THE COMPETITION TRIBUNAL
THE REPUBLIC OF SOUTH AFRICA

CASE NO: 22/CR/B/Jun01

Concerning the matter between:

NORVATIS SA (PTY) LTD	**1st Applicant**
ROCHE PRODUCTS (PTY) LTD	**2nd Applicant**
INGELHEIM PHARMACEUTICALS (PTY) LTD	**3rd Applicant**
BRISTOL MYERS SQUIBB (PTY) LTD	**4th Applicant**
SCHERING (PTY) LTD	**5th Applicant**
ABBOTT LABORATORIES SA (PTY) LTD	**6th Applicant**
SANOFI-SYNTHELABO (PTY) LTD	**7th Applicant**
BAYER (PTY) LTD	**8th Applicant**
ELI LILLY SA (PTY) LTD	**9th Applicant**
WYETH SA (PTY) LTD	**10th Applicant**
AVENTIS PHARMA PTY) LTD	**11th Applicant**
INTERNATIONAL HEALTHCARE DISTRIBUTORS (PTY) LTD	**12th Applicant**

and

THE COMPETITION COMMISSION	**1st Respondent**

MAIN STREET 2 (PTY) LTD t/a NEW UNITED PHARMACEUTICAL DISTRIBUTORS (PTY) LTD **2nd Respondent**

NATAL WHOLESALE CHEMISTS (PTY) LTD t/a ALPHA PHARM DURBAN **3rd Respondent**

MIDLANDS WHOLESALE CHEMISTS LTD t/a ALPHA PHARM PIETERMARITZBURG **4th Respondent**

EAST CAPE PHARMACEUTICALS LTD t/a ALPHA PHARM EASTERN CAPE **5th Respondent**

FREE STATE BUYING ASSOCIATION LTD t/a ALPHA PHARM BLOEMFONTEIN (KEMCO) **6th Respondent**

PHARMED PHARMACEUTICALS LTD **7th Respondent**

AGM PHARMACEUTICALS LTD t/a DOCMED **8th Respondent**

L'ETANG'S WHOLESALE CHEMISTS CC t/a L'ETANGS **9th Respondent**

RESEPKOR (PTY) LTD t/a RESKOR PHARMACEUTICAL WHOLESALERS **10th Respondent**

Reasons

BACKGROUND

1. On the 2nd May 2001 the Competition Commission referred to us a complaint by the 2nd to 10th respondents in this matter alleging that the applicants, together with MSD (Pty) Limited (another pharmaceutical manufacturer that is not party to these proceedings), engaged in practices prohibited by Chapter 2 of the Competition Act 89 of 1998 as amended (the Act). Specifically the Commission alleged that the applicants and MSD (Pty) Limited contravened sections 4(1)(a); 4(1)(b)(i); 5(1); 8(c); and 9(1)(c)(ii) of the Act.

2. The complaint referred to us was lodged with the Commission by the

respondents on the 11th October 1999; and was accepted by it on the 17th of February 2000. Prior to the Act being amended by Act 39 of 2000, which came into effect on the 1st of February 2001, the Commission was required to formally accept a complaint submitted to it for investigation. Thereafter in terms of the previous Commission rule 19(2) the complaint once accepted had to be referred to the Tribunal within one year after the date of acceptance as opposed to the date of submission[1]. In terms of the amended Act the requirement for formal acceptance of the complaint was dispensed with and the time period for referral – still one year – began running from the date of submission.[2]

3. On the 1st June 2001, in response to the referral of the complaint against them, the applicants instituted review proceedings in the High Court to have the complaint referral by the Commission set aside. (We deal with the grounds for the review application below.) On the same day the Tribunal received an urgent application by the applicants to stay the referral proceedings pending the finalisation of the review application in the High Court and condoning their non-compliance with the Tribunal Rules relating to time limits with reference to the filing of their answering affidavits.

4. At a hearing held on the 6th June, at the request of the Commission the hearing of the stay application was postponed until the 13th June. The Commission indicated that it would oppose the application for a stay and needed time to prepare. In order that the postponement not prejudice the applicants we made an order suspending the passage of days in the referral proceedings pending our decision in the application for a stay. The Commission elected not to file an answering affidavit and argued the matter on the basis of the applicants' founding papers.

5. When the hearing resumed on the 13th June the applicants argued that we should stay the referral proceedings because if they succeeded in the review application in the High Court the referral would be struck down rendering the proceedings in the Tribunal nugatory.

6. In the review proceedings before the High Court the applicants seek to have the complaint referral by the Commission set aside on two grounds. Firstly it is contended that in terms of section 50(5) of the Act as amended, the

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1 Rule 19(3) of the Commission Rules as they then were provided that this period could be extended by agreement between the Commission and all claimants recognized at the time or by the Tribunal on application to it by the Commission.

2 Section 50(2) states: "*Within one year after a complaint was submitted to it, the Commissioner must –*

a) … 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.*"

Commission is time barred from referring the complaint to us and must accordingly be regarded as having issued a Certificate of Non-referral.

7. *Secondly, the manner in which the complaint was referred by the Commission is alleged to constitute a breach of the applicants' common law right to audi alteram partemand, as such, is procedurally unfair administrative action in terms of sections 3 and 6 of the Promotion of Administrative Justice Act and a violation of section 33(1) of the Constitution. The applicants claim that the Commission acted unfairly because (1) it did not give them access to material evidence adverse to them or a summary thereof, to enable them to respond thereto; (2) they were not afforded a hearing to dispute the material evidence adverse to them prior to the Commission taking its decision to refer the complaint; and (3) the Commission has failed to substantiate allegations upon which its referral of the complaint is based.*

DECISION

8. The application for a stay of the proceeding of the Tribunal in case 22/CR/B/Jun01 is denied. Reasons for this decision follow.

REASONS

Jurisdiction

9. The parties appearing before us in this matter have devoted considerable time to a discussion of weighty jurisdictional matters. In essence the applicants allege that the Commission acted ultra vires by referring this matter to the Tribunal outside of the prescribed time limit. The determination of whether the Commission was competent or not to do so is a jurisdictional issue and, in terms of the Applicant's reading of section 62 of the Act such a question is a matter over which the Competition Appeal Court (CAC) and the High Court have jurisdiction but not the Tribunal. Secondly, the Applicant alleges that certain of its constitutional rights have been violated by the procedures employed by the Commission in referring this matter to the Tribunal. The Tribunal, continues the argument, similarly has no jurisdiction to decide constitutional matters because constitutional issues are part of the concurrent jurisdiction of the CAC and the High Court but not the Tribunal. Accordingly, since the review is concerned with jurisdictional matters and constitutional matters the Tribunal is barred from any enquiry that presupposes a decision on the merits of the review proceeding initiated in the High Court. Given then that the Applicant has discretion whether to approach the High Court or the CAC it is fully within its rights to approach the High Court and this is what it has done.

10. The Commission, on the other hand, argues that the review falls within the boundaries of the Tribunal's exclusive jurisdiction and that it is fully competent, indeed, from a jurisdictional point of view, it is uniquely competent, to hear the review at issue here. In essence, the Commission argues that the jurisdictional matters raised are not those, the adjudication of which is reserved for the High Court. As for the constitutional violations alleged, it is suggested that these are invoked precisely in order to give matters clearly within the Tribunal's jurisdictional competence a constitutional cast. The Commission argues that the taking of jurisdictional and constitutional points is in the nature of a mere device to place beyond the Tribunal's reach a matter actually within its jurisdiction. At very least, contends the Commission, the Tribunal enjoys concurrent jurisdiction with the High Court and, as such, it is jurisdictionally competent to enquire into the merits of the review. Moreover, argues the Commission, even if jurisdiction was found to be concurrent the principle that parties first exhaust the domestic remedies provided, that is those remedies specifically provided by the statute in question, dictate that the Competition Tribunal, or if that forum was found to be jurisdictionally incompetent, the CAC, hear this matter.

11. In our view this discussion sets the sights too high. The matter of granting a stay does not require a decision regarding the jurisdictional boundaries of the Tribunal. This appears to us to be the judicial equivalent of constructing a garden shed on foundations intended to support a skyscraper. The Tribunal has been asked to grant a stay of its own proceedings and its competence to do this has not been questioned. Accordingly all that is required is that we decide the basis for making this decision and that we then proceed to decide it. Our decision with respect to the stay in no way purports to derogate from the High Court's competence to decide the merits of the review. Nor does it purport to decide whether the Tribunal (or the CAC) enjoys concurrent, much less exclusive, jurisdiction in the review proceedings. The Tribunal has not been asked to conduct a review. This has been asked of the High Court. Should the High Court decide that this is not within its jurisdictional competence it will, as in the decision of Jali J in the matter of Seagram Africa (Pty) Ltd v Stellenbosch Farmers Winery Group (Pty) Ltd and Others; case number 7759/00 CPD, doubtlessly decline to decide the matter and direct the Applicant to approach the competent body, be it the Tribunal or the CAC.

12. The applicants have obviously, by very dint of their application, conceded the Tribunal's jurisdiction to decide whether or not to stay its proceedings in respect of the Commission's complaint referral in the case in question and this is what we shall decide, no more and no less. In the hearing Mr. Puckrin, for the applicants, conceded that the Tribunal was not being asked to partake in a mere formality, that it was, in other words, not being asked to issue a rubber stamp type approval. However he conceded a very limited basis for that discretion. Relying upon Rule 33(4) of the Rules of the High Court, he argued

that all that was at issue was 'convenience'[3]. The applicant's understanding of convenience did not, it appeared, even extend to the question of the 'balance of convenience'. It was simply a question of administrative convenience, on the same footing as, for example, the decision to separate the hearing of an *in limine* argument from the hearing on the substantive merits.

13. Mr. Brassey, for the Competition Commission, took a somewhat broader view of our discretion. He contended that the Tribunal should examine whether the review in question had any prospect of success. He argued that should we find that there was, indeed, no prospect of success, we should then refuse to grant the stay.

14. The convenience test is really not at issue here. Had we been asked to decide the review points ourselves the applicants may well have approached us and, as a matter of convenience, asked us to first decide the review points before proceeding to the substantive merits contained in the referral. In this instance, however, the review has been taken to another forum for consideration. We are being asked to stay our proceedings whilst these issues are considered in the High Court. Certainly convenience is a factor to consider in staying our proceedings. However there is a prior question to consider and that is, as Mr. Brassey suggests, the question of the prospects of success.

15. In the present situation the Tribunal is in an analogous position to that of the High Court under the interim constitution in relation to the constitutional validity of statutes. Hence in **Mhlungu**[4] Kentridge AJ, examined the nature of the High Court's obligation under the interim Constitution to refer constitutional matters to the Constitutional Court. The learned judge expressed it as follows:

> "**In s 103(4) of the Constitution, which deals with the referral to this Court of matters originating in inferior courts, the referring Provincial or Local Division must in addition be of the opinion 'that there is a reasonable prospect that the relevant law or provision will be held to be invalid'. … The reasonable prospect of success is, of course, to be understood as a sine qua non of a referral, not as in itself a sufficient ground. It is not always in the interest of justice to make a reference as soon as the relevant issue has been raised. Where the case is not likely to be of long duration it may be in the interests of justice to hear all the evidence or as much of it as possible before considering a referral. Interrupting and delaying a trial, and above all a criminal trial, is in itself undesirable, especially if it means that witnesses have to be brought back after a break of several months. Moreover, once the evidence in the case is heard it may turn out that**

3 The Tribunal is entitled to have regard to the High Court Rules where its own procedures make no provision for a procedure. See Rule 55(1)(b) of the Tribunal Rules.
4

the constitutional issue is not after all decisive. I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

16. The principles at issue in deciding whether or not to grant a stay are, we submit, identical. Borrowing the words of Kentridge AJ, in deciding whether to stay our proceedings 'the reasonable prospect of success is, of course, to be understood as a *sine qua non* of a referral (read 'stay'), not as in itself a sufficient ground'. Beyond the question of the reasonable prospect of success is, once again to borrow the learned Kentridge AJ's words, 'the interests of justice'. Note that the learned judge, in the paragraph cited, appears to cast the question of 'justice' in terms of the delay generated by a referral – per definition a request for a stay, is a request for a delay and, following this judgment, an unwarranted delay of a proceeding is unjust, the more so when the applicant fails to show that the referral has a reasonable prospect of success, that is, that it will achieve nothing more than a delay, a digression. We should also point out that, in the context of the **Mhlungu** judgment the question of the inferior court's jurisdiction to hear constitutional matters did not arise. It had no jurisdiction and still the learned Judge concluded that it was not required to refer a constitutional matter to the Constitutional Court if it did not pass the tests enunciated in the judgment, to recap, the *sine qua non* of a reasonable prospect of success, and, then, its decisiveness for the case and the interests of justice.

17. As we shall elaborate below we do not believe that the review has any reasonable prospect of success largely because the High Court itself has already decided both review points against the Applicants. It has, in other words, fallen at the first hurdle erected by Kentridge AJ's dictum in the **Mhlungu** judgment.

Commission is time barred

18. The Applicants argue in their review application that in terms of section 50(5) of the Act as amended the Commission is time barred from referring the complaint and must accordingly be regarded as having issued a notice of non-referral.

19. Section 50(5) provides:

(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 in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period."

20. Subsection (2) provides that the Commission must refer a complaint to the Tribunal within one year after it was submitted to it; and subsection (4) provides that before the one-year period allowed in subsection (2) expires, the Commission may extend it by agreement with the complainant or by application to the Competition Tribunal.

21. The Applicants argue that even though the complaint was lodged with the Commission before the Act was amended the above section applies by virtue of section 23(5) of Competition Second Amendment Act 39 of 2000. This section states:

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

22. The applicants argue that section 23(5) renders the amendments to the relevant sections of the Act – specifically including the amended Section 50 - retrospective and therefore applicable to the Commission's complaint proceedings.

23. Clearly at the time that the amendments came into effect the complaint was still under investigation by the Commission. The applicants argue that since neither sections 21(4) nor 27(2) are applicable to this matter, which is common cause between the parties, section 50(5) of the Act as amended applies. Accordingly, in the absence of proof that the Commission either reached an agreement with the complainants (the 2nd to 10th respondents in these proceedings) or received an order from the Tribunal extending the time period allowed for investigation, which otherwise, the Applicants argue, expired on 11 October 2000, the Commission must be regarded as having issued a notice of non-referral and is time barred from referring the complaint to the Tribunal. It is submitted by the applicants that the Commission therefore acted outside of its jurisdiction in referring the complaint to us when, by virtue of section 50(5), it was deemed to have issued a notice of non-referral.

24. On the applicants' argument, the provisions of section 50(5) apply retrospectively by virtue of section 23(5). It appears to be common cause that if the provisions of section 50(5) apply only prospectively, the Commission's referral was timeous. It follows therefore that the Applicants can only succeed on this point if they can establish that the provisions of section 50(5) are, as they argue, retrospective in nature.

25. It is common cause that there is a strong presumption against the retrospective application of legislation. It is also common cause that a statute can expressly be given retrospective effect and that in such a case the presumption does not operate. The matter becomes more complicated however as the courts have at times distinguished between the retrospective effects of changes to procedures on the one hands and changes to substantive rights on the other. Thus even though a statute may appear through express language to operate retrospectively the extent of the retrospective effect may be open to some doubt.

26. In the **Mhlungu** case Kentridge AJ stated:

> **"It is however not always easy to decide whether a new statutory provision is purely procedural or whether it also affects substantive rights. Rather than categorizing new procedures in this way it has been suggested one should simply ask whether or not they would affect vested rights if applied retrospectively …."**

27. The Applicants argue that section 23(5) is express in its application to procedural issues, that the issue of the time bar is a procedural matter and hence the new legislation applies retrospectively and the Commission in consequence is time barred. They find support for their approach in a recent decision of the CAC in Norvatis **SA (Pty) Ltd and Others v New United Pharmaceutical Distributors (formerly Mainstreet 2 (Pty) Ltd) and Others**[5]. In that matter the CAC had for the first time to interpret section 23(5). The Court grappled with the interpretation of the section but following the approach of the Constitutional Court in **Mhlungu** came to the conclusion that:

> " In the present dispute, section 23(5) mandates the adoption of **procedures contained in the Amendment Act for all cases which are already located in the legal pipeline created by the Act. But if the legislature wished to go further and provide that the substance of the law**

5 Case number 07/CAC/Dec00

pertaining to dispute on appeal from the Tribunal to the Court before the Amendment Act became law is to be governed by a provision of the Amendment Act it would have been required to employ an express decision to that effect." (At page 18.) (Our emphasis.)

28. We agree with the applicants that the decision of the CAC, namely that the effect of section 23(5) is that the amendments to the Act apply retrospectively to all procedural matters, supports, to this extent, their interpretation of the section. However, we do not agree with the applicants' argument that the question of whether or not the time period within which the Commission has to refer a complaint has prescribed is a procedural matter. In **Protea International (Pty) Ltd v Peat Marwick Mitchell & Co 1990 (2) SA 566 (A)** the Appellate Division of the Supreme Court of South Africa (the predecessor of the Supreme Court of Appeals) found that an extinction of a right by prescription is a matter of substantive law, and not of procedure. Clearly a decision that the Commission is time barred from referring the complaint means that the right of the Commission to refer the complaint, contemplated in section 50 of the Act as amended, has prescribed. Furthermore, it means that the right of the complainants, 2nd to 10th respondents in this matter, to have their complaint pursued by the Commission on their behalf before the Tribunal has also prescribed. According to the decision of the AD in the **Protea** case, which is binding on the High Court, this is a matter of substantive law. As we have observed above the CAC found that section 23(5) did not make the provisions of the Amendment Act applicable to matters of substantive law pertaining to a dispute on appeal from the Tribunal before the amendment became law. The implication of this distinction is equally appropriate to the present case. Unless the section contained a more express provision to the contrary it should not be construed as applying retrospectively to the substantive provisions of the Act pre-amendment. We therefore find no merit in the argument that we are bound by the decision of the CAC to find in the applicants' favour on this point.

29. Furthermore, in terms of the decision of the CAC, the provisions of section 23(5) are ambiguous and need to be read restrictively so that they do not lead to radical consequences that run "completely contrary to the dictum of the majority in **Mhlungu"**. Finding that the provisions of section 23(5) apply retrospectively as the applicants argue, would not only lead to radical consequences, but absurd consequences as well.

30. As the Commission points out in its papers, the effect of a decision that the amendments apply retrospectively; and therefore extinguish the Commission's right to refer this complaint; would result in the absurd consequence that by operation of the amendments to the Act, the due date by which the Commission had to refer the complaint to the Tribunal expired some four months prior to the amendments coming into operation in circumstances

where, but for the amendments, the date would not have expired at the date that the amendments came into effect. As appears above the complaint was lodged with the Commission on 11 October 1999 and accepted by the Commission on 17 February 2000. In terms of the law applicable at the time the Commission had until 17 February 2001 (or as long thereafter as had been agreed to it by the complainant or an order of the Tribunal) to refer the complaint. The amendments, which came into effect on 1 February 2001, did away with the requirement that the Commission accepts a complaint and the Commission now has to refer a complaint to the Tribunal within a year of the complaint being submitted to it. If the amendments apply retrospectively then the Commission would have had to refer the complaint to us a year after it was submitted, that is, by 10 October 2000 almost four months before the amendments came into effect.

31. There is a presumption in our law that the legislature does not intend to create absurdities, and the language of a statute may be departed from where its ordinary meaning would result in a glaring absurdity[6]. In English law Lindley LJ said this in the **Duke of Buccleuch** case[7]:

> *"You are not so to construe the Act of parliament as to reduce it to rank absurdity…. You are not to attribute to general language used by the legislature… a meaning that would not only carry out its object, but produce consequences which to the ordinary intelligence are absurd. You must give it such a meaning as will carry out its object"*

32. As appears above, the language used in section 23(5) has already been found to be ambiguous by the CAC. In that instance where an absurdity would result one interpretation of the statute, we must prefer the more rational meaning. It is our opinion that the High Court will not attribute to the legislature the absurd result that will result from applying the provisions of section 23(5) retrospectively and will interpret the section to apply only prospectively. We therefore see no prospects that the applicants will succeed in the High Court on this argument.

33. The applicants argue that since the contents of the amendment Act were known publicly prior to the commencement date the Commission had plenty of time to "get its house in order". This argument is without foundation. The Commission may have been aware of the possible enactment but had no reason to know when that would occur. Indeed the amendment Act was proclaimed on the same day that it came into effect. The Commission was not under any obligation to curtail its right to a one year period to investigate post acceptance, simply because the prospect of new legislation was lurking. It is a notorious fact that the passing of legislation is not time related to its enactment in any predictable way. Despite the applicants' ambitious attempts on this point the harsh and absurd consequences of applying the amendment

6 See for *example Administrator (Natal) v Bluff Drive-in Cinema 1969 (1) SA 415 (D) at 419 and Venter* v R 1907 TS 910 at 914.
7 (1889) 15 PD 96

retrospectively cannot be argued away.

34. We are satisfied that the applicants have no reasonable prospects of success on the point that the Commission is time barred from making the referral.

The Commission proceeded unfairly

35. The applicants allege that the complaint referral by the Commission violated the applicants' right to natural justice and constitutes procedurally unfair administrative action.

36. The Applicants' submission is that in terms of section 239 of the Constitution of the Republic of South Africa, 108, 1996, the Commission is an Organ of the State and that being an institution that exercises a public power and performs a public function the power of referral vested in the Commissioner is a discretionary power and is reviewable in terms of the principles of administrative law.

37. Its conduct therefore falls within the definition of administrative action in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (the Administrative Justice Act). [8]

38. They further argue that the Commission's conduct must be exercised in terms of the common law and the Constitution[9] which guarantees:

    1.38.1 Procedurally fair administrative action.

    2.38.2 Administrative action that is justifiable in relation to the reasons given for it where a person's rights are affected or threatened.

    3.38.3 Lawful administrative action.

39. The question arises, given this constitutional and administrative backdrop, whether the decision of the Commissioner to refer the complaint in terms of section 50(2) was arrived at in accordance with the requirements of administrative justice. The applicants argue that it was not and that the decision was unfair for the following reasons:

    39.1 The applicants were not given access to material evidence

8 The Administrative Justice Act defines administrative action as, inter alia, any decision taken, or any failure to take a decision by an organ of state, when "exercising a public power or performing a public function in terms of any legislation … which adversely affects the rights of any person and which has a direct, external legal effect". (There are various exclusions which are not applicable in this case, although significantly amongst these exclusions is a decision to institute or continue a prosecution) See paragraph (ff) of the definition.
9 Section 33.

adverse to them or to a summary of such evidence in order to enable them to address or refute such evidence

39.2 The applicants were not afforded a hearing to dispute material evidence adverse to them held by the Commission prior to its taking its decision to refer the complaint;

39.3 The Commission has failed to substantiate allegations upon which it purports to base its referral.[10]

39.4 By way of example they refer to the fact that the Commission did not give them an opportunity to comment on its allegations regarding market definition and market dominance.

40. The Commission argues that its decision to refer a complaint is neither final nor does it have any consequences for the applicants. Its powers are of a preliminary and investigative nature, comparable to those of the police services or the Directorate of Serious Economic Offences. Accordingly, the Commission submits, it has not engaged in unfair administrative action.

41. To decide whether an administrative action has been taken fairly it is crucial that the decision-making process be viewed as a whole. The demands of fairness will depend on the context of the decision viewed within the procedural context in which it arises. An essential feature of the context is the empowering statute, which creates the discretion, as regards both its language and the shape, and the legal and administrative system within which the decision is taken.[11]

42. In **Brenco**[12] the Supreme Court of Appeal had to consider, *inter alia*, whether the Board on Tariffs and Trade (BTT) had violated the principles of natural justice by making recommendations to the Minister of Trade and Industry without giving the respondents access to all information at its disposal or the opportunity to respond thereto prior to making the recommendation. The Court held that no single set of principles for giving effect to the rules of natural justice is applicable to all investigations, official enquiries and exercises of power. The Court emphasized the need for flexibility in the application of the principles of fairness depending on the context. The Court quoted the dicta of Sachs L.J. in **In re Pergamon Press Ltd**[13] where he stated:

> **"In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand ...**
>
> **It is only too easy to frame a precise set of rules which may appear**

10 See paragraph 51 of the applicants' application to the High Court.

11 See the dicta of Lord Mustill in *Doody v Secretary of State for the Home Department and Other Appeals* quoted extensively by the Supreme Court of Appeals in *Chairman: Board on Tariffs and Trade and Others v Brenco Incorporated and Other* (BRENCO) case number 285/99; at paragraph 13.

12 *Supra*

13 [1970] 3 All ER 535 (CA)

impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate ... the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective."

43. The Court then examined the provisions of the BTT Act[14] as part of the context to determine what the requirements of fairness are in BTT investigations. It found that in terms of that Act BTT performs both an investigative and determinative function. It went on to hold that:

> *"Whilst BTT has a duty to act fairly, it does not follow that it must discharge that duty precisely in the same respect in regard to the different functions performed by it. When BTT exercises its deliberative function, interested parties have a right to know the substance of the case that they must meet. They are entitled to an opportunity to make representations. In carrying out its investigative functions, BTT must not act vexatiously or oppressively towards those persons subject to investigation. In the context of enquiries in terms of sections 417 and 418 of the Companies Act 61 of 1973, investigatory proceedings, which have been recognised to be absolutely essential to achieve important policy objectives, are nevertheless subject to the constraint that the powers of investigation are not exercised in a vexatious, oppressive or unfair manner."*

44. The Court was of the view that when BTT carried out its investigative functions fairness did not demand that "every shred of information provided to BTT should be made available to the respondents"[15]. The standard applicable in the conduct of the investigative function is the general principle that an interested party must know the "gist" or the substance of the case that it has to meet.

45. Another complaint made in this matter against BTT was that its inspectors had obtained information from a party and that the

14 Act No. 107 0f 1986
15 At paragraph 42

information had not been given to the respondents so that they could test its correctness. On this point the Court held:

> *"There is no requirement that BTT in the investigation of a matter must inform the parties of every step that is to be taken in the investigation and permit parties to be present when the investigation is pursued by way of the verification exercise. There is no unfairness to the respondents in permitting the officials of BTT to clarify information without notice to the respondents. To hold otherwise would not only unduly hamper the exercise of the investigative powers of BTT, but would seek to transform an investigative process into an adjudicative process that is neither envisaged by the BTT Act, nor what the audi principle requires".*[16]

46. The Court found that BTT had not engaged in unfair procedural action when, in making the recommendation to the Minister, it relied on information that it had not disclosed to the respondents.

47. Nor is the result in **Brenco** surprising or novel. It represents the practical and flexible approach our courts have taken on many occasions to administrative fairness challenges.

48. In **Huisman v Minister of Local Government, Housing and Works 1996 (1) SA 836 (A),** Van den Heever J.A placed a significant emphasis on the theme of administrative efficiency and held that proceedings of administrative bodies could be endlessly protracted were such "right"(in this case the right to reply) to be held to exist. Whilst the case deals with a different set of procedures not analogous to those in this case it does illustrate the consistent approach of our courts in striking a compromise between fairness and practical concerns of efficiency.

49. The same could be said of the Competition Commission - the administrative efficiency of the Commission in rendering its duties could be severely affected if, in exercising its discretion in terms of section 50(2), its every action would be subject to scrutiny under the principle of administrative review in the manner suggested by the applicants in this matter.

50. Moreover, there is no express provision in the Act requiring or compelling the Commission to furnish reasons or to afford the applicant the opportunity to be heard prior to the Commission referring the restrictive practice complaint to the Tribunal. It would have to be inferred, and it seems to be difficult to read into the Act a necessary inference which compels the Commissioner to afford

16 Brenco supra at paragraph 51.

the applicant the right to be heard.

51. In **Park – Ross v Director for Serious Economic Offences 1998 (1) SA 108 (C)** J had to decide whether an applicant subject to a proceeding in terms of the Serious Economic Offences Act was entitled access to written statements given by witnesses to the Director of Serious Economic Offences. In coming to the conclusion that he was not, he remarked:

> " It is convenient to deal with the right to be heard first. I agree with … that the applicant has no right at this stage to invoke the audi alteram partem rule. In my view, it is clear that the powers of the respondent are as Mr Gauntlett argued, of a preliminary and investigative nature. In essence, in this context, they do not differ from those vested in members of the police service."[17]

52. In **Van der Merwe and Others v Slabbert NO. and Others 1998(3) SA 613 (N)**, Booysen J, stated the principle that:

> "It is so that bodies required to investigate only need in general not observe the rules of natural justice and that bodies are required to investigate facts and make recommendations to some other body or person with the power to act need not necessarily apply the rules of natural justice, depending on the circumstances."[18]

53. We turn now to the application of the above conclusion to the above circumstances of the present case.

54. The **Brenco** decision is entirely in point in relation to the matter at hand. It is our view that the distinction drawn by the court between an investigative and a determinative function performed by public bodies is crucial in ensuring that public bodies are not unduly restrained in their work where the exercise of their powers carries no serious or final consequences for affected parties.

55. In the context of this application the distinction drawn by the Court between investigative and determinative administrative conduct by public bodies disposes of the applicants' case. In terms of the decision in the **Brenco** case the violations of natural justice alleged by the applicants against the Commission can only be upheld if the complaint referral by the Commission constitutes a determinative action. Our view is that it does not. Section 21 of the Act, which deals with the functions of the Commission, states that the Commission has the power to investigate and evaluate alleged contraventions of Chapter 2. Chapter 2 deals with prohibited practices. The Commission therefore is empowered to investigate and evaluate alleged prohibited

17 See judgment at 122. Although the applicants argued that cases dealing with criminal procedures were not analogous we fail to see why. A complaint referral is brought at the instance of a public body in much the same way as a prosecution and the Tribunal can impose penalties in event of a contravention including an administrative fine.
18 See judgment at 624.

practices, and, in terms of section 50(2), refer to the Tribunal those complaints that in respect of which, it "determines", a prohibited practice has been established. The Commission is an investigative body, which in referring the complaint to the Tribunal is only instituting the initial procedural step on the road to a hearing.

56. The Tribunal, on the other hand, is specifically empowered by section 27(a) of the Act to adjudicate on prohibited practices and to determine whether a prohibited practice has actually occurred. In terms of section 52(2)(a) the Tribunal is explicitly enjoined to apply the rules of natural justice. A respondent in proceedings before the Tribunal clearly is afforded administrative justice rights; in terms of the Tribunal Rules it may request information prior to a hearing and be represented. The Tribunal clearly exercises a determinative action as it is empowered to do by the Act and therefore it is enjoined to conduct its proceedings in accordance with the tenets of natural justice. The Commission is not subject to the same requirement precisely because the legislature, like the Court in **Brenco**, sought, in this Act, to distinguish between investigative and adjudicative procedures.

57. Thus if one looks at the complaint procedure holistically, in accordance with the analysis in the **Brenco** case, and not in piecemeal fashion, one comes to the conclusion that, on existing case law which is binding on the High Court, the applicants' argument that it is entitled to administrative justice at the complaint referral stage has no prospect of success before the High Court. Their application attempts to transform an investigative process into an adjudicative process which, in the words of the court in the **Brenco** case *"is neither envisaged by the BTT Act (read Competition Act), nor what the audi principle requires."*

58. Furthermore, this application incorrectly assumes that if the applicants were in anyway prejudiced by the complaint referral, such prejudice cannot be remedied through the processes in the Tribunal. This is clearly not the case. As a matter of fact MSD, one of the respondents in the complaint referral, has applied to the Tribunal for a dismissal of the complaint referral on various grounds. The applicants have therefore ignored the fact that Tribunal Rules and procedures provide them with remedies if the referral is approached holistically.

59. If one examines the grounds of the applicants' complaint about why the Commission proceeded unfairly we will see that all three are accommodated in the Tribunal's procedures as set out in the Act and the Tribunal's Rules. Thus, in the proceedings before the Tribunal, the applicants would have to be given access to material evidence adverse to them, would be given a hearing to dispute adverse evidence and the Commission would have to be able to substantiate its allegations otherwise its case would fail.

60. If the applicants' contentions are correct the complaint referral process would amount to two sets of hearings, one before the Commission prior to its act of

referring the complaint and then the process before the Tribunal. The investigator, the Commission, would be asked to adjudicate over what it had thus far investigated despite the fact that it is not the final arbiter. A more pointless and inefficient process is hard to imagine. At the time that the Commission makes its referral the respondent firm (ie the applicants in this case) is not required to defend itself. That takes place when the hearing procedures evolve as part of the Tribunal process, that is, after the step of referral. Fairness is not compromised by denying natural justice prematurely; it is only compromised if it is ultimately denied.

61. In order to get around the difficulties occasioned by the case law and in particular the **Brenco** decision the applicants argued that in referring a complaint to us the Commission exercises a determinative action. Their argument revolves around the wording of section 50(2), which states that the Commission shall refer a complaint to the tribunal *"if it determines that a prohibited practice has been established"* (our underlining). In the applicants' argument the use of the word "determines" is proof that a complaint referral by the Commission is a determinative function. In our view the applicants are emphasizing form over substance. On the basis of its investigation the Commission determines whether or not a prohibited practice has occurred. If the Commission determines that a prohibited practice has occurred it cannot impose a fine or any other remedy, it must refer the complaint to the Tribunal. Referring a complaint to the Tribunal is not determinative of the complaint. All it means is that the respondent will have to face a hearing before the Tribunal where it will be given an opportunity to respond to the allegations that it has engaged in a prohibited practice. Even where the Commission decides not to refer a complaint this decision is also not determinative of the complaint - in terms of section 51(1) of the Act the complainant has the right to refer the complaint to the Tribunal directly. We repeat what we have stated above that the decision by the Commission to refer a complaint is merely one of the steps in the resolution of a complaint; it may be the most important one but it is not determinative of the complaint. The respondent gets an opportunity to state its case before the Tribunal. The decision of the Tribunal is determinative of the complaint as a whole and this is why the Act entitles a respondent in Tribunal proceedings to the principles of natural justice. In the light of the above and the **Brenco** decision, we see no prospect of this argument succeeding in the High Court.

62. The applicants also argue that a decision to refer a complaint is determinative since, in terms of section 49D, the Commission is entitled, without reference to the complainant, to settle matters with respondents, subject to a consent order by the Tribunal. The applicants' argument in this regard is hard to follow. Firstly the Commission's decision to refer cannot become a consent order without the consent of the respondent firm. As such its nature is more contractual than administrative. If it were a determinative administrative act the acquiescence of the affected party would not be required. Secondly any agreement between the Commission and respondent in terms of section 49D is expressly made subject to a decision of the Tribunal. It is only with the

imprimatur of the latter not the former that a consent order acquires its final character.

63. We conclude that there is no reasonable prospect that a High Court will uphold the unfair administrative procedure points raised by the applicants.

Conclusion

64. Having come to the conclusion that the two objections to the referral have no reasonable prospect of success in the High Court we accordingly refuse the application for the stay.

65. There is no order as to costs.

_____ **02 July 2001**

DH Lewis **Date**

Concurring: NM Manoim; P Maponya