# A view from the Tribunal

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Chairperson

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Good morning and warm greetings to all our guests and colleagues. It a pleasure to open the session this morning with a view from the Tribunal, which is what I have been asked to speak about. It is also an honour and a privilege to share the platform with my former boss, Judge President of the Competition Appeal Court, Judge Norman Manoim who has been a mentor and taught me everything I know so you can blame him for everything the Tribunal gets
wrong:). What I thought I would do is to give some remarks on the Tribunal's work in line with the theme of this year's conference "Towards competitive markets, transformation and de-concentration." I have been allocated 45 minutes. However, I am a little under the weather with a crackling voice from the flu, and hope the voice will co-operate for half an hour.

## Introduction

I wish to start by saying, context matters. What is the context in which we are today in South Africa, and the world.

John Maynard Keynes, arguably one of the most influential economists of the 20th century once said, “the political problem of mankind is to combine three things: economic efficiency, social justice and individual liberty.” In his 1930 essay titled “Economic possibilities for our grandchildren” he argued that the economic problem, is not a permanent problem for mankind, it can be solved.

South Africa’s economic problem remains growing inequality, unemployment and poverty. Added to this challenge, South Africans and businesses in South Africa are grappling with several pressures at the same time, from an ever-rising high cost of living, to an electricity and energy crisis, climate change, and an ongoing technology revolution that is disrupting existing markets and creating new ones.

One might ask what does competition law and policy have to do with this?

I would like to posit my remarks on several important edicts that underpin our thinking as the Tribunal, as we adjudicate to promote competitive and inclusive markets.

The first is the Constitution of the Republic of South Africa. The second is the Competition Act. And the third, a little further away from home, but relevant in the global context, are the United Nations 2030 Sustainable Development Goals. One might again ask what does the latter have to do with the first two, and I will explain.

We have already heard and held debates about the Constitutional Court's Mediclinic judgement two or three conferences ago (including just yesterday). We often hear cited, the Constitutional Court's decision, which requires us to take a transformative, constitutional and context sensitive approach to our determination of competition issues, and to not let legal sophistry undo what the Competition Act seeks to do. This is not to say that competition principles are abandoned. Competition law is

economics law and therefore solving a market power problem sometimes requires something akin to piercing the corporate veil and digging a little deeper through our inquisitorial powers to get to the crux of the matter, and not to hide behind sophisticated and technical legal points.

We have had a practical application of the Constitution and the Competition Act in several decisions by the Tribunal and the CAC. Interim relief applications are one such example.

I would like to offer a third and additional prism in the context of a globalized world that, in my view, aligns with applicable local competition laws and the Constitution of South Africa, which as mentioned are the 2030 UN Sustainable Development Goals. SA is a signatory to the 17 goals.

I do so because we often are confronted by debates about whether our Act or the way in which it is applied transcends the role of what competition authorities ought to do.

One school of thought is the "its not my problem!" school of thought. Efficiency is all competition law should concern itself

with, and because the Sustainable Development Goals are about equality not efficiency, they are irrelevant to competition law enforcement, and are not a competition problem.

The second school of thought is that open markets and access to markets are important tools for efficiency, inclusion, opportunity, mobility, and economic well- being. The design of our Competition Act follows this school of thought. In 2019, the Competition Act was amended. The amendments are intended to maintain the basic architecture of the Competition Act while strengthening certain provisions of the Act to and to align them with the stated purpose of transformation and addressing concentrated markets.

Professor Eleanor Fox reminds us that: Markets and access to markets stand side by side with food, health, shelter, education, environment, infrastructure, and institutions as critical tools to combat the world's greatest economic deprivations. Making markets work for people without power is an inherent Sustainable Development Goal.

As you know, our work as the Tribunal spans two broad areas. Mergers and acquisitions and prohibited practices. These two are our raison d'être. Our reason for existence.

**Starting with Mergers**

We hear and decide mergers in order to prevent those that substantially prevent or lessen competition and/or have a negative effect on the public interest.

In practice, we conduct a complete competition analysis (which includes balancing competition harm with efficiencies) first, and separately. The competition analysis is then followed by a public interest analysis. This separates the requirements for a competition analysis from what is required for a public interest analysis, and makes it possible for the Tribunal to strike a balance in its assessment.

The Tribunal also has to find the right balance between competing public interest factors listed in section 12A(3). As an adjudicative body we have to assess all the factors and weigh them against each other and take a wholistic view and the ultimate outcome is the

net effect of the merger on both the competition and public interest considerations.

Our observation is the public interest issues are often not adequately considered by merger parties. Take for example, employment, a long standing public interest issue. Very often employment effects are not taken into account timeously and are an afterthought. We do not see this in due diligence documents or board minutes. Sometimes even up to a Tribunal hearing, the effect on employment is not clear and we have to ask parties to go back in order to do a proper assessment of employment effects. The same goes for the other public interest factors.

By way of example, in the Epiroc merger, there was no substantial prevention or lessening of competition and therefore no competition concern arose. However, there was a significant reduction in ownership by historically disadvantaged persons from an effective 98% to a 28% shareholding. An ESOP was proposed as a condition and the question we had was whether the ESOP was enough to justify the merger from a public interest perspective given the significant reduction in HDP shareholding.

It turned out only on probing during the hearing that there were other positive public interest effects listed in section 12A(3) that would be brought about by the merger, including the impact on an industry or sector and the ability of national firms to compete in international markets. The acquiring firm, through its international links, would bring its technology and R&D which would benefit local manufacturing. It would also open up access to international markets for the target firm which would be able to export its products in international markets. The merger was ultimately approved with conditions relating to the establishment of an ESOP, a moratorium on retrenchments, and funding for skills, enterprise and supplier development initiatives. The point is these public interest factors were raised belatedly despite the negative impact on the public interest raised by the merger.

Parties are encouraged to address public interest factors upfront with as much vigour as the competition effects as this makes for a better assessment of the net effect of the merger on both competition and the public interest. And it saves time for all concerned.

In the Heineken and Distell merger, we approved the merger subject to various conditions, including those addressing certain human rights violations.

We imposed conditions to address concerns regarding increased concentration. The conditions require Heineken to divest of its local Strongbow business and brand to a licensee having a majority shareholding by historically disadvantaged persons. The conditions also address information exchange concerns between the Heineken Group and Distell.

We also imposed public interest conditions which included amongst others the establishment of an ESOP that introduces shareholding for employees.

We heard seriously concerning allegations from witnesses about alleged human rights abuses and the ill-treatment of temporary and seasonal farm workers, including women on farms whose working conditions were appalling, including having no access to ablution facilities, and having to substitute trees for toilets. We could not turn a blind eye to this. We imposed conditions tendered by the merger parties to investigate these allegations and to take

the necessary remedial steps; and to report their findings to the Commission which will monitor compliance with the conditions.

A developing trend in mergers, is an increase in sweetener conditions proposed by parties to get the deal through. Examples of these “sweetener” conditions, range from performing free surgery, addressing surgical backlogs in public hospitals, financially supporting the upgrade of clinics or mobile health units in under-serviced areas, to a commitment to human rights. We have imposed these conditions. Our approach has been to satisfy ourselves that there are indeed competition or public interest concerns first and thereafter, we consider whether the conditions are not shockingly inappropriate and/or if the conditions contribute to a positive change in society. We often also tighten the conditions to ensure their enforceability.

The benefit our of our competition regime is that these public interest considerations are done transparently and in public hearing, as you know.

**Turning to Prohibited Practices**

From inception in 1999 to date, the Tribunal has decided 32 interim relief cases.

- Almost half (14) of the cases related to abuse of dominance allegations.
- About a third (10) cases related to allegations about both abuse of dominance and vertical restraints.
- Five related to allegations of abuse of dominance, vertical and horizontal restraints.
- Two cases related to allegations of vertical and horizontal restrictions.
- And only one case related to collusion allegations.

It is not surprising that the majority of interim relief cases in which the Tribunal has been asked to rule, have dealt with allegations relating to abuse of dominance. In dominance cases the core concern is the exclusion of rivals, which is damaging to the competitive process, and which once it occurs, may be hard to reverse.

As some, if not many of you may be aware, the Tribunal's powers to grant interim relief have gone through two legislative regimes.

Initially, interim relief was catered for under the erstwhile section 59 which was repealed by the Competition Second Amendment Act in December 2000, which ushered in section 49C, as we now know it.

The requirements under section 59 (the old regime) and section 49C (the new regime) are similar except that under section 59, there was an additional factor in considering whether to grant interim relief, and this factor was whether interim relief was necessary to prevent the purposes of the Act being frustrated. This requirement was dropped in the new section 49C regime.

The second difference was the applicable standard when determining interim relief. Under section 59, the standard was <u>on the balance of probabilities</u>.

In one year, between 1999 and December 2000, the Tribunal decided five cases. Four were granted and only one was dismissed.

Contrast this to the standard under section 49C, which is that a successful applicant is required to make out a *prima facie* case, a change from the adopted standard in practice, of "on a balance of probabilities". This had a chilling effect on interim relief.

Between January 2001 to December 2018 under the new regime, the Tribunal decided 18 cases, and dismissed 16 after finding no prima facie evidence of a prohibited practice. Only two interim relief applications were granted.

The new regime clearly led to fewer interim relief applications being granted.

One of the policy objectives of the 2019 Competition Amendment Act is to open up the economy to greater investment in new businesses, with a focus on opening up markets for SMEs and black-owned business. Following the inclusion of "participation" in the definition of an exclusionary act, we are seeing a third wave of interim relief applications, as evidenced by the fact that since the 2019 Amendment Act, the Tribunal has decided nine cases. In five, cases, we granted interim relief and we dismissed four cases.

We are seeing an increase in the number the parties coming to us seeking interim relief and complaining about being excluded from markets. They are relying on the new provisions of the Amendment act. In the past, an exclusionary act meant conduct that prevents a firm's entry or expansion within a market but now also includes conduct that prevents a firm from "participating" in a market. Participation means 'the ability of or opportunity for firms to sustain themselves in the market'.

The debate now is whether a firm can say, "I am a small firm or a black owned firm that is being excluded and therefore I require interim relief for a short period of time, because a dominant firm is refusing to deal with me." This issue has been considered in recent interim relief applications, and the difficulty seems to be whether exclusion, in and of itself, is enough evidence of a prima facie prohibited practice. This is not made easy by the fact that in these cases there are often disputes about relevant markets, dominance, exclusionary conduct and anti-competitive effects.

While the CAC has provided guidance on this, there are still some grey areas as to what is required to show prima facie evidence of a prohibited practice in abuse of dominance cases. In e-Media the

CAC said that what is required is “clear, non-speculative and uncontroversial facts” that support the prima facie finding of a prohibited practice, and that “whilst there will inevitably be disputes of fact”, that should not prevent the Tribunal from taking a “robust approach” on the evidence before it.

But what is that robust approach? Our view is that this can only be determined after a careful consideration of the theories of harm, and the evidence available before us at the time of analysis.

In abuse of dominance cases, it is often difficult, even after a full-blown investigation to assess whether there is an anti-competitive effect. This is more so in interim relief proceedings. Relying on standards set in SAA and Computicket may set a high bar for interim relief. Under this standard, the requirement of a substantial anti-competitive effect is met either (i) if there is “evidence of actual harm to consumer welfare” or (ii) “if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals”.

The question is, is this standard appropriate at interim relief stage because it requires a consideration of a counterfactual, which is,

absent the conduct what would have happened? At interim relief stage, such evidence is seldom available.

Should the standard rather be whether or not the anti-competitive effects are non-trivial, as the CAC has also found, and whether the respondent can justify its conduct? These are the questions the Tribunal grapples with, in matters coming before us.

It is not all doom and gloom for interim relief. A balance is obviously required. From a policy perspective interim relief is an important tool designed to deal with imminent harm to competition, regulate market conditions during the investigation period, and improve the overall effectiveness of competition law enforcement. At the same time, interim relief becomes toothless if the bar is set too high.

**Market inquiries**

Another aspect of work that is worth noting are appeals from market inquiries. Market inquiries are meant to address concerns relating to economic concentration, among others. These are early days, but following the conclusion of the Commission's recent

market inquiry in digital markets, appeals are starting to come to us. At the same time, parties have brought review applications of the Commission's decision in the High Court. This may delay implementing the recommendations of the market inquiries whose outcomes are intended to promote competitive markets, transformation and deconcentration. However, this is part due process, and parties are entitled to exercise their legal rights.

Given the rapid and fast changing nature of digital markets, it is critical that these matters are dealt with, with expedition, lest the object of the inquiries are defeated.

**Conclusion**

It is not expected that our work in the pursuit of competitive, and inclusive markets will result in overnight changes to transforming the economy and levels of participation by SMEs and HDPs in firms in South Africa, nor indeed solve the economic problems I mentioned earlier. But the work of the competition authorities is an important building block. As Martin Luther King made the observation: 'All progress is precarious, and the solution of one problem brings us face to face with another.'

Still, we must persist to solve the next problem. The work we do is about incremental changes in the quest to create economic possibilities for our grandchildren.

By adopting a context-sensitive, transformative, constitutional approach which is consistent with the scheme of the Act, we contribute significantly to South Africa's transformation goals, one case at a time.

Thank you for the opportunity and I hope you will find today's programme fruitful and insightful.