COMPETITION APPEAL COURT OF THE REPUBLIC OF SOUTH AFRICA

CASE NO. 07/CAC/DEC00

In the matter between:

NOVARTIS SA (PTY) LTD	1st Appellant
ROCHE PRODUCTS (PTY) LTD	2nd Appellant
BOEHRINGER INGELHEIM (PTY) LTD	3rd Appellant
BRISTIOL MYERS SQUIBB (PTY) LTD	4th Appellant
SCHERING-BERLIN (PTY) LTD t/a BERLIMED	5th Appellant
BAYER (PTY) LTD	6th Appellant
ROLAB (PTY) LTD	7th Appellant
HOECHST MARION ROUSSEL LTD	8th Appellant
INTERNATIONAL HEALTHCARE DISTRIBUTORS (PTY) LTD	9th Appellant

and

NEW UNITED PHARMACEUTICAL DISTRIBUTORS (PTY) LTD (UPD) (FORMERLY MAINSTREET 2 (PTY) LTD)	1st Respondent
NATAL WHOLESALE CHEMISTS (PTY) LTD t/a ALPHA PHARM DURBAN	2nd Respondent

MIDLANDS WHOLESALE CHEMISTS (PTY) LTD T/a ALPHA PHARM PIETERMARITZBURG	3rd Respondent
EAST CAPE PHARMACEUTICALS LTD t/a ALPHA PHARM EASTERN CAPE	4th Respondent
FREE STATE BUYING ASSOCIATION LTD t/a ALPHA PHARM BLOEMFONTEIN (KEMCO)	5th Respondent
PHARMED PHARMACEUTICALS LIMITED	6th Respondent
L'ETANGS WHOLESALE CHEMIST CC t/a L'ETANGS	8th Respondent
RESEPKOR (PROPRIETARY) LIMITED t/a RESKOR	9th Respondent

JUDGMENT : DELIVERED JUNE 2001

DAVIS J.P.

On 11 October 1999 respondents brought an application for interim relief against appellants in terms of section 59 of the Competition Act 89 of 1998 (the Act) on 20 December 1999. On 17 February 2000 the Competition Commission accepted respondents' complaint. However appellants applied to the Competition Tribunal ('Tribunal') to dismiss the application on the basis that respondents lacked ***locus standi*** at the time of the launching of the application.

The Tribunal found that acceptance by the Competition Commission was a pre-requisite for a valid complaint in terms of section 59 and that accordingly the fact

that the Competition Commission had not accepted the complaint at the time that the application was launched by respondents was in itself fatal to the application. Having held that the respondents did not have the ***locus standi*** to bring the application it dismissed the application.

Pursuant thereto the Tribunal made the following cost order:

"1. The respondents who were parties to the dismissal application (the first, second, third, fourth, sixth, ninth, twelfth, thirteenth and fourteenth) are awarded costs of that application as follows –

i) In the case of the sixth respondent the costs of one attorney

ii) In the case of the other respondents the costs of two representatives is authorised provided that the fees of the additional representative may not exceed one half of the first representative.

2. The costs of the main application are reserved to be determined at the same time as the costs of the renewed interim relief application are determined provided that –

i) The applicants file and serve the renewed application by no later than 31 January 2001; and

ii) If they do not the respondents will be entitled to approach the registrar to have this matter set down to determine costs

iii) If any respondent to the present main application is not cited as a respondent in the renewed application such respondent

may also approach the registrar to have the matter set down to determine its costs."

The fifth appellant then appealed to this Court against the Tribunal's order that respondents were not liable to pay fifth appellants costs in the main application. The respondents then cross-appealed against the decision of Tribunal on the basis that the Tribunal had erred in finding that acceptance by the Competition Commission was a pre-requisite for an applicant to have ***locus standi*** to apply for interim relief in terms of section 59 of the Act.

THE APPEAL.

Mr Eiser, who appeared on behalf of fifth appellant, submitted that the decision of Tribunal in dismissing the main application on the grounds that the appellant had not complied with section 59 read with section 44 of the Act was a final decision based upon the 'selfstandige en afdoende verweer' See ***Masuku and Another v Mdlose and Another*** 1998(1) SA 1 (SCA) at 11 H-I. He further submitted that it was not competent for the Tribunal to order another tribunal which would hear a renewed application to decide the costs of the main application. As the Tribunal is a creature of statute and its powers were sourced in the statute, it could not decide ***mero motu*** and outside the powers granted to it in terms of the Act to make such an order.

Mr Nelson, who appeared together with Mr van Dorsten on behalf of respondents, submitted that the cost order made by the Tribunal was justified in

law. He referred to section 57(1) of the Act which provides that, subject to sub-section (2) and the Tribunal's rules of procedure, 'each party participating in the hearing must bear its own costs.' Section 57(2) of the Act did not alter this principle in the context of the present dispute, because it provides the Tribunal with a discretionary power to award costs in hearings consequent upon a referral of the complaint in terms of section 51(1). Accordingly the Tribunal is empowered with a discretion to make a costs order which must be exercised judicially after consideration of all the relevant facts. As **Van Niekerk J** said in ***Ganlan Investments (Pty) Ltd and Another v Trilion Ltd and Another*** 1996(3) SA 692(C) at 700 'It is trite law that an award of costs is a matter wholly within the discretion of the trial court and it must be exercised judicially under consideration of the facts of each case'.

Mr Nelson also referred to the reasoning employed by the Tribunal in arriving at its decision. It found ***inter alia*** that the regulations of the Competition Commission may well be ***ultra vires*** that is in the interests of the parties to deal with the matter, and further that the requirement for acceptance by the Commission appeared to escape all the parties and not merely the respondents, who had they been alerted, may well have corrected the defect before further costs were incurred. Accordingly the Tribunal concluded: "We believe that the interest of justice would not be served by making a costs award in respect of the main application at this stage and costs in this respect should be reserved".

The reasoning employed by the Tribunal reflected both a careful consideration of

all the facts and a judicial exercise of its discretion in coming to ia decision not to award costs in respect of the main application. Mr Nelson also referred to Rule 58(1) of the Tribunal Rules which do not place any limitations on the Tribunal's discretionary power to make an order for costs. Accordingly if a renewed application was heard there would be nothing to prevent the Tribunal seized with that application from allocating costs based on the evidence at its disposal. If the question of costs in the main application were to arise, the Tribunal would, have the jurisdiction to order costs because the first application would be closely associated with the renewed application.

As **Price AJA** said in **Sonia (Pty) Ltd v Wheeler** 1958(1) SA 555 (A) at 562: "Mr Lazarus argued that even if the Eastern Districts Court has jurisdiction to order cancellation of the contract, its jurisdiction does not extend to the money claimed for a refund of the price paid and costs. He contends that the claim for the cancellation of the sale cannot be used as a stepping stone to the money claimed so as to give the court extra jurisdiction. It is argued that if the money claims stood alone and there was no claim for cancellation, the Court would not have jurisdiction. Assuming this to be so, assuming that the Eastern Districts Court could not entertain a claim for a refund of the purchase price if that claim stood alone it nevertheless seems to me that every consideration of convenience and common sense indicates that were such a money claim if so closely associated with the claim for cancellation of the contract, as in this case, and is a consequential claim, following on the cancellation, the same Court which has

jurisdiction to decree cancellation should have jurisdiction to hear the money claim for a refund of the purchase price, and to order costs. A claim for costs is no less a money claim than the claim for refund of the price. A claim for costs does not differ from any other claim sounding in money".

In the present dispute, the costs of appellants' incurred in the dismissal of respondent's application on the basis that it lacked ***locus standi*** to so bring it, were awarded against respondent.

The only dispute insofar as costs are concerned, turns on costs relating to the main application. Viewed in this context it is clear that the Tribunal envisaged that the main application would be resuscitated by a fresh application brought by respondents on the basis that the Competition Commission accepted the complaint. In the event that such an application was not brought, the Tribunal's order afforded an opportunity to the successful party to approach the registrar to have the matter set down to determine the costs of the 'decided application'.

The order made by the Tribunal was not a final order. It envisaged the determination of a costs order insofar as the main application was concerned after a renewed application had been brought. The general rule that costs follow the event is subject to the overriding principle that all costs are in the discretion of the court provided the discretion is exercised judicially (see **The Laws of South Africa** vol. 3 at 292 and the cases collected therein).

In my view, there is no merit in the argument that the Tribunal exercised its discretion in judicially or that the order was of a final nature which precluded appellant from claiming costs at the later stage.

The Cross Appeal.

The basis of the cross-appeal can only be understood after an examination of the reasoning employed by the Tribunal. At the time of the application, section 59 provided: 'At any time, whether or not a hearing has commenced into an alleged prohibited practice, 'a person referred to in section 44 may apply to the Competition Tribunal for an interim order in respect of that alleged practice, and the Tribunal may grant such an order if……'

Section 44 provides: 'A complaint against a prohibited practice by a firm may be initiated by the Commissioner, or submitted to the Competition Commission by any person in the prescribed manner.

In determining what was meant by 'submitted in the prescribed manner', the Tribunal referred to the Rules of the Competition Commission. In particular, Rule 2(f)(ii) defines a complaint as a matter that has been submitted to the Commission in terms of section 44 and accepted by the Commission in terms of Rule 17.

Rule 17(1) provides 'A person other than the Commissioner by filing a completed Form CC 1, may submit a matter to the Commission, if

a) if the matter concerns a practice that meets both of the tests set out in Rule 16(a) & (b);

b) the submission is not frivolous; and

c) the Commissioner has not initiated or accepted a complaint in respect of that practice.

Rule 17(2) provides 'upon receiving a submission in terms of sub-rule (1), the Commission must either

a) accept the submission as a complaint in terms of section 44; or

(b) notify the person who made the submission that the Commission has rejected the submission as a complaint, and provide a brief written explanation for that decision.

The Tribunal found that Rule 17(2) read with Rule 2(f)(ii) supported the conclusion that a complaint was only submitted to the Competition Commission as defined once it had been duly accepted by the Commission. For this reason the phrase in section 59 "a person referred to in section 44" meant a person who had lodged a complaint with the Commission which had then been accepted by the Commission and thus had become a complaint as defined. As the Tribunal said in its determination [t]he statute 'mandates the use of regulation to provide the procedure for the manner of submission of complaints'. Thus 'on an interpretation of the rules, acceptance by the Commission is a pre-requisite for a valid complaint and that the application was launched prematurely'.

Mr Nelson submitted that there were two bases in terms of which this finding of the Tribunal should be rejected, namely that it had failed to properly interpret the words, "submitted in the prescribed manner" as contained in section 44 and that the Competition Second Amendment Act 39 2000 ('the Amendment Act') which came into effect on 1 February 2001 retrospectively amended the provisions of section 59 read together with section 44 so that, as the retrospective position now applied, the cross-appeal must succeed.

THE MEANING OF SUBMITTED IN THE PRESCRIBED MANNER.

Mr Nelson submitted that the word 'prescribed' was defined in section 1 as meaning 'prescribed from time to time by regulation in terms of section 78.' Section 78 provides that the Minister, by notice in the Gazette may make regulations that are required to give effect to the purposes of the Act. The rules of the Competition Commission were promulgated in terms of section 21(4) and section 78 of the Act and therefore he argued it was not proper to give meaning

to the phrase ‘in the prescribed manner’ in section 44 by reference to rules which were not part of the definition of ‘prescribed’ in terms of section 1.

The logic of this argument would lead to a rejection of a reference to rules promulgated under any section other than s 78 which prescribe any procedures. But s 21(4) does precisely that. It provides that the Minister may, in consultation with the Commissioner, and by notice in the Gazette prescribe regulations for matters relating to the functions of the Commission including (a) forms (b) time periods (c) information required (d) additional definitions (e) filing fees (f) access to confidential information (g) manner and form of participation in Commission procedures; and (h) procedures. To the extent that section 1 does not refer to section 21(4), it can only be concluded that this was an omission on the part of the legislation. While the court should be reluctant to come to the conclusion that there is a clear omission in the Act rather than seeking another possible plausible interpretation, in this context it is clear that s 1 should have referred to the two sections in trms of which regulations can be prescribed. When the phrase ‘in the prescribed manner’ was employed in section 44 it was intended that the complaint be lodged in terms of a procedure set out in rules promulgated by the Minister (in this case in terms of section 21(4)). For this reason I can find no merit in respondents argument.

Mr Nelson further submitted that were the Tribunal’s reasoning to be employed, it would result in only one complainant being able to bring an application for

interim relief in terms of section 59. The person referred to in section 44 would be a person who had brought a complaint which had been submitted as defined to the Commission. In terms of Rule 17(1)(c), a person, other than the Commissioner by filing a completed form CC 1 may submit a matter to the Commission…if the Commission has not initiated or accepted a complaint in respect of that practice. (my emphasis).

Mr Nelson submitted that if the Commissioner had accepted a complaint in respect of that practice by complainant A, all other complainants would be precluded from bringing an application in terms of section 59 in that their complaint could never be accepted in terms of the Rules.

As Mr Puckran, who appeared together with Mr Meyer on behalf of first to fourth and sixth to ninth appellants, submitted this result would not necessarily be capricious in that as the Tribunal found, to hold otherwise would lead to the danger that the complaint is an incohate fact until acceptance by the Commission. An applicant whose submissions still awaited acceptance by the Commission could proceed and possibly obtain interim relief from the Tribunal only to discover subsequently that the Commission had refused to accept the complaint thereby nullifying it. This possibility gives meaning to the Rule regarding acceptance of the complaint, the absence of which could undermine the certainty of the proceedings. As long as acceptance of the complaint is a requisite for a valid complaint, acceptance must take place before a valid complaint can be said to exist.

While it must be conceded that the Amendment Act has altered the position and hence is indicative that the legislature has changed its policy in this regard, as Mr Puckran submitted this did not make the initial interpretation of the provisions as contained in the Act capricious or unfair. They were clothed in the logic that there should be not dichotomy between the decision of the Commission and that of the Tribunal. Furthermore as Mr Eiser correctly submitted, the rule only precluded another litigant from making application in terms of section 59 in respect of the same practice, There does not appear to be a bar to other litigants

being joined in the matter nor could the rule be interpreted to preclude another litigant from making a complaint where there were differences in the alleged practice which had motivated the initial application in terms of section 59.

For this reason it is difficult to accept the argument of Mr Nelson that the Tribunal's decision was in contravention of section 34 of the Republic of South Africa Constitution Act 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, another independent and impartial tribunal or forum. In this case the dispute would have been decided in terms of the Act and before an independent tribunal, to which other interested parties would not necessarily be barred.

Were there to be any additional issue raised in the complaint of the second complainant, such a person would have an entitlement to bring an application in terms of section 59. Furthermore this interpretation is congruent with the words employed in section 44 namely 'submission in the prescribed manner' as opposed to submission 'lodged or delivered' in the prescribed manner which would have been words far more in keeping with the interpretation urged upon this court by Mr Nelson.

RETROSPECTIVITY.

Section 23(5) of the Amendment Act provides: 'Any proceedings that were pending before the Competition Commission, Competition Tribunal or Competition Appeal Court before the date of commencement of this Act must be proceeded with in terms of the Principle Act as amended, except to the extent that the regulation under section 21(4)of 27(2) of the Principle Act as amended, or a rule of the Competition Appeal Court, provides otherwise.'

In terms of section 49 C(1) of the Act (as amended by the Amendment Act) 'at any time, whether or not a hearing has commenced into the alleged prohibited practice, the complainant may apply to the Competition Tribunal for an interim order in respect of the alleged practice'.

In terms of section 49 B(2) of the Act as amended, any person may
a) submit information concerning an alleged prohibited practice to the

Competition Commission, in any manner or form; or

b) submit a complaint against an alleged prohibited practice to the Competition Commission in the prescribed form. In terms of Rule 3(4)(g) of the Competition Rules which replace Rule (2)(f)(2) of the old Rules, a complaint is defined as:

i) a matter initiated by the Commission in terms of section 49(b)(1); or

ii) a matter that has been submitted to the Commission in terms of section 49 B(2)(b).

Accordingly the requirement of acceptance by the Commission is no longer part of the legal dispensation which pertains after the passing of the Amendment Act.

For this reason Mr Nelson correctly submitted that were the Amendment Act to apply to these proceedings, the determination of the Tribunal would stand to be set aside.

This argument therefore confronts the strong presumption entrenched in any argument retrospectivity. As **Kentridge AJ** said is **S v Mhlungu and Others** 1995(3) SA 867(CC) at para 65-67 [t]here is a strong presumption that new legislation is not intended to be retroactive. By retroactive legislation is meant legislation which invalidates what was previously valid, or ***vice versa***, i.e. which affects transactions completed before the new statute came into operation…..It is legislation which enacts that 'as at a past date the law should be taken to have been that which it was not'…There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, e.g. by invalidating current contracts or impairing existing property rights…The general

rule therefore was that a statutory is as far as possible to be construed as operating only on facts which come into existence after its passing. There is a different presumption where a new law affects changes of procedure. It is presumed that such a law will apply to every case subsequently tried, 'no matter when such case began or when the course of action arose'…It is, however, not always easy to decide whether a new statutory provision is purely procedural or whether it also affects substantive rights. Rather than categorising new procedures in this way, it has been suggested, one should simply ask whether or not they would affect vested rights if applied retrospectively…There is also another well established rule of construction namely, that even if a new statute is intended to be retrospective insofar as it affects vested rights and obligations, it is nonetheless presumed not to affect matters which are the subject of pending legal proceedings'.

It must be conceded that the drafting of section 23(5) of the Amendment Act leaves much to be desired. In the context of our constitutional state, great care must be taken in the drafting of legislation to prevent the sloppy use of words to undermining the legal certainty required by a rechtstaat.

To the extent that there is any ambiguity in the legislation, section 23(5) must be interpreted to be congruent with the fundamental principles as outlined by **Kentridge AJ** in **Mhlungu supra.** The use of the words 'any proceedings that were pending' coupled with the words, 'must be proceeded with' would appear to mean that the procedures which must be employed in any matter which is pending at the time that the Amendment Act came into effect, are those

contained in the Amendment Act. The preamble to the Amendment Act provides that the purpose of the Act is ***inter alia*** 'to further regulate investigation and adjudication procedures and enforcement of decisions, judgments and orders of the Competition Commission and Competition Tribunal and Competition Appeal Court; regulate the relationship between the Competition Commission and other agencies and to provide for concurrent jurisdiction'.

The Amendment Act therefore contains a range of new procedures. It was clearly the intention of the legislature to ensure that these new procedures would apply to all proceedings which were pending at the time the legislation came into effect. The Commission, Tribunal and the Court were thus mandated to dispose of matters which had been initiated in terms of the new procedures. The question which then arises is whether any matter of substance which had been disposed of by the Tribunal under existing law, that is law prior to the Amendment Act, should now be adjudicated in terms of the Amendment Act.

In **S v Mhlungu and Others supra, Mahomed J** (as he then was) said at para 41 'The remaining category concerns appeals arising from trials which were commenced and were completed before the Constitution came into operation. In my view, such appeals must be disposed of without applying chapter 3 of the Constitution, because an appeal inherently contains the complaint that the Court ***a quo*** had erred in terms of the law which was then of application to it and not in terms of the law which subsequently came into operation. There should therefore also be no 'dislocation' arising from this category of appeals. There is nothing in the wording of s 241(8) which, on my interpretation, will entitle an appellant on appeal to rely on chap 3 if the proceedings against them had been concluded before the commencement of the Constitution. Such an appellant

would have to confine himself to the substantive law which applied during his trial.' See also **S v Thomas and Another** 1978(1) SA 329 (A) at 334.

The term 'pending' in relation to proceedings can have different connotations depending upon the context in which the word is used. Conventionally, proceedings pending in this context mean 'they have begun but not yet finished' **Mhlungu supra** at para 51. However in **Noah v Union National South British Insurance Company Ltd** 1979(1) SA 330(T) 332 **Eloff J** found that 'pending' in relation to proceedings can mean an action which has not been instituted but is about to be so instituted.

In the present dispute, section 23(5) mandates the adoption of procedures contained in the Amendment Act for all cases which are already located in the legal pipeline created by the Act. But if the legislature wished to go further and provide that the substance of the law pertaining to dispute on appeal from the Tribunal to the Court before the Amendment Act became law is to be governed by a provision of the Amendment Act it would have been required to employ an express provision to that effect.

The radical consequence of deciding an appeal on the basis of a law which did not apply when the initial decision was taken runs completely contrary to the ***dictum*** of the majority in **Mhlungu.** Such a change cannot be easily read into an Act by way of interpretation. In my view the cross appeal must be decided in terms of the law which existed when the Tribunal made its determination.

The appeal was initiated by fifth appellant only and to that extent costs can only be awarded against fifth appellant who was the unsuccessful party. The cross appeal was opposed by all appellants and save for fifth appellant, two counsel

were employed. Clearly the manner in which this dispute has been decided creates a problem of quantification of costs to be apportioned between the appeal and the cross appeal both of which were heard at the same hearing and the arguments of which were contained in the one set of heads of argument.

In terms of Rule 33(2) of the Rules of this Court the Registrar may perform the functions and duties of a taxing master or appoint any person as taxing master who, in the Registrar's opinion, is fit to perform the functions of duties assigned to or imposed on a taxing master by these rules. It would therefore be appropriate in this case for the quantification of the costs to be determined either by the Registrar acting as a taxing master or a person to be appointed by him.

ORDER.

For the reasons given,

1 The appeal is dismissed, with costs including costs occasioned by the employment of two counsel to be paid by fifth appellant only.

2 The cross appeal is dismissed with costs including costs occasioned by the employment of two counsel.

3 The Registrar is empowered to determine the quantification of the costs referred to in paragraphs 1 and 2.

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DAVIS J P

I agree

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MAILULA AJA

I agree _____

JALI AJA