IN THE COMPETITION APPEAL COURT

In the matter between

GOLD FIELDS LIMITED	**Appellant**
And	
HARMONY GOLD MINING COMPANY LIMITED	**1st Respondent**
THE COMPETITION COMMISSION	**2nd Respondent**

JUDGMENT:

DAVIS JP:

Introduction.

Appellant instituted an application in the Competition Tribunal ('the Tribunal') in which it sought an order to prevent first respondent from implementing a merger within the meaning of the Competition Act 89 of 1998 ('the Act').

The relief sought by appellant was couched in a notice of motion in the following terms:

'PART A

The applicant intends to make an application for an order in the following terms:

1. The applicant is hereby granted leave to bring Part A of this application as a matter of urgency, and any non-compliance by the applicant with the forms, time period and service provided for in the Rules for the Conduct of proceedings in the Competition Tribunal is hereby condoned.

2. Pending the final determination of the application set out in Part C below a temporary order in the following terms:

2.1 The first respondent (hereinafter referred to as the "first respondent" or "Harmony") shall be and is hereby interdicted and restrained from implementing a proposed transaction published by the first respondent on the Stock Exchange News Service ("SENS") on 18 October 2003 (the "announcement"), including but not limited to the taking of any steps designed to achieve the implementation of, inter alia, that portion of the transaction set out therein described as the "early settlement offer" (hereinafter referred to as the "early settlement offer" or the "transaction").

2.2 The first respondent shall be and is hereby interdicted and restrained from accepting the tender to it of any Gold Field shares or otherwise taking transfer of such shares in the share capital of the applicant as it may have accepted pursuant to the early settlement offer or otherwise.

2.3 The first respondent shall be and is hereby interdicted and restrained from voting, or otherwise exercising any rights attached to, any shares in the share capital of the applicant which it may have acquired pursuant to the early settlement offer or otherwise.

2.4 The second respondent (hereinafter referred to as the "second respondent" or "Norilsk") shall be and is hereby interdicted and restrained from voting, or otherwise exercising any rights attached to, any shares in the share capital of the applicant which it may hold, insofar as such votes are exercised in respect of or in connection with or such other rights pertain to any aspect of the transaction proposed to be implemented between the applicant and IAMGold Corporation Inc, a company registered and incorporated in accordance with the laws of Canada ("IAMGOLD"), the details of which were notified to shareholders of the applicant on 11 August 2004 (the "IAMGold" transaction").

3. The cost of this part A of the application be costs in part C, the main application.
4. Granting the applicant such further and/or alternative relief as this Honourable Tribunal deems fit.

PART B

The applicants intend to make application for an order in the following terms:

5. The applicant is hereby granted leave to bring Part B of this application as a matter of urgency, and any non-compliance by the applicant with the forms, time periods and service provided for in the Rules for the Conduct of Proceedings in the Competition Tribunal is hereby condoned.
6. That service of this Notice of Motion be effected on:

6.1 Each of the shareholders of the applicant as reflected in the applicant's register of members; and

6.2 Those persons named by the Central Securities Depositary Participants ("CSDPs") administering the sub-registers of the applicant being the beneficial holders of shares in the applicant, as reflected in the records of the CSDPS, (collectively the "applicant's shareholders") by publication of this order and the Notice of Motion, within 7 (seven) days of the date of this order, in each of the

Business Day, the Government Gazette, the Sunday Times, Rapport and Die Beeld.

7. That a copy of this Notice of Motion and the applicant's founding affidavit (together with the annexures thereto) shall be available, during normal business hours, prior to the hearing of the above Honourable Tribunal for the application in Part C hereof at the offices of the applicant's legal advisers, Edward Nathan and Friedland (Pty) Ltd (at the address reflected in Part A of this Notice of Motion). Further that, if requested, copies of such documents may be obtained, free of charge, on request, from the above named address.
8. That a subpoena, in terms of the draft subpoena attached to the founding affidavit to this Notice of Motion be issued.
9. That the costs of this Part B be costs in the cause of the application for the relief set out in Part C of this Notice of Motion.
10. Granting the applicant further and/or alternative relief.

PART C

The applicant intends to make an application for an order in the following terms:

11. The acceptance by and transfer of any shares in the share capital of Gold Fields (whether pursuant to the early settlement offer or otherwise) to and/or the exercise of any voting rights attaching to such Gold Fields' shares by Harmony prior to the approval by the competition authorities of the acquisition of 100% of the issued share capital of Gold Fields constitutes implementation of a notifiable merger prior to the approval thereof by the Competition Authorities and, as such, is

prohibited by the terms of the Competition Act (No 89 of 1998), as amended ("the Act").

12. Alternatively, the early settlement offer (as described in the announcement (which is attached to the applicant's founding affidavit marked NH1) constitutes a larger merger, which is required to be notified to the Competition Commission in terms of the Act.

13.The first respondent, alternatively the first and second respondents, jointly, are directed to notify the transaction to the third respondent as a large merger, in accordance with the requirements of the Act.

14.Pending the final approval, if any of the acquisition by Harmony of all of the shares in the share capital of Gold Fields or some of the shares in Gold Fields pursuant to the early settlement offer (with or without conditions) by the Competition Tribunal or the Competition Appeal Court in terms of the Act:

14.1 The first respondent (hereinafter referred to as the "first respondent" or "Harmony") shall be and is hereby interdicted and restrained from implementing a proposed transaction published by the first respondent on the Stock Exchange News Service ("SENS") on 18 October 2004 ("the announcement"), including but not limited to any steps designed to the implementation of, inter alia, that portion of the transaction set out therein described as "the early settlement offer" (hereinafter referred to as "the early settlement offer" or the "transaction").

14.2 The first respondent shall be and is hereby interdicted and restrained from accepting the tender to it of any Gold Fields shares or otherwise taking transfer of such shares in the share capital of the applicants it may have accepted to the early settlement offer or otherwise.

14.3 The first respondent shall be and is hereby interdicted and restrained from voting, or otherwise exercising any rights attached to, any shares in the share capital of the applicant which it may have acquired pursuant to the early settlement offer or otherwise.

14.4 The second respondent (hereinafter referred to as the "second respondent" or "Norilsk") shall be and is hereby interdicted and restrained from voting, or otherwise exercising any rights attached to, any shares in the share capital of the applicant which it may hold, insofar as such votes are exercised in respect of or in connection with or such other rights pertain to any aspect of the transaction proposed to be implemented between the applicant and IAMGold Corporation Inc, a company registered and incorporated in accordance with the laws of Canada ("IAMGold"), the details of which were notified to shareholders of the applicant on 11 August 2004 ("the IAMGold transaction").

15. The cost of this application, including the costs of the application set out in Parts A and B above, shall be paid jointly and severally by the first respondent, and by such other respondents as oppose this application, the one paying the others to be absolved.

16. Granting the applicant such further and/or alternative relief as this Honourable Tribunal deems fit.'

On 18 November 2004 the Tribunal dismissed the application. It is against this decision that appellant has appealed to this Court.

The Factual Background.

The facts can be briefly summarized thus:

In March 2004 Norimet Ltd, the wholly owned subsidiary of Norilsk, acquired 20,03% shareholding in appellant. On 11 August 2004 appellant announced that it had entered into an agreement with Canadian mining company, IAMGold Corporation ('IAMGold'). In terms of this agreement, appellant and IAMGold agreed to a pooling of appellant's assets located outside SADC area with the assets of IAMGold. In consideration for the purchase of these assets, IAMGold would issue shares to appellant resulting in appellant owning about 70% of IAMGold. Appellant's board of directors would be required to put this arrangement to its shareholders for approval by a simple majority at a shareholders meeting on 7 December 2004. Norilsk considered that the proposal would result in a significant diminution of value for shareholders as a whole. It conveyed its concerns about this proposal to appellant's management but to no avail. Accordingly, it announced that it would cast votes against the transaction.

On 16 October 2004 first respondent approached appellant's board of directors with a proposal for a merger between the two companies. In terms of this proposal, first respondent would acquire the entire issued share capital of appellant in exchange for the issue to appellant's shareholders of new shares in first respondent. Appellant's board asked for further particulars but before these were forthcoming, on 18 October 2004 first respondent made a public announcement of its bid for appellant. A circular was issued on the same day.

The offer appears to have been structured in two separate stages. In the first stage, which first respondent has called the early settlement offer, it offers to acquire up to 34,9% of the share capital in appellant. First respondent will not acquire any more shares at this stage and, if more shares are tendered, a pro rating mechanism will be used to scale back the shares accepted to this number. The only conditions attaching to this offer are that certain resolutions are to be passed at a general meeting of first respondent. The early settlement offer was open for acceptance from 20 October 2004 and closed for acceptance on 26 November 2004. Subsequent to this stage, the subsequent offer commences the day after the consideration is settled in respect of the early settlement offer. According to the circular this date is set, as being at the earliest, 29 November 2004 but no later than 3 December 2004. The subsequent offer which is open for acceptance until 4 February 2005 is subject to a number of conditions, ***inter alia*** that first respondent receives valid acceptances for over 50% of appellant's entire issued share capital, the proposed IAMGold transaction is not implemented for whatever reason including that the shareholders do not approve it at the general meeting on 7 December 2004 and that the merger is approved by the relevant regulatory authorities including the Competition authorities.

The Tribunal's decision.

When the matter came before the Tribunal, appellant contended that the early settlement offer amounted to an acquisition of control of appellant which control would be implemented at the general meeting on 7 December 2004 and would be in contravention of section 13 A of the Competition Act. The essence of the relief sought by appellant was an interdict to prevent the implementation of the early settlement offer on the grounds that the change in control had not been approved by the relevant Competition authorities. The Tribunal held, that on a balance of probabilities, it had not been established that the two offers formed part of a single offer to acquire control. It further found that the early settlement offer alone did not amount to a change of control nor could it be said, on the basis of the evidence placed before the Tribunal, that any arrangement or undertaking between Norilsk and first respondent established the existence of joint control. For these reasons the application was dismissed.

On 24 November 2004 an appeal against this decision was heard by this Court. The matter was enrolled on the basis of extreme urgency. The appeal was lodged on 18 November 2004. The Court received the record on Friday 19th November. Appellant's heads were received at 15h00 on 22 November and respondents' heads at 9.00 a.m. on 23 November 2004. As was made clear to counsel at the hearing the Court was not in the position, for obvious reasons given the complexity of the matter, to deliver a judgment before 26 November 2004 when the early settlement offer expired. Given the urgency however the following order was handed down on 26 November 2004:

‘Having read the papers and having heard counsel we make the following order:

1. Pending the final approval of the acquisition by Harmony of all of the shares in the share capital of Gold Fields or some of the shares in Gold Fields pursuant to the early settlement offer (with or without conditions) by the Competition Tribunal or the Competition Appeal Court in terms of the act:

1.1 The first respondent shall be and is hereby interdicted and restrained from voting or otherwise exercising any rights attached to, any shares in the share capital of the appellant which it may have acquired pursuant to the early settlement offer or otherwise.

2. The first Respondent is ordered to pay the costs of the appeal which costs include the cost of two (2) counsel.’

The following are the reasons for this order.

Jurisdiction to grant interdictory relief.

The application brought by appellant concerns the question as to whether the transaction is notifiable as being a large merger as defined in section 12 of the Act. If it is found to be a large merger, the Tribunal is required to approve the merger or to prohibit implementation thereof in terms of section 16(1) of the Act. Assuming that the proposed transaction in this case amounts to a large merger and that the Tribunal is required to approve thereof, the question arises as to the powers of the Tribunal in circumstances where a party intends to implement a large merger in contravention of the Act, particularly S 13 A thereof.

Section 13 A provides: 'The parties to an intermediate or large merger may not implement that merger until it has been approved with or without conditions, by the Competition Commission in terms of section 14(1)(b), the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17.'

Mr Unterhalter, who appeared together with Mr Wilson on behalf of first respondent, conceded that the only section which could conceivably be employed as a source of the Tribunal's power to grant interim relief was section 27(1)(d) of the Act which provides that 'the Competition Tribunal may make any ruling or order necessary or incidental to the performance of its functions in terms of this Act'. According to Mr Unterhalter, section 49 C of the Act expressly provides for interim relief but only in respect of an alleged prohibited practice. There is no similar provision in respect of mergers. Given this specific provision, Mr Unterhalter concluded that the legislature could not be understood to have created, in addition to this specific provision, a wide ranging residual power to grant interim relief which could well render S 49C redundant.

This conclusion is not justified by the literal reading of section 27(1)(d) nor does it appear to be a reasonable interpretation of the phrase 'necessary or incidental' to the powers of the Tribunal in the case of a merger. For example, if a party threatens to implement a large merger in contravention of section 13 A of the Act, as Mr Fine who appeared together with Mr Maenetje on behalf of third respondent noted, it would be counter productive and cost ineffective were the Tribunal to determine that a merger had taken place, prohibit such merger but then be unable to give effect to that order because of the absence of a provision empowering it to grant interdictory relief. If, in exercising its merger powers, the Tribunal found that a proposed transaction constituted a merger and the parties were intent on implementation, say before notification, it would be a legislative curiosity if the Tribunal did not have the power to grant an appropriate order to prevent a breach of the Act in circumstances where the breach was so flagrant. This implication could never have been the intention of the legislature.

This conclusion is supported by the judgment in **Seagram Africa (Pty) Ltd v Stellenbosch Farmers Winery Group Ltd and Others** 2001(2)SA 1129 (C). In this case, applicant applied for an interim interdict to restrain respondent from implementing a large merger until approval had been obtained in terms of the Act. The application was brought their application before the High Court rather than before the Tribunal. **Jali J** held that the High Court had no jurisdiction to grant such interdict. He held that the Tribunal had jurisdiction to grant the relief sought by the applicants for

> ‘there is nothing which prohibits a party which has been aggrieved by the action of another party to approach the Tribunal of the Court to move an application for an interdict. Section 27(1)(c) of the Act gives the Tribunal the right to ‘adjudicate in relation to any conduct wherever in terms of chap 2 or 3’. The duty given to the Tribunal to adjudicate does not exclude the duty to grant an interdict. The question is what conduct is prohibited in terms of chapter 3 as contemplated in this section? I am of the view that as chap 3 deals with mergers, conduct which could be prohibited in terms of chap 3 would, amongst others, be an attempt to proceed with a merger without notifying the commission in terms of s 13, when a

> merger falls squarely within the definition of the merger defined in s 12. If that is the case, then any aggrieved party would be entitled to approach the Tribunal to move such an application. In my view, the absence of a clear position in the Act so that the Tribunal can grant interdicts is not a shortcoming as the applicants contended.' (at 1140 G-J).

The test as to the existence of 'necessary implication' was set out in **Rennie NO v Gordon & Another NNO** 1998(1) SA (A) at 22 F as follows: 'the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands' In the present case, the reading suggested by first respondent would render the Tribunal powerless to prevent a violation of the Act. In certain cases the conduct could be penalized later in terms of the divestiture provision, S. 60, but in others a violating party would be able to win a war of position with impunity. In my view, the reading of the Tribunal's powers as set out in **Seagram's** case**, supra** is correct and is thus dispositive of the jurisdictional issue.

Requirements for Relief

During the hearing before the Tribunal a considerable debate took place regarding the nature of the relief being sought by appellant and in particular whether the relief sought was final relief or that of an interim nature. Mr Gauntlett who appeared together with Mr van der Nest and Mr Cockrell on behalf of appellant, did not press the issue of interim relief before this Court. The debate between the parties took place on the basis that the application constituted a prayer for final relief.

The requirements for a final interdict are trite law. They are:

(a) A clear right on the part of applicant;

(b) An injury actually committed or reasonably apprehended; and

(c) The absence of any other satisfactory remedy to the applicant.

See **Setlogelo v Setlogelo** 1914 A D 221.

Appellant contends that the proposed transaction is a merger that first respondent intends to implement in contravention of section 13 A(1) of the Act. If the merger would have to be implemented without approval, Mr Gauntlett submitted that appellant itself, as the target firm, would have also contravened the Act.

In order to analyse whether the proposed transaction contravened section 13 A(2) of the Act, a number of issues require analysis namely

1. was there an obligation on the part of first respondent to notify the Competition Commission of the transaction in terms of section 13 A(1);
2. Has there been a proposed merger in the present case; and
3. when does section 13 A(3) namely the provision which prohibits parties to a large merger from implementing that merger until approval has been given by the Competition Authorities.

Notification of the Merger.

Mr Unterhalter conceded that there was an obligation in terms of section 13 A(1) read with section 13 A(3) for first respondent to notify and obtain approval of its proposed merger before the merger was implemented. That conclusion clearly followed from the definition of large mergers in section 11 of the Act which provides that 'for purposes of this Chapter..…a large merger means a merger or proposed merger with a value at or above the higher threshold established in terms of sub-section (1)(a)' (my emphasis). First respondent's argument turned on two related issues, namely the time at which first respondent was so obligated to notify and that, at best for appellant, that obligation commenced after completion of the early settlement offer.

Once a party proposes a large merger, it must notify the Commission of that merger in the prescribed time and form. From the definition of 'acquiring firm' and 'target firm' it appears that the notification in terms of S 13 A(1) is the 'transaction' in terms of which control will be acquired. This interpretation gives proper meaning to the pre notification procedure, a point acknowledged by the Tribunal in **Bulmer SA (Pty) Ltd and Another v Distillers Corporation SA (Pty) Ltd** (Case 94/FN/ Nov.00) at p.17: 'Notification is intended to be as extensive as possible; hence the breadth of the language in section 12. Once a transaction presents the essential features of a merger it is notifiable. If this were not the case, there would be a danger that mergers that might have adverse effects might go undetected because the jurisdictional barriers in terms of section 12, had been set too high.'

The implication of this procedure is, not that the party cannot continue with its proposal, to effect a merger but that it will be prohibited in terms of section 13 A from implementing the merger until the latter has been approved.

Has there been a proposed Merger?

The question then arises as to whether, on the facts, there was a proposal to implement a transaction that, when so implemented, will involve the acquisition of control by first respondent either on its own or with another party over the whole or part of the business of appellant. If the answer is positive, then, on the basis of S 13 A(1) there is an obligation to notify.

Appellant contends that as from 18 October 2004, it was clear that first respondent was intent on effecting a merger between itself and appellant. The press releases and correspondence generated by first respondent are critical to an evaluation of this submission. I shall cite three of the key documents.

On 18 October 2004 the following announcement was published by the JSE News Service:

> ‘Announcement regarding a potential merger between Harmony and Gold Fields Limited (Gold Fields)
>
> 1.Introduction.
>
> The board of Harmony hereby announces the terms of a proposed merger between Harmony and Gold Fields (the proposed merger), under which Harmony proposes

to acquire the entire issued share capital of Gold Fields in exchange for the issue to Gold Fields shareholders of new shares in Harmony.

Harmony has conveyed the terms of the proposed merger to the board of Gold Fields and is hopeful that the proposed merger will be recommended by the directors of Gold Fields. However, in view of the proposed transaction between Gold Fields and IAMGold Corporation (the proposed IAMGold transaction), which Harmony considers to be contrary to the best interests of Gold Fields shareholders, Harmony believes that Gold Fields shareholders should be afforded the opportunity to decide on the merits of the proposed merger at the earliest opportunity. To this end, Harmony will shortly post to Gold Fields shareholders an offer document containing the detailed terms and conditions of the proposed merger.

The proposed merger is conditional, inter alia, on the proposed IAMGold transaction not proceeding and the approval of the proposed merger by Harmony shareholders.

The proposed merger will be implemented in accordance with the rules of the Securities Regulation Panel (SRP) and the US Securities and Exchange Commission (SEC).

4.Structure of the proposed merger.

Harmony has designed a mechanism to allow Gold Fields shareholders to realize, within as short a time period as reasonably practicable, the benefit of the premium inherent within the proposed merger. However, in order to allow all Gold Fields shareholders to benefit from this mechanism, Harmony must comply with the regulatory requirements in the United States of America (US). As a result, the proposed merger is to be structured as two immediately consecutive offers, each subject to the respective conditions precedent set out in paragraph 13.

Through the making of this announcement, Harmony has irrevocably committed to offer to acquire the entire issued share capital of Gold Fields in the following manner:

- early settlement offer: an initial offer to acquire up to 34.9% of the entire issued share capital of Gold Fields on the basis set out below, not subject to the tender of any minimum number of shares (the early settlement offer); and
- subsequent offer: an immediate follow-on offer on the same terms as the early settlement offer for the balance of the entire issued share capital of Gold Fields not already acquired by Harmony under the early settlement offer (the subsequent offer). The subsequent offer will be subject to the conditions precedent set out in paragraph 13.2'

13.2 With regard to the subsequent offer:

13.2.1 the passing and, where applicable, registration of the Harmony resolutions;

13.2.2 Harmony receiving valid acceptances of the subsequent offer from Gold Fields shareholders in respect of in excess of 50% of the entire issued share capital of Gold Fields (including those Gold Fields shares settled by Harmony under the early settlement offer and those Gold Fields shares in respect of which Norilsk has irrevocably undertaken to accept the subsequent offer);

13.2.3 The proposed IAMGold transaction not being implemented for whatever reason including, **inter alia**, Gold Fields shareholders failing to approve the proposed IAMGold transaction at the Gold Fields general meeting;

13.2.4 The proposed merger being approved by the South African Competition Authorities under the Competition Act, 1998 (Act 89 of l998), as amended;

13.2.5 The registration statement with respect to the Harmony consideration shares in the US offer having been declared effective by the SEC; and

13.2.6 The approval of all regulatory authorities whose approval is required for the implementation of the proposed merger.'

On 19 October 2004 Ms Jean Meijer, the attorney acting on behalf of first respondent, wrote to the Competition Commission. The letter was entitled "Application for permission to file separate notification of the large merger in terms of section 13 A(1) read with Rule 28". Ms Meijer writes:

> '1.We act for Harmony Gold Mining Company Limited which has made offers in terms of section 440 of the Companies Act….to the shareholders of Gold Fields Ltd….If successful, the offer will result in Harmony acquiring in excess of 50% of the entire share capital of Gold Fields ("the merger") thereby acquiring control as envisaged in section 12(2)(a) of the Competition Act…
>
> 2. In order to comply with USA regulatory requirements there will be two immediate consecutive offers. Harmony has irrevocably undertaken to acquire the entire share capital of Gold Fields in the following manner –

2.1Early settlement offer – an initial offer to acquire up to 34.9% of the entire issue share capital of Gold Fields; and

2.2 Subsequent offer – an immediate follow-on offer on the same terms as the early settlement offer for the balance of the issued share capital of Gold Fields not already acquired by Harmony under the early settlement offer.'

In a letter to the shareho lders of appellant on 20 October 2004 first respondent enclosed 'details of a proposed merger and urged shareholders to accept the proposed merger with Harmony'. The second paragraph of the letter of the Chief Executor of first respondent, Mr Bernard Swanepoel to appellant's shareholders contains the following passage:

'Harmony has conveyed the terms of the proposed merger to the Board of Directors of Gold Fields and it is hopeful that the proposed merger will be recommended by the Gold Fields Board. However, in view of the proposed disposal by Gold Fields of its international asset portfolio IAMGold, which Harmony considers to be contrary to the best interests of Gold Fields shareholders, Harmony believes that Gold Fields shall thus be afforded the opportunity to decide on the merits of the proposed merger at the earliest opportunity.'

The Tribunal adopted the approach that there was no need to notify. It reasoned thus:

'Whilst intention may have some evidential value in deciding whether a transaction is a merger it is by no means decisive of the issue. A good many buyers of shares may have ambitions to control a firm one day and if all purchases

> were to be notified as mergers once they have assumed this intent, any number of people would be jamming the highways to Pretoria to notify mergers to the Commission. Intent in the 'air' does not suffice.
>
> Whilst Gold Fields' case is perhaps stronger on the mechanics of the transaction inasmuch as the offer documentation purports to facilitate a smooth passage from the early settlement offer to the final offer, we nevertheless find that the chain between the transactions is broken for several reasons and that, accordingly, control is not effected at this, the first stage. Even if Harmony receives all of its acceptances at the first stage it does not follow that the second stage is inevitable. Whilst the second offer is automatic, acceptance of it is not, and many things may happen between now and then, including the possibility of movement in both share prices which might lead to arbitrage selling by holders or opportunistic squeezes for a better offer.'

But this conclusion is exactly the opposite of what it claims; it has elevated form over substance. The cumulative weight of the documents cited is a crystal clear indication of the value of the transaction – to effect a merger. This is not about day dreams to control a company, - the prospect and substance of first respondent's is publically announced.

Mr Unterhalter submitted that there was no dispute that the legal structure initially contemplated by first respondent for its bid was an offer which included an early settlement option Only on 15 October 2004 was the bid restructured into two separate and discrete offers, being the early settlement offer and the subsequent offer. This revised structure was adopted in order to comply with the regulatory requirements in the

United States, in terms of which no offer can contain an option which would allow early settlement of some shares before all the conditions of the offer were satisfied. The reason why 34,9% of the shares was set as the maximum percentage of shares that would be subject to the early settlement offer was because the mandatory offer requirements of the Securities Regulation code on Takeover and Mergers (SRC) are triggered when 35% or more of the company's shares are acquired.

Thus the transaction might well have been structured to comply with the regulatory requirements of the United States is one consideration. That the various announcements and correspondence generated by first respondent amounted to a proposed merger is a separate issue.

I did not take Mr Unterhalter to contend to the contrary. His fundamental objection to the relief sought by appellants turned on the question as to whether the acquisition by first respondent of 34,9% of the shares of appellant constituted a merger as defined in s 12 of the Act. In other words, Mr Unterhalter submitted that, even if the Tribunal had the power to grant intermediate relief claimed by appellant, this relief would be premature because it had not made out a case that the early settlement offer would result in an acquisition of control of appellant. In terms of section 12(1)(a) of the Act a merger occurs when a firm 'acquires or establishes' control over another. According to Mr Unterhalter, it is necessary for appellant to show that the transaction involved the acquisition or establishment of control of appellant. If the early settlement offer did not produce this result, then the transaction could not constitute a merger for the purpose of the Act and no relief could be obtained by appellant.

In its written heads, appellant adopted the approach that the proposed transaction involved a single transaction to acquire 100% of the shares in appellant. In support of this submission, it referred to the SENS announcement, the circular and the answering affidavit of Mr Grobicki in support of the submission that first respondent had embarked on a course of conduct, the effect of which would be to acquire up to 100% of the shares in appellant. Accordingly, any attempt to distinguish between the early settlement offer and the subsequent offer was irrelevant. On the evidence, first respondent's contention that there were in fact two discrete transactions could not be sustained. In his answering affidavit Mr Grobicki said 'The early settlement offer and the subsequent offer are two connected transactions in Harmony's overall objective to acquire control of Gold Fields'. In the registration statement filed at the Securities Exchange Commission in Washington DC, a copy of which was annexed to the answering affidavit the following appeared:

> 'The purpose of US offer and the South African offer is to acquire control of Gold Fields. It was the present intention of Harmony, as soon as practicable after the consummation of the US and South African offers, the further offers described below and the exercise of the irrevocable undertaking by Norilsk, to seek maximum representation on the board of directors of Gold Fields. Harmony also irrevocably commenced to launch further offers in the United States and South Africa for the remainder of the Gold Fields shares….. During the US offer and the South African offer, we will continue to review, on the basis of publicly available information, the business and operations of Gold Fields and evaluate various

> business strategies and operational initiatives that we may implement in the event that we acquire control of Gold Fields and to the extent we believe them appropriate. In addition, if and to the extent that we acquire control of Gold Fields, or otherwise obtain access to the books and records, management, employees and other resources of Gold Fields, we intend to conduct a detailed review of Gold Fields, business operation, assets, financial projections, budgets, strategic and business goals, legal and governance structures, properties, dividend policy, capitalization, capital structure, management and personnel and consider and determine what, if any, future actions would be desirable in light of the circumstances that then exist. For example, we may, among other things, plan to make changes in Gold Fields business facility, locations, corporate structure, capital structure, boards of directors and/or management, marketing strategies or dividends policy. If Harmony eventually acquires the necessary voting rights then such action is desirable in light of the circumstances that then exist, Harmony also reserves the right to merge Gold Fields into Harmony'.

There is considerable authority for the proposition that our law examines the substance of the transaction and 'will not be deceived by the form of the transaction: it will render aside the veil in which the transaction is wrapped and examine its true nature and substance' **Kilburn v Estate Kilburn** 1931 AD 501 and 507. In **Dadoo Ltd and Others v Krugersdorp Municipal Council** 1920 AD 530 and 547 **Innes CJ** stated

> '[the] rule is merely a branch of fundamental doctrine the law regards the substance rather than the form of things – the doctrine common, one would think,

> to every system of jurisprudence and conveniently expressed in the maxim plus **valet quod agitur quam quod simulate concipitur'**. This approach followed an earlier judgment of **Innes J** (as he then was) in **Zandburg v Van Zyl** 1910 AD 302 at 309 in which he said: 'The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. If the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances, that the same object might have been obtained in another way will not necessarily make the arrangement other than it purports to be. The enquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.'

The test therefore is not what the contract purports to arrange but what constitutes the intention of the parties to the agreements in question. See Erf 3183/1 Ladysmith (Pty) Ltd and Another v C I R 1996(3) SA 942(A) at 953 B. If as Mr Grobicki contends in his answering affidavit, the early settlement offer and the subsequent offer are indeed two connected transactions, and that first respondent's overall objective was to acquire control of appellant, then it can be taken that the intention of first respondent albeit shaped in two separate elements representive composite transaction to gain control of appellant. The persuasive nature of this argument notwithstanding, appellant's submissions before this Court concentrated on the effect of the early settlement offer.

Initially appellant's argument was premised on the fact that the early settlement offer, if successful, would result in first respondent acquiring 34.9% interest of appellant's shares, thereby gaining control of appellant. However, at the hearing Mr Gauntlett concentrated his argument exclusively on the effect of the early settlement offer together with the relationship between first respondent and Norilsk; that is whether joint control would be achieved by the two parties pursuant to the early settlement offer.

This argument was based on significant part on the undertaking given by Norilsk to first respondent.

On 16 October 2004 the following irrevocable undertaking was given to first respondent by Norilsk:

> ‘2 We currently hold directly and/or indirectly 98 467 758 Gold Fields shares (‘Specified Shares’).
>
> 3 We hereby irrevocably and unconditionally-
>
> 3.1 confirm that we are the beneficial holder of the Specified Shares, are entitled to exercise all voting rights attaching to the Specified Shares and are able to transfer unencumbered title in and to the Specified Shares to Harmony;
>
> 3.2 undertake, subject to the provisions of this letter –
>
> 3.2.1 not to dispose of or in any way encumber all or any of the Specified Shares or grant any right or restriction in connection with the Specified Shares;
>
> 3.2.2 to vote all of the Specified Shares against the proposed sale by Gold Fields of its non-South African aessets to IAMGolf Corporation (‘IAMGold’);

3.2.3 not to accept the early settlement offer (as defined in the Announcement) in respect of any of the Specified Shares; and

3.2.4 provided that the Proposed Offer is subject to and made on the same terms and conditions as the Terms and Conditions, to accept the subsequent offer (as defined in the Announcement) in respect of all of the Specified Shares in accordance with the terms of the proposed Offer, once the approvals required from the South African Competition Authorities and the South African Reserve Bank and any other required regulatory approvals to enable the Proposed Offer to be implemented in accordance with its terms, are granted without conditions the effect of which would be materially detrimental to the value of the enlarged group or are granted subject to such material conditions which we confirm to Harmony in writing are acceptable to us, which acceptance shall not be unreasonably withheld or delayed.

4 We are advised that Harmony may wish to implement the Proposed Offer by way of a scheme of arrangement in terms of section 311 of the Companies Act proposed by Harmony between Gold Fields and Gold Fields shareholders (other than Harmony)((‘Scheme of Arrangement’). We further hereby irrevocably and unconditionally undertake, subject to the provisions of this letter, in such event, to vote all of the Specified Shares in favour of the Scheme of Arrangement. Provided Harmony implements the Scheme of Arrangement on the Terms and Conditions, it being acknowledged and accepted that the mechanics of such

implementation will differ from the mechanics of the implementation of the Proposed Offer.

5. The undertakings contained herein shall remain in full force and effect until the earliest of –

5.1 20 May 2005;

5.2 30 days after the last of the approvals referred to in paragraph 3.2.4 has been obtained;

5.3 the date upon which the Proposed Offer lapses as a result of the non-fulfilment of any condition precedent to which the Proposed Offer is subject; and

5.4 the date upon which the Proposed Offer is withdrawn for any reason.

6. The undertakings contained herein will lapse and no longer be of any further force or effect if –

6.1 the Proposed Offer is not made on or before 1 November 2004; or

6.2 Harmony fails to take all reasonable steps required to implement the Proposed Offer, including but not limited to calling a meeting of shareholders of Harmony, making any regulatory filings and mailing offer documentation to Gold Fields shareholders within a reasonable time period.'

Mr Gauntlett noted that the undertaking given was to the effect that Norilsk would not dispose of or encumber its shares in appellant, it would vote all of its shares in appellant against IAMGold transaction, it would not accept first respondent's early settlement offer and it would accept its subsequent offer in due course.

On this basis Mr Gauntlett submitted that the acquisition by first respondent in terms of the early settlement agreement together with the irrevocable undertaking provided by Norilsk in respect of its shareholding of 20,03% would effectively give first respondent control over 54.93% of the issued share capital of appellant at the meeting on 7 December 2004 which had been called to vote on the proposed sale by appellant of its non South African assets to IAMGold.

There are two legal bases relied upon by appellant to support its argument concerning the effect of the early settlement offer upon the control of appellant. In terms of section 12(2)(b), a person controls a firm if that person is entitled to vote a majority of the votes that may be cast in a general meeting of the firm or has the ability to control the voting of the majority of those votes, either directly or through a controlled entity of that person. Secondly, section 12(2)(g) provides that "a person controls a firm… .if that person has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraph (a) to (f)."

In dealing with the argument that the acquisition of 34,9% of the shares of appellant together with the irrevocable undertaking provided by Norilsk would provide first respondent with control in terms of section 12(2)(g) the Tribunal concluded:

> ‘Control for purposes of the Competition Act is relevant to the controller’s ability to effect the behaviour of the control firm in some firm (sic). For instance section 12(2)(g) refers to the fact that one has the ability to materially influence the policy of the firm. This kind of evidence is entirely lacking in the applicant’s papers – there is no allegation of the existence of further agreements or even the fact that they will have a common incentive to control jointly. Whilst Gold Fields is entitled to be incredulous at the discussion between Harmony and Norilsk would not have gone further than the agreement on the undertaking, we must, in the absence of any other evidence accept respondents unequivocal version on the facts’.

In seeking to support this finding, Mr Unterhalter submitted that there were two elements in the threshold provided in section 12(2)(g); not only must the person be held to exercise influence over the firm but that person must be able to do so in the manner of a controller. Thus material influence alone is not sufficient to establish control. Control must amount to decisive influence as exercised by a controller of a firm. In this connection, Mr Unterhalter referred to the EC notice on the Concept of Concentration under the Merger Regulations and particularly paragraphs 32 and 35 thereof which provide

> ‘<u>Very exceptionally</u>, collective action can occur on a de facto basis where <u>strong common interests exist</u> between the minority shareholders <u>to the effect that they would not act against each other in exercising their rights in relation to the joint venture</u>….

> In the absence of strong common interests…. the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control Where there is no stable majority in the decision-making procedure and the majority can on each occasion be any of the various combinations possible amongst the minority shareholders, it cannot be assumed that the minority shareholders will jointly control the undertaking.' (my emphasis)

Mr Unterhalter submitted that the significance of these paragraphs is that they all involve collective action that produces a lasting change in the control structure of the firm in question. This would be the case even in respect of veto rights over specific decisions which may confer joint control. Accordingly, Mr Unterhalter submitted that the mere showing of a consistent voting pattern or even co-operation between shareholders was insufficient to establish joint control for the purposes of competition law. The common interest must be such that the parties will always or at least almost always vote together on all material decisions.

In my view, there is no textual basis for distinguishing between short and long term control particularly when the wording of section 12(2)(g) is carefully considered. This conclusion is well illustrated by the facts in the present case. It is common cause that were first respondent to acquire 34.9% of the shareholding of appellant, it together with Norilsk pursuant to the latter's irrevocable undertaking, would be able to defeat IAMGold a motion in favour of the transaction. This transaction has been presented by appellant to its shareholders as being of critical importance to the future of appellant.

The rationale for this transaction is set out in a cautionary announcement of 11 August 2004 thus:

> 'Gold Fields has established a significant portfolio of non-SADC assets, which produced approximately 1.4 million gold equivalent ounces on an attributable basis for the financial year ended 30 June 2004. As at 30 June 2003, the attributable proven and probable reserves for these assets totalled approximately 11.2 million ounces of gold and the attributable mineral resources represented approximately 26.4 million ounces of gold. Gold Fields believes that the transaction presents an opportunity to add further high quality production of approximately 0.4 million ounces per annum through the consolidation of IAMGold's and Gold Fields' holdings in Tarkwa and Damang and through the addition of IAMGold's holdings in Sadiola and Yatela.
>
> Furthermore, the transaction creates an entity that can compete with international gold companies on a level playing field. Direct access to the international capital and debt markets should enable the company to develop the APP and (subject to completion of its acquisition) Cerro Corona projects in an optimal manner, and to react more swiftly to acquisition opportunities as they arise.
>
> The injection of Gold Fields' non-SADC assets into a separately listed, financially independent company should present an opportunity for further value creation as the market benchmarks the assets of GOLD FIELDS INTERNATIONAL against those of its international peer group.'

This announcement makes clear that the IAMGold transaction is critical to the future of appellant, whatever the outcome of the decision taken at the meeting of 7 December 2004.

As a result of the early settlement offer and the irrevocable undertaking from Norilsk, first respondent will be able to effect a permanent and irreversible change to the very structure of its competitor; at the very least it will be able to materially interest a key policy of appellant by ensuring that appellant's long term strategy of entering into the IAMGold transaction could not be implemented. That the IAMGold transaction is critical to appellant's strategy was made clear by Mr Hollard in his founding affidavit:

> Gold Fields' rationale for concluding the IAMGold transaction was that it would create an entity that is better equipped to compete with companies through more direct access to the international capital and debt markets, thus providing the flexibility to respond more swiftly to acquisition and project development opportunities as they arise (and thereby facilitating both organic and acquisition growth within the merge entity) The effect of this will be the creation of substantial additional value for Gold Fields shareholders.

The early settlement, if implemented, would constitute a large merger that must be notified in terms of section 13 A (1). For this reason the acquisition by first respondent of 34,9% of the issued share capital of appellant read together with the irrevocable undertaking of Norilsk would constitute an assumption of control in terms of section 12(2)(g) of the Act.

S 13A(3) and the concept of 'impleme ntation'.

This conclusion leads to the further question, being the meaning of the concept of implementation. This concept if best understood in terms of the architecture of this part of the Act.

Section 13 A (3) which provides that 'the parties to an intermediate or a large merger may not implement that merger until it has been approved…..' must be read together with section 60(1) of the Act which provides that 'If a merger is implemented in contravention of chapter 3, the Competition Tribunal may –

(b) order a party the merger to sell his shares, interest or other assets that it has acquired pursuant to the merger; or

(c) declare void any provision and agreement to which the merger was subject.

In this context the Act does not differ significantly from Article 7(1) of the EC Merger Regulation (No. 131 – 2004 of 20 January 2004) which provides that: 'A concentration with a Community dimension as defined in Article 1 which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2) or on the basis of a presumption according to Article 10(6).

Article 7.2 provides that paragraph 1 shall not prevent implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as the stock exchange, by which control within the meaning of Article 3 is acquired from various sellers provided that

(a) the concentration is notified to the Commission pursuant to Article 4 without delay; and

(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain a full value of its investments based on a derogation granted by the Commission under paragraph 3.

The Canadian Competition Act of 1985, on which a number of the provisions of Chapter 3 of the Act were based, is of some assistance in dealing with the interpretation of implementation. Section 114(1) of the Canadian Act provides **inter alia** that, 'subject to this Part, where (a) a person, or two or more persons pursuant to an agreement or arrangement, proposed to acquire assets in the circumstances set out in sub-section 110 (2), to acquire shares in the circumstances set out in sub-section 110(3) to acquire an interest in a combination in the circumstances set out in sub-section 110(6)

the parties to the proposed merger shall, before the transaction is completed, notify the Commissioner that the transaction is proposed and supply the Commissioner with information in accordance with this Part.

Section 110of the Canadian Act refers to the acquisition of assets of an operating business where the aggregate value of those assets exceed a certain prescribed threshold. Likewise, section 110(3) refers to the acquisition of voting shares of a corporation that carries on an operating business or controls a corporation that carries on an operating business where the aggregate value of the assets of such business exceed a certain prescribed threshold. Similarly, section 110(6) refers to a proposed acquisition of an interest in the combination that carries on an operating business otherwise than through a corporation (a) where the aggregate value of the assets exceeds a certain prescribed limit. This notification to the Commissioner of Competition is required before the designated transaction is completed. In terms of section 100(1), the Competition Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that appears to the Tribunal may constitute or be directed towards the completion or implementation of a proposed merger in respect of which an application has not been made……' (my emphasis)

The Canadian Act therefore envisages notification before completion of the merger and provides authority for the award of interim relief where a party seeks to complete or implement a proposed merger.

That the phrase 'may not implement a merger until it has been approved' as it appears in section 13 A(3) of the Act does not constitute a complete or impediment, as does section 100 of the Canadian Act, it made it clear by the Tribunal's own finding in **Anglo American Holdings Limited v Kumba Resources Ltd (Industrial Development Corporation intervening) [2003] 2 CPLR 288 (CC)** at para 34 where the Tribunal said 'Whilst one could not expect firms to notify a merger where their ability to require control was at that stage academic it is not necessary for them to have completed the process of acquisition as a jurisdictional prerequisite to notification'. In short, the process of investigation begins after notification but not necessarily before the merger has been completed. What section 13 A(3) seeks to prohibit was not the completion of the merger but any implementation thereof prior to authorization having been granted by the relevant competition authorities.

Were the early settlement offer to constitute a merger as defined in section 12 of the Act, first respondent would not be entitled to exercise a controlling influence over first appellant pursuant to this offer without having obtained permission from the competition authorities to do so. This then leads to the question to whether the proposed transaction constitutes a proposed merger.

Apprehension of Harm.

Because the apprehension of harm was objective and the measure is reasonable apprehension Actual harm as an outcome need not be established on the part of balance of probabilities. See **Minister of Law and Order v Nordien** 1987(2) SA 894 (A). The harm with which appellant is clearly concerned in the present case is the exercise by first respondent of rights attaching to shares in contravention of the prohibition against the implementation of a large merger prior to scrutiny by the competition authorities. In exercising the rights attached to any shares it might acquire, first respondent will have the ability to materially influence the strategic positioning of appellant. This harm is exacerbated by virtue of the alternative transaction contemplated by directors of appellant which would then have been scuttled by the actions of first respondent. Mr Unterhalter attempted to counter this argument by contending that any application to interdict the implementation of the early settlement offer could only be brought after the early settlement closing date 26 November 2004. That however can not be an answer to a case which succeeds in showing a breach of section 13 A(3) of the Act and where such breach is clearly and deliberately intended to destroy a critical strategy contemplated and then recommended to shareholders by the directors of appellant.

This aspect of the case raises the particular approach adopted by the President of the Tribunal, David Lewis in his concurring judgment when he writes:

> 'Previous decisions of the Tribunal have demonstrated sensitivity to the prospect of merging parties structuring transactions with the specific intent of evading regulatory oversight and, in this way, undermining the objectives and administration of the Act. this has underpinned – appropriately in my view – an expansive view f control, a perspective endorsed by the Competition Appeal Court. I believe that this decision has been approached from this perspective and am confident that it in no way represents a relaxation of the Tribunal's commitment to ensure that the procedures of the Act are respected so as to enable effective regulation of merger activity. However I am also of the view that this transaction has served to highlight a second danger and that is that the management of target companies may well seek to use the provisions of the Competition Act to chill hostile mergers, in effect to prevent their own shareholders from exercising the rights that attach to their share in the ownership of the company in question. Hostile mergers – red of tooth and claw though they may be – are an important part of the very competitive process that we are mandated to defend and to promote. I am, accordingly, confident that this

> decision does not fall prey to entreaties that may be designed to protect incumbent managers from the wishes of their owners.'

If this carefully articulated approach to Chapter 3 of the Act was designed to adopt the purposive interpretation of the Act there can be no quarrel. The difficulty is that section 2 of the Act which outlines the purpose of the Act sets out a number of purposes, including the promotion of the efficiency, adaptability and development of the economy, the provision to consumers of competitive prices and product choices, the promotion of employment, the advancement of the socio economic welfare for all South Africans, the expansion of opportunities for South African participation in world markets and the recognition of the role of foreign competition in the Republic. Were the concept of hostile mergers to trump these objectives of the Act by way of a particular interpretation of chapter 3, such an approach would jettison the principle of interpretative integrity. One objective would destroy a consideration of the balance of section 2. In any event, great care should be taken to ensure that a purposive approach to the interpretation of the Act engages with the wording of the Act and its overall architecture, rather than seeking to ignore the latter in order to promote a particular policy objective which is both contested and controversial.

Conclusion.

Were first respondent to exercise its voting rights in terms of shares acquired pursuant to the proposed notifiable merger, it could effect a significant restructure of appellant. Were this to occur, by means of first respondent exercising its voting rights, this effectively constitutes an implementation of a merger in breach of section 13 A(3). The acquisition of 34,9% of the shareholding of appellant would thus empower first respondent to materially influence the strategic position of appellant and scuttle a significant transaction contemplated by the directors of appellant as contained in the cautionary announcement. The damage effected to appellant in the event that the merger was not approved could not probably be commercially undone. In the circumstances, appellant would have no viable remedy available to it.

For these reasons, the relief contained in the order as at 26 November 2004 was granted.