IN THE COMPETITION APPEAL COURT

CASE NUMBER: 02/CAC/SEPTOO

DATE: 13 OCTOBER 2000

In the matter between:

GLAXO WELLCOME (PROPRIETARY) LIMITED

First Appellant

PFIZER LABORATORIES (PROPRIETARY)

LIMITED

Second Appellant

PHARMACARE LIMITED

Third Appellant

SMITHKLINE BEECHAM PHARMACEUTICALS (PROPRIETARY) LIMITED

Fourth Appellant

WARNER LAMBERT SA (PROPRIETARY LIMITED

Fifth Appellant

SYNERGISTIC ALLIANCE INVESTMENTS

(PROPRIETARY) LIMITED

Sixth Appellant

DRUGGIST DISTRIBUTORS ([PROPRIETARY

LIMITED

Seventh Appellant

and

TERBLANCHE, DIANE, N.O.

First Respondent

FOURIE, FREDERICK, N.0.

Second Respondent

HOLDEN, MERLE, N.O.

Third Respondent

THE COMPETITION TRIBUNAL

Fourth Respondent

NATIONAL ASSOCIATION OF PHARMACEUTICAL

WHOLESALERS

Fifth Respondent

NATIONAL WHOLESALE CHEMISTS

(PROPRIETARY) LIMITED

Sixth Respondent

MIDLANDS WHOLESALE CHEMISTS
(PROPRIETARY) LIMITED, t/a PHARM

PIETERMARITZBURG

Seventh Respondent

EAST CAPE PHARMACEUTICALS LIMITED

t/a ALPHA PHARM EASTERN CAPE

Eighth Respondent

FREE STATE BUYING ASSOCIATION
LIMITED, t/a ALPHA PHARM BLOEMFONTEIN

(KEMCO)

Ninth Respondent

PHARMED PHARMACEUTICALS LIMITED

Tenth Respondent

L'ETANGS WHOLESALE CHEMIST CC,

t/a L'ETANGS

Eleventh Respondent

RESEPKOR (PROPRIETARY) LIMITED

t/a RESKOR

Twelfth Respondent

PHARMACEUTICAL WHOLESALERS
MAINSTREET 2 (PROPRIETARY) LIMITED,
t/a NEW UNITED PHARMACEUTICAL

DISTRIBUTORS

Thirteenth Respondent

J U D G M E N T

DELIVERED ON 13 OCTOBER 2000

DAVIS JP:

1. INTRODUCTION

On 28 August 2000 the Competition Tribunal, acting in terms of section 59(1) of the Competition Act, 89 of 1998 ("the Act"), granted an order of interim relief to the 5th to 13th respondents against appellants, of whom the 1st to 5th appellants are pharmaceutical manufacturers and importers who have established a joint exclusive distribution agreement for their products, the 6th appellant is a company formed by these manufacturers to establish a distribution agency and the 7th appellant is the distribution agency.

In granting an order the Tribunal justified its decision thus:

> "We find that an interim order is necessary in this case to prevent the purposes of the Act from being frustrated. The main purpose of the Act is to promote and maintain competition. The effect of the prohibited practice found in this case is to lessen competition in the distribution of pharmaceutical products. It is our view that it is reasonably necessary for us to give the interim relief order, as failure to do so will be allow (sic) the continuous frustration of the purposes of the Act. If we do not grant

the interim order and the claimants subsequently get a final order the competitive process and structure for the distribution of the respondents' manufacturers products will have been so skewed in favour of DD (7th appellant in the present appeal) and the respondents, that a final order may not be able to adequately address the effects of DD's conversion on the nature of competition in the distribution market."

Accordingly the Tribunal made the following order:

1. The claimants' application for interim relief in terms of section 59 of the Competition Act 89 0f 1998 is granted in respect of the respondents' alleged contraventions of section 4(1)(a) of the Act.
2. Respondents supply their products directly to the claimants and other wholesalers on term and conditions similar to those that apply to transactions between them and the claimants and other

   wholesalers immediately before the conversion of DD to a joint exclusive distribution agency for their products.
3. The order is to remain in force until the earlier of ;

   (i) 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 after the date of the issue of the order.

The appellants have now launched an urgent application to suspend the operation and execution of this order pending the final determination of an application for review and the setting aside of the Tribunal's decision and order in that matter and an appeal against such decision and order.

APPELLANTS' CASE

Mr Loxton, who appeared together with Mr Unterhalterand Mr Wilson, on behalf of appellants, submitted that this Court has a power to suspend the operation and execution of any decision of the Tribunal. In his view this would be consistent with the inherent jurisdiction of the High Court to stay the execution of a judicial order pending review or appeal proceedings. As Corbett JA (as he then was) stated in SAFCOR FORWARDING (PTY) LTD v NATIONAL TRANSPORT COMMISSION1982(3) SA 654 (A) at 675C-E:

> “The decisions of public bodies or officialdom sometimes bear hard on the individual. The impact thereof may be sudden and devastating. Therefore, as in the case of many other types of litigation, applications for the review of such decisions may require urgent handling and in proper circumstances the grant of interim relief."

Mr Loxton submitted that the High Court will grant interim relief in circumstances where (a) the applicant can show prima facie that its rights have been infringed and (b) the balance of convenience favours the granting of such interim relief. See SAFCOR FORWARDING (PTY) LTDsupraat 674-675; SOUTH CAPE CORPORATION (PTY) LTD v ENGINEERING MANAGEMENT SERVICES (PTY) LTD1977(3) SA 534 (A) at 545.

He thus contended that the same considerations should be applied in the present dispute to suspend the decision of the Tribunal. The Tribunal's decision should be suspended on the grounds that appellants have a prima facie right to the setting aside of the Tribunal's decision and order on review and or on appeal and that the balance of convenience favours the suspension of the Tribunal's order.

Before it is possible to canvass the merits of these submissions and hence the substantive justification for the appeal, it is necessary to examine a jurisdictional argument which was raised by respondents.

THE JURISDICTION OF THIS COURT IN SUSPENDING THE OPERATION OF AN ORDER IN TERMS OF SECTION 59(1)

Mr Nelson, who appeared together with Mr Van Dorstenon behalf of respondents, referred to section 38(2)(A)(d) of the Act which provides that the Judge President or any other judge of the Competition Appeal Court designated by the Judge President, may sit alone to consider an application to suspend the operation and execution of an order that is the subject of a review or appeal (my emphasis). Accordingly the Tribunal's interim order must be subject to either a review or an appeal before the Competition Appeal Court may consider the application to suspend the operation and execution of the order. When the application for a suspension of the Tribunal's order was launched by way of notice of motion, it was common cause that no application had been made to review the order of the Tribunal. An appeal however had been launched. Accordingly, Mr Nelson

referred to section 37(1) (b) of the Act which provides that the Competition Appeal Court may consider an appeal arising from the Competition Tribunal in respect of

(i) any of its final decisions other than a consent order made in terms of section 63; or

(ii) any of its interim or interlocutory orders that may, in terms of the Act, be taken on appeal. Section 58 of the Act which sets out the right of appeal to the Competition Appeal Court,makes no mention of any interlocutory or interim decision which may be taken on appeal. Thus there is no express provision which recognises an appeal of an order granted by the Tribunal in terms of section 59.

Mr Nelson's contention that a decision of the Tribunal in terms of section 59 is not appealable is supported by a decision of Lewis Pon behalf of the Tribunal in SOUTH AFRICAN RAISINS (PTY) LTD v SAD HOLDINGS LTD(Case No: 16/IR/DEC 99). In deciding that a section 59 decision was not appealable, Lewis Psaid:

> "The statute clearly does not accord a right of appeal to the Competition Appeal Court in respect of Section 59 hearings. The claimants are correct in submitting that neither section 17 nor section 58 - or, for that matter, any other provision in the Act - provides for an appeal against an order of the Tribunal for interim relief. Moreover, the claimant's contention that the common law and High Court treatment of interim relief supports their interpretation of the Act, is well-founded. In fact, it would appear that the legislature intended section 59 to provide a remedy similar to a simple interlocutory interdict, which at common law is not appealable, as opposed to an order that finally and definitively disposes of the matter."

In adopting this approach, Lewis P attempted to reconcile the provisions of the Act with established common law as articulated by Howie JAin GUARDIAN NATIONAL INSURANCE COMPANY LTD v SEARLE NO1999(3) SA 296 (SCA) at 301-302, namely:

> "Where this approach has been relaxed (the right to appeal the interim order) it has

been because the judicial decisions in question, whether referred to as judgments, orders, rulings or declarations had three attributes. First they were final in effect and not susceptible of alteration by the court of first instance. Secondly they were definitive of the rights of the parties, for example, because they granted a definitive and distinct relief. Thirdly, they had the effect of disposing of at least a substantial portion of the relief claimed."

An order granted by the Tribunal in terms of section 59 does not represent a final order because it enures only for for a limited period. Furthermore where a person complains against a prohibited practice, or where the complaint is initiated by the Commissioner in terms of section 44, an inquiry which follows an investigation in terms of section 45 and which would then proceed in terms of sections of 50 or 51 will have to canvass the same issues which were examined by the Tribunal when it awarded interim relief in terms of section 59. On the basis of this legislative scheme the order granted by the Tribunal does not meet with the three fundamental attributes to which Howie JA in the GUARDIAN NATIONAL INSURANCE case, supra had made reference.

Mr Loxton submitted that although not all interim orders under section 59 are appealable, the words "interim or interlocutory decisions that may, in terms of this Act, be taken on appeal" should be interpreted to be congruent with the common law. Hence interpretative guidance should be obtained from the test set out in ZWENI v MINISTER OF LAW AND ORDER1983(1) SA 523 (A) at 533 that judgments and orders are appealable which have the following attributes:

"first a decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

Mr Loxton contended that an interim order in terms of section 59 complied with all these requirements. It was final in effect and was not susceptible of alteration by the Tribunal. Unlike an interim interdict granted in terms of the common law, a section 59 order could not be altered by the Tribunal on application by either of the parties or mero motu before the end of the six-month period prescribed in terms of section 59 or a hearing by the Tribunal which would flow from a section 44

complaint, whichever is the earlier. As the section 59 order was not capable of anticipation nor was there any guarantee either that the Competition Commissioner would refer the complaint made in terms of section 44 to the Tribunal, or that the complaint would be referred on the same basis as the grounds upon which the Tribunal granted the interim order in terms of section 59 , it could not be contended that such an order effectively functioned in the same fashion as an interim order granted in terms of the common law.

A section 59 order granted a distinct and definitive relief and accordingly the second element of the test was met. Mr Loxton was constrained to argue that the third element of the ZWENI test was not applicable to section 59 proceedings as in effect a section 59 order was a parallel procedure to that initiated in terms of the complaint under section 44. Accordingly the consideration of "expense and convenience" that lie at the root of this third requirement, do not apply in respect of section 59 proceedings and for this reason Mr Loxton submitted that this element was not applicable in proceedings governed by section 59.

Mr Loxton attempted to bolster this argument by reference to section 34 of the Constitution of the Republic of South Africa 108 of 1996, namely that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate an independent and impartial Tribunal or forum. Thus when the empowering statute is unclear to whether a right to appeal lies to a court of law, he contended that the Constitution obliges a court which is vested with judicial scrutiny of an administrative organ to hear appeals from decisions of that organ. The determination of this question does depend upon an examination of the architecture of the Act. Once a complaint is initiated in terms of section 44, an investigation takes place pursuant to section 45 et seq. In terms of section 50, the Competition Commission can refer the dispute to the Tribunal or issue a notice of non referral in terms of section 50 of the Act. If a decision is taken not to refer, the complainant can refer the matter in terms of section 51. Then a determination as to whether a prohibited practice has been established will be examined by the Tribunal. To this extent thus the hearing by the Tribunal will dispose of the substance of the complaint which was initially canvassed in terms of section 59. For this reason it is my view that the ZWENI test is inapplicable to the order granted under section 59. The matter will be canvassed

again by the Tribunal save in a case where the complainant does not want to take the matter further (in the event of non referrral) .For reasons which I shall set out presently, the ambiguity, if any, should be resolved in favour of respondents. In so far as the recourse to section 34 of the Constitution is concerned, appellants have already had a right to have the dispute resolved by an independent and impartial Tribunal, the Competition Tribunal, which has been set up under the Act for the precise purpose of dealing with matters, such as the granting of orders in terms of section 59 of the Act. The members of the Tribunal were appointed for their expertise in the field of competition law and the very purpose of the Tribunal was to ensure an impartial adjudicatory process particularly regarding decisions of the applicable administrative body , being the Competition Commission.

To extend a constitutional right to a right of appeal in the context of the scheme of interim orders set out in the Act would do far greater violence to the architecture of the Act than to any right of the appellants to subvert the purpose of an interim order by an attempt to wrench a right of appeal from the provisions of section 34. In short section 34 of the Constitution would trump any legislative attempt
to eradicate an appeal in a dispute for which an appeal is appropriate as opposed to an interim order which does not meet the test for an appeal. In order to justify these conclusions it is necessary to examine, albeit briefly, the purposes of section 59. Lewis Pprovides a crisp outline thereof in the SOUTH AFRICAN RAISINS (PTY) LTD case supra,

> "Our conclusion that an interim relief order in terms of section 59 is not appealable, serves to avoid an outcome that would frustrate the whole purpose of providing an interim relief remedy in competition matters. If the granting of an interim order in terms of section 59 were appealable and the interim order stayed, as is argued by the respondents, this would destroy the main object of section 59 -to provide interim relief pending final determination of the complaint following a full investigation by the Commission."

In short, the purpose of section 59 is to ensure that serious and irreparable harm to a complainant would be prevented and that the very purposes of the Act would not be frustrated by the perpetuation of a prohibited practice prior to the section 44 complaint running its legislative course.

En passant, the Competition Second Amendment Bill 2000 which was before Parliament when this

matter was argued provides for a right of appeal against a section 59 order (section 49C in the Bill) ‘ that has a final or irreversible effect.’ The explanatory memorandum cryptically states that ‘the Act does not clearly address whether an interim relief order may be appealed. The proposals clarify this point.’

In terms of section 1(2) the Act must be interpreted in a manner that is consistent with the Constitution and which gives effect to the purposes set out in section (2). Section (2) makes clear that the purpose of the Act is to promote and maintain competition in the Republic in order, inter alia, to promote the efficiency, adaptability and development of the economy and to provide consumers with competitive prices and product choices. Were an act, which on clear evidence has been found to constitute a prohibited practice, be allowed to continue until a final determination takes place the very purpose of the Act itself would be undermined. Accordingly, to the extent that there may be any ambiguity in the Act, this would justify the conclusion to which I have come.

The question then arises to the reason for a right to appeal when the order in terms of section 59 is subject to a review; that is the reason as to why a different conclusion holds in the case of an application for a review of a section 59 order. The Constitution establishes a new regime of legality in South Africa. Consequently it is understandable that an application for a review of a decision in terms of section 59 could give rise to an appeal to this Court to suspend the section 59 order of the Tribunal. Were the Tribunal to have acted in a manner which would justify a review, that is a decision that could be questioned on any number of review grounds based on the principle of legality, it would be legally proper to consider a suspension of such an order. An order which is not congruent with our newly established principle of legality should not be allowed to stand, no matter that its purpose is to protect a clear interest recognised by the Act during an interim, defined period.

The question therefore arises to the meaning of ‘subject to a review’ . Mr Unterhalter, who argued this aspect of the case on behalf of appellants, submitted that once there was a right to a review, then it could be said that the application to suspend the operation in execution of an order in terms of section 59 was the subject of a review or appeal in terms of section 38(2)(A)(d). This cannot be correct. As Mr Unterhaltercorrectly submitted, were the Act to have denied a party a right to have such a decision reviewed, that provision in the Act would be unconstitutional. In short, all such

decisions must inherently be subject to a right of review. As such Mr Unterhalter'sreading of section 38(2)(A)(d) would amount to an unnecessary tautology. The section however makes sense when it is read to mean that areview has been launched ; that is a specific review proceeding against an order in terms of section 59 .This would then give rise to specific review proceedings, as opposed to a general constitutional or common law right of review.

At the time that the proceedings were launched, no such application for review had been brought. After the hearing was over, appellants launched an application on 15 September 2000 to review the Tribunal's order. Accordingly appellants now argued that to the extent that the launching of review proceedings was a prerequisite to this Court being able to exercise jurisdiction in terms of section 38(2)(A)(d) to suspend the operation in execution of the decision pending review proceedings, that requirement had been satisfied

Owing to this development after judgement had been reserved , I instructed the Registrar of the Court to advise the parties that they had a further week within which to file additional heads of argument which pertained to this defined issue. Both sides took advantage of this opportunity and the Court is indebted to counsel on both sides for their considerable assistance.

THE SUBSEQUENT REVIEW APLICATION AND ITS EFFECT ON PROCEEDINGS

Mr Loxtonsubmitted in his supplementary heads that, to the extent that section 38(2)(A)(d) requires an applicant to re-launch review proceedings the defect could be cured by a later application. In this he relied on SMITH v KWANONQUBELA TOWN COUNCIL1999(4) SA 947 (SCA) at 954D where Harms,JA said,

> "Apart from making perfectly good sense and being practical, it is legally sound. A party to litigation does not have the right to prevent the other party from rectifying a procedural defect. Were it otherwise one party would for instance not be entitled to amend a pleading, especially not after the filing of a valid exception. The ratification in the present instance does not affect any substantive rights…"

Smith'scase dealt with the question of the validity of a resolution authorising a person to institute legal proceedings on behalf of a council. Thus this case dealt , inter alia, with the issue of whether a person who wrongly believed that he had the necessary authority to act on behalf of a town council and so intended to act had the necessary locus standi if such actions were ratified with retrospective effect. Of particular relevance was the question to whether reliance could be placed upon a

ratification which took place after the objection to the necessary authority had been taken. The judgement then deals with the issue of ratificationn ex post factothe objection . Harms JA summarised the position thus at 954 F-G,

> “In SOUTH AFRICAN MILLING... the matter was also approached from a procedural point, namely that a party is not entitled to make out a case in reply and that a ratification relied upon in reply infringes this rule. This part of the ratiois strictly speaking not apposite to the present case because the issue here was decided upon a stated case which did not this court... in MOOSA AND CASSIM NNOhas clearly adopted, as correct, the refutation in BAECK & CO... of the approach and to state that I fully subscribe to that view."

This is a different problem from that confronting this court. In the present case the question arises to whether it is competent for this Court to grant an order suspending the operation of an order of the Tribunal. The court's jurisdiction in this regard is dependent upon whether the initial order of the Tribunal is subject to a review. When appellants came before this Court it had not launched a review. The papers were not drawn on the basis of a review; respondents were never given an opportunity to answer the case as to whether a prima faciecase for success in an application for review had been made in that the very application for review came after the court had reserved judgment on the initial application. For this reason the decision in SMITH'scase regarding ratification of authority which in turn relates to questions of the law of agency cannot be extended to provide authority for the submission urged by Mr Loxton, namely that the time of the launching of the application for a review of the Tribunal’s order is irrelevant to the problem of jurisdiction.The improper basis upon which appellants initially approached this Court is clearly evident in the initial founding affidavit of Mr Randall, the financial director of second applicant. Notwithstanding that no application for review of the Tribunal's order had been launched when he made his affidavit, he sets out inter alia,

> "The grounds on which the applicants seek to review and set aside the Tribunal's order."

Only on 15 September 2000 was an affidavit deposed to by Mr Randall in which he set out the precise reasons for the relief sought, that is a review. It is so that the initial founding affidavit appeared to conflate an application toappeal and one to review without ever applying for a review of the Tribunal's action taken in terms of section 59 of the Act. But the point of principle is this: when a party comes to court without launching an application for a review and the case is then argued by both parties on the basis of an absence of an application for a review and judgement is then reserved on that basis, it would work substantial prejudice if the decision is then to be taken on the grounds of a later application for a review, the very merits of which could have a significant bearing upon the outcome of the decision reagrding the application to appeal the section 59 order.

Without a proper application for review before the Court coupled with the necessary papers, it is difficult to conceive how a court can reasonably be expected to decide the matter on the basis of the very same test set out by Mr Loxtonas to whether it would be competent to suspend the initial order on the basis of balance of convenience.It is for this reason that the dictum of Potgieter JA in Thermo RadiantOven Sales (Pty)Ltd v Nelspruit Bakeries (Pty)Ltd1969 (2) SA 295(A) at 310 is applicable, '' .. the crucial time for determining the jurisdiction of a court to entertain an action is at the time of the commencement of the action.'' The test is whether the court had jurisdiction when the proceedings commenced. Coin Security Group (Pty)Ltd v Smit NO andOthers1992(3)SA 333(A) at 340A-B.

In view of the conclusion to which I have come regarding the lack of jurisdiction to hear such an appeal, it is unnecessary for me to express any view on the merits of the substantive case as set out by appellants.

ORDER

For the reasons given, the application to suspend the operation in execution of the Tribunal's order (under Case No 68/IR/JUN00 dated 28 August 2000) is dismissed with costs, including costs of two counsel.

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DAVIS, JP