



THE COMPETITION APPEAL COURT OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 271/CAC/Jul25

In the matter between:

PEPKOR HOLDINGS LIMITED

First Appellant

SHOPRITE HOLDINGS LIMITED

Second Appellant

and

LEWIS STORES PROPRIETARY LIMITED

Appeal Respondent

Coram: Nuku JA, Davis AJA and Dippenaar AJA

Heard: 17 September 2025

Delivered: 8 October 2025

Summary: Competition law – Appeal against decision of the Competition Tribunal granting leave to respondent to intervene in merger proceedings under s 53(c)(v) of the Competition Act 89 of 1998 as read with Tribunal Rule 46 – applicable test and principles restated – correct approach to intervention – respondent not producing sufficient evidence of likelihood of assistance to Tribunal – intervention order granted by Tribunal overly broad granting full participation– Tribunal failed to follow binding precedent and committed misdirections- order has final effect and is appealable.

ORDER

On appeal from: The Competition Tribunal:

1. The appeal is upheld;
2. The decision of the Competition Tribunal of 23 July 2025 under case number LM106Oct24/INT038Jun25 is set aside and replaced with the following order:
‘The intervention application is dismissed’;
3. The respondent is ordered to pay the costs of the appeal, including the costs of two counsel on scale C.

JUDGMENT

DAVIS AJA and DIPPENAAR AJA (NUKU JA concurring)

Introduction

[1] This appeal concerns one central issue, namely the scope of s 53(c)(v) of the Competition Act 89 of 1998 as amended (the Act) in terms of which the Act sets out the parties who may participate in merger hearings; in particular ‘any other person whom the Tribunal recognised as a participant.’ In short, this appeal turns on the basis by which a party has a right to participate in a merger hearing where it claims to have a material interest in the hearing as provided in s 53(d) (iv) of the Act.

[2] In this case the respondent applied to the Competition Tribunal (Tribunal) for admission to a merger hearing as an intervenor, contending that it has a material and substantial interest in the merger proceedings as well as having the necessary ability to assist the Tribunal in assessing the merger. The proposed merger is between the first and second appellants, respectively the first and third largest household furniture retailers in South Africa. The respondent is the second largest national household furniture retailer in South Africa. The Competition Commission (the Commission) had recommended that the merger be approved. It is within this context that the respondent

applied for admission to be an intervenor in the hearing before the Tribunal to determine whether the merger should be approved.

[3] The merging parties opposed this application. On 23 July 2025, the Tribunal upheld the respondent's application thus permitting it to participate in the merger proceedings.¹ It specified that it was given the rights of an intervenor with regard to the question of the definition of the relevant markets in relation to the retailing of household furniture products and whether the proposed merger is likely to lead to a substantial prevention or lessening of competition as contemplated in s 12A(1) of the Act, including by way of assessing the factors set out in s 12A(2) of the Act in relation to the identified relevant market(s) for the retailing of household furniture products. It was also admitted to assist the Tribunal in respect of potential remedies and/or the imposition of any conditions that might be imposed thereof. It is against this order that the first and second appellants have approached this Court on appeal.

The basis by which respondent sought admission

[4] In the founding affidavit deposed to by Mr Ryan Lepart, the Head of Legal of the respondent, the basis by which the respondent sought to intervene was set out thus:

'Lewis is in the position where it will be able to assist the Tribunal in its truth – seeking function as it is a national furniture retailer which has been actively involved in the retail furniture industry for many years and, therefore, is uniquely positioned to assist the Tribunal in providing insights and evidence into the nature of competition in the sector and how the proposed merger will likely influence subsequent competition post-merger and how it likely negatively affects customers of the merger parties.'

[5] After setting out, what in his view were the shortcomings in the Commission's findings and assessment of the competitive effects of the proposed merger in its merger report, Mr Lepart said 'if Lewis is permitted to intervene, it will provide the Tribunal with the relevant facts and economic evidence relating to each of these issues which are critical to the Tribunal's assessment of the merger'.

¹ The reasons for the Tribunal's decision were furnished on 5 September 2025.

[6] Mr Lepart in but one sentence in his founding affidavit says that ‘as a competitor it also has a material interest in the proposed merger’; a claim which is again repeated in the replying affidavit without further justification.

[7] Thus, in both the founding and replying affidavits it is made abundantly clear that the exclusive focus of the respondent’s intervention is to be located, in its view, at the inadequacy of the Commission’s assessment of the proposed merger.

[8] In summary, save for stating that it has a material interest, the respondent’s case before the Tribunal was that ‘it intends to provide the Tribunal with extensive evidence and unique insights regarding the following:

‘Market definition ... competitive dynamics in the furniture retail sector at a national level and in relation to the various local markets in which the merging parties’ stores overlap with specific reference to which retailers compete with one another in these local areas ... the anti-competitive effects that are likely to arise from the proposed transaction arise(sic) in the national market as well as in various local markets ... potential remedies that ought to be considered to ameliorate these very significant anti-competitive effects ... the negative public interest effects of merger.’

[9] It was thus in contending that it held ‘exclusive evidence and unique insights’ into these areas, that the respondent approached the Tribunal to be an intervening party. Indeed, the Tribunal understood that the essential case brought by the respondent for intervention before it concerned material knowledge possessed by the respondent. Thus, in its reasons the Tribunal set out respondents’ case thus:

‘Lewis argued that it had a direct interest in the merger proceedings, as it is the only national furniture retail chain that competes with both merging parties on a national basis. It submitted that, as a long-standing market participant, it possesses material knowledge of and unique insights into the furniture retail industry throughout South Africa, which would assist the Tribunal in discharging its truth-seeking function and in assessing the proposed merger and its likely impact on competition across relevant markets.’

The Tribunal's basis for admitting respondents

[10] The Tribunal articulated its understanding of the applicable law as being that 'intervention is not granted simply upon request; therefore, the Tribunal must inquire whether the party seeking to intervene will meaningfully assist in its section 12A inquiry'.

[11] But even if the case for intervention was based on a material and substantial interest possessed by the respondent, the Tribunal was constrained to accept on the strength of this Court's finding in *Community Healthcare Holdings (Pty) Ltd and Another v The Competition Tribunal and Others (Community Healthcare)*² that even if a party is able to show a material and substantial interest which would fall within the class of parties who may be admitted, the ultimate decision depends on the exercise of a judicial discretion by the Tribunal. In this case, it is clear that the Tribunal admitted the respondent, in the exercise of its discretion, on the basis of the contribution the respondent claimed it could make to the overall inquiry as to whether the merger should be permitted in terms of the s 12A enquiry.

[12] The Tribunal noted that there were significant differences in the evidence placed before it by the merging parties and respondent respectively; in particular regarding market structure, which competing versions could not be reconciled. It found that on the Commission's own estimate the merging parties could have a combined market share of over 45% of the defined market which is the threshold for an irrebuttable presumption of dominance.³ It noted further that the respondent claimed that the combined post-merger market share was approximately almost 50% while another market participant estimated that the merging parties share would be approximately 35%.

[13] The Tribunal found that a further dispute concerned whether the merger was a 3-to-2 merger of the largest players in the market. In this regard the Tribunal stated:⁴
'In our view, it seems unlikely [i.e 3:2 merger], as the merging parties have put it, that there are strictly three meaningful competitors in the market. However, it appears just as unlikely that

² *Community Healthcare Holdings (Pty) Ltd and Another v The Competition Tribunal and Others* [2006] 2 CPLR 431 (CAC) para 28.

³ See s 7 of the Act.

⁴ At para 52 of its reasons.

every single retailer of furniture constrains the merging parties as they have argued. We are left with a peculiarity in this matter where we do not have compelling evidence as to which operators *do* form part of the (effective) competitor set and how they compete.’

It concluded:⁵

‘In the absence of investigation evidence from consumer surveys and demand-side analysis of consumer preferences and substitutability of competitor offerings, competition authorities commonly rely on internal documents of firms and marketing information to interpret who market participants, in their own internal analyses, view as their close competitors. In this regard, we do not have before us comprehensive analyses of market studies, internal marketing and strategic documents and market insights to settle these issues.’

[14] Within this context, the Tribunal found that ‘Lewis was able to demonstrate detailed knowledge of the various players in the market, their offerings and the market realities of whether they are likely effective rivals of the merging parties’.⁶

[15] The Tribunal then formulated the issue at the stage of an intervention application as being ‘... not whether we agree with the various assertions, but rather whether we find that the admission of Lewis as an intervenor would assist us, along with further evidence of the merging parties, to more precisely determine these issues....we find that further evidence and analysis of the primary issues is required in the circumstances to assist our determination of the main matter.’

[16] In response to the argument of the merging parties that the Commission should be directed to address any deficiencies in its report and additional information could be requested from the merging parties, it stated:

‘In our assessment, we did not find that this proposed approach would assist us.

...

To curtail this process by referring back to the Commission and the merging parties to provide further analysis, without more, would render untested the manifestly determinative and contested information about how this market works. While this approach may seem practical for expediting these merger proceedings, it does not assist in our assessment, as such information

⁵ Para 53 of the Tribunal’s reasons.

⁶ Para 55 of the Tribunal’s reasons.

must be thoroughly interrogated and corroborated with evidence to enable a proper evaluation of the proposed merger.⁷

[17] For these reasons, the Tribunal concluded that ‘Lewis ought to be admitted as intervenor in these proceedings on the basis that it demonstrated its ability to provide significant and material evidence on the nature of competition in the market(s), the closeness of competition and the characterisation of regional or localised markets. All these issues are in dispute between the parties’.

[18] Significantly, the Tribunal noted that respondent was a competitor to the merging parties with a clear commercial interest in the outcome of this matter. In its view, this was a factor which was significant and which it had taken into account in the exercise of its discretion. In other words, it took into account that the respondent had a vested interest in the prohibition of the merger and that this factor was considered in the overall assessment as to whether to permit the respondent to intervene. In the final analysis, this was insufficient for it to exercise its discretion against the intervention application.

The relevant law

[19] In assessing the law which governs this application, apart from s 53(c) of the Act, Rule 46 of the Rules of the Tribunal needs to be taken into account. This Rule in relevant part provides as follows:

‘(1) At any time after an initiating document is filed with the Tribunal, any person who has a material interest in the relevant matter may apply to intervene in the Tribunal proceedings ... which must –

(a) include a concise statement of the nature of the person’s interest in the proceedings, and the matters in respect of which the person will make representations; and

...

(2) No more than 10 business days after receiving a motion to intervene, a member of the Tribunal assigned by the Chairperson must either:

(a) make an order allowing the applicant to intervene, subject to any limitations –

(i) necessary to ensure that the proceedings will be orderly and expeditious; or

⁷ Paras 62 and 63 of the Tribunal’s reasons.

(ii) on the matters with respect to which the person may participate, or the form of their participation; or

(b) deny the application, if the member concludes that the interests of the person are not within the scope of the Act, or are already represented by another participant in the proceeding.'

[20] This Court approached the implications of s 53(c) read with Rule 46(1) in *Africa Data Centres SA Development (Pty) Ltd v Digital Titan (Pty) Ltd and Others (Africa Data Centres)*⁸ as follows:

'The threshold for admission may not be as high as is the case in restricted practice cases, but it requires justification based on evidence; hence the necessity for the Tribunal to enquire into the question as to whether the party applying to intervene will assist it and its enquiry in terms of s 12A of the Act.'

[21] This approach is well established and was adopted in *Community Healthcare*.⁹ which endorsed *Anglo South Africa Capital (Pty) Ltd and Others v Industrial Development Corporation of South Africa and Another*.¹⁰

[22] It follows that when the Tribunal considers an application for intervention it must demand that an applicant demonstrate an evidential basis for admission as opposed to speculation, for it is only the former which may assist the Tribunal in carrying out its statutory mandate.

[23] What is equally significant from the judgment in *Africa Data Centre* is the following:¹¹

'[I]t cannot be denied that the appellant has a material interest in the first respondent entering the South African market as an independent competitor in the Data Centre business. However, that in itself does not necessarily entitle it to intervene in the merger proceedings in relation to the new entry theory of harm unless it could demonstrate to the satisfaction of the Tribunal that

⁸ *Africa Data Centres SA Development (Pty) Ltd v Digital Titan (Pty) Ltd and Others (Africa Data Centres)* [2022] 2 CPLR 21 (CAC) para 16.

⁹ *Community Healthcare* fn 2 above paras 38-39.

¹⁰ *Anglo South Africa Capital (Pty) Ltd and Others v Industrial Development Corporation of South Africa and Another* [2003] 1 CPLR 10 (CAC); 2004 (6) SA 196 (CAC).

¹¹ *Africa Data Centres* fn 8 above para 26.

there is a reasonable likelihood of the first respondent entering the South African market absent the merger.’

[24] When a party such as the respondent approaches the Tribunal to intervene, apart from a statement that it has a material interest in the merger (which needs to be contrasted to a commercial interest which connotes the possibility of a vested interest in subverting a merger between competitors), and its entire argument rests on its ability to contribute unique insights and evidence, it must demonstrate to the satisfaction of the Tribunal that it has evidence and knowledge which it can bring to bear on the proceedings which provide clear assistance to the Tribunal in the disposition of the case.¹²

[25] Furthermore, as has been emphasised on numerous occasions, a merger hearing is not a trial. As explained in *Northam Platinum Holdings Ltd v Impala Platinum Holdings Ltd and Others; Northam Platinum Holdings Limited v Carrim NO and Others (Northam)*,¹³ it is an enquiry which seeks to examine the nature of the market in the event that the merger takes place, contrasted to the relevant counterfactual, namely the nature of the future market absent the merger. As s 52 of the Act makes clear, it also requires the Tribunal to conduct its enquiry in an inquisitorial fashion, eschewing the traditional adversarial system of a trial as opposed to an inquisitorial enquiry by which the Tribunal can arrive at a reasoned decision as to whether to permit or disallow the merger.

¹² It is important again to note that in its replying affidavit the respondent repeated the basis for its intervention thus: Lewis has clearly made out a case for intervention in its founding affidavit and persists with its contention that, as a longstanding market participant in key competitive with merger parties, is best placed to provide the Tribunal with unique insights into an extensive evidence regarding the issues set out in paragraph 17.1 to 17.5 of the founding affidavit; the details of which have been set out earlier in this judgment

¹³ *Northam Platinum Holdings Ltd v Impala Platinum Holdings Ltd and Others; Northam Platinum Holdings Limited v Carrim NO and Others* [2022] ZACAC 10; [2022] 2 CPLR 25 (CAC) para 21 and the cases referred to therein.

[26] The jurisprudence which emerges from these cases is clear: a merger enquiry by virtue of the nature of a proposed merger transaction should be conducted expeditiously. Absent such an approach, mergers are less likely to take place in South Africa, even where the proposed merger advances the goals of the Act and hence the inclusive growth of the economy. So-called Stalingrad legal tactics have no place in a merger enquiry. The Tribunal needs to balance this danger against the advantages of acquiring knowledge, which otherwise it would not possess in the determination of the ultimate outcome of its merger hearing. This is especially important in cases such as the present where the intervenor is a competitor of the merging parties, who may be advancing its own commercial interests.

The appeal of the merging parties

[27] In upholding the respondent's application for intervention, the Tribunal identified four topics which it considered were sufficiently important to justify the intervention of the respondent. It found that the respondent would assist on the issues of market shares, customer preferences, the role of local markets and the need for more data regarding online sales.

[28] Counsel for the appellants submitted that what the Tribunal had effectively done to justify the application was to admit the respondent in order to 'plug the holes' in the investigations of the Commission to which the respondent had already made extensive representations. In support of this argument counsel submitted that, if the basis of intervention was that there were deficiencies in the investigations conducted by the Commission, the Tribunal, in the exercise of its inquisitorial power, could direct the Commission to supplement its investigation in the areas which the Tribunal had identified. It was submitted that the Tribunal had further provided completely inadequate justifications for not so acting by justifying its rejection of this submission on the basis that 'referring back to the Commission and the merging parties to provide further analysis without more, would render untested the manifestly determinative and contested information about how this market works'. The Tribunal's second justification was that 'as it is the Commission has conducted a comprehensive investigation and ultimately recommended conditional approval of the transaction'.

[29] According to the merging parties, these justifications did not withstand scrutiny. They did not provide any justifiable answer to the submission that the Tribunal could direct the Commission to supplement its investigation in respects in which the Tribunal had found the Commission's investigation and report to be lacking. It was submitted that furthermore, the Tribunal had failed to ask the central question whether the respondent had in its possession evidence that would not otherwise be available to the Tribunal, and which would assist the Tribunal in properly determining the likely effects of the merger. The Tribunal did not exercise its discretion judicially in the circumstances.

[30] According to the merging parties, the evidential basis for intervention as set out in respondent's affidavits were based on information available on Google or other accessible sites of information and were not unique to the respondent. In addition, the information would be provided, not by the respondent itself, but rather by its legal representatives and experts pursuant to interrogation and analysis of confidential information which had been provided to the Commission. The appellants submitted that there was no proper evidential basis set out for the respondent's claim to possess unique insights that could prove of assistance to the Tribunal.

[31] Counsel further submitted that the Tribunal had applied the incorrect test for intervention of the respondent, namely whether the Commission's findings could be reconciled with the submissions which had been made by respondent, fortified by the justification that there were material disputes of fact which could only be resolved by admitting respondent as an intervenor.

[32] Furthermore, it was contended that far from restricting the scope of intervention, the Tribunal's order granted the respondent the right to intervene in respect of all of the requirements for an enquiry set out in s 12A(2). Counsel submitted that the rights granted to the respondent extended far beyond the default position set out in s 53(c)(v) of the Act and ran counter to the principles set out in *Northam* in relation to obtaining such rights. The Tribunal had provided the intervenor with the most fulsome scope for intervention. It applied the wrong approach in requiring the merging parties to present 'compelling facts' justifying the curtailment of the respondent's rights of access, rather than to adopt the approach in *Northam* which requires the prospective intervenor to

motivate for each procedural right on the basis that such right is required to properly ventilate the intervenor's specific theory of harm.

[33] Other than the express exclusion of public interest factors, there were in counsel's view no restrictions that the Tribunal sought to impose upon the respondent. Even in the case of the public interest factors, the Tribunal had granted the respondent the right to intervene in respect of potential remedies and/or the position of any conditions in respect of the merger. Hence it opened the door to consideration of the public interest factors, despite expressly not granting the respondent public interest rights.

[34] In respect of buying power concerns, the Tribunal had disclaimed granting the respondent any rights regarding buying power, but the order granted respondent rights to intervene in respect of all of s 12A(2) and 12A(2)(d), which includes countervailing power. It was submitted that the order was thus at war with its own reasons.

[35] Critical to the merging parties' appeal was the submission that what effectively the Tribunal had done was to create a parallel role for the intervenor, that is similar to that of the Commission's role in merger hearings. It had, in the words of counsel, outsourced the functions of the Commission to the respondent by virtue of the fact that it had granted the respondent rights to participate in all prehearing conferences, full discovery rights, the right to require the Tribunal to summon people and documents, full participation rights in any and all interlocutories, the right to adduce evidence and present argument and the right to cross examine any witnesses. Further, the Tribunal granted the respondent's advisors the right to access the merger record and all documents filed in the proceedings in circumstances where portions of the record were confidential. This was particularly problematic in the light of the respondent being a direct competitor to the merging parties. Furthermore, counsel questioned whether there was any proper purpose served by the Tribunal in inviting additional lawyers and economists briefed by the respondent to replicate the Commission's merger assessment. In her words, 'this constitutes a privatisation of the merger function that the legislature assigned exclusively to the Commission and the Tribunal'.

The respondent's case

[36] Counsel for the respondent placed considerable emphasis on the flaws in the Commission's assessment. He submitted that it would undermine the Tribunal's truth seeking function and hence the very purpose of s 53 (c) if intervention could be denied simply because the Commission might have considered the particular theory of harm which had been raised in submissions made to the Commission by a prospective intervenor and then rejected same without any proper interrogation and without justification. He further submitted that it was essential that the respondent be permitted to intervene because a range of important evidence had not been properly considered by the Commission, including product offering, pricing, financing options, physical store presence, delivery costs, all of which held supreme relevance to the question as to whether market players could genuinely constrain the merging parties.

[37] In particular, he submitted that the respondent in its submissions had shown that it was able to demonstrate detailed knowledge of the various players in the market, their offerings and the market realities of whether there were effective rivals to the merging parties. Because the Commission's entire analysis was flawed on the basis of its failure to undertake a proper 'closeness of competition' assessment, the Tribunal was justified in admitting the respondent which was in the unique position of being able to assist it in the definition of the relevant market, the assessment of competitive effects and potential remedies.

[38] Responding to the argument that the Tribunal's order had effectively 'privatised' the public function of the Commission, counsel submitted that, by contrast, the Tribunal had employed procedural tools available to it to ensure that it would be in a position to obtain the most comprehensive evidence possible in order to fulfil its statutory duty to assess whether the merger would substantially prevent or lessen competition. The flaws in the Commission's assessment were highlighted by the respondent advancing a theory of harm of unilateral effects of the merger including potential foreclosure effects which would arise as a consequence of the proposed transaction which justified the order granted by the Tribunal.

[39] In the view of counsel, these flaws constitute compelling reasons to admit the respondent which, given its role in the market, would manifestly be able to assist in a comprehensive and fair inquiry into whether the merger should be prohibited or permitted. Allowing a knowledgeable competitor to provide such assistance was the most effective way to ensure a complete and accurate record upon which a justifiable decision could be made as to whether the merger passed competitive muster.

[40] To the argument that the order of the Tribunal effectively provided the respondent with an unfettered role in the proceedings, counsel submitted that the Tribunal had expressly stipulated that the respondent's rights would be subject to any limitations imposed by the Tribunal from time to time during the merger hearing.

[41] The respondent further raised certain complaints regarding its lack of access to the confidential record. During the hearing, it transpired that the respondent did not object to the portion of the confidential record relied on by the appellants for purposes of this appeal.¹⁴ Nothing more need accordingly be said on this issue.

Evaluation

[42] The approach adopted to merger hearings in general and the role and admission of intervenors in particular must be assessed in terms of the need to balance an expeditious resolution of any hearing regarding a merger pursuant to s 12A of the Act as against the contribution which an intervenor has shown it can make to the merger inquiry. Furthermore, as stated earlier, an intervenor is required to demonstrate an evidential basis as opposed to speculation by which it may assist the Tribunal in the hearing.

[43] The evidential basis regarding the application for intervention was made clear in *Africa Data Centres*:¹⁵

'This [a decision by the Tribunal to admit a participant] entails taking into account the likelihood of assistance promised by the prospective intervenor, balanced against the consequences of

¹⁴ Annexure B.

¹⁵ *Africa Data Centres* fn 8 above para 17.

the intervention in terms of the expedition and resolution of proceedings. If the likelihood of the prospective intervenor assisting the Tribunal's enquiry is doubtful, while the impact of the intervention is more than likely to impact on the expedition of the proceedings, then the Tribunal should decline the intervention or curtail its extent.'

[44] As pointed out in *Sunrise Energy Proprietary Limited v Strategic Fuel Fund Association NPC and Others*:¹⁶

'In essence, the applicant must demonstrate a genuine ability to assist the Tribunal in carrying out its statutory mandate. Even then, the decision as to whether or not to allow a party to intervene rests entirely with the Tribunal, provided that it is exercised judicially and in accordance with the rules of reason and justice. By the same token, the Tribunal is not obliged to allow a party to intervene solely based on its unsubstantiated claim that it is better suited than the Commission to assist the Tribunal to carry out its statutory mandate without adducing any evidence to that effect. This would open the door for time-consuming fishing expeditions and only serve to delay and/or prolong the merger proceedings unnecessarily.'

[45] It is again important to emphasise the nature of the order granted by the Tribunal; in particular in admitting external legal representatives and economic experts appointed by the respondent and allowing them access to all documents forming part of the Commission's merger record, permitting them to attend and participate in prehearing conferences, or the respondent to have access to confidential information albeit through its legal representative and economic experts, (who would be required to provide appropriate confidential undertakings in respect of these documents filed by the merging parties or the Commission or any other participants), the ability to call for discovery for further documents from the merging parties and request the Tribunal to summons and/or order any person to appear at the merger hearing and/or to prepare documents relevant to proceedings and to participate in any interlocutory proceedings and adduce oral and documentary evidence at the merger hearing and subject to cross examination any of the witnesses of the merging parties of the Commission and any other participants.

¹⁶ *Sunrise Energy Proprietary Limited v Strategic Fuel Fund Association NPC and Others* [2022] ZACAC 11; [2023] 1 CPLR 5 (CAC) para 14.

[46] It is manifest that this level of participation will retard an expeditious hearing. It is surely reasonable to imagine considerable disputes arising with regard to the discovery of further documents, the need for respondent's experts to take considerable time to produce expert reports, in addition to the possible various interlocutory proceedings which would doubtless flow therefrom to conclude that the breadth of the Tribunal's order foreshadows a laborious and lengthy process counter to the very objectives of an expeditious resolution.

[47] In the light thereof and in the required balancing exercise, this Court must surely take account of these factors together with the possible vested interest of a competitor in the merger proceedings to slow matters down in order to subvert the merger. It must then be satisfied that the contribution which a respondent can bring to the proceedings meets the test laid down by this Court.¹⁷ In particular, that the respondent has shown that it has unique knowledge of the market and can provide evidence in relation to the overall enquiry as to whether a merger should be permitted in order to justify admission.

[48] An examination of the two affidavits deposed on behalf of the respondent reveal generalised descriptions of the relevant market and contain no clear indication as to the nature of the specialised knowledge possessed by the respondent which could assist the Tribunal in its determination. The high watermark of respondent's case appears to be that the Commission's report is inadequate; and on the basis thereof, the respondent based its case on the criticism of the report and maintained that there were 'material disputes of fact'. As the Tribunal put it, there are material differences between the versions of the parties in this matter regarding the substantive issues 'on which our assessment of the likely (unilateral) effects the merger will turn'. In short, the affidavits fail to show whether the respondent is in possession of evidence which would not otherwise be available to the Tribunal after requiring further assistance from the Commission and which would therefore assist the Tribunal in determining the likely effects of the merger.

¹⁷ Set out in *Community Health Holdings (Pty) Ltd, supra* and *Northam, supra*.

[49] The core problem with the Tribunal's approach is that it based its decision upon the difference between the versions of the merger put up by the respondent and the Commission as well as that of the merging parties. But that is patently the incorrect test for intervention. On the basis of the case made out by the respondent in its affidavit in the intervention application, the test concerned the 'unique' contribution which the respondent could make in producing relevant evidence before the inquiry. That it regrettably failed to do.

[50] The Tribunal also appears to have overlooked the fundamental finding in *Northam, supra*, namely that once it admitted the respondent, the latter was entitled to a range of procedural rights after showing the necessity thereof. In other words, there was a burden upon the respondent to provide reasons as to why the procedural rights granted to it were justified in terms of the case it had made out for intervention. The respondent fell far short of the mark. Notwithstanding, the Tribunal granted extensive s 12A(2) rights including rights which the respondent did not even identify or contend for and public interest rights which were denied by the Tribunal.

[51] To the argument that paragraph 7 of the order ensured that the Tribunal retained the power to regulate its own process in the merger proceedings and that this entailed the possibility of the Tribunal curtailing the rights which it had granted to the respondent, paragraph 7 of the order must be read together with paragraph 81 of the reasons for justifying the order granted. This makes it clear that the order did not envisage a revisitation of the respondent's intervention or the procedural rights granted to it.

[52] In summary, the manner in which the Tribunal approached the application for intervention reveals that it did not take sufficient account of the fundamental test laid down by this Court, namely to what extent was the respondent as an intervenor likely to assist the Tribunal in circumstances where the information and evidence it was intending to provide could not have been obtained elsewhere. It also failed to strike an adequate balance between an order which did not undermine the objective of an expeditious resolution of the matter, the interest that the merging parties have in regard thereto as compared to the value of a contribution that an applicant for intervention might make to the hearing. Ultimately, the Tribunal failed to exercise its discretion judicially.

The appealability of the Tribunal's order

[53] Section 37(1)(b) of the Act provides thus:

'(1) The Competition Appeal Court may –

...

(b) consider an appeal arising from the Competition Tribunal in respect of –

- (i) any of its final decisions other than a consent order made in terms of section 63; or
- (ii) any of its interim or interlocutory decisions that may, in terms of this Act, be taken on appeal.'

[54] The appellants contended that the Tribunal's order was appealable under the interest of justice test as enunciated in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others (UDM v Lebashe)*¹⁸ considering the various misdirections of the Tribunal and its failure to apply this Court's binding precedent and that this Court has regularly entertained appeals in which the Tribunal has granted intervention.¹⁹ Counsel further submitted that the order was indeed final as envisaged by s 37(1)(b)(i) of the Act.

[55] Counsel for the respondent submitted that this Court would only have jurisdiction to hear appeals against two categories of decisions taken by the Tribunal, namely decisions that are 'final and interim or interlocutory decisions only if they "may be taken on appeal"' under the Act.

[56] In the view of counsel, an intervention order of the kind granted by a Tribunal in this case is an interlocutory order. It does not dispose of any issue or portion of the relief claimed in the main case. It leaves the main dispute to be resolved, and it was made to regulate the procedure to be adopted in respect of the hearing, which will lead to a final determination of the proposed merger. In advancing these submissions, reliance was placed on paragraph 7 of the Tribunal's order. By contrast to the reliance by the appellants on the decision of this Court in *Competition Commission of South Africa v*

¹⁸ *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2023 (1) SA 353 (CC) para 43.

¹⁹ Relying on *Northam and Africa Data Centres*, supra.

Bank of America Merrill Lynch International and Others,²⁰ which dealt with a finding on the jurisdiction of the Tribunal and/or Court, where the issue of jurisdiction could be dispositive of the main case. It was argued that to grant an intervention in a merger hearing could never be regarded as of the same significance; that is being dispositive of the main case.

[57] Much debate took place with regard to whether the order was subject to appeal if the interests of justice so demand.²¹ Given the misdirections of the Tribunal already referred to in this judgment in not following the binding precedent of this Court and the approach adopted by it, the interests of justice test is satisfied. But the further question must arise, notwithstanding the test of interests of justice, namely whether the Tribunal's order finally decided on the issue of the respondent's intervention. Given the nature of the order and the fact that other than adherence to timetables, the order disposed of the dispute as to whether the respondent could intervene and the rights that it would possess consequent thereto. It follows that in this connection the Tribunal has no power to revisit its determination.

[58] To recapitulate paragraph 7 of the Tribunal order provides that:

'Lewis' rights granted in paragraph 5 above will be subject to:

- 7.1. any limitation on their exercise imposed by the Tribunal from time to time during the merger proceedings and subsequent merger hearing; and
- 7.2. adherence by Lewis of any timetable set by the Tribunal.'

[59] On any plausible basis, this order cannot be read to justify the conclusion that the Tribunal's reasons entitled it to revisit its decision regarding the respondents' intervention application. That decision has been made to finality.

²⁰ *Competition Commission of South Africa v Bank of America Merrill Lynch International and Others* [2024] ZACAC 1; [2024] 1 CPLR 1 (CAC) para 55.

²¹ See in particular *United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others* [2022] ZACC 34; *Competition Commission of South Africa v Bank of America Merrill Lynch International and Others* [2024] ZACAC 1; [2024] 1 CPLR 1 (CAC) ('Forex II')

[60] The grant of intervention has significant implications for the rights of the appellants to ensure that a hearing which determines whether their proposed merger should be approved or disallowed is determined in an expeditious fashion. As we have found, this has been significantly compromised by the order which was granted by the Tribunal. The dispute brought on appeal to this Court is clearly defined. It is a dispute about intervention. It is not a dispute about whether the merger should be approved or disallowed. That awaits later determination. In short, the order which was granted by the Tribunal is final in effect and accordingly is appealable.

Conclusion

[61] It must be emphasised that the approach adopted in this judgment does not represent the end of the road for the respondent. The Tribunal possesses inquisitorial powers. It is more than entitled to summon the respondent to appear before it to provide it with any information and argument relevant to this proposed merger. It also has the power in terms of its inquisitorial powers to require the Commission to gather and present additional evidence in relation to the topics which it identified; being market shares, the effects of the merger on specified identified local markets and the role of online sales and economic surveys, demand side analyses of consumer preference. These are matters which clearly represent the kind of investigations that should be undertaken by the Commission.²² It has been alerted to the type of investigations which the Tribunal requires in the reasons provided by the Tribunal. To the extent that the Commission or the Tribunal considers that the respondent could be of assistance in this regard it could require the respondent to provide it with further evidence which would be of assistance.

[62] In summary, a finding that an intervention application brought by the respondent was not justified in terms of the application and the justifications which it offered for such intervention does not itself deny the possibility that the respondent can continue to make a contribution to the merger hearing. But its case falls far short of that which is required in terms of the jurisprudence of this Court to justify being an intervenor and hence to be

²² For example, as in *Vodacom (Pty) Ltd v Altech Autopage, A division of Altron TMT (Pty) Ltd* [2016] ZACT 43; [2016] 1 CPLR 265 (CT).

provided with the kind of wide procedural rights which are set out in the order of the Tribunal.

[63] For all these reasons, the appeal is upheld. The Tribunal's order is replaced with an order dismissing the intervention application brought by the respondent. The costs of the appeal follow the result, including the costs of two counsel. Considering the intricacies involved, costs on scale C are warranted.

Order

1. The appeal is upheld;
2. The decision of the Competition Tribunal of 23 July 2025 under case number LM106Oct24/INT038Jun25 is set aside and replaced with the following order:
 'The intervention application is dismissed';
3. The respondent is ordered to pay the costs of the appeal, including the costs of two counsel on scale C.

D M Davis AJA
Competition Appeal Court

F Dippenaar AJA
Competition Appeal Court

Appearances

For the appellants: MM Le Roux SC, S Quinn and K-K Gwaza

Instructed by: Webber Wentzel (first appellant) and
DLA Piper (second appellant)

For the appeal respondent: W Trengove SC and A Coutsooudis

Instructed by: Nortons Inc.