

SOUTH AFRICA / JUDGMENT

Competition Commission v Royal Bafokeng Holdings (Pty) Ltd and Others (39/X/May11) [2011] ZACT 29; [2011] 1 CPLR 118 (CT) (2 June 2011)

[2011] ZACT 29

COURT

Competition Tribunal

BEFORE

Y Carrim, A Wesseis, M Mokuena

CASE / FILE NUMBER

39/X/May11

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: 39/X/May11

In the matter between:

The Competition CommissionApplicant

and

Royal Bafokeng Holdings (Pty) Ltd1st Respondent

Mogs (Pty) Ltd2nd Respondent

Elbroc Mining Products (Pty) Ltd3rd Respondent

Stope Technology (Pty) Ltd4th Respondent

Panel : Y Carrim (Presiding Member), A Wesseis (Tribunal Member), and M Mokuena (Tribunal Member)

Heard on: 02 June 2011

Decided on : 02 June 2011

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A".

Y Carrim

Presiding Member

Concurring: A Wesseis and M Mokuena

Competition tribunal

South Africa

Notice of Motion

Date 17 May 2011 File_____

To: The Register of the Competition Tribunal

Concerning the matter between:

COMPETITION COMMISSION (APPLICANT)

AND

ROYAL BAFOKENG HOLDING (PTY) LTD & 3 (RESPONDENT)

Take notice that the Application intends to apply to the tribunal for the following order:

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA Commission Case No:2009 Mar4358 In the matter between: THE COMPETITION COMMISSION

.....APPLICANT And ROYAL BAFOKENG HOLDINGS (PTY) LTD

.....1st RESPONDENT MOGS (PTY) LIMITED

.....2nd RESPONDENT ELBROC MINING PRODUCTS (PTY) LTD

.....3rd RESPONDENT STOPE TECHNOLOGY (PTY) LTD

.....4th RESPONDENT CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND ROYAL BAFOKENG HOLDINGS (PTY) LTD, MOGS (PTY) LIMITED, ELBROC MINING PRODUCTS (PTY) LTD AND STOPE TECHNOLOGY (PTY) LTD IN REGARD TO A CONTRAVENTION OF SECTION 13A OF THE COMPETITION ACT 89 OF 1998 (AS AMENDED)

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Commission Case No:2009 Mar4358

In the matter between:

THE COMPETITION COMMISSIONAPPLICANT

And

ROYAL BAFOKENG HOLDINGS (PTY) LTD1st RESPONDENT

MOGS (PTY) LIMITED2nd RESPONDENT

ELBROC MINING PRODUCTS (PTY) LTD3rd RESPONDENT

STOPE TECHNOLOGY (PTY) LTD4th RESPONDENT

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND ROYAL BAFOKENG HOLDINGS (PTY) LTD, MOGS (PTY) LIMITED, ELBROC MINING PRODUCTS (PTY) LTD AND STOPE TECHNOLOGY (PTY) LTD IN REGARD TO A CONTRAVENTION OF SECTION 13A OF THE COMPETITION ACT 89 OF 1998 (AS AMENDED)

The Competition Commission and Royal Bafokeng Holdings (Pty) Ltd, Mogs (Pty) Limited, Eibroc Mining Products (Pty) Ltd and Stope Technology (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for confirmation of the Consent Agreement as an order of the Competition Tribunal in terms of Sections 49D as read with Sections 58(1)(b) and 59(1)(d)(i) of the Competition Act 89 of 1998, as amended, on the terms set out below:

1. Definitions For the purposes of this Consent Agreement the following definitions shall apply: 1.1. "Act" means the Competition Act 89 of 1998 (as amended). 1.2. "Commission" means the Competition Commission of South Africa, a statutory body established in terms of Section 19 of the Act, with its principal

place of business at Building C, Mulayo Building, dti Campus, cnr Meintjies & Essefen Streets, Pretoria, Gauteng. 1.3. "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of Section 26 of the Act with its principal

place of business at Building C, Mulayo Building, dti Campus, cnr Meintjies & Esseien Streets, Pretoria, Gauteng. 1.4. "Consent Agreement" means this written consent agreement duly signed by the Commission, RBH and Mogs. 1.5. "RBH" means Royal Bafokeng Holdings a private company which has its principal place of business at 37 High Street Melrose Arch Johannesburg. RBH is ultimately controlled by the Royal Bafokeng Nation. 1.6. "Mogs" means Mogs (Proprietary) Limited a private company which has its principal place of business at 37 High Street, Melrose Arch, Johannesburg. Mogs is as at the date of signature of this Consent Agreement controlled by RBH. 1.7. "Elbroc" means Elbroc Mining Products (Proprietary) Limited a private company which has its principal place of business at 37 High Street, Melrose Arch, Johannesburg 1.8. "Stopetek" means Stope Technology Services (Proprietary) Limited a private company which has its principal place of business at 37 High Street, Melrose Arch, Johannesburg 1.9. "Respondents" means RBH, Mogs, Elbroc and Stopetek collectively.

2. Background facts 2.1. MOGS began as a shelf company registered on the 9 May 2007. On the 15 December 2007 MOGS signed a sale of share agreement under which it purchased the share capital of Elbroc and Stopetek (the terms of this transaction had been negotiated between August and December 2007). The beneficial and registered shareholding in Eibroc and Stopetek was transferred on the 22 and 23 February 2008. 2.2. On 15 December 2007 the shareholding in Mogs was held 35% to Royal Bafokeng Mogs (Pty) Limited (an indirect subsidiary of RBH) and 75% as to CV5 Limited. 2.3. Subsequent to the signing of the sale of shares agreement the transaction in question was tabled at a RBH strategy meeting on the 18

January 2008 as RBH was being asked to finance the acquisition at a level commensurate with its MOGS shareholding, at that stage 35%. 2.4. At the time of implementation of the transaction Mogs was jointly controlled by Royal Bafokeng Mogs (Pty) Limited (an indirect subsidiary of RBH) 50.01% of the issued shares of Mogs and CVS Limited 40,99% of the issued shares of Mogs. 2.5. The transaction was not notified to the Commission as required by the provisions of section 13A of the Act. The Respondents implemented the transaction on 22 and 23 February 2008. 2.6. MOGS requested KPMG to undertake an investigation of MOGS' transactions to ensure compliance with the Act. 2.7. Failure to notify the Transaction only came to the attention of the Respondents when KPMG advised MOGS on 14 November 2008 of the requirements for notification of mergers under the provisions of the Chapter 3 of the Competition Act. 2.8. After having considered all the financial statements of the Respondents KPMG advised the Respondents on 5 December 2008 of the obligation that existed, to notify the transaction.

- 2.9. On 10 December 2008 KPMG advises the Commission of the transaction and the contravention of Section 13A(3) of the Competition Act. 2.10. The transaction was notified to the Commission as a large merger on 20 March 2009 under case no 2009Mar4358 and unconditionally approved by the Competition Tribunal on 27 May 2009. 3. Commission's investigation and findings 3.1. The Commission investigated the alleged contravention and found the following: 3.1.1. The Transaction resulted in the change of Elbroc and Stoptek control, which change of control constituted a merger in terms of section 12(1) of the Act. 3.1.2. Further, the Commission found that the threshold for a large merger as defined in section 11 (5)(c) as read with section 11 (1) of the Act and Notice 253 of 2001 was met in respect of the Transaction. 3.1.3. Further, the Commission found that the Respondents implemented the merger prior to the notification of and approval by the Tribunal in contravention of section 13A(3) of the Act. 4. Admissions 4.1. The Respondents admit that the transaction constituted a notifiable large merger as defined in Section 11(5)(c) of the Act. 4.2. The Respondents further admit that the merger was implemented prior to notification and approval of the Competition Tribunal in contravention of Section 13A(3) of the Act. 4.3. The Respondents further admit that RBH, Mogs, Elbroc and Stoptek were responsible for notifying the Commission of the Transaction. 5. Compliance with the Act The Respondents agree and undertake: 4.1. To refrain from engaging in prior implementation of notifiable mergers in contravention of section 13A(3) of the Act; 4.2. Develop and implement a compliance programme designed to ensure that its employees, management and directors do not engage in any conduct which constitutes a contravention of the Act, a copy of which programme shall be submitted to the Commission within 60 days of the date of confirmation of this consent agreement as an order of the Tribunal. 6. Administrative penalty 6.1. The Respondents admit that they are each liable to pay an administrative penalty in terms of section 58(1)(a)(iii) read with section 59(1)(d)(iv), 59(2) and
- (3) of the Act. 6.2. RBH and Mogs collectively agree to pay an administrative penalty of R1 000 000 (One Million Rand), and Elbroc and Stopetek collectively agree to pay an administrative penalty of R100 000 (One Hundred Thousand Rand). 6.3. Each penalty shall be payable within 7 (seven) days of the confirmation of this Consent Agreement as an order of the

Tribunal. 6.4. The administrative penalty is payable into the bank account of the Commission whose, banking details are: Bank; ABSA Bank Name of account: Competition Commission Account Number: 4050778576 Branch Code: 323345 6.5. Proof of payment of the administrative penalty amounts will be emailed to the Commission marked for the attention of the Manager of Mergers & Acquisitions. 6.6. The Commission will pay over the penalty amount to the National Revenue Fund referred to in section 59(4) of the Act. 7. Full and final settlement 7.1. This Consent Agreement, upon confirmation thereof as a consent order by the Tribunal, concludes all proceedings between the Commission and the Respondents in relation to the contravention of section 13A(3) of the Act, investigated under the Commission's case number: 2009Mar 4358. Date and signed at MELROSE on this the 4 day of APRIL 2011

The Competition Commission and Royal Bafokeng Holdings (Pty) Ltd, Mogs (Pty) Limited, Eibroc Mining Products (Pty) Ltd and Stope Technology (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for confirmation of the Consent Agreement as an order of the Competition Tribunal in terms of Sections 49D as read with Sections 58(1)(b) and 59(1)(d)(i) of the Competition Act 89 of 1998, as amended, on the terms set out below:

1. Definitions

For the purposes of this Consent Agreement the following definitions shall apply:

1.1. "Act" means the Competition Act 89 of 1998 (as amended).

1.2. "Commission" means the Competition Commission of South Africa, a statutory body established in terms of Section 19 of the Act, with its principal

place of business at Building C, Mulayo Building, dti Campus, cnr Meintjies & Essefen Streets, Pretoria, Gauteng.

1.3. "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of Section 26 of the Act with its principal

place of business at Building C, Mulayo Building, dti Campus, cnr Meintjies & Esseien Streets, Pretoria, Gauteng.

1.4. "Consent Agreement" means this written consent agreement duly signed by the Commission, RBH and Mogs.

1.5. "RBH" means Royal Bafokeng Holdings a private company which has its principal place of business at 37 High Street Melrose Arch Johannesburg. RBH is ultimately controlled by the Royal Bafokeng Nation.

1.6. "Mogs" means Mogs (Proprietary) Limited a private company which has its principal place of business at 37 High Street, Melrose Arch, Johannesburg. Mogs is as at the date of signature of this Consent Agreement controlled by RBH.

1.7. "Elbroc" means Elbroc Mining Products (Proprietary Limited a private company which has its principal place of business at 37 High Street, Melrose Arch, Johannesburg

1.8. Stopetek" means Stope Technology Services (Proprietary) Limited a private company which has its principal place of business at 37 High Street, Melrose Arch, Johannesburg

1.9. "Respondents" means RBH, Mogs, Elbroc and Stopetek collectively.

2. Background facts

2.1. MOGS began as a shelf company registered on the 9 May 2007. On the 15 December 2007 MOGS signed a sale of share agreement under which it purchased the share capital of Elbroc and Stopetek (the terms of this transaction had been negotiated between August and December 2007). The beneficial and registered shareholding in Elbroc and Stopetek was transferred on the 22 and 23 February 2008.

2.2. On 15 December 2007 the shareholding in Mogs was held 35% to Royal Bafokeng Mogs (Pty) Limited (an indirect subsidiary of RBH) and 75% as to CV5 Limited.

2.3. Subsequent to the signing of the sale of shares agreement the transaction in question was tabled at a RBH strategy meeting on the 18 January 2008 as RBH was being asked to finance the acquisition at a level commensurate with its MOGS shareholding, at that stage 35%.

2.4. At the time of implementation of the transaction Mogs was jointly controlled by Royal Bafokeng Mogs (Pty) Limited (an indirect subsidiary of RBH) 50.01% of the issued shares of Mogs and CVS Limited 40.99% of the issued shares of Mogs.

2.5. The transaction was not notified to the Commission as required by the provisions of section 13A of the Act. The Respondents implemented the transaction on 22 and 23 February 2008.

2.6. MOGS requested KPMG to undertake an investigation of MOGS' transactions to ensure compliance with the Act.

2.7. Failure to notify the Transaction only came to the attention of the Respondents when KPMG advised MOGS on 14 November 2008 of the requirements for notification of mergers under the provisions of the Chapter 3 of the Competition Act.

3. Commission's investigation and findings

3.1. The Commission investigated the alleged contravention and found the following:

3.1.1. The Transaction resulted in the change of Elbroc and Stopetek control, which change of control constituted a merger in terms of section 12(1) of the Act.

3.1.2. Further, the Commission found that the threshold for a large merger as defined in section 11 (5)(c) as read with section 11 (1) of the Act and Notice 253 of 2001 was met in respect of the Transaction.

3.1.3. Further, the Commission found that the Respondents implemented the merger prior to the notification of and approval by the Tribunal in contravention of section 13A(3) of the Act.

4. Admissions

4.1. The Respondents admit that the transaction constituted a notifiable large merger as defined in Section 11(5)(c) of the Act.

4.2. The Respondents further admit that the merger was implemented prior to notification and approval of the Competition Tribunal in contravention of Section 13A(3) of the Act.

4.3. The Respondents further admit that RBH, Mogs, Elbroc and Stoptek were responsible for notifying the Commission of the Transaction.

5. Compliance with the Act

The Respondents agree and undertake:

4.1. To refrain from engaging in prior implementation of notifiable mergers in contravention of section 13A(3) of the Act;

4.2. Develop and implement a compliance programme designed to ensure that its employees, management and directors do not engage in any conduct which constitutes a contravention of the Act, a copy of which programme shall be submitted to the Commission within 60 days of the date of confirmation of this consent agreement as an order of the Tribunal.

6. Administrative penalty

6.1. The Respondents admit that they are each liable to pay an administrative penalty in terms of section 58(1)(a)(iii) read with section 59(1)(d)(iv), 59(2) and

(3) of the Act.

6.2. RBH and Mogs collectively agree to pay an administrative penalty of R1 000 000 (One Million Rand), and Elbroc and Stopetek collectively agree to pay an administrative penalty of R100 000 (One Hundred Thousand Rand).

6.3. Each penalty shall be payable within 7 (seven) days of the confirmation of this Consent Agreement as an order of the Tribunal.

6.4. The administrative penalty is payable into the bank account of the Commission whose, banking details are:

Bank; ABSA Bank

Name of account: Competition Commission

Account Number: 4050778576

Branch Code: 323345

6.5. Proof of payment of the administrative penalty amounts will be emailed to the Commission marked for the attention of the Manager of Mergers & Acquisitions.

6.6. The Commission will pay over the penalty amount to the National Revenue Fund referred to in section 59(4) of the Act.

7. Full and final settlement

7.1. This Consent Agreement, upon confirmation thereof as a consent order by the Tribunal, concludes all proceedings between the Commission and the Respondents in relation to the contravention of section 13A(3) of the Act, investigated under the Commission's case number: 2009Mar 4358.

Date and signed at MELROSE on this the 4 day of APRIL 2011

ROYAL BAFOKENG HOLDINGS (PTY) LIMITED Date and signed at MELROSE on this the 4 day of APRIL 2011
MOGS (PTY) LIMITED Date and signed at ISANDO on this the 5 day of APRIL 2011
ELBROC MINING PRODUCTS (PTY) LTD Date and signed at ISANDO on this the 5 day of APRIL 2011
STOPE TECHNOLOGY (PTY) LTD Date and signed at PRETORIA on this the 12 day of May 2011
COMPETITION COMMISSION

ROYAL BAFOKENG HOLDINGS (PTY) LIMITED

Date and signed at MELROSE on this the 4 day of APRIL 2011

MOGS (PTY) LIMITED

Date and signed at ISANDO on this the 5 day of APRIL 2011

ELBROC MINING PRODUCTS (PTY) LTD

Date and signed at ISANDO on this the 5 day of APRIL 2011

STOPE TECHNOLOGY (PTY) LTD

Date and signed at PRETORIA on this the 12 day of May 2011

COMPETITION COMMISSION

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Prepared on 12 October 2026 · Esheria