



THE COMPETITION APPEAL COURT OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 280/CAC/June26

In the matter between:

PEPKOR HOLDINGS LIMITED

SHOPRITE HOLDINGS LIMITED

Second Appellant

and

LEWIS STORES PROPRIETARY LIMITED

Respondent

Coram: M E Nkosi AJA

Heard: 14 August 2026

Delivered: 1 September 2026

Neutral citation: *Pepkor Holdings Limited and Shoprite Holdings Limited v Lewis Stores Proprietary Limited (280/CAC/Jun26) [2026] ZACAC 7 (1 SEPTEMBER 2026)*

Summary: Competition law – The orders issued by the Competition Tribunal to compel further and better discovery – whether the discovery orders issued by the Tribunal fall within its jurisdiction and the scope of the intervening party's intervention – whether the discovery orders concerned are interlocutory orders within the meaning of s 37(1)(b)(ii) of the Act or are final in effect – No case made out to set aside the discovery orders appealed against – the appeal dismissed.

ORDER

An appeal of: The decision of the Competition Tribunal:

1 The appeal against the Tribunal's decision and order under case number LM176Feb24 is dismissed with costs on an attorney and client scale, including the costs of two counsel.

JUDGMENT

Nkosi AJA

Introduction

[1] The circumstances of this matter are somewhat peculiar and raise some interesting issues for determination by this Court. The appeal is brought by Pepkor Holdings Limited (Pepkor) and Shoprite Holdings Limited (Shoprite) which I will collectively refer to as the 'merger parties'. They are appealing against parts of the discovery orders (the impugned orders) that were issued by the Competition Tribunal (the Tribunal) on 22 May 2026 in two separate applications to compel further and better discovery.

[2] The first application was brought by Lewis Stores Proprietary Limited (Lewis), which is an intervenor in the proposed transaction between Pepkor and Shoprite, in terms of which Pepkor intended to acquire the furniture business of Shoprite. The second application was brought by the merger parties to compel further and better discovery from Lewis. Both applications were opposed, and the impugned orders were issued by the Tribunal after it invited and received further submissions from the parties in relation to their respective applications.

Factual background

[3] The factual background to the matter, briefly stated, is that Pepkor seeks to acquire from Shoprite the furniture division of its business operating in South Africa. That division includes OK Furniture and House & Home retail brands. On 30 September 2024 the merger parties filed a joint merger notification with the Competition Commission (the Commission) by virtue of the proposed transaction being a large merger.

[4] The Commission had, in turn, investigated the proposed merger and invited inputs from the merger parties, their competitors, as well as other interested parties. Lewis, a

competitor of the merger parties, was one of the participants in the Commission's hearing. Thereafter, the Commission referred the proposed merger to the Tribunal and recommended that it be approved subject to the imposition of a number of conditions, none of which is of relevance for the purposes of this appeal.

[5] Following the Commission's referral of the proposed merger to the Tribunal, Lewis applied for and was granted admission as an intervenor by the Tribunal.¹ The Tribunal's decision to admit Lewis as an intervenor was challenged by the merger parties in an appeal to this Court. The appeal was upheld and the order of the Tribunal granting leave to Lewis to intervene as a party in the proceedings was set aside. Lewis had, in turn, appealed to the Constitutional Court (the CC)² against the decision of this Court.

[6] One of the main concerns raised by the merger parties in their opposition of Lewis' appeal to the CC was that the effect of the Tribunal's decision to allow Lewis as an intervenor was to outsource to Lewis the statutory merger control functions reserved for the Tribunal and the Commission.³ This was rejected by the CC, which held (per Majiedt J) that such criticism was unfounded and admitted as 'sound' the Tribunal's reason that it admitted Lewis as a knowledgeable and comparable competitor of the merger parties.⁴

[7] It was further held by the CC that the order of the Tribunal granting Lewis the right to participate and to have access (through its independent advisors) to the confidential part of the merger record is neither new nor groundbreaking. Instead, so held the CC, giving a commercial competitor's legal and economic advisors access to confidential record documents under strict confidentiality undertakings is a standard practice in complex merger hearings, such as the one forming the subject of this appeal.⁵

[8] In the result, the CC upheld Lewis's appeal and the order of this Court was set aside and replaced with an order dismissing, with costs, the merger parties' appeal to this Court. In a nutshell, that is how Lewis ended up being a participant in the merger hearing involving the merger parties, with the rights to, *inter alia*, adduce oral and documentary

¹*Lewis Stores Proprietary Limited v Pepkor Holdings Limited* (LM106Oct24/INT038June25) 5 September 2025.

²*Lewis Stores Proprietary Ltd v Pepkor Holdings Ltd and Others* [2026] ZACC 4; 2026 (3) BCLR 207 (CC).

³*Ibid* para 74.

⁴*Ibid* para 75.

⁵*Lewis Stores Proprietary Ltd* fn 3 above paras 83 and 84

evidence, subject the merger parties' and the Commission's witnesses to cross-examination, interrogate documentary evidence and make submissions directly to the Tribunal.⁶

The issues

[9] Against the factual background set out above, the issues for determination by this Court are essentially the following:

- (a) Whether the impugned orders are appealable;
- (b) Whether the Tribunal exceeded its jurisdiction by granting the impugned orders;
- (c) Whether the Tribunal applied the correct test when it granted the impugned orders;
and
- (d) Whether the Tribunal failed to treat the parties equally.

[10] To place the issues listed above in a proper perspective, I must hasten to add that the first issue as to whether the impugned orders are appealable or not was raised as a point *in limine* by Ms Pudifin-Jones, who appeared with Mr Marriot SC (as his junior) on behalf of Lewis. The gist of Ms Pudifin-Jones' argument was that the impugned orders are, in essence, interlocutory directions for the production of documents in the context of large merger proceedings and, therefore, are not appealable.

[11] In response, the argument advanced by Ms Le Roux SC, on behalf of the merger parties, was that the impugned orders are appealable on either one of the two independent bases. Firstly, so she argued, they are final in their effect within the meaning of s 37(1)(b) and, secondly, because the interests of justice require that they be subjected to appellate scrutiny. In essence, she denied that the impugned orders are interlocutory in nature within the meaning of s 37(1)(b)(ii).

[12] The arguments advanced by both counsel on the point *in limine* are dealt with in more detail later in this judgment. At this stage, it suffices to point out that if the point *in limine* is upheld by this Court, the decision to that effect will be dispositive of this appeal, thus rendering it unnecessary for this Court to proceed with the determination of the remaining three issues listed above, except to the limited extent where the four issues may overlap.

⁶Ibid para 85.

Whether the impugned orders are appealable

[13] Needless to say, it is trite that the question of appealability is a threshold jurisdictional issue that must be determined by this Court at the outset before delving into the merits of the appeal. The reason for this was ably explained by the CC in *Competition Commission of South Africa v Standard Bank of South Africa Limited* as follow:⁷

'Where the jurisdiction of the court before which a review application is brought is contested, a ruling on this issue must precede all other orders. This is because a court must be competent to make whatever orders it issues. If a court lacks authority to make an order it grants, that order constitutes a nullity. Scarce judicial resources should not be wasted by engaging in fruitless exercises like making orders which cannot be enforced.'

[14] In the present case, the impugned orders required the merger parties, respectively, to produce information and/or documentation that was/were considered by the Tribunal relevant to the merger hearing. These included, *inter alia*, the complete board minutes, the projected budgets, the executive communications, the investment committee reports, as well as various other communications between the high-level executives of the merger parties in relation to the merger transaction.

[15] It was further stipulated in the impugned orders that if the merger parties contend that the additional responsive documents do not exist other than those they have already produced, they would each have to file an affidavit deposed to by a person with personal knowledge of that fact. Such affidavit must provide an explanation of the searches conducted by the merger parties concerned for the additional responsive documents and confirm under oath that the said documents do not exist.

[16] Central to this appeal is the merger parties' contention that the impugned orders relate to other parts of their non-furniture related businesses and over their other businesses outside South Africa. They contend that the Tribunal cannot exercise jurisdiction over their aforesaid businesses and that the information and/or documentation they are required to produce is/are beyond the limited scope of Lewis's intervention as circumscribed by the merger control provisions of the Act, and as recognised by the CC.

⁷*Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Limited and Others* [2020] ZACC 2; 2020 (4) BCLR 429 (CC); [2019] 2 CPLR 477 (CC) para 200.

The law

[17] For a proper determination of the law regarding the appealability of the Tribunal's decisions to this Court, I think it will be appropriate to adopt as a starting point the provisions of s 61(1) of the Competition Act 89 of 1998 (the Act), which read as follows:

'Appeals – (1) A person affected by a decision of the Competition Tribunal may appeal against, or apply to the Competition Appeal Court to review, that decision in accordance with the Rules of the Competition Appeal Court if, in terms of section 37, the Court has jurisdiction to consider that appeal or review that matter.'

[18] Section 37 of the Act deals with the functions of this Court, and of particular relevance for the purposes of this appeal are the provisions of s37 (1)(b), which read as follows:

'Functions of Competition Appeal Court – (1) The Competition Appeal Court may –

(a) ...

(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.'

[19] As indicated in the preceding paragraphs, the correct interpretation of the provisions of s 37(1)(b) of the Act is a bone of contention between the parties' legal representatives herein. According to the argument raised by Lewis' counsel, the impugned orders fall outside the provisions of s37(1)(b) because they are routine and run-of-the-mill directions granted by the Tribunal (usually without reasons)⁸ to ensure the efficient and effective running of its proceedings.

[20] The argument raised by the merger parties' counsel, on the other hand, is that the impugned orders are final in their effect within the meaning of s 37(1)(b) because they conclusively determine the disputed discovery rights and obligations of the parties. These include, so she argued, what Lewis may obtain, what the merger parties must produce,

⁸In the present case the merger parties requested the Tribunal to provide reasons for issuing the impugned orders.

including in unredacted form, and what Lewis need not produce, thus leaving nothing for the Tribunal to decide in respect of those disputes.

[21] Interestingly, I was referred by both counsel to *Zweni v Minister of Law and Order of the Republic of South Africa (Zweni)*⁹ as one of the authorities in support of their respective arguments. In *Zweni*, the Court held (per Harms AJA) that an appealable judgment or order has, as a general principle, three attributes: firstly, it must be final in effect and not susceptible of alteration by the court of first instance; secondly, it must be definitive of the rights of the parties; and thirdly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[22] It was submitted by both counsel that the test espoused in *Zweni* was extended by the CC in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others (Lebashe)*¹⁰ to include the interests of justice as an additional attribute to determine appealability. It was further submitted by Ms Le Roux that the same approach was applied by this Court in *Competition Commission of South Africa v Bank of America Merrill Lynch International and Others (Forex II)*¹¹ where it was held that while a dismissal of an exception is not appealable, an exception in respect of the jurisdiction of a court is appealable.

[23] However, as pointed out by this Court in *Forex II*, an exception taken in respect of the jurisdiction of a court has always been treated by our courts as final and, therefore, appealable. This is obviously because an exception of that nature can potentially bring the proceedings before the court of first instance to an abrupt end, which satisfies the common law attribute of finality as enunciated in *Zweni*. However, the same cannot be said of the impugned orders, particularly, as the proceedings before the Tribunal will proceed irrespective of the outcome of this appeal.

⁹*Zweni v Minister of Law and Order of the Republic of South Africa (Zweni)* [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) para 8.

¹⁰*United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA (CC) para 34

¹¹*Competition Commission of South Africa v Bank of America Merrill Lynch International and Others* [2024] ZACAC 1; [2024] 1 CPLR 1 (CAC) para 55.

[24] Besides, the effect of *Lebashe* on the common law test espoused in *Zweni* on the question of appealability was considered by this Court in *Competition Commission v Shoprite Checkers (Pty) Ltd and Another (Shoprite)*, where the following was held:¹²

'Both the *Zweni* and the interests of justice tests are fact-specific. The interests of justice test has not made the requirement of the attributes referred to in *Zweni* redundant. The difference between the two tests should not be exaggerated. The interests of justice test merely makes allowance a situation where one or more of the attributes referred to in *Zweni* may be absent, or if there are other attributes that stand out such as ongoing harm to the appellant caused by the interim order. The interests of justice test has certainly not opened the sluice-gate allowing for all interim orders to flow freely to the appeal court.'

[25] I am in full agreement with the above statement by this Court and, in my view, it should be taken a step further by making it clear that the interests of justice test is complementary to the common law test espoused in *Zweni*, as opposed to being regarded as a separate stand-alone test that may be applied in total disregard of the three attributes referred to in *Zweni*. To put it differently, I do not believe that the CC judgment in *Lebashe* should be interpreted to mean that the interest of justice test is an alternative to the common law test espoused in *Zweni*.

[26] This brings me to the argument advanced by Ms Le Roux that the impugned orders are final in effect in that they conclusively determine the disputed discovery rights and obligations of the parties. With respect, I disagree with such proposition. According to the Tribunal's order and Reasons for Decision (the Reasons), the Tribunal was not certain of the existence and/or relevance of the information and documentation that the merger parties are required to produce in terms of the impugned orders and will remain uncertain of that fact for as long as the impugned orders are not complied with.

[27] Instead, the impugned orders were formulated on the basis of certain references contained in the documents discovered by the merger parties.¹³ What the Tribunal could glean from such references was that the information contained in the redactions, as well as the other documents the merger parties are required to produce, may be relevant to the competition assessment of the proposed transaction.¹⁴ This is denied by the merger

¹²*Competition Commission v Shoprite Checkers (Pty) Ltd and Another*[2020] ZACAC 9 para 20.

¹³ The references include terms such as 'disposals and acquisitions'; 'peers', and; 'Project Pluto', which is the term used for the merger transaction between the merger parties.

¹⁴Pages 5-12 of the Reasons.

parties on the basis that the redacted information and the additional documents they are required to produce are of no relevance to the proposed transaction.

[28] In any event, the fact of the matter is that should it turn out that the Tribunal was mistaken in its belief that the redacted information and the additional documents the merger parties are required to produce are of no relevance to the proposed transaction, there is nothing preventing the Tribunal from either withdrawing or altering the impugned orders to leave only the responsive information and documents for the unconditional discovery by the merger parties. This obviously militates against Ms Le Roux's contention that the impugned orders are final in effect.

[29] In fact, the question as to whether the discovery orders are appealable or not has been considered by our courts in a number of judgments, all of which held that they are interlocutory in nature and, therefore, not appealable. One such judgment is *HJ v PJ*,¹⁵ where the Supreme Court of Appeal (SCA) held as follows:

'The upshot of the above is that the regional court's order to compel the respondent to discover is purely interlocutory in nature. It has no final effect, is not a definitive proceeding, and does not have the effect of disposing of at least a substantial portion of the relief claimed in the pending divorce action between the parties. Neither does it affect the rights of the parties whatsoever. The parties are still entitled to prosecute their case and are still at liberty to direct the court to any evidence and to advance any argument that they wish. The high court was obliged to entertain the issue, even if it was not raised, as to whether the matter before it was an appeal against a "decision" and thus an appeal within its jurisdiction *mero motu*. Its failure to do so amounts to a misdirection which is fatal to the appeal before this Court. This is because, the high court should not have proceeded with the merits as the regional court's order was not appealable. It should have struck the matter off the roll.'¹⁶

[30] Similarly, for the reasons set out in *HP v PJ*, there is no generalised right of appeal to this Court against the interlocutory or interim decisions of the Tribunal. The only two exception that are provided for in terms of the Act¹⁷ are, firstly, where the Tribunal makes

¹⁵*HJ v PJ* [2024] ZASCA 55 (19 April 2024) para 16.

¹⁶ See also *Ewels v Francis and Others* (Leave to Appeal) (6497/2022) [2025] ZAWCHC 113 (17 March 2025), where the court dismissed the application for leave to appeal on the basis that the order was not appealable.

¹⁷Section 37(1)(b)(ii)

a determination as to whether information is confidential in terms of s 44(8) read with s 44(6) and (7); 45(1)(a) and (b), and; secondly, a refusal by the Tribunal to grant an interim order in terms of s49C.¹⁸

[31] Consequently, having found that none of the attributes referred to in *Zweni* is present in respect of the impugned orders, the question is whether the impugned orders are nonetheless appealable in the interests of justice as contended by the merger parties. To this end, the elucidation provided by the merger parties is two-fold. They contend that: (a) firstly, the impugned orders alter the structure of the merger proceedings by converting the intervention into an open-ended enquiry into the merger parties' broader commercial affairs, and; (b) secondly, the disclosure of material that falls outside the Tribunal's jurisdiction and Lewis' intervention will cause them irreversible prejudice because once that material has been disclosed to Lewis' advisors their knowledge thereof cannot be erased.

[32] In my view, the concerns raised by the merger parties are without merit. As pointed out by the CC in *Lewis Stores Proprietary Ltd v Pepkor Holdings Ltd and Others*,¹⁹ giving a commercial competitor's legal advisors access to confidential documents under strict confidentiality undertakings is a standard practice in complex merger hearings like this one. Should Lewis' advisors find the disclosed material irrelevant as contended by the merger parties they will be legally, professionally and ethically bound not to disclose such material to their client, or any other person for that matter.

[33] In view of the foregoing, I do not believe that there is any risk of the merging parties suffering any prejudice arising from their compliance with the impugned orders. Besides, for the sake of fairness, this must be weighed against the risk of prejudice that may be suffered by Lewis if the impugned orders are set aside, but only to find that the material the merger parties are required to produce is, after all, relevant and responsive.

[34] In conclusion, contrary to what is contended by the merger parties, I find that the impugned orders are interlocutory orders within the meaning of s 37(1)(b)(ii) of the Act. Just like any other discovery orders, they do not fall within the category of interlocutory decisions which this Court is empowered to determine under the Act. In the circumstances,

¹⁸Section 47C(7).

¹⁹*Lewis* fn 3 above.

it accordingly follows that the impugned orders are not only interlocutory, but also not appealable. The point *in limine* raised by Lewis is accordingly upheld.

[35] However, for the sake of completeness, I feel obligated to also address the argument raised by Lewis' counsel that given that the merger parties had accepted that the appeals may be heard by a single judge, they had also accepted that the impugned orders are interlocutory. Such argument was based on s 38(2) of the Act, which provides that the Judge President of this Court must assign each matter before this Court to a bench composed of three judges of this Court, except for the matters listed in s 38(2A) which include, *inter alia*, an appeal against a decision of an interlocutory nature.

[36] In response, it was argued by the merger's parties' counsel that Lewis' counsel was not supposed to have raised that point in its legal arguments because an agreement was reached between the parties' legal representative prior to the hearing of the matter that a single judge should be assigned to hear the matter for expediency purposes. This was denied by Lewis' counsel, who argued that it was always their position that the impugned orders were interlocutory.

[37] For what it is worth, I do not believe that the provisions of s 38(2A) can possibly be interpreted as conferring the right to any party to exercise or waive the requirements of that section as such party may see fit. This is more so because the provisions of s 38(2) are couched in peremptory terms. In my view, any agreement which purports to override the express provisions of a statute would be *ultra vires* and, therefore, invalid.

The costs

[38] Regarding the issue of costs, it was argued by Mr Marriot that a punitive cost order on the attorney and client scale against the merger parties is warranted for, *inter alia*, the following reasons:

- (a) To mark this Court's disapproval of the merger parties' persistence to bring this appeal in the face of a plethora of authorities indicating that the impugned orders are purely interlocutory and, therefore, not appealable;
- (b) The merger parties have sought to appeal every decision of the Tribunal in this matter to date, including the decision to grant intervention to Lewis, the decision to allow Lewis access to the record of the merger proceedings and now the Tribunal's discovery rulings, and

- (c) To avoid the real danger that the very purpose of the Act could be frustrated if large corporate organisations are to have *carte blanche* to appeal each and every decision of the Tribunal to 'out litigate' their opponents.

[39] I have given serious thought to the concerns raised by Lewis' legal representatives in the preceding paragraph and find them fully justified when considering the history of this matter. I agree that it is high time this Court demonstrates its disapproval of the merging parties' conduct by granting a punitive cost order against them.

[40] In the circumstances, I accordingly issue an order in the following terms:

- (1) The appeal against the Tribunal's decision and order under case number LM176Feb24 is dismissed with costs on an attorney and client scale, including the costs of two counsel.

A handwritten signature in black ink, appearing to be 'M E NKOSI', is written over a solid black rectangular redaction box.

M E NKOSI

Acting Judge of Appeal
Competition Appeal Court of South Africa

Appearances

For the appellants:

Instructed by:

M M Le Roux SC, S Quinn & K K Magwaza

Webber Wentzel & DLA Piper Advisory
Services, Sandton.

For the respondent:

Instructed by:

G Marriott SC & Sarah Pudifin-Jones

Nortons Incorporated, Illovo.