CONSTITUTIONAL COURT OF SOUTH AFRICA

Lewis Stores Proprietary Ltd v Pepkor Holdings Ltd and Others

CCT 316/25
Date of judgment: 30 January 2026

MEDIA SUMMARY

On 19 December 2025, the Constitutional Court issued an order in an urgent application granting leave to appeal and upholding the appeal against a judgment of the Competition Appeal Court (CAC). On 30 January 2026 at 10h00, the Constitutional Court handed down judgment containing the reasons for that order.

This case concerns Lewis Stores (Pty) Limited's (Lewis) attempt to intervene in large merger proceedings between Pepkor Holdings Limited, the acquiring firm, and Shoprite Holdings Limited, the target firm. The Competition Commission recommended the conditional approval of the merger, which the Competition Tribunal was required to consider. During those proceedings, Lewis applied to intervene, contending that the merger raised serious competition concerns for low- and medium-income furniture consumers.

The Tribunal granted Lewis limited participatory rights in an order issued on 23 July 2025. On 5 September 2025, the Tribunal handed down reasons for that order, holding that Lewis had advanced a credible, merger-specific theory of harm, that aspects of the Commission's investigation appeared insufficiently probed, especially in relation to local market overlaps, the competitive constraints in the low-income furniture market, and the dynamics of store location and credit offerings, and that Lewis had access to information that could meaningfully assist the Tribunal.

The merger parties appealed to the CAC, contending that Lewis had failed to demonstrate unique or otherwise unobtainable information, that Lewis' participation would inevitably introduce substantial delay, and that the Tribunal had misconstrued the legal test for intervention under section 53(c)(v) of the Competition Act. The CAC upheld the appeal on 8 October 2025.

Lewis thereafter sought leave to appeal in this Court. The issues before this Court were:

(a) whether leave to appeal should be granted;
(b) whether the CAC applied the correct test for intervention in merger proceedings, and, if not, what the correct test is; and
(c) whether the CAC impermissibly interfered with the Tribunal's discretion.

In a unanimous judgment penned by Majiedt J, the Court held that this matter plainly engaged this Court's general and constitutional jurisdiction. It raised an arguable point of law of general public importance concerning the scope of the Tribunal's exercise of discretion, and the proper test for intervention in large merger proceedings, a point of law whose arguability is firmly established by the divergent outcomes reached by the Tribunal and the CAC. This Court agreed with submissions made by the applicant, that Constitutional jurisdiction was engaged, as the CAC either introduced a novel intervention test or applied the test incorrectly. This amounted to an error of law that implicated a litigant's right of access to courts under section 34 of the Constitution.

The second question this Court considered was whether the CAC applied an incorrect test for the intervention of third parties in large merger proceedings. Section 53(c) of the Act permits participation in merger hearings by specified parties, and by any other person recognised by the Tribunal. Rule 46 of the Rules of the Competition Tribunal (Rules), allows a person with a material interest in the proceedings to apply to intervene, subject to any limitations necessary to ensure orderly and expeditious proceedings.

This Court, looking at its previous jurisprudence, and that of the CAC over the years, summarised the settled test for intervention as requiring a prospective intervener to show either:

(a) a material interest in the proceedings; or
(b) an ability to assist the Tribunal.

The CAC's previous jurisprudence has consistently held that intervention in merger proceedings does not require a material and substantial interest. In the case *Community Healthcare*, endorsing the CAC's finding in *Anglo SA Capital*, the CAC held that a party may be admitted as a party to merger proceedings by demonstrating an ability to assist the Tribunal in applying the purposes of the Competition Act. In *Northam*, reaffirming its decision in *Africa Data Centres*, the CAC held that the Tribunal must weigh the likely assistance of a prospective intervener against the need for expedition, and that the scope of participation must enable constructive contribution to the two theories of harm which have been accepted as the basis of its rights of participation. In *Africa Data Centres* and *Sunrise Energy*, the CAC reiterated that intervention is not automatic, and must be justified by evidence showing that the applicant will assist the Tribunal in its enquiry.

This authority shows that the settled test for intervention asks whether the prospective intervener has demonstrated, through credible evidence, either a material interest in the proceedings or an ability to assist the Tribunal in adjudicating the merger. In this case, however, a far more stringent novel or, at best, erroneous test was introduced by the CAC.

It required an intervening applicant to demonstrate possession of special or unique insights that could not be obtained from any other source.

This Court concluded that this created an unworkable and well-nigh impossible test for intervention. This is especially so given that, at the intervention stage, the Tribunal does not and should not determine the correctness of the intervener's averments, nor resolve disputes about market dynamics or the anti-competitive effects of the merger. Those matters are properly addressed at the merger hearing itself. If intervention were permitted only where the Tribunal would otherwise lack access to the evidence, intervention would be rendered impossible, given the Tribunal's inquisitorial powers to subpoena witnesses or direct further investigation. It is therefore untenable to refuse intervention on the basis that any investigative gaps could be cured without it. The proper enquiry is whether the application was reasonably instituted when brought.

The CAC held that Lewis offered only generalised market descriptions and failed to identify any specialised knowledge that could assist the Tribunal. However, in its founding affidavit, Lewis outlined the parties' operations in the national furniture retail market, supported by maps, graphs, statistics and factual data, identified material deficiencies in the Commission's analysis of market definition and competitive effects, and explained the specific contributions it sought to make as an intervener. This Court concluded that in light of the detailed, fact-based evidence presented by Lewis, the Tribunal was justified in concluding, through a carefully reasoned application of the settled legal test, that the requirements for intervention had been satisfied.

This Court concluded that it was not necessary to determine whether the CAC formally introduced a new test or misapplied the existing one. In either event, it impermissibly elevated the threshold for intervention beyond that contemplated by section 53(c)(v), by requiring proof of unique or otherwise unobtainable evidence. That error sufficed to justify setting aside its decision. Applying the correct test, this Court held that Lewis made out a case for intervention, as the Tribunal correctly found.

This Court also dealt briefly with the CAC's impermissible interference with the Tribunal's exercise of its discretion to grant Lewis participatory rights. The CAC has repeatedly affirmed – in the cases of *Sunrise Energy*, *Imerys* and *Schumann Sasol* – that the decision whether to permit intervention lies within the Tribunal's discretion. In doing so, deference is owed to the Tribunal as a specialist body with a thorough grasp of the policy considerations relevant to merger analysis. The Tribunal's discretion may be interfered with only where it was not judicially exercised, was based on wrong principles or misdirection, or produced a decision that no properly directed tribunal could reasonably have reached.

The CAC held that the Tribunal did not consider at all rule 46 of the Tribunal Rules, and the prescription that the Tribunal decline to admit an intervener if it provides evidence already brought before it by another participant. That conclusion was incorrect. The Tribunal expressly referred to rule 46 and identified material gaps in the Commission's assessment, including local market overlaps, pricing interactions and the role of credit.

Clearly therefore, the Tribunal did consider the shortcomings in the Commission's assessment and held that Lewis' information could fill those shortcomings.

The CAC was therefore not entitled to substitute its own view of the usefulness of the evidence for that of the Tribunal. The CAC accordingly erred in interfering with the Tribunal's lawful and rational exercise of its discretion.

The final issue concerned the ambit of the Tribunal's participation order. The merger parties contended that the Tribunal improperly outsourced its statutory merger control functions to Lewis, granted intervention rights in respect of issues not sought in the intervention application, acted inconsistently by granting intervention in relation to countervailing power while stating in its reasons that this aspect was denied, and dismissed intervention on public interest grounds while nonetheless granting Lewis access to the entire merger record, including material relating solely to public interest.

This Court concluded that these wide-ranging criticisms were unfounded. Lewis' notice of motion and founding affidavit in the intervention application made plain that it sought full participatory rights. The Tribunal admitted Lewis as a knowledgeable and comparable competitor and permitted participation on the basis that it could assist in understanding competitive dynamics and assessing unilateral theories of harm. Importantly, the Tribunal granted intervention within a defined and curtailed scope, limited participation to specified competition issues, and refused intervention on beds and mattresses, buyer power and public interest. Its order was carefully circumscribed, fact specific, and consistent with established intervention jurisprudence.