



**competitiontribunal**  
*south africa*

Competition Tribunal **Annual Report 2001/2002**

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### An independent, impartial institution

The Competition Tribunal regulates mergers and adjudicates on anti-competitive business practices

### In respect of mergers, the Tribunal

- authorises or prohibits large mergers
- adjudicates appeals from the Competition Commission's decisions on intermediate mergers

### In respect of anti-competitive practices, the Tribunal

- adjudicates complaint referrals
- adjudicates interim relief applications
- hears appeals on exemptions

### Highlights of the period

- Forty-two large merger transactions decided in the period
- Fifty-six cases decided
- Record number of cases heard
- Challenging issues come before the Tribunal



on the financial statements of the Competition Tribunal for the year ended 31 March 2002

## Audit assignment

The financial statements as set out on pages 4 – 5 and 34 – 44, for the year ended 31 March 2002, have been audited in terms of section 188 of the Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996), read with sections 3 and 5 of the Auditor-General Act, 1995 (Act No 12 of 1995) and section 40(10) of the Competition Act, 1998 (Act No 89 of 1998), as amended. These financial statements, the maintenance of effective control measures and compliance with the relevant laws and regulations are the responsibility of the accounting authority of the Competition Tribunal. My responsibility is to express an opinion on these financial statements, based on the audit.

## Nature and scope

### *Audit of financial statements*

The audit was conducted in accordance with Statements of South African Auditing Standards. Those standards require that I plan and perform the audit to obtain reasonable assurance that the financial statements are free of material misstatement.

An audit includes:

- examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements;
- assessing the accounting principles used and significant estimates made by management; and
- evaluating the overall financial statement presentation.

Furthermore, an audit includes an examination, on a test basis, of evidence supporting compliance in all material respects with the relevant laws and regulations which came to my attention and are applicable to financial matters.

I believe that the audit provides a reasonable basis for my opinion.

## Audit opinion

In my opinion, the financial statements fairly present, in all material respects, the financial position of the Competition Tribunal at 31 March 2002 and the results of its operations and cash flows for the year then ended in accordance with generally accepted accounting practice and in the manner required by the Public Finance Management Act, 1999 (Act No 1 of 1999) (PFMA).

## Emphasis of matter

Without qualifying the audit opinion expressed above, attention is drawn to the following matters:

### *Matters affecting the financial statements*

#### *Contingent liability – Relocation of offices*

Attention is drawn to note 12 of the financial statements with regard to the contingent liability arising from the relocation to other premises. The final outcome and amounts is uncertain.

### *Matters not affecting the financial statements*

#### *Irregular expenditure*

As was reported in my previous audit report the part-time members of the Competition Tribunal were still remunerated up to 31 May 2001 at a rate substantially higher than that approved by the Minister in terms of section 34(1) of the Competition Act, 1998 (Act No 89 of 1998). Therefore, expenditure amounting to R46 043 is regarded as irregular expenditure in terms of the PFMA.

## Appreciation

The assistance rendered by the staff of the Competition Tribunal during the audit is sincerely appreciated.

**L A van Vuuren**  
*for Auditor-General*  
10 July 2002  
Pretoria

## Statement of responsibility

The accounting authority is responsible for the preparation, integrity and fair presentation of the financial statements of the Competition Tribunal of South Africa for the year ended 31 March 2002. The financial statements presented on pages 4 – 5 and 34 – 44 have been prepared in accordance with generally accepted accounting principles and include amounts based on judgements and estimates made by management. The accounting authority, in consultation with the executive committee prepared the other information included in the annual report and is responsible for both its accuracy and its consistency with the financial statements.

The accounting authority is of the opinion that the Tribunal will continue as a going concern in the foreseeable future.

The Office of the Auditor-General has audited the financial statements. The auditors were given unrestricted access to all financial records and related data, including minutes of all meetings of the executive committee, staff and the case management committee. The accounting authority believes that all representations made to the auditors during their audit are valid and appropriate.

The audit report of the Office of the Auditor-General is presented on page 2.

The financial statements were approved and signed by the accounting authority on 16 May 2002.

A handwritten signature in black ink, appearing to read 'DL', with a long horizontal line extending to the right.

**David Lewis**  
*Accounting Authority*  
16 May 2002



David Lewis  
Chairperson of the Competition Tribunal

The chairperson of the Tribunal presents the third annual report, which forms part of the audited financial statements of the Tribunal for the period ending 31 March 2002.

### Nature of business

The Competition Tribunal adjudicates competition matters in accordance with the Competition Act (Act 89 of 1998). It has jurisdiction throughout South Africa. The Tribunal is independent and subject to the constitution and the law. When a matter is referred to it the Tribunal may:

- grant an exemption from a relevant provision of the Act
- authorise a merger, with or without conditions, or prohibit a merger
- adjudicate in relation to any conduct prohibited in terms of the Act by determining whether prohibited conduct has occurred, and if so, impose a remedy provided for in the Act
- grant an order for costs

The Competition Tribunal was listed in terms of the Public Finance Management Act, 1999 as a National Public Entity effective from 1 April 2001.

### Objectives and targets

The role and core activities of the Competition Tribunal are defined by the Competition Act (1998) and its procedures are outlined in the Rules of the Competition Tribunal. As a court of first instance, the Tribunal's workload is driven by the cases brought to it in terms of the Act. This limits the ability of the institution to proactively set objectives and targets; and to accurately predict the number and types of anticipated cases.

### Financial results

	2002 R	2001 R
Total revenue	5 662 061	10 281 506
Total expenditure	(6 329 343)	( 6 312 709)
Operating (loss)/profit for the year	(667 282)	3 968 797
Total assets	10 985 291	12 208 006
Total liabilities	423 719	979 152

### Financial performance

The Tribunal receives 20% of the filing fee paid to the Commission as revenue. The reduction in filing fee income (51%) over the last year is due to the fact that the filing fees were lowered and threshold levels for notifiable mergers were increased. As from 1 February 2001 the filing fee for a large merger was reduced from R500 000 to R250 000 and for intermediate mergers from a maximum of R125 000 to R75 000.

No significant changes are evident in the operating costs over the last two years.

### Events subsequent to balance sheet date

No events took place between the balance sheet date and the date the financial statements were signed that were material enough to disclose it to the interested parties in the chairperson's report.

### Remuneration

The table below shows total remuneration received by the Chairperson and the CEO for the period ending 31 March 2002.

	2002 R	2001 R
Chairperson	591 636	540 775
CEO	410 071	401 800

These figures include performance bonuses for the CEO and any back pay received by the chairperson and the CEO. The Tribunal is responsible for the employees' contribution to group life as well as the administration costs associated with the pension fund. These figures are not included in the total remuneration given above.

## Significant events

### *Contingent liability*

#### *Relocation of offices*

The Commission and the Tribunal offices might relocate in approximately three years' time as per the request of the Department of Trade and Industry. If this occurs, the carrying amount of the leasehold improvements will have to be written off over the estimated remaining period before relocation. A portion of the penalty for the cancellation of the property lease agreement will also have to be written off when incurred. As the Tribunal pays the Commission a share of the lease costs, the Tribunal will have to bear a portion of the cancellation penalty. At year-end the extent of the write off and portion of the penalty cannot be reasonably determined due to uncertainties regarding the lease agreements and details of the planned relocation.

## Property, plant and equipment

The change in the nature of property, plant and equipment is set out in note 2 of the financial statements. There has been no change in the policy relating to the use of property, plant and equipment.

## Executive committee

The executive committee meets regularly and provides direction on decision-making and expenditure. The composition of the executive committee has remained unchanged over the period under review.

### *Members*

- David Lewis, chairperson
- Marumo Moerane, deputy chairperson
- Shan Ramburuth, CEO
- Janeen de Klerk, head of finance
- Norman Manoim, full-time Tribunal member

## Fruitless and wasteful expenditure

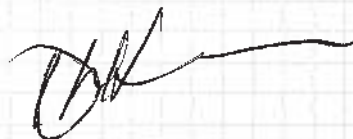
In my opinion, no fruitless or wasteful expenditure was incurred during the year under review.

## Irregular expenditure

From the Tribunal's inception to June 2001 part-time members of the Tribunal were remunerated at a rate of R4 000 per day. This rate was based on the Tribunal's interpretation of an approval by the relevant ministries to remunerate part-time members at the level of a Judge of the High Court. In May 2001 the Minister of Trade and Industry pointed out that he did not concur with this interpretation and the Tribunal was informed that the approved rate for the period up to 30 June 2001 and the period from July 2001 was R1 655 and R1 754 per day respectively.

In the light of the above, expenditure to the amount of R46 043 for the 2001 – 2002 financial year (see notes 7 and 14 of the financial statements) and R289 446 for the 2000 – 2001 financial year has not been authorised in terms of section 34(1) of the Competition Act, 1998.

As per the Minister's instructions, we have reverted to paying part-time members at the recommended level since 1 June 2001.



**David Lewis**

*Chairperson*

16 May 2002

## 1. The Competition Tribunal in 2001/2002

The Competition Tribunal, the court of first instance among the trio of institutions established by the Competition Act No 89 of 1998 to legislate and prosecute competition law in South Africa, has had another active year. This year the Competition Tribunal received 74 cases, of which 56 were decided.

The Competition Act requires that the Competition Tribunal adjudicate cases referred to it by the Competition Commission or brought directly to it by an aggrieved party. The Competition Commission investigates mergers and complaints of anti-competitive practices, while the Competition Appeal Court hears appeals from decisions of the Competition Tribunal and reviews its decisions.

## 2. The Competition Tribunal's members

In August 1999, the President, on recommendation from the Minister of Trade and Industry, appointed the chairperson and nine other members to serve a five-year period on the Competition Tribunal. One member resigned in December 2001 – no new appointment has been made. Two of the members (including the chairperson) are full-time executive members and seven (including the deputy chairperson) are part-time non-executive members. Adjudicative panels comprising three Tribunal members are appointed by the chairperson for each hearing brought before the Competition Tribunal.

The membership of the Tribunal represents a broad cross-section of the population of South Africa and each member is a citizen of the Republic. The Act specifies that members should have suitable qualifications and experience in economics, law, commerce, industry or public affairs. Five of the current Tribunal members have a legal background, three are economists and one is a chartered accountant.

### Members of the Competition Tribunal



**Chairperson**  
David Lewis  
(BCom, MA)



**Deputy chairperson**  
Advocate  
Marumo Moerane  
(BSc, BCom, LLB)



**Full-time member**  
Norman Manoim  
(BA, LLB)



**Part-time member**  
Urmila Bhoola  
(BA Hons, LLB,  
LLM)



**Part-time member**  
Professor F Fourie  
(BA Hons, MA, PhD)



**Part-time member**  
Professor M Holden  
(BCom Hons, MA,  
PhD)



**Part-time member**  
Phatudi Maponya  
(BProc, LLB, H Dip  
Company Law, LLM)



**Part-time member**  
Christine Qunta  
(BA, LLB)



**Part-time member**  
Sindi Zilwa  
(BCompt Hons)



**Resignation**  
Diane Terblanche  
(BA, LLB, LLM)



Tribunal members meet during the year to review the work of the Tribunal and keep abreast with new developments in competition economics and law. Members attended two workshops during the period under review. A workshop on 1 April 2001 on adjudication was facilitated by Sir Christopher Bellamy, president of the United Kingdom Competition Appeals Tribunal, and Prof Richard Whish, Professor of Law at Kings College, London. A further workshop with Professor Whish was held on 28 September 2001. In addition Tribunal members attended a conference co-hosted with the International Bar Association on 18 March 2002 titled "Competition Law and Policy in a Global Context". Four Tribunal members also attended the Fordham Corporate Law Institute's Annual Conference in New York in June 2001.

### 3. The staff of the Tribunal secretariat

Administrative, research and organisational support is provided to the chairperson and Tribunal members by the staff of the Competition Tribunal.

#### *Chief executive officer/registrar*

Shan Ramburuth

#### *Case managers*

Kim Kampel, Rietsie Badenhorst, Thulani Kunene

#### *Registry*

Eugene Tsitsi, head of registry, David Tefu, registry clerk, Jerry Ramatlo, court orderly/driver

#### *Finance*

Janeen de Klerk, head of finance, Donald Phiri, accounts assistant

#### *Executive secretaries*

Lerato Motaung, executive secretary to the chairperson, Tebogo Mputle, executive secretary to the CEO, Ntombi Mothei (resigned)



Shan Ramburuth  
Chief executive officer and registrar

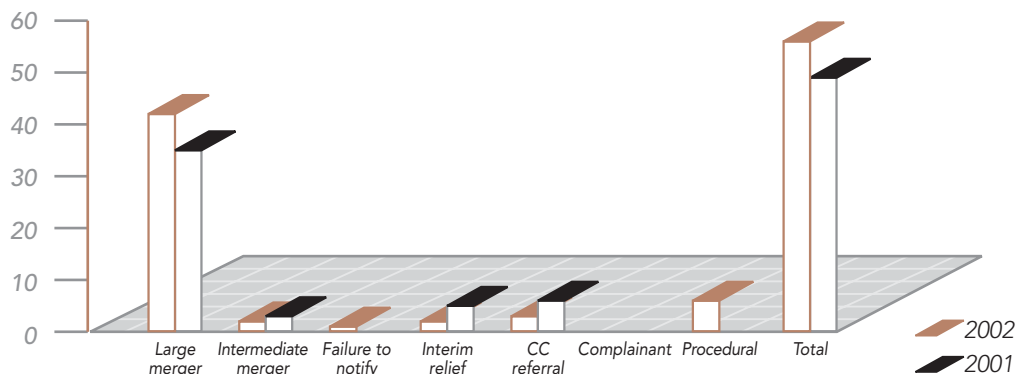


## 4. Cases before the Competition Tribunal: 1 April 2001 – 31 March 2002

The Competition Tribunal maintained a high case load during the current year, issuing 56 orders during the year, up from the 50 orders issued during the 2000/2001 financial year. The case load was distributed as follows:

	Decided	Withdrawn	Pending	Totals
<b>Merger cases</b>	<b>45</b>	<b>3</b>	<b>6</b>	<b>54</b>
• Large mergers	42		6	48
• Intermediate mergers	2	1		3
• Failure to notify a merger (consent order)	1	2		3
<b>Restrictive practice</b>	<b>5</b>	<b>2</b>	<b>6</b>	<b>13</b>
• Interim relief	2	1		3
• Commission referral (1 consent order)	3	1	2	6
• Complainant			4	4
<b>Procedural</b>	<b>6</b>			<b>6</b>
<b>TOTALS</b>	<b>56</b>	<b>5</b>	<b>12</b>	<b>73</b>

Decided cases



## 4.1 Mergers

### 4.1.1 Large mergers

The Competition Act (1998) requires that all large merger transactions be notified to the Competition Commission. Following an investigation which analyses the effect the merger has on competition in the relevant market, the Competition Commission makes a recommendation to the Tribunal on whether the transaction should be approved. The Tribunal may approve or prohibit a merger after a public hearing at which the parties to the transaction and other relevant stakeholders are represented.

Large mergers once again constituted the major case load of the Competition Tribunal. Of the 42 cases heard, during the period under review, 38 were unconditionally approved, three were conditionally approved and one was prohibited. Six cases were decided subsequent to the period under review:

Merging parties	Date received	Date of order	Decision
Randfontein Estates and AngloGold Ltd	24 Jan 01	28 Mar 01	Approved
Siemens Aktiengesellschaft AG and Atecs Mannesmann	1 Feb 01	28 Mar 01	Approved
Chevron Corporation and Texaco Incorporated	5 Feb 01	11 Apr 01	Approved
DB Investments SA and De Beers Consolidated Mines Ltd	23 Mar 01	9 May 01	Approved
Investec Group Ltd and Fedsure Investment Ltd	19 Mar 01	30 May 01	Approved
Nestlé SA (Pty) Ltd and Pets Products	24 Apr 01	31 May 01	Approved with conditions
BHP Steel Southern Africa and Billiton SA Ltd and Mine Smelter Investment (Pty) Ltd	1 Jun 01	28 Jun 01	Approved
BoE Bank and Credcor Ltd	18 May 01	4 Jul 01	Approved
Imperial Holdings Ltd and Tourism Investment Corporation Ltd	4 Jun 01	4 Jul 01	Approved
Comparex Holdings Ltd and Persetel Q Data Africa (Pty) Ltd	24 May 01	11 Jul 01	Approved
PSG Investment Bank Holdings and Real Africa Durolink Holdings Ltd	24 May 01	21 Jun 01	Approved
Schumann Sasol SA (Pty) Ltd and Price's Daelite (Pty) Ltd	10 May 01	04 Jul 01	Prohibited
Standard Corporate and Merchant Bank and PROCHEM (Pty) Ltd	11 Jun 01	26 Jul 01	Approved
WesBank Ltd and BoE Bank Ltd	26 Jun 01	25 Jul 01	Approved
Imperial Holdings Ltd and Megafreight Investments (Pty) Ltd		31 Jul 01	Approved

## 4.1.1 Large mergers (continued)

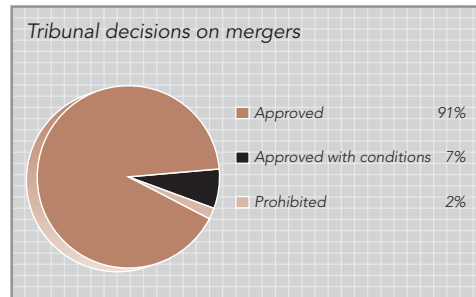
<b>Merging parties</b>	<b>Date received</b>	<b>Date of order</b>	<b>Decision</b>
BoE Bank Ltd and Cashbank Ltd	3 Jul 01	12 Sep 01	Approved
New Republic Bank Ltd and FBC Fidelity Bank Ltd	20 Jul 01	12 Sep 01	Approved
Siemens Business Services (Pty) Ltd and Unihold Group Ltd	20 Jul 01	20 Sep 01	Approved
Massmart Holdings Ltd and Jumbo Cash & Carry (Pty) Ltd and Sip 'n Save	3 Jul 01/15 Aug 01	21 Sep 01	Approved
Daimler Chrysler SA (Pty) Ltd and Sandown Motor Holdings (Pty) Ltd	23 Jul 01	5 Nov 01	Approved
AMB Holdings Ltd and AMB Private Equity Partners Ltd	7 Sep 01	2 Nov 01	Approved
Afrox Healthcare Ltd and Amalgamated Hospitals Ltd	21 Sep 01	16 Oct 01	Approved
Two Rivers Platinum (Pty) Ltd and Assmang Ltd	25 Sep 01	15 Nov 01	Approved
Clidet No. 323 (Pty) Ltd and MCG Industries (Pty) Ltd	24 Oct 01	28 Nov 01	Approved
Bidvest Group Ltd and Paragon Business Communication Ltd	9 Oct 01	16 Jan 02	Approved
Acerinox SA and Newco	10 Oct 01	28 Nov 01	Approved
Nestlé SA (Pty) Ltd and Dairymaid – Nestlé (Pty) Ltd	13 Nov 01	16 Jan 02	Approved
Imperial Holdings Ltd and Magnis Pretoria (Pty) Ltd	28 Nov 01	14 Dec 01	Approved
Unitrans Motors (Pty) Ltd and Motor Division of Senwes Ltd	10 Dec 01	17 Jan 02	Approved
Bid Industrial Holdings (Pty) Ltd and Magnum Security (Pty) Ltd	29 Nov 01	29 Jan 02	Approved
Shell SA (Pty) Ltd and Tepco Petroleum (Pty) Ltd	3 Dec 01	8 Feb 02	Approved
ABN Amro Bank NV and Pamodzi Foods (Pty) Ltd	7 Jan 02	30 Jan 02	Approved
Harmony Gold Mining Company Ltd and AngloGold Ltd	24 Jan 02	20 Feb 02	Approved
Caixa Geral de Depositos SA and Mercantile Lisbon Bank Ltd	25 Jan 02	13 Feb 02	Approved
Cray Valley Resins SA (Pty) Ltd and Coates Brothers SA (Pty) Ltd	16 Jan 02	7 Mar 02	Approved
Xstrata Ltd and Xstrata SA (Pty) Ltd and Duiker Mining (Pty) Ltd	21 Feb 02	13 Mar 02	Approved

<b>Merging parties</b>	<b>Date received</b>	<b>Date of order</b>	<b>Decision</b>
Iscor Ltd and Saldanha Steel (Pty) Ltd	7 Dec 01	21 Feb 02	Approved with conditions
Unilever Plc and Unifoods, a division of Unilever South Africa	25 Sep 01	6 Mar 02	Approved with conditions
Old Mutual Bank Ltd and Nedbank Ltd	16 Jan 02	7 Mar 02	Approved
OTK Agri Products Trading and Farm Feed Services	19 Feb 02	7 Mar 02	Approved
Bidvest Group Ltd and Voltex Holdings Ltd	22 Feb 02	13 Mar 02	Approved
Afrox Healthcare Ltd and Wilgers Hospitaal Bpk	27 Feb 02	13 Mar 02	Approved

**Large merger cases pending:**

(ie received, but not heard before 31 March 2002)

<b>Merging parties</b>	<b>Date received</b>	<b>Date of order</b>	<b>Decision</b>
Mondi Ltd and Kohler Cores & Cubes, a division of Kohler Packaging Ltd	24 Jan 02	23 May 02	Prohibited
Distell Group Ltd and Stellenbosch Farmers Winery Group Ltd	7 Feb 02		Pending
Sociedad Investments (Pty) Ltd and Furnex Stores (Pty) Ltd	13 Feb 02	08 May 02	Approved
Imperial Holdings and Murnau Holdings (Pty) Ltd	6 Mar 02	3 Apr 02	Approved
Islandsite Investment One Hundred and Forty Nine (Pty) Ltd and Sentrachem Ltd	11 Mar 02	17 Apr 02	Approved
Cape of Good Hope Bank Ltd and Nedcor Investment Bank Ltd	20 Mar 02	24 Apr 02	Approved



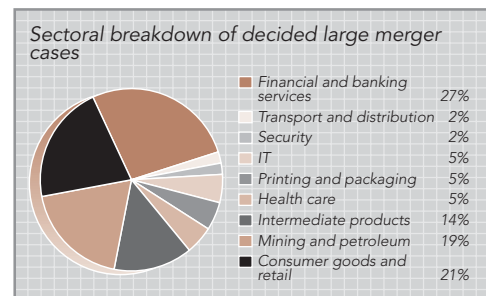
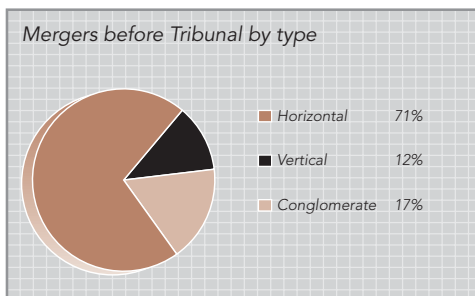
### Turnaround times for large mergers

Out of the 42 large merger cases that have been finalised, 23 were heard within the ten-day period prescribed in the Tribunal rules. There are numerous reasons for matters being heard beyond the prescribed period: further information may be requested from the merging parties, a pre-hearing meeting may be required to clarify contentious issues, parties may request more time to prepare their case. Of the 19 cases that were heard beyond the prescribed period, pre-hearing meetings had been held in eight of them.

In terms of the rules, the Tribunal must issue its order within ten days of the hearing, either approving the merger, approving the merger with conditions or prohibiting the merger. Out of the 42 decided cases, the order was released the same day in 29 cases and was within the ten-day prescribed period in all but one of the cases.

In all but three of the cases, the Tribunal issued written reasons for its decision within the prescribed 20-day period.

The Tribunal has considered transactions in varied product markets including consumer goods, chemicals and minerals, services and distribution. The majority comprised horizontal mergers (mergers between competing firms selling the same products or providing the same services), some conglomerate mergers (mergers between firms conducting unrelated business activities) and a small percentage comprised vertical mergers (mergers between firms operating at different stages of production).



## Issues concerning black economic empowerment come before the Competition Tribunal

### *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd*

The Competition Tribunal unconditionally approved the transaction between Shell SA and Tepco, contrary to the Competition Commission's recommendation to approve the transaction with conditions. The transaction resulted in Shell SA Marketing acquiring control of Tepco with Tepco's holding company, Thebe Investments, acquiring a 25% share in Shell SA Marketing. Shell SA's motivation for the transaction was to enable it to comply with black economic empowerment obligations required by "*The Charter for Empowering Historically Disadvantaged South Africans in the Petroleum and Liquid Fuels Industry*" which was drawn up under the auspices of the Department of Mineral and Energy Affairs. Thebe Investments wanted to dispose of Tepco because, as a new player, Tepco had experienced difficulties in penetrating an otherwise mature market thus exposing its shareholders to increased risk in the event of Tepco being liquidated.

Despite concluding that the transaction did not substantially prevent or lessen competition in the relevant markets, the Competition Commission had recommended that its approval be subject to conditions designed to ensure that control, or partial control, of Tepco remained in the hands of historically disadvantaged persons, and designed to maintain Tepco's brand and separate identity in the marketplace. The Commission based its recommendations on section 12A(3) of the Act which requires that the competition authorities assess whether a merger can or cannot be justified on public interest grounds by considering the effect that the merger will have on four public interest criteria, amongst them "the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive".

In its decision, the Tribunal noted that Thebe's decision to dispose of Tepco had been commercially motivated; and that its acquisition of a stake in Shell SA Marketing was consistent with black economic empowerment objectives.

The Tribunal was not persuaded that the Commission's recommendation advanced the objective of promoting black economic empowerment. The Tribunal said in concluding its report:

**"Our view is that this argument, though self-evident in many respects, should be advanced with considerable caution when the competition authorities use public interest as a basis for their intervention, particularly when competition is unimpaired and when the only historically disadvantaged investors whose interests are directly affected expressly reject the Commission's interventions. 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 – in this case the Employment Equity Act, the Skills Development Act and the Charter itself immediately spring to mind. The competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an overzealous manner lest they damage precisely those interests that they ostensibly seek to protect."**

## Brand divestiture orders a feature of the 2002 financial year

### *Unilever Plc and Unifoods, a division of Unilever South Africa*

The Competition Tribunal approved the South African leg of an international merger between Unifoods, a division of Unilever SA (Pty) Ltd, and Robertsons Foods (Pty) Ltd, subject to the condition that the merging parties sell certain brands and sub-brands to an independent third party or parties approved by the Competition Commission. The order regarding the divestiture was largely consistent with recommendations made jointly by the merging parties and the Competition Commission.

The brands to be divested are:

- All Royco products except the “Cup-a-Soup”, “Cup-a-Snack”, “Mates” and “Pasta and Sauce” sub-brands
- The “Quick Soup” and “Oodles of Noodles” sub-brands
- The Oxo brand in totality

The sale of these brands and sub-brands included all the intellectual property associated with the brand and could, at the option of the proposed buyer, include production facilities either to be used in a co-packaging arrangement (by means of a service agreement) or as an outright sale of all the assets.

## The scope of trade union participation tested

### *Unilever Plc and Unifoods, a division of Unilever South Africa*

The Tribunal order stipulated that the merging parties have to submit the name of the proposed buyer to the Competition Commission for its prior approval. The Commission would have to assess whether the proposed buyer would be able to effectively utilise the divested assets so as to be a viable competitor to the merging parties. The Commission would also verify that the conditions laid down in the sale agreement are fulfilled.

The Food and Allied Workers Union (FAWU) made detailed submissions at the hearing on this merger on both competition aspects and employment effects. The Tribunal rejected the suggestion of the merging parties that the number of jobs lost as a consequence of the merger was business sensitive information which could not be revealed to non-unionised employees.

**“The purpose of provisions (in the Competition Act requiring that employees be notified of a merger) is to ensure that employees’ representatives are provided with the necessary information to enable them to make representations to the competition authorities, if they so wish. The prime concern of employees would obviously be the effect of the merger on employment. The number of people who might lose their jobs determines the effect on employment. Keeping this information confidential deprives labour not only of the right to access to information that the legislature clearly gives to them, but also their right to make meaningful representation to the competition authorities on an issue that directly affects their interests. The legislature could never have contemplated that this information could be claimed as confidential information – all indications are to a contrary intention. We accordingly find that the number of employees which the merging parties contemplate retrenching does not constitute confidential information.”**

The Tribunal also ordered that, once the divestiture sale agreement has been concluded, trade unions be notified and consulted over the employment effects of the transaction. The Tribunal decision however asserts that employment issues resulting from mergers are best dealt with through the provisions of the Labour Relations Act:



“In our view the most significant right that the Competition Act extends to employees and their unions is the right to timeous information with respect to the potential employment impact of a merger. The news of a merger is, it appears, too often sprung upon unions and employees despite the powerful impact that these transactions often have on their interests. However, there is little doubt that, having received the information, the most powerful channel available to the unions to address employment-related issues arising from the merger is the Labour Relations Act or private collective bargaining agreements where they exist. Although we welcome input by the unions and employees at Tribunal meetings, clearly our decisions have to balance impacts on competition with employment impacts whereas the concerns of the Labour Relations Act and other collective bargaining arrangements have no such balancing requirement. In this case it seems that there was only limited interaction between the unions and the merging parties following the filing on the unions required by the Competition Act. This is regrettable. We have not been able to ascertain who – the parties or the unions – bears responsibility for the failure to take advantage of this information and to negotiate a mutually satisfactory solution of the labour-related problems arising from the transaction. We have accordingly inserted a condition requiring the parties to enter into discussions with the unions.”

### *Participation in merger hearings*

Merging parties have participated constructively in Tribunal hearings which are generally conducted as inquiries rather than as adversarial proceedings. A variety of interested parties have also participated in merger proceedings. These include trade unions, customers, competitors, experts and government departments where the merger impacted on government policy.

## Testing the parameters of the failing firm defence

### *Iscor Ltd and Saldanha Steel (Pty) Ltd*

The Competition Tribunal approved, with conditions, the transaction by which Saldanha Steel (Pty) Ltd became the wholly-owned subsidiary of Iscor Ltd through the latter's acquisition of the IDC's 50% shareholding. The Tribunal found that the merger could potentially result in both vertical and horizontal anti-competitive effects, but that this was outweighed by the negative consequences of Saldanha's failure for competition and the effects this will have on the region in which it is located.

In its reasons, the Tribunal examined how the failing firm doctrine is treated in international jurisprudence and set out the approach it adopted in this case:

1. A failing firm defence should not be invoked if it amounts in substance to another factor or defence which the Act already provides. In particular we draw attention to the efficiency defence and the public interest criteria.
2. The merger criteria for a failing firm set out in the tests of other jurisdictions will carry serious weight in our assessment.
3. A merger would not be regarded as lessening competition if the conditions laid out in the more stringent EU test can be satisfied.
4. A party falling short of the "market share would have gone to us" requirement, but that could satisfy the other elements of the test or the standard in the US test, would have a reasonable possibility of success depending on the degree of the anti-competitive sting. Thus where the anti-competitive effects of the merger are otherwise slight, then the Tribunal might be less stringent in the application of some of the criteria. Here the party should have regard to evidence that establishes some rationale for the existence of the failing firm doctrine. We have referred to some of these in our discussion although we do not suggest that this is an exhaustive list.
5. Evidence of the extent of failure or its imminence would be weighed up against the evidence of the anti-competitive effect. The greater the anti-competitive threat the greater the showing that failure is imminent.
6. No leniency would be afforded to the requirement that there be evidence that there is no less anti-competitive alternative.
7. The onus is on the merging firms to establish the evidence necessary to invoke the doctrine of the failing firm."

### *The Tribunal concluded:*

**"We are of the view that the merger will have an anti-competitive effect both because of the removal of Saldanha as a potential competitor to Iscor and the vertical effects on DSP (a customer). The vertical problems can be cured by the conditions we have imposed. In respect of the horizontal effects, when we balance the loss of potential competition with the prospect of Saldanha failing we conclude that the merger will not substantially lessen or prevent competition. In addition, from a public interest perspective, we arrive at the same conclusion as the failure of the transaction would in all probability lead to a closure temporarily or permanent of the firm, and with that a devastating impact on the region."**

The condition imposed by the Tribunal is that the merging parties may not make their supply of Hot Rolled Coils (HRC) to customer, Duferco Steel Processing (Pty) Ltd (Duferco), subject to any condition that requires Duferco to purchase its HRC supplies exclusively from Iscor and/or Saldanha; and/or places any restrictions on Duferco in relation to the sale of its products.

## Competition law's relaxed approach to vertical mergers tested

### *Schumann Sasol and Price's Daelite*

The Competition Tribunal prohibited the merger between Schumann Sasol (South Africa) (Pty) Ltd and Price's Daelite (Pty) Ltd. The proposed transaction constituted a vertical merger with Schumann Sasol, the dominant supplier of candle wax, acquiring the entire issued share capital of its largest customer, Price's Daelite, the largest manufacturer and marketer of household candles. Both parties enjoy significant market power in their respective markets. According to the parties, the proposed transaction was a consequence of financial difficulties experienced by Price's Daelite and unresolved disputes between them. The Tribunal however found that the failing firm defence did not support approval of the transaction.

The Tribunal analysed the impact of the proposed transaction in both the upstream candle wax market and the downstream household candle market. It found that the transaction would prevent or lessen competition in the upstream candle wax market by raising barriers to entry into that market. Furthermore, it would significantly increase the capacity of the merged entity to foreclose competition in the downstream candle market and raise its rivals' costs of doing business.

**“It is relationships between competitors – that is horizontal mergers (and horizontal agreements generally) – that tend to attract the immediate attention of anti-trust enforcement. Vertical arrangements do not, on the face of it, lessen competition in either of the markets in which the contracting parties are active. On the contrary, a strong body of opinion holds that vertical arrangements are frequently competitiveness enhancing, that is, far from diminishing competition, these arrangements actually enable the contracting parties to produce or distribute a better or lower priced product or service. In general then, it is argued, anti-trust proscription of these arrangements confuses the requirement to defend competition, with action essentially designed to defend competitors.**

**However, the Competition Act, in common with competition statutes elsewhere, does cover vertical mergers. It does so because it is widely recognised that, under particular circumstances, vertical mergers may impact negatively on competition. Alarm bells will sound where one or both of the parties to the transaction dominate the markets in which they operate. While a vertical transaction involving a dominant firm portends a variety of potentially anti-competitive outcomes, for the purposes of the present transaction it is the prospect of increased entry barriers as well as the possibility of market foreclosure and the related ability to raise rivals' costs that are of most immediate concern.”**

The decision of the Tribunal in this matter was taken on appeal to the Competition Appeal Court.

## The nature of structural and behavioural conditions examined

### *Astral Foods Ltd and National Chick Ltd*

The decision of the Competition Commission to prohibit the intermediate merger between Astral Foods Ltd (Astral) and National Chick Ltd (Natchix) was taken on appeal to the Competition Tribunal. The Tribunal approved the merger with conditions.

Both companies to this transaction operate in the broiler industry and the animal feed industry. Astral supplies parent stock to the broiler industry. Natchix, the largest independent broiler producer, acquires parent stock from Astral and breeds day-old chicks which it sells to other independent broiler producers. The transaction is both a horizontal and a vertical merger: horizontal because of the product overlap in the animal feed market and vertical through the acquisition of Natchix.

The Competition Commission had prohibited the merger on the grounds that it would remove an effective competitor of Astral (that is, Natchix subsidiary, Nutrex) from the animal feed market and would foreclose independent broiler breeders from the day-old chicks market as a result of Astral's vertical integration with Natchix.

At the Tribunal's hearing into this merger the parties offered to sell Nutrex in order to alleviate concerns about the horizontal aspects of the merger. Accordingly, the Tribunal ordered the divestiture of Nutrex as a condition for approval. The Tribunal further imposed conditions in relation to vertical aspects of the merger. These were intended to prevent Astral from discriminating between entities in its own group and its independent customers for equivalent transactions. In terms of the Tribunal order, Astral is required to supply each of its existing customers in terms of a standard five-year contract approved by the Commission; and will reduce supply to all customers pro rata their ordinary volumes in case of disease or any other event causing a shortage of stock.

At the hearing, the Competition Commission cautioned against setting remedies that address conduct rather than structure. The Commission argued that behavioural remedies are likely to be sidestepped and as such are inferior to a structural remedy such as prohibition or divestiture. In the reasons for its decision, the Tribunal responded to these concerns: **"We agree with the Commission that in most cases it is preferable to have remedies that address structure rather than conduct. But there are, in our view, circumstances where the presence of certain market factors together with conditions imposed by the anti-trust authorities will effectively address specific competitive concerns. These are circumstances where either divestiture or prohibition might be too drastic a remedy and where other remedies exist that could address the anti-competitive effects adequately without imposing an unreasonable burden on the competition authority to monitor. In our opinion the present case falls within that category."**

#### 4.1.2 Intermediate mergers

The Competition Commission has jurisdiction to approve or prohibit mergers classified as “intermediate”. Parties to an intermediate merger may appeal the Commission’s decision to the Tribunal. The Tribunal received three such appeals in the review period. The Tribunal upheld the Commission’s approval of the merger between KwaZulu Transport (Pty) Ltd and Basfour 2488 (Pty) Ltd because the party appealing against the decision did not have the right to an appeal. The Tribunal overturned the decision of the Commission to prohibit the merger between Astral Foods Ltd and National Chick Ltd and approved the transaction with conditions. The third appeal was withdrawn.

<b>Merging parties</b>	<b>Date received</b>	<b>Date of order</b>	<b>Decision</b>
Comparex Holdings Ltd and Persetel Q Data Africa(Pty) Ltd	22 May 01	Withdrawn	Withdrawn
Dumisani Victor Ngcaweni in re KwaZulu Transport (Pty) Ltd and Basfour 2488 (Pty) Ltd	27 Nov 01	13 Feb 02	Approved
Astral Foods Ltd and National Chick Ltd	18 Dec 01	02 Apr 02	Approved with conditions

#### 4.1.3 Failure to notify a merger

<b>Merging parties</b>	<b>Date received</b>	<b>Date of order</b>	<b>Decision</b>
Unilever Plc and Unilever NV and Bestfoods	11 May 01		Withdrawn
Etex Group SA and Glynwed Dublin Corporation	18 May 01		Withdrawn
Tourvest Holdings (Pty) Ltd and Kraalkraft (Pty) Ltd	17 Sep 01	30 Jan 02	Consent order

## 4.2 Prohibited restrictive practices

Three years after the implementation of the new competition laws, it is clear that restrictive practice cases are proving much slower than anticipated to prepare and prosecute. Restrictive practices are prohibited in terms of the Act if they have the effect of substantially preventing, or lessening, competition unless it can be proved that a technological, efficiency or other pro-competitive gain outweighs the practice. Restrictive practices include such prohibited activities as fixing prices, dividing markets, collusive tendering and resale price maintenance.

Many factors explain the lack of cases, including:

- Difficulties in investigating (including the lack of co-operation in accessing documents and information and reluctance by affected or aggrieved parties in coming forward with or volunteering information).
- Lack of experience in investigating and prosecuting competition cases.
- The lack of sufficient perceived incentives for parties to transgress the Act.

The Competition Tribunal heard both cases referred by the Competition Commission and also appeals against decisions by the Competition Commission against referring cases. The full list of complaints heard and pending follows:

#### 4.2.1 Interim relief

The Competition Act permits a complainant, in certain circumstances, to ask the Competition Tribunal to grant interim relief following the allegation of a prohibited practice if there is a danger that serious or irreparable damage may be caused to the applicant. The Tribunal will grant interim relief if it is reasonable and just to do so, having regard to the balance of convenience. Several such cases were brought before the Tribunal during the year under review. The full list follows:

<b>Applicant</b>	<b>Respondent</b>	<b>Summary</b>
Tepco Petroleum (Pty) Ltd	Sasol Ltd	Tepco Petroleum (Pty) Ltd alleged that the Main Supply Agreement they were obliged to sign with Sasol Ltd constituted a prohibited practice in contravention of sections 4(1) (a) or 4(1)(b)(i) or 4(1)(b)(ii) or 5(1) of the Competition Act because it prevented competition, limited production, divided geographical markets and prescribed conditions for purchasing and sales. This application was withdrawn.
Southern African Fruit Terminals (Pty) Ltd	Portnet, Transnet, Capespan (Pty) Ltd, International Harbour Services (Pty) Ltd	The applicant, which provides agency and logistical services for the export of citrus and deciduous fruit, sought access to Portnet's Quayside Cold Storage facilities which were being used exclusively by competitor, Capespan. The applicants sought the use of these facilities on competitive terms and wanted the Tribunal to vary or expunge all provisions in lease agreements between Portnet and Capespan which expressly or tacitly reserved or provided for exclusive use of such facilities. The Tribunal dismissed the application on the grounds that SAFT had not made out a case for interim relief.
Hayley A Cassim and Noeleen C Barendse	Virgin Active SA (Pty) Ltd	The applicants alleged that the respondent, being a dominant firm in the relevant market because it controlled approximately 80% of the fitness training facilities in the country, was abusing its dominance by requiring the applicants to purchase and wear the official personal trainer uniform when conducting their business at a gym operated or controlled by the respondent. The interim relief application lapsed following the Commission's non-referral of the complaint and the applicant's failure to pursue or withdraw the case.

HRP <sup>1</sup>	Basis of complaint VRP <sup>2</sup>	AOD <sup>3</sup>	Date received	Date of hearing	Date of order/ reasons	Outcome
	X		30 Aug 01	Withdrawn		Withdrawn
	5(1) 5(2)	8(b) 8(c) 8(d) (ii) 8(d) (iv) and 9	19 Sep 01	4 and 5 Mar 02	29 Apr 02	Dismissed
		8(a) and 8(b)	10 Oct 01	23 Jan 02	4 Feb 02	Dismissed

*1 HRP = Horizontal restricted practice*

*2 VRP = Vertical restricted practice*

*3 AOD = Abuse of dominance*

## 4.2.2 Complaint referral from the Competition Commission

Applicant	Respondent	Summary
Mainstreet 2 (Pty) Ltd T/A New United Pharmaceutical Distributors and others	Novartis SA (Pty) Ltd and others	Nine pharmaceutical wholesalers complained that an exclusive distribution agency formed by a group of pharmaceutical manufacturers was in contravention of the Act. The Commission's referral alleged that the formation of the exclusive distribution agency and the conduct pursuant thereto contravened sections 4, 5, 8 and 9 of the Act.
National Association of Pharmaceutical Wholesalers and others	Glaxo-Wellcome (Pty) Ltd and others	Following a complaint by pharmaceutical wholesalers, the Commission's referral alleged that the agreement by pharmaceutical manufacturers to form an exclusive distribution agency contravened sections 4, 5, 8 and 9 of the Act.
Jakobus Johannes Petrus Bezuidenhout and Jan Daniel du Preez	Patensie Sitrus Beherend Bpk	The Commission submitted that the respondent was a dominant firm in the relevant market; and by requiring its shareholders to deliver their produce to it, it was fixing a trading condition and, by preventing the complainants from selling their produce to its competitors, it was engaging in prohibited practices as defined in sections 4(1)(b)(i) and 8(d) of the Act. The Tribunal found that certain sections of the respondent's articles of association contravenes section 8(d)(1) of the Act and declared these sections void.
South African Raisins (Pty) Ltd	SA Dried Fruit Holdings and SA Vine Fruits (Pty) Ltd	The Commission's referral alleged that the respondent was a dominant firm and had contravened sections 4(1)(b)(i) and 8(d)(i) of the Act in compelling raisins producers to deliver their produce to it, and not to their competitors. The Tribunal dismissed this case because the Commission had referred the complaint after the requisite one-year period had lapsed.
Mr Jannie A van Niekerk	Bernina Saskor (Pty) Ltd	The Commission's referral alleged that the respondent had contravened section 8(d)(i) of the Act by instructing its franchisees not to provide the complainant with Bernina parts for the servicing and repairing of Bernina sewing machines. The Commission negotiated a consent order in terms of which the respondent agreed to supply Bernina parts to any customer without any limitations whatsoever.
Anglo American Corporation Medical Scheme and Engen Medical Fund	United South African Pharmacies	The Commission's referral alleged that the respondent's conduct in influencing its members to boycott servicing the members of the complainant amounted to a restrictive practice and involved directly or indirectly fixing a purchase price or trading conditions in contravention of section 4(1)(b)(i) of the Act. The case is being defended by the respondent.



HRP <sup>1</sup>	Basis of complaint VRP <sup>2</sup>	AOD <sup>3</sup>	Date received	Date of hearing	Date of order/ reasons	Outcome
4 (1) (B)			2 May 01	Pending		Pending
			22 Jun 01	Withdrawn		Withdrawn
		8(d)(i)	22 Jun 01	27 and 28 Feb 02	8 Apr 02	Granted based on 8(d)(i)
	5(1)	8(d)(i)	17 Jul 01	15 Oct 01	23 Oct 01	Dismissed
		8(d)(i)	7 Nov 01	12 Nov 01	13 Nov 01	Consent order
			17 Jan 02	Pending		Pending

1 HRP = Horizontal restricted practice

2 VRP = Vertical restricted practice

3 AOD = Abuse of dominance

## 4.2.3 Brought by a complainant following a non-referral by Commission

Applicant	Respondent	Summary
Avalon Group (Pty) Ltd <i>and</i> Videovision Entertainment (Pty) Ltd	Old Mutual Life Assurance Company of South Africa <i>and</i> Old Mutual Properties and others	The complainants alleged that the lease agreement concluded between the respondent and Ster Kinekor Films (Pty) Ltd constituted a prohibited restrictive vertical practice under section 5(1) of the Act. The complainants further alleged that, as the respondent is dominant in the market of renting premises for exhibition of films to the public, its decision not to grant the complainant lease for the operation of cinemas at the Gateway Shopping Centre was an unlawful prohibited practice as contemplated in section 8(c) of the Act. The case is being defended by the respondent.
National Association of Pharmaceutical Wholesalers and others	Glaxo-Wellcome (Pty) Ltd and others	The complainants alleged that the respondents, by establishing an exclusive distribution firm for their products and refusing to directly deal with the complainants, were in contravention of sections 4 and/or 5 and/or 8 and/or 9 of the Act. The case is being defended by the respondent.
Justice or Foodies Committee and others	Metcash Trading Ltd	The complainants alleged that the respondent was enforcing restrictive practices which included price fixing, forced purchases, prohibition against dealing with respondent's competitors, designated supplier and tying in contravention of sections 5 and 8 of the Act. The case is being defended by the respondent.



HRP <sup>1</sup>	Basis of complaint VRP <sup>2</sup>	AOD <sup>3</sup>	Date received	Date of hearing	Date of order/ reasons	Outcome
	5(1)	8(b) and (c) and 8(d) (i) and (iii) 8(c)	14 May 01	Pending		Pending
4	5	8 and 9	20 Jul 01	Pending		Pending
	5(1)	8(a)	8 Aug 01	Pending		Pending

<sup>1</sup> HRP = Horizontal restricted practice

<sup>2</sup> VRP = Vertical restricted practice

<sup>3</sup> AOD = Abuse of dominance

## 4.3 Decisions on procedure and points of law

Applicant	Respondent	Summary
Schering (Pty) Ltd and others	New United Pharmaceutical Distributors (Pty) Ltd and others	Whether a second interim relief application was dismissable as an abuse of process.
SAD Holdings Ltd and SAD Vine Fruit (Pty) Ltd	The Competition Commission	Whether the Commission had jurisdiction to refer the complaint to the Tribunal beyond the requisite one-year period. The question was whether the period between 15 March 2000, when the High Court delivered its order on the appeal, and 29 September 2000, when the Supreme Court of Appeal reversed that order, constitutes a valid suspension of the one-year period contemplated in Rule 19 of the Competition Commission rules.
The Competition Commission	Federal Mogul Aftermarket Southern Africa (Pty) Ltd	Whether the Tribunal is procedurally competent to direct joinder of parties as respondents. The Commission, when applying for joinder relied on Rule 51(1)(b) of the Tribunal rules and called upon the Tribunal to invoke Rule 10(3) of the High Court Rules.
Mr Dumisani Victor Ngcaweni and others	KwaZulu Transport (Pty) Ltd and Basfour 2488 (Pty) Ltd	Whether section 16(1)(b) read with section 13A(2) of the Act bestows upon individual employees of the merging firms the right to request the Tribunal to consider a decision by the Commission to approve an intermediate merger.
The Competition Commission	South African Airways (Pty) Ltd	Whether the Commission should be allowed to amend its founding affidavit in the complaint referral in terms of the Tribunal Rule 18 read with section 50(3)(iii) of the Act or not.
The Competition Commission and others	American Natural Soda Ash Corporation and others	Whether the word “effect” in section 3(1) of the Act, which is the application section, must be interpreted as meaning adverse effect.

<b>Date received</b>	<b>Date of hearing</b>	<b>Date of order/ reasons</b>	<b>Decision</b>
	31 Jul 01	13 Aug 01	The application to dismiss the second interim relief was dismissed.
13 Aug 01	15 Oct 01	16 Nov 01	The Commission was not precluded by operation of law from continuing its investigation. The one-year period had not been interrupted and the Commission therefore had no jurisdiction to refer the complaint to the Tribunal and was deemed to have issued a notice of non-referral to the complainants.
14 May 01	15 Aug 01	23 Aug 01	The Tribunal is of the view that there is no impediment to it granting the order sought thus ordering that the parties be joined as second to fourth respondents. The Tribunal held that both the statute, the common law and the rules give them a residual power to supplement its own rules of procedure in an appropriate manner, and to order joinder in the circumstances of this case seems an appropriate use of that power.
28 Nov 01	20 Jan 02	13 Feb 02	The Tribunal found that the applicants lacked locus stand to bring the proceedings. The Tribunal held that the use of the word “or” at the end of subsection 13A(2) (a) and the proviso to subsection 13A(2) (b) clearly indicates that the persons listed in 13A(2) (b) (ie employees or their representatives) are only required to be served a notice where there are no trade unions referred to in 13A(2) (a). A party to a merger is therefore not required to serve the merger notice on all the persons listed in subsection 13A(2) but to one of them only.
23 Aug 01	12 Nov 01	16 Nov 01	The amendment was allowed.
		30 Nov 01	The Tribunal found that on an ordinary interpretation the word effect in section 3(1) is not limited to adverse effects and that whilst the language may require some qualification it is not a qualification related to the nature of the “effects” but their extent.

## 5. Corporate governance

The Tribunal has kept abreast with recent developments on corporate governance and applies best practice principles in managing its work. Senior management in the Tribunal has followed and attended conferences in the development of the King II report on corporate governance.

### 5.1 Compliance with legislation

#### 5.1.1 The Competition Act

The functions, activities and procedures of the Competition Tribunal are prescribed by the Competition Act and the rules of the Competition Tribunal.

#### 5.1.2 The Public Finance Management Act

Since 1 April 2001 the Tribunal has been listed as a national public entity in schedule 3 A of the Public Finance Management Act (PFMA). The PFMA prescribes requirements for accountable and transparent financial management in the institution. The head of finance and the CEO have received training on implementing the requirements of the PFMA and associated Treasury regulations.

#### 5.1.3 Audit committee

An audit committee, which was established in March 2000, has met twice in the year under review – 28 August 2001 and 27 November 2001.

In the course of these meetings the audit committee reviewed the quarterly internal audit reports, commented on an investment policy drafted by the Tribunal, reviewed the internal and external audit plans and reviewed the annual report and financial statements for the period ending 31 March 2001.

The audit committee has assisted the executive committee in fulfilling its oversight responsibilities as they relate to internal controls, risk management, compliance with laws, regulations and ethics and financial management.

An audit committee charter adopted in December 2000 outlines the audit committee functions.

The audit committee comprises four external members and three Tribunal executive members. One member, Peter Modisele, resigned during the year and has been replaced by Nonku Tshombe.

#### **Executive members**

- David Lewis
- Shan Ramburuth
- Janeen de Klerk

#### **Non-executive members**

- Sakhile Masuku, chairperson
- Thabo Mosololi
- Nonku Tshombe
- Tobie Verwey

#### 5.1.4 Internal audits

The auditing firm, SAB&T, has performed the internal auditing function for the Tribunal. Its contract expired in March 2002 and KPMG has been appointed as the new internal auditors. In the current financial year, audits were performed quarterly.

The audit committee adopted an internal audit charter in December 2000.

Internal audits have covered a range of areas identified by management and the internal auditors, including:

- Corporate governance and compliance with relevant legislation
- The efficiency and effectiveness of administrative policies and procedures
- The reliability and integrity of financial and operating information
- The consistency of programmes with established objectives and goals

The internal audits have verified the credibility of effective management controls in the Tribunal.

#### 5.1.5 External audit

The office of the auditor-general has completed an external audit for the period ending 31 March 2002.

#### 5.1.6 Asset management

The executive committee approved two policy documents relating to asset management and procurement in January 2002 and February 2002 respectively. An asset register is maintained and updated monthly. Assets are physically inspected quarterly. A computerised system for labelling assets was implemented in November 2001. A driver's logbook which records daily usage is maintained for the Tribunal vehicle.

#### 5.1.7 Investment policy

A draft investment policy was reviewed by the executive committee in January 2002. In February 2002 this document was sent to **the dti** for approval. This was in compliance with Treasury regulations, which require that this policy be approved by the accounting authority. No response from **the dti** has been received to date.

### 5.2 Reporting to the Department of Trade and Industry

The Tribunal has submitted business plans and budgets to **the dti** in accordance with the PFMA and Treasury regulations. In addition, monthly reports on its expenditure and budget variance have been submitted. The Tribunal continues to liaise with **the dti** with regard to compliance with the PFMA.

### 5.3 Statutory requirements

The Tribunal has registered and met its obligations on the following levies and taxes:

- Skills Development Levy
- Workmen's Compensation
- Regional Services Council (RSC) Levy
- Establishment Levy
- Unemployment Insurance Fund (UIF)
- Value-added tax (VAT)
- Pay as you earn (PAYE)

The Receiver of Revenue exempted the Tribunal from section 10(1)(a) of the Income Tax Act (1962) in November 2000.

### 5.4 Executive committee

The executive committee provides direction on decision-making and expenditure and receives reports from the chief executive and the head of finance on operational plans. The executive committee has had 12 meetings in the period under review.

## Members

- David Lewis, chairperson
- Marumo Moerane, deputy chairperson
- Shan Ramburuth, CEO
- Janeen de Klerk, head of finance
- Norman Manoim, full-time Tribunal member

## 5.5 Staff meetings

The three staff meetings held this year have been effective in consulting and informing staff on operational and human resource policies. In addition a weekend team-building meeting was held in September 2001 at an external venue.

## 6. Training and human resource development

### 6.1 Staff composition

The Tribunal complied with the requirements of the Employment Equity Act by submitting the employment equity plan to the Department of Labour in December 2000. At the beginning of the period under review the Tribunal secretariat consisted of 12 staff, and one resignation occurred during the course of the year. A current employee was promoted to this vacant position. Five of the current staff members are female, seven are black, one is Asian and three are white. Six staff members have a bachelor's degree or higher.

### 6.2 Training and human resource development

The Tribunal has provided employees with opportunities for development and further education in line with our objectives.

Some 70,6 working days have been spent in training during the current financial year. In terms of salary cost, this amounts to R105 940,00 (ie an average of 6,42 training days per person at an average cost of R1 500,57 per day). Training and development comprises both in-house training and external courses, workshops and conferences locally and internationally.

Two case managers attended a five-day course for investigators in Canberra, Australia organised by the Australian Competition and Consumer Council. A third case manager worked on secondment in the mergers division of the Office of Fair Trading in the United Kingdom.

The Tribunal operates a bursary scheme, which assists employees in obtaining further tertiary qualifications. These loans cover tuition and examination fees up to R4 000 per annum per employee and are converted to bursaries on the employee successfully completing a course. During the current financial year, three staff members received study loans totalling R9 790. A total of 41% of these loans were allocated towards university degrees, while 48% of loans awarded in the previous year were converted to bursaries in the year under review.

### 6.3 Performance management system

The Tribunal implements a performance management system designed to align individual performance with the objectives of the institution and to ensure that staff enjoy adequate levels of support and feedback in fulfilling their work responsibilities.

Annual performance appraisal meetings with each staff member held in May 2001 evaluated overall performance, identified areas for improvement and determined training needs. Performance bonuses and salary adjustments are also determined on the basis of the performance appraisal.



## 7. Communicating the work of the Tribunal

The Tribunal actively keeps the media informed of all Tribunal hearings and decisions. Tribunal decisions are promptly posted onto the Tribunal website which has proved an effective vehicle for informing the media, legal practitioners, researchers and others. Tribunal cases have received fair coverage in the financial press and earlier difficulties arising from a lack of familiarity with the new institutions and law have largely been overcome.

The Tribunal co-hosted a seminar on competition law and economics for journalists with the Institute for the Advancement of Journalism. The seminar was facilitated by Prof Richard Whish of King's College, London and sought to familiarise participants with technical aspects of competition regulation.

Members and staff of the Tribunal have also addressed or made presentations in meetings, workshops and seminars on the Competition Act and the work of the competition authorities.

Tribunal members are kept informed of cases through the *Tribunal Tribune*, a quarterly newsletter carrying briefing articles on Tribunal cases and topical issues in competition regulation.

## 8. Participation in international initiatives

The Tribunal continues its involvement in initiatives aimed at strengthening international co-operation in competition law enforcement. The Chairperson of the Tribunal participates in the OECD's Global Competition Forum and is a member of the steering committee of the International Competition Network. The Tribunal actively participates in two subcommittees set up by the ICN to develop guidelines and best practices for merger notification and merger adjudication.

The chairperson of the Tribunal represented South Africa and presented a paper at a symposium on trade and competition policy hosted by the World Trade Organisation in April 2002. This symposium discussed the possibility of a multilateral framework on competition regulation following the resolutions at the WTO Ministerial Conference in Doha.

## 9. Meeting our objectives

As a court of first instance, the Tribunal's workload is driven by the cases brought to it in terms of the Act. The case-load of the Tribunal is entirely determined by referrals from external parties, either the Competition Commission or complainants, while operating costs, notably salaries and assets, remain largely fixed. This limits the ability of the institution to proactively set objectives and targets; and to accurately predict the number and types of anticipated cases. The Tribunal therefore sets annual objectives in relation to its administrative and management functions. Progress in implementing these objectives are illustrated in this report and the following table provides a summary of results obtained in fulfilling the objectives set for the period under review:

Objective as per business plan	Results achieved
<b>Registry</b>	
Document management system	Filing system maintained and updated; confidentiality maintained; documents timeously distributed to relevant parties
Case management system	Time-frames in Act adhered to; CMC meets weekly, effective communication with all parties; meetings and hearings set down
Database	Database developed and maintained on a weekly basis
Logistics for hearings	Hearings efficiently scheduled
<b>Research</b>	
Case research	Research conducted for panels as required
Newsletter	Four out of four planned newsletters produced
Resource centre and source book	Material acquired; resource centre maintained
Annual conference	Not held
Internship	Not implemented
<b>Operations</b>	
Policies and systems	Investment policy and procurement policy documents approved Job contracts revised
Asset management	Asset policy approved, register updated monthly, computerised labelling system implemented, physical assets inspected quarterly
Human resource manual	Human resource policies reviewed and manual updated
Performance management system	Appraisal meetings held; training needs identified; follow up action taken
Training	Training identified and implemented; conferences attended; team building held
Tribunal member meetings and training	Three out of three planned meetings/workshops held
International liaison	Seven international meetings/conferences attended One secondment to OFT Two attend investigators course in Australia
Communication, media liaison and website	Fair media coverage on decisions; decisions publicly available on website Workshop for journalists held with the Institute for the Advancement of Journalism
Annual report	To be tabled in Parliament
<b>Finance</b>	
Financial management	Budgets compiled and reviewed; regular reporting to Excom and <b>the dti</b>
Audits	Quarterly internal audits completed External audit completed
Compliance with legislation and regulation	Statutory payments made; adherence to PFMA monitored regularly
Payroll and HR records	Records maintained and updated; compliance with legislation

## 10. Financial management

The budget for the 12-month period ending 31 March 2002 reflected expenditure (inclusive of capital expenditure) of R8,78 million and estimated income (generated from fees and interest) of R3,42 million.

Income for the year amounted to R5,66 million and was distributed as follows:

Category	(Rm) (2002)	Percentage (2002)	Percentage (2001)
Government grants	–	–	–
Donor funds	–	–	2,46
Filing fees	4,72	83,38	89,50
Other income	0,94	16,62	8,04
<b>Total income</b>	<b>5,66</b>	<b>100</b>	<b>100</b>

Total expenditure (including capital expenditure) for the period was R6,37 million.

Category	(Rm) (2002)	Percentage (2002)	Percentage (2001)
Capital	0,04	0,59	0,52
Personnel and admin	5,15	79,68	
Recruitment and training	0,45	9,69	
Professional services	0,73	11,44	10,11
<b>Total expenditure</b>	<b>6,37</b>	<b>100</b>	<b>100</b>

Professional service expenditure includes payments to the commission (in terms of the MOU), hearing transcription services, legal fees and media and finance-related consulting services.

Recruitment and training expenditure includes costs associated with internal training courses and attendance at external courses and conferences.

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The annual financial statements were approved by the accounting authority on 16 May 2002 and is signed below by him.



**Accounting Authority**  
Pretoria

## Balance sheet

at 31 March 2002

	Notes	2002 R	2001 R
<b>Assets</b>			
<i>Non-current assets</i>			
Property, plant and equipment	2	603 738	839 800
<i>Current assets</i>			
Inventory	3	25 590	12 686
Trade and other receivables		766 679	242 457
Cash and cash equivalent		9 589 284	11 113 063
<b>Total assets</b>		<b>10 985 291</b>	<b>12 208 006</b>
<b>Funds and liabilities</b>			
<i>Capital and reserves</i>			
Accumulated funds		10 561 572	11 228 854
<i>Current liabilities</i>			
Trade and other payables	4	359 942	918 463
Provision for leave pay	5	63 777	60 689
<b>Total funds and liabilities</b>		<b>10 985 291</b>	<b>12 208 006</b>

## Income statement

for the year ended 31 March 2002

	Notes	2002 R	2001 R
Revenue from filing fees		4 721 059	9 202 092
Other income	6	941 002	1 079 414
<b>Operating costs</b>	7	<b>5 662 061</b> <b>(6 329 343)</b>	<b>10 281 506</b> <b>(6 312 709)</b>
<b>Operating (loss)/profit for the year</b>		<b>(667 282)</b>	<b>3 968 797</b>

## Statement of changes in funds

for the year ended 31 March 2002

	Accumulated funds
	<b>2002</b> <b>R</b>
Balance as at 1 April 2000	7 260 057
Surplus for the 2001 year	3 968 797
Balance as at 31 March 2001	11 228 854
Loss for the 2002 year	(667 282)
Balance at 31 March 2002	<b>10 561 572</b>

## Cash flow statement

for the year ended 31 March 2002

	Notes	2002 R	2001 R
Cash flows from operating activities		(1 482 919)	7 545 093
Cash receipts from customers		4 197 119	15 376 359
Cash paid to suppliers and employees		(6 620 604)	(8 652 917)
Cash (utilised)/generated by operations	10	(2 423 485)	6 723 442
Interest paid		(154)	(4 803)
Interest received		940 720	826 454
Cash flows from investing activities		(40 860)	(32 755)
Investment to expand operations			
Property, plant and equipment – acquired		(40 860)	(32 755)
(Decrease)/increase in cash and cash equivalents		(1 523 779)	7 512 338
Cash and cash equivalents at beginning of year		11 113 063	3 600 725
Cash and cash equivalents at end of year	11	<b>9 589 284</b>	11 113 063

## Notes to the annual financial statements

for the year ended 31 March 2002

### 1. Accounting policies

The financial statements are prepared on a historical cost basis and incorporate the following principal accounting policies, which are consistent with those of the previous year.

These financial statements comply with generally accepted accounting practice.

#### 1.1 Property, plant and equipment

Assets costing less than R2 000 are written off in the year of acquisition.

Property, plant and equipment are stated at historical cost less depreciation. Depreciation is calculated on a straight-line basis at rates considered appropriate to reduce the cost of the assets over their estimated useful lives.

The depreciation rates are as follows:

Computer equipment	33,33%
Furniture and fittings	20%
Leasehold improvements	18,18%
Motor vehicles	20%
Office equipment	20%

#### 1.2 Pension and other post-retirement benefits

Contributions to the defined contribution plan are charged to the income statement in the year in which they relate.

No shortfalls have been charged against income for the period under review.

#### 1.3 Inventory

Inventory is valued at the lower of cost or net realisable value and cost is determined on a first-in first-out basis.

#### 1.4 Leased assets

Leases under which the lessor effectively retains the risks and benefits of ownership are classified as operating leases. Obligations incurred under operating leases are charged to the income statement in equal instalments over the period of the lease, except when an alternative method is more representative of the time pattern from which benefits are derived.

#### 1.5 Cash and cash equivalents

This figure includes monies held in call accounts as well as cash in the bank and cash on hand.

#### 1.6 Revenue

Revenue comprises fees receivable for the year excluding value-added tax.

## Notes to the annual financial statements (continued)

for the year ended 31 March 2002

	2002 R	2001 R
<b>2. Property, plant and equipment</b>		
<i>Computer equipment</i>	69 844	121 216
Carrying amount at beginning of year	121 216	200 833
Cost	238 876	238 876
Accumulated depreciation	(117 660)	(38 043)
Additions	34 435	–
Depreciation	(85 807)	(79 617)
Carrying amount at end of year	69 844	121 216
Cost	273 311	238 876
Accumulated depreciation	(203 467)	(117 660)
<i>Furniture and fittings</i>	158 581	214 465
Carrying amount at beginning of year	214 465	260 583
Cost	301 245	288 525
Accumulated depreciation	(86 780)	(27 942)
Additions	6 425	12 720
Depreciation	(60 548)	(58 838)
Disposal	(1 761)	
Cost	(3 302)	–
Accumulated depreciation	1 541	–
Carrying amount at end of year	158 581	214 465
Cost	304 368	301 245
Accumulated depreciation	(145 787)	(86 780)
<i>Leasehold improvements</i>	315 664	420 806
Carrying amount at beginning of year	420 806	440 713
Cost	482 638	462 603
Accumulated depreciation	(61 832)	(21 890)
Additions	–	20 035
Depreciation	(105 142)	(39 942)
Carrying amount at end of year	315 664	420 806
Cost	482 638	482 638
Accumulated depreciation	(166 974)	(61 832)



	2002 R	2001 R
<b>2. Property, plant and equipment (continued)</b>		
<i>Motor vehicles</i>	53 318	74 645
Carrying amount at beginning of year	74 645	95 972
Cost	106 635	106 635
Accumulated depreciation	(31 990)	(10 663)
Depreciation	(21 327)	(21 327)
Carrying amount at end of year	53 318	74 645
Cost	106 635	106 635
Accumulated depreciation	(53 317)	(31 990)
<i>Office equipment</i>	6 331	8 668
Carrying amount at beginning of year	8 668	11 006
Cost	11 686	11 686
Accumulated depreciation	(3 018)	(680)
Depreciation	(2 337)	(2 338)
Carrying amount at end of year	6 331	8 668
Cost	11 686	11 686
Accumulated depreciation	(5 355)	(3 018)
	<b>603 738</b>	<b>839 800</b>
<b>3. Inventory</b>		
Inventory comprises:		
Consumables	25 590	12 686
<b>4. Trade and other payables</b>		
Accounts payable	288 392	822 765
Provision for salaries and bonuses	71 550	95 698
	<b>359 942</b>	<b>918 463</b>
<b>5. Provision for leave</b>		
Opening carrying amount	60 689	47 727
Additional provisions	63 777	60 689
Amounts used	–	(4 362)
Unused amounts reversed	(60 689)	(43 365)
Closing carrying amount	63 777	60 689

## Notes to the annual financial statements (continued)

for the year ended 31 March 2002

		2002 R	2001 R
<b>6. Other income</b>			
Interest received		940 720	826 454
Other		282	252 960
		<b>941 002</b>	<b>1 079 414</b>
<b>7. Operating (loss)/profit for the year</b>			
Operating (loss)/profit is stated after taking into account the following:			
	Notes		
<i>Expenditure</i>			
Auditors' remuneration		96 509	72 500
– Fees for audit		87 353	64 588
– Underprovision previous year		9 156	7 912
Depreciation of property, plant and equipment		275 161	202 062
– computer equipment		85 807	79 617
– furniture and fittings		60 548	58 838
– leasehold improvements		105 142	39 942
– motor vehicles		21 327	21 327
– office equipment		2 337	2 338
Operating leases		545 150	488 480
Premises		460 429	419 148
Hearing rooms		33 150	18 720
Equipment		51 571	50 612
Retirement benefit costs			
– defined contribution plan		143 116	153 232
Administration fees		19 686	24 375
Contributions		117 129	121 287
Board of Trustees expenses		6 301	7 570
Employee costs		3 459 214	3 386 181
Chairperson		591 636	540 775
CEO		410 071	401 800
Other personnel		2 457 507	2 443 606
Professional services		352 877	336 862
Interest paid		154	4 803
Disclosable item	14		
Irregular expenditure – allowances to Tribunal members		46 043	289 446

## 8. Operating lease commitments

The Competition Tribunal is renting premises from the Competition Commission. Rentals are charged against income as and when incurred. The remaining period of the lease is 9,5 years.

The Competition Tribunal is leasing a photocopier for a period of three years from 1 April 2001. The lease agreement is renewable at the end of the lease term and the Tribunal does not have an option to acquire the equipment.

The Competition Tribunal is leasing a fax machine for a period of five years from 1 September 1999. The lease agreement is renewable at the end of the lease term and the Tribunal does not have an option to acquire the equipment.

	2002 R	2001 R
<i>Commitments for the next 12 months:</i>	513 488	466 940
– Land and buildings	462 392	416 569
– Property, plant and equipment	51 096	50 371
<i>Commitments for one to five years:</i>	3 205 655	2 238 042
– Land and buildings	3 196 450	2 177 741
– Property, plant and equipment	9 205	60 301
<i>Commitments for more than five years:</i>		
– Land and buildings	3 353 587	4 834 687
	<b>7 072 730</b>	<b>7 539 669</b>

## 9. Employee benefits

### *Pension fund*

The Competition Commission Pension Fund, which is governed by the Pension Funds Act of 1956, is a defined contribution plan for all employees. All employees are members of the scheme which is administered by Sanlam Ltd. The scheme is currently invested in investment policies with Metropolitan Life. As an insured fund, the Competition Commission Pension Fund complies with regulation 28 of the Pensions Fund Act of 1956 and is exempted from statutory actuarial valuation.

## Notes to the annual financial statements (continued)

for the year ended 31 March 2002

	2002 R	2001 R
<b>10. Reconciliation of (loss)/surplus to cash generated/(utilised) from operations</b>		
(Loss)/surplus before taxation	(667 282)	3 968 797
Adjustments for:		
Change in provisions	(21 060)	156 387
Scrapping of asset	1 761	
Interest paid	154	4 803
Depreciation	275 161	202 062
Investment income	(940 720)	(826 454)
Operating (loss)/profit before working capital changes	(1 351 986)	3 505 595
<i>Working capital changes</i>	(1 071 499)	3 217 847
(Increase)/decrease in inventory	(12 904)	(1 654)
(Increase)/decrease in trade and other receivables	(524 222)	5 921 307
(Decrease)/increase in trade and other payables	(534 373)	(2 701 806)
Cash (utilised)/generated from operations	(2 423 485)	6 723 442
<b>11. Cash and cash equivalents</b>		
Cash and cash equivalents consist of cash on hand and balance with banks, and investments in call accounts. Cash and cash equivalents included in the cash flow statement comprise the following balance sheet amounts:		
Bank	428 142	1 105 758
Cash on hand	657	595
Investments	9 160 485	10 006 710
	9 589 284	11 113 063

### 12. Contingent liability

#### 12.1 Relocation of offices

The Commission and the Tribunal will be relocating offices in approximately three years' time as per the request of the Department of Trade and Industry. A portion of the penalty for the cancellation of the property lease agreement may be incurred when the Commission and Tribunal relocate their offices. As the Tribunal pays the Commission a share of the lease costs, the Tribunal will have to bear a portion of the cancellation penalty. At year-end the extent of the write off and portion of the penalty cannot be reasonably determined due to uncertainties regarding the lease agreements and details of the planned relocation (refer to the chairperson's report).

	2002 R	2001 R
<b>13. Change in estimate</b>		
Leasehold improvements were previously written off over a period of twelve years and are now being written off over a period of 5,5 years due to the anticipated relocation of the Tribunal. The net effect of the change in estimate resulted in an additional depreciation charge of R64 833.		
<i>Change in estimate: Leasehold improvements</i>	<b>64 833</b>	
Current depreciation charge	<b>105 142</b>	-
Previous depreciation charge	<b>40 309</b>	-
<b>14. Irregular expenditure</b>		
The Tribunal incurred irregular expenditure to the amount of R46 043 as a result of the incorrect interpretation of a previous approval of the relevant ministers in terms of section 34(1) of the Competition Act with regard to the remuneration of part-time members of the Tribunal (refer to note 9 of the chairperson's report).		
<b>15. Income tax exemption</b>		
The Competition Tribunal is exempt from income tax in terms of section 10(1)(a) of the Income Tax Act, 1962.		

## Schedule to the annual financial statements

for the year ended 31 March 2002

	2002 R	2001 R
<i>Operating costs</i>		
Audit fees – external	96 509	72 500
Audit fees – internal	59 523	67 054
Audit – sundry expenses	2 021	2 534
Bank charges	6 408	6 637
Catering management fee	24 408	24 408
Competition Commission – shared services	209 514	145 599
Computer, software licences	4 227	5 690
Conferences and seminars	155 729	462 966
Courier and delivery costs	22 809	20 187
Depreciation	275 161	202 062
Electricity, rates and taxes	54 830	50 250
Equipment hire	51 571	50 612
Establishment levy	8 134	22 316
Gifts	7 738	4 521
Insurance	20 801	60 011
Interest paid	154	4 803
IT service provider	28 320	31 570
Loss on furniture disposal	1 761	–
Media expenses	7 678	17 177
Minor office equipment	4 387	1 739
Motor vehicle expenses	12 014	12 346
Motor, travelling and entertainment	162 205	199 643
Printing, stationery and postage	119 792	119 284
Professional services	352 877	336 862
Publications, books and subscriptions	62 719	63 599
Recruitment and training costs	298 369	151 897
Rent paid	493 579	437 868
Repairs, maintenance and cleaning	91 852	73 147
Salaries	3 602 330	3 539 413
Security	37 288	31 950
Signage	–	–
Telephone and telex	54 635	94 064
	<b>6 329 343</b>	<b>6 312 709</b>

## *Report of the audit committee of the Competition Tribunal*

This report was prepared according to the Treasury Regulations for public entities issued in terms of the Public Finance Management Act, 1999 (Act No 1 of 1999), and promulgated in Government Gazette No 21249 on 31 May 2000. The Competition Tribunal is listed as a national public entity in Schedule 3A of the Act.

The internal controls of the Tribunal were effective during the year under review. No material internal control weaknesses were reported on by neither the internal auditors nor external auditors. The internal audit function was performed in a satisfactory manner for the period under review.

The audit committee was satisfied with the quality of in year management and monthly reports submitted in terms of the PFM Act, 2000 and the Division of Revenue Act.

The audit committee performed an evaluation of the 2002 annual financial statements prior to publication of these. Its evaluation did not reveal any flaws on these. Refer to the Auditor-General's report for further information.

A handwritten signature in black ink, appearing to read 'S. Masuku'.

**Sakhile Masuku**

*Chairperson: Tribunal Audit Committee*

## *Office address*

The Competition Tribunal's registered offices are situated at:

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