

SOUTH AFRICA / JUDGMENT

Royal Bofokeng Platinum Ltd v Maseve Investments 11 (Pty) Ltd (LM220Nov17) [2018] ZACT 10 (13 February 2018)

[2018] ZACT 10

COURT

Competition Tribunal

BEFORE

Norman Manoim, Andreas Wessels, Imraan Valodia

CASE / FILE NUMBER

LM220Nov17

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM220Nov17

In the matter between:

Royal Bafokeng Platinum Ltd

Primary Acquiring Firm

And

Maseve Investments 11 (Pty) Ltd

Primary Target Firm

Panel : Mr Norman Manoim (Presiding Member)

: Mr Andreas Wessels (Tribunal Member)

: Prof. Imraan Valodia (Tribunal Member)

Heard on : 15 January 2018

Order Issued on : 16 January 2018

Reasons

Issued on : 13 February 2018

REASONS

FOR DECISION

Approval

[1] On 16 January 2017, the Tribunal conditionally approved the proposed transaction between Royal Bafokeng Platinum Ltd ("RBPlat")

and Maseve Investments 11 (Pty) Ltd ("Maseve"), hereinafter collectively referred to as the merging parties.

[2] The reasons for approval follow.

Parties to the transaction

Primary Acquiring Firm

[3] RBPlat is a platinum group metals ("PGMs") producer and operates the Bafokeng Rasimone Platinum Mine Unincorporated Joint Venture ("BRPM JV"). BRPM JV was established to exploit PGMs in the Merensky and UG2 reefs in the Rustenburg area. The PGM concentrate produced at the BRPM JV contains the following six pure metals: platinum (Pt), palladium (Pd), rhodium (Rh), iridium (Ir), osmium (Os), ruthenium (Ru) as well as gold (Au) and base metals such as nickel, copper and cobalt.

[4] RBPlat is ultimately controlled by the Royal Bafokeng National Development Trust ("Royal Bafokeng Trust"). RBPlat controls Royal Bafokeng Resources ("RBR") which in turn controls BRPM JV.

Primary Target Firm

[5] Maseve is the operating and holding company of the Maseve Mine, located on the Western Limb of the Bushveld Complex near Rustenburg. It commenced non commercial production in February and March 2016. The Maseve Mine produces PGM bearing concentrate containing Pt, Pd, Rh, Ir, Ru and minimal byproducts being gold, copper and nickel. The PGM concentrate is then sold to Anglo American Platinum Ltd in terms of a life of mine off take agreement from Maseve mine with Rustenburg Platinum Mines Ltd.

[6] Platinum Group Metals (RSA) (Pty) Ltd ("PTM SA") holds a majority controlling interest in Maseve. The remainder is held by Africa Wide Mineral Prospecting and Exploration (Pty) Ltd ("Africa Wide").

[7] Currently, Maseve mine is nonoperational as it was placed under care and maintenance in September 2017 as a result of significant difficulties faced during its development and ramp up phase.

Proposed transaction

- [8] In terms of the term sheet agreement entered into between the merging parties, RBPlat will acquire Maseve from PTM SA and Africa Wide. Postmerger, RBPlat will exercise sole control over Maseve. The proposed transaction will take place in two stages. Firstly RBPlat, through RBR, will indirectly acquire Maseve's concentrator plant and surface rights in respect of immovable property owned by Maseve as a going concern for purposes of operating the concentrator plant. Secondly, RBPlat will acquire the total share capital in Maseve from PTM SA and Africa Wide.

Competition

analysis

- [9] The Commission considered the activities of the merging parties and found a horizontal overlap in the mining of PGMs and PGM byproducts such as gold, nickel and copper. The Commission, however, confined its investigation to the global markets for the production and supply of platinum and palladium respectively.[1] The Commission also identified a vertical relationship between the merging parties as RBPlat exploits PGMs and Maseve has the concentrator infrastructure to process such PGMs.
- [10] The Commission found that the merged entity will have a combined postmerger market share of less than 5% in the respective markets. In addition, the merged entity will continue to face competition from other significant players in the markets namely, Anglo American Platinum, Impala Platinum, Norilsk, and Stillwater Mining Company.
- [11] Regarding the vertical relationship, the Commission found that the proposed transaction is unlikely to raise any foreclosure concerns as Maseve's concentrator plant was used exclusively for its own purposes and has not been made available for use to any third party. Furthermore, RBPlat has its own concentrator plant and thus the premerger position in this regard remains unchanged.
- [12] In view of the above, the Commission concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any market.
- [13] We accordingly agreed with the Commission's analysis as the respective combined post merger market shares are de minimis and other players in the market are able to exercise some competitive restraint against the merged entity.

Public interest

- [14] The merging parties submitted that the proposed transaction will not result in any job losses. However, Maseve was forced to retrench

approximately 1300 out of 1700 employees in July 2017. Maseve submits that these retrenchments occurred as a result of financial and economic challenges faced by the platinum mining industry. During September 2017, Maseve was placed under care and maintenance and approximately 300 of the remaining employees were retrenched.[2] The current status quo at Maseve is that only 20

contracted employees are working at the mine and there are no employees at its concentrator plant.[3] We enquired from the merging parties whether these 20 employees were identifiable so to eliminate any uncertainties regarding their

status. A list of these employees were subsequently provided to us after the hearing.

[15] At RBPlat approximately 370 employees were retrenched in September 2017. RBPlat submitted that the retrenchments occurred as a part of a restructuring of the BRPM JV following poor performance and unprofitable operations at the mine's South Shaft. As such, the

retrenchments were not merger specific.

[16] The Commission contacted the employee representatives of the merging parties. The employees as RBPlat did not raise any concerns as the proposed transaction would bring about new opportunities for them going forward. The remaining employees at Maseve at the time, raised concern in that they did not understand why they were being retrenched instead of being transferred to the merged entity in terms of section 197 of the Labour Relations Act (LRA)[4].

[17] All the above retrenchments occurred prior to the merger being filed with the Commission, and at a time when the merging parties were negotiating the proposed transaction[5]. Given the close timing of the transaction negotiation, the retrenchments and merger notification, the Commission undertook to determine

whether the abovementioned retrenchments at both RBPlat and Maseve were merger specific.

[18] With regards to RBPlat, the Commission was satisfied that the retrenchments occurred due to operational reasons as the mine's South Shaft operations performed poorly. The Commission, therefore did not consider these job losses further.

[19] The Commission, however, found that the retrenchments at Maseve appeared to be directly linked to the proposed transaction as the retrenchments occurred during the period when the proposed transaction was negotiated. The Commission found that during this period, RBPlat made an offer to acquire Maseve from PTM SA as a non operating company without any staff or contractors. When this offer was made, no employees were retrenched at Maseve. The retrenchments that occurred in July and September 2017, therefore appeared to be merger specific as they seemed to be linked to the proposed transaction. Upon further investigation, the Commission could not link the premerger retrenchments at Maseve to the proposed transaction because the evidence before the Commission illustrated that Maseve was experiencing financial difficulties as it suffered increasing financial loss from 2014 to 2016. In addition, it would be unlikely that Maseve would continue operations absent the proposed transaction.

- [20] From the above, the Commission was of the view that the proposed transaction would have positive effects on employment as it could save the remaining jobs at Maseve. The counterfactual put up by the Commission illustrated that absent the merger, RBPlat would not have access to Maseve's concentrator plant which would cause its South Shaft operations to close. The effect of such closure would be catastrophic as approximately 2000 employees at the South Shaft would be retrenched during 2018. It is apparent that the proposed transaction would contribute positively to the longevity of RBPlat's South Shaft and the contemplated retrenchments in 2018 will be avoided. Ultimately, the Commission was of the view that the premerger retrenchments at Maseve are outweighed by jobsavings at RBPlat as a result of the proposed transaction. The merging parties further submitted that the proposed transaction will provide an opportunity to boost production because additional capacity will allow for additional employees to work at Maseve[6]. Furthermore, RBPlat currently has an expansion project (Styldrift I) on its facilities and the acquisition of Maseve will allow for increased production at both South Shaft and Styldrift I. This is the key synergy in the project for RBPlat.[7]
- [21] The Commission also engaged with the Economic Development Department (EDD) and inquired about the impact of the proposed transaction jobs in view of its findings. The EDD did not make any further submissions as it was satisfied with the positive impact on jobs arising from the proposed transaction.
- [22] In effort to secure the positive effects on jobs, the Commission deemed it necessary to approve the proposed transaction subject to conditions. Briefly, RBPlat shall employ 115 employees that were previously employed at the concentrator plant by 30 July 2018.
- Preference will be given to the 115 employees previously employed at the concentrator plant. Secondly, RBPlat will take over the 20 named contracted employees currently employed at Maseve in terms of section 197 of the LRA, at no less favourable terms than they currently enjoy within thirty days from the implementation of the proposed transaction.[8]
- [23] We accordingly agreed to these conditions as captured in Annexure A, attached hereto.
- [24] Furthermore, the proposed transaction does not raise any other public interest concerns.

Conclusion

- [25] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, no further public interest issues arise save for those adequately safeguarded by the conditions. Accordingly, we approved the proposed transaction with conditions marked as 'Annexure A'.

Mr Norman

Mr Andreas Wessels and Prof. Imraan Valodia concurring.

13 February 2017

Tribunal Case Managers

: Ndumiso Ndlovu and Hlumelo Vazi

For the Merging Parties

: I Dhladhla of Bowmans and A Aukema of Cliffe

Dekker Hofmeyr

For the Commission

: Z Siyo

ANNEXURE A:

Royal Bafokeng Platinum Limited

Maseve Investments 11 (Pty) Ltd

CASE NUMBER: 2017Oct0027

CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

1.1 “Acquiring Firm” means Royal Bafokeng Platinum Limited;

1.2 “Affected Employees” mean the 63 permanent employees and the 1 559 contract workers of Maseve who were retrenched prior to the proposed transaction; and the 58 contract workers of Maseve who are currently working at the Mine and whose contracts have been cancelled as a result of the Mine being under care and maintenance;

1.3 “Approval Date” means the date referred to in the Tribunal’s merger clearance certificate;

1.4 “Commission” means the Competition Commission of South Africa;

1.5 “Competition Act” means the Competition Act 89 of 1998, as amended;

1.6 “Concentrator Plant” means the Maseve concentrator plant;

1.7 “Conditions” mean these conditions;

1.8 “Days” mean any calendar day which is not a Saturday, Sunday or an official holiday in South Africa;

1.9 “Implementation Date” means the date on which the Merger is implemented;

1.10 "Plant Transaction" means the acquisition as a going concern of the Concentrator Plant and the surface rights in respect of the immovable property owned by Maseve which may be required by RBPlat for purposes of accessing and operating the Concentrator Plant.

1.11 "Proposed Merger" means the acquisition of the Target Firm by the Acquiring Firm;

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

1.13 "Merging Parties" means the Acquiring Firms and the Target Firms;

1.14 "Mine" means the Maseve mine owned by the Target Firm, which is currently under care and maintenance;

1.15 "Rules" mean the Rules for the Conduct of Proceedings in the Competition Commission and the Rules for the Conduct of Proceedings in the Competition Tribunal;

1.16 "Target Firm" means Maseve Investments 11 (Pty) Ltd; and

1.17 "Tribunal" means the Competition Tribunal of South Africa;

1.18 "20 individuals" mean the 20 permanent employees, whose names are listed in Appendix I to these conditions, currently working at the Mine and who will be offered employment by the Acquiring Firm as part of the implementation of the proposed transaction.

2. CONDITIONS TO THE APPROVAL OF THE MERGER

2.1 The Acquiring Firm shall employ 115 employees at the Concentrator Plant by 30 July 2018. First preference will be given to the 115 employees that were previously employed at the concentrator plant. To the extent that these employees are no longer available, RBPlat will endeavour to source employees from the local community in Rustenburg, in line with its current recruitment policy.

2.2 The Acquiring Firm, upon the implementation of the Proposed Merger, shall use reasonable endeavours to inform the Affected Employees, of any relevant job opportunities which arise at the Mine. To the extent that any of the Affected Employees apply for these jobs, and to the extent that such employees are suitably qualified for the relevant job, the Acquiring Firm will give preference to the Affected Employees over other equally qualified applicants who are not part of the Affected Employees.

2.3 The Acquiring Firm will forward a communicate via SMS, email and/or community notice boards, directly or indirectly through third party service providers to all the Affected Employees, providing such Affected Employees with the information and details of the position as well as contact details as to whom to contact within the Acquiring Firms human resource department to enable them to apply should they wish to do so. Under all circumstances the onus will rest on the Affected Employees to apply for a vacant position.

2.4 Should the Affected Employee meet the relevant criteria and job requirements in terms of qualification, experience and skills required, the application will be facilitated through the Acquiring Firms human resource department.

2.5 The Acquiring Firm shall take over the 20 permanent employees currently employed at the Mine, whose names are listed in Appendix I to these conditions, in accordance with Section 197 of the LRA at no less favourable terms than they currently enjoy, within 30 (thirty) Days from the implementation of the Plant Transaction.

MONITORING OF COMPLIANCE WITH THE CONDITIONS

2.6 The Merging Parties shall circulate a copy of the Conditions to all their employees and their relevant trade unions or employee representatives within 5 (five) Days of the Approval Date.

2.7 As proof of compliance thereof, a Chief Executive Officer of the Merging Parties shall within 10 (ten) Days of circulating the Conditions, submit an affidavit attesting to the circulation of the Conditions and provide a copy of the notice that was sent to the employees.

2.8 The Acquiring Firm shall inform the Commission of the Implementation Date within 5 (five) Days of it becoming effective.

2.9 As proof of compliance with clause 2.5 above, the Chief Executive Officer of the Acquiring Firm shall within 10 (ten) Days of employment being offered to the employees in clause 2.5 above, submit proof of, and an affidavit attesting to, the employees being offered employment together with any other written supporting documentation to this effect.

2.10 The Acquiring Firm shall provide the Commission with a detailed report setting out its efforts and compliance with clause 2.1 to 2.4 within 6 (six) months from the Approval Date. The report shall be accompanied by the following:

2.10.1 written and documentary proof of the employment of the 115 employees as stipulated in clause 2.1 of the Conditions; including efforts made to communicate the right of first preference to those previously employed; and proof in the form of an affidavit, duly deposed of by the Chief Executive Officer of the Acquiring Firm, attesting to the accuracy of the contents of the report.

2.11 The Acquiring Firm shall provide the Commission with a detailed report setting out its efforts and compliance with clause 2.2 to 2.4 of the Conditions on each anniversary of the Implementation Date for a period of 2 (two) years. The report shall be accompanied by an affidavit, duly deposed of by the Chief Executive Officer of the Acquiring Firm, attesting to the accuracy of the contents of the report.

2.12 In the event that the Commission receives any complaint in relation to noncompliance with the above Conditions, or otherwise determines that there has been an apparent breach by the Merging Parties of these Conditions, the breach shall be dealt with in terms of Rule 39 of the Competition Commission Rules.

2.13 Any individual who believes that the Merging Parties have not complied with or have acted in breach of these Conditions may approach the Commission.

2.14 The Merging Parties shall be entitled, upon good cause shown, to apply to the Tribunal for a waiver, relaxation, modification and/or substitution of one or more of the Conditions.

2.15 All correspondence in relation to this Condition should be forwarded to:
mergerconditions@compcom.co.za.

- [1] The merging parties produce far more platinum and palladium than any other PGM. Platinum and palladium are far more important than other metals that make up PGMs due to the high volumes produced and their economic value. The other metals (copper, nickel and cobalt) are mined as by products and have minimal market share.
- [2] The Commission found that in total, 1622 employees were retrenched at Maseve.
- [3] These 20 employees are employed as contract workers at the Maseve mine, but employed by a third party company. Transcript pg. 5, line 1517.
- [4] Act 66 of 1995.
- [5] The merger was filed with the Commission on 13 October 2017.
- [6] Transcript, pg. 14, line 15.
- [7] Transcript pg.18, line 1015.
- [8] There will not be any change to whatever their terms have been in the past. In other words, the terms under their current contract will remain unchanged. See Transcript pg. 12, line 1921 and pg. 13, line 12.

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Prepared on 11 October 2026 · Esheria