**IN THE COMPETITION TRIBUNAL**
**REPUBLIC OF SOUTH AFRICA**

**Case no. 05/X/JAN06**

In the matter between:

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|---|---|
| Cape Empowerment Trust Limited | Applicant |
| and | |
| Sanlam Life Insurance Limited | First Respondent |
| Sancino Projects Limited | Second Respondent |

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**Reasons**

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## Introduction

1. This application was brought on an urgent basis and was heard on 2 February 2006. Although it was framed as an application for an interim interdict, it was conceded by the applicant at the hearing that the relief sought was final in nature, and the hearing took place on that basis.

2. Although there is some equivocation in the founding papers, the uncontested facts suggest that the merger in question would be a large merger for the purposes of s. 13A of the Competition Act, No. 89 of 1998 (as amended), ("the Act"), and the submissions of the parties at the hearing were consistent with this view. For the purposes of this decision the Tribunal accepts that the merger under consideration would be a large merger.

3. The founding papers state that a parallel application has been launched in the High Court lest the Tribunal does not have jurisdiction to grant the interdict sought. We were however told in Sancino's answering evidence that the High Court application has been postponed to Monday, 6 February 2006, and that the parties all now accept that the Tribunal is entitled in principle to issue an interdict of the type sought in the notice of motion.

4. On 3 February 2006 the Tribunal issued an order dismissing the application with costs.

5. The reasons for the dismissal follow.

**Factual background**

6. The application was brought by Cape Empowerment Trust Limited ("CET"), to restrain the first respondent, Sanlam Life Insurance Limited ("Sanlam") from purporting to implement a merger with the second respondent, Sancino Projects Limited ("Sancino") at a time when Sanlam had not sought the approval of the competition authorities for the merger despite being, on CET's account of the matter, obliged to seek their approval in terms of the Act.

7. CET is an investment-holding company listed on the JSE. It has an empowerment background. Sancino is an unlisted investment-holding company, also with an empowerment profile.

8. Sanlam is one of South Africa's largest listed life insurance companies and is also a significant investor in, *inter alia*, a variety of unlisted projects. Its holding in Sancino falls into the latter category.

9. The circumstances of the alleged merger and other relevant details are explained briefly below.

10. Sancino's current portfolio of interests has, as its centre-piece, a shareholding of 13.02% in a company named Grand Parade Investments ("GPI"), whose assets include a minority holding in GrandWest casino, a substantial and profitable gaming operation in the Western Cape. Apart from GPI there is currently only one asset in Sancino's portfolio, namely a 100% holding in a company named Sancino Litho, which conducts a printing business. While Sancino Litho generates useful cash for Sancino it appears to have waning prospects and is by no means a jewel in Sancino's crown. On the other hand, GPI has, because of its casino interests, proven and burgeoning prospects.

11. Sancino has enjoyed no primrose path in its quest for growth and prosperity. In March 1998, at a time when it was wrestling with the consequences of some failed investments, it obtained an injection of funds from Sanlam, to the extent of R10 million. These funds were provided as the consideration for the issue to Sanlam of 10 million cumulative redeemable preference shares in Sancino with an 18% coupon. They were issued at a price of R1.00 per share, of which R0.01 was the par value and R0.99 premium. They will be referred to below as "the preference shares". At the time, Sancino had no other issued preference shares and had, it seems, some 3.53 million issued ordinary shares of a par value of R0.01 each. Sanlam owned 354,192 of these shares, or approximately 10% of the issued share capital before the issue of the 10 million preference shares.

12. After the issue to Sanlam of the preference shares, Sanlam owned some 76.4% of the issued share capital of Sancino, if the preference shares are properly to be regarded as part of Sancino's issued share capital – a point of contention to which we shall return below.

13. The agreement concluded between Sancino and Sanlam to give effect to this funding arrangement forms Annexure SLR 1 to the founding affidavit of Mr Sean Rai, chief executive officer of CET. It, in turn, refers to and incorporates as an annexure the provisions of article 109 of Sancino's articles of association, which had, we are told, been adopted and registered in February 1998 in order to make way for Sanlam's investment in the preference shares. This agreement is dated 13 March 1998 – a date which pre-dates the coming into effect of the Act (an event which took place in two stages, the first on 30 November 1998 and the second on 1 September 1999).

14. Among the relevant features of the agreement are that:

    - If dividends are not paid timeously, the amount unpaid will be added to the subscription price for the preference shares and dividends will be paid on the increased amount.

    - The preference shares are redeemable in full (including the value of unpaid dividends) on the fourth anniversary of the subscription date for the preference shares – thus on 13 March 2002.

15. It is worth quoting paragraph 6 of article 109 of Sancino's articles of association in full:

> *The holders of the Redeemable Preference Shares shall not have the right to vote at any of the meetings of the company unless any one or more of the following circumstances prevail at the date of the meeting:*
>
> *(i) the Preference Dividend or any part thereof, remain in arrears and unpaid after 30 days from the due date thereof;*
>
> *(ii) any Redemption Payment remains in arrears and unpaid after 30 days from the due date thereof;*
>
> *(iii) a resolution of the company is proposed which directly affects any of the rights attached to the Preference Shares or the interests of the holders thereof, including a resolution for the winding up of the company or for the reduction of its capital.*

16. Sancino's path continued to be a troubled one after Sanlam's injection of capital, and it appears that dividend payments on the preference shares fell into arrears and that no redemption took place on or after the due date in March 2002. For some time after that date it seems that Sanlam stood by without exercising voting rights in respect of the preference shares, merely accruing more of Sancino's indebtedness in the form of the value of unpaid dividends. By January 2006 the total amount owing by Sancino to Sanlam was some R23 million.

17. CET has for some time been negotiating with Sancino and with Sanlam with a view to acquiring Sancino or its GPI asset. It appears that CET has had a detailed knowledge of the main features of Sancino's affairs, including salient details of the preference share arrangements, since at least October 2005, if not well before. The negotiations did not lead to any agreement between the parties.

18. It is clear that CET has for some time been formulating a plan to obtain a controlling interest in Sancino. On 22 September 2005 CET announced in a public statement that it would be making an offer to Sancino's shareholders to acquire all their shares in Sancino. The circular setting out the offer forms Annexure SLR 2 to Mr Rai's affidavit and was issued on 5 October 2005.

19. The consideration which CET proposed in the circular was an all-share one, in the ratio of seven CET shares for each Sancino share. The offer seems to have been well received by some of Sancino's shareholders and Mr Rai's affidavit, dated 25 January 2006, states that CET has received acceptances of the offer to the extent of upwards of 53% of Sancino's shareholders.

20. In the face of this offer Sancino issued a circular of its own on 28 October 2005 in which it was stated, with some qualifications, that Sancino's expert advisers considered CET's offer a fair one but that Sancino's board did not consider the offer to be acceptable and none of Sancino's directors would personally accept it.

21. There were continued negotiations between CET and Sancino's board following the dates of these announcements but they appear to have led nowhere, and on 16 January 2006 Sancino notified its shareholders that it was convening a special meeting of shareholders on 8 February 2006 to vote on a number of special resolutions. The effect of these resolutions would be to convert the entire indebtedness of Sancino to Sanlam into ordinary shares in Sancino. As a result, Sanlam would become by a considerable margin a majority shareholder in Sancino regardless of the extent of acceptances received by CET in response to its offer to Sancino's shareholders. By holding ordinary shares instead of preference shares, Sanlam would share in the benefits of increases in the value of the ordinary shares, such as seem to be in prospect if the fortunes of GPI continue to wax.

22. As a counter-measure to Sancino's proposed special meeting of shareholders, CET has convened another special meeting of the shareholders of Sancino under section 180(2) of the Companies Act, to be held on 7 February 2006, to vote on a number of special resolutions. These envisage that Sancino will borrow R20 million from CET and may use these funds and others to pay Sanlam the amount of its indebtedness by Sancino, or enter into certain other financing arrangements that are not relevant to this application.

23. In any event, if the resolutions to be put to the vote on 7 February 2005 are passed and implemented, Sanlam's chances of converting its preference shares to ordinary shares will be nullified.

24. CET alleges in its founding papers that in March 2002 Sanlam acquired control of Sancino within the meaning of s. 12(2) of the Act by virtue of gaining voting rights in the preference shares – thus control in the form contemplated in s. 12(2)(b) of the Act – and has failed to notify the change of control, which represents a merger, to the competition authorities in accordance with the requirements of the Act. By voting its preference shares at the meetings on 7 and 8 February, as Sanlam contends it is entitled to do, it will, CET asserts, be implementing the merger without having obtained the approval of the competition authorities; and this, CET contends, will be a contravention of s. 13A(3) of the Act.

25. CET does not explain who, in its view, controlled Sancino before 13 March 2002, but by implication CET must consider this to have been an entity other than Sanlam.

26. S. 13A(3) of the Act provides that the parties to an intermediate or large merger may not implement that merger until it has been approved, with or without conditions, by the relevant competition authorities.

27. In this factual setting CET contends that there is urgency for the Tribunal to intervene and interdict Sanlam on the basis mentioned earlier in this decision.

28. CET's application, running with annexures to 269 pages, was filed with the Tribunal on 23 January 2006. Answering affidavits by Mr Foster, chief financial officer of Sanlam Private Equity, a division of Sanlam, and Mr Sonn, chairman of Sancino, were filed on 1 February 2006, that is, the day before the hearing. Written heads of argument were provided on behalf of all the parties on the day of the hearing.

29. Before dealing with the respondents' contentions it will be helpful to set out the relevant parts of s. 12 of the Act, since the application hinges on the interpretation of this section:

*12. Merger defined*

*(1) (a) For purposes of the Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or a part of the business of another firm.*

*(b) A merger contemplated in paragraph (a) may be achieved in any manner, including through –*

*(i) purchase or lease of the shares, an interest or assets of the other firm in question; or*

*(ii) amalgamation or other combination with the other firm in question.*

*(2) A person controls a firm if that person –*

*(a) beneficially owns more than one half of the issued share capital of the firm;*

*(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;*

*(c) is able to appoint or veto the appointment of a majority of the directors of the firm;*

*(d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);*

*(e) ………………………………….*

*(f) ……………………………………*

*(g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).*

30. In his answering affidavit on behalf of Sanlam, Mr Foster alleges that Sanlam acquired control of Sancino within the meaning of 12(2)(a) upon the issue of the preference shares in March 1998 since Sanlam became at that time the beneficial owner of more than half of Sancino's issued share capital. When Sanlam gained voting rights for the preference shares in March 2002 upon Sancino's default on

redemption payments, there was no change of control, and no obligation arose to file a merger notification with the competition authorities. All that changed is that Sanlam obtained a second form of control recognised by s. 12. This is true, Sanlam contends, even though the Act came into force before the preference shares gained voting rights upon the defaults by Sancino in relation to redemption and dividend payments.

31. As an alternative, Mr Foster asserts that Sanlam's voting rights came into existence not at the time of the payment defaults by Sancino, referred to above, but at the time when Sanlam subscribed for the preference shares, which came with such rights attached to them. On this reasoning it is irrelevant whether the defaults occurred before or after the Act came into force. As a further alternative, he asserts that the Act does not apply to events dictated by transactions concluded before the Act came into force, and the transaction in question is the agreement of 13 March 1998 by which Sanlam acquired the preference shares and the rights attaching to them.

32. Mr Sonn's affidavit on behalf of Sancino sets out very similar reasoning to that of Mr Foster. He says that Sanlam's rights to exercise votes in respect of the preference shares accrued when the shares were subscribed for, and that the Act cannot be applied retroactively to negate rights attached to the preference shares acquired before the Act came into force. Thus Sancino too contends that Sanlam had already acquired or established control over Sancino in the manner contemplated in s. 12(2)(a) of the Act before Chapter 3 of the Act, containing ss. 12 and 13A, came into effect. Accordingly, Sancino contends, Sanlam is not an acquiring firm as contemplated in s. 13A as read with s. 1 of the Act.

33. Mr Sonn denies that the application is urgent. He asserts that CET has known of Sanlam's rights under the preference shares for a protracted period and did not until very recently approach the Tribunal for assistance in preventing Sanlam from exercising voting rights attached to the preference shares. As early as March 2005 CET negotiated with Sanlam for the purchase of the preference shares. He suggests that any urgency which there may be has been entirely self-created by CET.

34. No replying evidence was filed on behalf of CET.

**Submissions on behalf of the parties**

35. At the hearing, CET's counsel, Mr Burger, who appeared together with Mr Fagan, summarised the case made out in the founding affidavit by Mr Rai, and then proceeded to deal with the defence to CET's allegations raised in the answering affidavits of Messrs Foster and Sonn.

36. Mr Burger took the approach that the Tribunal should look through the preference shares issued to Sanlam and find behind them what was effectively a loan, more precisely a debenture. In substance the preference shares, he contended, had more the characteristics of a debenture than true preference shares. He urged the Tribunal to have regard to the substance of the transaction entered into in 1998, which was essentially and fundamentally an arrangement to make funds available to Sancino for a relatively short period and at what was in reality a relatively high interest rate, clothed as dividends. If this approach was adopted, the preference shares were not part of Sancino's issued share capital but merely a loan. On this basis only the issued ordinary shares constituted Sancino's issued share capital, and the impending conversion of the loan advanced by Sanlam, masquerading as preference shares, into ordinary shares with concomitant voting rights, contemplated in the special resolutions to be voted upon on 8 February 2006, would amount to a change of control of Sancino in terms of both ss. 12(2)(a) and 12(2)(b), since Sanlam would become by far the largest equity shareholder in Sancino. In support of his contention that the preference shares were in substance a disguised debenture, Mr Burger quoted from *Blackman et al Commentary on the Companies Act Vol 1 at 5-175* where reference is made to a Chancery Division decision in a case called *Isle of Thannit, Electricity Supply Company* in which preference shares are described as "*somewhat more approximate to a debenture*"..

37. This approach was strongly opposed by Sanlam's counsel, Mr Rogers, who appeared together with Mr Farlam. Mr Rogers said that the substance-over-form argument now advanced by CET could only have been invoked if there had been something underhand or dishonest in the way in which Sancino and Sanlam had set about structuring their funding arrangements in 1998. He denied that there had been any such taint to the arrangements – they were entirely clear and correct and permissible within their own terms. The fact that they had achieved a result which would have been similar to what would have been achieved if Sancino and Sanlam had resorted to a debenture as the funding mechanism was irrelevant. The only respect in which the arrangement differed from countless other funding arrangements involving preference shares was that the amount of preference share capital injected in 1998 was relatively large compared to the issued ordinary share capital of Sancino. That feature did not alter the factual or legal nature of the arrangements in any way.

38. Mr Rogers went on to discuss the growing line of decisions in which s. 12 of the Act has been considered and interpreted, in particular relying on the reasoning adopted by the Competition Court of Appeal in <u>Distillers Corporation (South Africa) Limited and Stellenbosch Farmers' Winery Group Limited v. Bulmer (SA) (Pty) Limited and Seagram Africa (Pty) Limited</u>, case no. 08/CAC/MAY01, a decision delivered on 27

November 2001. For convenience we shall refer to it below as "the Distillers case".

39. At the time of the decision in the Distillers case the Competition Second Amendment Act, No. 30 of 2000, had not been enacted, but s. 12 was then in exactly the form in which it is found in the Act at present, and the decision remains pertinent today.

40. We shall return to the significance of the Distillers case when we discuss our conclusions about the application.

41. Mr Rogers also placed reliance on the Tribunal's reasoning in the case of Ethos Private Equity Fund IV and The Tsebo Outsourcing Group (Pty) Limited, case no. 30/LM/June03. We shall refer to it as the Ethos case. It too will be discussed below.

42. Sanlam's answer to the allegation that it had been required to file a merger notification in March 2002 when it acquired voting control of Sancino in terms of s. 12(2)(b) of the Act was, Mr Rogers argued, that Sanlam had already achieved control of Sancino in the form contemplated by s.12(2)(a) when the preference shares were issued to Sanlam. This was a one-off event and notification of an acquisition of another form of control as contemplated by another sub-section of s. 12(2) was not required.

43. Dealing with Sanlam's alternative submissions, Mr Rogers asserted that the Act could not be read to create a notification requirement arising from the acquisition by Sanlam of voting powers in its preference shares when the above-mentioned defaults by Sancino occurred, since this would amount to retrospective application of the Act when there is a general bias against the application of new legislation to undermine rights acquired before it came into effect. For reasons which will be clear from later comments in this decision, it is unnecessary to dwell on these submissions.

44. Mr Muller, who represented Sancino at the hearing, supported the contentions of Mr Rogers. He added some comments reminding the Tribunal of the drastic nature of an interdict restraining voting rights, and suggesting some solutions to the problem of "see-sawing" – the apparent need, on some interpretations of s. 12, for a party to repeatedly approach the competition authorities for approval of a merger when in fact the change was a renewed manifestation of a power relationship amounting to control which had been previously approved by the competition authorities.

45. Mr Muller also attacked the allegation of CET that there was justification for urgency in dealing with the application. He asserted that it was clear from the applicant's founding papers that for a good many months it had been aware of the circumstances of the issue of the preference shares and had taken no action, before launching the

application, to apply pressure to Sanlam and Sancino to make a merger notification to the Commission. By convening its s. 180(2) meeting of shareholders and then filing an urgent application for hearing by the Tribunal, it had created its own urgency and deserved no sympathy from the Tribunal on this score. Mr Muller supported the contention in Sancino's answering affidavit that the Tribunal should dismiss the application on this ground alone.

46. We should mention at this point that it was stated in the founding papers that Sanlam had, before issuing its circular convening the shareholders' meeting of 8 February 2006, approached the Commission for an advisory opinion on the question whether notification of its acquisition of voting powers in the preference shares upon Sancino's defaults of redemption payments and dividends would require merger notification. It emerged at the hearing that the Commission has not provided the opinion.

**The Tribunal's conclusions**

47. The Tribunal considers, despite Mr Burger's eloquent categorisation of the issue of the preference shares as a disguised loan akin to a debenture, that this is not a sustainable contention. On every criterion known to the Tribunal the preference share issue, in this case, was a real one, conforming to customary norms for preference shares, and was certainly not a sham or disguised transaction. While the coupon rate may appear to be on the high side this is a reflection of the risk taken by Sanlam – a risk which has so far led to monetary loss to Sanlam, not to untoward gains. In the risk/reward environment of private equity, a high coupon rate for preference shares is not unexpected and does not point to ulterior relationships. Nor does the fairly short period of four years for the redemption of the preference shares – again, in the fast-moving world of private equity, this is not abnormal. While, as Sanlam's counsel conceded, it may be unusual for an issue of preference share to swamp existing ordinary shares in par value, this was not an inappropriate or ill-matched response to the unhappy position in which Sancino found itself at the time of the issue.

48. The term "issued share capital" is not defined in the Companies Act, but it is clear that preference shares, when they exist, fall within the framework of the concept of the share capital as that topic is dealt with in the Companies Act. Of particular support for this proposition are the definitions in s. 1 of "equity share capital and equity shares" and the provisions of ss. 74 and 76.

49. On the basis of these findings the Tribunal cannot do otherwise than conclude in this case that the preference shares formed part of the issued share capital of Sancino throughout the period from 13 March 1998 to the date of the hearing. Accordingly, Sanlam had control of

Sancino from 13 March 1998 onwards in terms of the form of control described in s. 12(2(a) of the Act.

50. This result is not the end of the road in terms of the control of Sancino when the concept of control is seen through the prism of s. 12 of the Act. It bears reminding that s. 12 does not set out to pinpoint control of a firm in the normal sense of who, to the exclusion of others, directs the pulling of the levers which move the firm, but only whether there is one or more set of power relationships in play which call for consideration by the competition authorities as representing a potential threat to competition.

51. The Distillers case becomes relevant at this point.

52. In the Distillers case, the two appellants were both owned as to 90% by a common set of shareholders. They were proposing to merge, one acquiring the assets and liabilities of the other. They contended that because both had the same ultimate controlling shareholders there would be no change of control upon their merger and that no merger notification need be filed with the competition authorities. Davis JP had the following to say (at p.25):

> *The wording of section 12(2) clearly contemplates a situation where more than one party simultaneously exercises control over a company. This situation can be illustrated with the following example:*
>
> *A beneficially owns more than half the issued share capital of the firm. He concludes an agreement with B in order that the latter may run the business. B agrees provided that he obtains control over the appointment to the board of directors as well as of senior staff and marketing policy. In such a situation A would control the firm as defined in terms of section 12(2)(a) and B would exercise control as defined in term[s] of section 12(2)(g). In short, while A would have ultimate control, B would have control of a sufficient kind to bring him within the ambit of control as defined in section 12.*

53. On the facts of the case, Davis JP concluded (at p. 27):

> *Thus, the acquisition of the assets by first appellant would bring about the acquisition of control as between first appellant and second appellant, irrespective of what effect the transaction itself might have on the ultimate control that the shareholders of the two appellants exercised.*
>
> *For this reason, the transaction falls within the meaning of section 12(1) in that there was an acquisition of control pursuant to a transaction by which first appellant acquired the assets of*

> *second appellant. Accordingly appellant[s] were required to provide notification in terms of section 13 of the Act.*

(This decision concerned the period before the Act was amended in 2000 and s. 13 was the only section of the Act requiring notification of mergers. In the current form of the Act ss. 13 and 13A are relevant in requiring notification of various categories of merger.)

54. The implication of the findings of the CAC in the Distillers case for this application is that Sancino came under the control of Sanlam, for the purposes of s. 12(2)(a) of the Act, as soon as Sanlam subscribed for the preference shares, even if control was simultaneously exercised by others – no doubt some or all of the holders of the ordinary shares – in terms of s. 12(a)(b), or possibly some other sub-section of s. 12(2) about which we can only speculate, and that this seemingly dual control regime persisted until Sanlam acquired voting rights for the preference shares upon the occurrence of the defaults discussed above. Simultaneous control of a company for the purposes of s. 12 by two or more entities is a concept specifically acknowledged by the Distillers case.

55. Control of Sancino (in the sense of s. 12 of the Act) by the holders of the ordinary shares may then have fallen away (although we cannot be certain – there may be some arrangement by which Sanlam delegated control in the form contemplated in s. 12(2((b)); but this did not mean a change in control for the overall purpose of s. 12 of the Act since Sanlam held control in terms of s. 12(2)(a) both before and after March 2002. This was, if we understood it correctly, the gist of the argument advanced by Mr Rogers, and we consider it to be a correct view of the matter.

56. As the owner of the preference shares Sanlam owned more than half the issued share capital of Sancino, being the sum of the par value of its ordinary and preference shares. Taking account of the specific circumstances of Sancino's capital structure, this satisfies the definition of control in s. 12(2)(a) of the Act. This state of affairs predated the entry into force of Chapter 3 of the Act and accordingly it was not incumbent on Sanlam and Sancino to file a notification of this relationship with the competition authorities when the Act came into force.

57. Did this position change with the acquisition of voting powers by Sanlam in Sancino as a result of the defaults referred to repeatedly above?

58. Here it is as well to revert to the Ethos case, since it featured in the argument at the hearing.

59. In the Ethos case there was, before a particular transaction took place, common control of the Tsebo firm by Ethos and one of either of two

other firms, and control of Tsebo by another entity. Thus there was simultaneous sole control and joint control of a firm by different entities. The control mentioned is that referred to in s. 12 of the Act. A question arose about the consequences of a change in this array of relationships, and the Tribunal approached it as follows (in paragraphs 36 to 38 at p.9):

> *36.*
> *Does this mean that Ethos might have to notify again if it crosses some other threshold in section 12(2) that it presently does not enjoy now? For instance, if it was able to control or veto the appointment of the majority of the directors of the firm, a power that, as we have seen, it does not presently enjoy?*
>
> *(1) The answer to that question is no. A change of control is a once-off affair. Even if a firm has notified sole control at a time when that control is attenuated in some respects by other shareholders and it later acquires an unfettered right, provided that sole control has been notified and that this formed the basis of the decision, no subsequent notification is required.*

60. We do not consider that the Ethos case is directly in point since it postulates a prior merger notification, and hence a completed and adjudicated consideration by the competition authorities of the relationships between acquiring and acquired companies in a merger, before a second form of acquisition of control occurs. In the present case there had been no such prior consideration by the competition authorities when Sanlam acquired control of Sancino in the sense of s 12(2)(a) upon the issue of the preference shares, nor when it acquired voting powers over a majority of the issued share capital upon the occurrence of the defaults referred to repeatedly above. There was no change of control, but merely the super-imposition of another one or more forms of control contemplated by the Act. No additional potential threat to competition came into being when Sanlam gained the majority voting rights in Sancino. Notification in those circumstances would have been otiose.

61. It is unnecessary for the Tribunal to deal with the alternative defence of Sanlam and Sancino raising the issue of retrospectivity.

62. Our findings mean that there is no scope for the interdict sought by CET.

63. It should be stressed that our findings in this case – the first in which we have had to consider the role of preference shares in the share capital of a company – are confined to the circumstances of this case, and are not necessarily the last word of the Tribunal on the broader

topic of control in terms of issued share capital. Each case will have to be assessed on its own merits.

64. We should add that in any case we do not consider that CET has made out a good case for urgency. CET was aware of the existence and circumstances of the preference shares several months ago, and of the fact that they had been imbued with voting powers in March 2002 in terms of article 109.6 of Sancino's articles of association. If CET had wished to challenge the issue of a change of control arising from those voting powers it could have done so at the time it became so aware. By leaving the matter as late as it did, CET has imposed considerable stresses on all concerned, not least the Tribunal. The issues raised have a considerable degree of complexity and ideally the Tribunal would have issued its decision in good time before the meetings on 7 and 8 February 2006. We certainly do not wish to encourage litigants to bring disputes before the Tribunal on a basis of impossible levels of urgency, when our decisions are effectively overtaken by events before they are delivered, or if urgency has been self-created.

15 March 2006

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**L. Reyburn** **Date**

**Concurring: D. Lewis, U. Bhoola**