IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CASE NO: 53 / IR/ APR 00

CONCERNING THE MATTER BETWEEN:

NATIONAL ASSOCIATION OF PHARMACEUTICAL WHOLESALERS	First Applicant
NATAL WHOLESALE CHEMISTS (PTY) LTD T/A ALPHA PHARM DURBAN	Second Applicant
MIDLANDS WHOLESALE CHEMISTS (PTY) LTD T/A ALPHA PHARM PIETERMARITZBURG	Third Applicant
EAST CAPE PHARMACEUTICALS LTD T/A ALPHA PHARM EASTERN-CAPE	Fourth Applicant
FREE STATE BUYING ASSOCIATION LTD T/A ALPHA PHARM BLOEMFONTEIN (KEMCO)	Fifth Applicant
PHARMED PHARMACEUTICALS LTD	Sixth Applicant
L'ETANGS WHOLESALE CHEMIST CC T/A L'ETANGS	Seventh Applicant
RESEPKOR (PTY) LTD T/A RESKOR PHARMACEUTICAL WHOLESALERS	Eighth Applicant
MAINSTREET 2 (PTY) LTD T/A NEW UNITED PHARMACEUTICAL DISTRIBUTORS	Ninth Applicant

AND

GLAXO WELLCOME (PTY) LTD	First Respondent
PFIZER LABORATORIES (PTY) LTD	Second Respondent
PHARMACARE LTD	Third Respondent
SMITHKLINE BEECHAM PHARMACEUTICALS (PTY) LTD	Fourth Respondent
WARNER LAMBERT SA (PTY) LTD	Fifth Respondent
SYNERGISTIC ALLIANCE INVESTMENTS (PTY) LTD	Sixth Respondent
DRUGGIST DISTRIBUTORS (PTY) LTD	Seventh Respondent

REASONS FOR DECISION ON APPLICATION

FOR EXTENSION OF INTERIM ORDER

The applicants have applied for an extension of an interim order granted to them by the Tribunal on the 28th August 2000.

The relevant term in that order was:

> *(i) Respondents supply their products directly to the claimants and other wholesalers on terms and conditions similar to those that apply to transactions between them and the claimants and other wholesalers immediately before the conversion of Druggist Distributors (Pty) Ltd to a joint exclusive distribution agency for their products.*
>
> *(ii) the order remains in force until the earlier of:*
>
> *i. the conclusion of the hearing into the prohibited practices alleged by the claimants to have been committed by the respondents; or*
> *ii. the date that is six months of the date of the issue of this order.*

Subsequently the respondents launched an application to review that decision on 13 October 2000. They also applied to have the order suspended pending the review. Unlike a review, which must be heard by a full bench, a suspension application can be heard before a single judge.

On the 4 December 2000 Davis JP suspended the operation and execution of the order pending a review to a full bench of the Competition Appeal Court.

At the time of hearing this application:

1. The review application has yet to be heard by the Competition Appeal Court; and
2. The complaint has not yet been referred to the Competition Tribunal.

When the Tribunal grants an interim order, the order lasts until the conclusion of the hearing into the alleged prohibited practice or for a period of six months, whichever is earlier. However the order may be extended beyond this period. The provision in question is section 49(D)(5) which states:

> *If an interim order has been granted, and a hearing into that matter has not been concluded within six months after the date of that order, the Competition Tribunal, on good cause shown, may extend the interim order for a further period not exceeding six months."*

This application for extension was brought on the 28th February 2001. The significance of this date is that it was the last day on which the interim order would, but for its suspension have operated. The applicants were concerned that it might not have been competent for us to grant an extension once this period had expired and hence their haste in bringing these proceedings to us. Indeed such was their haste that the application was only filed with the Tribunal on the 27th of February (i.e the day before the expiry of the order) and it was entirely fortuitous that we had a panel convened on the 28th February to hear another matter and again fortuitous that the respondents legal team was before us in that matter and could conveniently be called upon to appear although they had no opportunity to file papers.

This urgency was entirely of the applicants' own creation and no satisfactory reason was given why the applicants waited till the eleventh hour to bring the application. Had the application been brought timeously the respondents would have had an adequate opportunity to answer and the applicants to reply.

The applicants sought to remedy this difficulty at the hearing by serving an amended Notice of Motion which provided for a rule nisi accompanied by an interim order on the following terms:

> *A rule nisi is hereby issued calling upon the Respondents to show cause on _____ at the Competition Tribunal, Pretoria, why an order should not be granted in the following terms:*
>
> > *1.1 Extending the interim order granted by the Tribunal in Case number 53/IR/APR 00 for the further period of six months provided for in section 49c(5) of the Competition Act 89 of 1998;*
> > *1.2 Directing the Respondents to pay the costs of this application should they oppose the relief sough by the Applicants herein.*
>
> *2. Pending the return day this rule nisi shall operate as an interim order in terms whereof the Tribunal's aforesaid decision and order is extended subject to the*

suspension order granted by the Competition Appeal Court under Case number 04/CAC/OCT00

The rule nisi the applicants argued would have the twofold virtue of (i) providing for the order to be extended within the requisite period, and (ii) allowing the respondents a reasonable time to show cause why the order should not be made final.

We have to decide:

1. Whether it is competent for us to grant a rule nisi and if so whether it is appropriate in the circumstances of this case; and if not
2. Whether we can grant an order on the current papers.

We have not addressed the issue of whether it is competent for us to extend an interim order that is subject to suspension. Although neither party considered that suspension was a bar to extension being ordered, subject to the suspension being set aside, we are less certain whether we may do so or if its is not within the competence of the review Court to make such an order itself or to refer the matter back to us to do so if the review is unsuccessful.

Rule Nisi

Harms defines a rule nisi as an order calling upon interested parties to show cause, if any on a fixed date why the rule should not be made final.[1] He goes on to say that it may or may not have interim effect and is especially well adapted for dealing with urgent matters. The order being sought in this case fits Harms' classification of a rule nisi with the qualification that it is accompanied by an order for interim relief pending the return day in the second prayer.

The respondents have argued that we do not have the power to grant a rule nisi.
Nothing in the Act or Rules expressly grants us the right to grant a rule nisi. The applicants argued that this right is implied in our broad discretion to regulate our procedures.[2] Whilst we do have this discretion we do not understand it to extend to the grant of a remedy not expressly authorized by the statute. The nature of the orders we may grant is set out in section 58. Nothing in that section authorizes us to grant the kind of rule nisi contemplated in this matter. Whilst it might be acceptable to request an order couched in the language of a rule nisi i.e calling upon a party to show cause why a rule should not be made final by a certain date, the objectionable aspect is the accompanying interim order sought on an ex parte basis. The tenor of the Act suggests that such an order is not competent. Section 49(C)(2)(a)

[1] See Civil Procedure in the Supreme Court – LTC Harms, at page 194
[2] See section 55(1) which states " Subject to the Competition Tribunal's Rules of Procedure, the Tribunal member presiding at a hearing may determine any matter for procedure for that hearing , with due regard to the circumstances of the case, and the requirements of section 52(2)".

requires us to give the respondent a reasonable opportunity to be heard, having regard to the urgency of the proceedings. What this means is that we give the respondent an opportunity to be heard even though in urgent circumstances that opportunity might have to be attenuated. However the right to be heard before granting the order remains sacrosanct. This is again echoed in the Act in section 52(2)(a) which says we must conduct our proceedings in accordance with the principles of natural justice. If we cannot grant an interim relief order without first giving the respondent an opportunity to be heard it follows as a matter of logic and consistent practice that we cannot extend such an order even on an interim basis without according the respondent the same right.

Secondly our discretion to extend a period in terms of section 49(D)(5) can only be on "*good cause shown*". This application has effectively been brought ex parte since although the respondents have had an opportunity to address us on the law and to make oral submissions they did not have the opportunity to file answering affidavits on the facts. Without having heard from the respondents who indicated they were opposed to the extension application we cannot accept that good cause has been shown which is a jurisdictional prerequisite for extension.

Thirdly even if we do have the power, which we doubt, this is not a matter on which a High Court would have granted a Rule nisi, accompanied by interim relief. As Corbett J pointed out in *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission*:

> *" The procedure of a Rule nisi is usually resorted to in matters of urgency and where the applicant seeks interim relief to protect his immediate interests."*[3]

In this instance urgency has been self-created. The applicants had ample time to bring the application and to provide the respondents with an opportunity to be heard.

Furthermore it is doubtful that the applicants have made out a cause of action, which would have met the standard required for the issue of a rule nisi in the High Court.

As Harms points out in his work in discussing the case of *Ex Parte Saiga Properties Pty Ltd[1997] All SA 474 E* :

> *" It is implicit in this decision that a rule nisi cannot be issued unless a cause of action is made out. A rule does not serve as a remedy for a bad cause."*[4]

We conclude that we cannot grant a Rule nisi accompanied by an interim order nor even if we have misconstrued our powers, would this have been an appropriate case to do so.

Good cause shown

[3] 1982(3) SA 654 at 674 H
[4] See Harms, op cit at page 195 fn 1.

The application is replete with allegations of the applicants' procedural difficulties and contains only one paragraph that appears to relate to good cause. That is paragraph 6, of the affidavit of Jaco Roestoff the applicants' attorney which states:

> *"Circumstances in the pharmaceutical industry have not changed for the better since the interim order was granted. In fact, the position of the Complainants has worsened as a consequence of yet a further exclusive distribution agency, known as Pharmaceutical Healthcare Distributors (Pty) Ltd, entering the market. In this regard the Tribunal is referred to Case No 98/IR/DEC 00".*

Whilst brevity in pleadings should always be commended and the applicant would be entitled to refer back to parts of the main record without having to regurgitate them, good cause shown requires something more than a statement that nothing has changed for the better since the interim order was granted. In our decision our panel did not find a case made out on irreparable harm to the applicants but rather found that interim relief should be granted because the purposes of the Act would be frustrated. The applicants' grounds appear to be premised on the allegation that irreparable harm to them is continuing. We cannot be expected to extend an order on grounds which we did not find to have been established when the order was originally granted. The other ground given is the entry of a new exclusive distribution agent in the market, which distributes on behalf of other pharmaceutical manufacturers. What this threat entails is not motivated and it is certainly not self-evident. The panel had in this case been concerned about the horizontal relationship between the respondent manufacturers(the first to fifth respondents) who owned the distributor (the sixth and seventh respondents). The panel obiter expressed the view that in circumstances exclusive agency agreements might be acceptable. Against this background to the order we fail to see how the facts alleged by Roestoff justify an extension. There must be some nexus between the findings of fact that formed the basis of the interim order and the " good cause shown" for extending the order.

One would also assume that an application for an extension order would address the balance of convenience of extending the order further, but this too has not been alleged.

We do not find that good cause has been shown on these papers and accordingly the application must fail.

The cost of this application shall be paid jointly and severally by the applicants the one paying the others to be absolved. The costs are to be restricted to the costs of one legal representative.

_____

Norman Manoim

2 March 2001
Date

Concurring: David Lewis and Diane Terblanche