**COMPETITION TRIBUNAL**
**REPUBLIC OF SOUTH AFRICA**

**Case No. 05/IR/A/Jul01**

**In the matter between:**

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| **Schering (Pty) Ltd** | **First Applicant** |
| **MSD (Pty) Ltd** | **Second** |
| **Novartis SA (Pty) Ltd** | **Third** |
| **Roche Products (Pty) Ltd** | **Fourth** |
| **Boehringer-Ingelheim Pharmaceuticals (Pty) Ltd** | **Fifth** |
| **Bristol Myers Squibb (Pty) Ltd** | **Sixth** |
| **Schering (Pty) Ltd** | **Seventh** |
| **Abbott Laboratories SA (Pty) Ltd** | **Eighth** |
| **Bayer (Pty) Ltd** | **Ninth** |
| **Eli Lilly SA (Pty) Ltd** | **Tenth** |
| **Wyeth SA (Pty) Ltd** | **Eleventh** |
| **Aventis Pharma (Pty) Ltd** | **Twelve** |
| **International Healthcare Distributors (Pty)Ltd** | **Thirteenth** |
| **Sanofi-Synthelobo (Pty) Ltd** | **Fourteenth** |

**and**

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| **New United Pharmaceutical Distributors (Pty) Ltd (formerly Mainstreet 2 (Pty) Ltd)** | **First Respondent** |
| **Natal Wholesale Chemists (Pty) Ltd t/a Alpha Pharm Durban** | **Second** |
| **Midlands Wholesale Chemists (Pty) Ltd t/a Alpha Pharm Pietermaritzburg** | **Third** |
| **East Cape Pharmaceuticals Ltd t/a Alpha Pharm Eastern Cape** | **Fourth** |
| **Free State Buying Association Ltd t/a Alpha Pharm Bloemfontein (Kemco)** | **Fifth** |
| **Pharmed Pharmaceuticals Ltd** | **Sixth** |
| **Agm Pharmaceuticals Ltd t/a Docmed** | **Seventh** |
| **L'etang's Wholesale Chemists CC t/a L'etangs** | **Eighth** |
| **Resepkor (Pty) Ltd t/a Reskor Pharmaceutical Wholesalers** | **Ninth** |
| **The Competition Commission** | **Tenth** |

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**Reasons for Decision**

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## Background

1. The applicants in this matter comprise a grouping of pharmaceutical manufacturers and, in the case of the twelfth applicant, International Healthcare Distributors (IHD), the company that provides these manufacturers with a range of distribution and logistical services.

2. The respondents in this matter are a group of wholesalers of pharmaceutical products.

3. The Tribunal is asked to dismiss, on the grounds of abuse of process, an application for interim relief brought by the wholesalers (the respondents in the present matter) against the manufacturers and their distribution company (the applicants in the present matter).[1]

4. On the 11th October 1999 the wholesalers lodged a complaint with the Commission against the manufacturers and, on the 20th December 1999, they applied to the Tribunal for interim relief in terms of section 59 of the old Act[2]. This will henceforth be referred to as 'the first interim relief application'. The manufacturers answered on the 29th February 2000.[3]

5. After securing an extension to file their replying affidavit on 30th April 2000, the wholesalers then applied for a further extension, until 19th June 2000. They averred that another grouping of pharmaceutical manufacturers was in the process of setting up a second distribution channel, Synergistic Alliance Investments (SAI). They applied for this second extension of the period to reply in the IHD interim relief matter because they wished to prioritise interdicting SAI, which had not yet commenced business. The wholesalers averred that cost considerations dictated that they could not appoint a second set of legal representatives. However, this extension application was withdrawn after it was opposed by several of the manufacturers. On the 13th July 2001, upon application by the manufacturers, the Tribunal granted an order against the wholesalers for costs of the withdrawn extension application. They have never filed their replying affidavit.

6. In July 2000, the manufacturers, upon realizing that the wholesalers had, in violation of Section 17(2) of the then applicable Competition Act, filed their first application for interim relief before their initiating complaint had been accepted by the Competition Commission, gave

[1] For ease of exposition, we shall henceforth refer to the applicants in this matter (who are the respondents in the interim relief application) as 'the manufacturers'. We shall refer to the respondents in this matter (who are the applicants in the interim relief matter) as 'the wholesalers'.
[2] The Competition Second Amendment Act took effect on the 1st February 2001.
[3] Note that the manufacturers had applied for an extension of time for submission of their answering affidavit. The wholesalers opposed this application. The Tribunal ultimately determined the date for submission of the answering affidavit, an effective extension of 36 days over the period specified in the rules.

notice of their intention to file an application for the dismissal of the first interim relief application. This application for dismissal was ultimately filed late in August 2000. The wholesalers opposed this application.

7. The Tribunal heard the matter on 15 November 2000 and ordered, on 29 November 2000, that the first interim relief application be dismissed because the wholesalers did not have *locus standi*. The Tribunal also reserved the costs in this matter for determination at the same time as the costs of a renewed application for interim relief were determined provided that the wholesalers filed a new application before 31st January 2001.[4]

8. On the 13th December 2000 some of the manufacturers filed a Notice of Appeal against the Competition Tribunal's decision to reserve costs. On the 22nd December 2000 the wholesalers filed a cross-appeal against the Tribunal's dismissal of the first application for interim relief.

9. The wholesalers filed a new application for interim relief on the 30th January 2001, the day before the filing deadline imposed by the Tribunal in its order of the 29th November 2000. This is henceforth referred to as 'the second interim relief application'. Because the Competition Appeal Court had not, at the time of the filing of the second interim relief application, yet heard the appeal and cross-appeal, the wholesalers inserted a suspensive condition into their second interim relief application which provided that the application would only take effect in the event that they failed in their cross-appeal against the dismissal of the first application for interim relief.

10. Both the appeal and cross-appeal were heard on the 23rd May 2001 and the Appeal Court delivered its decision to dismiss both appeals on the 14th June 2001.[5] Accordingly, in terms of the suspensive condition referred to above, the filing of the second application for interim relief takes effect.

11. It is this second application for interim relief which the manufacturers now seek to dismiss.

**The Application**

12. The applicants contend that this application for interim relief amounts to an abuse of process citing, in support of this contention, the respondent's alleged delay in proceeding with the first application. In addition, and in the alternative, the applicants contend that the application for interim relief is incompetent because it relies on affidavits and allegations prepared in 1999 – in other words, the factual basis of the second interim relief application is 'stale'.

[4] Competition Tribunal Case No: 25/IR/C/Aug00 and 25/IR/Dec99
[5] Competition Appeal Court Case No: 07/CAC/Dec00

13. In the event that the Tribunal dismisses the abovementioned application, the sixth applicant, Schering Pty Ltd, asks the Tribunal to order, first, that the law applicable to the second application for interim relief is the Competition Act No 89 of 1998, that is the law applicable before its amendment by the Second Competition Amendment Act which became effective on the 1 February 2001. Second, it asks the Tribunal to order that the respondents have waived their right to apply to the Tribunal for leave to supplement their founding affidavits in the second interim relief application.

**The Decision**

14. This application was heard on the 31st of July 2001. Following the hearing, the Tribunal dismissed the manufacturers' application for dismissal of the second interim relief application.

15. Although the parties had, at the pre-hearing conference, agreed that they would submit argument to the panel on the question of the applicability of the amended statute, it appears that, with the exception of the sixth applicant, they had neglected to prepare argument on this matter. The Tribunal has accordingly decided to reserve this question to the hearing on the merits of the interim relief application.

**The Reasons**

16. The manufacturers rest the factual basis for their case on the length of time taken to prosecute the first application for interim relief. They isolate two significant factors contributing to the delay and argue that both are occasioned by decisions of the wholesalers. These are, first, successive applications by the wholesalers for an extension of the time period within which they were required to file their replying affidavits in the interim relief application. Secondly, the manufacturers argue that considerable delay has been caused by the wholesaler's decision to appeal the Tribunal's decision of the 15th November 2000, the decision that upheld the manufacturers' jurisdictional challenge to the wholesalers' first application for interim relief.

17. The manufacturers draw a number of far-reaching inferences on the basis of these facts. In particular the manufacturers infer that the current application for interim relief is intended for a purpose other than that which appears on the face of the application – the manufacturers argue that it is a mere device to avoid the order of costs that, given the Tribunal's earlier decision to reserve costs until the conclusion of the hearing of the interim relief application, would flow from a decision of the wholesalers to abort their application for interim relief. That is, the manufacturers argue that the application for interim relief is not filed in good faith – it is a device to prevent an adverse costs order. This inference, it appears, is at the core of the manufacturers' contention that the conduct of their opponents constitutes an 'abuse of process'.

18. The manufacturers rely upon the general features of abuse of process identified by Mahomed CJ in Beinash v Wixley:

> *'What does constitute an abuse of process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. In can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the rules of the court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.'*[6]

19. The learned Chief Justice has elaborated a principle at a high level of generality and then circumscribed it by emphatically specifying that close attention be accorded to the 'circumstances of each case' precisely because 'there can be no all-encompassing definition of the concept'. We venture to suggest that these explicit qualifications seek to limit the mischief that may be done by an injudicious application of the general principle - in this case the consequence of finding an abuse is summary dismissal the complainant's case.[7] Accordingly, this outcome of this application is determined, as per Mahomed CJ's judgment, not on general principle but on the 'circumstances' of the case and it is on this basis that the manufacturers fail.[8]

20. What then are the 'circumstances', the facts, of this particular case, upon which the manufacturers base their allegation that the processes of the Tribunal have been abused? These are laid out at some length in the manufacturers' founding affidavit and centre, for the most part, on allegations that the wholesalers have been unduly tardy in the prosecution of their application for interim relief despite their protestations of urgency.

21. In summary, the manufacturers identify the following instances of delay occasioned by the conduct of the wholesalers:

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[6] 1997 (3) SA 721 at 734

[7] Another potential danger is that injudicious application of the general principle may result in the dismissal of a technical point, albeit a good technical point, because upholding it may not 'facilitate the pursuit of truth'.

[8] Hoexter JA, in Phillips v Botha 1999 (2) SA 555 (SCA) at 565 cites an Australian judgment that provides a somewhat narrower definition of abuse of process. ('If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse for this purpose..). But then, significantly, the learned Judge concludes: 'Where the court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the Court's duty to prevent such abuse. This power, however is to be exercised with great caution and only in a clear case.' Van Heerden AJA in S v Mattison 1981 SA 302 (A) at 313 appears to raise the burden of proof in such matters: 'As pointed out by Corbett J in Sher and Others v Sadowitz 1970 (1) SA 193 (C) at 195, a court's powers to set aside proceedings which amount to an abuse of the process of the court should be exercised only in very exceptional cases if it appears as a matter of certainty – and not only a preponderance of probability – that the proceeding is obviously unsustainable.'

22. Firstly, the fact that the wholesalers waited until the 20th December 1999, three months after the coming into effect of the Competition Act, before filing their first application for interim relief is cited as evidence of undue delay. This argument is singularly devoid of merit and will not be considered further. The Act expressly permits an aggrieved party to apply for interim relief at any time.[9] Moreover, bear in mind that the first application for interim relief was, on application by the manufacturers, struck down precisely because it was filed *too early*, before, that is, the Commission had 'accepted' the wholesalers complaints. In other words, for the purpose of their jurisdictional challenge the manufacturers prevailed because the application for interim relief was 'too early'. Now, for purposes of establishing an abuse of process, they ask that we find that the same filing was 'too late'. The wholesalers could not have filed a valid application for interim relief under the previous rules until the 17 February 2000, the date on which the Commission accepted the complaint.

23. Secondly, having received the applicants answering affidavit on the 29th February 2000, the wholesalers then applied for an extension (until the 30th April 2000) of the period for submitting their reply. They then applied for a further extension until the 19th June. When the manufacturers opposed this second application for extension it was withdrawn by the wholesalers. The replying affidavit has not been filed to this day.

24. Thirdly, when the manufacturers launched their application to dismiss, for lack of *locus standi*, the interim relief application, the wholesalers, instead of withdrawing the application and re-submitting a new application thus curing the procedural defect, elected to oppose the dismissal application. Moreover, when the Tribunal found against the wholesalers and dismissed the application for interim relief, the wholesalers, once again, declined to cure the defect but instead appealed the Tribunal's decision.

25. The manufacturers insist that this conduct is inconsistent with the respondents stated requirement for urgent relief and, accordingly, that explanation for it must be sought elsewhere.[10] The manufacturers insist that this conduct reveals that the wholesalers do not, in reality, seek interim relief; rather they have, now through the filing of the second interim relief application, sought to keep the matter of interim relief alive only for the purposes of avoiding an adverse costs order that is likely to follow a decision on their part to withdraw their application.

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[9] Section 59(1) of the Competition Act No.89 of 1998

[10] The manufacturers incorrectly conflate 'interim' and 'urgent'. It is true that the wholesalers have claimed that they urgently require interim relief. However, a showing of 'urgency' is only required in an application to reduce the time periods for the filing of papers in an interim relief application. Interim relief may be applied for at any time – as its name implies it is simply relief pending the final determination of the matter. There are a number of tests that have to be met in order to sustain an application for interim relief but urgency is not one of these.

26. Furthermore the manufacturers argue that the wholesalers are the authors of their own cost-related problems. In particular, the wholesalers election to pursue multiple litigation manifest in their decision to file a parallel interim relief application, this time against SAI, another distributor of pharmaceutical products, has significantly exacerbated the financial pressure upon them. The interim relief application filed against SAI, and the additional cost incurred as a result thereof, has contributed to the delay in pursuing timeously the interim relief application against IHD whilst simultaneously intensifying the pressure to avoid an adverse costs order through keeping alive the interim relief order.

27. The wholesalers, for their part, point out that the manufacturers only answered their initial interim relief application on the 29th February 2000. The answer – with annexures – ran to some 2000 pages containing hundreds of allegations as well as the reports of local and international experts. The wholesalers point out that a matter involving nine applicants and fourteen respondents, each of whom responded individually to the interim relief application, effectively meant that there were 126 separate applications contained within the interim relief application.

28. The wholesalers aver that having failed to meet the April date for filing their reply, and having asked for a further extension to 19th June 2000, they nevertheless elected not to file their reply because their opponents already indicated that they intended to apply for the dismissal of the application on jurisdictional grounds. This application for dismissal was only filed on 1st August 2000. Acting on legal advice the wholesalers elected to oppose the application for dismissal. When, on the 15th November 2000, the Tribunal found against the wholesalers and when the manufacturers entered their appeal against the Tribunal's order as to costs, the wholesalers, again acting on legal advice, entered a cross-appeal on the Tribunal's decision to dismiss the first interim relief application. However, in compliance with the Tribunal's order, the wholesalers filed a second interim relief application on the 30th January 2001. This second application was made conditional upon the decision of the Competition Appeal Court with respect to the wholesalers' cross appeal. Accordingly when the Appeal Court confirmed the decision of the Tribunal the second interim relief application took effect.

29. Key elements of the manufacturers' interpretation of the wholesalers approach to this litigation are not in dispute. Hence, it is common cause that the wholesalers' request for an extension of time for the filing of its replying affidavits in the first interim relief application was, in part, dictated by their desire to put their parallel application against SAI on the front burner. This desire appears partly to have been driven by strategic considerations, by the desire to prevent the emergence of a new distribution channel inimical to their commercial interests.

30. Moreover, the wholesalers have not sought to deny the part played by cost considerations in their request for the extension of filing periods. Nor have they sought to deny that their decision to pursue parallel litigation against SAI contributed substantially to their cost pressures.

31. However, we hesitate to draw the inference contended for by the manufacturers and this for the following reasons:

32. Firstly, while we certainly do not encourage the manipulation of Tribunal processes in order to suit the strategic considerations of one or other litigant, adversarial litigation encourages strategic conduct and, for that reason, it is a ubiquitous feature of most judicial and quasi-judicial processes. It is our duty to maintain this conduct within acceptable bounds. We believe that these boundaries have not been unduly transgressed in the present litigation. Moreover should strategic interventions in the process of litigation exceed the bounds of acceptability, remedies are available that fall considerably and appropriately short of dismissal. For example, they may, and still could, be reflected in a costs award. Or, if as in this case, the strategic conduct complained of is unreasonable delay, then it is open to the aggrieved party to approach the Tribunal and ask for the matter to be set down.[11]

33. Secondly, while we accept that cost considerations, particularly the prospect of an adverse costs award, play an important and legitimate role in discouraging capricious and vexatious litigation, we are not unsympathetic to parties who wish to conduct litigation with an eye to conserving costs. If, in a major piece of litigation, cost considerations dictate that time periods are somewhat elongated, then we believe that this is a price worth paying if access to the Tribunal is facilitated thereby. We accept that this has bearing on the quantum of costs borne by the respondents in matters such as these. However, it should be appreciated that, in the present matter, the Tribunal, in a decision confirmed by the Appeal Court, has reserved the question of costs for the determination of the merits of the application for interim relief. If the manufacturers prevail at that stage they will likely recoup their costs. Even if the wholesalers prevail on the merits it still remains open to the manufacturers to argue for certain of the costs of the proceedings. If the manufacturers are able to show that they were subject to unnecessary appearances or filings as a result, say, of dilatory conduct on the part of their opponents, then it is wholly possible for an appropriate portion of the costs to be awarded in their favour. Our reservation of costs does not oblige us to make a finding that costs follow the cause – quite the contrary, it means that the basis of the

[11] The manufacturers assert that they had attempted to have the matter set down. There appears to have been correspondence between the manufacturers' attorneys and the Registrar of the Tribunal in which the former requested that the matter be set down. However, we are presented with no evidence suggesting that the Tribunal was ever formally approached with an application for set down.

determination of costs and the recipient of these costs is yet to be decided.

34. In general, where costs are concerned what we would strive to avoid is a situation where aggrieved parties cannot even gain access to the merits stage because of cost considerations. Adopting any other approach may inadvertently encourage conduct from well-resourced litigants far more abusive than anything contended for here. We certainly appreciate, from a costs perspective, the wholesalers' reluctance to proceed with expensive filings in circumstances where reviews or appeals or dismissal applications are pending.

35. Thirdly, strategic and cost considerations aside, it is not surprising that the passage of this litigation has been subject to extensive delays. The stakes for all parties are extremely high. It is therefore to be expected that each side will proceed particularly cautiously and that all parties will seek to secure their rights and strategic advantage at every step and turn.[12] Moreover, the issues are, by any standard, extremely complex and require the submission of detailed evidence and legal argument. However, that question can only be resolved after consideration of the merits. Furthermore, all the factors that render the interim relief proceedings complex and lengthy will occasion unusual delays in the investigation and adjudication of the complaint. This matter has some considerable way to go before final determination. Viewed from that perspective, it is easy to appreciate why the wholesalers place considerable emphasis on those provisions of the Act that allow them to seek interim relief.

36. Fourthly, the manufacturers propose a very far-reaching remedy, no less than dismissal of the application before they have even answered the wholesaler's founding affidavit, much less subjected the merits to the scrutiny of the Tribunal. The wholesalers argue that this raises fundamental constitutional questions. The manufacturers disagree – they insist that the wholesalers right to have their matter heard before a court or equivalent tribunal is secure because, after dismissal, they will be entitled to file a competent application that will then be heard. We are, however, not persuaded by the manufacturers' rejoinder. Absent a jurisdictional bar, the wholesalers are entitled to have this application, the second interim relief application, heard. For the manufacturers to argue that preventing this application of the wholesalers from being heard does not bar them from making a new application is cold comfort.

37. We do however accept that there may be circumstances in which an abuse of the Tribunal's procedures may justify refusing a complainant access to the Tribunal. However we would reserve this remedy for abuses of an extraordinarily egregious nature. The manufacturers

[12] For this reason, we believe that it would be particularly inappropriate to infer an abuse of process from the wholesalers decision to contest, both at the level of the Tribunal and then in the Appeal Court, the manufacturers' application to dismiss the first interim relief application.

argue that delay on the part of the applicant constitutes sufficient ground for dismissal of an application for interim relief. They find support for this view in the judgment of van Wyk J in the case of *Juta & Co. Ltd v. Legal and Financial Publishing Co. (Pty) Ltd.*[13] In *Juta* the learned Judge refused to permit the filing of replying affidavits by the applicant for an interdict *pendente lite* because, he held, the applicants had engaged in a 'tyranny of litigation' by 'drag(ging) out proceedings unduly'. Van Wyk J. held that:

> *In this case we are considering an application for an interdict pendente lite, which, from its very nature, requires the maximum expedition on the part of an applicant.'*

38. However, an examination of the circumstances of *Juta* does not avail the manufacturers' case. In *Juta*, the applicant had advised the respondent on the 17th December 1968 that it had detected copyright infringements in a book published by the latter. On the 14th March 1969 the applicant instituted proceedings seeking an interdict *pendente lite*. The respondent answered timeously. The applicant then sought to file its replying affidavit and this, again, after considerable delay. The applicant had, at the time it sought to file its replying affidavits, still not issued summons. The learned Judge pointed out that 'had it issued summons at the time when the notice of motion proceedings were instituted, the trial could already have taken place'. It appears then that the applicant sought to gain the advantage of a temporary interdict while neglecting to institute an action for the final determination of the matter.

39. The facts of this case are clearly distinguishable from *Juta.* It is the Competition Commission that submits the claim for final determination to the Tribunal by means of a 'complaint referral', the equivalent of a summons in civil actions. This it has done. It is the wholesalers who have the right to approach the Tribunal for interim relief. This they have done. There is nothing to support the notion that the wholesalers seek the protection of interim relief while simultaneously dragging their heels in submitting the matter to final determination. In *Juta* it was precisely this opportunism that offended.

40. Mr. Nelson for the wholesalers has also drawn our attention to Goldstein J.'s judgment in the recent case of *Radio Islam v Chairperson, Council of the Independent Broadcasting Authority and Another.*[14] Here the learned Judge held:

> *"Interim applications, such as the present, must be brought, said van Wyk J in Juta and Co Ltd v Legal and Financial Publishing Co (Pty) Ltd 1969 (4) SA 443 at 445F with 'the maximum expedition on the part of an applicant'. I would prefer to state*

[13] C.P.D. 1969 (4), 443
[14] 1999 (3) SA 897 (W).

*the rule as requiring 'reasonable expedition'. I am dealing here with an application of extraordinary complexity. In these circumstances I turn to consider the applicant's reasons for delay…'*

41. Here, too, we are dealing with an application of extraordinary complexity'. Before leaping to infer abuse, it was incumbent upon us to examine the reasons for delay. On examination it is clear that the delay, such as it is, may be occasioned by nothing more than extraordinary complexity and, possibly, by a reasonable desire to conserve costs in what is surely extraordinarily costly litigation.

42. In summary then, in this case we are not convinced of the seriousness of the alleged abuse. Indeed we remain to be persuaded that it is abuse at all, rather than the delay occasioned by extraordinary complexity. We have accordingly dismissed the application. Any other decision, one based on a less stringent standard for establishing an abuse necessary to justify dismissal, would run the risk of obstructing precisely the 'pursuit of truth' that Mahomed CJ seeks to protect from abuse.

43. The manufacturer's contention that the second relief application falls to be dismissed at this stage because it relies on affidavits filed in 1999 and that are accordingly 'stale', is without merit. If indeed the facts relied upon cannot sustain the interim relief application filed in January 2001, then the wholesalers will not prevail in the hearing on the merits. We can, however, only decide this on an examination of the merits and it is precisely this examination that is effectively denied by the remedy contended for by manufacturers.

**The Order**

44. We accordingly make the following order:

    1. The application is dismissed.

    2. The Applicants, jointly and severally, are responsible for the costs in so far as it relates to the application for dismissal on a party and party scale, including the costs of two legal representatives.

    3. Should the respondents wish to file supplementary affidavits to their founding papers an Application for Leave to Supplement must be filed by 7 August 2001.They must also include in this application the nature of the information to be supplemented and the reasons therefor.

    4. The procedures set out in Competition Tribunal Rule 43 will apply to this application save that the periods for filing the

answering and replying affidavits as set out in Rule 43(1) and 43(2) are shortened to 5 business days each.

13 August 2001

**D. Lewis** **Date**

**Concurring: N. Manoim and U. Bhoola**