IN THE COMPETITION APPEAL COURT

43/CAC/Nov04

In the matter between

HARMONY GOLD MINING COMPANY LIMITED **Applicant**

And

GOLD FIELDS LIMITED **1st Respondent**

THE COMPETITION COMMISSION **2nd Respondent**

THE MINISTER OF TRADE AND INDUSTRY **3rd Respondent**

THE COMPETITION TRIBUNAL **4th Respondent**

JUDGMENT: 10 MAY 2005

DAVIS JP

[1] This is an application for leave to appeal to the Supreme Court of Appeal against the whole of the order of this Court dated 26 November 2004.

[2] The facts of the dispute between applicant and first respondent are described comprehensively in the principal judgment in which this Court set out its justification for the order granted on 26 November 2004. Accordingly, there is no necessity to traverse the factual dispute again.

[3] The Court's order was couched in the following terms:
'Pending the final approval of the acquisition by Harmony of all of the shares in the share capital of Gold Fields or some of the shares in Gold Fields pursuant to the early settlement offer (with or without conditions) by the Competition Tribunal or the Competition Appeal Court in terms of the Act:

1.1 [Harmony] shall be and is hereby interdicted and restrained from voting, or otherwise exercising any rights attached to, any shares in the share capital of [Gold Fields] which is may have acquired pursuant to the early settlement offer or otherwise.'

[4] Before the matter was heard on 24 March 2005, the Court communicated with the parties and requested them to consider whether the dispute was not moot. The reason for this request can be summarized thus: In the reasons given for the order, the Court found that the early settlement offer and the subsequent offer in substance formed part of a single transaction to acquire all the shares in first respondent. Subsequent to the order having been granted, the date of the early settlement order passed and the vote on the so-called IAM Gold transaction was concluded. The proposed merger, which was notified by applicant's attorney in terms of Rule 28 of the Commission's Rules of 19 October, 2004 has been set down for hearing before the Tribunal in May 2005. In terms of the principal judgment, this Court adopted the approach that at all material times there was but one merger transaction between the parties. It is clear in terms of section 13 A (3), of the Competition Act 89 of 1998 ('the Act') that applicant may not implement this merger as notified until it has been approved, with or without

conditions by the Competition Commission in terms of section 14(1)(d) of the ('the Act'), Competition Tribunal in terms of section 16(2) of the Act or the Competition Appeal Court in terms of section 17 of the Act.

[5] In short, the question of mootness concerns the issue as to whether the dispute is not now academic in that, subsequent to the order having been granted, section 13 A(3) of the Act is now of application to the proposed merger, notwithstanding disputes about the legal implications of the early settlement offer.

[6] In heads of argument, Mr Unterhalter, who appeared together with Mr Wilson on behalf of the applicants, submitted that the matter was not moot. Relying upon the decision of the Supreme Court of Appeal in **Radio Pretoria v Chairman, Independent Communications Authorities of South Africa** 2005(1) SA 47(SCA) at 55, he contended that a case is moot and therefore not justiciable if it no longer presents an existing controversy which is required if the Court is to avoid giving advisory opinions on abstract propositions of law.

[7] Mr Unterhalter submitted that, upon an application of this test, the present case was not academic. Although the vote on the so-called IAM Gold resolutions had taken place, applicant remained unable to exercise any of the rights attached to its shares in first respondent, including the right to vote on any matters that may have been put to first respondent's shareholders for approval. It was denied the right to minority shareholder protection and possibly even the right to receive dividends

and to sell its shares. Mr Unterhalter submitted that, even when the merger proceedings were finally determined, the interdict would only fall away if the merger was approved and not if it was prohibited. It followed that, in the event that the merger was prohibited, the interdict would endure indefinitely even after the merger proceedings were finally determined. The order would thus constitute a permanent deprivation of Harmony's rights as a shareholder. In my view, Mr Unterhalter is correct; the scope of the order extends beyond that which was intended by this court as is evident from the reasons provided

[8] It was common cause between the parties that this Court has the power to alter the order granted on 26 November 2004. Section 66(1) of the Act provides that this Court, acting on its own accord or an application of a person affected by a decision order, may vary or rescind its decision or order

(a) erroneously sought or granted in the absence of a party affected by it

(b) in which there is ambiguity, or an obvious error or omission but only to the extent of correcting that ambiguity, error or omission,

(c) made or granted as a result of a mistake, to all of the parties to the proceeding.
(my emphasis)

[9] Pursuant to this section, the Court invited the parties, particularly in the light of Mr Unterhalter's submissions, to consider whether a variation to the order should not be granted in terms of section 66.

[10] Mr Gauntlett, who appeared together with Mr van der Nest and Mr Cockrell on behalf of respondents, immediately took up the invitation of this Court and

proposed certain amendments that could be made to the order. For reasons best known to themselves, applicants' counsel stoutly resisted this invitation during the hearing. However on 31 March 2005 they submitted supplementary heads regarding this issue.

[11] The wording of section 66(b) of the Act follows the common law principle. The interpretation of this provision can thus be guided by the manner in which courts have dealt with the general common law principle of correcting, altering or supplementing an order. In **Firestone South Africa (Pty) Ltd v Genticuro** AG 1977 (4) SA 298 (A) at 307 **Trollip JA** said 'The Court may correct clerical, arithmetical, or other errors in its judgment or order so as to give effect to its true intention…This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance'.

[12] The order of 26 November 2004 was granted in great haste and under enormous pressure. The Tribunal had dismissed first respondent's application that the early settlement offer did not involve an acquisition of control over respondent. Within six days thereof, this Court heard an application based upon a voluminous record together with extensive and complex heads of argument. The Court was placed under considerable pressure to dispose of the matter before 26 November 2004, the cut-off date for the early settlement offer It duly issued its order. It was in no

position to provide reasons for the order given, the complex and important arguments that had been raised by counsel and which required careful analysis Reasons were provided later. An appellate court should not be placed under this kind of pressure. Understandably therefore, the order granted did not completely or accurately reflect the true intention of the Court as evidenced in the written reasons which were subsequently provided.

[13] There are accordingly clear grounds for correcting the order to reflect the proper intention of this Court. The intention of this Court, as is clear from the written reasons is that, until such time as the Competition Authorities had decided upon the notifiable merger, applicant should not be entitled to perform any act which could constitute the implementation of the merger as envisaged in section 13 A(3) of the Act. The order of 26 November 2004 must therefore be corrected to give proper reflection to the intention of the Court.

[14] Once these corrections are made the matter, in my view, becomes moot. Mr Unterhalter's eloquence concerning the possibility of some 'other merger' (other than the one before the Tribunal) notwithstanding, there is no other merger before the Tribunal or which is being proposed by applicants. Mr Gauntlett noted that first respondent announced its intention to acquire 100% of the share capital of first respondent. It was intent on acquiring all the shares of first respondent. It made its intention clear in the SENS announcement and was potentially capable of realizing this intention. Whatever might be the merits of an argument based on the early settlement offer it is this very merger as set out in a SENS announcement and described in the letter of applicant's attorneys of 19 October 2004 which is now before the Tribunal. This merger falls within the scope of

section 13 A(3). First respondent is prohibited from voting its shares or otherwise acting in a manner which would implement the merger in violation of section13 A(3) until such time as the Tribunal and possibly this Court finally determined the issue. To the extent that the order of 26 November 2004 is amended so as to replicate this position, the dispute between the parties which gave rise to the order has become moot. On this basis, there are in my view, no reasonable prospects, that another Court would come to a different conclusion.

For these reasons, the following order is made:

1. The order of 26 November 2004 will be corrected thus:

   Pending the final determination of the acquisition by Harmony of all the shares and the share capital of Goldfields or some of the shares in Goldfields pursuant to the early settlement offer (with or without conditions), by the Competition Tribunal or the Competition Appeal Court in terms of the Act:

   1.1 First respondent shall be and is hereby interdicted and restrained from voting its shares in the share capital of the applicant which it may have acquired in the early settlement offer or otherwise, which would constitute an attempt to implement the merger as set out in the SENS announcement of 15 October 2004 prior to the final determination of that merger by the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17 of the Act.

2. First respondent is ordered to pay the costs of the appeal which includes the cost of two counsel.

3. The application for leave to appeal is dismissed with costs, including the costs of two counsel.

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DAVIS JP

Jali and Hussain J JA concurred.