

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:03/LM/Jan07

In the matter between:

Impala Platinum Holdings Limited

Acquiring Firm

And

Islandsite Investments 225 (Pty) Ltd

Target Firm

Panel : Y Carrim (Presiding Member), N Manoim (Tribunal Member), and M Mokuena (Tribunal Member)
Heard on : 7 February 2007
Decided on : 7 February 2007
Reasons Issued: 22 February 2007

Reasons for Decision

Approval

1] On 7 February 2007, the Tribunal unconditionally approved the merger between Impala Platinum Holdings Limited and Islandsite Investments 225 (Pty) Ltd. The reasons for approving the transaction follow.

The parties

2] The primary acquiring firm is Impala Platinum Holdings Limited ('Implats'), a public company duly registered on the JSE Securities Exchange. Implats is not controlled by any single firm. Its major shareholders and their percentage

shareholding are as follows:

- [2.1] Public Investment Corporation 7.2%;
- [2.2] Old Mutual Group 6.5%;
- [2.3] Merrill Lynch 6.4%; and
- [2.4] Tegnesse Mynbeleggings Ltd 5.0%.

3] The primary target firm is Islandsite Investments 225 (Pty) Ltd ('Newco'), a newly formed South African subsidiary of African Platinum plc ('Afplats'), a company duly listed on the London Stock Exchange. Afplats is not controlled by any single shareholder. Afplats' major shareholders and their percentage shareholdings are as follows:

- [3.1] North Sound Capital LLC 14.44%;
- [3.2] CGT Management Limited 9.91%;
- [3.3] Royce and Associates Inc. 6.33%;
- [3.4] US Global Investors Inc. 4.10%; and
- [3.5] Tocqueville Asset Management 4.08%.

The transaction

4] This transaction involves two interconnected steps. The first step involves an internal restructuring in terms of which shareholdings of Afplats in Afplats (Pty) Ltd ('Afplats SA'), Imbasa Platinum (Pty) Ltd ('Imbasa Platinum') and Inkosi Platinum (Pty) Ltd ('Inkosi Platinum') will be transferred to Newco.¹ Newco is currently a wholly owned subsidiary of Afplats which has not begun trading.

¹ 74% of Afplats' shareholding in Afplats SA, 60% of its shareholding in Imbasa Platinum and its 49% shareholding in Inkosi platinum will be transferred to Newco.

- 5] The second step involves Implats subscribing for 29.9% of the ordinary shares in Newco. Afplats will continue holding the rest of the shareholding in Newco. Arguably, Implats will acquire a form of control over Newco because of the significant minority protections.²
- 6] The effect of the transaction will be that Implats will acquire 29.9% and joint control of Newco, and therefore an effective 22.13% interest in Afplats SA, and an effective 14.65% interest in Inkosi Platinum

Rationale for the transaction

- 7] Implats perceives the transaction as part of its strategy to increase production to meet growing demand, in order to remain competitive in the market.
- 8] Afplats submitted that it is entering into the transaction in order to commence mining operations. Afplats has been involved in the exploration of the Platinum Group Metals ('PGM') industry and is seeking to commence mining operations. Afplats has submitted that in order for it to commence mining operations it has partnered with Implats for the latter to provide financial backing as well as technical and management expertise.

The parties' activities

- 9] Implats is involved in the business of mining, refining and marketing of the six PGMs namely platinum, palladium, rhodium, osmium, ruthenium and iridium, which occur together in nature alongside nickel and copper.
- 10] Afplats is an exploration, investment and development firm focused on PGMs.

Overlapping activities

² Although Implats will not have a veto right, there will be a deadlock breaking mechanism in place. The deadlock provision contained in clause 7.4 of the Framework Agreement concluded between the parties sets out the approach to be followed in instances where the parties fail to agree on issues regarding the management of the Projects.

- 11] The merging parties submitted that there are no overlapping activities between them since Afplats has not commenced the mining of PGMs. However, the Commission assessed the effects of the transaction in each of the PGMs in light of the fact that Afplats owns reserves of PGMs and that it has entered into the transaction in order to obtain the financial and technical capacity to start mining these reserves.
- 12] The Commission noted that the proposed transaction will also give rise to vertical integration as Implats provides the downstream PGM refining services.³

Relevant markets

- 13] The Commission and the parties submitted that in many of its decisions,⁴ the Tribunal has endorsed the European Commission's decision in the matter between *Gencor Limited and Lonrho PLC* ('Gencor/ Lonrho'),⁵ that PGMs do not constitute one single market, but rather six different markets corresponding to each of the PGMs and these are Platinum, Palladium, Rhodium, Iridium, Ruthenium, and Osmium.
- 14] The Commission noted that PGM refining constitutes a separate and distinct market. PGM producers without refining capabilities will contract with PGM refiners for concentrate off-take. A specific type of plant and expertise is required to refine PGMs.⁶
- 15] In many of its previous cases⁷ the Tribunal has recognised that the geographic markets for PGMs and the market for the refining of PGMs are international.

3 The parties submitted that Afplats and Impala Refining Services Ltd ('IRS'), a subsidiary of Implats, have already concluded a concentration off-take agreement prior to the agreement. The merging parties submitted that this agreement was concluded after a competitive tender process and not in anticipation of the proposed transaction.

4 *Two Rivers Platinum and Assmag Ltd* Case No. 54/LM/Sep01 *Rustenburg Platinum Mines and Eastern Platinum Mines Ltd 'Pandora Joint Venture' and Rustenburg Platinum Mines Ltd* Case No. 55/LM/Aug02, *Rustenburg Platinum Mines Ltd and Royal Bafokeng Nation in their capacity as the participants in the Bafokeng Rasimone Joint Venture and Rustenburg Platinum Mines Ltd and the Royal Bafokeng Nation* Case No. 78/LM/Oct02; and *Aquarius Platinum (South Africa) (Pty) Ltd/ Rustenburg Platinum Mines Ltd* Case No. 35/LM/Jul03.

5 Case No. IV/M.619 OJ L011.

6 RT Jones, *Platinum Smelting in South Africa*, 1999 (www.mintek.co.za).

7 Refer to footnote 4 and 5.

16] In our view there have been very few changes in the mining, refining and marketing of PGMs to support a different approach to market definition.

Competition Analysis

Horizontal effect

17] The parties submitted that this transaction is not between two existing producers of PGMs, and thus, cannot be seen as advancing the already high levels of concentration in the market for PGMs. Afplats has been involved in the exploration of PGMs and is now seeking to commence mining activities through its partnership with Implats. They argue that there are no overlapping activities and, as a result, the transaction does not substantially prevent or lessen and does not affect the current status of competition in the various markets.

18] We disagree with the merging parties. Afplats owns PGM reserves and is a potential producer. At the hearing, the parties confirmed that in terms of the off-take agreement between them, Newco will sell the PGMs it produces to Implats and the latter will be responsible for selling the PGMs on to the world market as its own product. Thus the PGMs from Newco will increase Implats' output of PGMs on the world market. Accordingly we consider both parties to be in the market for the production of PGMs.

19] The Commission assessed the effects of the transaction in each of the PGMs in light of the fact that Afplats owns reserves of PGMs and that it has entered into the transaction in order to obtain the financial and technical capacity to start mining these reserves.

20] The Commission has submitted that the market share accretions resulting from this transaction are as follows:

Table 1 Global market share accretion⁸

| PGM | Market share accretion (%) |
|------------|-----------------------------------|
|------------|-----------------------------------|

⁸ The Commission obtained these figures from Implats (2006). The Commission calculated the estimated market share accretion by analysing the ounces per annum to be produced from the Merensky ore and UG2 ore in relation to global annual production of platinum in 2006.

| | |
|-----------|-----|
| | |
| Platinum | 2.3 |
| Palladium | 1.1 |
| Rhodium | 2.2 |
| Ruthenium | 2.6 |
| Iridium | 2.0 |

21] In analysing the accretions in market shares brought about by this transaction, it is evident that they are low since they do not exceed 3% and changes in concentration levels remain relatively low.⁹ Therefore, this transaction, on its own, does not substantially prevent or lessen competition.

Vertical effects

22] The transaction gives rise to vertical integration in that a downstream provider of PGM refining services (Implats) is acquiring an upstream potential producer of PGMs (Afplats). As shown by the market share figures brought about by this transaction, Afplats will not be in a position to foreclose the competitors of Implats in the market for the refining of PGMs.

23] A further concern raised by the Tribunal was that the joint venture would enable Implats to control the supply of Afplat's PGMs onto the international market thus influencing prices. The merging parties explained that Newco, the joint venture company, and not Implats, will decide how much PGMs ought to be mined. Implats already had a number of existing agreements with third parties, in terms of which it was required to fulfill delivery of PGMs. Any form of stockpiling was not possible because these agreements determined the future quantity of PGMs that Implats will sell in the market.¹⁰ In addition, the off-take agreement provided for Afplats to seek alternative marketing opportunities in the event that Implats did not fulfill its sales obligations as agreed.¹¹

24] It is unlikely that Implats will increase the refining costs for its other customers because there is no incentive to do so. The affected producers may seek other

9 Commission's recommendations, p7-9.

10 Transcript, page 8.

11 The clause entitled "Equality of Misery" permits Afplats the opportunity to market the excess product in certain circumstances in order to limit the potential losses to both parties. Record p319)

alternatives including the development of their own refining capabilities. Should the refining costs be increased, that will have very little impact on the total production costs.¹²

Public Interest

25] There are no public interest issues.

Conclusion

26] This transaction does not raise competition concerns. The transaction is accordingly approved unconditionally.

22 February 2007

Y Carrim

DATE

Tribunal Member

N Manoim and M Mokuena concur in the judgment of Y Carrim

Tribunal Researcher: R Kariga

For the merging parties: L Morphet and L Vundla, Deneys Reitz Attorneys.

For the Commission : M Ngobese (Mergers and Acquisitions)

12 The minimal impact is precipitated by the fact that it is estimated that refining accounts for a very small percentage of the total operating costs. The operating costs for each stage are as follows: mining (72%), concentrating (10%), smelting (9%) and refining (9%) (RT Jones, Platinum Smelting in South Africa, 1999, www.mintek.co.za).