**COMPETITION TRIBUNAL OF SOUTH AFRICA**

Case No.: 13/CR/FEB04

In the matter between:

**HARMONY GOLD MINING COMPANY LIMITED** First Applicant

**DURBAN ROODEPOORT DEEP LIMITED** Second Applicant

Versus

**MITTAL STEEL SOUTH AFRICA LIMITED** First Respondent

**MACSTEEL INTERNATIONAL HOLDINGS BV** Second Respondent

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In re: The Complaint Referral between:

**HARMONY GOLD MINING COMPANY LIMITED** First Complainant

**DURBAN ROODEPOORT DEEP LIMITED** Second Complainant

Versus

**MITTAL STEEL SOUTH AFRICA LIMITED** First Respondent

**MACSTEEL INTERNATIONAL HOLDINGS BV** Second Respondent

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Coram : Lewis PM, Manoim TM, Holden TM

Heard on : 31 May 2006
Delivered on : 19 June 2006

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REASONS AND ORDER

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MANOIM TM:

[1] This is an application brought by Harmony Gold Mining Company Limited and Durban Roodepoort Deep Limited ("the complainants"), to amend the relief sought by them in this complaint hearing. The application is opposed by both

respondents on various grounds.[1]

[2] The complaint referral to which this application relates concerns an allegation that the first respondent, Mittal Steel South Africa Limited ("Mittal"), has contravened section 8(a) of the Competition Act (the "Act"), by charging excessive prices in the South African flat steel market.

[3] Mittal also faces an allegation that it has contravened section 8(d)(i) of the Act, in that it requires or induces customers to not deal with a competitor. That allegation is, however, the subject of separate and specific relief, which the complainants do not seek to amend. Hence the amendment sought relates only to the section 8(a) or excessive pricing allegation. The amendment seeks to add alternative prayers to one of those already sought. As a comparison between the original prayer sought, prayer C, and the proposed alternative to it, prayer C *bis*, is germane to understanding the dispute between the parties, we set out below the original relief sought with the amendment included in bold type.

"…the complainants intend to apply to the above honourable Tribunal to

1 The procedure for amending pleadings is found in Tribunal rule 18 which states:

> "(1) *The person who filed a Complaint Referral may apply to the Tribunal by Notice of Motion in Form CT 6 at any time prior to the end of the hearing of that complaint for an order authorising them to amend their Form CT 1(1), CT 1(2) or CT 1(3), as the case may be, as filed.*
> *(2) If the Tribunal allows the amendment, it must allow any other party affected by the amendment to file additional documents consequential to those amendments within a time period allowed by the Tribunal."*

amend their referral of complaint, form CT1, by substituting the relief sought in the referral in respect of the claim of excessive pricing with the following:

"A For an order declaring that the first respondent's practice of employing import parity pricing (as set out in paragraph 11.1.5 of the founding affidavit) in the South African flat steel market amounts to an abuse of dominance in terms of section 8(a) of the Act;

B For an order directing the first respondent to refrain from charging excessive prices in the South African flat steel market;

C For an order directing the first respondent to levy factory gate prices in the South African flat steel market, irrespective of whether the product is intended for export or not;

**C *bis* <u>In the alternative to prayer C above</u>, for an order directing that:**

1. **The first respondent may not itself, or with any natural or juristic person, or through any entity, vehicle, trust or other juristic person in which it has an interest, export flat steel products from South Africa;**
2. **The first respondent divest its interest in the second respondent to an independent third party or parties approved by the Tribunal within such period and on such conditions as the Tribunal considers appropriate;**
3. **The first respondent may not:**
    i. **impose upon any customer of its flat steel products any condition in respect of the customer's use or**

**resale of those products; or**

**ii. reach agreement on a condition with a customer of its flat steel products, or enter into any arrangement or understanding with such a customer, in respect of the customer's use or resale of those products;**

**4 The first respondent waive in writing any condition in any agreement concerning the use or resale of flat steel products by a customer;**

**5 The first respondent make known in the public domain, at all times, its list prices, rebates, discounts and other standard terms of sale for flat steel products;**

D For an administrative penalty to be levied on the first respondent of 10% of its annual turnover for the financial year ended 30 June 2003 in the South African flat steel market;

E For those respondents that oppose the complaint to pay the costs incurred by the complainants in prosecuting the complaint;

F For an order granting further and/or alternative relief."[2]

[4] Two of the proposed prayers, C *bis* (1) and (2), have attracted the brunt of the respondents' criticism. In order to appreciate what the proposed prayers C *bis* (1) and (2) seek to remedy, it is necessary to refer to a joint venture that is presently in place between the two respondents. Macsteel International Holdings BV ("Macsteel"), the second respondent, is a joint venture company

2 See page 23 of the pleadings file in the complaint referral, as well as pages 1-4 of the amendment application.

owned in equal parts by Mittal and Macsteel Holdings (Pty) Ltd.[3] A contract was entered into in 1995, between Macsteel and Mittal, whose essential terms, insofar as they impact on this application, are:

1. Mittal undertakes to market a specified range of steel products, which include flat steel, only through Macsteel in the international market; (clause 30.1)
2. Macsteel undertakes not to sell any of these steel products in the domestic market without Mittal's consent; (clause 29.1)
3. The Macsteel Group also makes a similar undertaking to Mittal that as long as the agreement persists it will not market Mittal products in the international market other than through the joint venture (clause 31.2); and
4. Mittal undertakes to sell steel to Macsteel at "international related market prices". (clauses 29.2.1. and 30.2)

[5] The joint venture however is not confined to trading in Mittal's steel; apparently this constitutes roughly half of its business. Nor is the joint venture trivial from Mittal's point of view; approximately 40% of its flat steel is traded through the joint venture.

[6] Both complainants and respondents are clear that C *bis* (1) and (2) strike at the heart of this arrangement. They differ fundamentally over whether the existing prayer C placed it in similar jeopardy. This is relevant in assessing how

3 We refer to the second respondent as Macsteel as this is the way the parties refer to it in extracts we cite later. Note however that Macsteel Holdings (Pty) Ltd is the name of the joint shareholder in the second respondent, which through its subsidiaries, operates as a steel merchant in South Africa and abroad. The term 'Macsteel' has frequently in the hearings been used loosely to describe any of these entities and hence the note of caution as to what is meant here.

far reaching the amendment is and hence its possible prejudice to the respondents.

[7] What has made this application controversial is not only the debate over its ambit, but the timing of the application and the circumstances that preceded it.

[8] This complaint referral, with the relief in its present form, was instituted in February 2004. Though cited as a respondent in the complaint referral Macsteel chose not file any pleadings and adopted, as Harmony's counsel has put it, a "supine" response to the litigation. Given this posture, pleadings, discovery and the array of pre-hearing arrangements were conducted in Macsteel's absence.

[9] Macsteel alleges that the reason it did not participate in the complaint proceedings was because no relief was sought against it.[4] It relies for this on paragraph 8 of the complaint referral which states:

> *"Macsteel International is cited as a respondent for the interest it may have in this complaint. No relief is sought against Macsteel International, save for a cost order in the event of opposition"*

[10] It also relies, it says, on a statement made by Mr Unterhalter, the complainants' counsel, during his opening address on 15 March 2006.

4 Letter from Edward Nathan to Cliffe Dekker, dated 12 May 2006, amendment application record page 38.

[11] We will examine what was said by Mr. Unterhalter later, but prior to the commencement of the hearing, a telephone conversation took place between the respective attorneys of Macsteel and the complainants, on 10 March 2006. The complainants place great reliance on what was allegedly conveyed by them during the course of this conversation, to suggest that Macsteel ought to have been disturbed from its passivity into defending its interests in this case.

[12] There is disagreement about what actually transpired. It is however common cause that the initiative for the call came from Macsteel's attorney Ms Mendelsohn. She says her client was concerned about the adverse publicity implications of the impending hearing. She says she discussed two proposals with Ms Meijer, the complainants' attorney; either that the complainants would withdraw against Macsteel or Macsteel would consider participating in the proceedings. Told from Ms Meijer's point of view, the conversation takes roughly the same course, but she adds that she explained to Mendelsohn why papers had been served on Macsteel. According to Ms Meijer:

> *"I advised that the papers had initially been served on Macsteel, not because the complainants sought relief against Macsteel, but because a possible outcome of the proceedings was the termination of the agreement between Mittal and Macsteel."*[5]

[13] Thus says Ms Meijer, Macsteel's attorneys understood that Macsteel's exclusive relationship with Mittal was imperilled by prayer C.

5 See founding affidavit, paragraph 28.

[14] Mendelsohn denies that there was any debate as to *"...whether the Complainants' complaint might result in the termination of the agreement between Mittal and MIHBV."*[6] Nor she says did she seek any guidance from Meijer as to why Macsteel had been cited as a respondent.

[15] Thus for the complainants the conversation serves to alert Macsteel that prayer C portends doom for its arrangement with Mittal, and thus by implication, it ought to be on its guard. To Macsteel, nothing has been said to alter what has been stated in the pleadings cited earlier. Namely, no relief is sought against Macsteel.

[16] Macsteel says its understanding of the situation was reinforced a few days later, when Mr Unterhalter, in response to a question from the Tribunal during his opening address, says the following:

> "ADV UNTERHALTER*: Sorry, I perhaps should have made it clear. The Macsteel arrangement is simply the export channel, which ensures that effectively arbitrage doesn't take place. So, what happens is that under the Macsteel joint venture arrangement all exports are done through that singular channel and consequently it is impacted only because it is an agreement, which ensures that effectively arbitrage can't take place.*
>
> *So, it's really one of the mechanisms that's used to ensure market segmentation and the continuance of excessive pricing.*

6 See paragraph 147 the second respondent's answering affidavit read with the confirmatory affidavit of Ms Mendelsohn.

*CHAIRPERSON: But then this allegation finds no echo in the remedies that you seek.*

*ADV UNTERHALTER: No, it doesn't, and it's for that reason that we have not … I mean we cited Macsteel, but they have simply indicated that they will abide the decision. So, we simply use it for evidence. We don't seek specific remedies to undo that arrangement."*[7]

[17] This is the last word from the complainants on the subject of the pleadings, until the application for amendment. The complainants, however, place great reliance on Mr Unterhalter's cross-examination of Mr Dednam, a Mittal executive, and its chief witness on its pricing policies. During the course of cross examination Mr Unterhalter discusses the proposed relief and asks if there would be any problem in having a situation where Mittal can agree any price it liked with any customer provided it could not tell them what to do with the product. Mr Dednam indicates he would have no objection to that. Mr Unterhalter goes on to ask:

*"ADV UNTERHALTER: So that's the one stipulation. The other is you can't have a channel for exporting to get the exports offshore in the way that you do now. You've got to submit to yourself, which as you've indicated is not a problem, to traders competing for your business to place your product abroad. You say both of those are fine.*

*MR DEDNAM: That happened in the past.*

7 See transcript dated 15 March 2006, page 34.

*ADV UNTERHALTER: And it could happen again.*

*MR DEDNAM: It could happen again."*[8]

[18] Granted the seeds of the amendment contemplated may be read into this line of cross-examination. But the language of the cross examiner is ambiguous, cautious and insufficient to alert either the witness or Mittal's legal team that an amendment of the one now contained in C *bis* (1) and (2) is being contemplated, namely an attack on the joint venture agreement itself. It is precisely for these reasons we have pleadings and a procedure for amending them so that both parties to litigation know what case they have to meet and how to respond to it. The cross examination was not accompanied by any statement that an amendment was forthcoming, and if that was the complainants thinking at that time, they gave no outward expression of this until the service of the amendment application.

[19] Thus whatever the truth of the conversation between the attorneys, and despite the subliminal message allegedly conveyed by the cross-examination, the complainants have both in their pleadings and in counsel's opening address, maintained a consistent position; and that is that no relief was being sought specifically to undo the Macsteel arrangement i.e. the joint venture agreement between Macsteel and Mittal.

[20] It does not of course follow that prayer C did not pose consequences for Macsteel, simply because it did not strike at its legal apparatus. The

8 See transcript dated 6 April 2006, page 1864.

complainants argue that if prayer C was granted, this would have profound consequences for the business of the joint venture.

[21] The complainants' theory of harm in this case is that Mittal is able to sustain excessive prices because it can segment its customers, between those who get some discount or rebate and those who do not. In order to maintain this regime of different prices it has to be able to prevent arbitrage between those customers who qualify for better prices and those who do not. One such mechanism is the arrangement between Mittal and Macsteel. According to the complainants the arrangement serves both to take excess flat steel out of the domestic market, so as to sustain the allegedly excessive prices, and to ensure that it does not come back into the domestic market and hence depress prices. Hence the remedy sought in C *bis* (1) and (2) seeks to prohibit Mittal from exporting either itself or through any entity in which it has an interest and secondly to break the umbilical cord between it and Macsteel by requiring divestiture of its interest in the joint venture.

[22] The complainants allege that this is not the only method of preventing arbitrage and that there is evidence that customers who get preferential prices are subject to a regime imposed by contract that prevents them from reselling their steel obtained at more favourable prices in the domestic market. This would explain the amendment contained in C *bis* (3) and (4).

[23] The complainants argue that prayer C, the prayer originally formulated, would have the effect of eliminating any attempt to segment customers and hence arbitrage. Prayer C *bis* they argue is all of a piece with its predecessor in working to achieve the same objective. Under C while Mittal could retain its share in Macsteel and be permitted to export steel through it, it could not engage in price differentiation as to whether the product is intended for export or not by a customer.[9] Secondly, Mittal cannot enjoy any exclusive arrangement with Macsteel as the only customer to export its flat steel products. This is

9 Complainants' heads of argument, paragraph 20.

because prayer C allows any customer to buy product and then choose to export it or to sell it domestically.[10]

[24] C *bis* (1) and (2), the complainants argue, achieves the same end as does C. Prayer C, the complainants argue is aimed at resolving the segmentation problem by:

> "...requiring Mittal to offer product at the factory gate at the same prices to all customers who wish to purchase, regardless of whether a customer intends to use the product itself or re-sell it domestically or re-sell it into the export market. The remedy in prayer C therefore undermines Mittal's current market segmentation and renders it ineffective."[11]

[25] In contrast the respondents argue that the amendment has implications for them that prayer C did not have. Under prayer C, Mittal was not obliged to sell its stake in MIHBV and was not barred from exporting itself or through an entity in which it has an interest.

[26] The complainants however, carefully step aside from the legal consequences of prayer C, focussing instead on the market implications of why prayer C would threaten the joint venture agreement. In their founding affidavit they allege:

> *"But Mittal would not be able to entrench the kind of price differentiation that it currently practices in offering prices to Macsteel that are vastly different to its offerings to many classes of domestic customers because no commercial consideration relevant to quality, specification or volume*

10 Complainants' heads of argument, paragraph 21.
11 Complainants' heads of argument, paragraph 9.

*would justify such a differentiation."*

And then:

"The remedy in prayer C sought to ensure that customers could enter into negotiations with Mittal to purchase product from Mittal's entire output and then determine for themselves where that product would be resold and how it would be utilised."[12]

And further:

"However this does not mean that the order sought against Mittal in prayer C has no implications for the manner in which Macsteel buys products from Mittal. On the contrary, and as I have sought to sketch above, the plain import of prayer C is that Macsteel's position as the exclusive purchaser of Mittal product for export comes to an end because any customer, following the imposition of prayer C, is permitted to buy product for export and the price at which it does so cannot be determined by Mittal merely on the basis that the product is destined for export."[13]

[27] On this score Mittal begs to differ. In its answering affidavit it contends that even under prayer C:

" In short Prayer C…is *not an order against Macsteel, does not "undo the exclusivity that attaches to the relationship between Mittal and the Joint Venture", either directly or indirectly, and most importantly, does not prevent Mittal from using the Joint Venture as an exclusive export*

12 Harmony amendment application founding affidavit paragraphs 19- 20.
13 Harmony amendment application founding affidavit paragraph 27. Note that Macsteel denies that it has this interpretation but does not seriously contend for another. See Macsteel affidavit, paragraph 142.

> *channel through which to export Mittal's output in excess of local demand." In terms of Prayer C, Mittal could and would continue to sell to Macsteel, on an exclusive basis, at the same price. The agreement would be unaffected."*[14]

[28] Mittal goes on to allege that the proposed C *bis* is undeniably, an order of a fundamentally different kind, predicated upon different allegations and with wholly different consequences, for both Mittal and Macsteel.

[29] The question for the Tribunal is why prayer C lends itself to such widely different interpretations. Despite the fact that it may, in its present formulation, lack precision, the debate is not over its language, but its implications. In our view the reason for the dispute revolves around the difference between the legal and economic implications of prayer C. Neither side in this debate made this distinction, since it did not suit them to do so, since an all or nothing approach to the reading, would lead to C *bis*'s survival or demise.

[30] We, however, would not query the respondents' reading of the clause which was, we suggest, a purely legal construction of its import. The ordinary language of C does not require what C *bis* (1) and (2) require, and on that there is no ambiguity. However to suggest that prayer C had no implications for the business of the joint venture would be to adopt a completely blinkered approach to its impact on the market which the joint venture seeks to segment, albeit not on the contractual and ownership rights created by the joint venture. That would be to make the error of solely reading it *qua* lawyer, and not *qua* businessperson or economist.

[31] It is a reasonable economic reading of the original relief that once all customers received product at a factory gate price, the preferred status of Macsteel was under serious threat. The agreement left Macsteel as a

14 Mittal amendment application answering affidavit, paragraph 10.9.

segmented customer, an exporter only, but prayer C would have made all other customers 'unsegmented' i.e. free to dispose of their steel as they saw fit and not subject to the price disadvantage, previously the result of the present pricing policy regime of Mittal. What Macsteel and Mittal ignore is that the exclusivity on the complainants theory is buttressed, not by a contract alone, but also by the effective segmentation of the export and domestic pricing regimes, resulting in Macsteel receiving the lower factory gate price others do not receive. Once this segmentation is removed it is reasonable to assume that Macsteel's commercial advantage is seriously threatened. Thus on this reading, no legal provision required Mittal to prevent its domestic customers from exporting its steel and thus threatening the joint venture's exclusive rights. Rather the silence in contract was compensated for by the workings of the Mittal pricing policy. If Mittal's customers wanted to export the steel they purchased from it at the higher domestic price, they were free to do so, provided they could find anyone prepared to pay the higher price.[15] No one was going to, and presumably Mittal and Macsteel understanding this, did not need to provide for this in their agreement.

[32] We need not at this stage decide, whether this economic theory is correct, indeed it would be undesirable for us to do so, only if it is a reasonable reading of the possible market outcome of the relief. We find that it is. Having made this finding the next issue is whether this has consistently been Harmony's theory of the economic consequences of Prayer C or whether it has cobbled together a novel one to justify an argument that prayer C *bis* is not as extensive as the respondents suggest it is. The less novel prayer C *bis* is the less the respondents can claim prejudice by the amendment and hence the complainants have been at such pains to reduce its import.

[33] The complainants we find are correct to contend that prayer C and prayer

15 Note that the evidence is that domestic customers who received a discount or rebate from the domestic price are subject to restrictions on their ability to trade their steel.

C *bis* are similar, insofar as their economic implications for the joint venture. The same cannot be said of the legal implications of the two prayers, and we examine below why we say this.

[34] The complainants' case, as expressed through the pleadings, is that no relief is sought against Macsteel. This posture is given further support in the statement from Mr. Unterhalter in his opening address. In response to a question pertinently on this point by the Tribunal Mr. Unterhalter stated that Harmony did not seek specific remedies against the arrangement. This has remained the complainant's position throughout the hearing and they gave no indication, until this application was served that they had changed their mind on this point. That some cross-examination or other evidence might have contemplated this amendment, does not, absent an express avowal of the adoption of new remedies, avail them. Pleadings are there for a reason and an amendment procedure is there so that a process is followed to change them. As a result it was reasonable for the respondents to rely, and in their approach to the case to assume, that the legal edifice of the joint venture was not at the complainants behest, going to be subject to a proposed remedy.

[35] The respondents both argue that they are seriously prejudiced by the late amendment. From Macsteel's perspective it argues that had it known that the joint venture was the subject of possible relief it would have entered the fray. Instead, so disabused by the pleadings and the opening address of counsel, it elected to watch the case from the stands. Mittal for its part argues that if it had

been alerted to this relief it would have informed its approach to the case not just on remedies, but also the merits. Whilst Mittal has not been more specific on this point, arguing it rather at the level of abstraction, it is nevertheless a reasonable argument to make. We are satisfied that both respondents will be prejudiced by the amendments insofar as they implicate the legal edifice of the joint venture.

[36] This is of course not the end of the matter. As the complainants argue the practice in civil courts is to lean in favour of granting amendments unless there is prejudice to the other party which cannot be cured by an order for costs or a postponement. The complainants suggest that any prejudice in this case may be cured by allowing the re-opening of evidence on remedies and for this reason they suggest that we separate a finding on the merits from a finding on remedies.

[37] The respondents contend that the case itself would need to be re-opened amounting to both considerable expense and delay with the nightmarish scenario advanced, of further exchange of pleadings, the recall of witnesses and added discovery.[16]

[38] We are not in a position to assess where the truth lies between the complainants' optimism that prejudice occasioned by the amendment effecting the joint venture may be cured by a minor procedure and the respondents more alarmist caution that it would require major surgery.[17] This is no run of the mill

16 See for instance Macsteel's answering affidavit, paragraph 174.

17 The complainants had suggested that if the hearings were opened in respect of the remedies only they would not lead any new evidence save for possible rebuttal witnesses. **See transcript**

procedure which the Tribunal has daily experience of, such as a court may have in a collision case or a contractual dispute. The parameters of this type of dispute cannot be predicted on the basis of past experience, and so the respondents concerns cannot be lightly dismissed, more especially given what is at stake for them commercially.

[39] It is thus by no means certain that fairness would not dictate that the merits of the case would have to be re-opened and not just the case on remedies. In civil cases the law is that the onus to establish that the other party will not be prejudiced rests with the party seeking the amendment.[18] The complainants have not, in our view, discharged the onus of persuading us why, if C *bis* (1) and (2) are allowed as amendments, the case should not wholly or partially be reopened on the merits as well. The implication of this is that the prejudice to the respondents is by no means trivial.

[40] However, our proceedings are not wholly civil, and have as both the CAC and the SCA point out – consequences that are not wholly private, but public as well.[19] Although this case has not been brought by the Commission, but by private parties, were the Tribunal to find that excessive pricing had occurred this has implications for all domestic consumers of Mittal and not just the complainants.

[41] Mr Unterhalter therefore correctly cautions us not to put ourselves in a position where we make a finding without an ability to impose an effective remedy that follows that finding. Thus in the appropriate circumstances even great inconvenience to respondents may be justified, for the Act to be given its purpose.

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**dated 31 May 2006, page 2257.**

18 See for example *Euroshipping Corp of Monrovia v Minister of Agriculture* 1979 (2) SA 1072 (C) at para 1090 B.

19 See *American Natural Soda Ash Corp v Competition Commission* [2005] 1 CPLR 1 (SCA) at paras. 21 and 33, and *Glaxo Wellcome (Pty) Ltd v Terblanche NO and others* [2001-2002] CPLR 48 (CAC) at para. 53F-G.

[42] That notwithstanding, we are bound to ensure that our procedures are fair. This is so not only because we are subject to a constitutional obligation to ensure that our procedures are fair, but also as Mittal correctly argue because our statute is peremptory on this point as well.[20] In terms of section 52(2)(a) of the Act, the Tribunal must conduct its hearings in accordance with natural justice. Natural justice requires a party be given an opportunity to be heard. The courts have held that implicit in this right is a right to be given notice of an action and the opportunity to be heard.[21] If the amendment is granted Mittal argues the respondents would not have been given proper notice of the new consequences for them and they would not have been given a proper opportunity to be heard. Of course fairness and *audi alteram partem* may still be restored by allowing respondents an adequate opportunity procedurally to redress their prejudice. In this case however, proper concern for the orderly expedition of our procedures cannot allow us to tolerate at this late hour, an amendment whose prejudice would occasion such extensive remedial redress.

[43] Where an amendment is brought as late in proceedings as this one it must, as a matter of fairness to the opposing parties, be accompanied by a reasonable explanation. We have found that Harmony's amendment does

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20 Section 33(1) of the Constitution of the Republic of South Africa requires administrative action to be procedurally fair. The text of section 33 reads:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> 2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
> 3) National legislation must be enacted to give effect to these rights, and must-
>  a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>  b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>  c. promote an efficient administration."

21 See *Administrator, Transvaal, and Others, v Theletsane and Others*, 1991(2) SA 192 (A) at para 206 C-D.

occasion serious legal consequences for the respondents that are not consistent with the case as originally pleaded. For this reason we are not dealing with a trivial tightening up of relief that should have always been contemplated. Rather the complainants in this case have, through every outward expression on this matter, signalled that the joint venture was not imperilled. It does not avail the complainants to rely on the disputed telephone call between the attorneys to suggest that Macsteel was alerted to the consequences. Even assuming that Ms Meijer's version was correct, whatever impression of unease Ms Mendelsohn should have been left with after this cautionary call, it would have been dissipated by the opening remarks of Mr Unterhalter.

[44] The complainants did not merely remain, to borrow their own language, 'supine' on whether relief sought against the joint venture would be sought at a later stage - they actively sought to disabuse both respondents from this notion. Granted, the complainants are correct that relief in competition cases is complex, and that sometimes a remedy that may seem obvious in the dying moments of a case, may not have been obvious at its birth; but in this case the complainants have not convinced us that it took subsequent reflection at the end of the litigious jousting, for an epiphany to come to them for the first time that the joint venture needed to face remedial action. Rather it is more probable that the complainants had considered this throughout - indeed the express disavowal in the pleadings coupled with the later reassurance by counsel seems

to reinforce this; that tactically it would be better not to attack the joint venture as this would leave them with one opponent rather than two. This calculation is precisely how matters turned out. Having made this calculation by way of assurances given, it would be manifestly unfair to the respondents to allow them to change their stance now.

[45] For this reason out of considerations of fairness, based on the complainants' representations during the course of these proceedings, prior to the amendment, we refuse to grant the amendment insofar as clause C *bis* (1) and (2) are concerned.

[46] In relation to prayers C *bis* 3, 4 and 5 we have no difficulty granting the amendments. Macsteel have raised no objection to them and nor in their heads of argument do Mittal. These amendments are in their nature aligned to the economic theory foreshadowed in prayer C, and unlike C *bis* (1) and (2), were not the subject of any prior representation. Again, unlike C *bis* (1) and (2), they do not threaten the legal edifice of the Macsteel joint venture arrangement.

[47] We need not consider various other arguments raised by the respondents as those were raised in respect of C *bis* (1) and (2), and not (3), (4) and (5).

**Costs**

[48] As Macsteel has confined its objections to prayer C *bis* (1) and (2) it has been wholly successful and is entitled to its costs from the complainants. Mittal objected to the amendment as a whole and thus has only been partially successful.[22] For this reason we make no order as to costs as between the

22 Mittal has been rather confusing on the ambit of its objections. In its answering affidavit it

complainants and Mittal.

**The Order**

[49] In the result we make the following order:

1. The complainants are given leave to amend their complaint referral, but only insofar as it entails the inclusion into the complaint referral, as an alternative prayer to the existing prayer C, of paragraphs C *bis* (3), (4), and (5) of the application for amendment, and the complaint referral is accordingly amended by this substitution.
2. The complainants are refused leave to amend their complaint referral by the inclusion of paragraphs C bis (1) and (2) of the application for amendment.
3. The complainants, jointly and severally, must pay the costs of the second respondent occasioned by this amendment application, insofar as the complainants sought leave to introduce prayers C *bis* (1) and (2), and such costs are to include the costs of two counsel.
4. No order of costs is made in respect of the matter between the complainants and the first respondent.

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N M Manoim

Tribunal Member

concludes that the amendment as whole should not be granted (paragraph 13). In its heads of argument it states that the amendments in respect of C *bis* 1-4 should be refused (paragraph 7.4). At 5.21 of its heads it states that relief should not be granted in respect of C *bis* 1 and 2.

Lewis PM; and Holden TM **concur** in the judgment of Manoim TM.

Tribunal Researcher: T Masithulela

| | | |
|---|---|---|
| For the first and second applicant | : | DN Unterhalter SC and MA Wesley instructed by Cliffe Dekker Inc. |
| For the first respondent | : | CDA Loxton SC, G Pretorius SC, AG Gotz, and M Sikhakhane instructed by Bell Dewar & Hall Inc. |
| For the second respondent | : | JJ Gauntlett SC, and A Cockrell instructed by Edward Nathan Corporate Law Advisors. |