COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 66/LM/Oct01

In the large merger between:

Shell South Africa (Pty) Ltd

and

Tepco Petroleum (Pty) Ltd

Reasons for Decision

Approval

1. The Competition Tribunal issued a Merger Clearance Certificate on 8 February 2002 approving the merger without conditions. The reasons for our decision are set out below.

Background

Recommendation by the Competition Commission

2. The Competition Commission recommended that the merger be approved on the following conditions;

   a) Tepco continue to exist in the market jointly controlled/owned by Thebe and Shell South Africa;
   b) That the Tepco brand be maintained as a viable brand in the market place; and
   c) Any agreement, including a shareholders agreement, between the parties

pursuant to these conditions must be submitted to the Commission for its approval prior to the implementation thereof by the parties.

The transaction

3. Thebe Investment Corporation (Pty) Ltd ("Thebe") is selling its subsidiary Tepco Petroleum (Pty) Ltd ("Tepco"), after acquiring the shares of the minority shareholders in Tepco, to Shell South Africa (Pty) Ltd ("SSA").

4. Prior to the transaction SSA will be restructured into two companies, Shell South Africa Energy (Pty) Ltd[1], responsible for the refinery, chemicals, renewables, gas and power, exploration and production businesses, and SSA, responsible for retail marketing, the marketing distribution network, commercial fuels, liquefied petroleum gas, aviation, marine, lubricants and bitumen.

5. SSA will change its name to Shell South Africa Marketing (Pty) Ltd ("Shell SA Marketing") after the merger. At the same time Thebe will acquire between 17,5% and 25% of the issued share capital of Shell SA Marketing.

6. According to the parties Tepco will become a wholly owned subsidiary of Shell SA Marketing and will for the foreseeable future remain a separate brand, distinct from Shell, and will still be managed by the current management which is predominantly black. Shell SA Marketing will retain the Tepco brand and develop it in the market for as long as it remains viable and profitable. In terms of the shareholders agreement Shell shall appoint three of the four directors to the Board of Shell SA Marketing, including the Chairman and the Managing Director of the Company, and Thebe one.

The parties

7. Thebe is a broad-based black empowerment investment holding company, which was established primarily to use economic market mechanisms and opportunities to benefit previously disadvantaged people and communities. Thebe is controlled by the Batho-Batho Trust, which holds 73.67% of the issued shares in Thebe. Old Mutual holds 8.77%, Sanlam 8.77% and Investec 8.77%.

8. The objective of the Trust is to hold the shares in Thebe and to derive income from dividends declared by Thebe, its subsidiaries and associated companies. The income derived from Thebe is to be utilized for the sole benefit of previously disadvantaged people or communities behind them.

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1 A member of the Shell Group of Companies will hold the entire issued share capital of the new company.

9. Thebe holds 85% of the issued share capital in Tepco. Mvelaphanda Holdings (Pty) Ltd, Stelma Trust and Malan-Kinders Trust hold the remaining 15%. Tepco currently employs 38 people, 80% of whom are historically disadvantaged communities including three of its five senior managers. Tepco's principal business activity is the marketing and distribution of petroleum products.

10. SSA is a member of the Royal Dutch Shell Group of Companies, which is involved in oil and gas activities around the world. SSA's main business in South Africa is the manufacturing and sale of petroleum products, which it conducts directly through SSA or indirectly through subsidiaries.

Rationale for transaction

11. According to the parties the oil industry is a mature market with a low growth rate as well as low profit margins. Structural barriers to entry are high which makes it difficult for new players that do not have the same resources as the multi-national oil companies (including access to the upstream portion of the supply chain) to penetrate the market. For these reasons Tepco has incurred a net loss exposing its shareholders to increased risk in the event of Tepco being liquidated. In the absence of alternative funding solutions, and in order to remain a player in the industry Thebe decided to sell Tepco to SSA.

12. The major oil companies and other stakeholders in the petroleum industry have adopted the *"Charter: For the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Petroleum and Liquid fuels Industry"* ("the Charter") on 2 November 2000. The Charter states that it is the intention of the participating parties to bring about a 25% ownership and control by historically disadvantaged South Africans of all facets of the industry over a ten year period.

13. This transaction will assist Shell in laying the foundation for the involvement of previously disadvantaged persons in the company and is the overriding reason for Shell's decision to purchase Tepco.

The South African oil industry

14. The oil industry is a high volume, low margin, capital-intensive and, in South Africa, highly regulated industry. Shell, BP, Caltex, Engen, Total and Sasol are all crude refiners. They are also distributors of the final product marketed under their respective and well-known brand names. These companies, including Tepco, constitute the South African Petroleum Industry Association ("SAPIA").

15. Price control, especially retail price maintenance, and import control are the cornerstone of the regulatory dispensation of the South African liquid fuels industry. Maximum prices are set for petrol, diesel and paraffin from which dealers are allowed to discount.

16. Government is currently in the process of reviewing the current regulatory framework and both the Department of Trade and Industry ("DTI") and the Department of Mineral and Energy Affairs ("DMEA") have reiterated their support for measures that will increase the level of competition in the domestic market. The DMEA, a driving force behind the *Charter,* together with stakeholders in the liquid fuels industry have also set themselves goals to achieve Black Economic Empowerment in the sector.

Evaluating the merger

The Relevant market

17. The supply chain in the petroleum products industry can be divided into upstream activities, covering oil exploration, extraction and transportation and downstream activities consisting of refining, marketing and distribution. SSA and Tepco are players in the downstream activities where both SSA and Tepco have operations that overlap in the marketing and distribution of petroleum products. Tepco does not operate in the refining part of the value chain while SSA does

18. SSA and Tepco supply products to both the retail market, i.e. products that are sold to consumers through retail franchise networks such as petrol stations, and to the commercial market, i.e. business to business, which buys in bulk on either tender/contract basis or at individual negotiated prices. The commercial division is a major part of its business - it only owns fourteen stations that sell to the retail market.

19. The geographic market for the retailing of petrol is sub-national. Data is only available at the level of the magisterial district. With regard to the commercial segment we define the geographic market as national in light of the hospitality arrangements[2] between the market participants.

20. Within these two market segments both merging parties operate in the relevant product markets set out in the following two tables:

2 This agreement allows customers to go to any depot with which the contracting oil company has a hospitality arrangement, i.e customers are not limited to buying products from the owner of the nearest depot.

The Retail Market segment

PRODUCT MARKET	**KEY CUSTOMER GROUPS**	**SHELL SA**	**TEPCO**
Petrol	Fuel stations selling to the public	x	x
Diesel	Fuel stations selling to the public	x	x

The Commercial market segment

PRODUCT MARKET	**KEY CUSTOMER GROUPS**	**SHELL SA**	**TEPCO**
Petrol	• Parastatals • Commercial/passenger transport • Agriculture • Manufacturing • Construction • Mining • Local Municipalities • Resellers	x x x x x x x x	x x x x x
Diesel	• Parastatals • Transport • Agriculture • Manufacturing • Construction • Mining • Local Municipalities • Resellers	x x x x x x x x	x x x x x x
Illuminating paraffin	• Resellers	x	x

Effect of merger on competition

Market Shares

21. Percentage market shares of each of the participants on a national level for overlapping product markets, based on 2000 sales data are:

Market segments	Products	SSA	BP	Caltex	Engen	Sasol	Total	Afric Oil	Exel	Tepco	Merged Entity
RETAIL	Petrol	**18.2**	16.1	18.7	27.1	6.4	12.3	-	1.1	**0.2**	**18.4**
	Diesel	**25.3**	15.3	12.8	31.7	0.8	13.0	-	1.0	**0.1**	**25.4**
	Petrol	**13.7**	14.7	7..9	22.6	2.4	24.1	0.3	11.7	**2.7**	**16.4**
	Diesel	**16.2**	15.3	16.8	27.0	0.6	14.0	0.2	6.1	**3.7**	**19.9**
	Paraffin	**19.2**	16.9	16.7	31.2	-	8.0	-	2.7	**5.2**	**24.4**

22. SSA is the second largest national player in the retail diesel and commercial illuminating paraffin markets, the third largest national player in the retail petrol market and the fourth largest national player in the commercial petrol market. Total is the national leader in the commercial petrol market and Engen the national market leader in the retail petrol market, the retail diesel market and the commercial diesel market.

23. In analyzing the market share information[3] provided by the parties we found that in the **retail petrol and diesel markets** Tepco is present in five of the nine provinces namely Free State, KwaZulu-Natal, Gauteng, Mpumalanga and Northern Province, while SSA is present in all nine provinces. SSA and Tepco's businesses overlap in nine of the magisterial geographic areas. The merged entity will have market shares of between 20%-30% in four of the fourteen magisterial areas, market shares of between 30%-40% in two of the fourteen magisterial areas and market shares of more than 40% in two of the fourteen magisterial areas.

24. The market shares above 40% can be attributed to the fact that these are geographic markets situated in small towns and the merged entity will not own more than 50% of the total number of stations currently operating in these geographic areas.

25. The percentage market shares in the **commercial petrol** market in each province

3 i.e. the number of stations selling petrol and diesel in a magisterial area

are:

	BP	**Caltex**	**Engen**	**Sasol**	**Total**	**Afric Oil**	**Exel**	**Merged entity**
Western Cape	12.6	10.1	19.8	-	**28.0**	-	11.2	18.2
Eastern Cape	15.4	6.5	**30.7**	-	20.4	-	5.3	21.6
Northern Cape	**37.4**	11.3	18.8	-	13.8	-	2.6	16.1
Free State	6.7	6.2	**31.8**	1.1	16.7	-	27.1	10.3
KwaZulu-Natal	14.7	7.5	**35.1**	-	21.0	-	2.3	19.3
NW Province	17.9	12.5	17.3	-	15.0	-	**27.5**	9.8
Gauteng	13.1	3.5	14.1	10.0	**27.6**	1.4	14.5	15.8
Mpumalanga	13.0	5.7	20.6	3.6	**33.2**	-	9.5	14.4
Northern Province	14.7	10.9	20.8	-	**27.0**	1.7	10.3	19.7

26. From the above it is clear that the merged entity will be the third largest player in most of the provinces.

27. The percentage market shares in the **commercial diesel market** in each province:

	BP	**Caltex**	**Engen**	**Sasol**	**Total**	**Afric Oil**	**Exel**	**Merged entity**
Western Cape	**24.7**	21.5	19.7	-	12.8	-	2.4	18.9
Eastern Cape	14.7	22.8	**28.5**	-	18.0	-	1.2	14.9
Northern Cape	11.7	20.1	**28.3**	-	22.7	-	1.8	15.3
Free State	7.9	21.5	**32.6**	0.2	10.9	-	9.5	17.5
KwaZulu Natal	12.7	12.6	**28.7**	-	15.1	-	6.7	24.2
NW Province	20.1	14.4	**28.8**	0.3	15.5	-	7.9	13.1
Gauteng	14.9	16.3	**27.2**	1.1	12.1	1.3	8.0	19.1
Mpumalanga	11.4	13.8	**26.4**	2.7	13.5	-	6.4	24.9
Northern Province	17.8	16.9	**27.0**	0.3	12.5	-	6.6	18.8

28. Post this merger Engen will still be able to maintain its position as market leader in eight of the nine provinces and the merged entity the second largest player in four provinces and the third largest player in three provinces.

29. The percentage market shares in the **commercial illuminating paraffin** market in each province:

	BP	**Caltex**	**Engen**	**Total**	**Exel**	**Merged entity**
Western Cape	14.2	16.5	25.8	12.5	2.3	**28.6**

Eastern Cape		13.3	**31.3**	12.1	-	18.2
Northern Cape	14.8	25.1	15.0	10.8	0.1	24.4
Free State	9.3	26.4	**35.8**	4.7	1.7	22.1
KwaZulu Natal	9.9	7.7	34.3	8.8	3.0	**36.3**
NW Province	23.1	**35.3**	22.8	5.7	3.6	9.4
Gauteng	23.1	12.8	**28.4**	8.4	0.3	27.0
Mpumalanga	1.4	17.2	**32.6**	15.6	12.7	9.5
Northern Province	30.4	**33.7**	8.5	8.5	5.5	15.8

30. Post-merger the merged entity will be the largest player in two markets and the second largest player in three provinces.

31. Calculations presented by the Competition Commission and the parties on the level of concentration in each of the product markets before the merger show high levels of concentration in each of the product markets, well above 1800[4], with the post merger increase in the HHI in most of the product markets above 50 points.

Is the merger likely to substantially prevent or lessen competition in these circumstances?

32. The merger will not raise those barriers to entry in the down-stream market that stem from Government induced regulation. Moreover the merger will not have an effect on access depots because Tepco does not own any. Countervailing power does exist and the fact that these are relatively homogeneous products makes it very easy for customers to switch between suppliers. Furthermore, none of the participants in the commercial product markets have market power to raise prices unilaterally after the merger and customers have indicated to the Commission that they can negotiate prices.

33. Tepco is a small player with 14 stations country-wide. It has established a market presence in a few selected high risk markets that the other market participants were not interested in servicing. Although Tepco will exit the market, an effective competitor will not have exited the market in light of the fact that Tepco is a failing firm.

34. Although the merged entity's market shares in some of the magisterial markets are high this will not afford them market power at present as petroleum prices are regulated. If the market is deregulated at a later stage, in accordance with government's professed policy, we do not believe the high market shares raise concern. In the first place we doubt that magisterial boundaries correctly define

4 A market with a post merger HHI of above 1800 points is considered highly concentrated. If the post-merger HHI yields an increase of less than 50 points competition authorities are unlikely to challenge such mergers.

geographic markets for the retail petroleum market. Customers of retail outlets go to a convenient place to fill up. This could be a place near where they work or live or another place that they go to routinely. These convenience markets do not necessarily coincide with magisterial boundaries - they may be larger or smaller. Thus market shares at a magisterial level are not necessarily indicative of possible concentrations. More important is the fact that barriers to entry at the retail level are low and any one of the major companies can enter a local market to counter the exercise of market power at this level.

35. We thus agree with the Competition Commission that the merger does not substantially prevent or lessen Competition in the relevant markets.

Public Interest

36. We are required in terms of Section 12A(3) to examine the transaction's impact on public interest. It states as follows:

> *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 business, or firms controlled or owned by historically disadvantaged persons, to become competitive; and*
> *d) the ability of national industries to compete in international markets.*

37. It is important to emphasize that in terms of the Act our assessment of the public interest impact of the transaction may lead to the prohibition of (or the imposition of conditions on) a pro-competitive merger. Or it may result in us approving an anti-competitive merger. Hence, in balancing public interest and competition we are obliged to consider whether a merger that passes muster on the competition evaluation nevertheless falls to be prohibited because of its negative impact on any of the specified public interest factors including, in terms of Section 12A(3) (c), '*the effect that the merger will have on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive'*.

38. Conversely we are obliged to consider whether a 'bad' merger, that is a merger that will lead to a substantial lessening of competition, should nevertheless be approved because of its positive impact on the public interest, including the

competitive potential of firms owned or controlled by historically disadvantaged persons. Note that the Act does not otherwise guide us in balancing the competition and public interest assessments except insofar as Section 12A(1)(b) requires that the public interest grounds should be 'substantial'.

39. In the transaction before us the Competition Commission has concluded – and we have concurred – that competition is not lessened. It nevertheless recommends that we impose conditions on the transaction because, alleges the Commission, it has a negative impact on the competitive position of a firm controlled by historically disadvantaged persons.

40. In summary: Tepco is owned and controlled by historically disadvantaged investors. The controlling shareholder is Thebe, an investment company, which is controlled by the Batho-Batho Trust. The transaction will result in Shell SA Marketing acquiring control of Tepco. The consideration from this transaction – a sum of […][5]- plus an additional […] will be used by Thebe to acquire a 17.5% share in Shell SA Marketing, the company that will, post-merger, control the assets and trademarks of Tepco. The Commission has recommended conditions designed to ensure that control, or partial control, of Tepco remains in the hands of historically disadvantaged persons and designed to maintain the Tepco entity, that is, to ensure that its brands and separate identity are maintained. Thirdly that the Competition Commission pursuant to these conditions approves the Shareholders' agreement prior to implementation thereof. These recommendations, avers the Commission, are designed promote Tepco's competitive position.

41. We will now look at the conditions recommended by the Commission. Although it seems the Commission has proposed them as a package we will for the purpose of analysis first look at them individually and then make some general comments.

First Condition *- Tepco continue to exist in the market jointly controlled/owned by Thebe and Shell South Africa*

42. The difficulty with the condition is that it amounts to restructuring the deal in a form that neither of the merging parties wants. Tepco is no longer viable as a self-standing company. It appears that its difficulties are, to some significant extent, structural. That is to say, it appears that a small company isolated in a low return segment of the oil industry's value chain has precious little chance of sustainable growth. The Commission's condition is no solution to this problem. Adding Shell as a shareholder will not cure Tepco's ills nor is it likely that Shell would agree to a condition that kept the companies separate operationally. Empowerment is not furthered by obliging firms controlled by historically disadvantaged persons to

5 Confidential information.

continue to exist on a life support machine.

Second Condition - *That the Tepco brand be maintained as a viable brand in the market place*;

43. We assume firstly that this remedy is not self-standing and must be coupled to first condition. If that is the case then it suffers from the same defects as the first condition viz.the prolonging of a non-viable option. The parties have not said they will discontinue the Tepco brand. At our hearing Mr Shoniwe the Tepco Managing- Director confirmed this. However they want SSA to have the freedom to make this judgment call themselves. There is no public interest served by imposing on them the compulsory continuation of a brand name.[6]

44. If our first assumption is wrong and this is indeed a self-standing condition then we cannot understand what ill this remedy is designed to cure. Post-merger Tepco will be owned and controlled by Shell SA Marketing. Thebe, the erstwhile controlling shareholder of Tepco, will have a minority share in Shell SA Marketing. Why then propose measures ostensibly designed to protect the competitive position of Tepco, a company no longer controlled by historically disadvantaged persons? If Tepco, in its pre-merger form, was entering into an anti-competitive agreement with Shell, the Commission may, in terms of Section 10(3)(b)(ii), have been entitled to consider and grant an exemption on the grounds that the anti-competitive agreement promoted the ability of a firm owned by historically disadvantaged persons to become competitive.[7] But once Tepco's ownership has changed hands there can be no earthly reason for protecting its competitive position – it is manifestly no longer owned or controlled by historically disadvantaged persons.

Third condition- *Any agreement, including a shareholders agreement, between the parties pursuant to these conditions must be submitted to the Commission for its approval prior to the implementation thereof by the parties.*

45. The parties shareholder's agreement for Shell SA Marketing had not been finalized at the time of our hearing. We have had sight of a draft proposal, which

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6 The parties also criticized the condition for its vagueness. In view of our approach to the appropriateness of such a condition, we do not need to consider any further its formulation.

7 Or, post-merger, we may well face the situation where the merged firm, wishing to make an anti-competitive acquisition, argues for the transaction on the ground that it will promote the competitiveness of a firm with a substantial HDP shareholding. This would be a more credible avenue for invoking the public interest clause of the merger evaluation process and may well provide a sterner test for the competition authorities in its task of balancing competition and public interest. At this stage the competition authorities may well conclude that a 25% HDP interest does not sustain a case for approving an anti-competitive transaction whereas more fulsome HDP ownership and management involvement might.

we understand is near finalization. It is not clear whether the Commission's condition relates to the Shell SA Marketing's shareholder agreement or to an agreement that related back to the first condition i.e. the parties joint shareholding in Tepco in which case it would have had to deal with the joint control and ownership of that company. If the shareholders agreement contemplated is the latter then no more need be said about it as we have already indicated that we consider the first condition inappropriate.[8]

46. *If it relates to Shell SA Marketing we also see no justification to approve the terms and conditions. The parties are in our view free to make whatever bargain suits their respective commercial interests and no public interest is implicated by the nuts and bolts of the transaction that would require the regulator's scrutiny. The only caveat to this are the provisions of sections 15 and 16(3)*[9]*. If the deal ultimately looks different to the one, which has been notified, the Commission could apply to have the merger revoked. This however is not a public interest issue, but a general issue that relates to all mergers - no condition is necessary to give the Commission that power.*

The conditions generally

47. The only conceivable rationale for the Commission's recommendation is that it does not wish to see the ownership and control of a firms passing out of the hands of historically disadvantaged persons. If this is its concern – and it may have had some difficulty using the Competition Act for this purpose - then it should have recommended prohibition of the merger. However, the Commission is extremely reluctant to take this step – indeed it has gone out of its way to assure us of its support for the transaction.

48. It is not difficult to understand why, from a public interest perspective, it would be reluctant to prohibit the transaction:

   - Firstly, the transaction does not lead to the exit of a historically disadvantaged investor from the petroleum industry - in a related transaction Thebe acquires a 25% shareholding in Shell SA Marketing. Given the provisions of the *Charter* championed by the DMEA, SSA's interests are clearly served by a measure of partnership with Thebe. Indeed no great imaginative leap is required to present this transaction as SSA agreeing to take Tepco off Thebe's hands in exchange for Thebe agreeing to

8 As it happens no such agreement exits since that was not the deal made by the parties.
9 The Commission or Tribunal may revoke its decision to approve or conditionally approve a small or intermediate merger or a large merger.

maintain a degree of participation in the industry in association with SSA.

- Secondly, and related to this, Tepco, as we have noted above, is in parlous straits.
- Thirdly, Thebe's position requires careful consideration. Tepco represents a significant investment for Thebe. The travails of the small oil company may represent a considerable threat to Thebe itself. Accordingly, Thebe's decision to rid itself of this troublesome asset may represent a commercially prudent decision on its part. Would the 'competitiveness of firms owned by historically disadvantaged persons' have been promoted if Thebe, constrained in its ability to dispose of a troublesome investment, had sustained significant damage?

49. The Commission may protest that it has no wish to prevent the transaction. However, it must be recognized that the imposition of a condition on the purchaser will come with a price and Thebe, precisely the firm owned and controlled by historically disadvantaged persons, will pay that price. We would however go further and insist that even if Tepco had been a company in perfect health, the Commission should be extremely careful when, in the name of supporting historically disadvantaged investors, it intervenes in a commercial decision by such as investor.

50. Consider the following eminently plausible scenario: Thebe, in its commercial wisdom, may have decided to consolidate and expand its interests in the leisure and tourism industry. In order to do this it may have elected to dispose of its assets in the oil industry. White owned and controlled firms obviously do this with impunity – it represents a significant and perfectly respectable mode of financing business expansion. The Commission may believe that its proposed condition only constrains the acquiring firm. On the contrary its condition constrains the seller, the target firm, to sell its assets only to a purchaser who will accept these conditions, or, what is the same thing, it is constrained to offer its assets at a discount because the assets are accompanied by conditions specifying the post-transaction utilization of these assets.

51. To constrain the capital-raising options of firms owned by historically disadvantaged persons in this way not only condemns these firms to the margins of the economy and the margins of those sectors in which it believes it is best able to make a significant mark, it also lays the Commission open to a charge of paternalism. The Commission's role is to promote and protect competition and a specified public interest. It is not to second-guess the commercial decisions of precisely that element of the public that it is enjoined to defend, particularly where no threat to competition is entailed.

52. The Department of Mineral and Energy Affairs has, with the support of the Commission, recommended additional conditions. It has focused on a provision in the shareholders' agreement concluded between SSA and Thebe that commits SSA, in the event that it elects to dispose of all or part of its investments in its upstream refining activities, to discuss its intentions with Thebe. We are requested to require SSA to give Thebe a 'right of first refusal' in the event of such a disposal. This is tantamount to giving Thebe an option to acquire SSA's refining activities. Were Thebe ultimately to take up such an option this would undoubtedly represent an expansion of the stake of HDP firms in the oil industry.

53. We are, however, constrained to observe that options of this sort come at a price. There is no evidence suggesting that Thebe is willing to pay this price. On the contrary Thebe supports the transaction, it is a perfectly willing seller, a willingness attested to by both its CEO and the CEO of Tepco. We should point out that were SSA to consider disposing of its refining interests to one of its large competitors in the industry, the Commission would undoubtedly be concerned about the competition implication of such a divestment. This would be the appropriate circumstance in which to insist that SSA consider approaching a firm such as Thebe whose acquisition of these interests would raise no such competition concerns. But to insist that at this stage SSA gives an option to Thebe is simply to invite SSA to increase the price at which Thebe acquires its current shareholding in Shell SA Marketing.

54. Other conditions have also been proposed. It is suggested that we firm up Shell SA Marketing's commitment to capacity building and skills development; that it enhances the participation of historically disadvantaged persons in the management of Shell SA Marketing. Shell points out that it has an employment equity and skills development programme in place; that the shareholders' agreement requires the board of Shell SA Marketing, of which the CEO of Thebe will be a member, to establish a transformation committee charged, inter alia, with increasing the involvement of historically disadvantaged persons in the management of the business. We make no judgment on the sincerity of SSA's commitments in this regard. We are however skeptical of the ability of the Competition authorities to play a meaningful role in securing these laudable objectives and we are extremely concerned at the prospect of generating, in the process, a range of wholly unintended consequences.

55. We take comfort in the knowledge that Thebe negotiated the terms of its disposal of Tepco and its acquisition of a stake in Shell SA Marketing with SSA. It achieved the best deal that it believed that it was able to conclude. Who are we to say that, in concluding this deal, it 'under-sold' the interests of historically disadvantaged investors, concretely represented by itself. As earlier noted, it is an approach vulnerable to the charge of paternalism.

56. To quote Mr Khanyile, CEO of Thebe: "*the question is, is it Tepco that must be made more competitive or it is Thebe that must be made more competitive? If Thebe can compromise certain things about Tepco in order to gain an added economic advantage for Thebe, which is a historically disadvantaged company acting on sectors broader than just the petroleum sector, yes. Thebe becomes more competitive as a black owned company. I don't have problems in making that decision because I know that we will be empowered and I can actually demonstrate through our BEE approach that we are a much more vibrant BEE company after the transaction, than before the transaction, at a Thebe level*."

57. We take note of the Commission's rejoinder to the effect that as a public authority it must be guided by the public interest, it must enforce public policy. Expressed otherwise, the Commission is suggesting that what may be good for the Tepco shareholders, specifically Thebe, may not be good for South Africa and, in particular, may not be good for securing the spread of ownership by historically disadvantaged persons. While Thebe's narrow commercial interest may dictate that it exits Tepco and enters Shell SA Marketing on the agreed terms, the broader public interest requires that Thebe's pursuit of this objective not diminish the extent of ownership and control of historically disadvantaged persons in the economy.

58. Our view is that this argument, though self-evident in many respects, should be advanced with considerable caution when the competition authorities use public interest as a basis for their intervention, particularly when competition is unimpaired and when the only historically disadvantaged investors whose interests are directly affected expressly reject the Commission's interventions. The role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments – in this case the Employment Equity Act, the Skills Development Act and the *Charter* itself immediately spring to mind. The competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner lest they damage precisely those interests that they ostensibly seek to protect.

22 February 2002
D. Lewis Date

Concurring: N.Manoim and U. Bhoola