



## TRIBUNAL TRIBUNE



### WHO WE ARE

The Competition Tribunal is a specialist institution that works like a “court” in South Africa’s competition law system. It has jurisdiction throughout South Africa. It hears and decides competition cases such as mergers and complaints.

The Tribunal is independent and impartial and carries out its duties without fear, favour or prejudice. It is subject only to the Constitution, the law, and the Competition Act (“the Act”).

The Tribunal’s decisions have the same legal weight as the judgments of the High Court and Tribunal members adjudicate the matters. They comprise highly experienced lawyers and economists.



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## INTERVIEW WITH MONDO MAZWAI, CHAIRPERSON OF THE COMPETITION TRIBUNAL



Gillian De Gouveia: I'm looking forward to gaining insights about the Competition Tribunal, and its role in the South African competition economy. South Africa is one of the most unequal societies in the world, what are your thoughts on competition and inequality?

Chair: It is always important to me that we continuously reflect on the inequality challenges that our society faces. The effects of an ever widening 'inequality gap' are felt across the board:

- They threaten trust in markets and their ability to deliver prosperity to all people. For example, during the Covid-19 pandemic, consumers were exposed to high and unjustified prices; and
- They position us on an unsustainable path, which risks triggering economic and social instability. Take, for example, the July 2021 uprisings in KwaZulu-Natal and Gauteng. While these may be regarded as service delivery protests, at the heart of it, is inequality. Unabated, widening inequality may lead to our own Arab Spring. This concerns me.

The preamble to the Competition Act pronounces its purpose as "promoting and maintaining competition in the Republic in order to promote efficiency, adaptability and the development of the economy".

At the same time, the 2019 Amendments to the Competition Act specifically expand the public interest provisions in merger control (from the more established public interest provisions, such as employment, which have become a standard consideration when we look at mergers) to include a greater spread of ownership and the ability of small businesses not only to enter markets, but also to participate and expand within markets.

It is clear from this mandate that the goals of the Competition Act transcend traditional competition goals.

The recent study by the Competition Commission shows that markets remain highly concentrated. Some contend that accompanying concentrated markets, is a corresponding and disproportionate rise in corporate profits for large firms.

The suggestion – and sometimes outright criticism – is that despite competition enforcement trends such as uncovering of cartels and penalties imposed on transgressors, South African markets remain concentrated, and this has adverse consequences for consumers, economic productivity, economic inclusion, and inclusive growth.

Here are some thoughts on competition policy's interface with equality. It is widely known that the root of competition law harm is excessive market power. Excessive market power is durable and undermines both the efficiency and public interest goals of competition policy. It can be used to injure efficient market players by raising their costs, depriving them of business opportunities or driving them out of business.

Excessive market power can also be used to increase the cost of goods and services for consumers, lower wages, stunt investment, block entrepreneurship (especially by small and Black owned firms) and retard innovation. Furthermore, excessive market power tends to concentrate economic power. Monopolies and oligopolies also stand accused of using their power to win favourable policies such as state protection and entrench their dominance. All of this, taken together, exacerbates income inequality and inequality of economic opportunity.

**Gillian De Gouveia: Let me follow up on this, in what way is the Tribunal able to practically demonstrate its contribution towards tackling inequality in the country. Are there cases that you can share with us that demonstrate this?**

Chair: In DP World Logistics FZE and Imperial Logistics Limited, DP World, ultimately owned by the Dubai government, intended to acquire the South African firm, Imperial, subject to public interest conditions, including worker ownership. The Tribunal considered public interest concerns arising from the merger and the remedies proposed relating to a greater spread of ownership by workers and HDPs. The Tribunal also sought clarification and enhancements on certain aspects of the proposed conditions before approving the transaction.

The conditions imposed by the Tribunal included the establishment of an ESOP whereby employees in South Africa will have shareholding in Imperial Logistics South Africa Group (Pty) Ltd, a subsidiary of Imperial. The conditions also provided for Imperial to increase its enterprise and supplier development expenditure in South Africa, its spend on corporate social responsibility initiatives and training and development of Black persons and procurement from Black persons. Imperial further committed to incur capital expenditure of no less than R2.1 billion in South Africa over four years, ending 30 June 2025.

*In NET 1 Applied Technology and Ovobix and Luxiano 227*, the merger was found to result in a dilution of B-BBEE shareholding, thereby not promoting a greater spread of ownership by HDPs and workers in firms in the market, as contemplated under section 12A(3)(e) of the Act. A set of conditions involving the establishment of an employee share ownership program ("ESOP") were tendered. During the hearing, the Tribunal sought clarity and further details from the parties regarding certain aspects of the tendered conditions relating to the ESOP. These included issues such as the level of shareholding allocation to the ESOP; what costs, if any, there would be to the beneficiaries of the ESOP; the funding arrangement and criteria to be applied for qualification as a beneficiary; any exclusions that may apply; benefits that the beneficiaries would be entitled to; representation of employees; and consultation processes.

The merging parties subsequently enhanced the tendered ESOP-related conditions in certain respects. These were acceptable to the Tribunal after motivation by the merging parties and the Commission. The Tribunal thereafter approved the merger subject to, among others, the establishment of an ESOP for the benefit of workers.

Cases like these illustrate that competition policy can be a meaningful strategic lever aimed at fostering greater economic equality. Its effects should not be seen as incidental by-products, but rather as an additional path for societal change.

The Tribunal, of course, consistently strives to strike the right balance, intervening only when necessary, imposing conditions focusing on worker ownership programs when there is injury or when parties tender on the conditions. When this happens, the Tribunal does not hesitate to jump in to restore competition or promote public interest.

**Gillian De Gouveia: Lets shift gears here and ask what is the Tribunal's approach to the intersection between constitutional law and competition law?**

Chair: Following a Tribunal decision in a long running case involving Mediclinic's proposed merger with an independent hospital group, Matlosana, the Constitutional Court, in upholding the Tribunal's decision to prohibit the merger, reinforced the mandate of the competition authorities to apply beyond competition goals only. The Tribunal prohibited the merger on competition and public interest grounds. The merger could not be justified with regard being had to, among other things, the predictable hike in hospital tariffs due to the reduced competition if the merger was allowed, and the fact that this would affect uninsured patients who are a vulnerable group in the area of Potchefstroom/Klerksdorp.

The Constitutional Court reinforced the mandate of the competition authorities in enforcing the Competition Act to encompass constitutional rights enshrined in the Competition Act.



The Tribunal has since adopted the same transformative, constitutional and context-sensitive reasoning in several interim relief applications in order to enable participation by Black owned firms in the economy e.g. in an interim relief application, Makareng Electrical Industries (Pty) Ltd t/a Wilec (Wilec), a private, 100% Black-owned firm complained about abuse of dominance by Allbro (Pty) Ltd, an incumbent of over 40 years in the supply of transformer bushings used to transmit electrical power into or out of a transformer. The Tribunal found a real possibility that Wilec would exit the market which would not only deprive the market of some rivalry, competitive prices and choice in an already concentrated market. The Tribunal granted interim relief, concluding that Wilec had prima facie established an abuse of dominance.

**Gillian de Gouveia: What is your vision for the Tribunal's work?**

Chair: I expect that there will be an increase in the demand for the Tribunal's services because of the amendments to the Competition Act. This requires a growth in the Tribunal's resources including capacity in order to strengthen the organisation. In gearing the Tribunal up for this anticipated growth, we embarked on stakeholder engagements and are grateful for their inputs.

Our expansions plans are on track, we are increasing Tribunal members and case managers in keeping with the increasing demand for our services and the increased complexity of cases. We continue to improve efficiencies and strive to achieve our vision of a vibrant, competitive and inclusive economy.









## REFLECTIONS

The following reflections are the opinions of the authors and are not binding on the Tribunal or any member of the Tribunal.



**Prof. Liberty Mncube**

## UPDATE ON THE TRIBUNAL'S WORK

Professor Liberty Mncube, the Deputy Chairperson of the Tribunal, delivered the following keynote address at the Bowmans African Competition Law Conference in Cape Town on 24 February 2023:

It is a pleasure and an honour to be part this year's Bowmans conference. The number and quality of the attendees is testimony to the importance of the issues being discussed today. Chairperson Mondo Mazwai would have loved to be here and present with us today. Unfortunately, she has a personal bereavement. She says thank you to the Bowmans team for the flowers. I will share with her my experience with you.

### **The Amendments to the Competition Act**

In 2019, amendments were effected to the Competition Act with the aim of transforming markets to become competitive and inclusive. Of late, we have noticed that the amendments have led to a re-invigorated interest in exclusionary conduct and public interest issues in merger control as jurisprudence around the scope and interpretation of these through the lens of increasing participation and economic transformation develops.

Many of you will have observed that the decisions of the Tribunal on competition and public interest issues in merger control, seek to provide consumers with lower prices and high-quality products, promote the participation of small businesses and Black owned firms, promote a greater spread of ownership (including workers, for example through conditions relating to worker ownership programs), and foster competition to promote innovation, productivity and long-term inclusive growth, among others. This is in line with our statutory mandate.

Our statutory mandate stands in contrast to elsewhere in the world where merger control does not include a public interest assessment. For example, in the US, Lina Khan (FTC Chairperson in an article in the WSJ titled "ESG won't stop the FTC" argues "[their] job is to prevent illegal mergers, not to make the world a better place."

Unlike the US, our job in merger control is to make South Africa (and Africa) a better place, one case at a time. In line with our mandate.

Those of you who are keen observers of the Tribunal may have noticed some changes in the Tribunal's workload arising as a result of the 2019 competition law amendments. There has been an increase in the complexity of cases and an increase in the demand for the Tribunal's services.

### **Let me take a few moments to highlight some of the other changes.**

- First, in merger control, the expanded considerations, both regarding the competition and public interest aspects, have increased the ambit of issues for merger consideration and have led to longer hearings.
- Second, in prohibited practices, there has been an energised interest in exclusionary conduct as parties before the Tribunal contest the scope and interpretation of an exclusionary act through the lens of impeding or preventing participation.

### **Court judgments**

Court judgments also continue to influence the Tribunal's operations. The Constitutional Court's emphasis of the competition authorities' obligation to interpret the Competition Act in a manner which upholds the values enshrined in the Bill of Rights of the Constitution of the Republic

of South Africa, in Mediclinic means that the Tribunal will continue to apply a transformative, constitutional and context-sensitive approach to its determinations in order to address the inequalities that are present in our economy.

We expect that the intersection between competition and constitutional law will continue adding to the workflow and complexity of matters considered by the Tribunal.

- Recently, the CAC in eMedia has evolved the jurisprudence to include a constitutional and transformative view of the provisions of the Act in considering interim relief applications.

Interestingly, the Tribunal was established 24 years ago to be an independent and impartial adjudicative body whose function is to hear and decide mergers and prohibited practices cases under the Competition Act.

## The Tribunal

From its creation, the Tribunal had essentially two fundamental features: (1) specialized expertise both from a legal standpoint and an economic standpoint; and (2) a more expedited process.

**In terms of expertise,** Tribunal members are composed of both lawyers and economists with varied and extensive industry, academic and professional experience. The premium attached to specialised knowledge and experience is high. Competition law is really different from other forms of law, its identity depends on economics. Competition cases require the ability to hear and understand economic evidence and argument. This applies to both Tribunal members and support staff, who assist and manage the casework.

In Mediclinic, the Constitutional Court specifically emphasises that the CAC must assess the Tribunal's decision on a merger by:

*“tak[ing] account of the composition and expertise of the Tribunal as well as the nature of the enquiry which entails an element of probabilistic investigation into the effect of the proposed merger...”<sup>1</sup>*

<sup>1</sup> *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd 2022 (4) SA 323 (CC) para 44, where the majority cites IMERYS para 43*

The point here is that the ever more complex issues before the Tribunal require ever more careful scrutiny. Greater sophistication of evidence and analysis requires depth in familiarity with the subject matter.

Recently, the Tribunal announced the appointment of three pre-eminent Senior Counsel who will serve as part-time members in order to strengthen the work and expertise of the Tribunal. This is a welcome development.

In terms of process, the Tribunal has developed rules and practice directives to make its proceedings more efficient and more expeditious, so that it can handle cases more rapidly than regular courts.

The Tribunal has generally performed well in getting merger cases set down and decided within the statutory timelines. It is sometimes said, mainly I have to say by those who should know better, that the Tribunal is taking too long to write decisions. First, this is not universally true. And second, where it has happened there are reasons for it. These largely relate to internal considerations. For instance, during the COVID-19 pandemic, the Tribunal prioritised excessive pricing cases in order to contribute towards sustaining public trust and confidence in markets, by protecting consumers from unjustifiable high prices. The Tribunal also prioritised mergers. Many decisions on these cases were issued timeously.

The 'effects-based' system at the core of many of our competition assessments has become much more sophisticated, driven by new concepts such as “participation in a market” and more and better data and analytical techniques; in contested cases many Tribunal decisions have become much longer, reinforced by ample economic evidence (perhaps this indicates a trust deficiency); cartel behaviour has become more complex and devious, sometimes requiring some thoughts characterisation; and the economics of abuse has become ever more complex.

Consequently, getting opposed competition cases to the point of decision is taking longer and writing short reasons has certainly become more difficult.

We recognise that the turnaround times can be improved. The Tribunal is taking steps to improve time periods for issuing reasons for its decisions. These include strengthening case management

through the appointment of more senior case managers and the appointment of additional Tribunal members.

**In terms of expert evidence**, an important trend or procedure that the Tribunal has resorted to in the past few years has been to have panels of expert witnesses. This is sometimes referred to as “hot tubbing of experts”. Having experts appear together and asking questions to one another can assist in narrowing the issues much more quickly than you would be able to do through the typical adversary process, where the expert is defending or advocating the position of a party. I anticipate that the Tribunal will continue with this practice in certain cases.

**In terms of case management**, in most cases, the Tribunal has been pretty “hands-on”. As soon as the pleadings are in, the Tribunal calls for a case management conference to fix the timetable for the whole proceeding, so the process can move very rapidly.

The Tribunal has in some cases imposed on the parties time limits on how long a hearing is going to run. This is sometimes referred to as a “chess clock process”. In this process, the Tribunal enquires from counsel representing opposing parties how much time they need for the oral hearing. Counsel will tell the Tribunal, for example, “We need two weeks,” but it is up to them to determine how much total time they need. Once they have determined the time needed for the hearing, the Tribunal determines the duration of the hearing and allocates time. The “chess clock” process means that each opposing team starts the hearing knowing exactly the time allocated to it, let’s say, 25 hours allocated to the Respondent, and therefore, the Respondent’s counsel will have to plan his or her case within that timeframe. This process forces counsel to think about narrowing the issues and focus on what is really important to their case. For example, which witnesses should they spend their time on? Should they continue if cross-examination is leading nowhere?

So, the “chess clock” procedure is a mechanism by which the Tribunal has been able to manage its hearings in a very effectively manner. This “chess clock” procedure has allowed the Tribunal to have an efficient oral hearing process, with the hearing focusing on issues truly at stake and issues that need to be determined.

## COVID-19 and beyond

As many of you would accept, the COVID-19 pandemic precipitated a national lockdown which impacted many businesses and livelihoods, including our own activities. The Tribunal immediately took heed of government’s directive to work from home. In a way, the Tribunal was fortunate that the investments in its IT systems made in prior years enabled it to rapidly respond and to work seamlessly from home. The Tribunal issued Procedural Directives to address the hearing of the different types of cases, prioritizing mergers and excessive pricing complaints related to COVID-19. The Tribunal also developed protocols for virtual hearings.

The Tribunal was able to develop short cuts and fast-track processes because of its experience. The Tribunal was also able to be more flexible in its procedures, and tailor these to competition cases.

This year, the Tribunal has returned to the Office but has kept some of the innovations introduced as response to COVID-19, particularly virtual hearing for some cases. In the coming weeks, the Tribunal will publish Practice Directives which replace or amend those issued as a guideline for dealing with matters during COVID-19. I expect that some of the innovations developed in response to COVID-19 will continue for efficiency and effectiveness of the system.

## More interesting years to come

For myself, the next few years will certainly be interesting years.

The Tribunal recently completed a review assessing the effectiveness of the Tribunal and its structure in delivering on its mandate. I understand that the process involved getting external stakeholder views. I understand that the Association of Competition Law Practitioners contributed to the review. For this reason, the Tribunal extends its thanks to the Association of Competition Law Practitioners.

Thank you again Bowmans for this opportunity to share our perspective with you today, even though it is limited to the Competition Tribunal and to South Africa. I have no doubt that it may offer comparator lessons to many of the attendees of this conference.





**Sinethemba Mbeki**, Case Management Intern

## THE IMPORTANCE OF EMPLOYEE SHARE OWNERSHIP PLANS IN FOSTERING AN INCLUSIVE ECONOMY UNDER THE COMPETITION ACT

AUTHORS: SINETHEMBA MBEKI AND BANENG NAAPE

### 1. Introduction

The Competition Act (“the Act”), which came into force on September 1, 1999, intends to correct the old competition regime in South Africa.<sup>1</sup> When Parliament incorporated public interest provisions in this Act, this generated heated debates, eventually polarizing policymakers and economists.<sup>2</sup> The main concern of this is how it would be applied in practise when a merger is proposed; the uncertainty that comes with the assessment of public interest. Notwithstanding, the inclusion of public interest is to be seen as encouraging a transformative constitutional approach that is consistent with the scheme of the Act and that adopts a context-sensitive approach.<sup>3</sup>

<sup>1</sup>The origins of competition policy in South Africa can be traced back in the enactment of the Regulation of Monopolistic Conditions Act No.24 of 1955, which was administered by the Board of Trade and Industries. It was later amended by the Amendments to Act No.24 of 1955. The Mouton Commission of Inquiry later resulted in the introduction of the Maintenance and Promotion of Competition Act No.96 of 1979.

<sup>2</sup>Boshoff “The Economics of Public Interest Provisions in South African Competition Policy” (2021) 1.

<sup>3</sup>*eMedia Investments Proprietary Limited South Africa v Multichoice Proprietary Limited and Another*, (2011/CAC/JUN22) [2022] ZACAC 9 (1 August 2022), para 84.

In this study, we outline the rising number of cases related to a greater spread of ownership, which have been promoted using the tools of Employee Share Ownership Plans (“ESOPs”), as well as the implications for policy making under the Act in promoting an inclusive economy in South Africa.

### 2. The Competition Act geared towards transformation.

The Act is described in its preamble as to provide all South Africans with equal opportunity to participate fairly in the national economy, which transcend the traditional competition goals through the regulation.<sup>4</sup> Moreover, Section 2 of the Act, pronounces its purpose as, among other things, promoting and maintaining competition in the Republic in order to promote the efficiency, adaptability, and development of the economy, promoting a greater spread of ownership, particularly increasing the ownership stakes of historically disadvantaged persons (“HDPs”).<sup>5</sup> The recent Competition Amendment Act<sup>6</sup> has further broadened the range of public interest grounds considered by competition authorities in proposed transactions to include the ability of small and medium enterprises (“SMEs”), including firms controlled by or owned by HDPs and workers, to effectively enter, participate in, or expand within the market, the promotion of a greater spread of ownership, specifically to increase the levels of ownership by HDPs and workers.<sup>7</sup>

<sup>4</sup>Nzero “The Implications of public interest Consideration in the Interpretation and Application of the Failing Firm Doctrine in South African Merger Analysis” (2017) 80 THRHR 602. See also the Competition Act No. 89 of 1998, preamble.

<sup>5</sup>Section 2 of the Competition Act No. 89 of 1998

<sup>6</sup>Section 12A (1A) of the Competition Amendment Act.No. 18 of 2018.

<sup>7</sup>Angumuthoo “Public Interest in Mergers: South Africa” (2020) *The Antitrust Bulletin* 323.

Du Plessis asserts that the public interest, as used in the Act must be construed as primarily being concerned with undoing the inequitable distribution of resources that resulted from apartheid.<sup>8</sup> This then indicates that the reduction of inequality is one of the underlying objectives of the Act. This is critical, as Professor Fox (2019) argues:

*“Until the long left out majority are meaningfully integrated into the economic mainstream, the South African economy cannot realize its potential for efficiency. This means that leaning towards inclusiveness, rather than leaning towards freedom of action for firms with market power, is a better route towards competitive as well as fairly constituted markets.”<sup>9</sup>*

This is echoed by Du Plessis (2020) when he asserts that the Act indicates that the reduction of inequality is not good enough: what is aimed for is a concomitant reduction in racialised inequality.<sup>10</sup>

## 2.1 The promotion of a greater spread of ownership under the ESOPs

This section focuses on the implementation and rationale of the ESOPs. Moreover, we highlight what has been considered by policymakers in enhancing active involvement in the economy through ESOPs adoption.

The ESOPs have gained widespread recognition and support. According to Sithole (2019), the empowerment policies such as ESOPs are focused on transformation, especially concerning the advancement of HDPs and workers.<sup>11</sup> The development of ESOPs remains extremely important in fostering an inclusive economy.<sup>12</sup> This is because of the concerns of the high level of concentration in the South African economy and the necessity for measures that promote de-concentration, which are expressed in the preamble of the Act.<sup>13</sup>

<sup>8</sup>Du Plessis “The Role and Nature of the Public Interest in South African Competition Law (2020) 32 SA Merc LJ 234.

<sup>9</sup>Fox “South African, Competition Law and Equality: Restoring Equity by Antitrust in a Land where Markets were Brutally Skewed” (2019) *CPI Antitrust Chronicles*.

<sup>10</sup> Du Plessis page 236.

<sup>11</sup>Sithole “Unpacking Employee Share Ownership Plans ESOPs” (2019) [https://www.africportal.org/documents/21175/Introduction\\_and\\_Unpacking\\_ESOPs.pdf](https://www.africportal.org/documents/21175/Introduction_and_Unpacking_ESOPs.pdf) (Accessed 20-02-2023).

<sup>12</sup>Nomafu page 2.

<sup>13</sup>“Measuring Concentration and participation in the South African Economy: levels and Trends” (2021) <https://www.compcom.co.za/wp-content/uploads/2021/12/Concentration-Tracker-Summary-Report-1.pdf> (Accessed 22-02-2023).

In the private sector, there is a goal to increase employee economic empowerment as well as democratize asset ownership to a larger extent. This requires spreading ownership among more individual shareholders.<sup>14</sup>

The fundamental principle behind ESOPs is that workers are to own shares in the business that they are employed by. This is because ESOPs by their very nature, as an empowerment tool, serve as a retirement plan, an instrument used to facilitate employee ownership in both private and public firms, and tax-favoured management buyout and ownership transition.

ESOPs have been adopted in practice through various methods with the different objective, such as to retaining the interests of employees within the company as well as the company’s shareholders, firms and participants receive tax benefits. ESOPs have been implemented to fulfil the objectives of companies, employees, and governments, and most importantly, employee ownership in both private and public firms which has been encouraged. Since the ESOPs are implemented for various reasons, such as broadening ownership, enhancing firms’ performance, as ownership is linked to increased participation with management.

In other words, more employee representation at boards level has contributed to improved firms’ performance. Nomafu (2012) considers that the share ownership has the most obvious influence on productivity, and its impact grows when combined with other types of remuneration.<sup>15</sup> This is not to say that ESOPs alone increase productivity but to point out when comparing employee owned firm (“firms with ESOPs”) to non-employee owned firms (“firms without ESOPs”) literature such as, *inter alia*, a study by the World Bank<sup>16</sup>, and Munroe Capital<sup>17</sup> which shows that firms with ESOPs are more resilient.<sup>18</sup>

<sup>14</sup>Ibid.

<sup>15</sup> Nomafu, “Why Companies Need to Support ESOP Initiatives. Chartered Accountants, South Africa” (2012) <https://www.google.co.za/search?q=why+companies+need+to+support+esop+initiatives&rlz=1C15QJL> (Accessed 22-02-2023)

<sup>16</sup>International Experience, Discussion Paper, The World Bank, pp.7-20 [https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/LaborToolkit/Toolkit/pdf/reference/Gates\\_Sa\\_ghir\\_1995\\_ESOPs.pdf](https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/LaborToolkit/Toolkit/pdf/reference/Gates_Sa_ghir_1995_ESOPs.pdf) (Accessed 08-03-2023)

<sup>17</sup>Dealy, “ESOP Financing... A Corporate Finance Option That Improves a Company’s Cash-Flow While Strengthening Operational Performance.” *ABF Journal* (2013) <http://www.abfjournal.com/articles/esop-financing-a-corporate-finance-option-that-improves-a-companys-cash-flow-while-strengthening-operational-performance/> (Accessed 08-03-2023).

<sup>18</sup>Sithole page 13.

Notwithstanding the various benefits listed above for ESOPs, it is important to recognize that ESOPs are not appropriate for every firm or circumstance. This is because of their risky character. One of the most significant drawbacks of ESOPs is the issue of funding or financing ESOPs.<sup>19</sup> Another concern that has been raised in relation to ESOPs is the appointment of independent trustees and the costs of their services in managing the trust. They are paid from the ESOPs trust's gains, resulting in lower pay-outs for employees/participants. This speaks to the structure and/or the financing of ESOPs, mentioned above. Sunter (2012) has argued that the ESOPs are a better alternative to the Black Economic Empowerment ("BEE") deals that have been concluded.<sup>20</sup> This is due to the BEE arrangements favouring a small group of affluent and well-connected individuals.

On 18 May 2021, a practice note on the Regulations for Discretionary Collective Businesses was published by the Minister of Trade, Industry, and Competition ("Minister") in accordance with the Broad-Based Black Economic Empowerment Act.<sup>21</sup> The Minister here clarified the interpretation of the requirements under the B-BBEE Act and the Codes of Good Practice ("Codes") for broad-based black economic empowerment ("B-BBEE") ownership through 'discretionary collective enterprises, which include broad-based black ownership schemes, ESOPs, trade unions, not-for-profit companies, co-operatives, and trusts' in the Practice Note.<sup>22</sup>

In relation to ESOPs, the guidelines provide that an ESOPs is a form of ownership and should not be confused with daily operations of an entity and its labour relations issues where dismissed, retrenched, deceased, and incapacitated employees end up forfeiting their share/units as employment contracts and terms are not attached to their shareholding and should not be implemented as such. While not specifically addressed in the practice note, the Cliffe Dekker Hofmeyer Corporate & Commercial Alert (2021) states that broader policy questions have arisen

<sup>19</sup>*Ibid.*

<sup>20</sup>Sunter "ESOPs are top of the pops, Article, News24, Pretoria, South Africa" (2012) <http://www.news24.com/Columnists/ClemSunter/ESOPs-are-top-of-the-pops> (Accessed 20-02-2023)

<sup>21</sup>Broad-Based Black Economic Empowerment Act No.53 of 2003 ("B-BBEE Act").

<sup>22</sup>Bowmans Gilfillan Attorneys "South Africa: Clarity in B-BBEE Obligations – A Welcome Development for Private Equity Players Too" <https://bowmanslaw.com/insights/mergers-and-acquisitions/south-africa-clarity-in-b-bbee-obligations-a-welcome-development-for-private-equity-players-too/> (Accessible 07-03-2023).

regarding ways to further strengthen broad-based empowerment vehicles such as ESOPs, including measures to encourage worker nominees on company boards and the establishment of evergreen structures.<sup>23</sup>

### 3. Conclusion

In the implementation of the ESOPs, as provided above, policymakers have considered ways in which the HDPs and workers' participation are strengthened and ensuring that they are treated as owners and shareholders, rather than beneficiaries.<sup>24</sup> This can further be alleviated by educating participants on what it means to be a shareholder and have a shares in a firm, as often participants are seen as only beneficiaries. The duty of educating ESOPs participants is not just on businesses but also on trade unions, which necessitates trade unions deciding whether the mandate in this respect should be on firms or unions and/or both. This will foster an environment of active involvement.<sup>25</sup>



<sup>23</sup>Cliffe Dekker Hofmeyer Corporate & Commercial Alert "B-BBEE practice note issued by the dtic brings clarity on the rules for discretionary collective enterprises" <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2021/Corporate/Downloads/Corporate-Commercial-Alert-14-July-2021.pdf> (Accessed 07-03-2023).

<sup>24</sup>Sithole page 13. According to Nomafu, research by Napier University Business School conducted in 2011 found that most workers were more satisfied compared to when they worked for firm with no ESOPs.

<sup>25</sup>*Ibid.*





**Kameel Pancham**, Senior Case Manager

The Act is unique in that it combines classical competition considerations with public interest considerations. Both 'classes' of considerations are alluded to in the Act's preamble and more explicitly set out in section 2, giving the Act its purpose.

The purpose of the 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;
- f. to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons; and
- g. to detect and address conditions in the market for any particular goods or services, or any behaviour within such a market, that tends to impede, restrict or distort competition in connection with the supply or acquisition of those goods or services within the Republic.

The Tribunal is therefore required to take into account public interest factors during its assessment of matters before it. Apart from the traditional substantial lessening of competition assessment, the Tribunal is further required to consider the purpose of the Act in all matters and balance the competition issues with the public interest effects. The Act explicitly provides for public interest considerations in section 12A. However, this is specifically aimed at merger assessments. More recently, the Constitutional Court in *Mediclinic* affirmed what our approach to competition jurisprudence should be:

*"[3] It ought never to be acceptable for any of us, including the corporate citizens of this land, to indulge, talk less of over-indulge, in the unconscionable practice of seeking to record the highest profit margin possible by any means necessary, in wanton disregard for what that would do to the rest of humanity. Neither should the historic exclusion of some from meaningful participation, particularly in the mainstream economy, be normalised. For, this seems to be one of the most stubborn injustices of our past that require a more deliberate, intentional and systematic confrontation appropriately enabled by independent, incorruptible, efficient and effective law enforcement and justice-dispensing institutions."*

*"[7] Institutions created to breathe life into these critical provisions of the Act must therefore never allow what the Act exists to undo and to do, to somehow elude them in their decision-making process. The equalisation and enhancement of opportunities to enter the mainstream economic space, to stay there and operate in an environment that permits the previously excluded as well as small and medium-sized enterprises to survive, succeed and compete freely or favourably must always be allowed to enjoy their pre-ordained and necessary pre-eminence. The legitimisation through legal sophistry or some right-sounding and yet effectively inhibitive jurisprudential innovations must be vigilantly guarded against and deliberately flushed out of our justice and economic system."*

While Mediclinic was a merger, it was quoted with authority by the CAC in eMedia, an interim relief application. In other words, eMedia has evolved the jurisprudence to include a constitutional and transformative view of the provisions of the Act in considering other matter types, including interim relief applications. This echoes the purpose of the Act in the preamble and the objectives of the Act in section 2.

From the above it is clear that the Tribunal is required to uphold the Constitutional values enshrined in the Act when assessing all matter types, thus, public interest remains a significant and essential part of the Tribunal's considerations and will find application in all types of matters where necessary.



**Juliana Munyembate**, Case Manager

In September 2022, the Tribunal set aside a decision by the Commission in which it denied Caxton and CTP Publishers and Printers Limited ("Caxton") permission to file a separate notification of a merger between Caxton and Mpact Limited ("Mpact").

Caxton, a publishing and packaging group, currently has shareholding in the packaging and recycling group, Mpact. Caxton had applied to the Commission in June 2021 for permission to make a separate filing for a merger, in terms of which it sought to acquire majority control over Mpact. Mpact did not support the merger and refused to agree to a joint merger filing.

There are two mechanisms by which a merger approval process may commence i.e. Commission Rules 27 and 28. The first applies in circumstances where the merging parties are agreeable to a merger and therefore submit a joint merger notification. The second allows for an acquiring firm to apply to the Commission for permission to file a separate notification of a merger, usually in the context of hostile mergers i.e. when the target firm is hostile to the merger or for some other reason does not agree to a joint merger notification.

Caxton had applied to the Commission in line with the second mechanism (Commission Rule 28). However, the Commission refused Caxton's application on the basis that it would not be just and reasonable to permit a separate filing.

The Tribunal, in its decision, provided clarity on the factors to rely upon when assessing separate merger filings. The previous hostile merger decision of Freeworld was relied upon extensively by the parties and the Tribunal recognised that the mere intention of a firm in the 'air' was not sufficient to bring a merger or proposed merger into existence. More than intention was required from a firm to demonstrate that it intended to achieve this objective. At the same time when considering the "intention plus" steps taken by a firm it was not always easy to delineate in difficult cases at what point a proposed merger could come into existence.

The Tribunal found that the Commission failed to have due regard to the absence of relevant cumulative facts such as offer, price and terms in the threshold enquiry, facts that it itself had identified as being relevant.

The above should be considered by firms when embroiled in hostile mergers and applying for separate merger filings.



**Matshidiso Tseki**, Case Manager

In July 2022, the Tribunal approved the large merger between K2021134577 (South Africa) (Pty) Ltd (“NewCo”) (a NewCo, majority owned by Tsogo Sun Gaming Investments (Pty) Ltd (“Tsogo Sun”)) and Emerald Safari Resort (Pty) Ltd t/a Emerald Hotel Resort & Casino South Africa (“Emerald”). In term of this transaction NewCo would acquire shareholding in Emerald.

Both NewCo (through Tsogo Sun) and Emerald operate casinos and provide ancillary services such as short-term accommodation and conferencing/banqueting facilities in Gauteng. Tsogo Sun operates three casinos in Gauteng, namely Montecasino, Gold Reef City and Silverstar. Conversely, Emerald operates one casino, situated in Vanderbijlpark.

The casino industry is regulated by the National Gambling Act, which established the National Gambling Board (“NGB”) and the respective provincial gambling boards. In terms of the National Gambling Act, the NGB is mandated to, *inter alia*, evaluate the issuing of national gambling licences by provincial licencing authorities.

The National Gambling Act makes provision for the issuing of a total of 41 casino licences in South Africa, to be divided between the respective provinces. As at 31 March 2021, 38 of the 41 licences were issued in South Africa. The Gauteng Province was allocated a maximum of 7 licences, all of which have been issued. The Tribunal noted that due to the restriction in the number of available licences, the casino industry is characterised by high barriers to entry.

Furthermore, given that all licences allocated to the Gauteng province have been issued, it is unlikely that a new entrant will enter the Gauteng market in the near future.

This merger further highlighted the shift in consumer preference from the traditional brick-and-mortar casinos to online casino gaming as a result of the COVID-19 pandemic. The pandemic saw a decline in the gross gaming revenue in respect of traditional casinos and an increase in revenue in respect of the online segments.

This transaction took place in a landscape where, as a result of the COVID-19 pandemic as well as other factors, Emerald found itself in severe financial distress. This, in circumstances where it employs a significant number of employees and the local economy (i.e. the community of Vanderbijlpark) relies heavily on Emerald as Emerald procures certain goods and services from the community.

**This transaction stood out to me for the following reasons:**

The casino industry is evolving beyond just the traditional brick-and-mortar casinos and while it could not be spoken to definitively at the time of hearing this merger whether the shift towards online gambling segments is sustainable, considering that brick- and-mortar casinos had not yet returned to pre-COVID-19 operations, it will be interesting to see whether in future, the online segments will pose competitive constraint against traditional casinos. The increase in demand for these digital offerings will require the development of competition jurisprudence in order to regulate and/or adjudicate upon the new markets.

The Tribunal, as it is enjoined to do in terms of section 12A(3) of the Act, considered the public interest effects of this transaction. In order to protect Emerald’s employees, the Tribunal imposed a condition placing a 24-month moratorium on retrenchments. The Tribunal considered that the community of Vanderbijlpark benefits from Emerald’s business remaining in operation. As such, to ensure that Emerald remains operational and that the local community continues to benefit from such operations, the Tribunal imposed a condition that NewCo shall invest funds into Emerald’s business operations over a five-year period. Furthermore, that Emerald shall for a period of two years continue procuring goods and services from local suppliers.





## TRIBUNAL IN THE NEWS

**Advertising News South Africa**

### Competition Tribunal fines Corpcom Outdoor R1.38m for price fixing

1000 000 100 1000 1000 1000

The Competition Commission (Commission) has announced a ruling by the Competition Tribunal (Tribunal) in which it confirmed, as an order, a settlement agreement between the Commission and Johannesburg based media firm, Corpcom Outdoor.

**Price fixing**

Corpcom admitted to price fixing and has agreed to pay an administrative penalty of R1,386,438 and contribute R500,198 to the Economic Development Fund.

In terms of the settlement details, Corpcom has agreed to cooperate with the Commission and all subsequent proceedings in the Tribunal or Competition Appeal Court as warranted.

The Tribunal's order is the latest in several settlement agreements between the

**Business Day**

### Competition Tribunal approves acquisition of Imperial Logistics by Dubai firm

BL PREMIUM  
24 FEBRUARY 2022 - 12:47 BY MICHELLE DUWEDÉ

The Competition Tribunal has approved logistics company DP

**Polity**

### Tribunal releases reasons for conditional approval of Ardagh, Consol merger

**Moneyweb**

### DP World's R12.7bn acquisition of Imperial Logistics conditionally approved

Competition Tribunal orders it to establish an employee share ownership programme and spend at least R2 50m in five years on its SA operations.

By Ray Gidday | 21 Feb 2022 09:01

IMPERIAL **DOWN** 2.35%  
21 FEB 10:15 AM

**BUSINESSTECH**

### Tribunal approves African Bank acquisition of Grindrod Bank

Staff Writer | 11 October 2022

**Business Day**

### Competition Tribunal gives nod to African Bank-Grindrod Bank merger

Deal is pending approval from SA Reserve Bank and finance minister Enoch Godongwana

BL PREMIUM  
23 SEPTEMBER 2022 - 17:27 BY MICHELLE DUWEDÉ  
UPDATED 23 SEPTEMBER 2022 - 18:01

**WEW Minerals**

### Competition Tribunal starts hearing on alleged price fixing in the tyre industry

The Competition Tribunal on Monday started online hearings into alleged price-fixing in the domestic tyre industry.

The respondents are Apollo Tyres South Africa; Goodyear South Africa; Continental Tyres South Africa; Bridgestone

**CREAMER MEDIA'S ENGINEERING NEWS**

### Two car parts firms agree to R2.4m competition settlement

07 FEBRUARY 2022

BY RENÉE BARNES  
CONTRIBUTING EDITOR

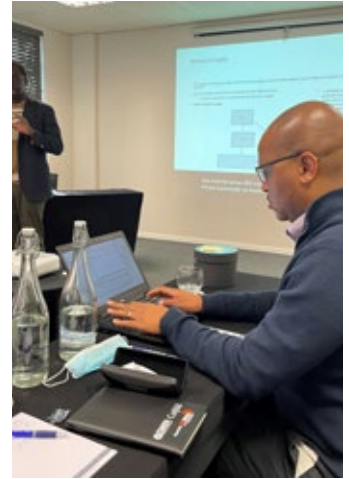
Two foreign firms involved in the car parts industry have agreed to pay a settlement amount totalling R2.4-million, after being accused of allegedly colluding to fix prices, divide markets and tender collusively in relation to requests for quotations to supply starter motors and windshield wipers.

The consent agreement has been confirmed as an order by the Competition Tribunal. Among others, the firms have also agreed to continue implementing an extensive competition law compliance programme and refrain from engaging in conduct in contravention of the Competition Act in the



## TRAINING HIGHLIGHTS

The Tribunal places great value in training and developing its staff and provides ongoing opportunities for its people to improve their qualifications and further develop their skills. Mpumi Tshabalala, Senior Case Manager, reflects on some of the training and development opportunities offered by the Tribunal in 2022:



Given that many COVID-19 restrictions were lifted in 2022 (including the associated social distancing protocols), we were afforded the opportunity to meet many of our “idols” in person. Through the Tribunal’s internal training programmes, Prof. Eleanor Fox and Prof. Massimo Motta visited the Tribunal to provide their insights into the latest trends in the field.

Prof. Fox is the Walter J. Derenberg Professor of Trade Regulation at the New York University School of Law. She is an expert in antitrust and competition policy and teaches, writes, and advises on competition policy worldwide, including in South Africa.

Prof. Motta is Research Professor at ICREA-Universitat Pompeu Fabra and at the Barcelona School of Economics. He founded the BSE's Competition and Market Regulation Program and is Scientific Director of this Master. He served as Chief Competition Economist of the European Commission from September 2013 to August 2016.

While Prof. Fox presented on the topic Competition Policy: *What is happening in the World?* Prof. Motta spoke regarding current case law on abuse of dominance in digital markets. It goes without saying that the sessions were an opportunity to probe the foremost competition academics on their interpretation of the evolution on the thinking of how nascent jurisprudence from developed countries could serve to enhance or hamper developing countries' thrust to use competition for the agenda of our context i.e. for growth and inclusiveness.

We also attended the Tribunal's Competition Basics training which introduces new case managers to the basic principles of competition enforcement. This training has been especially curated to meet the demands of today's cases. The training, which took place over two days, was also an opportunity to enhance team building. The Competition Basics training was supplemented with weekly training on current case law. It was particularly thought provoking to hear from one of the drafters of the Commission's Concentration Report.

The annual Competition Conference is always an anticipated highlight and the conference in 2022 was no exception. The Tribunal and Commission jointly host this auspicious event. The joy of being able to congregate in person again, following the pandemic, was a clear clarion call to all participants. The talks were widely attended and were increasingly effervescent.

Following the lifting of the pandemic-related worldwide travel bans, the Tribunal was also able to send three of its officials to the Organisation for Economic Co-operation and Development ("OECD") competition conference and working group meetings in Paris, France. Member Andre Wessels; Head of Case Management, Jabulani Ngoben; and Senior Case Manager, Mpumelelo Tshabalala, attended the events in November and December 2022.

The OECD is an international organisation that seeks to shape policies that foster prosperity, equality, opportunity and well-being for all. Together with governments, policy makers and citizens, it works on establishing evidence-based international standards and finding solutions to a range of social, economic and environmental challenges. In 2007 the OECD Council at Ministerial level adopted a resolution in terms of which South Africa became one of five Key Partners to the OECD, along with Brazil, China, India and Indonesia.





## TRIBUNAL INTERNSHIPS

The Tribunal also provides on-the-job training in the form of its internship programme that was launched over a decade ago. We understand the importance of helping to equip South Africa's youth for the workplace while also providing an opportunity for further skills training and mentoring. Presenting such opportunities is particularly important given South Africa's unemployment rate and, in particular, youth unemployment. Our internships integrate theory with practical experience and assist in developing the talent pool within competition law enforcement and competition economics.



**Theodora Michaletos**, Former Intern and Current Junior Case Manager

*"The Tribunal offers graduates an intensive three-week internship or a long-term internship of 12 months. I was first exposed to competition law through my short-term internship which inspired me to pursue my Master's degree in competition law. The excellent training which I was exposed to during my internship has filtered through my legal career, providing me with sound footing to leap into my articles with confidence. I am pleased to have returned to the Tribunal as a case manager. The Tribunal provides on-the-job training and offers us an opportunity to refine our writing and analytical skills. The inclusive culture allows for idea sharing and in-depth research of competition law. I have been exposed to the panel members' insightful knowledge of law and economics, which I hope to apply in my legal writing and thinking".*





**Sinethemba Mbeki**, Case Management Intern

**What has your job as an intern involved?**

My responsibilities as an intern include assisting in the research of specific legal, procedural, jurisdictional, and broader competition law issues; and assisting the case management division and Tribunal members by providing pre- and post-hearing briefings on cases.

**How have you benefited from your internship at the Tribunal?**

Working as an intern at the Tribunal has provided me with the advantage of being able to work directly with competition law and economic experts and the associated processes. This includes experiencing first-hand how these experts adjudicate and assess each matter on its own merits. The Tribunal's internal training for case managers has also been a source of learning, with case managers learning about developments in competition law jurisprudence. These experiences continue to broaden my horizon as an intern at the Tribunal.

**What have been the most challenging and rewarding aspects of your work as an intern?**

**Are there specific matters that come to mind?**

It has been most rewarding to be able to provide assistance in matters involving competition concerns. It has also been particularly interesting where other regulators and legislation is involved. Assessing different sectors or industries with

competition implications has been equally challenging and rewarding. Such matters allow one to be versatile and to learn how various industries or sectors operate. This, in my opinion, is essential in competition regulation.

**What has been the highlight of your internship?**

Working on major cases before the Tribunal and being part of a team that provides support to the members has been the highlight of my internship. "One can't put a price tag on the experience he or she is exposed to," says the Head of Case Management, Jabulani Ngobeni.

**What advice do you have for those who wish to pursue a career in competition law enforcement / adjudication?**

The golden rule is to pursue what one is passionate about. The same is true for a career in competition law enforcement. For me, humility in learning, serving and contributing to competition law enforcement has been crucial in developing my commitment and appreciation for competition law and what it has been able to do in the advancement of an inclusive economy. We're not yet where we want to be as a nation, but with competition regulation, we've taken a step in the right direction towards the development of a more inclusive economy.

**What are the future goals that you hope to achieve, both in your career and personally?**

In terms of my career, I am eager to work towards completing my Master's degree in competition regulation and earning a PhD in competition law. On a personal level, I intend to contribute to the advancement of the rural economy.



**Leila Raffee**, Case Management Intern  
(Economist)

**When did you join the Tribunal and why did you choose to do your internship at the Tribunal?**

I joined the Tribunal last year. I became aware of the Tribunal while completing my Masters in Economic Science at Wits. I was introduced to competition economics during my course work and thought that an internship at the Tribunal would be a good learning experience to see how the theories learnt in school are applied and play out in practice.

**What has your job as an intern involved?**

As an intern, I have been involved in providing research and summaries, managing cases, and drafting reasons.

**How have you benefited from your internship at the Tribunal?**

In addition to building on my competition economics knowledge, I have gained insight into competition law as well as the procedural aspects of law and adjudication.

**What have been the most challenging and rewarding aspects of your work as an intern?**

**Are there specific matters that come to mind?**

One of the most challenging yet rewarding experiences of last year was the Shoprite/ Massmart merger. There was a good deal of consideration in that matter and I learnt a lot from the decision-making processes involved.

**What has been the highlight of your internship?**

The continuous learning and guidance I have experienced from the Tribunal members and a dynamic team. In particular, I have enjoyed observing diverse views and critical engagement in various matters.





# TRIBUNAL IN THE NEWS

**The Citizen**

**Shoprite's bid to buy some Massmart stores approved with strict conditions**

The tribunal's approval follows a three-day merger hearing that included Shoprite's competitors - Pick n Pay and Spar

By Fabel Potel  
Senior District Journalist  
2 minute read  
19 Dec 2022  
11:19 am




Photo: Shoprite

The Competition Tribunal has approved Africa's largest retailer Shoprite to acquire some stores including wholesale and retail liquor stores belonging to Massmart.

The approval, however, excludes 30 grocery stores under the Cambridge and Rhino Cash and Carry brands which the tribunal identified as "highly problematic".

Shoprite will acquire 42 Cambridge Food and Rhino Cash and Carry stores - the majority of which will include adjacent liquor stores - two Fruitspot facilities, the Masfresh Meat business and 12 Mascons.

**MINING WEEKLY**

**Tribunal approves ARM, Bokoni merger**

The Competition Tribunal has approved a large merger between a subsidiary of African Rainbow Minerals (ARM) and Bokoni Platinum, which ARM recently acquired from platinum miners Anglo American Platinum and Atlas Resources Corporation for a cash consideration of R3.5-billion.


The tribunal has approved the merger between the subsidiary, ARM Bokoni Mining Consortium, and Bokoni, subject to public-interest-related conditions involving broad-based black economic empowerment and employment.

**BusinessDay**

**Competition Tribunal sends Caxton-Mpact merger tussle back to commission**

The process is likely to begin afresh and could well allow the takeover plans to be realised

PREMIUM  
23 SEPTEMBER 2022 - 16:46 by MICHELLE GUNDE



ing at loggerheads over Caxton's intention to acquire Johannesburg-based paper and plastics packaging firm Mpact, both companies have welcomed the

**NEWS SPORT ENTERTAINMENT SERIALS/ALIVE OPINION S MAG**

**SOUTH AFRICA**

**Why Competition Tribunal dismissed eMedia's application against MultiChoice**

Tribunal said it was unreasonable to grant interim relief in favour of eMedia in its battle with MultiChoice

04 July 2022 - 17:18

**fin24**

**eMedia cries bullying and uncompetitive behaviour after DSTV pulls plug on its channels**

fin24  
Thabane Khumalo



MultiChoice states that there were legitimate commercial reasons for its decision not to renew the eMedia channels.

- DStv ceased to carry four eMedia entertainment channels following the expiry of a five-year contract at the end of March.
- eMedia says the decision not to renew the broadcasting contracts is uncompetitive and harms its income potential.
- DStv continues to carry eMedia's 24-hour news channel, eNews, and the daily Afrikaans eNews news bulletin.

MultiChoice has been accused of "redundant conduct" and abuse of dominance by who court orders, because it discontinued the broadcast of four of its channels from the DStv platform.

**BusinessDay**

**Distell in a spin over diplomatic booze sales**

Nu Africa has hauled Distell before the Competition Tribunal

OL PREMIUM  
23 NOVEMBER 2022 - 09:15 by GARTHRECH DALL



A duty-free supplier that sold booze to diplomats has accused Distell of anti-competitive behaviour after it's largest alcohol producer was left supplier when it found some had been sold illegally to the mainstream market.

Four Pretoria-based winners with special licenses will supply three Super, signature and premium wine shipments for personal and military use. But alcohol, procured from the Six Six Beverage Services (being sold to diplomats from Malawi and Lesotho being


**Moneyweb**

**Competition Tribunal signs off on Mr Price's R3.3bn acquisition of Studio 88**

Approves the deal with no conditions.

By Aikona Makhabe 20 Jul 2022 @ 00:01

MPRICE	507.2	0.26%	FP2028H	476.12	0.33%	TFC	1116.8	0.55%
TRU2028	233.76	1.81%	10/11/2022, 10:00 AM					



**Tech**

**Facebook and WhatsApp referred to Competition Tribunal over market abuse**

If found guilty, they face fines up to 10% of turnover in SA

By Garen Ryan 15 Mar 2022 @ 11:52



**Shoprite wants parity with Pick n Pay, tells Competition Tribunal consent agreement unfair**

Shoprite's bid to buy some Massmart stores approved with strict conditions

The tribunal's approval follows a three-day merger hearing that included Shoprite's competitors - Pick n Pay and Spar

By Fabel Potel  
Senior District Journalist  
2 minute read  
19 Dec 2022  
11:19 am

**CREAMER MEDIA'S ENGINEERING NEWS**

**Tribunal approves SFF's buyout of an interest in bpSA's Cape Town Terminal**

The Competition Tribunal has unconditionally approved the large merger whereby the Strategic Fuel Fund (SFF) intends to acquire an interest in the assets of bp Southern Africa's (bpSA's) Cape Town Terminal.

Upon the implementation of the proposed transaction, SFF and bpSA will have joint control of the terminal.



## MEET OUR MEMBERS

Tribunal members adjudicate matters and write judgments, akin to a Judge in a High Court. Each Tribunal panel comprises three members who are either economists or lawyers with varied industry, academic and professional experience. Each panel must have at least one lawyer.



**Ms Mondo Mazwai, Chairperson**

Ms Mazwai served as a Tribunal member since 2013 and in August 2019 was appointed by President Cyril Ramaphosa as the first female and Black Chairperson of the Tribunal.

Ms Mazwai has over 24 years of experience in competition law, having joined the Commission in 1999 as an investigator in the Mergers & Acquisitions Division. Ms Mazwai was later appointed as a senior investigator in the Enforcement & Exemptions Division. She was appointed as Chief Legal Counsel and Acting Deputy Commissioner of the Commission in 2003.

After leaving the Commission, Ms Mazwai joined the law firm Cliffe Dekker (now Cliffe Dekker Hofmeyr) in 2005 as a Director in its Competition Department. In 2006, she was appointed as the national head of Cliffe Dekker's Competition Law Department. Her practice spanned all aspects of competition law and she represented firms in both the private and public sectors.

Ms Mazwai obtained her B Juris degree from the University of the Western Cape and her LLB degree from the University of KwaZulu-Natal ("UKZN"), after which she worked for Cheadle Thompson and Haysom Attorneys as a Candidate Attorney in 1995, Professional Assistant in 1997 and Associate Partner in 1999.



**Prof. Liberty Mncube, Deputy Chairperson**

Prof. Mncube is the Deputy Chairperson of the Tribunal, appointed on 1 February 2023. He joined the Tribunal as an acting part-time member in January 2022. Prior to that he was a Managing Director at FTI Consulting; served as the Chief Economist of the Commission from 2014 to 2019; joined the Commission in 2007; and was a Researcher at the Development Policy Research Unit, University of Cape Town ("UCT").

He is an expert in the application of economics to competition law and has provided expert economic testimony in several important merger control, abuse of dominance and collusion cases before the Tribunal for the Commission and private parties. He is also an Associate Professor of Economics at the School of Economics and Finance, University of the Witwatersrand ("Wits"). His teaching, supervision and research focuses on industrial organization, competition economics and competition policy. His scholarship has been published in local and international journals.

Prof. Mncube serves as a member of President Cyril Ramaphosa's Presidential Economic Advisory Council. He also served as a member of Minister Ebrahim Patel's Ministerial Advisory Panel tasked with developing Draft Amendments to the Act which led to the Competition Amendment Act 18 of 2018. He received a PhD in Economics from UKZN and an MSc in Economics from the University of York.



#### **Mr Andre Wessels**

Mr Andre Wessels has served as a full-time Tribunal member for over 12 years. He has more than 20 years' experience in economic regulation, mostly specialising in competition law and economics in South Africa and Europe.

Mr Wessels holds a BCom (Accounting and Economics) cum laude, BCom Hons (Economics) cum laude and MCom (Economics) cum laude.

Mr Wessels has held various positions including as entrepreneur, as senior economist, consultant and specialist advisor at, among others, the Competition Commission of South Africa, the Netherlands Competition Authority and the National Energy Regulator of South Africa.



#### **Ms Andiswa Ndoni**

Ms Andiswa Ndoni is a part-time Tribunal member. She is an attorney of the High Court of South Africa and a member of the Judicial Services Commission.

She has served as Executive Officer for Corporate Affairs & Governance for Basil Read Ltd; Company Secretary and Legal Counsel for Ubank Ltd; CEO of the BLA Legal Education Centre; Director of the LSSA Practical Law School in East London; member of the Rules Board for the Courts of Laws; member of the International Labour Organization Committee on Application of Standards; National President for the Black Lawyers Association; and council member for Business Unity South Africa.

She holds a B. Proc degree (University of Transkei), LLB & Post Graduate Diploma in Business Management (University of Natal, Durban), Certificate in Corporate Governance (RAU) and Global Executive Development Programme ("GIBS").





**Prof. Imraan Valodia**

Prof. Imraan Valodia is a part-time Tribunal member. He holds a doctorate in Economics from UKZN. His research interests include employment, the informal economy, gender and industrialisation. He has coordinated an international study in ten cities of the informal economy.

His recent book reports on the methodology and research findings of a three-year research project conducted in eight countries on the gender impacts of taxation. Prof. Valodia has published in leading international journals and is one of only a handful of South African economists with an NRF B-rating.

He serves on various economic policy forums and has worked with leading international development organisations including the United Nations (“UN”) Research Institute for Social Development, the UN Development Programme, UN Women, the World Bank, and Women in Informal Employment: Globalising and Organising.



**Prof. Fiona Tregenna**

Prof. Fiona Tregenna is a part-time Tribunal member. She obtained her Ph.D. in Economics from Cambridge University, UK, and her Master’s degree in Economics from the University of Massachusetts, USA.

She has held the DST/NRF South African Research Chair in Industrial Development (SARChI Industrial Development) and is a Professor of Economics at the University of Johannesburg (“UJ”). She has taught at universities; worked in research, policy and consulting; and has presented her research at conferences worldwide. Her award-winning research has been published in prestigious international journals.

Her primary area of research is the sectoral structure of economies and the changes therein, in relation to growth, with a particular focus on deindustrialisation and related issues. Within the competition field, she took part in the NEDLAC negotiations leading up to the promulgation of the Act.



### **Dr Thando Vilakazi**

Dr Thando Vilakazi is a part-time Tribunal member. He is Executive Director of the Centre for Competition, Regulation and Economic Development (“CCRED”) at UJ, specialising in academic research, teaching and advice on competition policy and industrial development.

He previously worked as an economist at the Commission and has provided teaching and advisory services to competition authorities, regulators, government departments and private enterprises in South Africa and various African countries.

His research interests include barriers to entry and economic participation, regional integration, competition policy and inclusive growth, and industrial development. He holds a PhD (Economics) from UJ and a Masters (Applied Economics) from UCT. He is also widely published.



### **Ms Sha'ista Goga**

Ms Sha'ista Goga is a part-time Tribunal member. An economist focusing on microeconomic policy, competition and economic regulation, she holds a Master of Philosophy in Economics from the University of Oxford and a Bachelor of Economic Science and Honours in Economics from Wits, with distinction.

She has provided analysis and advice on competition to companies, regulators and multilateral institutions. She has advised multilateral and regional organisations on developing and implementing competition policy and has trained authorities and regulators.

She has extensive experience in economic regulation, including in Southern and East Africa. Ms Goga is a Director of CCRED and an associate researcher at the Southern Centre for Inequality Studies at Wits. Her research interests include the relationship between competition and inequality and competition in digital markets and its impact on development.



**Geoff Budlender SC**

Geoff Budlender SC is a part-time Tribunal member. He is an experienced advocate practicing in Cape Town. He specialises in the areas of constitutional law, including human rights and administrative law and other aspects of public law. He has extensive litigation experience in the Constitutional Court, Supreme Court of Appeal, High Courts and Land Claims Court. He has acted as a High Court judge in Johannesburg and Cape Town. He is well known for his work as a human rights advocate. He co-founded the Legal Resources Centre in 1979 and worked on landmark cases including the abolishment of the death penalty in South Africa and the nationwide roll-out of antiretroviral medication. In 2021 he was awarded the International Bar Association Pro Bono Award for providing high impact pro bono services in defending human rights over the course of his 45-year career in the law.



**Jerome Wilson SC**

Jerome Wilson SC is a part-time Tribunal member. He is an experienced advocate at the Johannesburg Bar. He practices in the areas of competition, commercial and administrative law. He has extensive litigation experience in the Tribunal, CAC, High Court, Supreme Court of Appeal, Constitutional Court and courts in Botswana, Namibia, Tanzania and Zimbabwe as well as in local and international arbitrations. He has also practiced as an associate at a law firm in New York City between 1994-1996 after being admitted to the New York Bar. Among others, he holds legal qualifications from universities in South Africa, from Kings College in London, Oxford University in the UK and Yale University in the USA.

**Tembeka Ngcukaitobi SC**

Tembeka Ngcukaitobi SC is a part-time Tribunal member. He is an experienced advocate at the Johannesburg Bar specialising in competition law, labour law, constitutional law and commercial law. He has extensive litigation experience in the Tribunal, CAC, the High Court and the Supreme Court of Appeal and is recognised for his notable work on high-profile Constitutional Court cases. He has also acted as a judge of the Labour, Land Claims and High Courts respectively. Among others, he was appointed by President Thabo Mbeki to serve as a Commissioner at the South African Law Reform Commission from 2007-2011 and was appointed Commissioner of the Judicial Service Commission by President Cyril Ramaphosa in October 2022. In addition to various academic roles, he has also published numerous books as well as academic articles in accredited journals. He holds legal qualifications from universities in South Africa and the London School of Economics.





## SECRETARIAT



**Gcinumzi Qotywa**, Chief Operating Officer

Mr Qotywa is an accomplished leader in the public sector having served in various senior roles at the National Department of Environmental Affairs and the Development Bank of Southern Africa ("DBSA"), among others. He is also the founding Chief Executive Officer of the Buffalo City Metropolitan Development Agency ("BCMDA"), an economic development and investment promotion agency of the Buffalo City Metro Municipality, Eastern Cape. In these organisations and others, he has led, coached and motivated teams of various sizes and when the time for a new challenge came, he left behind very cohesive and purposeful teams.

In line with his passion for Corporate Governance, Mr Qotywa is also a Certified Director (Cert. Dir.), a designation awarded by the Institute of Directors South Africa ("IoDSA") to qualified Corporate Governance practitioners based on their stringent training and assessment criteria. He currently serves on various boards of entities ranging from Economic Development Agencies to Higher Education Institutions and serves as a Chairperson in two of those institutions.

In terms of qualifications, he holds a MBA degree from the Gordon Institute of Business Science (GIBS), University of Pretoria as well as a MA in Environment & Society from the same University of Pretoria. Prior to that, he had accomplished

a BA (Hons) in Environmental Studies and a BA (Education) both from the University of Transkei. He has also completed a seven months' Programme for Leadership Development (PLD) from the Harvard Business School, US, as well as Certificates in Changing the Game: Negotiation and Competitive Decision-Making as well as Strategy: Building and Sustaining Competitive Advantage from the same Harvard Business School. Mr Qotywa also completed an International Programme on Development Evaluation Training (IPDET) from the Carleton University (in collaboration with the World Bank). In addition, he is a Harvard South Africa Fellow, a Ford Foundation International Fellow, and an Abe Bailey Bursar.



**Sherylee Moonsamy** is the Chief Financial Officer at the Tribunal. She is a registered Chartered Accountant with the South African Institute of Chartered Accountants ("SAICA") since 2015.

She has over 14 years of experience in the public sector and over 8 years of financial management experience. She started her career by serving her articles at HLB Barnett Chown Incorporated before joining the Johannesburg Development Agency as an accountant in 2009. She was then promoted to Finance Manager in 2012 while she obtained her CA (SA) qualification.

In 2016, she was appointed as the Acting CFO for the agency and was later officially appointed as CFO in 2018. Ms Moonsamy has been acknowledged as one of the Mail & Guardian Top 200 Young Leaders in South Africa and SAICA's Top-35-under-35 CA's in 2018.



**Anisa Kessery**, Special Competition Law Counsel at the Tribunal, was admitted to the Johannesburg Society of Advocates in December 2018. She commenced her career in competition law with the Commission in 2000. She has approximately 23 years of experience in competition law, serving an accumulated 10 years of this at the Commission. Prior to joining the Johannesburg Bar, Ms Kessery was employed as a Principal Legal Counsel in the Commission's Legal Services Division.

She was promoted to Manager of Litigation shortly before she left the Commission to commence with her pupillage. She has appeared before the Tribunal and High Courts of South Africa. She has also appeared as junior counsel together with senior counsel in the Constitutional Court, the Tribunal, CAC, the High Courts of South Africa and Namibia, and the Supreme Court of Appeal of South Africa.

She graduated with a BProc degree in 1995 and an LLB degree in 1996 from the University of Durban Westville.



**Jabulani Ngobeni** is the Head of Case Management at the Tribunal. He initially joined the Tribunal in April 2006 as a Researcher and re-joined in December 2021 as the Head of Case Management. He holds, among others, B Juris, LLB and LLM degrees. He started his career as an Academic Assistant and Researcher at the University of South Africa ("UNISA") before completing his article of clerkship at the Germiston Justice Centre. He was admitted as an Attorney of the High Court of South Africa in October 2009.

From October 2009 until December 2011 he held the position of Legal Counsel at the Commission and was Senior Legal Counsel at the Commission from January 2012 - July 2013. In August 2013 he was appointed Principal Legal Counsel. During his career at the Commission he assisted and advised in various investigations and legal challenges arising from the Commission's litigation.

He served as Principal Legal Counsel in the Liquefied Petroleum Gas ("LPG") market inquiry and was also Principal Legal Counsel and evidence leader in the Public Transport Market Inquiry. In addition, he was assigned to lead the minibus/e-hailing/metered taxis workstream in the market inquiry. He also tutors law students at UNISA; lectures at the University of Pretoria; conducts training for the Black Lawyers Association Legal Education Centre on competition law and mergers and acquisitions; and has conducted training on competition law at the eSwatini Competition Authority and the Competition Authority Kenya.



**Baneng Naape** is an Economist at the Tribunal and recently made the list of the 30 Most Influential Young Economists in Sub-Saharan Africa. He joined the Tribunal in May 2022.

**What influenced your decision to pursue a career at the Tribunal?**

My decision was largely influenced by Prof. Liberty Mncube, the willingness to improve career prospects, passion for research work and the aspiration to learn new things in the process of serving the public. Given my track record and the history of organisations that I have worked for, I believe I have had my fair share of issues related to fiscal policy and monetary policy, which is what I used to specialise in.

**What does your typical work week as a Competition Economist entail?**

My typical work week entails assessing large mergers and prohibited practices in competition law. The bulk of my work involves advising panel members on various economic aspects of cases, conducting economic research on anti-competitive practices and drafting reasons for cases decided by the Tribunal. Other aspects of my work involve attending court hearings.

**Which aspects of your work do you find the most rewarding or challenging so far?**

What I find most rewarding and challenging about my work is preparing for panel briefings and drafting reasons. Panel briefings provide me with an opportunity to showcase my analytical skills and provide expert economic advice on certain economic aspects of the case, particularly the competition assessment and public interest concerns. This can be daunting at times given the enormous amount of reading that needs to be undertaken but it is equally rewarding.

**What motivates/inspires you in your role as an Economist at the Tribunal?**

My manager (Jabulani Ngobeni), the organisational culture, the impact of my work and the Tribunal at large. My manager is an understanding and progressive manager and having him around helps to get things done. The organisational culture is also phenomenal given the openness of communication, willingness to work as a team and the support we give each other. Also, the work we do as case managers is highly appreciated by the panel members and the public at large, given the impact of the decisions that are taken by panel members in the advancement of fair, inclusive and competitive markets in South Africa and how we as case managers play a role in that process.

Also, I have never been in an institution where one can work closely with the Chairperson. Even in her busy schedule, our Chairperson, Ms Mondo Mazwai, still finds time to listen to our proposals, nurture us and play a motherly figure role when we are not feeling well. When you have been in a toxic work environment before and find yourself in a peaceful work environment like that offered by the Tribunal, you get to realise that peace is the most precious commodity in life. For me, the Tribunal feels like a second home.



**Tell us about making the list of the 30 Most Influential Young Economists in Sub-Saharan Africa...**

I view it as a significant achievement, especially considering my age. I have always been a hard worker from an early age, and I may have expected such recognition at a later stage in my life. I have made significant contributions in the field of economics relative to my peers and my work has played a crucial role in shaping economic thinking and decision making. Being on the same list with Togo's Minister of Maritime Economy and the likes of Dr Daan Steenkamp is an indication that I am on the right track. Being recognised as one of the brightest young economists in South Africa is testimony to my track record and hard work.

**What are your future goals that you hope to achieve, both at work and personally?**

At work, I hope to mentor and guide junior economists and interns into becoming economic think tanks that will shape competition policy in the years to come. Personally, I hope to continue making a difference in the lives of ordinary citizens, especially those affected by the triple challenges of inequality, unemployment and poverty.

**Outside of the Tribunal, what are your interests?**

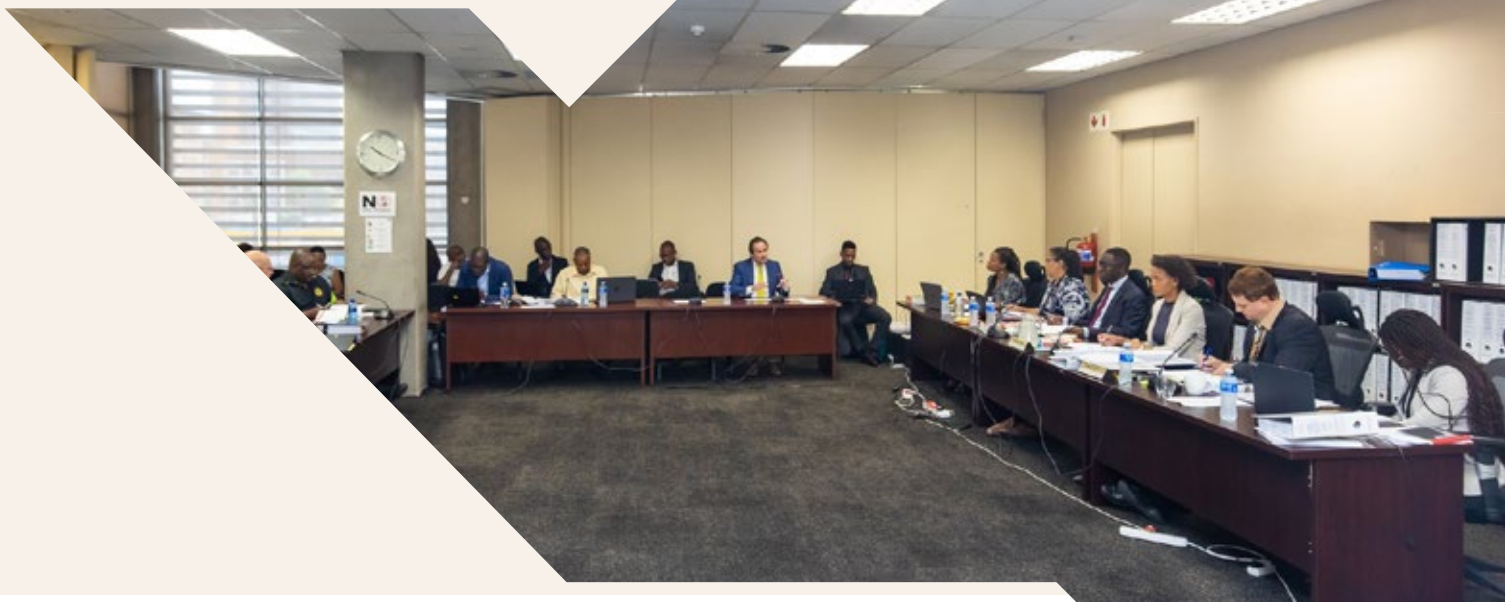
Traveling, writing Op-Eds, going to church and spending time with my family.

**What are you most excited or passionate about?**

Uplifting and inspiring disadvantaged people. Nothing gives me more satisfaction in life than witnessing someone succeed and knowing that I played a role in their life.

**When you think of South Africa and the future, what gives you a sense of hope?**

There are many bad things taking place in the country at present including job scarcity, socioeconomic inequality, power outages, corruption and crime. But every crisis presents an opportunity to think and do things differently and better. Personally, this gives me an opportunity to think outside the box, learn from past mistakes and fill spaces in society where my assistance is most needed. The future looks bright not only for me but for each and every one of us. All we need is the conviction in our hearts that indeed we can make a difference in society and that difference begins with each one of us.





**Rendani Neswiswi** is an Information Technology Assistant at the Tribunal and was awarded the Chairperson's Award in 2022, in recognition of his outstanding service and dedication to the Tribunal. Rendani is recognised and celebrated as an exemplary member of the Tribunal family.

**You are always willing to go the extra mile - what inspires you to always approach your work with so much passion and enthusiasm?**

Helping others and empowering people motivates me the most. It does not matter whether it is a colleague, friend or relative. There are times when the people around you need that extra drive to get going. I relish the opportunity to reach out to such people. It gives me a sense of confidence and belief that I can be of some help. The idea that I might provide a solution to someone's problem is what motivates me to do an excellent job. To understand and empathize with people is crucial too. You do not want to make them feel inferior or incapable of solving their own problems. We all face challenges, but we do not have to do so alone. This not only makes them feel better but also allows them to introspect and to think logically. I try to be positive myself. This allows me to project the same optimism onto others when they need it the most. Lending a helping hand is about making the person feel upbeat, energetic and positive.

**What does your typical work week entail?**

Support is my top priority. I start my day by first greeting everyone in the office, checking in and ensuring that they are able to start the day with 100% productivity in mind. I also spread a little sunshine along the way. Then I check my email/calendar for any meetings, appointments, or

other scheduled events so I can prepare for them. I feel confident in my ability to keep everyone organized and on schedule so we can all meet our objectives. I also feel that by taking over the majority of administrative duties, team members can delegate their time more efficiently as well as increase their work productivity.

**Which aspects of your work do you find the most rewarding?**

The most rewarding aspect of my job is developing my skills and helping to foster the growth of everyone around me. Being courteous, understanding and staying true to who you are will be the qualities that people appreciate. In an ever-changing industry, learning from others' successes and challenges makes us all better people and produces a higher quality product.

**What are the future goals that you hope to achieve, both at work and personally?**

When I initially started working in Information Technology ("IT") my focus was on how good I was with computers and phones etc. But eventually things progressed from "you are very good at this" to me wanting to make my very own gadget that will assist other people to enhance their own work. I have since set my sights on one day creating my very own application. I do not know the details of it yet, but I know that I will create it!

**Outside of the Tribunal, what are your interests?**

I enjoy watching/reading superhero shows and comics, spending time on the road with my friends doing road trips and excursions. I am often the designated driver due to my driving skills. One of my favourite experiences involved a road trip across four provinces in 14 days. It was an experience I will never forget. That is why I enjoy doing some driving for the Tribunal in my free time. I just love being on the road.

**What are you most excited or passionate about?**

My biggest passion is learning about software and technology. I was fascinated with computers from an early age, so I decided to study IT in college and I have continued in that direction since graduating. It has been an excellent choice for me! As a front-end support assistant, I get to help shape how the masses perceive technology and that is exciting to me.



## CASE MANAGEMENT AND REGISTRY

The Case Management Division, together with the Registry, works closely with the Tribunal members in facilitating the adjudicative role of the Tribunal and the management of cases. Case managers research legal, procedural, jurisdictional matters and broader competition law issues; liaise with lawyers, trade unions and other stakeholders in preparation for hearings; research and provide briefings on cases; and assist members in drafting reasons, among other duties.



**Jabulani Ngobeni**  
Head of Case Management



**Mpumelelo Tshabalala**  
Senior Case Manager



**Kameel Panoram**  
Senior Case Manager



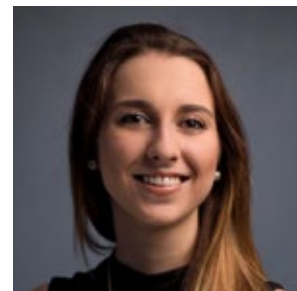
**Juliana Munyembate**  
Case manager



**Matshidiso Tseki**  
Case Manager



**Baneng Naape**  
Economist



**Theodora Michaleto**  
Junior Case Manager



**Tebogo Mputle**  
Head of Registry



**Themba Chauke**  
Registry Clerk



**David Tefu**  
Court Orderly



**Sibongile Moshoeshe**  
Registry Administrator



**Cyriel Mpaketsane**  
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