IN THE COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case Number: 35/IR/May05

In the matter between:

Nyobo Moses Malefo	First Applicant
Fullhouse Investments 119 (Pty) Ltd	Second Applicant
and	
Street Pole Ads (S.A.) (Pty) Ltd	First Respondent
Brent Herbert	Second Respondent
Grant Smith	Third Respondent
Lucas Potgieter	Fourth Respondent

REASONS AND ORDER

Background and Relief Sought

1. This is an application for interim relief. The application is denied and our reasons follow.

2. The application has been brought by Mr. NM Malefo ('Malefo'), who is the first applicant, and Fullhouse Investments 119 (Pty) Ltd ('Fullhouse'), the second applicant. Malefo has a 30% shareholding in two companies, Pole-Add SA (Pty) Ltd, a Pretoria-based operation and Validtrade 63 (Pty) Ltd ("Validtrade") which trades as Zama Marketing ("Zama") and is a Port Elizabeth-based operation. Fullhouse, which is controlled by Mr. Francois de Villiers, owns a further 20% share of these two companies, which we shall refer to collectively as 'Pole-Add' or simply as 'the company'.

3. The remaining 50% of the shares of Pole-Add are owned by the first respondent, Street Pole Ads (Pty) Ltd ('SPA'). The other three respondents cited are all directors and senior employees of the first respondent. SPA and Pole-Add are active in the same product market – they both provide the service of lamp pole advertising to their clients. Pole-Add provides this service in the Pretoria region whilst Validtrade provides the same service in Port Elizabeth. Both firms arrange for the advertising of a client's product or service through the design, production, erection and maintenance of signs on lamp-posts in various metropolitan areas. The advertising on a local authority's street poles is thus sanctioned by means of a contract entered into between the advertising agent – Pole-Add in the Pretoria case – and the relevant local authority.

4. This application concerns the affairs of Pole-Add, in particular its relationship to its largest shareholder, SPA. As we shall elaborate, it is effectively alleged that Pole-Add is simultaneously subjected to abuse within the meaning of Section 8 of the Competition Act by SPA *and* that it (Pole-Add) is engaged with SPA in a horizontal agreement in contravention of Section 4. However the application could not be brought by Pole-Add because those aggrieved by the alleged conduct of the respondents have no authority to bring the application on behalf of Pole-Add nor could they obtain such authority – they are but minority shareholders who collectively control 50% of the shareholding and the board seats of Pole-Add with the remaining shares and board seats controlled by SPA, whose alleged conduct forms the subject matter of this application. With knowledge of these facts only, it is plain to see that whatever competition issues may or may not be at stake, they are clearly not the only issues – there is certainly a very serious dispute between the shareholders of Pole-Add, a dispute which has, because of the particular shareholding structure, created a deadlock in the control of the company. This is clearly illustrated in the relief sought in both the complaint submitted to the Commission as well as in this application for interim relief.

5. In the complaint submitted to the Commission - which the Commission is yet to investigate and decide whether or not to refer to the Tribunal - the

applicants seek the following relief:

7.1 "A declaration that the respondents are involved in a number of prohibited practices in contravention of the Act;

7.2 An appropriate order in relation to a prohibited practice, including:

7.2.1 Interdicting any prohibited practice
7.2.2 Ordering a party to desist from any conduct which could be considered a prohibited practice;
7.2.3 *Ordering the following directors and/or employees who are involved, to so desist and be interdicted from the conduct referred to in paragraph 7.2.2:*
7.2.3.1 Brent Herbert;
7.2.3.2 Lucas Potgieter and
7.2.3.3 Grant Smith.

7.2.4 imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section;

7.2.5 ordering divestiture

7.2.6 declaring conduct of a firm to be a prohibited practice in terms of this Act, for the purpose of section 65

7.3 Declaring the whole or any part of any sales of shares or shareholders' agreement to be void;

7.4 Subject to sections 13(6) and 14(2), condoning, on good cause shown, any non-compliance with –

7.4.1 The Competition Commission or Competition Tribunal rules; or
7.4.2 A time limit set out in this Act.

7.5 That the relevant offending clauses of the agreements concerned or the entire agreement be set aside;

7.6 Further and/or alternative relief."

6. Note that the applicants seek, at final relief, the setting aside of the sale of shares and shareholders' agreement.

7. In the original Notice of Motion in the Interim Relief application before the Tribunal – the application which we are now deciding - the applicants seek the following relief:

1. "That the Applicants' failure to comply with the time periods and formalities referred to in the Rules for the conduct of proceedings in the

Competition Tribunal be condoned in terms of rule 28(3).

2. *That, pending the conclusion of a hearing into the prohibited practices referred to in sections 4(1)(a), 4(1)(b)(I,)(ii) and (iii), 8(c) and 8(d)(i) of the Competition Act 89 of 1998, which are referred to in the complaint filed on 28 April 2005 under case number 2005APR1560 or a date six months after the date of issue of this interim order, whichever is the earlier:*

   2.1 *The respondents be interdicted from directly or indirectly withdrawing or causing the withdrawal of Pole-Add SA's appeal/objection to the tender process pending before the Cape Town Municipality.*

   2.2 *Be interdicted from further implementing the provisions of clause 10 of the sale of shares agreement dated 24 September 2003 relating to the exercise of an option to purchase a further 50% ordinary "A" shares in Pole-Add SA and Valitrade 63*

   2.3 *Be interdicted from implementing the provisions of clause 3.1 of the shareholders agreement by appointing a further director to the Board of Directors of Pole-Add SA and Valitrade 63.*

   2.4 *Be interdicted from in any way communicating to customers in the advertising on street poles business in South Africa that Pole-Add SA or Valitrade 63 are in any manner whatsoever prohibited from conducting business with such customer*

   2.5 *Be interdicted from directly or indirectly charging any customers to whom services are rendered in terms of a contract between the City Council of Pretoria and Pole-Add SA any amount which causes the total remuneration and commission payable by the customer to exceed R379,84*

   2.6 *The Chairperson of the South African Public Accounts and Auditors Board be requested to urgently appoint a suitable independent auditor of not less than 15 years standing as chairman of the boards of directors of Pole-Add SA and Valitrade 63 with the power to vote as a director. This is to break any Board deadlock with a casting vote.*

3. *That Pole-Add SA and Valitrade be jointly liable for the remuneration of the independent auditor.*

4. *Costs*

5. *Further and/or alternative relief."*

8. During the course of the hearing held on 25 July 2005, the applicants abandoned

some of their original prayers for relief, namely prayer 2.6 and prayer 3.[1] Note however, that we are still asked to interdict the implementation of those aspects of the sale of shares agreement that would lead to the assumption of sole control of Pole-Add by SPA, these being the exercise of an option that SPA has on a further portion of Fullhouse's shares in Pole-Add and the right of SPA to appoint another director to the board of Pole-Add.

The Merger of SPA and Pole-Add

9. This application has its origins in a merger structured to take place in two interconnected stages, involving a total of three separate share transfers. The first transfer occurred, and the first stage was concluded, when, in September 2003, the first respondent, Streetpole Ads SA (Pty) Ltd, acquired from Mr Francois de Villiers 50% of the shareholding of the second applicant, Fullhouse Investments, in two companies, one a Pretoria-based operation, Pole-Add SA (Pty)Ltd and the other a Port Elizabeth based operation, trading as Zama Marketing.

10. The 'Sale of Shares and Loan Accounts' agreement,[2] in addition to specifying the terms of the first stage referred to in the preceding paragraph, also provided that, upon the seller, de Villiers, disposing of 60% of Fullhouse's remaining equity in Pole-Add to a historically disadvantaged person, the buyer, SPA, is entitled to exercise an option whereby it would acquire 50% of what remained of Fullhouse's interest in Pole-Add. These share transfers constitute the second leg of the transaction.

11. The condition in question was met. The BEE purchaser was Mr. NM ("Pasty") Malefo, the first applicant in this matter, who, on the purchase of 60% of Fullhouse's remaining shareholding in Pole-Add, became a 30% shareholder in that company. At the time of the purchase of shares, Malefo was described as a 'director and executive office bearer of Pole-Add and Zama Marketing'. Subsequent to purchasing the shares from De Villiers, Malefo could add to his web of connections with Pole-Add that of shareholder, but neither he nor De Villiers have ever held any office or direct interest in SPA.

12. In summary, then, the sequence of the transfer of control of Pole-Add was, first, from sole control by Fullhouse to joint control by Fullhouse and SPA. In the second leg, Malefo was introduced to the transaction. On the sale of 60% of Fullhouse's remaining shareholding in Pole-Add, SPA emerged as the single largest shareholder in Pole-Add, but it did not hold a majority of the shares. On the face of it, control of Pole-Add was now jointly held by SPA with 50% and Fullhouse and Malefo with 20% and 30% respectively. At this

1 See page 6, 70 of Transcript

2 Note that this is the agreement governing SPA's purchase of 50% of De Villiers' shares in Fullhouse Investments. When we refer to the 'sale agreement' it is to this agreement that we refer. There is a second 'Sale of Shares' agreement which governs the sale of shares by De Villiers to Mr. Malefo, the BEE partner. Should we need to refer to this agreement we will specifically refer to this as the 'De Villiers/Malefo sale agreement'.

stage SPA was entitled to appoint two directors and Malefo and Fullhouse were jointly entitled to appoint two directors. Upon exercise of the option, SPA would have acquired a further 10% interest in Pole-Add. Sole control of the two companies would then vest with SPA (60%), with Malefo (30%) and Fullhouse (10%) collectively retaining only a minority stake. The sale agreement provides that at this point, SPA would be entitled to appoint an additional director thus controlling the board of Pole-Add.[3]

13. On 19 April 2004, SPA exercised its option to purchase further shares from Fullhouse. However, in a letter from its attorneys dated 4 May 2005, Fullhouse alleged that SPA was in breach of the sales of shares agreement and the shareholders' agreement and accordingly purported to cancel both agreements. It then follows (and is specifically recorded in this correspondence) that Fullhouse similarly refused to honour SPA's option on its remaining shares in Pole-Add. The option is contained in a clause of the sale of shares agreement which de Villiers purported to cancel and is parasitic on the initial sale of de Villiers' shares to SPA.

14. De Villiers has accordingly declined to transfer the shares. Instead, on 28 April 2005, Fullhouse and Malefo filed a complaint with the Competition Commission in which it is alleged that SPA's relationship with Pole-Add contravenes Section 4 and Section 8 of the Competition Act. Among the remedies sought, is the setting aside of the sale agreement. The Commission is yet to decide whether or not to refer this complaint to the Tribunal. Malefo and Fullhouse have now also filed an application for interim relief. Among the remedies sought at this stage of the proceedings is the interdiction of the exercise of the option on de Villiers' remaining equity. This is the application presently before us.

15. Confronted by de Villiers' refusal to honour the option, SPA brought an application before the High Court in which it sought an order of specific performance arising from what it believed to be its legitimate exercise of its option. However, the court was persuaded that because the legal basis claimed for de Villiers' refusal to honour SPA's option on Fullhouse's shares lay in SPA's alleged contravention of the Competition Act, that it constituted matter falling within the exclusive jurisdiction of this Tribunal. In terms then of Section 65 of the Competition Act, the High Court referred the allegations of anti-competitive conduct to the Competition Tribunal and postponed *sine die* the application for specific performance.[4]

The Complaint

16. The applicants effectively allege that SPA has engaged in conduct in

3 Note that in terms of the sale agreement even if de Villiers had been unsuccessful in finding a BEE partner, SPA would still have had an option to purchase half of Fullhouse's interest in Pole-Add further bolstering the argument (elaborated below) that it had always been intended that control of Pole-Add would, sooner or later, and at the sole election of SPA, vest in SPA.

4 Street Pole-Ads (Pty) Ltd and Pole-Add S.A. (Pty) Ltd, and Others 19631/05 TPD

contravention of the Competition Act, in particular, Section 4, which prohibits certain 'restrictive horizontal practices' and Section 8, which proscribes a dominant firm from abusing that dominance. As already mentioned, a decidedly peculiar aspect of this matter is that the firm that SPA is alleged to be conspiring with, is the same firm that it is alleged to be abusing!

17. Section 4 provides:

1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if-

(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or pro-competitive gain resulting from it outweighs that effect; or

(b) *it involves any of the following restrictive horizontal practices :*

i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering.

18. Section 8 provides:

It is prohibited for a dominant firm to-

(a) charge an excessive price to the detriment of consumers;
(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;
(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effects of its act –
i. requiring or inducing a supplier or customer to not deal with a competitor;
ii. refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

iii. selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;

iv. selling goods or services below their marginal cost or average variable cost; or

v. buying-up a scarce supply of intermediate goods or resources required by a competitor.

19. Section 7 provides:

A firm is dominant in a market if –

a) it has at least 45% of that market;

(b) it has at least 35%, but less than 45%, of that market, unless it can show that it 10 does not have market power; or

(c) it has less than 35% of that market, but has market power.

20. The horizontal agreement – that is the agreement between competitors - which is alleged to fall foul of Section 4(1)(b) is contained in the shareholders agreement to which SPA, Fullhouse Investments, de Villiers, Pole-Add and Zama are party. The de Villiers/Malefo sale agreement provides that Malefo, upon purchase of a portion of de Villiers' shareholding in Pole-Add, is bound by the terms of this shareholders agreement. In particular, Clause 16 of this agreement, which is titled 'ability to compete', is alleged to contravene the Act because it specifies areas in which Pole-Add and SPA will not compete and it also provides for areas in which they may compete.

21. Curiously (but, as we shall outline, revealingly) we are *not* asked to interdict the implementation of Clause 16 of the shareholders agreement, the market allocation clause that is alleged to contravene Section 4. Instead we are asked to interdict the exercise of the option that is provided for in the *sale* agreement and which contains no mention of market allocation. In similar vein, we are asked to interdict the implementation of Clause 3.1 of the shareholders' agreement, which provides for SPA to appoint an additional director, thus giving its appointees a majority of board seats. A mere glance, therefore, at the notice of motion and the relief claimed therein already suggests that this is a battle about the control of Pole-Add, rather than about the allegedly anti-competitive conduct of SPA.

22. In addition, we are asked to interdict certain conduct allegedly perpetrated by SPA in apparent contravention of aspects of Clause 16 of the shareholders' agreement. This conduct relates to an allegation that SPA had sought to prevent Pole-Add (in apparent violation of Clause 16.2.1 of the shareholders

agreement) from competing in Cape Town.[5] We are also asked to interdict SPA from holding out to customers and prospective customers of Pole-Add that Pole-Add is not entitled to compete for their business. The net effect of granting the relief claimed, would leave only those elements of clause 16 intact which *prohibit* SPA from competing with Pole-Add – notably in Pretoria and Port Elizabeth.

23. The respondents are also alleged to have contravened Section 8 of the Act, which proscribes dominant firms from abusing their dominance. It is extremely difficult to identify the conduct which is alleged to contravene Section 8. This claim appears to relate to SPA on-selling advertising space in Pretoria which it had purchased from Pole-Add at a price higher than that specified in the latter's contract with the Pretoria City Council. Accordingly Clause 2.7 of the Notice of Motion asks us to interdict SPA from charging its customers more than R379,84 for advertising space in Pretoria that it had purchased from Pole-Add. We hesitate in identifying this as the abuse of dominance complained of because the same conduct also appears to be identified by Pole-Add as an instance of a price fixing agreement and, as such, in contravention not of Section 8 of the Act but of Section 4.[6] However this cannot be a Section 4 violation because the key element of Section 4 is the existence of an agreement between competing parties. The R400,00 allegedly charged by SPA is not, of course, pursuant to an agreement between Pole-Add and SPA. In fact, Pole-Add insists that SPA should be charging R379,84 while SPA, for its part, insists on its right to charge R400,00 thus reflecting a *dis*agreement on price rather than an agreement. The relationship of this pricing conduct to the abuse of dominance provisions of the Act is never specified. The high watermark of the applicants' argument is that this pricing conduct is somehow designed to permit the Pretoria City Council to terminate its agreement with Pole-Add which may then, in a new tendering process, allow SPA to replace Pole-Add as Pretoria's contracting partner.

24. We should add that there is also substantial disagreement between the applicants and the respondents in respect of the market in which this abuse is alleged to take place. On the face of it, both parties have presented a

5 In 2002 Pole-Add together with an empowerment partner, participated in a tender relating to outdoor advertising in Cape Town. In March 2005, short-listed applicants were invited by the City Council to submit tenders. SPA, bidding as part of a consortium, was one of the short listed applicants. However Pole-Add wished to have the tender process set aside on the grounds that the information on which the tender was based was now dated. It accordingly lodged an appeal against the procedure adopted by the council in this regard. SPA subsequently advised the body responsible for adjudicating the tender that Pole Add had no authority to submit an appeal as this had not, and given the position of SPA appointees on the Pole Add board, would not be authorised by the board. It appears that, for the purposes of this application, the applicants allege that this is evidence of the market allocation agreement in practice insofar as SPA is preventing Pole-Add from competing in Cape Town. SPA, for its part, argues that Pole Add is manifestly incapable of bidding for this contract insofar as a R10 million deposit is required in order to submit a tender. The applicants also allege that SPA's membership of the consortium constitutes collusive tendering. The respondents argue that, to the extent that the Cape Town tender raises any legal issues, these concern the authority of Pole-Add to file an appeal to the tender process, authority issues similar to those referred to in Paragraph 3, above.

6 See Complainant's Heads of Argument paragraph 28.2, at page 22.

plausible version of the relevant market, with the applicants predictably opting for a narrow market that is confined to street pole advertising while the respondents insist that this activity is part of a much larger market for all outdoor advertising. These disputed versions of the relevant market can only be resolved by further investigation – they cannot be resolved on the papers submitted for the purposes of interim relief and so the opaque allegations concerning abuse of dominance cannot be taken any further in these proceedings.

25. Let us return then to the allegation that the market sharing arrangement contained in the shareholders' agreement contravenes Section 4 of the Act. We have already noted that the relief sought does not end this contravention, if contravention it be. On the contrary, it seeks to *confirm* those sections of the market sharing agreement which both allow Pole-Add to compete with SPA (eg in Cape Town) and which *prevent* SPA from competing with Pole-Add (eg in Pretoria and Port Elizabeth). It would, of course, have been a simple matter to ask for the implementation of clause 16 of the Shareholders' Agreement to be interdicted. However this has not been asked for presumably because certain of the 'non-compete' clauses manifestly favour the applicants.

26. Nor, of course, does the relief that is sought in the interim relief application, resolve the dispute over control of the company. On the contrary, were we to grant those aspects of the relief sought that clearly relate to the control of Pole-Add – namely the exercise by SPA of its option on a portion of De Villiers' remaining equity interest in Pole-Add and the appointment by SPA of an additional member of Pole-Add's board – we would be *confirming* joint ownership and, with it, the effective deadlock over control of the company.

27. On the other hand, were SPA able to implement its option, this would end the impasse over control – it would take the matter outside of the grey area of joint control into the realm of sole control. And on the well-established principle that holds that a firm cannot conspire with or abuse its own subsidiary, it would also remove any appearance of competition contravention.

28. It is, in our view, precisely this clear resolution that the applicants seek to avoid – they wish to prevent control from passing to SPA, not least because it clearly removes the dispute between the shareholders from even the appearance of a competition contravention.

The requirements for interim relief

29. This then brings us to the requirements that have to be met if the Tribunal is to grant an application for interim relief.

30. Section 49C(2)(b) provides that the Competition Tribunal may grant an interim order if it is reasonable and just to do so, having regard to the following factors:

i) the evidence relating to the alleged prohibited practice;
ii) the need to prevent serious or irreparable damage to the applicant; and
iii) the balance of convenience.

31. As we have already shown, the evidence relating to the alleged prohibited practice is, at best, highly opaque. The content of the conduct that is alleged to contravene Section 8 is well nigh unintelligible. In any event, the market in which the contravention is alleged to have taken place, is in dispute.

32. As for the Section 4 violation, we are confronted with the unusual situation of one set of parties to an allegedly anti-competitive horizontal agreement filing a complaint against their co-conspirators – indeed Counsel for the applicants acknowledges his clients complicity in the alleged conspiracy.[7] This partly accounts for the difficulty in identifying the harm that arises from the agreement – the 'serious or irreparable damage' that the interdict must, if it is to be granted, seek to prevent. The market sharing agreement was presumably entered into because it was thought to be to the mutual benefit of the parties. And the selective and opportunistic identification of conduct related to the operation of that agreement that we are asked to interdict establishes that there have been predictable trade-offs in arriving at this agreement and that the applicants wish to maintain intact those parts of the agreement that are to their advantage. Hence they are, despite their new- found respect for the principles of competition, content to ask us to confirm that SPA will not compete with them in Port Elizabeth and Pretoria, while simultaneously confirming that the parties may compete in Cape Town.

33. There is certainly no evidence that Pole-Add is a party in danger of incurring 'serious or irreparable damage'. Indeed Malefo in his affidavit is at pains to emphasise the extent to which Pole-Add has prospered in the recent past.[8] This is an assessment shared by the respondents. And nor, if the market sharing agreement is effective, should we be surprised by this. After all market sharing agreements are entered into precisely to enable the conspirators to extract monopoly rents and to thrive albeit at the expense of the consumers. Alternatively, multi-branch enterprises co-ordinate the marketing activities of their branches in order to exploit efficiencies that benefit the firm.

34. This is, of course, why we would expect a consumer, and not a co-conspirator, to petition for relief when confronted by a horizontal agreement. There is certainly no evidence of consumer harm suffered.[9] There appears to be some suggestion that the consumers who are allegedly paying in excess of the advertising rate stipulated by the Pretoria city council – R400,00 as opposed to R379,84 – are consumers harmed by the arrangement. However, as we have pointed, out this is not a price which the alleged conspirators have fixed – indeed it represents a point of some considerable *dis*agreement.

7 See page 15, transcript
8 See Complainant's reply to Respondent's supplementary affidavit, page 938 at paragraph 9.
9 while ordinarily Section 4(1)(b) does not require a showing of harm, this showing is required if we are to grant an application for interim relief

35. The only harm that that is seriously contended for is harm to two of Pole-Add's shareholders, namely Malefo and De Villiers, who are, separately, minority shareholders but who collectively control half of Pole-Add's equity and half of its board. The record is replete with references to the harm allegedly suffered by these two shareholders and Malefo in particular.[10]

"3.3.27 The direct result of the conduct displayed by SPA's directors and stakeholders is:

3.3.27.1 The curtailment of the Company's ability to grow and generate more revenue than currently being generated.

3.3.27.2 The impairment of my potential dividend income and erosion of my shareholder's interest."

"ADV PREIS*: And we obviously will at the end of the day … we've also referred you to the provisions of Section 2, which will be contravened under these kinds of circumstances, as you've indicated. One has the obvious detrimental effect on historically disadvantaged individuals. Section 2 says you must protect those individuals."*[11]

"…Should I be disempowered, there is no turning back and I will be reduced to 'just another failed BEE statistic."[12]

36. The potential for conflict that is inherent in the relationship between SPA, on the one hand, and de Villiers and Malefo, on the other hand, is plain to see, as is the potential threat to the commercial interests of the applicants. At the risk of stating the obvious, because of the existence of minorities in the branch structure of SPA (that is, in what are effectively the Pretoria – Pole-Add – and Port Elizabeth – Zama - branches) the separate corporate identities of SPA and Pole-Add had to be retained. However it did not take long for the tensions embedded in this structure to rear their head. SPA's interests were in crediting as much business as possible to branches other than Pretoria because in the non-Pretoria branches, it did not have to share its profits with the Pretoria minorities. SPA denies that it was attempting to undermine its partners in Pole-Add – it insists that it was simply attempting to rationalise its group marketing activities. This may well be so, but it is not difficult to see why the shareholders of the Pretoria operation came to view key elements of this rationalisation as hostile to their commercial interests.[13]

37. Viewed from this perspective, the interests of the minority shareholders in Pole-Add, effectively the Pretoria branch of SPA, were, of course, diametrically opposed to those of its majority shareholders – the conflict was

10 See record page 28 Founding Affidavit. Also paragraph 12.12 at 536, paragraph 12.3.2 at page 537, paragraph 13.3. at page 538. See also page 539.
11 See transcript page 34.
12 Replying affidavit paragraph 12.8.4 at page 534
13 See Founding Affidavit at page 28.

compounded by assigning to the key representatives of the minority shareholders the task of managing the daily operations of the Pretoria branch while SPA naturally enjoyed managerial responsibility for the group operation which inevitably impacted on the Pretoria operation. The minority shareholders in Pole-Add were interested in crediting as much business as possible to Pole-Add, in which they enjoyed a share of the profits. These interests flew directly in the face of SPA's apparent attempts to limit the amount of business credited to Pretoria (that is, to Pole-Add) by insisting, so it is alleged, that all business that emanated from outside of Pretoria, even that which eventuated in the display of advertisements on poles in Pretoria, was to be credited to SPA and not to Pole Add. Hence SPA insisted that the location of the national head quarters of the client, including advertising agents, determine whether or not business was credited to SPA or to Pole-Add. It is then not difficult to see why the tension between the shareholders also infected the operational staff who, it appears, work on a commission basis. It also portended conflict in new markets, markets in which neither company enjoyed a presence, and hence the disagreement over entry into the Cape Town market.

38. It is clear that SPA's interest in Pole-Add lay overwhelmingly in the latter's contract with the Pretoria city authority and with further contracts that its BEE partner in Pole- Add could extract from other city authorities – Nelspruit is explicitly mentioned. However SPA effectively saw itself as being in charge of the on-sale to advertisers of the council controlled street poles. Whether this represented a rational division of labour or a devious attempt to cut the minorities out of a legitimate share of their profits is not clear. What is clear is that it created massive, if predictable, tension between the partners as well as potential harm to the commercial interests of Malefo and De Villiers. However, in order for us to grant interim relief we must be satisfied that the prospective harm, if any, that is implicit in this relationship is cognisable competition harm that arises from a contravention of the Competition Act.

39. Our finding is that the applicants have not shown serious or irreparable damage to Pole-Add that is reasonably apprehended to derive from the alleged restrictive practice, namely, the marketing arrangement contained in the shareholders' agreement. If any interests do suffer harm, then those are the interests of the minority shareholders of Pole-Add, and this harm derives not from the marketing arrangement in the shareholders' agreement but rather because of their position within the control structure of SPA and Pole-Add. If there is no harm suffered, then the balance of convenience must lie with the respondents.

40. The applicants have then not satisfied any of the factors which the Act mandates us to consider when faced with an application for interim relief. The evidence relating to the alleged prohibited practice is at best questionable and in any event challenged by the respondent, serious or irreparable harm has not been established and the balance of convenience cannot be said to favour the applicants. Although each of these elements does not have to be established – they are to be considered and weighed up in our decision – we

would be hard pressed to grant interim relief when there is no evidence of harm arising from a contravention of the Act. As we have elaborated, the competition contravention alleged is not a cause of harm to the applicant.

We accordingly deny the application for interim relief.

Merger regulation

41. For the sake of completeness we underline that this is a dispute about the control of a company. Chapter 2 of the Act – 'prohibited practices' – has little reference to the question of control. Moreover, the Tribunal is not, even in the case of the most egregious anti-competitive conduct, ordinarily empowered to effect a change in the control of a company or an asset. The Tribunal is, in terms of Section 60(2), able to order divestiture in response to a prohibited practice only in the event of a repeat offence that cannot otherwise be remedied and even then the divestiture remedy has to be confirmed by the Competition Appeal Court.

42. It is only in Chapter 3 of the Act – the chapter of the Act dealing with the regulation of mergers - that structural remedies are ordinarily contemplated and imposed. Hence the Tribunal or, in the case of intermediate mergers, the Commission may, by prohibiting a merger, pre-emptively act against attempts to alter the structure of a market. In the case of a small merger – which the merging parties are not compelled to notify to the Commission – the Commission may nevertheless require notification and, should it find that competition in the market has been substantially compromised by the transaction, require divestiture.

43. We raise this because the applicants are clearly seeking a structural remedy, that is, for the large part, beyond the powers of the Tribunal certainly at the interim relief stage of a complaint hearing. What is clear in this instance is that De Villiers had come to regret his decision to sell Pole-Add to SPA. Moreover, he and Malefo appear to have concluded that their commercial interests are seriously compromised by a shareholding arrangement which effectively has them holding minority stakes in two branches of the SPA group.

44. Their only remedy would be to ask the Commission to investigate the small merger and to find that it will lead to a substantial lessening of competition and, hence, that it should be prohibited. The applicants are, by no means, assured of success – indeed it is not even certain that the time periods for this sort of intervention have not lapsed. However it is clear that the conflict between the parties to this dispute concerns the assumption by SPA of control over Pole-Add. If the scrutiny of the competition authorities is required, then it is that fact – the change in control – that should be investigated and Chapter 3 of the Competition Act empowers the competition authorities to do so.

Order

The application for interim relief is dismissed.

Costs

45. In their Notice of Motion, the applicants requested that the matter be set down, on an urgent basis, on 24 May 2005. The respondents filed their answering affidavit on 23 May 2005. The respondents allege that the applicants should have contacted the Tribunal and ascertained that a panel was convened for the 24th. They were therefore, according to the respondents, remiss in not acting more diligently to secure the hearing date, as a result of which the respondents incurred costs in ensuring the attendance of their counsel on the day. However, we note that respondents were also not very diligent in ensuring that the hearing would proceed. The respondents filed a Notice of Intention to defend but indicated that they would not be in a position to file their answer by the appointed dates, and would do so "in due course". They then filed their own answering affidavit a day before the scheduled hearing date, surely anticipating that the applicant would want to file a reply and therefore could not seriously themselves have expected the matter to proceed on the 24th.

46. The matter was then formally set down to proceed on 22 June 2005. However, on the 21st June, and after the close of pleadings, the respondents filed a supplementary affidavit. This occasioned a further delay in proceedings, insofar as the Tribunal granted the applicant a postponement on application, in order to provide it the opportunity to reply to the respondent's supplementary affidavit.

We accordingly award costs as follows:

47. Each party to bear its own costs for the wasted hearing day of 24 May 2005. This is because both parties shared in the creation of the confusion relating to whether the hearing would proceed or not, therefore blame can be equally apportioned.

48. In respect of the postponement of the hearing on 22 June 2005, costs of two legal representatives are awarded to the applicants. Pleadings had already closed yet the respondents elected, of their own accord, to file a supplementary affidavit.

49. In respect of the main matter, the costs of two legal representatives are awarded to the respondents.

_____ **1 September 2005**

D. Lewis Date

Concurring: Y. Carrim, Adv. M. Madlanga

For the Applicant: Adv. D. Preis SC, instructed by der Merwe and Ferreira Attorneys

For the respondents: Adv. A. Redding SC, instructed by Bowman Gilfillan Attorneys