SectionI.1COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case Nos: 94/FN/Nov00
101/FN/Dec00

In the matter between:

Bulmer SA (Proprietary) Limited	**First Applicant**
Seagram Africa (Proprietary) Limited	**Second Applicant**
and	
Distillers Corporation (SA) Limited	**First Respondent**
Stellenbosch Farmers' Winery Group (Pty) Ltd	**Second Respondent**
The Competition Commission	**Third Respondent**

SectionI.2Reasons for Decision

A. INTRODUCTION

1) 1. Summary of the Issues

In this case the first respondent entered into a transaction to purchase the business of the second respondent. Three common shareholders hold 90% of the voting equity in each of the respondents[1]. We have to decide whether the transaction constitutes a merger as defined in the Act. If it does the respondents were in terms of section 13 of the Act under an obligation to notify the transaction to the Competition Commission. The respondents say they were under no such obligation, as the transaction did not lead to a change in the ultimate control of either company. The Competition Commission agreed with this contention, but two of the respondents' competitors, who are the applicants in this case, did not and they have brought the dispute to us. Prior to us even considering the question we have to decide if we have jurisdiction because the case was brought to us by the competitors and not the Commission.

1 We will refer to the first and second respondents as the "respondents" and the third respondent as the "Commission". We also refer to sections of the Competition Act and rules as they were prior to the amendments that came into effect on 1 February 2001, unless we have indicated otherwise.

2. History of Litigation

1. This application is brought by Bulmer SA (Proprietary) Limited ("Bulmers",) and Seagram Africa (Proprietary) Limited ("Seagrams") (the Applicants) against Distillers Corporation (SA) Limited ("Distillers" – First Respondent), Stellenbosch Farmers' Winery Group (Pty) Ltd ("SFW"- Second Respondent, and the Competition Commission (Third Respondent).[2]

2. The application is brought in terms of section 62(1) of the Competition Act 89 of 1998. The basis of the application is that the respondents failed to notify a transaction which the applicants contend is a merger as defined in terms of section 12(1) of the Act. They seek an order from the Tribunal declaring the implementation of the merger between SFW and Distillers (the respondents) to be in contravention of section 13 of the Act (compelling the respondents to notify such transaction) and ordering the respondents to sell any assets or interest it has acquired pursuant to the merger. They claim in the alternative an order compelling the respondents to **notify the merger** to the Commission in terms of Section 13 of the Act within 7 days thereafter.

3. The two applications were initially brought separately by Bulmers and Seagrams, but were subsequently consolidated as per agreement at the pre-hearing conference held on 6 February 2001.

4. The respondents confirmed at the pre-hearing that the merger had already been implemented.

5. The application was supported by the Food and Allied Workers Union and the National Union of Food, Beverages, Wine and Spirit and Allied Workers. We recognized the unions' as interveners at the hearing. Although the unions did not file any papers themselves they did make written and oral submissions based on the papers filed by the applicants and respondents. These submissions were confined to the legal issues raised by the application.

3. The Parties

6. Bulmers was established in March 1999 as a joint venture company between a South African brewery, Bavaria Brau (Pty) Ltd, and HP Bulmer Limited, an

2 During the pre-hearing it emerged that the Commission was joined merely as an interested party and no substantive order was being sought against them. The Commission subsequently indicated that it would not be participating in the proceedings.

English cider manufacturing company. Its main business activity comprises manufacturing and distributing alcoholic fruit beverage (AFB) products within and throughout South Africa. [3]

7. Seagrams is involved in the marketing, wholesale selling and distribution of various brands of liquor nationally.

8. Distillers is an investment holding company, involved, through its subsidiaries, in the production and wholesale distribution of branded spirits and wine. Distillers' produces, markets, sells and distributes various brandies (including Oude Meester, Richelieu, Viceroy, Klipdrift) and premium wines (for example Fleur du Cap, Le Bonheur, Neethlingshof and Grunberger). Other prominent trade marks include the local names J C Le Roux, Drostdy Hof and Amarula Cream as well as acting as an agent for international brands such as Gordon's gin; Bacardi rum; Grant's whiskey. Distillers also manufactures and distributes AFB products under the brand names of Bernini and Castello within South Africa.[4]

9. SFW is a producer and wholesaler of wine, spirits and alcoholic fruit beverages within South Africa. As a leading wine producer, it boasts names such as Nederburg, Zonnebloem, Graca, Chateau Libertas and Plaisir de Merle. Its spirit brands include Mellow-Wood and Old Buck gin; Mainstay cane spirit; Romanoff Vodka. It has the distribution rights in SA for Martell brandy[5] and Bols brandy. It is the market leader in the AFB market with brand names such as Hunters Dry, Hunters Gold, Crown, Savannah, Esprit, Montello and Manhattan.[6]

10. Presently, the corporate structuring of both SFW and Distillers is divided in a three-way split:

    - Rembrandt-KWV Investments ("RemKWV") holds 60% of the shares. RemKWV is a joint holding company of Rembrandt and KWV, in which each holds a 50% interest. KWV's interest in RemKWV is held through a listed subsidiary, KWV Investments Limited in which KWV owns approximately 54%;

    - SAB holds 30% through its wholly owned subsidiary Other Beverages Industries (Pty) Ltd ("OBI");

    - The general public holds the remaining 10%.

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3 The AFB market is the market comprising fermented fruit-based (apple or wine-based) and other fruit flavoured alcoholic beverage) Bulmer's founding affidavit p 5

4 Terms of Merger Document, page 35, Seagrams' founding affidavit page 7

5 Currently these rights are the subject of litigation between Seagrams and SFW.

6 Terms of Merger Document, page 35; Seagrams' founding affidavit, page 7

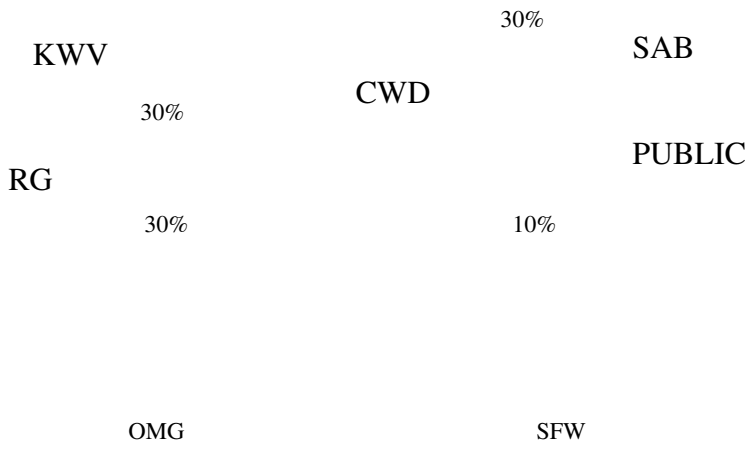
4. Developments in the Liquor Industry

11. Prior to 1979, two separate companies, Oude Meester Group Limited ("OMG") and SFW competed with each other in the liquor industry. Other major firms in the industry comprised SAB and Ko-operatiewe Wijnbouwers Vereniging van Zuid-Afrika Beperkt ("KWV").

12. With governmental consent, a significant restructuring in the industry occurred in 1979, when a new entity, Cape Wine and Distillers Limited ("CWD") was formed. This arose in pursuance of an arrangement between SAB, SFW, OMG and KWV. This restructuring gave effect to an agreement between the parties in terms of which the liquor industry was effectively divided between the various players. SAB purchased the Rembrandt Group's beer interests in exchange for agreeing to limit its involvement in wine and spirits to its 30% investment holding in CWD. Similarly, the Rembrandt Group undertook to abdicate its beer interests so as no longer to have any interests whatsoever in the beer market. Further in terms of this agreement, SFW and OMG became wholly owned subsidiaries of CWD.

13. CWD was listed on the Johannesburg Stock Exchange with its shareholding divided as follows:

    a. 30% held by The Rembrandt Group;
    b. 30% held by SAB;
    c. 30% held by KWV; and
    d. 10% held by the public.



14. Rembrandt and KWV subsequently formed a jointly-owned holding company, Rembrandt-KWV Investments Limited, in which they consolidated their respective shares in CWD to a 60% shareholding.

15. In 1988 another shake-up of the industry occurred when SFW and OMG were separately listed on the Johannesburg Stock Exchange. CWD retained the activities of SFW and was renamed SFW and OMG's interests were transferred to a new entity, Distillers Corporation.

16. On 8 June 2000, the legal representatives of the respondents contacted the Commission asking it to clarify whether the proposed transaction to merge the businesses of SFW and Distillers constituted a notifiable transaction. On 7 August 2000, the Commission concluded in a letter addressed to the respondents' legal representatives, that the proposed transaction would not constitute a merger as defined in section 12 of the Act and accordingly was not notifiable in terms of section 13. Based upon this direction, the respondents proceeded to issue cautionary announcements advising of the proposed merger.

17. In terms of an agreement dated 20 September 2000 (amended on 9 October 2000) the respondents effected a transaction whereby Distillers was to acquire all the principal assets and liabilities of SFW. The purchase consideration in respect of the SFW assets, in the amount of R515 157 950,31, was to be settled through the issue by Distillers to SFW of 55 580 000 Distillers ordinary shares in the share capital of Distillers. These Consideration Shares were to be distributed by way of a dividend in specie and reduction in share capital to the SFW shareholders.

18. On 10 October 2000 the Commission, after further enquiry, again addressed correspondence to the respondents' legal representatives, this time advising them that the transaction between SFW and Distillers did, in fact, constitute a merger as defined insofar as it did not in the Commission's view constitute an internal restructuring, and advising them of the requirement to notify the transaction within 7 days in accordance with the Act.

19. Upon receiving this notification, the respondents' legal representative met with the Commission's legal counsel to discuss the matter. In pursuance of this meeting the Commissioner contacted the respondents' legal representative and advised him that the Commission had reconsidered its position and accepted that the transaction did not constitute a merger within the definition of section 12 of the Act and, in light hereof, the transaction could proceed. [7]

20. The applicants were unhappy with the Commission's decision. They had at all times vigorously contended that these companies are separate and distinct juristic and business competitors and as a consequence, the merger of the two companies would significantly affect and hamper competition in the liquor industry.

21. Seagrams accordingly launched an application against the respondents in the Cape

7 See Seagram Record, page 258A, Supplementary Affidavit by Michael Katz.

High Court on 10 November 2000. The action was founded on Seagrams' contention that the transaction between SFW and Distillers constituted a merger in terms of the Act. The applicant sought an interdict restraining the respondents from implementing the merger, alternatively an order referring the matter to the Competition Tribunal.[8] In his judgement, Jali J ruled that section 65(3) made it clear that the High Court did not have jurisdiction to hear the matter, insofar as it related to competition issues. By virtue of the same reasoning, the court could not grant a referral order to the Competition Tribunal.

B. THE APPLICATION

2)

3) **1. Appropriate Act**

Since 1 February 2001 the Competition Act has been extensively amended by the Competition Second Amendment Act, Act no 39 of 2000. One of the provisions that has been amended has been section 12 which provides for the definition of a merger. We asked the parties if the amendment would have any bearing on our decision. All were in agreement that for the purpose of the issues in this case the change in definition did not lead to a different conclusion. On balance the parties concluded that the previous definition applied, as this was the provision in operation at the time when the transaction, assuming it was a merger, would have had to have been notified. Counsel for the respondents however urged us to indicate in our decision which section applied to the transaction although we were not enlightened why we should do so if nothing turned on this designation. We agree with the parties that nothing turns on this point and we decline to make any finding as to which version of the Act applies to the current transaction. For the purpose of our decision we have referred to the provisions of the Act as they were immediately prior to 1 February 2001 as the parties all addressed their arguments to us based on the Act as it was then.

2. Jurisdiction

The respondents argued that a prerequisite in order for us to have jurisdiction is that the matter must be "referred" to us. As authority for this proposition they draw our attention to section 27 of the Act, which provides for the functions of the Tribunal and states:

> *27(1) Upon a matter being referred to it in terms of this Act, the Competition Tribunal may –*
>
> *a) Grant an exemption from the provisions of this Act*
> *b) Authorize a merger, with or without conditions or prohibit a merger*
> *c) Adjudicate in relation to any conduct prohibited in terms of*

8 Seagram Africa (Pty) Ltd and Stellenbosch Farmers' Winery Group Ltd, Stellenbosch Farmers' Winery Ltd, Distillers Corporation (SA) Ltd 7759/00, CPD

Chapter 2 or 3, by determining whether prohibited conduct has occurred, and if so, impose a remedy provided for in Chapter 6;or

d) *Grant an order for costs in terms of section 57.* (Our underlining)

They argue that on a proper construction of the Act this means a "referral" by the Commission. Since this matter is before us by way of an application brought by the applicants and has not been referred to us by the Competition Commission we cannot have jurisdiction.

Implicit in this argument are two important assumptions. Firstly that section 27 is exhaustive with respect to how matters may be brought before us. Secondly, that when the section speaks of a "referral" it means a referral by the Commission and not by another person.

The expression "referral" is not defined in the Act so the respondents have drawn our attention to certain other sections in Chapter 3 where the word is always used in the context of the Commission referring something to the Tribunal. They further rely on the rules of the Tribunal to bolster this interpretation. The relevant provision is rule 42 which, provides for procedures not otherwise provided for in the rules. Since, as appears later, the applicants place reliance on this rule as well, it is set out in full below.

ArticleII.*42 "Initiating other proceedings*

SectionII.1(1) Any proceedings not otherwise provided for in these Rules may be initiated only by filing a Notice of Motion in Form CT 6 and supporting affidavit setting out the facts on which the application is based.

SectionII.2(2) The applicant must serve a copy of the Notice of Motion and affidavit on each respondent named in the Notice, within 5 business days after filing it.

(3) A Notice of Motion in terms of this Rule must -

(a) depending on the context –

9. set out the Commission's decision that is being appealed or reviewed;

(ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;

(i)(iii) set out the Tribunal Rule in respect of which the applicant seeks condonation; or

(iv) allege conduct referred to in

1) (aa) section 61(1)(c) in respect of which the Commission seeks an administrative fine; or

bb. section 62(1) in respect of which the Commission seeks an order of divestiture;

(b) indicate the order sought; and

(c) state the name and address of each person in respect of whom an order is sought.

The respondents argue that since sub-rules 42(3)(a) (iv)(aa) and (bb) mention the section 61 and 62 proceeding as one in which the "Commission" seeks an order i.e a specific party, as opposed for instance to rule 42(3)(a) (iii) which refers to the "applicant" i.e. a general party, this bolsters their interpretation that only the Commission may refer such a matter. In answer to the applicants' criticism that they were using the rules to interpret the Act the respondents say that this is an aspect of procedure properly reserved for the rules and the Act itself does not determine the issue.

We find no support for the respondents view in the text. In the first place even if we assume section 27 is exhaustive of the Tribunal's functions, which we doubt, there is no basis for reading the word "referral" to mean a referral by the Commission only. Had the legislature intended to use the word referral only in relation to the Commission it would

have either defined the word restrictively in the definition section of the Act, which it hasn't, or qualified its usage in section 27, which it hasn't. The respondents approach requires one to search for the word referral in the Act and having found that in Chapter 3 its usage happily coincides with an action expected of the Commission it must therefore mean that the two are wedded to one another and hence when we see the phrase in section 27 "referral to the Tribunal" this must be decoded to mean referral by the Commission. The approach collapses when we reach section 51(2) when we find referral associated with a complainant's non–referral[9] and in section 65(2)(b) where a civil court must "refer" a matter to the Tribunal. It is quite clear that the Act uses the word referral in a general sense and without confining it to the Commission.

On a purely textual interpretation there is nothing in section 27 which suggests that a matter cannot be referred to the Tribunal by a party other than the Commission. We are of course required to make our decision in terms of section 62 of the Act. That section is again silent as to who may invoke our jurisdiction. The respondents thus oblige us to read into this section the words "*subject to section 27"* and then read into section 27 the words on referral *by the Commission.* It is unlikely that the legislature could have intended that the Act required this amount of surgery.

The respondents also invoked a purposive argument to support their interpretation. The Act through section 65(3) gives us exclusive jurisdiction over subject matter not over process. This latter aspect is important because the Act creates a hierarchy of institutions commencing with the Commission and ultimately ending up with the Competition Appeal Court. The fact that the Supreme Court of Appeal may have jurisdiction over a dispute of a particular nature does not mean that the dispute may be heard by them directly without it being processed up through the hierarchy of courts, so by analogy in our Act they argue that all matters must commence at Commission level and from there be referred to the Tribunal. This is designed to ensure the orderly and proper governance of the Act so that the investigator investigates and the adjudicator adjudicates. Whilst there is much to be said for this argument it is not supported by the structure of the Act.

In the first place the Act does provide instances of referrals to the Tribunal which need not involve the Commission as the originating party. A civil court can refer a matter directly in terms of section 65(2) as we have observed earlier. A party can bring an interim relief application directly without the Commission first investigating it.[10] All that is required is that the complaint has been submitted to the Tribunal. The Commission may remain passive throughout these proceedings contrary thus to the purpose suggested by the respondents.

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9 Here the section states "*A referral to the Competition Tribunal whether by the Competition Commission in terms of section 50(a) or by a complainant in terms of subsection 1, must be in the prescribed form."* The respondents try to get around this difficulty by relying on the fact that referral here is used after the Commission has exercised its rights to not refer and hence the complainants right to refer is an indirect or derivative right of referral which cannot be exercised originally by the complainant.

10 See section 59 of the Act.

Secondly the respondents' interpretation leads one into a jurisdictional paradox. What happens in a case such as this where the Commission decides it does not have jurisdiction over a merger. A party who believes that this decision is erroneous cannot go the High Court as that court does not have jurisdiction over the interpretation of section 12 as this section is in Chapter 3 of the Act and section 65(3) states:

> "*The Competition Tribunal and the Competition Appeal Court share exclusive jurisdiction in respect of the following matters:*
>
> *a) Interpretation and application of the provisions of Chapters 2,3 and 6, other than this section; and*
> *b) The functions referred to in sections 21(1), 27(1) and 37(1)."*

This is not idle speculation on our part. Seagram's took this course of action initially in the Cape High Court in the matter of Seagram Africa (Pty) Ltd and Stellenbosch Farmers' Winery Group Ltd, Stellenbosch Farmers' Winery Ltd, Distillers Corporation (SA) Ltd7759/00, CPD and the court held it had no jurisdiction.

In that matter Jali J, held as follows on the question whether the applicant in that matter, Seagram's could refer the matter to the Tribunal:

> "I cannot see a problem with the applicant [i.e. Seagram's] referring this matter to the Tribunal itself if it is not satisfied with the Commission's position. I've already found that the referral to the Tribunal need not be done by the parties to the merger only. If the applicant is concerned about the merger then it is within its rights to refer same to the Tribunal and for the Tribunal to deal with the same." 11

If we adopt the respondents' current interpretation neither does the Tribunal have jurisdiction. When asked by the Tribunal what remedy a party in the position of the applicants would have the respondents lamely suggested that this would be by way of a mandamus to the High Court against the Commission. The applicants have pointed out that this is quite unsatisfactory. If the High Court has no review power by virtue of the exclusive jurisdiction conferred on the Competition Tribunal and Competition Appeal Court in terms of section 65(3) then for the same reason it cannot enjoy the power to entertain a mandamus, which could not be adjudicated upon without consideration of section 12 a section whose interpretation is the exclusive preserve of the competition authorities.

The applicants cannot be denied a remedy - even the respondents concede as much although their solution is unsatisfactory. In our view the position contended for by the applicants is correct and the Tribunal does have jurisdiction. Not only does this accord with a much simpler reading of the Act it is also consistent with the overriding purpose of the Act which is to give exclusive jurisdiction to the competition authorities over issues

11 (Judgment page 26) Ironically in this matter both parties argued the opposite of what they contend for before the Tribunal.

that require specialist interpretation such as the ambit of section 12.[12]

It is for this reason not necessary for us to delve into the debate over Rule 42 alluded to earlier. If the Act gives the applicants this remedy we do not have to search for it in the rules. Be that as its may at least two sub-rules would seem of possible application and it is unnecessary to decide which, for nothing turns on it. Nor indeed, as the applicants have pointed out, is Rule 42(3) exhaustive of all the possible permutations an application can take. The phrase in 42(3)(a) "depending on the context" says that if you bring one of these application then this is what you need to allege. It does not purport to be a closed list of all possible applications that may be brought. On this interpretation what Rule 42(1) does is to provide a residual procedure for "proceedings not otherwise provided for". Rule 42(3)(a) applies only to those specific applications that it mentions. If we follow this approach the general rule (rule 42(1)) can live together with the specific one (rule 42(3)) .On the respondents interpretation we have the one rule giving a general right only to have it curtailed by a subsequent one.

There is another more fundamental problem with the respondents' interpretation of Rule 42. If their interpretation is correct it means that applications to the Tribunal in terms of sections 61 and 62 are the prerogative of the Commission only. The rule is thus being interpreted then not as a procedural supplement to the Act, but as a means for denying other parties legal standing to bring such application. Whilst the Act is silent on the aspect of who has standing to bring such applications it does not delegate the issue of standing to the rules. On the contrary as we see in section 21(4), the section in terms of which rules are made, on the issue of participation, the rules must be confined to " manner and form"[13]. An interpretation of Rule 42(3) as a rule that grants standing would thus be ultra vires the Act. We reject this interpretation of Rule 42(3) in favour of an interpretation that is both intra vires the Act and makes sense of why a special procedure was expressly provided for the Commission.

The rule is not saying only the Commission may bring such an application. All its says is that where the Commission is the applicant it must "allege conduct.." Its purpose is to serve as a procedural direction for the Commission since in the ordinary course it is the party most likely to bring these applications given its function to ensure compliance with the Act. [14]

We must also not lose sight of the fact that the applicants have not come here directly

12 Seagrams have also referred to the possibility that a merger is not notified and the Commission remains passive. Since the Tribunal cannot be proactive in such a situation it must be possible for a third party to invoke the provisions of section 62 and to bring an action as the applicants here have done. There is nothing in the language of section 62 which suggests it can only be invoked by the Commission.

13 Section 21(4)(g)

14 It should also be noted that the Commission is obliged to follow a procedure in terms of its own rules for breaches of merger conditions (see Commission Rule 34) before it brings an application in terms of section 61,or 62 (see Commission Rule 34(1)(b)). This suggests that procedurally the Commission is in a different position to the private party and hence its special mention as well in the Tribunal rules.

without regard to the Commission. The Commission had been appraised of the transaction and declined jurisdiction – thus good governance as to hierarchy has not been flouted it has been followed. Indeed this application is no different in principle to the procedure the Act recognizes for the non-referral of a complaint. This is an instance of interested parties referring us a transaction after the Commission has effectively "non-referred".

The applicants also argued that an alternative procedural basis for them to bring the application could also be found in Rule 42(3)(a)(i) which provides for Commission decisions to be reviewed or appealed. The respondents attempted to counter this point by suggesting that the Commission had not made a decision but had merely furnished an advisory opinion. This distinction is highly artificial and without substance. It is quite clear that the Commission has decided that it has no jurisdiction and has abided by that decision; if not, it would have contended otherwise in these proceedings as it had the opportunity to do so since it is cited by both applicants as a respondent. Secondly the language of the Commission's letter to the respondents' attorney, states unequivocally "this will assist the Commission in making a final determination on the merger."[15]

We find therefore that we have jurisdiction to hear this matter. In interpreting the Act to ascertain whether we have jurisdiction we must not lose sight of the applicants constitutional rights to have a remedy to resolve disputes in an appropriate forum and for administrative justice. The legislature has in section 65(3) vested the Tribunal and Competition Appeal Court with the exclusive jurisdiction to interpret specific provisions of the Act. As Jali J expressed it:

> "It is clear that these institution were created by the legislature with the clear intention of excluding the jurisdiction of the High Court in competition matters.[16]

The interpretation we have given and the conclusion we have come to respects both the legislative intent of our Act and the applicants' constitutional rights. [17]

It is worth noting that on the facts of this case the respondents may well have waived their rights to contest our jurisdiction. The first time the respondents raised this point was in their heads of argument. The matter was not raised earlier in their answering affidavits as it ought to have been. Counsel for Bulmer referred us to the common law position that if a party in its pleadings does not object to jurisdiction ab initio it is deemed to have accepted jurisdiction, unless they could not have known of the basis for the objection at

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15 See Bulmers file page 281(A) Letter from the Commission to Michael Katz dated 10 October 2000

16 See Seagram Africa judgment pg 21

17 *See The Constitution of RSA section 33(1): " Everyone has the right to administrative action that is lawful, reasonable and procedurally fair." And section 34: "Everyone has the right to have any dispute that can be resolved by the application of law decided in fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

the relevant time.[18] In this case the respondents ought to have been alive to the issue at the time of the filing of their answer and given the fact that issues of jurisdiction were traversed in the earlier High Court matter it can hardly have been overlooked.

We could have disposed of the jurisdiction point on this latter ground alone but we decided not to do so as clarity on third party rights to approach us in similar circumstances is necessary and since the matter was fully argued before us this was an appropriate moment for us to indicate our interpretation of the Act.

3. Control

The central issue we now have to determine is whether the transaction between SFW and Distillers constitutes a merger that must be notified to the Competition Commission in terms of section 13 of the Act.

Section 13 of the Act makes it mandatory for any party to an intermediate or large merger to notify the Commission within 7 days of one of the events specified in section 13(1) which trigger the obligation to notify. Section 13(3) goes on to state that a party may not implement a merger until it has received the approval of the Competition Commission or the Tribunal depending on whether it is an intermediate or large merger.

Now it is common cause that this transaction, if a merger, would constitute a large merger, that it was not notified to the Commission and that it has since been implemented.

The respondents' case is that because the transaction did not bring about an "effective" change of control it was not a merger as defined in section 12 of the Act.

Section 12(1) states:

> **ArticleIII. "Merger defined**
> **SectionIII.1 (1) For purposes of *this Chapter*, a "merger" means the direct or indirect acquisition or direct or indirect establishment of control, by one or more persons over all significant interests in the whole or part of the business of a competitor, supplier, customer or other person, whether that control is achieved as a result of -**

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18 See Moller v Muller 1965 (1) SA 872 and the authorities referred to. In that case, Corbett, J, in interpreting section 28(1) (f) of the Magistrates' Court Act 32 of 1944 stated at 879: "*The Common law principle whereby a defendant, who has pleaded to the plaintiff's claim on the merits without objecting to the court's jurisdiction, must after litis contestatio be regarded as having submitted to the court's jurisdiction, has already been referred to. .. In my view, sect. 28(1))f) is intended to give recognition to the common law principle of submission to jurisdiction".* .

(i)(a) purchase or lease of the shares, interest, or assets of that competitor, supplier, customer or other person;

(ii)(b) amalgamation or combination with that competitor, supplier, customer or other person; or

(c) any other means.
(iii).

Section 12(2) goes on to state:

"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 to 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) in the case of a *firm* that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of a close corporation, owns the majority of members' *interest* or controls directly, or has the right to control the majority of members' votes in the close corporation; or

(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).

The parties were in agreement that section 12(2) does not purport to define control, it merely, as counsel for Bulmer argued, instances circumstances in which a person controls a firm, but does not purport to be an exhaustive list of the circumstances where control exists. We agree with this approach. That section 12(2) is not exhaustive is illustrated by the fact that it does not provide for the simplest of merger transactions contemplated in section 12(1)(a) where A acquires control over the business of B by way of a purchase of

assets. As a matter of common law A now controls what was the business of B but this transaction, clearly a merger as contemplated in section 12(1), is not to be found in the list contained in 12(2). The clear inference is that 12(2) is not exhaustive and only intended to be illustrative of some instances of control. As we discuss more fully below, the respondents understand the relationship between the two sections differently to justify their conclusion that section 12 is concerned only with changes in ultimate control.

We find however that section 12(2) has a more mundane relationship to section 12(1). The circumstances listed in 12(2) all have in common some examples of indirect control that might be exercised over a firm. Section 12(1) as we have seen provides for a merger to be accomplished through the acquisition or establishment of direct or indirect control. Since direct control is notionally uncomplicated the legislature did not need to state instances of it. The same cannot be said of indirect control so the legislature opted through 12(2) to give some examples to provide clarity. Hence the choice of language that precedes the list *"a person controls a firm if..."*

The conclusion we draw from this is that when we want to understand what control means for the purpose of section 12 we must interpret the language of 12(1) and see the instances of 12(2) as ancillary to but not determinative of that enquiry. To put it in another way 12(2) sets out the most commonly occurring situations to be found within the boundary of meaning of control, but it does not set the boundary - that must be done by reference to 12(1) alone.

This then leads to the first argument advanced by the applicants, which is that on a straight- forward application of the language of the section, not complicated by having to divine the purposes of the Act or delve into theories of corporate form, there has been a merger. Distillers, a person, has acquired direct control over the business of SFW by way of an asset purchase.

They argue that all the elements of the definition contained in section 12(1) are satisfied and thus we have a merger, which must be notified.

The respondents caution us against adopting such a literal approach to the interpretation of the section. Even if the language of the section fits the facts it cannot have been the legislature's intention to extend the burden of notification beyond that mischief for which it was intended to deal. As authority for this approach they cite the recent decision of the Supreme Court of Appeal in Sefalana Employee Benefits Organisation v Haslam and Others 2000 (2) SA 415 (SCA) at 419B where the court stated:

> *"'Parliament may well intend the remedy to extend beyond the immediate mischief'. As against that, I bear in mind that it should not lightly be presumed that the Legislature intended (to borrow the words of Bennion Statutory Interpretation 3rd ed (1997) at 725) 'to apply coercive measures going wider than was necessary to remedy the mischief in question."*

Applying this approach to section 12(1) they argued that what the legislature sought to be notified were only changes to "ultimate" control or "effective" control.. Thus we must distinguish between the form and substance of control. As a matter of form Distillers has assumed control over SFW 's business, but the reality is that since both SFW and Distillers were controlled by the same three shareholders prior to the transaction and Distillers, now Distell, will remain thus controlled post transaction, no change in effective control has taken place and hence there is no merger. This is where their argument on the significance of section 12(2) comes in. That subsection they argue contains different instances of ultimate or effective control. So that while the legislature has not purported to define control it has indicated a recognition that control vests in the ultimate controller by virtue of the common theme running through 12(2). This then leads them to their core proposition viz. that where firms are located in the same economic family a re-arrangement between a purchaser and seller within the family does not lead to a change of effective control and thus falls outside of section 12. By way of example if H is a holding company and controls two subsidiaries A and B directly and wishes to re-organise its structures so that B acquires the assets of the business of A by way of a sale, no merger has taken place on this argument because the ultimate control of H remains unaffected.

There is some support for this approach in both the Act and comparative jurisprudence.

The Act states that the prohibitions on horizontal restrictive practices in section 4(1) of the Act do not apply to agreements between, or concerted practices engaged in by :

> *4(5) "(a) a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary or any combination of them; or*
> *(b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a)."*

In European law the doctrine of a single economic entity has emerged in the case law in the context of whether Article 85(1) applied. Article 85(1), now Article 81(1) is the general prohibition against agreements constituting restrictive practices similar to our sections 4 and 5. The courts had to decide whether agreements between undertakings that formed part of the same group could amount to restrictive practices. The courts have held that they did not, provided the subsidiary did not have real autonomy in determining its line of conduct.

In the most recent case on the subject Viho Europe BV v Commission of the European Communities [19] the question was whether the distribution system which a parent company, Parker Pen Ltd, had with its wholly owned subsidiaries could be subject to Article 85(1) of the Treaty of Rome. The Court of Justice found that :

19 1996 ECR 1 5457

> "*Parker and its subsidiaries thus form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them"*[20].

The Court made the following observations in coming to its conclusion:

> "It should be noted, first of all, that it is established that Parker holds 100% of the shares of its subsidiaries in Germany, Belgium, Spain, France and the Netherlands and that the sales and marketing activities of its subsidiaries are directed by an area team appointed by the parent company and which controls, in particular, sales targets, gross margins, sales costs, cash flow and stocks. The area team also lays down the range of products to be sold, monitors advertising and issues directives concerning prices and discounts."[21]

In United States law the doctrine of the intra-enterprise conspiracy had been applied to conspiracies amongst commonly controlled companies. Controversy around the applicability of the doctrine was finally laid to rest in 1984 when the Supreme Court in Copperweld held that a parent and its wholly owned subsidiary must be treated as single enterprise and thus were incapable of forming a conspiracy for the purpose of section 1 of the Sherman Act.[22] The language of the decision is worth repeating:

> "A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common not disparate; their general corporate actions are guided or determined not by two separate consciousnesses but by one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver…. If parent and a wholly owned subsidiary do agree to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for section 1 scrutiny."[23]

Since *Copperweld* courts have grappled with the question as to how far to extend its ambit beyond 100% ownership. Courts have held consistently that de minimus departures in shareholding from 100% do not prevent the application of the *Copperweld* principle.[24]

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20 See pg 5485. paragraph 16 of the decision The Court referred to the following decisions (Case 48/69 ICI v Commission [1972] ECR 619, paragraphs 133 and 134; Case 15/74 Centrafarm v Sterling Drug [1974] ECR 1147, paragraph 41; Case 16/74 Centrafarm v Winthrop [1974] ECR 1183, paragraph 32; Case 30/87 Bodson v Pompes Funèbres [1988] ECR 2479, paragraph 19; and Case 66/86 Ahmed Saeed Flugreisen and Others v Zentrale zur Bekaempfung Unlauteren Wettbewerbs [1989] ECR 803, paragraph 35)

21 See Viho paragraph 15.

22 Section 1 of the Sherman Act makes illegal all contracts, etc in restraint of trade.

23 Copperweld Corp v Independent Tube Corp,467 US 752 (1984) at 771.

24 See Stephen Caulkins, *Copperweld in the Courts the road to Caribe* 63 Antirust Law Journal 345 , (1995) at 352.

In Century Oil Tool, Inc. v Production Specialties, Inc.[25] the two alleged conspirator companies were owned by the same three individuals in the following proportions - 30:30:40. However all three shareholders served on the boards of directors of the companies. The Court held there was:

> *"no relevant difference between a corporation wholly owned by another corporation, two corporations wholly owned by a third corporation or two corporations wholly owned by three persons who together manage all affairs of the two corporations."*

In Fishman v Wirtz [26]on the other hand the Seventh Circuit refused to extend the *Copperweld* principle to corporations owned in common by a large number of investors without proof that any individual or small group controlled both companies independent of the wishes of co-investors. The court found them to lack the complete unity of interest necessary to find them to be a single enterprise for the purpose of section 1.One of the reasons for the Court making this finding is that the investors were themselves owners of sport arenas and professional teams and would therefore have had their own separate interests in the control of access to the stadium.

The case law referred to and section 4(5) of our Act suggest that at least for the purpose of restrictive practice adjudication, the concept of a single economic entity is well established. To that extent the respondents' plea for its recognition is not without foundation. Yet we must be cautious before importing a concept that has proved useful in limiting the boundaries of restrictive practices to intra-enterprise arrangements, an area of substantive law, into merger notification, an area of procedural law. When we consider the application of a single economic entity analysis to section 12, we are applying the doctrine not to a case of a prohibited practice or to the assessment of whether a merger is anticompetitive, but a preliminary enquiry as to whether one is obliged to notify. By its very nature this inquiry must be a restricted one, which tends to support the view of Bulmer that if we recognise the doctrine under section 12 then it should only be recognized in the limited approach to the doctrine that we find in section 4(5) and in the European Union cases cited.

What we conclude from this discussion is this – a change in direct control presumptively triggers the obligation to notify. However we recognize that a limited class of transactions exists where that obligation may be negated if there is irrefutable evidence that indirect control remains unaffected. This is the case of firms who form part of a single economic unit, because the change in the direct form of control is illusory and has not altered the substance of control that both antedated and postdates the transaction. A clear example of when one would not be required to notify is the case of a company and transactions between it and its wholly owned

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25 737 F.2d 1316 (5th Cir.1984)

26 Fishman v Estate of Wirtz 807 F. 2d 520 (7th Cir 1986) and Areeda, Anitrust Law 2000 supplement ¶ 1469.

subsidiaries, in the manner contemplated in Section 4(5)(a). It is less clear whether we should also recognize the situations envisaged by Section 4(5)(b), as this section, as we have seen, provides for a wider class of related firms to qualify as a single economic entity but it is unclear from the language what the extent of that class is. All the section says is that the class must be *"similar in structure to those referred to in (a)"* At this early stage of our jurisprudence we can say no more than that transactions within the ambit of 4(5)(b) may be recognized as a single economic unit, for the purposes of section 12, but the provision must be interpreted strictly. The less something looks like a wholly owned parent subsidiary relationship the more cautious we need to be. To put it another way, the more ambiguous the case for a single economic entity the less scope there is for rebutting the inference that a direct acquisition has led to a change of control.

Pre-merger notification is, unavoidably, a blunt instrument. It is widely acknowledged that far more mergers are required to be notified than will raise substantive competition concerns. Yet the Competition authorities only have jurisdiction, to consider mergers that have been notified. At what stage do they sort out the wheat from the chaff- at the time that the obligation to notify is considered (section 13 read with section 12) or when the transaction is evaluated as a merger in terms of section 16? Notification is intended to be as extensive as possible hence the breadth of the language in section 12. Once a transaction presents the essential features of a merger it is notifiable. If this were not the case, there would be a danger that mergers that might have adverse effects might go undetected because the jurisdictional barriers in terms of section 12, had been set too high. Since it is only a preliminary enquiry the sorting takes place afterwards during the merger evaluation under section 16.

There are various indications in the Act and rules that support the view that the obligation to notify a merger was intended to be wide ranging and not confined to the considerations that would emerge later in the section 16 investigation:

- The thresholds in section 11 which determine the obligation to notify are based on turnover and asset size not market share, although it is market share which determines the enquiry under section 16.
- Section 12 refers to a competitor, supplier, customer or "other person". The inclusion of the category of "other person" considerably widens the ambit beyond the more obvious concerns about horizontal and vertical mergers to include all mergers.
- The Commission 's investigative powers only exist in relation to a transaction if it is a merger as appears from Rule 32 (now section 13 B) which states :

> *13(1) The Competition Commission may direct an inspector to investigate any merger, and may designate one or more persons to assist the inspector."*

This suggests that the legislature did not intend there to be an investigation into

whether a transaction is notifiable or not, since the Commission is procedurally and practically constrained in this exercise. Clearly the legislature intended that the obligation to notify be broadly construed and hence it only invested the Commission with its investigative jurisdiction once the transaction was already considered a merger. Included in this latter investigation would be some residual enquiry into control. Thus it is conceivable that control may have changed for the purpose of section 12(1), but on an examination under section 16 may not bring about a substantial lessening or prevention of competition.

- A merger cannot be implemented until it has been approved or conditionally approved. Once approved a transaction is immunized. This suggests a preference for transactions to be notified at the time they occur so that if they are objectionable they can be stopped before they are further consummated. If control is as multifaceted as section 12(2) suggests then the legislature must have intended to raise the burden of notification to avoid the undesirable consequences on all involved of having to unravel transactions afterwards.

It is for this reason that we come to the following conclusions about section 12(1).[27]

1. The scope to accept argument about a single economic entity as a jurisdictional prerequisite must at this stage of enquiry be limited to the clear cut cases suggested by section 4(5) with the added rider that section 4(5)(b) be strictly interpreted here.

2. Section 12 read as a whole conceives of control as an event-based concept which means that control can be acquired by one person by virtue of one provision in section 12(2) whilst it still resided in another by virtue of another provision of the section.[28] This does not lead to absurdity, as control is a notion determined both de jure and de facto and is not always rigidly reposed in one person at any given moment. By way of example – one of the ways the Act recognizes a change of control is through a lease. If I lease my widget factory for five years to A

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27 Much debate ensued about comparisons with the Canadian legislation with both sides of the argument using it as authority for their contentions. It is true that our merger definition is based on the language of the Canadian Act and like them we have a system of pre-merger notification. However the systems differ as well. In our system importantly a merger must be notifiable for the Commission to have jurisdiction. In Canada jurisdiction is not dependant on notification. Notification is merely there to smoke out the type of merger more likely to invite scrutiny hence exemptions from the obligation to notify are not exemptions from the Act's merger jurisdiction.

Canada therefore cannot provide answers to our procedural issues we must be guided solely by the language and logic of our own Act.

28 By way of example one person could have the power to appoint the majority of the board via the articles or a shareholders agreement and would have control in terms of section 12(2)(c) whilst at the same time another person may beneficially own more than half the issued share capital and have control in terms of section (12(2)(a).

(assuming the threshold qualifications are satisfied) that constitutes a merger. If I sell my factory during the lease to B this is surely notifiable as a merger even though B does not yet assume direct control over the assets until the end of the lease. It is no answer to say that the obligation only arises post lease as at that stage the sale has long since been consummated when unraveling it would prove impractical, precisely the impracticality pre-merger notification is meant to avoid. Similarly if during the course of the lease A sublet to C that too would trigger a notification obligation. Section 12 does not conceive of control as a singular event or unitary construct.[29]

ArticleIV.4. Application to facts of this case

We must now consider on the facts of this matter whether :

1. The respondents have made out a case for being considered as a single economic entity as we have set out above for the purpose of section 12 adjudication; or

2. If we have too strictly construed the notion of single economic entity whether they have established that the respondents were the subject of some ultimate controller prior to the transaction who remains in control post transaction, or

3. If they have failed to meet either test proposed in the first two points the transaction meets the requirements for a merger in terms of section 12.

The respondents' case is that SAB, through OBI, and Rembrandt and KWV through RemKWV, are the ultimate controllers of both SFW and Distillers, holding collectively 90% of the shares of both firms. The remaining 10% not held by them is publicly held and not necessarily by the same persons. Thus to use the language of the US case law, collectively they hold all but a de minimus amount of the equity of both companies. Post transaction these shareholdings remain the same and hence all they have done is to re-arrange the relationship of sibling companies; the parents are still in control.

Since none of the ultimate controllers has more than 30% of the company there needs to be evidence of some concerted action between the three shareholders to indicate that they form a single controlling mind. In their papers the respondents rely on the existence of a voting pool agreement between them (see Bulmer record page 255 para 4.3).

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29 The respondents require us to read section 12 as saying if one type of control which we call ultimate control remains it does not matter if there is a change in some more direct form of control because this form of control can only be provisional and can be removed or recalled by the final controllers. This enquiry into the ultimate controller if there always be such a notion is far from routine and was intended to form part of the post merger consideration in terms of section 16 into whether a merger substantially lessens or prevents competition.

Curiously enough the agreement was not attached to the respondents answer in either the Bulmer or Seagram's applications despite its centrality to their argument. It only became part of the record when subsequent to a pre-hearing the Tribunal directed that it be produced and the respondents subsequently filed a supplementary affidavit containing the agreement. In this subsequent affidavit they indicated that the specific clause in the agreement that they relied on was clause 11. (see Seagrams record page 344 para 7)

In argument the respondents shifted their ground away from the terms of the agreements and placed greater reliance on the notice to shareholders. (Transcript page 46)
The following facts were relied on –

- The fact that the resolutions to be proposed at the shareholders meetings of SFW and Distillers were a mirror image of one another supported by the same shareholders
- The directors of Distillers have a miniscule holding in the Company
- In both announcements shareholders are advised that SAB has given an undertaking to support the resolutions

We fail to see why any of these statements in the circular advance the respondents' case for the existence of a single economic entity. At best for them they demonstrate that when the three major shareholders of the two respondents concur they can prevail. What they have not demonstrated is some factual and /or legal framework to indicate that the shareholders act in concert on a regular basis to control the alleged group leading to the conclusion that collectively they constitute a single controlling consciousness.

Bulmer has argued convincingly that this agreement does not provide for joint control. The clause on which the respondents' seek to rely is clause 11 of the agreement which provides for the parties to support one another's nominations to the Board of Directors.[30] This does not amount to concertation between the respective shareholders and there is nothing in this agreement which suggests that the three firms constitute a single controlling mind for the group. The agreement seems to have another purpose and that is to prevent any one of the three on its own controlling the respondents.

An examination of the shareholders agreement shows that the 60% holding of RemKWV is also less decisive as a statement of control than it outwardly appears. Bulmer argues, relying on clauses 3.1 and 3.2 of the agreement concluded between KWV an Rembrandt on 13 November 1979, that RemKWV is simply a vehicle for the holding of the shares but points out that the two shareholders retain their rights to vote their shares directly at shareholder meetings and not via RemKWV and secondly appoint their directors directly and not through RemKWV.

It is also noteworthy that in an addendum to the agreement dated 18 November 1988 the

30 The agreement states that the companies shall each have 9 directors and that Rembrandt, SAB and KWV shall each be entitled to appoint, remove and replace 3 of those directors.

parties recorded the following:

> "*The parties record that whilst the provisions of 11.1 remain in force they presently are not availing themselves of the right to appoint the number of directors to the boards of Distillers and SFW as contemplated in 11.1, but that they retain the right at all times in consultation with one another to increase their representatives to such number."*[31]

This was the only evidence on the papers proffered by the respondents to support their contention that they constituted a single economic entity. The applicants on the other hand have alleged that the respondents were competitors and hence not a single economic entity and relied on the following to support them:[32]

- The respondent companies are separate legal entities
- They are controlled by separate boards of directors
- They have operated separately
- They had separate listings on the JSE
- The respondents have publicly held themselves out in their own circulars to shareholders as being in a competitive relationship and that this was to the benefit of shareholders. In a circular to shareholders dated 21 October 1988 the then CWD set out proposals for the separate listings of CWD, to be renamed SFW, and OMG, to be renamed Distillers:

  > *"Since its establishment in 1979 it has been Cape Wine's firm policy that SFW and OMG operate as completely separate and competing companies. Each handles its own production, marketing and distribution, and, under separate directors and management, they compete with all other producers in the market as well as each other. This policy stimulates healthy competition between SFW and OMG and the industry as a whole….The board of Cape Wine wishes to ensure that this position be further strengthened and has consequently decided to implement the proposals set out in this circular.."*
  >
  > "Shareholders in Cape Wine will not be affected in any way in that their shareholdings in Cape Wine will be replaced by identical shareholdings in both SFW and OMG (via Distillers).This will afford shareholders the opportunity of assessing the performance of both companies in a competitive environment."[33]

The respondents chose not to rebut any of these allegations and instead dismissed them with a denial of their relevance. However since the respondents have made a case out for

31 See para 6 of the addendum.
32 See Bulmer's Founding affidavit page 15, para 27.17
33 See Bulmer's Founding affidavit page 14 para 27.13 quoting page 6 of the 1988 circular

a single economic entity it is they who have made these allegations germane to these proceedings. On the facts before us we find there is no evidence to suggest the respondents form part of a single economic entity. Nor is there evidence that the shareholders direct the activities of either of the respondents let alone directing that they act in concert. On the contrary there is at least prima facie evidence that the two companies operated autonomously and were held out as competitors to their shareholders.

Accordingly on the facts the respondents have not established that the two firms were controlled by a single controller prior to the transaction. Neither of the two tests we postulated at the beginning of this section has been met. The respondents have not proved that they and their three common shareholders constitute a single economic entity. Nor would they have succeeded, had the concept been given the most generous latitude, which we do not concede it should. -

These issues having been disposed of, we must still establish if the transaction is a merger as defined in the Act. We find that it is. Distillers, a "person", acquired direct control over the business of SFW, "another person" and hence this transaction constituted a merger, which should have been notified to the Competition Commission in terms of section 13.

C. REMEDIES

In terms of section 62 of the Act once we have found that a merger has been implemented in contravention of Chapter 3 we have the discretion to order divestiture or to void any provision of the merger agreement.

Section 62 needs to be read in context with section 61 which provides for an administrative fine for a similar contravention. The intention of section 61 is to punish non-compliance. Since the legislature is unlikely to have intended to punish the same transgression twice under different sections of the Act it can be inferred that section 62 is not intended to be punitive but rather to provide the Tribunal with the powers to remedy the adverse effects of a merger which might have been prohibited or conditionally approved in terms of Chapter 3 had the merger been notified.

In this case the merging parties did not seek to evade the provisions of the Act and on the contrary approached the Commission who agreed with their interpretation and advised that the transaction did not constitute a merger. For this reason the imposition of a fine would be wholly inappropriate and neither of the applicants have asked us to do so.

On the other hand since section 62 provides a remedy that presupposes some enquiry into the impact of the transaction on competition, it would be premature for us to make such an order prior to hearing evidence or argument as to whether such a remedy is appropriate. It may well be, and we express no view on this as we are not in a position to do so on these papers, that the transaction would raise no concerns.

The respondents in their papers undertook to notify the transaction if we found it to be a merger[34]. We believe that this is the most sensible course of action to be followed now that we have made our determination and we would expect the respondents to respect that undertaking. Since we cannot oblige them to do so in terms of section 62 we intend to allow them the opportunity to voluntarily comply with the notification obligation but if they fail to do so we need some mechanism to reactivate these proceedings and to consider whether to impose any of the remedies in terms of section 62.

We order as follows-

1. We find that the transaction between the first and second respondents pursuant to the written agreement concluded between them on 20 September 2000 read together with the written addendum thereto concluded on 9 October 2000, is a merger as defined in section 12 of the Competition Act.
2. The respondents will be given a period of 10 business days from date of this decision to notify the merger to the Competition Commission in the manner prescribed for large mergers to be notified in the Act and rules.
3. We postpone sine die this hearing to enquire whether to impose a remedy in terms of section 62 (1)(a-b) until the merger has been notified and the Commission has made a recommendation in connection with the merger in terms of section 14 A[35]. The time periods set out in section 14 A will otherwise apply to these proceedings.
4. The applicants may apply to have this matter set down for a further hearing on whether we should make a final order in terms of section 62 in the event of non-compliance by the respondents with the time periods set out in paragraph 2 of this order.
5. The respondents, jointly and severally, are liable for the costs of the applicants. In the case of Seagrams these costs to include the costs of two counsel and one attorney and in the case of Bulmers, one counsel and one attorney.

_____ **19 April 2001**

N. Manoim **Date**

Concurring: D. H. Lewis, M.T.K. Moerane

34 See paragraphs 10.2 and 16 of the respondents answer in the Bulmer record.

35 This is of course of the section of the Act as subsequently amended post February 2001.