IN THE COMPETITION APPEAL COURT

CASE NO. 04/CAC/OCT00

IN THE MATTER BETWEEN:

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

JUDGEMENT: Delivered on 4 December 2000.

Davis JP:

1. **Introduction**

On 28th August 2000 the Competition Tribunal ('the Tribunal') made an interim order in terms of Section 59 of the Competition Act 89 of 1998 ('the Act') in terms of which

(i) the claimant's application for interim relief in terms of Section 59 of the Competition Act 89 of 1998 was granted in respect of the respondent's alleged contravention of Section 4(1)(a) of the Act

(ii) 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.

(iii) 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.

On 5 September 2000 applicants (being the respondents in the application before the Tribunal) lodged an application to suspend the operation and execution of the order pending the final determination of an application for a review and the setting aside of the Tribunal's decision and order including the order for costs.

On 13 October 2000 this court dismissed the application on the ground that no appeal lay to this Court in respect of an interim order of the Tribunal granted under section 59 of the Act. It further held that while the court had jurisdiction to grant a suspension of an order granted under section 59 of the Act pending review thereof, it could not do so when an application for review had not been filed prior to the commencement of the proceedings.

Before judgment was delivered on the 13th of October 2000 but after the application had been heard on 11 September 2000, applicants launched an application to the court for an order that decision of the Tribunal be reviewed and set aside.

Accordingly it is not disputed that this court now has jurisdiction to adjudicate upon the application for the suspension of the operation and execution of the order of the Tribunal.

2. Factual Background

> The distribution of pharmaceutical products in South Africa has traditionally been the business of pharmaceutical wholesalers. The wholesalers, who buy products from the manufacturers at a general discount of 17,5%, sell these products to pharmacists and other smaller buyers. This system changed when a joint exclusive distribution agency, International Healthcare Distributors (IHD) was established by several manufacturers and commenced business on 1 November 1993. Wholesalers found that the previous system changed after the establishment of IHD as they could no longer purchase pharmaceutical products directly from manufacturers who were members of IHD. Of major significance was that these wholesalers no longer obtained the 17,5% discount.

In July 1998, 5th to 13th respondent filed a complaint with the Competition Board (which operated under the then Maintenance and Promotion of Competition Act 96 of 1979, (the 'old Act')) alleging that IHD and its members contravened the provisions of the this Act in forming a joint exclusive distribution agency. In 1997 the applicant manufacturers came together under the so-called project NASA with the intention of establishing a similar joint exclusive distribution agency for their products. They formed a company called the Synergistic Alliance Investment (SAI) to acquire seventh applicant ("DD"), a national full line wholesaler, with the intention of converting it into a joint exclusive distribution agency. DD and the 13th respondent were the only national full line wholesalers. Presumably as a precautionary measure respondents applied to the erstwhile Competition Board to have the project exempted from the provisions of the old Act prohibiting horizontal collusion on conditions of supply.

In February 1999 the Board announced that it would conduct a formal investigation into exclusive distribution agencies in the pharmaceutical industry pursuant to a complaint against IHD. It found that there was prima facie evidence that restricted practices existed or could exist. SAI announced that that it would not go ahead with its project until the Board had issued its final report. This was published in May 1999. The board found that the joint exclusive distribution agency for pharmaceutical products would constitute a horizontal restricted practice prohibited under the old Act. The Board found that the formation of a joint exclusive distribution agency in a pharmaceutical market would have the effect of limiting distribution facilities in the market, restricting entry into the wholesale distribution market, maintaining or enhancing the prices or other consideration for pharmaceutical products and preventing the distribution of pharmaceutical products in the most efficient and economic manner.

By the time the Competition Commission was established in terms of the Act, the Minister of Trade & Industry decided not to implement any recommendations of the Board and thus declare exclusive distribution agencies in the pharmaceutical industry to be unlawful. He considered that the mechanisms provided under the new Act could resolve the matter more effectively and that complaints could be pursued with the Competition Commission.

In March 2000, SAI announced that it had acquired DD and it would go ahead with its plan to convert DD into a joint exclusive distribution agency for its members' products. Manufacturers who were members of SAI would in future sell all their products through DD. Ownership of the products sold through DD would remain with the manufacturer until the sale to relevant customer. DD would take all orders and collect payments on behalf of the manufacturers. DD advised all the manufacturers' customers of the change and attached a guide on how DD would operate. Soon thereafter DD issued a single credit application form on behalf of all the manufacturers to be completed by businesses wishing to open accounts with DD to buy their products. At the same time DD issued a single set of terms and conditions for the supply of the manufacturers' products.

Pursuant to these developments an application, in terms of section 59, was launched with the Tribunal on 28 April 2000. On 28 August 2000 the Tribunal made an order the terms of which have been set out above.

3. Grounds of Review

The grounds from which applicants seek to have the Tribunal decision and order reviewed and set aside include the following:-

1. The decision is void for vagueness

2. The decision was ultra vires in that the order was over broad, the order frustrates the purpose of the Act, the decision is not justifiable in relation to reasons given for it, the relief granted in the order extends to persons who were not parties to the proceedings.

3. The Tribunal made a material mistake of law regarding the incidence of the onus of proof in the Act and in disregarding benefits of the DD distribution structure that could have been gained otherwise than by the implementation of DD.

4. The Tribunal failed to take into account various relevant considerations and took account of irrelevant considerations.

5. Applicants were not given a fair hearing in respect of the relief granted in the order.

Applicants further allege that they will suffer severe and irrecoverable loss if the order operates until the application for review is determined and the review application then proves to be successful. They also contend that the complaints would not suffer substantial prejudice if the order was suspended pending final determination of the review application.

4. Test for granting suspension pending review

Mr Loxton, who appeared together with Mr Wilson on behalf of the applicants submitted that the applicants should succeed in obtaining a suspension of the Tribunal's decisions if they could show that:

i) they had prima facie prospects of success on the application for review of the Tribunal's decision and order; and

ii) the balance of convenience favoured the suspension of the Tribunal's order.

In short Mr Loxton's approach to the test that should be applied before the court invoked its powers in terms of section 38 (2A)(d) of the Act, namely the power to suspend the operation and execution of an order that is the subject of a review or appeal, was to follow the approach to stay applications developed in the common law. See, for example, Safcor Forwarding (Pty) Ltd v National Transport

Commission 1982(3)SA654(A) at 674-675; Southern Metropolitan Substructure v Thompson 1997(2)SA799(W) at 805.

Mr Nelson, who appeared together with Mr van Dorsten on behalf of respondents, submitted that, in the exercise of its discretion to grant a stay, the court must give careful consideration to the purposes of the Act. In short the purposes of the Act would be frustrated if the interim order granted by the Tribunal, after careful consideration of the available facts, were to be suspended in circumstances, where the review application is without substance, was launched merely to confer jurisdiction on the court to hear the stay application and represented a dilatory tactic that amounted to an abuse of the court process.

In considering such a decision, the court must balance the rights of an applicant to a stay with those of the party in whose favour the section 59 order has been granted by the Tribunal. Further the decision must take place within the context of legislation designed to promote competition. In this connection Mr Nelson cited Lewis P in South African Raisins (Pty) Ltd v SAD Holdings Ltd (Case No. 16/IR/Dec99), "our conclusion that an interim 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 the 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".

For these reasons Mr Nelson cautioned against the adoption of the same approach to stay applications as developed in accordance with the common law in that the fundamental question must always be whether or not the granting of the stay would have the effect of advancing the purposes of the Act. Accordingly he submitted that in the exercise of its discretion the court should consider whether or not:

1. Real and substantial injustice required a stay to be granted;
2. Injustice would result if the stay is refused;
3. The balance of convenience favoured the granting or the refusal of the stay; and
4. The applicants have substantial prospects of success in the review application.

In my view, a careful examination of the submissions made by both counsel

reveals that there was less of a difference between the approaches respectively contended for by Mr Loxton and Mr Nelson than would superficially appear to be the case. In considering whether to grant a stay, a conclusion that an applicant can show prima facie that his or her rights have been infringed and that there is a balance of convenience favouring the granting of such an order will weigh heavily with a court in the exercise of its discretion.

However in taking this decision the court has a discretion to grant or refuse an application to suspend an order. As Traverso J said in Santam Limited v Norman and another 1996 (3)SA502(C) at 505 F "It is a discretion which should be exercised judicially but generally speaking a court will grant a stay of execution where real and substantial justice requires such a stay or where injustice would otherwise be done" see also Strime v Strime 1983(4)SA850(C) at 852.

The position can be summarised thus: In exercising its discretion a court must, of necessity, enquire as to whether there is a prima facie case that an applicants rights have been infringed. Further the court must locate where the balance of convenience lies. But that is not all that has to be considered in the exercise of the discretion to grant such an order. Within the context of the Act there is the additional consideration that the suspension of an interim order in terms of section 59 can, if granted too easily, subvert the very purpose of an important provision of the Act which created this kind of order. Hence the court must exercise its discretion by means of a careful consideration of the policy considerations of the act in the context of the facts of the case.

If the test for the successful application for a stay of the execution of a section 59 order nods too generously in favour of the applicant, Mr Nelson's contention that the granting of a stay would subvert the very purpose of an order designed to ensure the promotion of pro-competitive behaviour would be justified. For this reason a court must enquire as to whether the applicant can show prima facie that its order has infringed a right which applicant enjoys, further that the balance of convenience favours the granting of such interim relief within the context of the factual matrix of the case and that the injustice caused by the perpetuation of the order would be greater than the possibility of jeopardizing the purposes of the Act promoted by the continuation of the section 59 order itself.

5. Grounds of Review

As set out above, applicants submitted that there were a number of grounds on which the Tribunal's order could be justifiably reviewed. However in his argument to the court, Mr Loxton concentrated attention on the vague and ambiguous nature of the order. He referred for definitional support to the

decision in Genticuro AG the Firestone (SA) (Pty) Ltd 1972(1)SA589(A) at 610 D where Trollip JA said, vagueness connotes 'being not only of double but also of indefinite meaning which cannot be resolved with the requisite degree of certainty by proper construction".

Applying this definition, Mr Loxton submitted that the key paragraph in the order of the Tribunal was incapable of being interpreted with the requisite degree of certainty by means of a proper construction. That paragraph provided that the respondents supply their products directly to the claimants and other wholesalers on terms and conditions similar to those that applied 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 (our emphasis) .

Mr Loxton submitted that the word 'similar' was a particularly difficult word to interpret. As Schreiner ACJ noted in R v Revelas 1959(1) SA75(A) at 80B-C "obviously there are degrees of similarity or likeness, some approaching, and exceptionally perhaps even reaching sameness, others amounting to know more than a slight resemblance. The similarity may be basic or superficial, general or specific. I do not think that the words "a similar" in GN 363 should be given a meaning "the same". That is at most a rare sense. And moreover the history of the Government Notices indicates that the word "same" was abandoned in favour of "similar". The change could hardly have been designed to make it clear that sameness was intended: rather it must been aimed at substituting the notion of resemblance".

In S v Mothobi 1972(3) SA841(O) at 842 E-F Kumleben AJ(as he then was)said "Die woord of begrip ' soortgelyk is egte een wat vir extensiewe of beperkende uitleg vatbaar is. Gevolglik kan daar nie met sekerheid bepaal word welke van hulle binne of buite die besteek van die voorwaarde val nie. Hoewel 'n verwysing na 'n 'soortgelyke misdaad' in 'n voorwaardevan opskorting soms in 'n bepaalde verband in orde mag wees , meen die Hof vir die redes vermeld dat die onderhawige geval dit 'n onwesenlike mate van onsekerheid skep".

Mr Loxton submitted that the approach adopted by Kumleben AJ was equally applicable to the order of the Tribunal. The manner in which the order had been framed left great uncertainty as to how terms of a contract must be understood. For example did the qualifying word 'similar' relate only to an enquiry as to comparative price or to other terms of the contract? To what extent could terms be adjusted to take account of external exigencies such as inflation? Similarly there was no clarity as to the meaning of a wholesaler as employed within the

context of the order.

Mr Loxton also contended that the manner in which "wholesaler" was employed in the offending paragraph led to uncertainty in that it was unclear whether the class of person contemplated was limited to companies registered with the South African Pharmaceutical Council as wholesalers or whether it included all companies who purchase applicants products. If it was only to include the former, then the order was unclear as to whether the class included only full line wholesalers such as respondents who offer a short line wholesalers. If it was the latter it was unclear whether the class was limited to non retailers who purchase the principles products for on sale to retailers or whether it also included retailers and retail buying groups who purchase applicants products for sale to other retailers.

Mr Loxton also attacked the logic of the reasoning of the Tribunal in justifying the grant of the order. In paragraph 67 of the Tribunal's decision, Ms Diane Terblanche writing on behalf of the Tribunal said: "the order we have issued compels the respondent to supply the claimants and other wholesalers on the same terms and conditions as before the advent of DD". By contrast the order which was granted referred to terms and conditions "similar to those that applied to transactions between them …."

Although applicants have launched an application in terms of Section 66 of the Act to have ambiguities in the order clarified, Mr Loxton submitted that section 66 only empowers the Tribunal to clarify its decision and vary its order if, on a proper construction, the meaning thereof is ambiguous. However the Tribunal was not empowered to alter the substance of the decision or order. The ambiguity and/or vagueness in the order was such that it could not be clarified without altering the very intention of the Tribunal and for this reason any such ambiguity or vagueness could not be cured in terms of section 66.

Applicants' further submission that it was not granted a fair hearing in respect of the relief granted in the order is relevant to this question.

In terms of paragraph 8 of the Notice of Motion for interim relief in terms of section 59 of the Act, respondents approached the Tribunal for an order in terms of which respondents would be ordered the continue supplying their products to applicants on terms and conditions identical to those given by respondents to DD. This was the nature of their case. The deliberations before the Tribunal were predicated upon this form of relief and there was no opportunity given to applicants to provide their views on any alternative approach or alternate relief of the kind which was granted by the Tribunal in terms of its order. Were the Tribunal to have granted the relief sought in paragraph 8 of the Notice of Motion, the relief which should have been granted by the Tribunal was to order that

applicants were to continue to supply products to respondents on terms identical to those given by applicants to DD.

In his response, Mr Nelson submitted that applicants were attempting to place imaginary jurisprudential obstacles in respondents way by presenting certain words as ambiguous rather than conceding that they admitted of some surmountable interpretive difficulty. As Young J said in R v deKock 1965(2)SA380(SR) at 384 C "the fact that the true interpretation of an Order is a matter of difficulty and even great difficulty does not necessarily imply that the Order is ambiguous for the purposes of the ambiguity rule. If I am driven to a particular conclusion then for me there is no ambiguity".

For this reason Mr Nelson submitted that the word 'wholesalers' could only constitute a reference to wholesalers with whom the manufacturers have engaged previously in business. Accordingly it would include both full and short line wholesalers. There was evidence before the Tribunal that the respondents were the only remaining full line wholesalers. There was therefore no need to make reference to other wholesalers if the order was intended to refer only to full line wholesalers. On the assumption that the order incorrectly referred to other wholesalers this should not be a basis for setting aside of the order and in particular depriving the wholesalers, to whom it correctly referred, from obtaining interim relief.

In terms of the Concise Oxford Dictionary the word similar is defined as "of the same kind, nature, or amount; having a resemblance (your house is similar to mine; we have similar tastes)". Mr Nelson thus submitted that in the context of the order, the word could be given its dictionary meaning. In short the Tribunal had made it clear that what was meant was that applicants must sell on the same terms and conditions as applied before the 29th of May 2000.

Relying upon a purposive interpretation to the order, Mr Nelson submitted that the Tribunal intended to restore the status quo to the fair competitive environment that existed prior to the 29th of May 2000. This meant that manufacturers competed in setting blue book prices at certain levels and wholesalers competed by passing on a portion of the wholesaler margin. To ensure that competition was restored manufacturers were directed to restore the wholesalers' ability to compete with one another on an equal footing. The decision of the Tribunal thus recognized that the complaint that the manufacturers had bandied together and tampered with existing price structures in a manner that was uncompetitive. This conclusion was justified on the evidence presented to the Tribunal and accordingly the order granted was designed to restore the status quo ante.

Given these competing arguments the test to be applied in granting such an order becomes critical. While Mr Nelson correctly contended that it would be improper

to grant a stay in circumstances whether the review application was without substance or formed part of dilatory tactics which amounted to an abuse of the court process, most cases have more distinct shades of gray. The essential question, within this factual context, has less to do with these considerations and more with the determination of how substantial the prospects of success in the review application must be before a court will make an interim decision of this nature. Clearly the more substantial the prospects of success may be in the review application, the greater the degree of substantial injustice which would follow were the stay not to be granted.

In my view, applicants must show that they have a justifiable case, that is a case which, on their papers, justifies a conclusion that a successful review may be prosecuted. Expressed differently, the question that arises is whether the court on the papers can reasonably come to the conclusion that the application for review before another court may be successful. In my view such a conclusion is justified in the present case.

The order was made by the Tribunal and not a court. Thus the reliance by Mr Nelson on dicta of Trollip JA in the Genticuro case cannot simply be applied to the order of a tribunal. Although Mr Nelson also cited Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg and Co Inc 1996(3)SA 355(A) at 362-363 as support for his argument , this case(as with the others cited) dealt with the award of an arbitrator which was to be made an order of court. In the present case, the problem is not only about ambiguity in that the order granted not by a court employs a different formulation to the relief sought in the notice of motion. In addition the order employs different language from the very explanation given by the Tribunal as to reasons for the order which it granted. The case law cited above reveals that it is a legitimate argument to contend that the word 'similar' is ambiguous. Such a conclusion does not require a process of creative lawyering to renders the word uncertain. The phrase "other wholesalers" may be interpreted in the manner contended for by respondents but there is a legitimate argument regarding the ambiguity of the phrase which renders this part of the order itself vague and ambiguous.
When the Tribunal grants an order which is different from that contained in a notice of motion great care should be given to its meaning and purport and further there should be no inherent linguistic difficulty for the parties being able to comply therewith. The consequence of non-compliance with such an order can be serious in that non compliance can be visited with severe penalties.

For these reasons I find that on the ground of review for vagueness and ambiguity, these is a clear basis for applicants to approach this Court for a stay.

6. Balance of Convenience

In Olympic Passenger Service (Pty) Ltd Ramlagan 1957(2)SA382(D) at 383F, Holmes J (as he then was) said "by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against prejudice the respondents that it be granted. In clarifying the scope of this dictum Magid J said in Verstappen v Port Edward Town Board & Others 1994(3)SA569(D and CLD) at 576 H "I do not believe that the learned judge intended to suggest that the manner in which the grant or refusal of an interdict would affect the immediate parties to the litigation was the only matter relevant to a determination of the balance of convenience. Where, as in this case, the wider general public is affected, the convenience of the public must be taken into account in any assessment of the balance of convenience" see also Corium (Pty) Ltd & Others in Myburgh Park Langebaan (Pty) Ltd & Others 1993(1)SA853(C) at 858F.

This latter dictum supports the principle contained in the submission of Mr Nelson, namely that in competition law the weighing up of the balance of convenience does not depend only upon a consideration of the interests of the immediate parties. In considering the balance of convenience, attention must also be given to the broader objective sought to be achieved by the Act and whether there is clear evidence that the conduct with which an applicant for such a stay wishes to persist will be contrary to the purposes of the Act. This consideration must weigh heavily against such applicant irrespective of the adverse financial consequences that the initial order of the Tribunal may entail. Consequently Mr Nelson referred to the reasons given by the Tribunal for the interim order, namely "if we did 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 would have been so skewed in favour of DD 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".

Were the prohibited practice allowed to continue the pattern of competitive prices for the distribution of respondents' products could be so skewed that the final order may not be able to correct the position.

For this reason Mr Nelson submitted that it was clear that the Tribunal was mindful of the fact that the anti-competitive arrangement that the applicants set up resulted in a significant financial benefit to the applicants that was derived directly from a reduced competition for the distribution of their products and which rents, but for their concerted action would in the ordinary course of business have accrued to wholesalers.

Mr Loxton submitted that the applicants would suffer a severe and irrecoverable loss if the order was not suspended pending review and applicants were in due course successful in the application. The order was, in his view, so vague that despite its best efforts applicants were unable to comply therewith. Accordingly

they ran a risk of being found subject to contempt of court proceedings and fined in terms of section 61 of the Act. Mr Loxton contended that applicants expended approximately R39m in converting DD into a distribution agent and upgrading its infrastructure in distribution services with an additional project cost of R51m being budgeted.

When the matter came before the Court, Mr Nelson applied, at the proverbial eleventh hour and somewhat tentatively, for leave to cross-examine certain representatives of the applicants on the contents of certain confidential affidavits setting out potential loss. The confidential affidavit, setting out respective financial positions of the parties, provided competing versions of the financial loss which may be suffered by the parties respectively were the Tribunal order to continue in force on the one hand or be suspended on the other.

These competing versions notwithstanding, it is clear that, were the Tribunal's order to continue to operate, applicants would suffer significant financial loss (although Mr Nelson did attempt, without clear evidence to suggest that being part of multi-national giants applicants loss was insignificant in relative terms). The Tribunal found that 'the manufacturers joint control of the distribution agency ensures that rents derived from the reduced competition for the distribution of their products accrue to them and not to some independent third party. It thus effectively ensures a transfer of these rents from the wholesalers to the manufacturers'.

Viewed in these terms, this dispute turns on competing claims to the rents derived from the distribution of pharmaceutical products. No compelling case was made out before the Tribunal (if its decision is any guide) or in the papers before this Court as to the broader societal interest particularly those of consumers whose interests may be affected by the outcome of this dispute. The Tribunal was also not able to arrive at a conclusion as to whether respondents would suffer serious, irreparable damage were the order not to be granted.

It is likely that there will be prejudice to both parties depending on the outcome of this decision. In the light of the clear case which applicants have made out to justify an application for review to set aside the order of the Tribunal and the further evidence which is available as to the financial loss which could be suffered in the event that the order continues, I am satisfied that the balance of convenience in the specific context of this case sufficiently favours a granting of the order as sought

7. Order

For the reasons set out:

(a) The operation and execution of the order of the Competition Tribunal under case number 68/IR/Jun00 dated 28 August 2000 is suspended, pending the final determination of an application for the review and the setting aside of the Competition Tribunal's decision and order including the order for costs.

(b) The costs of this application, such costs to include the costs of two counsel, shall be paid jointly and severally by the respondents the one paying the others to be absolved.

Davis JP