

SOUTH AFRICA / JUDGMENT

ARM Bokoni Mining Consortium (Pty) Ltd v Bokoni Platinum Mines (Pty) Ltd (LM187Mar22) [2022] ZACT 57; [2022] 2 CPLR 30 (CT) (11 August 2022)

[2022] ZACT 57

COURT

Competition Tribunal

BEFORE

I Valodia, T Vilakazi, E Daniels

CASE / FILE NUMBER

LM187Mar22

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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

Order

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that-

1. the merger between the abovementioned parties be approved in terms of section 16(2)(b) of the Act subject to the conditions attached hereto as Annexure A; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).

Signed by: Imraan

Signed at: 2022-08-11 15:42:17 +02:00

Reason: Witnessing Imraan

Date: 11 August 2022

Concurring: Dr Thando Vilakazi and Mr Enver Daniels

Merger Clearance Certificate

Date : 11 August 2022

To : Bowman Gilfillan Attorneys

You applied to the Competition Commission on 25 February 2022 for merger approval in accordance with Chapter 3 of the Competition Act.>

Your merger was referred to the Competition Tribunal in terms of section 14A of the Act, or was the subject of a Request for consideration by the Tribunal in terms of section 16(1) of the Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal

approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to: no conditions.

the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- a) it was granted on the basis of incorrect information for which a party to the merger was responsible.
- b) the approval was obtained by deceit.
- c) a firm concerned has breached an obligation attached to this approval.

The Registrar, Competition Tribunal

This form is prescribed by the Minister of Trade and Industry in terms of section 27 (2) of the Competition Act 1998 (Act No. 89 of 1998).

ANNEXURE A

ARM BOKONI MINING CONSORTIUM (PTY) LTD AND

BOKONI PLATINUM MINES (PTY) LTD CASE NUMBER: LM187Mar22

CONDITIONS

1. DEFINITIONS

The following terms have the meaning assigned to them below, and cognate expressions have corresponding meanings –

1.1 "Acquiring Firm" means ARM Bokoni Mining Consortium (Pty) Ltd, a private company incorporated in accordance with the laws of South Africa, with registration number 2014/269188/07;

1.2 "Approval Date" means the date referred to on the Competition Tribunal's Merger Clearance Certificate (Form CT 10), being the date on which the Merger is approved in terms of the Competition Act;

1.4 "B-BBEE Act" means the Broad-Based Black Economic Empowerment Act, 53 of 2003, as amended;

1.5 "Black Industrialists" means "Black Persons" as defined in the B-BBEE Act identified by the Acquiring Firm to hold shares in the Black Industrialists SPV;

1.6 "Black Industrialists SPV" means a special purpose vehicle which will be owned by Black Industrialists that will hold a shareholding of 5% in the Acquiring Firm;

1.7 "Bokoni Mine" means the mine known as "Bokoni Platinum Mine" operated by the Target Firm;

1.8 "Bokoni Mine's Retrenched Employees" means all the employees retrenched by the Target Firm in 2017 due to the Bokoni Mine being placed under care and maintenance;

1.9 "Care and Maintenance Employees" means 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 six months, until 31 December 2022;

1.10 "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;

1.12 "Competition Act" means the Competition Act, 89 of 1998, as amended;

1.13 "Conditions" means the conditions set out in clauses 3 and 4 herein, and "Condition" means, as the context requires, any one of them;

1.14 "Days" means any calendar day other than a Saturday, a Sunday or an official public holiday in South Africa;

1.15 "Employees" means the permanent employees (as contemplated under the Labour Relations Act) of the Target Firm, which shall include Workers, and "Employee" means, as the context requires, any one of them;

1.16 "ESOP SPV" means an employee share ownership plan to be implemented through an employee trust, that will acquire a shareholding of 5% in the Acquiring Firm and in terms of which Qualifying Employees shall be beneficiaries thereunder;

1.17 "Implementation Date" means the date occurring after the Approval Date, on which the Merger is implemented by the Merging Parties, which date is defined as the 'Closing Date' under the SPA;

1.18 "Labour Relations Act" means the Labour Relations Act, 66 of 1995, as amended;

1.19 "Local Community SPV" means a community special purpose vehicle through which host communities of the Bokoni Mine will benefit from a shareholding of 5% in the Acquiring Firm;

1.20 "Merged Entity" means the Target Firm subject to control of the Acquiring Firm following the Implementation Date;

1.21 "Merger" means the proposed acquisition by the Acquiring Firm of all of the shares in the Target Firm;

1.22 "Merging Parties" means the Acquiring Firm and the Target Firm;

1.23 "Qualifying Employees" means unskilled and semi-skilled Employees, and will exclude management and executive Employees;

1.24 "South Africa" means the Republic of South Africa;

1.25 "SPA" means the sale and purchase agreement entered into between Rustenburg Platinum Mines Limited, Bokoni Platinum Holdings Proprietary Limited, Plateau Resources Proprietary Limited, African Rainbow Minerals Limited and the Acquiring Firm on or about 17 December 2021 in terms of which, inter alia, Bokoni Platinum Holdings Proprietary Limited has agreed to sell all of its shares, constituting 100% of the issued shares in the Target Firm, and all of its claims against the Target Firm, to the Acquiring Firm;

1.26 "SPVs" means, collectively, the Black Industrialists SPV, the ESOP SPV and the Local Community SPV;

1.27 "Target Firm" means Bokoni Platinum Mines (Pty) Ltd, a private company incorporated in accordance with the laws of South Africa, with registration number 2007/016001/07;

1.28 "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act;

1.30 "Workers" means Employees, and, in the context of ownership, refers to ownership by a broad base of Employees

2. RECORDAL

2.1. On 25 February 2022, the Commission received notice of a large merger whereby the Acquiring Firm intends to acquire the entire issued share capital of the Target Firm (the "Proposed Transaction"). Following its investigation of the Merger, the Commission found that the Proposed Transaction is unlikely to substantially prevent or lessen competition in any market in South Africa.

2.2. In relation to public interest, the Merging Parties submit that the Bokoni Mine was placed under care and maintenance in 2017 due to several years of significant cash losses under difficult market conditions. As a result, the Bokoni Mine's Retrenched Employees were retrenched.

2.3. Post-Merger the Merging Parties anticipate that the re-operating of Bokoni Mine will create significant employment opportunities as detailed further in the Conditions.

2.4. Regarding the greater spread of ownership, the Merging Parties submit that as a result of the Merger, a Local Community SPV, an ESOP SPV and a Black Industrialist SPV will be established and will each acquire 5% of the ordinary shares of the Acquiring Firm for a nominal price.

2.5. Moreover, the Merging Parties submit that, subject to the outcome of a feasibility study to be conducted by the Acquiring Firm, the Merger is likely to result in the reoperating of Bokoni Mine and the creation of a significant amount of employment opportunities in South Africa, estimated to be approximately 5000 employment opportunities, of which approximately 2500 will be permanent.

2.6. The Commission requested that the Merger be approved subject to certain Conditions to address the above public interest commitments and to give first preference of employment to the Care and Maintenance Employees, which the Merging Parties have agreed to.

3. BROAD-BASED BLACK ECONOMIC EMPOWERMENT CONDITION

3.1. Within 36 (thirty-six) months of the Implementation Date, the Merged Entity shall finalise and implement the structures of the following:

3.1.1. the ESOP SPV;

3.1.2. the Local Community SPV; and

3.1.3. the Black Industrialists SPV.

3.2. The ESOP SPV structure shall be finalised in accordance with the following principles:

3.2.1. the ESOP SPV will be a trust established for the benefit of Qualifying Employees;

3.2.2. the Trust shall have a board of trustees as follows: the Merged Entity and the Workers shall appoint an equal number of trustees. In addition, the Workers shall be entitled to appoint 1 (one) independent chairperson with the prior written approval of the Merged Entity;

3.2.3. all Qualifying Employees shall be eligible for participation, and maternity leave will have no adverse impact on the qualifying criteria;

3.2.4. 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;

3.2.5. 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

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

3.3. The Local Community SPV structure shall be finalised in accordance with the following principles:

3.3.1. 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;

3.3.2. 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;

3.3.3. 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

3.3.4. 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.

3.4. The Black Industrialist SPV structure shall be finalised in accordance with the following principles:

3.4.1. 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;

3.4.2. 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

3.4.3. 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.

3.5. Prior to issuing any shares in the Acquiring Firm to the ESOP SPV, Local Community SPV and Black Industrialists SPV, the Merged Entity shall provide the Commission with (i) copies of the trust deed (in the case of the ESOP SPV) or memorandum of incorporation (in the case of the Local Community SPV and Black Industrialists SPV) of the relevant SPV and (ii) the terms of the shares in the Acquiring Firm to be issued to such SPV (such documents in relation to a SPV, collectively, the “SPV Documents”), and the following process shall apply:

3.5.1. in the event that the Commission (acting reasonably) takes the view that the proposed structure of the ESOP SPV, Local Community SPV or Black Industrialists SPV established (or to be established) by the Merged Entity in terms of the SPV Documents is not in compliance with the principles set out in this Condition in relation to such SPV, the following process shall apply:

3.5.1.1. the Commission shall within 60 (sixty) Days of receipt of the SPV Documents relating to the relevant SPV deliver a written notice to the Merged Entity setting out in reasonable detail such non-compliance (Non-Compliance Notice);

3.5.1.2. the Merged Entity and the Commission shall thereafter take reasonable steps to engage with each other regarding the alleged non-compliance;

3.5.1.3. in the event that any non-compliance with the principles set out in this Condition is established in relation to the structure of a SPV, the Merged Entity shall as soon as reasonably practicable thereafter take reasonable steps to remedy such non-compliance and deliver a written notice to the Commission informing the Commission regarding the steps taken to remedy such non-compliance (a "SPV Compliance Notice"); and

3.5.1.4. if the Commission acting reasonably is of the view that the proposed revised structure of the relevant SPV is still not in compliance with the principles set out in this Condition, the Commission shall within 14 (fourteen) Days of receipt of the SPV Compliance Notice, provide the Merged Entity with a new Non-Compliance Notice, in which circumstances the process set out in paragraphs 3.5.1.1 to 3.5.1.4 (as applicable) shall apply again.

3.6. In the event that the Commission fails to issue a Non-Compliance Notice within the timeframe contemplated in paragraph 3.5.1.1 or 3.5.1.4 (as applicable), the Merged Entity shall be entitled to proceed to implement the proposed structures of the ESOP SPV, Local Community SPV and/or Black Industrialists SPV as set out in the SPV Documents and (if applicable) the SPV Compliance Notice.

4. EMPLOYMENT CONDITION

4.1. For a period of 24 (twenty-four) months after the Implementation Date, the Merged Entity shall give first preference to the Care and Maintenance Employees 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.

4.2. The Merged Entity shall take reasonable steps to maintain a database of the names and contact details of all Care and Maintenance Employees and, should any vacancies arise within 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, amongst others, for a period of 24 (twenty-four) months after the Implementation Date, for purposes of clause 4.1.

5. MONITORING OF COMPLIANCE WITH THE CONDITIONS

5.1. The Merged Entity shall inform the Commission in writing of the Implementation Date within 5 (five) Days of the Implementation Date.

5.2. The Merging Parties shall circulate a copy of the Conditions to their employees in South Africa, the Care and Maintenance Employees and/or their respective representatives within 5 (five) Days of the Approval Date.

5.3. The Merging Parties shall advise the Care and Maintenance Employees and/or their respective representatives of the Condition in clause 4, within 10 (ten) Days of the Approval Date and shall make a non-confidential copy of such Condition available to all Care and Maintenance Employees and/or their respective representatives.

5.4. As proof of compliance thereof, the Merging Parties shall within 10 (ten) Days of circulating the Condition in clause 4 as required in clause 5.2, provide the Commission with an affidavit by a director employed by each of the Merging Parties attesting to the circulation of such Condition and attach a copy of the notice sent and/or published.

5.5. The Merged Entity shall, within 10 (ten) Days of the Implementation Date, provide the Commission with an affidavit which provides the total number of Care and Maintenance Employees that are employed by the Target Firm in South Africa as at the Approval Date. The affidavit referred to herein must be attested to by a senior official of the Merged Entity.

5.6. The Merged Entity shall, within 30 (thirty) Days of each anniversary of the Implementation Date for a period of 36 (thirty-six) months from the Implementation Date, provide to the Commission a report detailing its compliance with the Conditions. This report shall be accompanied by an affidavit attested to by a senior official of the Merged Entity, confirming the accuracy of the report.

5.7. The Merged Entity shall, annually following the approval of the Merger until the SPVs are implemented, provide to the Commission a report detailing the steps taken to implement the SPVs and the progress made in that regard. This report shall be accompanied by an affidavit attested to by a senior official of the Merged Entity, confirming the accuracy of the report.

5.8. The Merged Entity shall inform the Commission of the implementation date of the SPVs contemplated in clause 3 above within 10 (ten) Days of the implementation of such SPVs.

5.9. The Commission may request additional information from the Merging Parties, which the Commission may reasonably deem necessary for the purposes of monitoring the extent of compliance with the Conditions.

5.10. Any person, including any Care and Maintenance Employees (and any employees of the Acquiring Firm), who believes that the Merging Parties have not complied with or have acted in breach of the Conditions may approach the Commission.

6. APPARENT BREACH

In the event that the Commission discovers that there has been an apparent breach of these Conditions, this shall be dealt with in terms of Rule 37 of the Tribunal Rules read together with Rule 39 of the Commission Rules.

7. VARIATION

The Merging Parties or the Commission may at any time, on good cause shown and on notice to the other, apply to the Tribunal for any of the Conditions to be waived, relaxed, modified and/or substituted.

8. GENERAL

All correspondence in relation to the Conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za and ministry@thedtic.gov.za.

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