THE COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

CASE NO: 68/IR/JUN 00

In the matter between:

National Association of Pharmaceutical Wholesalers	**1st Applicant**
Natal Wholesale Chemists (Proprietary) Limited t/a Alpha Pharm Durban	**2nd Applicant**
Midlands Wholesale Chemists (Proprietary) Limited t/a Alpha Pharm Pietermaritzburg	**3rd Applicant**
East Cape Pharmaceuticals Limited t/a Alpha Pharm Eastern Cape	**4th Applicant**
Free State Buying Association Limited	**5th Applicant**
Pharmed Pharmaceuticals Limited	**6th Applicant**
L'Etangs Wholesale Chemist CC t/a L'Etangs	**7th Applicant**
Resepkor (Proprietary) Limited t/a Reskor	**8th Applicant**
Pharmaceutical Wholesalers Mainstreet 2 (Proprietary) Limited t/a New United Pharmaceutical Distributors	**9th Applicant**

AND

Glaxo Wellcome (Proprietary) Limited	**1st Respondent**
Pfizer Laboratories (Proprietary) Limited	**2nd Respondent**
Pharmacare Limited	**3rd Respondent**
Smithkline Beecham Pharmaceuticals (Proprietary) Limited	**4th Respondent**
Warner Lambert SA (Proprietary) Limited	**5th Respondent**
Synergistic Alliance Investments (Proprietary) Limited	**6th Respondent**
Druggists Distributors (Proprietary) Limited	**7th Respondent**

DECISION AND ORDER

INTRODUCTION

1. This is an application for interim relief by nine full-line wholesale distributors of pharmaceutical products. Five of the respondents are pharmaceutical manufacturers and importers ("the manufacturers") who have established a joint exclusive distribution agency ("EDA") for their products. The first, second, fourth and fifth respondents are multinational producers of ethical or patented pharmaceutical products. The third respondent, Pharmacare, is the largest South African producer of generic pharmaceutical products. The sixth respondent is a company formed by the manufacturers to establish the distribution agency; the distribution agency is the seventh respondent. This is in fact a re-hearing of an earlier interim relief application decided in 2000 which was sent back to the Tribunal by the Competition Appeal Court ("CAC") on review[1].

2. During the course of these proceedings, certain of the pharmaceutical companies have merged. Specifically, the 1st and 4th respondents merged to form GlaxoSmithKline ("GSK") and the 2nd and 5th respondents merged to form the Pfizer Pharmaceutical Group ("Pfizer"). There are therefore now three manufacturers party to this application, GSK, Pfizer and Aspen Pharmacare ("Pharmacare").

3. The ninth complainant, New United Pharmaceutical Distributors ("NUPD"), has recently been acquired by Clicks Pharmaceutical Wholesalers ("CPW"). An application was made to substitute NUPD with CPW at the commencement of the hearing. This application was unopposed and is accordingly granted.

FINDING

4. The application for interim relief is dismissed. The reasons for this decision follow.

APPLICATION TO RE-OPEN HEARINGS

5. This matter was heard on the 18-20 March 2003. Judgment was reserved.

6. On the 30 April 2003 the applicants filed an application to re-open the hearings. This application was brought in response to the promulgation on the 28 March 2003 of Proclamation Numbers R23 and R24 in Government Gazette No. 24627 that determined the dates on which various amendments to the Medicines and Related Substances Act 101 of 1965 would come into force.

7. This application is dismissed. Reasons are provided below.

[1] The Tribunal decision was reported under 68/IR/Jun00 and the CAC decision under 03/CAC/Oct00

BACKGROUND

8. In South Africa the pharmaceutical wholesalers have traditionally effected the distribution of pharmaceutical products from the manufacturers to the retail pharmacies. That is to say, specialist pharmaceutical wholesalers purchased pharmaceutical products from the manufacturers and then on-sold these to retail pharmacies and other small purchasers. Although there was some slight variance in the discount extended by the manufacturers to the wholesalers, it is common cause that the standard rate of discount was 17,5% off the manufacturers' list price. The wholesalers retained a portion of this discount, the difference between their purchasing price and their selling price constituting their trading margin. While there again appears to have been some variance in the size of this trading margin, the standard range appears to have been approximately 5%-7%. Note that the full-line wholesalers traded in all products traditionally available from retail pharmacists – hence the appellation 'full-line' - including ethical pharmaceutical products, over-the-counter pharmaceutical products and a range of fast moving consumer goods. Strictly speaking then the pharmaceutical wholesalers specialized in the wholesaling of the full range of products traditionally stocked by retail pharmacies, including, but not limited to, ethical pharmaceutical products.

9. In 1997 the manufacturers in this matter came together under the code name "Project Nasa" with the intention of establishing a joint EDA for their products. This followed on the heels of the formation by several other pharmaceutical majors of International Healthcare Distributors (IHD), an exclusive distribution agency for the products of its shareholders. In 1998 the members of Project NASA established a company called Synergistic Alliance Investment ("SAI").

10. In February 1999, the erstwhile Competition Board ('the Board') announced that, pursuant to the complaint submitted by the wholesalers against IHD as well as an application for exemption by the respondents in this matter, it would conduct a formal investigation into EDAs in the pharmaceutical industry. It appears that the respondents – then the members of Project NASA – were concerned that their intention to impose standard credit and certain other trading terms on their customers through the medium of their planned joint distribution arrangement would fall foul of the prohibition on collusive horizontal agreements and so sought exemption for this aspect of their intended arrangement from the Board.

11. The Board released its findings in May 1999 ("Report 75"). It found that a joint exclusive distribution agency for pharmaceutical products would constitute a horizontal restrictive practice prohibited by the Maintenance and Promotion of Competition Act ('the old Act'). The Board found that the formation of a joint EDA in this market would contravene the old Act.

12. The Board accordingly recommended that the identified restrictive practice be cured by way of a section 11 arrangement between itself and the manufacturers. Failing a section 11 arrangement, the Board recommended that the Minister of Trade and Industry, acting in terms of section 14(1) of the old Act, should declare the conduct of the manufacturers unlawful. In addition the Board recommended that the Minister request the Competition Commission to investigate the alleged horizontal restrictive practice between the manufacturers. The Minister decided not to implement the recommendation of the Board to declare exclusive distribution agencies in the pharmaceutical industry unlawful. He felt that the matter would be more effectively dealt with in terms of the then pending new Competition Act.

13. In March 2000, SAI announced that it would proceed to acquire **Druggist Distributors** ("DD"), one of the wholesale distributors, in order to convert DD into an EDA, or, into what it terms, an 'integrated logistics service provider' for SAI members. This took effect on 29 May 2000. Accordingly, with the conversion, DD – which was renamed **Kinesis Logistics (Pty) Ltd ("Kinesis")** as at the conversion date - went from being a **wholesaler**, owning its stock and trading on its own account, to an **agency distributor** which distributed its principals' stock at an agreed fee. Note that, at the time, DD and the ninth complainant in this matter, United Pharmaceutical Distributors (UPD), were the only *national* full-line wholesalers in existence.

14. The terms of the EDA provided that the shareholders of SAI would henceforth distribute all of their products through DD alone. This applied to all of their customers including retail pharmacists, dispensing doctors, hospital groups and the State. Note that the wholesalers had never been active in distributing pharmaceutical products to the large hospital groups and the State – these were serviced directly by the manufacturers. After DD's conversion from a wholesaler into a distribution agent, Kinesis, ownership of the products sold through Kinesis remained with the manufacturer until the sale to the customer. This, we emphasise, contrasts with the wholesale mode of distribution where the wholesaler, a trader, takes ownership of the product from the manufacturer. The wholesaler then on-sells these products to the retailer, in this way effecting the distribution of pharmaceutical products. In addition to the task of physical distribution, Kinesis performs a range of other distribution related services including the taking of orders and collection of payment on behalf of the manufacturers. Kinesis undertakes these services on behalf of each principal in exchange for a fee agreed between each principal and the distribution agent.

15. In May 2001 SAI was sold to **Tibbett and Britten** ("T&B"), a UK logistics services provider. Kinesis is a wholly owned subsidiary of SAI. The manufacturers maintain that their relationships with their distribution agent are now governed by separate service level

agreements concluded between the respective principals and T&B/Kinesis.

16. The interim relief application before us originates in the decision of the manufacturers in this matter to establish and utilize an exclusive distributor. On 7 June 2000 the applicants lodged their complaint with the Commission in terms of the then section 44 of the Act. They simultaneously filed an application for interim relief with the Tribunal on 8 June 2000. This application was made in terms of Section 59 of the Act, the then applicable section prior to the subsequent amendment to the Act.[2]

17. This interim relief matter was initially heard by the Tribunal in July 2000. On 28 August 2000, the panel decided to award interim relief to the pharmaceutical wholesalers against the manufacturers in terms of section 4(1)(a). The Tribunal ordered as follow:

> 1. *"The applicants' application for interim relief in terms of Section 59 of the Competition Act, 89 of 1998 is granted in respect of the respondents' alleged contravention of Section 4(1)(a) of the said Act.*
>
> 2. *That the respondents supply their products directly to the complainant and other wholesalers on terms and conditions similar to those that applied to transactions between them and the complainant and other wholesalers immediately before the conversion of DD to a joint exclusive distribution agency for their products.*
>
> 3. *That this order remains in force until the earlier of -*
>
> *3.1 the conclusion of the hearing into the prohibited practices alleged by the applicants to have been committed by the respondents; or*
>
> *3.2 the date that is six months after the date of the issue of this order;*
>
> *3.3 The respondents are ordered to pay the applicants' costs in the application on the scale as between party and party, including the costs of two counsel and one attorney. "*

18. The respondents took this decision of the Tribunal on review to the CAC.[3] On 5 September 2001 the CAC ordered that the Tribunal's decision and order be set aside and that the matter be remitted to the

[2] The Commission filed its complaint referral to the Tribunal shortly after the statutory period for the referral of complaints had expired. The respondents objected and the Commission withdrew its referral of the complaint, a deemed non-referral. On 19 June 2001, the Applicants referred their complaint directly to the Tribunal in terms of section 51(1) of the Act under case number 45/CR/Jul01.
[3] 03/CAC/Oct00

Tribunal for further hearing. On behalf of the court Selikowitz AJA (as he then was) found that the order was vague and embarrassing; that the manufacturers did not receive a fair hearing in respect of the relief that was ultimately granted; and that the order was overbroad.

19. The intention was therefore to "put the hearing back to the stage which had been reached before the decision was made". Judge Selikowitz stated that, in setting aside the decision and order in this matter, the proceedings as a whole were not invalidated. In his judgment, the learned Judge noted that:

> *"The Tribunal may… have to reconsider the matter and re-examine its factual findings in the light of further evidence and the important developments that have come about since the order was made….In addition the Tribunal may have to reapply its mind to the evidence and decide whether or not the Applicants have established a prohibited practice in terms of sections 5,8 or 9-matters which have been raised or debated but which in the light of its finding of a prohibited practice in terms of section 4 have not yet been regarded as requiring a determination by the Tribunal"* [4]

20. Note that the sale of SAI and its subsidiary, Kinesis, to Tibbet and Britten had taken place in the period between the Tribunal's decision and the hearing of the review. On the face of it this development may impact on the Tribunal's finding under Section 4(1)(a) and undoubtedly accounts for Judge Selikowitz's reference to 'important developments that have come about since the order was made'. The learned Judge directed the Tribunal to decide upon further procedural steps in the setting down of the re-hearing.

21. At a pre-hearing held on 22 October 2001 it was agreed that supplementary papers be filed to update the matter before the Tribunal.

22. Lengthy supplementary filings ensued over a period of several months. The full record comprises the original interim relief application in 2000 (the "A" files) and the current supplementary papers (the "B" files), totaling more than 8000 pages. The supplementary papers filed comprise supplementary founding papers, answering papers and replying papers. The parties were also given leave to file further documentation in the form of a rejoinder and surrejoinder.

23. At a further pre-hearing held on 29 October 2002, it was agreed that the Chairman convene a new panel to hear the matters since the original panel members were no longer available.

APPLICABLE LEGISLATION

[4] Page 36

24. The complaint in terms of which this application for interim relief is sought was filed with the Commission in June 2000. The Act was amended in February 2001. The amendments to the Act have implications in the area of interim relief. Which version of the Act is then applicable to the current proceedings?

25. Prior to the amendment of the Act, Section 59 provided:

> 1. *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 –*
>
> *a. there is evidence that a prohibited practice has occurred;*
>
> *b. an interim order is reasonably necessary to –*
>
> *i. prevent serious, irreparable damage to that person; or*
>
> *ii. to prevent the purposes of this Act being frustrated;*
>
> *c. the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and*
>
> *d. the balance of convenience favours the granting of the order.*

26. Section 49C of the amended Act provides:

> 1. *"At any time, whether or not a hearing has commenced into an alleged prohibited practice, the complainant may apply to the Competition Tribunal for an interim order in respect of that alleged practice.*
>
> 2. *The Competition Tribunal–*
>
> *a. must give the respondent a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and*
>
> *b. may grant an interim order if it is reasonable and just to do so, having regard to the following factors:*
>
> *i. the evidence relating to the alleged prohibited practice;*

ii. the need to prevent serious or irreparable damage to the complainant; and

iii. the balance of convenience.

3. In any proceedings in terms of this section, the standard of proof is the same as the standard of proof in a High Court on a common law application for an interim interdict…"

27. In particular then the amendments altered the standard of proof applicable in interim relief proceedings. Prior to the amendment the standard of proof was on a balance of probabilities. The amendment lowered the applicable standard of proof to the same as that on a common law application for an interim interdict. This latter has been authoritatively laid down as 'prima facie established though open to some doubt'.[5] In addition the factors that need to be established in order to sustain a claim for interim relief were amended.

28. Note also that the amended Act requires that we 'have regard' to three factors, namely, evidence relating to the alleged prohibited practice, the need to prevent serious or irreparable damage and the balance of convenience. In other words, we are required to balance these factors – for example, if we decided that the applicant was unlikely to succeed at the final hearing (that is, if evidence of a restrictive practice was found wanting) we may still grant interim relief if we felt the damage to be significant and the balance of convenience to rest firmly with a finding in favour of the applicant. By the same token, a strong likelihood of success may counterbalance unconvincing evidence of significant harm. While this balancing will be borne in mind, we have held elsewhere that we would be extremely reluctant to grant interim relief in the face of unconvincing evidence of a restrictive practice.[6] Harm to a market participant may be inflicted perfectly legitimately in the process of competition – hence, in our view, in an anti-trust case such as this a showing of harm, even considerable harm, is, on its own, not sufficient, because to respond only to evidence of harm may significantly chill the competitive process. In any event, as will be elaborated below, we have found that the applicant has neither established evidence of a restrictive practice nor of significant harm.

29. We do not consider it necessary to make a finding on the applicable Act. It is our view that on both the pre-amendment and post-amendment versions of the Act, the applicants fail to sustain their claim. We will however proceed on the assumption that the applicants' contention, namely that the amended Act applies, is correct.

THE ALLEGED CONTRAVENTIONS AND THE RELIEF SOUGHT

4. Webster v Mitchell 1948 (1) SA 1186 (W)

[6] York Timbers Limited and South African Forestry Company Limited 15/IR/Feb01

30. The applicants have alleged contraventions of Sections 4 ('horizontal restrictive practices'), 5 ('vertical restrictive practices'), 8 ('abuse of dominance') and 9 ('price discrimination') of the Act.

31. In its original Notice of Motion, filed on 8 June 2000, the applicants sought the following relief:

> "*1 The Applicants are hereby granted leave to bring this application as a matter of urgency and to argue this matter on the same papers as were filed by the parties in Case Number 53/IR/Apr00, which Application has been withdrawn.*
>
> *2 The non-compliance with the time periods be and is hereby condoned.*
>
> *3 The Respondents are hereby interdicted and restrained from converting the Seventh Respondent from a full-line wholesaler to an agency distributor.*
>
> *4 The Respondents are ordered to terminate with immediate effect the exclusive agency distribution agreement between the Seventh Respondent and the First to Fifth Respondents.*
>
> *5 The Respondents are hereby interdicted and restrained from inducing and/or allowing any other pharmaceutical manufacturer/importer to become a user or participant in the exclusive agency distribution arrangement that Seventh Respondent has with the First to Fifth Respondents.*
>
> *6 The Respondents are hereby interdicted and restrained from forming any new agency distribution firm to distribute their products on an exclusive and/or discriminatory basis.*
>
> *7 The Respondents are hereby interdicted and restrained from acquiring an interest in an existing agency distribution firm,*

whether it is solely or jointly owned, or contracting with such firm or any of its parent firms, for the purposes of distributing their products on an exclusive and/or discriminatory basis.

8 The Respondents are ordered to continue supplying their products to the Applicants on terms and conditions identical to those given by Respondents to DD.

9 The Seventh Respondent is hereby ordered to remain an independent wholesaler in the market that neither accepts from, nor grants to, the First to Fifth Respondents any commercial advantages that it does not accept from, nor grant to, other pharmaceutical manufacturers in equivalent transactions.

10 The Respondents are hereby ordered:

10.1 to advise all pharmacies, doctors or other purchasers that have been informed that it is to commence business on 29 May 2000 as an agency distributor that this will no longer be the position; and

10.2 not to make any further representations to pharmacists, doctors or other purchasers of pharmaceutical products that DD will act as agency distributor on behalf of the First to Fifth Respondents…"

32. As already noted, the CAC reviewed the decision of the previous Tribunal panel in this matter because it found the relief granted to be vague and embarrassing and overbroad. The court also found that the relief actually granted departed to such an extent from the relief claimed that the requirement of fairness dictated that the respondents be given a prior opportunity to be heard in relation to the relief actually granted.

33. Under these circumstances one may have been entitled to expect the applicants' supplementary papers to evidence particularly close attention to the framing of the relief claimed. Indeed if this were not sufficient reason to focus on the question of relief, then the 'further evidence and the important developments' that had occurred since the initial finding and specifically alluded to by the Court should have alerted the applicants to the necessity to consider carefully the framing of the relief claimed.

34. However, far from producing greater clarity on the question of the appropriate relief, all that has ensued since the remittal by the CAC is characterized by the most unseemly confusion and vacillation, responsibility for which is to be laid firmly at the feet of the applicants. In the applicants' supplementary papers submitted for this hearing, in each of the two versions of their heads of argument and in their oral argument we have been presented with a range of alternative options for relief – hence, we have been told that the relief specified in the original notice of motion applies;[7] we have also been told that, despite the CAC's strictures to the contrary, the claim for 'further and/or alternative relief' is a catch-all that effectively permits the Tribunal to grant whatever relief it deems appropriate as long as it affords the respondents the opportunity to be heard on the precise formulation;[8] alternatively we have been presented with a bald claim for a restoration of the *status quo ante* and with an equally bald denial that a restoration of the *status quo ante* is sought;[9] at the beginning of the hearing, in response to a request by the panel to identify the relief sought, we were presented by the applicants' counsel with a precise formulation that purported to address the CAC finding that the relief was vague and embarrassing and overbroad and that, we understood, attempted to specify appropriate 'further and/or alternative relief' and that effectively replaced the relief claimed in the original notice of motion;[10] and then finally, after a three day hearing, we were presented in the applicants' oral reply with a formal application to amend the notice of motion to include, along with the original notice of motion, the formulation presented at the beginning of the hearing![11]

35. We will return to this later, if only because the applicants' treatment of the question of relief is sufficient ground for dismissal of their claim. Indeed, it verges on an abuse of the adjudicative process. For the present, it suffices to note that we are unable to identify precisely the relief sought by the complainant. We then proceed to examine whether sufficient evidence has been adduced to sustain the allegation that a range of restrictive practices have been perpetrated without clear knowledge of the remedial action that we would order should any of these allegations be sustained. One unsatisfactory consequence of

[7] Transcript, page 427
[8] Record, page B2192
[9] Transcript, page 419
[10] Transcript, page 13
[11] Transcript, page 428

the applicants' failure to specify the relief that they seek is that it has left them at liberty to traverse the Act in search of a sustainable allegation, unconstrained by the usual requirement to specify what should be done in the event of such an allegation being sustained. While, as already noted and will be further elaborated, there is no doubt in our mind that this alone would constitute ground for dismissal, we nevertheless believe that after some three years of hearing an application for *interim* relief we have a public duty to examine the merits of this matter and it is to this task that we now turn albeit unguided by the light that clearly framed relief usually places at the end of that tunnel.

WHOLESALERS, DISTRIBUTORS AND THE CHAIN OF DISTRIBUTION

36. Before turning to the alleged restrictive practices, it is necessary to clarify pertinent aspects of the chain of pharmaceutical production and distribution.

37. In the pharmaceutical industry – as with many consumer goods – there are a relatively small number of manufacturers whose products are purchased by the final consumer through a relatively large number of retail outlets. In the case of 'ethical' or patented pharmaceutical products these retail outlets are a myriad of pharmacists, colloquially referred to in South Africa as 'chemists'. The manufacturer is thus confronted with the formidable task of ensuring that its product is available in the required quantity and form at the ultimate point of sale. In a word, the manufacturer is confronted with the task of *distributing* its product to the retailers.

38. There are a number of alternative mechanisms for effecting distribution. The manufacturer may simply be approached by the ultimate interface with the final end consumer, that is, the retailer, take orders for the product and arrange for its transportation to these points of retail distribution. Indeed, in the case of very large retailers of pharmaceutical products – these being the large hospital groups, most particularly, although not exclusively, the state hospital services – this is precisely how distribution is effected to this day. In other words, there is, in this important latter segment of the pharmaceutical manufacturing and distribution chain, a direct interface between the manufacturer, on the one hand, and, on the other, the vehicle through which the final end consumer acquires pharmaceutical products. There has been no need, presumably either on the part of the seller or the buyer, for an intermediary between these two ends of the chain and so the wholesale trade, precisely the intermediary between manufacturer and retailer, has largely been absent from this segment.

39. However, there are a large number of consumers of pharmaceutical products who do not procure their medicines by attending a hospital. Instead, they approach, in a manner not fundamentally different to a purchaser of, for example, clothing or grocery products, a high street

retailer in order to satisfy their needs. However, unlike in the case of grocery or mass clothing products, and this largely because of regulatory intervention, the retail pharmaceutical sector is not, at this stage, dominated by increasingly large outlets that, like, for example, Pick 'n Pay or Edgars, are household names in the area of grocery or clothing retail. Note that the rise of the large retail grocery supermarket chains has all but eliminated the grocery wholesale trade. The retail pharmaceutical sector, on the other hand, is still characterized by a large number of small retailers and so the wholesalers have maintained a considerable presence in this segment of pharmaceutical distribution.

40. For a manufacturer, per definition skilled in and focused upon the innovation and production process, interfacing with a large number of retailer customers is highly undesirable. It is indeed, albeit for different reasons, no less taxing for a large number of retailers to deal with a small number of producers, particularly in an industry whose peculiar features demand that the retailer stock the product of all or most manufacturers. In a word, the high costs associated with transacting between a small number of manufacturers, on the one hand, and, on the other hand, a large number of retailers – costs borne in various ways by both parties to the transaction - have created an opportunity for a set of traders, the wholesalers, to simultaneously meet the requirements of both the manufacturers and retailers. Naturally, as in any trade, the rise of these intermediaries is accompanied by rules, associations, legislation, venerable firms and the like, by, in other words, a sense of permanence. However, it is essential to understand that the rise of this intermediary trading function, however ordered and permanent it may subsequently appear to be, was essentially a spontaneous, admirably opportunistic response to a particular set of market conditions, a response to the high transaction costs incurred in the process of direct trade between manufacturer and retailer. In other words, a changed set of market conditions may call forth a different response from the key participants.

41. The wholesaling function is, of course, by no means costless. It requires considerable investment and the investors naturally seek a reward – their decision to direct their resources to pharmaceutical wholesaling is not, after all, driven by charitable considerations. It is driven by commercial considerations, by the reward that the entrepreneurs and investors expect to receive in exchange for meeting a demand generated by market conditions. But they are traders – they seek their reward neither from those from whom they purchase product nor from those to whom they sell product. They garner their reward by buying cheap and selling dear. If market conditions change so as to cause a deterioration in the wholesalers' terms of trade then they will either re-position themselves, usually by identifying value-added services that they introduce into the market thus allowing them to maintain or increase their overall trading margins, or they will face the risk of decline and, ultimately, outright elimination from the market.

42. It is clear that the writing has long been on the wall both in this particular sector of the economy and in the business of distribution more generally. In the pharmaceutical sector it is common cause that there is a hitherto unprecedented effort by the purchasers of pharmaceutical products and by those who finance the purchase of these products to secure a decrease in their prices. The buyers have, in short, sought to counter-balance the power of pharmaceutical manufacturers. For instance, the formation of large pharmacy chains such as Pharmacare, Hyperpharm, Dischem and Galleria are, in large part, inspired by an effort to constrain the prices of pharmaceutical products. In addition, increased monitoring of prices by managed health care organizations and medical aids as well as efforts through the formulary system, are all driven by the desire to constrain the pricing of pharmaceutical products.[12] But this has also meant the entry of the large buyer into an area traditionally characterized by small retail pharmacies. These large purchasers are, like the state, perfectly capable of interfacing directly with the manufacturer. They do not, in other words, require the intermediation of the wholesaler.

43. This pressure to constrain their pricing behaviour has also caused the pharmaceutical manufacturers to focus on costs incurred in the chain of manufacturing and distribution and this, too, explains their increased attention to the mode of distributing their products. In other words, there is no doubt that the manufacturers, pressured to constrain their own pricing, will look to decrease costs and to appropriate pockets of profit in the value chain. They have clearly decided that there are costs that can be squeezed out of the distribution chain and/or that there are profits to be appropriated in undertaking this function differently to the traditional wholesaler model. There is, however, nothing necessarily sinister about this albeit that it may reverberate to the detriment of established pharmaceutical wholesalers – it is simply part of the competitive process, a process that we are charged with promoting rather than reifying.

44. This may all seem rather obvious. However we have found it necessary to elaborate these seemingly self-evident truths because, whether blinded by self-interest or hubris, they are not sufficiently appreciated by the applicants in this matter. They appear to have forgotten that great markets – and with them great products and services – have disappeared before and will do so again. Great companies have frequently been victims of this, the competitive process. Still greater companies, spurred by the competitive process, have repositioned themselves – they have found new value-adding services to offer their customers, they have developed new products, and, at times, they have entered new markets. However, the matter before us represents an effort by a group of companies which, when confronted by market dynamics, turn to regulation, rather than

[12] Pharmaceutical lists and formularies define those pharmaceutical products that are reimbursed by a particular medical aid scheme.

innovation, to rescue them.[13] They insist in effect, that their service must remain viable for no greater reason than the time it has served as the industry's standard mode of effecting distribution. They insist that we order the manufacturers to maintain a discount to the wholesalers for the sole purpose of allowing the wholesalers to continue buying cheap. However, we have no greater warrant for this sort of intervention than we would have for an order imposing a higher price on the wholesaler's customers, the retailers, an intervention which would allow the wholesalers to sell 'dearer'.

ASSESSMENT OF ALLEGED RESTRICTIVE PRACTICES

The Relevant Markets

45. The applicants insist that it is necessary to identify the markets relevant to the transaction. It is noted that both Section 4(1)(a) and 5 require a showing of a substantial preventing or lessening of competition 'in a market'. While we have previously taken the view that Section 4 and 5 claims do not require a prior identification of the relevant market – that is, the relevant market can be read back, as it were, from evidence of the anti-competitive practice, thus side-stepping the formalism inherent in efforts at a prior identification of the market[14] – Section 7 specifies that dominance is established with respect to market share. Establishing dominance is, in turn, a threshold condition for establishing a Section 8 'abuse of dominance'. A prior identification of the market is thus necessary in order to evaluate the allegations of abuse of dominance.

46. The applicants have referred, in the course of their written and oral submissions, to a wide range of markets. The respondents note that there are references to[15]:

> *"154.1 product markets based on therapeutic categories*
>
> *154.2 a wholesale distribution market*
>
> *154.3 a market for the wholesale distribution of pharmaceutical products*

[13] This is not, as we elaborate below, entirely accurate. In fact the wholesalers have turned to new markets – the wholesaling of camera equipment was frequently mentioned – which is one reason why they have not been able to show that they have suffered serious or irreparable harm. And the shareholders of the largest of the applicants – UPD – have sold their interests to Clicks, a large chain store intent upon entering pharmaceutical retailing on a significant scale. Although it is not clear yet precisely how this will reposition UPD in the pharmaceutical market, common sense suggests that it will ultimately have a dramatic impact. These attempts at repositioning themselves constituted one response to changing market conditions. The other response – and the one that we are adjudicating – essentially seeks to use competition regulation to put a brake on changing market conditions.

[14] Natal Wholesale Chemists (Pty) Ltd and Astra Pharmaceuticals (Pty) Ltd & Others - 98/IR/Dec00

[15] Respondents' Heads page 64

154.4 a market for agency distribution services

154.5 an oligopolistic market"

47. There are, in our view, two relevant markets implicated in this matter. The first is, strictly speaking, not a single market but a set of distinct markets. Given that a pharmaceutical product intended for one therapeutic use cannot be substituted by a product intended for another therapeutic use, anti-trust investigations of the pharmaceutical industry tend to use the ATC3 categories as the bases for identifying the relevant pharmaceutical product markets. While we are alert to the possibility that an uncritical adoption of the ATC3 categories may occasionally produce somewhat distorted outcomes from an anti-trust perspective, for the purposes of interim relief the therapeutic categories are an acceptable proxy for identifying relevant markets.[16] However an important point to underline is that there can be no aggregation of pharmaceutical products into a single pharmaceutical product market.

48. The second market at issue is, it is argued, the market for the distribution of pharmaceutical products. This is the market in which Kinesis is said to compete with the applicants.[17] However a number of caveats are in order:

49. Firstly, the applicants, by their own admission, do not compete for the full range of logistical services offered by Kinesis. For example, the applicants do not offer what they themselves refer to as 'pre-wholesaling' services.[18] They only wish to provide what they at times identify as a 'wholesaling' or, at other times, refer to as a 'fine distribution' service. However, there is no apparent basis for their insistence that a particular set of distribution related functions (eg. fine distribution) properly and exclusively belongs to the realm of wholesaling, while others (eg. pre-wholesaling) may be performed in-house (as was historically the case) or by specialist logistic service providers (as is the case at present). The implicit suggestion made by the applicants, is that they contend for this 'wholesaling' or 'fine distribution' activity because that is all that they have always done in the past and that is all that they are interested in doing in the future.

[16] Using the ATC categories as the basis for determining the boundaries of the relevant market may lead to overly narrow markets because in certain instances it may be possible to substitute from outside of a given ATC designation. In other instances, the market definition derived from the ATC categories may be too broad insofar as particular consumers may not be able to substitute across the full range within an ATC category.

[17] Although the applicants also insist that the respondent manufacturers are competitors in this market. This is dealt with below.

[18] Pre-wholesaling is defined as those finished goods supply chain activities, such as bulk or primary warehousing, inter-depot stock movements to and between secondary warehouses and subsequent distribution to customers such as the State, hospitals, clinics and large buying groups. In South Africa these distribution and logistic activities have been traditionally undertaken by the manufacturers. Record, B1020. Kinesis also performs administrative functions such as order-taking, invoicing and debt collection.

50. The truth of the matter is that the wholesalers do 'fine distribution' as an intrinsic element of their role as wholesale traders – that is, they buy in bulk from the manufacturers and they sell in smaller quantities ('fine distribution') to the retailers and, in the process, are rewarded by the difference between their buying price and selling price less the cost (for example, warehousing) of this intermediation. They do not perform 'fine distribution' as a service charged out to the manufacturers. This is why the applicants occasionally slip into referring to a '*wholesale* pharmaceutical distribution market' or even a 'full-line *wholesale* pharmaceutical distribution' market rather than to a pharmaceutical distribution market. In other words, they choose, for obvious reasons, to define the distribution market by reference to the characteristics of the wholesale mode of distribution, rather than by reference to the functional characteristics of the activity in question, these simply being distribution and related logistical functions. What the applicants' approach conveniently serves to disguise is that they have been successfully challenged by competitors who effect distribution through a wholly new modality, a modality that is characterized not by wholesaling, but by the provision of a range of logistical services, including, but not limited to, fine distribution. It is wholly conceivable that these two distribution modalities may continue to co-exist and compete – this is precisely what is happening at present. But it is equally conceivable that, like the horse and buggy and the motor car, or the typewriter and the personal computer, the one modality may ultimately disappear in favour of a superior alternative.

51. Secondly, and this is also elaborated below, we are not persuaded that there is a separate market for the distribution of *pharmaceutical* products. That is, we know of no reason why, in the event that the specialist distributors of pharmaceutical services raise their charges, others who specialize in the production of distribution services generally should not offer their services to pharmaceutical manufacturers. There is, on the face of it, nothing unique about the distribution services required by pharmaceutical manufacturers. A more detailed examination of the evidence, of the sort possible at the final stage of determination, may persuade us that pharmaceutical distribution can only be carried out by dedicated, specialist wholesalers or by dedicated, specialist distribution service providers. But, on the face of it, the market is for the provision of distribution services, rather than *pharmaceutical* distribution services. As we elaborate below, this has a major, even dispositive, impact on the applicants' allegations relating to foreclosure.

52. Thirdly, the applicants contend that the manufacturers and wholesalers compete in this distribution market, or, at any rate, in what the applicants identify in their heads of argument as 'the relevant markets for the sale of products to retail pharmacies and to medical practitioners'. The gist of this argument seems to be that whereas previously only the wholesalers enjoyed direct access to the

manufacturers, this has now been extended to retailers and medical practitioners as well. Because, under this new regime, both manufacturers and wholesalers interact directly with retailers, they are somehow divined to be competitors in the same market 'for the sale of products to retail pharmacies and medical practitioners.'

53. We understand that the manufacturers have decided to interface directly, through their agent, Kinesis, with the retailers of their, that is, the manufacturers', own products. We are prepared to concede, with some residue of doubt, that this places both wholesalers and distribution agent in the same distribution market – despite the incontrovertible fact that the former trades in pharmaceutical products and the latter trades in distribution and logistical services we concede that both do, in effect, distribute pharmaceutical products. However, we cannot agree that this places the manufacturers and distributors in the same market. Even if the manufacturers had elected to perform all the distribution functions in-house, that is, through a fully vertically integrated distribution division, this would not make them competitors in the distribution market any more than performing security functions in-house would make them participants in the security services market. There is no iron law that says that the manufacturing process begins and ends at pre-ordained points, much less that it is illegitimate from a competition perspective for the manufacturer to engage in any activity beyond those points. The products belong to the manufacturers and our starting point is that they are entitled to distribute it to their various customers as they see fit, just as they are entitled to secure their premises as they see fit. Indeed, if the wholesalers were to permit the general public to purchase products directly from their premises, the retailers would have no recourse under competition law[19].

54. In fact, in this case, the manufacturers have not taken distribution services in-house – they have simply elected to determine price in a direct interface with the retailers and, in certain, but not all, instances they have decided that they will offer a uniform price regardless of the purchasers designation as 'wholesaler' or 'retailer'. Most of the physical acts associated with the task of ensuring that their products arrive at the purchasers' premises have been contracted out to a specialist provider of distribution services. If the wholesalers compete with anybody in this scheme then it is with the distribution agent and certainly not with the manufacturer. In short, further argument and evidence may well reveal that the wholesalers participate in the pharmaceutical wholesale market which, like the erstwhile market for typewriters, is in terminal decline, not because of a restrictive practice perpetrated by a customer or a competitor but because a wholly new product, a wholly new mode of distribution, has displaced it.

55. In summary, then, we conclude that there is a range of separate pharmaceutical product markets. While we note that closer

[19] Other regulations may prevent the general public from purchasing directly from wholesalers but these are not imposed in terms of competition imperatives.

examination may cause us to revise the use of ATC3 categories as the basis for designating these markets, this categorization will serve for the purposes of interim relief.

56. The distribution market is more difficult to identify with confidence on the basis of the evidence before us. Conventional wisdom appears to concede the existence of a market for the distribution of pharmaceutical products. However, just as those who, like the applicants, identify themselves as specialist distributors of pharmaceutical products, are nevertheless able to participate with apparent ease in the distribution of a range of non-pharmaceutical products, so too are we inclined to believe that specialist providers of distribution or logistical services could, with relative ease, participate in the distribution of pharmaceutical products.

57. Indeed, Tibbet and Britten is a case in point. It is a specialist supplier of logistical services that is now offering these services to pharmaceutical manufacturers and these include, but are by no means limited to, the 'fine distribution' performed by the wholesalers. Certainly, it is doing this through the medium of a specialist pharmaceutical distributor, Kinesis. However, it is clear that Kinesis is offering a range of logistical services identical to those offered by Tibbet and Britten to its other non-pharmaceutical clients. And, conversely, it is not immediately apparent what specialist facilities or capabilities are required in order to distribute pharmaceutical products. The existence of a cold chain is not peculiar to pharmaceutical products. Particular safety and security considerations may attach to distributing pharmaceutical products but then special treatment is required in the distribution of many products.

58. We are, in short, on the evidence presented, unable to reach a conclusion on the reach of the relevant distribution market. It may well be that further evidence supports the notion that there is a market for the distribution of pharmaceutical products. On the other hand, there are prima facie indications that a fuller investigation may reveal that the market is for the distribution of consumer goods generally and is not restricted to the distribution of pharmaceutical products.

Restrictive Horizontal Agreements

59. Section 4 of the Act provides:

> *"1. An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –*
>
> *a. it has the effect of substantially preventing, or lessening , competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any*

technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or

b. it involves any of the following restrictive horizontal practices:

i. directly or indirectly fixing a purchase or selling price or any other trading condition;

ii. dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

iii. collusive tendering."

60. Section 4 specifies two threshold conditions for an adverse finding under both sub-sections (a) or (b). These are, first, that there be an *agreement* or a *concerted practice* between firms or a decision by an *association* of firms. Second, that this agreement should be between firms in a *horizontal* relationship.

61. The manufacturers are all manufacturers of pharmaceutical products. We have determined that the relevant pharmaceutical product markets are, for present purposes, defined by ATC3 categories. For present purposes what is clear is that the manufacturers – the principals in the present agency arrangement – are in a horizontal relationship (or, more accurately, a number of horizontal *relationships) to* one another, that is, they do compete in several markets, although that horizontality extends only to those therapeutic categories in which more than one of the principals is active.

62. However, have these horizontally related firms concluded an agreement between themselves?

63. In the initial application for interim relief the Tribunal panel found that the respondents had contravened Section 4(1)(a) of the Act. The panel found that the element of agreement required to establish a claim under Section 4 resided in the respondents' **joint ownership** of SAI and of its wholly owned exclusive distributor, Kinesis. It is noteworthy that the panel specifically concluded:

"The anti-competitive effects of this type of distribution arrangement derive from three important features of the arrangement: firstly, it is a joint exclusive initiative between competing manufacturers; secondly, the manufacturers jointly control the agency and thirdly, the manufacturers play a significant role in a number of therapeutic product categories in which they currently compete.

Without the first feature, the arrangement would essentially be a vertical agency agreement of the type that would not raise competition concerns in terms of, for example, the EC's Guidelines on Vertical Restraints. In terms of these guidelines an agency agreement is considered not to be anti-competitive if the agent does not bear any risk in relation to the business it conducts on behalf of the principal. It is not material whether the agent acts for one or several principals or if the agreement prevents the principal from appointing other agents in competition with the contracted agent (i.e. an exclusive agency agreement). Such an agency agreement, however, becomes problematic where it facilitates collusion between the principals. In the present case, the relevant characteristics of the distribution agent (DD) are that it is an exclusive agent; it acts for several manufacturers; and it bears no risk in relation to the manufacturers' businesses. As such, in terms of the EC guidelines, the individual bilateral agency agreements between each of the manufacturers and DD are not in themselves problematic from a competition perspective. The distribution arrangement that these individual agreements establish is nevertheless anti-competitive because it arises from a concerted initiative by competing manufacturers."[20]

64. However, the respondents insist that any 'agreement' that may have been imputed in consequence of the previous regime of joint ownership is clearly vitiated by the sale of SAI/Kinesis to Tibbet and Britten. What we have now, argue the respondents, are three separate agency agreements concluded between, respectively, GSK, Pfizer and Pharmacare, on the one hand, and, on the other hand, Tibbet and Britten and/or its wholly owned subsidiaries, SAI and/or Kinesis. The complainants nevertheless continue to insist that both Section 4(1)(a) and (b) have been contravened.

65. This respondents' argument would, on the face of it, appear to be incontrovertible. In light of the abovementioned sale of SAI/Kinesis – surely one of the 'important developments' alluded to by the Competition Appeal Court - the applicants, in order to establish the continued existence of an agreement, would have to demonstrate, either that the sale to Tibbet and Britten was a sham designed to camouflage continued joint ownership, or that, notwithstanding the termination of the joint ownership arrangement, horizontal agreements remained in place that contravened either Sections 4(1)(a) or 4(1)(b), or, that the very decision by the respondents to sell SAI/Kinesis constituted an agreement in contravention of the Act, or that the decision/s of the manufacturers to enter into agency agreements with the new owners constituted such an agreement. Certainly, the Act

[20] NAPW and others and GlaxoWellcome (Pty) Ltd and others 68/IR/Jun00, at paragraph 38,39

gives a very wide meaning to 'agreement', a meaning that would extend some way beyond a legally enforceable contract.[21]

66. The requirements to prove that a contract of sale and the subsequent agency agreements constitute a mere sham are very onerous and no evidence of this has been presented despite the applicants' bald characterization of the merger as 'not a sincere commercial transaction motivated by normal business principles'.[22]

67. The applicants have alleged the existence of certain common practices (common, that is, between the manufacturers acting through their distribution agent) that, in their view, evidence the agreements contemplated in Section 4. Indeed they appear to claim that the subject matter of these alleged agreements conform to the agreements contemplated in Section 4(1)(b) and are therefore susceptible to the *per se* or outright condemnation provided for in that section of the Act. These refer variously to the alleged existence of a single credit application form, to the alleged existence of identical credit terms, to alleged co-ordinated revocation of credit, to the alleged fixing of delivery schedules and, then, to a thoroughly incomprehensible set of allegations derived from the allegedly oligopolistic nature of the pharmaceutical market and to parallel conduct allegedly engaged in by the participants in that market.[23]

68. Suffice to say that certain of these allegations refer, by the applicants own admission, to historical practices, that is, practices that have been discontinued and are thus no longer interdictable. In other instances the applicants have not proved that the practices alleged actually took place, much less that they were collusively determined. In other instances – and this refers particularly to allegations of the existence of an oligopolistic market and parallel conduct between the participants in this alleged oligopoly – it is frankly not possible to discern the conduct alleged. In the case of other practices – notably the allegations regarding the delivery schedules adhered to by Kinesis – it is clear that

[21] American Natural Soda Ash Corp and Others vs the Competition Commission, Botswana Ash (Pty) Ltd and Others 49/CR/Apr00

[22] See Record at P. B24.

[23] The notion that the market is oligopolistic appears to rely on the existence of a market for pharmaceutical products (as opposed to product markets defined by therapeutic categories) and the position therein of the manufacturers who respectively utilize the services of Kinesis and IHD, another provider of distribution services. Even if the elements of this allegation had been established – for example, even if it had been established that the various manufacturers were indeed competitors in a single pharmaceutical products market and that their conduct reflected the existence of an agreement or merely proceeded in parallel – it is not clear how we would be expected to address this allegation. If the IHD related manufacturers are indeed colluding, or conducting themselves in parallel, with the Kinesis related manufacturers then surely remedial action would have to be instituted against all of these manufacturers and their respective distribution providers who are presumably alleged to constitute the platform for this co-operation. Ordinarily, this allegation is so confused that it would not warrant the dignity of a response. But it does serve to illustrate the shot-gun type approach utilized by the applicants, that being to proliferate the quantum of allegations made with no regard to their coherence and rationality or to the existence of any factual basis, in the apparent hope that one of these wild allegations succeeds in hitting the target, that being the granting of interim relief.

even if the conduct alleged actually occurs and even if these practices were collusively determined by Kinesis' principals, they would nevertheless not fall to be condemned under Section 4(1)(b) which is exclusively concerned with 'directly or indirectly fixing a purchase or selling price or any other trading condition'. We have previously determined that the 'trading condition' referred to in this section must relate to the price-quantity nexus and would certainly not cover delivery schedules.[24]

69. We should add that this raft of allegations is particularly difficult to sustain in the light of the clear evidence, which we understand to be common cause, that the core price-relevant trading conditions – specifically the scale and structure of their discounts – diverge significantly as between each of the manufacturer respondents.

70. The notion that the agreement required by Section 4 is manifest in the decision by the erstwhile owners to sell their stake in SAI/Kinesis is thoroughly unpersuasive. The Tribunal had previously found their *joint ownership* to underpin a contravention of the Act. As already noted, the manufacturers then took steps to bring themselves into compliance by selling their jointly owned distribution company to an independent owned supplier of logistic and distribution services. Given that they jointly owned SAI/Kinesis, per definition the decision to sell the distribution companies and thus bring themselves into conformity with the views expressed by the Tribunal would have to have been taken jointly. Are they to be penalized for bringing themselves into compliance with the Act?

71. What of the decision of the three respondents to then enter into EDAs with the new owners of Kinesis? In other words, argue the applicants, the respondents had not merely agreed to sell SAI and Kinesis to T&B, but they had also agreed to enter into EDAs with the new owners of SAI/Kinesis or, what is the same thing, they had all agreed to discontinue key elements of their traditional relationship with the wholesalers, notably the industry-wide practice of granting wholesalers a discount of 17.5% off the manufacturers' list price.[25] Indeed, insist the applicants, not only does this constitute an agreement for the purposes of meeting the threshold condition for Section 4, but, more than that, it constitutes an agreement about the pricing policy that they would follow. This, argue the applicants, is tantamount to 'directly or indirectly fixing a purchase or selling price or any other trading

[24] See The Competition Commission and Patensie Sitrus Beherend Beperk 37/CR/Jun01 at paragraph 35

[25] In presenting the version of the relief asked for at the beginning of these hearings, Mr. Nelson, counsel for the applicants, expressed it thus: 'A simple way to clarify that again on an interim relief basis is to say to restore terms and conditions relating to discount structures because we will show you, Mr. Chairman, that the anti-competitive behaviour here pertains to a horizontal agreement between competitors pursuant whereto they agreed to a discount policy and that policy changed simultaneously the discount structure that applied in the pharmaceutical distribution industry. And it pertained to how discounts are calculated …' (Transcript P10)

condition' and is thus vulnerable to the outright or 'per se' condemnation provided for in Section 4(1)(b).

72. It is reasonably clear that *each* of the manufacturers had, prior to the sale, agreed that they would utilize T&B as their exclusive distribution agent. Although there is no evidence that they had reached this agreement between *themselves*, it is entirely conceivable that T&B would not have agreed to purchase SAI/Kinesis from the manufacturers had they not been assured that each of the manufacturers would enter into EDAs post-sale. We are accordingly prepared to accept, for the purposes of this interim relief application, that each of the erstwhile owners of SAI/Kinesis had been aware that their fellow shareholders were entering into the process of concluding an EDA with the new owner, T&B, and that prior commitments to this effect had been made by the three sellers, subsequently the three principals. But this does not change the *vertical* character of the agreements in question.

73. The applicants make much of the fact that the Commission, in approving the sale (an 'intermediate' merger), had insisted on the omission, from the sale agreement, of the commitments apparently made by each of the sellers to enter into EDAs with T&B. But there is nothing to suggest thereby that the Commission had been concerned about a *horizontal* agreement between the respective sellers. Nor is there anything untoward at the parties to the sale agreement removing the *condition*, the *requirement,* to enter into EDAs from that agreement, and then subsequently concluding EDAs with the respondents or, for that matter, with any other manufacturers who wished to utilize their services. If these EDAs are then, as in the present matter, subject to anti-trust scrutiny, they are properly examined as a species of vertical agreement or, if dominance is established, abuse of dominance. But the mere fact that more than one manufacturer utilizes the distribution services of the same distributor does not transform a series of vertical agreements into a single horizontal agreement.[26]

74. In short, then, the allegation that the manufacturers have contravened Section 4 of the Act by entering into EDAs with Kinesis does not pass muster because the applicants have failed to establish the prima facie existence of an agreement between parties in a horizontal relationship. All that has been established is the existence of a number of vertical arrangements, and this, of course, has never been denied by the respondents.

75. We should add that even if the applicants had established the existence of a horizontal agreement this would not have been sufficient

[26] We concur with the following argument in para 159 of the respondents' heads: 'The simple fact of the matter is that when the manufacturers established SAI so as to convert DD into an agency distributor, they did so not as competitors in various markets based on therapeutic categories, but rather as manufacturers having certain distribution requirements. Further they did not act as competitors in the distribution market but rather as firms that required the rendering of distribution services.'

to secure an adverse finding under Section 4(1)(b) because in order to succeed under 4(1)(b) it would have to be established that the agreement fixed prices or any other trading condition or that it divided markets or that it amounted to collusive tendering.

76. A characteristic allegation of price fixing would allege that the three manufacturers in question each produce, for example, drugs for treating a particular cancer – that is, drugs within the same therapeutic category or relevant market - and that they are somehow utilizing their common distribution service as a mechanism for eliminating price competition in the sale of these drugs. This is not the allegation that has been made for the purpose of securing a conviction under Section 4(1)(b). What is alleged is that the three manufactures conspired to cut the discount extended to the wholesalers – the standard 17.5% in respect of GSK and Pfizer and 10% in respect of Pharmacare – in order to give a competitive edge to 'their' exclusive distributor, Kinesis. The manufacturers have not hesitated to point out that if there ever was a price fixing element in existence here then it is probably to be found precisely in the standard 17,5% received by wholesalers prior to the decision of the respondents to enter into the EDA agreements.

77. In this case as already noted, the applicants insist that because the effect of the EDAs was to reduce the discount available to the wholesalers that this establishes that the 'agreement' covered 'pricing policy' and hence offended Section 4(1)(b)(i). In other words, the manufacturers, argue the applicants, have collusively decided to reduce the discount, or, what is the same thing, increase the price, at which they make their products available to the wholesalers thus contravening the prohibition on price fixing.

78. We cannot agree with this. This attempt to conflate pricing policy, or, more properly, *distribution* policy, with price fixing, would severely inhibit innovation in the distribution of pharmaceutical products. It would effectively ensure that the existing pharmaceutical wholesalers or any who set themselves up as wholesalers of pharmaceutical products would be entitled, as of right, to receive, in perpetuity, a preferential discount off the manufacturer's list price in order to enable them to effect the distribution of the manufacturers' products even if the manufacturers had, as in this case, made alternative arrangements for the distribution of their products. We are asked to find that a refusal on the part of more than a single manufacturer to extend this preferential discount to the wholesale trade is a manifestation of a price fixing conspiracy.

79. We should add that the applicants are constrained to demand more than mere preference in the discounting structure – they must stake a claim for a preference sufficiently great to enable them to insert themselves between the manufacturers and the retailers and it is for this reason, above all, that this dispute has such strong commercial overtones.

80. This latter point cannot be emphasized too strongly. We are in effect being asked to set the price of pharmaceutical products to the wholesale trade. For the interim it appears that we are being asked – although given the confusion surrounding remedies this is by no means clear – to order the manufacturers to extend precisely the same discount to the wholesalers as was extended prior to the introduction of the EDAs. The applicants argue that this is merely an interim remedy implying that in the final hearing a more 'market-friendly' solution, one more in keeping with the fundamental mission of a competition authority, may be found. But what could this possibly be? The wholesalers themselves insist that the discount is the basis of existence of their trade, and the size of the discount – that is, the size of the differential between the price received by the wholesalers and that received by other purchasers of pharmaceutical product – is a critical determinant of the viability of the wholesale trade. We must then, perforce, be asked again at the final stage to order a discount for wholesalers and one great enough to ensure their viability. Implicitly, we will also be asked then – as now – to order that the 'wholesalers' discount' not be extended to any of the 'wholesalers' customers'. For the present these seem to be confined to retail pharmacies, although there is no particular reason for this limitation. The wholesalers may, for example, desire to intermediate between the manufacturers and the state hospitals – what, on their present argument, would prevent them from approaching the Tribunal for an order giving them a discount that enabled them to trade profitably in this segment of the pharmaceutical market?

81. The truth is that the change in the discount available to the wholesalers flowed directly from the vertical agreements, that is, the EDAs – it arises, in other words, as a direct consequence of the decision to opt for one mode of distribution over another. Even if the applicants had managed to prove the existence of an agreement between the respondents to move from one mode of distribution to another this would not constitute a price fixing agreement.

82. Moreover, the contents of each of the vertical agreements provide no evidence of a price fixing conspiracy. Certainly, post the sale to Tibbet and Britten, the wholesalers are treated differently by each of the manufacturers in question – GSK appears to trade off a single, uniform discount off its list price; Pfizer's discount structure is volume based; and Pharmacare appears to be operating on much the same basis in relation to the wholesalers as it ever did. That is, while Kinesis handles Pharmacare's physical distribution, wholesalers are nevertheless still encouraged to trade in this manufacturer's product by the availability of a discount larger than that received by its other customers.[27] All that can be shown is that three manufacturers have elected to enter into

[27] This would appear to bear out the respondents' contention that, even on the applicants' own argument, there is no case against Pharmacare. The applicants nevertheless insist that an order is still required against Pharmacare in order to ensure that it cannot in future change the discount.

EDAs with a service provider; it has not even been shown that this was the product of an agreement between the manufacturers concerned, much less that the agreement fixed any price.

83. To succeed under Section 4(1)(a), the complainants would have to establish that the agreement substantially prevented or lessened competition in a market. There are allegations scattered around the volumes of documents submitted that allege the fixing of non-price conditions. For example it is consistently alleged that the principals have fixed the delivery schedules at a single delivery per day in contrast with the multiple daily delivery service offered by the wholesalers. However, properly speaking these are not conditions fixed by the principals but rather refer to the services provided by the distributor. In any event, the applicants would still, in order to succeed under Section 4(1)(a), have to show that the agreement substantially prevented or lessened competition in a market. They have averred that the allegedly *exclusive* nature of the agreements between each of the manufacturers and their distributor has eliminated intra-brand competition in markets characterized by an absence of inter-brand competition. These are the allegations made in order to establish their claim under Section 5(1) for the existence of a vertically restrictive agreement and we shall examine these under that section of the Act.

Restrictive Vertical Agreements

84. Section 5(1) of the Act provides:

> "1. *An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect."*

85. In this matter it is alleged that the respondents, by entering into contracts to establish an exclusive distribution agency, have fatally compromised intra-brand competition, competition between alternative sellers of the same brand. This, argue the applicants, should be of particular concern to the competition authorities because, it is alleged, it takes place in the context of an industry notable for the absence of inter-brand competition, competition between producers of alternative brands.

86. It is also alleged that the EDA effectively constitutes a barrier to new entry at the manufacturing level. Full-line wholesalers will, it is alleged, not be able to continue in business if they are not able to trade in the full range of pharmaceutical products. This means that pharmaceutical distribution will be dominated by agencies all in the exclusive service of active participants in the industry. Any would-be new entrant would then either have to persuade its competitors to undertake distribution

on its behalf or, alternatively, face the formidable hurdle of entering at the distribution and manufacturing levels simultaneously.

87. Moreover, when the EDA under scrutiny here is seen in the context of the establishment of two other exclusive arrangements that serve a number of other multinational producers of ethical pharmaceutical products – namely, the IHD and PHD arrangements - we are invited by the applicants to conclude that the mechanism of EDAs is part of a conspiracy to prevent generic products in particular from entering the market.

88. We will examine each of the elements of these allegations:

89. Firstly, certain particular features of this EDA call the applicants' contentions into question. Hence, we note that the EDA under scrutiny provides for an asymmetric form of exclusivity. That is to say, while the principals are contractually bound to exclusively use the distribution and other services offered by the agent, the agent is under no obligation to offer its services to the founding principals on an exclusive basis. Indeed it is pointed out that the principals have a positive interest in their distribution agent extending its client base to the extent that this permits the realization of scale economies and a consequent reduction in the unit costs of distribution. It appears, in fact, that the service level agreements between the principals and the distribution agent explicitly provide that the existing principals benefit from further scale economies realized by the agent through the expansion of its client base.

90. We are also asked to note that South Africa's largest generic producer – Pharmacare – is one of the principals served by the distribution agent in question here and that other smaller generic producers also utilize the services of Kinesis. Moreover, it appears that the other EDAs count generic producers in their client base. Hence even if Kinesis were prevailed upon by one its principals to exclude a competing generic producer, this would not preclude one of the other EDAs whose principals were not in competition with the generic producer in question from distributing the latter's product. We have also been presented with evidence that demonstrates that important generic producers – inter alia, Adcock Ingram – are successfully distributing their own product.

91. In general, in order to sustain this allegation of likely foreclosure we would have to be persuaded that Kinesis is dominant in the pharmaceutical distribution market – which is manifestly not the case – or that it has entered into a conspiracy with the other EDAs. There is no evidence of such a conspiracy. But even this would not suffice to persuade us. There are other pharmaceutical distribution mechanisms in place, other, that is, than the various EDAs, to be found not least of all in the ranks of the present applicants. Moreover, as we have already indicated in our discussion of the relevant market, we have no

reason to believe that other distributors, that is, providers of distribution and other logistic services in other sectors of the economy, would not be able to effect the distribution of pharmaceutical products. There are, we acknowledge, particular unique features that attach to the distribution of pharmaceutical products, but this applies to a range of products – fresh and frozen food products with their cold chain requirements is a pertinent example - and these have not precluded specialist logistic providers from meeting the requirements of manufacturers of these products. Indeed, as already noted, we are yet to be persuaded that the relevant market for the purposes of our present examination is correctly identified as that for the provision of distribution services to the *pharmaceutical* industry.

92. In other words the fuller examination of the evidence permitted by adjudication of the evidence presented at the final stage of the complaint referral, may well show that the relevant market is simply that for the provision of distribution services generally. Just as international freight forwarders, as well as shippers and air freight companies, participate in the export and import distribution of a range of products from fresh fish to diamonds, many with exotic regulatory and other requirements, so too is it wholly conceivable that providers of logistic and distribution services on the domestic market will respond positively to a commercial incentive to distribute pharmaceutical products.[28]

93. The applicants counter that, whatever the theoretical prospects for new entry may be, this has not occurred for many years and that the allegedly low returns earned by the wholesalers are an effective deterrent to new entrants.[29] Again, we are skeptical. Low returns may be endemic and permanent in the pharmaceutical wholesale trade. But this may be a signal that the wholesale mode of distribution has, like the typewriter, finally run into the sand. Wholesalers unwilling to grasp this nettle and reconsider their business model may well find themselves subject to endemically low returns. However, it is not for the competition authorities to protect them from their commercial folly. Certainly, as the present case exemplifies, there has been new entry by providers of logistic and distribution services. In other words, low returns may well be the outcome of a comfortable oligopoly whose participants are content with the easy life, with passing on pharmaceutical products and the associated margins to their long-standing and, it frequently appears, captive customers[30]. Low returns are not necessarily indicative of robust competition.

[28] The applicants have understandably made much of a throwaway statement in the respondents' early submission document to the Competition Board in 1998 at paragraph 12.1 (Transcript page 43) to the effect that wholesalers facilitate the entry into the market of generic substitutes and appears to offer the establishment of EDAs as a counter to the introduction of generics. The meaning of this statement – made in 1998 – has not been clarified by the respondents. However, even if this was their intention we would still have to be satisfied that market conditions would allow this exclusionary intent to be realized.

[29] Transcript page 76

[30] Respondents Heads page 143, Transcript p234

94. We should note another feature of the exclusivity that attaches to this particular EDA. Certainly, Kinesis is exclusively contracted to perform a range of distribution and logistical services on behalf of its principals. But this does not preclude wholesalers from procuring product through the agency of Kinesis for on-sale to the retailers. Nor, naturally, are the retailers precluded from sourcing the principals' product through the wholesale channel. The wholesalers argue that by establishing an identical price for retailers and wholesalers any possible incentive for retailers to purchase their requirements from the wholesalers has been eliminated – the wholesalers would either have to charge the retailers a higher price than that available through the EDA or they would have to forego all margin. But this seemingly self-evident contention requires considerably closer scrutiny. Certainly, it is common cause that Pharmacare actually maintains an explicit price differential between its wholesale customers and its retail customers.[31] Pfizer's pricing structure is explicitly determined by the volume of purchases and so there appears to be a margin available for those wishing to purchase in bulk for on-sale to smaller purchasers. GSK, the third principal, appears to maintain a uniform pricing structure.

95. However pricing aside, that is, even if we assumed that wholesalers and retailers were in fact charged an identical price, does this serve to eliminate the possibility of other pro-competitive offerings from the wholesalers? For example, the wholesalers insist that the full-line service that they offer is a convenient alternative for small retailers who, in the absence of such an offering, would have to place orders with a number of different EDAs. If this is indeed so, then why are wholesalers not able to charge for the convenience of one-stop purchasing? The greater frequency of the deliveries from the wholesalers is also presented as one of their competitive strengths. In other words, the EDA does not preclude the wholesalers from inserting themselves between the principals and their retail customers. However the test for a successful and sustainable pro-competitive insertion is that the wholesalers provide a pro-competitive rationale for their existence. If these additional offerings cannot be charged out, then it is clear that they are not valued by the market. It is not then for the competition authorities to foist these upon the market by providing that the wholesalers' position be secured through the provision of a price advantage.

96. Secondly, we have to examine the contention that the EDA has eliminated vigorous intra-brand competition, that is, competition between wholesale distributors of the identical pharmaceutical brand. Exclusive distribution arrangements do, per definition, eliminate intra-brand competition. However, there is insufficient evidence of vigorous competition between wholesalers (that is, intra-brand competition) in the pre-EDA era to sustain the allegation that this amounts to a

[31] Respondents' Heads, page 97

substantial lessening of competition. We are asked to infer high levels of competition between the various wholesalers from the allegedly low returns earned by the latter. However, as already noted, this may well be indicative of a monopolist or a group of co-operating oligopolists who value the quiet life over and above high returns.

97. This latter interpretation is supported by other prima facie evidence of co-operation, rather than vigorous competition, between the wholesalers, the uniform discount demanded from the manufactures not the least of these indicators. Furthermore, the respondents have submitted evidence suggesting that, far from vigorous competition between wholesalers for the custom of the retailers, many of the latter are effectively tied into supply arrangements with one or other full-line wholesalers. These ties are variously cemented – in some instances it appears that the retailer customers of the full-line wholesalers own equity stakes in the latter; at other times, there is evidence of wholesaler financial assistance to the retailer in exchange for a commitment on the part of the retailer to purchase supply exclusively or predominantly through the wholesaler in question.[32]

98. In the face of these prima facie indicators of co-operation as well as evidence submitted by the respondent's we are not able to accept, without further evidence, the complainant's bald assertion of strong intra-brand competition for pharmaceutical products in the pre-EDA era.

99. We should also note the argument, widely supported in contemporary competition analysis, that holds that insofar as a diminuition of intra-brand competition occurs as a result of an exclusive distribution arrangement, that this will be likely compensated for by more intensive inter-brand competition, that is, by competition between competing brands – in other words, that the distributor's focus on procuring competitive advantage for its clients brands will intensify competition with brands that do not enjoy the services of the distribution agent.

100. In opposition to this argument, the applicants contend that the pharmaceutical industry is characterized by unusually low levels of inter-brand competition. This contention appears to derive from two features associated with the market for pharmaceutical products. These are, first, the widespread use of intellectual property protection of pharmaceutical products. And, second, the 'must-have' nature of the product, the fact that product and brand selection of pharmaceutical products is made by the prescribing doctor thus eliminating the ability of the actual purchaser of the product to exercise any competitive choice.

101. We, of course, acknowledge ubiquitous use of patents in this sector. We note, however, the respondents' observation that even many

[32] Record B900, Respondents Heads, page 144

patent protected products face competition from products applicable for the same broad therapeutic purpose.[33] Moreover, we are constrained to observe that on closer appraisal of the evidence, the market for ethical pharmaceutical products may well be an innovation market, that is, that competition occurs in the innovation stage of the product life-cycle. This latter form of competition is not diminished by patent protection – indeed, it is competition in order to achieve patent protection in respect of a new innovation. The evidence before us does not justify a far-reaching judgment on the state of competition in the market for pharmaceutical products. We stress that further evidence and argument may well establish low levels of inter-brand competition in the pharmaceutical products market – certainly the exceptional returns posted by the pharmaceutical majors suggest low levels of competition. However, this conclusion cannot be justified on the papers submitted in this application for interim relief.

102. Even the 'must-have' nature of pharmaceutical product consumption has been called into question by relatively recent developments that have been highlighted by the respondents. We refer, of course, to increasing evidence of demand side buying power supported by legislative intervention that requires the use, under a range of circumstances, of cheaper products than those frequently prescribed by the consumer's doctor, as well as increasing pressure from medical aid schemes to contain costs[34]. Again, the respondents' counter arguments by no means dispose of their opponents' contentions. But they do unquestionably call them into a degree of doubt sufficient to constrain a granting of interim relief – in a word, more evidence is required to resolve this argument.

103. In summary then, based on general pharmaceutical product characteristics – the widespread use of patent protection and the 'must-have' nature of the product – the applicants argue that inter-brand competition is already considerably muted and that the formation of an EDA will eliminate intra-brand competition. However, contrary evidence submitted by the respondents suggests that intra-brand competition has never been particularly strong and that inter-brand competition may well be a great deal more robust than suggested by the applicants.

104. In the absence of further evidence, we accordingly cannot find that the vertical agreement between the respective principals and the distribution agencies as represented by three EDAs in question has resulted in a substantial preventing or lessening of competition in any of the relevant markets implicated in this matter.

105. In the light of this finding, we are not obliged to determine the conflicting claims made regarding the efficiency or otherwise of the EDAs over the wholesale form of distribution.

[33] Respondents Heads, page 115
[34] Record, B1092

Abuse Of Dominance

106. The applicants also allege contravention of Sections 8 (a), (b) (c) and (d)(i). These contraventions would all constitute abuses of a dominant provision. Section 9 prohibits price discrimination by a dominant firm.

107. We should state at the outset that the allegations relating to abuse of dominance have been particularly poorly framed by the applicants. Indeed, in most instances while a raft of allegations pertaining to abuse of dominance have been made in the original notice of motion, they are barely referred to in the papers subsequently filed or in the argument before the Tribunal.

Dominance

108. The threshold necessary to sustain an allegation of abuse of dominance, is that dominance in a market should be established. It is here that the applicants' difficulties begin.

109. Section 7 of the Act provides that:

> *A firm is dominant in a market if –*
> *(a) it has at least 45% of that market;*
> *(b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or*
> (c) *it has less than 35% of that market, but has market power.*

110. 'Market power' is defined in the Act as:

> *'the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.'*

111. Recall that we have identified two relevant markets. The first refers to a set of pharmaceutical products markets each defined by the ATC3 therapeutic categories. The second refers to the market for the distribution of pharmaceutical products, although as we have noted above, there is prima facie evidence suggesting that the market may be cast more broadly as a market for the distribution of consumer products.

112. We can find no coherent allegation regarding dominance in the second of these markets, the distribution market. The applicants do assert that the principals' alleged market power in the various product markets has enabled them to extend this into the distribution market. This assertion appears to rely upon an aggregation not merely of the respondent manufacturers' market shares, but also of the market shares of all the manufacturers who are party to one or other exclusive

distribution arrangement.[35] Clearly, whether defined broadly as a market for the distribution of consumer products, or narrowly as a market for the distribution of pharmaceutical products, it would be impossible to establish dominance on the part of Kinesis. Accordingly our discussion of the abuse of dominance allegations is focused on the pharmaceutical product markets.

113. With respect to the pharmaceutical product markets, the applicants have produced therapeutic class analysis tables to establish that the principals collectively hold market shares in excess of 45% in 31 ATC 3 classes and market shares exceeding 35% in 3 other ATC 3 classes. On this basis they conclude that *"the principals are jointly dominant or presumed to be dominant (i.e. have more than a 35% share) in 31 ATC 3 classes."*

114. With respect to this allegation of 'joint dominance', the respondents counter that

> *"It is not sufficient to assert collective dominance (and we do not concede that the concept is recognized in our legislation) merely because the sum of the sales of the companies that use the same distributor is at least 35%. There can be no economic justification for aggregating sales in this way. Where GSK, Pfizer and Pharmacare products have similar therapeutic qualities they are competing products in a particular product market, properly defined, whether or not they use the same distribution agent."*

115. We cannot but concur with the respondents. The applicants have essentially asserted that which they have sought unsuccessfully to prove in order to sustain their allegations under Section 4, namely that the principals have entered into a horizontal agreement. Even if we understand why a competition authority may elect to exercise particular vigilance towards a group of competing manufacturers using the same distribution agency - distribution being a particularly 'close to market' activity - the mere fact that they are doing so cannot be used to infer an agreement between the manufacturers and therefore cannot, of itself, infer 'joint' or 'collective' dominance for the purposes of sustaining a Section 8 allegation. Were we to permit this inference to be drawn we would expose every logistic or distribution service provider that had more than one client in the same market (as well as the clients themselves) to prosecution under Section 4 and, assuming that our Act does actually recognize the concept of abuse of *collective* dominance, Sections 8 and 9. In essence we would, by requiring that each provider of distribution services restrict itself to one client in each market, be severely inhibiting specialization in the provision of these services. Indeed, the entire tenor of the applicants' arguments

[35] Heads p 84, Record B2306

suggests that this is precisely the conclusion that they would have us draw.[36]

116. In addition to 'joint dominance' the applicants allege that "*the principals individually are dominant or presumed to be dominant (i.e. have more than a 35% share) in the following classes:*

Respondent	***ATC 3 Classes***
First Respondent	*14*
Second Respondent	*2*
Third Respondent	*6*
Fourth Respondent	*4*
Fifth Respondent	*1*

Source: Applicants' founding affidavit B17

117. Individual dominance is claimed as follows in the applicants' replying affidavits:

Respondent	***No. of ATC3 Categories 35%+***
GSK (First & Fourth Respondents)	15
Pfizer (Second & Fifth Respondents	3
Pharmacare (Third Respondent)	19

Source: Synthesis of Applicants' Market Share Analysis, B3218

118. The respondents, for their part, deny that dominance is proven in respect of the ATC 3 classes. They argue that in respect of certain products the manufacturer's patent may have expired, or other new innovative treatments may provide vigorous competition, or generic alternatives may be available. On this basis their expert report by Europe Economics, analyses the various markets and concludes that the degree of substitutability in the ATC 3 categories is such that the number of ATC 3 categories in which the respondents are dominant is relatively few.[37]

119. The applicants, in addition to the evidence submitted on market share in the various therapeutic categories, allege, relying upon Section 7(c), that the respondents have market power.

120. In support of this allegation, the applicants insist, firstly, that the respondents' have the power to control price. This, they argue, is a consequence of patent protection and of the "must-have" nature of pharmaceutical products.

[36] This is further borne out by the applicants professed comfort with the fact that Adcock Ingram distributes its own product. We infer from this that if each of the respondent manufacturers had elected to undertake distribution of its own product this would have encountered no opposition from the applicants – the anti-competitive core of the respondents' conduct then resides, from the applicant's perspective, in the fact that they all use the same provider of distribution services.

[37] Record page B1405

121. Clearly, patent protection confers a degree of monopoly power – this is its manifest intention. And while we have referred above to the submissions of the manufacturers in which they argue, inter alia, that even patented drugs are not immune from competition from other treatments in the same therapeutic category, there can be little denying the power conferred by a patent and the controversies surrounding the alleged willingness of the pharmaceutical manufactures to milk this power for all that it is worth. However, this having been said, it is indeed difficult to understand how the EDA confers 'additional' monopoly power on the patent holder. The source of the market power is the patent and this is not influenced by the distribution arrangement employed by the patent holder.

122. Secondly, the applicants argue that the principals have the power to behave independently of their customers and assert that this is evidenced by their unilateral alteration of the distribution pricing system and by the imposition of new trading terms and conditions via the EDA's**.** We will restate our response to this argument, which, although fundamentally flawed, constantly re-appears, in one guise or another, throughout the applicants' submissions.

123. The view supported by the applicants – and accepted for the purposes of this decision – is that the wholesalers and the logistic and distribution services specialists like Tibbet and Britten perform a distribution service for the pharmaceutical manufacturers. This is the basis of the applicants' insistence that they be rewarded for rendering this distribution service. The respondents, for their part, have decided to utilize the services of Kinesis, Tibbet and Britten's subsidiary. They have entered into a contract with Kinesis that appoints them their exclusive distribution agent. This is no different to appointing, on an exclusive basis, a firm of auditors or attorneys or an advertising agent or a security company. During the contract period alternative firms of, for example, auditors will not expect to perform an auditing function for the entity in question and they will naturally not expect to be rewarded. Indeed the only basis for the applicants' insistence that, in the face of the EDA, they continue to perform distribution services and that they be 'rewarded' for so doing is that, in fact, they are, in reality, not providers of distribution services at all, but they are rather traders in, inter alia, pharmaceutical products. What has changed is not the 'reward' offered to them for performing the distribution service, but rather their terms of trade, terms that now include the cost of the distribution and other related logistical services, costs which have been internalized by the respondents in the form of an exclusive agency agreement with Kinesis.

124. The applicants are, of course, perfectly at liberty to continue as traders of pharmaceutical products. To do this may well pre-suppose that they improve their terms of trade, that they bargain down the price charged by the manufacturers and/or bargain up the price they receive from the retailers. In order to improve their bargaining position they may, in

turn, have to incorporate new services into their trading activities. But why should their inability to achieve more favourable terms of trade be construed as a manifestation of market power on the part of the manufacturers?

125. The mere selection by the manufacturers of a distribution agent does obviously not, in itself, reflect market power. Monopsonistic market power would be manifest if a purchaser of distribution services were able to extract a sub-competitive price for the provision of these services. But there is no evidence for this, nor could there be. If the respondents insisted upon Kinesis delivering a competitive service at a sub-competitive price, then Kinesis would be at liberty to refuse the business and to compete for the distribution business of other pharmaceutical manufacturers, or, indeed, of camera manufacturers if the distribution market was defined broadly. The custom of the pharmaceutical manufacturers is undoubtedly incentive for the distribution service providers to bargain hard, to attempt to reduce costs in order to maintain a viable return and to introduce new and better services. But if, in the end, they are unable to agree on an acceptable rate and/or level of service, then the manufacturer would seek out another service provider and the distributor would seek out another purchaser of its services.

126. The wholesalers appear to contend that it is the exclusive element that manifests market power. But this too is untenable. There is an element of 'exclusivity' in every transaction – once I elect to purchase a motorcar, or, for that matter, the week's groceries, from a particular vendor, then other vendors are 'excluded'. I will have been induced to support the chosen vendor by the superiority of her offering. This is why it has been recognized, from the earliest days of US anti-trust jurisprudence, that every contract contains an implicit 'restraint of trade' and this is precisely why the sweeping language of the Sherman Act has been moderated by a rule of reason. It was recognized that a literal interpretation of the Sherman Act's prohibition of every contract in restraint of trade would have the perverse consequence of restraining the operation of the market itself, rather than the anti-competitive conduct at which it was directed.

127. The principle outlined above is not affected by the fact that the commodity in question here is a service which is provided over a period of time, rather than a product supplied at a particular point in time. Exclusivity in the provision of the service, in particular the length of time for which it is granted, is simply part of the bargain. It takes no great insight to imagine the service provider conceding a lower price or a higher level of service in exchange for greater certainty in the form, on this occasion, of a time bound exclusive arrangement. In the normal conduct of trade these bargains are entered into every minute of every day. Certainly, as soon as the bargain is struck others are 'excluded', are 'restrained' from trading to a greater or lesser extent.

128. We will not even attempt to untangle the web of conflicting evidence surrounding the question of whether or not the applicants were given the opportunity of bidding for the right to provide the distribution services sought by the manufacturer respondents. Suffice to say that there is no requirement that the provision of any input be subject to a public tender process. This form of purchasing may promote good governance and financial accountability; it may well be the most effective means of the purchaser ensuring that it is, indeed, receiving the best available good or service, at the lowest possible price. But it is certainly not required by competition law. Indeed competition law seeks to protect the market precisely because of a presupposition that profit maximizing incentives will dictate that, even in the absence of formally administered auctions and bidding processes, purchasers and sellers will find each other. We note also that the applicants have not given the impression that they were willing to provide many of the services required by the manufacturers and offered by Kinesis. On the contrary, the applicants have consistently attempted to deride many of these services as unnecessary 'luxuries' and have made it clear that all that they are interested in providing are the sub-set of distribution services which they have identified as 'fine distribution' for the purpose of on-sale or 'distribution' to the retail trade. Under these circumstances it is hardly surprising that the purchaser of the services – the respondents – never 'met' these particular would be suppliers – the applicants - in the market place.

Abuse of Dominance

129. Even if we proceed on the basis that one or other of the respondents 'individually' dominate 27 (founding affidavit) or 37 (replying affidavit) pharmaceutical product markets, the applicants would still have to establish that this dominance had been abused.

130. Section 8 of the Act provides:

> *It is prohibited for a dominant firm to –*
>
> *(a) charge an excessive price to the detriment of consumers;*
>
> *(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;*
>
> *(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or*
>
> *(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effects of its act -*

(i) requiring or inducing a supplier or customer to not deal with a competitor;…"

131. Section 9 prohibits a dominant firm from engaging in price discrimination.

132. Though they relied on certain sub-sections of sections 8 and 9 in their papers, the applicants did not deal in great detail with these abuse of dominance allegations in their Heads of Argument or in their oral argument at the hearing. Their Heads indicate that they are only pursuing abuse of dominance allegations under sections 8(d)(i) and 8(c).[38]The Tribunal expressly queried whether the wholesalers persisted in their claims under sections 8 (a) and (b) but no response was forthcoming. We therefore will not deal with either sections 8 (a), 8 (b) or 9, as these were not pursued by the applicants.

133. Note that the respondents in the record raise the in limine point that the Competition Tribunal does not have jurisdiction to consider whether the respondents have contravened section 8(a) of the Act because this was not part of the complaint that the Commission was originally asked to investigate. Therefore they ask that this be struck out of the founding affidavit. The respondents also queried the legitimacy of raising a section 8(b) complaint at this interim relief application. A similar point was raised in the Complaint Referral wherein the Tribunal held that it had no jurisdiction to consider certain allegations that were not part of the original complaint referral investigated by the Commission[39]. The Competition Appeal Court on appeal held that the Tribunal correctly struck out references to the prohibited practices of excessive pricing (section 8(a)) and predatory pricing (section 8(d)(iv)) from the referral and that the Tribunal erred in not striking out reference to the denial of access to an essential facility (section 8(b)) from the referral[40]. There is some controversy surrounding whether or not the wholesalers agreed they would abide the CT decision.

134. Therefore, even if they had been pursued, the CAC has held that sections 8(a) and 8(b) do not form part of the original complaint referral.[41]

Section 8(d)(i)

135. The wholesalers allege that the respondents are inducing each other, alternatively retail pharmacists and doctors, not to deal with the wholesalers, but with Kinesis.

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[38] Page 84 of Applicants' Heads

[39] 45/CR/Jul01

[40] The manufacturers raised the procedural issue of whether this section can be prosecuted at this interim relief application. Heads page 164 This issue was not dealt with by the wholesalers.

[41] Transcript page 260.

136. In their Heads of Argument they state that:

> *"The Principals have perpetrated an abuse of dominance by compelling or at least inducing the Complainant's customers to buy directly from them by offering them prices and/or discounts that the Applicants cannot match"*[42]

137. The respondents point out that the applicants have not established that they are competitors of the respondents, as envisaged by this section. They argue that pharmacists will choose to source product either from the manufacturers or the wholesalers on the basis of the distribution services offered, therefore, they compete in respect of the distribution service – not in respect of pharmaceutical products supplied. In this sense, the wholesalers and manufacturers compete at different levels of the supply chain, the wholesalers exerting no constraining force on the manufacturers at the product level, that is, in setting prices. They furthermore argue that "induce" cannot be interpreted broadly to include any manner of offering discounts based on volume of products purchased. We agree with this argument. More is required in terms of this section. It is the very essence of competition for competitors to compete for custom on the basis of superior offerings.

Section 8(c)

138. It is not clear from their papers whether the applicants are relying on the general species of exclusionary conduct in section 8(c).

139. In their Heads of Argument they state that:

> *"The Respondents, with effect from 29 May 2000, effectively refused to supply their products to the Applicants at the customary discounted rate, or at any price which would compensate the wholesalers for the services they render or to enable them to compete effectively with the Principals in the sale of their products. As their products are no longer offered to wholesalers on terms and conditions that make it viable for wholesalers to trade in such products. This is tantamount to a refusal to deal because the concept of a refusal to deal covers not only pure refusal, but also where a dominant company is only willing to deal on an unreasonable basis…"*

140. From their assertions in their Heads, it seems the applicants are seeking to encapsulate under this section their allegations that the manufacturers are denying them competitive access to their products; raising the barriers to entry into the distribution market; and ensuring that their accounts are paid for in preference to other creditors.

[42] Page 84

141. The respondents argue once again, that the applicants have not established, even on a prima facie basis, the markets in respect of which the respondents are dominant. They also insist that the evidence before us shows there are a number of efficiency and pro-competitive gains which arise from the use of the EDA.

142. It is not clear to us that the respondents' conduct is exclusionary. The applicants are clearly able to continue trading profitably in the respondents' products and the effluxion of time has demonstrated that they have not been ousted from the market. This point is elaborated on later in the decision. We refer to our decision in York Timbers Limited and Safcol Limited:[43]

> *"As already elaborated, we are not persuaded that the practice complained of, the reduction in the guaranteed supply from Witklip, is 'exclusionary' within the meaning of the Act - that is, it does not impede or prevent the applicant from expanding in the market but merely requires that it competes for its supply of raw material on terms similar to those available to its competitors. Moreover, even if the practice complained of were to be established as an impediment to the applicant's expansion in the market, it still remains for the applicant to establish the 'anti-competitive effect' of the practice, to show, in other words, that market power has been created or extended in consequence of the alleged act. This has not been done."*

143. Our reasoning in the York case is applicable here.

SERIOUS AND IRREPARABLE DAMAGE AND THE BALANCE OF CONVENIENCE

144. As already indicated, we will not take a view on which legislation – pre- or post-amendment - governs this matter because on both versions of interim relief, the fundamental criteria required for the granting of relief have not been established.

145. We held in Natal Wholesale Chemists (Pty) Ltd and Astra Pharmaceuticals that in terms of the amended Act, the Tribunal no longer has to consider whether each of the requirements for interim relief has been established in isolation, but must rather examine all of the factors listed in Section 49(2)C as a whole.[44] In this scheme a strong showing on some factors – say harm and the balance of convenience – may conceivably counterbalance a poor showing on another factor, say the evidence relating to the alleged restrictive practice.

[43] 15/IR/Feb01 at paragraph 100

[44] 98/IR/Dec00. This was also applied in York Timbers Limited and South African Forestry Company Limited 15/IR/Feb01.

146. We have already dealt with the first of the factors to be considered in deciding whether or not to grant interim relief, namely, the requirement to show evidence of a restrictive practice. As in the NWC case, in this case there is no evidence of a restrictive practice. We have, elsewhere in this decision, elaborated why, where we find the evidence of a restrictive practice very weak, and where, accordingly, evidence relating to the existence of a causal nexus between a restrictive practice and the harm is concomitantly weak, that we are unlikely to grant interim relief on the basis of harm or the balance of convenience alone. We have even previously held that where the applicants have not proved the restrictive practice on the basis of a prima facie case, it has not been necessary for us to deal with the remaining requirements of section 49C, viz. irreparable harm and the balance of convenience.[45] We will nevertheless proceed to examine harm, an issue of some considerable contention between the parties to this matter. Following that, the balance of convenience of granting the relief will be considered.

SERIOUS OR IRREPARABLE DAMAGE

147. In order to establish serious or irreparable damage the evidence must demonstrate that, on the face of it, absent a granting of interim relief, the ability of the applicants to remain as viable competitors within the market is 'seriously' or 'irreparably' threatened. In such circumstances, the material content of the applicants' right to move to the final stage of adjudication is called into question because, even if relief was granted at that stage, it may nevertheless not assist the applicants in their attempt to remain viable competitors. This has manifestly not been demonstrated in this case.

148. The applicants' prediction, stated in the strongest of terms, of their imminent demise has been a notable feature of this application for interim relief. Given the unusual length of time taken to reach the stage of actually adjudicating this application we are in the fortunate position of being able to evaluate the accuracy of these claims. Suffice to say, that they have proved to be, at the very least, wildly exaggerated. Indeed the possibility of all of the original applicants remaining in business some three years after the initiation of this application – and they are all still in business - could not have been countenanced on the basis of the applicants' own consistent contentions over the duration of this matter. Alternatively, the applicants' have vastly underestimated their own ability to respond pro-competitively to the new environment in which they find themselves.

149. The respondents have submitted evidence that persuasively establishes that the applicants have not been seriously or irreparably harmed.[46] While we agree with the applicants' argument that a successful showing of serious or irreparable harm does not require a

[45] Nkosinauth Ronald Msomi & Others and BAT 49/IR/Jul02
[46] Record page B1824-B1880

showing of imminent bankruptcy, evidence submitted by the respondents, evidence frequently drawn from the applicants' financial records and communications with their shareholders and the public, demonstrates that they remain robust participants in the wholesale pharmaceutical trade. Indeed the respondents have produced evidence which suggests that either the sale of Kinesis products by the applicants has not declined nearly as significantly in the relevant period as asserted by the applicants, alternatively, that the wholesalers' sales of the principals' products have grown, or certainly remained constant, in the relevant period.[47] Clearly, the applicants remain major customers of the manufacturer respondents in this matter. We must infer from this that their pro-competitive offerings vis-a-vis the EDAs – for example, greater frequency of deliveries and the benefits of one-stop purchasing – have held them in good stead.

150. The applicants have, in an attempt to explain the absence of apparent serious harm, argued that many of them have turned to the wholesaling of alternative products, for example cameras, but that their viability as *pharmaceutical* wholesalers remains in question. No evidence has been offered in support of this assertion. However, even if this were to be established, it serves to indicate that the changed environment in the pharmaceutical trade has caused them to deploy their talents and infrastructure elsewhere. This does not mean that, in the colourful but essentially unconvincing analogy offered by Mr. Nelson for the applicants, they have moved from wine manufacturing to legal practice. Rather they have deployed the experience and other capital accumulated in the pharmaceutical wholesale trade in order to trade in a product range wider than that traditionally within the province of pharmaceutical wholesalers.

151. This is precisely the sort of response that an unfettered process of competition promises. Indeed, as indicated in our discussion of the relevant market, it may serve to suggest that the relevant distribution market is not limited by pharmaceutical products – that is, just as the pharmaceutical wholesalers have, under competitive pressure, expanded their business model to incorporate other products, so too is it possible for suppliers of distribution services to non-pharmaceutical products to offer their services to pharmaceutical manufacturers. Be that as it may, what is clear is that the applicants' response has staved off serious harm and it has enabled them to remain profitably active in the wholesale business – their experience remains intact, as do their networks and capital equipment. Should the hearing on final relief arrive at conclusions different to our findings at this stage, there should be no obstacle to restoring their competitive position.

152. Several of the confidential affidavits submitted by representatives of the applicants confirm that since the advent of the EDA some of the wholesalers have resorted to 'roundtripping', effectively arbitrage

[47] B1878-B1880 and B4209 to B4211, Respondents' Heads, pages 41-42

where pharmaceutical product is acquired from participants in the chain of distribution who, for one reason or another, receive their product at a discounted price. This too represents a response to changed market conditions although it is suggested that it is not a recent phenomenon – it is, indeed, an inevitable feature of all markets in which price differentiations are present. However, the recent amendments to the Medicines Act prohibit the procurement of pharmaceutical products from any source other than original manufacturer thus effectively prohibiting arbitrage or roundtripping. This amendment – promulgated subsequent to the conclusion of hearings in this matter – is the basis for an application to re-open the hearings and which is discussed below.

153. It appears, however, that roundtripping has generally been regarded as unethical and potentially compromising of safety and other standards. For this reason, while, as one may expect in a segmented market, it has always been present to some degree or another, perhaps even in existence prior to the formation of EDAs, it appears to have been a relatively peripheral feature of the pharmaceutical trade. Hence, while we would expect the incidence of roundtripping to have intensified in the wake of the formation of the EDAs, and while the foreclosure of this response by the amended Medicines Act, is an additional source of pressure on the wholesalers, the impact of this amendment will not substantially alter the calculus of harm. That is, there is no basis for believing that roundtripping had constituted the basis for the continued viability of the wholesalers or, conversely, that its elimination would impact significantly on the quantum of harm.

BALANCE OF CONVENIENCE

154. The applications insist that they are sustaining continuing harm. Our assessment of the harm suffered by them is that it is neither serious or irreparable. In many cases the harm generated by change in the respondents' discounting structure has been ameliorated by the pro-competitive responses of the applicants who have, it appears, found ways of retaining a significant component of their pharmaceutical business, including that related to the respondents themselves; in other instances they have sought out other wholesale markets, cameras being the example most frequently mentioned. In the case of UPD, it has been absorbed into the Clicks group and clearly its future prospects and activities are likely to diverge significantly from their past. The long and short of it is that there is no reason to expect, absent the granting of interim relief, that the situation a year hence would look significantly different from the current position.

155. From the perspective of the respondents, the assessment of the prejudice that they will suffer in consequence of a granting of interim relief depends crucially on the nature of the relief granted. Given the vacillation on the part of the applicants and the consequent uncertainty regarding the relief asked for, it is well nigh impossible to assess the

prejudice that will be suffered by the respondents in consequence of a granting of relief. For example, it appears that the applicants are still asking that we order that Kinesis revert to DD, although, curiously, they insist, in the face of queries from the panel, that they make this request in the full knowledge that the Tribunal would not grant such far reaching relief. We can only surmise that they recognize that were this extraordinarily far reaching remedy to be considered then this would clearly tilt the balance of convenience in their opponents' favour.

156. Consistent with what appears to be the central feature of their case, the applicants insist that were we merely to order that the respondents temporarily restore the pre-EDA discount structure that, then, the inconvenience to the respondents would be minor and the balance of convenience would favour the applicants. Again we cannot concur with this assessment. The respondents point out that the restoration of the discount structure in favour of the applicants may well give rise to demands from other customers for a similarly favourable discount. This may well lead to further disruptive litigation.

157. We repeat that it is not possible to determine the balance of convenience in light of the uncertainty surrounding the relief claimed. In any event, we have found that the evidence submitted by the applicants in support of their various allegations does not justify the granting of interim relief. We are also not persuaded that, absent a granting of interim relief, the applicants will sustain serious or irreparable damage. Given these findings it seems hardly relevant to assess the balance of convenience consequent upon granting a remedy when we have determined that there is no discernible basis for instituting a remedy at all.

RELIEF

158. As set out earlier, as a point of departure, the applicants have failed to unequivocally establish the relief they are seeking. So glaring is their failure to do so, that it merits separate mention.

159. In their supplementary papers, filed in November 2001, the applicants do not clarify the relief they are claiming. When pressed on this issue by the respondents, they refer to the relief they are claiming in their supplementary replying affidavit where, in response to the respondents contentions that their relief sought is deficient, they state that their notice of motion contains a prayer for *"further and/or alternative relief"* and that the Tribunal should grant such relief as it deems appropriate under this head. Clearly mindful of the outcome of the CAC's review of the relief granted by the first Tribunal panel they go on to say:[48]

[48] On appeal, in 03/CAC/Oct00, Selikowitz AJA remarked that the Tribunal is only permitted to grant alternative relief where a case was made out for that relief on the papers; appellants (*manufacturers*) were apprised of the alternative relief contemplated; and appellants (*manufacturers*) are granted a full hearing in respect of such alternative relief. [our italics inserted]

"The Applicants reiterate that the Tribunal should only grant relief under this head that differs from the relief claimed in prayers 3 to 11of the notice of motion after affording the parties an opportunity to address it in respect of such proposed relief." [Record, B2192]

160. In their Heads of Argument (para 22) the Applicants state:

"The interim relief order requested by the Applicants is set out in the notice of motion that was filed on 8 June 2000. In the interim, both the facts and the law relating to this interim relief application have changed."

161. The applicants then go on to state:

"It would accordingly be reasonable and just for the Tribunal to grant an interim order in accordance with the directions handed down by the CAC."

162. At the hearing on 18th March 2003, counsel for the wholesalers took great pains to articulate the "further and/or alternative" relief claimed in accordance with the order handed down by Judge Selikowitz in the CAC judgment, in other words, to address all the points of contention of the previous interim relief order. He contended that the wholesalers were now claiming relief as follows:

"The first to fifth Respondents are ordered to supply their products to the complainant on terms and conditions relating to discounts structures identical to those that applied to transactions between them and the complainant immediately before the conversion of DD to a joint exclusive distribution agency for their products."

163. However, two days later, during his argument in reply, counsel for the wholesalers contended that the relief contained in the original notice of motion on 8 June 2000 had not been abandoned, but that in fact was being resurrected, along with the new order sought. He contended that the respondents had known since inception that the complainant sought an interim order *inter alia* as part and parcel of the reversion to the *status quo ante,* including that relating to the terms and conditions as set out as to discounts (p419 transcript). They also argued that the Competition Appeal Court considered the granting of an interim order that encompasses the reversion to a *status quo ante* that has anticompetitive elements.

164. At the same time, the complainant moved to amend their Notice of Motion to incorporate the relief in the form of an addition to the original Notice of Motion.

"For the sake of safety and in order to avoid technical objections at some later stage, Mr Chairman, we are going to move for an amendment to the Notice of Motion, just to add what we told you on day one with the manner in which we think the order should be formulated."

165. Counsel for the respondents objected vehemently to this application to amend. He based his objection on the fact that it was being brought at the close of proceedings, after argument, and that it attempted to reinstate relief that was abandoned, having never been referred to in the applicants' papers.

166. We accept these arguments. While it is true that the CAC stated that the Tribunal is not necessarily limited to granting the exact relief set out in the Notice of Motion, we find that this does not change the fact that, after the matter was referred back to the Tribunal by the CAC, the applicants failed to specify clearly the relief sought. The applicants themselves acknowledged that the facts and law in relation to this interim relief application had changed. This strongly suggests that since the conditions under which the original relief was formulated had lapsed, the appropriate course was now for the Tribunal to determine appropriate relief. The respondents are justified in protesting their confusion as to what remedy is being sought against them.

Nature of Relief Claimed

167. The respondents contend that the relief claimed is deficient for various reasons. Firstly that the relief sought in prayers 3 and 9 of the original notice of motion is incompetent since, as all the respondents have already joined Kinesis, the relief contended for is no longer appropriate and outdated. Similarly, they argue that the relief claimed in prayer 4 is of final effect, therefore would end up undoing the Kinesis structure prematurely, before any final pronouncement on the complaint referral.

168. At the hearing, the respondents argued that insofar as the EDA is already in place and the applicants continue to operate profitably in the market, there is no imminent harm to them. There is evidence that the applicants continue to trade profitably, both in the manufacturers products and non-pharmaceutical products. They maintained that interim relief is only competent as long as there is ongoing harm.[49] To the extent that any harm was suffered, it has now passed, and accordingly the Tribunal cannot make an order in respect of that which has already occurred.

169. The respondents rightfully point out that the framing of competent relief is essential to any claim for interim relief. We agree with this and point out that this is especially so in the light of the CAC criticism of the relief provided for in the earlier decision of the Tribunal. This being a central

[49] Transcript page 272

issue in the CAC decision, it was incumbent on the applicants to frame the relief appropriately ab initio.

Relief sought with regard to Pharmacare

170. The respondents point out that there is no justification for the relief sought against Pharmacare since the relief sought, a reversion to the discount structure, actually reflects Pharmacare's existing pricing regime – in other words, Pharmacare is already discounting its price to wholesalers. The respondents request that, since pursuing a claim against Pharmacare amounts to vexatious litigation, the claim must be dismissed with an award of costs on a special scale by reason of pursuing a case against parties against whom there is no complaint.

171. The applicants have nevertheless persisted in seeking relief against Pharmacare, arguing, or so it would seem, that in the absence of relief it too may decide to amend its discount structure in the direction favoured by the other respondents. We concur with the respondents that this is wholly inappropriate and, were we competent to do so, may well have attracted a punitive costs order.

APPLICATION TO RE-OPEN

172. As already indicated, approximately one month after the conclusion of the hearing of this matter and reservation of judgment, the applicants applied for leave to re-open the hearing. This application was inspired by the promulgation, subsequent to our reservation of judgment, of certain amendments to the Medicines and Related Substances Act 101 of 1965 ('the Medicines Act'). These amendments were published on the 28th March 2003, under Proclamation Numbers R23 and R24 in Government Gazette No. 24627. Central to this application, this notice specified the dates on which various amendments to the Medicines Act would come into operation.

173. The proclamation provided for the 'staggered' introduction of key amendments. In particular the proclamation provided that whereas Section 22H(1)(a) would come into operation with effect from the 2nd May 2003, Section 18A would only come into operation from the 2nd May 2004, a full year later. The latter provision – Section 18A – prohibits any person from supplying *"any medicine according to a bonus system, rebate or any other incentive scheme."* It provides, in other words, that the manufacturers' list price shall be the applicable prices of pharmaceutical products to the final end-consumer. In short, trading in pharmaceutical products was, as of the 2nd May 2004, to be prohibited.

174. Under this scheme, intermediaries in the chain of distribution from manufacturers to end-consumer would be rewarded by means of a pre-determined service fee. The level of this fee would be determined by a yet-to-be-appointed pricing committee. Therefore, implementation

of the relevant section will be delayed until the Minister makes regulations based on the pricing committee's regulations.

175. The respondents had argued that after the coming into effect of Section 18A, an order restoring the discount structure could not be granted because it would conflict with the legislature's prohibition of 'rebate or any other incentive scheme'. Note that the applicants suggested that in their discussions with relevant government officials in the period preceding the proclamation of the Act, they had asked government that specific consideration be given to this interim relief application. That is to say, it was specifically contemplated, or so the applicants claim, that were single exit pricing not to be implemented immediately, the Tribunal would be entitled to order that the manufacturers continue – for a period of one year at least – extending a discount to wholesalers.

176. However, although the introduction of section 18A was delayed until May 2004, Section 22H(1)(a) of the Medicines Act was to come into effect from the 2nd May 2003. This section provided that "*no wholesaler shall purchase medicines from any source other than the original manufacturer*". This means that the various devices that the applicants claim to have employed in response to the manufacturers' refusal to grant them a preferential wholesalers' discount were no longer available to them. All of these devices amount to one or other form of arbitrage whereby the wholesalers procured pharmaceutical products for on-sale from those who had managed to acquire these products at a preferred price from the manufacturers – for example, dispensing doctors. These various forms of arbitrage would now, with effect from 2nd May 2003, be outlawed by the requirement enshrined in Section 22H(1)(a) that the wholesalers acquire medicines from no source other than the original manufacturer.

177. The applicants argue that the upshot of this staggered implementation is that the wholesalers cannot be rewarded (and therefore mitigate their loss) through the provision of a service fee because this is yet to be determined and will only become operative once the Minister makes regulations based on the pricing committees' recommendations, which committee is yet to be constituted. Moreover, they can no longer, by dint of the immediate coming into effect of Section 22H(1)(a), engage in arbitrage. Hence, they argue, the staggered coming into effect of the amendment places them, for a period of the year, entirely at the mercy of the manufacturers who refuse to give them a preferential discount.

178. While the applicants readily conceded that both parties had previously addressed the imminent coming into operation of the amendments to the Medicines Act, they pointed out that the "staggered or partial" implementation of the Medicines Act had not been contemplated either in oral argument at the hearings or in the papers. The applicants contended that the partial implementation of the Act constituted a

"*material new development*" to be considered by the Tribunal when determining the outcome of the interim relief application. The applicants argued that this 'new development' - the staggered introduction of the Act – impacted on our assessment of the restrictive practice and on the extent of harm suffered by them.

179. The respondents opposed the application to re-open the hearing. The application was heard on 23 May 2003. As indicated above we have dismissed the application and the reasons for this decision follow.

180. The imminent coming into operation of the Medicines Act was indeed discussed at some length in the hearings. The issue was however raised by the respondents who effectively argued that, in the event that we found for the applicants, and if, pursuant on this finding, we were of a mind to order the restoration of the wholesalers' discount, then we should consider the impact of the amendments to the Medicines Act which would, because of its support for single-exit pricing, effectively render nugatory the relief in question.

181. In our view then, the context in which the Medicines Act was raised in the hearings never contemplated that it would impact on our finding with respect to the existence, or otherwise, of a restrictive practice. Even on the respondents' own argument it could only have impacted on the relief granted. In the event, we have not found against the respondents and, hence, have not had to consider the granting of relief or the possible altered context provided by the amendments to the Act, amendments which, even on the respondents' own version only impacted upon the relief that we may have granted.

182. This much appears to have been conceded by the applicants in the course of the hearing to re-open although it was suggested, without further elaboration, by their legal counsel that the increased dependence of the wholesalers on the manufacturers may provide grounds for arguing 'relational dominance', the controversial anti-trust theory sometimes advanced in the context of franchise-related claims.

183. However, the applicants also argued that the staggered introduction of the Act significantly impacted on the quantum of harm suffered by them, particularly those of the applicants who relied for their continued viability upon 'round-tripping' – a particular form of arbitrage – effectively outlawed by the coming into effect of Section 22H(1)(a). It is clearly conceivable that these amendments to the Medicines Act will impact significantly on the business of the wholesalers and it may well be that the particular form in which it is introduced will exaggerate the impact. Clearly the Act envisages the demise of the wholesaler model. Insofar as *trading* in pharmaceutical products is prohibited, the wholesalers will have no alternative but to become fee-based providers of distribution services, in common with other providers of similar services. In a word, they will cease to exist as wholesalers and the recently proclaimed amendments to the Act set them firmly on course

to extinction in their present form. However, the additional harm, insofar as there is any, is a direct consequence of the legislature's decision to prohibit arbitrage in pharmaceutical products. It is not directly attributable to the conduct of the manufacturers. In short there is no nexus between the additional harm alleged and the alleged conduct of the respondents in this matter.

184. We should also emphasise that we have not found the alleged conduct of the respondents to be in contravention of the Competition Act. In our discussion of harm we have underlined the importance in anti-trust cases of demonstrating a causal connection between an anti-competitive practice and harm because it is possible that a weaker, less innovative competitor may find itself harmed in the process of competition by the pro-competitive activities of a more effective competitor. This broadly comports with our finding in this matter. In short, the applicants have been harmed, if at all, by a more effective competitor and now by a legislature intent on striking at the very heart of the wholesaler business model, namely, the trade in pharmaceutical products. We have also noted that the individual applicants have not simply ignored this changed environment, nor have they sought to rely solely upon regulatory intervention. There have been pro-competitive responses, including, but not limited to, arbitrage in pharmaceutical products, a practice now prevented by the legislature. But it is clear, and has been elaborated in our discussion of the question of harm, that these pro-competitive responses, including but not limited to round-tripping and other forms of arbitrage, have significantly ameliorated any damage generated by the manufacturers' conduct.

185. Following on from this, it is incumbent on us to point out, that we have not found significant harm as a result of the manufacturers' conduct. The applicants have cried wolf, for three years – that is, they have predicted their own imminent demise on countless occasions and, we have found, they have vastly exaggerated their predicament. If their credibility is now found wanting when, yet again, they seek to invoke significant harm, then they have only themselves to blame.

186. The respondents, who had no objection to us taking judicial notice of the amendment, argued that the imminent coming into operation of the Medicines Amendment Act had already been fully addressed both in the papers and at the hearings of the interim relief matter. They argued that the applicants were well aware of the impact of the amendments to the Medicines Act and the fluid state of the legislative environment earlier on in the proceedings. They referred to the record wherein the applicants admitted that it was not known when the Act would come into force, confirming their recognition that the timing of the Act's implementation was uncertain. In this sense, the date of coming into force of section 18A was not material new evidence.

187. The re-opening of hearings is an extra-ordinary measure and the courts have clearly identified the circumstances under which this

should be permitted. The most authoritative ruling on this question is that of Holmes JA in **Mkhwanazi v van der Merwe[50].** Here the learned Judge stated;

> *The discretion under Rule 28(11)[51] must be exercised judicially, upon a consideration of all relevant factors, and in essence it is a matter of fairness to both sides. It is inappropriate for judicial decisions to lay down immutable conditions which have to be satisfied before the relief sought can be granted. Over the years the Courts have indicated certain guiding considerations or factors, but they must not be regarded as inflexible requirements, or as being individually decisive. Some are more cogent than others; but they should all be weighed in the scales, the pros against the cons."…*
>
> *"The considerations which usually fall to be weighed, in an application by a plaintiff under Rule 28(11), include the following:*
>
> *i. The reason why the evidence was not led timeously.*
> *ii. The degree of materiality of the evidence.*
> *iii. The possibility that it may have been shaped to relieve the pinch of the shoe.*
> *iv. The balance of prejudice, i.e. the prejudice to the plaintiff if the application is refused, and the prejudice to the defendant if it is granted. This is a wide field. It may include such factors as the amount or importance of the issue at stake; the fact that the defendant's witnesses may already have dispersed; the question whether the refusal might result in a judgment of absolution, in which event whether it might not be as broad as it is long to let the plaintiff lead the evidence rather than to put the parties to the expense of proceedings de novo.*
> *v. The stage which the particular litigation has reached. Where judgment has been reserved after all evidence has been led on both sides and, just before judgment is delivered, the plaintiff asks for leave to lead further evidence, it may well be that he will have a harder row to hoe, because of factors such as the increased possibility of prejudice to the defendant, the greater need for finality, and the undesirability of throwing the whole case into the melting pot again, and perhaps also the convenience of the court, which is usually under some pressure in its roster of cases. On the other hand, where a plaintiff closes his case and, before his opponents have taken any steps, asks for leave to add some further evidence, the case is then still in medias res as it were.*

[50] 1970 1 SA 609 (A) at 616-7

[51] Under the Magistrates court Act Rule 28(11) provides that: 'Either party may, with the leave of the court, adduce further evidence at any time before judgment; but such leave shall not be granted if it appears to the court that such evidence was intentionally withheld out of its proper order.'

vi. The healing balm of an appropriate order as to costs.

vii. The general need for finality in judicial proceedings. This factor is usually cited against the applicant for leave to lead further evidence. However, depending on the circumstances, finality might be sooner achieved by allowing such evidence and getting on with the case, than by granting absolution and opening the indeterminate way to litigation de novo in all its tedious amplitude.

viii. The appropriateness, or otherwise, in all the circumstances, of visiting the remissness of the attorney upon the head of his client."

188. Our decision to dismiss this application to re-open the hearing is grounded in a detailed consideration of the factors outlined by Holmes JA. Hence:

189. While the evidence regarding the *staggered* introduction of the Act could not have been introduced at an earlier stage, the fact is that the substantive content of the legislation was accurately predicted and its impact, including the impact on harm, did form part of the submissions in the main application for interim relief. Indeed, as counsel for the respondents has pointed out, one or more of the applicants that claims to have relied on round-tripping in the period subsequent to the formation of the EDA specifically submitted evidence of the harm that would be generated in the event that the avenues for arbitrage were foreclosed. We have considered this evidence in the context of our general discussion of the question of harm.

190. This leads directly to the question of materiality, surely a consideration that must rank *primus inter pares* in deciding whether or not to re-open a hearing. This has already been considered. We simply restate that the imminent coming into operation of the Medicines Act was invoked by the respondents only in respect of a possible remedy arising from a finding against them on the restrictive practice allegations. We have not found against them on the restrictive practice and so no question of imposing a remedy arises. The staggered implementation of the Act has no bearing on whether or not a restrictive practice has occurred.

191. The applicants argue that the staggered coming into operation of the Act impacts on the quantum of harm suffered by them. Again we restate that the question of harm arising from the restrictive practice has been considered at considerable length. We have found that, far from being threatened by imminent demise, the applicants appear, for the most part, to be thriving. This is largely as a result of their competitive offerings vis-à-vis Kinesis (for example, one-stop purchasing and more frequent deliveries) which have allowed them to continue trading in the products of the Kinesis principals, and as a result of their pro-competitive responses to changed circumstances (for example, entering new wholesale markets). Indeed not only has this evidence led us to reject the applicants' submissions regarding harm,

but it has called into question their very credibility on this issue. There is, in our view, no prospect that the additional harm, if there be any, occasioned by the staggered introduction of the Act would tilt the scales in the applicants' favour.

192. Further, on the question of harm, we restate that we have found no evidence of a restrictive practice and hence there can be no question of *additional* harm *in consequence of* the identical restrictive practice allegations. If the respondents have caused harm to the applicants it has occurred through the legitimate pursuit of their business interests, through, that is, the process of competition. We have made it clear that evidence of harm on its own would, in any event, not serve the applicants' cause – there has to be a nexus between the harm and the conduct of the respondents. Had the applicants alleged new evidence of anti-competitive conduct on the part of the respondents, then they may have had stronger grounds for arguing that the hearings to be re-opened. In fact, the additional harm alleged, has been occasioned by the 'conduct' of the legislature. This conduct is no more attributable to the respondents than would be an unfavourable movement of the exchange rate or a tax increase. Both of these latter developments may cause harm to the applicants, but responsibility could not be laid at the door of the respondents.

193. On the balance of prejudice, we note that these are interim proceedings. After some three years and many thousands of pages of affidavits and other submissions, we cannot believe that the applicants, who are *dominus litis* in the complaint referral, would not be ready to move expeditiously to a full hearing on this matter. They will, at that stage, be at liberty to present this evidence of the additional harm it alleges. In other words, our refusal to re-open the hearing now does not mean that there will be no further occasion on which the additional evidence can be ventilated and, hence, they are not unduly prejudiced by our dismissal of their application. The respondents, on the other hand, have been at the receiving end of an application for interim relief for some three years, a factor that has itself delayed proceeding to the final stage of adjudication in this matter. They have pointed out that, in the context of this litigation, Kinesis has not been able to go out into the market and encourage others to purchase their distribution and logistical services – we accept that the respondents are prejudiced by further delay.

194. The stage which the particular litigation has reached is another important consideration. Suffice to point out that judgment had already been reserved in this application for interim relief when the application to re-open was made. Indeed, so late was the application to re-open that under all normal circumstances judgment would have already been handed down by the time at which we received the application. It is only because of the extraordinary volume of documents filed in this matter that judgment had not, by then, been handed down.

195. We are conscious of the need to reach finality in this application for *interim* relief which has already dragged on far beyond the time appropriate in applications of this nature. We are equally cognizant of Judge Holmes' concern that dismissal of an application to re-open a hearing may, itself, give rise to further litigation and delay. However, we cannot allow this to influence our judgment believing, as we do, that there are no persuasive substantive grounds for re-opening this matter. If the applicants wish to follow their legal rights then they must do so – we must, however, take the decision which we believe to be correct regardless of thinly veiled threats by the applicants to employ a decision that is not to their liking as a basis for generating further delay.

196. The application to re-open the hearings is accordingly dismissed.

FINDING AND COSTS

197. The applications for interim relief and to re-open the hearings are accordingly dismissed.

198. The applicants are jointly and severally liable for the costs of the respondents such costs to include the costs of 3 legal representatives.

_____ **18 June 2003**

D. Lewis **Date**

Concurring: M.G. Holden; U. Bhoola

For the parties:	Adv. AJ Nelson SC, Adv. J. Van Dorsten instructed by Roestoff Venter and Kruse Attorneys Adv. D. Unterhalter, SC, Adv. J. Wilson, Adv. AG Gotz, instructed by Webber Wentzel Attorneys (Respondents)