



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.: LM156DEC21/OTH121Sep22

In the application to adduce further evidence between:

NORTHAM PLATINUM HOLDINGS LIMITED

Applicant

And

IMPALA PLATINUM HOLDINGS LIMITED

First Respondent

ROYAL BAFOKENG PLATINUM LIMITED

Second Respondent

COMPETITION COMMISSION OF SOUTH AFRICA

Third Respondent

**THE MINISTER OF TRADE, INDUSTRY AND
COMPETITION**

Fourth Respondent

Case no.: LM156DEC21

In re: the large merger between:

IMPALA PLATINUM HOLDINGS LIMITED

Primary Acquiring Firm

And

ROYAL BAFOKENG PLATINUM LIMITED

Primary Target Firm

Panel: Y Carrim (Presiding Member)
A Ndoni

I Valodia
Heard on: 28 September 2022
Order issued on: 30 September 2022

ORDER

HAVING read the documents placed on record and having heard counsel for the parties the Tribunal makes the following order:

A: Orders in relation to the application.

- [1] The application for discovery of all of Impala Platinum Holdings Limited's ("Implats") purchase of concentrate ("POC") agreements and/or all offtake agreements to which it is a party, or to which it has been a party over the past ten years, is dismissed [REDACTED]
[REDACTED]
[REDACTED]
- [2] The application for discovery of Implats' internal documents discussing, presenting, analysing, or reporting the actual effective capacity, and capacity utilisation at the smelting, conversion, and base metals removal stages, split into the treatment of primary concentrate produced internally or by affiliates and primary concentrate produced by third party junior miners, as well as forecasts and estimates over the foreseeable future,¹ is granted only to the extent detailed below:
- 2.1 The strategic documents serving before the Board reflecting—
- 2.1.1 the current nameplate and real capacity of its smelters;
and
- 2.1.2 the current and forecast utilisation of the smelters.
- 2.2 Implats must provide the documents in para 2.1 by no later than **16h00 on Wednesday 5 October 2022**, subject to the furnishing of appropriate confidentiality undertakings.

¹ Prayer 1.2 of the Notice of Motion.

- [3] The applications for the Tribunal to subpoena documents from Anglo American Platinum Limited (“Amplats”) and Sibanye Stillwater Limited, in terms of section 54 of the Competition Act and Tribunal Rule 47,² are dismissed on the basis that Northam’s theory of harm relates to the potential diminishing of smelter capacity on account of Royal Bafokeng Platinum Limited (“RBPlats”) moving some of its capacity from Amplats to Implats in static market conditions; understanding the likelihood and impact of this can be assessed with reference to the merging parties documents and witnesses already due to come before the Tribunal.
- [4] The application for Northam to lead a factual expert witness, Mr Damian Smith³ is granted on the basis that he is required to testify on his own knowledge and experience to the dynamics of contracting with junior miners and their relative bargaining positions vis-à-vis Implats, Amplats (if he has any knowledge) and Northam. If Mr Smith is unable to testify on these issues another Northam senior manager/executive with personal knowledge and experienced is permitted to testify instead. The identity of Northam’s witness and a copy of his/her witness statement must be filed by no later than **16h00 on 14 October 2022**.
- [5] The application to bring Mr Patrick Smith of RBB Economics to testify before the Tribunal as an expert witness for Northam⁴ is dismissed, on account of the fact that Northam’s theories of harm have already been articulated in its papers and the Tribunal wishes to acquire insights from factual witnesses about the vertical relationships in the value chain and the *de facto* implementation of the contractual relationships and capacity and utilisation.
- [6] The application to have one factual witness from each of two anonymous junior miners to testify as factual witnesses in a hearing where the merging parties are completely excluded from knowing what case is brought against them and by whom (*in camera* hearing)⁵ is dismissed on the basis that this would be manifestly unfair to the merging parties and does not accord with the Constitution and the principles of natural justice. However –

² Prayers 2 and 3 of the Notice of Motion.

³ Prayer 4 of the Notice of Motion.

⁴ Prayer 5 of the Notice of Motion.

- 6.1 The Commission is required to identify and lead a factual witness from a junior miner who is able to testify to the market dynamics of contracting with smelters downstream and provide an opinion on any potential merger remedies proposed.
- 6.2 This evidence will be canvassed in open court subject to the ordinary confidentiality regimes,⁶ where confidentiality is at issue.
- 6.3 The Commission must file the witness statement of this junior miner by no later than on **16h00 on 14 October 2022**. The application for Northam to cross-examine any witnesses called by any other party⁷ is granted. The merging parties and the Commission are also afforded an opportunity to cross examine any witnesses.

[7] There is no order as to costs.

B: Orders in relation to the further conduct of proceedings

- [8] The merging parties are required to bring one knowledgeable factual witness from each of them who is able to testify to the theories of harm raised by Northam and, if relevant, in rebuttal of the evidence of any other witness.
- [9] The merging parties must provide the identities and the witness statements of these witnesses by no later than **16h00 on Wednesday 26 October 2022**.
- [10] The Tribunal will allocate times for evidence in chief and cross examination of witnesses and provide directions for the further conduct of proceedings nearer the time of the hearing and parties will be advised accordingly.

Signed by: Yasmin Tayob Carrim
Signed at: 2022-09-30 17:17:56 +02:00
Reason: Witnessing Yasmin Tayob Carrim

Yasmin Tayob Carrim

Ms Yasmin Carrim

Mrs Andiswa Ndoni and Prof Imraan I. Valodia concurring.

30 September 2022

Date

⁶ In terms of the Unilever regime read with section 44 of the Competition Act.

⁷ Prayer 7 of the Notice of Motion.