**IN THE COMPETITION TRIBUNAL**
**REPUBLIC OF SOUTH AFRICA**

**Case Number: 97/CR/NOV04**

**GLAXOSMITHKLINE SOUTH AFRICA (PTY) LTD** **Applicant**

**And**

**MPHO MAKHATHININI** **1st Respondent**

**NELISIWE MTHETHWA** **2nd Respondent**

**MUSA MSOMI** **3rd Respondent**

**ELIJAH PAUL MUSOKE** **4th Respondent**

**TOM MYERS** **5th Respondent**

**AIDS HEALTHCARE FOUNDATION LTD** **6th Respondent**

**THE COMPETITION COMMISSION** **7th Respondent**

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**REASONS**

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**Introduction**

1. This is an application to have an agreement between the Competition Commission (the 'Commission') and the applicant made into a consent order in terms of section 49(D) of the Competition Act ('Act').

2. The applicant is Glaxosmithkline South Africa (Pty) Ltd ("GSK"), the South

African subsidiary of the large multinational pharmaceutical manufacturer Glaxo Group Limited.

3. The 1st to the sixth respondents were complainants in a prohibited practice case brought against the applicant, consequent upon a non-referral by the Commission in terms of section 51 of the Act. (For convenience we will refer to them collectively as the 'AHF complainants').[1]

4. The Commission is the seventh respondent as it is a party to the agreement which the applicant seeks to have made into a consent order.

5. Initially the application was opposed by the AHF complainants, but they withdrew their opposition on 2 March 2006, at the same time as withdrawing their complaint referral against the applicant. The only issue that arises in respect of this application is whether we have jurisdiction to grant the order sought. The merits of the agreement itself are not in issue.

**Background**

6. The factual background giving rise to this application has been fully set out in our earlier condonation decision in *Mpho Makhathinini and Others vs Glaxosmithkline South Africa (Pty) Ltd and Another*[2] and it is not necessary to repeat all those facts in this decision, save as is necessary to explain why the jurisdictional issue arises.

7. In September 2002, the Treatment Action Campaign ("TAC"), a non governmental organisation active in the health care sector, led a group of individuals and organisations that initiated a complaint against the applicant with the Commission, alleging that it had contravened the Competition Act (the Act) by excessively pricing its antiretroviral drugs ('ARV's') used to treat HIV positive persons.[3] In terms of section 8(a) of the Act, a dominant firm is prohibited from charging an excessive price. Shortly thereafter in January 2003, the AHF complainants lodged a complaint against the applicant with the Commission.[4] It is common cause that the TAC and AHF complaints related to substantially the same conduct on behalf of the applicant. For this reason, it appears the AHF complainants were willing to have the Commission consolidate their complaint with that of the TAC, and have them investigated together. The Commission then investigated the complaint.

8. Just prior to the date when the Commission would have had to refer the

1 This is because the application was led by the Aids Health Care Foundation or AHF a United States based non-governmental organisation.
2 Case No.: 34/CR/Apr04.
3 The TAC Complaint case was investigated by the Commission under Case Number: 2002Sep226.
4 The Commission gave the AHF complaint the Case Number 2003Jan357.

complaint to the Tribunal, it entered into an agreement with the applicant in which it agreed not to refer the matter, in return for the applicant agreeing to licence various generic manufacturers to manufacture ARV's.[5] The Commission was satisfied with this arrangement, as it appears, so was the TAC and its consortium of complainants, which also entered into a similar agreement. We will refer to this agreement between the applicant and the Commission as the 'December 2003 agreement'.

9. However the AHF complainants, unlike the TAC, were not a party to the agreement and allege that they were never consulted about its terms. They allege that they were only aware that it had taken place when they read about it in the media.[6]

10. The AHF complainants then decided to refer their complaint to the Tribunal themselves in terms of section 51(1) of the Act. They were entitled to do so, as in terms of section 50(5) of the Act, if the Commission has not referred a complaint during the requisite period, and has not issued a notice of non-referral, it is deemed to have issued one.

11. AHF was not able to file its complaint referral timeously and applied for condonation, an application opposed by the applicant, GSK. As appears more fully from our decision in that matter, we granted condonation on 23 July 2004.

12. Thereafter, on 22 November 2004 the applicant applied to have the December 2003 agreement made into a consent order in terms of section 49D of the Act. The AHF complainants, viewing this as a tactical ploy to deny them their relief, opposed the granting of the order. The basis of their opposition need not concern us today, in view of the fact that on 2 March 2006, they withdrew both their complaint referral and their opposition to the granting of the consent order. We were advised that some settlement had been reached although we do not know its terms.

**Jurisdictional issue**

13. While the application was still being argued as an opposed matter at our hearing on the 2nd of March 2005, we raised a point of jurisdiction with the applicant. The applicant then filed additional heads of argument on this point and we heard oral submissions from the applicant at our subsequent hearing on 2nd March 2006.[7] As this is a jurisdictional point, the lack of opposition

5 See paragraph 3.1 of the December 2003 agreement.
6 See paragraph 9.2.5 of AHF's answering affidavit in the consent order application (i.e., page 82-83 of the paginated bundle).
7 We postponed the matter during our earlier hearing to allow the AHF complainants to comment on the merits of the December 2003 agreement as one of their grounds of opposition was that they had not been consulted on its terms as they allege they ought to

does not detract from the fact that we must still decide the issue. It is trite law that an administrative tribunal can only exercise jurisdiction to the extent that its empowering statute permits it to.

14. In terms of section 50 of the Competition Act, the Competition Commission has a period of one year after the submission of a complaint to do one of the following –

i) to refer the complaint if it considers that a prohibited practice has taken place;
ii) to extend the period it has to refer the complaint by following the procedures laid down in section 50(4); or
iii) to issue a notice of non-referral.

15. In the present case the Commission did none of these things and is hence, by virtue of section 50(5), deemed to have issued a notice of non-referral to the AHF complainants.

16. The December 2003 agreement was entered into at time when the one-year period for referral had not yet expired. However, the application in terms of section 49(D) was brought after the expiry of the one year period, at a time when the Commission was deemed to have non-referred the complaint. The question we asked of the applicant was whether the Commission may be party to an application for a consent order at a point in time when it is no longer legally entitled to bring a complaint referral in respect of the complaint that forms the subject matter of the consent order.

17. The Commission has not opposed the application, but was not present when this point was argued, so we do not have the benefit of its view on the point of law.

18. The first issue addressed by the applicant is whether it, rather than the Commission, may make the application as has happened in this case, although the Commission is cited as a respondent. It has been normal practice for the Commission to bring this type of application. We need not decide this issue, although we will assume in the applicant's favour that it is entitled to do so.

19. The applicant concedes that the Commission no longer has jurisdiction to refer a complaint. However it argues that this does not mean that it does not retain the power to " agree on the terms of an appropriate order" or as Mr Unterhalter eloquently put it, the power to prosecute is not coextensive with the power to enter into an agreement. The main thrust of this argument relies on the language of the section 49D(1) which states:

*"If, during, on or after completion of the investigation of a complaint,*

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have been.

*the Competition Commission and the respondent agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1) (b)." (Our emphasis)*

20. The applicant argues that the clear meaning of "*after completion of the investigation"* means that an application for a consent order may be made at any time. The language in other words is unrestrained. In order to make it subject to any qualification and thus restrain it, this would require a reading in of the words *for so long as the Commission retains the power to refer the matter*. This, the applicant argues is not warranted and it refers to well known cases that caution against reading in language unless it is necessary to do so.[8] In this case it argues that there is no such necessity.

21. The applicant also relies on rule 24 of the Rules of conduct of proceedings for the Tribunal ('the Tribunal rules') to support its contentions that any party may bring such an application and that it may be brought at any time. The rule states that any party may bring such an application and as we stated earlier we have assumed in the applicants' favour that it is entitled to do so. The applicant also relies on rule 24(2) for the contention that the application can be brought at any time without any restriction on this right. The subrule states:

*"At any time before the Tribunal makes a final order in a complaint proceeding, a party may request the Tribunal to make a consent order by filing a Notice of Motion in Form CT 6 with the documents listed in sub-rule (1)(b)"*

22. The applicant also argues that if a settlement agreement was reached at some time after the Commission had already referred a matter and thus outside of the one year period this would prevent it settling the complaint and 'lock it' into a full trial, with no possibility of settling, no matter how willing the respondent was.

23. Both these arguments however rely on an interpretation of the section that creates a straw man argument for the applicant to easily refute. The interpretation that we offer of section 49D requires neither a reading in of words nor the absurd 'lock- in' consequence that the applicant contends for.

24. The Act makes it perfectly clear that when a complaint arrives the Commission has the prerogative to investigate it and then refer it. The period of this prerogative, is one year unless extended either with the consent of the complainant or if that is not possible, by application before the Tribunal. Once this period or any extension has expired, the Act is clear that the Commission's authority to prosecute lapses.

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8 See *Cowper Essex v Acton Local Board* 14 A.C. 153 at 169; cited with approval in *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129.

25. Thus the Act, if not expressly, at the very least by implication, contemplates two distinct periods in the gestation of a complaint before the Commission. First, an investigation period in which the Commission decides whether to refer the complaint or not, or with the consent of the respondent to enter into a consent agreement contemplated in section 49D; second, a litigation period if the Commission decides to refer the matter to the Tribunal, which is the period *"after the completion of the investigation"* that runs from the date of the filing of the referral until the conclusion of the proceedings. As long as the Commission files its complaint referral, which is the pleading that initiates the litigation period, within the prescribed period, it retains the title to prosecute the matter, and does not lose this title, irrespective of the time it takes to conclude the matter.

26. It is possible that the Commission and a respondent may not be able to agree on the terms of a consent order during the investigation period, but do so during the litigation period. It is for this reason that section 49D(1), contemplating this, refers to the fact that a consent order may also be granted in the period *after completion of the investigation of the complaint*. In this respect we are in agreement with the interpretation of the applicant - the Act cannot be interpreted in such a way that it locks the Commission and a respondent into litigation, simply because the complaint has been referred prior to the parties concluding a consent agreement.

27. It does not follow however - and this is where we part company with the interpretation of the applicant - that this also applies to a situation where the Commission has not referred the complaint, i.e. the words after the investigation do not contemplate <u>any</u> situation after the investigation, but only one where the Commission has retained its title to prosecute, by referring the complaint.

28. What differs in this interpretation from that of the applicant's, is that because it has referred the complaint on time, the Commission has not lost its title to prosecute and there is a reason why this is so material to appreciating the mechanism of the consent order. If the consent order does not find favour with the Tribunal the Commission retains its title to prosecute. Section 49D(2) makes it clear that apart from approving a consent order the Tribunal is entitled to either indicate changes it wants before it will make such an order or refuse to grant such an order.[9] If the Commission has lost its title to prosecute at this stage, then it is helpless to respond if the Tribunal wants changes to

9 Section 49D(2) provides as follows:

(2) After hearing a motion for a consent order, the Competition Tribunal must –

a) make the order as agreed to and proposed by the Competition Commission and the *respondent*;
b) indicate any changes that must be made in the draft order before it will make the order; or
c) refuse to make the order.

the order to which the respondent won't agree, or if the Tribunal refuses to grant the consent order.

29. It seems clear that the Commission must retain its title to prosecute at the time a consent order application has been launched to avoid it facing prosecutorial impotence if the Tribunal does not sanction its bargain with the respondent. It can retain this title to prosecute either (a) by having the consent application considered during the one year period or an extended period or (b) after this period, *provided* it has referred the complaint to the Tribunal during this period thus preserving that right. The legislature intended that once a matter had been non-referred by the Commission it washed its hands of the matter and had no further right or interest in the complaint including the right to settle it by way of a consent order. At this stage having non–referred, whether expressly or by way of inference, the Commission effectively vacates the battlefield with the respondent in favour of the complainant. It follows logically that this schema contemplates a period during which the Commission is unrestricted by the complainant in dealing with the complaint and thereafter, if not otherwise disposed of by the Commission by way of referral or a consent order, the complainant, with its full rights restored, may prosecute the matter unrestricted by the Commission.

30. Thus, the power to prosecute and the power to settle are coextensive; once the former is lost so is the latter. This is not a case of having to read in language into section 49D(1). If one follows the procedural evolution of a complaint - how the Commission enjoys the monopoly power to prosecute and how it can lose this right to a complainant – then one need not read in words to the section, one simply follows the schema and logic of the Act to appreciate that the legislature never contemplated conferring the power to settle to exist independently of the power to prosecute. It is precisely for this reason that the Commission is given such a long period to investigate a complaint and to apply to extend it. It must during this period of investigation decide whether to refer or settle a complaint. If it refers it can of course settle it later. What it may not do is to investigate, decide not to refer or settle and then at some later time decide it should enter into a settlement agreement for a consent order. Nor should it, as happened in this case, enter into some contract (as opposed to a consent agreement contemplated in section 49D) with a respondent not to prosecute further, in return for some quid pro quo, unless it fully appreciates the legal implications of doing this.

31. Nor does Tribunal rule 24, on which the applicant seeks to rely as a further plank for its argument, take the matter any further. At best it constitutes another re-expression of section 49D(1). It does not answer, expressly or by implication, the question of whether the Commission can settle when it has lost its power to prosecute. If anything rule 24(3) which states that the party filing the notice must serve it on the complainant and request the complainant to inform the Commission whether it is willing to accept damages in the order,

and if so amount claimed, suggests that this is all happening while the Commission's prosecutorial power is alive, otherwise what would be the point of all this if the complainant had already received or been deemed to have received, a notice of non-referral and was in the process of initiating its own complaint.

32. One can easily see what absurdities would result if the title to prosecute and settle were not coextensive. In the first place there is the fact that the Commission is left in a position of a contracting party not a prosecuting party in approaching settlement negotiations with the respondent, which cannot be in the public interest. The ability to approach a settlement negotiation with the threat of proceeding is vital to a proper bargaining process. A further concern is that the only time a consent order would be likely, after the title to prosecute has lapsed, is when a respondent faces a complainant in a non-referral situation or a new complaint based on a previous complaint that was not prosecuted. The respondent, anxious to constrain the complainant's range of remedies, then enters into a consent order with the Commission, the effect of which is to limit the private complainant's remedies to those contemplated in section 49D(4).[10] Now of course that presupposes that the Commission will allow itself to be used to those ends. However, the expedient motive of a respondent may not always be that transparent to the Commission, especially if it was not a complaint that it referred, and it may be persuaded that the complainant is unreasonably pursuing the respondent and that a good settlement is available to the Commission even in this case it had not sought to prosecute. The legislature never contemplated placing the Commission in this sort of situation as a settler of last resort – once it lost its title to prosecute the fate of the litigation is left to the private complainant and the respondent to resolve. Nor as a matter of public policy is it desirable that a body charged with policing legislation be left with a residual power to settle when its primary power to prosecute is lost.

33. The applicant's interpretation would also be extremely unfair to the private complainant. The latter is entitled to proceed with a complaint referral on the assumption that the field is now open to it and that the Commission had not entertained the possibility of entering into a consent agreement with the respondent, otherwise it would have done so before non–referring the complaint. It might spend vast resources on prosecuting its complaint only to find that it is robbed at the post by a subsequent deal between the

10 Note that under section 49D (4) the complainant is confined to two remedies - the voiding of an agreement, and a declaration that the conduct is unlawful. Any other remedy such as an interdict, or access, etc. would not be available to it, unless the consent order provided for them. We do not need to decide whether the private complainant can press for the imposition of an administrative penalty as the AHF complainants were seeking. Even if this remedy is only available to the Commission to contend for, a consent agreement still bars the private complainant from a number of remedies that it might otherwise wish to seek to remedy its complaint. Note that in relation to the interdict remedy the courts have decided in *Ansac v Botash, [2005] 1 CPLR 18 (CAC)* that such a remedy is open to a private complainant.

Commission and the respondent.[11] On our interpretation this would not arise because the settlement would have had to occur during the time that the Commission retained its prerogative to prosecute.

34. For this reason we find that although the settlement in this matter was concluded during the period when the Commission had retained its title to prosecute the complaint, the application for the consent order was made after this period – a time when we find that the Commission no longer retains the right to prosecute and hence no right to conclude, revise or amend a consent agreement. Without the Commission retaining this power, we have no jurisdiction to make the agreement that was entered into in December 2003 into a consent order. The application accordingly fails.

35. Given the considerable public interest there has been in the settlement between the Commission and the respondent we need to stress that our decision not to grant the consent order is a technical one, based on the timing of the application. Were this consent application to have been made at a time when the Commission retained its title to prosecute, we would have seen no bar to granting it. It would seem that the reason the December 2003 agreement was not made a consent order at the relevant time of its conclusion was that there was a difference of legal opinion between the applicant and the Commission about whether it was required to state the section of the Act it had contravened. The Commission it appears has changed its view on this matter and now no longer as a matter of policy requires such an admission to be made. We are not called upon to determine whether such a policy is correct in law, but we mention this only to indicate that it may well be that technical concerns of the Commission, as opposed to tactical machinations on the part of the applicant, explain the absence of an application for a consent order at the relevant time.

**ORDER**

36. The application is dismissed. There is no order as to costs.

_____ **20 March 2006**

11 Note too the danger of agreements being entered into prior to the referral by the private complainant, which only emerge in public as a consent agreements when it becomes known that the complainant has filed. Some of this can be detected in the present application where the AHF complainants clearly felt they were being excluded from the negotiations and settlement only to have them thrust in their faces when they showed a determination to pursue their complaint.

**Norman Manoim** **Date**

**Concurring: David Lewis and Yasmin Carrim**

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| For the Applicant: | Adv. D. Unterhalter SC together with Adv. Anthony Gotz instructed by Webber Wentzel Bowens |