COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 08/CR/Jan07

In the intervention application between:

Barnes Fencing Industries (Pty) Ltd	First Applicant
Dunrose (Pty) Ltd	Second Applicant

And

Iscor Limited (Mittal SA)	First Respondent
Allen Meshco (Pty) Ltd	Second Respondent
Wireforce Steelbar	Third Respondent
Hendok (Pty) Ltd	Fourth Respondent
Galvwire (Pty) Ltd	Fifth Respondent
Independent Galvanising (Pty) Ltd	Sixth Respondent
Associated Wire Industries (Pty) Ltd t/a Meshrite	Seventh Respondent
The Competition Commission	Eighth Respondent

In re the matter between

The Competition Commission	Applicant

And

Iscor Limited (Mittal SA)	First Respondent
Allen Meshco (Pty) Ltd	Second Respondent
Wireforce Steelbar	Third Respondent
Hendok (Pty) Ltd	Fourth Respondent
Galvwire (Pty) Ltd	Fifth Respondent
Independent Galvanising (Pty) Ltd	Sixth Respondent
Associated Wire Industries (Pty) Ltd t/a Meshrite	Seventh Respondent

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Panel	:	N Manoim (Presiding Member), U Bhoola (Tribunal Member) and Y Carrim (Tribunal Member),
Heard on	:	29 February 2008
Order Issued	:	28 March 2008
Reasons Issued:		28 March 2008

Intervention Application

DECISION

[1] In this matter Barnes Fencing (Pty) Ltd ("Barnes") and Dunrose (Pty) Ltd t/a Abracon ("Dunrose") apply to intervene in a prohibited practice case which the Commission has brought against the respondents.

[2] The application to intervene is only opposed by one of the respondents, Mittal South Africa Limited ("Mittal").[1] The Commission, also an interested party, does not oppose the application.

Legal regime

[3] The applicant applies to intervene in terms of section 53(1) (a)(ii)(bb) of the Competition Act (the 'Act'). In terms of that section:

> *"(1) 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:*
>
> *(a) If the hearing is in terms of Part C –*
>
> *(i) The Commissioner, or any person appointed by the Commissioner;*
>
> *(ii) The complainant if-*
>
> *(aa) the complainant referred the complaint to the Competition Tribunal;*
>
> *(bb) in the opinion of the presiding member of the Competition Tribunal, <u>the complainant's interest is not adequately represented by another participant, and then only to the extent required for the complainant's interest to be adequately represented</u>; (Our emphasis).*

[4] It is common cause that the applicants are the complainants in this matter and that they have an interest in the matter. (For convenience we will refer to them as "the complainants" from now on). What is not common cause is whether they have an interest that is not adequately represented in this matter by the Commission.

[1] This is probably because no relief is sought against the other respondents in either the Commission's referral or by way of the relief sought by the intervenors.

Background

[5] In December 2003, the complainants and another firm filed a complaint with the Competition Commission against the respondents. It is not necessary for our purposes to go into the complaint in any detail. The gist of it is that the complainants purchased an input from Mittal, a manufacturer of steel products, known as wire rod. The complainants convert the wire rod into various wire products, which they sell into the market, where they compete, inter alia, with the firms in the Allens Meshco Group[2] who perform a similar function.[3] Another firm competing in this wire product market with the complainants, Consolidated Wire Industries ("CWI"), is partially owned by Mittal.[4] The allegation is that Mittal, which used to supply the complainants during the relevant period of the complaint (2000 to 2003), declined credit facilities to the complainants, which prevented them from purchasing at all. However, the firms in the Allens Meshco Group received extended credit terms and preferential prices for their wire rod input. The theory of harm the complainants advance is that Mittal is attempting to discipline them for not following price rises in the downstream markets for wire products, by denying them the necessary input of wire rod on competitive terms relative to terms offered to rivals. It was also alleged that the firms in the Allans Meshco Group, while ostensibly competitors, co-ordinated their behaviour by fixing prices and allocating markets. They allege that this enabled the Allens Mescho Group to raise prices of wire, wire products and nails, and to enable Mittal to increase the prices of wire rod.[5]

[6] The Commission investigated this complaint and then referred it in two separate referrals. In the one referral it alleges that the firms in the Allens Meshco Group have contravened section 4 of the Act.[6] Mittal is not a respondent in this section 4 case and the complainants have not sought to intervene in that complaint.

[7] In its second referral, which is the one to which the intervention application *in casu* is related, the Commission alleges that Mittal has engaged in unlawful price discrimination by offering favourable credit and pricing terms to firms in

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[2] In these reasons, we shall refer to the second to the seventh respondents as the "Allens Meshco Group following the usage of the complainants in their founding affidavit. See founding affidavit of Doron Barnes, paragraph 15.
[3] Barnes makes wire (and in particular galvanized wire for fencing), and wire products from the wire rod, whilst Dunrose manufactures nails.
[4] Mittal has a 49% interest in CWI.
[5] See founding affidavit of Doron Barnes paragraph 24.3
[6] Competition Commission v Allens Meshco (Pty) Ltd & Others Case No. 09/CR/Jan07

the Allens Meshco Group. In this referral the Commission relies solely on a contravention of section 9 of the Act.

[8] The relief that the Commission seeks in its section 9 case is:[7]

> A. *For an order declaring that the Iscor's practice of charging its low carbon wire rod customers different prices amounts to prohibited price discrimination in terms of section 9 of the Act;*
>
> B. *For an order directing Iscor to refrain from charging its low carbon wire rod customers different prices or discriminating in prices between customers for low carbon wire rod;*
>
> C. *For those respondents that oppose the complaint to pay the costs jointly and severally;*
>
> D. *For further or alternative relief as the Tribunal may consider appropriate.*

Reasons for the intervention

[9] The complainants only sought to intervene in this matter after Mittal had filed its answering affidavit. The complainants allege that as the Commission had initially cited them as parties to the matter and then, after objection from Mittal, removed them, they were entitled to assume until that time that they were parties. Thereafter they decided to intervene in the matter and brought their application on 15 June 2007.

[10] The basis of their application to intervene is as follows;

1) The Commission has not relied on sections 8(c) and 8(d)(ii) of the Act although in its initial complaint they had alleged the conduct of Mittal had contravened sections 4, 5 and 8 of the Act, in addition to section 9.[8]

2) They seek relief the Commission is not seeking, specifically a conduct based form of relief that would require Mittal to make its pricing policy transparent.

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[7] On 16 May 2007 the Commission was granted permission to amend its papers by, *inter alia*, deleting the relief that the Tribunal impose an administrative penalty on Mittal.

[8] See founding affidavit of Doron Barnes paragraph 25.

3) They are concerned that the Commission has not made out a proper case in its pleadings for price discrimination and that it is necessary for it to intervene to remedy these deficiencies.

Mittal's objection

[11] Mittal argues that it is not competent for the section 8 claims to be brought by way of intervention and they should properly form part of a separate referral brought by the complainants, as this part of their complaint must be deemed to have been non-referred by the Commission, when it referred only the section 9 complaint. We go more fully into the basis for this argument later.

[12] In relation to the application to intervene in the section 9 referral, Mittal alleges that the complainants have failed to satisfy the legal test for intervention in prohibited practice cases i.e. of demonstrating that their interests have not been adequately represented by the Commission.[9] At best Mittal argues the complainants have quibbled about the 'laconic style' of the Commission's pleadings, but have not shown that the pleadings are inadequate – if that is ever a basis for intervention – and that hence no basis to intervene as 'second prosecutors' has been demonstrated, given a legislative preference to have the Commission as the preferred prosecutor of matters it refers.

[13] Finally, Mittal argues that the relief sought by the complainants, whilst different to that of the Commission, is not relief that could be competently ordered. In oral submissions Mittal did not press this point too far, and instead argued that even if the complainants wanted to contend for additional relief, this did not justify giving them full rights of intervention. Mittal relies on the fact that the language of section 53 permits intervention "only to the extent required for the complainants' interest to be adequately represented." According to Mittal, the complainants can adequately contend for the relief sought through some more restricted right of participation than full intervention.

ANALYSIS

1. <u>Section 8 complaints</u>

[14] To appreciate Mittal's argument on this point it is necessary to understand the unique machinery the Act provides for regulating the private rights of complainants and the public role given to the Commission. When a complainant lodges a complaint with the Commission it cannot refer that complaint directly

[9] See section 53(1) (a)(ii)(bb) quoted earlier.

to the Tribunal. The Commission is given a period of up to one year, subject to extension, to investigate the complaint. Thereafter the Commission may refer the compliant or refer *"...only some of the particulars of the complaint..."* or decline to refer it. In the latter two instances the complainant is entitled to refer the complaint or the balance of the complaint directly itself. In this case what we have to consider is what is meant by the phrase *"particulars of the complaint."* Mittal argues that this is a case where "only some of the particulars of the complaint" have been referred by the Commission and the complainants remedy should have been to directly refer "the particulars of the complaint not referred" – they are not entitled to rely on intervention rights to remedy this procedural default. Thus on Mittal's argument the two section 8 contraventions despite the fact that on the complainants version, they were legal conclusions premised on the same set of facts on which the Commission's referral was premised, constitute "particulars of the complaint" not referred.

[15] Let us consider the language of the sections in issue. Section 50(3) states:

> *(3) When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2)(a); it-*
>
> *(a) may –*
>
> *(i) refer all the particulars of the complaint as submitted by the complainant;*
>
> *(ii) refer only some of the particulars of the complainant as submitted by the complainant; or*
>
> *(iii) add particulars to the complaint as submitted by the complainant; and*
>
> *(b) must issue a notice of non-referral as contemplated in subsection (2)(b) in respect of any particulars of the complaint not referred to the Competition Tribunal."*

[16] This section needs to be read with section 50(5) which states:

> *(5) If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time period contemplated in subsection (2), or the extended period contemplated in subsection (4), the*

> *Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period."*

[17] At first blush it is not entirely clear why the concept of particulars of a complaint not referred, should apply to different legal conclusions based on the same set of facts. Why should someone who tells about conduct he deems anticompetitive, and which he classifies in a particular way, be forced, because the Commission chose to rely on a contravention of one section of the Act, to refer the same conduct by way of an independent referral as opposed to intervention, if that person believes that the same conduct gives rise to contravention of other sections of the Act.

[18] Mittal is alive to this criticism and in order to make an argument not based on pure formalism advances an analysis of the respective legal requirements needed to prove a section 9 contravention and the two section 8 contraventions.

[19] Mittal's argument is premised on the concept of *facta probanda* as we know it in civil proceedings. The *facta probanda* are the essential facts that need to be pleaded to sustain the legal conclusion on which a claim is based. Translated into competition proceedings it is the notion that different contraventions of the Act require different essential factual allegations to be pleaded, *facta probanda*, and whilst some of these might have elements in common (e.g. in section 8 and 9 claims it is an essential element of the contraventions that the respondent is a dominant firm) all are in some way distinct. By way of example, Mittal argues a refusal to deal case has as inter alia the following requirements – (1) a refusal to supply (2) the supply must be in respect of scarce goods (2) the injured party must be a competitor of the firm refusing supply (3) the supply of the goods must be economically feasible. These elements Mittal argues are not *facta probanda* in a section 9 case, which has its own distinct *facta probanda*. When the Commission referred the complaint in terms of section 9 it was thus in the language of 50(3), *'referring only some of the particulars of the complaint as submitted by the complainant"*

[20] Thus what Mittal seeks to argue is that the effect of the Commission's prosecutorial preference for section 9, meant that those *facta probanda* necessary to sustain a section 8 case, and that were distinctive of a section 8 case, had been relegated to the status of particulars of the complaint "not

referred", and hence, were only capable of being revived as part of a separate referral, which the complainants would have to bring in terms of section 50(5).

[21] To support its legal contentions Mittal relies principally on an interpretation of a decision of the Competition Appeal Court in Glaxo Wellcome (Pty) Ltd & Others v National Association of Pharmaceutical Wholesaler & Others ("Glaxo").[10] In that case, the question was whether a complainant who had filed a complaint referral, inter alia, alleging a respondent had denied it access to an essential facility, could proceed with referring that count, when its complaint to the Commission had only alleged facts concerning a refusal to deal. (Note there had been a non-referral by the Commission and hence the complainant was attempting to refer the complaint directly itself). The respondents in that case had argued that the complainant was obliged to file a fresh complaint with the Commission, and could not rely on the facts concerning the refusal to deal (section 8(d)(ii)), to found, based on the same complaint, the right to refer a complaint based on access to an essential facility (section 8(b)). The Tribunal held that as a refusal of access to an essential facility and a refusal to deal were "two sides of the same coin", the complainant was entitled to refer the essential facility count on the basis of its complaint about a refusal to deal. This aspect of the decision was overturned on appeal, with the Court disagreeing with the Tribunal about whether a refusal to deal was conceptually similar to the denial of access to an essential facility as provided for in the Act. (See paragraph 40).

[22] Mittal relies on this decision to advance its central proposition that " Notably *the CAC interpreted the words " particulars of a complaint as submitted by a complainant " to mean " the facta probanda necessary to establish a prohibited practice."*[11]

[23] However, in summarising what the Court said in this way Mittal omits a crucial phase which alters materially what it intended to say. What the Court in fact said was:

> *"When a complaint is referred to the Tribunal in terms of the Act, section 50(3), consistently provides that what must be referred are particulars of the complaint "as submitted by the complainant". Again a clear reference to the conduct referred to*

[10] Case No. 15/CAC/Feb02.

[11] See first respondent's Heads of Argument, paragraph 3.7.

by the complainant and which amount to the facta probanda necessary to establish a prohibited practice." (Our emphasis).

[24] Mittal has glossed out the significant words *"Again a clear reference to the conduct referred to by the complainant…"* The emphasis here is thus on what the conduct was. There is another quote in the decision where again there is a reference to conduct. After referring to the Tribunal's remarks that the conduct in that case was *substantially the same* the Court said the following:[12]

> *"Whilst I have no quarrel with finding reference to conduct, in the complaint, which amounts to refusal to deal, this cannot be declared conceptually similar to denial of access to essential facilities in terms of the Act."*

[25] In other words what the Court is saying, is where conduct in respect of one contravention is conceptually similar to another, a complainant could refer the matter without having to file a new complaint. The issue is not so much that of *facta probanda* being different, but whether the conduct is "conceptually similar". In deciding whether a contravention is conceptually similar to another, one has regard to the *facta probanda* of the respective complaints, but the fact that they are different is not the determinative issue – what is, is whether the conduct is conceptually similar – the fact that *facta probanda* for contraventions may be different, does not in and of itself, make them dissimilar. Conversely, the *facta probanda* may be identical, but the conduct is different, and we would then treat these as different particulars for the purpose of section 50(3).

[26] Note that in Glaxo the Court said,

> "*A complainant is not required to pigeonhole the conduct complained of with reference to particular sections of the Act. What is required is a statement or description of prohibited conduct*"

[27] If a complainant is not required to pigeonhole the conduct with reference to a particular section of the Act, then the fact that the Commission chooses to do so by taking that conduct and pigeonholing it under a particular section of the Act, does not mean that the Commission has elected not to refer certain particulars of the complaint. If that was the implication of referring the conduct

[12] See paragraph 39.

under one section of the Act and not another that would be effectively pigeon holing the complaint.

[28] But perhaps the most powerful support for the fact that the test is 'similar conduct' comes from another section of the Act, one the Court did not have to consider in Glaxo, but which resonates with the 'similar conduct' test discussed in that case. In terms of section 67(2) of the Act:

> *"A complaint may not be referred to the Competition Tribunal against any firm that has been a respondent in completed proceedings before the Tribunal under same or another section of this action of this Act relating substantially to the same conduct." (Our emphasis)*

[29] Now if Mittal's argument is followed to its logical conclusion this would create a paradox. A complainant brings a complaint in which it alleges that a respondent has been engaged in conduct amounting to a prohibited practice. It may or may not pigeonhole this conduct into a particular section of the Act. The Commission, as it is entitled to, refers the complaint in terms of a particular section of the Act. The complainant feels that the conduct which the Commission has referred is equally captured by another section or sections of the Act. On the Mittal argument since these sections have *facta probanda* different to those of the section that the Commission relies on, these particulars of the complaint have not been referred and the complainant must refer the case directly. Let us assume that the case brought by the Commission is now completed. The case brought by the complainant by way of direct referral is vulnerable to the respondent or the Tribunal *mero motu*, taking the point that for the purpose of section 67(2) the action may no longer be brought as it relates to conduct the same as was heard in completed proceedings (i.e. the Commission complaint). In these circumstances the section 67(2) defence must be successful, unless the complainant can show that the conduct it is now referring is not similar – it would not be sufficient to state that the *facta probanda* are not the same - the test under section 67(2) is whether the later complaint relates to substantially the same conduct as the earlier completed one.

[30] Thus since the Act's enforcement mechanism must be understood as creating a logically consistent schema, we must interpret section 50(3) in a manner that harmonises it with section 67(2). Thus when we try to understand what is

meant by “particulars of the complaint not referred” - by implication and without doing any violence to the language of section 50 that must refer to conduct, and conduct that is not similar or the same as that alleged in the complaint referral.

[31] This also makes perfect sense from the point of view of the rational administration of the Act. Respondents should not be subject to multiple referrals that relate to substantially the same conduct, merely because they are reliant on different sections of the Act. Likewise complainants are not to be put to the trouble of bringing a separate action when the conduct is similar to that being brought by the action the Commission relies upon.

[32] We thus find that the complainants are not precluded from bringing an application to intervene in respect of the section 8 counts, provided they relate to conduct that is substantially the same to that alleged in the main referral. In this case, no argument has been made to suggest it is not. The same theory of harm advanced under the section 9 case underpins the section 8 counts – namely that it is the conduct of Mittal in discriminating in respect of discounts and credit terms which is conduct designed to exclude the applicant from the market. The same or similar conduct is thus central to the allegations in respect of the Commission’s section 9 claim and the complainants section 8 claims.

[33] Having come to the conclusion that the conduct in the section 8 counts is similar to that in the main complaint, we must now test whether the complainants have an interest that is not adequately represented in the proceedings. In this case Mittal has not suggested that the section 8 counts would not be competent if the facts alleged were established in this case and we need not consider this aspect further

[34] However, it does not follow that a complainant would always be allowed to intervene in the Commissions’ referral, every time it thought that referral could have been made under another section of the Act. The section is not there for private players to second guess the Commission’s prosecutorial judgment. To allow complainants to intervene simply because the Commission has not proceeded with some alternative contravention of the Act, that the complainants deem appropriate, would interfere unduly with the rights of the Commission to bring a case as the legislature’s preferred prosecutor, burden respondents and prolong proceedings – even if the alternative count alleged by the would be intervenor might be a competent verdict on the same facts. Complainants

should be assisting the Commission in prosecuting its case not attempting to usurp its function.

[35] This case does give rise to some unusual features which may lead to apprehension by the complainant that its interests are not being adequately represented. Its complaint as originally framed has been carved up by the Commission into two separate referrals. In the first, based on a contravention of section 4, only the firms in the Allens Meshco Group, and not Mittal are the respondents. In the present price discrimination case, although the Allens Meshco Group firms are respondents, relief is sought against only Mittal for contravening section 9. The complainant thus has a legitimate concern that in cutting and splicing, as the Commission has done its complaint, into two separate cases with relief sought against different respondents in the respective cases, its original theory of harm as outlined earlier in this decision may get diluted or indeed never get raised in the process without its participation. There is nothing in the present Commission complaint referral in the section 9 matter to suggest its exclusionary nature. Although the Commission alleges an ant-competitive effect, it does not articulate what that effect is. Price discrimination can take different forms and its anticompetitive effects may be exploitative or exclusionary.[13] As the Commission does not fully articulate where its theory of harm lies, the complainant is entitled to assume that its theory of exclusion based on the alleged cartel, the subject matter of another complaint in which Mittal is not a respondent, has got lost in translation – and whilst the conduct alleged by the complainants, in their original complaint, can be found by reading together the two Commission complaint referrals, the glue that holds it together, the rationale for their theory of harm – from the complainants perspective - may be missing. As the complainants have expressed this concern their founding affidavit:

> *"The applicants' chief complaint is that Mittal's conduct was designed to force Barnes fencing from the market, or at least discipline it sufficiently…. The Commission has not even alluded to these concerns in its referral and it appears to the applicants that the Commission does not recognise the overall purpose and intention underlying Mittal's conduct."* [14]

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[13] See Bishop and Walker, " *The Economics of EC Competition Law*, 2nd edition, who argue that price discrimination can be anticompetitive if it leads to the exclusion of competitors (see paragraph 6.4) and Whish, *Competition Law* , 5th Edition who writes " price discrimination may be exploitative for consumers…" See Whish page 716

[14] See the founding affidavit of Barnes paragraphs 43-44.

[36] The complainants have an interest in having their theory of harm advanced in the present referral proceedings. Of the two referrals brought by the Commission arising from their original complaint this is the only one where Mittal is a respondent. The complainants have a legitimate concern that the theory of harm that they articulated has not found expression in the Commission's present section 9 referral and that without their intervention this theory of harm - which may prove material in establishing a contravention of the Act, and an appropriate remedy - will not be adequately represented. (Note that although a theory of harm advanced by an intervenor may be different to that of the Commission, as in this case, this does not amount to different particulars being referred, for the purpose of section 50(3). The conduct relied upon is the same – it is the interpretation of its significance that may differ. If we interpreted this otherwise, an unsuccessful complainant could keep bringing the same case against a respondent by merely altering its theory of harm and thus escape the limitation clause in section 67(2))

[37] Our discussion is not a criticism of the Commissions' prosecutorial choices. It has the discretion to frame a case as it sees fit in the public and not necessarily in a particular claimants' interests. We view the case in an intervention application from the complainants' perspective to see if its interest is adequately represented.

[38] In our view, on these facts, the complainants have established an interest not adequately represented in this case and they would be prejudiced if they were not allowed to intervene, as a separate complaint referral since it would be based on the same or similar conduct to the one *in casu*, would be vulnerable to objection in terms of section 67(2).

[39] It is worth mentioning what may be meant by particulars of the complaint for the purpose of understanding section 50. If the complainants in the present case had alleged other conduct that they considered discriminatory, and which the Commission had not referred, or that the same conduct contained in the referral had taken place during a different time period to the period alleged in the referral this would constitute an example of particulars not referred. Here the particulars would not be on all fours with the Commission's case, as they differed as to either manner or time and hence a separate referral would be necessary and would not be vulnerable to a successful attack under section 67(2).

2. Section 9 complaint

[40] Mittal's objection to this leg of the intervention application is that the section 9 case has been adequately made out by the Commission except to the extent of the additional relief sought. The relief sought, they argued, was not competent and hence should be refused. In the alternative, Mittal argued that even if the relief was competent, it should be limited to that which was necessary in order for the complainants' interest to be adequately represented.

[41] We deal first with the intervention in respect of the relief sought. Whilst it is competent for us to refuse intervention in respect of relief that would never likely be granted, the Tribunal would need to be cautious in this approach. The relief sought in this case is a form of conduct relief not sought by the Commission that seeks to remedy future behaviour in respect of price discrimination assuming, of course, that this has been proved. As such it is not such an unlikely form of relief that we could rule out at this stage.

[42] In our previous cases on intervention in prohibited practice cases, we have found that allowing a complainant to make a case for relief not sought by another participant in the case constitutes grounds for intervention in terms of section 53(1)(a)(ii)(bb).[15] We do not understand Mittal to seriously dispute this and so we need not justify this aspect further. Having found that the relief sought is a remedy which might be considered in the event of a finding of a contravention of section 9, we then have to consider whether this allows the complainants the full rights of participation which they seek or the more limited rights that Mittal suggest in their alternative submission.

[43] We do not need to go into this debate in great detail. Having granted the section 8 intervention this brings the complainants into the case on the merits and it would be impractical to demarcate areas relevant to the section 8 dispute and those to the section 9 given the substantial overlap. This would result in indeterminate objections during the course of hearing and distract from hearing the merits. Furthermore, given that we find the complainants are entitled to contend for the relief sought and that this might entail some engagement with the section 9 merits as well, further demarcation disputes in the hearing would emerge if this aspect of the case was subject to the limitations proposed by Mittal.

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[15] Anglo American Corporation Medical Scheme v The Competition Commission of South Africa & Others Case No. 04/CR/Jan02 and Comair Limited v The Competition Commission and South African Airways Case No. 83/CR/Oct04.

[44] Expressed differently even if we thought that the complainants had not made out a case for intervention in terms of the section 9 complaint because they took a view on the adequacy of the Commission's case as pleaded, once we admitted them in terms of the section 8 complaints and the right to contend for alternative relief in terms of section 9, ring fencing the residual part of the section 9 case because their interests may still be adequately represented, is neither practical nor fair to any party in the proceedings. The Tribunal enjoys a wide discretion to run its proceedings and our practice has been to minimise duplication between co-prosecutors, where we have allowed intervention so as to avoid prolonging proceedings and hardship for respondents. There would be no reason why the panel that hears this matter would not follow the same practice.

3. <u>Section 8(d) relief</u>

[45] During the course of oral argument, Mr Wesley, who appeared for the complainants, indicated that they might seek, as another form of relief, the imposition of an administrative penalty. The only count for which a penalty would be competent in terms of the present matter is section 8(d)(ii). The complainants did not make out case for this relief in their founding papers as they are required to do in terms of rule 46(1)(b) which states:

> "(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) ...;*
>
> *(b) be served on every participant in the proceedings."*

[46] It would be unfair to Mittal to permit the complainants to adopt such a laissez-faire approach to their intervention and we decline to allow them to intervene to seek this relief.

[47] We make the following order in respect of the intervention:

[47.1] The applicants are granted leave to intervene and participate in the complaint referred by the eighth respondent (the Commission)

against the first to the seventh respondents, in terms of section 53(1)(a)(ii)(bb) of the Competition Act 89 of 1998 ("the Act"), read with rule 46 of the Tribunal Rules;

[47.2] The applicants are granted leave to file an affidavit setting out the particulars of their complaint within ten business days of the order subject to the following-

[47.2.1] the particulars of complaint are confined to sections 8(c), 8(d)(ii) and section 9 of the Act, and the relief is confined to that contemplated in paragraph 45 of the founding affidavit of Doron Barnes;

[47.3] Each of the first to the seventh respondents is granted leave to file an answer to the applicant's complaint, in the form and within the periods set out in rule 16 of the Rules of the Tribunal;

[47.4] The applicants are granted leave to file a reply to an answer, if rule 17 of the Rules of the Tribunal permit them, in the form and within the periods set out in rule 17;

[47.5] The applicants are permitted to participate fully in the complaint hearing and pre-hearing procedures, including *inter alia* to:

a. participate in any pre-hearing conferences;
b. participate in any interlocutory procedures;
c. inspect all documents filed by the respondents, including confidential documents on appropriate conditions;
d. file documents and expert reports;
e. secure discovery from the respondents;
f. utilize the subpoena procedures set out in the Act;
g. obtain further particulars (if this be ordered) from the first to the seventh respondents as necessary;
h. cross-examine witnesses;
i. adduce evidence, including expert evidence, and call witnesses; and
j. present oral and written argument; and

[47.6] Mittal is ordered to pay the costs of the application on a party to party basis, including the costs of one counsel.

____________________ **<u>28 March 2008</u>**

N Manoim **DATE**

Tribunal Member

U Bhoola and Y Carrim concur in the judgment of N Manoim

Tribunal Researcher : R Kariga

For the applicants : M Wesley instructed by Bowman Gilfillan Attorneys

For First Respondent : O Rogers (SC) and A Gotz instructed by Brink Cohen and Le Roux Attorneys