COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No.: 46/LM/Jun02

In the matter between:

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

and

Anglo-American plc — **1st Respondent**
The Competition Commission — **2nd Respondent**

in the large mergers between:

Anglo American Holdings Ltd

and

Kumba Resources Ltd

Decision and Reasons in the Application for access to Confidential Documents

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Introduction

This is an application for us to order the respondents to produce certain documents for inspection by the applicant's legal representatives.

The Tribunal is currently considering the large merger between Anglo American Holdings Ltd (Anglo) and Kumba Resources Ltd.

The application has been brought by the IDC, an intervenor[1] in these merger proceedings for an order for the production of documents by the acquiring firm

[1] After protracted litigation the IDC was given leave to be an intervenor in these proceedings in terms of an order by the Competition Appeal Court. That decision which is reported as CAC Case No: 26/CAC/Dec02 limits the IDC's participation to issues specified in the order.

Anglo American plc[2] and the Competition Commission. The documents relate to an advisory opinion given by the Commission to Anglo concerning the implementation of an option that forms part of the aggregate of transactions to which this merger relates. The documents are presently not part of the record of the merger proceedings.

As our decision on the production of these documents will influence the manner in which these merger proceedings will continue, we were asked by all the participants to hear the application and rule on it as soon as possible.

Background

The parties to the merger notified the merger to the Competition Commission in June 2002. As part of the documents filed they are required to complete a merger notice known as form CC 4(2). This form requires the notifying parties to supply certain information to the Commission so that it can commence the task of investigating the merger. One of the items of information sought is a description of the transaction. In the form it is described in the following terms:

> *Schedule 4, question 11*
>
> *Describe the merger, including: the parties to the transaction; the assets, shares, or other interests being acquired; whether the assets, shares, or other interests are being purchased, leased, combined or otherwise transferred; the consideration, the contemplated timing for any major events required to bring about the completion of the transaction; and the intended structure of ownership and control of the completion of the merger.*

The parties to the merger duly completed this form and completed the answer to section 11 by stating that the merger amounted to a series of transactions, which in aggregate, together with the presence of one Anglo nominee on the Kumba board of directors, will give them control over Kumba for the purposes of the Act, given that one of the instances of control in the Act is when a person:

> *" has the ability to materially influence the policy of a firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)"*[3]

One of the transactions described, is one in terms of which Anglo has acquired an option to purchase from its controlling shareholder a company called Stimela,

[2] We will refer to the first respondent as Anglo although two entities of the group are involved in the merger proceedings, Anglo American plc and Anglo American Holdings Limited.
[3] Section 12(2)(g) of the Act

whose sole asset is a 10,5% shareholding in Kumba.[4] In the notification, this option, although exercised, is subject to a suspensive condition that approval for the merger be obtained in terms of the Act.

Subsequent to the Competition Commission filing its recommendation with the Tribunal in respect of the merger, but before the commencement of the hearing, Anglo sought an advisory opinion from the Commission as to whether it could exercise the option without fear of implementing the merger prior to approval. In terms of section 13A of the Act the parties to an intermediate or large merger may not implement that merger without the appropriate approval.

It is common cause that in soliciting that opinion Anglo provided certain information to the Commission. The Commission duly provided the parties with an advisory opinion in which it apparently concluded that the implementation of the option would not amount to prior implementation of the merger and hence, in its view, Anglo was entitled to exercise the option.

The Commission's advisory opinion, its internal documents that relate to any of its deliberations over that advice and the documents supplied by Anglo to solicit that advice, do not form part of the record of the Anglo / Kumba hearing.

The IDC states that it first learned of the existence of the advisory opinion through a firm of attorneys representing Stimela, in January 2003. Thereafter it sought a copy of the opinion from the Commission, who declined to furnish it citing, *inter alia*, an existing policy of not providing third parties with advisory opinions and the fact that it referred to confidential information supplied by the parties.

This has led to the current application by the IDC. The IDC seeks production of the following documents:

1. *All such documents as were furnished to the Second Respondent and/or to the Competition Tribunal in relation to the exercise of options by the First Respondent in the transaction between the First Respondent and Kumba Resources Ltd and/or of any transaction akin thereto.*

2. *The advisory opinion issued by the Second Respondent to Webber Wentzel Bowens regarding the exercise of options by the First Respondent and Kumba Resources Ltd and/or of any transaction akin thereto.*

3. *All correspondence and communications between the First Respondent (including their attorneys, Webber Wentzel Bowens) and Second*

[4] The transaction also entails some alternative scenarios not relevant to our purposes but its essence is that Anglo will acquire either direct or indirect control over Stimela's 10,5% stake in Kumba.

Respondent and/or this Honourable Tribunal, relating to the said advisory opinion.

4. *All minutes of meetings; internal memoranda and discussion notes as the second Respondent has in its possession relating to the aforesaid advisory opinion.*

The IDC presently limits production of the documents to its legal team in order that they can inspect the documents and then, if necessary, bring an application in terms of section 45 of the Act to either contest their confidentiality or for another appropriate order concerning access thereto. In so doing the IDC relies on the case of Competition Commission v Unilever [5] where the Court approved of this procedure in circumstances where the merging parties sought access to documents that formed part of the record but over which a third party competitor had claimed confidentiality.

The IDC argues that it requires the documents for the following purposes:

- *To identify the precise nature of the notified transaction that originally formed the subject matter of these proceedings, as well as Anglo's intentions in regard thereto; and/or*

- *To provide clarity as to whether or not the Tribunal has jurisdiction to entertain the application currently before it; and/or*

- *To reveal whether or not Anglo have implemented the very transaction that is currently being considered by the Tribunal; and/or*

- *To establish whether or not Anglo have misled the Competition Appeal Court in relation to the urgency of these proceedings; and/or*

- *To provide important insight into the attitude of the Commission in regard to the notified transactions and the value of the views that they have expressed in relation thereto; and/or*

- *To establish whether or not all of the jurisdictional facts in this matter are present; and/or*

- *To indicate whether or not the current proceedings are fundamentally flawed.*

The Commission and Anglo, who are the only respondents, oppose the application. At the hearing the Commission advised that it would no longer

[5] Competition Appeal Court: Competition Commission v Unilever plc and others, Case No. 13/CAC/Jan02.

oppose production of its opinion if it was ordered to do so, but it remained opposed to furnishing all minutes of meetings, internal memoranda and discussion notes relating to the advisory opinion.

Anglo remained steadfast in its opposition to the production of any of the documents. In opposing the application Anglo raised several objections many of which challenged the standing of the IDC to seek these particular documents as they fell outside the scope of its intervention as circumscribed by the Court.

In the light of the view that we take of this matter, we do not need to decide these issues. We find that the applicant has failed to establish that the documents would be relevant to merger proceedings. If they are not relevant to the merger proceedings they do not and should not form part of the record. We therefore need not decide whether the intervenor should be afforded access to the said documents.

Relevance of the documentation

We are presently considering the merger in terms of section 12A read with section 16(2) of the Act. We are not called upon to decide the issue whether or not the merger has been prematurely implemented in contravention of the Act, nor are we considering whether the merging parties have misled the Competition Appeal Court.

Given this limited mandate, documents will only be relevant if they relate either to the factors set out in section 12A or if they have a bearing on our jurisdiction to hear the merger.

The applicant has failed to make out a case that the documents sought will serve either purpose.

The issue central to all the documents sought is whether the Stimela transaction triggers the requirement to notify because, post implementation of the option, Anglo would control Kumba in some sense contemplated by the Act. The Commission has opined that it would not. Even if it turns out that it has been wrong on this point, and we hasten to add that there is no suggestion that it is, the documents would still not be relevant to the merger proceedings.

There is nothing on the papers to suggest, even remotely, that any of the documents could assist our function in assessing the current merger or establishing our jurisdiction. The status of the Stimela option is neutral; the parties' merger notice indicates that it is one of several transactions, which Anglo avers will give it control over Kumba. The parties are not seeking to evade their obligation to notify, so that the status of a preparatory step on the road to control does not presently concern us.

The IDC has sought to deal with the difficulties around relevance by raising several arguments.

It first argues that because it has not yet had sight of the documents, which may be relevant, its legal team ought to be permitted a 'little peek' so that they can make that determination.

The question then is if the IDC has failed on its own papers to establish that the documents are relevant, should it be permitted the opportunity to look at them in case they prove to be.

The IDC argues that no harm will come about if it is allowed to have a "peek". Anglo, and to a lesser extent, the Commission, argue that harm will be experienced if, without establishing a basis, a third party is able to ask for an order for access to information otherwise considered restricted in terms of the Commission's rules.[6]

Whilst we are in the dark as to the exact confidentiality concerns relating to the disputed papers, as neither Anglo nor the Commission have been very forthcoming on this point, it is for the applicant to first establish their relevance. And, as the applicant has failed to do so, we do not need to proceed further in this enquiry.

The applicant next argued that a basis for ordering its legal representatives to have sight of the documents is the concern that we should have about contradictory explanations that were tendered by the Commission and Anglo concerning the advisory opinion. As we understand this argument, it is that if we are made suspicious about the contents of the documents, as a result of contradictory or unsatisfactory explanations from the respondents, we should be inclined to infer the possibility of their relevance and order their production. Even if this argument is tenable as a legal proposition, which we need not decide, the applicant has failed to establish a factual basis for us to draw this inference. The inconsistencies alleged are either a result of an erroneous or incomplete reading of the papers. In our view, both Peter Arthur and Zolile Ntukwana, the respective deponents for Anglo and the Commission, give a consistent explanation of the contents of the documents.

On page 60 of the record Peter Arthur states that:

> *"The advisory opinion goes to the implementation of the Stimela option, an issue which is irrelevant to these proceedings."*

[6] See Rule 15 of the Commission' rules which classifies five classes of documents as restricted. Anglo argues that all the documents sought form part of one of these classes and that access to them is accordingly limited to the circumstances contemplated in the Rule which, according to it, do not apply in the present case.

And on page 102 of the record Zolile Ntukwana states that:

> *"It is stated that it was understood by the Competition Commission that Anglo exercised an option to purchase certain Stimela shares, which would entitle Anglo to acquire a 10.5% shareholding in Kumba."*

In a letter to the IDC dated 19 February 2003, page 33 of the record, Ntukwana stated:

> *"The Commission did not receive information with regard to the specific entities involved in the option concerned, except that such exercise would not confer control in any form contemplated in the Competition Act."*

At best for the IDC, the Commission's claim that it was not informed of the identity of the parties to the option might be inconsistent with Arthur's assertion that the advisory opinion dealt with the exercise of the Stimela option – yet the two could also be read consistently, i.e. that the size of an option equivalent to the Stimela option was disclosed, but not the identity of the other party. But even if there has been an inconsistency it is not sufficiently material as to cause one to raise one's eyebrows. In our view there is no material inconsistency in the versions of the respondents. Nor is it of any significance that Anglo may have in earlier applications viewed the Stimela option as the transaction that triggered a change of control. They are entitled to seek an opinion as to whether it would, and having being advised otherwise, to revise their view. If they are wrong on this, the issue becomes one of premature implementation, not an issue, as we have said, relevant to the merger proceedings.

The IDC has also argued that even if, from their content, it cannot establish that the documents are relevant, the fact they have been referred to in the proceedings in other documents and testimony has made them relevant. For this purpose they rely on Rule 35(11) of the High Court Rules, which states:

> *The Court may, during the course of any proceeding, order the production by any party thereto under oath of such documents or tape recordings in his power of control relating to any matter in question in such proceeding as the court may think meet, and the court may deal with such documents or tape recordings, when produced, as it thinks meet.*

Before dealing with the possible application of the said High Court Rule, it will be convenient to refer to the provisions of Rule 55 of the Competition Tribunal Rules.

Rule 55 of the Competition Tribunal Rules provides as follows:

55. Conduct of hearings

(1) *If, in the course of proceedings, a person is uncertain as to the practice and procedure to be followed, the member of the Tribunal presiding over a matter-*

(a) *may give directions on how to proceed; and*

(b) *for that purpose, if a question arises as to the practice and procedure to be followed in cases not provided for by these Rules, the member may have regard to the High Court Rules.*

The issue regarding the uncertainty "as to the practice and procedure to be followed" did not arise in this application. I was therefore not called upon to "give directions on how to proceed". Furthermore, it was not suggested that this was a case "not provided for" by the Competition Tribunal Rules. What I understood Counsel for the applicant to be saying was that, in exercising my powers in terms of section 54 of the Act, I could order the production of the documents sought in the same manner as a Court exercising its powers in terms of Rule 35(11) of the High Court Rules could. If, however, the intention was to invoke the provisions of Rule 55 of the Competition Tribunal Rules, I find that the said Rule is inapplicable to the current proceedings for the undermentioned reasons. Firstly, there was and still is no uncertainty as to the procedure and practice to be used. Secondly, the Act and the Competition Tribunal Rules do make provision for the practice and procedure to be followed in such an application. Thirdly, even if there had been some uncertainty with regard to the procedure and the practice to be followed, and I had to have regard to the said Rule 35(11), in the exercise of my discretion I would still not have ordered the production of the said documents. My reasons for so declining would have been based, firstly, on the irrelevance of the said documents to the merger proceedings and, secondly, on the impropriety of ordering the production of the said documents for the aforesaid purposes for which they were sought.

In general, one is not bound to follow this High Court Rule in Tribunal proceedings , nor do I believe that it should apply without proper justification to merger proceedings, which the Court has previously observed are non-adversarial in nature.[7]

In none of the references to these documents on which the applicant relies, either in the correspondence referred to or in the oral testimony, are the documents sought to be produced or used either to make a case on the merits or on jurisdiction. Indeed, they are simply referred to, *en passant*, to update the Tribunal on the fact that one of the options referred to in the CC (4) 2 form has

[7] See Competition Appeal Court Decision, Anglo South Africa Capital (Pty) Ltd and Others v Industrial Development Corporation of South Africa and Other, Case No: 26/CAC/Dec02, page 15.

since been exercised. We have not been told anything that indicates that this information requires to be tested. Given that we still have jurisdiction over the transaction, notwithstanding the implementation of the Stimela option, it does not seem to be relevant to the question of jurisdiction either. Of course, if we were simply dealing with an issue of unlawful prior implementation of the merger, the situation might be different. But we are not.

Another matter to consider is the possible applicability of section 54 of the Act. The material part of Section 54 provides as follows:

54. *Powers of member presiding at hearing*.

The member of the Competition Tribunal presiding at a hearing may-

(a) ……

(b) ……

(c) summon or order any person-

(i) *to produce any book, document or item* ***necessary for the purposes of the hearing****; or …*

(Emphasis supplied)

I was asked by the applicant to order the production of the advisory opinion and other documents. The applicant did not attempt to persuade me that the said documents were "necessary for the purposes of the hearing". Thus, in addition to finding that the said documents were not relevant to the determination of the merger, and for that very reason, I find that the said documents are not "necessary for the purposes of the hearing" and decline to order their production.

In conclusion, we find that the applicant has failed to prove that the documents it seeks to have produced are relevant to the issues that we have to decide. In the circumstances, the application fails.

Costs

The costs of the application are reserved.

_____ 9 July 2003

M.T.K. Moerane S.C. **Date**

Concurring: M. Holden, **N. Manoim**