THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 44/2000

In the matter between

Standard Bank Investment Corporation	**First Appellant**

and

The Competition Commission	**First Respondent**
The Competition Tribunal	**Second Respondent**
The Minister of Finance	**Third Respondent**
The Registrar of Banks	**Fourth Respondent**
The Minister of Trade and Industry	**Fifth Respondent**
Nedcor Limited	**Sixth Respondent**
Old Mutual PLC	**Seventh Respondent**
The Executive Officer of the Financial Services Board	**Eighth Respondent**
Liberty Life Association of Africa Limited	**Ninth Respondent**
South African Society of Banking Officials	**Tenth Respondent**
The Securities Regulation Panel	**Eleventh Respondent**

Case No: 50/2000

In the matter between

Liberty Life Association of Africa Limited	**Second Appellant**

and

The Competition Commission	**First Respondent**
The Competition Tribunal	**Second Respondent**
The Minister of Finance	**Third Respondent**
The Registrar of Banks	**Fourth Respondent**
The Minister of Trade and Industry	**Fifth Respondent**
Nedcor Limited	**Sixth Respondent**
Old Mutual PLC	**Seventh Respondent**
The Registrar of Long-Term Insurance	**Eighth Respondent**

Standard Bank Investment Corporation Limited Ninth Respondent
South African Society of Banking Officials Tenth Respondent
The Securities Regulation Panel Eleventh Respondent

CORAM: **HEFER, NIENABER, HARMS, MARAIS *et* SCHUTZ JJA**

DATE HEARD: **23 MARCH 2000**

DELIVERED: **31 MARCH 2000**

J U D G M E N T

MARAIS JA:

[1] I have had the benefit of reading the judgment of the majority of the court. Much as I admire the manner of its writing, I am unable to share its view as to the jurisdiction of the Competition Commission. The issue is a narrow one. Did the legislature intend s 3 (1) (d) to exclude from the purview of the Competition Act 89 of 1998 the proposed mergers of the banks and insurance companies involved?

[2] I come to the task of interpreting the provision without making any assumptions *a priori* as to the legislature's sense of priorities or as to its view on the relative importance of banking considerations as against competition concerns That would not be a permissible approach. If they are relevant and

appear with sufficient clarity from the legislation after one has undertaken the task, that is another matter.

[3] Equally, I approach the problem with no innate prejudice against either “reading in” or “reading down” or “extensively” or “restrictively” interpreting the provision. Whether or not the case calls for the deployment of any of those familiar techniques will only be known once one has taken into account in their totality all those factors to which it is legitimate to have regard in aid of interpretation. If it does, the use of the technique will be no more nor less intellectually justifiable than giving the language its plain meaning would have been if there had been no or insufficient reason to qualify or depart from it.

[4] Next, I remind myself of what is perhaps obvious; the provision must not be interpreted in isolation with only the definitions of some of its component parts being taken into account. In *Associated Newspapers Ltd v Registrar of Restrictive Trading Agreements* [1964] 1 All ER 55 (HL) at 58 H - 59 B Lord Evershed said:

> “It is no doubt true that if s 20 and s21 are looked at without regard to the context supplied by the rest of the Restrictive Trade Practices Act, 1956, the natural conclusion which their language suggests would be to confine the jurisdiction of the court to agreements subsisting (at any rate) when the jurisdiction of the court was invoked. By way of example I refer to the use (strongly relied on by counsel for the

> appellants) of the formula in s 20 (1) that the court should have jurisdiction to declare whether or not any restrictions 'are contrary to the public interest'; and perhaps more strongly to the use of the formula in sub-s (3) of the same section 'the agreement *shall* be void'. Nor do I forget the terms of sub-s (5) of s 20 or the language of para *(a)* to para *(g)* of s 21 (1). To these last mentioned subsections I shall return later. But in truth it is not, as I conceive, legitimate to read s 20 and s 21 bereft of their context - more particularly without having first read the first nineteen sections of the Act. There is, indeed, solid and respectable authority for the rule that you should 'begin at the beginning and go on till you come to the end: then stop'; and in my opinion the rule is I conceive (with all respect to what fell from DIPLOCK, L.J. (4) in the Court of Appeal) peculiarly proper when construing an Act of Parliament and seeking to discover from the Act the parliamentary intention."

The particular words quoted by Lord Evershed may have come from no more than Lewis Carroll's *Alice's Adventures in Wonderland*, Chap XII, but their soundness can surely not be doubted.

[5] Having done that, what do I find? First, a long title which proclaims that the purpose of the Act is to "provide for the establishment of a Competition Commission *responsible for* the investigation, control and evaluation of restrictive practices, abuse of dominant position, and *mergers*; and for the establishment of a Competition Tribunal *responsible to* adjudicate such matters; and for the establishment of a Competition Appeal Court; and for related matters".

[6] Second, a preamble which *inter alia* laments the existence of

"excessive concentrations of ownership and control within the national economy, *weak enforcement of anti-competitive trade practices*, and unjust restrictions on full and free participation in the economy by all South Africans". It records that "credible competition law, and effective structures to administer that law are necessary for an efficient functioning economy", and that "an efficient *competitive economic environment*, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans". It recites that the creation of such a regime is in order, *inter alia,* to "restrain particular trade practices which undermine a competitive economy", to "regulate the transfer of economic ownership in keeping with the public interest" and to "establish independent institutions to monitor economic competition".

[7] Third, there is in s 2 a statement of the purpose of the Act. It is
"to promote and maintain competition in the Republic in order -

(a) to promote the efficiency, adaptability and development of the economy;

(b) to provide consumers with competitive prices and product choices;

(c) to promote employment and advance the social and economic welfare of South Africans;

(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the

Republic;

(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons"

[8] Fourth, there is the use in s 3 of the very wide opening words "(t)his Act applies to all economic activity within, or having an effect within, the Republic" followed of course by the exceptions set out in sub-paragraphs (a), (b), (c), (d) and (e).

[9] Fifth, there are in Chapter 2 a series of restrictive practices which are prohibited, a prohibition upon the abuse of a dominant position in a market, and a wide ranging category of acts which constitute such abuse, including price discrimination. In the same chapter there is provision for exemption to be granted from its provisions upon application. In s 10 (4) additional powers of exemption are conferred upon the Competition Commission. It may exempt "an agreement, or practice, or category of either agreements, or practices, that relate to the exercise of a right acquired or protected in terms of" six specifically named Acts Before doing so, notice must be published in the Gazette and interested parties have 30 days within which to make written representations as to why the exemption should not be granted.

[10] Sixth, there is Chapter 3 which is specifically devoted to "Merger Control". It is quite clear that, if the Act is applicable to the proposed acquisition in the case, it would rank as a "large merger" within the meaning of s 11. Whether a merger or proposed merger be a large or intermediate merger as defined, s 13 (3) prohibits its implementation until approval has been received from the Competition Commission, the Competition Tribunal or the Competition Appeal Court, as the case may be. Relatively short time limits are stipulated within which the merger or proposed merger must either be approved, conditionally approved, or prohibited.

[11] Notice of the merger or proposed merger has to be given in terms of s 13 (2) to a representative trade union representing the employees of one of the merging firms involved or, if there is none, to any registered trade union representing a substantial number of employees of any such firm, or if there is no registered trade union in such firm, to representatives of the employees concerned.

[12] The criteria to be taken into account are set forth in s 16. The initial enquiry is whether or not the merger or proposed merger "is likely to substantially prevent or lessen competition". That is to be ascertained by considering the matters listed in s 16 (2) and any other factors relevant to

competition in the particular market. Amongst the factors is "whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail" (s 16 (2) (viii)). If it appears that competition is likely to be substantially prevented or lessened, it has to be considered whether any pro-competitive gains which will be greater than and offset the effects of any prevention or lessening of competition will ensue, and whether the merger can or cannot be justified "on substantial public interest grounds by assessing" various factors set forth in s 16 (3). They are the effect the merger will have on a particular industrial sector or region, employment, the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive, and the ability of national industries to compete in international markets In order to make representations on any public interest ground I have mentioned, the Minister of Trade and Industries may participate in the proceedings before the Competition Commission, the Competition Tribunal or the Competition Appeal Court.

[13] Seventh, there is s 21 which lists the functions of the Competition Commission. It is required, *inter alia*, to "negotiate agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction

over competition matters within the relevant industry or sector *and to ensure the consistent application of the principles of this Act*" (s 21 (1) (h)). It is also responsible to "participate in the proceedings of any regulatory authority" and to "advise, and receive advice from, any regulatory authority" (s 21 (1) (i) and (j)).

[14] Eighth, the Competition Commissioner, the Deputy Commissioner, the members of the Competition Tribunal and the members of the Competition Appeal Court are all required to have "suitable qualifications and experience in economics, law, commerce, industry or public affairs".

[15] Ninth, there are comprehensive powers given to the Competition Tribunal to deal with transgressions If a merger is implemented in contravention of Chapter 3, divestiture may be ordered and an administrative fine imposed.

[16] Tenth, the Competition Tribunal is empowered to grant an exemption from a relevant provision of the Act (s 27 (1) (a)).

[17] Eleventh, the Competition Tribunal and the Competition Appeal Court share exclusive jurisdiction in respect of the interpretation and application of Chapters 2, 3 and 6 (other than s 65) and the functions referred to in s 21 (1), 27 (1) and 37 (1) and the latter Court has final jurisdiction in respect of any

such matter (s 65 (3) and (4)).

[18] Twelfth, there are transitional provisions in Schedule 3 to the Act the effect of which is broadly this Mergers conditionally approved or prohibited under the Maintenance and Promotion of Competition Act 86 of 1979 are to be regarded as mergers conditionally approved or prohibited under the present Act. An exemption granted under the 1979 Act is to be regarded as having been granted under the present Act but is valid for only 12 months after the date of commencement of the present Act (30 November 1998). A merger which took place between the date of publication of the present Act (20 October 1998) and the date on which it came into operation (30 November 1998) and which would have constituted an intermediate or large merger if it had taken place after the commencement of the present Act, is regarded for a period of 12 months after the latter date as a merger in contravention of Chapter 3 and is subject to the divestiture provisions of the present Act unless it was approved under the 1979 Act or has been notified in terms of item 4 B. Item 4 B provides that any party to such a merger may within 3 months of the coming into operation of the present Act notify the Competition Commission of the transaction in terms of s 13 as if it were an intermediate or large merger whereupon the provisions of Chapter 3 (Merger

Control) of the present Act (*mutatis mutandis*) become applicable to it. (The emphasis which has been supplied while reviewing these provisions of the Act is mine.)

[19] I return to s 3 (1) (d). The definitions of "public regulation" and "regulatory authority" in s 1 are very wide. What emerges from them is that the public regulators covered by them could range from highly expert regulators of exalted stature whose writ runs nationwide and who derive their authority from nationally applicable legislation to far more humble and less expert functionaries whose physical area of jurisdiction is small indeed and who have been empowered to regulate by some locally applicable subordinate legislation. Equally worthy of note is that the exempting provision as I shall call it is of course applicable not only to those acts presently subject to or authorised by public regulation, but also to all such acts as may in future become so subject or so authorised.

[20] Once one has read the Competition Act in its entirety it becomes quite plain that the evils it identifies are regarded as not having been adequately countered in the past and that a change for the better is intended. It is also plain that a "competitive economic environment", the regulation of "the transfer of economic ownership in keeping with the public interest" and the

establishment of “institutions to monitor economic competition” are key concepts in the legislative plan to achieve that change for the better. In short, the general thrust of the stated objects of the Act is more and better control and certainly not less control than had existed in the past.

[21] When reading s 3 (1) one is struck by the amplitude of its opening words viz “This Act applies to all economic activity within, or having an effect within, the Republic .... “. One recalls that the Act is to bind even the State. One reads on to take account of the exceptions in sub-paragraphs (a), (b), (c), (d) and (e). All but (d) are unsurprising, for an understandable rationale for their existence is not far to seek. But (d) is in a different category. Its sweep, if considered in isolation, is so potentially wide and *prima facie* so at odds with all the other indications of legislative intent in the Act, that one cannot help but feel that there is more to this than meets the eye. Did the legislature take one step forward and two steps backwards? Did it, despite its brave words, retreat to a regulatory jurisdiction far less extensive in its reach than that which existed under the 1979 Act as amended? Did it intend to achieve such an ostensibly retrograde result simply by the insertion of this, to my mind, somewhat enigmatic exempting provision? Rhetorical flourishes these may appear to be but they are questions which arise in one’s

mind.

[22] It is true of course that the answers must be found, not in speculation, but in what the legislature itself has said. But that does not mean that where its intention to lay hands on competition concerns in a comprehensive and effective manner is manifest *ex facie* the Act as a whole, a meaning should be assigned to a generally cast and generally applicable exempting provision which would have the effect of precluding it from carrying out its intention to a degree and extent far greater than did the legislation it was designed to supplant.

[23] Had the words of (d) been so intractable in their ordinary meaning that they could only bear the meaning which the majority considers they must bear, I would have been prepared to hold that the contra-indications of legislative intent derived from the Act itself are so strong that a departure from that meaning would be justified. There would be nothing new in that. It has been done time without number. Whether or not a court does it depends entirely upon the strength of its conviction that the other legitimate *indicia* of legislative intent are so strong that not even the strength of the ordinary meaning of the words used can overcome them.

[24] Before explaining how I think the exempting provision falls to be

interpreted let me say something about the interpretation of it for which respondents contend. It is as bold as it is simple. The act of economic activity in issue is the acquisition of control. That act is subject to or authorised by public regulation. In so far as banks are involved the regulation occurs under the Banks Act. In so far as insurance companies are involved in the transaction the regulation occurs under the Long Term Insurance Act. In both instances there is an identifiable regulatory authority. It is quite irrelevant whether or not the criteria which those regulators must look to, or are entitled to look to, are competition concerns of the kind reflected in the Competition Act. Nor does it matter whether or not any consultation with the Competition Commission is required. The jurisdiction of the competition authorities is therefore excluded. That a merger having the deleterious effects against which the Competition Act sets its face may occur without the competition authorities or indeed any regulatory authority having considered them or even having jurisdiction to consider them, is of course inherent in the contention, but that is said to be the inevitable result of giving the language employed in the exempting provision its plain and unambiguous meaning.

[25] If that contention should be thought to be too unpalatable it is argued in the alternative that in the case of the Banks Act the requirement that there

be consultation with the Competition Commission softens the impact of that interpretation of the exempting provision.

[26] The implications of the main contention are, as I see it, startling. Its premise is that the legislature did not care whether a merger which might be offensive to both the letter and the spirit of the very Act in which the exempting provision is found, came about and was implemented, as long as someone somewhere who qualified as a regulatory authority had been empowered to say yea or nay to the merger. Whether that functionary had been empowered to do so simply to facilitate enforcement of stamp duties legislation, or simply to facilitate the monitoring of mergers so as to ensure the absence of foreign control of South African companies, or for whatever reason, would not matter. The proposition, if correct, would leave unaddressed and unregulated by the very authorities specifically charged with oversight of them mergers having the offensive characteristics spelt out in the Competition Act, as long as some or other authority with power to authorise mergers had authorised them, and even although the latter authority was not required to, and had not in fact, paid the slightest attention to those offensive characteristics when authorising the mergers I find it impossible to reconcile such a result with the clearly stated aims of the Competition Act.

[27] A *caveat* may not be out of place here. When interpreting the exemption provision one must not allow oneself to be mesmerised by the fortuitous circumstance that banks and insurance companies are involved in the particular case. The provision is of general application and the interpretation of its potential breadth and field of application cannot depend upon the nature of the industry which happens to be involved.

[28] In my opinion there is a fallacy in the main argument for respondents Just as a licence to trade in a particular commodity is not a licence to trade in a way which is unlawful in terms of the common law or another statute, so is an authorisation given under the Banks Act and the Long Term Insurance Act to two banks and two insurers to merge not to be regarded as an authorisation to merge notwithstanding that the merger will have the deleterious results which another Act controlling mergers has spelt out and has been enacted to combat. It is no more than an authorisation to merge because the requirements of the Banks Act and the Long Term Insurance Act are satisfied. It should not be construed as an authorisation to merge even if the social evils identified by the Competition Act are present or will ensue.

[29] If the exempting section is so understood when applied to mergers then some at least of its scope and purpose is readily apparent. In my view its

true purpose is not to immunise large swathes of economic activity from the attentions of the competition authorities but to prevent a situation akin to double jeopardy arising and potential clashes between regulatory authorities whose regulatory concerns are the same. To illustrate, if there be another statute dealing with mergers between particular kinds of companies and a merger cannot be permitted under that statute if it be found to be monopolistic in tendency, then the fact that that transaction is subject to public regulation in that particular respect, or that authorisation has been given because it is not found to be monopolistic in tendency, will exclude it from being attacked on the same ground before the Competition Commission.

[30] An example is s 38 of the Liquor Act 27 of 1989 which precludes the holder of a licence from permitting any other person to procure a controlling interest (defined as meaning an interest as defined in s 1 of the Maintenance and Promotion of Competition Act of 1979, for which one must now read the Competition Act of 1998) without the consent of the chairperson of the relevant Liquor Board. That consent must be refused if in his or her opinion the possibility exists that the granting of the application may cause a harmful monopolistic situation to arise or to be aggravated in the liquor trade or a branch thereof. A "monopoly situation" was defined in the 1979 Act. The

expression is not used in the 1998 Act but it appears from item 3 of the Transitional Provisions in Schedule 3 to the 1998 Act that a “monopoly situation” as defined in the 1979 Act is to be regarded as a “prohibited practice” within the meaning of the 1998 Act.

[31] What this approach entails, is acknowledging that what may appear to be one single act may in fact be multi-faceted and comprehend two or more acts Parties who enter into and implement a merger of the deleterious character described are doing a number of things To the extent that what they do has deleterious effects which were not approved and could not have been approved, their act was not subject to regulation nor was it authorised and the jurisdiction of the competition authorities was not ousted.

[32] As counsel for Liberty chose to express it, an act is seldom colourless It may be multi-hued. If one of those colours imparts to the act a competition dimension falling within the ambit of the competition concerns of the Competition Act, and the other regulatory authority has no jurisdiction to deal with that dimension and cannot be taken to have authorised the act *in that dimension,* then the act is not beyond the reach of the Competition Act.

[33] If this process of interpreting s 3 (1) (d) amounts to reading words such as “for competition purposes” into the provision, so be it, but it is only

the result of ascertaining the intended breadth of the provision by reading it in the context of the statute as a whole and in the light of the mischief which would be left entirely unchecked if it were not so read. I may point out that, although the working of the sub-conscious mind is so stealthy that one may not realise at first that one has done it, one has already "read into" the provision the word "other" before the words "public regulation". That is so obviously what is meant that one had sub-consciously read it in that light even although the word "other" was not there. I cannot imagine that anyone would cavil at that. If yet further "reading in" or "reading down" is shown to be necessary in order to give effect to the intention plainly expressed elsewhere in the Act, then that too should occasion no disquiet.

[34] I am not unduly troubled by the suggested lack of a means of calibration referred to in the judgment of the majority. Another statute which deals as comprehensively with competition concerns as does the Competition Act cannot be expected. If it existed the Competition Act would be redundant. There need not be a meticulously precise correlation between the rationale for the control for which the other statute provides and that for which the Competition Act provides In my view, substantial correlation would suffice. It is not a question of the other statute having to mirror all or

any particular number of the concerns which are reflected in the Competition Act before the exempting provision will operate. The enquiry is *ad hoc* in character and a far more limited one. One asks what there is about the act which is said to render it such that it should not be allowed or should be regulated. If the answer is that it is "likely to substantially prevent or lessen competition" one looks to see whether there is any other statute which may regulate an act *of that colour*. If the act is the acquisition of a controlling interest in a liquor firm and there is a statute which allows it to be permitted only if a harmful monopolistic situation will not arise or be aggravated, then there is a substantial correlation in the competition concerns of the two Acts and the Competition Act is excluded. If, on the other hand, the acquisition of such a controlling interest is allowed to be permitted only if the acquirer, if a natural person, is found to be a fit and proper person and has not been convicted of any offence involving violence or dishonesty, there is no such correlation and the Competition Act is not excluded.

[35] Each case will have to be decided on its own facts and the mere fact that there may be difficulties in deciding whether sufficient correlation exists, is not a sufficient reason to say that none need exist. If doubtful cases arise and they are not sufficiently clearly within the excepting provision then the

competition authorities' jurisdiction will exist. That seems to me to be entirely consistent with the stated aims of the Competition Act.

[36] I do not find speculation about policy shifts helpful. Before one can conclude that there has been a shift in policy there must be clear indications of it in the legislation. I find no such indications On the contrary, the picture seems clear. There was some earlier legislative vacillation but it was followed by dual control from 1991. Far from there being any clear indication in the Competition Act of 1998 that the existing policy of dual control was to change, there are clear indications of a resolve to take proper charge of competition concerns, to move away from the "weak enforcement of anti-competitive trade practices of the past, and provide "credible competition law, and effective structures to administer that law". That is hardly an appropriate preamble to an abolition of the competition authorities' existing control over a vast range of economic activity or to reversion to a policy abandoned many years before.

[37] In advanced economies mergers are notorious for their capacity to eliminate or stifle competition. That they may be benign in intent is not conclusive. Their effects may be malign. For that very reason the Competition Act singles them out *eo nomine* for its special attention and

dedicates an entire chapter to their control. In such circumstances it seems to me to be futile to attempt to justify a wide reading of the ambit of what mergers are excepted by s 3 (1) (d) by suggesting that if it is not so read, there could be nothing or little to which it will apply. That may be precisely what was intended. And until one has done what it is well nigh impossible to do, namely, trawled through the sea of statutes, provincial ordinances, local government legislation, and subordinate legislation in South Africa, and considered the licences, tariffs, directives or similar authorisation issued by a regulatory authority or pursuant to a statutory authority which exist, one will not be able to identify what is covered by the exception. And even when that has been done, the census of acts excluded will not be complete for, as I have pointed out before, the excepting provision also applies to what may come to exist in future. What that may be it is impossible to say. Human ingenuity is infinite when it comes to the avoidance of irksome restrictions upon economic activity. The excepting provision cannot be interpreted as if its operation is confined to the field of mergers It extends to all acts amounting to economic activity which would otherwise have been regulated by the Act. There is certainly no shortage of acts to which it would apply.

[38] The alternative argument referred to in par [25] is, in my opinion,

unsound. The fact that provision was made for consultation with the Competition Commission in the Banks Act is at best for respondents neutral. The provision existed in 1990 when the Banks Act was enacted and at a time when it was quite clear that the then Competition Board had concurrent independent jurisdiction over bank mergers It was plainly not an ouster provision then and its character did not change merely because in 1998 the Competition Act was enacted and contained the general exempting provision (s 3 (1) (d)). Nor does the fact that the public interest is one of the matters to be considered under the Banks Act and the Long Term Insurance Act take the matter any further. It too had been a requirement in 1990 when the Banks Act was enacted. It was also required to be considered in the Long Term Insurance Act. That notwithstanding, the then Competition Board enjoyed parallel jurisdiction.

[39] In so far as anything said in the case of *SAD Holdings Ltd* (referred to in the majority judgment) is inconsistent with what I have said, I am in respectful disagreement with it.

[40] For the rest, I am in respectful agreement with the majority. I would uphold the appeal of the appellants in respect of the matter dealt with in this judgment and make appropriate consequential orders As this is a minority

judgment there is no point in spelling those orders out.

R M MARAIS
JUDGE OF APPEAL