COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 34/CR/Apr04

In the matter between:

Mpho Makhathnini

Nelisiwe Mthethwa

Musa Msomi

Elijah Paul Musoke

Tom Myers

AIDS Healthcare Foundation Limited

and

Glaxosmithkline South Africa (Pty) Ltd

Glaxo Group Limited

Reasons

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1. This is an application, in terms of Rule 54(1) of the Rules of this Tribunal, for condonation in respect of the late filing of a Complaint Referral. The applicants seek leave to file their complaint referral within 20 business days of the date of this order. The applicants also ask the Tribunal to order the respondents to pay the costs of this application in the event that it is opposed.

2. The application was initially scheduled to be heard on 18 June 2004 but was postponed to the 19th July 2004 at the request of the respondents' attorneys. As a result, the applicants also seek the wasted costs occasioned by the postponement thereof.

3. The applicants submitted their complaint to the Commission during January 2003. The Commission acknowledged receipt thereof on 28 January 2003. On 16 October 2003, the Commission informed the applicants' attorney that it had decided to refer the matter to the Tribunal for determination alleging contravention of Sections 8(a), (b) and (c) of the Act. However, on 10 December 2003 the Commission informed the applicants' attorney that it had concluded a settlement agreement *between the Commission and the respondents* and that it had signed this agreement as the *"final settlement of the*

matter lodged by yourselves".[1] This agreement was never made an order of this Tribunal.

4. However, the applicants contend that they were not party to this agreement and, hence, could not be bound by it. It is apparent from the agreement that GSK only agreed to the settlement provided that the Commission did not insist on an admission that the Act had been contravened or on the imposition of an administrative penalty.[2] The detailed terms of the agreement are, however, not relevant for the purpose of the present application.

5. On 11 December 2003, the applicants, in a letter to the Commission, objected to the impression created that they were party to the settlement negotiations.[3] In this letter the applicants argued that the statement issued by the Commission alleging that "all parties concerned had agreed to the terms of the settlement agreement" is factually incorrect. Indeed, the applicants aver that their submissions were never considered by the Commission or, at any rate, have largely been ignored. The applicants also point out that they did not attend – nor were they invited to attend – the joint press conference involving the Commission, GSK, TAC and the other complainants and, at which, the settlement was announced.[4]

6. In response, the Commission – in its letter dated 11th December 2003 - advised the applicants' attorneys that "your clients are free to refer the matter to the Tribunal should they disagree with the outcome of the Commission's investigation."[5] The Commission insisted that its media release contains no factual inaccuracies or that it implied that the present applicants were consulted prior to the conclusion of the settlement agreement entered into between itself and GSK. The Commission took the view that *"the release only refers to those parties who were involved in the settlement negotiations and the conclusion of the settlement agreement with GSK, i.e. those parties who were present or represented at yesterday's press conference"*.[6]

7. In terms of section 50(2) of the Act, the Commission has a period of one year to investigate a complaint submitted to it, at which time it is required either to refer the complaint to the Tribunal or to approach the Tribunal for an extension of the time period or to issue a notice of non-referral in respect thereof.

8. Section 50(5) of the Act 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 contemplated in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period."

9. In terms of section 51(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 Tribunal, subject to its rules of procedure. The complainant is entitled, as laid out in Rule 14(1)(b) of the Tribunal Rules, to file its

1 Founding Affidavit, paras 17-18 (pp 9-10), read with annexure "MN5" (pp 23-24).
2 In this regard, see sections 58 and 59 of the Act.
3 Founding Affidavit, para 19 (p. 9) read with annexure "MN5" *supra*.
4 See annexure MN 6, page 25 of the record.
5 See Annexure MN7 to the Founding Affidavit, pp 28-29.
6 See footnote 5 *supra*.

complaint within 20 business days after the Commission has issued, or has been deemed to have issued, a notice of non-referral to that complainant.

10. However, a complainant may apply to this Tribunal in terms of Tribunal Rule 54(1) to condone the late filing of a document, or to request an extension or reduction of the time for filing a document, by filing a request in Form CT 6. This has been the approach adopted by the applicants in filing their condonation application before us.

11. Note too that Section 58(1)(c) of the Act provides that the Tribunal may, *on good cause shown*, condone any non-compliance with any of the time periods set out in the Act or its Rules.

12. In this instance, however, the Commission failed to issue a formal notice of non-referral of the applicants' complaint. Accordingly, the applicants argue that the one year period referred to in section 50(2) of the Act expired by midnight 27 January 2004. We concur with this view – there is no reason for departing from the provisions of Section 50(5) of the Act. In our view then, the applicants' complaint ought to have, in the normal course of events, been referred to us within 20 business days after the expiry of the period stipulated in section 50(2), i.e., by latest 25 February 2004. The breach should therefore be considered from this date and not from the 11 December 2003. Indeed, as shall be elaborated below, in this case it is conceivable that the operative time period for purposes of filing a complaint referral should be counted only from the 24th of March 2004, this being the date on which the applicants in this matter finally received a copy of the agreement which led the Commission to drop the case that it had initially decided to refer to the Tribunal.

13. We are of the view that the applicants have satisfactorily accounted for their delay in filing the present application. They explained that after receipt of the letter of 11 December 2003 from the Commission, the applicants' attorney consulted with Counsel and instructed him to provide him with an opinion as to the future course of this matter. However, the applicants' attorney took his annual leave from 23 December 2003 and when he returned on 19 January 2004 no opinion had been provided by Counsel. The AHF's attorney submitted that further attempts to obtain the opinion from the particular advocate were fruitless.[7]

14. By the middle of February 2004 the applicants' attorney was instructed to seek the advice of other counsel, which he duly did. As a result, the applicants' attorney was only able to continue with the matter at the beginning of March 2004.[8] Pursuant to Ms. Terri M. Ford's (a representative of the Aids Healthcare Foundation, a complainant in this matter) meeting on 12 March 2004 with AHF's attorney, Mr Musa Ntsibande, Ntsibande attempted to obtain clarity on the status of the complaint and to obtain copies of the settlement agreements. On 17 March 2004, Ntsibande telephoned Mr Kunene of the Commission and also transmitted a letter by facsimile to the Commission requesting a copy of the agreement. On 19 March 2004, Kunene informed the applicants' attorneys that the Commission did not have a copy of the agreement in its possession.[9] The applicants' attorney only obtained a copy of the settlement agreement between the Respondents and TAC on 24 March 2004. As already noted, there is a credible argument for insisting that this be treated as the operative date from which the filing days are counted – we are persuaded that the applicants were fully entitled to have sight of this agreement before deciding on their next course of action. Further discussions took place between the applicants'

7 Founding Affidavit, para 24 (page 13).
8 Founding Affidavit, para 25 (page 13).
9 Founding Affidavit, annexure "MN9" (page 32).

attorneys and the Commission and by 30 March 2004 the Commission advised the applicants' attorneys that they should have referred the matter to the Tribunal for determination.[10]

15. On 8 April 2004, the Aids Healthcare Foundation instructed its attorneys to proceed with the matter and AHF's attorneys only received these instructions on 11 April 2004. On 13 April 2004, AHF's attorneys instructed Counsel to prepare this application. The application was then filed on 22 April 2004.

16. We agree with the Respondents that Tribunal Rule 54(1) read with section 58(1)(c) of the Act requires the applicants to show "good cause" for the late filing of their complaint referral. We note too that this Tribunal *may*, in terms of Tribunal Rule 55(1)(b), have regard to the High Court Rules. Indeed, the applicants - in their heads of argument – made reference to decisions of the Supreme Court of Appeal[11] and pointed out that " a Court's power to grant condonation is discretionary. Such discretion is not fettered, for a Court will adopt a holistic approach and consider all the circumstances of each case in deciding whether good cause has been established…"

17. We should make it clear, however, that the courts have consistently refrained from attempting to formulate an exhaustive definition of "good cause" because to do so would hamper unnecessarily the exercise of the discretion vested in the Court.[12]

18. In their written submissions, the Respondents intimated that two principal requirements for the favourable exercise of the Court's discretion have consistently been emphasized. Firstly, that the applicant should file an affidavit satisfactorily explaining the delay or default so as to enable the Court to understand how it really came about, and to assess his or her conduct and motives. Secondly, the applicant should satisfy the court that he or she has a *bona fid*e case by at least showing that its case is not patently unfounded in that it is based on facts which, if proved, would entitle it to the relief sought. The third requirement is that the grant of the indulgence sought must not prejudice the other party in any way that cannot be compensated for by a suitable order as to postponement and costs.[13]

19. In considering applications of this nature, the Appellate Division in *United Plant Hire (Pty) Ltd v Hills and Others*[14] set out an *inexhaustive list* of relevant considerations which may include the degree of non-compliance with the Rules, the proffered explanation for the delay, the prospects of success on appeal, the importance of the case, the respondent's interest in finality, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice.

20. In this vein, the Supreme Court of Appeal recently emphasized that:

> "Condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of delay and their effects must be furnished so as to enable the court to understand clearly

10 See Annexure "MN11", page 36 of the Founding Affidavit.
11 *Melane v Santam Insurance Co* 1962 (4) SA 531 (A) at 532A; *Finbro Furnishers v Registrar of Deeds* 1985 (4) SA 773 (A) at 789; and *Byron v Duke Inc* 2002 (5) SA 483 (SCA).
12 See *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 234 (A) at 353A; *Ford v Groenewald* 1977 (4) SA 234 (T) at 225E-G; *Van Aswegen v Kruger* 1974 (3) SA 204 (O) at 205C.
13 Respondents' Heads of Argument, pages 9-11.
14 1976 (1) SA 717 (A) at 720E-G. See also *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362F-H; *Darries v Sheriff, Magistrate's Court, Wynberg, and Another* 1998 (3) SA 34 (SCA).

> the reasons and assess the responsibility. It must be obvious that if non-compliance is time-related, then the date, duration and extent of any obstacle on which reliance is placed must be spelled out".[15]

21. We are satisfied that the applicants have fully accounted for the entire period from 11 December 2003 to 22 April 2004 although the clock only started ticking from the 25 February 2004. As we have intimated above, the filing should conceivably have been calculated from the 24th March 2004. However, even if the 25th of February 2004 is viewed as the only operative date, the applicants were thus forty days late in filing this application. While we are frequently frustrated by the tardiness of legal practitioners, given the pace at which the wheels of justice grind forward this does not, given the explanations proffered, appear unduly excessive.

22. The respondents further argued that the applicants did not explain why the filing of the complaint referral had to be delayed pending receipt of the settlement agreement. This argument, in our view, does not hold water as it is the same agreement that the present respondents were allegedly said to have been a party to. Of course, the applicants denied that they were a party to this agreement. We think that it was of prime significance for the applicants to have had insight to it so as to enable them to consider its effects on them, if any. There is, indeed, much about this settlement that is unusual – the failure on the part of either the Commission, the Treatment Action Campaign or the respondent to even consult a co-complainant before concluding a highly publicized settlement should be mentioned; the fact that the Commission then informed the applicant in this matter that the settlement was reached 'in full and final settlement' of its complaint is another matter that the applicant would justifiably have sought legal opinion over.

23. Note also that there is a question mark over the validity of concluding a settlement of a complaint that had already been referred to the Tribunal without then referring the settlement agreement to the Tribunal. At very least, a prudent litigant would want to take legal advice over these and a number of other issues, and if this delayed their referral of the complaint, then responsibility must be shared by the other parties to this matter. Had there been a consent order within the meaning of the Act, the provisions of the Act and the Rules would have prevented the sort of confusion that ensued here. Rule 18(1) of the Commission Rules provides that if, at any time before issuing a Notice of Non-referral or referring a complaint to the Tribunal, it appears to the Commission that the respondent may be prepared to agree terms of a proposed order the Commission must notify the complainant in writing that a consent order may be recommended to the Tribunal. The Commission can also invite the complainant to inform the Commission within a prescribed period after receiving that notice whether the complainant is prepared to accept damages under such an order and if so, the amount of damages claimed. However, the applicants seem to have enjoyed none of those rights in these circumstances. Moreover, despite the above, a consent order does not preclude a complainant from applying for a declaration in terms of section 58(1)(a)(v) or (vi) of the Act or an award of civil damages in terms of section 65 unless the consent order includes an award of damages to the complainant.[16] In the circumstances, the applicants were entitled to seek clarity as to the true status of the Commission's consent order.

24. The respondents also point out that the applicants have yet to file the very complaint referral for which they seek an indulgence. The respondents argue that the applicants should have filed their

15 *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at para [6].
16 See section 49D(4) of the Act.

complaint referral simultaneously with their application for indulgence. That seems to be a futile exercise as the applicants' complaint referral cannot come before the Tribunal. While, there may be circumstances in which the particular facts dictate this simultaneous filing of the complaint referral and the condonation application, in the interest of minimizing the costs of litigation, seeking the condonation prior to preparing the papers for referral seems much the prudent course to have followed.

25. The respondents insist further that the applicants have no prospect of success. The Act does not require that we consider this and we will not do so. It appears to us that *'prospects of success'* would weigh more heavily were the applicant seeking condonation in respect of the filing of an appeal, that is to say when the aggrieved party has had at least the benefit of a hearing in open court. This is not the case here. And would be a bold adjudicator who took a view of prospects of success without having a benefit of the first hearing. We note also that the respondents elected to settle the matter rather than litigate although it must be clearly acknowledged that they only entered into the settlement on the basis that the Commission would not insist on an admission of guilty that the Act had been contravened or that an administrative penalty be imposed[17]. The referral of this complaint will not only provide the respondents with the opportunity to state their case, but, it will also present them with the further opportunity to vindicate their position in denying having engaged in any prohibited practices or any anti-competitive behaviour as alleged by the applicants.

26. Finally, the respondents argued that the balance of convenience favoured finding for them. It appears that the principal prejudice which they contemplated is the adverse publicity that would surround a full ventilation of this matter. They pointed out that they had already been subject to this unwelcome attention for some two years and that permitting the applicants to pursue their complaint would simply prolong this in a dispute that they believed had been settled.[18] The applicants, for their part, contended that should the complaint not be referred to the Tribunal they would be deprived of their constitutional right to have access to the courts. Without attempting to decide this constitutional point, I simply observe that refusal to grant the application for condonation would spell the end of the road for the applicants in a complaint which they, at any rate, were never given the opportunity of settling to their satisfaction. There can be little doubt that the balance of convenience favours the granting of the application.

27. I accordingly grant the application for condonation.

Costs

28. The respondents initially insisted that they were not served with the condonation application. However, the condonation filing bears the respondents' date stamp. It appears that the papers were served on one of the first respondent's employees who had somehow failed to pass the papers on to the appropriate personnel. That the respondents were represented in the hearing at all on the 18 June is due entirely to personnel of the Tribunal who, of their own initiative, ascertained the identity of the respondent's attorney and advised them of the hearing day. The respondents were, however, not ready to deal with the application on the scheduled day and so asked for a postponement. The delay is entirely of their own making and so, too, are the wasted costs of the 18 June.

29. I understand the respondents to argue that because the granting of condonation is an indulgence costs of the application should always be awarded against the applicants. Had the respondents elected

17 In this regard, see clauses 2.4 and 5 of the settlement agreement.
18 Answering Affidavit, para 22.6 – 22.12 (pages 69-71).

not to oppose the application then I may have awarded costs to them. However, they did oppose the application and they did not prevail. I see no reason to depart from the usual practice of costs following the cause and so costs of the hearing of the application on the 19th July are also awarded to the applicants.

30. A copy of the order handed down on the 23rd July 2004 is appended.

_____ **10 August 2004**

D. Lewis Date
Presiding Member

For the Applicants:	*Adv. C.J. Hartzenberg SC* (with him *Adv. C.S.A. Swart*) instructed by Musa Ntsibande *(Strauss Daly Inc.)*
For the Respondents:	*Adv. D. Untenhalter SC* (with him *Adv. Jerome Wilson*) instructed by Anton Norton *(Webber Wentzel Bowens)*

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Order

After hearing the parties on 19 July 2004 the Tribunal orders as follows:

1. The Applicants' late filing of the complaint referral to the Tribunal is condoned subject to clause 2 of this Order.

2. The Applicants shall file their complaint referral with the Tribunal within 20 business days from the date of this Order.

Costs

3. The Respondents shall pay wasted costs occasioned by the postponement of the application on 18 June 2004 including the costs of two legal representatives.

4. The Respondents shall pay the Applicants' costs occasioned by the Respondents' opposition to the application including the costs of two legal representatives.

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D. Lewis
Presiding Member

23 July 2004
Date