

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 25/IR/A/Dec99

In the matter between:

Mainstreet 2 (Pty) Ltd t/a New United Pharmaceutical Distributors (Pty) Ltd	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'etang's Wholesale Chemists CC t/a L'etang's	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
Boehriner 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 Pty (Ltd)	Twelfth Respondent
Hoescht Marion Rousell Ltd	Thirteenth Respondent
International Healthcare Distributors	Fourteenth Respondent

REASONS FOR DECISION TO AWARD COSTS

BACKGROUND

1. The applicants have instituted an application for interim relief in terms of section 59 of the Act against the respondents. This interim relief application is currently pending before the Tribunal.
2. Although this application was launched in December 1999 the exchange of pleadings has not yet been completed as the applicants' reply to the respondents' answer is still outstanding.
3. The respondents gave the applicants until the end of April 2000 to file their reply. At the end of April the applicants sought an additional extension from the respondents. Certain of the respondents indicated that they were opposed to any further extension. The applicants then chose to launch an application to request an extension of time until 18 June 2000. We will refer to this application as the extension application.

4. The extension application was opposed by the 1st, 2nd, 3rd, 4th, 6th, 9th, 12th, 13th and 14th respondents who filed answering affidavits.
5. The extension application was enrolled on 31 May 2000 for hearing and then removed from the roll at the request of the applicants' attorneys.
6. On the 6 June 2000 the applicants' attorneys withdrew the extension application in a letter addressed to the respondents and the Tribunal. The applicants did not tender costs, but on the contrary indicated that they would in due course request that the Tribunal make an order that those respondents who had opposed their application should pay the wasted costs occasioned by their opposition.
7. The respondents reacted by bringing an application for their costs and this is the matter we now consider.
8. At the outset the applicants raised a point *in limine* that the application for costs had been launched prematurely. They relied on an interpretation of section 27 of the Act which expressly deals with costs. Section 27 states:

“27(1) Upon a matter being referred to in terms of this Act, the Competition Tribunal may...

(d) grant an order for costs in terms of section 57.”

9. Section 57(1) makes it clear that an order for costs is discretionary, but in terms of section 57(2):

“If the Competition Tribunal –

(a) has not made a finding against a respondent, the Tribunal member presiding at a hearing may award costs to the respondent, and against a complainant who referred the complaint in terms of section 51(1);or

(b) has made a finding against a respondent, the Tribunal member presiding at a hearing may award costs against the respondent and to a complainant who referred the complaint in terms of section 51(1).”

10. The applicants argue that section 57 applies only in the context of the final complaint referral and further that the Tribunal is only authorized to award these costs when it makes its finding. Since the Act is silent on the provision of costs for interlocutory matters or interim relief applications the applicants argue that the implication is that they are to be dealt with when applying section 57 after the adjudication of the complaint.

11. The respondents, whilst conceding that section 57 applies only in so far as costs for complaints referrals are concerned, dispute the contention that the Tribunal's powers to award costs are confined to section 57. They instead rely on the provisions of rule 51(3) of the Tribunal Rules which states:

“51(3) Subject to section 57-

- (a) a Notice of Withdrawal may include a consent to pay costs; and***
(b) if no consent to pay costs is contained in a Notice of Withdrawal the other party may apply to the Tribunal by Notice of Motion in Form CT for an appropriate order for costs.”

DISCUSSION

12. The reason the Act contains an express provision dealing with costs in section 57 rather than leaving such issues to the Rules is that complaint proceedings involve both a public and private method for their prosecution. A complaint referral is normally brought at the instance of the Competition Commission, but where the Commission has issued a notice of non-referral the complaint can be brought at the instance of the private party who made it, in terms of section 51(1). As the applicants point out, the procedures are analogous to criminal proceedings where no costs orders are provided for against the State in bringing a prosecution, but when an individual institutes a private prosecution a cost award is competent. For this reason the legislature sought to make it clear that costs in these proceedings were (a) discretionary, and (b) only between the private parties. The Commission can neither benefit from nor be burdened with costs in these proceedings.
13. The respondents rely on rule 51(3) which they say is perfectly clear about costs in these circumstances. Since the applicants have withdrawn the extension application without tendering costs the respondents argue they are entitled to apply to us for an order compelling the applicants to pay up.
14. The applicants subject rule 51(3) to a more exacting interpretation. This rule, they point out, is prefaced by the words ***“subject to section 57”*** in the head text. This suggests the rule cannot be interpreted inconsistently with the interpretation given by them to section 57 which we have outlined above, i.e., the respondents are not entitled to apply for costs until the end of the complaint referral proceedings. Any other interpretation of the rule is *ultra vires* to the extent it is inconsistent with this interpretation for they argue section 57 is the sole source of authority for the awarding of costs in the Act.
15. We disagree with this interpretation of the rule. Firstly the reference to section 57 in the head text can be subject to another interpretation. Section 57 can be divided into three different propositions:

- (1) it provides for costs to be discretionary;
- (2) it provides for costs only as between private parties; and
- (3) it provides that an award of costs follows on a finding having been made pursuant to a complaint referral.

16. In the applicants' interpretation the reference to section 57 contemplates the third proposition but this interpretation makes no sense in the context of a notice of withdrawal. If a party serves a notice of withdrawal the proceedings terminate. No finding by the Tribunal as contemplated by section 57(2) is made in these circumstances. A more logical and contextual interpretation of the cross-reference is that it refers to propositions (1) and (2), i.e., after notice of withdrawal an award of costs is discretionary and only between private parties. This means that if the Commission was an initiating party (which it can be in terms of the Rules) and withdrew its application it would not be liable for costs nor could it seek costs if the converse occurred. The cross-reference is to ensure that the policy of the legislature has been imported into the rule.
17. We also do not agree with the applicants that section 27(1)(d) read with 57 is the only authority for the Tribunal to make a costs order. Section 27(2) which permits rules to be made concerning procedures for the Tribunal can clearly be read to include a regime for the awarding of costs. The express inclusion of a costs regime for final complaints is not to be read as exhaustive of an authority to award costs if one appreciates that its purpose in the Act is to deal with the unusual circumstances created by the dual mechanism for complaint referrals to the Tribunal.

CONCLUSION

18. Our conclusion is that our authority to order costs is not limited to the circumstances contemplated by section 57 and we are entitled to make a costs award now in terms of Rule 51(3).
19. The final question is even if we have the authority to order costs now should we exercise our discretion to grant costs at this stage or wait until the complaint has been finally decided. The applicants urge us to follow this latter course as they say only then will we know whether the applicants' failure to file on time was justifiable. This argument might have had merit if the applicants hadn't themselves withdrawn their application. Having done so, as the respondents correctly argue, these extension proceedings have been finally disposed of and the respondents are entitled to their costs. Nothing will emerge in the final hearing of the complaint which will have any bearing on the fate of an application since withdrawn. The respondents in our view are entitled to their costs now.

20. In so far as the events of 31 May 2000 are concerned we cannot attribute any blame to the applicants for the wasted costs of that day absent the respondents making out a case for this by way of affidavit. None of the respondents have done so. Mr. Puckrin on behalf of his clients conceded this point although Mr. Eiser who appeared for the sixth respondent did not. Absent such averments the applicants' version of the events must be accepted and we exclude the attendances of that day from our order. Otherwise the applicants are liable for costs in the manner stated in our order.
21. We were also asked to grant an order for costs on an attorney client basis. We do not need to decide this point as Rule 58 of the Tribunal Rules confines us to costs orders on a party and party scale.
22. We therefore make the following order:
1. that the Applicants pay the costs of the 1st, 2nd, 3rd, 4th, 6th, 9th, 12th, 13th and 14th respondents on a party and party basis at the High Court tariff in relation to the applicants application for an extension of time filed with the Tribunal on 2 May 2000, including all costs associated therewith, but excluding the costs occasioned by the Respondents in attending at the Tribunal on 31 May 2000.
 2. the costs where appropriate to include the fees of an additional representative.

N.M. Manoim

23 July 2000
Date

Concurring: D.H. Lewis; C. Quanta