COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

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

In the matter between:

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

and

Anglo-American Holdings Ltd **Respondent**

in the large mergers between:

Anglo American Holdings Ltd

and

Kumba Resources Ltd

and

Anglo South Africa Capital (Pty) Ltd

and

Anglovaal Mining Ltd

Decision and Reasons for decision: Application to Participate

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On the 11 December we heard the Industrial Development Corporation of South Africa Limited's (IDC) application to participate[1] (the application was referred to as an application for intervention) in the two large merger proceedings mentioned above. The application was opposed by the merging parties, as well as by the Competition Commission. The legal representatives of the parties concerned presented oral submissions at the hearing, which were founded on written heads

[1]As the application is founded on the provisions of section 53 of the Competition Act No 89 of 1998 (the "Act"), which deals with the right to participate in hearings, we prefer to refer to it as an application to participate.

of argument submitted earlier. We have decided to allow the IDC to participate in the merger proceedings and the reasons for our decision follow.

Background

This matter comes before us with a chequered history of interlocutory, appeal and recusal proceedings. The IDC's initial application to participate, granted by our colleague, Mr. Manoim, was successfully appealed against by Anglo American Holdings Ltd (Anglo). The Competition Appeal Court, having found that the hearing of the intervention application was procedurally flawed, referred the matter back to the Tribunal; hence this second hearing of the application to participate. It is unnecessary for us to dwell on the history of this matter, which is well documented in the decisions of Mr Manoim and the Competition Appeal Court. Instead, we focus on the arguments presented to us at the hearing in respect of the application to participate, the scope of such participation and access to confidential information.

Points *in limine*

The IDC made application to amend its original application in its entirety with a new notice of motion, which also entailed the introduction of an alternative ground for participation and a new supporting affidavit.

In limine, Anglo argues that no proper basis for the amendment to be allowed has been disclosed and that the amendment has caused substantial prejudice to the respondents. The IDC responds to this contention in its supplementary affidavit by referring to the relevant paragraphs in its founding affidavit, which purport to establish a basis for the amendment. Furthermore, the IDC also argues that the amendment does not constitute a new cause of action; rather, it brings forward fresh or alternative facts in support of the original ground.

Secondly, Anglo submits that Rule 46 is applicable to intervention applications such as the present one, thus there is no proper basis for the IDC to amend its original application in order that the matter be determined in terms of Rule 42.

The third point *in limine* is, in actual fact, not a point *in limine*. Anglo submits that the IDC should not be permitted to participate in respect of the manganese and zinc markets; presumably, if it is at all allowed to participate.

We have carefully considered all the submissions of all the parties and are of the view that the issues pertaining to these points *in limine* were fully canvassed and ventilated before us and, in the exercise of our discretion, we allow the amendment.

Our reasons for allowing the amendment are briefly the following:

Section 27(1)(d) of the Competition Act No. 89 0f 1998 (the "Act") provides that:

> *"The Competition Tribunal may make any ruling or order* ***necessary or incidental*** *to the performance of its functions in terms of this Act"* (Our emphasis).

Section 53(1)(c) of the Act provides as follows:

> *"The following persons may participate in a hearing, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:*
>
> *if the hearing is in terms of Chapter 3 –*
>
> *(i)* ……..
> *(ii)* …….
> *(iii)* …….
> *(iv)* …….
> *(v)* ***any other person whom the Competition Tribunal recognised as a participant***" (Our emphasis)

It is clear that the Tribunal has the power conferred upon it by the Act to allow a person, on application, to participate in merger proceedings. It appears to us that the precise juristic niche into which to place the application for such participation or the precise form of the application is not essential. What is of greater importance is the showing by the applicant in her application of good cause to enable the Tribunal to permit her to participate. In the following section we shall give an indication of what we regard as good cause. Where the application to participate is properly brought in terms of Rule 46 of the Rules of the Competition Tribunal (the "Rules") the criteria are those set out in the said Rule, in which case, the "good cause" referred to above will consist in the applicant's compliance with the said criteria. It matters not to us whether the application is described as having been brought in terms of Rule 42 or Rule 46, as long as the requisite good cause for the application, as explained above, has been shown. Holding otherwise would be sacrificing substance for form.

Nevertheless, it will be necessary for us to indicate our view of the applicable procedure. Clearly, Rule 46 was intended to deal with applications to participate sought in terms of section 53(1)(a) and 53(1)(b) of the Act. A reading of the relevant sections, particularly the default class in each section, reinforces this view. For instance, the default class of persons permitted to participate in hearings in respect of exemptions from prohibited practices under Part C of Chapter 2 of the Act are described in the following terms in section 53(1)(a)(iv) of the Act:

"*any other person who has **a material interest** in the hearing, unless, **in the opinion of the presiding member of the Competition Tribunal, that interest is adequately represented by another participant,** but only to the extent required for the complainant's interest to be adequately represented;"* (Our emphasis).

On the other hand, the default class of persons permitted to participate in hearings in respect of exemption hearings in terms of section 53(1)(b)(iv) of the Act are designated as follows:

"*any person contemplated in section 10(8) who submitted a representation to the Competition Commission, unless **in the opinion of the presiding member of the Competition Tribunal that person's interest is adequately represented by another participant,** but only to the extent required for the person's interest to be adequately represented;"* (Our emphasis).

The interest mentioned in the said section 10(8) of the Act is "***a substantial financial interest affected by a decision of the Competition Commission in terms of subsection (2), (4A) or (5).*** (Our emphasis).

The material provisions of Rule 46(2) provide as follows:

".... ***a member*** *of the Tribunal assigned by the Chairperson must either –*

(a) make an order allowing the applicant to intervene, subject to any limitations –
(i) necessary to ensure that the proceedings will be orderly and expeditious; or
(ii) on the matters with respect to which the person may participate, or the form of their participation; or

(b) *deny the application **if the member concludes that the interests of the person are not within the scope of the Act, or are already represented by another person in the proceeding."*** (Our emphasis).

With regard to mergers, particularly large mergers, and restrictive practices the default classes in section 53(1)(c)(v) and 53(1)(d)(iv) respectively, are designated as:

"***any other person whom the Tribunal recognised as a participant"*** (Our emphasis).

It appears, therefore, that the Tribunal has an unfettered discretion to recognise anyone as a participant in a hearing in terms of Chapter 3, particularly in respect

of large mergers, which, in terms of section 14A(1)(a) of the Act, must be referred to the Tribunal.

If the framers of the Rule, in particular, Rules 46(2) and 46(3), intended that the Rule should apply to mergers, they certainly failed to make provision therefor in the said Rule. They apparently did not appreciate that a single member of the Tribunal had no power to make an order allowing a person to intervene or make an order as to costs. Only the Tribunal has such power. This is clearly in accordance with the judgment of the Appeal Court in this matter[2].

Anglo, however, submits that Rule 46 applies to the application brought by the IDC. In order for the Rule to apply it would be necessary to read the provisions of Rule 46 in conformity with the Act by deleting the words "*a member of* " in Rule 46(2) and by substituting the word "*member*" with the word "*Tribunal*" in Rule 46(2)(b) and Rule 46(3). Anglo believes that such a reading will reflect the intention of the Legislature, will save the Rule from invalidity and will be in the interests of all persons seeking to participate in the proceedings of the Tribunal.

We are prepared to accept that interpretation for purposes of our decision. We find, however, that, even on that more stringent test, the IDC is entitled to participate in the large merger hearing. In particular, we find, as we shall elaborate below, that it has satisfied the criteria of having a material interest in the mergers and that its interests are within the scope of the Act and that its interests are not represented by any other participant.

If, however, we are wrong in our attempt to read Rule 46 in conformity with the Act, as suggested by Anglo, we believe that the Rule 42 procedure is wide enough to cover applications for intervention in terms of section 53 of the Act. We find that, even if the application is regarded as having been brought under Rule 42, the applicant has, as we shall endeavour to demonstrate below, shown good cause in respect of its application to be allowed to participate in the hearing of the large merger applications. For instance, we find, *inter alia,* that the IDC has a significant and relevant contribution to make in the adjudication on the large mergers.

Application to Participate

The opposition to the IDC's intervention application rests on the interpretation of the provisions of the Act and the Rules governing intervention proceedings. It is common cause that Section 53(1)(c)(v) of the Act is pertinent to this application. However, in contention is whether it is Rule 42 or Rule 46 that should be applied in determining whether or not the application is to succeed. This determination must be made having regard to the wording of Section 53(1)(c)(v).

[2] See *Anglo South Africa Capital (Pty) Limited and others v The Industrial Development Corporation of South Africa Limited (*CAC Case Nos: 24/CAC/Oct 02 and 25/CAC/Oct 02. 14 November 2002.)

Section 53(1)(c) provides as follows:

> *"If the hearing is in terms of Chapter 3 –*
>
> *I. any party to the merger;*
> *II. the Competition Commission;*
> *III. any person who was entitled to receive a notice in terms of section 13A (2) and who indicated to the Commission an intention to participate, in the prescribed form;*
> *IV. the Minister, if the Minister has indicated an intention to participate; and*
> ***V. any other person whom the Competition Tribunal recognised as a participant;"*** **(our emphasis).**

On the other hand subsection 53(1)(a) requires that

> *"(iv) any other person who has a **material interest** in the hearing, unless, in the opinion of the presiding member of the Competition Tribunal, **that interest is adequately represented by another participant**, but only to the extent required for the complainant's interest to be adequately represented;" **(our emphasis).***

What is immediately striking is that, unlike subsection 53(1)(a)(iv), subsection 53(1)(c)(v) does not require that a specific criterion should be met in order that a person be accorded the recognition to participate in merger proceedings. In his decision, our colleague, Mr Manoim, noted that by virtue of this omission *"the legislature clearly provided a less demanding threshold for intervention in merger proceedings as compared with restrictive practice and exemption proceedings"*[3]. In this regard we agree with Mr Manoim.

From this premise we proceed to the core examination of Rule 46.

Rule 46 is headed "Intervenors". It states that:

> *"(1) At any time after an initiating document is filed with the Tribunal, any person who **has a material interest** in the relevant matter may apply to intervene in the Tribunal proceedings by filing a Notice of Motion in Form CT 6, which must –*
>
> *a) include a concise statement of the nature of the person's interest in the proceedings, and the matters in respect of which the person will make representations; and*

[3] Reasons for decision by presiding member Mr N Manoim, 26 September 2002 at paragraph16.

b) be served on every other participant in the proceedings.

(2) No more than 10 business days after receiving a motion to intervene, a member of the Tribunal assigned by the Chairperson must either –

(a) make an order allowing the applicant to intervene, subject to any limitations –

I. necessary to ensure that the proceedings will be orderly and expeditious; or

II. on the matters with respect to which the person may participate, or the form of their participation; or

(b) deny the application, if the member concludes that the interests of the person are not within the scope of the Act, or are already represented by another participant in the proceeding."

An obvious difficulty arises when one considers that the requirements of a material interest and that such interest is not already represented by another participant as expressed in Rule 46, do not accord with a proper reading of Section 53(1)(c)(v), as we noted above. On this view, a way must be found which accords with the general procedural and legal thrust of Rule 46 but which equally accords with, accommodates and facilitates the implementation of Section 53(1)(c)(v).

Anglo contends that Rule 46 sets out the proper procedure for this application. It is clear that Rule 46 requires that the application be made by filing a notice of motion with a supporting affidavit and that the applicant seeking to intervene must show:

- A material interest in the matter;
- That its interests are within the scope of the Act, and that
- Its interests are not represented by another participant in the proceedings.

Anglo argues that Section 53(1)(c)(v) contemplates a prior exercise of discretion by the Competition Tribunal. It refers pertinently to the words employed, namely, *"any other person whom the Competition Tribunal recognised as a participant",* and concludes that Rule 42 therefore cannot apply.

The IDC says that Rule 46(2) postulates decision-making by a single member, which the Competition Appeal Court found to be *ultra vires* the Act. Therefore, the section ought not to be invoked in the determination of this application.

The IDC is, therefore, of the view that Rule 42 is the correct procedure for the determination of this application. This, it argues, is in line with a proper interpretation of Section 53(1)(c)(v).

In applying Rule 42, it argues that the Tribunal must exercise its discretion, guided by the requirements of the Promotion of Administrative Justice Act 3 of 2000. This would imply taking relevant considerations into account; not taking irrelevant considerations issues into account; being rationally related to the purpose of the Competition Act, and being reasonable.

Nonetheless, the IDC is satisfied that if the Tribunal were to decide that Rule 46 is the appropriate and relevant provision, then its application should succeed under the latter Rule. In support of this, the IDC details four grounds, which it says, individually and collectively, establish its material interest in these large mergers.

These material interest grounds are:

The IDC's statutory duties and responsibilities

The IDC points out that there is a large degree of correspondence between the IDC's statutory objects and duties on the one hand, and the purposes of the Competition Act and the public interest issues it seeks to advance, on the other. These include objectives in relation to promoting:

- the economic empowerment of historically disadvantaged groups and individuals,
- small and medium enterprises,
- employment,
- an efficient economy,
- investment,
- participation in foreign markets and
- regional and sectoral industrial development.

The IDC contends that on the basis of its policy and corporate objectives, and the overlap these have with the objectives of the Competition Act, it should be allowed to make representations on public interest grounds.

The IDC's historical involvement

The IDC emphasises that it has been intimately involved in the development of the mining industry, especially the iron ore, steel and related industries; and that it has vast experience and knowledge of these industries, which experience and expertise will assist the Tribunal in its truth seeking function.

The IDC's responsibilities in future development of the industries

The IDC is responsible for ensuring the future development of the iron and steel industry. Downstream beneficiation and competitive market structures are an essential pre-requisite for it to perform its statutory functions in this regard. The IDC's industrial policy objectives are intimately related to competition concerns.

The IDC's shareholding

Finally, the IDC submits that its shareholdings in the iron and steel industry (14% in Kumba, 50% in DSP and 8.8% in Iscor), singularly suffice in meeting the material interest test required in terms of Rule 46. It emphasizes that these shares are held as proxy for the public and not in pursuit of private interests.

Anglo's counter-argument is that the IDC's interests with reference to its objectives, powers and statutory duties, its historical, present and future role in the iron ore industry as well as its shareholdings in the industry do not accord it with a material interest that may be directly or substantially affected by the decision of the Tribunal in deciding on these mergers. Its financial or commercial interest, which Anglo and the Commission believe is too remote, does not satisfy the requirement of having a direct and substantial interest, that is, an interest that may be prejudicially affected by the Tribunal decision. Furthermore, submits Anglo, the Minister of Trade and Industry and the Competition Commission represent the public interest issues that concern the IDC. The Commission has also considered the competition effects of the transactions, hence the IDC's interests are represented by other parties in the matter. On this basis, the IDC's application for intervention fails to meet the test required in Rule 46.

If it is to be held that Rule 46 is the correct Rule in terms of which this application must be determined, we believe that this must be done in accordance with a proper reading of Section 53(1)(c)(v). It is trite that the Rules are subsidiary to the provisions of the Act and that Rules cannot detract from the essentials of the Act. There is great force in Mr Manoim's words:

> *"In order to apply the Rule in harmony with the Act the words material interest should not be interpreted in a manner that sets the threshold for intervention too high. To do so would seem to encroach on a statutory right in terms of section 53(1)(c)(v) granted to a party to intervene if the Tribunal recognises it."*[4]

On this view, we find that Section 53(1)(c)(v) requires that the "material interest" threshold set out in Rule 46 should not be read in a manner that sets the threshold too high. To do so would not only be contrary to Section 53(1)(c)(v) itself, but also to the spirit and purport of the Act in its entirety. Thus we are of the

[4] Reasons for decision by presiding member Mr N Manoim, 26 September 2002 at paragraph 20.

opinion that Section 53(1)(c)(v) requires a reading of the material interest threshold in Rule 46 in conformity with the Act.

Following on this, we find that the IDC meets this criterion by virtue of a combination of the following factors: its interests in Iron and Steel Corporation of SA (ISCOR), Kumba Resources Limited (Kumba) and DSP; its statutory duties and the specific nature of its experience, insight and concomitant historical and future involvement in the specific industries in question,

Furthermore, we find that the mere fact that the Minister and the Commission are participants in the merger proceedings cannot preclude any other interested party from seeking to participate. The Minister presumably represents the government's interest, while the Commission represents its statutory interests as an investigative body. These interests may not be co-extensive or coterminous with those, which the IDC seeks to protect.

As we indicated above, if we are wrong about the applicability of Rule 46 to the application by the IDC to participate in the large mergers, we find that Rule 42 does apply. It is arguable that the application by the IDC to participate in the said mergers is a proceeding "not otherwise provided for in [the] Rules."[5] As in the case of an application to intervene in terms of Rule 46, a Rule 42 application "may be initiated only by filing a Notice of Motion in Form CT6 and supporting affidavit setting out the facts on which the application is based."[6] In terms of the provisions of Rule 42(2), the applicant must serve a copy of the Notice of Motion on each respondent named in the Notice, within 5 business days after filing it". In terms of Rule 42(3) and (c), "a Notice of Motion in terms of this Rule must indicate the basis of the application and indicate the order sought, respectively".

It is clear, therefore, that, in form, a Rule 42 application is identical to a Rule 46 application. The only essential differences between the two are the substantive criteria that ground the relief. In the case of a Rule 42 application, as has been suggested above, an applicant has to show good cause for the application.

We find that the IDC has shown good cause for the relief it seeks, which consists in the grounds on which we found that it had established a material interest in terms of Rule 46 and also on the ground that it has a significant and relevant contribution to make in the large merger hearing, which contribution, according to the papers and arguments before us, is not likely to be made by any other participant. We find this last factor very weighty and persuasive.

Scope of Intervention

In the draft order attached to its founding affidavit the IDC sets out the essential elements of the extent of the participation it seeks. The substantive issues on

[5] See Rule 42(1).
[6] Ibid.

which it seeks to provide input accord closely with the order granted by Mr Manoim in his decision[7]. In terms of procedural participation, these include the right to:

- participate in the hearing through its legal representatives;
- inspect documents including confidential documents, through its legal representatives (The IDC initially also wanted its experts to have access to the confidential documents but temporarily withdrew this at the hearing);
- make written and oral representations in relation to the evidence and submissions;
- pose questions to witnesses, and
- call as witnesses Nera (an economic consultancy) representatives, Ms Hartzenberg and Mr Arthur Kemp.

Anglo's criticism is that this request amounts to unlimited participation. By requesting such, the IDC seeks to assume the role that the Commission would have played had it recommended the prohibition of the merger and this presents the risk of the IDC's participation turning the proceedings into a lengthy antagonistic trial.

The right to put questions to witnesses and inspect documents, says Anglo, cannot be unbounded. Witness questions should be specifically limited to matters regarding which the IDC has been allowed to make representations. The inspection of documents should be limited to those, which are necessary to make effective representations on which the IDC is allowed to participate. Anglo also raised the concern that Mr Kemp is a merchant banker; thus it would not be prudent to release confidential documents to him; and that Ms Hartzenberg's assistance in this matter has not been indicated.

Leaving aside for a moment the access to confidential information, with which we deal below, the procedural rights sought by the IDC are appropriate for any meaningful participation. Having regard to the interests of the IDC, which we consider to be substantial, we are of the view that the decision of Mr Manoim regarding this issue[8] would provide the IDC with appropriate and sufficient scope in respect of the following:

(i) all the factors that the Tribunal must take into account in respect of section 12(A)(2) of the Act read with section 12 (A)(1)(a)(i), including their concerns relating to barriers to entry in the iron ore market; the effect of the merger on pricing arrangements; the effect on export potential; on issues of whether purported efficiencies are merger specific or not; the effect on use of bulk transport infrastructure and the effects on the upstream and downstream markets, and

[7] See Annexure "NAM C" to the Applicants Founding Papers at pages 94-96 of the record.
[8] Reasons on the Scope of Intervention and the expert witness, 23 October 2002.

(ii) all factors to be considered in terms of section 12(A)(3), including the effect of the merger on the ability of historically disadvantaged persons to enter the mining industry, in particular the iron ore industry; whether the merger will result in a concentration of ownership that will adversely affect, from a competition policy point of view, the mining sector and any other related public interest issues.

It is furthermore pointed out that once a party has been granted the right to participate in terms of section 53(1), such party has the rights mentioned in the said section, namely, the right to put questions to witnesses and inspect any books, documents or items presented at the hearing. It would require very good reasons for the Tribunal to deprive that person of such rights or restrict them. We would suggest that the duty to persuade the Tribunal of the necessity to so deprive a recognised participant of or restrict such rights belongs to the person seeking such deprivation or restriction. We have not been so persuaded.

Access to confidential information

The IDC asserts that procedural fairness dictates that its legal representatives and experts be afforded access to all confidential documents filed in the large merger proceedings.

In support of this assertion the IDC looks to the *Unilever*[9] decision as setting the procedural precedent in allowing access to confidential information.

On the other hand, Anglo avers that the *Unilever* decision is applicable to merging parties seeking access to confidential information in the hands of the Commission and is not applicable to third parties wanting access to the merging parties' confidential information.

In order that effective participation is accorded, we are of the view that the IDC be permitted to inspect confidential documents contained in the record of the hearing, to the extent that they relate to matters in respect of which the IDC may participate, provided that such access is limited to the IDC's attorney and legal counsel, who are required to provide reasonable undertakings to protect such information. This is all we are required to consider at this point.

The Commission's position

The Commission opposes the IDC's participation to the extent that such participation undermines the authority of the Commission as the only public body empowered by the Act to investigate and make recommendations to the Tribunal on large mergers. The Commission suggests that the Tribunal can, in terms of s27(1)(d), order that the IDC take its submission first to the Commission for consideration. The Commission argues that the implications and the

[9] Competition Commission v Unilever Plc and Others, case no. 13/CAC/Jan02.

consequences of it not being given the opportunity to consider the IDC's submission will seriously undermine its authority in large merger investigations.

The Commission contends that not only will a ruling in favour of the IDC's participation provide a foundation for intervenors to usurp the statutory powers of the Commission, it may also result in the implication that a party with relevant information can withhold such information and await the recommendation by the Commission and only when the recommendation does not suit it, decide to participate.

The Commission finds it objectionable that an interested party that chooses not to make representations can belatedly claim that it does not have access to the process and then be accommodated. We agree that it is desirable that persons, who wish to participate in merger proceedings or to provide relevant information, should do so during the Commission's investigation process. We do not however agree that a failure to do so precludes or constrains any person from seeking to intervene or bring relevant facts to light once the Commission has referred the matter to the Tribunal.

In this regard, we re-iterate Mr Manoim's observation that *"there is nothing in the Act or Rule to suggest that an intervenor needs to have participated in the Commission's proceeding to acquire standing. Indeed the Rule explicitly states to the contrary when it says in the opening line of Rule 46* ***" at any time".***[10] However, we also note what was said by the IDC in these proceedings, namely, that it could not approach the Commission at an earlier stage as it was awaiting further information.

While participation during the Commission's investigation is to be encouraged, the reality of our corporate environment is such that interested parties are often not aware of merger proceedings until these are reported on in our newspapers. To prevent a person who failed to participate in the Commission's proceedings, from doing so during the Tribunal's proceedings merely for that reason, would be contrary to the provisions of the Act, namely, section 53 thereof. We cannot find anything in the Act that requires a person to first participate in the investigation process of the Commission in order to entitle him to participate in the merger hearing in terms of section 53 of the Act.

Furthermore, any such constraints will seriously impede the Tribunal's fact and truth seeking function. On the other hand, it is unimaginable that any intervention or submission of evidence, notwithstanding the extent thereof, presented during the Tribunal proceedings, will diminish or detract from the Commission's investigative role.

The legislature has conferred upon the Commission extensive statutory powers and an entrenched mandate, which no participant, be it a statutory institution

[10] Reasons for decision by presiding member Mr N Manoim, 26 September 2002 at paragraph 42

itself, could ever usurp. The Commission's investigative role is envisaged as an active one; it has the authority to solicit and compel the provision of information. Thus we find the contention that the IDC's failure to make submissions to the Commission should bar it from participating in the merger, an untenable one. The IDC's failure to, or election not to, make submissions to the Commission, ought not to have prevented the Commission itself from either soliciting such submissions or from engaging and investigating the interests or views of the IDC in these mergers.

Nonetheless, the Commission's referral of these mergers has placed them within the jurisdiction of the Tribunal. The adjudicative process has been set in motion. Even at this juncture, nothing in the Act precludes the Commission from considering the information to be presented by the IDC. To do so it may well require additional time, which it may request, as it would an extension of time during its investigation process. In this way it may amplify its recommendation and be better able to "strike a balance". What the Commission cannot do is to demand that the matter be referred back to it. We find that this is neither authorised nor required by the Act.

In any event, the Commission, like Anglo, advances the argument that Rule 46 is applicable to this application and that the IDC's minority shareholdings in Kumba and ISCOR do not meet the test of materiality. In particular, the Commission is overly concerned with the potential harm of turning merger proceedings into battlefields open to disgruntled minority shareholders, customers or competitors in pursuit of private interests. No doubt any opportunistic pursuit of private interests will be readily brought to light by merging parties and even the Commission itself. This concern ought not to overshadow the greater potential for legitimate issues to be raised by third parties in merger proceedings and the assistance they may render in facilitating our vigorous truth- seeking mission.

Conclusion

1. We find that the IDC's application to participate succeeds on the grounds outlined above.

2. To ensure the IDC's meaningful participation we find the scope of its participation and the access to confidential information as discussed above to be appropriate.

Costs

We heard no argument relating to costs. It would therefore be inappropriate to issue any costs order. Costs are reserved for determination at the merger hearing or at a time agreed upon by the parties.

_____ 24 December 2002

Adv. M.T.K. Moerane SC **Date**

Concurring: Prof.M. Holden, Prof.F. Fourie

For the merging parties: Webber Wentzel Bowens

For the applicant: Qunta Incorporated

For the Commission: Allan Coetzee, Legal Services Division