint in the proper form was filed with the Commission on 11 October 1999.

Nor is it disputed that Rule 17(2) had not been complied with at the time interim relief was applied for in December 1999. The respondents argue that this means that the requirements for a valid complaint did not exist prior to the launching of the application and ergo the applicants have no standing to bring this application. The applicants retort that the flaw in the respondents' argument is a "*misplaced reliance upon the applicability of Rule 17(2)*".

They argue that the statute does not require that a complaint be accepted in order for an applicant to acquire locus standi to bring an interim relief application, all that is required is that the complaint must have been filed.

A lengthy debate ensued between the applicant and the sixth respondent as to the correct interpretation of section 44. Its resolution depends on an assessment of whether the Rules on acceptance are intra or ultra vires the statute. In brief the applicants argued that what section 44 contemplates with the language of "submission" is a unilateral act by a complainant who lodges or files the required form with the Commission. The additional hurdle of acceptance created by Rule 17(2), they argue exceeds the regulatory ambit authorized by the section. According to the affidavit filed by the applicants' attorney,

> *"In the premises, and to the extent that Rule 17 purports to do so, it is ultra vires its empowering statute and therefore void. In particular Rule 17 cannot be used to cut down or enlarge the meaning of sections 44 or 59 of the Act. The Act does not require that "the complaint would have had to be accepted" by the Competition Commission before the interim application could be lodged."*

The sixth respondent contended with equal vigour that the regulation is intra vires the section and that the use of the word "submission" is itself suggestive of an acceptance process. Both parties relied on literal, textual and contextual interpretations of the Act and Rules to support their interpretations as to whether the statute should be interpreted as authorizing an 'acceptance" or merely a "lodgment", scheme for the submission of complaints to the Tribunal. Both also claimed support for their respective interpretations in the wording of the amendment to the present section 44, contained in section 49B(2)(b) of the Competition Second Amendment Bill (B 41B –2000).

This brings us to the essence of the difficulty we have with the applicants' argument in this matter. What the applicants are asking us to do is to ignore the clear language of the Rule because the statute does not authorize it. That this amounts to an argument that the Rule is ultra vires the statute is

something they skillfully avoided conceding in argument, although they do suggest this in their answer as we indicated above in the quote from the affidavit of their attorney. The reason for this circumlocution is that the applicants are perfectly aware that the Tribunal as a creature of statute only has those powers that the legislature seeks to confer upon it.

As the High Court has stated in Minister of Public Works v Haffejee NO 1996 (3) SA 745 (A) at 751:

> *"Where a tribunal is a creature of statute with no inherent powers (such as compensation court), it cannot by its own ruling or decision confer a jurisdiction upon itself which it does not in law possess."*

The Tribunal's functions are described in section 27 of the Act and the nature of the relief it can grant is set out in section 60. Neither section expressly or by necessary implication confers such a power on the Tribunal. The power to declare rules of the Commission ultra vires is accordingly not within our competence and no one has argued otherwise. Yet the implication of the applicants' argument is that we must ignore Rule 17(2) even if we cannot set it aside. The legal effect of this approach amounts to the same as finding them to be ultra vires. If an administrative Tribunal is given Rules it must follow them. In the case of Mosaka and others v Eiselen NO 1951 (4) SA 504 (T) it was held that:

> *"It seems to me that there must be a special approach to a problem such as this where the body concerned is a statutory body. Once regulations have been framed as to the procedure those regulations have the force of law. It may be that if the regulations are not comprehensive, and a matter arises which is not dealt with by the regulation the Council itself would have the right to decide upon the procedure. But if there is a regulation dealing with the matter the provisions of that regulation must be carried out."*

In doing so we are not using the Rules to interpret the statute, which the Courts have held one may not do.[2] Rather the statute mandates the use of

2 See Hamilton Brown v Chief Registrar of Deeds 1968 (4) SA 735 and Moodley and Others v Minister of

regulation to provide the procedure for the manner of submission of complaints. In any event we cannot treat the rules of the Commission as if they were invalid. This is the prerogative of the High Court should it ever be required to consider this issue.

Accordingly we find that on an interpretation of the rules, acceptance by the Commission is a prerequisite for a valid complaint and that the application was launched prematurely.

Apart from the clear language of Rule 17(2), when read with the definition of a complaint contained in Rule 2(f)(ii), the purpose of this Rule also supports the respondents' interpretation that acceptance must have taken place at the time the application was launched.

A prospective complainant must come along to the Commission and file a complaint in Form CC1. This action does not confer the legal status of a "*complaint*" on the filing until the Commission has accepted it in terms of Rule 17(2). The acceptance procedure is intended to serve as an initial screening to see whether the submission meets the standard set out in Rules 16 and 17(1) viz.

Rule 16:

> *"The Commissioner may initiate a complaint at any time, if-*
>
> *a) it concerns a matter that is within the jurisdiction of the Act; and*
> *b) it concerns a matter that constitutes a permitted complaint in terms of section 67.*

Rule 17(1):

> *A person, other than the Commissioner, by filing a completed form CC1, may submit a matter to the Commission, if*
>
> *a) the matter concerns a practice that meets both of the tests set out in Rule 16(a) and (b);*

Education and Culture, House of Delegates, and Another 1989 (3) SA 221 (A)

b) the submission is not frivolous; and
c) the Commissioner has not initiated or accepted a complaint in respect of that practice."

If the complaint is accepted, the Commission must proceed with its investigation and decide whether to refer the matter to the Tribunal or to issue a notice of non-referral. The juristic difference between a non-referral, a decision the Commission is entitled to make in terms of section 50(b) of the Act[3], and a non-acceptance in terms of Rule 17(2) is crucial. After a "non-referral" decision the complaint is kept alive, but the Commission opts out of its role as the referring party in favour of the complainant; after a "non-acceptance" decision the complaint is dead and can only be resurrected if the party successfully reviews the Commission's decision in terms of Rule 17(3).[4]

As the respondents have argued, the Rules require a complaint to be accepted to clothe it with validity; this means acceptance must have taken place before interim relief is applied for. To hold otherwise would lead to the danger that the complaint is an inchoate juristic fact until acceptance. An applicant whose submission still awaited acceptance by the Commission could proceed and possibly obtain interim relief from the Tribunal only to discover subsequently that the Commission had refused to accept the complaint thus nullifying it.[5] This makes the acceptance rule farcical and would introduce chaos and uncertainty into the proceedings. Logic dictates that as long as acceptance of a complaint is a requirement for valid complaint, acceptance must take place before a valid complaint can be said to exist.

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3 Section 50 states "After completing an investigation, the Competition Commission must –
a) refer the matter to the Competition Tribunal if it determines that a prohibited practice has been established ;or
b) in any other case, issue a notice of non-referral to the complainant in the prescribed form

4 **Rule 17(3) states "If the Commission has rejected a submission in terms of sub-rule (1) (a), (b) or (c), the person who made that submission may request, within 10 days after receiving a notice from the Commission in terms of sub-rule (2)(b), a review of the Commission's decision by the Competition Tribunal, subject to its Rules".**

5 Subject of course to a review to the Tribunal in terms of Rule 17(3).

For this reason we find that the applicants did not have locus standi to bring this interim relief application and the application is dismissed.

COSTS

There are two cost issues to be decided in this matter. Firstly the costs of this application to dismiss (the "dismissal application") and secondly the costs of the application as whole (the "main application"). The applicants have argued that if they are unsuccessful we should only award costs against them for the dismissal application but that the costs of the main application should be reserved until they have had an opportunity to renew these proceedings and if they do these costs become costs in the cause.

The respondents argued that the normal rule of cost following result should apply and if the applicants lose they should pay their costs for both the main application and the dismissal application. They argue that the onus is on the applicants to meet the jurisdictional requirements of the statute and Rules and having fallen short they must bear the costs.

As an administrative Tribunal we are less constrained by the obligation to always award costs than a High Court. In addition we have a discretion as to whether to award costs. This application is an unusual one for a number of reasons –

- The regulations may well be ultra vires but we do not have the jurisdiction to decide this and since the expense of approaching the High Court might well exceed the costs of filing a new application the applicants understandably may not wish to proceed to the High Court.
- The act is being amended to change the nature of the complaint regime.[6] The transitional provisions of the Bill make it retrospective in relation to pending proceedings[7].
- The applicants in their affidavit contended that in practice the Commission did not follow the acceptance procedure set out in

6 The Bill revises section 44 with a new section 49(B)(2)(b). Although the language of submission of a complaint is retained the ambit for regulation is considerably narrowed – the word prescribed now qualifies the word "form" currently it qualifies "manner". The new language suggests the legislature does not contemplate acceptance as requirement for a valid complaint.
7 Section 23(5) of the amendment Bill.

its rules. As evidence for this they relied on a letter from the Commission dated 18 October 1999. This letter, dated some time after the complaint was lodged, does not expressly stipulate that formal acceptance is a prerequisite to an application for interim relief. Nevertheless its silence on the issue of acceptance could have lead the applicants to reasonably construe that the Commission did not regard this as a prerequisite, more particularly as the letter draws the applicants' attention to interim relief as a remedy to be considered by them.

- The Commission has since accepted the complaint.
- The objection is a "technical" one in the manner understood in the case law.[8] Nor has the initial failure to have the complaint accepted prejudiced the respondents. The respondents complained that they are prejudiced by the failure of the applicants to have filed their reply despite considerable delay, but that is another matter and even if the complaint had been accepted before the main application was launched this would have had no bearing on the applicants alleged dilatoriness in reply.
- The requirement for acceptance seems to have escaped all parties not just the applicants who had they been alerted earlier might have corrected the defect before further costs were incurred. [9]

For all these reasons we believe that the interests of justice would not be served by making a costs award in respect of the main application at this stage and costs in this respect should be reserved[10]. Since this might

8 In Sirkhot v Parker 1929 1 PH F26 (C) the Court, after upholding an exception, did not grant costs in favour of the successful defendant, but ordered that costs be costs in the cause as the exception was a technical one and the defendant had not been embarrassed in any way.

9 Indeed the Respondents seemed less concerned about acceptance than about examining the complaint, as evidenced from the Affidavit of Johan Niehaus, on behalf of the 14th Respondent, paragraph 59 where he states "We would respectfully request the above Honourable Tribunal to permit the Respondents an examination of the complaint in order to ensure that there are no allegations contained in the complaint which will be taken into consideration by the Tribunal which are not already contained in this application for interim relief under section 59".

10 We have decided to reserve the costs as opposed to making them costs in the cause as there is always a possibility that the renewed application takes a significantly different form to the present and in that case we should allow a future Tribunal to have a discretion over whether the costs incurred should follow the cause.

prejudice the respondents if a renewed application is not brought we have decided to make the order in the following terms-

1. The respondents who were parties to the dismissal application (the first, second, third, fourth, sixth, ninth, twelfth, thirteenth and fourteenth) are awarded costs of that application as follows-

    (i) In the case of the sixth respondent the costs of one attorney

(ii) In the case of the other respondents the costs of two representatives is authorised provided that the fees of the additional representative may not exceed one half of the first representative.

2. The costs of the main application are reserved to be determined at the same time as the costs of the renewed interim relief application are determined provided that –

    (i) The applicants file and serve the renewed application by no later than 31 January 2001; and

(ii) If they do not the respondents will be entitled to approach the registrar to have this matter set down to determine costs

    iii) If any respondent to the present main application is not cited as a respondent in the renewed application such respondent may also approach the registrar to have the matter set down to determine its costs.

_____ 29 November 2000

Norman Manoim Date

Concurring: S. Zilwa; P. Maponya