COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No. 07/X/Jan00

In the matter between

Novatis SA (Pty) Ltd	**First Applicant**
Roche Products (Pty) Ltd	**Second Applicant**
Boehringer-Ingelheim (Pty) Ltd	**Third Applicant**
Bristol Myers-Squibb (Pty) Ltd	**Fourth Applicant**
Schering-Berlin (Pty) Ltd t/a Berlimed	**Fifth Applicant**
Bayer (Pty) Ltd	**Sixth Applicant**
Hoechst Marion Roussel (Pty) Ltd	**Seventh Applicant**
International Healthcare Distributors (Pty) Ltd	**Eighth Applicant**
Abbott Laboratories SA (Pty) Ltd	**Ninth Applicant**
Sanofi-Synthelabo (Pty) Ltd	**Tenth Applicant**
MSD (Pty) Ltd	**Eleventh Applicant**
Eli Lilly SA (Pty) Ltd	**Twelfth Applicant**
Wyeth SA (Pty) Ltd	**Thirteenth Applicant**

and

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

Reasons for order

1. Introduction

The applicants and respondents are opposing parties in a Section 59 interim relief application (the main application) pending before us, in which the respondents in this application are the claimants.

Thus far the only papers filed with the Tribunal in the main application are the claimants' (respondents')[1] founding papers.

The applicants bring this interlocutory application to require the respondents to discover certain information, which they say they require in order to able to complete their answer. We have refused the application for the reasons that follow.

2. The rationale for the application

The applicants have brought this application at a stage in the main application when they are required to file their answering affidavits. If the respondents want to establish a case for interim relief in terms of Section 59, they need amongst other things to show that they have suffered "serious, irreparable damage."[2] These allegations the applicants say are made out in the claimants founding papers as bald assertions and no documentary evidence to support them has been filed. The applicants aver that they need access to the documentation in order to prove "conclusively that the claimants contentions are without merit". The applicants say that without discovery they will be prejudiced in responding to allegations in the founding papers and can do no more than make bald denials. If they only gain access to the relevant documentation at pre-hearing stage, they may well be forced to file further affidavits once they have sight of them. As a result, they are prejudiced by the failure to get discovery before they are obliged to answer. The respondents claim prejudice to them if discovery is permitted at this stage. They argue that a massive amount of documentation is required of them, most of which contains confidential information, and that, notwithstanding undertakings of confidentiality from the applicants, discovery would prejudice them if allowed to take place outside of the procedural umbrella afforded by the pre-hearing discovery process contemplated in the Rules where discovery takes place in a context regulated by the assigned member.

[1] For convenience we refer to the parties as applicants and respondents as they are in this interlocutory application, although these roles are reversed in the main application.
[2] Whilst the Act provides this step as an alternative to establishing that the purposes of the Act are being frustrated, the respondents have alleged they are suffering serious irreparable damage.

3. Is there a right to discover at this stage of the proceedings?

The High Courts, both at common law and in terms of their rules, recognise a right to discover at three different stages of the litigation process:

1. Before an action has been instituted;
2. After an action has been instituted but before pleadings have closed; and
3. After close of pleadings prior to a hearing.[3]

As we go on to discuss later, the ambit of discovery differs depending on the stage of the proceeding when it is exercised.

In the case before us the applicant is asserting a right to discover at the second stage. The respondent argues that the right has been asserted prematurely and that no right to discover exists at this stage of our proceedings in terms of the Tribunal's Rules.

The only discovery procedure mentioned in the Tribunal's Rules is to be found in Rule 24(1)(c)(v) which states that at a pre-hearing conference the assigned member may give directions concerning discovery. The obligation to convene a pre-hearing conference arises only "*after documents have been filed."* From this may be inferred that whatever right to discovery the Tribunal's Rules may afford a party at best these rights may only be asserted after pleadings have been closed. No right to discovery at this stage of pleadings i.e. *before all the documents are filed*, is expressly provided for in the Tribunal's Rules. On this point both parties are in agreement.

They also agree that the Tribunal is entitled to have regard to the High Court Rules whenever there is a lacuna in the Tribunal's Rules for a procedure. This is because of Rule 54 (1) (b) which states,

> *54(1) If, in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the member of the Tribunal presiding over a matter –*
>
> *a) May give directions as to how to proceed; and*
>
> *b) For that purpose, if a question arises as to the practice and procedure to be followed <u>in cases not provided for by these Rules</u>, the member presiding may have regard to the High Court Rules.*

The consensus ends over the proper interpretation to be placed on the underlined words. The respondents argue that because a procedure for discovery is provided for in Rule 24, this provision is exhaustive as to discovery and therefore discovery is a case *"provided for by these Rules*". Once the Rules provide a procedure the Tribunal is not entitled to utilize Rule 54 to apply the relevant High Court Rule.

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[3] See Herbstein and Van Winsen (1997), *The Civil Practice of the Supreme Court of South Africa*, Juta, 4th Edition edited by Mervyn Dendy, Chapter 32.

The applicants suggest that the only case provided for in the Rules is stage three discovery and not stage two discovery and as these processes are not mutually exclusive, a lacuna remains in the Rules for stage two discovery and hence we may exercise our discretion in terms of Rule 54.

We agree with the applicants' interpretation. Whilst both procedures relate to discovery, they are intrinsically different. The respondents approach to Rule 54 would have us elevate to the highest degree of formalism a rule entitling the Tribunal to look to other sources to guide it in its procedures where appropriate. They would have us interpret a rule designed to liberate the Tribunal from procedural doubts in a manner that strangulates it. That is not to suggest the words "*in cases not provided" for* are without significance. They are intended to avoid conflicts where the Tribunal's Rules already provide for a particular procedure; otherwise the Tribunal could be free to prefer the High Court Rules to its own whenever it chose. No such conflict exists in the present case and we accept that we are entitled to exercise our discretion to have regard to the High Court Rules on discovery prior to the close of pleadings.

4. <u>What right of discovery should be allowed?</u>

The applicants argue that the Tribunal can cure the discovery lacuna in its Rules by having regard to Rule 35 of the High Court Rules, the well-known rule that regulates the rights and procedures for discovery. In particular, we are referred to Rules 35(1), 35 (12), and 35(13). Rule 35(12), which creates a narrower right, says a party must make discovery of documents to the other party if *"reference is made"* to those document in its affidavits or pleadings. Rule 35(1) creates a much wider right of discovery. It says a party may require discovery from another party of documents *"relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) …".* The rule contains an important caveat. The discovery notice may not be given <u>before</u> the close of pleadings without leave of a judge. In addition, a further caveat is to be found in Rule 35(13), which is the rule that makes discovery rules applicable to application proceedings. It states that the provisions of Rule 35 apply to applications only "*insofar as a court may direct".*

We deal separately with the appropriateness of following the two rules.

<u>Rule 35(12)</u>

Rule 35(12) is the rule on which the applicants relied when they sent their discovery notice to the respondents. The respondents correctly point out that this rule only applies if the documents that the applicants want to discover are referred to in the respondents' affidavits. The respondents confidently claimed that none of the documents sought are referred to in their papers and invited the applicants to contradict them. They say that in the absence of such a reference, Rule 35 (12) cannot be relied on. The applicants in closing argument appear to have conceded this point, but seek to rely on the broader provisions of Rule 35(1) read with Rule 35(13).

Rule 35(1)

Unlike Rule 35(12), Rule 35(1) applies to relevant documents regardless of whether the opposing party has referred to them in its pleadings. This is presumably why the applicants now seek to rely on this rule. The applicants are correct in contending that if we felt it was appropriate we could apply this rule and order discovery of all or some of the documentation sought. We must however be persuaded that on the facts the present case calls for us to exercise our discretion in their favour.

The courts in application proceedings utilise the provisions of Rule 35(1) only in exceptional circumstances.[4] The one reported case where exceptional circumstances were found to exist was a case where the application involved a final interdict.[5] Section 59 proceedings are interim, not final.

Since interim relief proceedings in terms of Section 59 are analogous to High Court application proceedings in all material respects, we see no reason to depart from the approach adopted by the High Courts. No exceptional circumstances have been demonstrated to us to indicate that we should order discovery at this stage of proceedings. The applicants have done little to motivate why the documents in question require their attention now. They have not told us what may be in them nor indeed do they know if some or all these document exist. Their inquiry is speculative based on a skepticism that the respondents financial situation is as dire as suggested on the papers. But even if the documents were to yield evidence that the respondents are in robust health, their non-disclosure to the applicants at this stage does not prejudice the applicants, who bear no onus to establish that the respondents are not suffering harm. If the applicants dispute this then the respondents run the risk of not establishing this point if they fail to provide more evidence. Furthermore, the applicant could still at the pre-hearing stage call for discovery in terms of Tribunal Rule 24 or request that oral evidence be led in terms of Tribunal Rule 30(4). This is the approach taken in applications in the High Court and we see no reason to interpret our statute any differently.

Whilst the applicant may be right that it may be more efficient to deal with these issues now than to wait until discovery at a pre-hearing, it is equally true that if pleadings could not be exchanged without elaborate discovery in advance, litigation would also be expensive and inefficient. The extent of the documentation sought by the applicants in this application proves that this concern is not merely speculative. The reason discovery is wider after pleadings have closed is that the exchange of pleadings helps define the parameters of the dispute in question. Since at this stage the test for discovery is one of

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[4] See for instance Herbstein and Van Winsen (at p. 587). In *Moulded Components and Rotomoulding South Africa Pty Ltd v Coucourakis and another* 1979(2) SA 457 (W), Botha J, as he was then, said at 470D-E
"In application proceedings we know that discovery is a very, very, rare and unusual procedure to be used and I have no doubt that that this is a sound practice and it is only in exceptional circumstances, in my view, that discovery should be ordered in application proceedings."
This approach has been followed most recently by Southwood J in *Loretz v Mackenzie* 1999 (2) SA 72 (T).

[5] *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985(1) SA 146(T).

relevance the completion of pleadings will make it easier to make this determination than if it had to be made at an earlier stage where the extent of the dispute is still speculative.

We find that:

1. Rule 54 entitles us to consider ordering discovery of documents prior to a pre-hearing conference and before all documents have been filed;
2. In the application before us, the documents sought are not referred to in the respondents affidavits and accordingly would not be discoverable if we applied Rule 35(12) of the High Court Rules; and
3. An exceptional case is required to require discovery at this stage in terms of Rule 35(1), read with Rule 35(13), and that such a case has not been made out by the applicants.

The application is dismissed.

Although the application was unsuccessful it was brought together with an application for condonation, which the respondents initially opposed and subsequently withdrew their opposition to. Since we did not ask for argument on costs, costs are reserved.

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D.H. Lewis **Date**
Presiding Member

Concurring: D.R. Terblanche and N.M. Manoim