



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 31/20

In the matter between:

**COMPETITION COMMISSION OF SOUTH AFRICA**

Applicant

and

**MEDICLINIC SOUTHERN AFRICA (PTY) LIMITED**

First Respondent

**MATLOSANA MEDICAL HEALTH SERVICES  
(PTY) LIMITED**

Second Respondent

**Neutral citation:** *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2021] ZACC 35

**Coram:** Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J.

**Judgments** Mogoeng CJ (majority): [1] to [88]  
Theron J (dissenting): [89] to [123]

**Heard on:** 11 March 2021

**Decided on:** 15 October 2021

**Summary:** section 12A of the Competition Act 89 of 1998 — substantial lessening of competition — impact of a merger on competition — impact on section 27 of the Constitution — interpretation in accordance with sections 7(2) and 39(2) of the Constitution — interference by appellate courts with findings of trial courts

Competition Appeal Court not entitled to interfere with findings of the Tribunal — appeal is upheld — no order as to costs

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## ORDER

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On appeal from the Competition Appeal Court of South Africa (hearing an appeal from the Competition Tribunal):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Competition Appeal Court is set aside.
4. There will be no order as to costs.

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## JUDGMENT

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MOGOENG CJ (Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Tlaletsi AJ and Tshiqi J concurring):

*Essential context*

[1] This is an application for leave to appeal against the judgment and order of the Competition Appeal Court. The question to be answered is whether that Court was, in law, correct in interfering as it did with the findings of and remedy given by the Competition Tribunal to prohibit a merger in the private health care services sector. But first, the essential context for the proper appreciation of the issues.

[2] It does not require an award-winning and world-acclaimed economic scientist to be persuaded that almost everything of consequence turns on the economy, here and across the nations of the earth. The ability of government and a nation to function in keeping with and for the advancement of shared constitutional aspirations, in

circumstances where integrity and meritocracy are necessarily allowed to occupy their rightful place, depends largely on the state of the economy. After all, poverty alleviation, the provision of high-quality education, the best health-enhancing facilities or necessities, and the enablement of the best business environment and job opportunities, would all be a pipe dream in the absence of an inclusive, ethical, truly human rights-oriented and vibrant or prosperous economy. This is what the notion or philosophy of business with a conscience or a social justice-sensitive economy is about.

[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.

[4] Colonialism, neo-colonialism and apartheid orchestrated an institutionalised concentration of ownership and control of all things of consequence in our national economy along racial lines. Unsurprisingly, the commanding heights of the corporate sector are seemingly the exclusive terrain of our white compatriots. It is this indisputable reality and our shared commitment to ensuring that South Africa really does get to belong to all who live in it, that the constitutional imperatives, laid out in the Preamble, to improve the quality of life of all citizens and free the potential of each are realised, that the likes of the Competition Act<sup>1</sup> had to and got to see the light of day.

[5] Sight must therefore never be lost of the central purpose for the enactment of that Act and for the investigative and adjudicatory structures that it gave birth to. To sharply

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<sup>1</sup> 89 of 1998.

channel the focus to where it belongs, to remind all of us and ensure that the fundamental challenges sought to be remedied through this Act and allied institutions are never left out of consideration, it is necessary that the Preamble to the Act be quoted in its entirety. It reads:

“The people of South Africa recognise:

That apartheid and other discriminatory laws and practices of the past resulted in *excessive concentrations of ownership and control* within the national economy, *inadequate restraints* against anti-competitive trade practices. and unjust restrictions on *full and free participation* in the economy by all South Africans.

That *the economy must be open to greater ownership by a greater number of South Africans.*

That credible competition law, and effective structures to administer that law are necessary for an efficient functioning economy.

That an efficient, *competitive economic environment. balancing the interests of workers, owners and consumers* and focused on development will benefit all South Africans.

IN ORDER TO—

provide all South Africans *equal opportunity to participate fairly in the national economy;*

achieve a more effective and efficient economy in South Africa;

provide for markets in which consumers have access to, and *can freely select, the quality and variety* of goods and services they desire;

create greater capability and an environment for South Africans to compete effectively in international markets;

restrain particular trade practices which undermine a competitive economy;

*regulate the transfer of economic ownership* in keeping with *the public interest;*

establish independent institutions to monitor economic competition; and

give effect to the international law obligations of the Republic.”

[6] And this finds further reinforcement from the purpose of the Act which is among other things to:

- (a) provide consumers with competitive prices;<sup>2</sup>
- (b) ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy;<sup>3</sup>
- (c) “promote” greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons; and
- (d) 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.<sup>4</sup>

[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.

[8] To achieve that noble and just objective, it bears emphasis that sight should never be lost of the need to pay special attention to the preceding realisable imperatives of our national economy. The merger that is the subject matter of this application must thus

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<sup>2</sup> Section 2(b) of the Act.

<sup>3</sup> Id at section 2(e).

<sup>4</sup> Id at section 2(g).

be approached with due regard to what would help achieve these goals and thus be in the best interests of the public – to approve or not to approve. Some of the more pointed and relevant questions that come to the fore are whether: (a) the approval of the merger would contribute towards ownership and control in the private health care services market still being excessively concentrated in the hands of historical players or in a way that would contribute towards the progressive realisation of the set ownership-spread objectives; (b) entry into this market or sector would be eased to allow for greater participation by a greater number of South Africans or would be allowed to become an even more difficult objective to achieve; (c) free and fair competition would be enhanced or hampered to some concerning degree; (d) the determination of the local geographic market would enable consumers to have access to and freely select the quality and variety of services in the private health care services sector; and (e) sufficient regard is being had, in dealing with substantial public interest considerations, to the ever-rising costs of private health care services in South Africa and whether regulatory and adjudicatory institutions in the competition environment do what the Constitution demands of them by containing this trend and discouraging mergers that would most likely or inevitably give rise to, and in a way normalise, tariff hikes for desperately needed goods or services in any economic space where they are already costly and somewhat unaffordable or inaccessible.

[9] The invocation of section 39(2) of the Constitution in interpreting legislation that implicates a right in the Bill of Rights, ought not to be viewed as an optional extra. It should rather be seen as a constitutional injunction. Whether any of the parties have specifically contended for the interpretation of legislation with express reference to or through the prism of section 39(2) should not really matter. It is, broadly speaking, a constitutional obligation that rests on the shoulders of any court interpreting legislation or developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.<sup>5</sup> That a court, whose judgment and order is appealed

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<sup>5</sup> *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 58; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 72 and *Investigating Directorate: Serious*

against, might not have heeded this constitutional call to duty should only point to its failure to do what it was obliged to do in the first place.

[10] Not only are courts, as integral parts of the State machinery, arguably under a section 7(2) obligation to promote, protect, respect and fulfil rights in the Bill of Rights, but the Tribunal and Competition Appeal Court have the added responsibility to do so imposed on them by the Preamble to the Act and its purpose.

[11] Confronting these issues in this way, is what fidelity to the promotion of the spirit, purport and objects of the right of access to health care services and of this Act are really about.<sup>6</sup> And that should inform our approach to the determination of the issues in this matter.

#### *Parties*

[12] The applicant is the Competition Commission established in terms of the Act. And the first respondent is Mediclinic Southern Africa (Pty) Limited whereas the second is Matlosana Medical Health Services (Pty) Limited (interchangeably referred to as target firm, MMHS or Matlosana).

#### *Background*

[13] Mediclinic owns a multidisciplinary hospital in Potchefstroom. In total it owns 50 hospitals in South Africa. Matlosana owns two multidisciplinary hospitals in Klerksdorp called Wilmed Park Private Hospital and Sunningdale Hospital (target hospitals) and a psychiatric hospital named Parkmed. Potchefstroom and Klerksdorp, which are in the North West Province, are just under 50km apart, with the travelling time of about 41 minutes.

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*Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at paras 21-2.

<sup>6</sup> *Hyundai* id at para 22.

[14] It is common cause that Parkmed's services are not in the same product market as those provided by the three multidisciplinary hospitals, and that the acquisition of control by Mediclinic over Parkmed would not give rise to any competition or public interest concerns. The dispute is about Mediclinic's acquisition of control over Wilmed and Sunningdale.

[15] The context within which the proposed merger should be understood is that there are three large corporate hospital groups in South Africa: Netcare, Life Healthcare and Mediclinic. Many independent hospitals are affiliated to the National Health Network (NHN), a non-profit company. Nationally, the numbers of hospitals and beds operated by these four groups, and by unaffiliated independents, are as follows:<sup>7</sup>

- (a) Netcare: 54 hospitals/10,004 beds (24.9%);
- (b) NHN: 62 hospitals/6,611 beds (24.7%);
- (c) Life: 57 hospitals/7,987 beds (21.3%);
- (d) Mediclinic: 50 hospitals/7,164 beds (20.3%);
- (e) Unaffiliated: 3,065 beds (8.8%);
- (f) Total beds: 34,831.

The target hospitals have 247 beds. If they are acquired by Mediclinic, the latter's national market share based on beds will increase by about 0.7%.

[16] Historically the NHN has been permitted, by way of an exemption granted in terms of section 10 of the Act, to negotiate tariffs and other benefits with medical schemes on behalf of its affiliated hospitals. In November 2018, this exemption was expanded to include procurement on behalf of affiliated hospitals. Target hospitals are part of the NHN.

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<sup>7</sup> The national market share, by number of beds, is given in brackets. See *Mediclinic Southern Africa (Pty) Ltd v The Competition Commission* [2020] ZACAC 3 (Competition Appeal Court judgment) at para 5.

[17] Apart from Mediclinic Potchefstroom, there is one other multidisciplinary hospital in Potchefstroom, MooiMed, which falls under the NHN. The drive-time between Mediclinic Potchefstroom and MooiMed is five minutes. Apart from the target hospitals, there is one other multidisciplinary hospital in Klerksdorp, Life Anncron, which belongs to the Life Healthcare group of hospitals. The drive-time between Wilmed and Anncron is also five minutes.

[18] Mediclinic intends acquiring a controlling share in Matlosana. And it will post-merger own inter alia Mediclinic Potchefstroom and Matlosana's Wilmed Park Private Hospital and Sunningdale Hospital, all multi-disciplinary private hospitals, as indicated, located in the North West Province.

[19] The robust, common cause evidence in this matter was found by the Tribunal to be that the proposed transaction will result in a significant increase in tariffs at the target hospitals when their tariff files change from the current NHN tariff files to the Mediclinic tariff files. This is because Mediclinic has, in comparison to the NHN, been able to achieve higher tariffs to date.

[20] It was also common cause that the tariff, which comes about because of national negotiations between hospital groups and medical schemes, is the major component of the total cost to a patient for hospital services, sometimes referred to as cost per event. The differences in tariff must, in the Tribunal's view, be weighed against other factors such as the cost of ethicals and surgicals to arrive at a final cost per event, which is the relevant figure for assessing the pricing effects of the proposed merger. According to the Tribunal, most medical aids raised concerns in relation to the anticipated effects of the proposed transaction on competition – especially in relation to tariff effects.

[21] The Tribunal concluded that the merger would remove the lower tariffs that are available to uninsured patients at the target hospitals and the proposed merger would significantly affect the uninsured patients by limiting their ability to switch to cheaper hospitals which have hitherto been the target hospitals. These uninsured patients do not

have the benefit of a medical scheme negotiating on their behalf and from a public interest perspective, this group is thus important and significant. They are admittedly vulnerable when one considers consumer welfare and the importance of private health care in South Africa.

[22] The merging parties argued that the above common cause tariff effects would be offset by certain claimed efficiencies<sup>8</sup> that Mediclinic could post-merger achieve in the target hospitals. Mediclinic argued that it was able to achieve inter alia procurement and utilisation efficiencies at hospitals because it ran them as a group. It also contended that the NHN is a loose alliance of independent hospitals which only used to have an exemption to bargain tariffs collectively and not to procure collectively. Mediclinic further maintained that the relevant counterfactual<sup>9</sup> to the proposed merger is the status quo and that the actuaries based their calculations on this being the case without considering the effect of these efficiencies.

[23] The Tribunal noted that, between the end of the hearing of oral testimonies on 13 June 2018 and final argument on 12 December 2018 and 15 January 2019, a new development occurred which changed the relevant counterfactual. This was that in November 2018 the Commission published its decision to conditionally approve an exemption application of the NHN to undertake collective or centralised procurement on behalf of its members. Because of the relative size of the NHN and the large volumes of surgicals and ethicals that it will procure on behalf of its members after the exemption, the Tribunal concluded that the procurement costs of Wilmed and Sunningdale will significantly reduce absent the proposed merger.<sup>10</sup> The Tribunal also held that the merging parties failed to demonstrate that other likely, merger-specific, timely efficiencies would result from the proposed merger that would outweigh the likely adverse tariff and other anti-competitive effects.

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<sup>8</sup> Technological efficiencies which ought to be considered in determining if the merger is likely to substantially prevent competition.

<sup>9</sup> *Mediclinic Southern Africa (Pty) Limited v Matlosana Medical Health Services (Pty) Limited* [2019] 2 CPLR 805 (CT) (Tribunal judgment) at para 10.

<sup>10</sup> *Id.*

[24] The Tribunal also observed that certain medical schemes raised concerns in relation to increased concentration and regional dominance<sup>11</sup> and its effects on Mediclinic's bargaining position in negotiations. It also concluded that the merging parties would, post-merger, be the dominant player in the market for the provision of private multi-disciplinary acute inpatient hospital services in the "MaJB" area consisting of the Ditsobotla, City of Matlosana and JB Marks local municipalities with a combined market share of approximately 63% – a market share that markedly towers over that of the next largest competitor.

[25] The Tribunal concluded that the merging parties' dominant position in the relevant market and the combined Mediclinic Potchefstroom, Wilmed and Sunningdale post-merger capability to provide a medical scheme wanting representation in the relevant geographic area with a complete coverage and range of services, would leave the medical schemes with little or no choice but to include the merged entity when constructing networks, including designated service providers.<sup>12</sup> It held the view that the proposed merger would make medical schemes' and patients' outside options much less attractive, giving the merged firm the ability to offer lower or no discounts on designated service providers and deteriorate non-price factors<sup>13</sup> in the relevant market. It also held that the medical aid members on the various low-cost options collectively are an important group from a public interest perspective. And that this is so because they are particularly vulnerable to the increasing costs of private health care in South Africa. The Tribunal went on to say that if the parties on the low-cost options could no longer afford private health care, this would put further constraints on the public health care sector in our country.

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<sup>11</sup> Id at para 313, after considering submissions from the medical schemes, the Tribunal concluded that the merging parties will post merger have a dominant position in the market.

<sup>12</sup> This is a healthcare provider or a group of healthcare providers selected by a scheme as a preferred provider(s) to offer to its members the diagnosis, treatment and care for PMB conditions.

<sup>13</sup> This refers to clinical quality and patient experience.

[26] The Tribunal also took account of evidence to the effect that Mediclinic has, in the past, attempted to leverage its dominance in one geographic region. This, it said, was where it did not face much competition. It reportedly required medical schemes to increase their utilisation of hospital facilities in a geographic region where it does face competition. Discovered correspondence in this case did, according to the Tribunal, reveal that the attainment of a dominant position in one geographic area or market can be leveraged to restrict members' choice of hospitals in a different geographic area or market. Because restricting choice is also considered to have an anticompetitive effect, the proposed merger may, in the Tribunal's view, potentially also have adverse effects on consumers outside of the defined relevant geographic market.

[27] From a non-price competition perspective, the Tribunal concluded that the proposed merger will likely lead to a deterioration in patient experience at the target hospitals if it is implemented.

[28] The merging parties submitted a continual iteration of different behavioural conditions<sup>14</sup> to address the competition concerns. This included a pricing remedy in the form of a post-merger discount off the Mediclinic tariffs. Considering the concerns raised by medical schemes, the Tribunal found that the proposed remedies did not address the source of the competitive harm, were limited in duration and were also inappropriate or inadequate in several other respects. The more pointed example it cited was the Commission's inability to effectively monitor and enforce the various proposed behavioural conditions.

[29] It was found that the adverse effects of the merger were not confined to the post-merger prevention or lessening of competition but also extended to public interest grounds that had to be considered by the Tribunal in terms of section 12A(3)(a) of the Act, which requires a consideration of the effects of a merger on "*a particular industrial sector or region*".

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<sup>14</sup> Tribunal judgment above n 9 at para 18.

[30] The proposed merger would, in the view of the Tribunal, have a significant effect on the health care costs of both insured and uninsured patients living in a specific region, the rural Potchefstroom/Klerksdorp region, in view of the target hospitals' significantly lower tariffs in comparison to Mediclinic. Moreover, the uninsured patients in that area, who are a vulnerable group, would, as stated, have less choice of cheaper hospitals post-merger and this would adversely affect their ability to switch between cheaper options. The Tribunal emphasised that the robust common cause evidence was that the proposed merger would significantly increase the tariffs at the target hospitals for both the insured and uninsured patient market segments. And it would thus, in the Tribunal's view, lead to an adverse public interest effect with no countervailing positive public interest ground advanced to mitigate this.

[31] For these reasons, on 29 January 2019 the Tribunal prohibited the merger.

[32] Aggrieved by the prohibition, the respondents successfully lodged an appeal to the Competition Appeal Court against the findings and remedy of the Tribunal. As a result of that outcome, the Commission has now approached this Court for leave to appeal.

### *Issues*

[33] The main issues are:

- (a) leave to appeal;
- (b) is this a case in which the Competition Appeal Court was, in law, entitled to interfere with the findings and remedy of the Tribunal;
- (c) did that Court have regard to the relevant provisions of the Constitution and act in line with them;
- (d) did it pay proper attention to the Preamble, purpose and relevant provisions of the Act, high costs in the private health care sector

- and the impact that the merger was likely to have on the consumers within the context of considerations of public interest;
- (e) is the merger likely to substantially prevent or lessen competition;
- and
- (f) remedy.

*Jurisdiction and leave to appeal*

[34] Whether leave to appeal should be granted is essentially a function of establishing two critical factors. The first is whether the jurisdiction of this Court is engaged. And the second and much broader one hinges on the demands of the interests of justice which, as is the case with jurisdiction, are informed by several factors.

[35] Beginning with jurisdiction, one of the relevant jurisdictional requirements is that a matter be constitutional in character.<sup>15</sup> Such a matter arises in circumstances where the issue involved is about the interpretation, protection or enforcement of constitutional rights and obligations.<sup>16</sup> Another is where “the matter raises an arguable point of law of general public importance which ought to be considered by [this] Court”.<sup>17</sup> Either way, it remains for this Court to finally decide whether the matter falls within its jurisdiction.<sup>18</sup> And any one of the requirements grappled with immediately below must inescapably be met, for it to be established.

[36] The merger that is the subject-matter of this litigation is in the health care sector. And the case is essentially about whether access to private health care services would be impeded, enhanced or unaffected by the merger. It involves the interpretation, protection and actualisation of this constitutional right and therefore implicates the constitutional right of access to health care services.<sup>19</sup> Arguably, it also concerns the

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<sup>15</sup> Section 167(3)(b)(i) of the Constitution.

<sup>16</sup> Id at section 167(7).

<sup>17</sup> Id at section 167(3)(b)(ii).

<sup>18</sup> Id at section 167(3)(c).

<sup>19</sup> Id at section 27.

obligation of the State to respect, promote, protect and fulfil this right as well<sup>20</sup> as a court's obligation to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation.<sup>21</sup>

[37] The issues concerning competition in this particular economic sector, what the test or correct interpretive approach to section 12A is, and under which circumstances it would be appropriate for the Competition Appeal Court, as an appellate court, to interfere with and set aside the factual and policy findings as well as the remedy of the Tribunal, which is a trial court equivalent, are points of law which are arguable in this matter. These issues are intertwined with the need to open and allow for greater participation and ownership by more South Africans in that economic sector and access to or the affordability of private health care services. And they are no doubt of general public importance, implicating the macro-economic landscape in the sphere of health care services. All things considered, these are matters that have some merit and deserve the attention of this Court.

[38] Noteworthy are factors that implicate this Court's jurisdiction. They do not necessarily have to be raised by litigants. It would suffice that "the matter raises" an arguable point of law of general public importance for this Court to have jurisdiction. Meaning, even if an applicant might not have raised an arguable point of law of general public importance, that is manifestly raised by the matter, it would still be open to this Court to consider its jurisdiction as established, based on that point.

[39] Not only is the jurisdiction of this Court engaged here, but the fact that there is a majority and a minority decision in the Competition Appeal Court concerning important legal questions does, according to our decision in *De Klerk*,<sup>22</sup> point strongly to the need to grant leave. It bears emphasis, that questions around circumstances under which the Competition Appeal Court may interfere with the factual findings or predictive

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<sup>20</sup> Id at section 7.

<sup>21</sup> Id at section 39(2).

<sup>22</sup> *De Klerk v Minister of Police* [2019] ZACC 32; 2020 (1) SACR 1 (CC); 2019 (12) BCLR 1425 (CC) at para 12.

decisions of the Tribunal and the exercise of its discretion in relation to remedy need to be addressed squarely by this Court. The Commission has reasonable prospects of success. I am satisfied that it is in the interests of justice that leave be granted.

*The Tribunal's power on mergers*

[40] Section 12A of the Act sets out the powers of the Commission and the Tribunal in considering a merger—

“12A. Consideration of mergers—

- (1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and—
  - (a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine—
    - (i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and
    - (ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3) ; or
  - (b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).
- (2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the *firms* in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including—

- (a) the actual and potential level of import competition in the market;
  - (b) the ease of entry into the market, including tariff and regulatory barriers;
  - (c) the level and trends of concentration, and history of collusion, in the market;
  - (d) the degree of countervailing power in the market;
  - (e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
  - (f) the nature and extent of vertical integration in the market;
  - (g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
  - (h) whether the merger will result in the removal of an effective competitor.
- (3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on—
- (a) a particular industrial sector or region;
  - (b) employment;
  - (c) the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged persons, to become competitive; and
  - (d) the ability of national industries to compete in international markets.”

[41] It was in the exercise of these powers that the Tribunal concluded that the proposed merger was likely to substantially lessen competition. It then assessed the strength of competition before and after the proposed merger in the relevant market with particular reference to the ease or difficulty with which new players would gain entry into the market regard being had to the tariffs and regulatory barriers. It for instance considered that it took many years, about nine to ten, for existing private hospitals, like MooiMed in Potchefstroom, to have additional beds or other facilities approved by the Department of Health, North West. And it concluded that entry was not only very difficult at a regulatory level but that it was even more difficult to start an altogether

new establishment in the private health care sector by reason of the capital expenditure inevitably involved. This would necessarily affect the previously disadvantaged as well as small and medium enterprises desirous of entering into this economic sector. As stated, the Tribunal also had regard to national concentration levels, the regional dominance of Mediclinic and the impact of that on competition should the proposed merger be approved.

[42] The Tribunal, as will be pointed out later, took account of the impact of the merger on the private health care services sector or region, as an industry, and the inability of the merger to promote a greater spread of ownership by a greater number of South Africans in line with the Preamble to the Act and its purpose. Presumably, the plight of the disadvantaged aspirant entrants in the health care services market was considered as well. It again bears emphasis that it concluded that the merger cannot be justified on substantial public interest grounds regard being had to, among other things, the predictable hike in tariffs that it would bring about, the impact on the consumer's ability to choose cheaper options and the need to give practical expression to the constitutional right to have access to health care services, particularly in the private sector.

*The Competition Appeal Court's power to interfere with the Tribunal's findings*

[43] In a majority judgment, the Competition Appeal Court reversed the findings of the Tribunal. And the question arises whether it was legally empowered to do so under the circumstances. To answer this question properly, requires a brief tour of our jurisprudential landscape to view the appellate courts' powers to interfere with or set aside factual findings and remedies of trial courts.

[44] Like all appellate courts, the Competition Appeal Court does not have unbridled powers to interfere with the decision of the Tribunal. Its powers to interfere with the decision of the Tribunal were more aptly set out by Rogers JA in *Imerys* in these terms:

“Where a determination of the Tribunal on a matter identified in section 12A(1) is brought on appeal, this Court will, apart from the well-known restrictions on appellate interference in factual findings, show a measure of deference to the Tribunal. The matter was put thus in the *Schumann Sasol* case:

‘The approach which this Court adopts to an appeal against the decision of the Tribunal in respect of a merger should take cognisance of the composition and role of the Tribunal as a specialist body which consists not only of lawyers but also of members possessed of the necessary financial and economic knowledge and thorough grasp of the relevant policy issues required in these kind of deliberations. Section 12A requires that the Tribunal make a determination after a holistic inquiry into whether the proposed merger is likely to substantially prevent or lessen competition. In assessing such a decision, this Court should take 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 . . . . In its decision as to whether to set aside, amend or confirm the decision of the Tribunal, *this Court must be cautious before imposing its own conception* of the policy considerations adopted by the Tribunal. *The Court should seek rather to examine and test rigorously the justifications offered* by the Tribunal for the decision to which it has arrived before it invokes its powers in terms of section 17.’<sup>23</sup>

[45] Although the majority could not be said to have forgotten the essence and applicability of what it referred to in *Imerys* as “the well-known restrictions on appellate interference in factual findings”<sup>24</sup> it does not appear to have acted in keeping with that understanding. It is therefore necessary that we remind ourselves of those well-known guiding principles as articulated by this Court in *Bernert*<sup>25</sup> and *Makate*<sup>26</sup>. In *Bernert* Ngcobo CJ said:

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<sup>23</sup>*Imerys South Africa (Pty) Ltd v The Competition Commission* [2017] ZACAC 1; 2017 JDR 0531 (CAC) (*Imerys*) at para 43.

<sup>24</sup> *Id.*

<sup>25</sup> *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) (*Bernert*).

<sup>26</sup> *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) (*Makate*).

“The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible one . . . . this rule of practice should not be used to ‘tie the hands of appellate courts’. It should be used to assist, and not to hamper, the appellate court to do justice to the case before it. Thus, where there is a *misdirection* on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is *clearly wrong*, it will reverse it.”<sup>27</sup>

Interference with factual findings by appellate courts would thus be justified only in the event of a misdirection or a clearly wrong decision. And this is to be done for the sole purpose of achieving justice.

[46] In *Makate Jafta J*, drawing from the above-quoted principle, had this to say about an appellate court’s entitlement to interfere with findings of fact:

“But even in the appeal, the deference afforded to a trial court’s credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case.”<sup>28</sup>

[47] The Justice went on to say:

“Here there was no misdirection and the trial court did not reach a wrong conclusion. On the contrary, it comprehensively analysed the evidence and set out compelling reasons for accepting evidence led by the applicant and rejecting that of the respondent. Consequently, we must approach this matter on the footing that the evidence of an agreement between the applicant and Mr Geissler was established.”<sup>29</sup>

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<sup>27</sup> *Bernert* above n 25 at para 106.

<sup>28</sup> *Makate* above note 26 at para 40.

<sup>29</sup> *Id* at para 41.

[48] This conclusion, in *Makate*, regarding how the trial court approached and dealt with factual issues or disputes, is on all fours with what is to be made of the Tribunal's factual findings in this matter. Neither did the Tribunal misdirect itself nor can it rightly be said to have been clearly wrong in its conclusion on the factual or policy issues. The Competition Appeal Court therefore had no legally-acceptable basis for interfering with the Tribunal's analysis and compelling reasons advanced for its conclusion and remedy. But, there is more.

[49] The Tribunal embarked on its probabilistic investigation while it was enquiring into the effect of the merger. But, the Competition Appeal Court did not factor this and the Tribunal's specialist character and thorough grasp of economic, financial and policy issues into its reflections. Interestingly and somewhat tellingly, even the Competition Appeal Court was constrained to pass the following compliment about the Tribunal's reasoning: "[t]he Tribunal, to whose *careful* and *comprehensive reasons I pay tribute*, make the following key findings".<sup>30</sup>

[50] The reversal of the Tribunal's factual findings and decision on remedy is not a consequence of a rigorous test and examination of its justifications with due deference to the expertise of its members demanded of the Competition Appeal Court by its *Imerys* and *Schumann*<sup>31</sup> decisions. It is more of an imposition of that Court's conception of what is right and a consequential replacement of the Tribunal's factual findings and discretionary decision on remedy with its own preference.

[51] Based on the expertise of its members, the evidence of economists, and other expert witnesses, the Tribunal made certain decisions. Those factual and policy decisions are indeed well-reasoned, insightful and comprehensive. I will limit myself to highlighting only a few key findings that do not require that we delve into factual disputes, which would in any event have been most inappropriate for this apex Court to

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<sup>30</sup> Competition Appeal Court judgment above n 7 at para 20.

<sup>31</sup> *Schumann Sasol (SA) (Pty) Ltd v Price's Daelite (Pty) Ltd* [2002] ZACAC 2; [2001-2002] CPLR 84 (CAC).

do. And they are whether the merger would give rise to a substantial lessening of competition; the determination of the local geographic market; regional dominance; a likelihood of harm; or a substantially negative impact on the interests of the public, regard being had to the constitutional right of access to health care services and whether prohibition is the appropriate remedy under the circumstances.

[52] Additional to the test for setting aside factual and policy findings on appeal, it is necessary that brief reflections be shared on the test for the assessment of harm or the substantial prevention or lessening of competition and the correct approach to constitutional interpretation.

[53] Beginning with the test and the correct interpretive approach, the Appeal Court failed to give proper effect to the purpose of the Act set out in section 2(b). This is particularly so in relation to its assessment of the likely substantial prevention or lessening of competition and public interest considerations. It also misdirected itself in a material respect by construing section 12A(1)(a) and (2) of the Act as requiring that a price increase post-merger be shown to be the result of the market share changes, which it termed “enhancement of market power”. This is not the test required by the Act. And nothing in the language and context of section 12A(1)(a) and (2) allows for the assessment to be conducted with reference to the “enhancement of market power” which is not even among the factors listed in section 12A(2). There is no textual or contextual support for this new test. In *Mondi*,<sup>32</sup> the Competition Appeal Court itself accepted that the assessment of harm has to be conducted within the specific framework of the Act. This enquiry necessitates recourse to the Preamble to the Act and the purpose thereof as set out in section 2.<sup>33</sup> The Appeal Court thus failed to follow this approach in circumstances where it was required to and innovatively laid down the “enhancement of market power” as the yardstick for the assessment to be conducted under section 12A(1)(a) and (2).

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<sup>32</sup> *Mondi Limited v Kohler Cores and Tubes* [2003] ZACAC 1; [2003] 1 CPLR 25 (CAC) (*Mondi*).

<sup>33</sup> *Id* at para 48.

[54] All that section 12A requires in this regard is that a determination be made whether there is a substantial prevention or lessening of competition. And this is ordinarily measured with reference to a potential increase in price. It does not lay down the “enhancement of market power” as the test or provide any basis for a court to do so. It follows that the majority departed from the wording of the Act which is the point of departure in statutory interpretation.

[55] In its interpretation of section 12A(1)(a) and (2) of the Act, the majority overlooked sections 7(2) and 39(2) of the Constitution, thus failing to adopt the correct interpretive approach to statutes as set out in this Court’s judgments.<sup>34</sup> Its approach fails to advance the purpose of the Act and to promote the spirit, purport and object of section 27 of the Constitution.

[56] That said, a somewhat detailed elaboration on the impermissibility of the Appeal Court’s interference with the Tribunal’s decision follows. This is not to be mistaken for an attempt to determine which of the factual findings made by the Tribunal or the Appeal Court are correct. Its purpose is merely to demonstrate that the Tribunal dealt with all the issues in line with its statutory powers, the jurisprudence of the Appeal Court and this Court. Additionally, it is to make the point that the Appeal Court was not entitled, in law, to interfere with the Tribunal’s decision.

*Local geographic market and substantial lessening of competition*

[57] Based on the internal documentation of the merging parties and all other evidence tendered, the Tribunal concluded that Potchefstroom and Klerksdorp should constitute or be part of one local geographic market for the provision of private multidisciplinary health care services. Unsurprisingly, because of the proximity of the two cities. Additionally, the historical trend reveals that patients from places as far away as 150km use the health care facilities in either of these cities for their treatment.

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<sup>34</sup> *Cool Ideas v 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC).

Regardless of what the trend might have been, concerning the willingness or apparent reluctance of the residents of Potchefstroom to travel to and use the Klerksdorp private multidisciplinary hospitals and *vice versa*, it cannot be a misdirection or a clearly wrong decision for the Tribunal to have found that there is actual competition or a real likelihood of future competition between similarly poised hospitals in the two cities. After all, they are only 50km and a 41 minutes' drive apart. And this, the Tribunal considered together with the trends relied on by the Competition Appeal Court for setting aside the Tribunal's determination of the local geographic market. If patients from rural areas could travel for more than double the distance between Klerksdorp and Potchefstroom, although admittedly because they have no facilities nearby, how can it be clearly wrong or a misdirection for the Tribunal to have concluded that residents of these two cities could, as some have already done, travel from one city to another in search of cheaper or high-quality health care services?

[58] More importantly, as both the Tribunal and the Competition Appeal Court minority's decisions observe, Mediclinic's own internal strategic documents have, as already said, revealed that it considers Klerksdorp and Potchefstroom private multidisciplinary hospitals to be competitors. It took some strenuous exercise for the majority to find some basis to support a view to the contrary. That said, the centrality of the local geographic market in determining whether the merger would lessen or not lessen competition substantially is self-evident here. The separation of the two cities for the determination of the local geographic market renders Mediclinic's footprints in Potchefstroom irrelevant to that determination. And that would then mean that the question of the possible regional dominance of Mediclinic, as a result of its acquisition of the two target hospitals in Klerksdorp, is thereby eliminated. Consequently, it would then simply be a case of a new player or replacement in the sector, that poses no threat to competition, harmlessly arriving in Klerksdorp. All this would then lead to the merger not being viewed as one that would result in the removal of a potentially or actually effective competitor to Mediclinic Potchefstroom in the form of the target

firm.<sup>35</sup> This factor alone has, as just indicated, contributed immensely to the reversal of the Tribunal's factual and policy findings as well as its remedy.

[59] The Appeal Court's majority rejected the findings of the Tribunal for reasons that do not demonstrate how the Tribunal could be said to have misdirected itself or been clearly wrong in its factual findings or policy decisions. Some of its key reasons are that no evidence was led to show that patients from Potchefstroom are likely to travel to Klerksdorp in the event of a small but significant non-transitory increase in price (SSNIP)<sup>36</sup> being imposed by hospitals in any of the two cities. And, as stated, that the history shows that only a small percentage of patients travelled from one city to another for medical treatment and presumably only when the specialist services they needed were not available in hospitals in their resident city. It also found that more patients do travel distances much longer than the distance between Potchefstroom and Klerksdorp, unlike the residents of these cities, only because they come from rural areas where similar medical facilities do not exist. They are, so to speak, forced by circumstances beyond their control to do so. The majority also placed some premium on inconvenience, travelling costs and the time factor as countervailing factors against the possible switch of "allegiance" in search of more affordable tariffs or better quality of services.

[60] Furthermore, the Competition Appeal Court dismissed Mediclinic's internal document that reveals that it regards private multidisciplinary hospitals in Klerksdorp as rivals or competitors of its Potchefstroom outfit for reasons that are not clear and satisfactory. It sought to explain away this damaging document as one that "contains the *puffery* one would expect in a sales pitch". That is not even what Mediclinic or the merging parties said in their own defence. Company documents must be taken for what

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<sup>35</sup> See section 12A(2)(h) of the Act.

<sup>36</sup> The "SSNIP test" defines a market by asking whether a small (usually 5-10%) but non-transitory increase in price of the impugned good would cause customers to procure a substitute for the good (in which case such substitutes fall within the relevant market), or would cause customers to procure the good (or its substitute) from a different geographical location (in which case that location falls within the relevant market).

they plainly represent or what they actually say and that is what the Tribunal did. The Tribunal cannot therefore be faulted for taking the view, as it did, that these strategic documents were the most reliable source of what the merging parties regarded as the relevant geographic market because “they were prepared based on commercial realities at the time and not for purposes of the merger proceedings”.

[61] Additionally, the Court treated and reduced the predicted and undisputed tariff hike to the level of insignificance. Lest we forget, to the overwhelming majority of South Africans, regard being had to our acute economic inequalities, even a 1% fuel or bread price hike probably constitutes a threat to their presumably shallow pockets and survival. And to the vulnerable group of uninsured patients it is even more so with the predicted percentage hike for health care services. It was therefore most unfortunate that the plight of the 100 or 200 uninsured patients that receive treatment from the Potchefstroom or Klerksdorp private multidisciplinary hospitals per year, was not accorded and handled, by the majority, with the necessary sensitivity and concern that their vulnerability cries out for or deserves. And that Court is, with respect, not in a position to tell whether or not the uninsured are price-sensitive. And we would all do well to avoid speculation on this issue.

[62] It is quite interesting and telling to note how the majority concluded its reasoning on the issues of the local geographic market and substantial lessening of competition. It, among other things, said—

“I thus consider that the Tribunal *erred* in holding that the relevant local market included both Klerksdorp and Potchefstroom. The Tribunal should have held that only the Klerksdorp hospitals compete for Klerksdorp patients and only Potchefstroom hospitals compete for Potchefstroom patients.”<sup>37</sup>

[63] I hasten to say that the test or trigger for the Competition Appeal Court to exercise its power to interfere with the Tribunal’s findings is not merely that it “erred”.

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<sup>37</sup> See the Competition Appeal Court judgment above n 7 at para 97.

The Tribunal must have misdirected itself or rendered a decision that is clearly wrong, as set out in *Bernert* and *Makate* as well as *Schumann* and *Imerys*. The majority went on to say:

“Because Potchefstroom and Klerksdorp do not fall in the same local market, the merger will not give rise to an SLC in relation to the local market within the meaning of section 12A(1). . . . Accordingly, any post-merger price increases at the target hospitals will not be a consequence of an SLC.”<sup>38</sup>

This buttresses the point made earlier in this judgment that the determination of the local geographic market is arguably the all essential component of the puzzle here. This finds further support from the majority’s remarks immediately below.

[64] On regional dominance in particular, the Court had this to say:

“The Tribunal found that the merger would give regional dominance in MaJB, which Mediclinic could exploit, at a national level, in its negotiations with schemes. . . . To the extent that the Tribunal’s reasoning depended on its finding that Klerksdorp and Potchefstroom are part of a single geographical market, it fails at the threshold. To the extent that it is a self-standing competition concern, *the evidence in support of this theory is not compelling*. . . . *The Tribunal thus erred* in finding that the merger would confer regional dominance on Mediclinic and that this would give rise to an SLC in negotiations between hospital groups and schemes for the construction of designated or preferred service provider networks.”<sup>39</sup>

That the Competition Appeal Court does not consider the evidence to be compelling, and that the Tribunal has in its view erred, does not in law empower it to set aside the Tribunal’s findings of fact.

[65] The Tribunal did not disregard the trend of a small percentage of patients from Potchefstroom seeking cheaper or better treatment in Klerksdorp and the residents of

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<sup>38</sup> Id at paras 98-9.

<sup>39</sup> Id at paras 97 and 100-1.

the latter travelling to Potchefstroom for the same reason. It set out to determine the “smallest geographic area over which a hypothetical monopolist<sup>40</sup> could impose and sustain a small but significant non-transitory increase in price or effect a deterioration in non-price effects”. The extent of that market was meant to depend on the distance that a patient would ordinarily be willing to travel in the event of a small but significant non-transitory increase in price at any of the hospitals.<sup>41</sup> And it was in this context that regard was had, not only to the proximity of the two cities to each other and expert evidence, but also “to what the merging parties’ own strategic documents reveal about the parameters of the geographic area in which they compete and who their competitors are in that ‘catchment’ area”. Again I say that Mediclinic had of its own accord said that private multidisciplinary hospitals in Klerksdorp were their competitors. And there is a detailed analysis of this issue by the Tribunal.<sup>42</sup> Although the Competition Appeal Court found an explanation out of this dilemma for them, it did so and interfered with the Tribunal’s decision in circumstances where the law does not allow it to.

[66] The Appeal Court’s approach to the provision of private health care services in a sector so difficult to enter, to survive in and be accessed by the broader public seems to inadvertently but effectively undermine the section 27 constitutional imperative, the need to open up space and ease entry into this sector for new and previously excluded players. This approach effectively frustrates the need to tamper with regional, and by extension national, dominance and to enhance easy competition, which is the set objective of the Act. As will be demonstrated shortly hereafter, the majority decision paid scant attention to the Preamble and purpose of the Act and thus failed to ensure that the local geographic market it determines will help consumers to have access to and freely select the quality and variety of services in the already costly private health care sector.<sup>43</sup>

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<sup>40</sup> See Tribunal judgment above n 9 at para 31.

<sup>41</sup> Id at para 123.

<sup>42</sup> Id at paras 124–149.

<sup>43</sup> See the Competition Appeal Court judgment above n 7 at para 136, which is reproduced at [74].

- [67] It is common cause or overwhelmingly accepted or not seriously disputed that:
- (a) entry into the private health care services sector is very difficult;
  - (b) the merger would result in an immediate increase in tariffs in a sector where costs are already high;
  - (c) tariff increase would be no less than the predicted percentage;
  - (d) the tariff would only be kept at a pre-existing level for a limited period;
  - (e) uninsured patients, who are vulnerable, would be hard hit by the tariff hike occasioned by the merger;
  - (f) the Commission would be unable to monitor the measures proposed by the merging parties to contain the tariff increase that would be occasioned by the merger; and
  - (g) Mediclinic is one of the three big unitary players in the private health care sector.

[68] And to buttress this point, it is necessary to again have the Tribunal speak to some of the key features of this case. It said:

“Furthermore, we note that the robust, common cause evidence during these proceedings was that:

- (i) there is a significant difference between the tariffs of Mediclinic and the target firms, with the target firms having significantly lower tariffs;
- (ii) the target firms provide significantly better discounts to uninsured patients than Mediclinic and on more tariff items; and
- (iii) the majority of medical aids were concerned about the effects of the proposed transaction on competition, specifically on tariffs.”<sup>44</sup>

The implications of the tariff hike for the most vulnerable group of patients – the uninsured – were dealt with at some length.

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<sup>44</sup> Tribunal judgment above n 9 at para 160.

[69] The Tribunal identified and sought to arrest the risk of the Potchefstroom and Klerksdorp combined catchment areas evolving or being marshalled into an effective dominant regional Mediclinic group. Again, this cannot be said to be a consequence of the Tribunal's clearly wrong assessment of the facts and issues or a misdirection. The target hospitals provide services at comparatively lower tariffs than Mediclinic Potchefstroom. This breathes life into the competitive spirit demanded by the Preamble, the purpose set out in section 2, the overall thrust of the Act and the constitutional right of access to health care services. That competitive environment ensures that "consumers have access to, and can freely select the quality and variety of goods and services they desire". Taking this away, as the merger would, was rightly found by the Tribunal to constitute a substantial lessening of competition.<sup>45</sup>

[70] The deference, by the Competition Appeal Court to the Tribunal, alluded to in both *Schumann* and *Imerys*, dictates that the Tribunal's factual findings and policy-oriented predictive decision should, in this case, have been left unaltered. The Tribunal has rendered a well-reasoned decision regarding the local geographic market, and the substantial lessening of competition. And Mediclinic's inability to address or provide a satisfactory solution to the deleterious effect of the immediate post-merger tariff increase on the consumer or the market, and its long term effects is properly explained. Much more is required than a mere difference of opinion or preference, for the Competition Appeal Court to be entitled to set aside these findings of the Tribunal.

*The Constitution and substantial public interest*

[71] The Constitution provides for a fundamental human right "to have access to health care services".<sup>46</sup> In interpreting section 12A of the Act, the Competition Appeal Court majority was required to have had regard to the provisions of section 39(2) of the Constitution which provides instructive guidance in construing any provision, including section 12A, the Preamble and purpose of the Act. This should have been done also

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<sup>45</sup> Id at paras 436-8.

<sup>46</sup> Section 27 of the Constitution.

with due regard to the State's constitutional obligation<sup>47</sup> to give effect to the rights in the Bill of Rights. Besides, both the Tribunal and the Competition Appeal Court are institutions of the State that bear the obligation to facilitate rather than impede, albeit inadvertently, the right of access to health care services.

[72] That approach to this interpretive exercise gives context to how the Tribunal and the Competition Appeal Court should have practically embraced their obligation to promote the spirit, purport and objects of the right to have access to health care services. In doing so, the pre-existing difficulty to enter that market and, the high and ever-rising tariffs consumers of medical services already have to contend with in the private sector, would necessarily have had to be factored into that process.

[73] With that understanding, Mediclinic's predicted post-merger tariff hike, in this country of huge inequalities and in this distressed economy, would not have been understood and treated as insignificant or miniscule as the Appeal Court seems to have perceived it. To a wealthy South African, the percentage by which tariffs would go up after the merger is understandably negligible and inconsequential. But, not so to an average South African who is not even a member of any medical scheme, not that members of medical schemes necessarily find these high tariffs any easier to live with. Maintaining or increasing the scope for choice of essential and much-needed services with particular regard to the plight of the financially under-resourced or the vulnerable, should always be at the back of the decision-makers' minds when dealing with mergers. This is, after all, one of the key demands of the Preamble and purpose of the Act.

[74] The Tribunal and the minority judgment confronted and grappled with these fundamental issues regarding access to medical services in the private sector in a practical and realistic way. Not much to that end is evident from the Competition Appeal Court's majority judgment. Of grave concern is, again, how the majority dealt with the implications of its judgment on the constitutional right of access to health care

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<sup>47</sup> Section 7 of the Constitution.

services, regard being had to the ever-increasing costs in the private health care industry and the impact thereof on the interests of the public. The majority underscores all the relevant constitutional and statutory principles but takes them no further. This is all it had to say in this connection:

“The position is different for uninsured patients. Although their number in Klerksdorp is likely to be small, perhaps only one or two hundred admissions per year, they can be viewed as a vulnerable class. Medical care is not a discretionary item. Health care is a fundamental right guaranteed by section 27(1) of the Constitution. Among the Competition Act’s purposes, as listed in section 2, are to provide consumers with competitive prices and product choices, and to advance the social welfare of South Africans. In the Preamble one reads that the Act was passed *inter alia* to ‘provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire.’<sup>48</sup>

The vulnerability of uninsured patients, the fundamental right to access health care services, the objectives laid out in the Preamble and purpose of the Act and the need for consumers to have a free and wider choice of the high quality goods and services are commendably alluded to by the majority here. Sadly, nothing of consequence is said about them in reasoning its way to setting aside the findings and remedy of the Tribunal. This is fatal to that Court’s judgment and order.

[75] Not only does the minority judgment allude to the Tribunal’s acute awareness of the fundamental importance of everyone’s need for the service that lies at the heart of this matter – health care – but it also went on to say:

“The evidence, in my view, demonstrates that the proposed merger would undermine rather than advance the constitutional right of the populace on the MaJB area to health care. This is because the proposed merger would make access to health care in that area more rather than less onerous. It would therefore not be in the public interest to approve the proposed merger.”<sup>49</sup>

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<sup>48</sup> Competition Appeal Court judgment above n 7 at para 136.

<sup>49</sup> *Id* at paras 278–9.

[76] The Tribunal expressed itself as follows in these key issues:

“The competition effects of any hospital merger should be considered in the context of the private health care sector as ‘a particular industrial sector or region’ contemplated in section 12A(3)(a) of the Act. We concur with the Commission that this sector serves an essential public good, which the Constitution protects under section 27. The proposed transaction will have a significant effect on the health care costs of both insured and uninsured patients living in a specific region – the rural Potchefstroom/Klerksdorp region, given that the target hospitals have significantly lower tariffs than Mediclinic. Moreover, the uninsured patients in this area, which are a vulnerable group, will have less choice of cheaper hospitals post-merger and this will adversely affect their ability to switch between cheaper options.

The merging parties themselves submitted that it is trite that there are serious concerns about private health care inflation in South Africa, and that there is a need to curb, escalating costs. They however submitted that there is substantial debate as to precisely what the drivers are of such escalations.”<sup>50</sup>

[77] Here the Tribunal, unlike the majority, sought to do what the Constitution, the Preamble to the Act and its purpose enjoin it to do. The impact of the merger on health care costs for both insured and uninsured patients, the vulnerability of uninsured patients, and the choice-enhancing effect of costs being lower at target hospitals, were engaged with and addressed. Additionally, the Tribunal grappled with a pertinent public interest concern that there is already a high and historical concentration of ownership and control in the private hospital sector which would be somewhat exacerbated by the proposed merger, and that Mediclinic would have regional dominance which would have an impact on bargaining dynamics in negotiating for discounts. It also addressed that the undisputed increase in tariffs at the target hospitals that must be seen within the broader context of serious concerns about private health care inflation in South Africa and the need to curb that escalation. The real risk of the merger limiting the uninsured patients’ choice between alternative hospitals since

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<sup>50</sup> Tribunal judgment above n 9 at paras 455–6.

cheaper options, in the form of target hospitals and their lower tariffs, would be eliminated by the merger, was also addressed.

[78] A more significant part of the Tribunal’s conclusion, that the Competition Appeal Court has been unable to explain why it is entitled to interfere with, bears repetition. Here it is:

“We have found that the proposed transaction is likely to result in a substantial prevention or lessening of competition in the relevant market, with significant price and non-price effects that would be harmful to customers. The merging parties’ proposed behavioural remedies do not address the source of the competitive harm, are limited in duration and inappropriate or inadequate in a number of respects, including the Commission’s inability to effectively monitor and enforce the various proposed behavioural conditions. Furthermore . . . the private hospital market is of public importance in South Africa with serious concerns about rising private health care costs in our country and will be prejudiced if the proposed behavioural conditions failed to remedy the likely substantial prevention or lessening of competition (SLC).

We note that, as the Competition Appeal Court said in *Imerys*, should market conditions change, the proposed transaction may still be presented for investigation by the Commission and possible approval. The door would not be permanently shut to the merging parties by this prohibition.”<sup>51</sup>

### *Remedy*

[79] The preceding statement links up well with the remedy component of both the Tribunal and the Competition Appeal Court’s decisions. And Rogers JA drove that point home more compellingly in *Imerys*. He, among other things, said:

“‘The merger will likely give rise to an SLC. Although the proposed conditions are more likely than not to remedy the likely SLC, there is a reasonable possibility that they will fail to do so. Therefore, we prohibit the merger.’

[W]here the uncertainty about the adequacy of the conditions concerns the likely duration of the SLC rather than the nature and content of the SLC, prohibition has this

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<sup>51</sup> Id at paras 436–8.

advantage over conditional approval. . . . If the merger is conditionally approved and the conditions turn out to be inadequate to neutralise the SLC, the harm cannot be reversed.”<sup>52</sup>

[80] This is exactly where the Tribunal found itself here. It concluded that the merger would most likely give rise to a substantial lessening of competition and that the conditions put forward by Mediclinic to ameliorate that substantial lessening of competition were inadequate. Heeding the sound word of caution in *Imerys* and in the exercise of its discretion, it chose to prohibit rather than approve the proposed merger. Evidently, the benefit of doing so was to circumvent the highly detrimental consequences of approving the merger in circumstances where the predictable harm, most likely to flow from the approval, would be irreversible. This would be so should the remedial conditions propounded by Mediclinic turn out to be inadequate for the purpose of neutralising the substantial lessening of competition, particularly because the Commission lacked the necessary capacities and resources to effectively monitor Mediclinic’s compliance. And this applies with equal force to the consequential harm the merger posed to the substantial interests of the public.

[81] It bears repetition, that South Africa is at present the land of gross economic inequalities. Its wealth or economic ownership and control is concentrated in the hands of a few. And in the private health care services sector, Mediclinic is one of the three dominant groups at a national level. Grounding the substantiality of lessened competition on a tariff hike, as “insignificantly” low as the predictive percentage is to the opulent, and with due regard to the already high and ever-escalating costs in the private health care services sector, the already dominant position of a company seeking to take over and the constitutional imperative to fulfil the right of access to health care services do, all things considered, justify the discretionary choice of prohibition as a remedy in this matter. This is supported by the Tribunal’s finding that the constitutionally-inspired public interest consideration would be harmed rather than advanced by the proposed merger.

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<sup>52</sup> *Imerys* above n 23 at paras 40-1.

[82] The choice of this remedy does not constitute a material misdirection that would otherwise allow an appellate court to interfere with the exercise of this true discretion. Laying down the permissible basis for interfering with the exercise of this kind of discretion this Court had this to say in *National Coalition*:

“A Court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. On its face, the complaint embodied in the ground of appeal sought to be introduced by the amendment does not meet this test because it alleges only an error in the exercise of its discretion by the High Court.”<sup>53</sup>

Here too, the Competition Appeal Court identifies only an *error* on the part of the Tribunal.

### *Conclusion*

[83] In sum, all the key issues on which this matter turns were comprehensively and methodically analysed and sound reasons advanced in support of the findings made. That the Competition Appeal Court saw the issues somewhat differently or holds the view that the Tribunal “erred”, is not the test. The issue is whether the Tribunal, a specialist adjudicator which had embarked on a probabilistic investigation before it gave a predictive decision, misdirected itself or was clearly wrong in its key findings and did commit a material misdirection with regard to remedy. And the answer is NO!

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<sup>53</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at para 11.

[84] The Competition Appeal Court was thus not entitled to set aside that remedy unless it could demonstrate that this is a case where a material misdirection had been committed by the Tribunal.<sup>54</sup>

[85] For these reasons, the findings and remedy of the Tribunal should have been left intact. The decision of the Competition Appeal Court thus falls to be set aside.

[86] In the view we take of this matter, it is not necessary to deal with the Commission's conditional Rule 31 application relating to the exemption it had granted to the National Health Network.

#### *Costs*

[87] The Commission is the successful party and costs should ordinarily follow the result. But, it is an institution of the State which draws its budget from the national fiscus. In line with *Biowatch*,<sup>55</sup> and there being no exceptional circumstances that would warrant ordering the respondents to pay the Commission's costs since constitutional issues are implicated and ventilated, each party will have to bear its own costs

#### *Order*

[88] In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Competition Appeal Court is set aside.
4. There will be no order as to costs.

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<sup>54</sup> *Id.*

<sup>55</sup> *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

THERON J (Khampepe J concurring):

*Introduction*

[89] I have had the benefit of reading the judgment of my Brother Mogoeng CJ (main judgment). Regrettably, I am unable to agree that this matter engages our jurisdiction. In my view, the questions of law which are alleged to arise either amount to purely factual questions or relate to remarks made by the Competition Appeal Court that were *obiter dicta* (comments made in passing) or, at most, are questions about the application of a settled legal test. Properly understood, this appeal turns on three questions of fact: what is the relevant market, will the merger cause a substantial lessening of competition, and will the merger cause prices at the target hospitals to increase or the quality of service to decrease?

[90] It is trite that a court is obliged, in terms of section 39(2) of the Constitution, to interpret legislation in a manner which promotes the spirit, purport and objects of the Bill of Rights. Accordingly, where the Competition Act is interpreted without sufficient regard to the section 39(2) injunction, this Court might well have cause to intervene. But this is not the case here. In this matter, we are not required to interpret the Competition Act. What we are asked to do, under the guise of constitutional and legal argument, is to overturn the factual findings of a specialist court that is statutorily empowered to make such determinations. This is not what section 167(3)(b) of the Constitution permits.<sup>56</sup>

*The nature of this matter*

[91] As the main judgment explains, the Tribunal and Competition Appeal Court were required to consider whether Mediclinic and Matlosana's proposed merger should

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<sup>56</sup> *S v Ramabele* [2020] ZACC 22; 2020 (2) SACR 604 (CC); 2020 (11) BCLR 1312 (CC) at para 33; *Tjiroze v Appeal Board of the Financial Services Board* [2020] ZACC 18; 2021 (1) BCLR 59 (CC) at para 16; *Mbatha v University of Zululand* [2013] ZACC 43; 2014 (2) BCLR 123 (CC) at paras 196-8; and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) (*Boesak*) at paras 15-6.

be approved or prohibited. Section 12A of the Competition Act sets out the relevant inquiry for such a determination. It requires that three questions be answered:

- (a) Is the impugned merger likely to substantially prevent or lessen competition?<sup>57</sup>
- (b) If so, is the merger likely to result in any technological, efficiency or other pro-competitive gain which will offset the anti-competitive effects of the merger, and would not likely be obtained if the merger is prevented, and can the merger be justified on substantial public interest grounds?<sup>58</sup>
- (c) Irrespective of the answer to the first question, can the merger be justified on substantial public interest grounds, or do such grounds weigh against its approval?<sup>59</sup>

[92] In order to answer these questions, various antecedent factual inquiries must take place. In particular, a court must evaluate the relevant facts that undergird an application of the SSNIP test,<sup>60</sup> and assess the evidence as to the likely effect that the proposed merger will have on market conditions and on prices.

[93] This is illustrated by the case before us. For example, before they could apply section 12A, both the Tribunal and Competition Appeal Court considered the proximity of Klerksdorp and Potchefstroom, patient flows between those two towns, and the likely effect of the merger on the hospital market structure and on prices.<sup>61</sup>

[94] It follows that there is a complex fact-based inquiry in merger proceedings which is antecedent to the application and interpretation of section 12A. And crucially, in

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<sup>57</sup> Section 12A(1) of the Act.

<sup>58</sup> Id at section 12A(1)(a) and (b).

<sup>59</sup> Id at section 12A(1A).

<sup>60</sup> See above n 36.

<sup>61</sup> Tribunal judgment above n 9 at paras 125, 146, 205-8, 298 and 338-9 and Competition Appeal Court judgment above n 7 at paras 44-7, 98, 145 and 202.

certain cases, such as the one before us, the dispute may turn entirely on this fact-based inquiry.

*Is this Court's jurisdiction engaged?*

[95] For leave to appeal to be granted in this Court, the applicant must meet two requirements. First, the matter must fall within the jurisdiction of this Court in that it raises a constitutional issue or an arguable point of law of general public importance. Second, the interests of justice must warrant that leave to appeal be granted.

[96] The Commission contends that this matter involves four issues which engage our jurisdiction:

- (a) First, it says that the Competition Appeal Court erroneously interpreted section 12A(1) of the Competition Act, by holding that a change in market structure is the only relevant consideration in determining whether a merger will likely cause a substantial lessening of competition.
- (b) Secondly, that the Competition Appeal Court failed, in assessing the price effects of the merger on the public interest, to place an onus on the merging parties to demonstrate “off-setting efficiencies”.
- (c) Thirdly, that the Competition Appeal Court failed to show the required deference to the Tribunal’s factual determinations and its findings on remedy. The Commission argues that, in doing so, the Competition Appeal Court departed from the approach laid down in *Imerys* (the deference issue).
- (d) Fourthly, that the Competition Appeal Court failed to adequately consider the right of access to healthcare services in its section 12A inquiry and that its interpretation and application of section 12A was therefore not accordance with sections 7(2) and 39(2) of the Constitution (the section 27 issue).

[97] The Commission contends that these issues routinely arise in merger proceedings and that their determination will affect how the Commission, the Tribunal and the Competition Appeal Court assess mergers in the future.

[98] The main judgment places particular reliance on the section 27 and deference issues. In respect of the former, it holds, in substance, that our constitutional jurisdiction is engaged because the proposed merger is in the healthcare sector and may have an impact on access to private healthcare services. However, as this Court has held time and again,<sup>62</sup> the fact that a matter impacts or implicates a constitutional right by itself is insufficient to engage our jurisdiction. In *Loureiro*, this Court held that—

“the mere fact that a matter is located in an area of the common law that can give effect to fundamental rights does not necessarily raise a constitutional issue. It must also pose questions about the interpretation and development of that law and not merely involve the application of an uncontroversial legal test to the facts.”<sup>63</sup>

[99] This is because it is difficult to conceive of a matter totally without implications for constitutional rights. Accordingly, if our jurisdiction was engaged by the mere implication of constitutional rights, section 167(3)(b)(i) of the Constitution would be rendered meaningless and our doors would be thrust open to adjudicate any and all disputes. The fact that this matter could implicate section 27 therefore does not mean, without more, that it engages our jurisdiction.

[100] How is section 27 implicated in this matter? As mentioned, the first and most obvious way in which the merger has implications for section 27 is that it is in the healthcare sector. However, as I have said, this, in itself, does not mean that our jurisdiction is engaged.

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<sup>62</sup> *Boesak* above n 56 at paras 15-6; *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) at para 33; and *Thebus v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 46.

<sup>63</sup> *Loureiro* id at para 33.

[101] The second way in which section 27 might be implicated, and which appears to animate the main judgment, is through the Competition Appeal Court's section 12A(3) analysis. The main judgment bemoans the fact that, unlike the Tribunal, the Competition Appeal Court purportedly failed to have regard to the vulnerability of uninsured patients, and to the fact that the merger might hinder the realisation of section 27 rights by driving hospital costs up. This appears to be the central basis upon which the main judgment holds that this matter concerns the State's obligation to respect, promote and protect the Constitution, and a court's duty to interpret legislation in terms of section 39(2). It is significant that the main judgment's finding that section 27 rights are adversely impacted is premised on the assumption that the proposed merger will in fact increase concentration in the healthcare market and increase prices.

[102] With respect, in making this assumption, the main judgment appears to misconstrue the Competition Appeal Court's reasoning. In my view, that Court's judgment reveals why section 27 is not implicated in a manner that renders this a constitutional matter. The Competition Appeal Court held, after a careful assessment of the facts and the Tribunal's decision, that the impugned merger was *not* likely to cause prices to increase, or result in increased concentration in the healthcare market. It did not hold, as the main judgment appears to suggest, that the vulnerable uninsured patients were of such a miniscule number as to be irrelevant to the public interest inquiry. Indeed, the Competition Appeal Court was clearly alive to the fact that the services rendered by the merging parties impact upon the realisation of section 27 rights and was mindful that in this regard uninsured patients stand on a different footing to insured patients:

“The position is different for uninsured patients. Although their number in Klerksdorp is likely to be small, perhaps only [...], they can be viewed as a vulnerable class. Medical care is not a discretionary item. Health care is a fundamental right guaranteed by section 27(1) of the Constitution. Among the Competition Act's purposes, as listed in section 2, are to provide consumers with competitive prices and product choices, and to advance the social welfare of South Africans. In the preamble one reads that the Act

was passed inter alia to ‘provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire’.<sup>64</sup>

[103] Had the Competition Appeal Court failed to take cognisance of these concerns, our jurisdiction might well have been engaged. We would then have been required to assess, with regard to sections 27 and 39(2) of the Constitution, whether the plight of the uninsured patients constituted a “substantial public interest ground” justifying the prohibition of the merger. The Commission argued that this is precisely what we were required to assess. But the Competition Appeal Court did not hold that the effect of the merger on uninsured patients was an irrelevant concern, and this question is therefore plainly not before us. Rather, as I have said, it held that the likely effect of the merger was that prices would decrease. To avoid any doubt, I note that early in its judgment the Competition Appeal Court noted that “prices for uninsured patients in Klerksdorp *might* thus go up”.<sup>65</sup> However, after considering the actuarial evidence, the Competition Appeal Court held:

“[O]ne may reasonably expect that the net effect of the merger and the implementation of Mediclinic’s efficiency initiatives will be that, despite the implementation of Mediclinic’s higher tariffs, CPE at the targets will fall by about [...]%. ”<sup>66</sup>

[104] We might doubt whether the actuarial evidence justified this finding in respect of both the insured and uninsured, but this was nonetheless Competition Appeal Court’s finding, and it was plainly a finding of fact. Until this factual finding is set aside, there is no basis upon which this Court can embark on an enquiry as to the relevance of sections 27 and 39(2) when interpreting and applying section 12A. Indeed, if the Competition Appeal Court’s finding that there will be no price increase stands, how can it be said that the constitutional rights of uninsured patients are imperilled? It should be recalled that in *Jiba*, this Court said that “[f]or a constitutional issue to arise the claim advanced must require the consideration *and application* of some constitutional rule or

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<sup>64</sup> Competition Appeal Court judgment above n 7 at para 136.

<sup>65</sup> Id at para 137. (Emphasis added.)

<sup>66</sup> Id at para 202. This figure has been omitted because it is confidential.

principle in the process of deciding the matter”.<sup>67</sup> Until and unless it is established that there was a price increase, there is no need to apply section 27 in the context of the public interest assessment under section 12A. Moreover, and perhaps most importantly, because the Competition Appeal Court held that the merger would not cause prices to increase, it cannot be said to have made any binding decision as to the effect of section 27 on section 12A, or its effect on inquiries into mergers in the healthcare sector.

[105] The third manner in which section 27 might be implicated in this dispute, and which was pressed by the Commission, relates to the interpretation of section 12A(1), and the question of onus in the public interest inquiry where no substantial lessening of competition has been shown.

[106] On this score, the Commission argued that the Competition Appeal Court erroneously interpreted section 12A(1) of the Competition Act, because it did not observe the section 39(2) injunction to promote the objects of the Bill of Rights. It contended, in particular, that the Competition Appeal Court erred in holding that for the purposes of determining whether a merger will cause a substantial lessening of competition, the only relevant consideration is whether the merger will result in a change of market share. It also argued that the Competition Appeal Court erroneously held that, in the context of the public interest enquiry, the merging parties were not obliged to demonstrate that Mediclinic’s off-setting efficiencies outweighed the public interest considerations which might have militated against approving the merger. This runs contrary to section 39(2), the Commission argued, because the Competition Appeal Court was required to approach the matter “on the basis that it had an obligation as far as possible to lower legal and financial hurdles to ensure the realisation of the right of access to healthcare services”.

[107] These interpretive questions are, however, irrelevant to a determination of the Commission’s appeal. Even if the Competition Appeal Court had accepted the

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<sup>67</sup> *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) (*Jiba*) at para 38. (Emphasis added.)

Commission's construction of section 12A(1), it would not have made a different order. And this is because it found, on the facts, that the merger was not likely to give rise to a price increase. As a result, to the extent that it made a finding that price effects are irrelevant to a determination of whether a merger will likely cause a substantial lessening of competition, this was plainly *obiter dictum*.

[108] Likewise, while the Competition Appeal Court held that once no substantial lessening of competition had been shown, the merging parties did not bear the onus of justifying the merger in terms of section 12A(3), this was in no way determinative of its finding. Instead, the central basis of the Competition Appeal Court's decision was that the merging parties had adduced sufficient evidence to demonstrate that Mediclinic's superior efficiencies would offset its higher tariffs, which would likely mean that prices at the target hospitals would decrease post-merger. The Competition Appeal Court also evaluated whether any other evidence justified the prohibition of the merger, and found that there was none. In so doing, it did not rely on the question of onus. The Competition Appeal Court's remarks regarding onus were thus also *obiter dicta*, and irrelevant to a determination of the present matter.

[109] As a result, this matter is not akin to the various cases in which this Court has held that its jurisdiction is engaged, despite the fact that it was required to engage in a determination of factual disputes. In those matters, and unlike in the case before us, although this Court was required to engage in an assessment of the facts, a legal question was in dispute, and the impugned *ratio decidendi* (reason or rationale for the judgment) of the lower court had determined the answer to the legal question.<sup>68</sup>

[110] For the same reason, the various questions regarding the correct interpretation of section 12A and onus do not engage our general jurisdiction. I emphasise, even if the

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<sup>68</sup> See for example: *Premier, Mpumalanga v Executive Committee of the Association of State Aided Schools: Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC); *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC); and *Thebus* above n 62.

Competition Appeal Court had adopted the Commission's interpretation of section 12A, or imposed an onus on the merging parties in the context of the section 12A(3) enquiry, it would not have found differently. These legal questions were immaterial to the Competition Appeal Court's decision, and therefore do not engage our jurisdiction.

[111] This Court has held that its jurisdiction is not engaged where the alleged jurisdictional foothold was immaterial to the lower court's determination. In particular, in *Mbatha*, this Court held that "a court's expression of view on a matter immaterial to its reasoning cannot confer jurisdiction on an appellate court".<sup>69</sup> This is precisely the case here. The various legal questions which the Commission suggests engage this Court's jurisdiction, and on which the Competition Appeal Court expressed a view, were entirely immaterial to that Court's decision.

[112] That the dispute, in truth, is fundamentally factual, is evident from the Commission's founding affidavit:

"It was plain from the merging parties' argument in the CAC, as it should be plain from the judgment of the CAC, that the merging parties attacked the Tribunal's findings of fact and exercise of remedial discretion. The findings of fact also involved the Tribunal's economic evaluation based on the tendered evidence with regard *inter alia* to market definition, the likelihood of a substantial lessening of competition ('SLC') and public interest considerations."

[113] Incorrect findings of fact do not raise constitutional issues.<sup>70</sup> Nor do they raise points of law.<sup>71</sup> As this Court explained in *Jiba*, "if what is at issue in a particular case

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<sup>69</sup> *Mbatha* above n 56 at para 198. In addition, at para 221, in a concurring judgment, Madlanga J reasoned that:

"Based on this and *Boesak*, in a scenario where it is clear that the substance of the contest between parties is purely factual, it cannot be said to raise a constitutional issue purely because an applicant says it does. Otherwise, that would be the simplest stratagem by means of which the unscrupulous would have their issues ventilated in this Court under the guise that they raise constitutional issues."

<sup>70</sup> *Jiba* above n 67 at para 49.

<sup>71</sup> *Id* at para 58.

is the determination of facts, the jurisdiction of this Court is not engaged”.<sup>72</sup> Moreover, incorrect findings of fact are not transformed into legal issues because a constitutional right is implicated. To hold otherwise is to assume that, somehow, a factual question can be answered with recourse to a constitutional right.

[114] The only remaining leg upon which our jurisdiction might be established is the supposedly legal question about the circumstances in which the Competition Appeal Court can permissibly interfere with the factual findings and remedy of the Tribunal. My Brother Mogoeng CJ says this is an arguable point of law.<sup>73</sup> This reasoning is plainly at odds with what this Court held in *Jiba*. There, it will be recalled, the Supreme Court of Appeal had overturned various factual findings of the High Court, in order to overturn the High Court’s finding that the impugned advocates should be struck from the roll. It was argued that this interference was impermissible, and that our jurisdiction was therefore engaged.<sup>74</sup> However, as this Court explained:

“It may well be that the majority in the Supreme Court of Appeal here has erroneously interfered with the discretion of the High Court. However, this does not raise an arguable point of law of general public importance. As outlined above, the error here lies in the factual assessment. A decision that is based on wrong facts does not amount to an arguable point of law. The enquiry that is undertaken to correct it remains factual.”<sup>75</sup>

[115] Applying the dicta from *Jiba*, if the Competition Appeal Court erred, it erred in its factual assessment. This error is not elevated into a legal question by virtue of the fact that the Competition Appeal Court allegedly failed to pay sufficient deference to the Tribunal. And the main judgment provides ample demonstration why. In order to assess whether the Competition Appeal Court erroneously interfered with the

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<sup>72</sup> Id at para 50.

<sup>73</sup> See [37].

<sup>74</sup> *Jiba* above n 67 at para 58.

<sup>75</sup> Id.

Tribunal's factual findings, the main judgment is forced to evaluate and criticise the factual findings of the Competition Appeal Court.

[116] That the main judgment does so for the purpose of determining whether the Competition Appeal Court paid sufficient deference to the Tribunal's factual findings does not transform a factual inquiry into a legal one. Where a litigant complains that an appeal court overstepped the bounds of permissible interference with factual findings of a trial court, the assessment that is called for is inevitably factual. A court seized with such an appeal must establish whether the court a quo erred on the facts in a manner sufficient to warrant appellate interference, and this invariably entails an evaluation of the factual findings made by the respective courts. Even if there is a distinction between revisiting factual findings made by an appeal court and evaluating whether it was entitled to interfere with factual findings, that distinction, for present purposes, is more apparent than real. Both would draw this Court into a determination of whether the Tribunal or Competition Appeal Court were wrong on the facts.

[117] Relatedly, I do not agree that the Competition Appeal Court's alleged erroneous interference with the remedial action of the Tribunal means that our jurisdiction is engaged. This is because, as the Competition Appeal Court correctly explained, once it overturned the findings of the Tribunal in respect of the substantial lessening of competition and public interest effects, it was at large to determine a suitable remedy. The main judgment appears to reject this explanation as inadequate. It is difficult to see why. In circumstances where the Competition Appeal Court finds that the Tribunal erred in holding that the merger would cause a substantial lessening of competition or gives rise to public interest concerns justifying its prohibition, it would be absurd to hold that the Appeal Court was not entitled to interfere with the Tribunal's remedy.

[118] This is also precisely why the Competition Appeal Court's findings on remedy do not engage our jurisdiction: in order to address those findings, we would first have to overturn its factual findings which permitted interference with the Tribunal's remedy. Thus, once again, we are confronted with what is, in reality, a factual question. And,

as I have been at pains to emphasise, this means that the Commission's appeal does not engage our jurisdiction.

[119] In any event, and as the main judgment explains, the principles governing an appellate court's interference with the factual findings and discretionary remedial findings of lower courts are settled. Accordingly, on the assumption that the Competition Appeal Court's alleged errors were not purely factual, they would amount to no more than the misapplication of a settled legal test. As this Court has repeatedly held, the misapplication of a settled legal test does not engage our jurisdiction.<sup>76</sup>

[120] Lastly, even if, contrary to what I believe to be the correct position, our jurisdiction is engaged, it would not be in the interests of justice to grant leave. As I have explained, and as the main judgment demonstrates, in order to upset the decision of the Competition Appeal Court, this Court is forced to overturn the detailed factual findings of a specialist court statutorily empowered to make such findings. And while the main judgment might do so under the pretence that the Competition Appeal Court failed to pay sufficient deference to the Tribunal, the assessment remains entirely factual. Absent a dispute about a legal question which was material to the lower court's decision, this is precisely the sort of inquiry which the interests of justice suggest we should not undertake.

[121] In this regard, *Media 24*<sup>77</sup> is instructive. There, it will be recalled, this Court was asked to determine whether pricing above average avoidable cost but below average total cost amounts to predation.<sup>78</sup> A narrow minority of this Court held that

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<sup>76</sup> *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (8) BCLR 807 (CC) at para 49; *Jiba* above n 67 at para 59; *Booyesen v Minister of Safety and Security* [2018] ZACC 18; 2018 (6) SA 1 (CC); 2018 (9) BCLR 1029 (CC) at paras 50-3; and *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC) at para 9.

<sup>77</sup> *Competition Commission of South Africa v Media 24 (Pty) Limited* [2019] ZACC 26; 2019 (5) SA 598 (CC); 2019 (9) BCLR 1049 (CC) (*Media 24*).

<sup>78</sup> *Id* at para 34.

this question did not engage our jurisdiction and that, even if it did, the interests of justice militated against granting leave.<sup>79</sup> To this end, the minority held that:

“The adjudicative institutions under the Competition Act are expert bodies and due recognition must be given to this, also in determining the proper constitutional competence of this Court in relation to competition matters. In addition to the accepted deference given to other courts in relation to factual findings, this means a similar deference to the competition authorities as better qualified to determine economic issues.”<sup>80</sup>

[122] A majority of the Court granted leave.<sup>81</sup> But its reasons for doing so echoed the concerns of the minority about the Competition Appeal Court’s functional competence. In particular, Goliath AJ explained that “[w]ere this matter to confront the Court with a factual question, it might well be in the interests of justice to defer to the specialist courts but as the third judgment points out, ‘this question entails critically examining the policy and normative implications of the various standards for predatory pricing’”.<sup>82</sup> In this matter, we are not confronted by a question which requires that we engage the normative or policy underpinnings of any rule of competition law. Instead, and at its height, this case requires that we assess whether the Tribunal’s findings were sufficiently erroneous as to warrant interference by the Competition Appeal Court. But that question, as I have stressed, is fundamentally factual. As a result, and on the strength of *Media 24*, even if our jurisdiction is engaged, the interests of justice demand that we defer to the expertise of the Competition Appeal Court, and thus refuse leave to appeal.

[123] For these reasons, I would dismiss the appeal.

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<sup>79</sup> Id at para 124.

<sup>80</sup> Id at para 136.

<sup>81</sup> Id at para 4.

<sup>82</sup> Id at para 52.

For the Applicant:

N Maenetje SC and Y Ntloko instructed  
by Competition Commission of South  
Africa

For the Respondents:

J Butler SC, M Norton SC and  
M Mbikiwa instructed by Cliffe Dekker  
Hofmeyr