IN 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

BEFORE: HEFER, NIENABER, HARMS, MARAIS and

SCHUTZ JJA

HEARD: 23 MARCH 2000

DELIVERED: 31 MARCH 2000

Bank merger - insurance merger - regulatory authorities - whether Minister of Finance and Registrar of Long-Term Insurance - or whether competition authorities as well - interpretation of statutes - literal and purposive construction.

J U D G M E N T

SCHUTZ JA:

[1] The issue in this appeal is whether the Competition Commission established under the Competition Act 89 of 1998 ("the Competition Act") is

one of the regulatory authorities whose approval of a bank merger and an insurance merger is required.

[2] Nedcor Limited ("Nedcor") has announced its intention of bringing about the merger of itself and Standard Bank Investment Corporation Ltd ("Standard Bank"), the controller of Standard Bank of South Africa Ltd. Standard Bank is the appellant in one of two appeals which have been heard as one, together with a third purported appeal. Standard Bank is, through its subsidiary, the largest commercial bank in South Africa. Nedcor rates third or fourth. The board of Standard Bank opposes the merger, the largest ever attempted in our country. The shareholders of Standard Bank are yet to speak. If the merger does take place it will also profoundly affect the second appellant, Liberty Life Association of Africa Limited ("Liberty"). Control of Standard Bank will give Nedcor and, through it, its own controller - Old Mutual PLC ("Old Mutual") - control over Liberty. Old Mutual and Liberty are competitors in the long-term insurance market. Liberty sides with Standard Bank in

opposing the proposed merger, as does the South African Society of Banking Officials, one of the respondents. There are eleven respondents in the Standard Bank appeal and eleven in the Liberty appeal (but not quite the same eleven). It would serve no point to list them all and I shall identify them to the extent necessary as they appear. It should be added, though, that the Minister of Finance, the Registrar of Banks and Old Mutual (all respondents) side with Nedcor's contentions. The Competition Commission has also purported to appeal and was represented before us by two counsel. However, it appeared that it was not asking for any order, but was merely concerned at some of the reasoning of the court *a quo*. It is therefore not an appellant, but that does not mean that it may not attract an adverse order for costs because of its participation in the hearing.

[3] Much has been said in the papers about the merits and demerits of Nedcor's proposal. This is not a subject on which this court should express any

view. The decision is one that rests, in the first place, with the appropriate regulatory authorities and ultimately, if permission be given, with the shareholders of Standard Bank. In fact the issue in the appeals concerns the identitification of the regulators. Nedcor contends that, as its proposal involves the acquisition of more than 49% of the shares in a company controlling a bank, the decision required is that of the Minister of Finance in terms of s 37 (2) (a) (iii) of the Banks Act 94 of 1990 ("the Banks Act") (albeit after consultation with the Competition Commission under s 37 (2) (b)) and, as its proposal also involves the acquisition of control over one life insurer by another, Nedbank accepts at this stage that the further decision of the Registrar of Long-Term Insurance in terms of s 26 of the Long-Term Insurance Act 52 of 1998 ("the Long-Term Insurance Act") is also required. Standard Bank and Liberty, on the other hand, contend that approval in terms of the Competition Act is an additional requirement. As the merger is a "large merger"as defined in s 11 (3) (b), the Competition Commission would have to refer it to the

Competition Tribunal (one of the other respondents) and the Minister of Trade and Industry (another respondent) with its recommendation, as required by s 14 (3). The Tribunal would then reach a decision in terms of sections 15 and 16. An appeal against the decision of the Tribunal lies to the Competition Appeal Court in terms of sections 17 and 37. What I have said about the procedures under the Competition Act is premised on the procedures and decisions under that Act having application to bank and insurance mergers. The dispute in the appeal is whether they do apply. The court *a quo*, per Coetzee AJ, held in favour of Nedcor that the separate permission of the competition authorities was not needed, but granted leave to appeal to this court.

[4] Subsections 37 (1) and (2) (a) of the Banks Act, although of some length and complication, are simple in their application to the facts of this case. As the acquisition of more than 49% of the shares in a "controlling company" of a bank is involved, the Minister of Finance's permission must be obtained in terms of s 37 (2) (a) (iii). The section proceeds in s 37 (2) (b):

> "Permission in terms of paragraph (a) shall only be granted on application on the prescribed form and after consultation with the Competition Board established by section 3 of the Maintenance and Promotion of Competition Act, 1979 (Act No 96 of 1979)."

The Act last mentioned was repealed in 1998 by the current Competition Act. However, in terms of s 83 (1) and schedule 3 par 4 (d) of that Act any reference in any other statute to the Competition Board under the 1979 Act is to be regarded as a reference to the Competition Commission under the 1998 Act.

[5] Certain criteria which the Minister of Finance must take into account in granting or withholding consent to the acquisition of control over a bank are set out in s 37 (4):

> "Permission in terms of subsection (2) for the acquisition of shares in a bank . . . shall not be granted unless . . . the Minister . . . is satisfied that the proposed acquisition of shares -
>
> (a) will not be contrary to the public interest; and
>
> (b) will not be contrary to the interests of the bank concerned or its depositors . . ."

[6] Subsections 26 (1) - (3) of the Long-Term Insurance Act provide in part:

> "(1) Subject to this section, no person shall, without the approval of the

Registrar, acquire or hold shares or any other interest in a long-term insurer which result in that person, directly or indirectly, alone or with an associate, exercising control over that long-term insurer.

(2) No person shall acquire shares in a long-term insurer if the aggregate

nominal value of those shares, by itself or together with the aggregate nominal value of the shares already owned by that person or by that person and his, her or its associates, will amount to 25 per cent or more of the total nominal value of all of the issued shares of the long-term insurer concerned, without first having obtained the approval of the Registrar.

(3) The approval referred to in subsection (2) -

(a) . . .

(b) shall not be given if it would be contrary to -

(i) the public interest: or

(ii) the interest of the policyholders, or of persons who may become policy-holders, of the long-term insurer; and . . .”

[7] Turning to the Competition Act, s 3 is headed “Application of Act” and subsection (1) reads:

“(1) This Act applies to all economic activity within, or having an effect within, the Republic, except -

(a) collective bargaining within the meaning of section 23 of the *Constitution*, and the Labour Relations Act, 1995 (Act No 66 of 1995);

(b) a collective agreement, as defined in section 213 of the Labour Relations Act, 1995;

(c) the rules of a professional association to the extent that they are exempted in terms of Schedule 1;

(d) acts subject to or authorised by *public regulation*; or

(e) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose."

"Public regulation" is defined in s 1 to mean:

> "Any national, provincial or local government legislation or subordinate legislation, or any license, tariff, directive or similar authorisation issued by a *regulatory authority* or pursuant to any statutory authority."

"Regulatory authority" is defined in the same section to mean:

> "An entity established in terms of national, provincial legislation or local government legislation or subordinate legislation responsible for regulating an industry, or sector of an industry."

[8] Nedcor and those who associate themselves with its arguments (to whom I shall refer collectively as "Nedcor", unless there is a need to highlight the exact provenance of an argument) contend that s 37 of the Banks Act provides for an entire regulatory system as far as the acquisition of control by one bank over another through the purchase of shares is concerned. In the course of exercising his discretion the Minister of Finance will take into account

competition considerations, after consultation with the Competition Commission, but will not necessarily give them predominant or decisive weight. He will take into account other considerations and particularly the importance of maintaining the integrity and security of banks - cf *Nuwe Suid-Afrikaanse Prinsipale Beleggings (Edms) Bpk and Another v Saambou Holdings Ltd and Others* 1992 (4) SA 696 (W) at 706 I - J. Similarly, Nedcor contends that, as far the acquisition of control over one life insurer by another is concerned, s 26 and associated provisions of the Long-Term Insurance Act provide an entire regulatory regime. Standard Bank and those who side with its arguments (to whom I shall refer similarly as "Standard Bank"), on the other hand, contend that s 3 (1) (d) of the Competition Act does not except bank or insurance mergers from the operation of the Competition Act, so that there are three, not two, regulatory authorities, the Minister of Finance, the Registrar of Long-Term Insurance and the Competition Commission. Nedcor, needless to say, holds s 3 (1) (d) to exempt bank and long-term insurance mergers from regulation by the

competition authorities, save as is provided in s 37 (2) (b) of the Banks Act.

[9] The resolution of the dispute depends upon the meaning of the exception contained in s 3 (1) (d) of the Competition Act. The opening words of s 3 (1) apply the Act to "all economic activity." These words of great generality extend its operation to the countless forms of activity which people undertake in order to earn a living. But the extension is not unlimited, as the existence of the five exceptions (a) to (e) proclaims. Because the area of demarcation of the Act can be derived only from the general enactment and the exceptions, there is no reason to give the exceptions less weight than the general words. In the case before us there is no doubt that the proposed bank merger is an "economic activity." The question is whether it will be an "act" (Afrikaans "handeling") "subject to or authorised by *public regulation*." Read in the context of the Act the "acts" envisaged form part of a confined class. That is so because the subject matter of the Act is what may broadly be described as actually or

potentially monopolistic or anti-competitive agreements, practices or acts, which are grouped under the headings restrictive horizontal practices, restrictive vertical practices, abuse of dominant position and mergers. Entering into an agreement or abusing dominance may in themselves be “acts” or “handelinge.” Because of the frequency with which I will have to refer to the confined construction that I have placed on the word “act”, and its importance, I shall refer to the word so construed as a “monopolistic act.” I do not use this expression pejoratively, nor in order to define, but in order to coin a brief label. This construction does not involve reading words into the subsection. It is a necessary construction, given the context and given the purpose of the Act. Failure to construe the word correctly is the reason, it seems to me, for much of the confusion and the concern about the operation of the Act, manifested both in this appeal and more widely.

[10] The act of merging two banks by the acquisition by one of the majority of the shares in the other is clearly an “act.” Because the Minister of Finance must

grant his “permission”, the act of acquisition has to be “authorised by” him. As this is so it is unnecessary to consider the exact import of the phrase “subject to.” The next enquiry is whether authorisation by the Minister is authorisation “ by public regulation.” This enquiry takes one to the definition of “public regulation.” This definition falls into at least two parts, but the one presently relevant is “any license, . . . or similar authorisation issued by a *regulatory authority* . . .” If the Minister is a “regulatory authority”, then this part of the definition is satisfied. That part of the definition of “regulatory authority” which reads “an entity established in terms of national . . . legislation . . . responsible for regulating an industry, or sector of an industry” is satisfied, provided that the Minister is an “entity”. As to whether the Minister is an “entity”, he clearly is. According to the Shorter OED an entity is a “being.” The nature of the being is indefinite. It may be a person, the holder of an office, a board, an institution. It may also be a Minister of Finance. The relevant part of the definition is satisfied because the Minister’s post is established under s

91, read with section 85 (2) of the Constitution of the Republic of South Africa, 1996; and because under the Banks Act he has wide powers of regulation over the banking industry (s 90) and particularly over bank mergers (see sections 37 and 54).

[11] My conclusion is that on a plain reading of s 3 (1) (d) it excepts acts performed under s 37 of the Banks Act (i e bank mergers by the acquisition of a majority shareholding) from the operation of the Competition Act in express terms. The general tenor of the numerous arguments as to why a literal reading of the subsection should not be adopted tends to confirm that the literal interpretation contended for by Nedcor is correct, as a literal interpretation.

[12] The same result follows in the case of s 26 (1) of the Long-Term Insurance Act. Because the "approval" of the Registrar is required before control over a long-term insurer may be acquired, the act of acquiring control is on a literal reading also excepted from the Competition Act by s 3 (1) (d) of that Act.

[13] The conclusions set out above have been reached without any reference to s 37 (2) (b) of the Banks Act, which has no counterpart in the Long-Term Insurance Act. Much argument was addressed to us on this subsection, with which it is unnecessary to deal, as a decision can be reached without reference to it. I say no more than that the requirement of prior consultation with the Competition Commission seems on the face of it to be an indication that the latter is not intended to be an independent regulatory authority with parallel jurisdiction in the case of a bank merger.

[14] I now turn to the various arguments that have been raised as to why s 3 (1) (d) should not be read as it reads.

[15] Running through many of these arguments is the contention that the Competition Act should be given a purposive reading, or, to put the matter slightly differently, that we should have regard to the spirit of that Act. This is so particularly, so the argument runs, because of the preamble to the Act, and its sections 1 (2), 2 and 3 (1). I set these provisions out, not because I think they

solve the problem before us, but because they were pressed upon us as lying at the root of its solution. The preamble reads:

> "THE PEOPLE of South Africa recognise:
>
> That apartheid and other discriminatory laws and practices of the past resulted in 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.
>
> That the economy must be open to greater ownership by a greater number of South Africans.
>
> That credible competition law, and effective structures to administer that law are necessary for an efficient functioning economy.
>
> That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans.
>
> IN ORDER TO -
>
> provide all South Africans equal opportunity to participate fairly in the national economy;
>
> achieve a more effective and efficient economy in South Africa;
>
> provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
>
> create greater capability and an environment for South Africans to compete effectively in international markets;
>
> restrain particular trade practices which undermine a competitive economy;
>
> regulate the transfer of economic ownership in keeping with the public interest;

establish independent institutions to monitor economic competition; and give effect to the international law obligations of the Republic."

Section 1 (2) reads in part:

"This Act must be interpreted -

(a) in a manner that is consistent with the *Constitution* and gives effect to the purposes set out in section 2."

Section 2 reads:

"Purpose of Act. - The purpose of *this Act* 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."

In the case of s 3 (1) stress is also placed upon the extended scope of the phrase "*all* economic activity." This stress begs the question as to the extent of

the succeeding exceptions.

[16] Our courts have, over many years, striven to give effect to the policy or object or purpose of legislation. This is reflected in a passage from the judgment of Innes CJ in *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 543. But the passage also reflects that it is not the function of a court to do violence to the language of a statute and impose its view of what the policy or object of a measure should be. The passage reads:

> "Speaking generally, every statute embodies some policy or is designed to carry out some object. When the language employed admits of doubt, it falls to be interpreted by the Court according to recognized rules of construction, paying regard, in the first place, to the ordinary meaning of the words used, but departing from such meaning under certain circumstances, if satisfied that such departure would give effect to the policy and object contemplated. I do not pause to discuss the question of the extent to which a departure from the ordinary meaning of the language is justified, because the construction of the statutory clauses before us is not in controversy. They are plain and unambiguous. But there must, of course, be a limit to such departure. A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be the policy or object of the particular measure".

[17] Another oft-quoted passage is that in the judgment of Schreiner JA in *Jaga v Dönges NO and Another* 1950 (4) SA 653 (A) at 664 E - H. It warns against the Sirenic perils of words, whilst repeating that there are bounds to legitimate interpretation. It reads:

> "Seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over the context, and *vice versa*, the less clear it is the greater the part that is likely to be played by the context.
>
> Ultimately, when the meaning of the language in the context is ascertained, it must be applied regardless of the consequences and even despite the interpreter's firm belief, not supportable by factors within the limits of interpretation, that the legislator had some other intention. . . . But the legitimate field of interpretation should not be restricted as the result of *excessive peering at the language* to be interpreted *without sufficient attention to the contextual scene*."
>
> (Own emphasis.)

[18] Also the Constitution, which expresses many values and rights in general terms, must have its language respected. As Kentridge AJ said in *S v Zuma and Others* 1995 (2) SA 642 (CC) at 652 I - 653 B:

> "While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.
>
> We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination. If I may again quote *S v Moagi* (*supra* at 184), I would say that a constitution 'embodying fundamental rights should *as far its language permits* be given a broad construction'."
>
> (My emphasis.)

[19] The ultimate logical dilemma which confronts such a one as would subvert the words chosen by Parliament in favour of the spirit of the law, is stated by Innes CJ, in the form of a question, in *Dadoo's* case (above) at 543-4:

> "What, then, is meant by saying, as some of the authorities do, that an act [the concrete transaction with which the court is concerned] may not contravene the language of the law, and yet may infringe its spirit and be on that account invalid? Does it mean that the intent or spirit of the law operates beyond the limits

> of its language, - in which case there would be in effect two enactments, one expressed, and the other unexpressed, but equally operative?"

[20] In terms of s 43 of the Constitution, the legislative authority of the national sphere of government is vested in Parliament. Parliament exercises its authority mainly by enacting Acts. Acts are expressed in words. There is therefore elementary merit in what was said by Harms JA in *Abrahamse v East London Municipality and Another: East London Municipality v Abrahamse* 1997 (4) SA 613 (SCA) at 632 G - H:

> "Interpretation concerns the meaning of the words used by the Legislature and it is therefore useful to approach the task by referring to the words used, and to leave extraneous considerations for later."

[21] Having regard to the authority and persuasiveness of what has gone before, I think that the submission in Standard Bank's heads of argument that the "semantic or literalist approach enjoys ever less support in modern legal theory" is cast rather high. However, as I have endeavoured to show, our law is an enthusiastic supporter of "purposive construction" in the sense stated by

Smalberger JA in *Public Carriers Association and Others v Toll Toad Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A) at 943 G - H:

> "Mindful of the fact that the primary aim of statutory interpretation is to arrive at the intention of the Legislature, the purpose of a statutory provision can provide a reliable pointer to such intention where there is ambiguity."

(In so far as the decision in *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others* 2000 (1) SA 113 (SCA) at 121 F - G is concerned, it is necessary to point out that the insertion of the quotation ascribed to Ogilvie Thompson JA is an error, as no such passage is to be found in *Secretary for Inland Revenue v Sturrock Sugar Farm (Pty) Ltd* 1965 (1) SA 897 (A).)

[22] Finally on the subject: the importance of purpose, the dangers of literalism and yet the weight of the words used in arriving at the purpose, is perhaps nowhere better expressed than by Judge Learned Hand in 1944 in *Borella et al v Borden Co* 145 Fed Rep 2d Series 63 at 64 - 65:

> "We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time. To say that that is a hazardous process is indeed a truism, but we cannot escape it, once we abandon literal interpretation - a method far more unreliable. . . .
>
> We do not indeed mean that here, or in any other interpretation of language, the words used are not far and away the most reliable source for learning the purpose of a document; the notion that the 'policy of a statute' does not inhere as much in its limitations as in its affirmations, is untenable."

[23] The drift of the arguments on the Standard Bank side, as they were developed, was that to give effect to the near all-embracing attack on anti-competitive acts which it is the purpose of the Competition Act to sustain, the impact of s 3 (1) (d) is to be lessened, that is, exceptions to the generality should be reduced. There was no uniformity as to how this was to be done, not surprisingly, as there were 15 counsel in court (only six of whom addressed us) and six sets of heads of argument and one supplement. Originally Standard Bank, Liberty and the Commission all proposed that words of limitation be

read into s 3 (1) (d). The trouble was that the words were not the same. *Quot homines tot sententiae*, you might say. But it is this very uncertainty which is created by different opinions as to how a statute should read that is often a bar to implying words: see Corbett JA in *Rennie NO v Gordon and Another* 1988 (1) SA (A) 1 at 22 E - H and Corbett AJ in *S v Burger* 1963 (4) SA 304 (C) at 308 C - F.

[24] Mr *Wallis*, who had not drawn the original heads for Liberty, understandably distanced himself from an attempt to read words in. Instead he argued for a contextual or purposive approach. Whether the problem was indeed shaken off so readily needs to be explored.

[25] The argument that was developed by *Mr Wallis*, as also *Mr Slomowitz*, for Standard Bank, was not always easy to follow. It was to the effect that s 3 (1) (d) applies only to such statutes as regulate particular fields and at the same time regulate competition within those fields, to a greater or lesser extent. The

example par excellence, if there is such an example, is a statute that deals with competition as comprehensively as does the Competition Act. No candidate was proposed. If there is none such, the exception becomes a portentous nullity, unless a means of calibration is found. How much special regulation must there be before a statute qualifies for exclusion by s 3 (1) (d)? Save for the firm affirmation that the two Acts with which we are concerned are beyond the pale of exception, we obtained no clear answer to this question. I do not think there is one. *Mr Smith,* who appeared for the Commission, particularly criticized the unreported decision of Ngoepe JP in the High Court, Transvaal Provincial Division, in the case of *SAD Holdings Ltd, SAD Vine Fruit Pty Ltd v SA Raisins Pty Ltd, Slabber and the Competition Tribunal* delivered on 15 March 2000. This decision may be open to the criticism that, contrary to what I have said above about the need for a "monopolistic act" to be present, the case may have decided that s 3 (1) (d) operates merely because a regulatory body operates in a general sense in a particular field. But I fail to see how any errors that the

judgment may contain advance *Mr Smith's* argument. The argument as to how much regulation was required, whatever quite it was, was intended to advance the supposed broad, near universal, purpose of the Competition Act.

[26] This purpose was also the engine driving *Mr Wallis's* next argument, that serious anomalies would arise if s 3 (1) (d) were not appropriately contained or restrained. He referred to a long list of statutes containing competition provisions. Other counsel assured us that there are many more. Examples mentioned were those governing air travel, medical aid schemes, broadcasters, telecommunications, the liquor industry and electricity supply. A literal interpretation of s 3 (1) (d) would lead to what was called a startlingly wide field of exclusion from the application of the Competition Act. When one bears in mind that one is concerned only with the exclusion of a "monopolistic act" I do not find such exclusions as there may be to be startling. I do not intend pronouncing upon individual statutes, but it may be that deliberate policy decisions, or mere inertia in reworking or integrating old statutes, offer an

explanation for scattered outcrops of monopoly laws.

[27] *Mr Slomowitz* took the anomaly argument considerably further. He contended that a literal interpretation would have the effect of exempting all share purchases on the Johannesburg Stock Exchange, thus practically nullifying the Competition Act. This is an impressive looking argument, but I do not think that it has substance, essentially because the instances relied upon are not "acts" of the kind which the Competition Act is intended to frustrate or regulate, ie they are not of themselves "monopolistic acts." The argument is that a purchase of shares would be "subject to" the Companies Act, the Stock Exchanges Control Act, 1985, as well as the rules and regulations thereunder. In truth, however, anyone may buy or sell shares. The market on which shares are bought may be subject to some regulation, but the act of buying a share is not; any more than the act of buying a sack of lettuces on a fresh produce market is.

[28] So much for the anomalies. I do not claim to have conducted a definitive

or binding investigation of them, but I do think that I have shown that they are not as alarming as they are claimed to be. I can now come back to the argument that the operation or non-operation of s 3 (1) (d) depends upon degrees of regulation exercised by other statutes or organs created under them over competition matters. The principial difficulty with the argument is that there are no degrees about an "act" (in the sense of a "monopolistic act") being "subject to" or "authorised by" a statutory regulator. It either is or it is not. This leaves no room for an enquiry into the extent or degree of regulation, which is the unlikely starting point of the argument under consideration. There is no room for calibration. So that the attempts to inject life back into a moribund Competition Act by an infusion of its spirit, are unnecessary. Properly interpreted the Act has a wide, if not universal application. The Act is alive and well. This should be some solace to *Mr Smith's* client.

[29] The next argument was that the history of the legislation on banks, insurers and monopolies compels us to depart from a literal reading of s 3 (1)

(d), so as to allow regulation by the Commission parallel with that of the Minister of Finance and the Registrar of Long-Term Insurance. I do not intend going through this legislation at length, because in the end what emerges is that there have been marked policy shifts in the past (not surprising, as there are strong arguments both ways) and a fundamental change in the structure of the competition authorities, so that there is no consistent, even less, reliable pointer in the history, which dictates a non-literal reading of the 1998 competition statute. It is true that between 1979 and 1985 there was dual regulation of bank mergers by the Minister of Finance and the (then) Minister of Economic Affairs. It is also true that between 1991 and 1998 there was dual control. But the 1998 Competition Act is so fundamentally different from its 1979 predecessor that there is simply no inference that can be drawn that dual regulation was intended after 1998, and particularly not so in the face of s 3 (1) (d).

[30] Finally it was argued that we should harken to the message contained

in s 1 (3) of the Competition Act, which lays down that any person interpreting the Act "may consider appropriate foreign law." Our courts have, of course, considered foreign law, where appropriate, over the years. Indeed the Roman-Dutch system of law is itself a product of just such a process, as is the on-going South African system which succeeded it. Reference to foreign law is sometimes helpful, particularly when one's own system is silent or uncertain on a point, or may be thought to be deficient, or simply for purposes of comparison and enlargement of view. But the ransacking of the legal libraries of the world may, where it is not appropriate, lead to no more than more paper, more costs, more delay and even more confusion, without any commensurate benefit. There is also sometimes a positive danger in resorting to foreign law - that it should be only half understood, because the person going to it does not sufficiently understand the foreign system. A significant part of the papers in this case was taken up with foreign material, Canadian and American, to aid us in our task. The difficulty I have found in making any use of it is that it is, again,

inconclusive. Some systems choose dual control, others single, yet others dual control with one regulator predominant. If the conclusion is once reached that our own policy in those regards may be gathered clearly from our own legislation, I see no point in burdening readers of this judgment further by referring to voluminous foreign material, which does not advance the argument.

[31] On appeal there was a faint attempt to pursue a prayer praying a direction to the Minister of Finance and the Registrar of Banks to provide Standard Bank with a copy of Nedcor's application under s 37 (2) with its supporting documentation and all other written representations and information obtained from other parties. The Minister of Finance has submitted that in the light of his undertaking to furnish interested parties with such information as they may be entitled to there is at present no dispute. It is not the function of this court to act as adviser: *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another* etc 1995 (4) SA 1 (A) at 14 G, *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) at

524 I - 525 C. And insofar as Standard Bank bases its case upon the Constitution, it is a salutary rule that a question of constitutional law should not be anticipated in advance of the necessity of deciding it: *Zantsi v Council of State, Ciskei, and Others* 1995 (4) SA (CC) at 617 H - 618 C. Standard Bank should await the decision of the Minister, and if it be dissatisfied with it and believes that it has a valid complaint as to the process by which he reached his decision, that will be the time to take action.

[32] The two appeals are dismissed. The costs are to be paid jointly and severally

by the two appellants and the Competition Commission. Costs are to include the

costs of two counsel where two or more were employed.

W P SCHUTZ

JUDGE OF APPEAL

CONCUR
HEFER JA
NIENABER JA
HARMS JA