

What is the Test for Intervention in Merger Proceedings?

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Insights from Lewis Stores Proprietary Ltd v Pepkor Holdings Ltd and Others

INTRODUCTION

In the matter of *Lewis Stores Proprietary Ltd v Pepkor Holdings Ltd and Others*¹, the Constitutional Court handed down a judgment setting out the test for third-party intervention in merger proceedings.

The case arose from Lewis Stores (Pty) Ltd's attempt to intervene in large merger proceedings between Pepkor Holdings Ltd and Shoprite Holdings Ltd. The central legal dispute concerned whether the Competition Appeal Court (CAC) had introduced a stringent new standard for third-party interveners, or had misapplied the existing intervention test, thereby imposing an unduly onerous and unworkable threshold.

THE BASIS FOR INTERVENTION

Lewis Stores (Pty) Ltd sought to intervene before the Competition Tribunal, contending that the proposed acquisition by Pepkor Holdings Ltd of Shoprite Holdings Ltd's OK Furniture and House & Home divisions would fundamentally reshape the competitive structure of the low-to-medium income furniture retail industry.

Lewis Stores (Pty) Ltd maintained that it possessed detailed, first-hand information including national pricing data and store-level knowledge that the Competition Commission had either failed to obtain or failed to properly analyse during its investigation. The Competition Tribunal granted Lewis (Pty) Ltd limited participation rights, finding that Lewis Stores (Pty) Ltd had presented a credible, merger-specific theory of harm, and that Lewis Stores (Pty) Ltd had access to information that could meaningfully assist the Competition Tribunal.

THE CAC'S "NOVEL" EVIDENTIARY THRESHOLD

The merger parties appealed to the CAC, averring that Lewis Stores (Pty) Ltd had failed to demonstrate that it possessed unique or otherwise unobtainable information, and that Lewis (Pty) Ltd's participation

would introduce substantial delay, and that the Competition Tribunal had misunderstood the legal test for intervention.

The CAC placed considerable emphasis on the need for expedition in merger proceedings and on the Competition Tribunal's inquisitorial and case-management powers. The CAC upheld the appeal, thereby overturning the Competition Tribunal's decision and dismissing the intervention application on the basis that Lewis Stores (Pty) Ltd had failed to show that it possessed unique or otherwise unobtainable information that was capable of materially assisting the Competition Tribunal through intervention. Lewis Stores (Pty) Ltd thereafter sought leave to appeal in the Constitutional Court.

CONSTITUTIONAL COURT'S VIEW

The issues before the Constitutional Court were:

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

The Constitutional Court recognised that the appeal raised a point of law of general public importance. It held that the CAC had either introduced a novel test for intervention, or had misapplied the existing test, and that this constituted an error of law implicating a litigant's right of access to courts.

In coming to its decision, the Constitutional Court reaffirmed the settled test for intervention as requiring a prospective intervener to show either:

- a material interest in the proceedings; or
- an ability to assist the Competition Tribunal.

The Constitutional Court set aside the CAC's decision, finding that the CAC had improperly elevated the threshold for intervention by requiring Lewis Stores (Pty) Ltd to prove that its information was unique or otherwise unobtainable.

DEFERENCE TO THE TRIBUNAL'S DISCRETION

The Constitutional Court confirmed that the Competition Tribunal, as a specialist adjudicative body, enjoys a “true discretion”, which may only be interfered with where it was not exercised judicially, was based on a wrong principle or misdirection, or resulted in a decision that no properly directed tribunal could reasonably have reached.

Consequently, the Constitutional Court found that the CAC had wrongly interfered with the Competition Tribunal's discretionary decision to grant participatory rights.

CONCLUSION

The Constitutional Court's judgment provides important clarification on the threshold for third-party intervention in merger proceedings. It confirms that a prospective intervener is not required to prove that the information it possesses is unique or otherwise unobtainable. Rather, the enquiry is whether the prospective intervener has demonstrated either a material interest in the proceedings or an ability to assist the Competition Tribunal in its statutory merger analysis.

The judgment also reaffirms the specialist role of the Competition Tribunal and the deference owed to its discretionary decisions. The decision therefore reinforces the Competition Tribunal's role in ensuring that merger proceedings are informed by relevant evidence, while confirming that expedition must not come at the expense of meaningful participation where such participation may assist the Competition Tribunal.

¹*Lewis Stores Proprietary Ltd v Pepkor Holdings Ltd and Others* 2026 (3) BCLR 207 (CC).



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