

SOUTH AFRICA / JUDGMENT

Harmony Gold Mining Company Ltd and Others v The remaining gold mining South African operations of AgloGold Ashanti Ltd (LM171Mar20) [2020] ZACT 22 (27 May 2020)

[2020] ZACT 22

COURT

Competition Tribunal

BEFORE

Y Carrim, A Ndoni, F Tregenna

CASE / FILE NUMBER

LM171Mar20

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM171Mar20 In the matter between Harmony Gold Mining Company Ltd, Harmony Moab Khotsoang Operations (Pty) Ltd and Golden Core Trade & Invest (Pty) Ltd Acquiring Firms And The remaining gold mining South African operations of AngloGold Ashanti Ltd Target Firms
Panel : Ms Y Carrim (Presiding Member) : Ms A Ndoni (Tribunal Member) : Prof. F Tregenna (Tribunal Member) Heard on : 29 April 2020 Order Issued on : 29 April 2020

Reasons

Issued on : 27 May 2020

REASONS

FOR DECISION

APPROVAL

- [1] On 29 April 2020, the Competition Tribunal (“Tribunal”) unconditionally approved a large merger between Harmony Gold Mining Company Ltd, Harmony Moab Khotsoang Operations (Pty) Ltd and Golden Core Trade & Invest (Pty) Ltd and the remaining gold mining South African operations of AngloGold Ashanti Ltd.
- [2] The reasons for the approval of the proposed transaction follow.

PARTIES TO THE PROPOSED TRANSACTION

Acquiring firms

- [3] The acquiring firms are Harmony Gold Mining Company Ltd (“Harmony Gold”), Harmony Moab Khotsoang Operations (Pty) Ltd (“Harmony Moab”) and Golden Core Trade & Invest (Pty) Ltd (“Golden Core”).
- [4] Harmony Gold is a JSE-listed firm incorporated in South Africa, and is not controlled by any firm. Harmony Gold controls multiple firms, including its wholly owned firms Harmony Moab and Golden Core.
- [5] Harmony Gold conducts gold mining and exploration in nine mines in South Africa, primarily producing gold. Silver and uranium are by-products of its gold production. Harmony Gold sells its gold and silver on the London Bullion Market.

Target firms

- [6] The target firms are the remaining gold mining South African operations of AngloGold Ashanti Ltd (“AngloGold”).

AngloGold is not controlled by any firm. It controls multiple firms.

- [7] The primary target firms consist of the WW package[1] and the VR package,[2] which are wholly owned firms and assets of AngloGold. The target firms do not control any firms outside of these packages.
- [8] AngloGold’s WW and VR packages also conduct gold mining and exploration, primarily producing gold. Silver is the only by-product from these packages.

PROPOSED TRANSACTION AND RATIONALE

- [9] Harmony Gold intends to acquire the WW package and the VR package from AngloGold. Post-merger, Harmony Gold will have sole control of the WW package and the VR package.
- [10] The Competition Commission (“Commission”) noted that this proposed transaction aligns with AngloGold’s previous as well as projected disposals of its gold mining assets in South Africa. The Commission also found that Harmony Gold stood to acquire gold assets which were a strategic fit.

RELEVANT MARKET AND IMPACT ON COMPETITION

- [11] The Commission found a horizontal overlap in the activities of the merging parties as both are active in the production and supply of gold and silver. The Commission concluded on two relevant markets in which it assessed the proposed transaction’s impact on competition. The first being the international market for the production and supply of gold, and the second being the international market for the production and supply of silver.

- [12] In the international market for the production and supply of gold, the Commission found that the merged entity would have a post-merger market share of 1.7% following an accretion of 0.4%. The Commission found that this market was highly fragmented and the merged entity would continue to face competitive constraints as no participant's market share exceeded 10%.
- [13] In the international market for the production and supply of silver, the Commission found that the merged entity would maintain a post-merger market share of 0.3% following no discernible accretion. Similarly, the merged entity would continue to face competitive constraints from a highly fragmented market as no participant's market share exceeded 10%.
- [14] In light of the above, the Commission concluded that the proposed transaction was unlikely to substantially lessen or prevent competition in either of these markets.

PUBLIC INTEREST

- [15] During the Commission's investigation, unions representing the employees of the target firms were concerned about conditions and security of employment post-merger. A 12-month moratorium on retrenchments was also proposed as a condition of the merger.
- [16] In response to these concerns, the merging parties confirmed that all employees would, ultimately enjoy terms and conditions of employment that were on the whole not less favourable than those that existed pre-merger. The merging parties also submitted that the Labour Relations Act[3] afforded the employees protection in this regard. The Commission found that the merging parties' submissions adequately addressed these concerns.
- [17] As to the proposed imposition of a 12-month moratorium on all post-merger retrenchments, the merging parties made an undertaking that no retrenchments would occur as a result of the proposed transaction. The Commission found that this undertaking adequately addressed this concern.
- [18] The Commission also assessed whether a dilution in the ownership by historically disadvantaged persons of the target firms (the WW & VR Packages) would occur post-merger. The Commission noted that both packages are wholly owned by AngloGold. The Commission also noted that both Harmony Gold and AngloGold (neither being controlled by any firm) are JSE-listed companies whose shares are widely traded. The Commission concluded that the proposed merger would result in a greater spread of ownership and increased levels of ownership by historically disadvantaged persons due to Harmony Gold's +30% B-BBEE shareholding at group level.

[19] The Commission assessed the proposed transaction's effects on historically disadvantaged suppliers that supply services such as cleaning, gardening, food and beverages to the target firms. The merging parties confirmed that all such contracts would be transferred to them on similar, commercially reasonable terms. The merging parties additionally undertook to facilitate and enhance the economic participation of local black-owned businesses. Based on this, the Commission found that the proposed transaction was unlikely to result in a negative impact on these suppliers as well as AngloGold's previous community initiatives.

CONCLUSION

[20] In light of the above, we concluded that the proposed transaction was unlikely to substantially prevent or lessen competition in any relevant market. In addition, no public interest concerns arise from the proposed transaction.

[21] Accordingly, we approved the transaction without conditions.

27 May 2020 Ms Y Carrim Date Ms A Ndoni and Prof. F Tregenna concurring Tribunal Case Manager: P Kumbirai For the Merging Parties: L Mabidikane of Bowmans for Harmony Gold M Garden & T Theron of ENSafrica for AngloGold For the Commission: T Loate and R Darji

[1] The West Wits ("WW") package comprises of: the WW mining business as a going concern made up of 3 mines in Carletonville;

AngloGold's 25 ordinary shares in as well as its loan claims against Covalent Water Company (Pty) Ltd; 1 ordinary share in AGA Security Services (Pty) Ltd; 100 ordinary shares in Masakhisane Investment (Pty) Ltd.

[2] The Vaal River ("VR") package comprises of: the VR remaining businesses as a going concern, made up of the assets and liabilities excluded from Harmony Moab's 2018 acquisition of AngloGold's VR mining business (see LM229Nov17); AngloGold's 1633 ordinary shares in as well as its loan claims against First Uranium (Pty) Ltd.

[3] No. 66 of 1995 as amended.

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