IN THE COMPETITION APPEAL COURT

CASE NO: 03/CAC/OCT00

In the matter between:

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

and

TERBLANCHE, DIANE, N.O.	First Respondent
FOURIE, FREDERICK, N.O.	Second Respondent
HOLDEN, MERLE, N.O.	Third Respondent
THE COMPETITION TRIBUNAL	Fourth Respondent
NATIONAL ASSOCIATION OF PHARMACEUTICAL WHOLESALERS	Fifth Respondent
NATAL WHOLESALE CHEMISTS (PROPRIETARY) LIMITED	Sixth Respondent

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

JUDGMENT DELIVERED ON 5th SEPTEMBER 2001

SELIKOWITZ AJA:

SELIKOWITZ AJA:

INTRODUCTION

This is an application to have the decision and the order of the Competition Tribunal ("the Tribunal") under case number 68/IR/JUN00 dated 28 August 2000 reviewed and set aside. For the sake of convenience the Applicants will be referred to as Appellants. In the interests of consistency, and where appropriate, references to "Applicants" in quotations from the pleadings, the record and the heads of argument have been altered to read "Appellants".

First to Fifth Appellants are importers and manufacturers of pharmaceutical products. They have entered into a joint distribution agreement. Sixth Appellant is the company formed by them as the entity through which they would establish their distribution agency. Seventh Appellant is the agency distributor. It commenced operation on 29 May 2000.

First, Second and Third Respondents are cited *nomine officio* as the members of the panel assigned to this matter pursuant to the terms of sec. 31 of the Competition Act, No. 89 of 1998 (hereinafter the "Act") and whose decision and order are the subject of this review application. Fourth Respondent is the Tribunal. Sec. 31(6) of the Act provides that the decision of a majority of the members of a panel is the decision of the Tribunal.

Sixth to Thirteenth Respondents are wholesalers of pharmaceutical and other products. These eight Respondents are members of Fifth Respondent, a voluntary association which promotes the interests of pharmaceutical wholesalers.

The decision and order in issue here were given in respect of an application by Fifth to Thirteenth Respondents (the "Complainants") for interim relief against Appellants in terms of sec.59 of the Act. In the interests of consistency, references to Fifth to Thirteenth Respondents in quotations from the pleadings, record and heads of argument have been altered to read "Complainants"

Over many years importers and manufacturers of pharmaceutical products distributed these products through wholesalers such as the Complainants. This system was changed during 1993 when several manufacturers - not involved in this matter - established a joint distribution agency. Amongst the results were that wholesalers could not buy directly from those manufacturers and that their purchase discount was reduced. During 1997, First to Fifth Appellants decided to establish their joint own exclusive distribution agency. As noted, they formed Sixth Appellant to acquire Seventh Appellant, an existing national pharmaceutical wholesaler, and to convert it to their requirements.

On 8 June 2000 Complainants submitted a complaint to the Competition

Commission against the Appellants in terms of what was then sec.44 of the Act. The Commission accepted the complaint in terms of its Rules.

Complainants then launched an application for interim relief in terms of the sec. 59 of the Act as it then was.

Both in their complaint and in their interim relief papers Complainants alleged that Appellants were in contravention of four separate sections of the Act. The four sections are, sec.4 - which prohibits restrictive horizontal practices; sec.5 - which prohibits restrictive vertical practices; sec.8 - which prohibits abuse of dominance; and sec.9 - which prohibits price discrimination by a dominant firm.

The alleged contraventions were addressed in the papers filed of record and in oral argument presented at a three-day hearing before the panel which took place on 25, 26 and 27 July 2000. The panel delivered its unanimous decision on 28 August 2000. It granted interim relief in terms of sec. 59 of the Act. In the course of its decision, it made, *inter alia*, the following finding:

> **"On the evidence before us, we find that there is sufficient evidence that the agreement between the First to Fifth Appellants to distribute their products through a joint exclusive distribution agency has the effect of substantially preventing or lessening competition in the market for the distribution of pharmaceutical products in certain significant therapeutic categories, in terms of Section 4(1)(a). Having found for the Complainants under Section 4(1)(a) we did not consider their case under any of the other sections."**

The Tribunal accordingly made the following order:

> **The Complainants' application for interim relief in terms of Section 59 of the Act, 89 of 1998 is granted in respect of the Appellants' alleged contravention of Section 4(1)(a) of the said Act.**
>
> **That the First to Fifth Appellants supply their products directly to the Complainants and other wholesalers on terms and conditions similar to those that applied to transactions between them and the**

Complainants and other wholesalers immediately before the conversion of Seventh Appellant to a joint exclusive distribution agency for their products.

That this order remains in force until the earlier of -

i. the conclusion of the hearing into the prohibited practices alleged by the Complainants to have been committed by the Appellants; or

ii. the date that is six months after the date of the issue of this order;

The Appellants are ordered to pay the Complainants' costs in the application on the scale as between party and party, including the costs of two counsel and one attorney."

On 5 September 2000, Appellants applied to the Competition Appeal Court as a matter of urgency for an order to suspend the operation and execution of the Tribunal's interim order pending the determination of appeal or review proceedings which Appellants intended to launch.

On 11 September 2000 the first stay application was heard by the Competition Appeal Court. The presiding Judge, Davis JP dismissed the application on the grounds that the interim order was not appeallable and that the jurisdiction provided in sec. 38 of the Act to suspend such an order could only be exercised where there was a review actually pending.

Four days later, Appellants launched the current application to review and to set aside the Tribunal's decision and order made in the section 59 application.

On 16 October 2000, Appellants brought a second stay application, which was again considered by the Competition Appeal Court. On this occasion the application succeeded and a stay was ordered on 4 December 2000.

THE ISSUES BEFORE THIS COURT

The grounds upon which Appellants seek to have the Tribunal's decision reviewed are conveniently summarised as the following:

the decision is void for vagueness;

the Appellants were not granted a fair hearing in respect of the relief granted in the order;

the decision is *ultra vire*s in that:

the order is overbroad;

the order frustrates the clear purposesec.of the Act;

the findings in the decision are not justifiable in relation to the reasons given therefore; alternatively the Tribunal took into account irrelevant considerations and/or failed to take into account relevant considerations;

the relief in the order extends to persons who were not parties to the proceedings;

the Tribunal made a material mistake of law:

regarding the incidence of the *onus* of proof in the Act;

in disregarding the benefits of the joint distribution structure that could have been gained other than by the use of Seventh Appellant.

Complainants opposed the review application and filed answering affidavits in which they resisted each and every ground of review.

In the principal answering affidavit Complainants submit that there are "*no ground that justify this Honourable Court intervening to review and set aside the Tribunal's decision and order*".

Complainants ask that the decision and order of the Tribunal be confirmed. In the alternative, that this Court should amend the decision and in the further alternative that the matter be remitted to the Tribunal for further hearing in terms of sec 37(2)(b) of the Act.

Some twelve days before the date scheduled for the hearing of this matter, Complainants' Attorney wrote to the Registrar of the Court asking him to:

> **" ... notify the Judges that**
>
> > **1.**The Complainants consent to the review on the basis that the decision be referred back to the Tribunal on such terms as the Competition Appeal Court deems appropriate.
> >
> > **2.**An endeavour to agree such terms with the Appellants as far back as 7 December 2000 has unfortunately failed.
> >
> > **3.**In our view the only pertinent issue will be one of costs."

The heads of argument filed on behalf of Complainants state at the outset that:

> **"The Complainants consent to an order pursuant whereto the order of the Competition Tribunal under Case No 68/IR/Jun00 ("the matter") is reviewed and set aside and the matter is remitted to the Competition Tribunal for a further hearing in terms of section 37(2)(b) of the Act 89 of 1998, as amended ("the Act")."**

The heads of argument state further that:

> **"For the Court's convenience a draft order is annexed hereto marked "A". Although the draft order records certain remittal terms these are proposed merely in an endeavour to assist the Court in the exercise of the discretion vested in it, in terms of section 37(2)(b) of the Act, and the Complainants will abide any decision that the Court deems appropriate in this regard."**

Counsel for Complainants then seek to identify the issues before this Court in the following terms:

> **"Given that the setting aside of the Tribunal's order is not in issue and that there are no exceptional circumstances or reasons for not remitting the matter for a further hearing, the Complainants' submit that the only pertinent issue is one of costs."**

Averring that they had indicated that were prepared at an early stage to consent to

the setting aside of the Tribunals order on condition that the matter was remitted for further consideration by the Tribunal on terms to be agreed between themselves and Appellants, Complainants sought an order that Appellants pay the costs of the appeal.

Counsel for Appellants responded in Supplementary Heads of Argument:

> **"In their heads of argument, the Complainants now appear to concede the merits of the Appellants' application for the review and setting aside of the Tribunal's decision and order, and consent to the remittal of the matter to the Tribunal for rehearing on terms set out in a draft order. They then argue, on the basis that they have throughout consented to this relief, not only that they should not have to pay the Appellants' costs in these proceedings, but also that the Appellants should have to pay their costs.**
>
> **These contentions are misleading and inconsistent with the position previously taken by the Complainants in these proceedings. For the reasons set out below, there is no basis for absolving the Complainants to pay the costs of this application on an opposed basis.**
>
> **The Appellants challenged the Tribunal's order and decision on a number of review grounds and prayed in their notice of motion for the Tribunal's order and decision to be reviewed and set aside on all or any of these grounds.**
>
> **This Honourable Court is empowered to provide this relief at common law and in terms of s 37 of the Act (No 89 of 1998) (the "Act"). Section 37(2) provides that this Honourable Court may give any judgment or make any order, including an order to:**
>
> > **"(a) confirm, amend or set aside a decision or order of the Competition Tribunal; or**
> >
> > **(b) remit the matter to the Competition Tribunal for a further rehearing on any appropriate terms"**
>
> **It is clear from the Appellants' notice of motion that they seek a setting aside of the Tribunal's order and decision in terms of subsec (a) of s 37. They do not seek its remittal to the Tribunal on specific terms as contemplated by subsec (b) of s 37. This arises from the applicants' contention, evident in the review grounds that it has raised, that the Tribunal's order and decision are bad in**

whole and not in part. The applicants challenge the wording of the Tribunal's order, the right of hearing afforded to the Appellants in respect of the relief ultimately granted by the Tribunal, and allege that the decision and order were *ultra vires* on various grounds. We refer in particular in this regard to the applicants' allegations that various findings in the Tribunal's decision are not justifiable for the reasons given therefore; alternatively, the Tribunal took into account irrelevant considerations and/or failed to take into account relevant considerations. These allegations are made in reference to the definition of the relevant market, the effect of the DD [i.e. Seventh Appellant] distribution system on competition and the frustration of the purposes of the Act.

It is thus evident that the Appellants contend that no part of the Tribunal's decision and order should be allowed to stand. Consequently, it would be inappropriate to remit the matter for rehearing on specified terms in terms of s 37(2)(b) as submitted by the complainants. Rather, the decision and order should simply be reviewed and set aside in terms of s 37(2)(a) and the matter allowed to be considered afresh by the Tribunal. This is the normal order in successful review applications, as reflected in the cases cited in the complainants' heads of argument."

First to Fourth Respondents have not participated in the review nor indicated any attitude thereto. They must be assumed to abide the decision of this Court.

At the hearing before this Court *Mr Nelson SC* who appeared with *Mr van Dorsten* for Complainants conceded that the Tribunals order was reviewable on two of grounds advanced by Appellants; the two grounds being that the order was vague and ambiguous and that it did not coincide with the prayers as sought by Complainants.

It was common cause - and correctly so - that this Court will not set aside the Tribunal's decision and order on the basis that the Complainants have consented thereto; nor by reason of any agreement between Complainants and Appellants. The Tribunal is empowered to make decisions and issue orders. In doing so it is exercising a public function entrusted to it by the Legislature. Unless there are grounds in law to do so, the Court will not interfere in the Tribunal's exercise of its powers.

Mr Unterhalter who represented Appellants together with *Mr Wilson* also pointed out that there were a number of grounds of review which were not conceded by Complainants and requested the Court to adjucate all the grounds advanced.

APPLICABLE LEGISLATION

Before proceeding to consider the merits of the review it should be noted that the application for interim relief in terms of sec. 59 of the Act was heard by the Tribunal on 25 - 27 July 2000 and the decision was delivered on 29 August 2000. Appellants launched the current review proceedings on 15 September 2000. With effect from 1 February 2001, the Act was amended by the *Competition Second Amendment Act* (No 39 of 2000) (the "Second Amendment Act"). The Second Amendment Act brought about significant changes to the Act and materially altered sec. 59 dealing with interim relief. (See: sec. 15 of the Amending Act).

Notwithstanding the coming into effect of the Second Amendment Act, it is trite that the substantive review of the Tribunal's decision and order must be undertaken by reference to the Act as it existed at the time of the hearing of the application. Accordingly, references below to the Act in relation to the application for interim relief in terms of sec. 59 are references to the Act prior to the coming into effect of the Amendment Act.

The jurisdiction and powers of this Court to hear and decide the current review proceedings under the Act have not been affected by the Second Amendment Act. The provisions of sec. 37 of the Act which apply are those which were substituted for the original sec. 37 by sec. 2 of the first *Competition Amendment Act*, No. 15 of 2000 which came into effect on 1 September 2000, a fortnight before the current review application was launched.

REVIEW JURISDICTION

The Competition Appeal Court's review jurisdiction is governed by the Act and is exercised in accordance with the normal common law principles of judicial review, which now derive their force from the Constitution of the Republic of South Africa (Act 108 of 1996) (the "Constitution") and the constitutional doctrine of legality. (See: **PHARMACEUTICAL MANUFACTURERS' ASSOCIATION OF SA and ANOTHER: in re Ex Parte PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA and OTHERS,** 2000 (2) SA 674 (CC)). In the course of his judgment, Chaskalson P said that:

> **"[20] The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. . .**

[33] ... The control of public power by the Courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts. . .

[40]. . . We now have a detailed written Constitution. It expressly rejects the doctrine of the supremacy of Parliament, but incorporates other common-law constitutional principles and gives them greater substance than they previously had. The rule of law is specifically declared to be one of the foundational values of the constitutional order, fundamental rights are identified and entrenched, and provision is made for the control of public power, including judicial review of all legislation and conduct inconsistent with the Constitution ...

[44] I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."

All discretionary powers must be exercised in accordance with the Constitution. (**Metcash Trading Ltd v Commissioner for South African Revenue Service and Another 2001 (1) SA 1109 (CC) at paras 40-42**)

Sec. 37 of the Act expressly empowers this Court to review decisions of the Tribunal. This power is repeated and reinforced by sec. 61 which came into effect on 1 February 2001.

The Tribunal's decisions, although judicial in nature, are administrative decisions. I am in agreement with the remarks of Froneman DJP where in **CAREPHONE (PTY) LTD v MARCUS NO AND OTHERS** 1999 (3) SA 304 (LAC), he said:

> **"[18] The constitutional answer to this submission is that, although the Commission or other organs of State may perform functions of a judicial nature, they are not courts of law and thus have no judicial authority under the Constitution (ss 165, 166 and 239 of the Constitution). Their judicial functions do not transform them into part of the judicial arm of the State, nor does it make them part of the judicial process (cf *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) (1996 (4) BCLR 449) at paras [95] - [97]).**
>
> **[19] The substantive answer to the argument is to be found in the purpose of the administrative justice section of the Bill of Rights. That purpose is to extend the values of accountability, responsiveness and openness to institutions of public power which might not previously have been subject to those constraints. Courts of law were in any event always subject to the kind of requirements set out in the section. It would simply be incongruous to free other public institutions exercising judicial functions from those constraints. It is not necessary to seek the origins of those constraints in other provisions of the Bill of Rights, such as the access to justice provision (s 34). Administrative action may take many forms, even if judicial in nature, but the action remains administrative."**

I turn now to a consideration of the individual grounds of review advanced by Appellants.

IS THE ORDER VAGUE AND/OR AMBIGUOUS?

It is trite law that orders of tribunals and other functionaries may be set aside if they are void for vagueness. An order which is prescriptive must on the face of it, unambiguously specify what has to be complied with. A failure to comply with an order of the Tribunal may render a respondent liable, under s 59(1)(c) of Competition Act, to administrative penalties of up to 10% of its annual turnover, and, under s 73(1), to criminal prosecution. If, after application of the normal rules of interpretation, the reviewing court is unable to ascertain its meaning, the order will be characterised as void for vagueness and liable to be set aside. (See: **Visagie v State President**, 1989 (3) SA 859 (A) at 870B-D; **S v Dlamini**, 1999 (4) SA 623 (CC) at para 75).

Irresolvable ambiguity is a species of vagueness. As found by Trollip JA in **Genticuro AG v Firestone SA (Pty) Ltd,** 1972 (1) SA 589 (A) at 610B,

> "'***Ambiguity*'… has the wide connotation of 'uncertainty' or 'vagueness', i.e. as being not only of double but also of indefinite meaning which cannot be resolved with the requisite degree of certainty by proper construction".**

Mr Unterhalter submitted that when the normal rules of interpretation are applied to the Tribunal's decision and order *in casu*, they do not yield a clear answer and that the decision is accordingly incurably vague in the sense set out in ***Genticuro's*** case (*supra*).

In **S v Mothobi**, 1972 (3) SA 841 (O), the court was concerned with a custodial sentence which was suspended subject to a condition that the accused not be found guilty of a similar offence (*'n soortgelyke oortreding*). The learned Judge (Kumleben AJ and Smuts J, (as they then were) concurring stressed the need for certainty in conditions of that kind, *inter alia* in the event of another court being required at a later stage to determine whether or not there had been a breach of the conditions.

Those sentiments are of equal application to an order such as that given by the Tribunal, the breach of which gives rise to serious consequences. Appellants are entitled to know with certainty what they must or must not do.

As was stated by Davis JP in his judgment in the second stay application (See: p. 16 of the typed judgment - Record, vol. 11, p. 3049):

> **"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."**

As recorded above, the prescriptive paragraph of the Tribunal's order is in the following terms:

> "That the Appellants supply their products *directly* to the Complainants and *other wholesalers* on terms and conditions *similar* to those that applied to transactions between them and the Complainants and other wholesalers immediately before the

> conversion of Seventh Appellant to a joint exclusive distribution agency for their products."

I have italicised the two words and the phrase which Appellants contend are the offending parts of the order.

"Similar"

Appellants submit that the first vague and/or ambiguous word in the order is "*similar*", as applied to the terms and conditions on which the Appellants are required to supply the Complainants and other wholesalers. It was argued that the meaning of that word, in the context of the order and decision, is incapable of determination, with the result that the Appellants are not able to determine what is and what is not required of them in order to comply with the order.

In **R v Revelas**, 1959 (1) SA 75 (A) at 80B-C, Schreiner ACJ observed that:

> "It has been said that ['***similar***'] **is 'almost always a difficult word to construe' (*Union Government (Minister of Finance) v Gowar*, 1915 A.D. 426, per De Villiers, A.J.A., at p. 443). Obviously there are degrees of similarity or likeness, some approaching, and exceptionally perhaps even reaching, sameness, others amounting to no 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 263 should be given the 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 have been aimed at substituting the notion of resemblance."**

The Tribunal's decision presents an analogous set of circumstances. At paragraph 67 of its decision, (See: Pleadings p.69) the Tribunal states that:

> "The order we have issued compels the respondents to supply the Complainants and other wholesalers on the ***same*** **terms and conditions as before the advent of Seventh Appellant."** (Italics added)

It is quite clear that, as had occurred in the ***Revelas*** case, the Tribunal abandoned "*same*" when it referred, later, to "*similar*" terms and conditions in its order.

It was held in ***S v Mothobi,*** (*supra*) that the meaning of the word "*similar*" could not be determined

with any measure of accuracy and accordingly that it required the setting aside of the order in which it was contained. In this regard, the Court found that:

> "Die woord '***soortgelyk***' **beteken letterlik 'van dieselfde soort'. Weens die inherente onpresiesheid van die woord, kan die betekenis daarvan gewoonlik nie met enige mate van akkuraatheid vasgestel word nie."**
> (at 841F)

His Lordship then quoted the section from ***Revelas*** case referred to above, and continued (at 842E-F) as follows:

> "Die woord of begrip '***soortgelyk***' **is egter een wat vir ekstensiewe of beperkende uitleg vatbaar is. Gevolglik kan daar nie met sekerheid bepaal word welke van hulle binne of buite die bestek van die voorwaarde val nie. Hoewel 'n verwysing na 'n '*soortgelyke misdaad*' in 'n voorwaarde van opskorting soms in 'n bepaalde verband in orde mag wees, meen die Hof vir die redes vermeld dat in die onderhawige geval dit 'n onwenslike mate van onsekerheid skep."**

(For a similar observation, see: also **S v van Rooyen**, 1974 (3) SA 319 (NC) at 320F).

There are reported cases in which the word "*similar*" has not been found to be incurably vague. (See for example: **Union Government (Minister of Finance) v Gowar**, 1915 AD 426 ; **Potgieter en n Ander v Van Zyl**, 1983 (3) SA 451 (O)**.** In those cases, however, the meaning of "*similar*" was found to be ascertainable from the surrounding wording in accordance with the principles of statutory interpretation. In addition, neither of these cases involved a *mandamus* requiring the respondent itself to determine the meaning of the word "*similar*" on pain of criminal or other sanctions in the event of it proving to be wrong.

In the order under review, in addition to it being unclear as to whether the terms and conditions are required to be the same or merely similar, it is also unclear which "*terms and conditions*" are contemplated by the order. It appears that most of the Appellants, when acting as principals, sold their products to the Complainants at a discount (generally 17,5%) off list price. It is unclear in the order whether it is merely the discount that is required to be the same or whether the underlying list price is also included. If it is merely the discount that is required to be the same (or, indeed, similar), then it is legitimate to ask what the order requires of those Appellants, such as First Appellant, which, as I understand the evidence, did not use a discount formula but simply set a selling price for its

products.

It is also unclear whether the order applies merely in respect of terms and conditions that are less advantageous to customers as a result of the advent of Seventh Appellants, or whether they also apply to sales which are more advantageous. If the latter, some Appellants would, on the facts presented, be required to reduce the discount rate, or increase the price, at which they sell certain products to their consumers.

I am, in all the circumstances, satisfied that the meaning of the word "*similar*" as it appears in the Tribunal's order is incapable of sufficiently certain determination, with the result that Appellants are not able to tell what is and what is not required of them in terms of the offer.

Accepting, as I do, that the "*similar*' terms and conditions are not required to be the same, I find that the order is vague in that it is unclear as to what extent, and in which respects, the terms and conditions are allowed to differ from those that prevailed previously. The Appellants cannot reasonably determine, for example, the extent to which they are permitted in terms of the order to raise or lower their prices, discount rates or any of their other trading terms and conditions.

"Other Wholesalers"

The order is also vague and/or ambiguous insofar as it requires the Applicants to supply their products to the Complainants and *"other wholesalers*". There are on the facts as set out in the record different types of "wholesalers" in the pharmaceutical market. It is unclear, for instance, whether the class of persons contemplated is limited to companies registered with the South African Pharmacy Council as wholesalers, or whether it includes all companies which buy the Principals' products for on-sale. If the former, it is unclear whether the class includes only full-line wholesalers (such as the Complainants) or also short-line wholesalers. If the latter, it is unclear whether the class is limited to non-retailers (such as the Complainants) which purchase the Principals' products for on-sale to retailers, or whether it also includes retailers and retail buying groups which purchase Appellants' products for on-sale to other retailers. It is stated on the record that from a business perspective, there is no meaningful distinction between these categories of customers.

It is also unclear whether the wholesalers contemplated by the order include only those customers with whom Appellants had business relationships before they

commenced distrubuting through Seventh Appellant, or whether they also include wholesalers with whom Appellants did not previously conduct business.

The vagueness of the term '*wholesalers*' as it appears in the Tribunal's order is demonstrated when regard is had to Complainants' attempts in their answering affidavit to explain the meaning of the word. (See: *Fifth to Thirteenth Respondents' Affidavit;* para 28. Pleadings File p. 148-9). The explanation serves to illustrate the inherent ambiguity of that word in the Tribunal's order. In the first sentence Complainants state that wholesalers "*must be defined in the context of the industry where it is used to refer to wholesalers who are registered as such with the South African Pharmacy Council*". No evidence was given of this alleged customary usage in the proceedings before the Tribunal, and the Tribunal makes no reference to such usage in its decision. However, in the very next sentence Complainants add another element to the definition of "*wholesalers*", namely that they must have been wholesalers "*with whom the manufacturers did business before*". The following sentence refers to yet a further element, namely that the word refers both to full-line and short-line wholesalers. Finally Complainants revert to an interpretation of "*wholesalers*" as meaning merely "*registered wholesalers*".

Even if one were to seek the meaning of '*wholesalers*' by reference to the decision of the Tribunal, there is scant support in the decision for any of the various meanings attributed to the word by Complainants. Complainants identify certain paragraphs in the decision where the word is referred to. An analysis of the paragraphs identified by the Complainants which contain the word "*wholesalers*" (which list is itself not exhaustive), reveals no clear nor consistent meaning. For example, in paragraph 2 of its decision, the Tribunal appears to limit the use of the word "*wholesalers*" to full-line wholesalers. (See: Pleadings file, p. 55). In the other paragraphs mentioned, the word could mean either full-line or short-line wholesalers. Again, in paragraph 2, *"wholesalers"* clearly refers to all wholesalers in South Africa. It cannot be interpreted as referring only to wholesalers "*with whom the manufacturers did business before*".

In my view the phrase '*other wholesalers*' as it appears in the Tribunal's order is vague and ambiguous.

"Directly"

The third basis for the attack on the grounds that the order is vague and/or ambiguous in that it

requires that Appellants - all of them - to supply their products *"directly*" to the Complainants and other wholesalers. It was argued by Appellant that is not apparent *ex facie* the order whether or not Appellants are allowed to use the infrastructure of Seventh Appellants in order to deliver their products to the Complainants and other wholesalers. It would appear that the Tribunal was aware of and considered the issue but failed to clarify their view in the order.

In its decision (para. 67; Pleadings file, p. 69) the Tribunal states:

> **"If practical considerations require it, the manufacturers can supply the wholesalers using [seventh Appellant's] infrastructure and facilities, so long as they do so on commercial terms and conditions similar to those that applied before [Seventh Appellant] was converted to a joint exclusive distribution agency. At the same time [Seventh Appellant] may continue to provide distribution agency services to the manufacturers."**

It is clear that it was the Tribunal's view as set out in its decision that, if '*practical considerations'* required it, Appellants would be permitted to use the distribution services of Seventh Appellant to '*supply the wholesalers'*. There were thus two possibilities contemplated. One was not using the services of Seventh Appellant and the other was the use of those services. However, the order, as worded, requires that Appellants supply their products '*directly*' to the Complainants and other wholesalers and does not reflect the possibility of any alternative indirect supply.

In my view the reference to *'directly*' in the order is not *per se* ambiguous. The word '*directly*' means without the intervention of an intermediary. Seventh Appellant acting as an agent is, undoubtedly, an intermediary. Appellants are unequivocally required by the order to supply their customers *'directly*' and not through any intermediary. The fact that the order does not reflect the view of the Tribunal as stated in para. 67 may constitute a separate ground of objection. The order as granted, however, is neither vague nor ambiguous in respect of direct supply.

In the circumstances, and for the reasons stated I find that in respect of the references to '*similar*' and '*other wholesalers*' the order of the Tribunal is vague and/or ambiguous to an extent that its meaning cannot be determined by application of the normal rules of interpretation. Consequently, Appellants are unable to establish what is and what is not required of them in terms of the order and the order therefore falls to be set aside.

NO FAIR HEARING IN RESPECT OF THE RELIEF AS ORDERED

Appellants had a right to a fair hearing before the Tribunal in terms of secs. 33 and 34 of the Constitution which incorporates and extends the common law, (See: **Du Preez & Another v Truth and Reconciliation Commission**, 1997 (3) SA 204 (A) at 231H-232) as also in terms of sec. 59(1)(c) of the Act.

Appellants submit however, that they were not granted a fair hearing in respect of the relief granted in the order because that relief, was not sought by the Complainants in their notice of motion and was not raised by the Tribunal at the hearing of the sec. 59 application, nor indeed, at any time prior to the order being issued.

In their notice of motion Complainants sought wide ranging orders in terms of sec. 59 of the Act. Orders were, *inter alia* sought, interdicting Appellants from converting Seventh Appellant to an agency distributor - an event which had already occurred; requiring Appellants to forthwith terminate their exclusive agency distribution agreement and ordering Seventh Appellant to remain an independent wholesaler which does not favour First to Fifth Appellants. What was not sought, however, was an order requiring Appellants to return to the supply system which prevailed before the conversion of Seventh Appellant to a joint exclusive distribution agency for Appellants' products. In that regard Complainants prayed for an order that:

> **"8. The Appellants are ordered to continue supplying their products to the Complainants on terms and conditions identical to those given by Appellants to Seventh Appellant."**

While it is clear that the Tribunal is not necessarily limited to granting the exact relief set out in the notice of motion, it was only permitted to grant alternative relief where

a case was made out for that relief on the papers;

Appellants were apprised of the alternative relief contemplated; and

Appellants are granted a full hearing in respect of such alternative

relief.

(See: **Port Nolloth Municipality v Xhalisa and Others**, 1991 (3) SA 98 (C); **Queensland Insurance Co. Ltd v Banque Commerciale Africaine** 1946 AD 272)

In respect of the right to a hearing, the Court in **Port Nolloth Municipality,** (*supra*)**,** stated (at 112D-F) that:

> "A prayer for 'further and/or alternative relief'] can be invoked to justify or entitle a party to an order other than that set out in the notice of motion **… where that order is clearly indicated in the founding (and other) affidavits … and is established by satisfactory evidence on the papers (or is given)... 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'."**

In the recent case of **Nortje en 'n Ander Others v Minister van Korrektiewe Dienste en Andere**, 2001 (3) SA 472 (SCA), Brand AJA observed that the requirements of a reasonable opportunity to which a party is entitled in order to put his case ought not be too closely defined. However, the guidelines laid down in the *dictum* of Lord Mustill in **Doody v Secretary of State for the Home Department and Other Appeals** [1993] 3 ALL ER 92 (HL) 106 d-h, and approved by Corbett CJ in the **Du Preez** case (*supra* at p. 232 B-C) remain valid and useful in deciding whether a fair hearing was held in cases where *audi alteram partem* applies.

The paragraphs of Lord Mustill's *dictum* which were quoted by Brand AJA and which are apposite here are:

> "**[5] Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.**
>
> **[6] Since the person affected usually cannot make worthwhile representations without knowing**

what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

(at p. 480 D-F)

Appellants uncontradicted evidence is that they were never given an opportunity to make submissions in regard to the relief as ordered by the Tribunal. They were not informed that an order in terms different from that prayed for was to be granted. They were consequently deprived of an opportunity to make representations in respect of the order.

The Complainants do not take issue with Appellants in regard to the pertinent raising of the relief ordered but allege in their answering affidavit that the relief granted was encompassed by the wide relief claimed in the notice of motion. (See: para. 61.1; Pleadings file, p. 198). The Complainants were, however, unable to identify any part of their notice of motion that encompasses the relief ultimately granted by the Tribunal. It is apparent from a reading of the Complainants' prayers for relief that none of these prayers, in fact, covers the relief granted by the Tribunal.

In their effort to justify the Tribunal's order in their answering affidavit, Complainants point to a portion of their Second Replying Affidavit in the s 59 proceedings which they claim foreshadows the relief granted by the Tribunal (See: para. 61.3; Pleadings file, p 199). However, it is clear from a reading of this passage that it does not avail Complainants. Firstly, the relief there claimed is not the same as the relief granted by the Tribunal. Secondly, the reference therein is to an order that "*this pricing structure is made to apply to Seventh Appellant*". This reflects the failure of the Complainants to appreciate that Seventh Appellant is not a principal purchaser of the First to Fifth Appellants' goods but a true distribution agent. Thirdly, it would appear that even this relief was never pertinently raised by the Tribunal, nor was an opportunity granted to the Appellants to address the Tribunal in respect thereof.

In all the circumstances, I am of the view that Appellants' constitutional and common law rights to a fair hearing were breached by the Tribunal. Furthermore, the requirement in s 59(1)(c) of the Act that the Principals be given "*a reasonable opportunity to be heard"* was not adequately met. Accordingly, the Tribunal's order should be set aside on the ground that the Appellants did not receive a fair hearing in respect of the relief ultimately granted by the Tribunal.

DECISION IS *ULTRA VIRES*

Appellants further impugn the order of the Tribunal on the grounds that it is *ultra vires*. This ground is, in turn, based upon a number of separate attacks.

The Order is overbroad

In **Goldberg and Others v Minister of Prisons and Others**, 1979 (1) SA 14 (A), Corbett JA (as he then was) said:

> **"An exercise of a discretion is assailable in a court of law where it**
>
> **is shown that the party in whom it is vested acted *mala fide* or from ulterior motive or failed to apply his mind to the matter (*The Administrator, Transvaal and The Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) at 80B - H; *Schoch NO and Others v Bhettay and Others* 1974 (4) SA 860 (A) at 865A - H). In this context "*ulterior motive*" does not necessarily connote a sinister motivation: it can relate simply to the case where, for instance, a person or body vested by statute with the discretionary power uses it for a purpose not expressly or impliedly authorised by the statutory enactment (see *Administrator, Cape v Associated Buildings Ltd* 1957 (2) SA 317 (A) at 325D, 329H - 330A; Rose-Innes *Judicial Review of Administrative Tribunals* at 127 - 30; Wiechers *Administratiefreg* at 242 - 3). Moreover, in *Northwest Townships (Pty) Ltd v The Administrator, Transvaal* 1975 (4) SA 1 (T) Colman J (in whose judgment Cillie JP and Davidson J concurred) pointed out that the failure by the person vested with the discretion to apply his mind to the matter (see 8G):**
>
> > **'... has been held, in other English and South African cases, to include capriciousness, a failure, on the part of the person enjoined to make the decision, to appreciate the nature and limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and an application of wrong principles.'"**

(at 48D-H):

It follows that a statutory discretion exercised for a purpose contrary to the statute in question is *ultra vires* and will be set aside by the Court on that ground. The exercise of the discretionary power in a manner which frustrates the clear purpose of the statute, or renders the provisions of the statute nugatory, is invalid and must likewise be set aside. (Cf: **Corium (Pty) Ltd and Others v Myburgh Park Langebaan (Pty) Ltd and Others**, 1995 (3) SA 51 (C) at 67F-68C)

In terms of s 60(1)(a)(ii) (now s 58(1)(a)(ii)) of the Act, the Tribunal is empowered to order a party to supply or distribute goods to another party. The power is, however, limited. The order to supply or

distribute must be on terms that are "*reasonably required to end a prohibited practice*".

The words "*reasonably required*" dictate that the terms imposed by the Tribunal should be no more onerous than is reasonably necessary to end the prohibited practice found by the Tribunal. In **Automec Srl v Commission** [1992] 5 CMLR 431, the European Court of Justice held that "*[t]he burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to obtain the objectives sought, namely compliance with the rules infringed.*"

This approach accords with the principle of proportionality contained in sec. 36 of the Constitution. And as already noted, all discretionary powers must be exercised in accordance with the Constitution.

The prohibited practice identified by the Tribunal was that First to Fifth Appellants' joint exclusive distribution arrangement set up through Sixth Appellant and operated through Seventh Appellant substantially reduced competition "*primarily*" in the market for the distribution of pharmaceutical products in "*certain significant therapeutic categories*" where the First to Fifth Appellants "*play a significant role*". (See: Tribunal Decision, para. 14 read with para. 33; Pleadings file, pp. 58,61).

It was submitted by Appellants that the order granted by the Tribunal is in its own terms overbroad and not reasonably required to end the prohibited practice identified. Two arguments were advanced.

Firstly, that the relief ordered does not apply only to the distribution of those pharmaceutical products in therapeutic categories in which First to Fifth Appellants play a *"significant role"*, but to the distribution of all their products.

Secondly, that the relief granted is not limited to ensuring that direct access to First to Fifth Appellants' products is granted to the Complainants. It goes further by requiring these Appellants to sell their products to all wholesalers upon terms and conditions fixed at a particular time. In so doing, the order prohibits Appellants from amending the terms (including, for example, price and payment terms) upon which they sell their products to each of the Complainants and other wholesalers on commercially justifiable grounds. It also prevents the Appellants from choosing their customers on a commercially justifiable basis, for example from being able to decline to supply a wholesaler which has been guilty of misconduct.

It was argued that, in the result, the order infringes Appellants' freedom of

commercial activity under secs. 18 and 22 of the Constitution, and that it has a discriminatory impact on the Appellants relative to other pharmaceutical manufacturers in breach of sec. 9 of the Constitution.

In their answering affidavit (para. 30; Pleadings File p. 151) Complainants pointing to the use of the word "*primarily*", sought to argue that the Tribunal found in paragraph 33 of its decision that the joint distribution arrangement substantially reduced competition not only in the market for the distribution of pharmaceutical products in therapeutic categories where the First to Fifth Appellants play a significant role, but also in a broader distribution market. I am satisfied, however, that on a proper reading of the decision, the Tribunal's finding set out in paragraph 14 only refers to a reduction of competition "*in the market for the distribution of pharmaceutical products in certain significant therapeutic categories*".

Sec. 59 of the Competition Act empowers the Tribunal to grant interim relief. When it grants an interim order in terms of sec. 59, the Tribunal is not limited to the powers in sec. 60. The powers provided for in sec. 60 of the Competition Act are:

> **"In addition to its other powers in terms of this Act ..."**

Sec. 59 permits the Tribunal to grant an interim order that is "reasonably necessary to:

> **(i) prevent serious, irreparable damage to [an applicant]; or**
> **(ii) to prevent the purposes of this Act being frustrated."**

In this matter the Tribunal found that Complainants had not established that they would suffer serious irreparable damage if no interim order was granted. The Tribunal found, however, that an interim order was necessary to prevent the purposes of the Competition Act being frustrated, namely to put an end to "the prohibited practice found in this case [which] is to lessen competition in the distribution of pharmaceutical products."

Having identified the market in which First to Fifth Appellants were engaged in a "*prohibited practice*" in terms of sec. 4(1) (a) of the Competition Act as being "*the market for the distribution of pharmaceutical products in certain significant therapeutic categories*", there is no apparent justification for extending the ambit of the *mandamus* granted to include all the Appellants' products. The interim order should have been limited to the relevant therapeutic categories. To the extent that it is not so limited it is overbroad and cannot stand.

The Competition Act is intended to promote and regulate an efficient and competitive economic environment throughout South Africa. The Competition Act applies "to all economic activity within, or having an effect within, the Republic" (See: Sec. 3 of the Competition Act). The "*prohibited practices*" identified by the Competition Act may or may not, in any given matter, be solely of concern between or affect the parties to the *lis*. A "*prohibited practice*" may, in a given case, be confined to the parties or it may affect a wider group. For this reason, and having regard to the provisions of sec. 59 of the Competition Act, I am satisfied that it would be an entirely artificial situation were the Tribunal to be limited to making an interim order which applied only to the parties in circumstances where the identified "*prohibited practice*" was of wider application than just between the parties before the Tribunal.

Firstly and from a practical point of view it would be undesirable that every "victim" of the "*prohibited practice*" should have to lodge a complaint and seek interim relief. The resultant multiplicity of cases would simply overburden and multiply the work of the Tribunal and would lead to unnecessary expenditure without any practical purpose.

Secondly, to limit the order to the parties would be entirely artificial. For the Tribunal to approach its task on the basis that it should limit its order to the parties would be to ignore the very purposes which the interim order is required to protect. The Tribunal is the statutory body which has been entrusted by the Legislature with the duty, *inter alia*, of identifying, adjudicating and remedying practices by Chapter 2 of the Competition Act. The decisions which it takes must reach the outlawed behaviour wherever it is identified. Where the evidence shows that the "*prohibited practice*" is applied to and affects a wider group than just the complaining parties then the Tribunal would, if it were to limit the application of its order, be exercising its discretion without taking all the circumstances into account.

In deciding whether to make an interim order and, indeed, the terms of such order the Tribunal 's discretion is, in terms of sec. 59, sufficiently wide to enable it to have regard to the extent of the "*prohibited practice*". In **Rood v Wallach** 1904 TS 257 Innes CJ who delivered the judgment of the Full Bench of the Transvaal Supreme Court, said:

> **"... In considering in each particular matter what real and substantial justice requires, the Court may take into account all the circumstances surrounding the case."**

(At p. 259)

The remarks apply equally to the Tribunal exercising its discretion in regard to an interim order.

Similarly, in **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd**, 1977 (3) SA 534 (AD) Corbett JA (as he then was) stated:

> **"In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances."**

(at p. 545)

For these reasons I am of the view that an interim order made by the Tribunal pursuant to the terms of sec. 59 can be extended to apply to persons who are not parties to the *lis.* In this case the order requires Appellants to supply their products to "the Complainants and other wholesalers on terms and conditions ...". I find that the extension of the order to customers other than the Complainants is not only unobjectionable but indeed, appropriate.

Insofar as the Appellants point out that the terms of the order limit their ability to act upon sound commercial grounds that criticism is sound. The order does not include any escape valve whereby Appellants could decline to supply a Complainants or other wholesaler who might be in breach of an obligation towards the Appellants or any of them. To that extent the order is overbroad and should not be allowed to stand. This aspect is an example of the practical benefit of giving the parties an opportunity to be heard in respect of relief which was not debated before the Tribunal. Where parties are apprised of the relief claimed they have an opportunity to address any shortcomings in the terms of the proposed order. Where, however, an order is made without the opportunity for submissions the Tribunal may overlook an effect of such order which may not even have been intended.

Order frustrates the clear purpose of the Competition Act.

The next ground upon which Appellants contend that the order of the Tribunal is *ultra vires* is the submission that the Order frustrates the clear purpose of the Competition Act.

Section 2 of the Competition Act provides:

> **Purpose of Act. —The purpose of this Act is to promote and maintain competition in the Republic in order—**
>
> **(a) to promote the efficiency, adaptability and development of the economy;**
>
> **(b) to provide consumers with competitive prices and product choices;**
>
> **(c) to promote employment and advance the social and economic welfare of**

South Africans;
(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

Appellants contend that the Tribunal's order frustrates the clear purpose of the Competition Act as set out in sec. 2 thereof in two ways. Firstly, prior to the advent of Seventh Appellant, most of the Appellants supplied their products to the Complainants at a standard 17.5% discount off list price. It is common cause that this discount rate has been an industry norm for over 25 years, irrespective of the fluctuating forces of supply and demand for the various pharmaceutical manufacturers' products. This price structure was thus, potentially, at least, an historical anomaly which is no longer commercially justifiable. (See: Founding affidavit, para 9.2.2.1 and the references there cited; Pleadings file, p. 27)

It was argued that the concerted practice of the Complainants in requiring this standard discount rate from manufacturers constitutes an agreement to fix prices in violation of s 4(1)(b)(i) of the Competition Act. Accordingly, if the Principals were required to sell all their products to the Complainants at this same rate, there would be a reversion to this unlawful conduct on the part of the wholesalers.

The Complainants responded in their answering affidavit that the 17.5% discount was merely a base rate, off which additional promotional and early settlement discounts were granted (See: para. 31.2; Pleadings file, p. 152). This reply does not satisfactorily answer the criticism as the mere use of a base price list in this manner may well constitute horizontal price fixing. (Cf: **Plymouth Dealers Association v US** 279 F.2d 128 (9th Cir 1960)).

Secondly, the Tribunal's order may require the Appellants to sell products to the Complainants and other wholesalers on terms and conditions preferential to those offered to their other customers. There is no meaningful distinction between these two classes of customers. Even as between wholesalers themselves, the order may, depending on the definition of "*wholesalers*", be construed as requiring that preferential pricing only be extended to certain wholesalers and not to others. Furthermore, the order only applies to wholesalers which were customers at a particular date. Other customers wishing to enter the wholesale distribution market may thus be at a disadvantage and, in such event, the order would have the effect of restricting entry into the market.

Therefore, it was submitted, the discrimination in price between wholesalers and non-wholesalers required by the Tribunal's order is hostile to the objects and contents of the Competition Act, and particularly the principle, in sec. 9 of the Competition Act, that there should not be differential treatment of purchasers.

Thus, it was argued that enforcement of the order would frustrate the clear purposes of the Competition Act, and that it should accordingly be set aside as *ultra vires*.

In my view it is unnecessary to consider the merits of the individual arguments concerning the alleged frustrations of the purposes of the Competition Act. What must be borne in mind is that the subject matter of this review is an interim order. Such an order is by definition a temporary measure aimed at minimising damage prior to the final determination of the issues. On the one hand the Tribunal is required to impose measures which are reasonably necessary to control damage either to the Complainants or to prevent the purposes of the Act being frustrated. On the other hand the Tribunal must avoid making a final decision in respect of the issues. What is required is that a temporary regime be enforced which will as far as possible ensure fairness and minimise anti-competitive behaviour. In balancing those aims the Tribunal may in certain circumstances have to endorse or indeed, enforce practices which are irreconcilable with the purposes as set out in sec. 2 of the Act. Such a situation is inherent in the grant of interim relief in this context.

The purposes of the Act as set out in sec. 2 are manifold and may not always be reconcilable in the short term. Thus to take a single example, sec. 2(b) emphasises competitive prices and product choices while sec. 2(c) seeks to promote employment. The tension between those two purposes may require the Tribunal to sacrifice one in favour of the other in an interim order.

Furthermore one of the purposes of the Act is to create a fair and accountable system by which to regulate competition in our society. In order to protect that system and not to pre-judge, nor indeed to even be perceived to pre-judge any issue the Tribunal may have to introduce or to endorse on a temporary basis a scheme which displays anti-competitive elements simply because that scheme is in the opinion of the Tribunal *reasonably necessary* to achieve the administrative fairness required by the Constitution and in the light of which the Act must be applied.

In every case in which an interim order is to be made, the very many factors which make up modern commercial trade practices have to be weighed against the purposes of the Act. In so doing the Tribunal is bound to find tensions and it is the Tribunal's task to consider them and to exercise a discretion in favour of what is fair in the circumstances. Because the order is only a temporary order, and is made before a final determination of the issues, care ought to be taken to avoid excessive and

irreparable harm to all concerned. For this reason the preservation of a *status quo* or the reversion to the *status ante quo*, albeit that such situations are uncompetitive is often the device which is found to be the fairest, least harmful and most practical solution on an interim basis. The perpetuation of an apparently outlawed practice on an interim basis is not only unobjectionable but will, in many cases be inevitable or, simply the least of all evils. When the matter is finally decided the Tribunal will be less constrained in ordering fundamental changes to uphold the central purposes of the Act. I say "less constrained" because the potential for conflicts between the various purposes in sec. 2 of the Act is quite apparent and a measure of balancing and choice will often be unavoidable even at the stage of final decision.

In my view, the issue of an interim order which on close scrutiny contains elements which introduce, endorse or perpetuate a "*prohibited practice*" does not *per se* mean that the Tribunal has acted *ultra vires* its powers.

ARE THE FINDINGS JUSTIFIABLE IN RELATION TO THE REASONS GIVEN?

The next ground upon which the decision and order of the Tribunal were attacked was that the findings are not justifiable in relation to reasons given.
In terms of sec. 33(2) of the Constitution, *"everyone whose rights have been adversely affected by administrative action has the right to be given written reasons"*.

In terms of sec. 33 of the Constitution, read with item 23(2)(b)(d) of Schedule 6 thereto, Appellants have a right to *"administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened"*.

The provisions of this item override the common law doctrine of symptomatic unreasonableness and introduce into South African administrative law a requirement

of rationality in the merit or outcome of the administrative act.

Much of the argument focussed not upon the relationship between the order and the reasons but upon the justification for and rationality of the Tribunal's findings. Appellants submitted that the Tribunal was not justified, either on the basis of the evidence before it, or alternatively on the basis that it failed to take into account relevant considerations and/or took into account irrelevant considerations, in making certain of
the findings which it made. These finding include the important determinations of the relevant market

and the effect that the joint distribution through Seventh Appellant has on competition. Also under this head, Appellants attacked the order as not being justifiable in that the Tribunal's decision that the order was reasonably necessary was founded on an indecisive finding that the purposes of the Act "*may*" be frustrated. The Tribunal found "*... that a final order may not be able to adequately address the effects of [Seventh Appellant's] conversion on the nature of the competition in the distribution market*." (See: para. 64; Pleadings p. 68). Under this head, Appellants repeated that the inclusion of "*other wholesalers*" in the order was not justified.

The arguments in respect of these issues involved an in-depth analysis of the pleadings and evidence in order to seek to show that the Tribunal's decision and order could not be justified. In the light of the findings I have already made and for the further reasons I will mention, I do not consider it necessary nor appropriate to embark upon an analysis of the evidence in this judgment. This is so especially in view of the fact that the Tribunal may - I emphasise "may" - have to reconsider the matter and to re-examine its factual findings in the light of further evidence and the important developments that have come about since the order was made.

This Court has been informed that after the Tribunal granted the interim order, First to Fifth Appellants disposed of Sixth Appellant, the holding company of Seventh Appellant, to a third party. Appellants state that this was done to avoid further litigation by a restructuring in line with a format which had been approved by the Tribunal in another instance. Whether or not Appellants have succeeded in their intention is not in issue here. However, the restructuring may be relevant to a reconsideration of the interim relief if the further developments are to be included in the evidence for reconsideration.

In addition, the Tribunal may have to re-apply its mind to the evidence and decide whether or not Complainants have established a "*prohibited practice*" in terms of secs. 5, 8 or 9 - matters which have been raised and debated but which in the light of its

finding of a "*prohibited practice*" under sec.4 have not as yet been regarded as requiring a determination by the Tribunal.

REVIEWABLE MISTAKES OF LAW

In our law only certain mistakes of law are reviewable.

As stated in Baxter, *Administrative Law* (1984) at 469:

> **"Reviewable errors of law have sometimes been referred to as 'jurisdictional facts', but in the case of discretionary powers it is more usual for such errors to be characterized**

as errors which distort the nature, or prevent the exercise, of that discretion which has been conferred."

Similarly, in **Hira and Another v Booysen and Another,** 1992 (4) SA 69 (A), the Court distinguished between an error of law "*on the merits*", which could not be reviewed and an error -

"... which causes the decision-maker to fail to appreciate the nature of the discretion or power conferred upon him and as a result not to exercise the discretion or power or refuse to do so."
(at p. 90D-E)

From the record it is clear that the Tribunal made a reviewable mistake of law regarding the incidence of the *onus* of proof in Chapter 6 (i.e. Secs 59 to 68) of the Act as a result of which it failed to apply the provisions of sec.59 correctly. Sec.68 provides that:

"In any proceedings in terms of Chapter 3 or this Chapter, the standard of proof is on a balance of probabilities."

There is nothing Chapter 6 which deals with "*Remedies and Enforcement*" to indicate that the normal rule that he who asserts must prove - because he who wants something from the tribunal must prove that he is entitled to it - is not applicable. Indeed, the reference to a "*standard of proof*" in sec. 68 presupposes that one party will have the burden of establishing the facts.

In terms of sec. 59, read with sec. 68, the Tribunal is only empowered to grant interim relief in circumstances where it had found that the Complainants had established each of the elements of sec. 59 on a balance of probabilities. This required of the Tribunal that it determine and record which of the relevant facts were found to have been proved and which had no been satisfactorily proved.

The decision does not evidence that the Tribunal embarked on such a process. Without coming to a conclusion as to which facts had been proved, the Tribunal was not in a position to weigh up, for example, the prejudice to the Complainants of not granting interim relief against the prejudice to the Applicants of granting it.
The error is a material one and by itself justifies the setting aside of the decision and order.

Appellants also argued that the Tribunal made the further material mistake of law in disregarding benefits of the Appellants joint distribution structure that could have been gained other than by the implementation of Seventh Appellant. I have considered the decision of the Tribunal with particular reference to the paragraphs

relied upon by Appellants and cannot find justification for the criticism. The Tribunal considered the evidence and made findings in regard to the issue of the "technological, efficiency or other pro-competitive gains" referred to in sec. 4(1)(a). I cannot find that the Tribunal made any reviewable mistakes of law in that regard.

REVIEW AND SET ASIDE - CONCLUSION

For the reasons stated there are a number of independent grounds upon which the decision and order of the Competition Tribunal under case number 68/IR/JUN00 dated 28 August 2000 cannot stand and should be reviewed and set aside.

REMITTAL - WITH OR WITHOUT DIRECTIONS?

Whilst the Complainants and the Appellants are now *ad idem* that the decision and order be set aside albeit not fully agreed upon the bases therefore, they disagree as to what further orders, if any, should be made.

Complainants submit that the matter should be remitted in accordance with the provisions of sec. 37(2)(b) of the Act to the same panel which heard and decided the matter with directions that the panel continue the hearing on the same papers duly amplified so as to raise further issues which arise out of this review judgment and which may have arisen by reason of any changed circumstances. They ask for the order to be reviewed and set aside in terms of sec. 37(2)(a) of the Act and that the matter then be remitted to the Tribunal for further hearing in terms of sec. 37(2)(b) of the Act. They have provided the Court with a suggested "*Draft Order*" which includes directions to the Tribunal detailing what should be reconsidered.

Appellants contend that the decision and order "should simply be reviewed and set aside in terms of sec. 37(2)(a) and the matter allowed to be considered afresh by the Tribunal." During argument *Mr Unterhalter* stated that while both sides agree that there should be a remittal, Appellants submit that such remittal should be unconditional and that it should be a remittal to the Tribunal "as an institution" and not to the original panel.

The first matter to be considered here is the Court's powers as prescribed in sec. 37 of the Act. As already noted, Sub-sec 37(2) provides that:

"(2) The Competition Appeal Court may give any judgment or make any order, including an order to -

(a) confirm, amend or set aside a decision or order of the Competition Tribunal; or

(b) remit a matter to the Competition Tribunal for a further hearing on any appropriate terms."

The powers set out in sub-paragraphs (a) and (b) are provided as alternative powers. When this was raised by the Court during argument, Appellants' Counsel seemed to favour a reading of the "or" as "and", pointing out that the Court could not remit an order without first setting it aside. *Mr Nelson* throughout sought a setting aside coupled with a remittal order in terms of sub-section 37(2)(b).

In my view the powers provided in sub-paragraphs 2(a) and 2(b) are true alternatives. Subsection 2(a) empowers the Court to confirm, amend or set aside a decision or order while subsection 2(b) provides the Court with the power to remit the matter to the Tribunal without taking any of the steps provided in subsection 2(a). They are different remedies and, as provided in the sec. 39, are mutually exclusive.

The statutory power to remit without setting aside the order is a very useful power where the decision or order of the Tribunal is incomplete and requires to be supplemented before the matter is ripe for appeal or review or indeed, where a remittal with directions can remove the need for a review and setting aside. There may be cases where the Tribunal has failed to consider a relevant issue or where its decision or order is deficient and where this Court finds that the problem can best be solved by a remittal to the Tribunal for further consideration or clarification without this Court having to act in terms of sub-section 2(a).

The power provided in sub-section 2(a) equates to the Court's common law power on review. The common law power includes - as a matter of law - the power to remit with or without directions after the decision or order has been set aside wholly or in part. This power which is well-established in our law is different from the power provided in sub-section 2(b).

Although repeatedly advanced in terms of sec. 37(2)(b), Complainants' request for the matter to be remitted after it is set aside is in substance a claim based upon the Courts' inherent common law powers included by law in the powers contained in sec. 37(2)(a).

The ordinary course is to refer the matter back to the administrative tribunal or functionary because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. (See: **Vries v Du Plessi s N.O.**, 1967 (4) SA 469 (SWA) at p. 482; **Johannesburg City Council v Administrator, Transvaal & Another**, 1969 (2) SA 72 (T) at p. 76).

An analysis of the reported cases illustrates that the reviewing court will itself correct the decision of the tribunal or functionary and substitute its own decision where the result is a foregone conclusion; (See for example: **Traub v Administrator, Transvaal**, 1989 (2) SA 396 (T) at p. 418-420); where further delay may cause undue prejudice (See for example: **Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg**, 1985 (2) SA 790 (A) at p. 805 F-H); where the tribunal or functionary has exhibited bias or incompetence which would render it unfair to re-expose a party to the same jurisdiction; (See for example: **Mahlaela v De Beer**, 1986 (4) SA 782 (T) at p. 794-5); where the Court finds itself to be in as good a position as the tribunal or functionary. Here the Courts, will despite the fact that they are usurping the function of another, nonetheless act if fairness so dictates; (See for example: **Theron v Ring van Wellington van die NG Sendingkerk van Suid-Afrika**, 1976 (2) SA 1 (A) at p. 31 B-E)

This approach was recently reaffirmed by the Supreme Court of Appeal in **Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council**, 1999 (1) SA 104 (SCA) where it was said that:

> **"In approving the plan in question, the first respondent was discharging its administrative functions. When setting aside such a decision, a Court of law will be governed by certain principles in deciding whether to refer the matter back or substitute its own decision for that of the administrative organ. The principles governing such a decision have been set out as follows:**
>
> > **'From a survey of the . . . decisions it seems to me possible to state the basic principle as follows, namely that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that, although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides.'**
>
> **(*Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349G. See also, *inter alia, Local Road Transportation Board and Another v Durban City Council and Another* 1965 (1) SA 586 (A) at 598D--F; and *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others* 1986 (2) SA 663 (A) at 680E--F.)**
>
> **The general principle is therefore that the matter will be sent back unless there are special circumstances giving reason for not doing so. Thus, for example, a matter would not be referred back where the tribunal or functionary has exhibited bias or gross incompetence or when the outcome appears to be forgone. (*Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others* (*supra* at 680F--G).)"**

(at p. 109)

Where the tribunal which is empowered to decide a matter has, in effect, a number of chambers - as is the case here where a panel consisting of three members of the Tribunal hears the matter - then our Courts have where fairness so requires remitted the matter with directions that another functionary should deal further with the matter. (See: **S v Somciza**, 1990 (1) SA 361 (A) at p. 366)

Although no allegations of bias nor of serious incompetence are made, Appellants initially submitted that because of the interim nature of the proceedings and because of the number of grounds upon which the decision and order are liable to be set aside, it is inappropriate to remit the matter to the Tribunal. At the hearing, however, it was common cause that the matter should be remitted but Appellants argued that it should be sent back to the Tribunal as an institution as opposed to the panel which first heard and decided the matter. Appellants contended that any rehearing had to be a hearing *de novo*.

Complainants submitted that the matter should be remitted to the panel who first heard it as the members were apprised of the facts which are set out in a very lengthy record. They also pointed to the fact that the members of the panel were now familiar with the issues as also the practices in the wholesale pharmaceutical trade. To have to start again before a new panel will considerably and unjustifiably increase the costs of what is, after all, an interim application,

I have considered the arguments raised and cannot find any basis upon which to refuse to remit the matter. Logically the resumption must be before the existing panel. If any panel members are not available, then the Chairperson of the Tribunal will have to act in terms of sec. 31 of the Act. In setting aside the decision and order in this matter the proceedings as a whole are not invalidated. On the facts *in casu*, the hearing is put back to the stage which had been reached before the decision was made. When the matter proceeds the Tribunal will have to decide upon the further procedural steps which it takes. Without limiting or extensively defining the concerns which may arise, it appears that the panel may be faced with an application to re-open the matter in order to place further or updated information before it; it may itself require further argument in the light of this decision; it may be required to consider the complaints made in terms of secs. 5, 8 and 9 of the Act - matters which have not yet been decided and which fall essentially within the domain of the Tribunal. The Tribunal has been empowered by the Legislature to determine the issues which arise in the sec. 59 application and, save in respect of the matters dealt with in this judgment, there is no basis for this Court to impose its own views, at this stage, as to what may be relevant or how the Tribunal should

go about the further hearing of this matter. Those decisions are, and at this stage, remain, the prerogative of the Tribunal.

In all the circumstances it seems fair to all concerned that the matter be remitted to the Tribunal for the hearing to be resumed before the panel to which it was assigned in terms of sec. 31(1) of the Act.

COSTS

Both parties asked the court to favour them with an award of costs. Appellants submitted that they had to pursue the review in order to protect and enforce their rights. Complainants argued that they had conceded the review and offered to agree terms upon which this Court could be asked to remit the matter but that their overtures were rebuffed by unco-operative Appellants.
Section 61(2) of the Act provides that:

> **"The Competition Appeal Court may make an order for the payment of costs against any party in the hearing, or against any person who represented a party in the hearing, according to the requirements of the law and fairness."**

The review hearing could not be avoided by agreement. Only an abandonment by the Complainants of their order could they have avoided a full hearing before this Court. In any event even the concessions made by the Complainants were limited to the two grounds upon which Davis JP had suspended the operation of the interim order pending this judgment. Consequently Appellants were fully entitled to proceed to try and establish their remaining grounds of review. In cases where a matter is remitted for further hearing, it does not assist a party nor, indeed, the tribunal or functionary to have only some of the grounds of review determined. Such a situation may create a false sense as to the remaining issues and would inevitably lead to a subsequent review when the same errors are perpetuated or repeated.

Further, Complainants' offer to concede the review was conditional upon Appellants reaching agreement with them as to the terms upon which the matter would be remitted to the Tribunal. When Appellants declined to enter into negotiations, Complainants promptly filed lengthy answering affidavits in which they vehemently opposed each and every ground of review. It was then only some twelve days before the hearing that Complainants advised the Court that they would "*consent to the review on the basis that the decision be referred back to the Tribunal on such terms as the Competition*

Appeal Court deems appropriate."

Up until the matter was argued, Appellants opposed an order remitting the matter. It was argued that the decision and order should simply be set aside. That, it was submitted, would have the effect of reinvesting the Tribunal with jurisdiction. It was, however, clear that *Mr Unterhalter* opposed the grant of an order sending the matter back to the original panel. He supported a hearing *de novo* and consequently resisted an order which contained any directions for the further hearing of the matter.

In the result, Appellants have achieved substantial success. A majority of their grounds of review have been upheld. On the other hand, Complainants have succeeded in only one aspect, namely in their submission that the matter should be remitted to the panel which was seized with it originally. No other directions will be made.
When regard is had to the pleadings and argument for the review I find that very little time and effort was expended in respect of the remittal issue. It was introduced by Complainants on a conditional basis before the answering affidavits were filed. Thereafter those affidavits, strenuously resisted and opposed the review. The question of a concession was again conditionally linked to a remittal when Complainants heads of argument were filed a week before the hearing. In the circumstances, I am satisfied that fairness demands that the costs follow the result. Appellants have succeeded save in respect of the referral to the original panel. That issue occupied the Court for a relatively short time and is of insufficient import or weight to justify depriving Appellants of any part of their costs.
The Court notes that the parties agreed to bear their own costs in respect of the hearing on 22 May 2001.

In the result it is ordered:

0. **That the decision and order of the Competition Tribunal under case number 68/IR/JUN00 dated 28 August 2000 are reviewed and set aside. The matter is remitted to the Tribunal for further hearing by the panel which is seized therewith;**

4. That the Complainants are ordered to pay the costs of this review application, such costs to include the costs of two counsel.

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SELIKOWITZ AJA

MAILULA AJA and **JALI AJA** .