THE COMPETION APPEAL COURT OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 272/CAC/JUL25

In the matter between:

PEPKOR HOLDINGS LIMITED **FIRST APPLICANT**

SHOPRITE HOLDINGS LIMITED **SECOND APPLICANT**

and

LEWIS STORES PROPRIETARY LIMITED **RESPONDENT**

Arising from the matter in Competition Tribunal Case No: LM106Oct24/INT038Jun25

LEWIS STORES PROPRIETARY LIMITED **APPLICANT IN INTERVENTION**

and

PEPKOR HOLDINGS LIMITED **FIRST RESPONDENT IN INTERVENTION**

SHOPRITE HOLDINGS LIMITED **SECOND RESPONDENT IN INTERVENTION**

COMPETITION COMMISSION **THIRD RESPONDENT IN INTERVENTION**

In re: the large merger proceedings between:

PEPKOR HOLDINGS LIMITED **ACQUIRING FIRM**

and

THE FURNITURE BUSINESS OF SHOPRITE HOLDINGS LIMITED **TARGET FIRM**

(the “large merger proceedings”)

Heard: 29 August 2025

Order: 29 August 2025

Reasons Delivered: 3 September 2025

Summary: Competition law – suspension application – section 38(2A)*(d)* of the Competition Act 89 of 1998 – whether the order of the Competition Tribunal granting rights of intervention in merger proceedings should be suspended pending determination of the appeal – order granted.

ORDER

Suspension application of the decision of the Competition Tribunal:

1. The operation and execution of the order of the Competition Tribunal dated 23 July 2025 in case no. LM106Oct24/INT038Jun25, granting Lewis Stores (Pty) Ltd rights of intervention in the merger proceedings between Pepkor Holdings Ltd and Shoprite Holdings Ltd, is suspended pending the determination of the appeal set down for hearing on 17 September 2025.

2. The respondent, Lewis Stores (Pty) Ltd, is ordered to pay the costs of this application, including the costs of two counsel.

JUDGMENT

Masipa AJA

Background

[1] The application is brought in terms of section 38(2A)*(d)* of the Competition Act 89 of 1998 (the Act) for the suspension of an order of the Competition Tribunal (the Tribunal) handed down on 23 July 2025. In terms of that order, Lewis Stores (Pty) Ltd (Lewis) was granted wide-ranging rights of intervention in the large merger proceedings concerning Pepkor Holdings Limited's proposed acquisition of the furniture business of Shoprite Holdings Limited.

[2] The merging parties (Pepkor and Shoprite) have appealed against that order in this Court. The appeal is set down for hearing on 17 September 2025. They now seek an interim suspension of the Tribunal's order to prevent the premature disclosure of their confidential and competitively sensitive information to a direct competitor. Lewis opposes the application, contending that: the Tribunal's order is not appealable; the applicants' notice of appeal is defective; the appeal lacks prospects of success; and that the merging parties undermine the rule of law by refusing immediate compliance.

Substantive Context for Intervention

[3] Lewis justified its intervention on the basis that the Commission materially erred in its market analysis. It argued that independent and regional players were wrongly included as competitive constraints in a national market, when in fact only three firms – Pepkor, Shoprite Furniture, and Lewis – compete nationally. On that footing, Lewis contended the merger was effectively a '3-to-2 merger' likely to result in unilateral effects. It relied on the Tribunal's ruling in *JD Group Ltd v Ellerine Holdings Ltd.*[1] Lewis further alleged that the Commission understated the merging parties' market shares, and that the merger's rationale was to give Pepkor scale to exercise buyer power over

[1] *JD Group Ltd/Ellerine Holdings Ltd* Tribunal Case No. 78/LM/JUL01 (Competition Tribunal, 28 January 2002) paras 111–112.

suppliers. It also raised public interest concerns, including adverse effects on employment and the participation of historically disadvantaged persons (HDPs).

[4] The merging parties countered that Lewis's reliance on *JD Group/Ellerines* was outdated, and that more recent jurisprudence, such as *TFG Furnishings (Pty) Ltd v Tapestry Home Brands (Pty) Ltd,*[2] supported a broader approach to market definition, considering consumer behaviour and local contestability. They argued that the market is fragmented and contested, and that Lewis's intervention was an opportunistic attempt to frustrate the merger ahead of peak trading. These competing submissions underscore the substantive stakes of the appeal. By granting Lewis plenary rights, the Tribunal effectively enabled it to relitigate the Commission's entire market analysis. That strengthens the applicants' case that the Tribunal misdirected itself by outsourcing the Commission's statutory mandate.

The Legal Framework

[5] Section 38(2A)(d) of the Act empowers a judge of this Court to suspend the operation and execution of the Tribunal's order that is the subject of a review or appeal. This Court in *Glaxo Wellcome (Pty) Ltd v Terblanche*[3] and *Community Healthcare Holdings v Competition Tribunal*[4] held that suspension is discretionary power and must be exercised judicially with reference to: (i) whether an appeal is pending; (ii) the prospects of success; (iii) the balance of convenience; and (iv) the interests of justice.

Appealability

[6] The first hurdle is whether the Tribunal's order is appealable. At common law, the touchstone was *Zweni v Minister of Law and Order (Zweni).*[5] It held that for an order to be appealable it has to (i) be final in effect; (ii) be definitive of the rights of the parties; and (iii) dispose of a substantial portion of the relief claimed. This Court adopted that restrictive approach in *Telkom SA Ltd v Orion Cellular (Pty) Ltd,*[6] holding that interim rulings by the Tribunal lacked the necessary finality to be appealable.

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[2] *TFG Furnishings (Pty) Ltd v Tapestry Home Brands (Pty) Ltd* [2022] 2 CPLR (CT) paras 97–101.
[3] *Glaxo Wellcome (Pty) Ltd and Others v Terblanche* (04/CAC/OCT00, 4 December 2000).
[4] *Community Healthcare Holdings (Pty) Ltd v Competition Tribunal and Others* [2006] 2 CPLR 431 (CAC).
[5] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J–533B.
[6] *Telkom SA Ltd v Orion Cellular (Pty) Ltd* (41/CAC/MAY05) [2006] ZACAC 3 para 23.

[7] However, the Constitutional Court in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others (Lebashe)*[7] decisively shifted the ground. It held that the question is no longer whether an order meets the *Zweni* criteria but whether the interests of justice warrant appellate scrutiny. This Court has since applied *Lebashe* in *Competition Commission v Bank of America Merrill Lynch International and Others.*[8] It confirmed that even rulings that are not 'final' may be appealable if justice so requires, particularly where they bear on the integrity or structure of proceedings. The competition jurisprudence on intervention reinforces this. In *African Data Centres SA Development (Pty) Ltd v Digital Titan (Pty) Ltd,*[9] the Court stressed that intervention must be circumscribed to assist the Tribunal without displacing the statutory mandate of the Commission. Similarly, in *Caxton and CTP Publishers and Printers Ltd v Naspers Ltd,*[10] intervention was recognised as permissible but only within limits tethered to the intervenor's theory of harm.

[8] Against this backdrop, the Tribunal's order in the present case is plainly appealable. It is not a minor procedural ruling: it fundamentally alters the nature of the merger proceedings by granting Lewis comprehensive rights – including access to confidential records, discovery, subpoena powers, cross-examination, and expert evidence – effectively equating it to a statutory authority. An order of such consequence cannot be shielded from appellate oversight. The interests of justice require that it be appealable.

Prospects of Success

[10] The merging parties contend that the Tribunal erred by conferring on Lewis rights indistinguishable from those of the Commission, untethered to any defined theory of harm. As *African Data Centres* and *Caxton* make clear, intervention must be tailored: it may supplement, but not supplant, the Commission's investigative role. On

[7] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC) paras 43–44.
[8] *Competition Commission of South Africa v Bank of America Merrill Lynch International Ltd and Others* [2024] 1 CPLR 1 (CAC) paras 22–24.
[9] *African Data Centres SA Development (Pty) Ltd v Digital Titan (Pty) Ltd* [2022] ZACAC 6; [2022] 2 CPLR 21 (CAC) paras 14–15.
[10] *Caxton & CTP Publishers and Printers Ltd v Naspers Ltd* (72/CAC/AUG07) [2009] ZACAC 3 paras 24–26.

these grounds, I am of the view that the appeal enjoys reasonable prospects of success.

Prejudice and Balance of Convenience

[11] If suspension is refused, the applicants' confidential and competitively sensitive information will be disclosed to advisers of a direct competitor. Such disclosure is irreversible: knowledge once acquired cannot be erased. Lewis contends that confidentiality undertakings suffice. But undertakings cannot neutralise the competitive harm from premature disclosure.

[12] By contrast, Lewis suffers little prejudice from suspension. The merger timetable has not yet been set, and the appeal will be heard within weeks. The inconvenience of delayed preparation is marginal compared to the irreversible prejudice risked by disclosure. The balance of convenience thus favours suspension.

Interests of Justice

[13] The appeal raises systemic issues: the permissible scope of intervention, the treatment of confidential information, and the balance between transparency and protection in merger control. Preserving the *status quo* until these issues are resolved serves the interests of justice.

The Rule of Law

[14] Lewis submits that the applicants' resistance to immediate compliance undermines the rule of law. That argument is misplaced. Section 38(2A)*(d)* expressly provides for suspension applications. By invoking it, the merging parties vindicate the rule of law rather than defy it. To compel compliance regardless of a pending and arguable appeal would render the suspension mechanism nugatory.

Costs

[15] As a result, the merging parties have been successful. Lewis's opposition was not justified. Therefore, costs must follow the result. The merging parties sought to amend their prayers for costs, which initially only sought costs for one counsel, to include two counsel. This was not opposed by Lewis, who were also represented by

two counsel. Taking this into account and having considered the mater, I am of the view that the costs of two counsel are warranted.

Order

[16] The following order is made:

1. The operation and execution of the order of the Competition Tribunal dated 23 July 2025 in case no. LM106Oct24/INT038Jun25, granting Lewis Stores (Pty) Ltd rights of intervention in the merger proceedings between Pepkor Holdings Ltd and Shoprite Holdings Ltd, is suspended pending the determination of the appeal set down for hearing on 17 September 2025.

2. The respondent, Lewis Stores (Pty) Ltd, is ordered to pay the costs of this application, including the costs of two counsel.

[redacted]

MBS MASIPA AJA

APPEARANCES

For the 1st and 2nd Applicants: M Le Roux SC, S Quinn and K-K Gwaza

Instructed by: Webber Wentzel and DLA Piper Advisory Services

For the Respondent: W Trengove SC and S Pudifin-Jones

Instructed by: Nortons Incorporated