IN THE COMPETITION APPEAL COURT
OF SOUTH AFRICA

In the matter between: **Case No: 70/CAC/Apr07**

Mittal Steel South Africa Limited 1st Appellant

Macsteel International BV 2nd Appellant

Macsteel Holdings (Pty) Limited 3rd Appellant

and

Harmony Gold Mining Company Limited 1st Respondent

Durban Roodepoort Deep Limited 2nd Respondent

Judgment: 29 May 2009

Davis JP, Malan JA and Tshiqi JA:

[1] Introduction

The first and second complainants filed a complaint with the Competition Commission against the first appellant ('Mittal') of a contravention of ss 8(a) and

8(d)(i) of the Competition Act 89 of 1998 in terms of s 49B. The Commission issued a notice of non-referral in terms of s 50(2)(b) and the complainants thereafter referred the complaints to the Competition Tribunal in terms of s 51(1). The Tribunal found on 27 March 2007 that Mittal had contravened s 8(a) and dismissed the complaint under s 8(d) (the 'Merits Decision'). The issue of the remedies to be ordered was postponed. The Tribunal then handed down its judgment on the remedies on 6 September 2007 (the 'Remedies Decision').

[2] The Competition Appeal Court ordered that any appeals by Mittal and the second appellant would be consolidated and heard as a single appeal. This appeal concerns both the merits and the remedies decisions. All the appellants appealed against the orders given pursuant to both decisions. In addition, and in the alternative, the second and third appellants renewed the application for leave to introduce further evidence and other related relief. The third appellant lodged a notice of appeal on the basis that it was a person affected by the decision of the Tribunal as contemplated by s 61(1). This is clearly the position.

[3] The process before the Tribunal was initiated by a complaint referral by the complainants alleging contraventions by Mittal of s 8(a) and of s 8(d)(i). The latter complaint was dismissed, and there is no cross-appeal against the order dismissing this complaint. Hence only the complaint under s 8(a) is relevant to this appeal. No question arises of whether the conduct in issue could have fallen under any of the prohibitions in other sections of the Act (eg ss 8(c), 8(d)(iii) or 9).

The embodiment of these other sections in the Act, however, have a bearing on the interpretation of s 8(a), and on the remedies for contravention of s 8(a).

[4] Section 8 deals with the 'abuse of dominance' and provides:

'It is prohibited for a dominant firm to –

(a) charge an excessive price to the detriment of consumers;

(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;

(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain;

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act:

(i) requiring or inducing a supplier or customer to not deal with a competitor;

(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

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

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

(v) buying-up a scarce supply of intermediate goods or resource required by a competitor.

[5] Section 1(1)(ix) defines 'excessive price' as:[1]

'a price for a good or service which

(aa) bears no reasonable relation to the economic value of that good or service; and

(bb) is higher than the value referred to in subparagraph (aa).'

[6] The complaint referred to the Tribunal sought an order declaring that the practice of Mittal of employing import parity pricing ('IPP') in the South African flat steel market constituted an abuse of dominance in terms of s 8(a), ie constituted the charging of an excessive price, and for consequential relief based on that declaration. In amended form, the consequential relief claimed included orders prohibiting the imposition of use or resale conditions on customers, requiring Mittal to waive any existing conditions of that kind, the publishing of Mittal's list prices, and an administrative penalty. The Tribunal declined to grant an order declaring that Mittal's practice of employing IPP in the domestic flat steel market constituted an abuse of dominance. The Tribunal instead made an order (paragraph 1 of the Remedies Decision) declaring that Mittal's practice of reducing the supply of flat steel products available for sale on the domestic

[1] The late classical doctrine of *laesio enormis* in terms of which 'een verkoop tegen een prijs lager dan de helft van de waarde der zaak kon worden aangetast' (JC van Oven *Leerboek van Romeinsch Privaatrecht* (1948) 3ed para 139 at 247) has become abrogated by disuse or was never part of South African law. In *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) Van den Heever JA said at 871 that 'the doctrine that persons of full legal capacity can resile from contracts into which they have solemnly entered in the absence of fraud, duress or excusable mistake, was never part of the law of South Africa and in the few cases in which it was applied, it was done so by mistake.' By some turn of history the doctrine, albeit that South African law does not require a price to be 'fair', has been 'revived' by s 8(a) as a prohibition of an 'excessive' price.

market through the imposition of conditions of resale on the steel merchants and those of its customers who receive a rebate off the Mittal SA domestic list price is an abuse of dominance in terms of s 8(a).

[7] On the strength of that declaration, the Tribunal granted the consequential relief claimed by the complainants (see orders 2 to 5 of the Remedies Decision) and costs. The full text of the order granted by the Tribunal in the Remedies Decision reads as follows:

1. Mittal SA's practice of reducing the supply of flat steel products available for sale on the domestic market through the imposition of conditions of resale on the steel merchants and those of its customers who receive a rebate off the Mittal SA domestic list price, is an abuse of dominance in terms of Section 8(a) of the Competition Act.
2. Mittal SA may not:
   (i) Impose upon any customer of its flat steel products any conditions in respect of the customers use or resale of those products; or
   (ii) Reach agreement on a condition with a customer of its flat steel products, or enter into any arrangement or understanding with such a customer, in respect of the customers' use or resale of those products.
3. Mittal SA is ordered to waive in writing any condition in any agreement concerning the use or resale of flat steel products by a customer.
4. Mittal SA is ordered to make known in the public domain, at all times, its list prices, rebates, discounts and other standard items of sale for flat steel products.
5. Mittal SA is ordered to pay an administrative penalty of R691 800 000.00 (six hundred and ninety one million and eight hundred thousand) to the Commission within 20 Business days of this decision.
6. Mittal SA is ordered to pay the costs of the complainants including the cost of two counsel and the qualifying costs of two expert witnesses.

[8] Since the only conduct proscribed by s 8(a) is the charging of an excessive price, the Tribunal's declaratory order can be characterised as a declaration that Mittal's practice of reducing the supply of flat steel in South Africa through the imposition of resale conditions constitutes the charging of an excessive price. The remaining orders made by the Tribunal were consequential upon its declaratory order. The Tribunal would have had no jurisdiction to grant the consequential relief in the absence of a finding that Mittal had charged an excessive price in violation of s 8(a).[2]

[9] The Mittal/Macsteel relationship: Role of the Joint Venture

Although the Tribunal's declaratory order refers to the imposition of resale conditions on 'the steel merchants', the Tribunal appears to have had only one arrangement in mind, namely the condition in the agreement between Mittal and the Macsteel joint venture company (the second appellant) in terms whereof the latter handles Mittal's exports on the basis that the steel in question must be exported and cannot be resold by the second appellant into the domestic market. Mittal exports steel exclusively through the joint venture company. Sales from Mittal to the second respondent and by the latter to the end-customer are back-to-back contracts. The reference to customers who receive rebates is a reference to customers to whom such rebates are offered because they either intend to use the steel in the manufacture of steel products for export or because they are

[2] Section 58.

competing domestically with cheap imports of fabricated steel products. The price at which Mittal exports steel through the second appellant has historically been lower than the domestic price. In respect of the period covered by the evidence, Mittal's domestic price was determined with reference to IPP, though various customers were offered discounts and rebates.

[10] The Tribunal ruled that s 8(a) did not require an analysis of price levels. Nevertheless, it appears to have been of the view that the domestic price was higher than it would have been if resale conditions had not been imposed on the second respondent and on rebate customers.[3] The Tribunal's thinking was that if customers who received reduced prices were free simply to resell the steel into the domestic market, such steel would become available domestically at lower prices than IPP, thus causing the domestic price to drop from IPP and tend towards the export price. The Tribunal described the imposition of the resale conditions as a segmentation of the market which led to a reduction in the volume of steel available domestically.[4]

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[3] Merits Decision paras 47, 164 ff, 189.

[4] Merits Decision para 187: 'Moreover, it is clear from the evidence that the complainant and the other witnesses who are steel users believe that their commercial activities are disadvantaged in their respective market places because of the price charged for a 'must have' input, steel. This is what has caused them to invoke Section 8(a) of the Act - they are aggrieved by the absolute price charged for steel. Hence what we have been asked to pronounce upon is the inability of domestic producers to bargain over the price of Mittal SA's excess supply of flat steel products. What clearly emerges is dissatisfaction – and a degree of puzzlement – at the notion that domestic steel prices are based on market conditions in distant markets rather than on supply

[11] It is common cause that Mittal manufactures more steel than is required by the domestic market. Mittal supplies part of its production to the international steel market. Mittal found it more efficient to use the services of the second appellant as its vehicle for marketing steel in the international steel market. The second appellant is a Netherlands company, jointly owned by subsidiaries of Mittal and the third appellant, established pursuant to a joint venture agreement in 1995 ('the JV Agreement').[5] At the time the JV Agreement was concluded, the Macsteel group was a well-established steel trader in the international steel market. When the second appellant was established, a significant part of its business comprised sales in the export market of Mittal's products, but it also conducted other business in the international steel market.[6] The second appellant traded and trades only in the international steel market; it has not, and does not, trade in the domestic market in South Africa.[7]

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and demand conditions in the South African market and that notional transport charges are levied on a product that is not, in physical reality, transported over the vast and costly distances that nevertheless constitute an important element of the domestic price. The complainants clearly believe ... that the price of steel should be determined by local demand and supply conditions which, in their estimation – and they are correct – would, if free of abusive conduct, produce a lower steel price. Hence the allegation has been one of excessive pricing.'

[5] The JV Agreement can be found at Record 2:372ff.

[6] Dednam Record 47:10808; Jones Amendment Application Record 3:680.

[7] Jones Amendment Application Record 3:679.

[12] The JV Agreement relates to 'specified ISCOR products', which are the products 'which are exported' and itemised in clause 1.2.15, and include flat steel and other steel products. These are the products which the second appellant is, to the extent that Mittal is able and willing to supply them to the second appellant, obliged to purchase from Mittal,[8] and which Mittal is obliged to market in the international market only through the second appellant.[9] The allocation between products for the domestic market and products for the international market, lies entirely with Mittal. This is further recognised by clause 21.4, which reads: 'It is specifically recorded that ISCOR will service its local clients on a first priority basis.' The mechanism of this allocation arises from the nature of the ordering and production function. Given the differences in specification between products produced by Mittal, the orders (both domestic and international) are placed early which enables Mittal to estimate and meet the local demand and still produce for orders generated internationally.[10]

[13] The relevant provisions of the JV Agreement are:

'MACSTEEL Group has a well established capability and organisation for the international marketing of steel products' (Clause 2.12)

'ISCOR will in all likelihood always produce a certain quality and quantity of steel products which will be available for export' (Clause 2.2)

'the parties … have agreed to an arrangement for the marketing of steel products in the international territory' (Clause 2.3)

[8] Clause 29.2.1 at Record 2:417.

[9] Clause 30.1 at Record 2:417.

[10] Tomlinson 46: 10429; Dednam 47: 10636-7.

[14] Clause 5.3 provides for Mittal to 'give notice of termination to all its existing steel export agents'. The second appellant would fulfil the role which Mittal's export agents had previously fulfilled.[11] Clause 21.1.2 provides that Mittal 'shall be entitled to require that its products are sold pursuant to long term contracts' and that Mittal would bear any additional commercial risk arising from this requirement. Such risks would include fluctuations in international steel prices and currency exchange rates that would emerge from a fixed price long-term contract but not form part of the usual transactions concluded by the second respondent. Clause 21.2 provides that 'the day to day trading management of JV CO will remain in contact with ISCOR's mill operations', and that 'ISCOR will be entitled to constant communication regarding the trading activities of JV CO'; and that 'ISCOR will be entitled at any time to have full access to the end user after notifying JV CO'. Clause 29.2 provides 'To the extent that ISCOR is able and willing to supply the specified ISCOR products to JV CO' the second appellant was obliged to purchase them. In terms of clause 32.6.1 Mittal undertakes that, if the tonnage of specified products fell below 1 million tons per annum (and the shortfall cannot be made up in the ensuing 6 months), it would pay an amount equal to 75 % of the commission income which the second appellant would have earned on such shortfall. Clause 34.2 obliges the second appellant to 'endeavour to obtain the highest prevailing prices in the markets in which it operates, having regard for ISCOR's ability to deliver on time and in accordance with the conditions set out in this agreement'. Clause 37 obliges the second appellant to

[11] Dednam Record 47:10808 ff.

'promote the sales of the specified ISCOR products produced by ISCOR'; to 'obtain the highest prices for such products'; to 'promote the best interests of ISCOR'; to 'provide ISCOR with market intelligence in respect of all products traded'; and that the second appellant 'will owe a duty of the utmost good faith to ISCOR'. In terms of clause 34, the second appellant earned only a margin on sales: 'JV CO shall be entitled to deduct a percentage commission from ISCOR as remuneration for its marketing services.'

[15] In summary, the JV Agreement provides that the second appellant is obliged to seek offers from purchasers only in the international steel market, at the best available prices, for only the steel products which Mittal is willing and able to supply for the export market. The second appellant will present Mittal with such offers. Mittal does not offer steel to the second appellant at any particular price; the price setting operates the other way round, in that the second appellant solicits offers from customers on the international steel market, and Mittal then decides to supply or decline to supply the second appellant, pursuant to that offer, taking into account transport and other costs associated with delivery to the ultimate buyer with whom volumes, price and the delivery destination have been pre-arranged. Mittal will supply steel pursuant to such offers only to the extent that it is able and willing to do so. The second appellant earns only a fixed margin on sales effected by the aforesaid process.

[16] Merits Decision

In its decision on the merits, the Tribunal asked itself how a competition authority should approach the question of excessive pricing. It gave the following answer:[12]

'[W]e must *first* ask ourselves whether the structure of the market in question enables those who participate in it to charge excessive prices [the 'structural test']. As we will indicate, we believe this to be a significantly higher hurdle than those that must be cleared to establish "mere" dominance. It requires "super-dominance", a structural condition the characteristics of which are elaborated below. If that higher hurdle is cleared, we must *then* ask ourselves whether Mittal SA has engaged in conduct designed to take advantage of – to "abuse" – those structural opportunities by imposing excessive prices on its customers [the 'conduct test']. If the *second* question is also answered in the affirmative, the excessive pricing must be proscribed by imposing a remedy which addresses the underlying structural basis for the offending conduct arising from the structural advantage that enables the firm in question to charge a price in excess of that which would have prevailed in the absence of the anti-competitive structure and/or ancillary conduct. As will be elaborated at length, in this case Mittal SA does rely on its super-dominant structural position as well as on ancillary conduct in setting the price that it charges. Only if both forms of these remedies are impossible to devise should an actual price level be specified. In short, we treat excessive pricing as a phenomenon that may arise from a particular structure and that itself may be the basis for ancillary conduct that is utilized in order to sustain supra-competitive prices, to sustain, as per the definition of the Act …' (own italics).

[17] The Tribunal opined that, given that Mittal's pricing power extended beyond that enjoyed by a mere dominant firm and its price not being subject to regulation, it could conclude without further analysis that[13]

[12] Paras 83-4.

[13] Merits Decision para 129.

'as a matter of profit maximising rationality, be reasonably construed as excessive because, in the oft quoted words of the United Brands judgement, it does not derive from structures compatible with any notion of "normal and effective competition."'

The Tribunal was, however, still obliged to consider whether, as a fact, the firm was charging the maximum monopoly price or not:[14]

'In short, while our examination of the relevant market and market shares and entry barriers is a sufficient basis for our conclusion that Mittal SA is one of those rare firms endowed with sufficient market power to charge excessive prices, it may be an insufficient basis for finding that it has actually deployed that power in contravention of Section 8 (a).'

[18] The Tribunal accepted that Mittal produces more steel than the domestic market requires and, consequently exports the excess production. The second appellant is the 'export arm' of Mittal and Mittal offers the excess production to the second appellant at a discount or rebate on the price it charges domestic steel merchants. In return, the second appellant undertakes not to sell the excess in the domestic market. Therefore, the Tribunal opined that Mittal shorts the domestic market by ensuring that the excess production is not available in South Africa at a lower price than its own domestic price. In this way, the Tribunal found, Mittal maintains its domestic price at a higher

[14] Merits Decision para 2. In para 133 the Tribunal noted that the second enquiry was mandated because s 8(a) is ultimately directed at conduct and so: 'were we to derive our conclusions regarding the alleged existence of excessive pricing solely by reference to structure, we would effectively be concluding that certain structures – uncontested firms in incontestable and unregulated markets – were prohibited per se. We do not believe that this accords with the character of section 8. It is conduct that abuses a structural advantage – dominance or, in section 8(a)'s case, 'super-dominance' – that is prohibited. It is not the underlying structure that is prohibited.'

level than would have been the case if the excess were also made available to merchants at a lower price in the domestic market. This analysis led the Tribunal to the conclusion that, if the price is determined by 'cognisable competition considerations, then that price will bear a reasonable relationship to the economic value of the good in question.[15] The Tribunal found that the arrangement with the second appellant pursuant to the JV Agreement was the essential ancillary conduct[16]

'whereby Mittal SA abuses its structural advantage to maintain its pre-selected price level. It is, of course, conduct that is only available to an uncontested firm in an incontestable market. If this were not the case, Mittal SA's traders would be able to turn to alternative suppliers of flat steel products in order to meet demand that is unrealised at Mittal SA's pre-selected domestic price level. Mittal SA of course wishes to create the impression that there is no unrealised demand. It wishes to create the impression that it satisfies all domestic demand and that its export activities are simply a vent – an unprofitable vent, it moreover alleges - for a surplus that it would much rather sell into the more lucrative domestic market. However this is, at best, only a half-truth and one that, when fully considered, does considerable violence to the whole truth – certainly, Mittal SA meets all domestic demand, but, and here is the crucial caveat, <u>at its unilaterally targeted price level.</u> If a would-be purchaser of steel for use in South Africa were to approach Macsteel International with an offer to purchase at a price <u>below</u> the prevailing domestic price but <u>above</u> that which Macsteel International could realise on the international market, the trader would, as a matter of profit maximising rationality, accept such an offer. However, it is by agreement with Mittal SA, prohibited from accepting the offer because to do so would, as Mr. Dednam candidly concedes, be to reduce the price of steel across the whole range of Mittal SA's domestic sales. Its willingness to enter into such an agreement is, of course, predicated on Mittal SA's super dominance – to express it

[15] Merits Decision para 147.

[16] Merits Decision para 168.

crudely, a firm that wishes to trade in South African steel is obliged to accept Mittal SA's trading conditions. The economics is disarmingly elementary – indeed it is the first principle of monopolistic conduct.

[19] As regards the market structure, the 'structural test',[17] the Tribunal held that, in order for a firm to charge an excessive price, the market share of that firm should 'approximate 100% and there should be no realistic prospect of entry – in other words the market should be uncontested and incontestable'.[18] The key to the Tribunal's approach is found in the following passage:

'[96] In summary then our approach is to follow the schema of the Act and the standard approach to allegations of abuse of dominance which, as we have seen, derives dominance from specified *market shares* and the possession of *market power.* Following this approach, it reasonably holds that the power to price 'excessively' is the preserve of firms of overwhelming size relative to the market in which they are located and which are, in addition, markets characterised by unusually high entry barriers. That is, the market share enjoyed by the firm in question should approximate 100% and there should be no realistic prospect of entry – *in other words the market should be both uncontested and incontestable*. The concept of 'super dominance' and the special responsibilities that attach to this privileged status is well recognised in scholarly work …

[106] We should of course add that the question of excessive pricing – or, at least, the possibility of challenging pricing conduct – is unlikely to arise in the case of a legal monopoly precisely because, in the current economic policy environment, such an institution will, invariably, be subject to regulation. **As already noted, it is our view that Section 8(a) is precisely intended to apply to those rare markets that are *uncontested* (monopolised or 'super-dominated'), *incontestable* (subject to insurmountable entry barriers) and *unregulated* (not subject to price regulation).** The South African market for flat steel products is, the evidence

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[17] See Sutherland and Kemp *Competition Law of South Africa* (Service Issue 11 October 2008) para 7.9.2.

[18] Merits Decision paras 96 and 106.

shows, just such a market, and this is why the proposal of Evans and Padilla and other writers that the powers of competition authorities to intervene in pricing conduct be reserved for the most exceptional circumstances is, in our view, strictly adhered to in this decision even though we do not require it to be restricted to a case of a legal monopoly.

[107] In the present case, dominance of the relevant market is indeed absolute, that is, there are, within the boundaries of the relevant market, no meaningful constraints on the first respondent's ability to unilaterally determine price – its market share is persistently vast and there is no prospect of new entry at all, and certainly not within any time-frame that anti-trust jurisprudence and enforcement practice would regard as constituting an effective competitive constraint. Moreover, the firm in question was owned by the state, for much of its life its prices were regulated by the state, and certain of its current advantages derive from advantages accrued from the period of state ownership as well as subsequent subsidisation.

[108] In short, the first respondent, Mittal SA, is no mere 'dominant firm' – it is 'super dominant', a 'monopoly' in the parlance of US anti-trust law. ***It is, to all intents and purposes, an uncontested firm in an incontestable market*.** This is a market structure that is rarely encountered in competition analysis, possibly as rare as its opposite number, a market that meets the conditions of perfect competition. As already noted, while even a super-dominant firm, a monopolist pure and simple, remains constrained by the existence of a ceiling in the price that it may charge, this limitation is not imposed by, indeed is in no way influenced by, the pricing practices of competitors, actual or potential, in the relevant market, or, even as a last resort, by the ability of the customers, to forego use of the product in question.

[121] ***In summary then, Mittal SA is, for the purposes of the Act, clearly dominant in the relevant market, the South African market for flat steel products. However, as already elaborated, in order to establish the structural basis for charging excess prices, something more than mere dominance is required. In our view Section 8(a) demands a showing of extraordinary or 'excessive' market power, the power to price at a level beyond that available to a mere dominant firm. The extent of Mittal SA's market share taken together with the height of entry barriers and its recent history of state support easily establishes its status as a super-dominant firm within the relevant market. It has been proved that it is indeed an uncontested firm within an incontestable market.***

It is in such a market that a firm approximates a true monopoly and can charge monopoly prices.[19] In holding that a firm is super-dominant when its

[19] Merits Decision paras 108 and 125–127.

market share 'approximates 100%', the Tribunal was indicating that a firm is super-dominant when it is able to exercise market power as if it had 100% of the market ie that it is able to exercise market power as if it were a monopolist.

[20] As regards the second question, the 'conduct test', the Tribunal explained that it was required to consider whether the firm 'has engaged in conduct designed to abuse its "super dominant" position by charging an excessive price'.[20] The Tribunal said:

'[134] Hence, in addition to examining the structural features of the market in question, we must examine evidence which suggests that Mittal SA has engaged in conduct designed to abuse its 'super dominant' position by charging an excessive price. This is an enquiry mandated by the principles and practice of competition law and economics. We emphasise that we will not approach this enquiry by considering that evidence relating to actual price levels which effectively requires us, first, to identify a particular *level* as unlawful ('excessive) and then to impose a *level* of price that would be lawful ('non-excessive'). This, we stress, is an approach consistent with the practice of price regulation – it is not commonly found in the principles and practice of competition law and economics.'

[21] In assessing that price, the Tribunal held that it must assess whether the price is the result of 'cognisable competition considerations' or not.[21] A price determined in the former method reflects the economic value of

[20] Merits Decision para 134.

[21] Merits Decision para 147.

the product.[22] Where, however, 'the price appears to have no explanation other than the pure exercise of monopoly power, then the price is not reasonable in relation to economic value'.[23] This is a criterion to determine whether the pricing behaviour of a firm is at a competitive level or not:

'[146] We should at once dispel the notion that the term 'economic value' in our Act is intended to impute a cost-based theory of value, much less one that is rooted in any particular version of cost because if the legislature intended economic value to mean marginal cost or average variable cost it would have said so since it uses these terms explicitly in 8d(iv). That is to say, in assessing predatory pricing the legislature intends us to use a cost-based test and so Section 8(d)(iv) explicitly guides us in the cost measurement that is central to an evaluation of an allegation of price predation. However Section 8(a) and its accompanying definition make no reference at all to the relationship between an excessive price and cost. The reference is rather to the relationship between price and *economic value*.

[147] The concept of economic value consistent with the principles and practice of competition law and economics is, in the words of Evans and Padilla, *'the equilibrium price that would result from the free interaction of demand and supply in a competitive market'* or the '*competitive market price'.* As we have already suggested then, our judgement of the relationship between price and economic value rests on our evaluation of the market conditions that underpin the price. If the examination of the structure of the market and any relevant ancillary conduct reveals that price is indeed determined by, what we have termed above, *cognisable competition considerations*, then that price will bear a reasonable relationship to the economic value of the good in question. However, if the price is the product of a market structure and of ancillary conduct that reflects precisely the *absence of cognisable competition considerations* then that price will be excessive in relation to the economic value because it will not have been determined by '*the free interaction of demand and supply in a competitive market'.* As we are careful to explicate below, *'cognisable competition considerations'* or a *'competitive market'* do not necessarily equate to conditions of perfect competition.

[148] Having rejected the view that the concept of economic value suggested by the Act is cost-based, we note the obvious point that this does not mean that cost does not play a major role in determining the absolute level of the *competitive* price or, what is the same thing, the economic value of a good or service. Even if the market for high performance cars is vigorously competitive

[22] Merits Decision para 147.

[23] Merits decision para 151.

and that for bicycles is monopolised, a high performance sports car will always have a higher price or economic value than a bicycle, and this for the simple reason that the underlying costs of producing a high performance sport car would not allow a manufacturer of these products to stay in business if he sold his product at the same price as a bicycle. But to extend this analogy, it may well be that price and economic value are satisfactorily aligned in the pricing of high performance sports cars (that is, there is no excessive pricing) if their prices are the product of competitive market conditions, while the price of bicycles may be found to be excessive in relation to their economic value if they are priced under conditions of pure monopoly.

[22] The Tribunal examined the actual prices charged by Mittal and concluded that Mittal charged its domestic customers an import parity price for flat steel products, in other words, a price set by calculating the notional cost of importing those products.[24] It expressly rejected Mittal's suggestion that it no longer employed the import parity pricing methodology.[25] The Tribunal set out in some detail the methodology employed by Mittal to arrive at its import parity prices, and also noted that Mittal contractually prevents customers who receive prices lower than import parity from 'redirecting' this discounted product into the general domestic market.[26] The Tribunal held that Mittal targeted the import parity price because of its 'close approximation to the monopolist's profit maximising price'.[27] The Tribunal held further that to achieve this price Mittal was obliged to engage in further acts that amounted to an abuse of its dominance, namely withholding its full supply from the domestic market. Absent this further conduct, particularly the JV, Mittal would not be able to charge the maximum monopoly price because, for example, Macsteel would then accept an offer to sell to a domestic purchaser at a price below Mittal's domestic price but above the price Macsteel could realise on the international market.[28] The JV, as employed by Mittal, thus prevented this supply at such a price from becoming available to the domestic market, although the measures Mittal adopted to prevent other flat steel products it sold at prices lower than IPP becoming available in the domestic market were

[24] Merits Decision paras 38–47.

[25] Merits Decision paras 44–46.

[26] Merits Decision para 43.

[27] Merits Decision paras 43 nn 35 and 21; paras 61, 163.

[28] Merits Decision para 168.

also fundamental to the abuse, since such sales also had the potential to exert downward pressure on the domestic price.[29] This conduct confirmed that Mittal was abusing its position of super dominance and charging a price in the domestic market that is not the product of cognisable competition:[30]

> '[152] In this case our finding is that the price of flat steel products in the South African market is ***only*** explicable by reference to Mittal SA's unusually high level of structural dominance which, in turn, supports ancillary conduct that maintains the price targeted by the monopoly steel producer. The ancillary conduct – which as we shall elaborate below is the enforced segmentation of separately priced markets – is a critical element of this decision because it demonstrates, as we shall elaborate, that even Mittal SA's structural super-dominance was not on its own sufficient to guarantee that it actually achieved its unilaterally selected target price. Instead it was obliged to engage, in a clearly pre-meditated fashion, in ancillary conduct, conduct that is only available to a super-dominant firm, to achieve its desired price level in the domestic market. In other words, our finding of excessive pricing does not derive from an examination of the market structure alone; it also rests on the ancillary conduct upon which Mittal SA relied, ancillary conduct that itself depends upon the existence of structural super-dominance, in order to achieve its pricing ambitions. It is the cumulative impact of this structure and the ancillary conduct that puts Mittal SA's contravention of Section 8(a) beyond doubt.'

[29] Merits Decision paras 168–169 and 177.

[30] See also para 151 of the Merits Decision: 'By contrast, we emphasise again, ***where the price appears to have no explanation other than the pure exercise of monopoly power***, then the price is not reasonable in relation to economic value. In other words what is relevant in our enquiry is not the arithmetic relationship between the price and some or other conception of cost. What is relevant are the underlying considerations that underpin the price level. Are these considerations founded in competition in its many degrees and guises or are they founded in pure monopoly?'

[23] This analysis of the reasoning employed by the Tribunal assists in elucidating the core basis of the dispute in this case: the definition of excessive pricing appears to mandate an examination as to whether there is a reasonable relationship between the price charged and the economic value of the good or service. Volumes of expert evidence were generated to give content to this relationship. However, the Tribunal held that it was not necessary in this case to determine the reasonableness of the relationship between the maximum monopoly price charged by Mittal and the economic value of flat steel products on the basis of an empirical quantitative comparative study of prices in various markets. In its view, the price charged by Mittal could never bear a reasonable relationship to the economic value because it was the maximum monopoly price achieved through the exertion of market power to reduce supply in the domestic market and was therefore, by definition, not determined under conditions of competition (which would always have invariably produced a lower price). The Tribunal held that, in the light of this evidence, it was not necessary for it to consider the expert evidence to establish that fact:

'[153] In summary then, our examination as to the source of the pricing power is thus an examination into its reasonableness. Reasonableness in the context of a competition statute must mean 'economically reasonable'. Economically reasonable in the context of a competition statute must mean having regard to the pro and anti –competitive considerations that we normally apply. As we go on to argue in this decision, the occasions where one can find no reasonable relationship between a price and the economic value underpinning it are few indeed. The circumstances giving rise to Mittal SA's pricing power in respect of some of its domestic consumers depends on the existence of a range of factual issues that we do not encounter in the market place everyday, even in those markets habituated by long extant dominant firms.

[154] Nor is there any need to dwell on dictionary definitions of what *excessive* means. The term is a defined one and hence it is the statutory, rather than the dictionary, definition of the word that we apply. The statutory definition as opposed to the ordinary word 'excess' does not require one to conclude when a particular level of differentiation is sufficiently large to constitute excess. Rather it requires one to find a relationship between a price and economic value that admits of no *reasonable* explanation, that is, of an explanation that does not rely upon the exercise of the degree of market power that arises from super-dominance. The finding of an excessive price is then determined not by some arbitrary measure of difference but is rather an enquiry into the rationality of pricing. It thus condemns pricing for which unchallenged and incontestable monopoly is the only explanation as opposed to a price that may simply be high but for which innovation or even branding – that is, pro-competitive measures - provide the underlying rationale.

[155] For this reason we find that a reading of the Act that requires us to find precise levels for the economic value and then the actual prevailing price and then to correlate them to some notional competitive price to be overly mechanistic and contextually unsupported. This reading might have some validity if we were meant to act as price regulators and to order the price back down to the non-excessive level. We have already firmly rejected the implicit contention that the sparse wording of Section 8(a) is intended to convert us from an agency that promotes and protects competitive market conditions to an agency that determines price through the simulation of competitive market conditions.'

[24] The Tribunal did not, however, discount fixing price levels in the future, should it be so required. The Tribunal expressly held only that it should sidestep methodologies of price regulation 'if it is possible – and we believe in this instance it is'.[31] The Tribunal held further that 'if a competition authority is not able to carry out its excessive pricing mandate [by isolating and addressing underlying structural conditions and ancillary behaviour that enables the setting of an excessive price] then it may have to resort to the

[31] Merits Decision para 81.

fixing of a price but, we stress, in our view this should be done as a final resort.'[32]

In summary, the Tribunal appeared to take the view that a literal interpretation of s 8(a) read with s 1(i) (ix) of the Act could require an investigation into actual price levels and hence the determination of particular price abuse which pricing would contravene the Act. That enquiry would convert the Tribunal into a price regulator and thus take it outside of its mandated scope as a competition authority.

[25] Foreign law

This is the first case dealing with the meaning and scope of s 8(a). The influence of foreign law on the meaning and purpose of this section may be clear but the proper application thereof mandates caution.

[26] Section 8(a) has its origin in the jurisprudence of European competition law. As important a consideration as that may be the Supreme Court of Appeal has cautioned that our Act must be interpreted primarily with reference to its own language.[33] Thus, while s 1(3) of the Act provides that when interpreting and applying the statute, appropriate foreign and international law may be

[32] Merits Decision para 81 n 67. See also para 89 where the Tribunal again stresses that it will follow the approach set out in its decision 'where possible'.

[33] Cf *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) at 814F–815A.

considered, it is nonetheless 'necessary to view the competition laws of other countries in their proper historical, social and institutional contexts'.[34]

[27] The Tribunal noted that the definition of 'excessive price' was borrowed from *United Brands*[35] but observed that this borrowing 'in no way requires us to adopt uncritically all elements of a European approach to excessive pricing.'[36] The Tribunal was well aware of the differences between s 8 of the Act and Article 82 and correctly noted that our legislation contained a definition of an 'excessive price'.[37] The Tribunal's cautious approach to foreign law is correct. This approach has been emphasised by both this court and the Supreme Court of Appeal.[38] Unfortunately, the Tribunal did not follow this cautious approach but, instead, applied its a priori view on the role of a competition authority, that is its 'conceptual approach', to almost the complete extension of an engagement with the legislative texts. This very point was made by this Court in *Goldfields Ltd v*

[34] Reyburn *Competition Law of South Africa (Issue 5)* page 2–4. See *Mondi Ltd and Kohler Cores and Tubes (a division of Kohler Packaging Ltd) v Competition Commission* [2003] 1 CPLR 25 (CAC) 35-36; *Federal-Mogul Aftermarket Southern Africa (Pty) Limited v The Competition Commission* [2005] 1 CPLR 50 (CAC) 53.

[35] *United Brands Company and United Brands Continental BV v The Commission of the European Communities* [1978] 1 CMLR 429.

[36] Merits Decision para 137.

[37] Merits Decision paras 138-9.

[38] See *Mondi Ltd and Kohler Cores and Tubes (a division of Kohler Packaging Ltd) v Competition Tribunal* [2003] 1 CPLR 25 (CAC) at 35J-36B; *Federal-Mogul Aftermarket Southern Africa (Pty) Limited v The Competition Commission and another* [2005] 1 CPLR 50 (CAC) at 53A-E; *Standard Bank Investment Corporation Ltd v Competition Commission and Others*; *Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) at 814F-815A.

Harmony Gold Mining Company Ltd and Another in criticising the approach the Tribunal had adopted in that case:[39]

'In any event great care should be taken to ensure that a purposive approach to the interpretation of the Act engages with the wording of the Act and its overall architecture, rather than seeking to ignore the latter in order to promote a particular policy objective which is both contested and controversial.

[28] The Tribunal is bound to apply the Act. If the proper interpretation of s 8(a) requires the Tribunal to engage with price levels, it must do so. Even less justifiable is the taking of liberties with the language of the Act so as to make s 8(a) serve the Tribunal's preference to deal with market structure rather than price level. That is to turn the exercise of establishing the intention of Parliament on its head. Instead of starting with the words the legislature chose to use, the Tribunal started with the interpretation it preferred and then ignored the language of the section. The words chosen by the legislature when enacting s 8(a) (and the definition of 'excessive price') clearly and unambiguously[40]

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[39] 43/CAC/Nov04.

[40] When interpreting a statute, the objective is to ascertain what the legislature intended by using the words chosen. It must always be assumed without counter pointers that statutory language, as it stands, is a reliable expression of legislative intent. Accordingly, the starting point in any interpretative inquiry is to establish the ordinary grammatical, dictionary or literal meaning of the words themselves (*S v Zuma & Others* 1995 (2) SA 642 (CC) paras 17–18 at 652H–653A). Courts (and tribunals) are thus required to look first at the language of the statutory instrument and when the words are 'clear and unambiguous, to place upon them their grammatical construction, and to give them their ordinary effect' (*Venter v R* 1907 TS 910 913; *Bhyat v Commissioner for Immigration* 1932 AD 125 129. See also *Abrahamse v East London*

indicate that what is prohibited is the 'charging' of an excessive 'price', not so-called 'ancillary abusive conduct' designed to take advantage of a particular market structure.

We do not wish to be misunderstood. Legislative interpretation does not reduce to a simple recourse to a dictionary. For a start, the inherent plasticity of language and the manner in which precedent and legal culture influence the process of statutory interpretation dictate otherwise. But, a court is required to engage with the text and the language employed therein; it must produce an interpretation which it can justify after this engagement with the legislation. It may not eschew the text to promote its own theory, however attractive the latter may appear to be. In the event that the language of the text is unable plausibly to support the advocated theory, then it is for Parliament, if it so wishes, to reconsider the text.

[29] This approach to interpretation should not be construed as an indication that this Court is oblivious to the problems posed by this case. To the contrary . Mittal (in its previous guises) was owned and controlled by the State since its establishment in 1928 until its privatisation in 1989. As Dr Zaveren Rustomjee, a previous Director-general of the Department of Trade and Industry, testified before the

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Municipality and Another; East London Municipality v Abrahamse 1997 (4) SA 613 (SCA) 632G–H).

Tribunal, government incentives and support for Mittal continued for a number of years after privatisation. We emphasise that the preamble to the Act includes a manifest concern with previous excessive concentrations of ownership and control within the national economy. Further, a purpose of competition law, particularly South African competition law as is made clear in s 2, dictates that a history of such state largesse cannot be permitted to subvert competition nor should the market power inherited from the erstwhile status as a state enterprise be exerted with continued impunity. Further, as the available literature compellingly illustrates,

'[t]he assessment of excessive pricing is subject to substantial conceptual and practical difficulties, and any policy that seeks to detect and prohibit excessive prices is likely to yield incorrect predictions in numerous instances.'[41]

But none of these difficulties permits a disregard of the provisions of the Act. With these observations, we now turn to a more precise analysis of the Tribunal's determination.

[30] Analysis of the Judgment

Part B of Chapter 2 of the Act is headed 'Abuse of a Dominant Position' and s 8 'Abuse of *dominance* prohibited'. The prohibitions in section 8 are preceded by the words 'It is prohibited for a dominant firm to —'. The test

[41] See for example, Evans and Padilla at 98-99

for dominance is expressly laid down in s 7 and a firm is 'dominant' in a market if '(a) it has at least 45 % of that market'.[42] Other categories are referred to in paragraphs (b) and (c). The same test is applicable to all firms to which Part B of Chapter 2 applies, namely those meeting the threshold requirement determined under s 6. There is no reference in s 8 to the concept of a 'super-dominant firm' used by the Tribunal. Section 8 applies to all dominant firms whether they are monopolies or 'super-dominant firms' provided only the requirements of ss 6 and 7 are met. To introduce the concept of 'super-dominance' ignores principles of statutory interpretation: it was, moreover, emphasised in *S v Dodo*[43] that '[i]t is pre-

[42] These provisions were probably also influenced by *United Brands*. In para 65, for example, the court defined dominance 'as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'. That seems to have influenced the definition of 'market power' in the Act. Notable, too, is the fact that the ECJ found that UBC's share of the relevant market was 'always more than 40% and nearly 45%', but held in para 109 that 'this percentage does not however permit the conclusion that UBC automatically controls the market', considerations which may have informed the approach to dominance in s 7 of our Act, in terms of which a firm with a market share above 45% is deemed to be dominant.

[43] 2001 (3 SA 382 (CC) para 22. In *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) para 26: 'Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed"' (Mokgoro J). Ngcobo J para 70 said: 'The rule of law embraces, among other things, the requirement that laws be "ascertainable in advance so as to be predictable and not

eminently the function of the legislature to determine what conduct should be criminalised and punished.'

[31] The methodology employed by the Tribunal to determine whether a price is 'excessive' for purposes of s 8(a) depends on its criterion of 'super-dominance'.[44] It said[45] that, as a competition authority, it had to first ask

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retrospective in its operation."'

[44] See Merits Decision paras 72, 84, 96, 106, 121 and 186.

[45] See para 84 cited above para 16 and also para 96: 'In summary then our approach is to follow the schema of the Act and the standard approach to allegations of abuse of dominance which, as we have seen, derives dominance from specified *market shares* and the possession of *market power.* Following this approach, it reasonably holds that the power to price 'excessively' is the preserve of firms of overwhelming size relative to the market in which they are located and which are, in addition, markets characterised by unusually high entry barriers. That is, the market share enjoyed by the firm in question should approximate 100% and there should be no realistic prospect of entry – *<u>in other words the market should be both uncontested and incontestable</u>*. The concept of 'super dominance' and the special responsibilities that attach to this privileged status is well recognised ...' See para 106: '[I]t is our view that Section 8(a) is precisely intended to apply to those rare markets that are *uncontested* (monopolised or "super-dominated"), *incontestable* (subject to insurmountable entry barriers) and *unregulated* (not subject to price regulation).' The Tribunal's approach is defended by David Lewis 'Exploitive Abuses – A Note on the Harmony Gold v Mittal Steel Excessive Pricing Case' paper presented at the *35th Annual International Antitrust Law and Policy Conference* 25-6 September 2008 hosted by the Fordham Competition Law Institute, New York. The Tribunal's approach limiting the operation of s 8(a) to actual or virtual monopolies could well lead to the exclusion of oligopolies from its ambit. Cf para 150 and *Mondi Ltd and Kohler Cores and Tubes (a division of Kohler Packaging Ltd) v Competition Tribunal* [2003] 1 CPLR 25 para 41.

whether the market structure enabled those participating in it to charge excessive prices (the 'structural test'). The market share of the firm concerned should be approaching 100 per cent and the market 'uncontested' and 'incontestable'.[46] This 'hurdle' the Tribunal considered was a significant one, requiring not mere dominance but 'super-dominance'. Once that has been established, it must further be determined whether the firm concerned has engaged in conduct abusing the structural opportunities by imposing excessive prices (the 'conduct test').

[32] The Tribunal's idea that a market must be 'uncontested' and 'incontestable' and the firm 'super-dominant' otherwise the price charged cannot be excessive finds no support in the Act.[47] The wording of s 8(a), read with the definition of 'excessive price' in s 1, calls for the making of certain distinct enquiries. First, the determination of the actual price of the good or service in question and which is alleged to be excessive.

[46] Merits Decision paras 96, 162.

[47] Moreover, the idea that the market must be 'incontestable' does not convince. For example, in an oligopoly the oligopolists would be able to exercise an effective competitive constraint on each other but, as a matter of business calculation, separately choose not to do so. The market would be contestable, although not in fact contested, while excessive prices may be charged. Moreover, even in the case of a monopolist, the Tribunal's idea cannot be sustained. The market may be incontestable at the high price which the monopoly actually charges, but become contestable at a still higher price (by potentially drawing in competitors). The current price may thus be judged excessive but (on the Tribunal's reasoning) the still higher price could not be judged excessive.

Secondly, the determination of the 'economic value' of the good or service expressed in monetary terms, as an amount of money.[48] Thirdly, if the actual price is higher than the economic value of the good or service, is the difference unreasonable or, to put it in another way, is there 'no reasonable relation' between the actual price and the economic value of the good or service? Fourthly, is the charging of the excessive price to the detriment of the consumers? The first two enquiries call for factual determinations of the actual price and the economic value and the third for a value judgment. The fourth enquiry also involves, as we will show, a value judgment.

[33] As already noted, the Tribunal did not proceed along these lines. Its approach was that, if a 'super-dominant' firm exercises to the full its market power in setting a price, then its price is *ipso facto* excessive as contemplated by s 8(a).[49] It found in so many words that Mittal had contravened s 8: it had, by

[48] The *Shorter Oxford English Dictionary* defines 'value' as: '1. That amount of some commodity medium of exchange, etc., which is considered to be an equivalent for something else; a fair or adequate equivalent or return. 2. The material or monetary worth of a thing; the amount at which it may be estimated in terms of some medium of exchange or other standard of a like nature. ME. The equivalent (in material worth) of a specified sum or amount. Late ME …'

[49] See Merits Decision para 164. See also para 189: ' ... We have ... asked whether the structure of the market admits of the possibility of excessive pricing. This, as we have elaborated, requires a showing of exceptional or super-dominance. We have then examined the relationship between this super-dominance, on the one hand, and Mittal SA's ability to price up to its pre-selected price target, particularly given the existence of excess supply at that target price. What we have found

virtue of its super-dominance, the structural market power to select a target price for its domestic market (the IPP) and supported this price by withholding supply from the domestic market. This, the Tribunal said was 'the most elementary and offensive of monopolistic conduct'.[50] The cumulative impact of its super-dominance and its resultant conduct led to the withholding of supply from the domestic market resulting in a price that is unconstrained by any competitive considerations and hence 'excessive'. There is no support for this approach in the Act.[51]

[34] The expression 'economic value' is not defined but must be interpreted to give it a definite meaning corresponding to the intention of the legislature – a meaning capable, moreover, of practical application. As we have already observed, if it is impossible to do so, the conclusion would follow that the legislative provision does not pass constitutional muster; but that is a conclusion which ought to be avoided.[52] Because s 8(a) contemplates a relation between a *price* and the *economic value*, it follows that the latter expression must, as is

is that Mittal SA employs its super-dominance to achieve its target price by ensuring that the excess supply that exists at that price is removed from the domestic market and that it does not re-enter the domestic market again. And because Mittal SA has no domestic competition to speak of it does not have to fear new supply from a domestic source. This reduction of supply is the essence of its agreement with Macsteel International and it is further built into the manner in which it grants rebates off its list price to selected domestic customers. The result is a price in excess of that which would prevail in the absence of Mittal SA's super-dominance and the ancillary conduct that it enables.'

[50] Para 164.

[51] Cf Sutherland and Kemp 7 - 40(1).

ordinarily the case with price, refer to an amount of money. In contrast with Article 82(a) (formerly article 86(a)) of the Treaty of Rome, our legislation does not refer to a price that is 'unfair'.[53]. Article 86 (now Article 82) read as follows:[54]

'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;

(b) limiting production markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

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[52] *LAWSA*, First Reissue, vol 25 Part 1, *sv* 'Statute Law and Interpretation' by Du Plessis, para 330; *Minister of Labour and Others v Port Elizabeth Municipality* 1952 (2) SA 522 (A) 533-4.

[53] See above paras 4.

[54] Hirsch/Montag/Säcker *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht (Kartellrecht) Band 1 Europäisches Wettbewerbsrecht* (2007) 1148 justify the enactment of Article 82 (now 86): 'Insbesondere die Erzwingung unangemessener Preise stellt den geradezu prototypischen und wohl am stärksten mit Marktmacht in Verbindung gebrachten Missbrauch dar. Die Fähigkeitbeherrschenden Unternehmen, bei Abnehmern überhöhte Preise durchzusetzen, liefert auch das stärkste Argument dafür, das Entstehen marktbeherrschender Stellungen im Wege der Zusammenschlusskontrolle zu verhindern. Die Kontrolle des Preisgebarens marktmächtiger Unternehmen ist daher jedenfalls im Himblick auf das mit dieser Vorschrift bezweckte Ziel des Verbraucherschutzes grundsätzlich eine nahe liegende Aufgabe im Rahmen der Missbrauchkontrolle. Die Verhinderung von Überpreisen könnte aber auch mit volkswirtschaftlichen Erwägungen, dh. unter dem Gesichtspunkt der Consumer Welfare im Sinne der gesamtgesellschaftlichen Wohlfahrt, gerechtfertigt werden.' Cf Motta and De Streel 'Exploitative and Exclusionary Excessive Prices in EU Law' paper presented at *8th Annual European Union Competition Workshop, Florence (June 2003)* at p 3.

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

The governing criterion used in Article 86 was widely formulated: 'any abuse … of a dominant position … shall be prohibited…'. The four instances set out in sub-articles (a) to (d) of Article 86 were cases of conduct which 'may' constitute 'such abuse'; the words 'may in particular' make it clear that there is no legislative *numerus clausus*. There are however significant textual pointers in the direction of the mandated enquiry: First, Article 86 deals with an 'unfair price' not an 'excessive price'. Secondly, Article 86 contains the integer of an 'abuse … of a dominant position'. If no finding of such 'abuse' is made, there can be no contravention of Article 86. Thirdly, the imposing of 'unfair … prices or other unfair trading conditions' may but do not necessarily constitute such 'abuse'. Fourthly, the determination of an 'unfair price' requires an empirical analysis. Finally, in addition, an assessment that the price in issue constitutes an 'abuse of dominant power' must be made.

[35] In *United Brands* [55]the Commission decided that United Brands had contravened Article 86 in that it had abused its dominant position as seller of bananas in the relevant market comprising the Belgo-Luxembourg Economic Union, Denmark, Germany, Ireland and the Netherlands. The complaint, under the wide provisions of Article 86, was in respect of four categories of

[55] *United Brands Company and United Brands Continental BV v The Commission of the European Communities* [1978] 1 CMLR 429.

transgression: First, the use of a clause prohibiting the resale of bananas while still green; secondly, the refusal to supply a particular reseller (Oleson); thirdly, discriminatory pricing; and, fourthly, unfair pricing. The Commission decided that United Brands had transgressed Article 86 on all four grounds. On appeal the ECJ upheld the decision in regard to the first three categories, but set aside the decision of the Commission in respect of the fourth category, unfair pricing.[56]

[36] The essence of the Commission's contentions was that 'the policy of partitioning the relevant market has enabled UBC to charge prices … which … often amount to wide differences which cannot be justified objectively.'[57] The ECJ pointed out that 'it appeared to the Commission to be justifiable without analysing the UBC's costs structure, to treat prices charged to Irish customers as representative and that differences between the prices cif Dublin delivered Rotterdam and the other prices charged by UBC for its sales for Rotterdam or Bremerhaven show profits of the same order of magnitude as these differences.'[58] The prices charged in Germany, Denmark and Belgo-Luxembourg area were sometimes 100 per cent higher than the prices charged in Ireland. United Brand countered the contentions of the Commission by alleging that it suffered a loss on its sales in Ireland.[59]

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[56] The latter part of the decision appears at paras 235 – 261 of the report.

[57] Para 236.

[58] Para 238.

[59] Paras 242-7.

[37] The crucial passages in *United Brands* which influenced the Tribunal in this dispute are the following:

'[248] The imposition by an undertaking in a dominant position directly or indirectly of unfair purchase or selling prices is an abuse to which exception can be taken under Article 86 of the Treaty.

[249] It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition..

[250] In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied, is such an abuse'

[251] This excess could inter alia be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin; however the Commission has not done this since it has not analysed UBC's costs structure.

[252] The question therefore to be determined is whether the difference between the costs actually incurred and the price actually charged is excessive and, if the answer to this question is in the affirmative, to consider whether a price has been imposed which is either unfair in itself or when compared to competing products'.

[253] Other ways may be devised – and economic theorists have not failed to think up several – of selecting rules for determining whether the price of a product is unfair.

[254] While appreciating the considerable and at times great difficulties in working out production costs which may sometimes include a discretionary apportionment of indirect costs and general expenditure and which may vary significantly according to the size of the undertaking, its object, the complex nature of its set up, its territorial area of operations, whether it manufactures one or several products, the number of its subsidiaries and their relationship with each other, the production costs of the banana do not seem to present any insuperable problems.

[258] The Commission bases its view that prices are excessive on an analysis of the differences – in its view excessive – between the prices charged in the different member-States and on the policy of discriminatory prices which has been considered above.

[259] The foundation of its argument has been … [that] the margin allowed by the sale of bananas to Irish ripeners was much smaller than in some other member-States and it concluded from this that the amount by which the actual prices f.o.r Bremerhaven and Rotterdam exceed the delivered Rotterdam prices for bananas to be sold to Irish customers c.i.f Dublin must represent a profit of the same order of magnitude.

[260] Having found that the prices charged to ripeners of the other member-States were considerably higher sometimes by as much as 50 per cent, than the prices charged to customers in Ireland it concluded that UBC was making a very substantial profit.'

[38] The ECJ considered an empirical enquiry into the costs actually incurred by the seller and into the prices actually charged by the seller to be necessary. This exercise was however not done by the Commission, because it had made no empiric enquiry into United Brand's costs. The remarks in paragraph 252 are not a finding on the facts of *United Brands*; that is obvious from what followed in paragraph 251 – 268, where it was found that the evidence had not established that an unfair price had been imposed. The dictum was a general statement to the effect that charging a price which is found to be excessive, would (more accurately 'may') constitute an abuse; and that a price which 'has no reasonable relation to the economic value of the product supplied' would be 'a price which is excessive'.

[39] This paragraph did not deal with the question of how it can or should be objectively determined whether or not a particular price 'has no reasonable relation to the economic value of the product supplied' and hence be regarded as 'excessive'. An answer to this question appears from the following paragraphs. What the Commission argued was that, in order to assess whether a price is 'excessive', there was no need to engage in an empirical enquiry into the costs actually incurred, (and hence the comparison between those costs and the actual selling prices, and the assessment whether the difference is excessive); and that the final assessment whether a price is unfair in itself, or when compared to competing products, could be made without an empirical enquiry into costs actually incurred. Put positively, the Commission contended that the assessment that a price actually charged is excessive and hence unfair, could be made purely by comparing that price with other prices. This contention of the Commission was rejected by the ECJ: the absence of an enquiry resulted in the Commission having failed to prove, by the required evidence, that the price actually charged in the member-States other than Ireland was 'excessive'.[60] In this regard – although this was not necessary in view of the failure of the Commission to make the necessary empirical enquiry – evidence of UBC that it had sold bananas at a loss in Ireland cast further doubt on the Commission's contention.[61] In short, the ECJ ruled that a mere comparison of prices at which the seller actually sold a product to different buyers in the same market was an

[60] Cf Motta and De Streel 4 ff.

[61] Paras 261-8.

insufficient basis to conclude that the higher price was 'excessive' – even where they are 50 per cent higher than the lower price.

[40] Mr Petersen, who appeared together with Mr Maenentje and Ms le Roux as amici curiae (and to whom this court is indebted for their thoughtful and diligent contribution), submitted that the legislature must have intended, by using the expression 'economic value', an amount of money which would notionally be the price or value of the good or service if market conditions other than those actually prevailing were to prevail.[62] What the legislature must be taken to have intended by 'economic value' is the notional price of the good or service under assumed conditions of *long-run competitive equilibrium*. This requires the assumption that, in the long run,[63] firms could enter the industry in the event of a higher than

[62] Cf *Attheraces Ltd v The British Horseracing Board Ltd* [2007] EWCA Civ 38 (CA), paras 210 ff and *United Brands* para 249. This the Tribunal also realised. In para 142 it said: '[O]ne can safely assume that a price that is the subject of functioning market forces will not be deemed excessive or unrelated to the economic value of the good in question. After all the critical premise of competition law is that functioning markets determine what prices are reasonable.' It does not follow, however, that this observation means that the Tribunal must determine, not price levels, but the market conditions that generated the price.

[63] Lipsey, Courant and Ragan *Economics* 12ed (1999) 173-4 define the 'short run' as the length of time over which the firm has some fixed factors of production; the 'long run' as the length of time over which all of the firm's factors of production are variable, but its technology is fixed; and the 'very long run' as the length of time over which all of the firm's factors of production and its technology are variable. Samuelson and Nordhaus *Economics* 13ed (1989) 976, define the 'long

normal rate of return on capital, or could leave the industry to avoid a lower than normal rate of return. It does not imply perfect competition in the short-run, but rather competition that would be effective enough in the long run to eliminate what economists refer to as 'pure profit' – that is a reward of any factor of production in excess of the long-run competitive norm

run' as a 'term used to denote a period over which full adjustment to changes can take place. In microeconomics it denotes the time over which firms can enter or leave an industry and the capital stock can be changed. In macroeconomics, it is often used to mean the period over which all prices, wage contracts, tax rates and expectations can fully adjust.' The 'short run' in contrast is a period 'in which all factors cannot adjust fully' (982). In *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* [1990] 4 CMLR 102 para 43 where unfair conditions in airline tariffs were considered the ECJ said: 'Certain interpretive criteria for assessing whether the rate employed is excessive may be inferred from Directive 87/601, which lays down the criteria to be followed by the aeronautical authorities for approving tariffs. It appears in particular ... that tariffs must be reasonable related to the long-term fully allocated costs of the air carrier ...' See also Motta and De Streel 5-6.

which is relevant to that industry or branch of production.[64]

[41] The European Court of Justice in *United Brands* considered that the lack of a reasonable relation between price and economic value could

[64] Lipsey *et al* 172: ''Economists often use the term 'normal profits' to refer to the opportunity costs of capital and risk taking. When this definition is used, we would say that the firm must earn normal profits if it is to be willing to stay in the industry … It is important to be clear about the various meanings of the term *profit* ...'. Alfred Marshall wrote in *Principles of Economics* 8ed (1920) 1930 Reprint 617-9: '§ 4. [T]here is in each trade and in every branch of each trade, a more or less definite rate of profits on turnover which is regarded as a 'fair' or normal rate. Of course these rates are always changing in consequence of changes in methods of trade; which are generally begun by individuals who desire to do a larger trade at a lower rate of profit on turnover than has been customary, but at a larger rate of profit per annum on their capital. If however there happens to be no great change of this kind going on, the traditions of the trade that a certain rate of profit on turnover should be charged for a particular class of work are of great practical service to those in the trade. Such traditions are the outcome of much experience tending to show that, if that rate is charged, a proper allowance will be made for all the costs (supplementary [fixed] as well as prime [variable]) incurred for that particular purpose, and in addition the normal rate of profit per annum in that class of business will be afforded. … This is the 'fair' rate of profit on the turnover which an honest man is expected to charge for making goods to order, when no price has been agreed on beforehand; and it is the rate which a court of law will allow, in case a dispute should arise between buyer and seller. § 5. During all this inquiry we have had in view chiefly the ultimate, or long-period or true normal results of economic forces; we have considered the way in which the supply of business ability in command of capital tends in the long run to

be revealed, inter alia, by establishing the firm's profit margin.[65] It is apparent that the court considered that a price corresponding to economic value is one which would allow a firm to reap only those trading benefits which it would reap under conditions of 'normal and sufficiently effective competition'.[66] A higher price deriving simply from the use made of a

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adjust itself to the demand; we have seen how it seeks constantly every business and every method of conducting every business in which it can render services that are so highly valued by persons who are able to pay good prices for the satisfaction of their wants, that those services will in the long run earn a high reward. The motive force is the competition of undertakers: each one tries every opening, forecasting probable future events, reducing them to their true relative proportions, and considering what surplus is likely to be afforded by the receipts of any undertaking over the outlay required for it. All his prospective gains enter into the profits which draw him towards the undertaking; all the investments of his capital and energies in making the appliances for future production, and in building up the 'immaterial' capital of a business connection, have to show themselves to him as likely to be profitable, before he will enter on them: the whole of the profits which he expects from them enter into the reward, which he expects in the long run for his venture. And if he is a man of normal ability (normal that is for that class of work), and is on the margin of doubt whether to make the venture or not, they may be taken as true representatives of the (marginal) normal expenses of production of the services in question. Thus the whole of the normal profits enter into true or long-period supply price. … A long period of time is however needed in order to get the full operation of all these causes, so that exceptional success may be balanced against exceptional failure.' Mark Blaug *Economic theory in retrospect*, 5th edition, Cambridge University Press 1997 439 writes: 'In long-run competitive equilibrium the reward of each factor, including the hiring factor, equals its marginal value product; there is no residual for the entrepreneur and dominant position would be one bearing no reasonable relation to economic value.[67] Section 8(a), read with the definition of 'excessive price' in s 1, seems clearly to have had its inspiration in these ideas.[68]

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profits are zero.' He makes it clear that by 'profits' here he means 'pure profit' (ie 'economic profit' as distinct from 'normal profit'). He goes on to define 'pure profit' as — 'a residual left over after all contractual costs have been met, including the transfer costs of management, insurable risks, depreciation and payments to shareholders sufficient to maintain investment at current levels' (at 440).

[65] See para 253 of *United Brands*: 'Other ways may be devised – and economic theorists have not failed to think up several – of selecting the rules for determining whether the price of a product is unfair.'

[66] In Cf *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] ECC 13 (CA) the Court of Appeal rejected the argument that 'normal conduct' could be assessed in terms of the market, where the party, whose conduct was the subject of the complaint, was dominant. Summarising the ECJ jurisprudence the court said: 'The whole premise of the Court of Justice's analysis is that it looks at the conduct in question on the basis that it takes place in a market in which competition has already been distorted by the presence of the dominant firm. The latter's conduct then has to be looked at objectively, that is to say, according to practices in a normal and not an abnormal market.' Langen/Bunte *Kommentar zum Deutschen und Europaischen Kartellrecht* Vol 2 (2006) 10ed at 501 referring to the relationship between the actual price and the costs write: 'Bei einem krassen Preis-Kosten-Missverhältnis erzielt nämlich das beherrschende Unternehmen Gewinne, die es bei einem funktionierenden Markt-Preis-Mechanismus mit Mitteln des normalen Leistungswettbewerbs nicht erzielt hätte.' See Hirsch/Montag/Säcker *Münchener Kommentar zum Europäischen und Deutschen*

[42] In *General Motors Continental NV v Commission of the European Communities*,[69] the ECJ considered that an abuse of dominance might lie, inter alia, in the imposition of a price which is excessive in relation to the economic value of the good or service. In paragraph 22 the court observed that '[t]he absence of any abuse is also shown by the fact that very soon afterwards the applicant brought its rates into line with the real economic costs of the operation ...' It is apparent that the court considered 'the real economic cost of the operation' to be indicative of its economic value.[70]

Wettbewerbsrecht (Kartellrecht) Band 1 Europäisches Wettbewerbsrecht (2007) 1149 and Motta and De Streel at 3.

[67] It is evident from *United Brands* that not every price charged by a dominant firm that is higher than the 'economic value' could have been considered an abuse, or else there would have been no need to formulate the criterion of 'no reasonable relation'. In the case of our s 8(a) the legislature has made it clear that not every excess of a dominant firm's price over economic value will be 'excessive' as defined.

[68] See para 27 above.

[69] [1976] 4 CMLR 95; Record 10:2223-6.

[70] See Brassey *et al Competition Law* (by David Unterhalter) 202. It is correct that the inquiry into economic value does not involve a view as to what value 'should' be. Nevertheless, a market has to be hypothesised by postulating a long-run competitive equilibrium and the cost conditions (including normal profit) that would then prevail. While the dominant firm's own incurred or likely costs will no doubt form an important evidential ingredient in such an inquiry, they will not in and of themselves provide a measure for arriving at economic value unless they can be shown to correspond to the competitive norm.

[43] It seems to follow that, in determining the economic value of a good or service, the cost savings to the firm resulting from the subsidised loan or the lower than market rental – or indeed any other special advantage, current or historical, that serves to reduce the particular firm's costs below the notional competitive norm ought to be disregarded. Thus economic value' is a notional objective competitive-market standard, and not one derived from circumstances peculiar to the particular firm. If the firm's price is no higher than economic value, no contravention of s 8(a) can arise. If, however, the firm's price is in fact higher than economic value so determined, the test of reasonableness in respect of the difference remains to be applied. The expression 'reasonable profit'[71] when dealing with economic value should be avoided. The test of reasonableness applies to the excess of price over economic value, and thus only to the element of 'pure profit' (over and above 'normal profit') implicit in that price. It is at this stage of the enquiry that circumstances peculiar to the particular dominant firm would rationally come into the reckoning. It would seem sound, when considering whether the higher price bears a reasonable relation to economic value or not, to take into account the benefits flowing to the firm from the subsidised loan, long-term low rental, or other special advantage which may serve to reduce its own long-run average costs below the notional norm. Having regard to all the particular circumstances, it might then be concluded that

[71] Cf Motta and De Streel 6 and 18.

no addition of 'pure' or 'economic' profit by means of a price higher than economic value could reasonably be justified, or that the extent of the excess which might otherwise be justified would fall to be reduced. By parity of reasoning, accounting costs may reflect an uncompetitive inefficiency. The criterion of economic value, on the other hand, recognises only the costs that would be recovered in long-run competitive equilibrium. Accordingly, it is possible that a dominant firm's price may be substantially and also unreasonably higher than economic value even when the accounting profit of the firm reveals no such picture.[72]

[44] Import parity pricing

The Tribunal found that the geographic market in which the complainant and Mittal engaged in 'is indeed the national South African market for flat steel products, the market in which a great many of its customers meet Mittal SA and in which its pricing power is effectively unconstrained by any competing suppliers, either in another country or from a product that could

[72] Cf Merits Decision para 36: '[A]n inefficient firm may charge excessive prices and still not show exceptional profits.' Cf also *Lucazeau and others v SACEM and Others* ECR 1989 at 02811 (Cour d'Appel de Poitiers) para 29; *Ministere Public v Tournier and Verney* [1991] 4 CMLR 248 para 42.

be substituted for steel.'[73] In this market, it found that the import parity ('IPP') price was excessive. But, under the Act, an IPP cannot *per se* be excessive. This is so because the Act requires that it be established that the actual price is higher than the economic value. Only when there is no reasonable relation between the price and the value can the price be regarded as being excessive. Whether the actual price is described or formulated on the basis of an IPP cannot, for the purposes of this determination, be definitive. It may, depending on the facts of the dispute, for reasons set out presently, have some evidential relevance as to how the dispute must ultimately be determined. For a domestic producer whose only pricing constraint is the fact that the customer may resort to imports, the IPP is the upper price limit. From this fact, however, it cannot be inferred, without more, that it is a price higher than the economic value of the good or service and hence justify a conclusive finding in terms of s 8(a) of the Act. Nor does it follow that any excess over the economic value is not reasonable.

[45] The Tribunal noted[74] that the 'insistence that steel imports restrain Mittal SA's pricing is only at the point where Mittal SA's domestic price exceeds the landed price of imported steel in South Africa.' If Mittal SA's domestic price was, for a *sustained* period, to exceed, by a *significant*

[73] Para 63. See also *Sasol Ltd and others / Engen Ltd and Others* [2006] 1 CPLR 189 (CT) para 142 and *Tongaat Hulett Group / Transvaal Suiker Bpk* [1999–2000] CPLR 127 (CT) para 54.

[74] Para 68.

margin, the landed cost of imported steel products plus ‘add ons’ like the 5 % ‘hassle’ factor, then, and only then, would the incentive to import become a realistic one for domestic consumers of these products.‘ The price constraint imposed by the potential for imports, which is recognised by the Tribunal, is no different in principle from the price constraint that any firm, having the advantage of an exclusive location near to its customers, faces in the form of the potential for those customers to decide rather to incur the cost of fetching alternative products from a more distant supplier or having them transported from afar. The local firm may well have appreciable market power by virtue of the *degree* of its independence from its customers and competitors; and its exploitation of that power might result in a price judged to be ‘excessive’ But the mere fact that it prices up to the constraining limit, to the point at which the boundaries to its geographical market dissolve and an alternative source of supply becomes realistic for its customers, provides no basis for determining whether its price at that limit is higher than and bears a reasonable relation to economic value or not. The question is simply whether the actual price level at which imports constrain the price of domestic supplies is excessive or not when charged by the domestic supplier. Abuse arises where a domestic monopoly (or indeed an oligopoly in which firms have market power) employs the shelter of distance, for example to extract an unjustifiable amount of ‘pure profit’ by way of a price unreasonably higher than the economic value of the good or service concerned. Whether, in fact, it is doing this or not has to be proved.

[46] If prices charged by foreign suppliers in competitive markets provide a sound comparative basis for assessing the economic value of similar products produced here, then the extent of the transport and related costs needed to bring the foreign supplies to our market will obviously provide a measure of the price premium which a local dominant supplier could extract, over and above economic value. Knowing the extent of the transport and related costs may thus provide a basis for a finding of market power – but the premise remains that a notional competitive price (or economic value) shall first have been established. Once economic value has been established, it is the actual amount of the excess in the price charged by the local firm that has to be measured and evaluated for the purposes of s 8(a). All that import parity pricing will indicate is that the firm is pricing fully to the constraining limit. A dominant supplier which is able, and does, simply set its price at import parity without careful reference to costs would do so at its peril, for, if the import parity price is higher than the economic value of the supply, the supplier could well have difficulty defending the excess as having any reasonable relation to economic value. However, if in fact the supplier references its price to prices prevailing in other comparable but competitive markets, then its price would be likely to approximate to economic value.

[47] Price regulation

As noted previously, the spectre of price regulation was of great concern to the Tribunal. The Tribunal emphasised:[75] '[W]e eschew the role of price regulator, and so the vast quantum of the evidence and much of the argument submitted to us is simply irrelevant' and added:[76]

'The standard approaches and instruments of competition enforcement comprise interventions in the structure of the affected markets and in the conduct of its participants so as to produce outcomes that are, as far as possible, unsullied by the possession or, rather, the abuse, of market power. As already noted, there are compelling conceptual and practical reasons why a competition authority should eschew a price regulation role and if it is possible ... to prove and remedy excessive pricing without resort to the methodologies of price regulation, then this is the approach that must be favoured.'

The powers and duties of the competition authorities, and their limitations, are contained in the Act. The authorities are not called upon to set a price for a good or service. It is incumbent on the Tribunal, if necessary to determine whether a specific price is 'excessive' in contravention of s 8(a). There is no suggestion in the Act that the competition authorities should regulate and set prices. To the extent that the enquiry requires the examination of a possible excess of the charged price over economic value, as defined, that enquiry is required by virtue of the express formulation employed by the Act.

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[75] Para 89. See also paras 37, 74, 77, 87.

[76] Para 81.

[48] Determining an 'excessive' price

It was remarked in *Napp*:[77]

> 'Measuring whether a price is above the level that would exist in a competitive market is rarely an easy task. The fact that the exercise may be difficult is not, however, a reason for not attempting it. In the present case, the methods used by the Director are various comparisons of (i) Napp's prices with Napp's costs, (ii) Napp's prices with the costs of its next most profitable competitor, (iii) Napp's prices with those of its competitors and (iv) Napp's prices with prices charged by Napp in other markets. Those methods seem to us to be among the approaches that may reasonably be used to establish excessive prices, although there are, no doubt, other methods.'

Evans and Padilla,[78] in their discussion of various policies towards the prohibition of excessive pricing by dominant firms, emphasise the 'conceptual as well as practical difficulties' of determining what constitutes an 'unfair' price for purposes of Article 82 of the EC Treaty.[79] Due to the complexity of the exercise more than one method is employed under Article 82.[80] Primarily, a comparison between the actual price and the

[77] *Napp Pharmaceutical Holdings Ltd & Others v General General of Fair Trading* [2002] CAT 1 para 392.

[78].David S Evans and A Jorge Padilla 'Excessive prices: Using Economics to Define Administrative Legal Rules' 1(1) *Journal of Competition Law and Economics* 97

[79] Record 17/3736.

[80] Langen/Bunte *Kommentar zum Deutschen und Europäischen Kartellrecht Band 2* 10ed (2006) 500 ff at 501-2 refer to the difficulties in employing the cost:profit approach and state: 'Eine Kosten- und Gewinnbetrachtung zur Ermittlung der Angemessenheit von Preisen ist insb. bei

costs of production is made but, where this is not possible, the price can be compared to prices in comparable markets.[81] In comparing prices the European Court makes use of different comparator prices.[82]

ihrer Anwendung auf Mehrproduktunternehmen mit großen Schwierigkeiten verbunden, weil die mittelbaren Kosten und die allg. Betriebskosten willkürlich aufgeteilt sein können ... Ähnlich schwierig ist die Beurteilung bei multinationalen Konzernen, wo die angewandten konzerninternen Transferpreise nicht immer die entstandenen Kosten wiederspiegeln ... Schließlich können sich Schwierigkeiten bei Preisen und Gebüren, die von Monopolunternehmen gefordert werden, ergeben. Die kartellbehördliche Praxis stellt daher in Fällen, wo eine Kosten- und Gewinnanalyse keinen Aufschluss über die Anwendung unangemessener Preise gibt, eine Preisvergleich auf Grund des sog. Vergleichmarkskonzepts an. Hiernach wird der vom Marktbeherrscher tatsächlich verlangte Preis zu einem fiktiven Preis in Beziehung gesetz, der sich bei wirksamen Wettbewerb gebildet hätte.' See also Evans and Padilla 102; Hirsch/Montag/Säcker *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht (Kartellrecht) Band 1 Europäisches Wettbewerbsrecht* (2007) 1151 ff. Motta and De Streel 'Exploitative and Exclusionary Prices in EU Law' paper presented to the *8th Annual European Competition Workshop*, Florence (June 2003) at 3 ff refer to a 'veritable cocktail of approaches' and state at 5 'Indeed the authority should try to get cost data and compare them with the excessive price. It is only when it is too difficult to get these data, or in order to complement a cost analysis, that the authority may decide to compare competitors' prices, and more generally, compare the investigated prices with some benchmark prices.' See *Attheraces Ltd v The British Horseracing Board Ltd* [2007] EWCA Civ 38 (CA) para 213.

[81] See *The British Post Office v Deutsche Post AG (Re Interception of Cross-Border Mail)* [2002] 4 CMLR 17 paras 159 ff. In para 159 it was said: ''[T]he fairness of a certain price may be tested by comparing this price and the economic value of the good or service provided. A price which is

[49] Section 8(a) is differently constructed but, similarly, different methods may be employed to ascertain the 'economic value' of the good or service concerned. Section 8(a) does not contain the same prohibition as does Article 82. The latter proscribes the abuse of a dominant position. This is not against which s 8(a) is directed. Section 8(a) prohibits the

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set at a level which bears no reasonable relation to the economic value of the service provided must be regarded as excessive in itself, since it has the effect of unfairly exploiting customers. In a market which is open to competition the normal test to be applied would be to compare the price of the dominant operator with the prices charged by competitors. Due to the existence of DPAG's wide-ranging monopoly, such a price comparison is not possible in the present case. Furthermore, DPAG has only recently introduced a transparent, internal cost accounting system and no reliable data exist for the period of time relevant to this case. ... An alternative benchmark must therefore be used.' See also *Scandlines Sverige AB v port of Helsingborg* Comp/A.36568/D3 (23 July 2004) paras 230 ff.

[82] Eg prices and costs for other products and markets where the costs can be compared and the margin between the prices and costs used to determine a reasonable profit (*United Brands Company v EC Commission* [1978] 1 CMLR 429; *Lucazeau v SACEM* [1991] 4 CMLR 248 at 292; *Ahmed Saeed Flugreisen and Another v Zentrale zur Bekampfung Unlauteren Wettbewerbs eV* [1990] 4 CMLR 102). The prices charged to different customers in the same geographic market by the firm for other products with similar or identical costs (*General Motors Continental NV v EC Commission* [1976] 1 CMLR 95; *British Leyland plc v EC Commission* [1987] 1 CMLR 185). The prices charged to customers in different geographic markets for the same or similar product (after correcting for transport and related costs: *United Brands Company v EC Commission* [1978] 1 CMLR 429; *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Grossmarkte GmbH & Co KG* [1971] CMLR 631; *Sirena srl v Eda srl* [1971] CMLR 260; *Ministere Public v Tournier* [1991] 4 CMLR 248; *Lucazeau v SACEM* [1991] 4 CMLR 248; *Napp Pharmaceuticals* at paras 392-6) and the prices of similar products in a competitive market

charging of an excessive price but Article 82 refers to an 'unfair price'. The effect of *United Brands* is that an 'abuse' can be found in the charging of an 'unfair price' and that the latter may be a price which has 'no reasonable relation to the economic value of the product'. The court did not define what was meant by this term nor did it explain how the absence of a reasonable relationship had to be assessed. Our legislation proceeds from a different premise. It borrowed from *United Brands* the idea of a price which 'bears no reasonable relation to the economic value of that good or service'. What this expression means and how it should be determined must be ascertained by the empirical enquiry referred to.[83] The Tribunal, however, did not approach the matter in this way but, regarded the price charged by Mittal as one having no reasonable relation to the economic value of the good or service simply because of the absence of normal and effective competition. Courts often have to quantify things in money where only a rough estimate is possible on the basis of evidence reasonably available to the party bearing the onus of proof. The quantification of patrimonial damages,[84] and of compensation necessary to avoid unjustified enrichment are not dissimilar examples.[85] A 'fairly robust

(*Bodson v Pompes Funebres des Regions Liberees SA* [1989] 4 CMLR 984; *Scandlines Sverige AG v Helsingborg*, unreported decision of the European Commission, Case COMP/A.36.568/D3 at paras 171-3).

[83] See para 28 above.

[84] *LAWSA* 2ed Vol 7 para 113.

[85] *Thompson v Scholtz* 1999 (1) SA 232 (SCA) at 248I-249D.

approach' may thus have to be adopted particularly when account is taken that 'long run normal' profit and the conceptual basis upon which this term is predicated are notional.[86] Within the context of adjudication, which deals with probabilities, these concepts cannot be employed with scientific precision. For example, where the actual price is shown, as in the *British Leyland* case,[87] to exceed the normal price for roughly similar products to a degree which is, on the face of it, utterly exorbitant, then the need to quantify economic value more precisely before concluding that the actual price bears no reasonable relation to it may fall away.

[50] In this way a *prima facie* case would have been made out, leaving it to a firm in appellant's position to adduce evidence to the contrary, if it is to avoid the case against it becoming conclusive.[88] Likewise, where the dominant firm raises the normal price for its product substantially without

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[86] Cf *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA) 646J-647A. For a similar approach see *Attheraces LTD v The British Horseracing Board Ltd* [2007] ECWA CIV 38

[87] *Leyland plc v EC Commission* [1987] 1 CMLR 185 paras 25-30; *General Motors Continental NV v EC Commission British* [1976]4 CMLR 95 para 12. In *United Brands* para 266 the court considered the price charged with the price of bananas of a similar quality of a competitor. The difference was 7 % which was not 'automatically' regarded as excessive and consequently unfair. See Motta and De Streel 9 ff.

[88] Cf *Lucazeau and Others v SACEM and Others* ECR 1989 page 02811 para 25.

any corresponding rise in costs, this may indicate *prima facie* that the new price is higher than economic value without the need to quantify the latter more precisely.[89] Where input costs vary considerably in cycles, the dominant firm's actual costs may fall sharply without it carrying out a corresponding reduction in its price. Likewise, if the firm usually prices to import parity, it may neglect for a time to bring its price into correspondence with that (ultimately constraining) maximum, relying in the short-term on customer ignorance or inertia in order to charge more. In consequence, the firm's own accounting profits may show a considerable increase during a certain period or periods, over and above the levels which it usually achieves. If there is no reason to suppose that the firm's own usual levels of accounting profit would have resulted in a return on capital that is less than the notional competitive norm (ie enough to sustain it in business in the long run), then it would appear *prima facie* that the firm must have earned 'pure' profit as a result of its pricing during the period or periods when the spike occurred. Thus an adverse finding on a narrower basis than that originally alleged may potentially be secured, without any concession that the firm's prices ordinarily charged when input costs etc were higher were themselves legitimate.

[51] Prices ordinarily charged locally in other markets by the same firm or by other firms with broadly comparable cost structures at comparable

[89] Cf *British Leyland plc, supra*.

levels of output, may obviously serve as a measure of the 'economic value' of the same good or service in our market – if the other markets are shown to be, or can be assumed to be, characterised by effective competition in the long run.[90] An assumption of effective competition could usually be made in such a case, without any unfairness to the firm accused, if the comparative price ordinarily charged in the other markets is shown to be lower than the actual price, after all appropriate adjustments have been made.[91] In this way, the difficulty of directly measuring profitability[92] may be

[90] Cf Motta and De Streel 5.

[91] Cf *Ministere Public v Tournier and Verney* [1991] 4 CMLR 248 paras 4, 7, and 25-31 where in para 38 the court stated: 'When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member-States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States.'

[92] In *United Brands supra*, the Court observed (para 254): 'While appreciating the considerable and at times very great difficulties in working out production costs which may sometimes include a discretionary apportionment of indirect costs and general expenditure and which may vary significantly according to the size of the undertaking, its object, the complex nature of its set up, its territorial area of operations, whether it manufactures one or several products, the number of its subsidiaries and their relationship with each other, the production costs of the banana do not seem to present any insuperable problems.' As to the problem of appropriately allocating overhead costs in cases where the same firm produces several different products using the same infrastructure, many firms nowadays in practice make detailed costing allocations themselves in

overcome.

[52] However, there may be no alternative to a detailed exercise in comparative costing. If expert evidence has been given concerning costing data, the necessary adjustments to be made for comparative purposes, the appropriate methodology needed to establish the opportunity cost of capital and allow for depreciation and replenishment of plant etc, then findings based on an evaluation of that evidence will have to be made. When a lower price (eg, a rebated local price or an ex-works export price) is said to be sufficient to 'cover costs', it is important to establish that the price concerned covers not merely the accounting costs but also the relevant opportunity costs of capital.[93] Where a dominant domestic producer maintains price differentiation between export and domestic customers, and embarks on an expansion of its production capacity wholly or mainly in order to increase its export sales, then it would be difficult to avoid the conclusion that its export price would be at or above economic value – at the expanded level of output intended. In any event, the

order to keep a check on the profitability of different lines of business.

[93] Evans and Padilla at 103 observe: 'Measurement issues are the least of the concerns with using profit benchmarks, though. Accounting procedures do not provide for capitalization of R&D and advertising, do not address inflation, and do not properly adjust rates of return for risk. Thus accounting profits do not reflect economic profits except under the most unrealistic assumptions. The relationship between accounting and economic rates of return hinges on the time shape of net revenues, something that varies across industries, across firms within an industry, and even across time for a given firm.'

business calculations involved in the expansion could be expected to provide important evidence regarding both the current and future positions.

[53] The experts who gave evidence at the hearing before the Tribunal all recognised the difficulties with the necessary exercise, and the fact that competition authorities worldwide have struggled with excessive price cases. None of them, however, considered it possible to make a finding of excessive price without doing the exercise. Professor Roberts stated:[94]

> 'Well, I have termed broadly the conceptual issues. I mean, we are not arguing the import parity pricing per se (inaudible) is [equivalent] to excessive prices. So we do agree that it is an empirical question, because we agree you have got to analyse what the competitive price would be and how large the import parity based prices or how much higher the import parity based prices are above that competitive prices and empirical exercise. However, it's also important – where we're looking at the pricing system – to show that it is something, which flows from the exercise of market power. So Dr Walker says, well you know the system really appears to have … it is not about the pricing system. What it is it's about the pricing levels. Well, we say that it must be about both. I mean, you must analyse the levels, but you must also analyse the way in which those prices are attained and enforced.'

[54] The essence of Prof Roberts' analysis is the recognition of the need for an empirical exercise to be conducted in analysing whether a price is excessive. He concentrates, however, on his concern to show that the reason for the price level is that the dominant party has abused its market power. The empirical exercise is accepted as a necessity and therefore not elaborated on.[95]

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[94] 44: 10010-1.

[95] 44:10220.

'Adv Loxton: So what is the determinant that you now say that is the economic value against which you must measure prices?

Prof Roberts: We measure it in terms of what prices will be in a competitive market, subject to those prices covering costs.'

Prof Roberts was asked, in cross-examination, in regard to 'the difficulty of establishing an excessive price'.[96]

'Roberts: 'The proposition being that it is difficult to assess?

Adv Loxton: It's difficult to assess and difficult to implement.

Prof Roberts: It's certainly true that the US adopted a different approach because of the difficulties. However, it is certainly an empirical exercise, which requires one to gather a lot of factual evidence together. However, I think you mentioned it in your proposition that this is a similar experience that has been found in the EU and that I would say there that while there is a lot of debate around the EU's application, that it is very notable, but one still finds this being debated and one finds, for example, the UK's office of Fair Trading setting up standards for assessing excessive pricing.

So, I certainly don't disagree that it's an empirical exercise and there are challenges certainly to be overcome, but it is not an exercise, which the US has not undertaken or jurisdiction within the EU have not set out methodologies for address.'

The erroneous approach of the Competition Tribunal also explains why Mittal ends up in the anomalous and wholly impractical position of having been found guilty of and heavily fined for excessive pricing, without any finding of which prices for which of the variety of products were excessive, nor of the period in which the excessive prices were charged, nor of what a non-excessive price would have been, nor of the amount of the excess which it was found to have

[96] 45: 10241-2.

charged, nor any indication of how – in changing market conditions, eg where production costs may have risen, or supply and/or demand may have changed – an 'excessive price' would in the future be determined.

[55] Detriment to consumers

As far as detriment to consumers is concerned the Tribunal remarked:

'[71] An overly fastidious defence counsel may wish to make something of the subordinate phrase '*to the detriment of consumers*' though none have attempted to do so here. What, after all, could more clearly inure to the detriment of consumers than an "excessive price"? We will, without further consideration, as, implicitly, have the defence counsel, treat this phrase as simply a superfluous description of an excessive price rather than a qualifier of its likely effects.'

Section 8(a) requires that the excessive price be charged 'to the detriment of consumers'. This requires a value judgment. However, it does not appear to be in dispute that, if the prices complained of are held to be excessive, detriment to consumers will have resulted. However, a few words are necessary. The customers to whom the excessive price is charged may be consumers (users) of the good or service concerned, but not necessarily so. Although they may overlap, 'customers' and 'consumers' appear to be distinct concepts in the Act.[97] There is, generally

[97] The word 'consumers' is used three times: in the preamble; in s 2(b) where it is said that one of the purposes of the Act is 'to provide consumers with competitive prices…'; and in s 8(a). The Act also uses the word 'customers' or 'customer' where it is dealing with the supplier-customer connection or relationship. See the definitions of 'essential facility', 'market power' and 'vertical relationship' in s 1; s 4(b)(ii); s 8(d)(i).

speaking, a presumption or reasonable supposition that the same words or expressions in the same Act are intended to bear the same meaning where no indication to the contrary is given.[98] Conversely, where the Legislature uses a different expression, it is presumed to have intended a different meaning.[99] Moreover, an excessive price may be charged to a single customer; in the expression 'to the detriment of consumers' the Legislature uses the plural. Sutherland and Kemp[100] suggest that downstream consumers of the product in question or of products derived from it are the only relevant category of consumers. However, where customers of the dominant firm themselves consume the product – whether productively or as final consumers – it would seem artificial to exclude them from the ambit of the term.

[56] Application to Lead Further Evidence

From the foregoing it is clear that the Tribunal misconstrued its powers and came to a decision that cannot be justified by the words on the Act. Its judgment and order must therefore be set aside. This court is in terms of s 37(2) entitled to

'give any judgment or make any order, including an order to –

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[98] *Minister of the Interior v Machadodorp Investments and Another* 1957 (2) SA 395 (A) 404D; *More v Minister of Cooperation and Development* 1986 (1) SA 102 (A) 115C.

[99] *R v Sisilane* 1959 (2) SA 448 (A) 453F-G; *Consolidated Textile Mills Ltd v President of the Industrial Court and Others* 1989 (1) SA 302 (A) 307A-308C.

[100] At 7 – 40(1) to 7 – 40(2). See also 7 – 40(6).

(a) confirm, amend or set aside a decision or order of the Competition Tribunal; or

(b) to remit a matter to the Competition Tribunal for a further hearing on any appropriate terms.'

[57] The second and third appellants have requested this court to allow further evidence to be lead either by hearing the evidence itself or by setting aside the decision of the Tribunal with directions to receive further evidence and to reconsider its decision and orders in the light of all the evidence including the further evidence to be lead.[101] An application to hear further evidence will be granted only in exceptional circumstances. In *S v De Jager*[102] it was said:

'(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which is sought to be lead was not lead at the trial.

(b) There should be a *prima facie* likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.'

In addition, the evidence sought to be introduced must not be of such nature as to prejudice the other party to the dispute. This consideration, however, is not necessarily determinative.[103]

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[101] Eg *S v Njaba* 1966 (3) SA 140 (A) 145; *S v Nkala* 1964 (1) SA 493 (A) 498) and cf *National Association of Pharmaceutical Wholesalers and Others v Glaxo Wellcome (Pty) Ltd* 2003 BLRCL 402 (CAC) paras 18-9; *Farmer's Co-op Ltd v Borden* 1961 (1) SA 441 (FC) 444F-445B..

[102] 1965 (2) SA 612 (A) 613CD and see *Stoffberg v All Stones BK* [2002] 2 All SA 8 (SCA) 16 HJ.

[103] *Staatspresident v Lefuo* 1990 (1) SA 679 (A) 692 AD; *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) 616G-617D.

[58] The second appellant seeks to introduce the evidence of Mr Leon William Price, the chief executive officer of the third appellant.[104] Briefly, the evidence relates to the operation of the international steel market,[105] the role of the second appellant rendering services to Mittal and the effect of the JV agreement on the

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[104] Application Further Evidence at 23 ff

[105] The Tribunal found the relevant market to be the South African steel market and the evidence led discounted the existence of an 'international' or 'global' steel market. Dednam 47: 10726 believes there is a global steel market but defers to Tomlinson and Fish. The latter two leave one in little doubt. Fish said at 42 9470 'No, there isn't a global steel market and my chart here shows clearly that there isn't a global market.' At 43: 9794 he was questioned: 'Adv Loxton: What I put to you there is that there are regional markets, which affect each other. So what happens in one market will affect other markets around the world and to that extent there is a global market in the sense that they are all related. All off the events, which affect price in one area of the world, tend to affect prices in another area of the world. Mr Fish: The answer to the question, I think at the time is I held up my chart 12, which shows clearly that different parts of the world, the peak of the cycle can be 12 months different in different part of the world. Between the United States and Asia the peak of the cycle can be 12 months apart. Now you could say that that relationship, but if you are providing something like a global price, then clearly when one market is at its peak, as you can see there in 2005, that's the Asian market, then the North American has almost got to the bottom of its cycle. So if you ask me whether a global price in itself is something you can work with, then clearly that can't be the case, if you are comparing one part of the world where the price has hit its peak and another part of the world, which has almost reached its bottom point. So the reason why I said you don't have a global market, which came out of the fact that we have a global price, that is the answer to the question; that you are comparing things, which are just not comparable at that moment in time. And that's why I said that there isn't a global price.' Tomlinson said at 46: 10514-5: 'I am not claiming that there are not regional differences between

domestic steel price. Price refers in his affidavit to the earlier affidavit of Mr Peter Charles Howard Jones[106] which was used in opposing the amendment sought by the respondents. The evidence will establish that the second appellant is an established trader in the international steel market and in 2007 31 per cent of its business was sourced from Mittal. In 2007 Mittal exported 26.27 percent of its production. The second appellant operates in the international steel market which excludes South Africa. Price remarks:[107] 'The suggestion that export sales to MIHBV are domestic because a ship is loaded in a South African dock is completely erroneous.' In the international market the second appellant is a small player having less than 2,5 per cent of it. The second appellant does not offer prices to Mittal but gathers price information from the market and solicits offers from customers which it submits to Mittal. Mittal may accept or decline these offers. The second appellant undertook to purchase the entire export capacity of Mittal. Sales are made by Mittal to the second appellant on a FOB stowed basis in US dollars. Payment is made to Mittal on average 13 days after invoice whether or not payment has been received by the second appellant. Only Mittal's excess production is exported in this way. Price states: 'The export allocations vary according to domestic requirements, production capacity of the mills, and maintenance programmes. Domestic market requirements always take

markets. What I'm saying is that one market is not likely to remain massively out of line with behaviour in other markets for very long.'

[106] Application Further Evidence at 36 ff.the affidavit of Jones forms part of the evidence before the Tribunal. Cf s 55(3)(a) and was referred to in the Merits Decision para 28 n31.

[107] Para 10.1 at 30.

precedence over exports.'[108] It follows that the second appellant has no control over Mittal's allocation of products for export, its costs or domestic pricing policy or international steel prices. It follows that export prices will be lower than domestic prices since the 'price paid to the producer at the point of shipment from the producer's country must be reduced by all the costs of transporting the material to the overseas market concerned ...'.[109]

[59] The relief sought in the original complaint referral of was as follows:

A. For an order declaring that Iscor's practice of employing import parity pricing (as set out in paragraph 11.1.5 above) in the South African flat steel market amounts to an abuse of dominance in terms of section 8(a) of the Act;

B. For an order directing Iscor to refrain from charging excessive prices in the South African flat steel market;

C. For an order directing Iscor to levy factory gate prices in the South African flat steel market, irrespective of whether the product is intended for export or not;

D. For an administrative penalty to be levied on Iscor of 10% of its annual turnover for the financial year ended 30 June 2003 in the South African flat steel market;

E. For those respondents that oppose the complaint to pay the costs incurred by the complainants in prosecuting the complaint.

[60] That relief was aimed at Mittal's setting its domestic prices in the South African flat steel market at import parity. The second appellant had no control over the setting of Mittal's domestic prices, and since the JV Agreement dealt only with the second appellant obtaining offers for Mittal from foreign buyers at

[108] Para 7.10 at 28.

[109] Para 10.4 at 31.

the best available international prices for the production capacity in excess of domestic demand, none of the relief originally sought could affect the second appellant's rights under the JV Agreement. Even the original prayer C, it was submitted, was irrelevant to the second appellant, since under the JV Agreement no question of Mittal offering any prices, let alone factory gate prices, arose. In these circumstances the second appellant, against whom no relief was sought,[110] and whose role as the 'export channel' of Mittal was – in the opening address of the Complainant's counsel – said to 'find no echo' in the remedies sought by the Complainants, had no reason to, and did not, participate in the hearing of evidence which commenced on 15 March 2006 and concluded on 25 April 2006. Counsel for the respondents expressed himself in argument as follows:[111]

'Adv Unterhalter: Sorry, I perhaps should have made it clear. The Mac Steel arrangement is simply the export channel, which ensures that effectively arbitrage doesn't take place. So, what happens is that under the Mac Steel joint venture arrangement all exports are done through that singular channel and consequently it is impacted only because it is an arrangement, which ensures that effectively arbitrage can't take place.

So, it's really one of the mechanisms that's used to ensure market segmentation and the continuance of excessive pricing.

Chairperson: But then this allegation finds no echo in the remedies that you seek.

Adv Unterhalter: No, it doesn't, and it's for that treason that we have not ... I mean we cited Mac Steel, but they have simply indicated that they will abide the decision. So, we simply use it for evidence. We don't seek specific remedies to undo that arrangement.'

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[110] Complaint Referral Record 2:349 para 8.

[111] Record 39:8964, lines 4 – 19.

[61] After the evidence was completed and on 26 April 2006, the complainants sought an amendment to the relief sought in the prayers. They did so by adding, as an alternative to prayer C, a new prayer C (bis).[112] The terms of the amendment sought are as follows:

'…the complainants intend to apply to the above honourable Tribunal to amend their referral of complaint, form CT1, by substituting the relief sought in the referral in respect of the claim of excessive pricing with the following:

'A For an order declaring that the first respondent's practice of employing import parity pricing (as set out in paragraph 11.1.5 of the founding affidavit) in the South African flat steel market amounts to an abuse of dominance in terms of section 8(a) of the Act;

B For an order directing the first respondent to refrain from charging excessive prices in the South African flat steel market;

C For an order directing the first respondent to levy factory gate prices in the South African flat steel market, irrespective of whether the product is intended for export or not;

C bis <u>In the alternative to prayer C above</u>, for an order directing that:

1. **The first respondent may not itself, or with any natural or juristic person, or through any entity, vehicle, trust or other juristic person in which it has an interest, export flat steel products from South Africa;**
2. **The first respondent divest its interest in the second respondent to an independent third party or parties approved by the Tribunal within such period and on such conditions as the Tribunal considers appropriate;**
3. **The first respondent may not:**
   - **I. impose upon any customer of its flat steel products any condition in respect of the customer's use or resale of those products; or**
   - **II. reach agreement on a condition with a customer of its flat steel products, or enter into any arrangement or understanding with such a customer, in respect of the customer's use or resale of those products;**

[112] Record 3:614 – 614.

4. The first respondent waive in writing any condition in any agreement concerning the use or resale of flat steel products by a customer;

5. The first respondent make known in the public domain, at all times, its list prices, rebates, discounts and other standard terms of sale for flat steel products;

D For an administrative penalty to be levied on the first respondent of 10% of its annual turnover for the financial year ended 30 June 2003 in the South African flat steel market;

E For those respondents that oppose the complaint to pay the costs incurred by the complainants in prosecuting the complaint;

F For an order granting further and/or alternative relief.'

[62] The essential amendments are contained in prayer C (bis) directed at preventing Mittal from exporting at all. These prayers C (bis) 1 and C (bis) 2 would, if granted, directly affect the second appellant's rights and interests under the JV Agreement. The second appellant therefore, and for the first time, participated in the proceedings, at this stage after completion of the evidence, to oppose the granting of the proposed amendment introducing prayers C (bis) 1 and C (bis) 2. The Tribunal refused the amendments contained in the proposed prayers C (bis) 1 and 2. In the reasons and order made by Manoim TM[113] he said:

'[42] ... If the amendment is granted Mittal argues the respondents would not have been given proper notice of the new consequences for them and they would not have been given a proper opportunity to be heard. Of course fairness and *audi alteram partem* may still be restored by allowing respondents an adequate opportunity procedurally to redress their prejudice. In this case however, proper concern for the orderly expedition of our procedures cannot allow us to tolerate

[113] 19 June 2006. See the Record of the application to lead further evidence 205 ff.

at this late hour, an amendment whose prejudice would occasion such extensive remedial redress.

[43] Where an amendment is brought as late in proceedings as this one it must, as a matter of fairness to the opposing parties, be accompanied by a reasonable explanation. We have found that Harmony's amendment does occasion serious legal consequences for the respondents that are not consistent with the case originally pleaded. For this reason we are not dealing with trivial tightening up of relief that should always have been contemplated. Rather the complainants in this case have, through every outward expression on this matter, signalled that the joint venture was not imperilled...

[44] The complainants did not merely remain, to borrow their own language, "supine" on whether relief sought against the joint venture would be sought at a later stage – they actively sought to disabuse both respondents from this notion. Granted, the complainants are correct that relief in competition cases is complex, and that sometimes a remedy that may seem obvious in the dying moments of a case, may not have been obvious at its birth; but in this case the complainants have not convinced us that it took subsequent reflection at the end of the litigious jousting, for an epiphany to come to them for the first time that the joint venture needed to face remedial action. Rather it is more probable that the complainants had considered this throughout – indeed the express disavowal in the pleadings coupled with the late reassurance by counsel seems to reinforce this; that tactically it would be better not to attack the joint venture as this would leave them with one opponent rather than two. This calculation is precisely how matter turned out. Having made this calculation by way of assurances given, it would be manifestly unfair to the respondents to allow them to change their stance now.'

[63] The amendments to the prayers sought to be introduced by the proposed new prayers C (bis) (3) (i) and (ii), (4) and (5) were not opposed by the second appellant, and were granted. Manoim TM in allowing these amendments said:

'[46] In relation to prayers C *bis* 3, 4 and 5 we have no difficulty granting the amendments. Macsteel have raised no objection to them nor in their heads of argument do Mittal. These amendments are in their nature aligned to the economic theory foreshadowed in prayer C, and unlike C *bis* (1) and (2), were not the subject of any prior legal representation. Again, unlike C *bis* (1) and (2, they do not threaten the legal edifice of the Macsteel joint venture arrangement.'

[64] Having succeeded in its opposition to the introduction of the proposed new prayers C (bis) 1 and 2 – which would have affected the second appellant's rights and interests under the JV Agreement - the second appellant was assured that its rights and interests under the JV Agreement would remain unaffected by prayers C (bis) 3, 4 and 5 by other remarks of Manoim TM refusing the amendments proposed by prayers C (bis) 1 and 2 and granting the amendments proposed by prayers C (bis) 3 (i) and (ii), 4 and 5.[114]

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[114] Paras [34] ('As a result it was reasonable for the respondents to rely, and in their approach to the case to assume, that the legal edifice of the joint venture was not at the complainants behest, going to be subject to a proposed remedy.'; [35] ('We are satisfied that both respondents will be prejudiced by the amendments insofar as they implicate the legal edifice of the joint venture.'); [43] ('We have found that Harmony's amendment does occasion serious legal consequences for the respondents that are not consistent with the case originally pleaded'). Despite these remarks the Tribunal also said para 30: 'However to suggest that prayer C had no implications for the business of the joint venture would be to adopt a completely blinkered approach to its impact on the market which the joint venture seeks to segment, albeit not on the contractual and ownership rights created by the joint venture. That would be to make the error of solely reading it *qua* lawyer, and not *qua* businessperson or economist.'

[65] Mr Cilliers, who appeared together with Mr Cockrell and Mr Turner on behalf of the second appellant, submitted that, for these reasons, the second appellant participated during the closing argument only to a limited extent.[115] In his oral presentation Mr Cilliers submitted that, in these circumstances, any relief which may be granted could not affect the second appellant's rights or interests under the JV Agreement, and that this could not be subverted in any way, including dressing up a remedy as having only 'economic consequences' while in substance affecting the second appellant's rights under the JV Agreement. Furthermore, he submitted that prayer C (that Mittal 'levy factory gate prices in the South African flat steel market, irrespective of whether the product is intended for export or not') could not extend to the second appellant which obtained prices in the international steel market. The second appellant did not consider itself as a 'customer' of Mittal as contemplated by prayers C (bis) 3(i) and (ii) or C (bis) 4. Counsel's response to the Tribunal was that the second respondent did not understand it to be affected by these prayers in particular prayer C (bis) 3 (i) and (ii) and C (bis) 4.[116]

[66] In his opposing affidavit Mr Jones stated that the market in which the second appellant operates is 'an international one, and excludes the South African domestic market'.[117] The second appellant purchases and exports only

[115] Record 51:11657 – 11676.

[116] Record 51:11667, 11669, 11670 and 11671.

[117] Record 3:679 para 18.2.

Mittal's excess production not required for the domestic market.[118] It has no control over Mittal's pricing policy or production costs.[119] It solicits offers from overseas purchasers and conveys these offers to Mittal.[120] There is no link between the prices which the second appellant obtains in the international market and the domestic prices.[121] Jones made it clear that he understood the reference to the 'South African steel market' in the original prayer C to limit the relief sought to 'local merchants or end-users (not MIHBV)'. The second appellant 'does not operate "in the South African flat steel market."'[122] Prayers C (bis) 3 and 4 were both intended to bring about an end to the exclusivity arrangement between Mittal the second appellant, ie introducing a new form of relief.[123] It was submitted that there was no indication that prayers C (bis) 3 and 4 would include under 'customer' the second appellant or that those prayers would affect the second appellant's operations outside the domestic steel market or under the JV agreement.

[67] In view of this chronology and the manner in which the forms of relief were couched, it seems that the second appellant is justified in its contention and belief that on a proper construction of the amended prayers for relief, as formulated, none of them could, even if granted, affect the second appellant's

[118] Record 3:680 para 26.

[119] Record 3:681 para 29.

[120] Record 3:684 para 35.

[121] Record 3:687-9 paras 45-8.

[122] Record 3:690-1 para 53.

[123] Record 4:721-2 paras 16-9.

rights and interests under the JV Agreement. The declaratory order sought in prayer A would determine the ambit of any conduct which may be found to be prohibited conduct; all the other orders sought would only constitute mandatory or prohibitory interdicts to give effect to such declaratory order. The declaratory order sought in prayer A, however, was limited to the pricing practice of Mittal 'in the South African flat steel market'. The JV Agreement, however, show that the second appellant did not trade in, or have anything to do with Mittal's pricing policies, or any pricing of flat steel, or any steel, in the South African market. Under the JV Agreement the second appellant brought to Mittal offers, which Mittal could, if it so chose, accept in order to dispose of its export volumes. Hence, prayer C (bis), like prayer A (and prayers B and D) was not construed as applying to the trading activities of the second appellant pursuant to the JV Agreement. More specifically, the 'customer' referred to in prayers C (bis) 3(i) and C (bis) 3(ii) and C (bis) 4, was not seen as applying to the second appellant, who, acting for a fixed margin as export arm of Mittal, arranged sales of Mittal's export volumes in the international steel market with ultimate purchasers with whom volumes, prices and destinations had been agreed. On the contrary, the word 'customer' in prayers C (bis) 3(i) and (ii), and C (bis) 4, it was submitted, could only be reasonably construed as applying to a 'customer' who may wish to resell the Mittal products in the domestic market – a possibility for which the very nature and scope of the JV Agreement left no room. Moreover, since the Competition Tribunal had refused the application to introduce prayers C (bis) 1 and 2, it would reasonably follow that the second appellant remained unconstrained to continue its exports under the JV Agreement, the essence whereof was for the second appellant to obtain the best international prices for Mittal's surplus production, and bring them to Mittal for acceptance or rejection. These prayers were reproduced in orders 2(i), 2(ii) and 3 of the Tribunal's final order:

'Mittal SA may not:

(2) (i) Impose upon any customer of its flat steel products any conditions in respect of the customers use or resale of those products; or (ii) Reach agreement on a condition with a customer of its flat steel products, or enter into any arrangement or understanding with such a customer, in respect of the customers' use or resale of those products.

(3) Mittal SA is ordered to waive in writing any condition in any agreement concerning the use or resale of flat steel products by a customer.'

[68] The Tribunal appears to have intended that orders 2(i), 2(ii) and 3 should carry such a wide meaning, ie that the second appellant is included under the 'customer' referred to in those orders. This impression can be gained from paragraph 29 of the Tribunal's reasons given in its Remedies Decision where it said:[124]

'[A]t the hearing of final argument Mr Gauntlett, for Macsteel International, appeared suddenly to oppose the application to his client of the remedy contained in C (bis) 1 and 2 [this is a reference to the original prayers C (bis) 3(i) and (ii) and C (bis) (4) – see Record 1:114-5] We cannot understand Macsteel International's belated opposition. This is a remedy imposed on Mittal SA and, given that it goes directly to its pricing methodology, will, we believe, impact upon all domestic purchasers of Mittal SA's flat steel products. All that distinguished Macsteel

[124] Para 29 Remedies Decision.

International was that, by being cited as second respondent, it was given an unusual opportunity to participate at any stage of the hearing. It chose not to do so and its sudden flurry of opposition during the hearing of oral argument is eccentric to say the least.'

[69] It is difficult to understand how the Tribunal, (having stated in relation to the introduction of the prayers now embodied in orders 2(i), 2(ii) and 3, that 'it was reasonable for the respondents to rely and … assume that the legal edifice of the joint venture … was not going to be subject to a proposed remedy', and refusing C (bis) 1 and 2 on the basis inter alia that 'both respondents will be prejudiced by the amendments insofar as they implicate the legal edifice of the joint venture', and stating that 'the prayers C (bis) 3, 4 and 5 do not threaten the legal edifice of the Macsteel joint venture arrangement)', could have intended that orders 2(i), 2(ii) and 3 should have the very opposite effect of applying to the second appellant as a 'customer' of Mittal by striking at a material term of the JV Agreement (clause 29.1). If orders 2 and 3 were intended to apply to the second appellant and the JV Agreement, the most glaring instance of a flat contradiction of the Tribunal's earlier statements would be order 3 that enjoins the second respondent to waive a material term of the 'legal edifice' of the JV Agreement, namely clause 29.1, and therefore directly 'implicates' the 'legal edifice" of the JV Agreement and 'renders it subject to a proposed [and actually ordered] remedy.'

[70] If the Tribunal intended these orders to have a literal effect, they materially differ from the terms of the amended relief sought by the complainants. The consequence of this is either that there was no notification to the second appellant of the opportunity to file additional documents, and no compliance with Rule 18(2); or that the second appellant was taken by surprise and that the hearing was not in accordance with the principles of natural justice as required by s 52(2)(a) of the Act.[125] Very much the same considerations apply to order 4.

[71] The prayer for a declaratory order, which would define the scope and limits of the prohibited conduct, was originally that Mittal's practice of employing import parity pricing in the South African flat steel market, be declared an abuse of dominance. The complainants sought to amend the nature and scope of the prohibited conduct by seeking, in the alternative, an order prohibiting Mittal, directly or through an entity in which it has an interest (ie the second appellant) from exporting flat steel products from South Africa at all. The application for this amendment was refused. The declaratory order as originally prayed for, remained unchanged. The Tribunal declined to declare that Mittal's 'practice of employing import parity pricing … in the South African flat steel market' amounts to an abuse of dominance.[126] Instead in the decision the Tribunal invoked a novel

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[125] *Glaxo-Wellcome (Pty) Limited v Terblanche NO* [2001-2002) CPLR 48 (CAC) at 60.

[126] Remedies Decision para 16: 'We have emphasised that our approach to the allegation of excessive pricing has not been to determine a 'right' or 'wrong' price level. We accordingly cannot find that the import parity price level is an abuse of dominance, the 'wrong' or 'excessive' price level, anymore than we would declare the export parity price to be the 'right' price level. Mittal SA's offence resides in the fact that it has administratively selected a price and it has adjusted the amount that it, the super dominant player, supplies to the domestic market so as to ensure that it achieves the pre-selected price. It matters not whether this price is the import parity

'theory of harm' and 'characterisation of the prohibited conduct', and proceeded to make a declaratory order (Order 1), defining the prohibited conduct, which had not been sought by the complainants and, importantly, an order of which the second and third appellants had no forewarning. Order 1 involved 'steel merchants and those of its customers who receive a rebate off the Mittal SA price list', and the conditions of sale to them, in the definition of the conduct constituting an abuse of dominance. In paragraph 17 of the Remedies Decision this is explained:

'It would be unfair to deny the complainant any form of declaratory relief because we have formulated the theory of harm in a different form. Declaratory relief is a necessary prerequisite for a complainant to commence a civil claim for damages in terms of the Act as it is the manner in which the Tribunal characterises the conduct found to be an abuse.[127] As this case illustrates, even though the Tribunal may find in favour of a complainant, the characterisation of the prohibited conduct may be different. Accordingly, we will not declare a particular price level to be excessive but we have reformulated Prayer A in a manner that is consistent with the conduct that we have found to be an abuse in this case. It now reads as follows:

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price or, as Mittal SA would have it, a price based upon a random basket of prices that prevail in other national markets. What matters is that by manipulating the supply of flat steel products available on the domestic market it ensures that the price is not determined by cognisable competition considerations.'

[127] Section 65(6)(b) states that when a person who has suffered a loss or damage as a result of a prohibited practice wishes to institute a civil claim they must, inter alia, file a notice from the Tribunal certifying that the conduct forming the basis for the civil action has been found to be a prohibited practice in terms of the Act. Section 58(1)(v) of the Act requires that the Tribunal may make as one of its orders an order 'declaring conduct a prohibited practice in terms of this Act, for the purpose of section 65.'

Mittal SA's practice of reducing the supply of flat steel products available for sale on the domestic market, through the imposition of conditions of resale on the steel merchants and those of its customers who receive a rebate off the Mittal SA list price, is an abuse of dominance in terms of Section 8(a) of the Competition Act.'

[72] Order 1 differs from the declarator sought by the complainants (an order that the practice of employing import parity pricing in the South African flat steel market a prohibited practice). Despite the limits inherent in order 1, orders 2(i), 2(ii) and 3 are formulated so as to apply to any 'customer' of Mittal for flat steel products, regardless of whether it is a customer supplied with products 'available for sale in the domestic market'; and even where there is no 'imposition' of conditions of resale on the customer (see order 2(ii)); and regardless of whether the customer receives 'a rebate off the Mittal SA domestic list price'. If orders 1, 2 and 3 are to be read literally they could well be applicable to the second appellant. The second appellant submitted that had they had notice or forewarning of the substance and formulation of order 1, it would have presented evidence and argument to show that order 1, and the consequential orders 2, 3 and 4, should not be made in terms which affected the rights and interests of the second appellant under the JV Agreement. So, for instance, the second appellant would have presented its own evidence to show that it does not deal in products 'available for sale on the domestic market'; nor does it 'receive a rebate off the Mittal SA domestic list price'; nor are conditions of resale 'imposed' on it; nor does the JV Agreement have anything to do with preserving the possibilities of arbitrage. Hence, also in respect of order 1, there was no compliance with

Rule 18(2) and in any event the second appellant was taken by surprise by order 1 (which is the foundation for the other orders), and consequently the hearing was not conducted in accordance with the principles of natural justice as required by s 52(2)(a) of the Act.

[73] We have considered the objections to the application but it seems that a proper case for the leading of further evidence has been made out. This evidence seems to be material and would, but for the misunderstanding, have been led by the second appellant. The evidence to be lead has been identified. It was submitted that evidence tendered will show that the JV agreement does not affect the domestic market or domestic prices and does not lead to excessive prices as the Tribunal accepted[128]. The Tribunal in its reasons for allowing the amendment distinguished between reading the amended prayers qua lawyer and qua businessman and said that the amended prayers would not threaten the 'legal edifice' of the JV Agreement. But they indeed seem to affect a material term of the JV Agreement.

[74] Referral back to the Tribunal

The Competition Tribunal is a specialist administrative tribunal created by s 26(1) of the Act. Its functions are listed and may only be exercised in accordance with the Act.[129] It must adjudicate on any matter referred to it under the Act, and each matter will be referred to a panel of three. Members need not be lawyers: they

[128] Paras 163-4 of the Merits Decision.

[129] Sections 26(1)(d); 27.

may have qualifications and experience in economics, law, commerce, industry or public affairs.[130] However, the chairperson must when assigning a matter to the Tribunal, ensure that at least one member of the panel, consisting of three, is a person who has legal training and experience. The Chairperson designates one of the three members of a panel to preside over each proceeding.[131] The Tribunal does not function as an ordinary court. Competition proceedings involve the public interest, and under the Act, the Tribunal has an active role to play in protecting that interest.[132] 'As a result, the Tribunal conducts its proceedings in an inquisitorial manner, potentially calling its own witnesses, accepting evidence not normally admissible in a court of law, allowing a broad range of participants, and adjusting its procedures as it sees fit.'[133]

[75] As has been demonstrated in this judgment, the approach of the Tribunal, to the question of an excessive price, the care and considerable thought taken in its formulation notwithstanding, is fundamentally flawed. Both the decision on the merits and the orders made pursuant thereto in the remedies decision should be set aside. This court was urged in argument that, were it arrive at this conclusion, it should decide the matter, given that it had the benefit of all the necessary evidence. The nature of this decision is not a technical legal one. It entails an evaluation of detailed economic and financial evidence. As a

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[130] Section 28(2)(b).

[131] Section 31.

[132] See ss 54-5.

[133] Sutherland and Kemp 11-24, para 11.4.6.1.

specialised administrative body possessed of economic expertise, it follows that the Tribunal's views on what would be 'excessive' in the circumstances of this case and within the parameters of the law as set out in this judgment, are essential for the proper adjudication of the matter, particularly in a case of such importance. The matter should therefore be referred back to the Tribunal.

[76] Mr Unterhalter, who appeared with Mr Wesley on behalf of the respondents, correctly cautioned against any cause of action that would prolong this dispute unnecessary. For this reason, other than the limited scope of evidence relating to matters raised in Mr Price's affidavit, on which adjudication is clearly limited, there is danger that a referral to the Tribunal on the merits could prolong proceedings unnecessarily.

[77] It is thus helpful to the expedition of further proceedings which must be conducted within the parameters of this judgment to provide further guidance to the Tribunal upon the referral back to it. As we have earlier in this judgment noted,[134] where the price appears from the evidence and more particularly the manner in which the case is pleaded and argued, to bear no reasonable relation to economic value, then it is upon the firm accused of a breach of s 8(a) to adduce contrary evidence. In the present case, the evidence of Mittal's overwhelming dominance was rarely contested. Appellants sought to contest the finding that, with a share of 82 % of the domestic market, Mittal was not 'super – dominant' but they produced little evidence other than arithmetic hermeneutics to

[134] Para 38.

gainsay clear evidence of overwhelming dominance in the domestic market. The difficulties of proving excessive pricing notwithstanding, it is precisely in the case of so dominant a firm, that commentators have advocated the application of an excessive pricing provision by the relevant competition authority.[135] In this case Mittal imposes a system of IPP. It accepts that this results in higher prices for the domestic market price over the export market price. Its explanation, briefly summarized, was set out in Mittal's written argument thus:

'On Mittal's version (which the Tribunal did not grapple with nor reject), its business in the export market would not on its own be sustainable, nor would its business in both markets be sustainable at the export price. The net realised export price is a low price which Mittal is forced to accept in the export market because of its locational disadvantage.

If one thinks away for the moment the existence of MJV as the intermediary in export sales and postulates the ultimate export customer as purchasing directly from Mittal FOB in South Africa, an export customer is in essence one who represents the Mittal that he will buy a particular volume of steel from Mittal but is prepared to pay no more than (say) $470 pt FOB in Durban, because if the price were higher he could get the product cheaper domestically or from an exporter is (say) Brazil or China. Mittal justifiably regards the price as very low, and unsustainable if applied to its business as a whole. However, because the price will cover variable cost and make some contribution to fixed cost, it makes business sense to do the deal. Given the basis of the transaction, it is perfectly legitimate for Mittal to hold the customer to its representation by way of a condition against domestic resale. Such a condition merely prevents the customer from representing that he is a customer in the export market when in truth he is a customer in the domestic market. MJV as an intermediary simply takes place of this national export customer, and is thus subject to the condition.'

[135] Eg Motta and de Streel at 15-16

[78] Mr Rogers, who appeared with Mr Loxton and Mr Gotz on behalf of first appellant, in reply rather tellingly conceded, in effect, that the IPP system of pricing in the domestic market 'subsidised' Mittal's export business. In short, Mittal's case was about its justification for its pricing policy and that was based upon the argument that IPP was required for Mittal's overall business, domestic and export. Respondent's case was also different from the approach adopted by the Tribunal. Dr Roberts, its economic expert, provided the following clear conclusion on its case about excessive pricing.

'To assess the excessiveness of prices of local steel set on an import parity basis, we follow the practice of assessing the prices against various comparitors. We then assesses the comparitors in terms of whether these prices can be taken as based on commercial decisions, yielding a reasonable return , on the basis of efficient operations. In summary, we find that import-parity prices are excessive relative to indictors of a competitive price, which include Iscor's net export prices, prices for firms producing products for the secondary exports, prices for firms competing with substitutes downstream and prices for multi-national corporations that can locate production elsewhere. The magnitude of the mark-up of local prices over these competitive price benchmarks ranges from approximately twenty per cent to approximately fifty per cent.'[136]

Further, in dealing with the export price comparative, Mr Unterhalter submitted that for basic products (hot rolled coil, cold rolled coil and galvanized steel), over the five year period for which the respondents were provided with data, Mittal's local IPP prices were more than 50%

[136] Record: 5:984.

above its average export prices for much of the period. Over the same cycle, Mittal's IPP-based prices for hot rolled coil were 61% above its export prices. In Mr Unterhalter's view, export prices are a reliable indicator of the sort of prices that would be achieved by Mittal for flat steel products in conditions of competition in the domestic market, and therefore the economic value of flat steel. Having regard to the massive differences between those export prices and the domestic prices charged by Mittal, the respondents contended that Mittal's domestic IPP-based prices bore no reasonable relation to the economic value of flat steel and were therefore excessive.

[80] To an extent, there is a parallel to be drawn between Mittal's pricing and that of the concept of phantom freight as set out in the brief in *Weyerhaeuser v Lyman Lamb*:[137]

'Industry-wide adherence to a single basing-point price system also may result in some firms acting in a manner that would be contrary to their individual interests if they acted without collusion. Some sellers are located closer than others to particular customers. When transportation cost is substantial relative to product cost, this location advantage is a significant competitive benefit that firms, acting unilaterally and in their own self interest, would seek to exploit. Employment of a uniform basing-point system requires sellers to sacrifice that locational advantage by charging "phantom freight." On the basis of the expert testimony before it, the jury could infer that such behavior would not persist in the plywood market absent collusion – i.e., that under competitive conditions, southern plywood sellers seeking to expand their sales would

[137] (Cert dismissed) 655 F 2d 627.

have reduced freight charges to nearby purchasers until the "phantom" cost was eliminated. Based on respondents' evidence, the jury could have concluded that adherence to an artificial basing-point system by all sellers would only be rational if those sellers who sacrificed locational advantages were assured by agreement of some recompense in the form of enchanced general price.'

The use of phantom freight appears to approximate the IPP system adopted by MIttal in the present case. It thus further illustrates the need for a proper evaluation of Mittal's explanation of its IPP policy within the context of the wording of s 8(a) read together with s 1(i) (ix).

[81] In summary, the dominance of Mittal read together with its case in answer to respondent's case, as pleaded, raised a *prima facie* presumption of a contravention of s 8 (a). The Tribunal was therefore required to analyse the evidence to determine whether Mittal's justification rebutted this presumption sufficiently for it to conclude, on the probabilities, that no breach of s 8(a), as alleged, had been committed. That analysis does not require further evidence but rather an examination of the evidence in terms of the statutory framework as set out in this judgment.[138]

[138] As an indication of the type of considerations which the Tribunal may take into account in its analysis of the available evidence, see the list (which are guides and certainly not a *numerus clausus*) provided by Sutherland and Kemp at 7 – 40 (2) ff:

1. Production costs. Certainly in British Leyland, supra production costs were considered as a route of enquiry as the court accepted the possibility of comparing the sales price of the product to costs of production to determine whether the difference was excessive

[82] In *Anglo South Africa Capital (Pty) Ltd v Industrial Development Corporation of South Africa Ltd (Intervening)*[139] this court set out its approach to referrals as follows::

'The ordinary course in such a dispute is to refer a matter such as this back to third respondent because a Court is slow to assume a discretion which has been granted by the Act to a tribunal (see *Johannesburg City Council v Administrator, Transvaal & Another* 1969 (2) SA 72 (T) at 76). Case law supports the conclusion, however, that a reviewing court will itself correct a decision of a tribunal, notwithstanding the general approach where the result is a foregone conclusion, where further delay may cause undue prejudice, or where the Tribunal or functionary has exhibited bias or incompetence which would render it unfair to expose a party to the very same jurisdiction. This approach has been confirmed in *Erf 167 Orchards CC v The Greater Johannesburg Metropolitan Council* 1999(1) SA 104 (SCA) where Ngoepe, AJA held at 109C-F:

"In approving the plan in question, the first respondent was discharging its administrative functions. When setting aside such a decision, a court of law will be governed by certain principles in deciding whether to refer the matter back or substitute its own decision for that of the administrative organ. The principles governing such a decision have been set out as follows:

'From a survey… of the decisions it seems to me possible to state the basic principle as follows; namely, that the Court has a discretion to exercise judicially upon a consideration of facts of each

2. Profitability. For example does the firm's profit exceed its costs of capital for that particular kind of business. If the excessive price has taken place over a short period as opposed to the life of the business, a return on sales, gross margins, truncated internal rate of return or market valuation can be employed
3. Price of comparable products in competitive markets
4. Reward for risk or innovation
5. Inherent characteristics of the market. For example with cyclical demand, price may increase pursuant to higher demand.

[139] 24/CAC/Oct02 15-6.

case and that although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides.' (Livestock & Meat Industries Control Board v Garda 1961(1) SA 342 (A) at 349G…

The general principle is, therefore, that the matter will be sent back unless there are special circumstances giving reason for not doing so. Thus, for example a matter would not be referred back where the tribunal or functionary has exhibited bias or gross incompetence, or when the outcome appears to be foregone."

I propose to deal with the three exceptions to the general rule as set out in the *Erf 167 Orchards CC* case. In my view, the result in this dispute is not a foregone conclusion. Questions arise as to the power of third respondent, acting in terms of section 53, to admit a party to merger proceedings of this kind. In particular, reference can be made to the various objectives of the Act in terms of section 2, including that small and medium size enterprises have an equitable opportunity to participate in the economy (52(e)); the promotion of a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons (52(f)). The decision as to who should be appropriately admitted as a participant must be made with reference to the Act as a whole, including its purposes, two of which I have outlined. In the circumstances of this dispute it cannot be said that it is a foregone conclusion that either first respondent should be refused rights of intervention, or admitted as a participant.'

[83] Given the conclusion at which this court has arrived, an adverse costs order in respect of the merits hearing against either of the parties would not be appropriate. Hence there will be no order as to costs.

[84] The following order is made:

(1) The decision and the order of the Tribunal dated 27 March 2007 and 6 September 2007 respectively are set aside;

(2) The matter is remitted to the Tribunal for

(a) the hearing of viva voce evidence by the parties in relation to the matters canvassed in the affidavit of Leon William Price in the application dated 20 February 2008; and

(b) the determination, by way of an assessment of the evidence which has already been heard by the Tribunal, whether Mittal contravened section 8(a) of the Competition Act 89 of 1998 in respect of the prices it charged for flat steel products and any consequent relief.

(3) The respondents jointly and severally are ordered to pay the costs of the application to adduce further evidence.

Davis JP

Malan JA

Tshiqi JA

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Date of hearing: 23 & 24 October 2008

Date of judgment: 29 May 2009