THE COMPETITION APPEAL COURT

OF SOUTH AFRICA

CAC CASE NO: 29/CAC/JUL03

In the matter between :

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

and

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

---

J U D G M E N T

PATEL, AJA

[1] This is an appeal from a decision of the Competition Tribunal ('Lewis Tribunal') refusing the appellants certain interim relief against the respondents. The appellants also apply for condonation for their failure to file the appeal record timeously. The respondents have counter-appealed against the Lewis Tribunal's refusal to accommodate in the costs order an order requiring the appellants to pay qualifying fees of all experts used by the respondents in the preparation of their opposing papers.

[2] The appellants are wholesalers of pharmaceuticals products manufactured by the first to the fifth respondents. They will hereinafter be referred to as 'the wholesalers'. At the time of the hearing of the matter, the eighth appellant was in the process of being liquidated. The liquidators of the eighth appellant indicated that they did not wish to proceed with the appeal.

[3] The first, second, fourth and fifth respondents are multinational manufacturers of ethical and patented pharmaceutical products. The third respondent, Aspen Pharmacare, is a South African producer of generic pharmaceutical products. By the time this appeal was heard the first and fourth respondents had merged to form Glaxo Smith Kline ('GSK') and the second and fifth respondents had merged to form the Pfizer Pharmaceutical Group ('Pfizer'). There are therefore three manufacturer parties to this application, namely, GSK, Pfizer and Aspen Pharmacare. This was also the position when the Lewis Tribunal heard the matter. These respondents will be collectively referred to as the 'manufacturers'.

[4] When the appeal was called before us, counsel for the manufacturers indicated that the application for condonation for the non compliance with rule 19 of the rules of this Court was opposed on two grounds . Firstly, that the wholesalers had failed to provide a reasonable explanation for their failure to comply with Rule 19 and more pertinently that there were not reasonable prospects that the appeal would succeed. If the latter be the case then it would be unnecessary to consider the explanation of the wholesalers for their failure to timeously comply with rule 19. In the circumstances the Court proceeded to hear argument on the merits of the appeal, in order to determine both the application for condonation and, in the event of its success, the appeal itself.

[5] I proceed now to consider the merits. I do not propose to give a detailed background to the dispute. The Lewis tribunal, in my view, has in its judgment dealt fully with the historical background and with the nature of the wholesaling and pharmaceutical industry. It would serve no purpose in repeating the same. The dispute has its genesis in a decision by the manufacturers to establish and use an exclusive distribution agency ('EDA') for the distribution of their pharmaceutical products and to provide other logistical services. To this end and in May 2000 the seventh respondent, Druggist Distributors (Pty) Limited ('DD'), was converted from a wholesaler into a company performing logistics services on behalf of the manufacturers of pharmaceutical products. These logistics services include not only the distribution of the drugs but also the taking of orders and the collection of payment on behalf of the manufacturers. This is done for a fee agreed between each principal and the EDA. The functions performed by the EDA are therefore, save for the distribution and sale of medicine, different from the functions performed by the wholesalers.

[6] Upon its conversion into a logistics service provider, the name of DD was changed to Kinesis Logistics (Pty) Ltd ('Kinesis'). In May 2001, Kinesis and its holding company, Synergistic Alliance Investments (Pty) Limited ('SAI'), the sixth respondent were sold by

the manufacturers to Tibbeth & Britten (Pty) Ltd ('T&B'), an independent third party logistics provider. (Under the circumstances, why the sixth and seventh respondents remain parties to the dispute is as enigmatic as are many other aspects of this matter.) Before the conversion of DD into Kinesis, the wholesalers (including DD *qua* wholesalers) purchased the manufacturers' products at a discount of 17.5% of their list prices and then on-sold them to the retail sector. The discount offered by the third respondent, Pharmacare, was 10% and this has not changed.

[7] The gravamen of the complaint of the wholesalers is that the use by the manufacturers of an agent has and will impact negatively on their businesses in that there has been and will be a reduction in the historical discount offered to them. It is not in dispute that the appellants still trade with the manufacturers and receive discounts on their purchases. Stripped of all nuances in argument, what the appellants seek is a continuance of the *status quo* and an interdict preventing the manufacturers from dealing with an exclusive distribution agency. The appellants have not joined T & B to the proceedings knowing well that sixth and seventh respondents no

longer exist and did not exist at the time the application was heard by the Lewis Tribunal. T & B has a substantial interest in these proceedings and one would have thought that they would have been joined in the hearing before the Lewis Tribunal. I shall advert to this aspect a little later.

[8] An interim interdict is by its very nature a temporary and exceptional remedy which is granted by a court before the rights of the parties are fully determined. Due caution has to be exercised in the grant of the relief. Relief should only be granted if a proper case is made out (see Memory Institute SA CC t/a SA Memory Institute v Hansen and Others 2004(2) SA 630 (SCA) at para 10). It was common cause that s59 of the Act, before it was amended by Act 39 of 2000 with effect from 1 February 2001, applied as the application in this matter was brought before the amendment which substituted the current section 49C came into effect. Section 59 provided that the Tribunal "*may grant"* an interim 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.

The above requirements are however not determinative and even where all these requirements are present a court has a discretion to refuse an interim interdict.

[9] The wholesalers have not been expeditious in either bringing the application or proceeding with it. On 7 June 2000 the wholesalers lodged their complaint with the Competition Commission in terms of the then section 44 of the Competition Act 89 of 1998 ('the Act'). The wholesalers simultaneously filed an application for interim relief with the Competition Tribunal in terms of the then applicable s59 of the Act. On 28 August 2000 the tribunal ('Terblanche Tribunal') awarded interim relief to the wholesalers against the manufacturers in terms of s4(1)(a) of the Act. The interim interdict granted ordered the manufacturers to supply their products directly to the wholesalers on terms and conditions extant prior to the wholesalers resorting to the use of DD as an EDA. On 5 September 2001 this court reviewed and set aside the decision of the Terblanche Tribunal on the ground, inter

alia, that the order was vague, embarrassing and overbroad in statement (See *Glaxo Wellcome (Pty) Ltd v Terblance NO* [2001-2002] CLPR 48 (CAC). This Court was also of the view that the relief granted differed markedly from that sought before the Terblanche Tribunal. Accordingly the manufacturers were prejudiced in that they did not have a proper opportunity to meet the case and make the necessary representations.

[10] As is evident from the affidavit of Roets filed on behalf of the Respondents, a pre-hearing conference was held before Diane Terblanche to determine the further procedural steps which had to be followed in light of the above decision of this Court. The wholesalers were given leave to file further supplementary affidavits and the manufacturers, as they entitled, to file any further answering affidavits subject to the parties complying with the Competition Tribunal Rules. Further interlocutory skirmishes took place between the parties with regards to confidentiality and the filing of further affidavits. These are set out in the affidavit of Roets. I do not wish to delve further into tardiness of the wholesalers in bringing the application for interim relief to a finality nor whether the manufacturers may have adopted dilatory tactics save to state that approximately three years elapsed before the matter was reheard by the Lewis Tribunal and a decision given.

[11] The wholesalers were *domini litis* and they could have expedited the hearing. They were not entitled to adopt a *non possumus* position with regards to the application on the merits. In this time the merits of the wholesalers' claim could have been

properly ventilated and a decision reached as to whether the manufacturers had committed a prohibited practice. On this ground alone the Lewis Tribunal would have been entitled to dismiss the application. This view is fortified when regard is had to the provisions of section 59(2) and (3) of the Act before it was amended. These sub-sections are now re-enacted as section 49C(5). The legislature clearly intended, and continues to intend, that interim orders should serve only to ameliorate an urgent situation and to be of limited duration. To grant interim relief after such a long passage of time defeats the very object of interim relief pendent elite.

[12] On the papers the appellants have alleged contraventions of s4 ('horizontal restrictive practice'), s5 ('vertical restrictive practice') s8 ('abuse of dominance') and s9('price discrimination') of the Act. In the absence of any subsequent amendment to the notice of motion the answer as to what relief was sought by the appellants must be found in the notice of motion filed in June 2000.

[13] The relief sought by the appellants as evidenced by the Notice of Motion is the following:

1. The Applicants are hereby granted leave to bring the 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 participate 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 the 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.

11. The First to Fifth Respondents are otherwise ordered to restore their competitive relationships, inter se, to the status quo that existed prior to the establishment of SAI, by taking the following measures:

11.1 any director of SAI who is also a director of any or more or all of the First to Fifth Respondents, International Healthcare Distributors (Pty) Ltd, Merck(Pty) Ltd, Kite Logistics(Pty) Ltd or RTT Warehousing (Pty) Ltd, trading as Pharmaceutical Healthcare Distributors (here collectively referred to as “the competing companies”0 shall, within ten days of the date on which this order is granted, resign as a director either of SAI or of any one or more or all of the competing companies (as per his or her preference) so as to ensure that none of

the SAI directors simultaneously hold directorships in any of the competing companies; and/or

11.2 any director of DD who is also a director of any one or more of all of the aforesaid competing companies shall, within ten days of the date on which this order is granted, resign as a director either of DD or of any one or more or all of the competing companies (as per his or her preference) so as to ensure that none of the DD directors simultaneously hold directorships in any of the competing companies; and/or

11.3 the First to Fifth Respondents shall rescind, and forbear from engaging in, any and all joint decisions, policies and concerted practices as to prices, terms and conditions, delivery of products and all other matters affecting their competitive relationships, and they shall refrain from any and all communications regarding the same; and/or

11.4 the First to Fifth Respondents shall refrain from any and all contracts and communications with hospitals, pharmacists and doctors in the name or on behalf of SAI or DD; and/or

11.5 the First to Fifth Respondents shall refrain from engaging in any other conduct which would otherwise lessen or prevent competition between them.

12. This interim relief order shall remain in operation for the period stipulated in Section 59(2) and shall remain in operation notwithstanding any Notice of Appeal against this order.

13. Granting the Applicants such further and/or alternative relief as the tribunal deems appropriate;

14. The Respondents are ordered to pay the costs of this Application jointly and severally, the one paying the others to be absolved.

[14] It is common cause that the above unamended notice of motion remains the only clear statement of the relief sought by the appellants. The relief sought above is in the nature of prohibitory and mandatory interdicts which were to remain in force for period stipulated in section 59(2) of the Act as it existed before amendment

by the Competition Second Amendment Act 39 of 2000. The manufacturers for the reasons advanced in their answering affidavit timeously informed the appellants that the relief sought was incompetent. Despite an undertaking by the wholesalers to amend the notice of motion, the same was not proceeded with.

[15] The grant by the Terblanche Tribunal of the order was at least in letter inconsistent with the notice of motion and the fact that it was subsequently set aside by this Court would have made the wholesalers aware of the need to define the relief sought with precision so that the manufacturers would be alive to the case which they had to meet. The manufacturers supplementary affidavit deposed to by Randell pertinently raised the question as to what relief was being claimed in light of the EDA already being in operation (Supplementary answering affidavit para 4.1 and 4.2, volume 15, page B884).

[16] No amendments were forthcoming from the appellants despite an undertaking to do so. On the final day of argument the wholesalers application for leave to amend the relief to include the prayer that the manufacturers be ordered "to supply their products to the claimants (wholesalers) on terms and conditions relating to discount structures identical to those that apply to transactions between them and the claimants immediately before the conversation of DD to a joint exclusive distribution agency for their products" was refused. The Lewis Tribunal in effect and in my view correctly refused them the amendment since it was brought on the eve of the closure of the case and just as argument was being finalised. The grant of an amendment at such a late stage would have prejudiced the wholesalers. No appeal was filed against the Tribunal's decision not to permit the amendment and accordingly the wholesalers must stand or fall by the relief sought by them in the notice of motion.

[17] The appellants were content to place reliance on prayer 13 of

the notice of motion and leave it to the tribunal to grant whatever relief the tribunal deemed appropriate (Supplementary replying affidavit para10.2, volume 19, page B21920). Any prejudice suffered by the manufacturers could according to the wholesalers be overcome by the manufacturers being given an opportunity to address the tribunal (Supplementary replying affidavit para 710, volume 19, page B2513). No clear indication was given by the wholesalers as to what further and alternative relief they would be relying on. Whatever alleged hurdle stood in their way in precisely defining the relief they sought could have been overcome when they filed their supplementary rejoinder more than a year after the answering affidavits were served. The wholesalers in adopting this position appear to have lost sight of the decision reviewing and setting aside the decision of the Terblance Tribunal.

[18] The conduct of this litigation by the wholesalers on this aspect can only be described as cavalier in the extreme. The wholesalers have not effectively gainsaid the manufacturer's submission that in light of the disappearance of the sixth an seventh respondents and the advent of T&B the relief foreshadowed in paragraphs 3 to 11 is incompetent and moribund. Before I consider whether the wholesalers can rely on the omnibus prayer contained in prayer 13, I shall very briefly advert to whether prayers 3 to 11 of the original notice of motion afford the wholesalers any relief. This exercise is necessary because the wholesalers on the papers before us have equivocated as to whether they have abandoned the relief contained in these paragraphs.

PRAYER 3

[19] This prayer seeks an order restraining the manufacturers from converting Kinesis from a full-line wholesaler to an agency distributor. This prayer is clearly incompetent since the conversion that is sought to be interdicted not only occurred before the Lewis Tribunal heard the matter but T&B an independent EDA was already in existence. It

is settled law that an interdict cannot be remedy for past invasion of rights (see *Phillip Morris Inc v Marlboro Shirt Co S A Ltd* 1991 (2) SA 720(A) 735B).

PRAYER 4

[20] This prayer seeks an order requiring the manufacturers to terminate with immediate effect the exclusive agency agreements with Kinesis an entity with which the manufacturers had no dealing at the time the Lewis Tribunal heard the matter. If anything T&B had to be joined in the proceedings if this prayer was to have any meaning. In any event the grant of such any order would have had final effect before the merits could have been determined. Such final relief at an interim level is not envisaged by the Act. An order temporarily suspending the operation of the exclusive agency agreement may, however, have been competent.

PRAYER 5

[21] This prayer seeks an order restraining the manufacturers from inducing and/or allowing any other pharmaceutical manufacturer to participate in the EDA arrangement that Kinesis has with the manufacturers. The prayer has to stand or fall with prayer 4. For the

reasons mentioned above this prayer is equally incompetent. Moreover this prayer affects rights of third parties who were not before the Lewis Tribunal or this Court.

PRAYER 6 & 7

[22] Both these prayers are overbroad in their provenance. Prayer 6 which seeks to interdict the manufacturers from forming any new agency firm "to distribute their products on an exclusive and/or discriminatory basis" does not accommodate the *de facto* existence of T&B. Prayer 7 has a similar deficiency. In any event the papers do not support these prayers.

PRAYER 8

[23] This requires respondents to continue supplying their products to the wholesalers "on terms and conditions identical to DD" The relationship between the manufacturers and the wholesalers is one of purchase and sale. The relationship and the breadth of service offered by an EDA bears no comparison to warrant identical treatment. DD in any event does not exist. The papers do not justify the substitution of T&B with DD. The relief foreshadowed in this prayer appears to be anti-competitive, difficult to implement and

further imposes contractual obligation on the manufacturers which may be difficult for this court to supervise. In arriving at this conclusion I have no regard to the Medicines and Related Substances Control Amendment Act of 1997 which has introduced a single-exit price which would in any event make prayer 8 difficult to enforce.

PRAYERS 9, 10 & 11

[24] These prayers are incompetent since as adverted to earlier there exists a new reality and the conduct sought to be interdicted has already occurred. In particular the relief sought in prayer 11 is not borne out by the papers.

[25] In the premises I agree wholeheartedly with counsel for the manufacturers that the relief in paragraphs 3 to 11 is moribund.

[26] Can the wholesalers rely on the *clausule salutare* or the omnibus prayer as it is often referred to ask for the amended relief which was refused by the Lewis Tribunal? As pointed out earlier, the refusal by the Lewis Tribunal to grant the amendment on the pen-ultimate day of the hearing is not on appeal before us. In any event the extent to which a tribunal or court can grant amended relief under the *clausule salutare* is as observed by Van Reenen J in *Combustion Technology (Pty) Ltd v Technoburn (Pty)Ltd* 2003 (1) SA 265 (C)

para [11] 'not devoid of difficulty'. Para 11 of the judgment dealing with a *clausule salutare* is worthy of repetition:

"Isaacs *Beck's Theory and Principles of Pleading in Civil Actions* 5th ed at 61 says that it 'cannot be precisely indicated', whilst Erasmus *et al Supreme Court Practice* at B1-130A content themselves with that it 'will not assist a plaintiff who seeks relief of quite a different nature from that asked for in the summons'. It is not possible to distil generally applicable criteria from the decided cases in which the ambit of a prayer of that nature (the so-called *clausule salutare)* has been considered. (See *Trustees of the Orange River Land and Asbestos Co v King and Others* 6 HCG 260; *Colonial Treasurer v Senekal Municipality* 1910 OPD 7; *Queensland Insurance Co Ltd v Banque Commerciale Africaine* 1946 AD 272 at 286; Rooibokoord Sitrus (Edms) Bpk v Louw's Creek Sitrus Koőperatiewe Maatskappy Bpk *1964 (3) SA 601 (T) at 608A;* Luzon Investments (Pty) Ltd v Strand Municipality and Another 1990 (1) SA 213 (C) at 229G-230B.) Berman J in *Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 112 D-F provided the following, in my respectful view, instructive exposition thereof:

> 'Such a prayer can be invoked to justify or entitle a party to an order in terms other than that set out in the notice of motion (or summons or declaration) where that order is clearly indicated in the founding (and other) affidavits (or in the pleadings) and is established by satisfactory evidence on the papers (or is given), cf *Trustees of the Orange River Land and Asbestos Co v King and Others* 6 HCG 260 at 296-7. Relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefor has been fully canvassed, viz the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of "further

and/or alternative relief"".

[27] The above requirements are not fulfilled by the papers before us. Thus prayer 13 for "further and/or alternative relief" cannot be a carte-blanche for parties to claim whatever relief they deem appropriate and to seek the same at the hearing of the matter or for a court *mero motu* to grant whatever relief it considers appropriate in circumstances as in this case where the wholesalers were given an ample opportunity to pin their colours to the mast in order for the manufacturers to properly respond to the relief sought. They are in circumstances the authors of their own misfortune. This appeal falls to be dismissed on this further ground.

[28] It is therefore unnecessary to consider the further merits of the appeal save to say that but for the extravagant language at times, no fault in general can be found in the Lewis Tribunal's reasoning on the merits of the appeal and in particular against the Tribunal's finding that the balance of convenience does not favour the wholesalers in the grant of any interim relief.

[29] I need however to advert to two further matters in order to arrive at an appropriate order for costs. On the wholesalers own version there was no basis for the relief sought against Pharmacare since they at all times have had competitive access to their products. Pharmacare at all time applied the 10% discount structure to the wholesalers and this dispensation continued with the advent of the EDA dispensation. Nor, on the papers, is there even a scintilla of

evidence to show that Pharmacare had threatened a deviation from this dispensation or had threatened to treat the wholesalers any differently from the EDA. The Lewis Tribunal, in my view, correctly found that the claim against Pharmacare was baseless and inappropriate. An appropriate costs order is warranted under the circumstances. In my view Pharmcare is entitled to a special costs order on an attorney and client scale.

[30] Having taken into account the circumstances of the appellants' non compliance with rule 19 and the merits of the appeal, I am of the view as there are no real prospects of success the granting of condonation would not be warranted.

[31] The manufacturers have cross-appealed against the Lewis Tribunal's failure to include in the costs order an order to include the qualifying fees of experts used by the manufacturers in preparing their papers in opposition to this application. No reasons are given by the Lewis Tribunal. However, the costs order granted by the Lewis Tribunal, in my view, is correct since the wholesalers would be required to utilize the evidence tendered by these experts in the main application. Either the Tribunal or, if necessary, this court would then be in a better position to rule an appropriate order with regards to the qualifying fees of the experts. The cross-appeal is dismissed with costs.

[32] In the premises the application for condonation is accordingly refused with costs, the latter to include the respondent's costs in relation to the appeal save that the appellants are ordered to pay the third Respondent's (Pharmacare Limited) costs of appeal on an attorney and own client basis. The eighth appellant, in liquidation, is exempted from paying the costs occasioned by the hearing of this application.

_____

PATEL A.J.A.

JALI et SELIKOWITZ J.J.A. concurring