



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM187Mar22

In the matter between:

ARM Bokoni Mining Consortium (Pty) Ltd

Primary Acquiring Firm

And

Bokoni Platinum Mines (Pty) Ltd

Primary Target Firm

Panel	:	I Valodia (Presiding Member)
	:	T Vilakazi (Tribunal Panel Member)
	:	E Daniels (Tribunal Panel Member)
Heard on	:	11 August 2022
Decided on	:	11 August 2022
Reasons issued on	:	07 September 2022

Reasons for Decision

[1] On 11 August 2022, the Tribunal conditionally approved the large merger between ARM Bokoni Mining Consortium (Pty) Ltd (“ARM Bokoni”) and Bokoni Platinum Mines (Pty) Ltd (“Bokoni Platinum”). In terms of the proposed transaction, ARM Bokoni intends to acquire the entire share capital of Bokoni Platinum. Post-merger, ARM Bokoni will exercise sole control over Bokoni Platinum.

The merging parties and activities

[2] ARM Bokoni is controlled by African Rainbow Minerals Platinum (Pty) Ltd (“ARM Platinum”) which is in turn controlled by African Rainbow Minerals Limited (“ARM”), a public company listed on the JSE Limited (“ARM Group”)¹. ARM Bokoni does not have

¹ ARM directly and indirectly controls a number of firms such as Modikwa Platinum Mine (Pty) Ltd (“Modikwa”); Nkomati Joint Venture and Two Rivers Platinum (Pty) Ltd, amongst others.

any business activities. It was established as a Special Purpose Vehicle ("SPV") for purposes of the proposed transaction.

- [3] The ARM Group is a diversified mining and minerals company with operations in South Africa and a manganese alloy production plant in Malaysia. It mines and beneficiates iron ore, manganese ore, chrome ore, platinum group metals ("PGMs"), nickel, ferromanganese, and coal. It further has a strategic investment in gold through its stake in Harmony Gold Mining Company Limited ("Harmony Gold").
- [4] Bokoni Platinum is wholly owned by Bokoni Platinum Holdings (Pty) Ltd, which is in turn jointly controlled by Plateau Resources (Pty) Ltd and Rustenburg Platinum Mines Limited². ("Target Group")
- [5] The Target Group operates and holds the mining rights to Bokoni Mine, an underground PGM mining operation located in the Limpopo Province. The operation comprises mining infrastructure of two decline production shafts as well as two old non-production shafts, namely Vertical and UM2 shafts. In addition, the operation has two concentrator plants, a village, a clinic and ancillary assets within the mining area.
- [6] The mine contains all six PGMs, namely, platinum, palladium, rhodium, ruthenium, iridium and osmium. Rhodium, platinum and palladium are the most economically significant metals in the group and are found in the largest quantities³.
- [7] Due to several years of significant financial losses, Bokoni Mine was placed under care and maintenance in October 2017.

Competition Assessment

Overlaps

- [8] The Commission considered the activities of the merging parties and found that there exists both horizontal and vertical overlaps.
- [9] The horizontal overlap is as a result of both parties being involved in the market for the manufacturing and production of PGMs, more specifically (i) platinum, (ii) palladium, (iii) rhodium, (iv) ruthenium, (v) iridium, and (vi) osmium. The vertical overlap is pre-existing and arises as a result of the ARM Group, through Modikwa, selling PGE-rich concentrate to Anglo American Platinum, who further processes it through its smelting

² Rustenburg Platinum is a wholly owned subsidiary of Anglo-American Platinum Limited, a public company listed on the JSE.

³ The remaining PGMs are produced as co-products of platinum and are not mined on their own.

and refining facilities to refined metal⁴. The Commission found that this arms-length vertical relationship will continue post-merger and will not be impacted by the merger.

Market Definition

- [10] The Commission noted that while the merging parties are both involved in the manufacturing and production of the abovementioned PGMs, iridium and ruthenium constitute minor PGMs and are produced as by-products to platinum, palladium and rhodium. Furthermore, production decisions are not based on the levels of iridium and ruthenium that will be produced. With regard to osmium, the Commission found that the demand for it is not significant, and it is produced on an ancillary basis and stockpiled.
- [11] The Commission further considered that the Tribunal has, in several cases, considered the market for PGMs to be global in nature⁵ and given that the merging parties operate at a national and global level, the Commission did not deviate from Tribunal precedence and assessed the impact of the proposed transaction globally.
- [12] In the circumstances, the Commission assessed the impact of the proposed transaction upon the global markets for the mining and production of (i) Platinum, (ii) Palladium, and (iii) Rhodium.
- [13] On the basis of the above evidence, the Tribunal has assessed the impact of the merger on the global markets for the mining and production of Platinum, Palladium, and Rhodium.

Market shares and levels of concentration

Global Market for the Mining and Production of Platinum

- [14] The Commission found that the merged entity will have an estimated combined post-merger market share of 4%, with a market share accretion of 2% in the international market for the mining and production of platinum.

⁴ Similarly, prior to being placed under care and maintenance, the produce produced by Bokoni Mine was transported to the Anglo-American Platinum Polokwane smelter and sold to Anglo American Platinum for further processing.

⁵ Tribunal case numbers: 52/LM/Jul11, 49/LM/Jun11, 54/LM/Sep01, LM220Mar15/020917, LM178Nov15 and LM024May21.

- [15] Furthermore, the Commission found that there are alternative players in the market such as, *inter alia*, Anglo-American Platinum, Impala Platinum, Norilsk Nickel and Sibanye-Stillwater that will continue to constrain the merged entity post-merger.
- [16] Accordingly, the Commission concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in the global market for the mining and production of Platinum.

Global Market for the Mining and Production of Palladium

- [17] The Commission found that the merged entity will have an estimated combined post-merger market share of 3%, with a market share accretion of 2% in the international market for the mining and production of palladium.
- [18] Likewise, the Commission found that there are alternative players in the market such as, *inter alia*, Anglo-American Platinum, Impala Platinum, Norilsk Nickel and Sibanye-Stillwater that will continue to constrain the merged entity post-merger.
- [19] Accordingly, the Commission concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in the global market for the mining and production of palladium.

Global Market for the Mining and Production of Rhodium

- [20] The Commission found that the merged entity will have an estimated combined post-merger market share of 3.29%, with a market share accretion of 0.29% in the international market for the mining and production of rhodium.
- [21] Similarly, the Commission found that there are alternative players in the market such as, *inter alia*, Anglo-American Platinum, Impala Platinum, Norilsk Nickel and Sibanye-Stillwater that will continue to constrain the merged entity post-merger.
- [22] Accordingly, the Commission concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in the global market for the mining and production of rhodium.
- [23] In the light of the above, the Commission concluded that the proposed transaction is unlikely to substantially lessen or prevent competition in any market in South Africa.

- [24] The Tribunal assessed whether the proposed transaction will result in the significant lessening of competition in the global markets for the mining and production of Platinum, Palladium, and Rhodium. In its assessment, the Tribunal considered that the market shares in respect of each PGM is less than 5% and accretions are less than 3%. Furthermore, that the merged entity will remain subject to constraints from the likes of Anglo-American Platinum, Impala Platinum, Norilsk Nickel and Sibanye-Stillwater.
- [25] The Tribunal concludes that the merger does not give rise to a likely prospect of lessening competition as a result of horizontal unilateral effects. This is evident from the small market shares and the merged entity continuing to face constraints from its competitors.

Public Interest Analysis

Effect on Employment

- [26] As a result of years of significant financial losses, Bokoni Mine was placed under care and maintenance in 2017. This resulted in pre-merger retrenchments of its employees. The process and implementation of the pre-merger retrenchments is governed by the Section 189 Separation / Retrenchment Agreement ("Retrenchment Agreement") concluded by Bokoni Platinum and the National Union of Mineworkers ("NUM"), UASA - The Union and Togetherness Amalgamated Workers Union of South Africa ("TAWUSA") on 18 September 2017⁶.
- [27] The NUM, on behalf of the Target Firm's employees raised concern as to whether section 197A of the Labour Relations Act⁷, as amended ("LRA") will apply to the current care and maintenance employees. In addition, the NUM sought clarity as to whether the provisions of the Retrenchment Agreement which provided that when the mine reopens, preference for employment opportunities will be given to retrenched employees would apply.
- [28] In response to the NUM's concerns, the merging parties submitted that neither Sections 197 or 197A of the LRA are applicable as Section 197A only applies to a sale

⁶ Merger Record p 798.

⁷ 66 of 1995.

of a business as a going concern⁸ and the proposed transaction involves a sale of shares.

- [29] The merging parties further submitted that the current care and maintenance employees are employed under fixed-term contracts, due to expire on 30 June 2022. As such, given other regulatory approvals and conditions precedent still outstanding, it is unlikely that the proposed transaction will be implemented by end of June 2022. With the result that Bokoni Platinum intends to extend the fixed-term contracts for a further period of 6 months, until 3 December 2022. Upon expiry of the fixed-term contracts, ARM Bokoni will use reasonable endeavours in considering the care and maintenance employees for any roles required at the Bokoni Mine, based on mine plan requirements and the new organisational structure.
- [30] In addition, the merging parties submitted that in terms of the Retrenchment Agreement, former retrenched employees of Bokoni Mine would be given preference for employment opportunities in the event that the mine resumes operations by 31 December 2019. Given that the mine did not resume operations by 31 December 2019, this term is no longer applicable.
- [31] The Commission sought to impose a condition to the proposed transaction, to the effect that for a period of 24 months after the implementation date, the merged entity shall give first preference to those employees who were retrenched when Bokoni Mine was placed under care and maintenance, for any vacancies within the merged entity.
- [32] The merging parties reiterated that in terms of the Retrenchment Agreement, the retrenched employees would be given employment preference provided that the mine resumed operations by 31 December 2019. The mine has, to date, not resumed operations and remains under care and maintenance. Furthermore, that it would be burdensome and impractical for the merged entity to carry this obligation towards the retrenched employees, particularly where the merging parties have agreed to a condition which will achieve the same purpose albeit in relation to the care and maintenance employees.
- [33] The merging parties submitted that the proposed transaction will not negatively affect employment. In this regard, the re-opening of Bokoni Mine is expected to create approximately 5000 employment opportunities, 2500 of which be permanent and 2500

⁸ Where the old employer is insolvent and a scheme, arrangement or compromise is being entered into to avoid winding up or sequestration for reasons of insolvency.

will be temporary. The temporary employment opportunities will arise as a result of the anticipated construction work to be undertaken on Bokoni Mine, in order to ready the mine for resumption of operations.⁹

[34] In the circumstances, the Tribunal approved the proposed transaction subject to the condition that:

- a. For a period of 24 months after the Implementation Date the merged entity shall:
 - i. give first preference to the Care and Maintenance Employees¹⁰ for any vacancies within the merged entity, provided that the Care and Maintenance Employees have the requisite qualifications, skills, know-how and experience for those specific vacancies, at all times subject to the merged entity's employment equity plan and transformation requirements.
 - ii. take reasonable steps to maintain a database of the names and contact details of all Care and Maintenance Employees. Should any vacancies arise, the merged entity undertakes to communicate available vacancies to the Care and Maintenance Employees through their last known contact details such as email and/or cell phone numbers.

The promotion of a greater spread of ownership

[35] The merging parties submitted that pre-merger, the ARM Group (through ARM) has a 58.29% B-BBEE shareholding, while the Target Group has 59% BEE shareholding.

[36] Given the proposed transaction, the ARM Group has committed to establishing a Black Industrialists SPV, ESOP SPV and a Local Community SPV, which will each hold a 5% interest in ARM Bokoni.

[37] The Commission found that with the establishment of the abovementioned SPVs, post-merger, the BEE shareholding will be 64%, with an incretion of 5% on the target firm's shareholding as follows: ARM (85%*58.03%) = 49.32% + Community SPV (5%*100%) + ESOP SPV (5%*100%) + Black Industrialist SPV (5%*100%) = 64.3%.

⁹ ARM Bokoni reiterates that the anticipated job creation is subject to the outcome of a feasibility study, which is still at an early stage of evaluation.

¹⁰ The current fixed-term contract care and maintenance employees of Bokoni Mine, whose contracts are due to expire on 30 June 2022 and are likely to be extended for a further period of up to 6 months, until 31 December 2022.

[38] The Commission concluded that the proposed transaction will have a positive impact on the greater spread of ownership.

[39] Accordingly, the Tribunal approved the proposed transaction on condition that within 36 months of the implementation date, the merged entity shall finalise and implement the following structures:

- a. The ESOP SPV
 - i. the ESOP SPV will be a trust established for the benefit of Qualifying Employees¹¹;
 - ii. the trust shall have a board of trustees. The merged entity and the workers shall appoint an equal number of trustees. In addition, the workers shall be entitled to appoint one independent chairperson, with the prior written approval of the Merged entity;
 - iii. all Qualifying Employees shall be eligible for participation, and maternity leave will have no adverse impact on the qualifying criteria;
 - iv. the ESOP SPV shall acquire a shareholding of 5% in the Acquiring Firm for a nominal consideration and on an unencumbered basis. For the avoidance of doubt, Qualifying Employees will not be required to pay any monies to participate in the ESOP SPV and the nominal consideration required to purchase shareholding in the Acquiring Firm shall be advanced to the ESOP SPV by ARM or ARM Platinum and shall not be in the form of a loan;
 - v. as an ordinary shareholder, the ESOP SPV, like all the other ordinary shareholders of the Acquiring Firm, will be entitled to receive dividends in respect of its ordinary shares in the Acquiring Firm once the Acquiring Firm is able to declare ordinary dividends to its ordinary shareholders; and
 - vi. the ESOP SPV will, in addition to its ordinary shares in the Acquiring Firm, subscribe for a separate class of shares in the Acquiring Firm that will entitle the ESOP SPV to a trickle dividend pending the declaration and payment of ordinary dividends. The trickle dividend will start to accrue from the year that the Target Firm achieves its first PGM concentrate sales. The accrued values will accumulate in favour of the ESOP SPV over a 5 (five) year cycle and

¹¹ Defined as “unskilled and semi-skilled Employees and will exclude managements and executive Employees”.

become payable to Qualifying Employees, via the ESOP SPV, at the end of the fifth year of each cycle.

b. Local Community SPV

- i. the Local Community SPV will be a non-profit company established for the benefit of host communities of the Bokoni Mine that will be eligible for participation;
- ii. the Local Community SPV shall acquire a shareholding of 5% in the Acquiring Firm for a nominal consideration and on an unencumbered basis. For the avoidance of doubt, eligible host communities will not be required to pay any monies to participate in the Local Community SPV and the nominal consideration required to purchase shareholding in the Acquiring Firm shall be advanced to the Local Community SPV by ARM or ARM Platinum and shall not be in the form of a loan;
- iii. as an ordinary shareholder, the Local Community SPV, like all the other ordinary shareholders of the Acquiring Firm, will be entitled to receive dividends in respect of its ordinary shares in the Acquiring Firm once the Acquiring Firm is able to declare ordinary dividends to its ordinary shareholders; and
- iv. the Local Community SPV will, in addition to its ordinary shares in the Acquiring Firm, subscribe for a separate class of shares in the Acquiring Firm that will entitle the Local Community SPV to a trickle dividend pending the declaration and payment of ordinary dividends. The trickle dividend for the Local Community SPV will be paid effective from the first fully completed financial year after the Implementation Date of the Proposed Transaction until the Acquiring Firm is able to declare ordinary dividends to its ordinary shareholders.

c. Black Industrialist SPV

- i. the Black Industrialists SPV will be a private company owned by Black Industrialists. The board of directors of the Black Industrialist SPV will include representatives of the Black Industrialist shareholders;
- ii. the Black Industrialists SPV shall acquire a shareholding of 5% in the Acquiring Firm for a nominal consideration and on an unencumbered basis. For the

avoidance of doubt, the Black Industrialists will only pay a nominal consideration to acquire shares in the Black Industrialists SPV; and

- iii. as an ordinary shareholder, the Black Industrialists SPV, like all the other ordinary shareholders of the Acquiring Firm, will be entitled to receive dividends in respect of its ordinary shares in the Acquiring Firm once the Acquiring Firm is able to declare ordinary dividends to its ordinary shareholders.

[40] The Tribunal invited the merging parties to revisit their proposed Conditions and to define the term “*Black Industrialists*”, in line with the DTIC’s policy. The merging parties subsequently revised the Conditions and defined the term to mean “*Black Persons as defined in the B-BBEE Act identified by the Acquiring Firm to hold shares in the Black Industrialists SPV*¹²”.

Effect of the merger on a particular industrial sector or region

[41] The merging parties submitted that as a result of being placed on care and maintenance in 2017, Bokoni Mine had a limited need for production related inputs and supplies. Further, that through the proposed transaction, the ARM Group intends on finalising a Definitive Feasibility Study within 12 months after implementation date and to commence mining operations in 2023. This will enable the ARM Group to create sustainable value for a broad range of stakeholders including local communities and employees as well as establishing key local and regional supply chains for critical inputs and supplies once the mine is operational.

[42] Consequently, the Commission found that the proposed transaction will have a positive impact on the region in which Bokoni Mine is situated.

Other Public Interest

[43] The Commission submitted that the proposed transaction raises no other public interest concerns.

¹² Clause 1.5 of the Conditions.

Conclusion

[44] We conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. The proposed transaction has been approved subject to the above-mentioned public interest conditions, marked **Annexure A**.

7 September 2022

Presiding Member
Prof. Imraan Valodia

Date

Concurring: Dr Thando Vilakazi and Mr Enver Daniels

Tribunal Case Managers:	Matshidiso Tseki and Leila Raffee
For the Merging Parties:	Kgomotso Mmutle, Busisiwe Masango, Daryl Dingley of Webber Wentzel. Lebohang Mabidikwane of Bowmans.
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