COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case no: 93/LM/NOV04

In the large merger between:

HARMONY GOLD MINING COMPANY LIMITED Primary Acquiring Firm

and

GOLD FIELDS LIMITED Primary Target Firm

Reasons for decision

Introduction

1. On 10 May 2005 the Tribunal approved the hostile take-over by Harmony Gold Mining Company Limited of Gold Fields Limited subject to the following conditions:

    1. The following limitations shall be placed on the retrenchments at the merged entity –

        a) There shall be no retrenchments of employees at the merged entity below the level of Patterson grade C or equivalent as a result of the merger;
        b) The merged entity may retrench up to a maximum of 1000 employees at or above the level of Patterson grade C or equivalent as a result of the merger.

    2. For purposes of paragraph 1 –

        a) 'merged entity' means Harmony Gold Mining Company Limited and its subsidiaries including Gold Fields Limited; and
        b) 'employees' includes contract labour.

    3. The undertaking in paragraph 1 shall apply for a period of 24 months from the date of the Competition Tribunal order.

    4. The Competition Commission must monitor the above conditions.

5. In order for the Competition Commission to properly monitor the above conditions the merged entity must adhere to the following procedures:

    a. Provide the Commission with quarterly reports regarding the effects of the proposed transaction on employment.

    b. Each report must include the following information:
        (i.) the current levels of employment, per job category, at the merged entity;
        (ii.) the number of actual retrenchments per job category in the quarter reported on;
        (iii.) the reasons, per job category, for retrenchments;
        (iv.) the number of planned further retrenchments per job category;
        (v.) the status of further retrenchments; and
        (vi.) the process upon which the retrenchments will take or have taken place.

    c. The quarterly reports must be submitted for the period of this order. Should the retrenchment process in the merged entity, as a result of the proposed transaction, not be finalized within the period of this order, the merged entity shall be obliged to submit further quarterly reports until the entire retrenchment process has been finalized.

    d. The quarterly reports must be submitted to the Competition Commission no later than one calendar month following the end of each quarter.

Transaction Background

6. In October 2004 Harmony Gold Mining Company Ltd ("Harmony") launched a hostile takeover bid for rival mining house Gold Fields Ltd ("Gold Fields"). The bid was made in two stages, the first '*the early settlement offer*' and the second stage, '*the subsequent offer*'.

7. The '*early settlement offer*', which Harmony claimed was not subject to regulatory approval, was the subject of a whole set of procedural applications brought against Harmony and which resulted in the Competition Appeal Court ruling, on 26 November 2004, that '*the early settlement offer*' and '*the subsequent offer*' in substance formed part of a single transaction to acquire control of Gold Fields and, therefore, interdicted and restrained Harmony from voting its shares in the share capital of Gold Fields prior to the final determination of the merger by the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17 of the Act.[1]

[1] The full history of these proceedings are reported in Competition Tribunal Case No: 86/FN/Oct04 and Competition Appeal Court Case No: CAC/43/Nov04.

8. Subsequent to the Competition Appeal Court hearing Harmony acquired 11.8% of Gold Fields' shares. On 8 November 2005, at the same time that Harmony announced its *'early settlement offer'* it also filed its merger notification with the Competition Commission. Gold Fields responded on 15 December 2005, informing the Competition Commission that it is a hostile take-over.

9. On 11 February 2005 the Competition Commission recommended that the proposed merger be approved subject to the following conditions:

   1. The following limitations shall be placed on the retrenchments at the merged entity –

      a. There shall be zero retrenchments at the merged entity below the level of corporate, management and supervisory positions as a result of the merger;
      b. The merged entity may retrench up to a maximum of 1500 employees in corporate, management and supervisory positions as a result of the merger.

   2. Corporate, management and supervisory positions shall mean positions from shift boss level up to the chief executive.

   3. The moratorium mentioned in 1 above shall apply for a period of 24 months from the date of the Competition Tribunal order.

   Monitoring of the recommended conditional approval

   The following procedures must be adhered to in order for the Commission to properly monitor the abovementioned proposed conditions:

   1. The merged entity must:

   a) Provide the Commission with quarterly reports regarding the effects of the proposed transaction on employment.

   b) Each report must include the following information:
      (i.) the current levels of employment, per job category, at the merged entity;
      (ii.) the number of actual retrenchments per job category in the quarter reported on;
      (iii.) the reasons, per job category, for retrenchments;
      (iv.) the number of planned further retrenchments per job category;
      (v.) the status of further retrenchments; and

(vi.) *the process upon which the retrenchments will take or have taken place.*

c) *The quarterly reports must be submitted for the period of this order. Should the retrenchment process in the merged entity, as a result of the proposed transaction, not be finalized within the period of this order, the merged entity shall be obliged to submit further quarterly reports until the entire retrenchment process has been finalized.*

d) *The quarterly reports must be submitted to the Competition Commission no later than one calendar month following the end of each quarter.*

10. A pre-hearing was held on 25 February 2005 during which intervenors were identified, a time-table for filing submissions was agreed on and discovery and confidentiality issues addressed. A second pre-hearing date was set for 20 April 2005 to discuss the final logistics of the case and the hearing dates were set down for 3 to 6 May 2005.

11. On 30 March and 8,19 and 20 April 2005 applications to intervene, confidentiality applications and discovery were heard. During the pre-hearing, held on 20 April it became apparent to the Tribunal that it would need additional hearing dates since the since the parties had called 13 witnesses in total. The hearing days were thus extended to 7,8 and 9 May.

12. Three parties intervened, Stitch Wise (Pty) Ltd, Paragon Textiles (Pty) Ltd and Knee'd'em (Pty) Ltd. The intervenors called one witness, Ms N. Killasy, who is a Director of all three intervenors.

13. The following witnesses were called by Harmony and Gold Fields:

Gold Field witnesses:

1) Mr. T. P Goodlace — Senior Vice President, Strategic Planning, Gold Fields
2) Mr. J McLuskie — Expert Witness on deep level mining
3) Dr N.S. Segal — Independent consultant
4) Prof. H Bhorat — Director, Development Policy Research Unit, UCT
5) Mr. J Hodge — Engagement Manager: Competition and regulation practice, Genesis Analytics
6) Mr. N. Goodwin — Gold Analyst, TSEC Securities
7) Mr. M.J. Mitchley — Senior Manager Gold Fields
8) Prof. SA du Plessis — Associate Professor in macro-economics University of Stellenbosch

Harmony witnesses:

1) Dr. C. Caffarra — Economist and Director of Lexecon Ltd
2) Mr. B.M Saunders — Executive: Investor Relations Harmony
3) Mr. A. Clay — Director of Venmyn Rand (Pty) Ltd
4) Prof. S. Roberts — Associate Professor of Economics, University of Witwatersrand
5) Mr. Z.B. Swanepoel — Chief Executive Officer of Harmony

14. Although all the Unions that represent the mineworkers were informed of the hearing none were represented before the Tribunal. UASA and Solidarity attended the pre-hearing on 25 February 2005 but did not submit any further submissions nor attended any further hearings in this regard. The National Union of Mine Workers, on 26 April 2005, requested an opportunity to address the Tribunal at the hearing but never showed up.

COMPETITION EVALUATION

The Gold Market – competition implications

15. It is common cause between the Commission and the acquiring and target firms that this merger presents no competition problems in the gold market. Although the merged entity will, by most relevant measures, be the largest gold producer in South Africa and in the world, it's share of world gold production will still only be 9,5%. In short the structure of the market for the production of gold is characterised by its high degree of fragmentation. Moreover daily prices are fixed internationally through a relatively transparent mechanism, which appears relatively impervious to direct producer influence. The gold market has been analysed in previous transactions and this transaction does not change the conclusions reached in these earlier decisions.[2] Accordingly the gold market will not be examined further.

[2] See: Harmony Gold Mining Company Ltd and Randfontein Estates, Case No: 16/LM/Feb00
Franco-Nevada Mining Corporation Ltd and Gold Fields Ltd, Case No 77/LM/Jul00
Randfontein Estates Ltd and Anglogold, Case No: 03/LM/Jan01
Clidet No 383 (Pty) Ltd and The Free state Operations of Anglogold Ltd, Case No: 05/LM/Jan02
Crown Gold Recoveries (Pty) Ltd and IDC of South Africa Ltd and Khumo Bathong Holdings (Pty) Ltd Case No: 31/LM/May02
Armgold/Harmony Freegold Joint Venture Company (Pty) Ltd and St Helena Gold Mines Ltd Case No: 54/LM/Aug02
Anglogold Ltd and Driefontein Consolidated (Pty_) Ltd Case No: 66/LM/Nov03
Harmony Gold Mining Company Ltd and African Rainbow Minerals Gold Ltd Case No: 25/LM/May03
Ubuntu-Ubuntu Commercial Enterprises (Pty) Ltd and Anglovaal Mining Ltd/Avgold Ltd/Harmony Gold Mining Company Ltd Case No: 06/LM/Feb04

Markets for the supply of inputs to gold producers – competition implications

16. Gold Fields alleges that the merger will lead to a substantial lessening of competition in the markets for the supply of inputs to the gold mining sector. Gold fields argues that because the merger will reduce the number of South African gold producing majors from three to two, competition will be substantially lessened in many of the markets in which inputs are sold to the gold mining sector – the merger will, in other words, create oligopsonistic or buyer market power. The consequence, asserts Gold Fields, will be manifest in the ability of the buyer to force input prices to sub-competitive price and output levels. Gold Fields also argued that, in addition to these static allocative inefficiencies, the accretion to buying power will give rise to dynamic consequences insofar as the suppliers' incentive to invest and further develop their products will be dampened. It is not clear whether Gold Fields contended that these dynamic consequences would be generated by a change in the structure on the demand side of the market or in consequence of the particular modality employed by Harmony to procure supplies. It was alleged that Harmony's approach to procurement is dictated by considerations of price alone whereas the Gold Fields' approach is allegedly more sensitive to quality considerations. Gold Fields argues that the latter mode of procurement is more conducive to supplier investment in product improvement.

17. Gold Fields attempted to adduce evidence in support of its contentions. This evidence was gathered by a survey conducted of its suppliers and a meeting it convened of some 200 suppliers. On this basis Gold Fields concluded that 39% of their suppliers would be forced out of business and 56% expected a material downscaling in business volumes.[3]

18. We are sceptical of evidence gathered in the manner. Gold Fields' suppliers would, under these circumstances, understandably be inclined to provide answers supportive of an important customer's clearly expressed standpoint – indeed the survey result may well reflect the power of Gold Fields *vis a vis* its suppliers rather than genuine apprehension of the merger. We should add that the presentation to the suppliers has compromised the value of this evidence. Highly disputed figures of the employment loss predicted by Gold Fields are presented as fact. The tone of the communication is decidedly alarmist and manifestly designed to strike fear into the hearts of the suppliers and their employees.[4] It appears, moreover, that the presentation, on behalf of Gold Fields, was made by its legal advisers, Edward Nathan – the presentation slides certainly carry Edward Nathan's explicit imprimatur. Not only does this provide a veneer of independence, but it may have imbued certain important statements with a legal

[3] Transcript p.28

[4] Note particularly the slide titled 'effect on suppliers' on pages 3772-7 of the record, where the suppliers are told that, inter alia, many of them will 'forced out' of business and that 'entire communities will be harmed extensively'.

authority which they should not have enjoyed. For example the analysis presented to the suppliers and the dire impact predicted is predicated on an analysis of the 'extensive efficiencies' promised by Harmony, 'promises' which, Edward Nathan baldly and quite incorrectly asserts (in bold type), 'Harmony is not entitled to abandon'.[5] The reasonable reader of this document would assume that Harmony was legally obliged to achieve these efficiencies and hence been more susceptible to come to panic induced conclusions. We attach no weight to evidence gathered under these circumstances.

19. Our scepticism of the evidence presented by Gold Fields is deepened by the conspicuous failure of any suppliers to make submissions to the Tribunal. Indeed a significant number of suppliers had initially made submissions. However it appears that when they realised that they may be obliged to repeat their allegations in an open enquiry and subject to cross-examination they all withdrew their statements and objections. This may well indicate that they feared victimisation in the event of a successful Harmony acquisition (although as the Commission points out, the mere fact that they feared victimisation from Harmony post-merger indicated that they envisaged competing for the merged entity's custom – that is, contrary to Gold Fields' evidence, its suppliers had not resigned themselves to going out of business). However their reticence to defend their claims may also indicate that they were largely designed to please an increasingly anxious Gold Fields' management and they feared that they would not stand up to scrutiny.[6] In the event, the only supplier who made submissions to the Tribunal was a representative of what is best understood as a corporate social investment project and she, indeed, made her representations in terms of the public interest.

20. The Commission investigated the possibility of a substantial lessening of competition in the supplier markets. Parties notifying a merger are required to identify their 10 largest suppliers. The Commission telephonically contacted about 52 Gold Fields' suppliers, including its 10 largest suppliers.[7] The Commission summarises its efforts and some of its most important findings:

> *The suppliers contacted ranged suppliers of hydraulic pumps, gum boots, bearings, cleaning chemicals, pumps, rolling stock, skips, heat exchange for underground use, batteries, motors, valves, mechanical seals, hoses and fittings, conveyor belts, backfill bags, knee and arm guards, radiators, oil coolers and the construction of underground dams, pump stations and*

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[5] We say incorrectly because counsel for Gold Fields conceded in final argument that Harmony was not under any obligation to achieve its claimed efficiencies.

[6] Certainly one of the suppliers interviewed told the Commission that he had signed the document presented at the meetings in order to ensure that he retained Goldfields' business. Another who indicated opposition to the merger at the meeting, indicated to the Commission that he was neutral. And, as we have already observed several – including some very large companies – who made submissions to the Commission opposing the merger were not prepared to subject these to the scrutiny of the Tribunal proceedings.

[7] See transcript of 5 May at page 558.

> *pipe installations, inter alia. Of the suppliers contacted none was wholly dependent on Gold Fields as a customer with many citing Gold Fields, Harmony and Anglo American-Ashanti and being their major customers. Some of the contractors located in the gold mining areas were branches of larger companies such as Rocla (part of the Murray and Roberts group), Builder's Market (part of the Iliad Group with branches in Welkom, Klerksdorp, Rustenburg, Gauteng and Polokwane), Conway Johnson (part of the Inmins group listed on the JSE) and Alstom (an international company). Contractors and suppliers in the Carletonville area cited that, in addition to the gold mines, the platinum mines are important customers.*[8]

21. It appears that the Commission's enquiries elicited a range of responses. Predictably, some amongst those Gold Fields' suppliers that have no established relationship with Harmony expressed disquiet at the prospective merger. The Commission summarises its findings:

> *In summary it can be said that the majority of businesses who have expressed concerns about the merger operate in markets where competition takes place. The concerns of many of the company representatives with respect to the merger can be said to be related to their uncertainty about being able to secure business in a market where most projects go out on tender.*[9]

22. Counsel for Gold Fields made much of the Commission's failure to go behind the responses gleaned from the telephone interviews and to identify the relevant markets and then conduct a detailed competition analysis of the impact of the transaction. The Commission reasonably responded that because its interviews with a significant sample of key suppliers indicated little if no competition concern with the merger there was no need for a time consuming and resource sapping examination of each of the many product and geographic markets in which a vast array of inputs are supplied to the merging parties.[10]

23. Gold Fields also relied upon evidence and argument presented by one of its expert economic witnesses, Dr. S. du Plessis. Dr. du Plessis purported to measure concentration in these markets by using a measure dubbed the '*dispersed* HHI'. The Herfindahl Hirschman Index or HHI is widely and legitimately employed as a measure of market concentration in anti-trust analysis. However, a necessary prior step to calculating the HHI is the identification of the relevant market. This

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[8] Commission's Recommendations p21

[9] Commission's Recommendations p23

[10] The Commission's decision not to take this line of investigation any further is powerfully endorsed by the fact that these were *Goldfields'* suppliers that were taking a neutral view of a Harmony acquisition of their customer. Indeed had they indicated concern, the Commission would have had to press further partly because of the real likelihood that their stated concern lay less with the absence of buyer competition in the post-merger market than with the fear that they were about to lose a valued customer. This latter is not a competition problem – it is, if anything, a spur to competition.

is more than a filter – it is the necessary preliminary step towards the construction of a filter and that filter is the HHI, which measures concentration in the relevant market. In other words, once the relevant markets have been identified the market shares of the various participants in these relevant markets are calculated and the index is applied in order to assess the change in market concentration that will arise from the merger of two of the participants. It is widely used by competition authorities, including the South African Competition Commission, as a measure of the increase in concentration resulting from a horizontal merger and, hence, as a first cut indicator of a possible accrual of market power that may arise from this increase in concentration. However, the HHI is never, on its own, construed as sufficient evidence of market power – this requires a detailed evaluation of a range of factors including barriers to entry, the prospect of import competition and the dynamics of the market in question.

24. However the *dispersed* HHI utilised by Dr. du Plessis does not serve the same useful filtering purpose as the HHI and accordingly is, du Plessis acknowledged and the Harmony expert, Dr. C. Caffarra, confirmed, rarely, if ever, utilised in anti-trust analysis.[11] There is no substitute for defining the relevant market and the Commission's interviews constituted precisely the appropriate first step in this direction. Had its interviews revealed any concern amongst the diverse suppliers that it contacted then it would have been obliged to conduct a deeper investigation in order to identify the relevant market. Thereafter it would have calculated market shares and then computed the HHI in order to measure the changes in concentration that would accrue in consequence of the merger of the two market participants, of the two buyers.

25. The Gold Fields' expert witness has made no attempt whatsoever to delineate the relevant markets. What he has done is to utilise highly aggregated (and dated) industrial statistics – specifically, the 'Supply and Use' tables for South Africa in 2000 – which have then been employed to identify 9 broadly defined sectors, or, more accurately, products, in which the gold mining sector accounts for more than 4% of total demand. Then, assuming that each purchasing sector constituted a single monopoly – an assumption patently at odds with reality - a dispersed HHI was calculated which purported, in the fashion of the HHI, to identify the market concentration of the sector as a purchaser of the output in question – he effectively insists that he has, in the manner of the HHI, provided an indicative measure of market concentration without defining the market.[12] In this manner – and after several iterations with the Harmony expert in which he purported to modify his results in order to accommodate specific criticisms of his efforts – Dr.

[11] Indeed Dr du Plessis himself claims so little for his analysis that its probative content is seriously in doubt. In the end he seems to suggest little more than that his report – and his analytical tool, the dispersed HHI – provides pointers for further investigation. However the validity of even this claim is, as we outline, called into question.

[12] As Counsel for Harmony pointed out by designating each sector a monopoly, the merging of two small buyers in a fragmented market would yield the same dispersed HHI as would a merger to monopoly of the only two firms in the market.

du Plessis identified three problematic groups of products, these being 'other rubber products', 'pumps' and 'mining machinery'. These are product groups in respect of which the *dispersed* HHI exceeds 0.18. It appears that this threshold was chosen in order to provide an appearance of conformity with the HHI threshold utilised by the US Department of Justice.

26. Let us consider, by way of example, the product designated by the industrial statistics as 'pumps', one of the 'markets' in which Dr. du Plessis' dispersed HHI indicates cause for concern. But the most casual observation tells one that this is no market at all. It is an aggregation of several diverse markets. It incorporates a range of non-substitutable products – pumps utilised in underground mines, pumps utilised in farm boreholes, pumps utilised in domestic swimming pools and, for all we and, indeed, Dr. du Plessis, know, pumps utilised in automobile engines. Had he even spoken to a single supplier of pumps to the gold mining sector he may have discovered that, as did the Commission on many occasions, the producer in question was unconcerned with the merger. Had he been of a mind to interrogate this response further, it may then have been revealed that these pumps are utilised across the mining sector and, hence, that the merger of even two large gold mining companies would, in the face of an attempt to exercise market power, not necessarily depress prices below the competitive level – the pump producers would simply turn to their other mining customers. He may also have found that the mining pump producers also actively supply international markets. He may have found that the mining pump supplier, faced by an exercise of buyer power on the part of his mining customers, is easily able to switch to supplying pumps to the agricultural sector. Or he may have discovered that the pump supplier enjoyed a monopoly in its market and, in consequence, that he felt relatively impervious to the change in the structure of his customers' market.

27. We could go on in this fashion *ad nauseam.* The conclusion, though, is reasonably clear: anti-trust investigation does not easily lend itself to desktop research utilising highly aggregated industrial data. It is micro-economic research and there is, as the Commission has shown, no substitute for engaging with the actual producers and customers. This was not even attempted by the Gold Fields' expert. Instead reliance was placed on a measure and a data set that yielded, at best, no results of consequence. At worst, the results may be downright misleading – just as Dr. du Plessis' high dispersed HHI's may, on relatively cursory examination of the relevant markets embedded in the product ranges, reveal no cognisable competition problems, so may some of his low dispersed HHI's camouflage, on a proper definition of the relevant market, very definite problems. In other words, the dispersed HHI is susceptible to both Type 1 and Type 2 errors – it may signal problems where there are none; and it may signal the absence of problems where there are some. Dr. Caffarra, the Harmony expert, characterised the dispersed HHI:

> *'..as a screening devise that doesn't really screen because (it) is subject to type 2 errors. It can tell us that there are some sectors where a problem*

exists, but then we may find there isn't one. It may tell us that there are some sectors where there isn't a problem, because you are below the threshold and still there is a problem when you define the market correctly. That is to me the hallmark of a not very useful approach. You want to do other things instead. You want to look….that's why surveys exist. You want to look…in a perfect world, you would want to calculate the elasticity of supply, but in a world where you don't have this type of data it won't be possible to do complicated econometrics and calculate the elasticity of supply or the supply curve.

So, you are down to asking nitty-gritty questions to suppliers. Where are your concerns and how dispersed is the group of buyers that you sell to? As well as this fact that we are not really defining the relevant market. None of the categories that Prof. du Plessis has come up with resembles even remotely a relevant market, something that he has conceded but it doesn't seem to worry him. It worries me very much from the perspective of competition economics because I only can make any kind of meaningful inferences, however indirect, from market shares of from concentration indices to the extent that they pertain to one market.[13]

28. We should add here that those concerned to protect competition – and such is the stance adopted by Gold Fields and its expert in this matter – should approach the concept of buyer power with considerable circumspection. Buyer power is most frequently alleged in respect of large retailers. While there can be little doubt about the purchasing power of retail giants, there can be equally little doubt that this frequently redounds to the benefit of the ultimate consumer. Moreover, to argue that customers have an interest in squeezing their suppliers' margins to such an extent that they are forced to cut back production and even exit the market is to impute considerable short-sightedness, even irrationality, to the purchaser who may, in consequence of his exercise of market power, not only be faced by supplies of compromised quality but even ultimately by a monopoly supplier.

29. Finally we note that Gold Fields has made much of the fact that it enters into long-term partnerships with its suppliers and that it does not privilege price above quality in its approach to procurement. This, it insists, contrasts with the Harmony approach, which is alleged to be aggressively focused on securing price concessions from suppliers who are denied the certainty of long-term contracts. This has nothing to do with our enquiry. It also appears to be empty rhetoric. Certainly Gold Fields' appraisals of its own procurement policies indicate – and we would expect no less - that it is as concerned with price as is Harmony. Nor are we persuaded that long term contracts as opposed to regular tendering and regular pressures on suppliers to review their pricing is preferable from a competition or public interest perspective. Certainly markets in which suppliers

[13] See page 666 of the transcript dated 6 May 2005.

are reviewed at relatively short intervals are subject to keen competitive pressures and may also be more conducive to new entry.

30. We find accordingly that the merger is not likely to substantially lessen or prevent competition in any market.

PUBLIC INTEREST

31. This matter then turns on argument and evidence regarding the impact of the transaction on the public interest. A range of public interest concerns have been submitted for our consideration and we will examine each of these in turn. However we will first examine the legal regime that the Act provides for the regulation of the public interest.

The legal position

32. Section 12A sets out the relationship between the competition inquiry we have just performed and the public interest.

Section 12A. Consideration of Mergers

(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and-

(a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine-

(i.) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

(ii.) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or

(b) *otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).*

33. Note that we have underlined the words *can* and *cannot* that appear twice in this section. Gold Fields argues that if a merger raises no competition problems and no negative public interest issues, it must still be prohibited if there is no evidence that it can be justified on public interest grounds.

34. Thus when making a public interest enquiry we first ask if the merger cannot be justified on public interest grounds. If we come to the conclusion that there is no basis for concluding that there is not, in the words of Mr Cockrell who argued for Gold Fields on this point, we cannot close the books and walk away. The Act then requires us to consider if the merger can be justified on public interest grounds. If there is no evidence that the merger can be justified on public interest grounds it must be prohibited. Expressed differently, unless there is a net positive public interest gain from a merger, it must be prohibited.

35. This is a far-reaching conclusion and, as we suggested in our hearing to Mr Cockrell, would render a good measure of the mergers which come before us daily, susceptible to prohibition.

36. Let us see how Gold Fields comes to this conclusion and then examine if there is any basis for it.

37. Gold Fields starts by noting that the Act requires the Tribunal to have regard to public interest criteria even when no competition issue is implicated. This is because of the word 'otherwise' found in section 12 A(b). This interpretation thus far accords with our finding in Anglo/Kumba Tribunal Case No: 46/LM/Jun02 where we held:

    As the IDC has contended, and in our view correctly, the use of the word "otherwise" in section 12A(1)(b) means that the public interest evaluation must still be undertaken by the Tribunal, regardless of the outcome of the section 12A(2) 'competition' analysis. As we have previously stated the public interest can operate either to sanitise an anticompetitive merger or to impugn a merger found not be anticompetitive.[14]

38. Gold Fields goes on to note that in the purpose section of the Act, Section 2, public interest criteria are reflected in some sections such as (c), (e) and (f) which it argues, are not intuitively competition concerns.

39. This then gives Gold Fields the platform to support its reading of section 12A because it is a reading of the Act as we shall see that requires divorcing the public interest from any relationship to competition.

40. Let us first examine how the procedural aspects of section 12 A work, as it involves a set of stages and conclusions that are necessary to appreciate in order to understand the textual argument made by Gold Fields.

[14] See the large merger between Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Ltd, Tribunal Case No: 08/LM/Feb02, para 210.

41. All mergers must first be subject to a competition evaluation.[15] This is not because of some administrative preference but because this is what the section requires.

42. Two possible outcomes flow from this. If the merger is not found to lessen competition we follow the path set out in sub-section (b). This merger can thus be considered as having passed the competition inquiry. If the merger is found to be anti-competitive (we use this term again simply as shorthand) then the next stages enumerated in sub-section (a) follow. First one performs the efficiency trade –off required by (a)(i).[16] This inquiry again can have two outcomes. The efficiency trade off can be greater than and offset the anti-competitive effects in which case the merger can again be considered to have passed the competition inquiry and be on all fours with the merger that followed the path of subsection (b). If the efficiency trade off does not redeem the merger then the merger emerges from the competition enquiry as having a net harm to competition.

43. What is evident then is that under path (b) a merger emerges always having passed the competition enquiry, but a merger under path (a) may, depending on the verdict of the efficiency trade off, pass or fail the competition test.

44. Mergers following either path are then subject to the public interest inquiry. The (a) merger does so in terms of (a)(ii) and the (b) merger in terms of that sub-paragraph. The language of the public interest test however is identical for both namely, whether the merger '*can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).*'

45. Now the words *can* or *cannot* indicate that a merger that has failed the competition test can still be passed on the public interest test and hence be approved. Conversely, that a merger that has passed the competition test could still fail the public interest test and hence be prohibited.

46. Under path (a) *can* and *cannot* could arguably be interpreted as signifying the existence of these two outcomes, because the possibility of transforming both a 'failed' and 'passed' merger exist. But this interpretation does not explain why under option (b) where we only have 'passed' mergers the legislature still provides for a *"can"*, when logically, it seems the only aspect of transformation that can take place is for the merger to 'fail' on public interest grounds and hence '*cannot'* would have sufficed.

47. This gets to the nub of the Gold Fields argument, which is premised on the notion that the word '*can'* is otherwise superfluous in paragraph (b) unless it can be given the interpretation for which they contend. It follows that if Gold Fields is correct about the interpretation given to (b) the same interpretation must be given to (a)(ii) as the language is identical. Hence Gold Fields argues that one not only

[15] Shorthand for whether the merger is likely to substantially prevent or lessen competition.
[16] 'Efficiency' is shorthand for *"technological, efficiency or other pro-competitive gain"* .

has to determine whether the merger '*cannot'* be justified on public interest grounds, but also assuming the absence of a rationale for *'cannot'*, still prove that it *can* i.e. the existence of a positive impact on the public interest. Only by adopting this approach, so it appears to be contended, are the *can and cannot* sensibly accounted for as alternatives in the same phrase.

48. As a matter of pure interpretation the Gold Fields approach is a possible, albeit a very mechanistic reading. On this reading, finding the absence of a negative public interest does not end the Tribunal's task. It must then make a "*can"* finding, which translated, means a finding that the merger benefits the public interest.

49. But, at best for Gold Fields, only an adherence to a sterile literalism commends this approach. Neither logic, the manner in which section 12A is constructed or sensible public policy, support this interpretation, as we go on to show. Nor, if we can confine ourselves only to a purely textual analysis is the Gold Fields interpretation the only possible one.

50. It appears that the only policy rationale beyond the semantic that Gold Fields can enlist to its cause is the approach to the culture of justification in constitutional theory. Gold Fields argues that the use of the word justification is a signal that the approach to the public interest must be capable of justification in the sense that this term is understood in constitutional law. In constitutional law we ask whether state action is capable of being justified. If a decision is made it must be capable of being rationally explained. Because section 12A has used the word justification, says Gold Fields, a similar approach must be adopted. Thus it is not good enough to determine whether the merger may not be unjustifiable on public interest grounds, the constitutionally derived culture of justification requires us to determine affirmatively that a merger <u>is</u> justifiable.

51. This approach is doubtful for a number of reasons. There is no reason to import the constitutional approach to justification simply because there is a congruence in language in the Competition Act. Secondly, mergers are transactions of private players. To equate them to a doctrine requiring justification of state action is wholly inappropriate nor can it be justified by public policy. Thirdly, it seems to defy logic. Why should the legislature make a firm justify its merger affirmatively on public interest grounds, but not require that affirmative justification on competition grounds, when this is a statute primarily concerned with competition, and hence presumably elevates that object more highly than any other subsidiary object.[17]

[17] The word justification is only used in the public interest leg of the inquiry not the competition leg. In the competition leg one is required to simply consider whether the merged will adversely effect competition not whether it will promote competition. Even if the efficiency defence is invoked as a gesture to 'justification' it needs to be noted that it operates to negate a negative conclusion and not to assert a positive conclusion over a neutral one.

52. There are a number of responses to Gold Fields' interpretation. The first and perhaps most obvious is that having to show a negation of the reasons for why something cannot be justified seems to lead to the obvious default conclusion that one should be treated as if one *can*; as opposed to Gold Fields' default position which is that absent an assertion of a positive, the default is that you are treated as if you *cannot*. [18]

53. Thus far we have approached the semantic argument by cautioning against attaching too much significance to the presence of a "possibly" superfluous *can* in sub-section (b). (*Can* as we have indicated above, is not "possibly" superfluous in (a)(ii) as there are two outcomes here, recall the discussion above.)

54. But, there is an obvious approach to the textual interpretation that Gold Fields has not considered and which more credibly explains what the legislature is signalling through the explicit choice of the words *can* and *cannot*. The public interest grounds once evaluated, do not always point to the same net conclusion. Indeed, in certain cases, as we pointed out in our decision in Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Ltd, Tribunal Case No: 08LM/Feb02, ("the Distell case"), they may lead to opposing conclusions which requires an internal weighing up to lead to some net conclusion on the public interest.[19] For instance a merger may lead to no competition problems and hence the merger follows the path of sub-section (b). If in examining the public interest and we find that it leads to some employment loss it will be public interest negative (Section 12 A (3)(b)). However the merger could also lead to the creation of a national champion and hence is public interest positive (Section 12 A (3)(d)). Thus the Tribunal is required to perform an internal balancing of two conflicting public interest considerations before coming to net conclusion. The words "*can or cannot"* are then instructive. They tell us that the public interest can have both adverse and benign effects. Secondly, they indicate that the competition authority is required to balance the positive and negative outcomes and come to a net conclusion on the public interest as opposed to a net positive conclusion as Gold Fields would have it.

55. Thus far we have only toyed with the textual semantics of the argument. If Gold Fields' interpretation were correct it would have led to a construction of the section, which is wholly at variance with what it is at present. Since Gold Fields argues that every merger must be shown to have a positive effect on the public interest in order to be approved, it follows then that this ought to be the first inquiry, because absent a showing of a positive impact on the public interest the merger must fail – why bother with the complexities of inquiring into market definition and efficiencies until this showing has been made. If it is to be the first inquiry one would expect the section to be drafted to reflect this. Instead section 12A directs the competition authorities to do the exact opposite of what on the

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[18] Gold Fields argues that there can be no default position and hence its position is the correct one. However its position leads, as we have shown, inevitably to a default position.

[19] See Distell paragraph 214

Gold Fields' interpretation they should logically be doing first. It expressly states in 12 A (1) that the Tribunal "*must initially determine*" the competition question and "*then determine*" the public interest.

56. This prioritisation of the competition inquiry explains the use of the word *justification* in the public interest test. The public interest inquiry may lead to a conclusion that is the opposite of the competition one, but it is a conclusion that is justified not in and of itself, but with regard to the conclusion on the competition section. It is not a blinkered approach, which makes the public interest inquiry separate and distinctive from the outcome of the prior inquiry. Yes, it is possible that a merger that will not be anti-competitive can be turned down on public interest grounds, but that does not mean that in coming to the conclusion on the latter, one will have no regard to the conclusion on the first.[20] Hence section 12 A makes use of the term *"justified"* in conjunction with the public interest inquiry. It is not used in the sense that the merger must be justified independently on public interest grounds. Rather it means that the public interest conclusion is justified in relation to prior competition conclusion.

57. Gold Fields argument that we referred to earlier that section 2 supports its interpretation of the autonomy of the public interest concerns in the Act is also not correct. Although some sub-paragraphs of section 2 refer to purely public interest concerns they do so in competition context. Section 2 commences with the injunction that *"the purpose of this Act is to promote and maintain competition in the Republic in order -...."*

58. The public interest in the purpose section is seen clearly as dependent not independent of competition.

59. Finally, we consider whether the Gold Fields approach is consistent with the policy of the Act. Beyond its culture of justification argument, Gold Fields has not tried to do so. While many already consider our public interest requirements an anathema to merger control policy, few would argue for a position that mergers are so inherently harmful, that absent a positive contribution to the public interest, a merger that raises no competition concerns must be stopped.

60. On the other hand the contrary position is compelling. That is, that a merger that raises no competition concerns and no negative public interest concerns should be permitted. There is no public policy that can be advanced to suggest that the species of contract that we define as a *merger* is so inherently harmful that if it cannot be shown to make the public interest better should be stopped. Recall for a moment that the public interest showing must be substantial. Since substantial is not a relative term, it is either a substantial effect or it is not, this means that mergers involving large firms are more likely to be able to make a positive showing than ones involving small firms simply because they are bigger players economically. If that is so then small firms will always struggle to find a positive

[20] This is what we held in Anglo/Kumba. See citation supra.

substantial public interest and hence be more likely on the Gold Fields approach to be prohibited. Recall that even parties to what is defined as a 'small merger' can be required to notify to the Commission and once so required their merger is subject to the section 12A regime.[21] How can such parties ever show that their merger is justified on substantial public interest grounds? Even if they can show that a few more people will have jobs post merger that is hardly sufficient to meet the test of substantiality – on the Gold Fields test they must fail.

61. We find that as a matter of law it is not necessary for Harmony to show that the merger can be justified on public interest grounds. All that it needs to establish, having found as we have earlier that it will not have a likely anti-competitive effect, is that the merger will not have a substantial negative effect on the public interest.

62. We now go on to examine the facts to see whether the merger will have a substantial negative effect on the public interest.

The effect of the merger on a particular indus trial sector or region a sector

63. A brief section of the report submitted by one of Gold Fields' economic experts, Dr. du Plessis, alleged that a successful acquisition of his client by Harmony portended 'systemic risk.' The low watermark of his argument is that the merged entity might collapse, allegedly under the combined weight of Harmony's distressed finances and its poor management (which management, alleged du Plessis, had been responsible for Harmony's financial distress). In other words, a contagion originating in Harmony would infect the merged entity resulting in its descent into ruin and bankruptcy.

64. We should say at once that even if this threat were to be realised, it is by no means clear that this would impact negatively on the public interest. The scenario implicitly sketched by du Plessis is one where firm failure is manifest in the sudden cessation of mining activities in the merged entity. This is, of course, an extremely unlikely proposition. Were Harmony or, indeed, the merged entity, to fail, then the company or its individual mining assets would simply be sold off to others at a price sufficiently discounted to enable the continuation of mining activities. Under this scenario the only stakeholders likely to suffer adverse consequences would be the shareholders of the failed concern. And then there is, of course, no apparent reason why we should assume that the merging of two firms – one sound, the other relatively distressed – will result in the inevitable demise of the merged entity. It could equally result in the rescuing of the weaker of the two firms and that, of course, may well, on Gold Fields' own argument, promote the public interest.[22]

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[21] See section 13(3).

[22] In his opening address, Mr. Gauntlet, Gold Fields' senior counsel, characterised Harmony as an 'emaciated predator' that is attempting to acquire Goldfields 'in an endeavour to survive'. We could

65. But 'systemic risk' portends more than the mere bankruptcy of a single firm. It is a concept more traditionally associated with the banking sector where the failure or threatened failure of a large bank may cause a sudden loss of confidence on the part of depositors in the entire banking system. Given the centrality of banking, the fear is that lack of confidence in the banking system may infect other spheres of economic and commercial life. Extended to gold mining then we are asked to find that the collapse of the gold mining 'system' portends threat not only to the gold sector, but, given the continued importance of gold in the South African economy, to that latter terrain as well.

66. In describing systemic risk Dr. du Plessis himself argues that 'the relatively greater corporate risk of Harmony could undermine the sustainability of a Harmony/Gold Fields merger, with potentially grave implications for the South African economy'.[23] This is then the high watermark of Dr. du Plessis' allegations and accords with conventional understanding of 'systemic risk' as traditionally applied to the banking sector.

67. The evidence adduced by Dr.du Plessis' in support of this dramatic conclusion is confined to his analysis of a range of conventional accounting ratios on which basis he concludes that:

> '*…there are various warning lights suggesting the possibility of financial distress at Harmony*'.[24]

68. He then concludes that because the Harmony management '*presided over the deteriorating risk profile of Harmony*' that the same management would, if it presided over the merged entity, cause deterioration in its risk profile.

69. The only analysis of the last link in this tendentious chain of causation is contained in the final sentence of his report where he baldly asserts:

> '*Given the size of these firms and the importance of the gold mining industry in the economy, the risk posed by the potential financial distress of a merged entity may rightly be called systemic*'.[25]

70. And again in his evidence in chief:

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reasonably conclude from this colourful invocation that should its prey elude it, then Harmony's very survival is put at risk with all the negative consequences for the public interest arising from firm or even 'systemic' failure that Gold Fields has identified – to state the obvious, this may well be an argument for approving the merger on public interest grounds!

[23] See page 4 of the Witness bundle.

[24] See page 20 of the Witness bundle. Note that he warns, in footnote 13 on page 18, that a sharp change in the environment (such as depreciation of the Rand) could lead to a significant change in the assessment offered.

[25] See page 21 of the witness bundle.

'I'm going to indicate that there are warning signs of financial distress at Harmony and given the size of the merger and the importance of the sector within which the merger occurs in this economy, from a macro-economic perspective, if a merger should proceed between these two companies, there is a concern that the management, which presided over the company now with the warning signs of financial distress would be in charge of a much bigger entity, which given the importance of this industry, would pose a systemic risk in this economy.'[26]

71. Consider what it is that we are invited to decide: Firstly, we are asked to determine, on the basis of the financial stress allegedly revealed by Harmony's accounting ratios, that Harmony is threatened with imminent collapse. And this despite du Plessis own admission that *'there is no consensus in the financial literature on the preferred measures with which to predict, for example, corporate financial distress'.* Secondly, we are invited to decide that the financial stress allegedly suffered by Harmony will infect the merged entity - as we have already pointed out it is wholly conceivable that the merger would relieve rather than exacerbate Harmony's alleged distress. The only argument advanced by Dr du Plessis in support of the more pessimistic prognosis that he favours is that the same management that presided over Harmony's alleged decline would now secure the decline of the merged entity. Accordingly, we are, thirdly, invited to judge the quality of Harmony's management and its contribution to Harmony's travails relative to that of the Gold Fields' management.

72. We are also expected to accept that while the merged entity and the South African economy is spiraling downward towards systemic collapse, nothing will be done to reverse it. In a revealing passage of his evidence in chief Dr. du Plessis concedes that:

> '*Financial stress is a slightly fuzzy term, which is meant to indicate that a corporation is in a position where, <u>if nothing changes, in other words, if the world stays the same and we simply turn the clock onwards,</u> then the firm is not sustainable as a financial enterprise*.'[27]

73. This approach ignores market driven incentives. Would shareholders simply stand by idly as their company was driven into the ground? Surely, they would seek to replace incumbent management. Or they may elect to withdraw their commitment to the ailing firm, thus depressing its share price and making it, in turn, vulnerable to take over. These are the very mechanisms that we are mandated to protect rather than override which is what Gold Fields would have us do.

74. In this vein, we should add that none of the other witnesses or any of the other affected parties who one may reasonably expect to be concerned at this potential

[26] See page 589 of the transcript dated 5 May 2005.
[27] Transcript p588 (our emphasis)

economic Armageddon has alerted us to this threat.[28] Neither the unions, nor the community of gold analysts, nor Harmony's auditors or shareholders, nor other gold producers, nor the World Gold Council, nor the legions of experienced journalists who have extensively covered this merger, nor, indeed, the government of South Africa, seem to have detected this pending cataclysm. It has been exclusively revealed to a professor specialising in macro-economics who, through the examination of a number of standard accounting ratios, has identified this threat and then outlined it in five pages of his report to the Competition Tribunal. Remarkably, or, perhaps, predictably, the person to whom this insight has been revealed does not possess expertise in the gold mining sector or the economics of finance or accountancy and therefore does not even pass the threshold that must be applied in assigning weight to expert evidence, that being the possession of relevant expertise.

75. Having perused Dr. du Plessis' report and having heard his evidence in chief, we can confidently reject the evidence and argument contained therein. We repeat, the witness is manifestly not qualified to express these opinions, which have not been corroborated by any of other witness or commentator. The quality of the evidence and the argument is indicative of his lack of expertise in these areas.

The effect of the merger on employment

76. The employment consequences of the merger were examined at length on the record and in the hearings. In its recommendation the Commission concludes that the *"proposed transaction raises serious concerns with respect to job losses."* The Commission raised these concerns with Harmony who were willing to give an undertaking that the job losses be limited to 1500 so-called 'supervisory positions'. The Commission was of the view that if the undertaking was made a condition of the approval of the merger this would obviate the public interest concerns. We have accepted this recommendation although we have imposed a lower limit – 1000 as opposed to 1500 - than that suggested by the Commission. The Commission's recommendation that job loss be restricted to managerial and supervisory categories has also been accepted although we have attempted to identify the affected categories in order to limit any ambiguity in the interpretation of our order. The conditions that we have imposed also ensure that employees whose terms and conditions are governed by a labour contract – referred to as 'contract employees' – be treated as employees of the merged entity for the purposes of this order.

[28] The one possible exception is Dr. N. Segal, another expert witness called by Goldfields. We say 'possible' because Dr. Segal's evidence and argument was at a high level of generality. It does nevertheless appear that he too apprehended that Harmony's acquisition of Goldfields would threaten the sustainability of the latter and that this portended threat to the gold mining sector and, hence, to the South African economy. The factors identified by Dr. Segal that portend systemic risk range through the fact that Harmony is smaller than Goldfields, that Goldfields' mines are allegedly more complex operations than Harmony's, that Harmony would inevitably undermine managerial capacity at Goldfields and that Harmony would withdraw Goldfields from the World Gold Council.

77. Harmony's evidence was that the merger was unlikely to have an adverse effect on employment and that it was unnecessary to impose a condition that related to employment effects. Nevertheless it indicated that from a pragmatic point of view that it was not opposed to having the condition proposed by the Commission made a condition for our approval as comfort to all concerned. Harmony argued that as it had not had an opportunity to perform a due diligence exercise it was unable to be more precise about the number of retrenchments that might arise out of the merger. However its past experience in mining mergers which includes mines previously owned by Gold Fields such as Evander, indicated that merger specific retrenchments were not extensive because it employed a top down approach. By this Harmony means that it retrenched from the highest levels first and then downwards. This approach, because high-level employees receive disproportionately better remuneration, meant that it could achieve high levels of savings with fewer job cuts. In addition it outlined that the likely retrenchments would come about as a result of its management philosophy the so-called Harmony Way which favoured reducing the size of mining head offices and the layer of regional management that exists between the mine and the head office. The figure of 1500 it suggests is a conservative estimate of what these retrenchments might be in the current Gold Fields operation. The merger would not likely lead to retrenchments at lower levels for this reason.

78. Gold Fields, for its part, took the view – at some considerable length – that in order for Harmony to make the savings that it had 'promised' its shareholders, the scale of job loss would have to exceed that provided for in the Commission's recommended ceiling by an order of some considerable magnitude. There was some dispute – resolved in Harmony's favour – as to whether Harmony had undertaken to achieve cost savings of R1 billion per annum or R1,6 billion per annum. If the lower figure was accepted on Gold Fields estimation there would be approximately 4000 job losses as a result of the merger.

79. This entire argument is, for the most part, of no relevance to our proceedings. Counsel for Gold Fields acknowledged that Harmony's 'undertakings' regarding the savings that it expected to introduce into the merged entity are of no legal effect as they are undertakings made to the shareholders of the merging parties. It does not follow that even if these cost cutting claims are extravagant that Harmony will introduce extensive job cuts to implement the promised savings. If job cutting is irrational as Gold Fields witnesses suggest it is then Harmony is more likely to renege on its promises to shareholders than to cripple the company to keep its promise. Harmony denies it needs to be stressed that the savings promised are as job cut related as suggested by Gold Fields.

80. Nor do we have reason for believing that the employment loss need exceed the number stipulated in the condition. In our view employment loss arising from the merger generally refers to the job loss occasioned by the rationalisation of production and support facilities. In this instance there will be limited rationalisation – certainly none of the production facilities, that is, the mines

themselves, are to be merged and so the need for rationalisation is limited and will, by and large, not affect mine level employees.

81. Harmony as we noted makes much of its relatively flat employment structure, an approach that, it avers, enables it to dispense with several layers of management in the corporate head office and in the mining regions themselves. This goes to the heart of the distinction between, on the one hand, Harmony's approach to managing a gold mining group and, on the other, Gold Fields' approach. Retrenchments occurring in consequence of Harmony's leaner management structure are then appropriately considered to result from the merger itself. Our condition simply permits Harmony to exercise this management prerogative by providing for a possible level of retrenchment that includes both rationalisation and the flattening of the management structures.

82. Again Gold Fields' witnesses opined at length on the violence that this leaner approach would do to the ability of Harmony to operate the merged entity. Harmony disagrees. We are unable to take a view on this debate and nor do we have to. Again should Gold Fields' prognostications be borne out and should it indeed prove impossible for Harmony to dispense with the layers of management it deems superfluous and counter-productive, this is not a matter with which we need to concern ourselves. We are not obliging Harmony to dispense with these managerial layers – we are simply requiring that, whatever it chooses to do, retrenchments must be limited to the numbers and to the categories provided for in our conditions.

83. We had requested the parties to submit a view on the impact that previous gold mining mergers had had on the affected communities. Gold Fields submitted reports prepared by two experts, Dr. H. Bhorat and Mr. James Hodge.[29] Both of these experts testified at the hearings. Dr. Bhorat's report documented the impact that the reduction of employment in gold mining has had on poverty levels both in the directly affected mining areas as well as in the regions from which many of the migrant workers, who are mostly unskilled, are drawn. There can be no quarrelling with his conclusions. We take some comfort from the fact that the merger-specific retrenchments to which our condition refers will implicate only those categories of employees best equipped to secure alternative employment.[30]

84. Mr. Hodge attempted to correlate employment loss with merger events. He concluded that these were robustly correlated. Counsel for Harmony argued persuasively that it is not sufficient to demonstrate correlation. If causation is to be found, what is required is a theory of the relationship between the two observed phenomena. Mr. Hodge effectively reasoned that retrenchments loosened the bond between employer and employee, or, as he would have it, it

[29] See the G:enesis Report, page 48 of the Witness bundle.
[30] Dr. Bhorat also conceded that he was not concerned about the categories of skilled labour referred to in the Competition Commission's conditions. See page 251 of the transcript dated 4 May 2005.

enabled the new management to break the implicit contracts that its predecessor management had developed over long periods.

85. This is not a very persuasive theory. In a relatively regulated labour market with national union representation, the regulatory regime and even the identity of those who operate within it, are unaffected by the fact of the merger – there are then 'bonds' or 'relationships' with the national unions that will not be lightly broken because the impact will extend beyond the immediate area of contestation and there are 'explicit' contracts that are the provisions of the Labour Relations Act and, as is likely, industry and company wide collective bargaining agreements, that are unaffected by the merger. It is conceivable that the management of the merged entity may attempt to use the cover of persistent general job loss in order to effect merger specific retrenchments. But here we take comfort from the monitoring mechanisms that are imposed as part of the conditions. More than that, we are certain that the powerful mining unions – none of whom opposed the conditions proposed by the Commission – will closely monitor future retrenchments in the merged entity and will ensure compliance with the terms of our order.

86. Of course, as pointed out by Harmony's counsel, the observed relationship between merger and job loss may well reflect the general and long-term decline of gold mining – the origins of both employment loss and merger activity may well be found in this general industry-wide decline. Hence it is common cause that Harmony is currently engaged in significant retrenchment activity on the mines that it owns. This is likely to continue regardless of whether or not there is a merger. On the other hand, it is suggested – not least of all by Gold Fields – that the merger represents an attempt by Harmony to place itself on a stronger footing, that is, that the merger (and the retrenchments) represent Harmony's response both to the long term decline of the sector and to the prevailing level of Rand-equivalent price of gold. Were the merger to go ahead under these circumstances, Mr. Hodge's econometrics would once again demonstrate a correlation between the merger and job loss when in fact both of these phenomena are driven by long-term sectoral decline coupled with commodity cycles and exchange rate movements.

87. Certainly it seems clear to us, if not to Mr. Hodge, that the level of post-merger retrenchment activity will be critically influenced by the specific character of the assets acquired. Hence, the earlier merger waves analysed by Mr. Hodge do appear to reflect Harmony's acquisition of the marginal mines upon which it built its gold mining group. This is manifestly not the case in the present transaction and there appears to be little reason to expect the merger to influence the rate of retrenchment in the mines presently controlled by Gold Fields. There may, to be sure, still be job decline in these mines. However, the pace of job loss will be dictated by the decline of the industry rather than by the merger event.

88. It is conceivable that where, as in the earlier events, marginal mines are absorbed, the pace of retrenchment is influenced by the merger. However, under these circumstances it is extremely difficult to construct the counterfactual. Certainly there was much unresolved factual dispute over Harmony's claimed record in extending the life of mines – despite Gold Fields' denials this is certainly Harmony's widely held reputation. It is then wholly conceivable that a post-merger 'rightsizing' may well be predicated on a changed perception of the life of the mine and the approach to the available ore reserves that accompanies this change. The counterfactual – that is, where the seller retained control of the mine - may well be a larger workforce employed for a relatively short period to harvest rapidly the ore reserve and then to close down the mine. Indeed it may well be that the owners of the target mine, had calculated that maintaining the mine in production required a level of investment and extraordinary expenditure, including retrenchment, to which it was not prepared to commit. Under these circumstances the merger may well correlate with an accelerated pace of retrenchment but it takes, nevertheless, a particularly distorted logic to ascribe the retrenchments to the merger.

89. We are nevertheless mindful of the fact that retrenchments of semi-skilled and unskilled workers in the present mining environment may well have an adverse effect on employment and hence the public interest, because they may lead to long term unemployment consequences, particularly if the evidence of Professor Bhorat is accepted. Of importance here is that Harmony has not done a due-diligence and absent the condition we would have to be content with its estimation that fom past merger experience there is no likelihood of merger specific retrenchments of this class of employee. We find that taking comfort from such a possibly uninformed estimation is insufficient in the circumstances of this case, and a condition is warranted to protect the public interest. We must also bear in mind that it was on the basis of the condition as proposed by the Commission that certain parties such as the unions did not participate in the proceedings and they may well have done so to express concerns had it not been forthcoming.

90. Although Gold Fields had argued that the merger be prohibited on public interest grounds in the alternative it asked that the level of retrenchments be limited to head office employees an amount of 112. Neither of its experts on the employment issues took issue with the proposed condition of the Commission, and hence it seems that Gold Fields needed to rely on the likelihood that Harmony would never be able to keep to this condition to achieve its promised savings to justify why the merger should be prohibited. On this latter point there is no evidence to suggest that if a condition is imposed on Harmony that it will not honour it.

91. We are then content to limit the merger-specific retrenchments to 1000 and to require that they all be drawn from the ranks of management and supervisory staff. It seems to be common cause that these are employees that are able to find new employment in the event of retrenchment because they have marketable skills. We have reduced the number of retrenchments provided for in the Commission's recommendations by 500. This we have done because the most detailed accounting by Harmony suggested slightly over 900 retrenchments.[31] We are naturally aware that Harmony has been obliged to take a view without the benefit of a due diligence. However, due diligence or no, the figure provided to us represents its best effort to detail the scale of merger related retrenchment and this is what we will accept as the maximum permissible level of retrenchment.

Conclusion

92. We have found that the merger will not substantially lessen or prevent competition in any market. We have found that the merger may have an adverse effect on employment and hence the public interest but that the condition we have imposed will obviate any substantial public interest concern.

18 May 2005

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D. Lewis **Date**

Concurring: N. Manoim and Y. Carrim

[31] The Counsel for Harmony in its cross-examination of Mr McLuskie suggested that 921 retrenchments were envisaged. See page 167 of the transcript of 3 May 2005. Mr Swanepoel, in his evidence, anticipated 1000 retrenchments. See page 983 of the transcript dated 8 May 2005.