

## COMPETITION TRIBUNAL OF SOUTH AFRICA

**Case No: LM186Nov15**

In the matter between:

**SIBANYE PLATINUM BERMUDA (PTY) LTD**

Primary Acquiring Firm

and

**AQUARIUS PLATINUM LTD**

Primary Target Firm

AND

**Case No: LM178Nov15**

In the matter between:

**SIBANYE PLATINUM BERMUDA (PTY) LTD**

Primary Acquiring Firm

and

**THE RUSTENBURG MINES**

Primary Target Firm

**(A DIVISION OF RUSTENBURG PLATINUM MINES LTD)**

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Panel	:	Norman Manoim (Presiding Member) Anton Roskam (Tribunal Member) Medi Mokuena (Tribunal Member)
Heard on	:	14 March 2016
Last additional information received on	:	14 March 2016
Orders issued on	:	16 March 2016
Reasons issued on	:	26 April 2016

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## REASONS FOR DECISIONS

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## **INTRODUCTION**

- [1] On 16 March 2016, the Competition Tribunal ("Tribunal") conditionally approved the following two acquisitions: (1) the acquisition of Aquarius Platinum Mine Ltd ("Aquarius") by Sibanye Platinum Bermuda (Pty) Ltd ("BidCo"); and, (2) the acquisition of the Rustenburg Mines (a Division of Rustenburg Platinum Mines Ltd) ("Rustenburg Mines") by Sibanye Rustenburg Platinum Mines (Pty) Ltd ("Sibanye Platinum"). For convenience, we refer to these two acquisitions as "the Sibanye – Aquarius merger" and "the Sibanye – Rustenburg Mines merger".
- [2] The reasons for the conditional approvals are set out together because the two acquisitions were heard simultaneously and they are linked, especially with regard to the public interest issues. We will, however, begin by considering the competition issues of each acquisition.

## **THE SIBANYE – AQUARIUS MERGER**

### **PRIMARY ACQUIRING FIRM**

- [3] The primary acquiring firm is BidCo, a company incorporated in accordance with the laws of Bermuda. BidCo is a newly established company for the purposes of this transaction and intends to register in South Africa. BidCo is wholly owned and controlled by Sibanye Gold Ltd ("Sibanye Gold"), a public company with a primary listing on the Johannesburg Stock Exchange. Sibanye Gold is not controlled by any firm. For the purposes of these reasons, Sibanye Gold and its subsidiaries will collectively be referred to as "Sibanye".
- [4] Sibanye owns and operates four underground and surface gold operations. These operations are the Cooke, Driefontein and Kloof operations in the West Witwatersrand region, and the Beatrix operation in the southern Free State province.
- [5] In addition to its mining activities, Sibanye owns and manages significant extraction and processing facilities. Sibanye also, as a by-product of the gold

ore refining process at Rand Refinery, produces a small amount of silver that is melted and refined into a product suitable for sale.

- [6] Furthermore, Sibanye has a number of organic projects, including the West Rand Tailings Retreatment Project (WRTRP) on the Far West Rand and the Burnstone project on the South Rand of Gauteng province as well as the Beisa North, Beisa South, Bloemhoek, De Bron-Merriespruit, Hakkies and Roblin projects in the Free State.

#### **PRIMARY TARGET FIRM**

- [7] The primary target firm is Aquarius, a public company incorporated in accordance with the laws of Bermuda. Aquarius has its primary listing on the Australian Securities Exchange, a secondary listing on the Johannesburg Stock Exchange and a premium listing on the London Stock Exchange. Aquarius is not controlled by any firm.
- [8] Aquarius focusses on the mining of platinum, palladium and rhodium. It also produces ruthenium and iridium in very small quantities as co-products. Aquarius also produces PGM by-products such as nickel, copper and chrome and chromite, as well as a relatively small amount of gold.
- [9] Aquarius's operations comprise of the Kroondaal, Mimosa, Marikana Platinum Mine and Platinum Mile retreatment facility.

#### **PROPOSED TRANSACTION AND RATIONALE**

- [10] In terms of the proposed transaction, Sibanye Gold through BidCo intends to acquire 100% of the issued share capital of Aquarius and amalgamate BidCo and Aquarius in accordance with the Bermuda Companies Act of 1981. BidCo and Aquarius will post-merger operate as one company under the name BidCo. On completion of the proposed transaction, Sibanye will have sole control of BidCo.
- [11] According to Sibanye Gold, this transaction will assist Sibanye in its growth strategy in the mining sector, as Aquarius is a well-managed and well-resourced company.

[12] In addition, the transaction has a strong strategic and financial rationale, both as a standalone transaction and when considered in conjunction with the proposed Sibanye-Rustenburg merger.

[13] Aquarius, on the other hand, submits that the current transaction provides it with an opportunity to realise its investment.

#### **COMPETITION ASSESSMENT**

[14] The proposed transaction gives rise to a horizontal overlap. The relevant product market is the international market for the production and supply of gold. Post-merger the merged entity will have a market share of less than two percent. In line with this, the Commission concluded that this transaction is unlikely to substantially prevent or lessen competition in the identified market.

[15] None of the parties represented at the hearing indicated that the proposed transaction was anti-competitive.

[16] We concur with the Commission's conclusion.

#### **THE SIBANYE – RUSTENBURG MINES MERGER**

##### **PRIMARY ACQUIRING FIRM**

[17] The primary acquiring firm is Sibanye Platinum, a newly established company incorporated in accordance with the company laws of South Africa. Sibanye Platinum is wholly owned and controlled by Sibanye Gold, which is described in paragraphs [4] to [6] above.

##### **PRIMARY TARGET FIRM**

[18] The primary target firm is The Rustenburg Mines, a division of Rustenburg Platinum Mines Ltd ("RPM"), a company incorporated in accordance with the company laws of South Africa. RPM is a wholly owned subsidiary of Anglo American Platinum Ltd ("Anglo American Platinum"), a company listed on the Johannesburg Stock Exchange. Anglo American Platinum is, in turn, ultimately controlled by Anglo American Plc ("Anglo American"). Anglo American is listed

on the London, Johannesburg, Swiss, Botswana and Namibian Stock Exchanges. Anglo American is not controlled by any firm.

- [19] The Rustenburg Mines is a mining and concentrating complex comprising of the Bathopele, Siphumelele and Thembelani mining operations, two concentrating plants, an on-site chrome recovery plant and the Western Tailings Retreatment plant. The concentrate produced at the Rustenburg Mines also contains (as by-products or co-products) gold, nickel, copper, chrome, silver and cobalt. The Platinum Group Metals ("PGMs") concentrate produced at the Rustenburg Mines is supplied to RPM's Waterval Smelter and is then smelted and refined to produce various PGMs and base metals which are, in turn, sold by RPM to third party domestic customers or to Anglo Platinum Marketing Ltd ("APML"), which on-sell the refined PGMs (and base metals) to customers throughout the world.

#### **PROPOSED TRANSACTION AND RATIONALE**

- [20] In terms of the Sale and Purchase Agreement, Sibanye Gold through its newly established company, Sibanye Platinum, intends to acquire the Rustenburg Mines as a going concern. On completion of the proposed transaction Sibanye Gold will wholly own and control the Rustenburg Mines.
- [21] According to Sibanye Gold, this transaction will assist Sibanye Gold in its strategy of growth in the mining sector. Anglo American Platinum believes that Sibanye Gold is an appropriate new owner for the Rustenburg Mines, which are quality assets with long term and sustainable potential under Sibanye Gold's control.

#### **COMPETITION ASSESSMENT**

- [22] The proposed transaction gives rise to a horizontal overlap. The Commission identified the relevant product market as the international market for the production and supply of silver and gold. This is because both merging parties are active in the identified market. In the market for the production and supply of gold and silver the merged entity will have a post-merger market share of less than 2%.

[23] The Commission also took into account that Sibanye will also be acquiring Aquarius.

[24] In the international market for the mining of PGMs, the Commission found that the merged entity will have a post-merger market share of less than 12%.

[25] The Commission therefore concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market.

[26] None of the parties represented at the hearing indicated that the proposed transaction was anti-competitive.

[27] We concur with the Commission's conclusion.

## **PUBLIC INTEREST CONSIDERATIONS OF THE MERGERS**

[28] The Commission identified two public interest concerns: employment and Black Economic Empowerment ("BEE") procurement pertaining to small and medium enterprises ("SMEs").

### **EMPLOYMENT**

[29] Aquarius, the target firm in this merger, owns the Kroondaal operation. The Rustenburg Mines (a division of Rustenburg Platinum Mines Ltd), which is the target firm in the other merger, owns the Bathopele Mine. The two mergers involve a potential consolidation of certain activities of the Bathopele and Kroondaal operations. Both these operations mine the same body of ore. Therefore, the proposed transactions could have a negative impact on employment.

[30] As a result of the rationalisation of the Kroondaal and Bathopele operations, it was recognised that the following employees could possibly be dismissed for operational requirements: (1) 14 non-site employees who occupied duplicate positions in the Patterson Grades C and above ("the 14 employees' category"); and, (2) about 260 employees who occupied positions in the Patterson Grades C and below ("the 260 employees' category"). The Patterson C grade positions in the first and second categories relate to different positions.

## **The Relevant Legal Principles**

[31] In the *Metropolitan and Momentum* merger<sup>1</sup> the Tribunal, after referring to section 12A of the Competition Act, 1998 (Act 89 of 1998) (“the Competition Act”), and in particular sections 12A (1)(b) and 12 A(3), held that “once a *prima facie* ground has been alleged that a merger may not be justifiable on substantial public interest grounds, the evidential burden ... shifts to the merging parties to rebut it.” The two criteria to be considered in determining whether or not the merger is warranted are:

- “1) a rational process has been followed to arrive at the determination of the number of jobs to be lost, i.e. that the reason for the job reduction and the number of jobs proposed to be shed are rationally connected; and
- 2) the public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest, justifying the job loss and which is cognisable under the Act.”

## **The Commission’s Submissions**

[32] The Commission submitted that there should be an indefinite moratorium on dismissals for operational requirements as a result of the mergers except for the four positions classified as top executive positions. The executive positions identified were the chief executive officer (“CEO”), the managing director, the company secretary and the environmental manager. The reason for the exception was that the persons who occupied these positions probably enjoyed re-employment opportunities.

[33] As regards the indefinite nature of the employment condition, Mr Quilliam of the Commission, pointed out that the Commission would prefer an indefinite timeframe, although he was aware that the Tribunal had previously maintained that a moratorium on retrenchments relating to the merger itself could not be indefinite.

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<sup>1</sup> *Metropolitan Holdings Ltd and Momentum Group Ltd* (Competition Case No. 41/LM/Jul10).

[34] The Commission contested both criteria set out above; namely, that a rational process has been followed to arrive at the determination of the number of jobs to be lost and that the public interest in preventing the employment losses was balanced by an equally weighty and countervailing public interest recognised by the Competition Act that justified the job losses.

### **The Merging Parties' Submissions**

[35] The merging parties submitted that in principle the employment conditions relating to the mergers be as follows.

[36] Both mergers should be approved on the general employment condition that no dismissals for operational requirements (i.e. "retrenchments") take place at the merging parties' operations as a result of the mergers for a period of 24 months after the date of implementation of the mergers.

[37] The exceptions to this general employment condition be that the acquiring firms in each merger be able to retrench as a result of the merger the employees in the 14 employees' category and the 260 employees' category within the 24-month period after the implementation date of the mergers. Therefore, the number of potential retrenchments would be limited to these two categories of employees during the 24-month period after the implementation of the mergers.

[38] The merging parties in both mergers made a number of submissions in support of their proposal.

[39] The first submission, which was in line with the first criterion quote above, was that the reason for the job reductions and the potential number of job reductions during the 24-month period were rationally connected.

[40] In support of this submission, Mr Cockrell, who appeared for the merging parties in this merger and Sibanye Rustenburg Platinum Mines (Pty) Ltd in the other merger, called Dr Richard Stewart, the Senior Vice-President of Business Development at Sibanye, and Jean Nel, the CEO at Aquarius, to provide information to the Tribunal.



- [41] Dr Stewart explained that it was difficult at this stage to determine precisely how many employees would be affected. The reasons for this included the difficulties of the due diligence process given the structures of the businesses being bought and how they were serviced by the companies that owned them, the lack of detailed information about job descriptions and functions and the difficulty of predicting what a particular job would be required to do 12 or 24 months after the implementation of the mergers.
- [42] He also stated that in investigating the number of potential retrenchments, the acquiring firms had decided that they would try to protect jobs in the Paterson A and B grades, because employees in the Patterson C grade and grades above the C grade had better opportunities of finding alternative employment.
- [43] Dr Stewart explained the process of arriving at the number of employees in the 14 employees' and 260 employees' categories. The first process involved a process of identifying duplicate roles. The second involved analysing historical transactions.
- [44] In respect of the 260 employees' category he indicated that the merging parties would be willing to cap the figure at 250 employees.
- [45] Dr Stewart also explained that the 14 employees' category comprised top executives, payroll clerks and senior technical managers.
- [46] Mr Nel also provided the Tribunal with information about how the number of potential retrenchments were calculated if the proposed consolidation of the Kroondaal and Bathopele mines took place. In essence, it involved analysing the services that were shared by the two mines. It emerged from Mr Nel's evidence that the calculations were complicated because Aquarius did not use the Patterson grading system and therefore alignment was difficult.
- [47] Based on the information provided by Dr Stewart and Mr Nel, it was submitted that a rational process has been followed to arrive at the determination of the number of jobs that might be lost.

- [48] In relation to the second criterion – the public interest in preventing employment loss being balanced by an equally weighty, but countervailing public interest, justifying the job loss and which is cognisable under the Act – Mr Cockrell submitted that two considerations were important. The first was the effect of the mergers on a particular industrial sector or region; the second was the effect of the mergers on employment. These factors are listed in section 12A(3)(a) and (b) of the Competition Act respectively.
- [49] As regards to the effect of the mergers on a particular industrial sector or region, Mr Cockrell submitted that it was well known that the platinum mining sector was in decline in the Rustenburg area. He indicated that a number of mines in the Rustenburg area had already ceased production and that this included three mines in the immediate vicinity of the Kroonandaal and Bathopele mines.
- [50] In support of this contention, he referred to a letter from the Rustenburg Chamber of Commerce which stated, amongst other things, that “the South African and international commodities market in the mining sector [was] experiencing the worst economic pressures it had [had] to deal with in decades.”
- [51] The letter also stated that this had had a negative impact on many businesses. It stated that “[m]any businesses [had] closed doors as a direct result of the impact of these and current low levels of dispensable income of the affected communities as well as lower volumes of business experienced by companies selling goods and services to the mine[s].” In addition, the letter referred to Lonmin’s announcement in June of 2015 that it had to shed 3 500 jobs at its operations and the consequent dire consequences this had had for the affected employees and their households.
- [52] Mr Cockrell submitted that juxtaposed to this was Sibanye’s vision, which included prolonging the life of mines, which would not only provide a sustainable plan for the jobs of the majority of employees, but would also secure the incomes of all the dependent families.

[53] Lastly, Mr Cockrell referred to concluding remarks in the letter from the Rustenburg Chamber of Commerce. It stated as follows: "The mining sector, Rustenburg businesses and communities cannot afford that this opportunity of a rescue plan by Sibanye not be implemented."

[54] As regards the effect of the mergers on employment, it was submitted that if the mergers were approved subject to the conditions proposed by the Commission, the mergers would not be implemented, as it would not make commercial sense to do so. This would result in shafts being closed at the Rustenburg Mines and at Aquarius with many jobs being lost.

[55] In support of this contention, Mr Cockrell referred to an extract of a report from the Bagatla Ba Kgafela Investment Holdings, one of shareholders in the future empowerment deal. It stated as follows:

*"In the event the transaction is approved, there may be some jobs lost, a relatively small number of higher skilled educated employees that have in many cases management or supervisory responsibilities. However, if the transaction does not go through, there is a real possibility that Anglo Plats may shut down the mines. Having cognisance to the multiplier effect, this outcome would be catastrophic to the Rustenburg region, surrounding communities and the country at large. It is irrefutable that the transaction will have a positive net effect on employment and the public interest insofar as it is intended to avoid large scale job losses and significant impacts on local businesses and the knock-on effect on the general community that would likely result from same."*

[56] Mr Wilson, who appeared for the Rustenburg Mines in the Sibanye – Rustenburg Mines merger asked Mr Poggiolini, the Head of Strategy at Anglo American, to provide information to the Tribunal.

[57] Mr Poggiolini dealt with the current life expectancy of the Rustenburg Mines – Bathopele, Siphumelele and Thembalani. He stated that Khuseleka, which is part of the Thembalani operations, would close in 2019 and the rest of the operations would end in 2026.

[58] Mr Poggiolini also stated that at current prices all these mines are sub-economic. He stated that Anglo American Platinum's policy was that all mines had to break even after capital expenditure. He therefore indicated that failing the conclusion of the Sibanye – Rustenburg Mines merger, steps would need to be taken to improve the cash flow position of the Rustenburg operations and it was likely that Anglo American would not be prepared to invest the required funds in the mines. He also indicated that if the merger did not go ahead, restructuring would be required, including the closure of shafts, which could result in about 13 000 employees at all levels losing their jobs.

[59] In contrast to Mr Poggiolini's representations about what would transpire if the merger was not implemented, Neil Froneman, the CEO of Sibanye Gold, dealt with the public interest consequences of the mergers if they were to be implemented. Mr Froneman submitted that effectively about 25 000 jobs in the Rustenburg area would be saved as a result of the transactions going ahead. He stated that if the Tribunal imposed the Commission's set of conditions, the mergers would not be implemented, as it would not be feasible to continue with the businesses post-merger.

[60] Therefore, the merging parties submitted that the public interest in preventing employment loss because of the proposed consolidation of the Kroonandaal and Bathopele mines was balanced by an equally weighty and countervailing public interest – the likely positive effects of the proposed mergers upon the platinum mining sector and the Rustenburg area and upon employment as a whole.

#### **THE UNIONS' SUBMISSIONS**

[61] Employees of the merging parties were represented by United Association of South Africa ("UASA"), Solidarity, the Association of Mineworkers and Construction Union ("AMCU") and the National Union of Mineworkers ("NUM").

[62] Solidarity's Mr Schoeman indicated that Solidarity recognised that there was a need to institute drastic reforms to the platinum industry. He stressed that job losses should be an absolute last resort. He therefore supported a moratorium on possible dismissals for two reasons. The first was that a moratorium would lead to lesser dismissals as a result of natural attrition. The second was that the

moratorium gave the unions time to prepare their members for the possibility of the dismissals and to institute measures, such as re-skilling their members, to ameliorate the adverse effects of the possible dismissals.

[63] Ms Freese, who appeared for AMCU, submitted that there should be a three-year moratorium on all dismissals for operational requirements as a result of the mergers. She also submitted that if retrenchments were necessary, then there should at least be a three-year moratorium on retrenchments for unskilled and semiskilled workers; namely, those workers falling within the Patterson A and B grades.

[64] UASA's Mr Van Heerden supported his trade union colleagues' submissions. He proposed that there be a job security guarantee of three years.

[65] Mr Brukwe of NUM was concerned that if the proposed mergers were approved without a retrenchment moratorium, then the mergers would become the operational requirement necessitating the retrenchments. He indicated that NUM supported a three-year moratorium on all retrenchments, but submitted that if this was not possible then special emphasis should be placed on Patterson Grades A, B and C (and he emphasised that grade C should be included) because employees in these bands constituted the vulnerable group.

### **Our Assessment regarding the Employment Condition**

[66] We are of the view that the 24-month period is sufficient, particularly because it will only begin to run from the date of implementation of the mergers. It appears that the date of implementation of the proposed consolidation of the Kroondaal and Bathopele mines would take place after the lapse of a fairly considerable time following the merger approvals.

[67] We are also of the view that the merging parties have shown that a rational process was followed to arrive at the determination of the number of jobs that could be lost. We are mindful of the difficulties of determining the number of potential retrenchments at this stage. Obviously, further and detailed investigations will be necessary after the mergers are implemented and a process of meaningful consultations with the trade unions in terms of sections

189 and 189A of the Labour Relations Act, 1995 (Act 66 of 1995) would need to occur before any retrenchments took place. The investigative process after the mergers and the consultation process may result in a lower number of retrenchments. It cannot result in more retrenchments in the 24-month period after the merger implementation dates than the numbers imposed by the employment conditions.

[68] From the documents referred to and the information and submissions of the witnesses for the merging parties, it is apparent that the public interest in preventing employment loss because of the proposed consolidation of the Kroondaal and Bathopele mines is outweighed by a countervailing public interest. The countervailing public interest is the positive effects of the proposed mergers upon the platinum mining sector and the Rustenburg area and that it is likely that greater employment in this sector and the Rustenburg area will result from the mergers, despite the potential losses arising from the possible consolidation of the Kroondaal and Bathopele mines.

#### **BLACK ECONOMIC EMPOWERMENT**

[69] The Commission indicated that it had received concerns from AMCU and NUM about the BEE procurement schemes for SMEs. They were concerned that after the mergers the acquiring firms might not continue with these schemes.

[70] In order to address this concern, the Commission proposed that a condition be imposed obligating the merging parties to ensure that they maintained the BEE procurement policies currently in place.

#### **AMCU's Submission**

[71] Ms Freese submitted that to the extent that the current BEE procurement practices exceeded the minimum requirements of the Mining Charter, the BEE procurement condition should be drafted in such a way that the acquiring firms could not regress to the minimums in the Charter. This submission was made despite AMCU not being aware of the target firms' current BEE procurement policies and practices and how many BEE companies were involved.

## **The Merging Parties' Submissions**

[72] The merging parties opposed the Commission's and AMCU's proposals. They proposed that they be obliged to ensure that the requirements of the Mining Charter be adhered to.

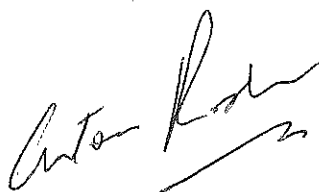
## **Our Assessment**

[73] Having perused the provisions of the current Mining Charter, and bearing in mind that the Mining Charter is reviewed every five years, we are of the view that the Mining Charter sufficiently addresses the BEE and SME procurements concerns raised. Moreover, we are of the view that it was inappropriate for the Commission to impose conditions or targets that exceeded those determined for the industry.

[74] In addition, we are apprehensive that the Commission's and AMCU's proposals are impractical, as the current procurement policies and practices in place were not known and it was unclear how they would be measured and over what period they should be determined.

## **CONCLUSION**

[75] Therefore, we are of the view that the proposed transaction is unlikely to substantially prevent or lessen competition in the relevant market. We agree with the Commission that the proposed transaction does give rise to significant public interest concerns. We therefore approve the merger subject to employment and BEE procurement conditions attached hereto as Annexure A.



**Mr Anton Roskam**

26 April 2016

DATE

**Mr Norman Manoim and Ms Medi Mokuena concurring.**

Tribunal Researcher	:	Caroline Sserufusa
For the Merging Parties	:	Adv. Cockrell instructed by ENSafrica and Malan Scholes Attorneys Adv. Wilson instructed by Norton Rose
For the Commission	:	Layne Quilliam and Kholiswa Mnisi
For AMCU	:	Adv. Freese instructed by Larry Dave Inc.
For NUM	:	Mr Brukwe
For UASA	:	Mr Van Heerden
For Solidariteit	:	Mr Schoeman



## **Annexure A**

**Sibanye Platinum Bermuda Proprietary Limited**

**and**

**Aquarius Platinum Limited**

**CC Case Number: 2015Nov0627**

**CT Case Number: LM186Nov15**

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### **Conditions**

#### **1. DEFINITIONS**

The following expressions shall bear the meaning assigned to them below and cognate expressions bear a corresponding meaning:

- 1.1 **"Acquiring Firm"** means Sibanye Platinum Bermuda Limited ("**BidCo**");
- 1.2 **"Affected Employees"** means the 14 Non-Site Office Employees identified in the attached Annexure B;
- 1.3 **"Approval Date"** means the date referred to in the Competition Tribunal's clearance certificate (Form CT 10);
- 1.4 **"Aquarius"** means Aquarius Platinum Limited;
- 1.5 **"AQPSA"** means Aquarius Platinum (SA) Pty Ltd;
- 1.6 **"Beneficiaries of the Aquarius current BEE procurement policy"** means SMEs currently benefiting from the existing BEE procurement policy at AQPSA;
- 1.7 **"Business Day"** means any calendar day which is not a Saturday, a Sunday or an official public holiday in South Africa;
- 1.8 **"Commission"** means the Competition Commission of South Africa;
- 1.9 **"Competition Act"** means the Competition Act 89 of 1998, as amended;

- 1.10 **"Conditions"** means these conditions;
- 1.11 **"Implementation Date"** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.12 **"LRA"** means the Labour Relations Act No. 66 of 1995 (as amended);
- 1.13 **"Merging Parties"** means BidCo and Aquarius;
- 1.14 **"Merger"** means the amalgamation of BidCo and Aquarius in accordance with the Bermuda Companies Act of 1981;
- 1.15 **"Potential Consolidation"** means the possible consolidation of certain activities between the Kroondal operation (AQPSA) and the Bathopele Mine (part of the Rustenburg Mines);
- 1.16 **"Potential Consolidation Employees"** means those employees defined in paragraph 1.16 of the conditions subject to which the Tribunal approved the Rustenburg Mines Merger (as defined in paragraph 1.19 below);
- 1.17 **"Rustenburg Mines"** means the division of Rustenburg Platinum Limited being acquired by (ultimately) Sibanye Gold in the Rustenburg Mines Merger;
- 1.18 **"Rustenburg Mines Implementation Date"** means the date on which the Rustenburg Mines Merger is implemented;
- 1.19 **"Rustenburg Mines Merger"** means the merger between Sibanye Rustenburg Platinum Mines Proprietary Limited and the Rustenburg Mines that was conditionally approved by the Tribunal under Case Number LM178Nov15;
- 1.20 **"Sibanye Gold"** means Sibanye Gold Limited, a company which wholly owns BidCo;
- 1.21 **"Target Firm"** means Aquarius;
- 1.22 **"Trade Unions"** mean United Association of South Africa ("UASA"), Association of Mineworkers and Construction Union ("AMCU"), National Union of Mineworkers ("NUM") and Solidarity Union; and
- 1.23 **"Tribunal"** means the Competition Tribunal of South Africa.

## **2. CONDITIONS TO THE APPROVAL OF THE MERGER**

### **2.1. EMPLOYMENT**

2.1.1. The Merging Parties shall limit retrenchments to the Affected Employees (i.e. the 14 (fourteen) Non-Site Office Employees identified in Annexure B) and, subject to clause 2.1.2 below, shall ensure that there are no other retrenchments at the Merging Parties' operations as a result of the Merger for a period of twenty four months (2 years) from the Implementation Date.

2.1.2. In the event that the Potential Consolidation does in fact occur within twenty four months (2 years) following the Rustenburg Mines Implementation Date, any retrenchments as a result of the Potential Consolidation shall be limited to the Potential Consolidation Employees.

2.1.3. For the sake of clarity, retrenchments do not include (i) voluntary separation arrangements; (ii) voluntary early retirement packages, (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger or Potential Consolidation; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a contract of a contract worker.

### **2.2. BEE PROCUREMENT POLICY**

2.2.1. The Merging Parties shall ensure that the BEE procurement policy currently in place at AQPSA continues to comply with the requirements as set out in the Mining Charter as determined from time to time.

## **3. MONITORING OF COMPLIANCE WITH THE CONDITIONS**

3.1. The Merging Parties shall circulate a copy of the Conditions to all its employees and their relevant Trade Unions and/or employee representatives within 5 (five) business days of

the Approval Date.

- 3.2. The Merging Parties shall circulate a copy of the Conditions to the Beneficiaries of the Aquarius current BEE procurement policy within 5 (five) business days of the Approval Date.
- 3.3. As proof of compliance with 3.1 and 3.2 above, a senior official of the Merging Parties shall within 10 (ten) business 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 all employees and the Beneficiaries of the Aquarius current BEE procurement policy.
- 3.4. The Merging Parties shall inform the Commission of the Implementation Date within five (5) days of its occurrence.
- 3.5. Any employee and/or Beneficiary of the Aquarius current BEE procurement policy who believes that his/her employment and/or contract with the Merging Parties has been terminated in contravention of the Conditions may approach the Commission with his or her complaint.
- 3.6. The Acquiring Firm shall submit an affidavit (deposed to by a senior official of the Acquiring Firm) on each anniversary of the Implementation Date, confirming compliance with clause 2.1.1 of the Conditions for the duration of the Conditions (determined with reference to clause 2.1.1 above).
- 3.7. 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.

#### **4. GENERAL**

- 4.1. All correspondences in relation to these conditions must be submitted to the following e-mail address: [mergerconditions@compcom.co.za](mailto:mergerconditions@compcom.co.za).

## ANNEXURE B

**Table 4: A summary of employees likely to be affected by the Merger in South Africa**

Location	Likely to be Affected	Position Category	Reason
Non-site employees	14	<u>"Patterson C grade and above"</u> , Chief Executive Officer, Managing Director, Secretary/Legal Counsel, Environmental Manager, Mining Titles Administrator, office secretary, Payroll Supervisor, a secretary and 6 payroll clerks	Due to duplication in jobs as a result of the Merger

## **Annexure A**

**Sibanye Rustenburg Platinum Mines Proprietary Limited**

**and**

**The Rustenburg Mines (a division of Rustenburg Platinum Mines Limited)**

**CC Case Number: 2015Nov0625**

**CT Case Number: LM178Nov15**

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### **Conditions**

#### **1. DEFINITIONS**

The following expressions shall bear the meaning assigned to them below and cognate expressions bear a corresponding meaning:

- 1.1 **"Acquiring Firm"** means Sibanye Rustenburg Platinum Mines Proprietary Limited (**"Sibanye Rustenburg"**);
- 1.2 **"Affected Employees"** means up to 250 employees falling within Patterson Grade C and above, provided that this is as a result of a duplication arising from the merger ;
- 1.3 **"Approval Date"** means the date referred to in the Competition Tribunal's clearance certificate (Form CT 10);
- 1.4 **"Aquarius"** means Aquarius Platinum Limited, the target firm being acquired by Sibanye Platinum Bermuda Proprietary Limited in a merger transaction filed with the Commission under case number 2015Nov0627;
- 1.5 **"AQPSA"** means Aquarius Platinum (SA) Pty Ltd, Aquarius' operative entity in South Africa which controls, *inter alia*, what is known as the **"Kroondal operation"**;
- 1.6 **"Beneficiaries of the Rustenburg Mines' current BEE procurement policy"** means SMEs currently benefiting from the existing BEE procurement policy at the Rustenburg Mines;

- 1.7 **"Business Day"** means any calendar day which is not a Saturday, a Sunday or an official public holiday in South Africa;
- 1.8 **"Commission"** means the Competition Commission of South Africa;
- 1.9 **"Competition Act"** means the Competition Act 89 of 1998, as amended;
- 1.10 **"Conditions"** mean these conditions;
- 1.11 **"Implementation Date"** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.12 **"LRA"** means the Labour Relations Act No. 66 of 1995 (as amended);
- 1.13 **"Merging Parties"** means Sibanye Rustenburg and Rustenburg Mines;
- 1.14 **"Merger"** means the acquisition of the Rustenburg Mines by Sibanye Rustenburg;
- 1.15 **"Potential Consolidation"** means the possible consolidation of certain activities between the Bathopele Mine (part of the Rustenburg Mines) and the Kroondal operation (AQPSA);
- 1.16 **"Potential Consolidation Employees"** means 260 employees, comprising of 140 persons within Paterson Grade C and above and 120 persons in Paterson Grade A and B that may potentially be affected should the Potential Consolidation in fact take place;
- 1.17 **"Rustenburg Mines"** means the Rustenburg mining and concentrating complex division of Rustenburg Platinum Limited, comprising the Bathopele, Siphumelele and Thembelani mining operations, two concentrating plants, an on-site chrome recovery plant and the Western Tailings Retreatment plant and associated surface infrastructure and related employees, assets and liabilities;
- 1.18 **"Sibanye Gold"** means Sibanye Gold Limited, a company which wholly owns Sibanye Rustenburg;
- 1.19 **"Trade Unions"** mean United Association of South Africa ("**UASA**"), Association of Mineworkers and Construction Union ("**AMCU**"), National Union of Mineworkers ("**NUM**") and Solidarity Union; and
- 1.20 **"Tribunal"** means the Competition Tribunal of South Africa.

## **2. CONDITIONS TO THE APPROVAL OF THE MERGER**

### **2.1. EMPLOYMENT**

2.1.1. The Merging Parties shall limit retrenchments to the Affected Employees (identified in Annexure B) and, subject to clause 2.1.2 below, shall ensure that there are no other retrenchments at the Merging Parties' operations as a result of the Merger for a period of twenty four months (2 years) from the Implementation Date.

2.1.2. In the event that the Potential Consolidation does in fact occur within twenty four months (2 years) following the Implementation Date, any retrenchments as a result of the Potential Consolidation shall be limited to the Potential Consolidation Employees (i.e. 260 Employees, being 140 persons in Paterson Grade C and above and 120 persons in Paterson Grade A and B).

2.1.3. For the sake of clarity, retrenchments do not include (i) voluntary separation arrangements; (ii) voluntary early retirement packages, (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger or Potential Consolidation; (vi) terminations in the ordinary course of business, including but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a contract of a contract worker.

### **2.2. BEE PROCUREMENT POLICY**

2.2.1. The Merging Parties shall ensure that the BEE procurement policy currently in place at the Rustenburg Mines continues to comply with the requirements as set out in the Mining Charter as determined from time to time



### **3. MONITORING OF COMPLIANCE WITH THE CONDITIONS**

- 3.1. The Merging Parties shall circulate (by way of, for example, a newsletter or notices posted on noticeboards) a copy of the Conditions to all its employees and their relevant Trade Unions and/or employee representatives within 5 (five) business days of the Approval Date.
- 3.2. The Merging Parties shall circulate a copy of the Conditions to the Beneficiaries of the Rustenburg Mines' current BEE procurement policy within 5 (five) business days of the Approval Date.
- 3.3. As proof of compliance with 3.1 and 3.2 above, a senior official of the Merging Parties shall within 10 (ten) business 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 Affected Employees and Beneficiaries of the Rustenburg Mines current BEE procurement policy.
- 3.4. The Merging Parties shall inform the Commission of the Implementation Date within five (5) days of its occurrence.
- 3.5. Any employee and/or Beneficiary of the Rustenburg Mines' current BEE procurement policy who believes that his/her employment and/or contract with the Merging Parties has been terminated in contravention of the Conditions may approach the Commission with his or her complaint.
- 3.6. The Acquiring Firm shall submit an affidavit (deposed to by a senior official of the Acquiring Firm) on each anniversary of the Implementation Date, confirming compliance with clause 2.1.1 and 2.1.2 of the Conditions for the duration of the Conditions (determined with reference to clauses 2.1.1 and 2.1.2 above).

3.7. 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.

#### **4. GENERAL**

All correspondences in relation to these conditions must be submitted to the following e-mail address: [mergerconditions@compcom.co.za](mailto:mergerconditions@compcom.co.za).

## Annexure B

**Table 1: Employees likely to be retrenched based on the merging parties' submissions**

Level	Position Category	Reason	Likely Affected
Patterson Grade C and above	This includes position such as: Employee Benefits Administrators, Senior Patrolperson, Assistant Public Health Officer, Senior Administrator Document Control, Junior Buyer, Liquor Outlet Superintendent, Senior Accountant Capital Assistant Accountant, Business Improvement Coach, Single Accommodation Kitchen Supervisor, HR Assistant Operations, Senior Human Resource Assistant, HRD Instructor Dogs, Protection Services Control Room Operator, Resource Geologist, HRD Manager Mining, Planning Analyst, Senior Manager Operations Finance, Principal Rock Engineer, Assistant Mining Engineer, HR Assistant Shaft Underground etc.	Possible Paterson Grade C and above jobs impacted as a result of duplication of jobs arising from the Merger.	200-250