competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: RVW317Mar18

In the matter between:

CTP LIMITED	First Applicant
PRIVATE PROPERTY SOUTH AFRICA (PTY) LTD	Second Applicant
BETTERLIFE GROUP LIMITED	Third Applicant
OOBA PROPRIETARY LIMITED	Fourth Applicant

And

THE COMPETITION COMMISSION	Respondent

Panel	: Enver Daniels (Presiding Member) : Imraan Valodia (Tribunal Member) : Fiona Tregenna (Tribunal Member)
Heard on	: 05 December 2018
Decided on	: 25 January 2019
Reasons issued on	: 05 September 2019

REASONS FOR DECISION

INTRODUCTION

1. On 5 December 2018, the Tribunal was called upon to determine whether or not various conditions imposed by the Competition Commission ("Commission") in an intermediate merger transaction between CTP Limited and Private Property South Africa (Pty) Ltd ought to be set aside. On 25 January 2019, we issued our order setting aside the conditions imposed on the merger.

2. It is necessary, in view of the approach which we have adopted in this matter to give a brief history of the events which led to this application. Many of the issues are common cause and not in dispute.

BACKGROUND

3. The First Applicant, CTP Limited ("CTP"), a company with limited liability is a wholly owned subsidiary of Caxton Publishers and Printers Limited which is wholly owned by Caxton and CTP Publishers and Printers Limited.

4. The Second Applicant, Private Property South Africa (Pty) Ltd ("Private Property") sells property-related digital advertising services online. The advertising platform is used mainly by estate agencies and agents and enables property shoppers to search for properties. The platform is also used by a variety of other entities as well, such as banks, insurers, other bond originators and also by providers of legal services, electrical compliance services and entomological services and so on.

5. It is apparent from this that the main users of the Private Property platform are primarily estate agencies and estate agents and that would appear to be the market serviced by Private Property. The secondary market is made up of bond originators and others.

6. Private Property operates in a so-called 'two-sided' market. In such a market, the providers of online property listing services, such as Private Property, must be able to generate sufficient interest in their services to attract people seeking property and those who wish to sell or rent their properties. This is acknowledged by both the first and second applicants and the Commission who submit that the relevant product market is the market for the supply of listing and advertising services to estate agents and consumers through online property portals[1] and also that the geographic market is national.[2]

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[1] See paras 26 and 38 of the Merger Report (pages R584 and R587 of the record) and para 8 of the merging parties competition analysis (Page R117 of the record).
[2] Para 6.2 (page 588 of the record).

7. On 27 November 2017, the Commission issued a Merger Clearance Certificate in respect of a merger between CTP Limited and Private Property South Africa (Pty) Ltd, which it had approved subject to various conditions.

8. These conditions prompted this application. To properly understand the concerns which the applicants had about the conditions, it is necessary to look at the various "cross" shareholdings in the companies in question and the business relationships between the parties.

9. Prior to the merger, according to the applicants, Private Property had the following shareholders:
    a. One Africa Media (Pty) Ltd (81.5%);
    b. Estate Agents Property Portal Company (Pty) Ltd (13%); and
    c. Property Advertising Joint Venture (Pty) Ltd (5.5%).

10. The mechanics of the merger resulted in the shareholdings changing somewhat, but it is unnecessary to deal more fully with that.

11. What is important, though, is that the third and fourth respondents, Betterlife and Ooba, each ultimately acquired a 9.5% share in Private Property, post the merger. Betterlife and Ooba are bond originators who also compete for the provision of short-term insurance.

12. Clause 5.2 of the conditions imposed by the Commission states that:

> *"Private Property may at any time, on good cause shown, apply to the Commission for the Conditions to be lifted, revised or amended. Should a dispute arise in relation to the variation of the Conditions, the Merging Parties shall apply to the Tribunal, on good cause shown, for the Conditions to be lifted, revised or amended."*

13. A dispute arose between the parties, necessitating this application. The dispute relates to the Commission's failure to consider, either properly or at all, a request made by the parties for a variation of the final condition relating to cross-directorships.

14. The offending condition is to be found in clause 3.1 which reads as follows:[3]

> "*3.1* ***Cross directorships***
>
> *3.1.1 For as long as ooba and Betterlife can nominate individuals to the Private Property Board, they shall ensure that their respective nominees to the Private Property Board:*
>
> *3.1.1.1 are not the same persons serving, nominated and/or appointed on any board or management committees or sub-committees of either ooba and/or Betterlife respectively; and*
>
> *3.1.1.2 are not the same persons engaged in the direct day to-day management and/or oversight of either ooba and/or Betterlife's bond origination and short-term insurance businesses, respectively.*
>
> *3.2* ***Confidentiality of information***
>
> *3.2.1. The Private Property Board nominees of ooba and Betterlife shall not disclose any of their respective Competitively Sensitive Information to each other through their engagements on the Private Property Board. In this regard, the ooba and Betterlife nominees that sit on the Private Property Board shall be required to sign Confidentiality Undertakings."*

15. The initial condition proposed by the Commission with which the applicants also took issue read:

> "*3.1* ***Cross directorships***
>
> *3.1.1 For as long as ooba and Betterlife can nominate individuals to the Private Property Board, they shall ensure that their nominees to the Private Property Board:*
>
> *3.1.1.1 are not the same persons serving, nominated and or/ appointed on any board or management committees or sub-committee of either ooba and / or Betterlife;*

[3] Pg. R614 of the record.

3.1.1.2 are not the same persons engaged in the direct day-to-day management and / or oversight of either ooba and / or Betterlife's bond origination business;

3.1.1.3 decline any and all invitation(s) to attend any meeting(s) of the board of directors and / or management committees or discussions at any sub-committee meetings of either ooba and / or Betterlife;

3.1.1.4 shall not receive any board documents pertaining to the bond origination businesses of ooba and / or Betterlife, to the extent that they contain Competitively Sensitive Information;

3.1.1.5 will not have served on the board of directors and / or management committees of either ooba and / or Betterlife for a period of three (3) months prior to be (sic) nominated to the Private Property Board;

3.1.1.6 shall to (sic) adhere to the Confidentiality Undertakings."

16. The offending condition appears to be less onerous than the initial condition, as sub-paragraphs 3.1.1.3 – 3.1.1.6 have not been incorporated in the offending condition.

17. However, the offending condition contains a reference to "short-term insurance businesses" which had not been contained in the initial condition.

18. The Applicants' complaint, however, is that the Commission did not consider either the bond origination or the short-term insurance markets and it is, therefore, inappropriate for the Commission to impose a condition that relates to a market that has not been adequately assessed by the Commission.

THE INTERMEDIATE MERGER NOTIFICATION

19. On 11 September 2017, prior to this application, CTP and Private Property notified an intermediate merger. In terms of that merger, CTP would acquire control over Private Property in terms of section 12(2) of the Act.

20. On 8 November 2017, the Commission informed the merging parties that it had received concerns and objections about the proposed merger. These were stated as follows:

    a. ooba and Betterlife are the biggest bond originators and have relationships with estate agents. Their shareholding (in Private Property) will strengthen their position in the market and impact on existing and new bond originators who want to enter the market;
    b. The estate agencies who use the services of ooba and Betterlife may get preferential treatment and discounts from Private Property;
    c. A relationship exists between Private Property and estate agents through the Estate Agents Property Portal Company (Pty) Ltd ("EAPPC") which may increase its shareholding in Private Property and, as a result, EAPPC will be incentivised to use ooba and Betterlife exclusively and obtain preferential prices from Private Property.

21. The applicants responded to these complaints by stating that CTP would not support a business strategy which did not make commercial or financial sense and that ooba and Betterlife would not be able to either control Private Property or direct its commercial operations. The applicants noted that the complainant did not explain how ooba and Betterlife's shareholding in Private Property would strengthen their market positions. Because Private Property faced competition from other online property portals, foreclosure would be unlikely. A meeting was held with the Commission on 13 November 2017 at which the responses to and the explanations about the complaints were further clarified by the merging parties.

22. No additional concerns were raised by the Commission and on 14 November 2017, the Commission issued draft conditions for the merging parties' consideration. These conditions introduced a new concern, not previously raised, that ooba and Betterlife board representatives could engage in information exchanges through the merger created platform. During the hearing, the Commission argued that the ooba and Betterlife board representatives could slip away during the board meetings to exchange information and to hold discussions.

23. These new concerns were not canvassed with the merging parties and with ooba and Betterlife by the Commission which stated, incorrectly according to the applicants, that they (the merging parties) had agreed to various undertakings.

24. The applicants responded promptly to the new conditions pointing out that they disagreed that the ooba and Betterlife board representatives would simply through their presence on the board be able to exchange information on the bond origination market. Apart from challenging the notion that any harm was merger specific, the applicants pointed out that the condition was irrational and disproportionate and that there were less drastic and invasive means to prevent harm.

25. The applicants then proposed a revised set of conditions which they felt would address the Commission's concerns and which would essentially result in the representatives of ooba and Betterlife not attending and being present in the same board meetings.

26. The Commission did not respond to the proposal by the merging parties, but on 27 November 2017, issued a clearance certificate containing the new conditions but in their reasons introduced for the very first time a reference to ooba and Betterlife being competitors in also the short-term insurances services market and that the two would also exchange information in respect of this market. The information exchange concern emanates from the merger.

27. There are two issues to take note of and those are that the Commission did not discuss the conditions with the merging parties and introduced a reference to the short-term insurance services market for the very first time, without any input from the merging parties. The Commission is an organ of state with considerable expertise and resources at its disposal. Presumably the short-term insurance services market consideration was not an oversight but something which the Commission considered right at the outset. The unanswered question then is why the Commission did not include it in the first set of conditions and why it introduced it in the final conditions without reference to the merging parties, more particularly ooba and Betterlife.

28. Relying on clause 5.2 of the conditions, the applicants, through their attorneys attempted, unsuccessfully, to engage the Commission on the conditions.

29. The history of that engagement, which ultimately culminated in this application commenced on 13 December 2017.

30. The merging parties pointed out that they were never provided with an opportunity to consider the conditions; and, that the only potential harm identified by the Commission was the possibility of information sharing between ooba and Betterlife.

31. The Commission, on 10 January 2018, requested the parties to provide it with the specific amendments which they wanted to make to the final conditions. The request was strange because the merging parties had, through their attorneys, specified the amendments which would be acceptable to them in a letter dated 16 November 2017. Nevertheless, the merging parties' lawyers responded the very next day which is indicative of the seriousness with which the merging parties regarded the final conditions.

32. The reasons advanced by the merging parties for their proposed amendments were that a desired outcome must be achieved in the least onerous way and they were concerned that neither ooba nor Betterlife would be able to properly monitor their investment in Private Property.

33. On 12 January 2018, the merging parties provided further information in the form of clarification of the clauses and the consequential amendments which will need to be made.

34. The Commission responded on 29 January 2018. The response is instructive of how the Commission dealt with the merging parties' request for a variation. With reference to the Tribunal's decision in *Ferro South Africa (Pty) Ltd and Atland Chemicals CC*,[4] the Commission noted that the Tribunal does not distinguish between good cause and exceptional circumstances and that it defined

[4] (LM179Jan14/ VAR152Nov16).

exceptional circumstances as meaning unusual and unexpected circumstances. The Commission stated that it had adopted the same approach to the merging parties' request. The merging parties "*good cause*" is based on the fact, acknowledged by the Commission, that ooba and Betterlife were not afforded an opportunity to comment on the reasons, but the Commission argued that they were nevertheless aware of the conditions and had not only commented on them but had also proposed amendments.

35. In this regard, the Commission is not entirely correct as the conditions differed from what was originally proposed by the Commission and the merging parties only saw them when Commission approved the merger subject to the final conditions.

36. The Commission then says that it has the legislative authority to approve a merger subject to conditions and that in the interests of transparency it may afford parties an opportunity to comment, but suggests that where parties have consented, they do not have to be given an opportunity to comment on conditions.[5] Finally, in this regard the Commission makes it clear that it does not regard the fact that the merging parties were "not privy to" the conditions finally imposed as "good cause sufficient to merit a variation."

37. The Commission then details its objections to the merging parties' proposed condition, arguing that it would undermine the Commission's concern that ooba and Betterlife would use Private Property as a platform through which to exchange information and to undermine competition. The proposed condition also seeks to do away with the requirement that the two parties' directors on the Private Property board must be operationally separate from the parties' bond origination and short-term insurance businesses.

[5] These submissions are all contained in the Commission's letter dated 29 January 2018. In respect of this particular issue the Commission states: "Whilst in the interests of transparency, the Commission may afford the parties the opportunity to comment on proposed conditions, the Competition Act No. 89 of 1998 (as amended) (Competition Act) does not predicate the Commission's ability to impose conditions on the merging parties having consented thereto".

THE APPLICATION BEFORE US

38. The Commission in its affidavit filed in answer to the Applicant's founding affidavit states that its decisions of 27 November 2017 and 29 January 2018 are not reviewable because they are "rational and reasonable, procedurally fair, and based on a consideration of relevant considerations and a correct interpretation of law".[6]

39. As a general rule, the Tribunal would be hesitant to interfere with conditions which had been properly considered by the Commission in the manner described by it in its answering affidavit.

40. However, we are not convinced that the Commission has applied its mind fully to the merging parties' request.

41. In merger proceedings, this Tribunal has to consider, firstly, whether there has in actual fact been a merger and, once it has established that fact, it then, secondly, has to consider the impact of that merger on competition.[7] We do not think it is necessary to consider the first part of the enquiry as a merger has clearly taken place.[8] The merger was approved by the Commission subject to conditions which we have been asked to review.

42. We do, though, need to consider the second leg of our enquiry in terms of section 12A of the Act. That enquiry relates to whether or not the merger transaction was likely to substantially prevent or lessen competition.[9]

43. To make that determination, we need to comprehensively assess the likelihood of co-ordination after the merger, taking into account the relevant market, the competitive dynamics within the market and any or all of the factors set out in section 12A(2).[10]

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[6] Para 14.2 of the Commission's answering affidavit.
[7] *African Media Entertainment Ltd v Lewis NO and Others* [2008] 1 CPLR 1 (CAC).
[8] Ibid para 48.
[9] Ibid para 49.
[10] Ibid para 51.

44. In its reasons for conditional approval dated 27 November 2017, the Commission noted that "the proposed transaction results in a horizontal overlap in the market for the supply of listing and advertising services to estate agents and consumers through online property portals".[11] The Commission also noted that "the acquiring firm is significantly small ...and therefore the merger is unlikely to change the structure of the market".[12] Furthermore, the Commission mentioned that the merged entity would be constrained by other property portals, such as the much larger Property 24 and that customers had several alternatives to Private Property.[13]

45. With reference to both ooba and Betterlife, the Commission stated in its reasons that Private Property would not be able to foreclose their competitors because those competitors would be able to obtain listing and advertising online services elsewhere.[14]

46. The Commission had identified the market as being the market in which the merged entity would compete and confined its enquiry in terms of section 12A, more particularly section 12A(2), to that market. This section provides as follows:

> *"(2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including—*
>
> *(a) the actual and potential level of import competition in the market;*
>
> *(b) the ease of entry into the market, including tariff and regulatory barriers;*
>
> *(c) the level and trends of concentration, and history of collusion, in the market;*
>
> *(d) the degree of countervailing power in the market;*

[11] The Commission's reasons on para 7.
[12] Ibid.
[13] Ibid para 8.
[14] Ibid para 9.

(e) *the dynamic characteristics of the market, including growth, innovation, and product differentiation;*

(f) *the nature and extent of vertical integration in the market;*

(g) *whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and*

(h) *whether the merger will result in the removal of an effective competitor.*"

47. The Commission had in fact considered the strength of competition in the relevant market (which as indicated above is the market for the supply of listing and advertising services to estate agents and consumers) and had reached its conclusions on the impact on competition. The Commission's merger report filed on 11 September 2017, was very detailed and comprehensive.[15]

48. The Commission considered the activities of the merging parties and concluded that the merged entity will have a market share of about 20.7% with an accretion of approximately 20.5% in the relevant market. However, the acquiring firm is small with a market share of only 0.2% and therefore the merger won't change the competitive structure of the market.[16]

49. According to the Commission, the barriers to entry into the relevant market are high (but not insurmountable) and, in any event, the merged entity would be constrained by other online property portals, post-merger, such as Property24, IOL Property, Gumtree and OLX. Therefore, the structure of the market is unlikely to change, and the proposed transaction is unlikely to substantially prevent or lessen competition in any market in South Africa.[17]

50. Our own analysis and consideration of the evidence before us leads us to concur with that conclusion.

51. The Commission had received an objection to the merger by [redacted]. That concern related to the merged entity's ability to foreclose on its competitors, post-

[15] The report is contained in pages R571 – R615 of the record.
[16] Ibid para 7.
[17] Ibid paras 53 and 54.

merger, because ooba and Betterlife were part of the merged entity. The Commission's investigation of that objection concluded that Private Property does not have the ability to foreclose those competitors and that it would not have any financial incentives to do so.[18] Essentially the complaints were that should the merger be approved then Private Property may give preferential treatment to estate agents who use the bond origination services of ooba and Betterlife by giving them discounts and preferential deals.

52. It is common cause that ooba and Betterlife are competitors in the bond origination and short-term insurance markets. These are two separate and distinct markets and cannot in any conceivable way be linked to the market for the supply of listing and advertising services to estate agents and consumers. Any concerns which the Commission may have about information sharing in the two markets in which ooba and Betterlife compete cannot be reasonably and rationally addressed by imposing a condition, which is to prevent information sharing in relation to those markets, on the merger before us, without fully considering and analysing, amongst other factors,[19] the two markets and the level of competition in those markets. Before dealing with this aspect, it is necessary to consider how the Commission approached Ooba and Betterlife's participation in the merged entity.

53. The Commission, firstly, noted that market share determines the merged entity's ability to foreclose. This aspect was dealt with above and will not be considered again, except to note that the Commission concluded that the merged entity would not have the ability to foreclose downstream market participants. Even if a bond originator were precluded from advertising on the Private Property portal that bond originator would have alternatives. The Commission also noted that ooba and Betterlife are minority shareholders and would not be able to influence commercial decisions.[20]

54. Furthermore, the Commission observed that Private Property would not have any incentive to foreclose estate agents and bond originators from listing properties

[18] Ibid para 8.
[19] Ibid para 68.
[20] Ibid paras 70 and 71.

because that is how it generates its income which they would not be able to recoup.[21] The merging parties were aware that the participation by ooba and Betterlife may raise competition concerns and entered into a shareholders agreement to address those concerns.

55. However, the Commission noted that ooba and Betterlife will have board representation and that that will create a platform through which the two competitors could share information regarding the bond origination and short-term insurance markets in which they compete which might facilitate coordinated conduct.[22] The manner in which the Commission dealt with its own concerns in its merger report is instructive both in the merger report itself and in its responses to the merging parties.

56. In relation to potential information sharing between ooba and Betterlife, the Commission states that it is of the view that conditions to prevent cross-shareholding are appropriate and records that it has reached consensus with the merging parties on the conditions.[23] The merging parties dispute that such consensus was reached.[24] The merging parties allege that they had strongly disputed the imposition of those conditions as they were inappropriate and not justified by the facts. However, in good faith they had, without making any concessions regarding the conditions, engaged the Commission to address the Commission's concerns by proposing amendments and to settle the difference between them.[25] In paragraph 81 of its reasons, the Commission stated:[26]

> "*To remedy potential information exchange between ooba and Betterlife in relation to bond origination markets (our emphasis), the Commission is of the view that conditions to prevent cross holding that might facilitate information sharing between ooba and Betterlife are appropriate in the proposed transaction. The Commission and the merging parties have reached*

[21] Ibid para 72.
[22] Ibid para 9 and 78.
[23] Ibid para 81.
[24] Preliminary Replying Affidavit. Para 20. Page R623 of the record.
[25] Ibid paras 20 - 23.
[26] Commission's reasons para 81.

consensus on the Conditions attached hereto as ***Annexure A"*** (our emphasis).

57. In this paragraph the Commission refers only to the bond origination market and the consensus reached in that regard. This statement is contested by the merging parties.

58. In paragraph 84, the Commission stated:[27]

> *"The Commission finds that the proposed transaction is likely to create a platform that might facilitate coordinated conduct in a form of information sharing in the bond origination market and short-term insurance markets due to ooba and Betterlife being on the board of Private Property. The Commission therefore imposes the condition annexed hereto as* ***"Annexure A"*** (our emphasis)."

59. Whilst one may argue that the drafting of the two paragraphs was simply inelegant, there are important differences between the two. Paragraph 81 made reference only to the bond origination market and the Commission alleges that the conditions were consensual. However, in paragraph 84, the Commission introduces a reference to the short-term insurance market and states unequivocally that it has imposed the condition. It is not possible to reconcile these differences. Either the conditions were consensual, or they were not. Paragraph 84 appears to lend credence to the merging parties claim that they had not reached consensus on the condition. The further reference to the short-term insurance market in that paragraph is inexplicable. It appears to have been included as an afterthought.

60. The Commission filed a lengthy answering affidavit in response to the merging parties founding affidavit. In paragraph 61 of this affidavit, the deponent, Mr Amanda Mfuphi ("Mr Mfuphi"), specifically concedes that the merging parties did not agree to the final conditions but argues that they had agreed to conditions "albeit on terms proposed by them". It is obvious that the allegation in the merger

[27] Commission's reasons para 84.

report that consensus had been reached is incorrect, with no explanation being proffered as to why the allegation was made.

61. In paragraphs 76 and 78 Mr Mfuphi admits that the Commission failed to respond to the merging parties' letter of 16 November 2017 and to hold further meetings with them, but disputes that it was obliged to do so. In fact, a similar claim is made in paragraph 78.

62. In paragraph 80, Mr Mfuphi admits that the applicants did not agree to the final conditions but contends that they were consulted and that they had held a meeting with the merging parties' attorneys of record on 13 November 2017 where information sharing concerns were raised. In their founding affidavit, the merging parties mention that on 13 November 2017, they clarified their explanations and responses to the Commission.[28]

63. In paragraphs 108 and 137, Mr Mfuphi also admits that the merging parties did not have sight of the conditions before they were issued but submits that it does not constitute a violation of the *audi alteram partem* principle (the *audi* principle). In paragraph 138, Mr Mfuphi states that the merging parties were afforded an opportunity of making representations. More specifically, Mr Mfuphi states that the decision to impose the conditions was procedurally fair, did not violate the *audi* principle and is thus not reviewable under PAJA or the principle of legality and that the decision was rationally connected to the purpose for which it was taken.[29]

64. The Commission's heads of argument follow the approach it adopted in its founding affidavit. In paragraph 36, for example, it is submitted that the Commission was under no obligation to respond to the applicants' letter of 16 November 2017 and was not obliged to continue the negotiations. It was simply required to make a determination in terms of section 13(5)(b) of the Act which it did and to indicate to the applicants that their proposed amendments were not acceptable. The way in which the Executive Committee (Exco) dealt with the proposed amendments either before or after the conditions were imposed is not

[28] Founding affidavit (FA) paras 31 and 37.
[29] Answering affidavit (AA) paras 140 and 148.

fully explained in the heads of argument. In paragraph 38.3 of the heads, the Commission alludes to Exco having had knowledge that the draft conditions had not been achieved by agreement. It also mentions that the clearance certificate in any event was issued by the Commission's Mergers and Acquisitions Division and not the Exco. If Exco knew that the draft conditions were not consensual, one must wonder why the conditions are misleading in respect of the alleged consensus that was reached. No attempt is made to explain whether or not, post approval of the merger, Exco considered the request for a variation of the reasons along the lines suggested by the merging parties. The Competition Commission consists of Commissioner and one or more Deputy Commissioners, appointed by the Minister in terms of the Act.[30] A reference to the Competition Commission would, therefore, be a reference to the Commissioner and the Deputy Commissioners acting in concert. The Commissioner and the Deputy Commissioners must finally consider and decide mergers which are notified to it in terms of the Act.

65. The Commission is an organ of state and bound by section 8 the Constitution of the Republic of South Africa, 1996 which states that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. The Commission is bound to conduct its investigations and to make its decisions in accordance with the Act and the Constitution.

66. In *Africa Media,*[31] the CAC noted that in *Glaxo Welcome (Pty) Ltd v Terblanche NO and Others*[32] Selikowitz AJA dealt comprehensively with the review jurisdiction of the Court. It also noted that he had found that "*the Tribunal's decisions, although judicial in nature, are administrative decisions*".[33]

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[30] Section 19(2) of the Act.
[31] *Africa Media Entertainment Ltd v Lewis NO and Others* [2008] 1 CPLR 1 (CAC).
[32] [2001–2002] CPLR 48 (CAC) at 54.
[33] *Africa Media* para 27.

67. The Commission's decision-making powers are also administrative in nature and must be lawful, reasonable and procedurally fair.[34] In this regard, section 3 of the Promotion of Administrative Justice Act[35] specifically provides:

> *"**3. Procedurally fair administrative action affecting any person.—***
>
> *(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*
>
> *(2) (a) A fair administrative procedure depends on the circumstances of each case.*
>
> *(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—*
>
> *(i) adequate notice of the nature and purpose of the proposed administrative action;*
>
> *(ii) a reasonable opportunity to make representation;*
>
> *(iii) a clear statement of the administrative action;*
>
> *(iv) adequate notice of any right of review or internal appeal, where applicable; and*
>
> *(v) adequate notice of the right to request reasons in terms of section 5."*

68. The Commission's approach to its interaction with the merging parties seems to be inconsistent with the provisions of the Act. It failed to respond to the merging parties' correspondence, did not properly consider their representations and failed to clarify whether Exco had actually considered the merging parties' counter proposals.

69. It would appear to us, therefore, that the Commission had not fully applied its mind to the issues raised by the merging parties. In *Africa Media*, the CAC gave important guidance as to how a merger enquiry should be conducted. In this case the CAC had to determine whether the Tribunal's decision in that case was

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[34] We do note, however, that some decisions by the Competition Commission do not constitute administrative action and therefore not reviewable under PAJA, such as the Commission's decision to refer a complaint to the Tribunal (*Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another* [2003] 1 All SA 82 (SCA). Also, see further *Competition Commission of SA v Telkom SA Ltd and Another* [2010] 2 II SA 433 (SCA).

[35] Act No 3 of 2000.

materially influenced by an error of law. It went on to explain that in order to determine whether the Tribunal's decision to approve the merger was materially influenced by an error of law, it is necessary to examine the essential architecture pertaining to the evaluation of a merger.[36]

70. Section 12A(1) and (2) of the Act reads as follows:

> *"(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and*
>
> *(a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine –:*
>
> *(i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and*
>
> *(ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).*
>
> *(2) When determining whether or not a merger is likely to substantially prevent or lessen competition the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the firm in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market including–:*
>
> *(a) the actual and potential level of import competition in the market;*
>
> *(b) the ease of entry into the market, including tariff and regulatory barriers;*
>
> *(c) the level and trends of concentration, and history of collusion in the market;*
>
> *(d) the degree of countervailing power in the market;*

[36] *Africa Media* supra para 29.

(e) *the dynamic characteristics of the market, including growth; innovation and product differentiation;*

(f) *the nature and extent of vertical integration in the market;*

(g) *whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail ;and*

(h) *whether the merger will result in the removal of an effective competitor."*

71. It stated that the CAC had previously set out its approach to these sections to the Act. See *Schumann Sasol (SA) (Pty) Ltd v Price's Daelite (Pty) Ltd*[37] at 87 where the Court stated that:

> *"Section 12A provides for definite stages in the inquiry which it mandates. In the first place the Commission or the Tribunal must determine whether the merger is likely to substantially prevent or lessen competition. In making such a determination the Competition Tribunal must assess the strength of competition in the relevant market and the probability that, after the merger, the firms in the market will behave competitively or co-operatively. In making this assessment consideration must be given to the non-exhaustive list of factors set out in section 12A(2) which are relevant to the assessment of competition in that market. This initial inquiry may be termed the threshold test. The test must be applied to the relevant market which is the actual market and not a hypothetical or idealised market...."* (Emphasis added).[38]

72. The comments made about the Tribunal apply equally to the Commission which must also follow the approach laid down in the Act and confirmed by the CAC. The Commission's merger report is comprehensive and detailed in respect of the merger itself and the Commission concluded that the proposed transaction is unlikely to raise foreclosure concerns.

73. It did find, though that the transaction is likely to create a platform that might facilitate coordinated conduct in a form of information-sharing in the bond

[37] [2001–2002] CPLR 84 (CAC).
[38] Ibid para 30.

origination market and the short-term insurance market and for that reason approved the merger with conditions.

74. In its reasons for its decision the Commission explains that as ooba and Betterlife will have board representation, it is of the view that a platform will be created that might facilitate coordinated conduct in the form of information sharing.[39] This view is repeated in paragraph 2.2 of the conditions.

75. In order to arrive at such a view, the Commission was obliged, in accordance with what was laid down in *Africa Media* to consider the bond origination and short-term insurance markets, the level of competition in the market and whether ooba and Betterlife would, after the merger, behave cooperatively or competitively in those markets.

76. It is evident from the merger report itself that the Commission did not consider both of these two markets. Had it done so, it would have included information about those markets in the report. The same observation must be made about the information exchange theories. The Commission has not explained why it believes that, through the ooba and Betterlife directors serving on the Private Property board, a platform may be created through which information might be exchanged. There is no suggestion in the report that collusive activity has taken place in those markets and that ooba and Betterlife were part of such activity.

77. In the absence of relevant information, we are required to speculate about these things which would be a serious misdirection. The criticism that the Commission has not properly applied its mind to the issues is strengthened by the absence of information in the report.

78. Before the hearing of this matter, we suggested to the parties that they meet to consider the amendments proposed by the merging parties, as we were, *prima facie*, of the view that the conditions tendered by the merging parties were sufficient to address the concerns of the Commission.

[39] Para 10 of the reasons for the decision.

79. The hearing proceeded because, we were informed, the Commission would not consider the proposed conditions under any circumstances.

CONCLUSION

80. We are of the view that the bond origination and short-term insurance markets were either not considered at all or not properly considered by the Commission. It would therefore appear that there was no rational basis for the conditions.

81. For that reason, we have approved the merger without conditions and no order as to costs were made.

Presiding Member
Mr Enver Daniels

05 September 2019
Date

Prof. Imraan Valodia and Prof. Fiona Tregenna concurring.

Tribunal Case Manager:	Ndumiso Ndlovu.
For the Applicants:	S Budlender and S Pudifin-Jones instructed by Nortons Inc.
For the Respondent:	C Slump.