



## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 10/AM/Feb11

In the matter between:

<b>MTO FORESTRY (PROPRIETARY) LIMITED</b>	<b>First Applicant</b>
<b>BOSKOR SAWMILL (PROPRIETARY) LIMITED</b>	<b>Second Applicant</b>
<b>BOSKOR RIPPLANT (PROPRIETARY) LIMITED</b>	<b>Third Applicant</b>
<b>and</b>	
<b>THE COMPETITION COMMISSION</b>	<b>First Respondent</b>
<b>A.C. WHITCHER (PROPRIETARY) LIMITED</b>	<b>Second Respondent</b>
<b>PG BISON LIMITED</b>	<b>Third Respondent</b>
<b>STEINHOFF SOUTHERN CAPE (PROPRIETARY) LIMITED</b>	<b>Fourth Respondent</b>
<b>THESEN SAWMILL (PROPRIETARY) LIMITED</b>	<b>Fifth Respondent</b>
<b>STEINHOFF DOORS &amp; BUILDING MATERIALS (PROPRIETARY) LIMITED</b>	<b>Sixth Respondent</b>
<b>In re the intermediate merger between:</b>	
<b>MTO FORESTRY (PROPRIETARY) LIMITED</b>	<b>Primary Acquiring Firm</b>
<b>and</b>	
<b>BOSKOR SAWMILL (PROPRIETARY) LIMITED</b>	
<b>BOSKOR RIPPLANT (PROPRIETARY)LIMITED</b>	<b>Primary Target Firms</b>

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Panel : Lawrence Reyburn (Presiding Member),  
Andreas Wessels (Tribunal Member)  
Andiswa Ndoni (Tribunal Member)  
Heard on : 28 October 2011  
Order issued on : 28 October 2011  
Reasons issued on : 17 January 2012

### **Reasons for Decision and Costs Order in the Suspension Application**

- 1] At the hearing of this matter on 28 October 2011 the Tribunal upheld an objection *in limine* to an application for temporary suspension of the operation of the conditions imposed by the Competition Commission (“the Commission”) in its conditional approval of the intermediate merger between the first, second and third applicants.
- 2] The application was accordingly refused. The reasons for that decision are set out below, together with the Tribunal’s costs order in the matter.
- 3] The matter has an unusual background in that this was the Commission’s second decision concerning the intended merger.

### **Background**

- 4] The merger notification was filed with the Commission on 14 December 2006 by the intending merging parties, MTO Forestry (Proprietary) Limited (“MTO”), which is the first applicant in these proceedings, and the second and third applicants in these proceedings, Boskor Sawmill (Proprietary) Limited and Boskor Ripplant (Proprietary) Limited (collectively “Boskor”). The aim of the merger was to pool assets of MTO and Boskor (“the merging parties”) in the Eastern and Western Cape provinces in the plantation and sawmilling businesses.
- 5] On 13 March 2007 the Commission issued its first decision, approving the merger unconditionally. The merging parties proceeded to implement the merger.

- 6] In July 2007 A.C. Whitcher (Proprietary) Limited (“Whitcher”), a customer of MTO which considered that its interests would be adversely affected by the merger, filed an application before the Tribunal to review the Commission’s merger approval. The review application was dismissed by the Tribunal on 10 December 2008.<sup>1</sup>
- 7] Whitcher proceeded to take the Tribunal’s decision on appeal to the Competition Court of Appeal (“the CAC”) and on 3 August 2009 the CAC set aside the Tribunal’s decision and remitted the case to the Commission for renewed consideration of the intended merger.<sup>2</sup> The scope and implications of the CAC’s decision (“the CAC review appeal decision”) are dealt with in more detail below.
- 8] On the second round the Commission approved the merger but subject to a number of conditions. That decision of the Commission,<sup>3</sup> dated 27 January 2011, will be referred to below as “the Commission’s second decision.”
- 9] On 10 February 2011 the merging parties, being dissatisfied with this outcome, filed an application before the Tribunal under Section 16(1)(a) of the Competition Act, no. 89 of 1998, as amended (“the Act”) seeking the Tribunal’s consideration of the Commission’s second decision and hence seeking a fresh view of the issues.
- 10] Twelve days later, namely on 22 February 2011, the merging parties filed the present application for suspension of the operation of the conditions attached to the Commission’s second decision pending the outcome of the Tribunal’s consideration of the Commission’s second decision.
- 11] The Tribunal was then approached by the second to sixth respondents in these proceedings for leave to intervene in the consideration proceedings

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1 Case no. 69/AM/Jul07.

2 CAC case no. 84/CAC/Jan09.

3 See merger clearance certificate and attached conditions and report.

and these suspension proceedings. After a hearing the Tribunal granted such leave on 5 August 2011.<sup>4</sup>

12]The third to sixth respondents, P.G. Bison Limited (third respondent), Steinhoff Southern Cape (Proprietary) Limited (fourth respondent), Thesen Sawmill (Proprietary) Limited (fifth respondent) and Steinhoff Doors & Building Materials (Proprietary) Limited (sixth respondent), were at that time all members of the Steinhoff group of companies. Steinhoff International Holdings Limited, the parent company, is a listed entity.

13]It appears from the answering affidavit by Mr Gary Chaplin for the third to fifth respondents, dated 4 September 2011, that the sixth respondent was sold to an unrelated group some time before that date<sup>5</sup> and the sixth respondent was unrepresented at the hearing. It will be disregarded in the remainder of this decision.

14]The third to fifth respondents will be referred to below as “the Steinhoff objectors.”

15]We shall not attempt to describe or summarise the conditions imposed by the Commission in its second decision otherwise than to say that they include a stipulation that the merged entity allocate 350% of its sawlog output, broken down in various categories of sizes, species, origin and other characteristics, to the open market, which is taken to include Whitcher and the Steinhoff objectors and other third-party customers. The merging parties assert that the conditions are impractical, expensive to apply, and that compliance with them is impossible.

## **Business Operations**

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<sup>4</sup> Case no. 10/AM/Feb11.

<sup>5</sup> See par. 2 of Chaplin’s affidavit.

16] The parties to the matter engage with each other at the level of business operations in a manner which, in brief summary, is as follows. The situation described is pre-merger.

17] MTO owns plantations and sawmills in the Eastern and Western Cape. Boskor, a substantial customer of MTO for sawlogs, owns sawmills in the Tsitsikamma area of the Eastern Cape. The merger thus has both horizontal and vertical dimensions.

18] Whitcher operates a sawmill in the Tsitsikamma area and is a competitor of the merging parties and is also a customer of MTO for sawlogs. It fears for the security of its supply of sawlogs from the merged entity.

19] The Steinhoff objectors are customers of MTO for sawlogs and poles and they too fear that their supplies from the merged entity will be in jeopardy if the merger is approved unconditionally.

### **The nature of the consideration proceedings and the relevant statutory provisions**

20] The merging parties have brought the Commission's second decision before the Tribunal under Section 16(1)(a) of the Act. The relevant provisions read as follows:

*16(1) If the Competition Commission approves –*

*a) a small or intermediate merger subject to any conditions, or prohibits such merger, any party to the merger, by written notice and in the prescribed form, may request the Competition Tribunal to consider the conditions or prohibited merger...*

*(2) Upon receiving a .....request in terms of subsection (1), the Competition Tribunal must consider the merger in terms of section 12A, and the ..... request, and within the prescribed time –*

*(a) approve the merger;*

- (b) *approve the merger subject to conditions; or*
- (c) *prohibit implementation of the merger.*

21] There is no express provision in the Act for the Tribunal to grant interim relief by way of temporary suspension of conditions laid down by the Commission in a decision regarding an intermediate merger.

22] The only provision in the Act which deals expressly with the Tribunal's powers to grant interim relief is Section 49C, in which the interim relief referred to applies to complaints of prohibited practices. Section 58(1), which sets out a number of specific orders which the Tribunal may make in relation to prohibited practices, does not deal with the granting of interim relief in relation to merger decisions of the Commission. Procedures for giving effect to Section 49C are set out in rule 26 of the Rules for the Conduct of Proceedings in the Competition Tribunal ("the Tribunal's rules").

23] The silence of the Act in relation to powers of the Tribunal to grant temporary suspension of a small or intermediate merger decision of the Commission must be contrasted with the express language in which the Act sets out the power of the CAC in this respect. Section 38(2A)(d) states:

*"The Judge President, or any other judge of the Competition Appeal Court designated by the Judge President, may sit alone to consider an application to suspend the operation and execution of an order that is the subject of a review or appeal."*

24] Section 27 of the Act was relied on by the merging parties to provide the basis for this alleged power of the Tribunal, particularly the reference in Section 27(1)(d) to incidental powers of the Tribunal. Section 27(1), under the rubric **Functions of Competition Tribunal**, reads as follows:

*27(1) The Competition Tribunal may –*

- a) adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and if so, to impose any remedy provided for in this Act;*
- b) adjudicate on any other matters that may, in terms of this Act, be considered by it, and make any order provided for in this Act;*
- c) hear appeals from, or review any decision or, the Competition Commission that may, in terms of this Act, be referred to it; and*
- d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act.*

We shall return to the Section 27(1)(d) power later in this decision.

25] When approving a small or intermediate merger subject to conditions the Commission issues a merger clearance certificate on Form CC 15, with the conditions and the body of its decision attached to that form. This is in conformity with Rule 38(3) of the Rules for the Conduct of Proceedings in the Competition Commission (“the Commission’s rules”).

26] Decisions of the Commission, once issued, are immediately enforceable. Section 64(1) of the Act is clear in this regard. It reads as follows:

*64(1) Any decision, judgement or order of the Competition Commission, Competition Tribunal or Competition Appeal Court may be served, executed and enforced as if it were an order of the High Court.*

27] We have no doubt that a decision of the Commission approving an intermediate merger subject to stated conditions and duly accompanied by a merger certificate in terms of Rule 38(3) of the Commission’s rules is a decision as contemplated in Section 64(1).

28] Parties to an intermediate merger that has been conditionally approved by the Commission who do not comply with the conditions risk the

revocation of the approval by the Commission under Section 15 of the Act.

The relevant provisions read:

*15(1) The Competition Commission may revoke its own decision to .....conditionally approve a[n] .....intermediate merger if –*

*a) .....*

*b) .....*

*c) a firm concerned has breached an obligation attached to the decision.*

*(2) If the Competition Commission revokes a decision to approve a merger under subsection (1), it may prohibit that merger even though any time limit set out in the Chapter may have elapsed.*

29]The Tribunal is further entitled in such circumstances to impose an administrative penalty on the merging parties. Section 59(1)(d)(iii) provides:

*59(1) The Competition Tribunal may impose an administrative penalty only –*

*a) ....*

*b) ....*

*c) ....*

*d) If the parties to a merger have –*

*i) ....*

*ii) ....*

*iii) proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the Competition Commission in terms of section 13 or 14, or the Competition Tribunal in terms of section 16...*

30]There is also a possibility that divestiture of assets may be ordered by the Tribunal if merger conditions imposed by the Commission under Chapter 3



(the portion of the Act dealing with merger control) are contravened. Section 60(1) provides:

*60(1) If a merger is implemented in contravention of Chapter 3, the Competition Tribunal may –*

*a) order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger...*

31] Before resorting to the drastic remedy of revocation the Commission is obliged to place the relevant firm under notice. How it does so is determined by the Commission's rule 39, which requires the Commission to issue a so-called Notice of Apparent Breach under cover of a Form CC19. What may follow is effectively a proposal by the recipient of the notice of a plan to remedy the breach, and normally consultation between this firm and the Commission will ensue with the objective of achieving compliance with the conditions. If the consultation process fails the Commission may proceed to revoke the merger approval. The process of revocation, if matters reach that stage, is governed by the Commission's rule 40.

32] It appears from the papers that a Notice of Apparent Breach was issued by the Commission on 20 April 2011, but there has not been finality resulting from it. We were told at the hearing on 28 October 2011 that the merging parties were still in non-compliance with the conditions.

33] Clearly, the scheme of the Act contemplates that merging parties will be strictly bound by conditions imposed by the Commission for the approval of an intermediate merger, and it is striking that nothing in the relevant statutory provisions contemplates the intervention of the Tribunal in the relevant procedures laid down for the Commission to observe in following up on breaches of its merger conditions. We return to this topic later in dealing with our conclusions on the point *in limine*.

## **Opposition to the application**

34] The Commission, Whitcher and the Steinhoff objectors have all opposed the suspension application, relying on various grounds, both substantive and formal.

35] Among the latter is the point *in limine* taken by Whitcher, with the support of the Steinhoff objectors, to which we now turn.

### **Point *in Limine***

36] Whitcher claimed that the Tribunal lacked jurisdiction to hear the suspension application since it has no powers to suspend the operation of a decision of the Commission in an intermediate merger once that decision has been duly made. The fact that the decision has been brought before the Tribunal for consideration under Section 16(1)(a) does not affect that proposition, it was argued.

37] In the circumstances of this case, what the merging parties requested, so Whitcher's argument went, was in fact consent at this stage to merge, coupled with suspension of the conditions imposed by the Commission in its second decision. Thus what was being requested was only a partial suspension, namely that directed to the imposed conditions, together with the Tribunal's approbation of the right of the merging parties to merge. No power existed on the part of the Tribunal to entertain such an outcome, nor in fact any form of suspension of a decision of the Commission duly taken.

38] Whitcher's counsel refuted any suggestion that such a power might be implied under Section 27 as being incidental to the Tribunal's powers and necessary for the exercise of its functions. While the Tribunal was empowered to consider an intermediate merger referred to it under Section 16(1)(a), there was no reason to think that the legislature regarded it necessary for the Tribunal to be able to sterilise the Commission's decision by any form of interim ruling that would apply until the consideration proceedings had been completed. No such power was

necessary for the Tribunal to carry out its functions effectively.

39] On the contrary, any such power would undercut the right of the Commission conferred by Section 15(1)(c) to revoke its small or intermediate merger approval if there had been non-compliance with conditions imposed by the Commission. No reason existed to imagine that the legislature intended to confer powers on the Tribunal to bring about such interference with the discretion of the Commission in this regard.

40] In these circumstances Whitcher contended that the merging parties, being in breach of the conditions imposed by the Commission, were in this application seeking the Tribunal's approbation of their breach of the Act.

41] Whitcher's stance on the point *in limine* was supported by the Steinhoff objectors. The Commission did not express a view on the point as it had not dealt with it in its answering affidavit.

42] The merging parties contended that the starting point for dealing with the matter was that they had in fact merged and had done so lawfully in 2007, and that the merger itself was a legally approved *fait accompli* and represented the *status quo*. All that was in question was the validity of the conditions imposed on the merging parties in the Commission's second decision. Since the Tribunal had powers to set aside these conditions permanently in a consideration proceeding under Section 16(1)(a), it followed that, if it were satisfied in interim proceedings, on the basis of standard legal criteria for interim relief, that the conditions had been wrongly imposed, it could suspend them pending the outcome of the consideration proceedings.

43] Counsel for the merging parties placed strong reliance on a passage in the CAC's decision in the review appeal mentioned above. At paragraph 40 of the CAC's decision the court notes that a court may exercise a discretion not to grant a review because any relief granted would be incapable of practical implementation, given the lapse of time between the launch of the proceedings and the granting judgment, and notes further that because of

the fact that the merger had already been implemented and business by the merged entity had been conducted, there would be “huge prejudice” if the appeal were to succeed.

None the less, the court pointed out (in paragraphs 41-42):

*“Given the nature of merger proceedings, were this argument to succeed, it would be extremely difficult for any successful party to gain substantive relief in a merger review. Mergers require expedition; litigation of a complex kind demands careful deliberation. A balance has to be struck between these considerations as opposed to an abandonment of the deliberative requirements of adjudication. In any event, the effect of a decision to refer the matter back to the Commission would not practically undo the various transactions described by Mr Reeves [the deponent for the merging parties]. On the strength of Oudekraal Estates (Pty) Ltd v City of Cape Town 2004(6) SA 222 (SCA), a decision to merge would have taken place, pursuant to what was then a duly authorised decision on the part of the Commission. In terms of the findings of this court, that decision by the Commission must be set aside. But the order which is to be made in this case does not [a]ffect the legal consequences of any decision or act taken pursuant to the merger as approved by the Commission. What flowed legally from the Commission’s decision to permit the merger, cannot be set aside in these proceedings nor can any of the contractual obligations entered into by the merged parties automatically be declared to be of no force and effect in law, until a court, upon hearing the merits of a duly formulated application so decides. Hence, any setting aside of acts taken pursuant to the authorisation of the merger by the Commission would have to flow from such a duly launched application which would need to be successfully upheld by another court ..... Any such application would, of course, have to be brought during the period in which the Commission would be required to reconsider its decision, itself an indication that a stay of such proceedings would, in the ordinary course, be far more appropriate than the granting of irreversible relief, that is setting aside of transactions already undertaken at the very time that the Commission is reconsidering whether to permit the merger.”*

44] On the basis of this reasoning the CAC concluded that the merging parties' argument concerning prejudice flowing from the success of the review appeal should not be fatal to the granting of the appeal.<sup>6</sup> Accordingly, the appeal was allowed and the first decision of the Commission was set aside and the transaction was referred back to the Commission *"for further consideration as to whether the merger should be approved and if so whether appropriate conditions should be attached to such approval..."*

45] The merging parties' counsel stressed that no application to a court had been made in the interim by any of the respondents to obtain relief in respect of any of the matters referred to by the CAC in the light of the Oudekraal decision, and accordingly, it was submitted, the merger was intact and had lawfully taken place, and only the conditions imposed by the Commission in its second decision could be the subject of contention. These were unduly onerous and impossible or impractical to implement, and should be suspended pending the hearing of the merits of the consideration proceedings under Section 16(1)(a).

46] We are not concerned in this decision with the latter argument, apart from noting that it was controverted by the Commission, by Whitcher, and by the Steinhoff objectors.

47] Even the debate about the legal status of the merger as implemented and any ancillary transactions flowing from the implementation – an example mentioned at the hearing was a contract entered into by the merged entity for the transportation of its products – seems to us to call for no comment or decision by the Tribunal at this stage. We are concerned only with the question whether the Tribunal has powers to suspend the operation of the conditions imposed on the merger by the Commission in its second decision.

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<sup>6</sup> See par 43 of the CAC's decision.

48]The merging parties, in arguing that the Tribunal has the power to entertain the application, placed reliance on the decision in Gold Fields Limited v Harmony Gold Mining Company Limited and another.<sup>7</sup> In that case the question in issue was whether the Tribunal had the power to grant an interdict preventing the implementation of a notifiable merger which had not been approved, despite the absence of express reference in the Act to such powers. The CAC held that it would be counter-productive and cost-ineffective for the Tribunal to determine that the merger had taken place and then prohibit it, but lack the power to give effect to that order by the grant of an appropriate interdict. Thus an interdictory power was found to exist under Section 27(1)(d) in those circumstances. We do not believe that this decision and the reasoning employed in it by the CAC assist the merging parties since the interdictory power found to exist is not on all fours with an alleged power to suspend the operation of conditions laid down by the Commission. The interdictory power found to exist is directed at preventing or halting illegal conduct, whereas the power we are asked to infer would in fact condone what on the face of it is a contravention of the Act and hence illegal conduct.

49]The merging parties also referred to the decision in GlaxoWellcome (Pty) Ltd and others v Terblanche NO and another.<sup>8</sup> In that case an application in the CAC for the suspension of an order of the Tribunal was rejected on the basis that the order of the Tribunal was not appealable. We do not see that this decision advances the case of the merging parties. As we have seen, the CAC, unlike the Tribunal, has express powers to suspend the effect of orders which are subject to appeal or review, and nothing of relevance to the position of the Tribunal can be gleaned from it.

50]One of the strong contentions of the merging parties was that there is a bias in the common law and High Court procedure that the *status quo* should be preserved when matters of appeal or review were in prospect, and that this approach should also underpin the reasoning of the Tribunal

in its approach to the suspension application. We were urged to accept

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<sup>7</sup> (43/CAC/Nov04) [2005] 1 CPLR 74 (CAC) (27 January 2005).

<sup>8</sup> (02/CACSept00) [2000] ZACAC 1 (11 October 2000).

that the *status quo* in this case was that the merger of the first, second and third applicants had lawfully taken place in 2007 and that nothing since then had disturbed this. The CAC decision in the successful review appeal case brought by Whitcher had, it was argued, not disturbed the *status quo*, and the absence of an application to a court as foreshadowed in the Oudekraal decision had reinforced this *status quo*.

51] Although it is not strictly necessary for the purposes of this decision for us to rule on this point, we note that we consider the true position to be by no means as simple as this. Contrary to the interpretation of the text and order in the CAC case advanced to us by the merging parties' counsel, we consider that the CAC's order setting aside the original unconditional approval of the merger by the Commission served to vacate entirely that decision of the Commission, whatever might be the legal effects of steps taken and transactions entered into on the basis of that overturned decision.

52] Thus the conditional approval of the Commission's second decision did not for the purposes of regulation of the merger under the Act bear upon a merged entity but on the merging parties as notionally separate entities, as had the Commission's first decision. The decision of the CAC, which reflectively considered the implications of its reasoning and its decision and the harm the decision and order would do to the merging parties, removed the legal basis for the merger and hence ended the *status quo* pleaded for by the merging parties in this application. The merging parties have had the choice to abide by the Commission's decision and accept the merger together with the conditions newly imposed or to reject the conditional merger and dispute the validity of the Commission's second decision in consideration proceedings under Section 16(1)(a). The half-way house they have pleaded for is in our view not open to them.

53] The interpretation we place on the above-quoted provisions of the Act describing the powers of the Commission to obtain enforcement of its

decisions and the routes open to the Commission if there is non-compliance with a decision it has duly made in an intermediate merger

leaves no room for the possibility that the Tribunal has implied powers under Section 27(1)(d) to hear the suspension application. On the contrary, the lack of express provisions in the Act in regard to the Tribunal on those issues seems to us consistent with the view advanced by Whitcher and the Steinhoff objectors that the legislature has deliberately excluded the Tribunal from having such jurisdiction. This leaves the Commission free to deal unhindered with the task of ensuring compliance with conditions it imposes on small and intermediate mergers, a task which in the normal course of events advances the public interest. The CAC, by contrast with the Tribunal, has express powers in regard to the suspension of the effects of orders in cases brought to it for appeal or review, and this seems to us no matter of mere coincidence but to reflect the well-considered intention of the legislature to withhold such powers from the Tribunal.

54] There are various possible reasons why the legislature may have made this choice. One possibility with some cogency is that to have bestowed this jurisdiction on the Tribunal would have created the risk that all parties to conditionally approved intermediate mergers would be tempted to bring not only consideration proceedings to overturn or vary the conditions but also proceedings for interim suspension of the conditions, thereby reaping the benefits of the anticompetitive effects of the merger without bearing the encumbrances of the merger conditions imposed.

55] We stress that from a competition effects perspective a conditional approval of a merger is similar to the prohibition of a merger in that - but for the imposed conditions - the merger would be anticompetitive and would be of harm to consumers. To allow imposed merger conditions to be suspended would mean that a small or intermediate merger that, but for those conditions, has been found by the Commission to be anticompetitive, could be implemented by merging parties with the full thrust of its negative effects on competition in the relevant markets until

such time as a consideration application is heard and decided by the Tribunal. It may very well be impossible to restore the harm done to



competition in the affected markets and consumers in the period of suspension, if suspension was a possibility. In our view the legislature in the design of the Act wanted to prevent such occurrences of harm to competition and ultimately consumers.

### **Order on the merits**

56] It is for these reasons that the point *in limine* was upheld on 28 October 2011 and the application for temporary suspension of the conditions imposed by the Commission's second decision was dismissed.

### **Costs**

57] It is not the Tribunal's practice to order costs in favour of or against the Commission, and accordingly we make no order as to the Commission's costs.

58] Although the Tribunal does not normally award costs in favour of a party taking a technical or formal point in a case where there are substantial issues whose merits are at stake, our view in this instance is that it would be inequitable to deprive the respondents of their costs when to deal properly with this application they have had to contend in their papers on record and their heads of argument with the extensive merits of the application. This has no doubt put them to considerable expense that was ultimately unnecessary.

59] We have taken account of the argument of counsel for the merging parties, raised near the close of the hearing, that questioned the power of the Tribunal to award costs against his clients. He referred us to Section 57(1) of the Act, which states:

*57(1) Subject to subsection (2), and the Competition Tribunal's rules of procedure, each party participating in a hearing must bear its own costs.*

60] Exceptions to what was described as this "default position" are thus possible if provided for in the Tribunal's rules. Rule 58(1) of these rules

states:

*58(1) Upon making an order under Part 4, the Tribunal may make an order for costs.*

61] Part 4 of the Tribunal's rules includes Rule 42, which has the rubric **initiating other proceedings**. It was in terms of this provision, which is a catch-all for proceedings not dealt with specifically elsewhere in the rules, that the suspension application was made.

62] We consider that there is thus a sound statutory basis for the award of costs in this case should the Tribunal find it proper to exercise its discretion in this regard.

63] We order the merging parties to pay the costs of Witcher and the Steinhoff objectors in this application, such costs to include the costs of two counsel.

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**L Reyburn**

17 January 2012  
**Date**

**A Wessels and A Ndoni concurring**

Tribunal Researcher: Songezo Ralarala

For the Applicants: Advocate Mike Van Der Nest (SC) and Advocate Jerome Wilson instructed by Edward Nathan Sonnenbergs.

For the Commission: Advocate Tsebo Sibeko (SC) and Advocate Cecil Baloyi.

For the 2<sup>nd</sup> Respondents: Advocate David Unterhalter (SC) and Advocate Anthony Gotz instructed by Webber Wentzel.

For 3<sup>rd</sup> to 5<sup>th</sup> Respondents: Advocate Arnold Subel (SC) and Advocate Johan De Waal.

For 6<sup>th</sup> Respondent: No appearance

