COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No.: 45/LM/Jun02 and 46/LM/Jun02

In the matter between:

Industrial Development Corporation of South Africa Ltd **Applicant**

and

Anglo-American Holdings Ltd **Respondent**

in the large mergers between:

SectionI.1Anglo American Holdings Ltd

and

SectionI.2Kumba Resources Ltd

and

Anglo South Africa Capital (Pty) Ltd

and

Anglovaal Mining Ltd

SectionI.3Reasons on the Scope of Intervention and Tribunal Expert

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ArticleII.Procedural history

1. On the 20th September 2002 I ruled that the IDC (the intervenor) would be entitled to intervene in these proceedings. The merging parties asked me to provide my reasons for that decision which I did on the 26th September.

2. In my ruling on the 20th September I indicated that the intervenor would have to file a document outlining the extent of its participation by the 8th October 2002. The intervenor did not do so, claiming it was hampered in its task by the extensive edits contained in the version of the record it had received to date from the merging parties. I ordered that it be given an unexpurgated version of the Commission's recommendation[1] and the IDC were required to make their submission by midday on the11th October, which they did.

3. On Tuesday the 15th October 2002 a further pre-hearing was held. I heard argument from counsel representing the merging parties, whom I shall refer to from now on as the 'parties', on two issues viz. what the extent of the intervenor's participation in the hearing should be, and whether I have the power to call as a witness an expert in economics. I had proposed the latter at the previous pre-hearing.

4. I was asked to make rulings on both these matters. I initially proposed that the parties and the intervenor negotiate to try and reach agreement on the contents of a draft order. Agreement could only be reached on certain of the intervenor's procedural rights. I was asked to hear argument and to rule on the remaining issues. I then heard argument from the parties on the same day.

5. However, counsel appearing for the intervenor then asked for the opportunity to be given further time to prepare argument, as he said he had been confronted, only that morning, with the parties lengthy heads of argument on the extent of the intervention which included a draft of a proposed order. Furthermore the intervenor had not been aware of the parties' objection in respect of the expert witness.[2]

6. I considered the request reasonable and I adjourned the pre-hearing and allowed

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1I nevertheless agreed that certain details of the transaction, which appear in that report could remain deleted, with my agreement, in the version supplied to the intervenor's legal representatives, as they had no bearing on any of the issues on which they sought to intervene.

2 I had mentioned at the 8th October pre-hearing that I intended to call an expert witness and at that stage there was no objection from the parties. On Friday afternoon 11th October, we received a letter from the parties indicating their concerns about the calling of the expert. This letter was not sent to the intervenor. I make nothing of the fact that the objection only came some days later and for this reason I heard the parties submissions on this point on the 15th October. However, fairness required that I give the intervenor the opportunity to place argument before me as well and hence the indulgence granted to them to file heads on this issue by 17th October.

the intervenor to file heads of argument on both issues by the 17th October. They were duly filed on that date and I was able to consider them before making my order.

7. I gave my ruling, which is attached, on the 18th October. I have since then received a request for the reasons for my ruling, which I set out below.

8. Extent of intervenor's participation

9. The extent of the intervenor's participation needs to be determined in two senses; firstly, the issues on which it wishes to participate, which I shall refer to as the 'scope' of its participation and secondly, the procedural rights which it shall enjoy in order to be able to raise those issues. I propose to deal with these separately as the parties and the intervenor have done.

SectionII.1Procedural rights

10. The parties were able to reach agreement on all the procedural issues except that of access to confidential information. I will for this reason confine myself to this issue.

11. According to the parties, the intervenor should only be entitled to inspect non-confidential documents and then only those that are necessary for it to inspect in order to make effective representations.

12. The intervenor's on the other hand, at least during the course of argument at the pre-hearing, sought access to all documents including confidential ones irrespective of whether these fell within the scope of its participation. Confusingly, however, the draft order that was submitted with its heads of argument, states in paragraph 1.3:

> *The IDC will be entitled to take all the steps necessary to participate and make the aforesaid representations, including questioning witnesses, the inspection of documents (subject to the provisions of the Act relating to confidentiality), the questioning of witnesses and the presentation of written and oral argument.*

13. The caveat about confidential information is ambiguous.[3] Nevertheless I shall

3 It could be read either, that it wants access to all documentation, including that which is confidential, but would abide by some restriction imposed upon its access, or that it seeks only non-confidential information. Nor is it clear whether it confines its request for documentation that is relevant only to the scope of its

assume that the intervenor has not changed its stance since argument, and that it means that it seeks access to all information including confidential information, but that it would abide by any restriction imposed to protect such confidentiality.

14. The parties are correct that the intervenor is not a party with a case to meet or prove, as would be an ordinary litigant. They use this as the basis for arguing that they are therefore not entitled to access to all documentation, as would be a litigant in a trial.

15. Nevertheless, if a person is allowed to intervene in merger proceedings, the Tribunal must ensure that its intervention is meaningful. An intervenor who has only got access to half the story does neither itself nor our proceedings any justice. We must not lose sight of the fact that the intervenor, although there, to represent its own interest, is also there to assist the Tribunal in its truth seeking function.[4] If the intervenor cannot access documentation which may be vital in the consideration of its arguments it takes little imagination to foresee that those representing an opposing view will argue that its views should be given little weight as it has formed its views on an inadequate record.

16. We have an interest in seeing that an intervenor can make representations that are meaningful and not *"illusory"* to adopt the language of Coleman J in Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another .[5]

17. This is not to say that intervenors should always be allowed such information and no hard and fast rule should be laid down. In this case the intervenor would not be able to make a meaningful contribution and hence assist our deliberations without such access. To protect the interest of the parties I have restricted access to the legal representatives and the intervenor's two experts who will be required to give confidentiality undertakings. The IDC itself will not have access.

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participation or the proceeding as a whole.

4 This function of the intervenor is recognized in the Canadian cases, which the parties referred us to. See, page 9 - 10 of Director of Investigation and Research v Canadian Pacific Limited and others (CT 96/2) and Commissioner of Competition v Canadian Waste Services Holdings Inc (CT2000002), where the Tribunal states, *"intervenors are usually admitted because they are at the time of their admission in a position to offer additional insight to the Tribunal*."

5 Coleman J stated: *" It is clear on the authorities that a person who is entitled to the benefit of the audi alteram partem rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretence of giving the person concerned a hearing would clearly not be a compliance with the Rule. …What would follow … is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly he must be put into possession of such information as will render his right to make representations a real, and not illusory one",* (My emphasis) Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another 1980 (3) SA 476 (T) at 486 E – H.

18. The order I have given is an attempt to achieve a balance between the intervernor's right, the Tribunal's interest in their meaningful participation and the parties' interest in preserving the confidential nature of their information.

SectionII.2Scope of Participation

19. The parties referred me to several Canadian cases in which the Canadian Competition Tribunal had to rule on applications by firms to intervene in merger proceedings to which they were not party. The parties sought to use those cases to show that the Canadian Tribunal adopts a strict approach to identifying the scope of the intervenor's interest.

20. I need not decide whether the Canadian approach is the correct one that should always be followed in our proceedings. [6] Nevertheless, a perusal of those decisions indicates that the methodology I have employed is consistent with theirs –viz. once the interest has been identified the scope must be consistent with that interest. I have in my previous decision identified what the intervenor's interest is, and in this decision I have determined its scope. It must be borne in mind that in our Act, unlike the Canadian statute, public interest factors form part of the merger assessment. For this reason the scope of an intervenor's rights might be more widely crafted in our proceedings than in that of our Canadian counterpart's.[7]

21. Both sides furnished me with their proposed draft orders on what the scope of the intervenor's participation should be.

22. My order is wider in scope than that proposed by the parties, but narrower than that proposed by the intervenor. I do not propose to give reasons for each item in the order as I take most of its content to be common cause on the basis of the content of the two draft orders. I will confine myself to explaining why I have widened the scope of the parties draft order and narrowed that of the intervenor's.

23. The Competition Act provides in section 16(2), that when the Competition

6 We should remember the Competition Appeal Court's caution about comparative borrowing *"which is then wrenched from its legitimate structure and legal roots to provide support for a particular interpretation of the Act."* (See York Timbers v Safcol (CAC) 2001 paragraph 6.8(unreported) This caution is even more pertinent in relation to procedural rights, as no two systems are exactly alike. The language used in the Canadian statute as it appears in the cases differs from that in our own. In the Canadian statute the person seeking to intervene must be *directly affected*. As to how I have interpreted this section in our Act, see my decision dated 26 September.

7 Nevertheless the Canadian Tribunal still adopts a broad approach as the Canadian Pacific merger indicates. Here the Tribunal allowed the Montreal Port Corporation to intervene on issues such as the efficiency and competitiveness of the port in relation to certain other ports. The one issue on which its participation was denied, the effect of financial losses on the Montreal region, is an indication of where our statute differs from the Canadian one, because our public interest enquiry requires us to look at the effect of a merger on a region.

Tribunal considers a merger, it must do so in terms of the factors set out in section 12 A. That section provides a three-stage process for merger consideration. First, we consider if the merger will substantially lessen competition by applying inter-alia the factors listed in section 12 A (2), what I will call the '*pure competition'* criteria. If that answer leads to a negative conclusion we then go on to determine if the anti-competitive effects are offset by any efficiency gain as set out in section 12A(1)(ii) the so called '*efficiency defense'*. As a final step wherever the conclusion to these first two stages leads us we must consider the merger in terms of the public interest criteria, which are specified in section 12A(3). The public interest test possesses a Janus-faced quality, as it can work to resurrect a merger that is otherwise found anti-competitive, following the first two stages of the enquiry or to condemn a merger that has survived the competitive assessment of the first two stages.

24. It is for this reason that I first approached the order by differentiating between those issues relevant to 'pure competition' issues or the factors that we must look at in terms of section 12A (2) read with the efficiency defense and the public interest issues located in 12A(3).

25. In relation to the 'pure' competition issues I have largely followed the version of the order suggested by the merging parties. These are located in section 1.1 of the order.

26. Paragraph 1.1.4 of the order relates to the efficiency issues, which the parties are alleging as part of their submissions. In argument counsel for the parties had no difficulty conceding this point, which was set out in the intervenor's submission but not included in the parties draft. For this reason I need not justify its inclusion any further.

27. Paragraph 1.1.5 was included in the intervenor' s notice, but not the parties. Since the efficiency considerations also involve in large part the better use of the Oryx railway line, which connects the iron ore mines to Saldanha Bay, it seems a logical corollary to such an enquiry to hear if the arrangements lead to any adverse effects and hence the inclusion of 1.1.5.

28. Paragraph 1.1.6 serves to clarify issues of scope in the previous paragraphs and requires no further elaboration.

29. In section 1.2, I set out the issues on which the intervenor may participate in relation to the public interest. Paragraph 1.2.1 again was common to both draft versions so I will not elaborate on it any further.

30. Paragraph 1.2.3 simply allows the intervenor to make any of its submissions, which it has made on the 'pure competition' grounds on public interest grounds as

well. It would be artificial to classify them as purely one or the other as they could as easily be raised in terms of either sub-section. By way of example the Oryx railway line issues could also be relevant in terms of section 12A(3)(a).

31. However, if the length of submissions devoted to this issue in the heads of argument is anything to go by, then it is paragraph 1.2.2 that is the most contentious, and for this reason I have left it to last.

32. The intervenor, in its notice in which it indicated the issues on which it wished to participate, alleges that it has concerns about what it describes variously as Anglo's 'dominance', 'monopolization' and further increase in the 'concentration of ownership and control' in the mining industry. [8] It states that these are in conflict with national minerals policy and the Industrial Development Act, which is the statute establishing the intervenor. They then go on to raise these issues in much the same form in relation to the Competition Act, in paragraph 8, for which purpose they rely on extracts from the preamble and section 2 of the Act, which they argue locate these issues as being relevant to our merger consideration function.[9]

33. The parties argue that our merger proceedings are not concerned with the objectives of either minerals legislation or the IDC's statute, nor are the citations from the preamble and section 2 pertinent to our function in terms of section 12A. To see what we have to consider in terms of merger considerations we must confine ourselves to the language of section 12A and, looked at from that perspective these issues are not directly relevant and hence should not be part of the intervenor's scope.

34. I agree with the merging parties that we must consider the merger from the perspective of the Competition Act and not some other statute. [10]

35. I agree too, that we must confine our analysis to the framework of section 12A and that the preamble and the objectives cannot be used to found some other consideration not expressly or by implication located in that section.

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8 See paragraphs 6.1 and 7.1.

9 The preamble of the Act contains references to past *"..excessive concentrations of ownership and control"* and the need to *"regulate the transfer of ownership in keeping with the public interest"*. Section 2 inter-alia refers to the purpose of the Act being *" to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged people."*

10 The content of the IDC's Act is relevant to the IDC's interest, as I have recognized in my decision on its participation. To the extent that the IDC's statutory objectives are co-extensive with those issues that we may consider under the Competition Act they have an interest in raising those issues before us. (See paragraphs 36-40 of my decision dated 26 September 2002.)

36. Nevertheless section 12A is widely framed. The pure competition considerations although listed do not constitute a closed list, hence the use of the word *"..including.."* that precedes the introduction of the list in section 12A(2).

37. The public interest considerations whilst drafted in terse language are broad in scope. For instance the phrase *"..effect on a particular industrial sector or region"* opens up for consideration an enormous range of issues without doing any violence to the language. Given that 12A(2) contains a non-exhaustive list, and the wide ambit of 12A(3), it is a legitimate exercise in statutory interpretation to look at other parts of the statute, which set out its purpose and objectives, so as to create the lens through which we should view the interpretation of section 12A. Indeed this is precisely the approach followed by Marais JA in his minority judgment in the Standard Bank case, which involved the interpretation of a section relating to the application of the Competition Act.[11]

38. Our courts have consistently held that in interpreting a provision of a statute one may consider the preamble of the Act (or any other express indications in the Act as to the object that has to be achieved.)

39. In Distillers Corporation (South Africa) Ltd v Bulmer (SA) Pty Ltd [12], Davis JP expressly invoked this principle of interpretation at page 358 paragraph A:

> *" The applicable sections of the Act thus provide a clear indication of the purpose of chap 3, namely that transactions which are likely substantially to prevent or lessen competition should be carefully examined by the competition authorities. This interpretation is supported by the preamble to the Act which provides, inter alia, that the Act 'restrain(s) particular trade practices which undermine a competitive economy and establish(es) independent institutions to monitor economic competition'. Section 2 of the Act provides that the purpose of the Act is to promote competition in the Republic. It follows that the Act was designed to ensure that the competition authorities examine the widest possible range of potential merger transactions to examine whether competition was impaired and this purpose provides a strong pointer in favour of a broad interpretation to s 12 of the Act."*

40. The Supreme Court of Appeal in Stopforth v Minister of Justice and Others [13], in interpreting the Promotion of National Unity and Reconciliation Act 34 of 1995 applied a purposive approach and held that the preamble of the Act clearly expressed the intention that amnesty was to be granted in respect of political act,

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11 Standard Bank Investment Corporation Ltd v Competition Commission 2000 (2) SA 797 SCA, page 816 - 817

12 Distillers Corporation (South Africa) Ltd v Bulmer (SA) Pty Ltd 2002 (2) SA 346 CAC at page 358

13 Stopforth v Minister of Justice and Others 2000 (1) SA 113 SCA at page 122

which must have been committed in the context of past conflicts between groups in South Africa.

41. In Thoroughbred Breeders' Association v Price Waterhouse [14], Olivier JA once again embraced this fundamental principle of interpretation in seeking to interpret the Apportionment of Damages Act 34 of 1956.

42. In Kellaway *Principles of Legal Interpretation* [15], the learned author deals with the determination of the purpose of an enactment and states that in seeking the purpose of an Act the Court may:

    1) look at the preamble to the Act or at other express indications in the Act as to the object that has to be achieved;
    2) study the various sections wherein a purpose may be found;
    3) look at what led to the enactment (not to show the meaning, but to show the mischief the enactment was intended to deal with);
    4) draw logical inferences from the context of the enactment'.

43. The above extract was expressly supported by the Transkei High Court in Konyn and Others v Special Investigating Unit. [16]

44. But even without this purposive interpretation, a mere textual interpretation of section 12A(3)(a) suggests that submissions on increased concentrations in a sector, in this case mining, are relevant to a merger's effect on an industrial *sector*. The legislature's use of the word *sector* here as opposed to the use of the word *market*, the word used in section 12A(2), is instructive. Clearly the legislature intended that in undertaking the analysis of the public interest, the competition authorities were to have regard to some sphere of economic activity, wider than the mere relevant market, the traditional tool of analysis of pure competition law issues.

45. Issues around the alleged concentration in the mining sector are thus relevant, as both a purposive and textual interpretation of section 12A lead me to conclude, and hence the inclusion of paragraph 1.2.2 of my order, albeit in a more limited form than that sought by the intervenor.

46. I have excluded certain aspects from the intervenor's draft order. Some are excluded as I consider them to be covered in the order as I have reformulated it or were repetitive. Others such as the issue of corporate governance are not relevant

14 Thoroughbred Breeders'Association v Price Waterhouse 2001(4) SA 551 SCA at page 623-624.
15 Kellaway, EA, *Principles of Legal Interpretation Statutes, Contracts and Wills,* Butterworths, Durban, 1995at page 69.
16 Konyn and Others v Special Investigating Unit 1999 (1) SA 1001 (TkH) at page 1010.

to any consideration that we have to consider in terms of section 12A, even on the broadest possible interpretation and hence have been excluded.

47. Apart from the explanation I have offered above, the other departures from the respective draft orders are insignificant, mainly stylistic, and hence require no further comment.

(a) B. Expert Witness

48. I indicated to the participants that I wish to call an economist, Dr. Simon Roberts, of the University of the Witwatersrand, as an expert witness. Dr Roberts has been asked to prepare a report on the transaction in relation to the 'pure competition' issues and to submit the report prior to the proceedings.[17] It is also possible that he may be called as a witness in relation to his report. The parties and the intervenor will be given copies of the report prior to the commencement of the hearing. They will be given the opportunity to file submissions or to rebut any evidence that the expert submits if they so wish.

49. The brief that Dr Roberts has been given is an open one and is contained in the letter, which is Annexure A to my order. As the letter indicates, Dr Roberts is free to come to his own conclusions in this regard. Beyond this he has been given no other brief.

50. This means that it is conceivable that Dr Roberts may come to the conclusion that he:

    1) Agrees with the merger analysis and conclusions of the parties experts;
    2) Agrees with the conclusion of the parties experts that the merger raises no competition concerns, but does so for different reasons; or
    3) Disagrees with the analysis of the parties experts and comes to the conclusion that the merger does substantially lessen or prevent competition in the relevant markets.

51. The merging parties argue that I have no power to call Dr Roberts. They argue that whilst I may have the power to call witnesses in certain limited circumstances, I do not have the power to call an expert in economics, an issue on which the Tribunal itself is presumed to be expert. They have advanced several reasons for their objection.

52. The first objection is related to the concern that the calling of an expert will lead to that person usurping a function that the Act gives to the Tribunal. They rely for this proposition on section 28 of the Act, which sets out the qualifications of

17 This is the same day on which the participants are filing various other documents.

members of the Tribunal, and states inter-alia in section 28(2)(b) that each member of the Tribunal must:

> *"have suitable qualifications and experience in economics, law, commerce, industry or public affairs"*

53. In the present hearing, the panel will be composed of two economists and this they argue strengthens their argument that the panel is not in need of any further expertise on economics. To call the independent expert would be to delegate or cede an authority vested in us to an outside party and that, they argue is impermissible.

54. They went further to argue that none of the powers given to us under the Act give us the power, in counsel's words on page 72 –73 of the transcript of the pre-hearing, to:

> *"..develop a relationship with a witness that is styled the Tribunal's witness and where the Tribunal issues instructions, as indeed a party would instruct a witness for the purpose of advancing a case. And it's the instructions to a witness, which we in our respectful submission suggest oversteps the mark from adjudication into the arena and is not grounded in a power that we can see in the Act."*

55. Section 54, they say, gives us the power to call a witness in relation to a specific body of evidence, but not a witness such as an expert, who will require instructions for the purpose of advancing a case and it is those instructions where the problem lies. They also argue that the calling of the expert would undermine the proper function of the Commission as the investigative authority in terms of the Act, and that it compromises the protection that must be afforded to confidential information.

56. I propose to deal with their objections by firstly looking at why I consider the Tribunal has the power under the Act and Rules to call such a witness. Secondly, to examine the policy reasons for why, if the Tribunal does have such a power, it might want to call an expert witness on economic matters. Thirdly, to examine what concerns there might be about the use of such a power.

57. The Act provides the Tribunal with wide powers in respect of the calling of evidence. That this is so, is apparent from several sections.

58. Section 54(a) – (c) states:

> *"The member of the Competition Tribunal presiding at a hearing may –*

(b) (a) Direct or summon any person to appear at any specified time and place;

(c) (b) Question any person under oath or affirmation;

(d) (c) Summon or order any person –

1) (i)To produce any book, document or item necessary for the purposes of the hearing; or

2) (ii)To perform any other act in relation to this Act; "

59. If the powers under (a) and (b) are not clear enough, in relation to the calling of a witness the residual power under sub-section (c)(ii) can be clearly read to include calling someone to prepare a report and produce it for the Tribunal.

60. Section 52(2) of the Act states that the Tribunal may conduct its hearings … *" in an inquisitorial manner."*

61. In our law the exercise of the inquisitorial power has been widely construed as a survey of certain decisions shows. This is because an inquisitorial tribunal's purpose is to seek the 'complete truth' as opposed to the adversarial tribunal's seeking of 'procedural truth' between the versions of two or more contending parties. As Sachs J has described this quality in S v Baloyi (Minister of Justice and Another Intervening) 2000(2) SA 425 (CC), paragraph [31]:

> *"It also requires that they be inquisitorial that is it places the judicial officer in an active role to get at the truth"*

62. If the function is a truth seeking one, then per definition it must include the right to gather information that is required. As Josman AJ expressed this in Ross v South Peninsula Municipality 2000 (1) SA 589 (C) at 595:

> *"In systems employing the inquisitorial system a judicial officer is able to call for and gather whatever information is required."*

63. Possibly the most detailed description of what this role entails in our law is to be found in the decision of Meer J in Mlifi v Klingenberg 1999 (2) SA 674 (LCC) at 702 – 704, where the learned judge said:

> "[107] The inquisitorial system rejects the notion of a passive Judge. On the contrary the Judge is expected actively to undertake a comprehensive investigation into the facts surrounding the dispute. He or she need not rely solely on the evidence adduced by the parties. His or her role is to find the objective or material truth. The dismissal of a case on the basis of inadequate evidence would be seen to be a failure on the part of the

> Judiciary. The Judge must manage the case from the outset to ensure that it is run efficiently. He or she interviews the parties separately at an early stage of the proceedings, discusses with them points they need to consider, advises them of their rights and duties, *determines what witnesses are to be called (and this may include witnesses the Judge wishes to call) and what documentary evidence is required, makes settlement proposals and decides when the matter is ripe for hearing. At the hearing the Judge plays an active role in the presentation of evidence and the questioning of witnesses and determines the order in which they testify."*(My emphasis)

64. On a proper interpretation of the inquisitorial power alone, the Tribunal has the power to call a witness such as Dr Roberts.

65. Section 27(d) of the Act states that the Tribunal may make any ruling or order necessary or incidental to the performance of its functions in terms of the Act. It is in the words of Davis JP in The Competition Commission v Uniliver PLC and Others, 13/CAC/Jan02, "*a residual power."* Amongst our functions in terms of this Act are merger considerations in terms of Chapter 3 of the Act and pursuant that function we may conduct our hearings inquisitorially, (Section 52(2)) and make directions in relation to our hearings (Section 54). The power to call the expert witness is thus exercised pursuant to these functions

66. If the Act were not clear enough any doubt is dispelled by the rules. In terms of the pre-hearing rules, which are made applicable to merger proceedings[18], the member assigned to the pre-hearing has the power to give directions in respect of-

> *22(1)(c) (ii) witnesses to be called by the Tribunal at the hearing, the questioning of witnesses and the language in which they will testify;*[19]

67. I am satisfied therefore that we have wide powers under the Act to not only call witnesses but also expert witnesses, and an expert on economics. Nowhere does it appear that there is in the language of any of these sections a case to be made for distinguishing an expert witness from any other kind of witness.

68. It seems that the questions that the parties raise relate more properly, not to whether we have such a power to call a witness, as we clearly have, but to whether we should be exercising our discretion to use that power, in the circumstances of this hearing.

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18 Rule 35(3). See also Rule 35(4).

19 The parties suggested that the only power we had at a pre-hearing was to direct the Commission to investigate specific issues and to obtain certain evidence. (See Rule 22 (1)(b).) However this power is complementary to our power to call witnesses in terms of rule 22 (c) (vi) Thus there may be times that we cannot determine who should be called so we would request the Commission to investigate the matter further. The existence of this power does not exclude our own power to call an expert witness.

69. Here it seems the parties offer three policy reasons why we should not:

    1) *We would be in danger of having our discretion usurped by an expert. As I understand it what the parties are saying to us is this - 'you are the sole arbiters of section 12A and you cannot appoint anyone else to advise you on this.'*[20]

    2) *We would be in danger of entering the ring as the expert would need to be instructed to present a case and we should not be presenting any case as we are there to adjudicate not litigate.*

    3) We would be undermining the Commission as the institution responsible for investigation in terms of the Act.

70. Economics is central to the consideration of any merger. As Jeremy Lever Q.C. in his foreword to a leading work on the economics of competition law has stated:

> *"There has never been a greater need for economists with a proper understanding of the issues raised by competition law and the related, though distinct, area of the legal regulation of utilities. Although we speak of these areas as law, they are really the application of economics in a legally regular way."*[21]

71. This involves not only a consideration of the facts but also a determination of what facts may be relevant, and then how to apply theory to interpret them.

72. Lever states:

> *"We are therefore continuing to move in a direction that favours the construction of decision by the UK competition authorities so as to comprise a major premise – the applicable economic principles, then a minor premise - the relevant facts, followed by a conclusion deduced from the premises .The role of the economist in formulating the relevant major premises and in analyzing the generally complex factual matrix so as to identify the relevant facts for inclusion in the minor premise will clearly be of ever- increasing importance."*

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20 Although they did not say so expressly, I do not understand the parties to object to the calling of any expert in respect of this first point, but that these are problems associated with the calling of an economist a subject on which we are presumed expert. Thus if we were to call a scientist this problem in relation to the first point would not arise.

21 Bishop and Walker, Economics of E.C. Competition Law: Concepts, Application and Measurement, 1999

73. Economic ideas in this area are neither static nor are they settled or uncontroversial. Economists too, bring different tools to their assessments ranging from mathematical and statistical models to more exotic theories of how firms might behave in the market.

74. Again in the words of Lever:

> *"The study of economic principles to be applied in the fields of competition law and utilities regulation therefore has been and continues to be a growth industry. Moreover the trend towards more sophisticated economic analysis has led to a better informed and more principled debate between the competition authorities and the economic experts who give evidence to them."*

75. What this illustrates is the danger of the Tribunal presuming itself expert in a field that is so complex. The fact that we call for the opinion of an independent person is not an abrogation of our adjudicative function. Rather it helps sharpen that function. It exposes us to the ideas of another person, ideas we may have not considered and which the participants have not brought to our attention. We cannot but benefit from such a contribution. At the very worst it may prove superfluous, if the expert agrees with those views of the parties, but that can hardly be an issue of concern for them.

76. In this case I have identified the need to call an expert not only because of the significance of this transaction, but also because we will not be hearing any debate between the parties and the Commission, who both see the issues in the same way. This is not a criticism of the Commission, we may at the end of the hearing join the chorus of voices that supports the approval of the merger, but we have a statutory function to discharge, and it is one independent of the Commission's in order to come to a conclusion. A decision to prohibit a merger can at least be undone on appeal at the instance of the merging parties. A decision to approve a merger cannot be undone by anyone, (at least in the circumstances of this case where there is no employee body intervening), and in this sense our decision is final and not subject to correction.[22] *For this reason the hearing of another independent voice on the issues will help ensure that we discharge this function with the degree of care the Act requires of us.*

77. The requirement that there be persons with economic expertise on the Tribunal is not intended to make us omniscient in these matters, rather it is to equip us with the experience and background to understand arguments once made. The Act requires us to have some economic knowledge when we are viewed as a body of

22 This is because section 17 of the Act gives the right to appeal only to merging parties and to employee representatives, but the latter only have standing to appeal if they "*had been a participant in the proceedings before the Tribunal"*. In this hearing we have no employee or trade union participating and hence the parties would be the only ones with the right to appeal.

Tribunal members collectively, but not a monopoly on economic wisdom. Nor does calling an expert mean that we are wedded to that person's conclusions. The expert's report will be made available to the participants in advance and the expert will, if necessary, be called to give evidence and be questioned by any participant.

78. Indeed, the only possible bearing that our expertise may have in relation to the usurpation concern is that we are less likely to be susceptible to flawed evidence from an economic expert, than would be a lay tribunal.

79. The second concern of the parties, is that somehow they cannot conceive how an expert can be called without being instructed by the Tribunal, as if it were a party in adversarial proceedings, which says to an expert - this is our case what do you have to say about it. It is not necessary for the Tribunal to approach the expert on the basis of some brief or case it is trying to make out. Our brief is the application of section 12 A, and this is the instruction given to the expert as the letter shows. The supposed dangers of entering the ring as an adversary are not apparent to me in this procedure.

80. The parties concerns here appear to arise from the fact that they confuse an adversarial approach to briefing witnesses with that required when a body exercises an inquisitorial function. In the case of Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 (A) the court quoted the following remarks of Sir Richard Scott, which sets out this distinction clearly:

> *'In an inquisitorial inquiry there are no litigants. There are simply witnesses who have, or may have, knowledge of some of the matters under investigation. The witnesses have no "case" to promote. It is true that they may have an interest in protecting their reputations, and an interest in answering as cogently and comprehensively as possible allegations made against them. But they have no "case" in the adversarial sense. Similarly, there is no "case" against any witnesses. There may be damaging factual evidence given by others, which the witness disputes. There may be opinion evidence given by others, which disparages the witness. In these events the witness may need an opportunity to give his own evidence in refutation.' 23*

81. Nor does the fact that we exercise an active role in the gathering of evidence

23 The quote comes from the Duty to be Fair' by Sir Richard Scott, formerly Lord Justice and now Vice-Chancellor of the Supreme Court ((1995) Law Quarterly Review 596). This article draws upon his Matrix-Churchill Inquiry into the Sale of Arms to Iraq. Its essence is this (at 598-9): It is quoted in DU PREEZ AND ANOTHER v TRUTH AND RECONCILIATION COMMISSION 1997 (3) SA 204 (A) p218.

make us partisan provided we exercise that role fairly and with due regard to the rights of affected participants. This is the position contended for by Baxter in Administrative Law (see page 249 – 250):

> *" A leading English administrative lawyer has argued that one fundamental principle which should govern tribunal procedure is that it should be adversary, not inquisitorial. It is submitted that this view is mistaken. It casts tribunals too rigidly in the mould of courts of law. An active role on the part of the tribunal in the gathering of evidence and assisting of unrepresented parties does not make the tribunal partisan, even though such a role might not be appropriate in a court of law. What is essential is that the tribunal should be impartial and that persons affected by the tribunal's decision be given a full opportunity to present their cases and controvert those against them; this is the essence of fairness."*

82. The third policy concern is that this would undermine the role of the Commission as the body charged with the role of investigation in terms of the Act. Whilst the Commission has an investigative function in terms of the Act it is clear from the sections that I referred to earlier that this function does not exist to the exclusion of the Tribunal's inquisitorial powers in terms of the Act. The legislature did not intend to make investigation the sole preserve of the Commission. What is clear is that our investigative functions are more limited than those of the Commission, which can for instance obtain a warrant to search premises and seize material, but the calling of an expert witness is a modest use of those investigative powers, which the Act invests the Tribunal with. I am satisfied that the Tribunal's calling of the witness does nothing to weaken the Commission as an institution.

83. The parties also made much of the Commission's expertise in economic matters and the fact that they had included in their team an economist from the United States' Department of Justice. This is irrelevant. Even if the Commission had in its team a host of Nobel laureates in economics this in no way diminishes the way we must conceive of our function. We are neither a body of review of the Commission or a supervisory one. The language of section 16(2) in the Act is clear. We "must consider the merger in terms of section 12A, and the recommendation and request.." Thus we must apply our own mind to the interpretation of section 12A although we must have regard to the Commission's recommendation.

84. I find therefore that not only are there no policy reasons for why I should not be calling for the evidence of Dr Roberts, but that there are in the circumstances of this case compelling reasons why he should be called.

85. The final objection to the calling of Dr Roberts relates to the protection of confidential information. Dr Roberts had already been briefed with confidential

information obtained from the parties although this has been drawn to his attention and he has made undertakings in this respect. Counsel for the parties, has to his credit, not made any issue of information being given to the expert, a person known to them and in whom they have confidence in this respect. Rather it is the principle of the issue that they are arguing.

86. Section 69 creates the penal provision for breach of confidence. In terms of this section:

(1) It is an offence to disclose any confidential information concerning the affairs of any person or firm obtained –

a) in carrying out any function in terms of this Act; or
b) as a result of initiating a complaint, or participating in any proceedings in terms of this Act. (My emphasis)

(2) Subsection (1) does not apply to information disclosed –

a) for the purpose of the proper administration or enforcement of this Act;
b) for the purpose of the administration of justice; or
c) at the request of an inspector, Commissioner, Deputy Commissioner or Competition Tribunal member entitled to receive the information.

87. The parties argue that information may only be disclosed to the expert in terms of section 69(2). If we do not have the power to appoint an expert, as they have argued we do not, then we cannot disclose the information to our expert in terms of section 69(2). The expert in turn would not be carrying out a function in terms of the Act and hence would not qualify to be in breach of section 69(1). The parties appear to be using this as a backdoor route to be arguing why we do not have the power to instruct an expert. In so doing they are caught up in a circular argument. On the one hand they appear to argue that we haven't the power to call an expert we cannot instruct an expert with confidential information and hence adequately protect them. On the other hand they appear to argue that our lack of authority to call an expert can be inferred from our lack of ability to protect confidential information.

88. Given that I have found that the Tribunal has such a power, this concern is academic, and the expert is subject to the penal provisions of section 69, presumably in two respects; firstly he will be performing a function in terms of the Act and secondly he will be participating in proceedings in terms of the Act. The parties concern that confidential information is not subject to the penal protection of section 69 is unfounded and accordingly does not constitute a basis for the exclusion of the expert's evidence.

89. For all these reasons I am not satisfied that parties concerns about the calling of the expert have any validity and accordingly I have decided that he will be called, hence paragraph 3 of my order.

23 October 2002

NM Manoim
Presiding Member

Date

For merging parties: WWB Anthony Norton and D Unterhalter (Counsel)
For Intervenor: Cristine Qunta and AJ Nelson and JL van Dorsten.
For Competition Commission: Allen Coetzee