IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CASE NO: 31/CAC/Sep03

In the matter between:

THE COMPETITION COMMISSION

Appellant

and

DISTILLERS CORPORATION (SA) LIMITED

First Respondent

STELLENBOSCH FARMERS WINERY GROUP LIMITED

Second Respondent

JUDGMENT

Malan AJA:

[1] On 27 August 2003, the Competition Commission (the "Commission") delivered a notice of appeal against certain parts of two decisions of the Competition Tribunal (the "Tribunal"), one dated 6

February 2003 and the other dated 30 July 2003, relating to the large merger between the first and second respondents (the "merger"). However, it appears that it is the Tribunal's "order" dated 18 June

2003 that is the relevant "decision" for the purposes of ss 16 and 17(1) of the Act which was published by the Tribunal in the Government Gazette (GN 1844 of 2003) on 4 July 2003 pursuant to its obligations in terms of s 16(4) of the Act.*

[2] These proceedings concern two objections by the respondents *in limine* to the Commission's notice of appeal: first, that the Commission does not enjoy *locus standi* to appeal against the Tribunal's

decisions; and, secondly, that the notice of appeal was filed out of time and the late filing thereof cannot or should not be condoned.

[3] The parties have agreed, and this Court has ordered, that the two objections *in limine* be determined separately and prior to the merits of the Commission's appeal because either objection would, if

determined in favour of the respondents, dispose of the appeal without an adjudication being required of the merits thereof. The respondents will abandon the cross appeal in the event of a final finding

against the Commission on one or both of the *in limine* issues.

[4] The question whether the Commission has *locus standi* to appeal against a Tribunal merger decision has not previously been considered. In *Mondi Limited v Kohler Cores and Tubes*[1] the

Commission sought to *participate* in an appeal by parties to a large merger against a Tribunal decision prohibiting such merger. The Commission's contention in those proceedings was that the

Commission had *locus standi* to *participate* in an appeal brought by merger parties against a Tribunal decision prohibiting a merger. As appears from the judgment in that matter, the appellant merger

parties objected to the application by the Commission to *participate* in the merger proceedings, contending that it had no *locus standi* to do so. The Court did not find it necessary, in view of the

conclusion it reached, to determine this question.[2] In these proceedings (unlike in *Mondi*), the merger in question was *approved* by the Tribunal (albeit conditionally), and it is the Commission that is

seeking to appeal against the Tribunal's decision. It follows that it is insufficient for the Commission to establish a right merely to *participate* in appeal proceedings. The question is whether the

Commission has a *right of appeal* against a Tribunal merger decision. In view of my conclusion on the first issue it is not necessary to determine the question whether the notice of appeal was filed late

and whether the late filing of the notice could or should be condoned. Nor is it necessary to express any view on the glaring absence of a proper application for condonation.

[5] Section 17(1) of the Competition Act (No. 89 of 1998) (the "Act") regulates who may appeal to this Court against Tribunal merger proceedings and it provides as follows:

a. “Within 20 business days after notice of a decision by the Competition Tribunal in terms of section 16, an appeal from that decision may be made to the Competition Appeal Court, subject to its rules, by -

(1) any party to the merger; or

(2) a person who, in terms of section 13A(2), is required to be given notice of the merger, provided the person had been a participant in the proceedings of the Competition Tribunal.”

In terms of s 16(2) the Tribunal may consider the approval (with or without conditions) or prohibition of a small or intermediate merger by the Commission, or itself approve (with or without conditions) or

prohibit a large merger referred to it by the Commission. It is clear from the wording of s 17(1) that only two categories of persons are permitted in terms of the Act to appeal against decisions by the

Tribunal in merger proceedings, and that the Commission does not fall within either of these categories: A “party to a merger” is defined in s 1(1)(xviii) of the Act as “an acquiring firm or a target firm”. An

“acquiring firm” is in turn defined as a firm that, as a result of the merger, would acquire or establish control over the business of another firm, or that has control of such acquiring firm or is controlled by it

(s 1(1)(i)). Similarly, a “target firm” is defined as a firm whose business would be controlled by an acquiring firm as a result of a merger, or whose business is controlled by such target firm (s (1)(xxxiii)). It

follows that the Commission does not enjoy a right to appeal against a Tribunal merger decision in terms of s 17(1)(a).

As regards s 17(1)(b), s 13A(2) provides that, in the case of an intermediate or larger merger, the primary acquiring firm and primary target firm must each provide a copy of the merger notification to:

“(a) any registered trade union that represents a substantial number of its employees; or

(b) the employees concerned or representatives of the employees concerned, if there are no such registered trade unions.”

In terms of s (1)(1)(xxvi) a “registered trade union” is defined as “a trade union registered in terms of s 96 of the Labour Relations Act, 1995 (Act No. 66 of 1995)”. It follows that the Commission does

not enjoy a right to appeal against a merger decision of the Tribunal in terms of s 17(1) of the Act. Having specifically stipulated two categories of persons as having this right, it is clear that the Legislature

intended such right of appeal to be limited to these two categories of persons: *expressio unius est exclusio alterius.*[3] This view is supported by the provisions of s 16(1). Where the Commission itself

approves (conditionally or unconditionally) or prohibits a small or intermediate merger, the same parties as in s 17(1) may request the Tribunal to consider the matter. This tends to confirm the proposition

that the Legislature intended that only the named persons could attack merger decisions. In the case of a small or intermediate merger, the other provisions on which the Commission relies would not be

available as well. The Commission's argument entails the anomaly that whereas s 16(1) is exhaustive of the parties who may attack merger decisions in respect of small and intermediate mergers, s 17(1) –

which limits the right of appeal to precisely the same parties – would not be exhaustive in the case of large mergers. Moreover, whereas only the parties named in s 16(1) may require the Commission's

decision on a small or intermediate merger to be considered by the Tribunal, a range of further parties would, if the Commission's argument is correct, become entitled to pursue a further appeal against

the decision of the Tribunal on such a merger.

[6] The Commission relies on s 61(1) which falls under Part E of the Act, and is entitled "Appeals and Reviews to Competition Appeal Court". It provides as follows:

"a person affected by a decision of the Competition Tribunal may appeal against, or apply to the Competition Appeal Court to review, that decision in accordance with the Rules of the Competition Appeal Court if, in terms of section 37, the Court has jurisdiction to consider that appeal or review that matter."

Section 37 of the Act, entitled "Functions of Competition Appeal Cour*t*", in turn provides as follows:

"(1) The Competition Appeal Court may—

(a) review any decision of the Competition Tribunal; or

(b) consider an appeal arising from the Competition Tribunal in respect of—

(i) any of its final decisions other than a consent order made in terms of section 63; or

(ii) any of its interim or interlocutory decisions that may, in terms of this Act, be taken on appeal.

(2) The Competition Appeal Court may give any judgment or make any order, including an order to —

(a) confirm, amend or set aside a decision or order of the Competition Tribunal; or

(b) remit a matter to the Competition Tribunal for a further hearing on any appropriate terms."

Section 61(1) provides a general right to a person "affected by" a decision of the Tribunal to appeal to this Court against such Tribunal decision where it is a final decision (other than a consent order); or

an interim or interlocutory decision that may, in terms of the Act, be taken on appeal; and/or to review any such Tribunal decision.

[7] The Commission has argued that it is a person "affected by" the Tribunal's merger decision within the meaning of s 61(1), that this decision is a final decision within the meaning of s 37(1)(b)(i) and

accordingly that the Commission enjoys a right to appeal in terms of these sections. The Commission's argument is that, because the Commission is given a wide range of functions under the Act, any

decision of the Tribunal impacts on any of its various functions. For example, it has been argued that the Commission is affected by incorrect market definitions or remedies that are applied too leniently.

The decision of the Tribunal in this case, it is said, "impacts on the competitive structure of various markets and therefore impacts on the functions" of the Commission. It is, to my mind, clear that the

Commission is not a "person affected by" a Tribunal decision approving a merger and that the Commission does not enjoy a right of appeal in respect of such decisions in terms of s 61(1). The limitation

of rights of appeal to persons "affected by" the decision in question is contained in various other statutes, including s 25 of the Workmen's Compensation Act (No. 30 of 1941),[4] s 8(1)(c) of the Road

Transportation Act (No. 74 of 1977)[5] and s 91(1) of the Compensation for Occupational Injuries and Diseases Act (No. 130 of 1993).[6] Generally, a limited interpretation is given to these words to

mean a person "proximately" affected.[7]

The Commission is not "proximately affected" by a Tribunal decision approving a merger. The Commission's task in merger proceedings is to investigate and adjudicate upon small and intermediate

mergers, to advise the Tribunal on large mergers, and to participate in merger hearings before the Tribunal. Once the Commission has discharged these duties, it is *functus officio*.[8] Unlike in complaint

proceedings, the Commission is not a party to such proceedings in the ordinary sense of the word. It is merely a participant whose participation ends with the Tribunal hearing. The Commission has no

direct or substantial interest in the decision reached by the Tribunal. Moreover, the Tribunal is a body superior in status and expertise to the Commission under the Act, and it would subvert this regulatory

hierarchy were the Commission permitted to appeal against decisions of the very body that had considered the Commission's own adjudication of small or intermediate mergers, or to which it had made

recommendations in respect of large mergers. By contrast, the two categories of persons expressly identified as having a right of appeal against Tribunal merger decisions, namely the merger parties

themselves and trade unions and employees of the merger parties, are clearly "proximately affected" by the decision in question and are accordingly persons "affected by" such decision for the purposes

of s 61(1) of the Act.

[8] It follows and is apparent from the structure of the Act that s 61(1) must be read subject to s 17(1). In fact, a consideration of the two sections illustrate the rule of statutory interpretation that

generalia specialibus non derogant which applies to both earlier and subsequent enactments[9] as well as to specific and general provisions in the same legislation.[10] In the context of the Act, it is

clear that ss 61(1) and 37 are general provisions governing the kind of Tribunal decisions generally that may be appealed to, and reviewed by, the Competition Appeal Court, and also which categories of

person may appeal and review such decisions. Section 17(1) is a specific provision governing the categories of persons which may appeal Tribunal decisions specifically in terms of s 16 of the Act. This is

also evident from a comparison of s 37(2) and s 17(2) of the Act. As set out above, the former provides that this Court may give any judgment or make any order, including an order to:

> "(a) confirm, amend or set aside a decision or order of the Competition Tribunal; or
>
> (b) remit a matter to the Competition Tribunal for a further hearing on any appropriate terms."

Section 17(2), on the other hand, provides that, in the specific context of Tribunal merger decisions in terms of s 16, this Court may only:

> "(a) set aside the decision of the Competition Tribunal;
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> (b) amend the decision by ordering or removing restrictions, or by including or deleting conditions; or
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> (c) confirm the decision."

The reason for this differentiation is not far to seek: merger proceedings are by their very nature matters that should be disposed of expeditiously.[11] This Court is required in terms of s 17(3) to approve

the merger (with or without conditions) or to prohibit it. This Court is not given the power to remit the matter to the Tribunal. While s 37(2) confers general powers on this Court when hearing appeals or

reviews of Tribunal decisions. Sections 17(2) and (3) are specific provisions governing the powers of this Court in appeals against Tribunal merger decisions specifically. Moreover, it is clear that the

general words in ss 61(1) and 37 are "capable of reasonable and sensible application without extending them to subjects specially dealt with"[12] by s 17 (ie Tribunal merger decisions). The provisions of

ss 61(1) and 37 are, for instance, applicable to all types of Tribunal decisions which (unlike merger decisions) do not have their own specific appellate regime within the Act. Tribunal decisions in complaint

proceedings under Parts A and B of Chapter 2, and Tribunal decisions in exemption proceedings under Part C thereof would be governed by these general provisions. There is no "internal" statutory

regime equivalent to s 17 for appeals against these kinds of decisions, and accordingly they would be subject to the general appellate provisions of ss 61(1) and 37. This case calls for the application of

the maxim *generalia specialibus non derogant*, with the result that ss 61(1) and 37 should not be read as altering or derogating from the provisions of s 17 in respect of appeals against Tribunal merger

decisions. It follows that the categories of persons which may appeal against Tribunal merger decisions are those limited categories specifically set out in s 17(1) and not the class of "*affected*" persons

referred to in s 61(1).

It follows that this Court's powers in respect of Tribunal merger decisions are those specific powers set out in ss 17(2) and (3) and not the general appellate powers referred to in s 37(2). The powers set

out in ss 17(2) and (3) may be exercised by this Court only when a matter has come before the Court *pursuant to s 17(1)*. When the relevant provisions of the Act are construed in the manner discussed

above they are not inconsistent. Nor can it be said that they lead to an inequitous result.

[8] The Commission has argued that its exclusion from appeal proceedings could lead to results that "can be more detrimental to consumers, customers or suppliers of one of the merged entities, than to

the merging parties themselves". It has been submitted that that it is clearly "extraordinary and iniquitous to provide some participants with a right of appeal where other participants [ie the Commission]

are left with a review option only". Section 53(1)(c) determines who may participate in merger proceedings: (i) any party to the merger; (ii) the Competition Commission; (iii) any person who was

entitled to receive a notice in terms of s 13A(2) and who indicated to the Commission an intention to participate, in the prescribed form; (iv) the Minister [of Trade and Industry], if the Minister has

indicated an intention to participate; and (v) any other person whom the Competition Tribunal recognised as a participant. Not all these participants may appeal against a decision of the Tribunal. Those

who may are specifically referred to in s 17(1) namely those in subparagraphs (i) and (iii). The intention of the legislature could not have been expressed more clearly and the omission of the other

participants is clearly indicative of the Legislature's intention.[13] The Commission is created by statute (s 19(1)) and "must exercise its functions in accordance with this Act" (s 19(1)(c)). The

Commission has no purpose, powers or functions beyond those granted by the Act. It derives its powers, obligations and jurisdiction from the statute.[14] The functions of the Commission are set out in

s 21(1). The only function that is vested in the Commission in respect of merger regulation is to "authorise, with or without conditions, prohibit or affirm mergers of which it receives notice in terms of

Chapter 3" (s 21(1)(e)). In addition, in terms of s 21(2)(c), the Commission may "perform any other function assigned to it in terms of this or any other Act". In this regard, certain powers and functions

in respect of merger regulation are conferred on the Commission by Chapter 3 of the Act. As regards *small mergers*, the Commission may require the merger parties to notify it of the merger if, in its

opinion, the merger may substantially prevent or lessen competition, or cannot be justified on public interest grounds (s 13(3)). After the merger parties have fulfilled all their notification requirements, the

Commission must, after considering the merger in terms of s 12A, either approve the merger (with or without conditions) or prohibit it (s 13(5)(b)). As regards *intermediate mergers*, the merger parties

are required to notify the Commission thereof (s 13A(1)), and the Commission, after having considered the merger in terms of s 12A, must either approve the merger (with or without conditions) or

prohibit it (s 14(1)). As regards *large mergers*, the merger parties are also required to notify the Commission thereof (s 13A(1)). After receiving notice of a large merger, the Commission must refer such

notice to the Tribunal and to the Minister of Trade and Industry. After the merger parties have fulfilled their notification requirements, the Commission must forward to the Tribunal and Minister a written

recommendation, with reasons, whether or not implementation of the merger should be approved (with or without conditions) or prohibited (s 14A(1)). The Commission enjoys power to investigate any

merger and to require any merger party to provide additional information in respect of the merger (s 13B).

Any decisions taken by the Commission in respect of small or intermediate mergers are subject to the consideration of the Tribunal: If the Commission approves a *small or intermediate merger* subject

to conditions, or prohibits it, any party to the merger may request the Tribunal to consider the conditions or prohibition order (s 16(1)(a)). But where the Commission approves an *intermediate merger*,

or approves such merger subject to conditions, a person who, in terms of s 13A(2), is required to be given notice of the merger may request the Tribunal to consider the approval or conditional approval,

provided that the person had been a participant in the proceedings of the Commission (s 16(1)(b)). As regards *large mergers*, the Tribunal is required, upon receiving a referral of such merger and

recommendation from the Commission, to consider the merger in terms of s 12A and such recommendation, and either to approve the merger (with or without conditions) or prohibit it (s 16(2)).Within

this framework, the Commission is granted a right in terms of s 53(1)(c) of the Act to participate in merger hearings before the Tribunal. The Commission also has the power to revoke its own decision to

approve or conditionally approve a small or intermediate merger in certain circumstances (s 15(1)) and, in the case of large mergers, may apply for the Tribunal to revoke its own decision to approve or

conditionally approve a merger (s 16(3)). It follows that the Act provides a comprehensive framework for the regulation of merger control. In respect of all mergers, the Commission has an investigative

function. In addition, however, the Commission effectively acts as an adjudicative body in respect of small and intermediate mergers whose decisions can be reconsidered by the Tribunal. Moreover, in

respect of large merger proceedings, the Commission acts as an advisory body to the Tribunal. In this respect, the Commission's role in merger control is quite different from its role in respect of

prohibited practices and complaints in respect of them. In the latter, the Commission has no adjudicative or advisory role; rather, it investigates complaints initiated by, or referred to it (s 49B) and, if it

determines that a prohibited practice has been established, must refer the complaint to the Tribunal for hearing (s 50(2)). In the event that the Commission does refer a complaint to the Tribunal, then it

effectively prosecutes the complaint against the respondent before the Tribunal. The Commission is thus a "party" to, and more specifically the applicant in, complaint proceedings before the Tribunal

when it has referred the complaint in question to the Tribunal. However, it is merely a "participant" in merger proceedings before the Tribunal where the only "parties" are the merger parties themselves.

Its "interest" in the two forms of proceedings is therefore different and it has no further function to fulfil in merger proceedings once it has investigated and adjudicated or advised upon the merger in

question, and participated in the merger hearing. The Commission then becomes *functus officio*.

[9] The Commission has argued that it is necessary for it to have a right of appeal in order to protect the interests of consumers and other participants in the markets affected by the merger (see par 5.1 of

its heads of argument). This submission, it has correctly been shown by Mr Rogers who appeared with Mr Wilson on behalf of the Respondents, fails to take into account that the Tribunal is a superior

body to the Commission in the regulatory hierarchy provided by the Act, and which is better qualified than the Commission in the field of merger regulation.[15] In the circumstances, there is nothing

extraordinary or iniquitous in the Commission not having a right to appeal against Tribunal merger decisions. In fact, the absence of any provision in the Act allowing such an appeal is consistent with the

functions and powers of the Commission and its particular role in merger proceedings.

[10] The Commission has also contended that its interpretation of the Act is consistent with the Constitution of the Republic of South Africa (Act 106 of 1998) whereas that of the respondents is not (par

7 of its heads of argument). The Commission has contended that an interpretation of the Act that limits the right of appeal in merger proceedings to those categories of persons listed in s 17(1) is

inconsistent with the right to equality in s 9(1); the right to administrative action that is procedurally fair in s 33(1); and the right to a fair public hearing of a legal dispute in s 34. These contentions were not

pressed in argument and perhaps rightly so for it is clear that the differentiation between the appeal rights of the Commission and those of the categories of persons listed in s 17(1) does bear a "rational

connection to a legitimate government purpose". The differentiation does not amount to "discrimination", let alone "unfair discrimination", as set out in *Harksen v Lane NO*.[16] As regards the right to

procedural unfairness, the Commission has failed to define what "administrative action" (as defined in s 1(i) of the Promotion of Administrative Fairness Act 3 of 2000) is at issue or in what is procedurally

unfair. The Tribunal's decision on a large merger does not affect the "rights" (or "legitimate expectations") of the Commission. As regards the right to a "fair" public hearing under s 34 of the Constitution,

the Commission's argument (at par 7.6) is that "a hearing cannot be regarded as fair if the parties referred to in s 17(1)(a) and (b) are given a right of appeal against the finding in such hearing whereas the

other persons affected by the result is [sic] not granted such right of appeal". This argument does not relate to the fairness of the hearing itself and does not involve s 34 of the Constitution.

None of the Commission's |Constitutional contentions have any merit. In terms of s 8(4) of the Constitution a juristic person such as the Commission is entitled to the rights in the Bill of Rights "to the

extent required by the nature of the rights and the nature of that juristic person". The Commission is a statutory body established for specific purposes and with limited functions and powers. In the nature

of things, such a body will have rights and powers which are more restricted than other persons. The Commission's reliance on the Constitution is an attempt to acquire powers and functions which the

Legislature did not to confer on the Commission.

[11] The Commission has argued that, if s 61(1) does not afford it any right to appeal against Tribunal merger decisions, the result would be that the Minister would not have a right of appeal in

circumstances where the merger parties themselves and their trade unions and employees do have such right (par 6 of the heads of argument). Section 18(1) provides that the Minister "[I]n order to make

representations on any public interest ground referred to in Section 121A(3)" may participate as a party in any intermediate or large merger proceedings before the Commission, the Tribunal and this

Court. The Commission has argued that, if the interpretation of the Respondents are correct that only the parties referred to in s 17(1) have a right of appeal, the Minister's rights of appeal would be

limited to that of a respondent only. The Commission thus calls for a construction that would allow the Minster to appeal any decision of the Tribunal in cases falling within s 12A(3) to avoid any disparity

between the Minister's rights and those of trade unions and parties to the merger and avoid any subordination of the public interest issues referred to in s 12A(3) to the competition criteria set out in s

12A(2). This argument is difficult to follow. Had the Legislature intended the Minister to have a right to appeal against Tribunal merger decisions, it would have been simple to provide for it in s 17(1).

Both the Minister and the Commission are specifically excluded even though they are listed within the categories of persons entitled to participate in merger hearings before the Tribunal in terms of s 53(1

(c). Nor would the public interest issues referred to in s 12A(3) be subordinated to the competition considerations of s 12A(2) because the Minister enjoys an express right in terms of s 18(1) of the Act

to participate as a party in any large merger proceedings before the Commission, the Tribunal and this Court in order to make representations on any public interest ground referred to in s 12A(3) albeit

that the Minister may not launch appeal proceedings like any of the categories of persons listed in s 17(1). This is due the latter's direct and immediate interest in the Tribunal's decision and not any

subordination of public interest factors to competition considerations.

[12] I would therefore uphold the first point *in limine* and dismiss the appeal.

Malan AJA

I agree and it is so ordered.

Davis JP

I agree.

Jali JA

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* I am indebted to counsel (Mr Rogers SC and Mr Wilson) for the Respondents for their very useful heads of argument.

[1] Case No. 20/CAC/Jun02 dated 14 February 2003

1 **[2] Davis JP remarked as follows: "[T]here is some merit in the argument of appellants and it is preferable if the Legislature were to examine the Act with a view to considering the desirability of the primary investigating agency, the Commission, having a right to appear in proceedings of this nature."**

[3] Cf *Strauss v Strauss* 1973 (3) SA 788 (A) at 791H-792A; *Cargo Africa CC v Gilbeys Distillers and Vintners* 1996 (2) SA 324 (C) at 329HI; Steyn *Die Uitleg van Wette* 5ed at 50-1.

[4] See eg *Fred Saber (Pty) Limited v Franks* 1949 (1) SA 388 (A) at 395ff; *Trawler and Line Fishermen's Union v Workmen's Compensation Commission* 1953 (4) SA 65 (C) at 67ff; *Ex parte Workmen's Compensation Commissioner: In re Plotkin v Accident Fund* 1970 (2) SA 418 (T) at 420ff; *Workmen's Compensation Commissioner v Crawford and Another* 1987 (1) SA 296 (A) at 305DH.

[5] eg *Chairman, National Transport Commission and Others v LC de Lange Transport (Pty) Limited* 1983 (4) SA 678 (E) at 685ff, 688G.

[6] eg *Venter v Compensation Commissioner* 2001 (4) SA 753 (T) at 755E and the authorities cited in the previous notes.

[7] In *Workmen's Compensation Commissioner v Crawford supra* at 305G the Appellate Division held that the phrase "any person affected by a decision" should be given "a limited interpretation". In support of this view, the Court quoted De Villiers CJ in *Sibisi v Trustees Under Natal Act No. 9, 1910* 1913 AD 77 at 81, where he said that "… the expression 'affected' does not mean remotely, but proximately affected." In *Trawler and Line Fishermen's Union supra* the appellant was held not to be the person affected by the decision of the respondent because its interest was merely "a general one" arising from the deceased's membership of its union (at 68FG).

[8] cf *Jordaan v Oosthuizen* 1969 SA 606 (O) at 610BC.

[9] *R v Gwantshu* 1931 EDL 29 at 31: "Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular

intention to do so.'

[10] cf *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) at 510BE; *Sappi Fine Papers (Pty) Ltd v ICI Canada Inc (formerly CIL Inc)* 1992 (3) SA 306 (A) at 328B-F; *S v De Sa* 1982 (3) SA 941 (A) at 956C-F; *United African Motor and Allied Workers' Union v Fodens (SA) (Pty) Ltd* 1987 (3) SA 269 (T) at 273DE; *Kommissaris van Binnelandse Inkomste v Van der Walt* 1986 (4) SA 303 (T) at 310I; *Norman & Co (Pty) Ltd v Hansella Construction Co (Pty) Ltd* 1968 (1) SA 503 (T) at 504AD.

[11] Intermediate and large mergers may not be implemented until they have been finally approved (s 13A(3)) and small mergers may not be further implemented once they have been required to be notified to the Commission (s 13(4)). In terms of s 16(2) the Tribunal is required to issue its decision on a merger "within the prescribed time". In terms of Rule 35(1) the Tribunal must schedule its first hearing or conference within ten business days of the referral, and in terms of rule 35(4) its decision on the merger must be issued within ten business days after the end of the hearing. In keeping with the legislature's policy of expeditious decision-making in merger cases, the Act reflects an intention on the part of the Legislature to minimize uncertainty and delay arising from the merger regulation process by limiting the persons who may appeal against Tribunal merger decisions to a limited number of designated categories which are the most directly affected by the merger approval process, namely, the merger parties themselves, and their trade unions and employees. For the same reason, s 17(2) does not include the general appellate powers vested in this Court in terms of s 37(2), such as remitting a matter to the Tribunal for further hearing (s 37(2)(b)), which may delay the merger regulation process.

[12] *R v Gwantshu* 1931 EDL 29 at 31.

[13] cf *Trawler and Line Fishermen's Union v Workmen's Compensation Commission* 1953 (4) SA 65 (C) 68GH. Section 13A(3) of the Act provides that the parties to an intermediate or large merger may not implement it until it has been approved, with or without conditions, by the Commission in terms of s 14(1)(b), the Tribunal in terms of s 16(2) or this Court in terms of s 17. This subs lends some support for the contention that s 17 exclusively regulates the right of appeal in merger proceedings.

[14] *Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another* 2003 (3) SA 64 (SCA) at 71I-72E; *Venter v Compensation Commissioner* 2001 (4) SA 753 (T) 757CF referred to in *Old Mutual Properties (Pty) Limited and Another v The Competition Tribunal and Others* (21/CAC/Jul02) par 7.

[15] The Tribunal, unlike the Commission, is a Tribunal of record (s 26(1)(c) *Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another supra* at 72FG), whose functions include the consideration of adjudications made by the Commission in respect of small and intermediate mergers (s 16(1)) and of the recommendations made by the Commission in large merger proceedings (s16(2)). The Tribunal represents a broad cross-section of the population of South Africa (s 28(1)(a)), comprises persons with legal training and experience (s 28(1)(b)) and its members have "suitable qualifications and experience in economics, law, commerce, industry or public affairs" (s 28(2)(b)).

[16] 1998 (1) SA 300 (CC) par 51-54 at 323C-325D.