COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 04/CR/Jan02

In the matter between:

The Competition Commission of South Africa	Applicant
and	
Anglo American Medical Scheme	Intervening Complainant
Engen Medical Fund	Second Complainant
And	
United South African Pharmacies	First Respondent
Members of United South African Pharmacies	Second and further Respondents

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DECISION ON EXCEPTION APPLICATIONS

On 17 January 2002 the Commission initiated complaint referral proceedings against the respondents.

On 4 June 2002 the intervenor, ("AACMED") was given leave to intervene in these proceedings and it then filed its own intervenor's referral on 18 June 2002 against the respondents.

The first respondent, whom we shall refer to as USAP, has raised a number of exceptions to both referrals which we consider in this decision. Since some of the issues raised in the exceptions are similar, we have dealt with them thematically, rather than separately, in respect of each referral.

Timing of exception

AACMED at the outset has argued that exceptions have no place in our proceedings, which are meant to be informal and expeditious. Whilst we do not quibble with the latter observation we have indicated on a number of previous occasions that where appropriate, we will entertain exceptions even at this stage of our proceedings i.e. before the respondent has filed an answer.[1] In our view, if these exceptions are well founded, they are appropriately raised now. For this reason we proceed with an examination of the merits of the exceptions.

Approach to exceptions

We have previously, in our Botash and Glaxo Welcome decisions, indicated our approach to exceptions.[2]

Briefly this approach is twofold. In the first place it must be borne in mind that the principles of exception, which parties exhort us to emulate in our proceedings, are derived from adversarial proceedings whose objective it is to provide a forum for the vindication of private rights. Ours in contrast are to provide a forum to vindicate the public interest. Given this difference in objectives we should be alive to the danger inherent in grafting the principles of exception developed by adversarial courts uncritically on our proceedings.

Secondly the Tribunal may step into the ring at its discretion exercising its inquisitorial powers, and hence pleadings play a less central role in our procedures.

The effect of both these observations is that our approach to pleadings will be less strict than would be a High Court's.[3]

That being said this does not mean that a respondent is required to answer to any type of pleading proffered, regardless of its impoverishment of fact or legal averment. Fairness is also a standard that our procedures must meet. Respondents are entitled to understand the case being made out against them. The standard set out in Rule 15 of the Tribunal Rules must be adhered to.

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1 For a discussion of this see our decision in National Association of Pharmaceutical Wholesalers & Others vs Glaxo Wellcome & Others 45/CR/Jul01. This approach was approved of by the Competition in Appeal Court when the same matter went on appeal. See Glaxo Wellcome (Pty) Ltd & Others and National Association of Pharmaceutical Wholesalers & Others 15/CAC/FEB02

2 American Natural Soda Ash Corp CHS Global (Pty) Ltd and the Competition Commission, Botswana Ash (Pty) Ltd et al 49/CR/Apr00; National Association of Pharmaceutical Wholesalers & Others vs Glaxo Wellcome & Others 45/CR/Jul01

3 We should not lose sight either of the Act's albeit permissive injunction for our proceedings to be informal. (See section 52(2)(b)).

Non- Joinder (Commission and AACMED)

In both referrals USAP is cited as the first respondent. This has occasioned no difficulty. Both referrals however seek relief against USAP's members too. Given that USAP has 1600 members distributed nationwide, the pleaders were faced with a practical difficulty.

The Commission's investigator in her affidavit simply alleges that the –

> *"Second respondent is all the retail pharmacies that are members of the First respondent. I do not know the further particulars of the Second respondents."*

AACMED alleges that –

> *"The second and further respondents are the members of USAP, an estimated 1600 retail pharmacies and pharmacy groups registered under the Pharmacy Act… situated in various suburbs, towns and cities throughout South Africa. A list of the second and further respondents, which also reflects each of their places of business, is annexed hereto marked "A".*

USAP alleges that neither formulation is satisfactory and state that the members of USAP have not been properly joined in these proceedings in that they have neither been cited properly nor served with the papers.

The Commission in its complaint referral seeks an administrative fine against the second respondent and a declaration that their conduct constitutes a prohibited practice. [4] The consequence of such a declaration is that a respondent may be faced with civil liability for damages. (See section 65(b) of the Act) AACMED seeks an interdict against them. Failure to comply with an order of the Tribunal can make a respondent liable for an administrative fine and criminal penalty. [5]

For this reason we find that the second respondent in the complaint referral and the second and further respondents in the intervenor's referral have not been properly joined. We will however give both the Commission and the intervenor the opportunity to rectify this. Whether they do so by citing all the members of USAP or only those who are alleged to have participated in the boycott is for them to decide.

Time (Commission only)

4 See prayers 2 and 3 of the Commission's Complaint Referral.
5 See section 59(1)(c) and section 73.

USAP complains that the Commission has failed to allege when the prohibited practices are suppose to have taken place. We find that they are entitled to this information. The Commission will be given an opportunity to file an additional affidavit to make these averments.

Failure to identify wrongdoers (Commission only)

USAP complains that the Commission have referred in paragraph 10.1 of the complaint referral to certain members of USAP perpetrating conduct but that these members are not identified nor is it alleged that they are in horizontal relationships as competitors. USAP is entitled to know the identity of the members so that it can verify whether this allegation is correct. If the Commission is not aware of specific identities it should at least give some indication of why they make this allegation or where it emanates from. It is noteworthy that in the AACMED referral certain firms are specifically named. The Commission will be given an opportunity to file an additional affidavit to make these averments.

The allegation that they are competitors repeats the market definition objection, which we deal with below.

Limitation (AACMED only)

USAP alleges that AACMED is not entitled to seek any relief or to pursue any cause of action beyond the cause of action made out in the in the complaint referral filed by the Competition Commission.

This exception is without foundation and appears to be an argument objecting to the intervention, which has already been decided, and not to the intervenor's referral. There is nothing to suggest that AACMED has exceeded the bounds of that order. As counsel for AACMED points out the very fact that AACMED intervened to seek relief not sought by the Commission suggests that they would need to make out a cause of action that might not be found in the Commission's papers.

This exception is dismissed.

(A) Boycott (AACMED) and (B) Failure to indicate precisely what conduct is alleged to be an infringement of Section 4 (Commission)

USAP complains against AACMED that there are no facts "only assertions" pleaded in relation to the second and further respondent engaging in a boycott.

In relation to the Commission it asserts that it is not clear which conduct constitutes an infringement by USAP, whether by its members or both.

This objection is again without foundation. Both the Commission and AACMED have set out sufficient information to enable the first respondent to plead. The Commission in paragraphs 5 and 9 of its referral makes allegations in respect of the conduct of both USAP and its members.

Similarly, in the AACMED referral, the allegations are set out sufficiently for the purpose of enabling USAP to understand the case it has to meet.

The respondent is required to read the referrals in their totality and not isolate specific paragraphs to complain that the case against them is inadequately ventilated.[6]

Furthermore the courts will not allow an exception on the grounds that a pleading is vague and embarrassing unless the excipient will be seriously prejudiced. This USAP has not demonstrated.[7]

This exception is dismissed both in respect of the Commission and AACMED.

Definition of the relevant market (Commission and AACMED)

USAP's complaint here, which goes to the root of both referrals, is that neither the Commission nor AACMED have succeeded in defining a relevant market and hence both referrals are fatally flawed for want of alleging a necessary jurisdictional fact.

USAP argues that in order to succeed with a claim in terms of section 4, a claimant must show that the respondents are competitors. This is because section 4 requires the agreement to be one between firms in a *horizontal relationship* and a *horizontal relationship* is defined in the Act as being one between competitors. Firms can only be competitors, it is argued, if they compete within the same market. This entails competing in respect of either substitutable products or services as well as in the same geographic market. It is the latter aspect, which USAP alleges has not been pleaded properly, and hence no case is made out that the respondents are competitors.

6 In Jowell v Bramwell 1998(1) SA 836 (W) at 899 G the court held that a complaint that a pleading is vague and embarrassing cannot be directed against a particular paragraph in a cause of action it must go to the whole cause of action.
7 See Levitan v New Haven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298A, Kennedy V Steenkamp 1936 CPD 113 at 115, City of Cape Town v National Meat Supplies Ltd 1938 CPD at 63

The Commission, they argue, has alleged that the geographic markets are local. For instance in paragraph 8.2.6 of her affidavit the Commission's investigator states:

> *"Competition between pharmacies occurs within a local area. Local in the present matter is used to refer to either town (in the case of small towns) or a suburb or a township (in the case of big cities).*

If this is so, USAP argues, it must allege which of the second respondents compete with one another locally, which it has not done. Secondly it is improbable that all the second respondents who on the Commission' s version are located in a number of local markets could be competitors of one another. There is, USAP maintains, a disjuncture between the Commission's market definition and its theory of competitive harm. How can markets be local and harm be national?

In AACMED's referral the geographic market is alleged to be local:

> "The second and further respondents are competitors of one another in as much as each vies with the other second and further respondents for custom within the suburbs, towns cities and surrounding areas in which they are located."[8]

However AACMED also allege that it is national.

> *"The second and further respondents also intermittently compete with one another on a national basis."*[9]

USAP's criticism of the market definition is that it is meaningless, vague and embarrassing and contradicts that of the Commission.

What the Commission contends for is to be found in paragraph 8.2.10 of the Complaint referral.

Here the Commission, in a concluding paragraph, allege:

> ".. the geographic market should be defined as a local market for the retail of prescription medicines to members of the medical aid schemes. The only case where the geographic market could be defined as national is in the case of chronic medication for which the medical aid members may

8 Paragraph 5.2 of the intervenor's referral.
9 Paragraph 5.3 of the intervenor's referral.

order using the order pharmacies."[10]

In our view both referrals attempt to define a relevant geographic market.

The Commission and AACMED have alleged that the respondent firms compete with one another on a local basis. AACMED go further to allege that these local markets may also intermittently compete. Both then allege an agreement amongst the respondents nationally to deal with AACMED members only on certain terms.

The agreement, it is alleged, has as its purpose placing pressure on AACMED via its members to restore its previous policy to payments of discounts. There is thus a relationship between the manner in which the members of the second respondent class compete at a local level and the object of the agreement viz. to use power in local markets collectively to force compliance nationally. [11] The case is, as we understand it, one that seeks to establish a causal link between competition in local markets and the alleged national boycott. It is thus not correct to state that no geographic market has been alleged - both pleaders have done so. [12]For the purpose of pleading their case both the Commission and AACMED have made sufficient allegations to enable the respondents to not only appreciate the case being made out against them, but also to answer in the manner required by Rule 16. Whether the theory of harm made out is adequate or not is not a matter for exception, but for evidence and argument.

USAP's error is to elevate a relevant market definition to the status of a prior jurisdictional fact. What must never be lost sight of is that market definition

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10 Paragraph 8.2.10 of the Commission's referral.

11 See Commission referral paragraph 10.2

12 Nor does USAP's argument deal with the recognition in competition law theory of chains of substitution. (See OFT Guidelines According to OFT Guidelines on Market Definition (OFT 403 in paragraph 4.4, chains of substitution can be an important factor in geographic, particularly in retail markets:

> *"Consumers in any one location may not be willing to travel more than, say, two or three miles to purchase a particular product, but there may be a chain of substitution creating a much larger geographic market."*

The AACMED referral with its reference to *"intermittent competition"* is certainly consistent with such a theory. So is the Commission's allegation in paragraph 8.2.7 of the investigators affidavit that:

> *"*In the result, the markets are likely to be local and *consequently numerous geographical markets can be identified based on the individual towns, suburbs or townships around South Africa."* (Our emphasis)

serves as a *"surrogate for detrimental effects"*[13]

Thus if a complainant can establish detrimental effects, elaborate market definition to establish market power is unnecessary as market power is presumed from the existence of the anticompetitive effect.

We have made this observation albeit in a different context in the Natal Wholesale case[14] where we stated:

> "We do not share the respondent's view that a formal market definition is a necessary precursor to an enquiry into an alleged restrictive practice. We concur with the claimant that the purpose of defining a relevant market is to identify the exercise of market power defined in the Act as 'the power of a firm to control prices, to exclude competition or to behave to an appreciable extent *independently of its competitors, customers or suppliers' and that market definition is only a tool for estimating market power, not a scientific test."*

What the Act requires by the notion that parties are in a horizontal relationship is an allegation that they are in the same line of business.[15] Neither the language of the Act nor the logic of how the section works requires that there be allegations that the respondents operate in the same geographical market in order to be considered competitors. Take, for instance, the prohibition on dividing markets by allocating territories, set out in section 4(1)(b). If the respondent's argument is correct, such a practice could never be instituted against those who divided markets before they were ever in one another's markets. By definition, having divided territories, they are not in the same geographic market, and indeed may never have been. It is ludicrous to suggest that for this reason they would not be competitors.

The respondent of course might retort that in these situations the market dividers are potential competitors within the same geographic markets and hence their *a priori* condition that they be competitors in a geographic market is still satisfied.

Yet this begins to become a more and more contrived argument, an attempt to re-construct a model whose initial premise is faulty.

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13 The language is that of Areeda in P. Areeda, Antitrust Law paragraph 1511 pg 429, 1986. Quoted with approval in FTC v Indiana Federation of Dentists 476 US 447, 1986 at 460.
14 Natal Wholesale Chemists (Pty) Ltd v Astra Pharmaceuticals (Pty) Ltd and others – 98/IR/Dec00 at page 14.
15 Whish describes horizontal agreements as being between firms "at the same level of the market", Competition Law, Fourth Edition page 91

The point nevertheless is that it is not a prior jurisdiction requirement that, at least for the purpose of section 4, a complainant has to allege a relevant geographic market. Proof of an agreement between firms in the same line of business, which has the effect of substantially preventing or lessening competition in a market, would suffice for a finding against the respondents, without a finding of what constitutes the relevant geographic market. If that is so at the end of proceedings then it can hardly be required of a complainant that they plead the relevant geographic market at the pleadings stage.

The real complaint of the respondent, although not articulated as such, is that the Commission and the intervenor have not alleged what their theory of harm is. Whilst this may be a desirable feature of pleading it is not a sine qua non of a non- excipiable plea. Both referrals contain sufficient factual material to enable the respondent to plead. They know who the respondents are, where they are located, and what the actions constituting the alleged boycott are. Any other deficiencies that there may be are matters for evidence.

Given what we stated earlier about our approach to pleadings being less demanding than in adversarial proceedings, we find that the present referrals are adequately pleaded in this respect, for the purpose of enabling the respondent to understand and respond to the case against it.

The exception in respect of the market definition fails in respect of both the Commission's and the intervenor's referrals.

Costs

Costs are relevant only between AACMED and USAP. As both parties have only been partially successful we make no order as to costs.

22 January 2003

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N. Manoim Date

Concurring: D. Lewis, M. Holden

For the parties:	CDA Loxton SC, AG Gotz, instructed by Webber Wentzel Attorneys (Intervening Complainant)

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