CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 316/25

In the matter between:

LEWIS STORES (PTY) LIMITED	Applicant
and	
PEPKOR HOLDINGS LIMITED	First Respondent
SHOPRITE HOLDINGS LIMITED	Second Respondent
COMPETITION COMMISSION	Third Respondent

Neutral citation:	*Lewis Stores Proprietary Ltd v Pepkor Holdings Ltd and Others* [2026] ZACC 4
Coram:	Mlambo DCJ, Dambuza AJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Rogers J, Savage AJ and Tshiqi J
Judgment:	Majiedt J (unanimous)
Heard on:	10 December 2025
Decided on:	30 January 2026
Summary:	Competition law — intervention in large merger — test restated — Competition Appeal Court erring in introducing new test or applying wrong test — Competition Appeal Court erring in improperly interfering in Competition Tribunal's exercise of discretion

REASONS FOR ORDER

MAJIEDT J (unanimous):

Introduction and background

[1] On 19 December 2025, the following order was issued by this Court:

> "1. Leave to appeal is granted.
> 2. The appeal is upheld.
> 3. The order of the Competition Appeal Court is set aside and replaced with the following:
> '(i) The appeal is dismissed.
> (ii) The appellants must jointly and severally pay the respondent's costs of appeal, including the costs of two counsel on scale C.'
> 4. Reasons for this order will follow at a later date.
> 5. The costs in this Court stand over for determination when the reasons for this order are handed down."

[2] These are the reasons for that order. This is an urgent application for leave to appeal against a decision of the Competition Appeal Court (CAC), that set aside an order by the Competition Tribunal (Tribunal), partially granting the applicant, Lewis Stores (Pty) Limited (Lewis), a right to intervene in the large merger proceedings between the first respondent, Pepkor Holdings Limited (Pepkor), the acquiring firm, and the second respondent, Shoprite Holdings Limited (Shoprite),[1] the target firm.[2]

[1] Pepkor owns the well-known brands, Bradlows and Russells, while Shoprite owns the equally well-known OK Furniture and House & Home brands.

[2] *Pepkor Holdings Limited v Lewis Stores Proprietary Limited* [2025] ZACAC 6 (CAC judgment).

[3] The Competition Commission (Commission) had recommended the conditional approval of the proposed merger. As this is a large merger, the Tribunal had to consider the Commission's recommendation.[3] In the course of those proceedings, Lewis applied to intervene before the Tribunal, contending that the merger raised significant competition concerns for low- and medium-income furniture buying households. The Tribunal granted Lewis partial rights to participate in the proceedings,[4] which the merger parties successfully appealed in the CAC. Lewis now approaches this Court contending, in the main, that the CAC applied the incorrect test for intervention, and undermined the Tribunal's statutory authority by improperly interfering in the Tribunal's exercise of its discretion.

[4] The following issues are before this Court:

(a) whether this Court has jurisdiction, and whether it should grant leave to appeal;

(b) whether the CAC impermissibly interfered with the Tribunal's discretion; and

(c) whether the CAC applied the correct test for intervention in merger proceedings, and, if not, what the correct test is.

[5] The merger was first investigated by the Commission following Pepkor's notification of its proposed acquisition of Shoprite's OK Furniture and House & Home divisions. After a seven-month investigation, during which it obtained information from the merger parties, competitors (including Lewis), suppliers, and customers, the Commission recommended the conditional approval of the merger. It concluded that the merger would not substantially lessen or prevent competition. In doing so, the Commission relied on a broad list of retailers that it considered part of the competitive

[3] In terms of section 15, read with section 14A(1), of the Competition Act, 89 of 1998 (Act).

[4] *Lewis Stores Proprietary Limited v Pepkor Holdings Limited*, unreported decision of the Tribunal, Case No LM106Oct24/INT038Jun25 (5 September 2025). The Tribunal issued an order on 23 July 2025 and furnished reasons for that decision on 5 September 2025 (Tribunal Order and Reasons).

landscape, including national and regional chains, premium lifestyle outlets, online sellers and smaller niche operators.

[6] Before the Tribunal, Lewis applied for participatory rights in the merger hearing. It argued that the merger would fundamentally reshape the competitive structure of the furniture retail industry, producing a near three-to-two consolidation among national chains. This argument is based on Lewis' averment that the three parties before us are the only true national furniture retail chains in the low- to middle-income furniture buying segment, with Pepkor being the largest, followed by Lewis and Shoprite. Lewis contended before the Tribunal that Pepkor and Shoprite compete closely in pricing, promotional strategies, credit offerings, and store network placement, and that this rivalry would be substantially weakened by the merger. Lewis also contended that it possessed detailed, first-hand information, drawn from its national footprint, pricing data, store-level knowledge, and long-standing experience serving lower-income consumers, that the Commission had either not obtained or not properly analysed.

[7] This information, according to Lewis, would materially assist the Tribunal in identifying unilateral effects, understanding how consumers substitute between national chains, and evaluating the impact of the merger in vulnerable local markets, including rural towns where the merger parties are the only national furniture retailers. Lewis emphasised that this kind of internal industry knowledge is not typically available to the Commission, and that the Tribunal's inquisitorial mandate requires it to have access to all relevant evidence.

[8] The merger parties opposed the intervention. They argued that Lewis was a competitor with a direct commercial interest in delaying or preventing the merger, and that its desire to intervene was driven by competitive self-interest rather than an ability to assist the Tribunal. The merger parties submitted, further, that Lewis had not demonstrated any unique or specialised evidence unavailable to the Commission, and that the differences between Lewis' and the Commission's views reflected mere disagreements about economic interpretation rather than deficiencies in the evidentiary

record. They also contended that granting Lewis participatory rights, particularly access to confidential merger documents and the right to file expert and factual evidence, would significantly delay the merger hearing, frustrate the statutory imperative of expedition in merger proceedings and undermine the Commission's role as the primary investigator. The Commission itself abided the intervention application, taking no position.

[9] The Tribunal granted Lewis' application. It held that Lewis had presented a credible, merger-specific theory of harm grounded in factual allegations of close competition and potential unilateral effects. The Tribunal found that aspects of the Commission's investigation appeared incomplete or insufficiently probed, especially in relation to local market overlaps, the actual competitive constraints in the low-income segment, and the dynamics of store location. In the Tribunal's view, Lewis had access to information that could meaningfully assist it in discharging its statutory duty to evaluate the merger under section 12A of the Act.[5]

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[5] Section 12A of the Act reads:

> "**Consideration of mergers**
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> (1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and if it appears that the merger is likely to substantially prevent or lessen competition, then determine–
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> (a) whether or not the merger is likely to result in any technological, efficiency or other procompetitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and
>
> (b) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).
>
> (1A) Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).
>
> (2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the *firms* in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including–
>
> (a) the actual and potential level of import competition in the market;

[10] While acknowledging the merger parties' concerns about delay, the Tribunal held that these could be mitigated through tight case-management controls, explicitly reserving to itself the power to narrow, adjust or withdraw Lewis' participatory rights as the hearing progressed. The Tribunal thus granted Lewis targeted rights to participate

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(b) the ease of entry into the market, including tariff and regulatory barriers;

(c) the level and trends of concentration, and history of collusion, in the market;

(d) the degree of countervailing power in the market;

(e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;

(f) the nature and extent of vertical integration in the market;

(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail;

(h) whether the merger will result in the removal of an effective competitor;

(i) the extent of ownership by a party to the merger in another *firm* or other *firms* in related markets;

(j) the extent to which a party to the merger is related to another *firm* or other *firms* in related markets, including through common members or directors; and

(k) any other mergers engaged in by a party to a merger for such period as may be stipulated by the Competition Commission.

(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on—

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of *small and medium businesses*, or *firms* controlled or owned by historically disadvantaged persons, to effectively enter into, *participate* in or expand within the market;

(d) the ability of national industries to compete in international markets; and

(e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and *workers* in *firms* in the market."

in the merger proceedings[6] and made those rights subject to tight controls by the Tribunal.[7]

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[6] The Tribunal made the following order:

> "On application by Lewis Stores Proprietary Limited ("**Lewis**") to intervene as a participant in the above matter, and having heard the parties, the Tribunal hereby orders the following:
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> 1. Lewis' application to intervene is granted.
>
> 2. Lewis is recognised as a participant in the large merger proceedings before the Tribunal under the case number LM106OCT24, subject to the scope of intervention described at paragraph 4.
>
> 3. Subject to 6 below, Lewis' external legal representatives and economic experts are granted access to all documents forming part of the Competition Commission's merger record, including those filed under a claim of confidentiality, subject to the provision of appropriate confidentiality undertakings.
>
> 4. Lewis is permitted to participate in the merger proceedings in respect of the following matters:
>
> 4.1 the definition of the relevant market(s) in relation to the retailing of household furniture products;
>
> 4.2 whether the proposed merger is likely to lead to a substantial prevention or lessening of competition as contemplated in section 12A(1) of the Competition Act, 89 of 1998 ("Act"), including by assessing the factors set out in sections 12A(2) of the Act, in relation to the identified relevant markets(s) for the retailing of household furniture products.
>
> 4.3 potential remedies and/or the imposition of any conditions in respect of 4.1 and 4.2 above.
>
> (collectively the **"Scope of Intervention"**).
>
> 5. Subject to the Scope of Intervention, Lewis' participation in the merger hearing before the Tribunal shall include the right:
>
> 5.1 to attend and participate in pre-hearing conferences;
>
> 5.2 to have access to, and to inspect, only through its legal representatives and economic experts that have signed appropriate confidentiality undertakings, any documents filed by any of the merger parties, the Commission and any other participants in the merger proceedings, including any confidential information filed by any participant subject to a claim of confidentiality;
>
> 5.3 to call for discovery of further documents from the merger parties, the Commission and any other participants in the merger proceedings;
>
> 5.4 to request the Tribunal to direct, summon and/or order any person to appear at the merger hearing and/or to produce documents relevant to the merger hearing;
>
> 5.5 to participate in any interlocutory proceedings in respect of the merger hearing;
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> 5.6 to adduce oral and documentary evidence at the merger hearing including through expert witnesses;
>
> 5.7 to cross-examine any of the witnesses of the merger parties, the Commission and any other participants in the merger hearing; and
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> 5.8 to present written and oral argument at the merger hearing.

[11] The merger parties appealed that decision to the CAC. They argued that the Tribunal had misconstrued the legal test for intervention under section 53(c)(v) of the Act. In their submission, the correct threshold requires a prospective intervener to demonstrate an ability to assist the Tribunal by offering truly unique or otherwise unobtainable information, something over and above what competitors typically possess. They contended that Lewis had offered nothing beyond generalised assertions and criticisms of the Commission's report, and that the Tribunal had improperly conflated factual disputes about competition dynamics with the question whether Lewis' evidence met the legal threshold for intervention. The merger parties also repeated their argument that the Tribunal's order was excessively broad and would inevitably introduce substantial delay, contrary to the statutory requirement for merger proceedings to be conducted expeditiously.

[12] Lewis, in response, submitted that the Tribunal had correctly applied the settled CAC test, which asks whether the intervener is reasonably capable of assisting the Tribunal, not whether the intervener possesses uniquely specialised information. Lewis argued that the merger parties' proposed test had never before been applied in merger proceedings and would set an impossibly high bar for third-party participation, especially in markets where competitors are often the only entities with real-world insights into competitive dynamics. It maintained that its evidence was detailed,

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6. In relation to 3 and 5.2 above, to the extent that any third-party documents contain information claimed as confidential by them, the Competition Commission will endeavour to secure the necessary permissions to allow for the third-party confidential information to be released to Lewis' legal representatives and economic experts that have signed the requisite confidentiality undertakings.

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

   7.1 any limitations 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 to any timetable set by the Tribunal for the proceedings before it in respect of the merger hearing.

8. There is no order as to costs."

[7] Tribunal Order and Reasons above n 4 at para 7.

concrete, and highly relevant, and that the Tribunal's case-management provisions adequately addressed concerns about timing and delay.

[13] The CAC upheld the appeal and set aside the Tribunal's order in its entirety, substituting in its stead an order dismissing with costs the intervention application. The CAC held that Lewis had not demonstrated the kind of unique or otherwise unavailable information that would justify its participation in the merger hearing. The CAC characterised Lewis' affidavits as insufficiently specific and too generalised to satisfy what it regarded as the proper test for intervention. It further held that the procedural rights granted by the Tribunal were too wide and would lead to a laborious and lengthy process, undermining the statutory imperative that mergers be addressed expeditiously. The CAC concluded that the Tribunal had misdirected itself by admitting Lewis on the strength of contested factual issues rather than establishing whether Lewis had met the threshold for participation.

Parties' submissions

[14] Lewis submits that this Court has constitutional jurisdiction because the CAC's judgment implicates its constitutional rights under sections 33 (right to just administrative action) and 34 (right of access to courts). Lewis contends that exclusion from the merger proceedings denies it a fair opportunity to be heard in the only forum empowered to assess merger-specific harm, and therefore limits its right of access to courts and the right to procedurally fair administrative action.

[15] Lewis also argues that the matter raises arguable points of law of general public importance, as the CAC's decision introduces what Lewis characterises as a new and unworkable test for intervention that will affect a wide range of potential third-party participants, such as small businesses, NGOs, suppliers, customers and competitors, who may seek to participate in future merger proceedings.

[16] Lewis contends further that it has demonstrated good prospects of success and that it is in the interests of justice to grant leave to appeal because, without intervention

rights, it will be permanently excluded from the merger hearing and unable to place evidence of competitive harm before the Tribunal. It emphasises that merger proceedings are fast-moving and that once the Tribunal hearing concludes, exclusion becomes irreversible.

[17] Regarding the merits, according to Lewis, the test for intervention is well-established, and the CAC has consistently enunciated the requirements as (a) a material (or "genuine") interest aligned to the purposes of the Act; or (b) the ability to assist the Tribunal in adjudicating the merger. Lewis points out that the Tribunal had, in this instance, correctly applied this trite test.

[18] Lewis submits further that the CAC had applied an incorrect legal test for intervention by requiring an intervener to demonstrate "unique knowledge" or evidence unobtainable elsewhere. It argues that this test has no basis in the Act, the Tribunal Rules, or prior well-settled CAC jurisprudence, which it says have long required only that an intervener demonstrate a reasonable ability to assist the Tribunal in its inquisitorial fact-finding function.

[19] In Lewis' view, the Tribunal correctly applied this settled standard and properly exercised its discretion in finding that Lewis had advanced a detailed, merger-specific theory of harm, and could provide evidence regarding pricing dynamics, market structure, credit offerings, and local competitive conditions that the Commission had not sufficiently assessed. Lewis maintains that the CAC impermissibly substituted its own view for that of the Tribunal, which is the specialist body statutorily tasked with merger adjudication and which exercises a true discretion in that regard. According to Lewis, the CAC overstated concerns about delay notwithstanding the Tribunal's comprehensive case-management protections. Lewis seeks reinstatement of the Tribunal's order granting it targeted participatory rights.

[20] The merger parties submit that this Court lacks jurisdiction because no constitutional issue arises. They argue that neither section 33 nor section 34 confers a

right on a private party to participate in merger proceedings, which are governed exclusively by the statutory discretion in section 53(c)(v) of the Act. Because Lewis never challenged the constitutionality of that provision, the respondents say it cannot now argue that its constitutional rights require intervention.

[21] The merger parties submit further that the application raises no arguable point of law of general public importance, as the CAC simply applied existing law to the specific facts before it. According to them, the application is merely an attempt to re-litigate factual disputes, and there are no prospects of success, because the CAC correctly found that Lewis did not meet the factual threshold for intervention. They argue that the interests of justice weigh heavily against granting leave to appeal in circumstances where merger proceedings must be conducted expeditiously, and where the CAC's judgment merely restored the statutory framework.

[22] Regarding the merits, the merger parties argue that the CAC applied the correct and long-established test for intervention: whether the prospective intervener can meaningfully assist the Tribunal by offering evidence that the Tribunal would not otherwise have. They contend that Lewis failed to satisfy this test because its affidavits were generalised, conclusory and lacked concrete evidence of unique knowledge that could materially assist the Tribunal beyond what the Commission already gathered during its investigation.

[23] The merger parties maintain that the Tribunal materially misdirected itself by granting rights that were overly broad and inconsistent with its own reasons, by providing Lewis access to the entire merger record, including confidential material. According to the merger parties, by doing so, the Tribunal had effectively outsourced aspects of the Commission's statutory investigative role to a competitor with a direct commercial interest in delaying the merger. They also emphasise that the Tribunal's order would have resulted in a lengthy and burdensome process, contrary to the statutory imperative for expedition in merger matters. In their view, the CAC correctly

identified these misdirections, applied the proper legal test and correctly set aside Lewis' intervention in its entirety.

[24] The merger parties are fiercely critical of the Tribunal's order. They submit that, although Lewis denies having an ulterior motive to frustrate the merger, the Tribunal handed Lewis every means to do so by:

(a) Outsourcing to Lewis the merger control functions that the Act reserves only for the Commission and the Tribunal. According to them, the Tribunal improperly delegated these public functions and powers to Lewis, a private party with an ulterior motive, and, in reality, to its external lawyers and economists.

(b) Granting Lewis intervention rights regarding topics that Lewis had not even mentioned or sought in its intervention application.

(c) Granting Lewis' intervention application insofar as countervailing power is concerned, yet stating in its reasons that it had denied this part of Lewis' application. The merger parties contend that the CAC was correct in its finding that the Tribunal's reasons and order are at war with one another and had to be corrected.

(d) Dismissing Lewis' intervention application insofar as public interest is concerned, but then granting Lewis access to the entire merger record, including those portions relating solely to public interest.

Jurisdiction and leave to appeal

[25] In my assessment, this matter plainly engages this Court's jurisdiction, certainly its general jurisdiction, and also its constitutional jurisdiction. The appeal raises an arguable point of law of general public importance concerning the scope of the Tribunal's discretion and the test governing intervention in merger proceedings. It is plainly a point of law, and its arguability is firmly established: first, given the divergent outcomes in the Tribunal and CAC; and, secondly, for the reasons that follow, that the appeal must be upheld. Self-evidently, this matter affects all intervention applications in large mergers, an aspect on which this Court has not spoken as yet. Merger

proceedings routinely involve prospective interveners whose participation bears directly on the completeness of the evidentiary record, the functioning of the Tribunal's inquisitorial mandate, and the credibility of the merger regime more generally. The divergence between the Tribunal and the CAC in the present instance highlights the importance of this Court providing clarity on this interpretive dispute.

[26] The case also engages our constitutional jurisdiction since, for the reasons I will advance, the CAC either introduced a novel test for intervention or got the test wrong. On either score that constitutes an error of law and would infringe a litigant's right of access to courts under section 34. It therefore falls within the ambit of *Villa Crop*.[8] There, this Court held:

> "The adoption of an incorrect legal standard to decide an application to amend is to make an error of law. It is not a misapplication of law because the decision does not proceed from a correct legal premise to an incorrect conclusion as a result of a failure properly to apply the law to the relevant facts."[9]

[27] The Court went on to hold that "[t]hat is an error of law and one that, if followed, would infringe upon the rights of litigants to enjoy access to the courts, contrary to section 34 of the Constitution".[10] In the present instance this Court's constitutional jurisdiction is engaged not because any error in applying section 53(c)(v) raises a constitutional issue, but because the application of an incorrect legal standard for intervention has the effect of excluding a party from the only forum empowered to adjudicate merger-specific harm, the Tribunal. The constitutional issue is thus not the correctness of the outcome, but the use of a test that impermissibly limits access to a statutory adjudicative process, engaging section 34.

[8] *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* [2022] ZACC 42; 2023 (4) BCLR 461 (CC); 2024 (1) SA 331 (CC).

[9] Id at para 65.

[10] Id at para 66.

[28] It is also self-evidently in the interests of justice that we correct the CAC's error of law and its impermissible interference in the exercise of the Tribunal's true discretion as an adjudicative body, as will presently appear. The use of an incorrect test will plainly impact on many large mergers where intervention is sought.

Merits

Test for intervention

[29] Section 53(c) of the Act reads:

> "Right to participate in hearing
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> 53. The following persons may participate in a hearing, [contemplated in section 52] in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:
>
> (a) . . . ;
>
> (b) . . . ;
>
> (c) if the hearing is in terms of Chapter 3—
>
> (i) any party to the merger;
>
> (ii) the Competition Commission;
>
> (iii) any person who was entitled to receive a notice in terms of section 13A (2), and who indicated to the Commission an intention to participate, in the prescribed form;
>
> (iv) the *Minister*, if the *Minister* has indicated an intention to participate; and
>
> (v) any other person whom the Tribunal recognised as a participant."

[30] Rule 46 of the Rules of the Tribunal is relevant; it reads:

> "(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 by filing a Notice of Motion in Form CT6, which must–
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> (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
>
> (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."

[31] The CAC has over the years developed a, by now, well-established test for intervention. It requires of a potential intervener to show:

(a) a material interest in the proceedings; or

(b) that it is likely to be able to assist the Tribunal.

[32] While both requirements are in issue, the judgments of the Tribunal and the CAC were confined to the second issue, whether Lewis as an intervening party would be in a position to assist the Tribunal. It is doubtful that Lewis has a material interest in the merger; in any event it seems to me that on the evidence adduced it has not shown any. The CAC judgment suggests that Lewis has not substantiated its bald averment that it has a material interest. In this judgment I proceed on the basis that Lewis did not make out a case for a material interest. Its intervention is therefore solely dependent on its ability to assist.

[33] As stated, Lewis' primary challenge to the CAC's judgment and order is twofold, that the CAC improperly interfered with the Tribunal's exercise of its discretion in granting Lewis participatory rights; and secondly, that the CAC applied a novel test, alternatively the wrong test, for intervention. I deal with these two aspects *seriatim*, albeit in reverse order, considering first the novel/wrong test argument.

Did the CAC apply an incorrect test?

[34] This is the first time that the test for intervention in merger proceedings will be receiving this Court's attention. And as far as I could establish, this is also the first time that the CAC has set aside a decision of the Tribunal to grant an intervention application. What, then, does the CAC case law tell us about the test for intervention?

[35] In *Community Healthcare*,[11] the CAC had to consider appeals against the refusal of the Tribunal to recognise the appellants before the CAC as participants in a merger in the healthcare sector. The CAC summarised and endorsed the findings in one of its earlier decisions, *Anglo SA Capital*,[12] as follows:

> "[28] The approach adopted by this Court in *Anglo SA [Capital]* can be summarised thus:
>
> 28.1 The requirement of material and substantial interest, which is manifestly the appropriate test for ordinary litigation, was too restrictive a test to be applied by the Tribunal in the exercise of its discretion in terms of s[ection] 53(1)(c)(v).
>
> 28.2 A party who is able to ensure a material and substantial interest would fall within the class of parties who may be admitted upon the exercise of their judicial discretion by the Tribunal.
>
> 28.3 A party who is unable to show a material and substantial interest in the matter *may well be admitted if it is able to provide evidence of its ability to assist the Tribunal* in the latter's consideration of the application of the various purposes of the Act as contained in s[ection] 1 thereof, to the relevant merger transaction."[13] (Emphasis added.)

[11] *Community Healthcare Holdings (Pty) Ltd v Competition Tribunal* [2005] ZACAC 3; [2005] 1 CPLR 38 (CAC); 2005 (5) SA 175 (CAC).

[12] *Anglo South Africa Capital (Pty) Ltd v Industrial Development Corporation of South Africa* 2004 (6) SA 196 (CAC).

[13] Id at para 28.

[36] More recently, in *Northam*,[14] the CAC had to consider an appeal and review against a decision of the Tribunal to grant a limited suite of participatory rights to Northam Platinum Holdings Limited (Northam) in a large merger involving the first and second respondents in that case, Impala Platinum Holdings Limited (Impala) and Royal Bafokeng Platinum Limited (Royal Bafokeng), respectively. In terms of the proposed merger, Impala would acquire control over Royal Bafokeng. Dissatisfied with the restrictive nature of the rights of participation granted to it by the Tribunal, Northam approached the CAC for relief in an appeal and review.

[37] The CAC cited approvingly its earlier decision in *Africa Data Centres*[15] which had held in respect of the balance between rights granted to a participant against the need for expedition, that the decision by the Tribunal to admit a participant—

> "entails taking into account the likelihood of assistance promised by the prospective intervener, balanced against the consequences of the intervention in terms of the expedition and resolution of the proceedings. If the likelihood of the prospective intervener 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."[16]

[38] The Court enunciated the sole question before it as being "the content of the participation which has been granted to [Northam] on the basis that it can assist the Tribunal in respect of the possible vertical effects of the proposed merger and the extent to which the merger effects could be prejudicial to junior miners in South Africa".[17] On that basis, and bearing in mind that the primary question of law before the CAC was the

[14] *Northam Platinum Holdings Limited v Impala Platinum Holdings Limited* [2022] ZACAC 10; [2022] 2 CPLR 25 (CAC).

[15] *Africa Data Centres SA Development (Pty) Ltd v Digital Titan (Pty) Ltd* [2022] ZACAC 6; [2022] 2 CPLR 21 (CAC).

[16] Id at para 17.

[17] Id at para 44.

content of the participation order of the Tribunal, the following statement indirectly confirms the trite test enunciated by the CAC:

> "The Tribunal should exercise its discretion in a reasonable fashion in order to ensure that [Northam] is able to *contribute constructively to the two theories of harm which have been accepted as the basis of its rights of participation*".[18] (Emphasis added.)

[39] *Africa Data Centres* was also an appeal against limited participatory rights granted by the Tribunal in respect of the large merger proceedings before it involving Digital Titan (Pty) Limited and IDE Investments. The Tribunal had granted Africa Data Centres participation in respect of only two of the three theories of harm it had raised as a concern regarding the proposed merger.

[40] Citing the Court's earlier judgments in *Anglo SA Capital* and *Community Healthcare*, the CAC held:

> "[T]he Tribunal is [not] obliged to let in any party who knocks on its doors seeking to intervene. 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 in its enquiry* in terms of section 12A of the Act."[19] (Emphasis added.)

[41] Lastly, in *Sunrise Energy*,[20] a similar approach was adopted. The case concerned an appeal against parts of the decision and order of the Tribunal admitting the appellant as a participant in the large merger proceeding before the Tribunal involving the Strategic Fuel Fund Association and Avedia Energy. The CAC overturned the Tribunal's granting of limited intervention rights. There, too, the Court referred to the principles explicated in *Anglo SA Capital* and *Community Healthcare* and, echoing the remarks made in the latter, stated:

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[18] Id at para 47.

[19] Id at para 16.

[20] *Sunrise Energy (Pty) Ltd v Strategic Fuel Fund Association NPC* [2022] ZACAC 11; [2023] 1 CPLR 5 (CAC).

> "[A]lthough the intervention regime in mergers is more liberal than that provided for in rule 46(1) of the Rules of the Tribunal, that does not mean that the Tribunal is obliged to allow any party to intervene. Instead, the Tribunal must enquire into the question as to whether the party applying to intervene will assist it in its enquiry in terms of section 12A of the Act. This entails taking into account the likelihood of assistance promised by the prospective intervener, balanced against the consequences of the intervention in terms of the expedition and resolution of the proceedings. If the likelihood of the prospective intervener assisting the Tribunal's enquiry is doubtful, while 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."[21]

[42] These cases show that the CAC has consistently applied the test for intervention by asking whether the would-be participant has shown, through credible, admissible evidence that (a) it has a material interest in the merger proceedings; or (b) it will be able to assist the Tribunal in adjudicating the merger. Here though, a far more stringent novel or, at best, erroneous test was introduced by the CAC. For the first time, a test has been put forward which requires of an intervening applicant to provide special, unique insights not obtainable elsewhere. The CAC did not explain its departure from the established test, for example that the test was wrong or inadequate or that the facts in the present matter justified the departure.

[43] An argument was advanced by counsel for the merger parties that the CAC did not in fact introduce a new test, but had simply assessed Lewis' own assertions of its ability to assist. I disagree – there can be no doubt that the CAC had a new (or wrong) test in mind when one has regard to its statements:

> "[The Court] must . . . be satisfied that the contribution which a respondent can bring to the proceedings meets the test laid down by this Court. In particular, that the respondent has shown that it has *unique knowledge* of the market and can provide

[21] Id at para 13.

> evidence in relation to the overall enquiry as to whether a merger should be permitted in order to justify admission."[22] (Emphasis added.)

[44] The CAC held further:

> "[Lewis' affidavits] contain no clear indication as to the nature of the *specialised knowledge* possessed by [Lewis] which could assist the Tribunal in its determination."[23] (Emphasis added.)

[45] Lastly it held:

> "[The Tribunal] . . . did not take sufficient account of the fundamental test laid down by this Court, namely to what extent was [Lewis] 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*."[24] (Emphasis added.)

[46] The test outlined here requires a potential participant who seeks intervention to show unique and specialised knowledge and that it possesses information and evidence which could not have been obtained elsewhere. There is much to be said for the submission on behalf of Lewis that this creates an unworkable and well-nigh impossible test for intervention. And it plainly runs counter to the well-settled jurisprudence laid down in, amongst others, *Community Healthcare*, *Northam* and *Africa Data Centres*.

[47] Moreover, the requirement that the intervener must show that the information and evidence it proposes to adduce "could not have been obtained elsewhere" suggests that some clairvoyance on the part of the would-be participant is required. This is all the more so when one considers that the Tribunal, at the stage of an intervention application, does not, cannot and ought not to seek to determine whether the intervener's averments are correct. Nor is the Tribunal in a position, or called upon, to resolve

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[22] CAC judgment above n 2 at para 47. Inexplicably, in support of this statement, the Court cites its earlier decisions in *Community Healthcare* and *Northam*, which do not bear out this far more stringent test.

[23] Id at para 48.

[24] Id at para 52.

disputes as to the nature of competition in the market and the anti-competitive effects of the merger. That is the purpose of the merger hearing which will follow.

[48] If the correct test were whether, but for intervention, the Tribunal would not have access to the relevant evidence, it is hard to see how intervention could ever be possible. Given the inquisitorial powers of the Commission and Tribunal, it is always possible for the Tribunal to get evidence if it wants it. Thus, in this instance, it could subpoena witnesses from Lewis *duces tecum* (you shall bring with you); or it could direct the Commission to undertake further specified investigations. But that would be true in every case. The merger parties' counsel acknowledged that if the CAC had adopted this test, it would be wrong in law, but counsel contended that this is not what the CAC has done.

[49] The merger parties argued that, through a supplementary investigation or through the Tribunal's inquisitorial powers, Lewis' evidence could be obtained without the need for its intervention. Lewis' counsel correctly countered that, if Lewis had not intervened, the shortcomings in the Commission's investigation and the need for additional evidence would not have become apparent. The merger parties' approach, which the CAC accepted, thus has the bizarre consequence that a party in Lewis' position has to bring an intervention application in order to demonstrate the inadequacy of the Commission's investigation and that the Tribunal should receive further evidence, only then to be told that its intervention should not be granted because the Commission and Tribunal can do all of this without intervention. It is untenable that the very act of bringing an intervention application can logically be the thing that deprives the applicant of the right to intervene. One is required to examine the prevailing circumstances at the time the intervention application is instituted – either the application is reasonably brought or it is not.

[50] This Court emphasised in *SA Riding*, which entailed an intervention application in a restitution of land rights case before the Land Claims Court:

> "But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief."[25]

[51] Much was made by the CAC of Lewis' averments before the Tribunal in its intervention application of the "extensive evidence and unique insights" that it would be able to provide to the Tribunal into aspects like market definition; competitive dynamics in the furniture retail sector; the anti-competitive aspects of the proposed merger; potential remedies that bear consideration to ameliorate these possible anti-competitive effects; and the negative public interests of the merger.[26] The CAC in effect required of Lewis to prove these assertions of exclusive evidence and unique insights. As is to be expected, the merger parties keenly embraced this approach, but that approach is misconceived.

[52] Where a litigant overstates its case with exaggerated, uninhibited pleading (which, at worst, is what Lewis may have been guilty of here), the settled test nonetheless remains the same. The test for intervention, enunciated in section 53(c)(v) of the Act, read with Tribunal Rule 46, and by the well-established preceding CAC jurisprudence, cannot change simply because a potential intervener sets the bar higher for itself in order (presumably) to ensure that it gets the right to participate. That is not how the law works. A pleader's hyperbole cannot lift the bar higher than what the established law says it is. That would set a moving target which undermines certainty in law.

[53] It may well be, though, that Lewis is right when it argues that in making this averment of unique insights, it was simply alluding to the factual reality on the record at that time "that no one else had done the work to expose the flaws in the Commission's

[25] *South African Riding for the Disabled Association v Regional Land Claims Commissioner* [2017] ZACC 4; 2017 (5) SA 1 (CC); 2017 (8) BCLR 1053 (CC) at para 9.

[26] This was said by the head of Lewis Stores' Legal Section, Mr Ryan Lepart, in the founding affidavit in the intervention application. It bears mention, in passing, that the CAC misquoted this averment as "exclusive evidence and unique insights". Nothing, however, turns on this obviously bona fide error.

analysis or reveal the true nature of competition". It says that it did not seek to create a new test. Lewis candidly concedes that it does not have an unqualified right of intervention and that it must make out a cogent case for intervention by way of credible and admissible evidence. No final decision needs to be made on this point and it is not necessary to delve into the record to test this submission – what matters is that the test is clear and well-settled and no amount of exaggerated pleading could change it. There is, after all, a world of difference between, on the one hand, requiring a would-be participant to show evidence of an ability to assist, and, on the other, requiring a showing of specialised, unique knowledge and the possession of information and evidence which could not be obtained elsewhere.

[54] There does not appear to be any serious dispute at this juncture that the Commission's initial assessment fell materially short of what was required. The most glaring inadequacies are in respect of the absence of consumer surveys and insufficient attention to closeness of competition, self-evidently two crucial features of the theory of harm as a consequence of the proposed merger, particularly to lower-income consumers, as advanced by Lewis. In its papers, Lewis clearly enunciated its primary concern that the proposed merger would give rise to a significant increase in concentration and is plainly and admittedly intended to increase the scale of the merged entity by combining the two parties' respective operations and businesses.

[55] Lewis' primary contention was that the proposed merger would remove a key competitive constraint on the acquiring firm (Pepkor) and would in effect be a three-to-two merger at a national level. According to Lewis, combining Pepkor and Shoprite's household furniture retail businesses would "create an insurmountably dominant firm of a size and scale that no other retail furniture retailer in South Africa will be able to match". It calculates the proposed merged entity's market share as 59% (based on store count in this particular market of over 1 100 stores).

[56] Lewis claims that through the proposed merger, Pepkor would eliminate competition from its closest competitor in this particular segment of the furniture retail

business, the target firm, Shoprite's OK Furniture. To this end, Lewis adduced extensive evidence that it says exposed the Commission's failure to:

(a) conduct a reliable market analysis, by not comparing the proverbial apples with apples and, instead, conducting a misguided analysis of vastly disparate product offerings by non-comparable furniture retailers;

(b) conduct any pricing analysis to compare the pricing of the various entities which the merger parties claimed were direct competitors; and

(c) conduct a proper analysis of the relevant local markets and related competitive effects in respect of which the merger parties' stores overlap.

[57] The CAC found that Lewis merely provided "generalised descriptions of the relevant market and . . . no clear indication as to the nature of the specialised knowledge possessed by [it] which could assist the Tribunal in its determination".[27] And in argument, the merger parties disparagingly called Lewis' evidence contained in graphs and maps a desktop "Google Maps" exercise. Both of these are wrong and, it must be said, in the latter instance also uncharitable.

[58] In the intervention application's founding affidavit, Lewis set out extensively, first, a high-level overview of the activities of the merger parties and Lewis to provide insight into the national furniture retail market. To this end it made use of maps, graphs and statistics and provided facts and figures. Next, Lewis provided a synopsis of the main shortcomings in the Commission's assessment of the proposed merger relating to market definition and competitive effects. It also furnished details of the substantive contribution Lewis as intervener wished to make in respect of these two aspects as well as its unique ability to assist the Tribunal in deciding the proposed merger. Lastly, Lewis dealt with the issues of public interest (which in its view had been inadequately addressed by the Commission) and access to confidential information.

[27] CAC judgment above n 2 at para 48.

[59] Based on this extensive evidence and information provided by Lewis, supported by facts and figures, the Tribunal can hardly be faulted in its findings that—

(a) 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";[28]

(b) "Lewis' submissions cast material doubt on the completeness of the assessment conducted by the merging parties";[29] and

(c) "Lewis 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 issues or localised markets".[30]

[60] The Tribunal gave a carefully reasoned decision, applied the law to the extensive facts alleged by Lewis and, by utilising the correct, settled test, concluded that Lewis had made out a case for intervention. The Tribunal was cognisant of the fact that there was a need to strike a balance between the need for expedition with the requirements for a fair hearing and strived to do so in its order, a matter to be discussed presently. It adopted an approach that achieved the purposes of the Act, as this Court urged in *Mediclinic*.[31]

[61] The Tribunal thus correctly held that Lewis had advanced a merger-specific theory of harm, namely the unilateral effects arising from national and local concentration that goes to the purposes of the Act, and that its participation will assist the Tribunal in resolving disputed issues and the admitted investigative deficiencies on the part of the Commission. Self-evidently, an important consideration in this proposed

[28] Tribunal Order and Reasons above n 4 at para 55.

[29] Id at para 65.

[30] Id at para 66.

[31] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd* [2021] ZACC 35; 2022 (4) SA 323 (CC); 2022 (5) BCLR 532 (CC) at paras 3, 5 and 71.

merger is the possible anti-competitive effects. The Tribunal was cognisant of this fact and reasoned (correctly so):

> "[I]t is important in our view that there is careful consideration of the likely anti-competitive effects, if any, of the proposed merger and in particular the effects of the merger on different consumer segments . . . . In the case of household furniture, it is accepted that we are dealing with differentiated goods, which is widely understood to necessitate a thorough assessment of the closeness of competition between purported alternatives and rivals."[32]

[62] To conclude, it is not necessary to determine whether the CAC formally introduced a new test or misapplied the existing one. In either event, it impermissibly elevated the threshold for intervention beyond that contemplated by section 53(c)(v), by requiring proof of unique or otherwise unobtainable evidence. That error suffices to justify setting aside its decision.

[63] That is not to say that, if the CAC held the view that the present test is inadequate or no longer effective, it could not introduce a new test. But then it must advance adequate reasons for doing so. In any event, the merger parties disavowed reliance on a new test and argued that the CAC had stuck to the well-established test. Applying the correct test, I hold that Lewis made out a case for intervention, as the Tribunal correctly found. Although this is really the end of the matter, save to deal with the merger parties' criticism of the Tribunal's order, it is necessary to deal briefly with the CAC's impermissible interference with the Tribunal's exercise of its discretion to grant Lewis participatory rights.

[64] Before doing so, it is necessary to restate the previously well-settled test for intervention under section 53(c)(v) – the correct test is whether the applicant for intervention has shown, on the credible and admissible material before the Tribunal, a

[32] Tribunal Order and Reasons above n 4 at para 48. It is by now well-settled that there is a need to conduct a careful analysis of closeness of competition in mergers which involve differentiated products: *JD Group and Ellerines Holdings Limited* [2000] ZACT 35; *Mr Price Group Ltd v K2018509367 (South Africa) (Pty) Ltd (Yuppiechef)* [2021] ZACT 53.

reasonable prospect of assisting the Tribunal in the performance of its statutory merger analysis. That enquiry entails having regard to the nature of the issues, the evidence tendered and the need for expeditious proceedings. Uniqueness or exclusivity of information is not required.

The CAC's interference with the exercise of the Tribunal's discretion

[65] In *Sunrise Energy*, the CAC reasoned thus about the exercise of the Tribunal's discretion:

> "If there is no doubt that the participation of a party in the merger proceedings would assist the Tribunal in fulfilling its mandate in accordance with the provisions of the Act, as was the case in *[Anglo SA Capital]*, one would expect the Tribunal to exercise its discretion in favour of allowing such party to intervene. 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."[33]

[66] This Court has made plain the CAC does not have unbridled powers to interfere with decisions of the Tribunal.[34] The Court cited the dictum of the CAC in *Imerys* that deference is due to the Tribunal as a specialist body.[35] *Imerys*, in turn, cited that Court's earlier decision in *Schumann Sasol,* where it was held:

> "The approach which this Court adopts to an appeal against the decision of the Tribunal in respect of a merger should take cognizance of the composition and role of the Tribunal as a specialist body which consists not only of lawyers but also of members possessed of the necessary financial and economic knowledge and thorough grasp of the relevant policy issues required in these kinds of deliberations. Section 12A requires that the Tribunal make a determination after a holistic inquiry into whether the

[33] *Sunrise Energy* above n 20 at para 14. See also *Northam* above n 14 at para 47.

[34] *Mediclinic* above n 31 at para 44; and compare *Northam* above n 14 at para 49.

[35] *Imerys South Africa (Pty) Ltd v The Competition Commission* [2017] ZACAC 1; [2017] 1 CPLR (CAC) at para 43.

> proposed merger is likely to substantially prevent or lessen competition. In assessing such a decision, this Court should take account of the composition and expertise of the Tribunal as well as the nature of the enquiry which entails an element of probabilistic investigation into the effect of the proposed merger . . . . In its decision as to whether to set aside, amend or confirm the decision of the Tribunal, this Court must be cautious before imposing its own conception of the policy considerations upon the decision adopted by the Tribunal. The Court should seek rather to examine and test rigorously the justifications offered by the Tribunal for the decision to which it has arrived before it invokes its power in terms of s[ection] 17."[36]

[67] Section 53(c)(v) confers upon the Tribunal a true discretion to determine whether participation is appropriate. This discretion empowers the Tribunal to weigh a range of interrelated considerations, including the relevance and potential assistance of the intervener's evidence, the adequacy of the existing evidentiary record, the need to ensure that merger proceedings are both fair and expeditious and the Tribunal's own ability to manage proceedings to prevent undue delay.

[68] When a lower court (or Tribunal) has exercised a true discretion, it is generally inappropriate for an appellate court to interfere unless—

(a) the discretion was not judicially exercised;

(b) the discretion was influenced by the wrong principles or by a misdirection on the facts; or

(c) the lower court reached a decision which, in the result, could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[37]

[36] *Schumann Sasol (SA) (Pty) Ltd v Price's Daelite (Pty) Ltd* [2002] ZACAC 2; [2001-2002] CPLR 84 (CAC) at 11-12.

[37] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 88. See also *Anglo SA Capital* above n 12 at 208.

Factors that provide further guidance include: that the decision must be made on substantial reasons and not be capricious,[38] and that the lower court should bring its own unbiased honest judgment to bear upon the matter and make an order that the court considers to be fair and just.[39]

[69] Applying these criteria, the Tribunal's ruling does not meet the required threshold for intervention. The CAC held that the Tribunal did not consider at all rule 46 of the Tribunal Rules, and the prescription that the Tribunal declines to admit an intervener if it provides evidence already brought before it by another participant.[40]

[70] In this regard the CAC erred, since it is plain that the Tribunal did, in fact, mention rule 46 as part of the framework applicable to its analysis[41] and pertinently identified the gaps in the Commission's investigation, most notably in relation to local market overlaps, pricing interactions among the three national furniture retailers and the role of credit in shaping competitive dynamics. It went on to find that Lewis possessed the operational experience and data capable of addressing these gaps. Clearly therefore, the Tribunal did consider the shortcomings in the Commission's assessment and (correctly in my view) held that Lewis' information could fill those shortcomings. This suggests that such information was not before the Tribunal already, and was therefore not brought by another participant.[42]

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[38] *Government Printing Works v Public Service Association* [2024] ZALAC 63; [2025] BLLR 112 (LAC); (2025) 46 ILJ 915 (LAC) at para 21.

[39] Id.

[40] CAC judgment above n 2 at para 52 states:

> "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 intervener 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."

[41] Tribunal Order and Reasons above n 4 at para 35.

[42] This the Tribunal made clear in paras 42-3 of its decision, when it held:

[71] Much of the CAC's criticism rests on its assessment that Lewis had not demonstrated "unique" or otherwise unobtainable information. But the Tribunal did not proceed on the basis that uniqueness was required; rather, it (correctly) considered that Lewis' evidence would assist in addressing the acknowledged gaps in the Commission's evaluation. The Tribunal's appreciation of its inquisitorial role was entirely consistent with established precedent. Where, as here, the Tribunal acted within the bounds of its statutory discretion, the CAC was not entitled to disturb its ruling.

[72] The discretion of the Tribunal in respect of intervention relates to assistance in an evaluative exercise, that is, the merits of the merger, which the Tribunal rather than the CAC must undertake. That is precisely why the CAC should be particularly cautious about telling the Tribunal that it will not be sufficiently assisted by the intervener. The CAC might hold the view that it (the CAC) would not be assisted, but the decision on the merits of the merger is not one for the CAC to make, but rather the Tribunal. It may well be that the Tribunal might legitimately take a different view on the assistance to be gained from the intervener.

[73] In sum, the CAC was wrong to interfere with the Tribunal's lawful, rational exercise of its true discretion to determine whether Lewis' participation would assist it in seeking the true facts and interrogating the Commission's findings to decide the merger. This, too, is adequate as a self-standing ground to overturn the CAC's order. The last aspect for consideration is the ambit of the Tribunal's participation order.

> "When assessing the assistance offered by a person seeking to intervene, the Tribunal will consider whether the additional information provided by the applicant
>
> (i) relates to matters within the Tribunal's jurisdiction;
>
> (ii) *is not already available to the Tribunal*; and
>
> (iii) whether the potential benefits of such assistance outweigh any adverse effects the intervention might have on the speed and resolution of the proceedings . . . .
>
> 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." (Emphasis added.)

Tribunal's order

[74] As stated, the main complaints by the merger parties are that the Tribunal—

(a) outsourced to Lewis its statutory merger control functions reserved for it and the Commission;

(b) granted Lewis intervention rights regarding topics that Lewis had not even mentioned or sought in its intervention application;

(c) granted Lewis' intervention application insofar as countervailing power is concerned, yet stating in its reasons that it had denied this part of Lewis' application; and, finally,

(d) dismissed Lewis' intervention application insofar as public interest is concerned, but then granted Lewis access to the entire merger record, including those portions relating solely to public interest.

[75] These wide-ranging criticisms are unfounded. It bears emphasis that Lewis' notice of motion and founding affidavit in the intervention application make plain that it sought full participatory rights. In the notice of motion, Lewis sought full access to the record and participatory rights as a party. This was repeated and motivated fully in the founding affidavit, where it sought access to the full record and for its legal representatives and independent third-party experts to be granted full access to the confidential part of the record. Finally, Lewis fully motivated its prayers in the notice of motion which sought full rights of participation as a party.

[76] For reasons which have now been assessed as sound, the Tribunal admitted Lewis as "a knowledgeable and comparable competitor".[43] It took the view that its participation should be permitted as Lewis—

> "could assist the Tribunal in gaining insights into the nature of competition in the relevant markets and in elucidating the unilateral theories of harm . . . particularly in relation to the definition of the relevant market(s) for the retailing of household

[43] Tribunal Order and Reasons above n 4 at para 69.

> furniture products. Such participation could further assist in assessing whether the proposed merger is likely to result in a substantial prevention or lessening of competition."[44]

[77] As a consequence, the Tribunal granted Lewis intervention rights, but, importantly, did so "with *a defined and curtailed scope of intervention proportionate to this specific market(s) and issues*".[45] Axiomatically, the Tribunal's orders must be read with its comprehensive reasoning as a whole.[46] And it is just as self-evident that the ambit of participatory rights granted is fact-dependent from case to case. Generally speaking, there is nothing unusual about the types of rights granted to Lewis in this instance – that much is evident from the CAC's intervention case law, including some of the cases referred to earlier.

[78] The Tribunal's order has been reproduced earlier.[47] It did not grant Lewis all the relief it had asked for. So, for instance, the Tribunal declined Lewis participatory rights in respect of the retail of beds and mattresses.[48] And, because Lewis was unable to elucidate its buyer power concerns at the hearing in the Tribunal, it was denied participatory rights on that aspect as well.[49] The same happened in relation to the public interest issues raised by Lewis, including the effect on the sector as a whole, employment and the ability of small- and medium-sized businesses and those owned by historically disadvantaged persons to participate in the market.[50]

[79] For all the reasons extensively explained by it, [51] the Tribunal therefore curtailed the ambit of Lewis' intervention as reflected in paragraph 4 of its order. It bears

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[44] Id.

[45] Id (emphasis added).

[46] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) at para 29.

[47] Tribunal's order above n 6.

[48] Tribunal Order and Reasons above n 4 at para 71.

[49] Id at para 72.

[50] Id at para 73.

[51] Id at para 74.

repetition that Lewis was granted participatory rights only in limited, carefully circumscribed matters. They were—

(a) the definition of the relevant market(s) in relation to the retailing of household furniture products;

(b) whether the proposed merger is likely to lead to a substantial prevention or lessening of competition as contemplated in section 12A(1) of the Act, including by assessing the factors set out in section 12A(2), in relation to the identified relevant market(s) for the retailing of household furniture products; and

(c) potential remedies and/or the imposition of any conditions in respect of (a) and (b) above.

[80] The Tribunal also furnished comprehensive reasons for the broad procedural rights granted to Lewis.[52] Referencing *Northam*, it explained why some rights were granted and others not, why some were restricted and how it sought to strike a balance between the granting of participatory rights and the need for expedition.[53] This explanation bears testimony to a careful, rational and reasonable exercise of the Tribunal's discretionary powers.[54]

[81] It is necessary to deal briefly with an argument advanced by the merger parties as to why, in the light of the CAC's judgment in *Northam*, the ambit of the Tribunal's order should be trimmed. The reliance on *Northam* is ill-conceived. That case must be understood in relation to its own facts and issues. As stated, the case entailed an appeal and review before the CAC against a decision of the Tribunal to grant a limited suite of participatory rights to Northam in a large merger. The CAC emphasised that—

[52] Id at paras 76-81.

[53] Id at para 76.

[54] *Northam* above n 14 at para 47.

(a) the case before it simply concerned the content of the participatory rights granted;[55] and

(b) each of the rights of participation sought on appeal and review had to be assessed separately and on its own merits.[56]

[82] After a careful assessment of the individual further participatory rights sought, the CAC granted some of them,[57] but denied others.[58] It is thus fallacious to invoke *Northam* as authority for the curtailment of the Tribunal's present order. On the contrary, the Tribunal's order here is in line with what had been sought by Lewis and, having granted that relief, the Tribunal fully explained it in its subsequent reasons. Importantly, as was the case in *Northam*,[59] the Tribunal's present order grants limited, circumscribed participatory rights and the rationale behind granting it is comprehensively motivated in its reasons.

[83] Notably, similar to the *Northam* order, the Tribunal, amongst others, granted Lewis, through its legal representatives and economic advisers, access to and the right to inspect confidential documents filed in the merger proceedings, subject to the signing of appropriate confidentiality undertakings.[60] The merger parties' contention that "this information is proprietary to the merging parties and is confidential *vis-à-vis* Lewis, a direct competitor", is puzzling. And equally perplexing is the consequent submission that, as the Tribunal had "admitted Lewis so that it can pay for its external advisors to review the documents and perform the Commission's role", it amounts to "a privatisation of the Commission's public merger function".

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[55] Id at para 44.

[56] Id at para 45.

[57] The CAC expanded the time limits imposed upon Northam, granted it the right of confidential access to the relevant part of the Commission's record and permitted Northam to apply to the Tribunal for the consideration of additional documentary evidence and/or the calling of a witness.

[58] Northam was denied the right to call for discovery of further relevant documents or to call or cross-examine witnesses.

[59] Compare *Northam* above n 14 at para 62, items 2.2 and 2.3 of the order.

[60] Tribunal's order above n 6 at para 5.2; compare *Northam* above n 14 at para 62, item 2.3.1 of the order.

[84] The Tribunal's order granting Lewis the right to participate and, amongst others to have access (through its independent advisors) to the confidential part of the merger record is not new nor groundbreaking. It happened in *Northam* and other CAC and Tribunal cases too.[61] This was no "privatisation" or outsourcing of statutory function at all. The statutory function (and duty) to adjudicate the proposed merger remains that of the Tribunal at the merger hearing. It is the only entity that can approve (with or without conditions) or prohibit a merger. An order granting intervention and concomitant participatory rights simply affords the intervening party the right to be heard.[62] Orders of this kind are not unusual in complex competition cases, including large mergers like this one.

[85] Finally, I might add, it is no adequate recourse at all to Lewis that, as the merger parties contended and the CAC suggested,[63] the Commission is presently filling the gaps by way of a supplementary report and that the Commission may still invite Lewis to make submissions or call it as a witness. This is no adequate alternative for participatory rights as a party in the merger proceedings. Upon admission as a participant, Lewis acquires the status of a party, distinctly different from an admitted *amicus curiae*,[64] and must be enabled to contribute meaningfully to the merger proceedings.[65] That meaningful participation includes, amongst others, the right to adduce oral and documentary evidence, to subject the merger parties' and the Commission's witnesses to cross-examination, to interrogate documentary evidence and to make submissions directly to the Tribunal. It also includes the right to appeal or review an adverse finding at the end of the merger hearing. Participatory rights should

[61] *Sunrise Energy* above n 20; *Supreme Health Administrators (Pty) Ltd / Network Healthcare Holdings Limited / Council for Medical Schemes and Competition Commission / Phodiclinics (Pty) Ltd / DJF Defty (Pty) Ltd* [2006] ZACT 45; [2006] 1 CPLR 422 (CT); *APL Cartons (Pty) Ltd v Corruseal Group (Pty) Ltd* [2022] ZACT 40; [2023] 1 CPLR 11.

[62] *SA Riding* above n 25 at paras 10-11.

[63] CAC judgment above n 2 at para 61.

[64] *Northam* above n 14 at para 19.

[65] Id at para 47.

only be limited where there is a justifiable basis for doing so, in order that the admitted intervener is in a position to provide the Tribunal with the assistance that prompted the Tribunal to grant it intervention.[66]

[86] The costs of the hearing in this Court were reserved. There is no reason why costs should not follow the outcome. Lewis was compelled to approach this Court to overturn the CAC's decision to set aside the Tribunal's order admitting it as an intervening party. The CAC order deprives Lewis of the right to participate and to be heard in a large merger with significant implications for competition in the middle-class household furniture retail segment, in which Lewis is indisputably a major player. The CAC itself recognised, albeit obliquely, the inadequacies in the Commission's report.[67]

Further order

[87] In addition to the orders issued on 19 December 2025, the first and second respondents are ordered, jointly and severally, to pay the applicant's costs in this Court, including the costs of two counsel.

[66] Id at para 53.

[67] CAC judgment above n 2 at para 61.

For the Applicant:	N Maenetje SC, A Coutsoudis and S Pudifin-Jones instructed by Nortons Incorporated
For the First and Second Respondents:	M le Roux SC, S Quinn and K-K Gwaza instructed by Webber Wentzel (First Respondent's attorneys) and DLA Piper Advisory Services (Second Respondent's attorneys)