IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CASE NO: 15/CAC/Feb02

In the matter between:

GLAXO WELLCOME (PTY) LIMITED First Appellant

PFIZER LABORATORIES (PTY) LIMITED Second Appellant
PHARMACARE LIMITED Third Appellant
SMITHKLINE BEECHAM PHARMACEUTICALS (PTY) LIMITED Fourth Appellant
WARNER LAMBERT SA (PTY) LIMITED Fifth Appellant
SYNERGISTIC ALLIANCE INVESTMENTS (PTY) LIMITED Seventh Appellant
DRUGGIST DISTRIBUTORS (PTY) LIMITED Eighth Appellant
and

NATIONAL ASSOCIATION OF PHARMACEUTICAL WHOLESALERS First Respondent

NATAL WHOLESALE CHEMIST (PTY) LIMITED t/a ALPHA PHARM DURBAN Second Respondent

MIDLANDS WHOLESALE CHEMISTS (PTY) LTD t/a ALPHA PHARM PIETERMARITZBURG Third Respondent

EAST CAPE PHARMACEUTICALS LIMITED t/a ALPHA PHARM EASTERN CAPE Fourth Respondent

FREE STATE BUYING ASSOCIATION LIMITED t/a ALPHA PHARM BLOEMFONTEIN (KEMCO) Fifth Respondent

PHARMED PHARMACEUTICALS LIMITED Sixth Respondent

L'ETANGS WHOLE CHEMISTS CC t/a L'ETANGS Seventh Respondent

RESEPKOR (PTY) LIMITED t/a RESKOR

PHARMACEUTICALS WHOLESALERS Eighth Respondent

MAINSTREET 2 (PTY) LIMITED t/a NEW UNITED PHARMACEUTICAL DISTRIBUTORS Ninth Respondent

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J U D G M E N T

HUSSAIN, JA:

Introduction

[1] This is an appeal and cross-appeal against a decision of the Competition Tribunal ("*the Tribunal*") handed down on 14 January 2002.

The background

[2] The appellants before this Court are respondents in a complaint referral brought by the respondents before this Court to the Tribunal. In this judgment, in relation to both the appeal and cross-appeal, I shall refer to the respondents as "*the complainants*" and the appellants as "*the respondents*".

[3] The complainants are pharmaceutical wholesalers and distributors while the first to seventh respondents are manufacturers of pharmaceutical products a substantial volume of which are sold and distributed by the complainants. The respondents and the complainants are thus in a vertical relationship whereby the complainants procure products from the respondents which they market and distribute as wholesalers.

[4] The appellants' complaint to the Competition Commission ("*the Commission*") related to the

conversion by the respondents of, 8th respondent, Druggists Distributors (Pty) Ltd ("*DD*"), from a wholesaler into a distribution agent, and the performance by this agent of distribution services on behalf of the respondent. Before the conversion of DD, the respondents sold a significant amount of their private sector products to wholesalers, such as the complainants. The complainants purchased products from the respondents at a standard discount of 17,5% off the list prices. These products were then sold by the complainants to the retail market made up mainly of chemists/pharmacists and dispensing doctors. The respondents continue to supply the complainants large volumes of their respective products except that the respondents stopped offering the complainants the 17,5% discount. The complainants objected to the respondents' decision to set up a distribution agent.

[5] The complainants sought relief against the respondents through the provisions of the Competition Act No 89 of 1998 ("*the Act*") alleging that the latter have engaged in conduct prohibited by sections 4, 5, 8 and 9 of the Act.

On 7 June 2000 the complainants lodged a complaint with the Commission ("*the complaint*"). The Commission investigated the complaint and decided to refer the complaint to the Tribunal in terms of the Act. The referral however was filed outside of the statutory period prescribed by the Act and the Commission was deemed to have issued a certificate of non-referral.

[6] On 19 June 2001 the complainants, in terms of section 51(1) of the Act referred the complaint to the Tribunal ("*the referral*"). Thereafter the respondents were required to file their answer within the prescribed time period. The respondents applied to the Tribunal for an extension of the date for the filing of their answering affidavit to the complaint referral. During the course of this application the complainants expressed some reservations about the possibility that the respondents might raise certain technical points thereby causing delay. The Tribunal allowed the respondents the extension that was

sought and at the same time placed the latter on terms for the raising of any technical points. Thus the respondents were asked to raise any technical points in limineon or before 20 August 2001.

[7] On 17 August 2001, and before filing their answering affidavit, the respondents on notice of motion (Form CT6), applied to the Tribunal for the striking out of various paragraphs and prayers contained in the complaint referral.

[8] The respondents' notice of motion claims the following relief:

"*1. striking out:*

1.1 prayers 3 and 7(b) of Annex C and paragraphs 19.4 to 19.9 of Mr Kevin Vyvyan-Day's affidavit;

1.2 prayer 7(a) of Annex C and paragraph 19.3 of Vyvyan-Day's affidavit;

1.3 prayer 7(d) of Annex C;

1.4 prayer 7(e) of Annex C;

1.5 prayer 6 of Annex C;

1.6 prayer 8 of Annex C;

1.7 prayers 11 and 12 of Annex C

1.8 prayers 1, 4 and 5 of Annex C;

2. condoning the shortening of the time periods prescribed by the Rules of Proceedings before the Competition Tribunal on account of the urgency of this application;"

After hearing the application the Tribunal granted an order in the following terms:

"*100. We make the following order in respect of the striking out application :*

1. Prayers 1.2; 1.4 and 2 of the Notice of Motion are granted.

2. Prayer 1.1, insofar as it is partly based on an objection to jurisdiction is dismissed. Insofar as it is partly based on allegations that the Complaint referral discloses no cause of action it is postponed in accordance with paragraph 3 of this

order.

3. Consideration of the remaining prayers is postponed until after close of pleadings or at the hearing of the matter, in accordance with any ruling of the Tribunal.

4. Costs are reserved."

[9] The respondents appeal against the second order and the complainants cross appeal against the first order.

The relevant prayers in the complaint referral read as follow:

Prayer 3

"*Ordering the Principals to provide direct access to their products on terms determined by the Tribunal to be reasonably required where essential resources like the Principals products are concerned;*"

Prayer 7(b)

"*the refusal by the Principals to give the Complaints direct access to their products when it is economically feasible to do so;*"

Prayer 7(a)

"*Declaring the following conduct of the Respondents, past or present, to be prohibited practices in terms of section 8 of the Act, for purposes of section 65:*

the charging of excessive prices by the Principals to the detriment of consumers;"

Prayer 7(e)

"*selling the Principals' products, through their exclusive distribution channel, at below their marginal or average variable cost;*"

[10] Thus the complainants, in the referral, alleged conduct, on the part of the respondents, which, inter alia, amounted to:

(a) denial of access to an essential facility;

(b) the charging of excessive prices and

(c) predatory pricing.

[11] The respondents' application to strike out was based on the absence of jurisdiction on the part of the Tribunal to hear the complaint based on the above conduct. The respondents submitted that the complainants, in the referral, were attempting to rely on conduct not alleged in the complaint.

[12] The complainants opposed the application for striking out principally on the basis that:

(a) the Tribunal, at this stage, ought not to hear such an application and

(b) if the Tribunal did hear the application, then the application must fail because, in all the circumstances, the Tribunal did have jurisdiction to consider the complaint referral based on the offending conduct as alleged by the complainants.

The Tribunal ruled that they could properly hear the application for striking out and made the aforesaid order.

Complaint procedures

[13] For a proper understanding of the issues in this appeal and cross-appeal a brief consideration of the complaint procedures in Part C of the Act is essential.

[14] Section 49B provides for the initiating of a complaint. This may be done in any manner or form or in the prescribed form. The wording of section 49B is worth noting in that it is not prescriptive as to how a complaint may be initiated. This theme runs throughout the complaint procedures, the object being to enable complaints to be lodged without the need for procedures that are too technical and/or formalistic.

Section 49B provides as follows:

> "***49B. Initiating a complaint***
>
> *(1) The Commissioner may initiate a complaint against an alleged prohibited practice.*
>
> *(2) 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.*
>
> *(3) Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.*
>
> *(4) At any time during an investigation, the Commissioner may designate one or more persons to assist the inspector.*"

[15] Section 49B focuses on a "*prohibited practice*" and does not require a complainant to identify prohibited conduct with reference to various sections of the Act. A complainant is not required to

pigeonhole the conduct complained of with reference to particular sections of the Act. What is required is a statement or description of prohibited conduct. In this regard Form CC1, prescribed in terms of sections 21(4) and 49B of the Act, is instructive. The form requires a complainant to "*provide a concise statement of the conduct*" that is the subject of a complaint. A complainant need only identify the conductof which it complained.

[16] Clearly it is intended that once the complaint is initiated the Commission will investigate the matter and it is the Commission which is enjoined to find that the conduct complained of amounts to prohibited conduct in terms of one or more sections of the Act. While the complaint need not be drafted with precision or even a reference to the Act, the allegations or the conduct in the complaint must be cognisably linked to particular prohibited conduct or practices. There must be a rational or recognisable link between the conduct referred to in a complaint and the prohibitions in the Act, otherwise it will not be possible to say what the complaint is about and what should be investigated. Note that section 49B provides that, once a complaint is initiated, the Commission mustinvestigate the complaint.

[17] Sections 50 and 51 of the Act regulate how matters may be referred to the Tribunal. These sections provide as follows:

> "***50. Outcome of complaint***
>
> *(1) At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.*
>
> *(2) Within one year after a complaint was submitted to it, the Commissioner must –*
>
> *(a) subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established; or*
>
> *(b) in any other case, issue a notice of non-referral to the complainant in the prescribed form.*

(3) When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2)(a), it –

(a) may –

(i) refer all the particulars of the complaint as submitted by the complainant;

(ii) refer only some of the particulars of the complaint as submitted by the complainant; or

(iii) add particulars to the complaint as submitted by the complainant; and

(b) must issue a notice of non-referral as contemplated in subsection (2)(b) in respect of any particulars of the complaint not referred to the Competition Tribunal.

(4) In a particular case –

(a) the Competition Commission and the complainant may agree to extend the period allowed in subsection (2); or

(b) on application by the Competition Commission made before the end of the period contemplated in paragraph (a), the Competition Tribunal may extend that period.

(5) If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time contemplated in subsection (2), or the extended period contemplated in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period.

51. Referral to Competition Tribunal

(1) If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Competition Tribunal, subject to its rules of

procedure.

(2) A referral to the Competition Tribunal, whether by the Competition Commission in terms of section 50(1), or by a complainant in terms of subsection (1), must be in the prescribed form.

(3) The Chairperson of the Competition Tribunal must, by notice in the Gazette, publish each referral made to the Tribunal.

(4) The notice published in terms of subsection (3) must include –

(a) the name of the respondent; and

(b) the nature of the conduct that is the subject of the referral."

[18] The particular wording of sections 50 and 51 is noteworthy. The sections consistently refer to "*a complaint*" followed by what the Commission may do with "*the complaint*". What is intended is that the Commission consider and investigate the particular conduct complained of by the complainant. The Commission may then determine that such conduct amounts to a prohibited practice in terms of a section or sections of the Act.

[19] When a complaint is referred to the Tribunal in terms of the Act, section 50(3), consistently provides that what must be referred are particulars of the complaint "*as submitted by the complainant*". Again a clear reference to the conduct referred to by the complainant and which amount to the facta probandanecessary to establish a prohibited practice.

[20] Section 50(3)(a) of the Act provides that the Commission may refer all, or only some, of the particulars of the conduct to the Tribunal. In respect of any particulars which are not referred to the Tribunal the Commission mustissue a notice of non-referral.

[21] The legislature intended that the Commission would issue a notice of non-referral in response to a complaint:

(a) when, after completing its investigation, the Commission determines that

no prohibited practice was established and decides not to refer the complaint in its entirety (section 50(2)(b)) and

(b) when the Commission does refer the complaint to the Tribunal but decides not to refer all of the particulars of the complaint.

[22] What is intended is that if a complainant believes that those particulars of its complaint that are not referred to the Tribunal may establish a prohibited practice, then the complainant will not be prejudiced by the Commission's refusal to refer. Again it must be noted that section 50 was carefully crafted and what was contemplated, in the event of non-referral by the Commission, was that the complainant may itself refer to "*the complaint*" or particulars of "*the*" complaint to the Tribunal. It was not intended that in the event of a non-referral by the Commission that the complainant is given carte blanche in its referral and may thereby introduce a new complaint or particulars of a complaint not mentioned in the conduct which formed the subject of the complaint in terms of section 49B.

[23] Section 51(1) provides that if the Commission issues a notice of non-referral in response to "*a*" complaint, the complainant may refer "*the*" complaint directly to the Tribunal. Note that a complainant is expected to refer "*the complaint*", not anycomplaint, a clear reference to the conduct that was the subject of the complaint in terms of section 49B.

[24] Section 51 cannot be interpreted to allow, where the Commission decides not to refer a complaint in its entirety, a complainant to add to the referral particulars of conduct which were not complained of or referred to the Commission in terms of section 49B of the Act.

The jurisdictional requirement

[25] The initiating of a complaint requires a referral of allegedly prohibited conduct to the Commission. There is no provision in the Act for a referral directly to the Tribunal. The purpose of the Commission's investigation is to consider the conduct described by a complainant and to determine whether or not a prohibited practice has been established. On completion of its enquiry, and having found a prohibited practice, the Commission must refer the matter to the Tribunal.

American Natural Soda Ash Corporation and Another v Botswana Ash (Pty) Ltd a decision of the Competition Tribunal Case No 49/CR/APR00, 27/3/2001.

[26] The Commission is thus the legislature's "*plaintiff of first choice*". Only if the Commission decides not to refer or fails to refer a complaint of a prohibited practice can a complainant refer thatcomplaint "*directly*" to the Tribunal.

[27] The Commission represents both the public interest and the particular interest of a complainant. The Tribunal has recognised the status of the Commission as the primary party in prosecuting complaints before it in the public interest.

American Natural Soda Ash Corporation v Botswana Ash (Pty) Ltd 49/CR/AJUL000.

National Association of Pharmaceutical Wholesalers v Glaxo Wellcome (Pty) Ltd 45/CR/JUL01.

[28] The process of investigation by the Commission of a complaint is a necessary prerequisite to any referral because it is for the Commission to protect the public interest if it considers a prohibited practice to have been established. The Act does not allow for a complainant to bypass these investigative procedures by adducing or adding ad hoc complaints in a referral.

[29] The submission of particulars of a complaint to the Commission is the jurisdictional fact or precondition which must be satisfied before the Tribunal can exercise its powers over a respondent.

See S A Defence and Aid Fund and Another v Minister of Justice1967 1 SA 31 (C) at 34-35 where it was

held:

> "*Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power (see e.g. Kellerman v Minister of Interior, 1945 T.P.D. 179; Tefu v Minister of Justice and Another, 1953 (2) SA 61 (T)). On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a Court of law*."

[30] Thus in the present matter, a complaint to the Commission by the complainants that the respondents have engaged in conduct amounting to predation or the charging of excessive prices, is a jurisdictional fact falling into the first category. In the absence of a submission of particulars relating to such conduct to the Commission, any exercise of power by the Tribunal in relation to such prohibited practice will be invalid. The Tribunal may only entertain a referral properly referred to it and in terms of the Act. The Tribunal's wide inquisitorial powers cannot be extended to circumvent the clearly defined complaint procedures set out in the Act. If the Tribunal does not have jurisdiction to consider allegations of a prohibited practice, it cannot use its inquisitorial powers to empower it to determine whether or not a respondent has committed that prohibited practice.

[31] The dispute resolution mechanism in the Labour Relations Act 1995 are analogous. For instance the Commission for Conciliation, Mediation and Arbitration does not have jurisdiction to arbitrate a dispute which has not first been the subject of conciliation by the parties.

National Union of Metalworkers of SA and Others v Cementation Africa Contacts (Pty) Ltd 19 ILJ 1208 (LC) at 1214H-1215A.

[32] The role of the Commission is key to the complaint procedures as set out in the Act. In the matter before us, we are told from the Bar that the Commission filed the referral out of time due to

"*administrative errors*". Whilst the Commission was not before us in order to explain their omissions it appears, prima facie, that it failed in its duty. The Commission's role is pivotal and "*administrative*" or other failures serve to undermine the complaint procedures prescribed by the Act. Surely the Commission must take all steps and institute procedures to avoid such lapses in carrying out its statutory duties.

[33] The Tribunal's approach to the jurisdictional question is set out in its decision as follows:

> "*88. Thus in approaching a jurisdiction problem of the kind raised by the respondent we examine the conduct alleged in the complaint and compare it with that alleged in the subsequent Complaint Referral. We ignore the fact that in the CC 1 the complainant may have alleged that certain sections of the Act have been contravened by the respondent inconsistent with the subsequent contraventions alleged in the referral. We then examine the conduct alleged in the CC1 and see if it is substantially the same as that alleged in the referral. If it is, the complainant has standing. If not the complainant does not and its remedy is to lodge a new complaint with the Commission containing those allegations. If the new complaint is closely linked to the pending referral the complainant would then have to persuade the Commission to refer or non-refer the additional counts on an urgent basis so that the subsequent Complaint Referral at whosever's behest could be consolidated with the pending referral.*"
>
> "*91. We now go on to examine the complaint as supplemented by the interim relief application annexed, to see whether it contains any factual allegations that amounts to conduct substantially the same as those alleged in relation to the excessive pricing, predatory pricing and access to essential facility counts contained in the Complaint Referral.*"

In principle I can find no fault with this approach.

The proper approach is to determine first what conduct is alleged in the complaint and what prohibited practices such conduct may be said to invoke or be rationally connected to. Then, consideration is given to the referral to see whether the conduct there alleged is substantially the same.

[34] Having examined the complaint the Tribunal correctly concluded that there was no reference to, or particulars of complaint which amounted to, the prohibited conduct of excessive pricing and predatory pricing. In fact it is common cause between the parties that the complainants made no allegations of predatory pricing and excessive pricing in the complaint. In my opinion the Tribunal cannot be faulted for finding that the complainants were not entitled to include allegations of this conduct in the referral.

[35] Having made such a finding it must follow that the respondents' application to strike out must succeed, insofar as it relates to the conduct of excessive pricing and predatory pricing. The complainants cannot rely on any of the Tribunal's powers, as wide as they may be, to suggest that the Tribunal may nevertheless consider such allegations in the referral. The Tribunal simply does not have the jurisdiction to do so. Nor does it assist the complainant to argue that the striking out, at this stage when the respondents have yet to file their answering affidavit, will be premature. Filing of further papers will not cure the jurisdictional difficulty.

[36] If the Tribunal lacks jurisdiction then it makes no sense to put the respondents to the extent of filing answers to the alleged conduct only to have the allegations struck out at a later stage i.e. at a pre-hearing or the hearing itself.

[37] The respondents submitted that instead of entertaining an application to strike at this stage the Tribunal ought to have waited for at least a pre-hearing at which it could use its extensive powers to inquire into whether or not the Commission did investigate the conduct in question. I can find no merit in this as the test is not whether the Commission in fact investigated the matter but whether the complainants ever submitted that complaint or particulars of the complaint to the Commission.

[38] No injustice results from this interpretation of the Act. If the complainants never submitted particulars of a complaint regarding predatory pricing or the charging of excessive prices to the Commission it is still open for them to do so by way of a fresh complaint. Nor will this necessarily result in excessive delay. The complainants have already formulated their complaint and merely have to submit that in the prescribed manner to the Commission. There is no basis for the complainants to speculate that the Commission will delay in investigating the complaint and making a referral to the Tribunal.

<u>Essential facilities doctrine</u>

[39] I now turn to the respondents' alleged conduct of refusing access to an essential facility when it is economically feasible to do so.

Again the respondents objected in respect of this charge on the basis that no particulars of such conduct appears in the complaint. The Tribunal found as follows:

> "*96. Whilst in the complaint the conduct complained of is made in the context of a refusal to deal the factual allegations are substantially the same. Refusals to deal and denial of access to an essential facility are often two sides of the same coin. In American jurisprudence 'refusal to deal cases under the Sherman Act have been analyzed under ... the intent test and essential facilities test. These two lines of cases are*

"conceptually similar" and "no bright line can be drawn" between them. Indeed, cases are sometimes analyzed under both tests'. Some American commentators have even argued that the doctrine of essential facilities is unnecessary because it is embodied in the doctrine of a refusal to deal. In Bellamy & Child, a leading textbook on European Competition Law, the essential facilities doctrine is dealt with as a species of conduct falling within the category of refusals to deal.

97. We find that the prohibited practice relating to access to an essential facility has been substantially alleged in the complaint to the Commission. The objection in respect of this charge on jurisdictional grounds is rejected."

I cannot agree with this finding. In my opinion the Tribunal misdirected itself in two respects:

(a) It miscast the comparative law and

(b) Its interpretation of the clear provisions of the Act was flawed.

[40] Whilst I have no quarrel with finding reference to conduct, in the complaint, which amounts to refusal to deal, this cannot be declared to be conceptually similar to the denial of access to essential facilities as provided for in the Act.

I will first make reference to the comparative law then turn to the specific provisions in the Act.

[41] Neither article 82 of the EC Treaty, nor the Sherman Anti-Trust Act makes any express reference to the expression "*essential facility*". What one finds are provisions relating to the general prohibition of abuse of a dominant position. The essential facility doctrine in both the US law and EC law is the result of judicial application of widely-framed norms directed at conduct amounting to the abuse of a dominant position. However, as will appear in this judgment, the doctrine as developed by the Courts is specific and has distinct requirements. The doctrine is not applied merely as a species of conduct falling within the category of refusals to deal.

[42] The term "*essential facility*" originated in the United States. In the case of United States v Terminal

Railroad Association of St Louis, 224 US 383 (1912) the US Supreme Court dealt with the refusal to give reasonable access to the only railway terminal in St Louis. The Court found that it was a violation of the Sherman Act to deny competitors access to the terminal, on reasonable terms, as such access was essential to their ability to compete. Note that the case dealt with the infrastructural facility of a terminal, the duplication of which facility, by a competitor, was not economically viable.

[43] The doctrine was developed in other earlier cases. See Gamco Incorporated v Providence Fruit and Produce Building233 US 817 (1952) and Otter Tail Power Company v US410 US 366 (1973). The former case dealt with access to a building which as a result of its peculiar position was attractive for the purpose of conducting business with wholesalers and retailers for the supply of bulk fresh produce. The latter case dealt with the provision of wholesale power supply from the power company's established grid to municipalities which chose to own their own retail distribution system. Again both these cases dealt with infrastructural facilities that are not easily duplicated and are essential to competitors' entry into the market.

[44] Reference to the term "*essential facility doctrine*" was used in the case of Hecht v Pro-Football Inc436 US 956 (1978). The Court formulated the doctrine in the following terms:

> "*The essential facility doctrine, also called the 'bottleneck principle', states that 'where facilities cannot practically be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is an illegal restraint of trade to foreclose the scarce facility ... when the restrictive covenant covers an essential facility ... all possible competition is by definition excluded and the restraint is thus unreasonable per se – provided that the facility can be shared practically.*"

The case involved access to a football stadium by a professional football team.

[45] The case of MCI Communications Corporation and MCI Telecommunications v American Telephone and Telegraph Company708 F.2d 1081 (1983) is instructive. In that case AT&T denied MCI, a

competitor, interconnections to its switched network. The United States Court of Appeals, Seventh Circuit, found that it was technically feasible for AT&T to provide the requested interconnections and that its refusal to do so breached US antitrust laws. The US Court of Appeals found that the case law sets forth four elements necessary to establish liability under the essential facility doctrine:

> "*(1) control of the essential facility by a monopolist;*
> *(2) a competitor's inability practically or reasonably to duplicate the essential facility;*
>
> *(3) the denial of the use of the facility to a competitor; and*
>
> *(4) the feasibility of providing the facility*."
>
> (at pages 1132-1133)

What was emphasised in the AT&Tcase is that in US law a complaint under the essential facility doctrine requires specific allegations.

[46] Similarly the EC Treaty does not contain an explicit prohibition against refusing access to an essential facility. The law was developed in a number of article 86 cases involving abuses by firms of their dominant positions.

[47] Access to an essential facility was dealt with by the European Commission in the matter of Sea Containers v Stena Sealinkcase IV/34.689 (Official Journal L317, 47, 1988/11/24). The Commission found that denial of access to a port by Stena Sealink to Sea Containers amounted to an abuse of Stena Sealink's dominant position in the provision of such an essential facility. Having fully considered the infrastructural nature of the port and having considered the use of the port by the operators of the ferry service, the Commission concluded that the capacity of the harbour was sufficient to permit a third operator without undue inconvenience. Again the facility in question was infrastructural and will require enormous capital investment to duplicate, if indeed duplication was possible.

[48] In La Poste/SWIFT + GUFcase IV/36.120 (Official Journal C335, 1997/11/06) a complaint was filed by the French Post Office, La Poste, against the Society for Worldwide International Financial Telecommunications (SWIFT) and GUF. SWIFT is engaged in the international transfer of payment messages. La Poste applied to become a member of SWIFT and was refused on the basis that it did not meet SWIFT's membership criteria. The European Commission noted that SWIFT was an essential facility for transmitting electronic payment messages. SWIFT was the only network providing connections to banks located worldwide. To deny membership would in effect be to exclude a competitor from the international transfer market. Clearly it was not possible for a competitor to duplicate SWIFT's worldwide network.

[49] The essential facilities doctrine was considered in the recent case of Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co KG and Otherscase C-7/97 [1999] 4 CMLR 112, a decision of the Court of Justice of the European community (Sixth Chamber). This case concerned the refusal of a large media company which held a substantial share of the daily newspaper market in Austria and which operated the only nationwide home-delivery scheme, to allow a rival publisher with a small circulation access to the home-delivery scheme. The Court found that for refusal to grant access to be an abuse:

1. the refusal had to be likely to eliminate all competition from the person requesting the service;

2. the refusal must be incapable of being objectively justified; and

3. access had to be indispensable to the carrying on of the person's business, inasmuch as there was no actual or potential substitute for the facility.

On the facts the Court found that the refusal of access to the home-delivery scheme did not meet these criteria. Other methods of delivery existed to which there were no

material economic or technical barriers. It is not impossible or unreasonably difficult for the rival publisher to establish its own delivery scheme.

[50] Thus the comparative law, consulted by the Tribunal, in fact establishes a distinctive doctrine relating to a refusal of access to an essential facility, with specific requirements that do not collapse into a general complaint of a refusal to deal by a dominant firm.

I now turn to the specific formulation of the Act.

[51] Part B of the Act deals with the abuse of a dominant position. Section 8 provides as follows:

> "***8. Abuse of dominance prohibited***
>
> *It is prohibited for a dominant firm to –*
>
> *(a) charge an excessive price to the detriment of consumers;*
>
> *(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;*
>
> *(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or*
>
> *(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –*
>
> *(i) requiring or inducing a supplier or customer to not deal with a competitor;*
>
> *(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;*
>
> *(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;*
>
> *(iv) selling goods or services below their marginal or average*

variable cost; or

(v) buying-up a scarce supply of intermediate goods or resources required by a competitor."

"*Essential facility*" is defined in section 1(viii) as follows:

"*means an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers*"

At the outset one must not lose sight of the architecture of the Act and in particular section 8. I note the following:

1. Sections 8(a) and 8(b) are per seprohibitions which allow for no justification.

2. Sections 8(c) and 8(d) are not per seprohibitions and firms accused of engaging in exclusionary acts may raise the defence that the technological efficiency or other pro-competitive gains which flow outweigh its anti-competitive effect.

3. A dominant firm's refusal to supply scarce goods to a competitor when supplying these goods is economically feasible is dealt with in section 8(d)(ii). It was intended that a firm accused of this conduct be allowed to raise a defence.

4. The legislature could not have intended that the refusal to supply scarce goods to a competitor, when it is economically feasible to do so, to be considered as a refusal to give a competitor access to an essential facility

under section 8(b).

5. "*Essential facility*" is defined in the Act. Such a facility is a resource or infrastructure that cannot reasonably be duplicated. Essential facility is certainly not the supply of scarce goods to a competitor.

6. The Act provides a statutory codification of the distinctive abuse of refusing to give a competitor access to an essential facility when it is economically feasible to do so.

7. Section 8(b) was clearly intended to be a prohibition, separate and distinct.

[52] Thus there exists no language in the Act that supports the Tribunal's approach that refusals to deal and denial of access to an essential facility "*are often two sides of the same coin*". On the Tribunal's reasoning, an exclusionary act under section 8(d)(ii) could be justified but precisely the same conduct under section 8(b) could not be defensible. An absurd result which could not have been intended by the legislature.

[53] I cannot find any particulars of conduct amounting to a denial of access to an essential facility in the complaint. The complainants in the referral allege as follows:

"*19.7 The Principals' products constitute resources that cannot be reasonably duplicated because of the protection afforded by patents and licenses.*

19.8 The Complainants must have reasonable access to the Principals' products in order to compete with the Respondents in both the product

and distribution markets.

19.9 The Principals refuse to provide the Complainants with competitive access to their products and will only deal with them on a basis that is not economically viable. The Principals extend their monopoly and market power in the product market to the downstream market by refusing to provide reasonable access to the product resources that they own or control in terms of patents and/or licensing agreements."

This is a possible attempt by the complainants, for the first time in their referral, to allege conduct prohibited in terms of section 8(b). Key to the complainants' approach is their interpretation of "*resource*" within the meaning of section 8(b) read with section 1(viii) of the Act. According to the complainants the respondents' product constitute resources that cannot be reasonably duplicated. In my opinion the clear provisions of the Act do not support such an interpretation. For reasons already stated "*resource*" was not meant to be interpreted as products, goods or services. I cannot agree with the complainants that pharmaceutical products qualify as essential facilities and resources for anti-trust purposes.

[54] The approach of the Tribunal as well as the interpretation relied upon by the complainants effectively gives section 8(b) a wide meaning. In my opinion this broadens the scope of section 8(b) well beyond what was intended by the legislature. The legislature intended, from the clear architecture of the Act, that there should be limits to the essential facilities doctrine. To demand that a dominant firm should grant access to its facilities is a substantial intervention on the part of a competition authority. The widening of the application and scope of the essential facilities doctrine can have harmful economic effects such as discouraging investment in infrastructure. An investor might be reluctant to invest for fear of a third party demanding a "*free ride*" on the fruits of such investment.

See Competition Law Richard Whish 4thedition page 617.

Certainly, from a reference to decided cases, judicial application does not appear to favour a wide

interpretation and application of the doctrine. As stated by Whish "*the essential facilities doctrine must be applied with caution*".

[55] For purposes of this judgment I consider it unnecessary to deal in any detail with the law relating to the interpretation of statutes. Suffice it to say that I was guided by the principles set out in Bhyat v Commissioner for Immigration1932 AD 125 at 129; Ebrahim v Minister of Interior1977 1 SA 665 (A) at 673; Standard Bank Investment Corporation v Competition Commission2000 2 SA 797 (SCA); F A Raisins (Pty) Ltd v SAD Holdings Ltd2001 2 SA 877 (SCA).

[56] Thus, whilst it is unnecessary, for purposes of this judgment, to define the ambit of section 8(b), I find that section 8(b) does not prohibit the conduct of refusing to supply scarce goods to a competitor. For reasons already stated "*refuse to give a competitor access to an essential facility*" does not mean "*refusing to supply scarce goods to a competitor*". Nor is section 8(b) a species of some more general refusal to deal.

[57] Accordingly, to allege a contravention of section 8(b) a complainant will have to aver, in its complaint that:

1. the dominant firm concerned refuses to give the complainant access to an infrastructure or a resource;

2. the complainant and the dominant firm are competitors;

3. the infrastructure or resource concerned cannot reasonably be duplicated;

4. the complainant cannot reasonably provide goods or services to its competitors without access to the infrastructure or resource; and

5. it is economically feasible for the dominant firm to provide its competitors with access to the infrastructure or resource.

This the complainants failed to do in their complaint. Nor did they, for what it is worth, make such averments in their referral.

I now turn to the procedure followed by the Tribunal in the application for striking out.

[58] Allegations of excessive pricing, predatory pricing and denial of access to an essential facility, if properly placed before the Tribunal in terms of the Act, are serious allegations of prohibited conduct that call for a response from the respondent. Unlike pleadings in the High Court, the response must be in the form of an affidavit wherein it will not suffice merely for the respondent to admit, deny or confess and avoid. A comprehensive response involving lengthy and involved research and consultation is called for. The consequence, by the very nature of the disputes, can result in the filing of voluminous papers at enormous costs. It makes no sense for a respondent to be put to such trouble and expense in responding to allegations not properly before the Tribunal. The Tribunal correctly concluded that it will not be premature to entertain an application to strike out before an answering affidavit is filed by the respondents. The Tribunal's application and interpretation of the rules of the Tribunal read with the Uniform Rules of the High Court cannot be faulted. Save for this, I find it unnecessary, for purposes of this judgment, to launch into extensive commentary on the various provisions of the Tribunal's Rules read with the Uniform Rules.

The Tribunal has a general discretion under the Act to regulate its own proceedings. It may determine any matter of procedure for a hearing, with due regard to the circumstances of the case, provided only that, in doing so, it observes the requirements of section 52(2) namely expedition, informality and the principles of natural justice. See section 55 of the Act.

[59] Thus I find that:

1. The Tribunal acted correctly in finding that it could hear an application for striking out before the respondents filed their answering affidavit.

2. The Tribunal correctly struck out references to the prohibited practices of excessive pricing and predatory pricing from the referral.

3. The Tribunal erred in not striking out reference to the denial of access to an essential facility from the referral.

In the result I make the following order:

1. The appeal is upheld and the decision of the Tribunal is amended as follows:

    1.1 Prayer 1.1 of the respondents' notice of motion in its application to strike out certain parts of the complainants' complaint referral is granted.

2. The complainants are ordered to pay the costs of the appeal including the costs of two counsel.

3. The cross-appeal is dismissed with costs which costs include the cost of two counsel.

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I HUSSAIN JA

I agree:

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S SELIKOWITZ JA

I agree:

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M L MAILULA AJA