

https://dspace.org/

"A Critical and comparative analysis of the public interest case law jurisprudence of the competition tribunal of South Africa on large and notifiable mergers, since the enactment of the competition act no.89 of 1998 (as amended)".

Zwane, Bhangase, Patrick, Mzabalazo

2007-10-02
University of the Witwatersrand, Johannesburg
http://hdl.handle.net/10539/20552

Downloaded from a DSpace repository. https://dspace.org/

UNIVERSITY OF THE WITWATERSRAND, JHB

SCHOOL OF LAW

LL.M BY COURSEWORK AND RESEARCH REPORT

RESEARCH REPORTS 2007: PROPOSED TITLE

STUDENT NAME: BHANGASE PATRICK MAZABALAZO ZWANE

STUDENT NUMBER: 0516472N

PROPOSED TITLE OF RESEARCH REPORT:

" A CRITICAL AND COMPARATIVE ANALYSIS OF THE PUBLIC INTEREST CASE LAW JURISPRUDENCE OF THE COMPETITION TRIBUNAL OF SOUTH AFRICA ON LARGE AND NOTIFIABLE MERGERS, SINCE THE ENACTMENT OF THE COMPETITION ACT NO.89 OF 1998(AS AMENDED)"

NAME OF SUPERVISOR": PROFESSOR DAVID UNTERHALTER

Declaration

I declare that this research report is my own unaided work. It is submitted for the degree of ...MASTER OF LAWS..... in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other University.

Signed: .....

Student name: BHANGASE PATRICK MZABALAZO ZWANE

Date: 2/10/2007

Table of Contents

Page

1. Synopsis v

1.0 Introduction 1

1.1.0 A Brief Overview of the Public Interest Dynamic 1

1.1.1 An Overarching View of the Key Distinctive Characteristics and the Ethic Behind the New Competition Legislative Dispensation.....2

1.1.2 Establishment of the Competition Tribunal 4

1.2 Large Mergers 5

1.3 The Jurisdiction of the Competition Tribunal in Large Mergers 8

1.4 Statutory Exemptions 8

1.5 The Definition of "Public Interest" 9

1.6 Statutory Interpretation of "Public Interest" 10

1.7 The Framework for Analysis 14

2.1 "Employment" 15

2.1.1 Merger Likely to Lead to Major Loss of Employment 17

2.1.2 Emergent Prospects of New Employment Opportunities 18

2.1.3 The Tribunal's Perspective on Claims 20

2.1.4 New Positions Resultant from Merger 21

2.1.5 Conceivably Brighter Prospects for Employees 22

2.1.6 Merger to Result In Notable Skills Development, Employment Benefits 23

2.1.7 Impact of Merger on Employee Numbers, Levels of Seniority Thereof, Skill Levels Affected and Relative Ready Re-Employability Thereof in the Market Place 24

2.1.8 Impact on Employment of Skilled Employees 25

2.1.9 Merger Affecting Status of Some Senior Managers, But Causing No Retrenchments 28

2.1.10 Tribunal's Treatment of Scenario Where Workers Have the Choice to Either Accept Severance Packages or Transfer from One Entity to Another 29

2.1.11 Merger Brings Prospects of Retrenchment for A Handful of Skilled And Senior Employees 29

2.1.12 Transfer of Employees from Target Firm to Acquiring Firm Seen As Innocuous For Public Interest Purposes.....30

2.1.13 Transfer of Employment Contracts, No Retrenchments 30

2.1.14 No Impact on Jobs and Employment 30

2.1.15 Retention of All Current Employees Post-Merger Found To Be Innocuous For Public Interest Purposes 31

2.1.16 Business and Employees of Target Firm to Be Transferred to an Entity of Acquiring Firm 31

2.1.17 Process Dynamics Considerations in Terms of Affected Employees' Involvement and Input 32

2.1.18 The Relevance of the Role of Unions In the Merger Approval Consideration Process 36

2.1.19 The Role Of Union In Influencing Treatment By Tribunal of Concerns Regarding Possible Retrenchment of Workers Post-Merger 37

2.1.20 The Role Of Unions: Merger Background of Significant Historical Reductions in Numbers of Employees.....39

2.2 The Treatment by the Tribunal of a Public Interest Scenario Where Jobs Would Probably Be Lost Whether the Merger Was Approved or Not 41

2.2.1 Post-Merger Determination of Merger Consent 43

2.2.2 Positive Turnaround at Hearing on Issue of Anticipated Merger Specific Job Losses 44

2.2.3 Retrenchments of a Few Likely To Result From "Duplication of Services" Due To Merger 45

2.2.4 Upfront Union Involvement in the Negotiations of the Merger Parties with the Commission.....46

2.2.5 Business Continuity as a Separate Distinct 48
2.2.6 Collective Bargaining Agreement Pertaining To Retrenchments Made Part of Court Order 48

2.2.7 Pre-Existing Collective Bargaining Agreements 49

2.2.8 Employees Not Properly Informed of Merger Consequences.....50

2.2.9 Business Acquired As a Going Concern 51

2.2.10 Division Taken Over As a Going Concern 51

2.2.11 Business Acquired As a Going Concern 52

2.2.12 Structure of Deal to Assume the Form of Sale 52

2.2.13 Structure of Deal to Assume the Form of Sale 53

2.2.14 No Merger Specific Loss of Employment 53

2.2.15 Merger Positive for Employment 54

2.2.16 Employment Loss Due To Merger Minimal 54

3.0 "The Ability of Small Business 55

3.1 Black Economic Empowerment ("Bee") Considerations 56

3.2 The Dynamics of Bee as Public Interest Issue 57

3.3 Merger to Result In Exit of a Very Successful Black Business and Expansion of the Traditional Corporate Retailers 64

3.4 Bee Considerations and Procedural Issues 65

3.5 Bee and Mining Charter Considerations 67

3.6 Bee Considerations 68

3.7 Merger to Bring Bee Entity into Market in Issue And Create a Significant Number of New Jobs 70

3.8 Small Business Entities Owned By Previously Disadvantaged

Persons to Be Afforded Greater Competitiveness No Impact On Employment 71

3.9 Afrox –"Medi-Clinic"Case – The Genuiness of The Presence of Bee Characteristics 72

3.10 Bee as Public Interest Issue 74

3.11 Transaction Positive for Bee and Raises No Adverse Public Interest Considerations 81

4.0 "Particular Industrial Sector or Region" 82

4.1 Loss of an Independent Voice in the Print Media 83

5.0 "The Ability of National Industries to Compete In International Markets" 84

6.0 A bird Eye's View of Some Key Contrasts of The South African Approach with Certain Foreign Jurisdictions in the Treatment of Public Interest Considerations 88

7.0 The Presence and/or Absence of Public Interest Considerations 95

7.1 The Dynamics of Potential Conflict between Two Public Interest Desirables 95

7.2 Is the Retrenchment of As Many Skilled 97

7.3 The Relationship Between Small Businesses and Organised Labour in the Context of Public Interest Dynamics 100

7.4 How Favourably Has the Determination and Enforcement of Pure Competition Issues and Public Interest Issues By and Under the Same Authority Unfolded In South African Competition Law? 101

7.5 What Hope for the Building of New Constituencies To Deepen the Culture of the New Public Interest 108

7.6 The Desirability of Higher Case Incidences on Some of the Public Interest Issue Classes 109

Synopsis:

The Competition Act no.89 of 1998 coupled with its amendments ushered in a new era in the competition analysis and merger approval process in South Africa. This research paper's purpose is to intimately explore the emergent doctrine of "public interest" institutionalized in this new dispensation of competition legislation.

In particular this report places under the spot light the treatment of public interest issues in case law jurisprudence as developed in the consideration and determination of large and notifiable mergers under the auspices of the Competition Tribunal of the Republic of South Africa since the inception of the said new legislative order.

The efficacy of the determination of socio-political issues and pure competitive efficiency issues separately but under and by the same entity are also examined

The contrast between the South African approach to the application of the doctrine of the public interest and that of some other competition jurisdictions abroad is also explored

1.0 INTRODUCTION

The enactment of the Competition Act no 89 of 1998[i] ('the Competition Act") ushered in a new era in the regulation of competition in South Africa. The said Act has since been refined through amendment with the passing of the Competition Amendment Act No.35 of 1999[ii], the Competition Amendment Act No.15 of 2000[iii] and the Competition Second Amendment Act No.39 of 2000[iv].

1.1.0 A BRIEF OVERVIEW OF THE PUBLIC INTEREST DYNAMIC IN THE POLITICAL ECONOMY OF COMPETITION

As a point of departure it is important to note, as Creamer puts it, "the relationship between Competition Policy, Industrial Policy and the linkage of these policies to particular class and fractional interests is complex"[v].

Ilya Yuzanov writes that on the face of things we may assume that "the antitrust authorities in most countries would prefer to base their implementation of competition policy on sound economic principles"[vi]. He highlights that, however," competition policy does not function in a vacuum. It is influenced by other pocilies. Social, industrial-protectionist or consumer interest goals are sometimes "added" to competition policy through government/parliamentary decisions. So we may speak about political goals and political influence on competition policy. It may be discussed at great length as to whether it is bad or good, but we must admit that it is a widespread practice" [vii].

---

[i] Martin Brassey, John Campbell, Robert Legh, Charles Simkins, David Unterhalter, Jerome Wilson Competition Law, 1st ed (2002) by Juta 336.
[ii] Brassey and five others 336
[iii] Brassey and five others336
[iv] Brassey and five others336
[v] Creamer Kenneth, The Political Economy of Competition Law for TIPS FORUM, 20-22 September,1998
[vi] Ilya Yuzanov, infra
[vii] Ilya Yuzanov, Competition Law and Policy-the role of political influence, Fordham Corporate Law Institute, Chapter 25,2002 ed

Indeed, may we really pretend that there is a system of antitrust or competition regulation anywhere in the world that is based 100% purely on unadulterated market efficiency precepts and dynamics? Surely in the end it is not a question of kind but a matter of the degree to which any system of antitrust or competition regulation is influenced in its body of law and practice by such departures from supposedly "classically pure" market efficiency principles and precepts.

After all, as Justice Lewis so aptly reminds us, the essence of the role of antitrust/competition law," its historic and continuing role" was and is "supporting the powerless against the powerful"[viii]in the economic jungle. Is animosity to the buttressing and edification of public interest precepts in their codification through legislation not then a paradoxical denial of the very soul and essence of the underlying purpose of this body of the law?

1.1.1 AN OVERARCHING VIEW OF THE KEY DISTINCTIVE CHARACTERISTICS AND THE ETHIC BEHIND THE NEW COMPETITION LEGISLATIVE DISPENSATION

As we discuss the emergent casuistic jurisprudence of the Competition Tribunal in the context of this essay it is manifest, in keeping with the observations of Juzanov and Lewis above, the said Competition Tribunal case jurisprudence has not unfolded in a socio-political and economic vacuum. Analysis of certain insight deepening aspects of such broader context will accordingly form a feature of this work. In the wake of the collapse of the political order underpinned by legislated discrimination in South Africa, the post-apartheid government of the country envisioned in the Competition Act a significant tool for "industrial and social policy"[ix].

[viii] Justice Lewis infra 622

[ix] Brassey and five others 88

It also saw the new statute as going well beyond addressing "pure competition"[x] matters and devised it to try and accomplish a "plurality of objectives"[xi], consumer welfare being but one of them. It also contemplated the Competition Act as a vehicle for "restructuring industry"[xii] in the country and in addition to accommodate the pressing demands and aspirations of "previously disadvantaged communities, small business and labour"[xiii]

Analyzing the thinking behind this new transitional and tranformative dynamism, Justice David Lewis, the Chairperson of the Competition Tribunal in South Africa states, interalia, that "The new regime clearly seeks to distinguish Itself by its promotion of greater equality to access to wealth and income earning opportunities; it wants interest groups marginalized by the previous order, essentially the new party's electoral constituency, to be the principal beneficiaries behind the new order. However government also recognizes that these distributional goals can be achieved only through a significant improvement in economic performance, in economic efficiency".[xiv]

In elaboration, Justice Lewis discloses how the school of thought behind the new competition regulation order, in essence, meets the strong objections to its alleged "polluting" of "classical, state of the art" antitrust or competition jurisprudence. He observes, "South Africa's political leaders do not in common with most of their kin in the rest of the world view these objectives [to wit, the aforesaid ones of distribution and significant economic performance and economic efficiency][xv]as mutually exclusive.

---

[x] Brassey and five others 88
[xi] Brassey and five others20
[xii] Brassey and five others 88
[xiii] Brassey and five others 88
[xiv] see David Lewis, The Political Economy of Antitrust, in Fordham Corporate Law Institute, B Hawk Ed, 2002, 617
[xv] The portion in square brackets is the Author's own restatement of Judge Lewis' words in the immediately preceding paragraph, to afford flowing contextual readability

They do not, in other words, easily accept or admit to an efficiency/equity trade-off. On the contrary, the popular view in South African society is that poor economic performance is, in large part, a product of power relations that excluded the majority from access to the economy. Concretely these broad objectives translate into support for, interalia, black economic empowerment (seen largely as broadening the ownership of economic assets), for small and medium sized enterprises and for job retention and creation. In order to achieve any credibility in the society, every major piece of legislation would have to embody, in letter and spirit, this range of objectives"[xvi]

Such thinking, accordingly, is what informs the Competition Act's extending, on public interest provisions, significantly beyond[xvii] those of comparable legislation in some other offshore legal jurisdictions with a longer history of regulating competition.

1.1 .2 ESTABLISHMENT OF THE COMPETITION TRIBUNAL

The Competition Tribunal, established in terms of section 26 of the Competition Act, is a juristic person and a tribunal of record with a Chairperson, at least three members and not more than ten members, who serve on a full time or part time basis at the Minister's[xviii] recommendation. The members are appointed by the President[xix] from a list of persons nominated by the Minister and upon consultation with the Minister after or without a process of public consultation.

The ordinary term of each member is five years, subject to renewal by the President, provided that no person may serve as Chairperson for more than two consecutive terms.

[xvi] David Lewis supra, 617.
[xvii] Brassey and five others supra 88
[xviii] The South African Minister of State responsible for competition
[xix] The State President of South Africa

The Deputy Chairperson, who deputizes for the Chairperson in his or her absence, is appointed where the President on the Minister's recommendation so appoints a member of the tribunal[xx].

In keeping with the now proverbial "rainbow nation" tone, Parliament, in terms of section 28 of the Competition Act provided that in constituting the Tribunal the Executive had to effect such, interalia, in such a way that when it is "viewed collectively" the Tribunal must "represent a broad cross section of the population of the Republic"[xxi].

It is a further requirement of the Competition Act that the Tribunal must be so made up that that it has a sufficient number of legally trained and experienced members thereof to enable its Chairperson to comply with the demands thereon of section 31(2) (a) of the Competition Act. That sub section dictates that each panel of the Tribunal to which the Chairperson assigns a matter (in terms of subsection 1 of the said section 31) must have at least one legally trained and experienced person in its composition[xxii].

1.2 LARGE MERGERS

In terms of Section 11 of the Competition Act, pertaining to "Thresholds and Categories of Mergers" the Minister responsible for the portfolio under which the regulation of competition falls, upon consultation with the Competition Commission and after a process of public consultation commenced by means of a Ministerial notice in the gazette, from time to time, to create thresholds which delineate the three different categories of mergers.

[xx] Brassey and five others supra 350
[xxi] A reference to the Republic of South Africa; Brassey and five others supra 350,
[xxii] Brassey and five others supra, 351

The largest of these, the subject of analysis, is "large mergers" which are delineated in terms of section 11(3) (c) of the said Act.

If we are to confine our public interest analysis on mergers to large mergers we have to first determine what the threshold for large mergers presently is

The answer lies via the lower merger thresholds.

"Small Mergers" under present thresholds have been pegged as those mergers "whose turnover or asset values fall below either of the minimum thresholds?[xxiii]"

"Intermediate Mergers" have been designated as those mergers "whose turnover or asset values fall between R200 million and R3, 5 billion, where the turnover or asset value of the target is above R300million but below R100 million[xxiv] .

"Large Mergers" are weighted as those mergers "which equal or exceed one or both of the "higher thresholds"[xxv].

Put another way large mergers are those mergers which equal or exceed R3,5 billion and where the target entity's asset value is equal to or higher than R100 million.

According to the Competition Commission's report for 2005-2006 it "received 408 mergers notifications... 97 of which were large mergers."[xxvi]

[xxiii] Presentation notes for Certificate Course in Competition Law, University of Cape Town, .25-27 July, 2005 N Hlatshwayo, of Webber Wetzel Bowens Mergers & Acquisitions

[xxiv] N Hlatshwayo supra

[xxv] N Hlatswayo supra

[xxvi] Irvine Heather and Morphet Lesley of Deneys Reitz attorneys, Business and Tax Law Review supplement No.1,3,February,2007,Business Day,12th February,2007.

Notwithstanding the fact that the turnaround time in terms of decision making is still considered to be "within international benchmarks"[xxvii] the case is already being made that rise in the the case load of notifiable mergers perhaps warrants an amendment of the Act "to facilitate a more speedy approval process"[xxviii].

One of the recommendations made in that regard is that the "monetary merger thresholds" be raised, which would enable a smaller number of mergers requiring statutory review[xxix]. The downside noted if that were to happen is a potential for more mergers that are not market efficient creeping through "under the fences", as it were, by facility of the less stringent regulatory net[xxx].

As a further suggestion for relieving pressure on the regulatory authorities Hervine and Morphet note a suggestion being mooted by the Law Society of the Northern Province of South Africa in terms of which the Competition on Act could be amended to allow for "short form filings" (like in several other competition jurisdictions) and "long form filings"[xxxi]. It is suggested that under such a position it would only be "mergers which raise substantial competition law or public interest concerns would require the "long form filing" and be subject to detailed review by tribunal."[xxxii]

The qualification is made, however, that that tribunal would retain an overview role ("big brother", if you like) over the proceedings in any and all matters and "could require transactions filed using the short- form filing, to be converted to a long form –filing if necessary"[xxxiii].

[xxvii] Irvine and Morphet supra,3
[xxviii] Irvine and Morphet supra,3
[xxviii] Irvine and Morphet supra,3
[xxviii] Irvine and Morphet supra,3
[xxix] Irvine and Morphet supra,3
[xxx] Irvine and Morphet supra,3
[xxxi] Irvine and Morphet supra,3
[xxxii] Irvine and Morphet supra,3
[xxxiii] Irvine and Morphet supra,3

It is intimated that this would free up the Competition Commission to determine uninvolved acquisitions "even of the deal values classifies then as large mergers"[xxxiv]. It will be a matter of much interest to all competition law and practice esotericisms to see how this debate pans out.

1.3 THE JURISDICTION OF THE COMPETITION TRIBUNAL IN LARGE MERGERS

Section 16(2) of the Competition Act provides for the process by which the Tribunal should receive large merger cases for their disposal on referral thereof from and by the Commission and the Tribunal may, in determining the same,"(a) approve the merger ;(b) approve the merger subject to any condition (c) prohibit implementation of the merger"[xxxv]

Section 16(3) and (4) of the Competition Act provides *interalia* for the revocation by the Commission of its own decision upon application by the Commission and for the peremptory publication of its decision in terms of section 16(2) or 16(3) of such Act and enjoins the tribunal to give written reasons for any such decision[xxxvi].

1.5 STATUTORY EXEMPTIONS

The Competition Act at section 10(8) thereof provides for the Competition Tribunal to hear any appeals by any other person with "a substantial financial interest" (who is affected by such decision) against a decision by the Competition Commission in terms of subsection (2),(4A)or(5)[xxxvii] of Section 10 of such Act, in the exercise of its exemption dispensing jurisdiction.

[xxxiv] Irvine and Morphet supra,3
[xxxv] Brassey and five others, 347
[xxxvi] Brassey and five others,347
[xxxvii] Brassey and five others 343

The Competition Act does not define the import of "substantial financial interest" and presumably that falls for the Tribunal to determine in the future in a case in point coming before it.

1.5 THE DEFINITION OF "PUBLIC INTEREST"

The phrases "public interest" and "public policy" are often used interchangeably. A tantalizing debate churning in the author's mind is whether it cannot be meaningfully argued that laws to secure the public interest are passed in pursuit of pre-existing policy that warrants that which is dear to society in terms of its norms.

That, in effect, therefore, public interest is subsumed in public policy; that public policy is more immediately anchored in the roots of a society's fundamental psyche as to who it essentially perceives itself to be than public interest, which resolves itself essentially into a social tool made and intended for and applied to the realization of the society's norms and mores promise to itself, as borne by public policy.

A contrary argument would be that there are countries where what is in the public interest has not been codified as to its bolts and nuts and much discretion is left to the courts through case law and ***stare decisis*** to unfold the substance and precedent of what it entails in practice. Secondly, public policy can be made and changed by society as society evolves, just like a society's perception of what is in the public interest at a given time.

This, even before one factors into the complex the consideration that members of the public's views in a given society on any social question never constitute a monolithic edifice; that such diverse views themselves are, in any event, a dynamic phenomenon. Indeed, not infrequently, such dynamism outstrips the given polity's lawmakers' capacity or, for that matter, aggregated willingness to promptly reflect, from time to time, in

consequential legislation the emergently dominant shades of social perception and preference, (albeit, possibly only transiently so dominant).

While this debate may be important, its resolution is inessential for the purposes of this report and the author will leave the jury out thereon .He will proceed on the premise that the two phrases are interchangeable and of the same essence; so emboldened by *obita dicta* in some merger proceedings where the same phenomena has been treated of by the Competition Tribunal with a utilization of both terms exchangeably.

In our law, as a general rule agreements are "prohibited by common law" if they are contrary to public policy or are "***contra bonos mores*** (against good morals")"[xxxviii].

Gibson sets out that it is fraught with complexity to try and define public policy and good morals as they "change constantly"[xxxix].

As we commence analysis herein, perhaps it is prudent to remind ourselves of how long judicial minds have wrestled with public policy issues with this quote from a1896 English case which Gibson points us to:

"Public policy is a restive horse and when once you get astride of it there is no knowing where it will take you": **Cleaver v Mutual reserve fund Life Association" [1892] QB 47[xl].**

1.6 STATUTORY INTERPRETATION OF "PUBLIC INTEREST"

Section 1 of the Definition and Interpretation section of the Competition Act [xli], which one would be inclined to first peruse and look to for guidance

---

[xxxviii] JTR GIBSON, assisted by RGM COMRIE, MERCANTILE AND COMPANY LAW ,6th Ed, Juta 11
[xxxix] JTR Gibson supra
[xl] JTR Gibson supra

in this regard, does not specifically afford us a definition of the phrase "public interest". The Competition Act as a general point of departure renders unlawful "mergers likely to substantially prevent or lessen competition"[xlii].

MERGER IMPLICATIONS FOR THE "PUBLIC INTEREST":

The Competition Commission ('the Commission") and the Competition Tribunal ("the Tribunal") must also enquire into the transaction's implications for the "public interest"[xliii] .The Tribunal may grant consent for a merger or refuse it on public interest considerations "whether or not the merger is anticompetitive"[xliv].

Despite the seemingly broad terms of Section 12 A (1) of the Competition Act which require the Commission or Tribunal to "not only assess mergers from a competition perspective, but also from a public interest perspective", Section 12A (3) thereof surely narrows "the public interest jurisdiction" to determination of the impact, if any, that a merger will have on:

" ***a) a particular industrial sector or region;***

b) employment;

c) the ability of small business, or firms controlled or owned by historically disadvantaged persons, to become competitive; and

d) the ability of national industries to compete in international markets'[xlv] "

[xli] Brassey and five others 336

[xlii] N Hlatshwayo, of Webber Wetzel Bowens Mergers &Acquisitions; Presentation notes for Certificate Course in Competition Law, University of Cape Town .25-27 July, 2005.

[xliii] Eleanor M. Fox, Lawrence A Sullivan, Rudolph JR Peritz , Cases and Materials on U.S. ANTITRUST IN GLOBAL CONTEXT (*American Case Book Series*) second edition (2004),by THOMAS WEST 353.

[xliv] Fox 353

[xlv] Brassey and five others 336

Justice Lewis writes that certain jurisdictions "...put the public interest or distributional issues in the act and oblige the competition authority to make the trade off. This is the approach followed in the South African Competition Act. Hence mergers, for example, are first evaluated on standard competition criteria and then this decision has to be weighed up against the impact on the stated public interest criteria-employment, small business and Black economic empowerment. Is this ideal? No it isn't .Is it price worth paying for the credibility of the authority? Yes it certainly is"[xlvi]

Accordingly, operationally the Tribunal does its work in each merger approval matter in a staggered two-stage fashion[xlvii]. Indeed, notwithstanding that the tribunal may have reached the conclusion that a particular merger will facilitate intensified competition in the market segment of the merged entity, the public interest determination must yet be made and "separately and independently"[xlviii].

Justice Lewis very articulately maps out the analysis process's phases and planes as follows: "Note also that the act requires a definite sequencing of the analyses-first the impact on competition is analysed; secondly, an anticompetitive transaction is examined for its impact on public interest factors. In short, the balance is always struck through the filter of a competition analysis. The upshot is that the outcome of the competition analysis will tend to lead the decision to approve or prohibit a transaction on public interest influencing the imposition of conditions."[xlix]

To place it all in overall perspective, Justice Lewis discloses that in the two years that had passed (as at the time of his writing) since the tribunal he chaired came into existence, no decision "to approve or prohibit a transaction on public interest grounds" had ever been made and that all

[xlvi] David Lewis supra,620
[xlvii] N Hlatshwayo supra
[xlviii] N Hlatswayo supra
[xlix] Justice Davis supra621

the Tribunal's decisions had been reached on "competition grounds, with the only exception being "an occasion on which an anticompetitive transaction was approved on efficiency grounds" in the matter of Schumann SASOL (SA)(PTY) LIMITED AND PRICE's DAELITE(PTY)LIMITED Case No.23/LM/May/2001[I]

In the light of Justice Lewis' shortly aforegoing remarks and of the fact that the focus of this research report is "public interest" considerations, the analytical approach herein, unless the contrary is indicated in a given instance, will be to take it as a given that the merger consent application in each matter has already been deemed compliant in respect to the question of market efficiency.

Justice Lewis continues to indicate that "Our act provides nothing by way of rules and guidelines for balancing public interest and competition considerations and so these have to be developed in the investigative practice and in the Tribunal's decisions"[Ii]

Perhaps at the very outset the author may safely indicate that most of the reported tribunal cases have disclosed matters where there simply have not been any material public interest issues and the bulk of the merger consent application issues coming up before the tribunal have turned around pure market efficiency considerations.

[I] Justice Davis supra 621
[Ii] David Lewis supra,621

1.7 THE FRAMEWORK FOR ANALYSIS

The Author has determined to proceed within a six part analytical framework in the treatment of the public interest issues and matters ancillary thereto, in the following order:

(i) ***PART A***"

"EMPLOYMENT";

(ii) ***PART B***

"THE ABILITY OF SMALL BUSINESS, OR FIRMS CONTROLLED OR OWNED BY HISTORICALLY DISADVANTAGED PERSONS, TO BECOME COMPETITIVE"

(iii) ***PART C***

"PARTICULAR INDUSTRIAL SECTOR OR REGION";

(iv) ***PART D***
"THE ABILITY OF NATIONAL INDUSTRIES TO COMPETE IN INTERNATIONAL MARKETS "

(Vii) ***PART E:***

A BIRD'S EYE VIEW OF SOME KEY CONTRASTS WITH THE SOUTH AFRICAN APPROACH IN THE TREATMENT OF PUBLIC INTEREST CONSIDERATIONS IN CERTAIN FOREIGN COMPETITION JURISDICTIONS

(Viii) ***PART F:***

SOME CLOSING INSIGHTS

(i) ***PART "A"***:

2.2 "EMPLOYMENT"

The word "employment" as utilized in section 12 A (3) (b)[lii] thereof is not interpreted by the Competition Act. Hence, presumably Parliament had no intention for it to bear a dedicated or a specialised sense for purposes of the said Act. Perhaps we may safely deduce therefrom that neither did Parliament intend it to have a strand or shade of meaning necessarily distinguishable from that derivable from the body of South African labour law or even, for that matter, from the mundane dictionary one.

Indeed, the author is also not aware of any matter that has come before the Tribunal for determination where the strict import of the word "employment "as applied in the said section 12 A (3) (b) of the Competition Act has been pivotal to the disposal of the case and where "employment " was concurrently the emergent public interest dynamic for determination.

In most incidences when dealing with public interest considerations, the competition authorities have largely focused on the employment aspect[liii]. This, it would appear, because those were the emergent inherent public interest issues in those matters.

As the writer was analysing the tribunal's body of case law with a particular eye on the post merger employment dynamics, it emerged quite distinctly that in the vast majority of these cases employment was either not an issue at all or not an insurmountable one when it presented and merger approval was in fact granted.

[lii] Brassey and five others345

[liii] N Hlatshwayo presentation notes for certificate course in competition law, university of cape town .25-27 July , 2005 of Webber Wentzel Bowens Mergers &Acquisitions

In this vein, quite a notable number of cases were, indeed, found by the Tribunal to have no significant public interest issues of any kind whatsoever.

It will emerge in this paper that in most of the cases before the Tribunal where the foreseeability of significant merger-consequent loss of employment was the case, merger consent was nevertheless granted subject to certain conditions specifically intended to ameliorate the reality underlying such concerns. .

This is probably due in part to the likelihood that certain merging entities appear to proceed to significant lengths to ensure that the merger structure or model they elect for presentation to the Commission and eventually to the Tribunal is as compliant with public interest considerations (including employment preservation measures) as possible.

A further emergent reason for this, from what the author could decipher from the Tribunal's accumulated body of case law, were the concerted efforts of Counsel for the merging entities and/or those of the Commission, as the case may be, to explore, negotiate and present alternative acceptable conditional approval scenarios to the Tribunal; to the Tribunal's own willingness to weigh the same's practical viability and legal efficacy in the light of the public interest considerations in focus. This, in the event that the Tribunal was not prepared in a given case to approve the merger parties' application for relief strictly as filed.

Some of the analysis in the tribunal's body of case law in this regard, though in certain instances amounting to no more than ***obita dicta,*** is nevertheless fairly momentous. It is revealing of the Tribunal's tendentious inclinations as it pursues the quest to ensure that in respect to public interest issues as well it complied with both the letter and the spirit of the new competition dispensation.

It is conceivable also that in a case where the tribunal granted merger consent subject to certain conditions' being adhered to by the merger entities, while the concern's warranting the imposition of the conditions did not result in merger consent's being declined, they nonetheless disclose the tribunal's inherent willingness to decline consent were the matter one where the Tribunal was convinced that no conditions' imposition could remove or meaningfully ameliorate the mischief targeted by the conditions' imposition.

Indeed, these traits of the Tribunal's reasoning will in future, in appropriate circumstances, no doubt positively influence actual decisions to decline or approve merger consent for employment related public interest reasons. Even now these considerations must surely be influencing merger agreement configurations and merger-consent application structuring dynamics.

While such matter is in view, may the author caution that he found it compelling for this research report to be as much about how the Tribunal disposed of matters where in its determination the public interest presented, as about why in several instances what ostensibly constituted an incidence of or issues privy to the public interest, no genuine and/or material public interest considerations were found to be in play by the Tribunal.

2.1.1 MERGER LIKELY TO LEAD TO MAJOR LOSS OF EMPLOYMENT

In **AGRI OPERATIONS LIMITED / DAYBREAK FARMS (PROPRIETARY) LIMITED**[liv] the Commission was *interalia* perturbed that the transaction could result in significant employment loss. Maersk had disclosed to the Commission that it foresaw the said merger resulting in

[liv] Case No. 113,Large Mergers NOV 2003,Competition Tribunal website

the loss of about 5% or 1,500 jobs around the world in the merged entity in a term of 5 years[lv].

Notwithstanding that the merger entities had intimated that retrenchments in South Africa were improbable "as natural attrition over time might obviate the need for retrenchments"[lvi] the Commission was nevertheless still unsettled about this aspect.

The merger entities in the circumstances volunteered to accept an approval condition in respect of safeguarding employment that the Commission found satisfactory[lvii] .The tribunal was of the mind that in the light of the significant levels in terms of merger triggered loss of employment opportunities, especially with regards to "unskilled workers" that the said condition was warranted[lviii] and it decided that no "unskilled employees" of the merged entity should be retrenched for "a period of twelve months" from the date of the Tribunal's order approving the merger[lix].

2.1.2 EMERGENT PROSPECTS OF NEW EMPLOYMENT OPPORTUNITIES BEING CREATED POST MERGER SUBMITTED AS PART OF COMPLIANCE WITH PUBLIC INTEREST CONSIDERATIONS

In the matter of **KWV LTD ('KWV") / NMZ SCHULZ FINE WINE AND SPIRITS (PROPRIETARY) LIMITED**[lx] it was the collective submission of the merging entities that the merger would have no negative implications for the public interest [lxi]. Indeed, on the contrary, the merging parties made out the case that they were anticipating that the merged entity would in all

---

[lv] Case 113 supra, 4
[lvi] Case 113 supra,4
[lvii] Case 113 supra,4
[lviii] Case 113 supra,4
[lix] Case 113,supra 4
[lx] Case No.74/Large Mergers/SEP, 2006,.Competition Tribunal website
[lxi] Case No. 74 supra

probability have to increase employment to enable it "to cope with the distribution of the additional volumes of KWV's alcoholic beverages"[lxii]

In approving this merger transaction without conditions the Tribunal rejected the relevant Union, the Food and Allied Workers Union's (FAWU) submission, which essentially sought the imposition of a "moratorium on retrenchments for a period of 48 months subsequent to the merger"[lxiii]. The basis for such rejection was evidential inadequacy in FAWU's submission as to whether there was any basis for anticipating any retrenchments in the first place[lxiv].

The Tribunal's approach in this matter disclosed that it was not going to be feeble handed in the treatment of evidential compliance issues, even in matters where public interest considerations were allegedly in play. In other words the "public interest" is not a soft issue that requires no more than to be alleged and then hooked up trailer like to a somewhat plausible tale. Though the Tribunal's judgment does not spell that out in so many words this approach is presumably to ensure that public interest was only invoked where it could be materially established that such considerations were, indeed, in play.

This, in turn, presumably to ensure that there was no question either of abuse of such doctrine nor any unwarranted resisting and/or encumbering of merger application proceedings that were in essence innocuous or even positive from a public interest perspective. It is, of course, trite in our law in that "...the burden of proof lies upon him who asserts" [lxv].

[lxii] Case No 74 supra.
[lxiii] Case No 74 supra
[lxiv] Case No 74 supra
[lxv] See Pillay v Krishna,1946 AD 946 cited in Henry John May, South African Cases and Statutes of Evidence, 4th Ed.,1962 by Juta 19

One further senses an undertone in the Tribunal's approach to this matter, that as much as it welcomes large mergers which have a positive impact on employment in the nature of a probable need and likelihood for the post merger entity to take on more employees that the pre-merger entities had put together, the key employment centric concern of the Tribunal, where applicable, is an emergent prospect of significant job losses post merger that are peculiarly merger triggered or merger specific.

Looming significant retrenchments due to the merger (as already disclosed) were clearly not in evidence in this matter. There being no other public interest contentions merger consent was granted unconditionally[lxvi].

2.1.3 THE TRIBUNAL'S PERSPECTIVE ON CLAIMS OF ALLEGED PROSPECTIVE MERGER TRIGGERED JOB CREATION

In this matter of **INZUZO FURNITURE MANUFACTURERS (PROPRIETARY) LIMITED AND PG BISON HOLDINGS (PROPRIETARY) LIMITED**[lxvii]which has some of the characteristics of the preceding KWV matter, the merger entities, who were exploiting the opportunities availed by the Eastern Cape cluster development, made representations to the Tribunal that the transaction had "vital public interest benefits"[lxviii] that had to be factored in in assessing the merger application.

The merger parties posited that the chipboard plant inside the cluster development settlement would trigger the creation of "280 direct jobs and approximately 1766 indirect jobs within the cluster development itself"[lxix].

[lxvi] Case No 74 Supra
[lxvii] Case No.12/Large Mergers/FEB04,16
[lxviii] Case No.12 supra,16
[lxix] Case No.12 supra,16

Expressed differently the submission being made here was that this transaction was not merely innocuous from a public interest perspective, but that it was firmly positive for the public interest.

The Tribunal's view was that the alleged employment benefits submission did not stand up to close scrutiny in that the said jobs projected to be created were not directly merger specific[lxx]. Nevertheless there was nothing of record that militated against the public interest in this matter.[lxxi]

We see the Tribunal firing a broadside here, hinting that it will not allow itself to be hoodwinked into factoring in merger specific "efficiencies"[lxxii] that were really attributable to the cluster development more generically.

The merger was ultimately approved conditionally with the Tribunal content that it adequately offset the perceived "potential anti-competitive effects" thereof.

2.1.4 NEW POSITIONS RESULTANT FROM MERGER TO STEM POSSIBLE RETRENCHMENTS

In **MURRAY AND ROBERTS LIMITED AND OCONBRICK MANUFACTURING (PTY) LTD PURPLE RAIN PROPERTIES NO. 421 (PTY) LIMITED AND P.S. TRANSPORT (PTY) LTD**[lxxiii] the merging entities submitted that at the most "25 of the 306 employees", who happened to be "senior management and administrative staff" of WUDGMC could in a "worst-case scenario" lose their employment The merger parties had represented to the Commission that they would endeavour as much as possible to absorb these employees in 23 new merger consequent employment positions.

[lxx] Case no.12,16
[lxxi] Case No.12,16
[lxxii] Case No.12,16
[lxxiii] Case No.51Large Mergers, June 05,Competition Tribunal website

2.1.5 CONCEIVABLY BRIGHTER PROSPECTS FOR EMPLOYEES DUE TO THEIR BEING SUBSUMMED INTO A LARGER EMPLOYER ENTITY

In this matter of **SANDOWN MOTOR HOLDINGS (PTY) LIMITED AND PAARL MOTORS (PTY) LIMITED**[lxxiv] a public interest compliance case was made going beyond that no threat to existing employment levels and no other negatively impacted public interest issues were in the scenario. It was submitted that there was also a foreseeable benefit "to the one hundred and eight (108) current employees of Paarl Motors since they "would all be employed by SMH, a larger vehicle dealer"[lxxv].

Here we see the merging parties seeking to persuade the Tribunal that such employees' being subsumed into a bigger employer entity would create a more stable base for their retention. Presumably the suggestion was that a bigger entity was by definition also more stable than a smaller one; that, as it were, *ipso facto* that detail, the jobs at stake would thus also be more sustainable or stable. The corporate US energy giant Enron's spectacular collapse in recent years, of course, is a classic example of the fact that this stability due to size type factor is not necessarily and always true, The tribunal, like in the KWV matter, did not make much of this and was clearly more interested in the assurances that no employees of the affected entities would be retrenched post merger.

Indeed, the Tribunal in approving the merger unconditionally did no more than allude to the fact that the submission that such said employees would be employed by a bigger entity had been made[lxxvi].

[lxxiv] Case No.65 Large Mergers,August,2006
[lxxv] Case No.65 supra
[lxxvi] Case No.65 supra

2.1.6 MERGER TO RESULT IN NOTABLE SKILLS DEVELOPMENT, EMPLOYMENT BENEFITS

In SIEMENS LIMITED AND MARGOTT HOLDINGS (PRAULUS) LIMITED[lxxvii] the merging parties contended that the pending merger transaction would cause a major accentuation of "skills development" [lxxviii]and greater employment spin offs[lxxix].

It was submitted in support of the merger that on effecting the merger Siemens would take into its employ all the employees of Marqott[lxxx].

The Tribunal also positively noted that the merging entities offered, of their own motion, to have imposed on the merged entity a condition, as part of the disposal of shareholding in Marqott, to wit, that "no Marqott employees may be retrenched for a period of two years"[lxxxi] from the transaction approval date.

Moreover, the merging entities represented that the primary motivation for the mooted merger was the facilitation of the emergent entity's transforming into a key competitor in a market where robust business growth was anticipated following significant foreseen expansion in electricity project infrastructure expenditure[lxxxii]. It was in that light contended that this could lead to further job creation and training of employees. This led the Tribunal to deduce that the merger would have no negative consequences for the public interest. The tribunal accepted the Commission's representation for unconditional approval of the merger[lxxxiii].

[lxxvii] CASE NO. 21Large Mergers, MAR 06,Competition Tribunal website
[lxxviii] Case NO.21 supra
[lxxix] Case No.21 supra
[lxxx] Case No.21 supra
[lxxxi] Case No 21 supra
[lxxxii] Case No.21 supra
[lxxxiii] Case No.21 supra

2.1.7 IMPACT OF MERGER ON EMPLOYEE NUMBERS, LEVELS OF SENIORITY THEREOF, SKILL LEVELS AFFECTED AND RELATIVE READY RE-EMPLOYABILITY THEREOF IN THE MARKET PLACE

In the case of **INTERNATIONAL MINERAL RESOURCES AGE ("IMRA") AND KERMAS SOUTH AFRICA (PTY) LTD**[lxxxiv] the merger entities submitted that the proposed merger "would have an impact on employment"[lxxxv] and that job losses not in excess of "60 employees out of 900 Bromor employees"[lxxxvi]. would be affected It was only "the semi-skilled and skilled employees (i.e. non-manufacturing employees)"[lxxxvii] that would be impacted by "post-merger redundancies"[lxxxviii].

An undertaking on the timelines of such retrenchments was made by the merging entities that such retrenchments would be kept in abeyance "for a period of at least nine (9) months"[lxxxix]; further that no measures would be taken towards retrenchment readiness, at the least, for a period of "six (6) months" [xc]as calculated from merger implementation date.

The corporate and social security measures taken in ameliorating the impact of the redundancies on a category of affected employees, non of whom is unskilled, the time lines when no preparations could even be made towards retrenchment implementation and the minimum time delays undertaken in the actual implementation of the retrenchments would appear to have helped ease the process of approval of this merger.[xci]

[lxxxiv] Case NO.03Large Merger June 06
[lxxxv] Case No. 03 supra
[lxxxvi] Case No.03 supra
[lxxxvii] Case No.03 supra
[lxxxviii] Case No.03 supra
[lxxxix] Case No.03 supra
[xc] Case No.03 supra
[xci] Case No.03 supra

The tribunal found that the public interest considerations did not warrant the imposition of any conditions. It may well be that the undertakings volunteered by the merger entities reduced the probability of the tribunal's imposing its own, perhaps more stringent, approval conditions[xcii]..

What is not settled or even addressed by this judgment, however, is the question of, if up to sixty employees out of nine hundred's pending redundancy does not raise the tribunal's "eyebrows", how many employees' looming retrenchment raises the alarm with the tribunal? Or is this perhaps the wrong question? Should the question be how many workers of what level of skills and/or of what level of seniority or, for that matter juniority, must be at risk of retrenchment for the tribunal to start becoming unsettled?

This case does not purport to address the unacceptable outer limit levels of redundancy. Rather, it is submitted; in disclosing that the aforesaid levels of redundancy are bearable to the tribunal it flags the question of where the diving line lies between the acceptable and the unacceptable levels in this regard.

2.1.8 IMPACT ON EMPLOYMENT OF SKILLED EMPLOYEES

Tendentiously in the vein of the last discussed IMRA case, in the matter of **PRESTASI BROILERS (PROPRIETARY) LIMITED / THEBE RISK SERVICES (PROPRIETARY) LIMITED**[xciii] we see the Tribunal addressing the matter of a projected post merger situation where a relatively small number of essentially, "skilled" workers[xciv], were to be affected by the merger. The tribunal did not consider that to constitute a public interest huddle of the magnitude that would warrant either the declining of merger

---

[xcii] Case No 03 supra
[xciii] CASE NO. 27/Large Mergers/APR 06,Competion Tribunal website
[xciv] Case No 27 supra

consent or the granting of it subject to certain conditions relating to the fate of the workers so affected[xcv].

The case jurisprudence developed by the tribunal so far discloses that in a number of cases where skilled workers were to be laid off due to a merger triggered rationalization the approach of the tribunal has been to counter weigh this relatively negative fact against the fact that their superior skills compared to the bulk of the (usually lesser skilled) work force of the pre-merger entities made the blow of their loss of employment that little bit less harsh.

The tribunal has largely tended to entertain the submissions of Counsel that ,on average, employees with superior skills had greater leverage in the job market in terms of the chances of finding suitable alternative employment post merger induced retrenchment.

This argument, it is with respect contended, is a rather sweeping one and does not withstand close scrutiny as the job market is not itself static and could be in either a general state of decline at the time of a merger or be so in the particular sector(s) or industry where the specialized superior skills being laid off would ordinarily be most likely to find alternative employment or would be functionally best suited to be re-absorbed into the economy.

A contrary contention would presumably hold out that in a given casuistic instance, with proper proof of such dire decline in re-employment prospects for a given category of particularly specialized highly skilled labour the Tribunal would most probably factor such into its ruling on the merger consent application..

[xcv] Case No.27 supra

There is no indication, for instance, that In an industry wide decline that happens to coincide with the merger application the Tribunal would not proceed with appropriate restraint and sensitivity; that it probably would not impose approval conditions and the like to ameliorate the dire threat therein posed to the employment of such skilled professionals.

This, incidentally conjures in the author mind's another conceivable scenario. Picture a situation where the emergent laying off of certain highly specialised professional employees due to a merger in part triggered by the need to rationalise and consolidate just for operational survival in the face of the prevalence of particularly lean financial times in a given industry or sector thereof.

Were it to be proved on a balance of probabilities that, albeit such professionals were being offered most generous retrenchment packages, that the only meaningful prospect of their re-employment in their niche areas of specialization in the short to medium term during the industry slump would be for them to relocate overseas; for their skills to be lost to South Africa (possibly permanently).

Would this be a public interest scenario warranting the Tribunal to impose some conditional restraints on such a merger or to even decline consent for it?

Indeed, should merger triggered monumental loss of employment of rare skilled South African to overseas countries be a matter that would or should warrant the Tribunal to impose judicial restraints to such merger or to the manner of its implementation?

The writer is not aware of any case finalized by or even currently before the Tribunal where the nature and parameters of probable re-employability have been penetratively examined and defined.

Indeed, no case has ever mapped out, for all practical intents and purposes, quite how extensive within the scope of section 12 A (3)(b)[xcvi] of the Competition Act is the legal scope of the Tribunal's discretion in the imposition of restraints on foreseeable negative merger impact upon existing employment.

This is clearly an unfolding and unfinished matter. It is arguably properly one never to ever be completely settled given the diverse combination of circumstances in these regards that can manifest before the tribunal for determination.

The Tribunal is ultimately faced with a delicate balancing act between making merger approval not too stringent a process and thus stifling the natural dynamics of industry and the market place and ensuring on the other hand that jobs are not casually disposed of in the highly pressured hurly burly world of urgent merger deal closure.

The tribunal found "no significant public interest issues" and thus unconditionally approved this transaction.

2.1.9 MERGER AFFECTING STATUS OF SOME SENIOR MANAGERS, BUT CAUSING NO RETRENCHMENTS

In the matter of **SASOL OIL (PTY) LTD / EXEL PETROLEUM (PTY) LTD**[xcvii] it emerged for public interest purposes before the tribunal that the expectation was that the merger would cause a handful of minor "adjustments" impacting the positions of some members of senior management [xcviii]. This notwithstanding, the merger entities foresaw no retrenchments due to the merger consequent "integration" exercise.

[xcvi] Brassey and five others 345
[xcvii] Case no. 57 Large Mergers Oct 2003,Competition Tribunal website
[xcviii] Case NO.57 supra

The merger was approved unconditionally

2.1.10 TRIBUNAL'S TREATMENT OF SCENARIO WHERE WORKERS HAVE THE CHOICE TO EITHER ACCEPT SEVERANCE PACKAGES OR TRANSFER FROM ONE ENTITY TO ANOTHER

In the case of **VODACOM SERVICES PROVIDER COMPANY (PROPRIETARY) LIMITED AND VODACOM PROPERTIES NO.2 (PROPRIETARY) LIMITED AND AFRICELL CELLULAR SERVICES (PROPRIETARY) LIMITED ("AFRICELL")**[xcix] the nub of the merger entities' public interest compliance submission on the employment front was that Africell's workers would either "transfer to the franchisee" in compliance with the Labour Relations Act or such employees would have the option to elect to accept "the severance packages" that Africell will offer to them"[c] and that accordingly the merger would not adversely influence employment. The Tribunal found that this all made for a neutral public interest position[ci] and approved the merger without conditions.

2.1.11 MERGER BRINGS PROSPECTS OF RETRENCHMENT FOR A HANDFUL OF SKILLED AND SENIOR EMPLOYEES

In the case of **CHEMICAL SERVICES LIMITED AND LEOCHEM (PROPRIETARY) LIMITED ("LEOCHEM")**[cii] the tribunal did not deem unacceptable the level and nature of retrenchments in prospect since only three employees, each of them a director of Leochem, faced any risk of being retrenched[ciii]. The tribunal's take on the matter was that since these were all "highly skilled persons" the probability of them finding alternative

---

[xcix] Case No.48 Large Mergers June 2006 Competition Tribunal
[c] Case No. 48 supra
[ci] Case No.48 supra
[cii] Case No. 109 Large Mergers, NOV 05,Competition Tribunal website
[ciii] Case No 109 supra

employment was high in the event of their being laid off[civ] and approved the merger unconditionally.

2.1.12 TRANSFER OF EMPLOYEES FROM TARGET FIRM TO ACQUIRING FIRM SEEN AS INNOCUOUS FOR PUBLIC INTEREST PURPOSES

In the matter of **PLAASKEM (PTY) LTD ("PLAASKEM") AND UAP AGROCHEMICALS KZN (PTY) LTD ("UAP KZN") UAP CROP CARE (PTY) LTD**[cv], the tribunal , having regard to the fact that the entire complement of employees of UAP KZN and UAP Cape "would be transferred to Plaaskem" and in the absence of any other key public interest question, approved the merger unconditionally.

2.1.13 TRANSFER OF EMPLOYMENT CONTRACTS, NO RETRENCHMENTS

In this case again, to wit, in **ENGEN PETROLEUM LIMITED AND FXX ON MOBIL SOUTH AFRICA (PROPRIETARY) LIMITED**[cvi] the tribunal positively noted the pending "transfer of employment contracts from EMSA to Engen" and this being the only emergent public interest question, concurred with the commission's recommendation and approved the merger unconditionally.

2.1.14 NO IMPACT ON JOBS AND EMPLOYMENT

In this case, the matter of **LEXSHELL 676 INVESTMENT (PROPRIETARY) LIMITED / XSTRATA SOUTH AFRICA (PTY) LIMITED**[cvii] we can observe a typical example of the numerous case instances where the Tribunal has not found[cviii] the existence of any public

---

[civ] Case No.109 supra
[cv] Case No.78 Large Mergers OCT 2004
[cvi] CASE NO. 14 Large Mergers ,NOV 2004,Competition Tribunal website
[cvii] CASE NO. 30 Large Mergers APRIL 2006,Competition Tribunal website
[cviii] Case No.30 Competition Tribunal website

interest issues and where there had simply been no merger sensitive job loss issues existing or prospective. The writer has included this case, as it were; to represent the plethora of such cases that come before the tribunal completely free of issues as to public interest related controversies.

2.1.15 RETENTION OF ALL CURRENT EMPLOYEES POST-MERGER FOUND TO BE INNOCUOUS FOR PUBLIC INTEREST PURPOSES

In **NEDBANK LIMITED AND RETAIL BRANDS INTERAFRICA (PTY) LTD AND CONTINENTAL BEVERAGES (PTY) LTD**[cix], employment being the only emergent public interest question the tribunal accepted the submission of the merger parties that "all Smartcall's current employees"[cx] would be retained and that accordingly the transaction had no adverse employment implications.

2.1.16 BUSINESS AND EMPLOYEES OF TARGET FIRM TO BE TRANSFERRED TO AN ENTITY OF ACQUIRING FIRM: TERMS AND CONDITIONS OF EMPLOYMENT NOT TO CHANGE: NO PUBLIC INTEREST ISSUES

In the case of **COMMERCIAL PROPERTY FINANCE DIVISION OF ABSA BANK LUMBARD AND EQUITY ESTATES (PROPRIETARY) LIMITED**[cxi] the tribunal was content in respect to public interest considerations that as per the merger entities' submissions the merger would not negatively impact employment as "the business of Equity Estates" would be "transferred" to MRX together with all with employees thereof, whose employment would "continue" under MRX "on the same terms and conditions as those of their employment with Equity Estates"[cxii].

[cix] CASE NO. 71Large Mergers, DEC 2003 Competition Tribunal website
[cx] Case No.71 Large Mergers supra
[cxi] Case No.17 Large Mergers February,2006
[cxii] Case No.17 Supra

2.1.17 PROCESS DYNAMICS CONSIDERATIONS IN TERMS OF AFFECTED EMPLOYEES' INVOLVEMENT AND INPUT

In the matter of **FUJITSU SIEMENS COMPUTERS (HOLDING) BV ("FSC") AND SIEMENS SERVICES NEW CO (PTY) LIMITED**[cxiii] we see the assumption of a stance by a merger consent litigant, to wit, FSC and "its controlling firms, Siemens and Fujitsu that it was significant that they did "not directly carry on business in South Africa" but had only an indirect presence through their subsidiaries' operations[cxiv] in the country.

Due to the non-existence of a trade union at "the Product Related Service Business ("PRS business")", an attempt to inform the employees was made through the twice-attempted delivery of "a copy of the merger notice" on the representative of the workers, a Mr. Groenewald.

It emerges that the said workers' representative disclosed that the workers at PRS business had no inclination to try and challenge approval of the merger but were singularly pre-occupied with "conditions of service, severance packages and such like labour related concerns"[cxv].

Despite the Commission's requesting the workers' representative to formalize the workers' "concerns in writing" up to the date of delivery of the judgment such correspondence had not been forthcoming from the said representative[cxvi]. The merger parties submitted that there would be "no effect on employment" and the tribunal found no public interest difficulties to exist[cxvii].

[cxiii] CASE NO.26 Large Mergers, MAR 2006,Competition Tribunal website
[cxiv] Case NO.26 supra
[cxv] Case NO.26 supra
[cxvi] Case No.26 Supra
[cxvii] Case No.26 Supra

This matter discloses the difficulties that the Tribunal can face where the employees affected are not unionized or otherwise organized and where there is no formal joining of issue on behalf of the workers before the Tribunal.

The tribunal ends up heavily dependant on what facts the Commission could gather, on the probably one-sided perspective of the merging entities and on their good faith. In this matter, clearly had the workers been properly organized, represented and formally joined issue, their concerns would have been made a formal part of the record and perhaps the merger might even have been approved subject to the imposition of some specific conditions; such conditions as would substantively address and secure the relative preservation of their conditions of employment by the post merger entity on such terms as would then be meet.

The contention that there will be no retrenchments post merger, as it is not legally binding, even if it turns out to be factual in the future, does not guarantee that there will, in fact, be no adverse revisions of the conditions of service by the merged entity.

The tribunal's approach to this matter tends to disclose the reluctance of all judicial officers to appear to be descending on to the adversarial floor of argument by seemingly overzealously pursuing an issue while the party who would presumably be most affected by it is seemingly displaying scant interest.

While the tribunal will in appropriately presented and canvassed matters evidently carefully weigh the impact on the public interest, in this matter it transmitted firmly the message (to borrow a phrase) that it will not be "an agony Aunt" .It will not go out of its way to hunt for details from all the workers as to the nitty gritty of how, if at all, their conditions of service are likely to be affected by the merger.

This is perhaps particularly necessary as the Competition Act gives the Commission the prosecutorial role and the Tribunal the judicial one in the discharge of the competition authorities' business; arguably the role of pursuing these kinds of issues more minutely was for the Commission to execute and more vigorously so than it did in this matter.

Justice Lewis emphasizes the importance of the sound functionality of this division of labour as he denotes interalia the need for ". an independent and accessible antitrust authority with a clear demarcation between the investigative and adjudicative functions.."[cxviii].

This notwithstanding, at a perhaps purely academic level, one might as well ponder whether the tribunal could not, through the powers vested in its "presiding member"[cxix], of its own motion have caused the workers' representative in this matter to be subpoenaed in terms of section 54 (a) and (b) and possibly (c) of the Competition Act[cxx], which provides wide powers to the Tribunal in this regard?

This, to cause the said workers' representative to orally amplify the employees' concerns under oath, thereby also affording the merger parties an opportunity to cross examine him and interrogate further any misrepresentations to its cause in this regard as might occur?

Would so doing really have set a dangerous precedent that would potentially burden process and unduly fetter the Tribunal's exercise of its clearly wide discretion in this regard in the handling of similar matters in future?

[cxviii] Justice Lewis supra, 622
[cxix] Section 54 of the Competition Act,No89of 1998 as amended
[cxx] Competition Act, supra

It surely cannot even be suggested, or can it be, that the Tribunal exercised its discretion in this regard imprudently? Was it not sufficient for the Tribunal, to note that the Commission had twice sought the workers' representative to submit written submissions to it in this regard?

Does that, however, not itself beg a question? The question being what if the workers' representative in fact was sloppy in relaying the Commission's request for the workers' written representations? Would the workers' fate in such circumstances be determined by vehicle of a sole representative's caprices? so, even if the body of the work force might not have had more than a hazy clue at that stage in the merger approval process as to what was unfolding on their employment's future?

Did the fact that the Commission tried to secure such written representations assuage the Tribunal's "judicially informed conscience" in the exercise of its discretion? This, notwithstanding that the Tribunal clearly had not been averse to the attempts the Commission had made to obtain the workers' representations?

Indeed, does the fact that as per the tribunal's own record, up to the date of judgment these representations were still anticipated to be received and considered as part of the hearing process, not compound the notional discomfort flowing from the deciding of the matter without first subpoenaing and hearing the workers' representative (and perhaps also some of his worker colleagues) under oath?

Would such said subpoena's issuance on the other not have been the striking of a telling blow for employee participation in ensuring that the employment aspects of the public interest were not merely skimmed over? Would this not help ensure that some more disturbing aspects of the matter were not possibly overlooked while lurking just under the seemingly mundane surface of the application proceedings?

What if some particularly material facts in this regard had simply not come to the attention of the Commission and by extension that of the Tribunal? This, it could further be contended, is especially sensitively so in a matter like this one where non-unionized and (for merger process participation purposes, anyway) clearly disorganized workers, coupled with their presumably scant litigation financing resources and the merger–seeking entities they were facing's bearing the might of two powerful global player multinationals?

In this regard, it would appear, the tribunal's attitude was that any party who considered their interests might be at due risk of peril has to duly file its papers and appear before the Tribunal as regulated to canvass its cause. The Tribunal found the merger to be clear on the public interest front and granted its unconditional approval[cxxi].

2.1.18 THE RELEVANCE OF THE ROLE OF UNIONS IN THE MERGER APPROVAL CONSIDERATION PROCESS

In this case, to wit, **AFROX HEALTH CARE LIMITED AND AMALGAMATED HOSPITALS LIMITED**[cxxii] the entities to the merger having disclosed that they foresaw no job losses, the Commission indicated to the tribunal that it had received "no representations" from the unions to which the employees of the merging entities belonged[cxxiii].

The wording of the Tribunal's judgment after observing that there were no representations from unions, that". Accordingly no public interest concerns arise from the merger"[cxxiv], interpreted casually, implicitly betray a notion that if the unions do not raise public interest issues then none can arise or none do arise. That surely would fly in the face of the Competition Act's

---

[cxxi] Case No.26 supra
[cxxii] CASE NO. 53/LM/SEP 01,Competition Tribunal website
[cxxiii] Case No.53 supra
[cxxiv] Case No.53 supra

own terms and spirit in respect to public interest issues, their relatively wide scope and sources.

In the nature of the typically adversarial relationship between corporate employer and Union and with the protection of workers' rights and interests' falling naturally in the domain of the Union, such words do tend to underline that no representations from the appropriate Union(s) could well be perceived, albeit wrongly so in certain circumstances, as meaning more particularly that no employment related public interest issues are in view.

We have noted and are yet to encounter in this report repeat instances where the relevant union has fallen particularly short of the mark in providing swift, informed, exemplarily interventionist and "pursue matter to the finish "type leadership in matters that have come before the tribunal, where union membership's interests were at risk?

2.1.19 THE ROLE OF UNION IN INFLUENCING TREATMENT BY TRIBUNAL OF CONCERNS REGARDING POSSIBLE RETRENCHMENT OF WORKERS POST-MERGER

In **BID INDUSTRIAL HOLDINGS (PTY) LTD AND G. FOX AND COMPANY (PTY) LIMITED**[cxxv] the Union SACTWU presented its concerns to the tribunal pertaining to "continued employment of G. Fox's employees subsequent to the merger"[cxxvi]. This, in the light of the non-existence of a definite commitment from the merger parties in respect "to possible retrenchments" consequent to the merger[cxxvii].

[cxxv] Case No.53 supra
[cxxvi] Case No.53 supra
[cxxvii] Case No58 supra

In the absence of such a concrete undertaking, in the Union' view the merged entity's hand would be unfettered and it could retrench as it desired upon the approval of the merger by the competition authorities. The Commission sought and obtained from the merger entities a commitment that "no unionized employees would be retrenched for a period of 18 months from the effective date as a result of the merger"[cxxviii]

Bid Industrial, however, qualified its undertaking with the cautionary note that in the eventuality of unanticipated developments beyond "its control and unrelated to the merger" in the nature, for instance, of an unforeseeable "downturn in the market in which G. Fox operates"[cxxix] then Bid Industrial would in any event be forced to take such steps (retrenchments included, as the circumstances may dictate) as would be in the optimum "interests of the business"[cxxx]This, so as to secure the survival and longevity of the business. The Commission's perspective was that these qualified undertakings should allay the union's said fears[cxxxi].

Only a day prior to the hearing the trade union sent the tribunal a letter soliciting approval of the pending merger application strictly subject to the stipulation that that no retrenchments should be effected for a minimum period of 24 months[cxxxii].

A number of procedural shortcomings did not help the union's cause before the tribunal, as it did not appear to submit any "oral submissions" and motivate its letter borne submissions. It merely affirmed that its said correspondence made out a "formal submission to the hearing"[cxxxiii].

[cxxviii] Case No 58 supra
[cxxix] Case No.58 supra
[cxxx] Case No.58 supra
[cxxxi] Case No.58 supra
[cxxxii] Case No.58 supra
[cxxxiii] Case No.58 supra

On the face of such correspondence, the tribunal found no evidential basis for finding that the merger itself would trigger retrenchments of some persons[cxxxiv]..

In addition, the merging parties made a "good faith" undertaking that they would not retrench unionized employees for a period of eighteen (18) months from the date of approval of this merger by the Competition Tribunal[cxxxv].

The Tribunal concluded that the said undertaking made by the merging entities provided adequate safeguards in this regard, most particularly as there was no real evidence that any retrenchments would be caused by this merger in the first place. Unconditional merger consent was granted herein[cxxxvi]

2.1.20 THE ROLE OF UNIONS: MERGER BACKGROUD OF SIGNIFICANT HISTORICAL REDUCTIONS IN NUMBERS OF EMPLOYEES

In the matter of **LNM HOLDINGS MV AND ISCOR LIMITED**[cxxxvii] the tribunal heard representations from two of Iscor's unions, Solidarity and the National Union of Metalworkers of South Africa (Numsa). Their concerns were informed by the historical backdrop whereby employment levels had dwindled sharply in the last few years at ISCOR allegedly "from 44 000 in 1980 to 12 200 in 2004"[cxxxviii], according to the Unions' submissions.

[cxxxiv] Case No.58 supra
[cxxxv] Case NO.58 supra
[cxxxvi] Case No 58 supra
[cxxxvii] CASE NO.08/LM/FEB 04,Competition Tribunal website
[cxxxviii] CASE NO.8 supra

The bulk of these jobs, according to the Unions, had ceased to exist "between 1980 and 1997," accordingly predating the year 2002 when LNM acquired "its first investment in Iscor"[cxxxix]

The Unions were at one in asserting that LNM had the reputation of "a job cutter" and that it was well known to cut wages readily as part of its "miracle" turn around strategy[cxl]..

LNM strenuously denied these charges and submitted that it enjoyed positive relations with unions when it had taken over .It submitted *interalia* that the unions had not succeeded in exhibiting a link between the job losses and the purposes of LNM[cxli].

After much deliberation on employment and the related issues, the tribunal formed the view that there were no direct plans to turn away from "existing Iscor Policies"[cxlii].

As has already manifested in this report, a common thread in the Tribunal's body of case law is the relative inadequacies of organized and non-organized labour's submissions to the Tribunal, which emerges in this case as well. Neither of the two Unions affected herein made or even offered to make "any oral" submissions in this hearing, opting instead to bank on their basic written representations.

As a consequence the tribunal ended up faced with a glaring evidential and adversarial process gap in the proceedings in that LNM's representations on the employment related matters went unrefuted. The tribunal sums up the difficulties this created in stating in its decision *interalia* that the Unions' non-attendance at the hearing "did not make their

---

[cxxxix] Case No.8 supra
[cxl] Case NO.8 supra
[cxli] Case No.8supra
[cxlii] Case No.8 supra

case any stronger". Clearly a courteous understatement of the dire consequences of such neglect of due process for the Unions' cause.

What remains a mystery to the writer is that the Unions must surely have been aware that because of the massive financial and strategic stakes for the merging entities, coupled with their capacity to afford and their predictable non hesitation to secure the finest legal counsel they could secure for such crucial proceedings, even if the Unions could not afford to pay legal counsel to properly represent them at such hearing, they could have, at least sent a senior Union official to the hearing to amplify and maintain the resilience of the Union's cause as best he knew how?!!

As aforesaid this sad reality is compounded by the trend that emerges in the tribunal's body of case law where repeatedly Unions have not only[cxliii] failed to appear at the hearing, but have manifestly placed their faith in no more than a simple letter sent to the Tribunal stating their grievances. .

No specific effect "on employment policy" at Iscor was found to exist by the tribunal nor any other adverse impact on the "public interest" that is protected in terms of the Act. The merger was approved unconditionally[cxliv].

2.2 THE TREATMENT BY THE TRIBUNAL OF A PUBLIC INTEREST SCENARIO WHERE JOBS WOULD PROBABLY BE LOST WHETHER THE MERGER WAS APPROVED OR NOT

In the matter of **BOART LONG YEAR (A DIVISION OF ANGLO OPERATING), HUDDY (PROPRIETARY) LIMITED AND HUDDY ROCK TOOLS (PTY) LTD**[cxlv] something of a Hobson's choice confronted the

---

[cxliii] CASE NO.8 supra
[cxliv] CASE NO 8 supra
[cxlv] CASE NO.41/LMA/AUG 03,Competition Tribunal website

Tribunal in that from a scenario of the likely loss of about 145 jobs if the merger were permitted, non approval of the merger would leave the status about as negative,`` 120 jobs would nevertheless be lost if the merger were not approved[cxlvi]

The tribunal also had to contend with the reality that Boart's Springs plant had to acquire increased volumes that were realizable purely by means of the merger for it to continue operating viably[cxlvii]. Accordingly, if merger approval were to be declined Boart's coring division would in all probability be relocated beyond South Africa, to a sister plant thereof in the United States of America[cxlviii].

Moreover Huddy contended that failing the merger, it would necessarily have to cease manufacturing operations and would have to become merely a distribution firm with further negative consequences for employment levels[cxlix]..

The tribunal was quite concerned that in the light of the "global dynamic of the industry" bar the merger, both Boart and Huddy would abandon some of their manufacturing activities in South Africa. It took keen note of the fact that jobs were on the line either way as declined merger consent on the public interest grounds of trying to prevent the loss of jobs would nevertheless precipitate the "unintended" effect of worsening the very loss of employment[cl]..

[cxlvi] Case No 41 supra
[cxlvii] Case no.41 supra
[cxlviii] Case No.41 supra
[cxlix] Case NO.41 supra
[cl] Case No 41 supra

The Tribunal ended up concluding that approval of the merger subject to certain conditions was the lesser of the two evils in the quest to lessen the run on jobs in the circumstances[cli].

This case also bears out two other interesting dimensions; "the failing firm" characteristic and the characteristic of non merger approval "limiting the competitiveness of a firm in foreign markets" which are discussed below...

2.2.1 POST-MERGER DETERMINATION OF MERGER CONSENT APPLICATION; EMERGENT LABOUR ISSUES CONSEQUENT AND CONSIDERATION OF POSSIBLE CRIMINAL SANCTION FOR PROCEEDING WITH LARGE MERGER WITHOUT PRIOR APPROVAL THEREOF BY THE TRIBUNAL

In the matter of **NEDBANK LIMITED/RETAIL BRANDS INTERAFRICA (PTY) LTD AND CONTINENTAL BEVERAGES (PROPRIETARY) LIMITED**[clii] in so far as the public interest relates to jobs, this is a "water under the bridge" type situation as the merger, which was implemented in 2000 without merger approval, had impacted employees of the target firms post merger, with significant retrenchments taking place[cliii].

The merger entities submitted that the said retrenchments were effected in order to reduce costs in a rescue exercise by Nedbank to try and secure the survival of the target firms from liquidation. It was submitted that but for this exercise, some jobs would have been lost anyway[cliv].

[cli] Case No.41 supra
[clii] CASE NO. 71,Large Merger DEC 2003,Competion Tribunal website
[cliii] Case No.71 supra
[cliv] Case NO.71 Supra

The Commission was of the view that the retrenchments highlighted some serious public interest issues[clv]. Nevertheless, as the merger was implemented 25 months prior to the determination of the matter by the Tribunal, the Commission recommended that the retrenchment should be cited as an "an aggravating circumstance"[clvi] in the eventuality that the merger parties were prosecuted for effecting the merger without possessing the requisite regulatory authorization.

This, of course, begs the question of why the Commission was not laying such charges itself instead of merely recommending a sanction on a speculative basis with the lapse of the said 25 months since merger implementation the employment issue became largely of academic interest for public interest purposes. It is quite ironic that though there clearly had been significant employment related public interest issues at the time of the merger implementation, the tribunal had no choice but to conclude that there were no public interest issues pending as at the time of the decision itself [clvii].

2.2.2 POSITIVE TURNAROUND AT HEARING ON ISSUE OF ANTICIPATED MERGER SPECIFIC JOB LOSSES

In the matter of **ADCOCK INGRAM (PROPRIETARY) LIMITED AND THE SCIENTIFIC GROUP (PTY) LTD AND SCIENTIFIC GROUP INVESTMENTS (PTY) LTD**[clviii] at the hearing the merger entities moved away from their previous stance that at the most 20 employees might face retrenchment They submitted to the Tribunal that "no jobs" would be

---

[clv] Case No.71 Supra
[clvi] Case No.71 Supra
[clvii] Case No.71 Supra
[clviii] CASE NO. 20Large Mergers, AUG 2005,Competition Tribunal website

affected as a consequence of the merger after all[clix]. There being no other public interest issues the merger was approved unconditionally[clx].

2.2.3 RETRENCHMENTS OF A FEW LIKELY TO RESULT FROM "DUPLICATION OF SERVICES" DUE TO MERGER

In the case of **SANTAM LTD / KAGISO TRUST AND NOVA GROUP HOLDINGS LTD**[clxi] the parties to the merger disclosed that seven (7) employees would be impacted by the merger due to "duplication of services within Nova Group and Santam"[clxii].

It was submitted in support of the merger that these employees were particularly marketable in "the financial sector" and would most probably locate alternative employment[clxiii].
This turned around eventually as the merging entities made a declaration at the hearing that the impacted workers would not exceed five (5) and that an endeavour to subsume that five into Santa would be made.

The merger entities further submitted that the deal was pro-BEE as it facilitated the opening up of an opportunity for Kais Trust, a leading empowerment investment banking services group, to secure shares in the insurance industry.

The Tribunal did not make much of the BEE driven submissions, but nevertheless found no public interest difficulties with the application and granted the merger consent unconditionally.

[clix] Case No.20 supra
[clx] Case No.20 supra
[clxi] Case No. Case No.32 Large Merger, May 2005 Competition Tribunal
[clxii] Case No. 32 supra
[clxiii] CASE No. 32supra

2.2.4 UPFRONT UNION INVOLVEMENT IN THE NEGOTIATIONS OF THE MERGER PARTIES WITH THE COMMISSION, ESPECIALLY OF THE EMPLOYMENT IMPACTING ASPECTS CAN HELP SPEED UP THE HEARING AT THE TRIBUNAL AND CONCOMMITANTLY REDUCE THE COSTS OF LITIGATION

In the **LONMIN PLC AND SOUTHERN PLATINUM CORP**[clxiv] matter, it was submitted that the financial health of the Messina mining operations was in a desperate state and that unless the merger was allowed; in the region of 1532 jobs could be lost at the operation.

It was submitted that if the merger were approved, with Lonmin's involvement, the number of retrenchments could be substantially reduced and in the region of "284 semi-skilled workers and 116 workers at management, artisan, supervisor and administrator levels might be retrenched" if the worst were to occur[clxv].

The merger entities submitted that the projected retrenchments were due to a necessary operational adjustment to a less dangerous mining methodology, restructured operational timetable and the rationalization of a prohibitive operational cost structure. It was disclosed to the tribunal that in excess of 60% of the pre-merger cost structure at Messina was employment related[clxvi].

Due to a lingering concern on the Commission's part that the said retrenchments were still too high, some conditions of approval were negotiated and agreed together with the merger entities?

[clxiv] Case No.41 Large Mergers, May,2005,Competition Tribunal
[clxv] Case No 41 supra
[clxvi] Case No 41 supra

The one emergent difficulty was that the Unions acting on behalf of the employees at Messina Mine had not been at all involved in the preparation of the proposed conditions of approval.

To resolve this impasse, the Tribunal requested the merger parties to transmit copies of the Commission's conditional approval proposals to all the affected Unions for them to ponder and make representations in this regard.

Correspondence was eventually furnished to the Tribunal disclosing the Unions' acceptance of the mooted merger conditions of approval[clxvii].

At the Tribunal's insistence the Unions were represented at the hearing and they re-affirmed the acceptability of the conditions[clxviii].

The merger was eventually approved subject to such agreed conditions. These conditions included ***interalia*** i) the consolidation of total retrenchment numbers generally and sectionally among the different skill levels and skill categories of workers, ii) the short listing of a minimum of a quarter of the job positions that would become available at Lonhim (or somewhere else within the merged entity group) for the amelioration of actual retrenchment levels. Alternative skills training for retrenched workers were also stipulated as an approval condition It was ordered that the same should be effected before retrenchments actually occurred.

The conditions were to remain in force for a period of 24 months from the issuance "of the clearance certificate by the Competition Tribunal".

The merger was conditionally so approved

[clxvii] Case No.41 supra
[clxviii] Case No.41 supra

2.2.5 BUSINESS CONTINUITY AS A SEPARATE DISTINCT BUSINESS: RETRENCHMENTS NOT TO RESULT

In **MOMENTUM GROUP LIMITED AND BONHEUR 94 GENERAL TRADING (PTY) LTD** the Tribunal was satisfied with the submissions of the merger parties that the merger would not precipitate any retrenchments, since the business of Sovereign would preserve its operational status "as a separate discreet business". The merger was approved unconditionally.

2.2.6 COLLECTIVE BARGAINING AGREEMENT PERTAINING TO RETRENCHMENTS MADE PART OF COURT ORDER

In **MULTICHOICE SUBSCRIBER MANAGEMENT (PTY) LTD ("MULTICHOICE")/TISCALL (PTY) LTD**[clxix] the tribunal stipulated a condition in respect to the retrenchment of employees. This condition stemmed not from "the hearings" but from an agreement entered into between "the merged entity and their employees as part of their collective bargaining".

In imposing such condition, the Tribunal pursued the route adopted in "a previous merger", in respect to abiding by the terms of an agreement already concluded "between employees and employer". The merger was approved subject to certain conditions.

Here we see the Tribunal not only respecting but also actively enforcing a pre-existing agreement between employer and employees.

[clxix] Case no. 28 April 2004, Large Mergers, Competition Tribunal website

Even though the judgment does not state it in so many word, this is presumably in keeping with the important limitation to the Tribunal's jurisdiction enshrined in section 3(1)(b) of the Competition Act which excludes "a collective agreement", as defined in section 213 of the Labour Relations Act, 1995..."[clxx]

2.2.7 PRE-EXISTING COLLECTIVE BARGAINING AGREEMENTS ENFORCEABLE WITHOUT TRIBUNAL HAVING TO IMPOSE AN "ENABLING" ENFORCEMENT CONDITION IN THAT REGARD

In the **INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA("IDC") AND PRILLA 2000 (PTY) LIMITED**[clxxi] matter the Tribunal declined SACTWU' s request for the imposition of a condition to approve the merger subject to IDC's being compelled to "abide by any agreements with the National Textile Bargaining Council".

The tribunal accepted the Competition Commission's perspective that "a condition to this effect is unnecessary, since the merger doesn't alter the validity or enforceability of this agreement/s with the National Textile Bargaining Council".

The Tribunal's difficulty was imposing by court order the terms of an agreement that had been concluded in a separate labour law process and as the terms of such agreements had not been hammered out in the merger approval process itself. This notwithstanding the fact that retrenchment considerations are relevant in competition law in the determination of public interest issues.

[clxx] Brassey and 5 others supra 341

[clxxi] Case NO. 72 Large Merger SEP 2004,Competition Tribunal website

It is quite interesting to contrast this case with the immediately preceding one above, where the tribunal was willing to go in the opposite direction in materially similar circumstances. In both instances the agreements did not arise inherently from the merger hearing proceedings but from separate collective bargaining under the ambit of the Labour Relations Act.

While in both cases presumably influenced by a keen awareness of the dictates of the said limitation to its jurisdiction in terms of Section 3(1)(b) of the Competition Act as read with Section 213 of the Labour Relations Act, has the Tribunal here nevertheless exposed itself to the accusation that it has so proceeded in a manner that leaves no discernible or consistent trail of precedent;

That effectively it either positively enforces such collective agreements by judicial sanction through the imposition of a condition for them to be abided with or by refusing to have anything to do with collective agreements and, importantly, somewhat ambivalently and confusingly so?

As the Tribunal does not in either of these cases specifically cite the said Section 3(1)(b) of the Competition Act as read with Section 213 of the Labour Relations Act, it would perhaps be imprudent, on these facts to explore this aspect any further.

2.2.8 EMPLOYEES NOT PROPERLY INFORMED OF MERGER CONSEQUENCES: PROCESS ISSUE

In **LIBERTY GROUP LIMITED AND CAPITAL ALLIANCE HOLDINGS (PTY) LIMITED**[clxxii] where it appeared to the court that the employees of the affected firms had not been properly informed of the retrenchment implications of the proposed merger, the tribunal directed that the merger

[clxxii] CASE NO. 04/LARGE MERGERS, JAN, 2005 COMPETITION TRIBUNAL WEBSITE,

entities should "give an undertaking that they would address the employees' concerns "before the merger order was issued"[clxxiii].

This occurred after some employees had written, following a directive of the tribunal to the merger entities to write to their employees and give them "the worst case scenario" in respect to possible retrenchments post merger[clxxiv].

The merger was conditionally so approved.

2.2.9 BUSINESS ACQUIRED AS A GOING CONCERN: HENCE NO UNTOWARD IMPLICATIONS FOR EMPLOYMENT

In CLIDENT NO.533 (PTY) LTD ("CLIDENT")/EFY APPLIANCES LTD AND OTHERS [clxxv] the tribunal accepted the merging parties' contention that inasmuch as the business being sold would be taken over as "a going concern" no real difficulties were foreseeable in respect to employment. There being no other public interest issues burdening the matter, the merger was approved unconditionally.

2.2.10 DIVISION TAKEN OVER AS A GOING CONCERN: NO PUBLIC INTEREST ISSUES

In ALEXANDER FORBES GROUP (PTY) LTD ("ALEX") AND PERSETEL Q DATA TRADING (PTY) LTD[clxxvi] the tribunal was content that no public interest difficulties were in point as by pre-existing agreement "Alexander Forbes took over the whole division of Remuneration Consulting Surveys without change in personnel".

[clxxiii] Case NO 4 SUPRA
[clxxiv] Case No.4 SUPRA
[clxxv] CASE NO. 88LARGE MERGERS OCT 2004,Cmpetition Law Tribunal website
[clxxvi] CASE NO. 84LARGE MERGERS OCT 2004,Competition Law Tribunal website

In addition, in any event "the division of PQ Data acquired by Alexander Forbes had already been sold".

2.2.11 BUSINESS ACQUIRED AS A GOING CONCERN: NO SUBMISSION FROM UNIONS: NO PUBLIC INTEREST ISSUES

In **IMPERIAL HOLDINGS ("IMPERIAL") AND MURNAU HOLDINGS (PTY) LTD**[clxxvii] as the business of Murnau we see that as the business is sold and bought "as a going concern, it is not envisaged that there will be any job losses as a result of the merger". The tribunal was content that there were no public interest issues. Again in this matter no submissions were sent in by the registered trade unions on the workers' behalf.

On a separate note, in the Clident[clxxviii] and Alex cases immediately consecutively preceding this matter and indeed, in this matter, we can see how the merger structure and 'transition vehicle" employed in each case were found by the tribunal to have the common thread of having absolutely no impact on employment and hence no public interest issues arose on that front. Indeed, no other public interest issues arose in these matters and they were all easily approved by the Tribunal.

2.2.12 STRUCTURE OF DEAL TO ASSUME THE FORM OF SALE OF SHARES RESULTING IN NO PUBLIC INTEREST ISSUES

In BIDVEST GROUP LUMBARD AND VOLTEX HOLDINGS LUMBARD[clxxix] the Tribunal accepted the submissions that since the matter assumed the form of "a sale of shares", it would have no negative effect on employment – as none of the operating entities of the merging

---

[clxxvii] Case No.16,Large Mergers, March 2002,Competition Tribunal
[clxxviii] Case No 16 supra
[clxxix] Case no.10 Large Merger Feb 2002 Large Merger , ,Competition tribunal website

parties would lay off any workers merger specifically. No substantial public interest issues arise from the merger.

2.2.13 STRUCTURE OF DEAL TO ASSUME THE FORM OF SALE OF SHARES RESULTING IN NO PUBLIC INTEREST ISSUES

In BIDVEST GROUP LUMBARD AND VOLTEX HOLDINGS LUMBARD[clxxx] the Tribunal accepted the submissions that since the matter assumed the form of "a sale of shares", it would have no negative effect on employment – as none of the operating entities of the merging parties would lay off any workers merger specifically. I t was found by the Tribunal that no substantial public interest issues arose from the merger.

The three immediately preceding cases, the Clident, Alex and Imperial cases make for an interesting comparison with the present case. In all four cases the deal structure itself was designed so as not to affect jobs at all with the subtle nuance in this one being that instead of the transfer of the work force from one entity to another or the sale of the business of the target entity as a going concern (with its employees) there was a transfer of equity shareholding achieving the same result.

2.2.14 NO MERGER SPECIFIC LOSS OF EMPLOYMENT

In **NEDCOR INVESTMENT BANK HOLDINGS LIMITED AND TEMPLETON NIB ASSET MAYCRAT (PTY) LIMITED**[clxxxi] the transaction was not to result in any retrenchments whereas in the second transaction where job losses were expected these were to be due mainly to the "overall restructuring within the Nedcor Group".

[clxxx] Case No.10 large Mergers, March 2002,Competion Tribunal website
[clxxxi] Case no.86 and 87/large mergers Dec 2002,Competition Tribunal website

Possibly 18 jobs were to be lost as a direct consequence of the "current transactions". The tribunal agreed that that this number was relatively insignificant when contrasted with the number of jobs to be retained and the transaction was accordingly approved unconditionally.

2.2.15 MERGER POSITIVE FOR EMPLOYMENT: TO EXTEND LIFE OF MINE AND TO ENABLE SIGNIFICANT NUMBER OF NEW JOBS

In this matter, of **AQUARIUS PLATINUM (SOUTH AFRICA) (PTY) LTD/RUSTENBURG PLATINUM MUSS LIMITED AND ACQUIRES PLATINUM (SA) (PTY) LTD /RUSTENBURG PLATINUM**[clxxxii] **:** the tribunal accepted the parties' projection that the merger would facilitate a material extension of the operational life of the Roundel mine, which clearly helped secure job prospects for a longer period. Moreover it transpired that the merger would enable "the creation" of in the region of 100 new job opportunities.

The Tribunal noted that public interest considerations, to the degree that any had been in issue relating to employment, had been favorable to the approval of the merger and the merger was accordingly approved "without any conditions".

2.2.16 EMPLOYMENT LOSS DUE TO MERGER MINIMAL DUE TO EMPLOYEES HAVING SECURED ALTERNATIVE EMPLOYMENT WHEN MERGER TARGET FIRM CEASED TO OPERATE

In HIGHVELD STEEL AND VANADIUM CORPORATION LTD, VAN LEER SOUTH AFRICA AND STEELBANK MERCHANTS (PTY) LTD T/A DRUMPAK[clxxxiii] it emerged to the tribunal that in some respects public interest considerations had been overtaken by events as, the majority of

---

[clxxxii] Case No.75 Large Mergers July,2003

[clxxxiii] Case Number 06 Large Mergers Oct 1999,Competition Tribunal website

the would have been affected employees had since been found other employment. Job losses were accordingly going to be quite negligible. In the event the Tribunal allowed the merger to be effected unconditionally.

(ii) PART "B"

3.0 "THE ABILITY OF SMALL BUSINESS, OR FIRMS CONTROLLED OR OWNED BY HISTORICALLY DISDVANTAGED PERSONS, TO BECOME COMPETITIVE"

TERMS AND DEFINITIONS

"Historically disadvantaged persons" is defined in section 3(2) of the Competition Act as follows: "For all purposes of *this Act* a person is a historically disadvantaged person if that person –

a) is one of a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race;
b) is an association, a majority of whose members are individuals referred to in paragraph (a);
c) is a juristic person other than an association, and individuals referred to in paragraph (a), own and control a majority of its issued share capital or members' *interest* and are able to control a majority of its votes; or
d) is a juristic person or association, and persons referred to in paragraph (a), (b) or (c) own and control a majority of its issued share capital or members' *interest* and are able to control a majority of its votes."[clxxxiv]

[clxxxiv] Brassey and five others 341

"Small firm" is defined in the definitions and interpretation section of the Competition Act (section 1 thereof) as having the meaning:" set out in the National Small business Act, 1996 (Act 102 of 1996)"[clxxxv].

Possibly because Counsel relieve the court of the burden of having to decide such questions by pre-agreeing them before hearing proceedings commence, the author in his research of Tribunal case jurisprudence has not encountered a matter where the question had to be decided upon whether an entity in the presenting facts before the Tribunal constituted a "small business", within the meaning contemplated by the Competition Act.

"Black Economic Empowerment" is neither employed as such nor does the Competition Act interpret it. Its spirit is nevertheless a much pervading theme in those matters before the tribunal that impacted or turned on "historically disadvantaged persons" as shall be seen below.

3.1 BLACK ECONOMIC EMPOWERMENT ("BEE") CONSIDERATIONS: INCREASE OF OWNERSHIP OF PREVIOUSLY DISADVANTAGED PERSONS

In **TSEBO OUTSOURCING GROUP (PROPRIETARY) LIMITED AND DRAKE & SCULL FM (SA) (PTY) LTD**[clxxxvi] on the public interest front the Tribunal definitively found that the transaction increased "the ownership stakes of historically disadvantaged persons" and there being no other significant public interest issues approved the merger unconditionally[clxxxvii]

[clxxxv] Brassey and five others 340
[clxxxvi] CASE NO. 25 Large Merger, APR 2004 Competition Tribunal website
[clxxxvii] Case no 25 Competition Tribunal website

3.2 THE DYNAMICS OF BEE AS PUBLIC INTEREST ISSUE NOT CRITICAL TO ADDRESS ONCE DETERMINATION MADE THAT MERGER *IN CASU* DOES NOT AFFECT COMPETITION

In **ENGEN PETROLEUM LIMITED VS ZENEX OIL (PROPRIETARY) LIMITED**[clxxxviii] notwithstanding that black economic empowerment was invoked as a public interest dynamic of this transaction, the Tribunal took the view that as the merger did not affect competition, the matter of addressing black economic empowerment dimension did not even have to be addressed[clxxxix].

A noteworthy process dynamic here is that were the case in the reverse order, this principle would certainly not be applied. Bearing in mind the flavour of its jurisprudence to date on the importance of market efficiency in mergers, it is simply inconceivable to observe the tribunal passing over averments and submissions about materially anticompetitive behavior in any matter.

That since the public interest case was so robust in a given matter; market efficiency did not need to be considered at all. To place this aspect further into perspective, the public interest considerations that were being mooted, if we can rely entirely on the averments of the merger entities[cxc] were, in any event, positive ones and nothing, for instance, anywhere near "massive merger specific retrenchments".

The Author agonized much over with the approach to simply dispense with the consideration of a public interest consideration, to wit, in this case BEE, purely because the market efficiency case was positive for the merger.

[clxxxviii] Case No.26 Large Merger ,DEC 1999 Competition Tribunal website
[clxxxix] Case No.26 supra
[cxc] Which matter as we shall see below may be more vexed than that.

Indeed, as the "loop clearance" process goes in statute driven practice, public interest issues are not even considered until the market efficiency question is addressed.

The author now wonders, however, whether in the light of the approach in this case the tribunal can, with respect, be said to have somewhat written in a "casuistic/ judicial" proviso to section 12 A of the Competition Act in relation to public interest issues. A discretion creating type proviso perhaps qualifying the provision in such Act making for the secondary consideration of public interest issues that reads something like "provided the tribunal; may dispense with the consideration of public interest issues if it deems it unnecessary in the circumstances of any case"?.

In terms of section 12A (1) of the Competition Act, does the tribunal , as a matter of law and legal compliance, not have to put each merger matter through the "double loop' acid test of soundness in respect to market efficiency and of its impact on the public interest criteria front?. Are both of these "loops" not specifically enunciated as peremptory to be effected in terms of this particular provision?.

Do not the words in Section 12 A (1) of the Competition Act, in respect to the market efficiency determination process, to the effect that the Tribunal must "initially determine"[cxci] not implicitly themselves suggest that a secondary or "subsequent" analysis, to wit, the public interest dynamic, is automatically to follow.

Indeed, the words in Section 12 A (b) of the Competition Act, providing that the Tribunal should,"(b) otherwise determine whether the merger can or can not be justified on substantial public interest grounds by assessing the factors set out in sub section (3)" are the enabling text for loop 2 of the

[cxci] Brassey and five others, 345supra

process, loop 1 having been facilitated by the preceding sub section thereof starting with the letter (a). Notwithstanding the use of the word "otherwise" which is potentially misleading on a shallow reading of the said sub section 12 A(b),a careful reading of the so called 2 "loops" of such section 12 A discloses a process of phased analysis and not one of alternative analysis.

The writer is by no means suggesting that even a particular category of public interest contemplated by the said provision that is quite manifestly not occasioned by the facts should be looked into perfunctorily just for purposes of cold, formal, "go through the motions" type statutory compliance.

What is contemplated is a matter like this one, where the merger entities specifically presented a certain public interest issue as a key and material consideration in their merger consent application, that there was a significant. Black economic empowerment dimension to the mooted merger entity superstructure.

Equally weighty in its potency herein is the fact that neither the Commission in its submissions to the Tribunal nor the court itself in its findings ever even suggested that the said mooted BEE dynamic was not material or significant in its nature or import The reason for this could be that there is no indication in this matter that the enquiry into the BEE submissions of the merger entities was ever in earnest made at all a "second loop" phase process..

It would appear that the tribunal took the simple view that since the said BEE considerations were not going to alter its inclination to allow the merger, then considering the same amounted virtually to a waste of the court's time.

If that were, indeed, the underlying thinking then the niggling aspect is how could the court have decided to allow a merger having only gone through one of the two statutory loops of merger analysis clearly contemplated by the Competition Act?

Indeed, if this were a fiercely contested matter, would an appeal not be competent on the simple point of law that the court had totally neglected taking the matter through one of the two imperative legs of merger analysis? .

The obvious argument against such an appeal would be that the would be appellant's case would not have been advanced by a finding that accepted the merger entities' submission that the merger were positive for black economic empowerment, as that would only have strengthened the court's resolve to approve the merger. Then again that would proceed on the premise of an assumption, to wit, that having made a proper inquiry into the BEE considerations the court would found them, indeed positive for BEE. Is that, however, necessarily true in every such case?

Surely the primary question remains .Is the election not to consider a specifically averred and evidentially documented public interest dimension a matter within the judicial discretion of the court or a matter of fundamental and absolute peremptory legal compliance?

Is it of the essence of the merger approval process or a matter the tribunal can dispense with in an absolute or qualified judicial discretion?

The author's view is firmly that this is of the essence of the merger analysis process and that there is, with respect, no discretion given to the tribunal in this regard.

Parliament in framing the said section 12A(3) of the Competition Act and its aforesaid linking sister provisions in respect to public interest considerations surely firmly guarded against making the determination of the same at all a matter of judicial discretion.

Were the question of whether the public interest was considered or not in a given matter a matter for judicial discretion then in practice the way case law in this regard would develop would resolve itself in a major way into a matter of the jurisprudential hue of the particular panel of the tribunal considering a given matter.

It would assuredly encourage "tribunal panel shopping" of sorts by Counsel for the litigants, with merging entities with a particularly awkward matter from a public interest stand point possibly tempted to maneuver and have their matter heard by a panel of the tribunal that might generally not be particularly well disposed to the whole doctrinal notion of "the public interest". This, if it were to occur, would be a distinct negative for the development of South Africa's competition jurisprudence.

As to whether or not to treat of public interest considerations as distinct from those of buttressed ,peremptory ,entrenched and absolute legal compliance.

In the author's view, once the market efficiency loop of the analysis process has been cleared, at the very least, a preliminary inquiry into whether or not there are any public interest considerations emergent on the facts must ensue. Once it emerges from such preliminary inquiry that there are indications that (a) certain significant public interest consideration(s) is (or are) even apparently emergent, then the tribunal has to enquire into and determine the same in earnest.

What is the point of doing such if and when it will not alter the decision of the tribunal anyway?

Two reasons.

First and foremost the Tribunal does not know what the outcome that it has not yet reached will be. Neither, indeed, is it judicially supposed to know anyway, before it makes that enquiry in earnest into the dimension of public interest issues.

What, for example, would we make of a hypothetical instance where on enquiring deeply into a case that is allegedly very positive for the public interest the tribunal, to its shock, was to actually find that the merger application was anathema for the purposes of a certain public interest consideration?

Say, in a matter where black economic empowerment was being dangled to the tribunal as a particular strength of the given merger application and the tribunal on closer examination of the matter were to find that the claims to be favorable for black economic empowerment were, in fact, true only on the surface?

That in fact the transaction was hiding a sinister insidiously camouflaged anti black economic empowerment dimension? So much so that the tribunal could not then in fact see itself approving such a merger?

In other words prior to a due process enquiry into the merits of the public interest question presenting in a given matter, a proper call on the true status in that regard can surely not be safely made

Secondly, it seems to the writer that Parliament also contemplated the development of a body of case law where, *interalia,* the treatment in some

detail by any competition-deciding forum seized with a public interest determination question, as occasioned (black economic empowerment, no less) would gradually but increasingly augment the impact of this new competition law dynamic in South African society.

Even if it were proved that it was not a particular concern of Parliament in so framing the said new Competition statute, it is clearly desirable for the development of greater certainty on the breathing propensities of this new lung [cxcii] of South African competition law and practice, that the competition law bench does not, with respect, lightly by-pass opportunities to treat of these considerations in the judgments of the tribunal.

Otherwise, case law on some aspects of the doctrine of the public interest may remain thinner than it could be, well into the future. This, in turn, could possibly stunt the development of the fledgling keenly public interest conscious culture of regulating competition in the country.

It is arguable that even where these observations of the tribunal amounted to no more than *obiter dicta* in certain instances, nevertheless the approach thereof to such newly affirmed criteria of our new body of competition law would help inculturate a strong judicially enabled climate of what the same really entailed in practice.

The author will, of course, be the first to admit that *obita dicta* by definition is a natural by product of judicial reasoning, as waves are to the sea. No attempt to be prescriptive to the bench in this regard is being made, as the same would not only not be competent if attempted, it would also be like trying to hint to the mighty ocean what shape and rhythm its waves should assume...

[cxcii] To coin a phrase

3.3 MERGER TO RESULT IN EXIT OF A VERY SUCCESSFUL BLACK BUSINESS AND EXPANSION OF THE "TRADITIONAL CORPORATE RETAILERS"

In **VODACOM GROUP (PTY) LTD AND COINTEL VA (PTY) LTD**[cxciii] the proposed merger was to see the exit of what appeared to be a particularly thriving black owned business from this particular sector of the market and the further growth of "one of the traditional corporate retailers"[cxciv].

There were also some intimation on record that Mr. Hassid of Magic Merkel (the target firm) had been pressurized to enter into the sale by Daimler Chrysler[cxcv]. Notwithstanding this, indications were clearly that he now wished to proceed and had formally disclosed it of record that he had no issue with the sale's proceeding to completion.

With this firm emergent posture of the seller the tribunal's hands were then tied and it could not pursue the issue of the alleged forced sale. Neither could the alleged exit of what appeared to be a particularly thriving black owned business and the further growth of "one of the traditional corporate retailers" be made an issue.

It would appear, this so as the ones that would ordinarily be sought to be empowered were, in this deal anyway, also very much pleading for the merger to be approved. As emerges in the immediately following Vodafone case and in the Tepco case[cxcvi], purporting to "protect" the previously disadvantaged by gainsaying their business and investment decisions is fraught with thorny difficulties; accusations of paternalism not being the least of these. In the event the merger was approved. Unconditionally

---

[cxciii] CASE NO. 52/LM/JUNE 05 Competition Tribunal website
[cxciv] Case NO.52 Supra
[cxcv] Case NO.52 Supra
[cxcvi] infra , Para 3.11, 83

3.4 BEE CONSIDERATIONS AND PROCEDURAL ISSUES

In **VODAFONE GROUP PPL AND VENFIN LIMITED / BUSINESS VENTURE INVESTMENTS NO. 951 LIMITED AND VENFIN GROUP FINANCE (PTY) LIMITED AND STEERS**[cxcvii] on a procedural question the Tribunal clarified the legal point that in terms of the Competition Act, it did not have the legal authority to instruct parties into whose favour they should dispose of their assets[cxcviii].

To coin a phrase, the Tribunal stated that it was not "cupid's quiver for consummating nuptials of the merger species". At the very most, the Tribunal is authorized to deny merger consent on the grounds set out in the Competition Act and accordingly no party could properly seek relief in terms of which the tribunal had to issue an order directing a party disposing of its assets as to who to sell those assets to. [cxcix] The nearest relevant provision in the Act is section 12 A (3) (c) which states:

"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 the merger will have on the ability of small firms or firms controlled by historically disadvantaged persons to become competitive." The tribunal found that no lawful reading of even this provision could confer on the Tribunal the power to direct a party as to whom to sell assets to[cc]

The black owned business being taken over was resoundingly acknowledged to be quite successful, indeed. Accordingly, whatever other motive may have contributed it can hardly be disputed that its being merger targeted was manifestly triggered by the success story that it was,

---

[cxcvii] CASE NO. 111/LM/NOV 05 Competition Tribunal website
[cxcviii] CASE NO. 111 supra
[cxcix] Case NO.111 Supra
[cc] Case NO 111 Supra

which made it quite attractive to the acquiring firm. In that light competitiveness could hardly be said to be something it was materially or particularly in need of.

The said section of the Competition Act, in any event, does not stipulate an "increase" in competitiveness where it is already in meaningful existence. The word employed "become" has a patently transitional contextual sense to it; that of facilitating "becoming" competitive.

Viewed differently, the interpretation of the application of this provision can only be proper when such firms sought to be empowered's quest for competitiveness is viewed in the context of main stream big business, from which the proprietors of such black firms were basically denied or limited access in a plethora of ways and for a number of reasons; hence disadvantaged.

Moreover competitiveness is surely an elastic concept as distinguished from a rigidly absolute one. "To be competitive" therefore arguably includes "increased" competitiveness". Once a black owned business ceases to be so owned, any increase in competitiveness it may acquire in its merged form would patently not be a thrust in the direction of increasing the ability of small business, or firms controlled or owned by historically disadvantaged persons, to become more competitive.

Nevertheless, both expressions, to "become competitive" (which is already in the law) and to "become more competitive" followed by the words "as the case may be" would arguably have been a more versatile, comprehensive and less controversial way to couch the terms of this aspect of the Competition Act.

The tribunal herein further drew attention to its having adopted "a deferential view" to public interest issues in its construction of the terms of

the Competition Act, where "some other instruments of regulation" pertain to similar issues"[cci].

It was yet further highlighted that in the Shell/Tepco decision the Tribunal noted, "the role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments."

The Telecommunications Act and the ICASA Act were alluded to as pieces of legislation in point in that regard, with the ICT Charter being mentioned as relevant in that these instruments all address "more directly and appropriately the equity issues raised by the objectors" than does the Competition Act's merger control provisions[ccii].

Accordingly, the tribunal ruled that the objection filed was of no legal consequence or "substance." The merger was accordingly approved unconditionally.

3.5 BEE AND MINING CHARTER CONSIDERATIONS

In the matter of **PAMODZI INVESTMENT HOLDINGS (PROPRIETARY) LIMITED ALLIED AND PRODUCTION INDUSTRIES HOLDINGS (PTY) LTD & OTHERS**[cciii] the parties to the merger represented to the court that the subject merger would enable RBN to expand the scope of its activities in the mining industry.

Furthermore, the merging entities stated that it would be through the merger project that the Implants Group would be enabled to accomplish "the objectives of the MPRD Act and the Mining Charter".

[cci] Case NO.111 Supra
[ccii] Case NO.111 supra
[cciii] CASE NO. 22 Large Mergers MAR,2006 Competition tribunal website

Other than this positive aspect the Tribunal found no other "public interest issues" in this matter. In agreement with the Commission' submissions the Tribunal approved the merger unconditionally.

3.6 BEE CONSIDERATIONS: ENGEN ALREADY EMPOWERED AND THEREFORE NO MERGER SPECIFIC EMPOWERMENT CONSIDERATIONS: ANTI COMPETITIVE MERGER TO IMPACT NEGATIVELY ON ALREADY COMPLIANT OIL COMPANIES

In the **SASOL LIMITED, LIMITED, PETRONAS INTERNATIONAL CORP AND SASOL OIL (PTY) LIMITED ENGEN LIMITED**[cciv] **CASE** the only public interest benefit posited was in respect to the BEE opportunities allegedly afforded by the proposed merger.

This line did not inspire the tribunal as Engen was already empowered and Sasol admitted that it was introducing "empowerment partners into its fuels business" merger or no merger. In other words such empowerment initiatives were not merger specific[ccv].

Notwithstanding whether the merger took place or not, Sasol Oil would imperatively, as per the dictates of the industry specific empowerment charter dispose of the portion of its equity to "historically disadvantaged persons" necessary for it to achieve compliance in this regard[ccvi].

Indeed, by this time most, if not all its major competitors in the fuels energy sector had already complied in this regard and such compliance pressures on SASOL OIL were probably already intense.

[cciv] Case No.101 Large Mergers,Dec2004
[ccv] Case no 101 supra
[ccvi] Case No 101 supra

The tribunal also took a particularly dim view of the emergent "anti-competitive" effect of the proposed merger and considered that it would significantly negatively impact the retail arms of the Opposing Oil Companies where, as it turned out, the most significant Black Economic Empowerment had to date taken place[ccvii].

The tribunal was particularly persuaded in this vein by the eloquent input of Mr. Mncwango of Masana, who disclosed that the proposed merger, especially if it resulted in the "prioritization against the Oaks commercial and industrial customers" contended for by the merging entities, "would lead to the demise of Masana"[ccviii].

It was submitted on behalf of the merging parties that the merger, if approved, would also enable a more "balanced company' that would in turn advance the interests of the company and hence reduce "the cost of capital and better enable the empowerment partners to fund the acquisition of their Stake"[ccix].

The tribunal noted that no real effort was made to demonstrate this contended advantage and the Tribunal was not persuaded that the same, even if it were proved, could "ever countervail" the profound effect of a probable "reduction of competition in the markets" pertinent to the merger matter.

The tribunal also expressed its distinct unease in what, for all intents and purposes, was a "direct trade off between our competition finding, on the One hand, and the cost of empowerment financing, on the other".

The Tribunal was strongly persuaded that "the "balance'" sought

---

[ccvii] Case no 101 supra
[ccviii] Case No.101 supra
[ccix] Case No 101 supra

and underpinning the proposed merger transaction increased the future outlook of the merger entity's market power.

It was ultimately for these reasons that the merger transaction was not approved[ccx]. The strenuously driven BEE centric alleged prospective public interest benefits of the proposed transaction, besides the difficulties of proof of their efficacy and of their merger specificity, could not in the end torpedo the overwhelming anti competitive market power attributes bedeviling the prospects of this merger application.

3.7 MERGER TO BRING BEE ENTITY INTO MARKET IN ISSUE AND TO CREATE A SIGNIFICANT NUMBER OF NEW JOBS

In **ANGLO SOUTH AFRICA CAPITAL (PTY) LTD, EYESIZWE COAL (PTY) LTD, MAFUBE COAL MINING (PTY) LTD AND NORTH MINING BUSINESS AND ADDITIONAL RESERVES**[ccxi] the tribunal noted that the merger would enable a BEE entity's entry into this market, the steam coal market band and the prospect of the creation of 500 extra jobs that would submittedly be facilitated by the merger.

While it is quite common in its body of case law for the Tribunal to be quite wary of the prospect of significant merger triggered retrenchments, it seems to the author rather rare for the Tribunal to particularly laud the creation of new jobs.

In this case the Tribunal in addition to indicating that there were no negative concerns on the public interest front actually highlighted that the merger was, indeed, positive in that regard. This was clearly an allusion to

---

[ccx] Case No. 101 supra

[ccxi] Case No.44 Large Mergers, May 2005,Competition Tribunal

the creation of the 500 new jobs. The merger was accordingly approved free of conditions[ccxii]..

3.8 SMALL BUSINESS ENTITIES OWNED BY PREVIOUSLY DISADVANTAGED PERSONS TO BE AFFORDED GREATER COMPETITIVENESS: NO IMPACT ON EMPLOYMENT

In **COMMUNITY INVESTMENT VENTURES HOLDING (PTY) LTD, COMMUNITY INVESTMENT VENTURES (PTY) LTD AND COMMUNITY INVESTMENT HOLDINGS (PTY) LIMITED, CIE GROUP (PTY) LIMITED**[ccxiii] the submissions of the merging entities disclosed that the merger would impart no negative effects on employment enabled by that the businesses would go on doing business after the merger as before it.

According to the merger parties one of the key advantages availed by the merger was that it would allegedly strengthen the capacity of "small businesses or firms controlled by or owned by historically disadvantaged persons to become competitive".

One of the observable quirks here is that the Tribunal does not speak directly to these alleged claims of the project capacitating the said small firms to become more competitive.

In some matters where a positive public interest consideration was being touted, when skeptical about a submission the tribunal would expressly state it. If it was of the mind that the claims were unquantified, like it was in the proposed major petroleum merger between interalia Sasol and Engen[ccxiv], it actually clearly so indicated .

[ccxii] Case No 44 supra
[ccxiii] CASE NO.23 Large Mergers MAR 2005, Competition Tribunal Website.
[ccxiv] Supra, 68, Para 3.6

In this particular matter one is left to speculate whether the tribunal's stating no more than the fact that such claim was made by the merging parties discloses its concurrence with the merging entities' claim or its veiled skepticism.

Perhaps the indication at the end of the written judgment that "there were no significant public interest considerations" was the Tribunal's way of disclosing that whether the merger parties were right or wrong, their point would not have altered the public interest landscape in this regard to any degree that really mattered.

In the event the merger was approved unconditionally[ccxv].

3.9 AFROX –"MEDI-CLINIC"CASE – THE GENUINESS OF THE PRESENCE OF BEE CHARACTERISTICS AND THE IMPACT THEREOF TESTED BEFORE TRIBUNAL

In the matter of **BUSINESS VENTURE INVESTME NTS 790 (PTY) LTD ("BID CO") AND AFROX HEALTH CARE LIMITED ("AHL")**[ccxvi] several issues were examined, one of them being the effect of the alleged presence of BEE considerations on the approval process dynamics of a proposed merger.

Significantly the finally approved merger differed materially from the initially proposed merger structure placed before the Tribunal.[ccxvii]

The final transaction was minus Medi-Clinic, a significant player in the private hospital market.

[ccxv] Case No.23 supra
[ccxvi] Case No.105 Large Merger, Dec, 2005,Competition Tribunal
[ccxvii] N Hlatshwayo supra

The BEE dynamic is an important one in the prevailing South African economic climate and was a critical force in this transaction as well.

Such dynamic's impact on this transaction is aptly grasped by the tribunal and expressed in the following terms: -

"The transaction represents a rare opportunity to acquire a significant stake in a business such as a health-it is large, well placed in its sector, it also represents the first intervention by BEE Investors in the healthcare sector and is one of the largest BEE transactions ever."[ccxviii]

In the initial effort towards the merger herein in which Medi Clinic was participating, the Tribunal faced the challenge of having to determine whether this was a genuine BEE transaction and if so to what extent it was[ccxix].

In delivering its judgment the Tribunal usefully[ccxx] revisited the structure of the deal as it had first been mooted and reasoned thus:" the major reason for Medi-Clinic assuming control over A health and its BEE shareholders was to give effect to an agreement in terms of which Medi-Clinic would have acquired approximately one-third of A health capacity, thus changing the complex landscape in the private hospital market. As disturbing is the fact that Medi-Clinic had sought to achieve this outcome by the most cynical manipulation of the government and the Competition Act's support for black economic empowerment"[ccxxi] Very strong words indeed!!

It comes out manifestly clearly from such terminology that the Competition authorities simply loath anticompetitive mergers' weaving into deal structures, almost by subterfuge, BEE characteristics so that, as it were,

---

[ccxviii] Case No.105 supra
[ccxix] N Hlatshwayo supra
[ccxx] As a point of reference for future merger deal structuring
[ccxxi] Case No.105 supra

as a "Trojan Horse"[ccxxii] they can try and enter the economy without being discerned for the anti-competitive influence they really are.

In addition, the particularly powerful message here is that the most compelling presenting BEE case will not in and of itself *per se* warrant its being accommodated by the tribunal if it is housed in a particularly unpalatable market inefficient merger vehicle.
The merger was finally approved subject to some conditions and it was termed by the Tribunal to be "an important boost to black economic empowerment"[ccxxiii]

3.10 DO THE DYNAMICS OF FOSTERING AND ENHANCING A BEE CULTURE INCLUDE ARTIFICIAL PRESERVATION OF A FAILING FIRM THAT WILL NO LONGER BE CONTROLLED BY PREVIOUSLY DISADVANTAGED PERSONS;IF THAT, SO AT ANY COST? THE RELATIONSHIP BETWEEN BEE, OWNERSHIP AND CONTROL REVISITED

In the ***SHELL*** **SOUTH AFRICA (PROPRIETARY) LIMITED ("SHELL SOUTH AFRICA")AND TEPCO PETROLEUM (PROPRIETARY) LIMITED** matter[ccxxiv] we see the entity Thebe Investment Corporation ("Thebe'), a black empowerment investment holding company incorporated to mobilize economic opportunities to empower previously disadvantaged people and communities, the proprietor of Tepco, "an employer of 38 people, 80% of whom were historically disadvantaged".

Tepco was the proprietor of 14 gas stations around the country and, quite significantly, "was failing".

[ccxxii] N Hlatshwayo supra
[ccxxiii] Case No.105 supra
[ccxxiv] *CASE NO66 Large Merger OCT,* 2002 Competition Tribunal website

Thebe offered to sell Tepco to Shell South Africa and as part of the deal structure simultaneously "acquire 17.5% to 25% of Shell South Africa Marketing"[ccxxv].

Shell South Africa Marketing sought to retain the Tepco brand as a distinct and stand alone brand for the immediate future, to grow it in the market for as long as it could be profitable, to maintain Tepco's management which was very largely black[ccxxvi].

In keeping with the South African oil industry's empowerment charter of placing in the region of 25%(twenty five per centum) of "ownership and control" with previously disadvantaged persons within a decade, Shell's key strategic intent in acquiring Tepco was to enable its so partnering with "previously disadvantaged South Africans".

Having expressed no reservations regarding the competitive efficiency of the proposed merger, the Commission submitted to the Tribunal that the merger should be approved, however, subject to three conditions, pivoted to advance the critical matter of black economic empowerment.

The conditions were: "1) that Tepco continue to exist jointly controlled by Thebe and Shell S.A., 2) that Tepco be maintained as a viable brand, and 3) that any agreement between the parties be submitted to the Commission for approval"[ccxxvii].

On the public interest issues and the Commission's submissions, the Tribunal proceeded as follows:

[ccxxv] Fox ,Sullivan and Peritz, cases and materials US ANTITRUST IN GLOBAL CONTEXT,2ND ed by Thomas West,353

[ccxxvi] Fox and others supra

[ccxxvii] Fox and others supra

On the first suggested condition: – effectively that Tepco be enabled to continue to survive in the market controlled/owned collectively by Thebe and Shell South Africa, the Tribunal's reservations with it summed themselves up in that this would effectively be a restructuring of the transaction in a configuration that was desired by none of the merging entities[ccxxviii].

The tribunal underlined the fact that Tepco was not in any event still capable of surviving as a stand-alone company. The difficulties of this particular proposition were above all else those of structure[ccxxix].

This so in that a small entity constrained in a "low return segment of the oil industry's value chain" had virtually no chance of maintaining "sustainable growth"[ccxxx].

The tribunal's attitude to the submission was ultimately that the said condition could not be a solution to what was a fundamental difficulty; that Shell as a shareholder would not cure Tepco's ailments and. even more significantly, Shell would in all probability decline accession to an arrangement that "kept the companies separate operationally"[ccxxxi].

Cutting most incisively to the marrow of the matter was the tribunal's penetrating observation, to wit, "Empowerment is not furthered by obliging firms controlled by historically disadvantaged persons to continue to exist on a life support machine"[ccxxxii].

Quite soundly, the tribunal frowned on what seemed to be an attempt to resuscitate a firm owned or controlled by historically disadvantaged

---

[ccxxviii] Fox and others supra
[ccxxix] Fox and others supra
[ccxxx] Fox and others supra
[ccxxxi] Fox and others supra
[ccxxxii] Fox and others supra

persons and keep it on "life support' merely to preserve its BEE status[ccxxxiii]. Indeed, considering "empowerment " as a dynamic force *per se* , one has wonder as to what the preservation of a "life support" status has to do with empowerment? It has nothing to do with growth or strengthening which are central concepts to the very notion of empowerment. On the contrary in seeking to preserve that which is definitely failing with no tangible recovery strategy, it seems to have everything to do with what could be termed "a culture of denial of imminent death".

Indeed, a touch amusingly, sight seemed to have been lost by the Commission (as the tribunal hinted) of the fact that the BEE nature of the ownership or control of Tepco was, in any event, to cease post merger (as appears more fully *infra*)[ccxxxiv].

Put in other words, despite the very best of intentions to deepen the roots of empowerment, that which seems the best BEE medicine might operationally turn out to be the worst form of slow poison to the very entity sought to be enabled and strengthened To paraphrase a common saying, "sincerity is no guarantee against being earnestly wrong".

On the second condition – that the Tepco brand be kept going as "a viable brand in the market place" the tribunal would not accept that this would be solution was" self-standing" and was of the view that it had to be coupled to the first'; If that be so, then it was burdened with the shortcomings of the first, to wit, enabling the continued limping of "a non-viable option".

The tribunal highlighted that it was not one of the merging entities' submissions that they would do away with the "Tepco brand". Indeed,

---

[ccxxxiii] Fox and others supra
[ccxxxiv] Fox and others Supra

during the tribunal hearing Mr. Shongwe, the Tepco Managing Director confirmed this fact[ccxxxv]

Since there never was an immediate intention to dispense with the TEPCO brand on Shell's part, one might add to these words of the tribunal application of the well-worn phrase, "If it is not broken do not fix it". In earnest Thebe and Tepco desired that Shell South Africa should have the freedom to make this judgment call for themselves. There was no public interest served by imposing on them the compulsory continuation of a brand name.

The tribunal looked at the other side of the coin and indicated that if it was mistaken and such latter said condition was, indeed, "self standing" then the tribunal could not grasp what anomaly the condition was intended to address, as after the merger Tepco would be "owned and controlled" by Shell SA Marketing. Thebe, the previous "controlling shareholder" of Tepco would then be shareholder in Shell SA Marketing, albeit, in the nature of things, a minority one[ccxxxvi].

"Why?" the Tribunal puzzled, devise a mechanism that on the face thereof is Intended to preserve the "competitive position" of Tepco, a company that would not any more be under the control of "historically disadvantaged persons"?

Besides, since Tepco was a failing firm at the time of the merger application, with respect, what "competitive position" was really contemplated by the Commission in that regard? Or was Shell South Africa being effectively asked to make Tepco competitive and thereby help feed an illusory notion that it had been, indeed, competitive at all material times herein? Surely, not!!

[ccxxxv] Fox and others Supra
[ccxxxvi] Fox and others Supra

Albeit the phrase "competitive position" can be used loosely to mean the "vantage" point from which a firm supposedly competes in the market place, is its use not really hollow and mere words when all party stakeholders concerned are agreed that for all intents and purposes the given firm is not only uncompetitive in its industry sector and market, but that it is in fact distinctly failing?

If Tepco, in its form before the merger was in earnest transacting an "anti-competitive agreement" with Shell, the Commission could, as per the terms of Section 10 (3) (b) (ii) of the Competition Act, have been able to mull over the issuance of an exemption on the basis that "the anti-competitive agreement promoted the ability of a firm owned by historically disadvantaged persons to become competitive"[ccxxxvii].

However, as of the nature of the mooted merger as soon as Tepco's ownership "has changed hands there can be no earthly reason for protecting its competitive position" as it would then clearly no longer be in the ownership or control of "historically disadvantaged persons"[ccxxxviii]and no empowerment purpose could possibly be served thereby.

The tribunal noted that the Commission's being at pains to disclose that it was not trying to resist the merger was all well and fine, but the stark reality was that unavoidably, interposing the condition on the purchaser would materialise at "a price".

Ironically Thebe, "precisely the firm owned and controlled by historically disadvantaged persons" would be the entity to incur such a price! A case then perhaps of black economic disempowerment, or so the writer seems to gather the Tribunal's agonizing to be here.

[ccxxxvii] Fox and others Supra
[ccxxxviii] Fox and others supra

Indeed, added the Tribunal, Tepco's poor financial health compounded the position yet further as had it been in "perfect health" the Commission would nevertheless surely have to thread with particular care when, in the name of supporting the "historically disadvantaged investors", it intervened in a business determination by such an investor.

The tribunal spotlighted consideration of the following eminently plausible scenario: Thebe, in its commercial wisdom, may have decided to consolidate and expand its interests in the leisure and tourism industry. In order to do this it may have elected to dispose of its assets in the oil industry. White owned and controlled firms obviously do this with impunity – it represents a significant and perfectly respectable mode of financing business expansion[ccxxxix].

The tribunal further hinted that the Commission should perhaps consider whether it really was the case that its suggested condition would only impact on the seller, the target firm, to dispose of its assets peculiarly to an acquirer who would be prepared to "accept these conditions". To state this in other words, Thebe in such a scenario would effectively be forced "to offer its assets at a discount" due to the fact that they would situationally be shackled and burdened with onerous conditions constraining "the post-transaction utilization of these assets"[ccxl].

The tribunal's view was that this would also limit "the capital-raising options" of entities owned or controlled by "historically disadvantaged persons". In so doing these firms would be marginalized to the periphery of the economy and to the borderlines of the sectors in which the Commission believed they were capable of making a worthwhile impact.

[ccxxxix] Fox and others supra
[ccxl] Fox and others Supra

Indeed, in a very strongly worded cautionary note, the tribunal alerted the Commission that it could well expose itself to accusations of "paternalism", supposedly from the quarters of the very BEE entities it was purporting to assist in that regard[ccxli].

The tribunal, revisiting the Commission's statutory role in this vein said it was "to promote and protect competition and a specified public interest" and that it was not to gainsay the wisdom of the business decisions of just that sector of the general public that it is duty bound to defend. That this was especially so where no hazard to healthy competition was emergent. This is one of those judgments that so eloquently speaks for itself that any commentary at this point might constitute just that one cook too many that finally spoils that broth!!

3.11 TRANSACTION POSITIVE FOR BEE AND RAISES NO ADVERSE PUBLIC INTEREST CONSIDERATIONS

In CROM GOLD RECOVERIES (PTY) LTD AND INDUSTRIAL DEVELOPMENT CORPORATE OF SA[ccxlii]: the Tribunal accepted the Competition Commission's view that not only did the matter not raise any negative public interest concerns but, on the contrary, KBH was controlled by two family trusts, the Nichol Trust (60%) and the Baird Trust (40%), whose beneficiaries were "historically disadvantaged individuals".

Minister Erwin, in opening a conference of the Commission *interalia* lauded the SONAE SOUTH AFRICA (PROPRIETARY) LIMITED and SAPPI NOVOBOARD merger in which historically disadvantaged persons were enabled to "participate in the mainstream economy"[ccxliii].

[ccxli] Fox and others supra
[ccxlii] Case No. 66 Large Mergers Feb. 22, 2002,Competition Tribunal website
[ccxliii] Case no.31 Large Mergers, May 2002 Competition Tribunal website.

He highlighted how this transaction "undertook to promote procurement strategies " to lend support to SMMEs from "historically disadvantaged communities"[ccxliv]. This was to be achieved by means of "sub contracting technical services" and enterprises owned by black people to be integrated into "sales, repairs and maintenance of gas equipment"[ccxlv]

(v) ***PART "C"***

4.0 "PARTICULAR INDUSTRIAL SECTOR OR REGION"

In **ISCOR LIMITED AND SALDANHA STEEL (PTY) LIMITED**[ccxlvi] the tribunal not only found anti-competitive considerations in the proposed merger but ones hostile to the public interest as well. The public interest perspective thereof being constituted in that "the failure of the transaction would in all probability lead to a closure temporarily or permanently of the firm, and with that a devastating impact on the region"[ccxlvii].

Moreover the tribunal noted that if the merger proceeded, the parties projected that that those affected by retrenchment post merger would be fewer than 10 (ten) and that this would impact upon "management staff (general managers, sales managers, debtors clerks and inventory controllers)".

Thereupon it was projected that a further 40 employees would leave Trident's employ "at a normal industry rate of attrition". By contrast, if the merger consent were declined Baldwin's would be compelled to close down certain of its plants and "scale back at others leading to a greater loss of employment".

[ccxliv] Competition Commission Conference,2002 ,Competition Commission website
[ccxlv] Competition Conference supra
[ccxlvi] Case No.67 Large Merger Dec 2001 Competition Tribunal website
[ccxlvii] CASE No.67 supra

This is, indeed, an important judgment in that it is a matter where the Tribunal accepted that the merger entities had "successfully discharged the onus of proving that such anti-competitive effects were convincingly offset by the efficiency gains of the merged entity".

This was presumably in invocation of the terms of section 12A(1)(a)(i) of the Competition Act, which provides that in the event that ". it appears that the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result from the merger, and would not likely be obtained if the merger is prevented.." The merger was against this background approved.

4.1 LOSS OF AN INDEPENDENT VOICE IN THE PRINT MEDIA

In **JOHNNIC PUBLISHING LTD AND NEW AFRICA PUBLICATIONS LTD** [ccxlviii] the Freedom of Expression Institute ("FEI") made written representations to the Commission that Johnnic was acquiring the Sowetan" in order to "dumb down its content" so that it could "compete vigorously" with the Daily Sun.That this purchase would result in the loss of one of "of the independent voices in the print media".

The FEI made no appearance before the Tribunal to elaborate on its sent in documented representations. The tribunal, while appreciating in principle the concern that media mergers could conceivably result in "a lessening of independent voices in the media" was not at all persuaded that the FEI had proved that, if at all there were to be a change in "the Sowetan's positioning"; that same would necessarily be a consequence of the merger transaction and that "the owners" would not have done it outside the context of the merger.

[ccxlviii] CASE NO. 36 Large Merger, APR 2004,Competition tribunal website

Neither did the Tribunal find that if there were to be a change of strategy by Johnnic on the positioning of the Sowetan, as alleged (which allegation in the Tribunal's assessment had not been proved) it would necessarily have reduced the "number of voices" in this market to a material degree.

This is yet further evidence of the fact that the Tribunal will simply not tolerate sweeping sentimental submissions that fail to shift the burden proof on the underlying allegations on to the shoulders of the merging entities. Public interest, in other words, still has to be proved like any other allegation through which a material impact is sought to be made on the proceedings; it is no magic wand for those with some socio-economic gripe to wave or some instant cure, all social diseases healing pill for them to take.

With the transaction not disclosing any significant public interest issues, the Tribunal agreed with the Commission's submission that merger consent be granted unconditionally.

(IV) ***PART D***

5.0 "THE ABILITY OF NATIONAL INDUSTRIES TO COMPETE IN INTERNATIONAL MARKETS"

In **BOART LONG YEAR (A DIVISION OF ANGLO OPERATING, HUDDY (PROPRIETARY) LIMITED AND HUDDY ROCK TOOLS (PTY) LTD**[ccxlix] something of a hobson's choice confronted the Tribunal in that from a scenario of the likely loss of about 145 jobs if the merger were permitted, non approval of the same would leave things about as negative, as 120 jobs would nevertheless be lost if the merger were not approved[ccl]

[ccxlix] CASE NO.41/LMA/AUG 03 competition tribunal website

[ccl] Case NO 41supra

The tribunal also had to contend with the reality that Boart's Springs plant had to acquire increased volumes that were realizable purely by means of the merger for it to continue operating viably[ccli].

Accordingly if merger approval were to be declined Boart's coring division would in all probability be relocated beyond South Africa, to a sister plant thereof in the United States of America[cclii].

Moreover Huddy contended that failing the merger, it would necessarily have to cease manufacturing operations and would have to become merely a distribution firm with further negative consequences for its employment levels[ccliii].

The tribunal was quite concerned that in the light of the "global dynamic of the industry", bar the merger, both Boart and Huddy would abandon some of their manufacturing activities in South Africa.

The tribunal keenly took note of the fact that jobs were on the line either way as declined merger consent on the public interest grounds of trying to prevent the loss of jobs would precipitate the "unintended" very effect of worsening the loss of employment[ccliv]. The Tribunal ended up concluding that approval of the merger subject to certain conditions was the lesser of the two evils in the quest to lessen the run on jobs in the circumstances[cclv].

This case, which has already been discussed supra is, in this instance, cited in relation to the discussion of the aspect of limiting the "ability of national industries to compete in international markets" contemplated in

---

[ccli] Case No.41 supra
[cclii] Case No.41 supra
[ccliii] Case No.41 supra
[ccliv] Case No.41 supra
[cclv] Case no.41 supra

section 12A(3)(d) of the Competition Act and discloses characteristics of "the failing firm" phenomenon.

Since Boart would have moved its manufacturing in this regard to one of its US plants, from a point of view of the firm as a South African entity and for purposes of its South African operations, South Africa would have lost such manufacturing for export capacity and the South African entity would have lost the export business it was enjoying due to such manufacturing, as the same would cease with non approval of the merger.

The question that is moot, though, is whether the locally operating subsidiary arm of a foreign multinational falls strictly within a "national" industry for the purposes and within the parameters that Parliament had in mind when it fingered the mischief in this regard in framing section 12 A (3)(d)[cclvi] of the Competition Act?.

The word "national" is not defined in the Competition Act and one is left to wonder whether it was intended by Parliament in a parochially patriotic sense, that a firm had to be South African for all intents and purposes; from registration, inception to operations and owned predominantly by South Africans for it to form part of a national industry or did it suffice for it to simply have an operational presence locally in some industry? This, a pertinent question, especially in a political economy transformation obsessed socio-political environment in South Africa at the time of the enactment of the said competition statute?

Again perhaps the matter is really a simple one and the reason that the word "national" was not even defined by the drafters of the Competition Act was because it was intended to have its laid back ordinary dictionary meaning, which the Oxford Concise English dictionary, at any rate, defines

[cclvi] Brassey and five others 345

interalia as "of or common to a nation or the nation". In other words simple operational presence within the national boundaries would presumably suffice to make a firm belong to the pertinent industry to which that firm's operations are customarily accepted to belong.

From Boart's own point of view, if indeed it formed part of a "national" industry, relocating its said manufacturing operations from Springs to the US would have meant conducting the same manufacturing within a probably higher production fixed overheads environment, including for instance labour input costs. This could well have compromised its capacity to maintain sufficiently competitive pricing compared to that presumably enabled by the cost structure of production in Springs, South Africa.

To the extent that such would have influenced higher the price at which Huddy's would sell the same kind of products after they were manufactured at a higher production cost base, it could conceivably have alienated some its customers and shrunk its market share overseas. On the face of it this would appear to qualify as a case within the meaning of the said section 12 A (3)(d) of the Competition Act.

After all are certain US multinational firms not infamous for moving significant production overseas, especially to so called "sweat shops" in the Far East (and to some extent to Africa) to avoid the high costs of production in the US; especially labour related ones or, as the Americans would put it, "labor" induced ones ?

The Tribunal, in any event, finally approved the merger.

(iii) PART "E"

6.0 A BIRD'S EYE'S VIEW OF SOME KEY CONTRASTS WITH THE SOUTH AFRICAN APPROACH IN THE TREATMENT OF PUBLIC INTEREST CONSIDERATIONS BY CERTAIN FOREIGN COMPETITION LAW JURISDICTIONS

In contrasting the South African merger analysis approach with that of some key foreign jurisdictions, a key distinction that is brought up by the authors of the leading South African work, *Competition Law,* is the fact that in countries such as the United States of America, Canada, Australia and the European Union "there is no separate "public interest" analysis under the law."[cclvii] It would be simplistic, however, to pretend that the competition authorities in such jurisdictions act in an environment free from any influence from "broader public interest and political factors"[cclviii].

The fulcrum that tilts the scale in a comparison of such jurisdictions' approaches to the South African one is that their legal competition analysis apparatus does not dedicate a compulsory, self-contained consideration and determination of the "public interest" dynamic as distinct from the pure market efficiency analysis exercise.

The approach in the United Kingdom, however, is fairly different, as basically, instead of a specialized court performing such functions, a public and politically accountable functionary, the Secretary of State for Trade and Industry applies a "broad based "public interest" "test" in determining the appropriateness or not of approving a proposed merger.

The one variation to this that the author encountered in the United Kingdom's approach was that in the event of it being deemed by a court

---

[cclvii] Brassey and five others
[cclviii] Brassey and five others

that any "restrictions or information" in any agreement were contrary to the public interest, then "the agreement shall be void in respect to those restrictions or information provisions". [cclix]

In the United States some of the most significant antitrust exemptions include those availed to labour Unions and applicable to collective bargaining agreements.

A special exemption applies to the activities of Unions within certain limits.

In the Case of Apex Hosiery v Leader the United States Supreme Court held that "Union monopolization of the labor supply does not violate the antitrust laws". A year later in a United States court it was held that the union undertakings were exempt from anti trust scrutiny "so long as a union acts in its self interest and does not combine with non labor groups" in realizing its ends. [cclx]

Going back in the history of antitrust law in Israel, in terms of a 1959 law we see the definition of cartels and restrictive arrangements excluding "labour agreements and arrangements among producers of agricultural products"[cclxi]. These were manifestly motivated by the protection of the public interest, which deemed such groups and/or activities as warranting special protection in the interests of the public good.

There can be no doubt that the socio-political history of a country heavily influences the evolution of its legal apparatus, with competition legislation being no exception in this regard.

[cclix] JOHN AGNEW, Competition Law,London,1985,1st Ed, by ALLEN and UNWIN,135

[cclx] ERNEST GELLHORN, WILLIAM E..KOVACIC,STEPHEN CALKINS, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL ,5th ed, THOMAS WEST,1994,574

[cclxi] CORWIN D.EDWARDS,CONTROLS OF CARTELS AND MONOPOLIES, An International Comparison,1st Ed,1967by OCEANA PUBLICATIONS,352

In the sense of competition legislation, the concept of BEE would appear to be unique to South African competition law and must constitute the most significant difference with the said western competition regulation jurisdictions in the application infrastructure and in the dynamics of the doctrine of the "public interest".

South Africa's particularly skewed per capita income at the time of political transition in the mid–nineties had a very weighty impact on the "historically disadvantaged persons" of that country and evidently persuaded the post apartheid political powers that a unique codified entrenchment of "public interest" in both substantive law and process was peremptory to tangibly and systemically alleviate the key historical disparities.

In this vein it is instructive to consider the remarks of the then South African Minister of Trade and Industry in a key note speech to a Competition Commission conference:" A key objective of the newly elected government in 1994 was to develop and grow the economy, expand the economic opportunities that were denied to so many of our people and ensure that patterns of ownership started to reflect the demography of our country. These policies were set out in the Reconstruction and Development Programme...and the result was a body of law that stressed competition within the structural change in both the South African and the global economy .In addition. Government needs to create opportunities for South Africans to participate meaningfully in the economy, particularly historically disadvantaged individuals" [cclxii]

It is in this regard as well notably distinct from the relatively uncodified (and arguably less stringent) approaches of the said western countries to the matter of the "public interest".

[cclxii] Minister Erwin's speech, Competition Conference, Competition Commission website

From a totally different perspective we see again how politics can create a climate that takes a deep sense of the importance of their functional independence for the competition authorities to ignore.

In the US Boeing Company /McDonnell Douglas Corporation case we see politicians weighing in into the controversy quite early, with Americans pronouncing the merger "good for the American economy" and one politician even adding that it was good for America "even if consumers of airplane seats are somewhat worse off"[cclxiii].

The EC Competition Commissioner of the time (as the name then was) had such strong reservations about what was viewed by the Europeans as "blatantly anticompetitive and seriously harmful to competition and to Airbus" that she issued a threat that if the merger were consummated without European Community approval, the European Commission would "impose prohibitive fines on Boeing and might seize Boeing planes flying into the European Union." [cclxiv]

The US federal trade Commission in considering the matter pointed out that it had no discretion to approve "anti competitive but "good" mergers". and observed that, after all, the "national champion" contention was "almost certainly a delusion"[cclxv]; that the "best way to boost the United States' exports, address concerns about the balance of trade and create jobs" was to insist on United States' firms competing vigorously at home and abroad"[cclxvi]. The Federal Commission also highlighted that the resultant "strengthening of a dominant position" would much impede

[cclxiii] Eleanor M Fox, cases and MATERIALS ON THE COMPETITION LAW OF THE EUROPEAN UNION,2nd Ed ,2002 by West Group,955
[cclxiv] Eleanor M Fox immediate supra
[cclxv] Fox supra, 955
[cclxvi] Fox supra, 955

competition in the common market and within the sense of "Article 2(3) of the merger regulation[cclxvii].

The Federal Commission also considered "the important interest of the United States" of which it was alerted by the US department of Defense and the Department of Justice who appeared on behalf of the US government[cclxviii] .The Federal Commission eventually accepted a complex of undertakings from Boeing which embodied a mix of structural and behavioral inputs and allowed the merger subject to such elaborate conditions.

The Federal Commission further put in place a stringent monitoring regimen to ensure compliance with such conditions. Finally it firmly cautioned Boeing to ensure accessibility of its facilities and enable this monitoring process to proceed unimpeded[cclxix].

While these measures largely assuaged the anxieties of the European Community, a Pandora box of controversy opened up regarding the "extraterritorial application of national antitrust laws to mergers involving foreign companies"[cclxx].

These kinds of controversies are here to stay in the modern world as the acceleration of globalization logically discloses more of the same, with most of the world's largest mergers' implications reverberating across a few oceans, a diverse number of national borders and, to coin a phrase, a mix of geo-legal competition jurisdictions.

[cclxvii] Fox supra 955
[cclxviii] Andrew I Gavil, William E. Kovacic, Jonathan B Baker, 1st Ed, 2002,76
[cclxix] Gavil supra
[cclxx] Gavil supra 77

Indeed, a penetrating look must be taken at the veiled complex inner state of this giant corporation "ruled" fast globalizing modern world; what it has become and is yet further becoming.

Hertz[cclxxi], going to print as early as the year 2001 records that: "Propelled by government policies of privatization, deregulation and trade liberalization, and the advances in communication technologies of the past twenty years, a power shift has taken place. The hundred largest multinational corporations now control about 20 per cent of global foreign assets, fifty-one of the hundred biggest economies in the world are now corporations, only forty- nine are nation states"[cclxxii].Could it even be seriously debated that a significant degree of such corporate multinational expansion has surely taken place by vehicle of mergers, albeit numerous takeovers too?

If use of American folk's casual language could be excused for just this phrase, perhaps "we ain't seen nothing yet" in this regard. If Hertz's now dated statistics are any yardstick to go by, the corporate multinational turbines were only just starting to turn!!

Characteristic of the bundle of contradictions that this modern world has increasingly become, accentuating and inhibiting such globalization is a phenomenon that so often in the history of world commerce has triggered trade wars. It has also flattered to lure and deceive by presenting as a noble "broadened concept" of "the public interest". I will phrase it "National interest is public interest". From a European Commission perspective (as it then was) that should probably read "Regional interest is public interest".

[cclxxi] Hertz Noreena, THE SILENT TAKEOVER, Global Capitalism And The Death Of Democracy, Arrow,2001

[cclxxii] Hertz supra 9

While these phrases embody interests that often co-incide they clearly are not identical in nature nor are their terms readily interchangeable.

In this regard it is interesting to note certain provisions of the US statute, the Webb- Pomerene Act[cclxxiii] in terms of which the US President has the legal authority to exempt "some defense contractors and small businesses" from the antitrust laws "on finding that the exemption is in the national interest". There we go again, alas!! ; so long as there are nations and regions of nations on earth, it will not go away; "national interest is public interest"; "regional interest, is public interest".

This dynamic, while apparently self evidentially common sensical as to the merits of the thinking sustaining it, is perhaps not quite so simple. This being due to that not all public interest is predicated upon an expressly enunciated national interest rationale in the very terms and text of the enabling statute. The nub of the author's contention in that regard being that not all-public interest dynamics are driven purely by nationalistic protectionism.

The fact that the South African Competition Act requires caution to be exercised on how a large merger (say, between two South African firms with a trading presence only in South Africa) could impact on the employees of the merger entities need not trigger the ire of any nation across the Atlantic (or for that matter the Indian Ocean). After all, is not the fight against reduced employment levels one of the rare issues on which the Nations of the world, at least, claim to concur? .

[cclxxiii] No.15 U.S.C.A, see ANTITRUST cases, ECONOMIC NOTES AND OTHE MATERIALS 2nd Ed,, 1981 WEST GROUP, 76, 1054.

(vi) PART "F"

7.0 SOME CONCLUDING CONSIDERATIONS

In concluding, instead of making some sweeping coverall remarks, the author has decided instead to discuss a bouquet of *capita selecta* that arguably does not fit snuggly in any of the aforegoing discussion sub-categories. These nevertheless present public interest issues that are important topics in their own right in the context of this research report. The said topics now follow sequentially.

7.1 THE PRESENCE AND/OR ABSENCE OF PUBLIC INTEREST CONSIDERATIONS: A QUEST FOR THE NEGATIVE OR A HUNT FOR THE POSITIVE?

INDUSTRIAL DEVELOPMENT CORPORATION AND ANGLO AMERICAN GROUP ("KUMBA RESOURCES")[cclxxiv]: -

In this matter the tribunal was of the view that the matter did not require intervention on the basis of public policy.

Gold Fields argued, in relation to the importance of the public interest enquiry, that "If a merger raises no competition problems and no negative public interest issues, it must still be prohibited if there is no evidence that it can be justified on public interest grounds"[cclxxv]. Put differently, if there is not an overall positive public interest outcome from the merger, it should be prohibited.

The Tribunal disagreed thus: -"While many already consider our public interest requirements an anathema to merger control policy, few would

---

[cclxxiv] Case No.45, 2002 Large Merger, Competition Tribunal
[cclxxv] Case No 45 supra

argue for a position that mergers are so inherently harmful, that absent a positive contribution to the public interest, a merger that raises no competition concerns must be stopped"[cclxxvi].

On the other hand the contrary position is compelling. That is, that a merger that raises no competition concerns and no negative public interest concerns should be permitted[cclxxvii].

In concluding its assessment on this point the Tribunal intimated that apart from the need to establish that the merger" will not have a likely anti-competitive effect", it must also be established that it " will not have a substantial negative effect on the public interest"[cclxxviii].

Potential employment issues were negated by the imposition of conditions in relation to both the level and number of employees to be retrenched[cclxxix].

The tribunal limited the number of retrenchments to 2,000 employees at managerial and supervisory levels[cclxxx].

The tribunal acknowledged that there was already a significant downturn in the mining industry and loss of employment was already a real concern in the industry. Nevertheless the tribunal felt assured that the retrenchments that were to occur at managerial and supervisory levels had readily re-marketable skills in terms of finding substitute employment.

[cclxxvi] Case No.45 supra
[cclxxvii] Case No45 supra
[cclxxviii] Case No.45 supra
[cclxxix] Case No.45 supra
[cclxxx] Case No 45 supra

THE DYNAMICS OF POTENTIAL CONFLICT BETWEEN TWO PUBLIC INTEREST DESIRABLES, "BEE" AND "EMPLOYMENT" PRESERVATION

Addressing the delegates in one of Commission's conferences on the common contention that acquisitions are "crucial for black economic empowerment" the then most senior officer of the Commission[cclxxxi], raised hypothetically the quandary that would present itself in a situation where a new BEE entity that is to acquire a stake and participate in a State owned company, where the deal structure was such that 40% or more of the employees of this State company were to be retrenched merger specifically. He raised the question of "whether this really suffices for purposes of BEE; How do we bring a balance to that"[cclxxxii]. He said this while drumming home the crucialness of the existence and the watchdog role of the Commission.

7.2 IS THE RETRENCHMENT OF AS MANY SKILLED WORKERS AS OPERATIONALLY BEARABLE AS AGAINST UNSKILLED WORKERS THE SOFT PREMIUM INSURANCE FOR THE APPROVAL OF MERGERS THAT WOULD OTHERWISE PROBABLY BE DECLINED ON EMPLOYMENT NEGATIVES FOR THE PUBLIC INTEREST?

In an issue of the Star newspaper's employment centric supplement "Workplace", attention is drawn to the plight of "upper level managers" in mergers where retrenchments are in the offing. The difficulty "created by the overlap between the functions of the competition authorities and the dispute resolution institutions under the Labour Relations Act"[cclxxxiii] is highlighted in this article.

[cclxxxi] M Simelane paper ,Competition Conference
[cclxxxii] M Simelane paper supra
[cclxxxiii] Workplace Staff, Workplace Supplement Star Newspaper 30th August 2006.

The contention is made therein that in recent mergers and acquisitions, the competition authorities have in instances stipulated conditions to a merger that enable a number of " senior management employees to face retrenchment" after the merger implementation.

It is therein contended that the said stipulations by the competition authorities were made "without any merger conditions or consultation having taken place beforehand with potentially affected persons".

It is represented that by the time the competition authorities have approved the merger and consultations begin in terms of section 189 of the Labour Relations Act, it is too late.

The process dynamics, it is contended, are such that whatever consultation is made "becomes meaningless" in that a statutory body has already made a prior judicially binding determination on the matter.

It is posited in the said article that"the overlap currently is too broad and requires curtailment". This is presumably a reference to the concurrent jurisdiction that the Tribunal enjoys with other statutory labour law related institutions that deal with matters that are not specifically excluded in terms of section 3 (1) (a) and (b) of the Competition Act[cclxxxiv]

It would appear food for thought that in the matters discussed herein above where senior managers were proposed to be laid off post merger, in none of them were any representations on behalf of senior employees made or invited to be made by the tribunal.

[cclxxxiv] Brassey and five others 341

It seems to have sufficed for the tribunal to settle that part of the matter on the basis that the senior employees would be factored in in respect of any submission made on behalf of the employees generally and that retrenchment affected senior employees would most probably be re-absorbed into the economy fairly easily having regard to their relatively more marketable skills.

Senior managers, of the nature of their status in the company, of course are typically not unionized. Indeed, not infrequently the interests of senior managers and those of the union in their company, sector or industry, as of the nature of the vagaries of the industrial environment, are incompatible.

One wonders whether the tribunal has an undisclosed perception that senior managers by virtue of their strategically relatively easier access to corporate information as compared to the average low skilled or unskilled labourer, that they are some of the earliest employees to know about the merger and its likely implications for their jobs?

That due to such relatively ready access to corporate information as important as imminent mergers, senior managers need no cajoling to promptly submit the representations they may need and/or wish to make in terms of section 54 of the Competition Act, regarding any reservations about the merger implications for their employment that they might wish to express?[cclxxxv].

If so, such perceptions would, with respect, be based on a premise that is, with respect, often not applicable as management cultures are not homogenous and some corporate boards may well be more secretive than

[cclxxxv] Brassey and five other 359

others prior to reaching a certain stage in their critical due diligence processes of merger preparation activity.

7.3 THE RELATIONSHIP BETWEEN SMALL BUSINESSES AND ORGANISED LABOUR IN THE CONTEXT OF PUBLIC INTEREST DYNAMICS

One might be tempted to think that in the context of small business owned by the previously disadvantaged persons and organized labour, whose members are overwhelmingly from the population of previously disadvantaged persons, that a natural alliance against organized capital might be a virtually spontaneous one. A somewhat diluted version of the old adage "the enemy of my enemy is my friend' in action, perhaps?

Not so observes Justice Lewis. In analyzing the likely emergent dynamics in the establishment of "new constituencies" as a backdrop to the inculturation of a new order flowing from the new competition legislative dispensation, Justice Lewis concludes that "even on a most populist interpretation of the act, organized labour and small business are likely to prove fickle allies at best, precisely because of inevitable conflicts, at least between their short term interests and the broader interests of promoting competition"[cclxxxvi]

[cclxxxvi] Justice Lewis supra, 618

7.4 HOW FAVOURABLY HAS THE DETERMINATION AND ENFORCEMENT OF PURE COMPETITION ISSUES AND PUBLIC INTEREST ISSUES BY AND UNDER THE SAME AUTHORITY UNFOLDED IN SOUTH AFRICAN COMPETITION LAW?

This is not a question with a single bullet answer.

Justice Lewis gives us the ideal launch in discussing this aspect by pointing out that "Our act provides nothing by way of rules and guidelines for balancing public interest and competition considerations and so these have to develop in the investigative practice and in the Tribunal's decisions"[cclxxxvii].

Bearing in mind these daunting pioneering challenges the Tribunal has developed quite an imaginative and helpful body of jurisprudence in its interpretation and application of the "public interest" tenets of the new competition regime in South Africa, while threading in unchartered waters.

As can be seen from the above discussed tension on the treatment of the category interest of senior managers in large merger triggered retrenchment scenarios, this is no simple balancing act.

Another difficulty that this report discloses is the relative lack of effective participation by labour, organized and non-organized, in the "public interest" testing processes.

It may well be that Unions and labour representatives may be far more familiar and comfortable with the other mechanisms of labour regulation than those affecting employment as a public interest consideration in competition law.

[cclxxxvii] Justice Lewis supra, 620

In this light words have hardly ever been truer than the following: that the "classic dilemma" confronting those who would dare to initiate socio-economic and political change is that "those who stand to lose from the reform are well organized and coherent, while those who will benefit from the reform and are dispersed and incoherent"[cclxxxviii]

Indications are that the Commission still faces some significant public awareness expansion, training and consciencisation challenges in these regards for process dynamics to be optimized towards the fuller actualization of Parliament's lofty public interest ambitions in the wording of the Competition Act.

The Authors of *Competition Law* caution that in the raging debate as to what is the primary object of the Competition Act that contrary to what the early decisions of the tribunal would suggest that market efficiency is the dominant aim of the those making decisions in terms of the Competition Act, that the tribunal might one day "be overwhelmed by socio-economic factors, black empowerment not least" .

Justice Davis, with a sober optimism wrestles with the same issues thus: "the reconciliation of the politics and economics of antitrust has also to take place in the law itself and in its implementation. Building a broadly based constituency for antitrust will act as a counterweight to the demands of the narrow interest groups but it will not make them go away, nor will it eliminate the substantive underlying societal concerns that put these diverse objectives on the antitrust agenda in the first place".

Determining BEE and what does not constitute BEE in the public interest context as appears in the Afrox case *supra* has its thorny parts in a post

---

[cclxxxviii][cclxxxviii] Justice Lewis, supra 619

apartheid environment where there is clearly very little tolerance for perceived slow paced transformation among the historically disadvantaged persons.

Is there really a sobering prospect that a debate in earnest could in time ensue in populist circles, that could earn the tribunal the reputation of nurturing market efficiency sentiments more dearly than BEE ones; recklessly placing the Tribunal in disrepute with a significant number of some of those putatively less initiated in the fine balancing act and delicacy of the application of these legalized policies of the land?

Some of those in favour of a pure economic efficiency competition dispensation would probably submit that the Tribunal has already gone a wee bit too far in the other way.

Indeed, dispensing "simple justice between man and man" from the bench in keeping with this famous judicial pronouncement, is more than ever before, not for the faint hearted.

There can be no doubt that Justice Lewis does not belong to the breed of the faint hearted. Weighing the nature and the implications of this structurally entrenched balancing act challenge facing the tribunal, he muses: "Judicial officers decide interest disputes all the time-there is no reason why they should find it impossible to balance the conflict that sometimes arises between the promotion of competition on the one hand and the concerns of a particular interest group on the other."[cclxxxix]

Consideration of Section 26 (2)[ccxc] of the Competition Act, while it does enable the receipt of a "response to a public call for nominations" in the process of making appointments to the Tribunal, the executive does not

---

[cclxxxix] Justice Lewis supra,620

[ccxc] Brassey supra 350

have to follow this route and neither does it have to accept all, certain, or any nominations in the event it does call for nominations at all.

In that light a significant change in the thinking of the State President of that day and/or that of the Minister responsible for competition law related issues could one day result in the appointment of a tribunal with a significantly different outlook on its role than the present tribunal does on matters of public interest, whatever one's view is on the general outlook of the present Tribunal.

Accordingly, the shifting of the sands in this regard is very much susceptible to the tribunal's term in office and the blowing of the political winds. The prevailing under current battle for Presidential succession within the ruling political party in South Africa perhaps makes scenario planning in this regard an exercise of some precariousness.

It could be contended on the contrary that there are a number of checks and balances that meaningfully limit the scope of the exercise of power in this regard by the Executive arm of government. The provisions of Section 28[ccxci]of. the Competition Act stipulates some Executive restraining criteria; interalia, that the membership of the Tribunal must not be: "3(a) an office bearer of any party, movement, organization or body of partisan or political nature (2)[must have][ccxcii] a suitable qualification and experience in economics, law, commerce, industry or public affairs (2)(c) ;[must][ccxciii] be committed to the principles enunciated in section 2"of the Competition Act."

In considering the aforegoing one wonders whether this members' qualifications sub- section could not have been more precisely framed, in

---

[ccxci] Brassey supra 350
[ccxcii] Author's amplification
[ccxciii] Author's amplification

that as it stands the impression could well be created that one needed to be suitably qualified and experienced in all the fields of endeavour specified thereunder.

Surely this is not the present practice in the appointment of tribunal members and neither does it appeal to the writer that the legislature did in earnest intend to impose such heavily onerous pre-qualifications on would be members thereof. In so intending Parliament would also have dramatically reduced the executive arm of government's choice of eligible persons for membership; perhaps, on occasion, even paralyzed the work of the court in protracted searches for sufficient fully compliant candidates. Nevertheless the wording as it stands is truly unhelpful, were it to be interpreted strictly.

Furthermore, the wording "suitably qualified and experienced" and as to so qualified and experienced by whose standards is not defined. One is left to wonder whether the tribunal might one day be faced with a request to rule on a question of the legitimacy of its own establishment, to wit, the qualificatory worthiness of its members; perhaps member by member thereof. Would its members not then, as it were, face the test of possibly becoming judges in their own cause?

Surely such a question would have to be decided by another, higher court of competent jurisdiction, probably one in the Supreme Court division of the South African courts hierarchy. This so, for the manner of exercise of authority that would really be under challenge would be that of the appointing Executive arm of the State.

The said section 2 of the Competition Act[ccxciv] is a finely balanced mix of the market efficiency and the public interest considerations embodied in

[ccxciv] Brassey and five others 340,341

section 12 A(3),in pursuit *interalia* of a stronger more versatile South African economy, of a more robust position and an increased market share for South African business entities in international commerce..

Surely the lack of a provision in section 29 of the Competition Act[ccxcv], (the tribunal members' tenure and removals provision) of a clause enabling the State President to remove or to be legally compellable to remove a member of the tribunal for evidently failing to demonstrate commitment to section 2 of Competition Act in the discharge of Tribunal business, renders the said provision a patently unenforceable one, as good as it sounds.

"Commitment" for all its discipline conjuring imagery in one's mind is ironically quite a nebulous concept for purposes of legal precision and enforceability.

Section 29(i) and (iii) pertaining respectively to the removal of a Tribunal member for "serious misconduct" and "engaging in any activity" that may undermine the integrity of the Tribunal" would appear to contemplate the usual delinquencies of misbehaving bearers of public office, that could occur in relation to other public institutions as well.

Such would include notable criminal behaviour and/or highly scandalous immoral behavior that the public generally considers particularly socially objectionable and which tends to bring the institution in which such public office is held into significant disrepute.

The State President would be legally hard put to be heard to properly bring under the ambit of the said section 2 of the Competition Act a removal of a

---

[ccxcv] Brassey and five others,350,351

member of the tribunal from office, if the member was merely philosophically controversial.

The hypothetical example comes to mind where, for instance, a member who with a fair amount of regularity delivers extensively reasoned minority judgments dissenting from those of the deliberating panel of the Tribunal on which he or she usually sits to hear matters.

This, without infrequent irritation to the other deliberating panel members of the Tribunal!. Could the repeat gainsaying of the majority decisions of the Tribunal by this one member, though not binding on the tribunal, be said to be promoting an air of notional uncertainty in the advancement through Competition law of the of the objects of Section 2 of the Competition Act; thence, can a lack of commitment to the objectives enshrined in the said Section 2 of the Competition Act by this member be therefrom inferred? Not without risking compromising judicial independence to a dangerous degree.

If this hypothetical example of "lack of commitment" may be rather far fetched, what would constitute a realistic example of such lack of commitment that would in fact be justiciable if displayed by a tribunal member. With sincere respect to the drafters of The Competition Act, if such is reasonably conceivable the author honestly battled to conjure up in his mind a concrete, non-purely hypothetical form that an incidence thereof could take.

Of the matter of minority decisions of the Tribunal, while there is no express enabling provision for the same to be made and delivered, there is a rich judicial legacy in South African law that a judge may dissent from his or her colleagues' judicial position and render a minority judgment. That in itself creates a sound platform for continuing such a trite practice. Section 31(6) of the Competition Act, in providing *interalia* that "the

decision of a panel [of the Tribunal][ccxcvi] is the decision of the Tribunal" adds a further dimension to this reality.

This provision, by virtue of the inherent counter assertion it naturally embodies, to wit, that minority judgments, if any, do *not* constitute the decision of the Tribunal, by force of inescapable implication discloses that minority judgments, for their weight in law, are also contemplated, where emergent.

7.5 WHAT HOPE FOR THE BUILDING OF NEW CONSTITUENCIES TO DEEPEN THE CULTURE OF THE NEW PUBLIC INTEREST BUTTRESSING ORDER

The sad prognosis in this regard is that it will not be the familiar structures of organized underprivileged society that will most readily take up the cudgels in the quest to deepen this new culture of emphasizing the public interest in competition law, but "firstly consumers and secondly, and more important [tly][ccxcvii], that broad inchoate mass of citizens who are comforted and empowered by the presence of institutions in their society tasked with checking the activities of powerful interest groups"[ccxcviii] .

This itself begs a question, or does it not? If say, organized labour is manifestly not as effective or as organized as it could be in pursuing the full enforcement of its constituency's public interest rights, on the flipside, as according to the concise Oxford dictionary, at any rate, "inchoate" means "just begun; undeveloped, rudimentary, unformed", how much activism promise is really latent in civil society?

[ccxcvi] The words in the square brackets are the Author's amplification for clarity.
[ccxcvii] Bracketed portion ,author's own addition for contextual clarity
[ccxcviii] Justice Lewis, supra 619

Furthermore in this vein, just how organized is "the consumer". Of all the decided matters discussed in this essay, for instance, the author can only recall the Johnnic matter[ccxcix], pertaining to the positioning of the Sowetan in the newspaper industry, where a non commercially motivated consumer body, the Freedom of Expression Institute ("FEI') actually took the trouble to have its written reservations about the merger filed with the tribunal in that matter. Again we will recall in this regard that the FEI failed to appear before the tribunal when it arguably mattered the most, to steer home its contentions in oral submissions at the hearing.

Clearly the challenge in respect to the need for greater and effectively piloted popular and consumer activism in this regard is still huge.

7.6 THE DESIRABILITY OF HIGHER CASE INCIDENCES ON SOME OF THE PUBLIC INTEREST ISSUE CLASSES

As considered herein under the discussion head of employment as a public interest category, supposedly of the nature of their particular circumstances the bulk of the incidences of public interest cases have tended to have an employment/retrenchment consideration leaning.

Having said that, lingering In the writer's mind, however, is whether this reality is purely a consequence of the intrinsic nature of the matters coming before the tribunal and not in part due to the weak advocacy of those said "dispersed and inchoate ",[ccc] poorly capitalized interest groups and lobbies. It is primarily to the benefit of such interest groups, after all, that such other aspects of public interest also feature meaningfully in the pleadings filed of record before the Tribunal and are fully ventilated at the applicable hearings.

[ccxcix] Case No 36 /2004 Large Mergers supra

[ccc] Justice Lewis, supra 619

The litigation for merger approval before the tribunal is typically brought by organized capital or by the Commission, as mergers, in the nature of things, are virtually the preserve of organized capital.

Large capital would surely not be inclined to play watchdog on whether every public interest aspect that could conceivably be pertinent to a merger application being heard has been met. In most cases such would either invite onerous approval conditions for it or in a worst-case scenario result in merger authorization's being declined.

Whatever the picture when the jury is in on this question, the stark reality is that the amount of case jurisprudence on the other aspects of the South African public interest edifice requires many more casuistic instances, to enable the tribunal's body of case law to develop greater depth and settlement in that regard.

Proceeding for a moment on the premise that lack of suitably robust and persistent advocacy from appropriate interest groups has nothing to do with the lopsided category incidence of public interest issues coming up for adjudication before the tribunal, society is clearly not suddenly going to go out if its way to alter the quirks of its socio –economic and political dynamics to enable that "balance" to result.

That will simply have to come with time in the normally fairly unpredictable ebb and flow of human affairs, whose complex exigencies have a knock on effect on the incidences and disposal time lines of issues coming before the courts for determination; those coming up before the Tribunal no less.

BIBLIOGRAPHY:

1. COMPETITION LAW, MARTIN BRASSEY, JOHN CAMPBELL, ROBERT LEGH, CHARLES SIMK INS, DAVID UNTERHALTER, JEROME WILSON, 1ST ED, 2002 BY JUTA.

2. CASE AND MATERIALS ON U.S ANTITRUST IN GLOBAL CONTEXT, ELEANOR M. FOX, LAWRENCE A.SULLIVAN, RUDOLPH J.R. PERITZ, 2ED, 2004 BY THOMSON WEST

3. COMPETITION LAW, JOHN AGNEW LONDON, 1985, 1STED, BY ALLEN AND UNWIN.

4. ANTITRUST LAW AND ECONOMICS IN A NUTSHELL ERNEST GELLHORN, WILLIAM E. KOVACIC, STEPHEN CALKINS, 5th ed, THOMAS WEST,1994.

5. CONTROLS OF CARTELS AND MONOPOLIES, an International Comparison CORWIND.EDWARDS, 1st Ed, 1967 by OCEANA PUBLICATIONS.

6. CASES AND MATERIALS ON THE COMPETITION LAW OF THE EUROPEAN UNION ELEANOR M FOX, 2nd Ed , 2002 by West Group.

7. ANITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY ANDREW I. GAVIL, WILLIAM E. KOVACIC, JONATHAN B. BAKER, 1st ed, 2002 BY THOMPSON WEST.

8. HENRY JOHN MAY, SOUTH AFRICAN CASES AND STATUTES OF EVIDENCE, 4TH ED., 1962 BY JUTA

9. ECONOMIC NOTES AND OTHER MATERIALS, RICHARD A. POSNER, FRANK H. EASTERBROOK 2nd Ed, 1981, WEST GROUP

10. HERTZ NOREENA, THE SILENT TAKEOVER, GLOBAL CAPITALISM AND THE DEATH OF DEMOCRACY, Arrow Books, 2001

11. PRESENTATION NOTES FOR CERTIFICATE COURSE IN COMPETITION LAW, UNIVERSITY OF CAPE TOWN 25-27 JULY, 2005 N HLATSHWAYO, OF WEBBER WETZEL BOWENS MERGERS &ACQUISITIONS;

12. THE WEBSITE OF THE COMPETITION TRIBUNAL OF THE REPUBLIC OF SOUTH AFRICA.

13. THE WEBSITE OF THE COMPETITION COMMISSION OF THE REPUBLIC OF SOUTH AFRICA.

14. THE "WORKPLACE" SUPPLEMENT, THE STAR NEWSPAPER, AUGUST 30, 2006.

15. FORDHAM CORPORATE LAW INSTITUTE, 2002 Ed.

16. THE POLITICAL ECONOMY OF COMPETITION LAW CONFERENCE PAPER, CREAMER KENNETH, FOR TIPS FORUM 20-22 SEP, 1998.

17. IRVINE HEATHER AND MORPHET LESLEY of Deneys Reitz Attorneys, BUSINESS AND TAX LAW REVIEW SUPPLEMENT NO.1, FEBRUARY 2007, BUSINESS DAY, 12TH FEBRUARY 2007.