IN THE COMPETITION APPEAL COURT.

Case No. 62/CAC/APR06

In the matter between

Glaxo Smith Kline South Africa (Pty) Ltd	**Applicant**

and

David Lewis N.O	**1st Respondent**
Norman Manoin N.O.	**2nd Respondent**
Yasmin Manoin N.O.	**3rd Respondent**
The Competition Tribunal	**4th Respondent**
Mpho Makhathini	**5th Respondent**
Nelisiwe Mthethwa	**6th Respondent**
Musi Msomi	**7th Respondent**
Elijah Paul Musoke	**8th Respondent**
Tom Myers	**9th Respondent**
Aids Healthcare Foundation Ltd	**10th Respondent**
The Competition Tribunal	**11th Respondent**

JUDGMENT

DELIVERED 6 DECEMBER 2006

SELIKOWITZ JA:

The Court has before it, an application to review and an appeal brought by Glaxosmithkline South Africa (Pty) Ltd ("the Applicant"). Both the review and the appeal arise from the same proceedings and for all practical purposes can be dealt with together.

Applicant applied to the Competition Tribunal ("the Tribunal") for an order confirming a settlement agreement concluded between itself and the Competition Commission ("the Commission") as a consent order in terms of Section 49D of the Competition Act 89 of 1998, as amended. ("the Act").

The Tribunal declined to confirm the agreement as a consent order on the basis that it did not have jurisdiction to do so. The Tribunal observed, however, that, had it been vested with jurisdiction, it "*would have seen no bar to granting"* the consent order.

There are no factual disputes on the papers, and the only question that arises for determination in the appeal and in the review is a question of law. The question is whether, having regard to the terms of the Act, the Tribunal correctly held that it lacked jurisdiction to confirm the settlement agreement as a consent order in terms of section 49D of the Competition Act.

Applicant is the South African subsidiary of a large multinational pharmaceutical manufacturer, Glaxo Group Limited.

First, Second and Third Respondents are cited *nomine officio* and are the three members of the Tribunal who constituted the panel which considered the application and took the decision against which the review and appeal are directed.

Fourth Respondent is the Tribunal. Fifth to Tenth Respondents were complainants in a prohibited practice case brought against the applicant, consequent upon a non-referral by the Commission in terms of section 51 of the Act. For convenience they will be referred to collectively as the 'AHF complainants'.

The Commission is the Eleventh Respondent. It is joined because it is a party to the settlement agreement which Applicant seeks to have made into a consent order.

None of the Respondents opposed the review or the appeal and none of them were represented before this Court.

As Glaxosmithkline South Africa (Pty) Ltd is both Applicant in the review as also the Appellant, I will, in the interests of simplicity, refer the company as Applicant. Because the Act refers to the party against whom a complaint has been made regarding an alleged prohibited practice as the "respondent", I will adopt that nomenclature when discussing the relevant provisions of the Act. References to "respondent" will be consistent with the wording of the Act. References to the Respondents who are cited in the review and in the appeal will be made using an upper case first letter.

During September 2002, the Treatment Action Campaign ("TAC"), a non governmental organisation active in the health care sector, led a group of individuals and organisations that

initiated a complaint against the applicant with the Commission, alleging that it had contravened the Act by excessively pricing its antiretroviral drugs used to treat HIV positive persons. In terms of section 8(a) of the Act, a dominant firm is prohibited from charging an excessive price. Shortly thereafter on 27 January 2003, the AHF complainants lodged a complaint against the applicant with the Commission. The TAC and AHF complaints both related to substantially the same conduct on behalf of the applicant. For this reason, it appears the AHF complainants were willing to have the Commission consolidate their complaint with that of the TAC, and have the two complaints investigated together. The Commission thereafter proceeded with its investigation.

Section 50 of the Act provides that:

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.**

(1) 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.**

(1) 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.**

(1) 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.

The Act also recognises that the Commission and the party against whom a complaint has been initiated ("the respondent") might wish to reach agreement as to the terms of "an appropriate order".

Section 49D of the Act provides:

Consent Orders

(1) If, during, on or after completion of the investigation of a complaint, the Competition Commission and the *respondent* agree on the terms of an appropriate order, the Competition Tribunal,

without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1)(b).

(2) After hearing a motion for a consent order, the Competition Tribunal must —

(a) make the order as agreed to and proposed by the Competition Commission and the *respondent*;

(b) indicate any changes that must be made in the draft order before it will make the order; or

(c) refuse to make the order.

(1) With the consent of a *complainant*, a consent order may include an award of damages to the *complainant*.

(2) A consent order does not preclude a *complainant* from applying for—

(a) a declaration in terms of section 58(1)*(a)*(v) or (vi); or

(b) an award of civil damages in terms of section 65, unless the consent order includes an award of damages to the *complainant*.

It was accepted by the Tribunal and all other parties that the twelve month period referred to on Section 50(2) of the Act expired on the first anniversary of the AHF complaint which was investigated together with the earlier TAC complaint. It is not clear whether the TAC agreed to an extension pursuant to the terms of section 50(4)(a). However, in view of this acceptance, I too shall accept that date.

Just prior to the expiry of the twelve month period by which the Commission would have had to either refer the complaint to the Tribunal, or issue a notice of non-referral, it entered into a settlement agreement with Applicant in terms whereof the Commission agreed not to refer the complaints to the Tribunal, in return for Applicant agreeing to grant licences to various generic manufacturers to manufacture it's antiretroviral drugs. This settlement agreement was concluded on 3 December 2003.

The AHF complainants, unlike the TAC, were not a party to the settlement agreement and alleged that they were never consulted about its terms. They alleged that they were only made aware that it had taken place when they read about it in the media.

Pursuant to the settlement agreement, the Commission did not refer the complaints to the Tribunal. Nor did it issue a notice of non-referral. The AHF complainants then decided to refer their complaint to the Tribunal themselves in terms of section 51(1) of the Act. They were entitled to do so, as in terms of section 50(5) of the Act as the Commission is deemed to have issued a notice of non-referral.

In terms of section 51 of the Act:

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.

In terms of the applicable procedural rules the complainant may, within twenty business days, refer the complaint directly to the Tribunal.

AHF was not able to file its complaint referral timeously and applied for condonation. Despite opposition by Applicant, the Tribunal granted the condonation application on 23 July 2004. During the condonation proceedings, First Respondent, the chairperson of the Tribunal, raised a concern as to whether it was appropriate that the settlement agreement had not been referred to the Tribunal for confirmation in terms of section 49D of the Act.

Thereafter, on 22 November 2004 Applicant applied to have the settlement agreement of December 2003 confirmed and made a consent order in terms of section 49D(2)(a) of the Act. The AHF complainants, acting in an apparent effort to protect their right to pursue their complaint before the Tribunal, opposed the granting of the order. The basis of their opposition is, however, no longer relevant, in view of the fact that on 2 March 2006 - and whilst the application was being argued - they withdrew both their complaint referral and their opposition to the granting of the consent order.

While the application was still being argued as an opposed matter before the Tribunal at its hearing on the 2nd of March 2005, the Tribunal, *mero motu* raised an issue which it has consistently characterised as a point of jurisdiction. Applicant then filed additional heads of argument on this point and the Tribunal heard oral submissions from the applicant at a subsequent hearing exactly a year later to the day.

The Tribunal found that the December 2003 agreement was entered into at time when the one-year period for referral to it by the Commission had not yet expired. However, the application in terms of section 49D was brought after the expiry of the one year period, at a time after the Commission was deemed to have non-referred the complaint. In its "Reasons" for refusing the application, the Tribunal states that the question "asked of the Applicant was whether the Commission may be party to an application for a consent order at a point in time when it is no longer legally entitled to bring a complaint referral in respect of the complaint that forms the subject matter of the consent order".

The Commission was cited as a respondent in the application for a consent order. Not surprisingly, as it was a party to the agreement, it did not oppose the application. Nor was it present when the point raised was argued. The Tribunal notes that "we do not have the benefit of its view on the

point of law".

The first issue addressed by Applicant before the Tribunal was whether it, rather than the Commission, may make the application as had happened in this instance. The Tribunal recorded that "[i]t has been normal practice for the Commission to bring this type of application. We need not decide this issue, although we will assume in the applicant's favour that it is entitled to do so". I will revert to that issue later in this judgment.

Applicant conceded that at the time when the application in terms of section 49D was brought, the Commission no longer had the power to refer a complaint. However it argued that this does not mean that the Commission did not retain the power to " agree on the terms of an appropriate order". The main thrust of Applicant's argument both before the Tribunal and this Court relies on the language of the section 49D(1) which states:

> "**If, during, on or after completion of the investigation of a complaint, the Competition Commission and the respondent agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1) (b)."**

Applicant submits that the plain meaning of section 49D(1) is that the agreement has to be reached "during, on or after" the investigation but that neither that section, nor any other states when the application to confirm has to be made. Applicant argues that there is no warrant to "read in" words which limited the time by which the application to confirm has to be made and that there are safeguards in the Act to ensure that the complainants are not prejudiced.

The Tribunal after analysing the scheme of the Act - and in particular, sections 49D and 50 - concluded that the word "after" as it appears in section 49D(1) did include the power to reach and agreement after the investigation was completed, but that the section did "not contemplate any situation after the investigation, but only one where the Commission has retained its title to prosecute, by referring the complaint."

The basis of the Tribunal's decision is that:

> "the Commission must retain its title to prosecute at the time a consent order application has been launched to avoid it facing prosecutorial impotence if the Tribunal does not sanction its bargain with the respondent. It can retain this title to prosecute either (a) by having the consent application considered during the one year period or an extended period or (b) after this period, provided it has referred the complaint to the Tribunal during the period thus preserving that right. The legislature intended that once a matter had been non-referred by the Commission it washed its hands of the matter and had no further right or interest in the complaint including the right to settle it by way of a consent order."

The Tribunal expressed the view that:

> "Thus, the power to prosecute and the power to settle are coextensive; once the former is lost so is the latter.

> Thus, the power to prosecute and the power to settle are coextensive; once the former is lost so is the latter. This is not a case of having to read in language into section 49D(1). If one follows the procedural evolution of a complaint - how the Commission enjoys the monopoly power to prosecute and how it can lose this right to a complainant – then one need not read in words to the section, one simply follows the schema and logic of the Act to appreciate that the legislature never contemplated conferring the power to settle to exist independently of the power to prosecute. It is precisely for this reason that the Commission is given such a long period to investigate a complaint and to apply to extend it. It must during this period of investigation decide whether to refer or settle a complaint. If it refers it can of course settle it later. What it may not do is to investigate, decide not to refer or settle and then at some later time decide it should enter into a settlement agreement for a consent order. Nor should it, as happened in this case, enter into some contract (as opposed to a consent agreement contemplated in section 49D) with a respondent not to prosecute further, in return for some *quid pro quo*, unless it fully appreciates the legal implications of doing this."

In support of its finding the Tribunal pointed to what it considered to be the undesirable results of accepting Applicant's interpretation of the Act.

> "One can easily see what absurdities would result if the title to prosecute and settle were not coextensive. In the first place there is the fact that the Commission is left in a position of a contracting party not a prosecuting party in approaching settlement negotiations with the respondent, which cannot be in the public interest. The ability to approach a settlement negotiation with the threat of proceeding is vital to a proper bargaining process. A further concern is that the only time a consent order would be likely, after the title to prosecute has lapsed, is when a respondent faces a complainant in a non-referral situation or a new complaint based on a previous complaint that was not prosecuted. The respondent, anxious to constrain the complainant's range of remedies, then enters into a consent order with the Commission, the effect of which is to limit the private complainant's remedies to those contemplated in section 49D(4). Now of course that presupposes that the Commission will allow itself to be used to those ends. However, the expedient motive of a respondent may not always be that transparent to the Commission, especially if it was not a complaint that it referred, and it may be persuaded that the complainant is unreasonably pursuing the respondent and that a good settlement is available to the Commission even in this case it had not sought to prosecute. The legislature never contemplated placing the Commission in this sort of situation as a settler of last resort – once it lost its title to prosecute the fate of the litigation is left to the private complainant and the respondent to resolve. Nor as a matter of public policy is it desirable that a body charged with policing legislation be left with a residual power to settle when its primary power to prosecute is lost.
>
> The applicant's interpretation would also be extremely unfair to the private complainant. The latter is entitled to proceed with a complaint referral on the assumption that the field is now open to it and that the Commission had not entertained the possibility of entering into a consent agreement with the respondent, otherwise it would have done so before non–referring the complaint. It might spend vast resources on prosecuting its complaint only to find that it is robbed at the post by a subsequent deal between the Commission and the respondent. On our interpretation this would not arise because the settlement would have had to occur during the time that the Commission retained its prerogative to prosecute."

The Tribunal concluded its reasons as follows:

> "For this reason we find that although the settlement in this matter was concluded during the period when the Commission had retained its title to prosecute the complaint, the application

for the consent order was made after this period – a time when we find that the Commission no longer retains the right to prosecute and hence no right to conclude, revise or amend a consent agreement. Without the Commission retaining this power, we have no jurisdiction to make the agreement that was entered into in December 2003 into a consent order. The application accordingly fails.

Given the considerable public interest there has been in the settlement between the Commission and the respondent we need to stress that our decision not to grant the consent order is a technical one, based on the timing of the application. Were this consent application to have been made at a time when the Commission retained its title to prosecute, we would have seen no bar to granting it. It would seem that the reason the December 2003 agreement was not made a consent order at the relevant time of its conclusion was that there was a difference of legal opinion between the applicant and the Commission about whether it was required to state the section of the Act it had contravened. The Commission it appears has changed its view on this matter and now no longer as a matter of policy requires such an admission to be made. We are not called upon to determine whether such a policy is correct in law, but we mention this only to indicate that it may well be that technical concerns of the Commission, as opposed to tactical machinations on the part of the applicant, explain the absence of an application for a consent order at the relevant time."

In his argument before this Court, *Mr Unterhalter* SC (who appeared for Applicant together with Mr *Cockrell* and Mr *Gotz*) emphasised three points.

Firstly, he contended that the provisions of section 49D(1) are clear and unequivocal. The Commission can enter into a settlement agreement "*during, on or after completion of the investigation of a compliant*." The plain meaning of these words does not limit the time during which the Commission can conclude a settlement agreement. Indeed, it can do so after a referral to the Tribunal and right up until the Tribunal announces its findings.

Section 49D has two jurisdictional requirements that must be satisfied before the Tribunal may grant an order in terms of the section. They are:

- the Commission and the respondent must have agreed the terms of an appropriate order;
- the agreement must have been reached "*during, on or after the completion of the investigation of a complaint*".

It was submitted that both requirements had been met and that the Tribunal had the necessary jurisdiction to grant an order confirming the settlement agreement.

Secondly, there was no warrant, in law, to read in words that limited the clear meaning of section 49D(1) of the Act.

Thirdly, the anomalies relied upon by the Tribunal were more apparent than real. Even where the complainant pursued the complaint, the Commission had the right to appear and participate in the

hearing (Section 53(1)(a). It was, therefore, not rendered impotent.

The legislature granted the right to the complainant to pursue its complain where there is a non-referral to ensure that it is not prejudiced.

Recognising that the Commission has a role to represent the public interest in cases of an alleged prohibited practice, *Mr Unterhalter* submitted that the complainant who pursues a complain after a non-referral, has both a private and a public role.

In order to determine the questions raised in the review and appeal - which are in both cases the same questions - it is necessary to examine the provisions of the Act.

Part C of Chapter 5 of the Act deals with the complaint procedures and investigation of alleged prohibited practices. A complaint may be initiated by the Commissioner *mero motu* or as a result of information or a complaint submitted by "any person" to the Commission. (Section 49B(1)and (2)). The Commissioner is obliged to direct an inspector to investigate the complaint "as soon as possible" (Section 49B(3)). The investigative procedures and powers are found in Parts A and B of Chapter 5 of the Act.

Section 49C provides that an interim order may "at any time" be granted by the Tribunal at the instance of a complainant in respect of a prohibited practice.

Section 50 deals with the outcome of a complaint. The provisions recognise and give effect to the fact that the Commission is empowered and, indeed, directed to investigate and evaluate alleged contraventions of Chapter 2 of the Act which deals with prohibited practices. *Per contra*, the Tribunal is empowered to adjudicate on prohibited practices (See: **Simelane & Others NNO v Seven-Eleven Corporation SA (Pty) Ltd & Another** 2003 (3) SA 64 (SCA) paras. 55 and 56).

The Commission is empowered to refer the complaint to the Tribunal for adjudication at any time after the complaint is initiated (Section 50(1)). However, the Commission must, within one year after the complaint was submitted to it, either refer the complaint to the Tribunal "if it determines that a prohibited practice has been established or in any other case, issue a notice of non-referral to the complainant in the prescribed form." (Section 50(2)).

When the Commission refers a complaint to the Tribunal it may refer all or only some of the particulars of the complaint or add any particulars to the complaint. It must issue a notice of non-referral in respect of any particulars not referred. (Section 50(1),(2) and (3)).

The period of one year provided for in section 50(2) can be extended by agreement between the

Commission and the complainant. (Section 50(4)(a)). Section 50(4)(b) empowers the Tribunal ,at the instance of the Commission , to extend the extended period agreed to by the Commission and the complainant provided that the application for such further extention is made during the period of the initial agreed extension.

The statement made by the Tribunal in its Reasons (para 24) to the effect that the period which the Commission has in which to investigate and refer the complaint is one year "unless extended either with the consent of the complainant or, if that is not possible by application before the Tribunal" is erroneous. The terms of section 50(4)(b) are clear. The extension which the Tribunal is empowered to grant is an extension to the period which the Commission and the complainant had agreed to in terms of section 50(4)(a). Absent an agreement in terms of section 50(4)(a), there is no period to extend pursuant to the terms of section 50(4)(b). Notwithstanding the "or" which links sub-sections 50(4)(a) and (b), the wording of sub-section (b) cannot provide an alternative to sub-paragraph (a) by reason of the words "that period" which can only refer to the period "contemplated in paragraph (a)". The reference to a period of "one year" appears in section 50(2) only. In order to give effect to the clear terms of section 50(4)(b) the "or" should properly be read as "and".

As noted, section 50(5) is a deeming provision. If the Commission has not referred a complaint to the Tribunal nor issued a notice of non-referral, within the one year contemplated in sub-subsection (2), or any period extended in accordance with sub-section (4), the Commission "must be regarded as having issued a notice of non-referral on the expiry of the relevant period."

Section 51, the final section in Part C of Chapter 5, permits the complainant to refer the complaint to the Tribunal where the Commission has issued a notice of non-referral either actual or deemed. (Section 51(1)).

Any referral must be in the prescribed form and the Chairperson of the Tribunal must publish each referral in the Gazette and include in the notice certain specified details. (Sections 51(2), (3) and (4)).

I return now to Section 49D which is quoted above and which deals with Consent Orders.

The Act as originally passed first came into force during 1998 and 1999. In the original Act consent orders were referred to in section 63. That section formed part of Chapter 6 of the Act.

In terms of section 15 of the *Competition Second Amendment Act*, No 39 of 2000 Chapters 5 and 6 of the original Act were substituted by the chapters that now appear in the legislation. The subject matter of the former section 63 is now deal with in section 49D. This is relevant when one has regard to the nature and functions of the Commission.

The Commission is established by section 19 of the Act. It is a juristic person with jurisdiction throughout the Republic of South Africa and "must exercise its functions in accordance with this Act." (Section 19(1)). These functions are primarily set out in section 21 and the relevant provisions are:

21. Functions of Competition Commission

(1) The Competition Commission is responsible to –

(a) ... ;
(b) ... ;

(c) investigate and evaluate alleged contravention's of Chapter 2;

(d) ... ;

(e) ... ;

(f) negotiate and conclude consent orders in terms of section 63;

(g) refer matters to the Competition Tribunal, and appear before the Tribunal, as required by *this Act*;
(h) ... ;
(i) ... ;

(j) ... ;

(k) ... ; and

(l) deal with any other matter referred to it by the Tribunal.

When the *Competition Second Amendment Act*, No 39 of 2000 was passed the legislature appears to have failed to make the necessary and consequential amendment to section 21(1)(f) so as to substitute section 49D, the section which thereafter regulated Consent Orders, for section 63 which had before the amendment regulated them.

The Commission is a creature of statute which has only those powers given to it in the Act. It has a defined role and and, "must exercise its functions in accordance with this Act." (Section 19(1)).

The terms of section 49D(1) in relation to the scope of the powers of the Commission is clear. The language is clear and effect can be given to the ordinary meaning of the words. Section 49D empowers the Commission to agree the terms of an "appropriate order" with a respondent against whom a complaint has been laid and in respect of whose practices an investigation has been instituted. The content of the agreement which the Commission is empowered to enter into is limited to "the terms of an appropriate order". Clearly such order could be drafted in terms which incorporate an annexed detailed agreement. An example of such an agreement is the December 2003 settlement agreement at issue here.

The nature of the agreement which the Commission can conclude is limited to an agreement on the terms of an appropriate order. That agreement is not to be confused with a settlement agreement which may itself be incorporated in the proposed order. The actual terms of the proposed order are not enforceable nor, indeed, is any settlement agreement which is referred to or incorporated in the proposed order legally enforceable until it is dealt with and confirmed by the Tribunal in terms of section 49D.

The binding effect of the agreed order will be limited to requiring the parties to proceed with an application to the Tribunal for confirmation of the agreed order in terms of section 49D of the Act.

I am fortified in my view by the wording of section 49D(2) which empowers the Tribunal to:

> "(a) make the order as agreed to and **proposed** by the Competition Commission and the respondent;
>
> (b) indicate any changes that must be made in the **draft order** before it will make the order; or,
>
> (c) refuse to make the order."

(My emphasis).

When can the Commission and the respondent conclude an agreement as contemplated in section 49D?

Because the Commission is enjoined and obliged to investigate the alleged prohibited practices of a respondent against whom a complaint is made and to evaluate whether or not to refer the complaint to the Tribunal for adjudication, the Commission would not - without being specially empowered - be authorised to "settle" the matter or to agree an appropriate order. For the Commission to do so without authorisation would, in my view, amount to an abrogation of its duty to exercise its functions in accordance with the Act. The Commission clearly has a public duty in cases of prohibited practices. That duty extends beyond the protection or advancement of the complainants private interests. The Commission acts on behalf of the South African public and, in particular, the South African consumers whenever it investigates a complaint, evaluates the results and determines whether or not to refer the matter to the Tribunal for adjudication.

Section 49D read with section 21(1)f) are the provisions which empower the Commission to agree an appropriate order with the respondent.

The power which is granted has a time component which is expressed in the words: "during, on or after completion of the investigation of a complaint". The legislature has recognised that there may be circumstances where the Commission will find itself in a position to reach agreement on an appropriate order before it has completed its investigation. Indeed, if the respondent agrees to cease the alleged prohibited practice it would hardly be necessary for the Commission to embark upon or complete an inquiry. It is for this reason that the legislature has empowered the Commission to reach an agreement during, on or after it completes it's investigation.

Applicant contended, and the Tribunal found that the word "after" means that the agreement as to an appropriate order could be entered into even after the time for the Commission to have either referred the complaint to the Tribunal or issued a notice of non-referral in respect of the whole or part of the complaint.

I do not agree.

In my view, the words "during, on or after completion of the investigation of a complaint" relate only to a time in relation to the investigation. They do not affect the Commission's obligation to evaluate the results of an investigation which has been undertaken and to fulfill its duty to refer the complaint to the Tribunal if it determines that the respondent is engaging or has engaged in a prohibited practice.

In my opinion, it is hardly likely that a respondent will agree to cease a practice where there is no basis for it being characterised as a prohibited practice. It was suggested in argument that a respondent might be prepared to cease a practice for sound business reasons even though it was convinced that the practice was not a prohibited one. That may well occur. However, the Act is not intended to provide for such a situation and that possibility ought not to influence the proper interpretation of the Act.

On the assumption that there will only be an agreement between the Commission and the respondent when the latter is engaged or was engaged in a prohibited practice, I am of the firm view that the Commission cannot ignore its duty to evaluate the practise and refer the complaint if it determines that there is or has been a prohibited practice. Not to do so would amount to an abrogation by the Commission of its duty in terms of the Act to both the complainant and to the public.

The interpretation of section 49D(1) contended for by Applicant results in incongruity and produces a result which could never have been intended by the legislature. Indeed, the result would effectively undermine the confirmatory role of the Tribunal.

It must be borne in mind that when the Tribunal comes to consider whether or not to confirm the agreed order and, as it is empowered to do, to request that the order be changed, the provisions of the Act and the intention of the legislature would be emasculated if the time for a referral had passed.

The submission by *Mr Unterhalter* that the complainant could still pursue its complaint is no answer. The policing of prohibited practices is primarily the task of the Commission and the Tribunal. It is only where the Commission decides not to make a referral or fails to issue a notice of non-referral that the complainant has the option, not obligation, to pursue the complaint. Even if the complainant does take advantage of section 51(1) that *ex post facto* decision does not relieve the Commission of its duty to fulfill its obligations timeously in terms of the Act. The Commission is not entitled to abrogate its public duty by failing to refer a matter on the grounds that it believes that the agreement on a proposed order will be confirmed. It is precisely because the Commission must refer a complaint which it determines as establishing a prohibited practice that the Commission must not only conclude the agreement envisaged in section 49D(1) before the time for referral or non-referral is reached but it must allow time for the Tribunal to adjudicate and decide whether to confirm the proposed order so that it can institute a referral should the Tribunal refuse to confirm the order. Furthermore time must be allowed before the referral or non-referral date to permit any changes to be made if so sought by the Tribunal.

As noted the date for referral or non-referral is no later than one year after the complaint was submitted. That date can be extended by agreement with the complainant and if so extended, then it can be further extended by the Tribunal. The practical effect of section 50(4) is to allow a complainant to stymie an agreement on a draft order where the year is nearly run. It may be advisable for the Commission and the Tribunal to report this anomaly to the *Minister of Trade and Industry* with a view to having section 50(4) amended so as to permit the Commission to approach the Tribunal for an extension without a prior extension having been agreed to by the complainant. If that were the situation then the Commission could apply to extend the time for referral or non-referral where there was the probability of an agreed order but insufficient time for it to be dealt with by the Tribunal in terms of the Act.

The Commission would certainly not be exercising its functions in accordance with the Act if it were to agree an appropriate order with the respondent and then allow the time for referring a complaint to the Tribunal to lapse. If the Tribunal declined confirmation or sought changes that the respondent rejected, the opportunity to police and end an alleged prohibited practice would be lost or, at least, dependant upon the complainant to pursue. Such a situation runs contrary to the purposes of the Act.

The Tribunal stated that "[i]t seems clear that the Commission must retain its title to prosecute at the time that the consent order application has been launched to avoid it facing prosecutorial impotence if the Tribunal does not sanction its bargain with the respondent." I do not agree. There is no warrant for the finding that the launch of an application in terms of section 49D(1) has the effect of suspending the running of the period by which a referral or notice of non-referral must be issued or that the launch of the application extends that period. The processing of the application to a final decision has to be completed in time for a referral should the Commission have determined that a prohibited practice has been established and the Tribunal declines to confirm the agreed draft order. Should the refusal by the Tribunal to confirm the draft order be taken on appeal, the filing of the notice of appeal will, at common law, freeze the *status quo ante*.

Mr Unterhalter submitted that the fact that the complainant could pursue its complaint even after a consent order was made by the Tribunal showed that the granting of the confirmation after the expiry of the time for referral or non-referral supported Applicant's position. (Section 49D(4)). After the consent order is made, the complainant's rights are, however, limited to applying for a declaration "for the purposes of section 65" or "an award of civil damages in terms of section 65, unless the consent order includes an award of damages to the complainant." Section 65 recognises a civil action for damages but prohibits the plaintiff from commencing such action without first filing a notice from the Chairperson of the Tribunal or the Judge President of this Court certifying that the conduct relied upon has been found to be a prohibited practice. The complainant's rights in terms of section 49D(4) provide scant protection for South African consumers in a case of a prohibited practice.

I referred earlier to the question of who should bring the application in terms of section 49D(1) for confirmation of an agreed draft order. In terms of the general principles of our law of procedure, the parties who seek the confirmation of the agreed order should jointly apply for the consent order. The parties to the agreement as well as any other interested parties will need to be cited and joined. The Act envisages that the Tribunal may confirm the agreement "without hearing any evidence". That does not, however, relieve the Tribunal of making an informed decision. In order to do so, the Tribunal will invariably need to be informed by both the Commission and the respondent as to the appropriateness of the agreed draft order and to that end the parties to the agreement should be before the Tribunal and should motivate the application. Rule 18(2) of the Competition Commission Rules, which is quoted below, provides for the Commission to refer the agreed draft order to the Tribunal. In this matter the application was brought by Applicant only and the Commission was cited as a respondent. The Tribunal noted, however, that the Commission was not represented at the hearing - at least when the jurisdiction issue was argued. The Tribunal cannot discharge its duty without investigating the appropriateness of the order and, in my view, it requires input from the Commission as to its findings, and its reasons for agreeing that the order is appropriate. It would be desirable for both the respondent and the Commission to jointly bring the application. That procedure may, however, be impractical both from a costs perspective and because the two parties may prefer to employ their own legal representatives and not act jointly. If that is so, the Commission should be asked to file an affidavit in support of the respondent's application. In all cases, however, the Commission should be represented at the hearing in order to assist the Tribunal with its task.

It was argued before this court that to preclude a settlement after the time within which a referral can for all practical purposes be made, deprives the respondent and the Commission of the opportunity to settle and to avoid unnecessary cost and effort. The effect of my view is not, however, as characterised by that argument.

After a referral, the matter comes before the Tribunal for adjudication. There is no reason whatsoever why after reaching agreement with the Commission and/or the complainant and/or any other interested parties - or, indeed, without such agreement, a respondent cannot present a draft order to the Tribunal and agree to it being made an order of the Tribunal. Such a procedure would be *dehors* section 49D which is a provision intended to empower the Commission to agree a draft order during, on or after the completion of the investigation but not in such a manner or at such a time as to preclude the Commission from fulfilling its duties in terms of the Act. The Tribunal is entitled - at any time while it is seized with the matter - to make an order proposed and agreed to by the respondent provided only that it acts in accordance with the requirements of just administrative action that is lawful, reasonable and procedurally fair. And, of course, that it is thereafter satisfied that the order is appropriate.

At the hearing before the Tribunal, Applicant sought to rely upon the terms of Rule 24 of the Competition Tribunal Rules. Sub-section (2) states that:

> "**At any time before the Tribunal makes a final order in a complaint proceeding, a party may request the Tribunal to make a coinsent order by filing**

a Notice of Motion in form CT6 with the documents listed in sub-rule 1(b).”

Insofar as this sub-rule is intended to regulate the procedure for the confirmation of a consent order in terms of section 49D it would appear to me to be *ultra vires*. Section 78 of the Act empowers the *Minister of Trade and Industry* to make “regulations that are required to give effect to the purposes of this Act”. The regulations are subordinate legislation and they cannot alter the provisions of the Act. If on a proper interpretation of the Act, an application to confirm an agreed draft order must be determined before the expiry of the time for a referral to the Tribunal then the regulations in question can go no further than to give effect to those provisions of the Act.

En passant, I note Rule 18 of the Competition Commission Rules which deals with consent orders which was not mentioned by the Tribunal in its ‘Reasons” nor was it referred to by the Applicant in this Court. The rule is, however, instructive. It states:

18. Consent orders

(1) If, at any time before issuing a Notice of Non-referral in Form CC 8, or referring a complaint to the Tribunal in Form CT 1(1), it appears to the Commission that the respondent may be prepared to agree terms of a proposed order, the Commission –

(a) must notify the complainant, in writing, that a consent order may be recommended to the Tribunal; and

(b) invite the complainant to inform the Commission in writing within 10 business days after receiving that notice –

(i) whether the complainant is prepared to accept damages under such an order; and

(ii) if so, the amount of damages claimed.

(1) If the Commission and the respondent agree the terms of an appropriate order, the Commission must –

(a) refer the complaint to the Tribunal in Form CT 1(1) to be proceeded with in terms of section 49D;

(b) attach to the referral -

(i) a draft order

(aa) setting out the section of the Act that has been contravened;

(bb) setting out the terms agreed between the Commission and the respondent, including, if applicable, the amount of damages agreed between the respondent and the complainant; and

(cc) signed by the Commission and the respondent indicating their consent to the draft order; and

(ii) Form CT 3, completed by the complainant, if applicable; and

(c) serve a copy of the referral and draft order on the respondent and the complainant.

(1) The Commission must not include an order of damages in a draft consent order unless it is supported by a completed Form CT3.

(2) A draft consent order may be submitted to the Tribunal in terms of section 49D and this Rule notwithstanding the refusal by a complainant to consent to including an award of

damages in that draft order.

It is noteworthy that the Commission rule envisages that the agreement to a proposed order will be made at any time before referral or non-referral. Furthermore the "... Commission must refer the complaint to the Tribunal in Form CT 1(1) to be proceeded with in terms of section 49D"

In the settlement agreement of 3 December 2003, the Commission undertook not to refer the complaint to the Tribunal. I am of the view that Commission is not entitled to conclude such an agreement. The Commission cannot abrogate its statutory functions by agreement. It should also be observed that the agreement pursuant section 49D(1) between the Commission and the respondent to the effect that the Tribunal would be requested to incorporate the settlement agreement into a consent order does not have the effect of making the terms of the settlement agreement legally enforceable until such time as the agreed draft order is confirmed by the Tribunal and a consent order is made. The undertaking by the Commission in this case not to refer the complaint was, in the circumstances of this case, not only *ultra vires* but an exercise in futility in that the time for referral had passed before the Tribunal was asked to confirm the agreed draft order which, if confirmed**,** would have incorporated the settlement agreement and given it efficacy.

The Tribunal was satisfied that the agreement of 3 December 2003 was made within the period allowed for the Commission to refer the complaint to the Tribunal or issue a notice of non-referral. Further , it found that the agreement satisfied the requirements of section 49D(1) and was susceptible of confirmation in terms of that section. The settlement agreement of 3 December 2003 does not, in my view, satisfy the requirements of section 49D in that the Commission and the Applicant did not agree upon the terms of an appropriate order. The agreement is simply a settlement agreement. There is no reference in the settlement agreement to any appropriate order nor to a consent order. Indeed, it appears on the facts advanced by Applicant in its founding affidavit in the review application that until some time in 2004, the Commission held the view that no consent order could be made unless it contained an admission of liability and acknowledgement by Applicant that it was engaged in a prohibited practices. Applicant has consistently refused to make that concession.

It was only in a letter dated 16 November 2004 - long after the time for a referral or a notice of non-referral had expired - that the Commission consented to the settlement agreement of 3 December 2003 being confirmed as a consent order. Given those facts, it cannot be said that any agreement as to an appropriate order - as envisaged in section 49D(1) was concluded before the period for the referral of the complaint had expired

On the facts of this matter, the Commission had already in October 2003 decided to refer the

complaint to the Tribunal. Having made that determination, it remained open to the Commission to agree a draft order with Applicant as contemplated in section 49D(1) provided only that it referred the complaint to the Tribunal timeously if no consent order was issued prior to the expiry of the time for referring the complaint.

As will appear from what is set out above, I am of the opinion that the decision of the Tribunal not to confirm the proposed order incorporating the settlement agreement was a correct decision. As noted I do not subscribe to a number of the arguments and interpretations relied upon by the Tribunal, but concur with their decision not to confirm the agreement of 3 December 2003 for the reasons stated above.

In the result, the review and the appeal are both dismissed. As none of the Respondents opposed the review or the appeal no order as to costs is made.

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SELIKOWITZ JA

Davis JP and Mhlantla AJA concurred.