

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case no.: 06/LM/Feb04

In the large merger between:

Ubuntu-Ubuntu Commercial Enterprises (Pty) Ltd

and

Anglovaal Mining Ltd/Avgold Ltd/Harmony Gold Mining Company Ltd

Reasons

Introduction

On 7 April 2004 the Tribunal unconditionally approved a merger involving Ubuntu-Ubuntu Commercial Enterprises (Pty) Ltd (“Ubuntu”), Anglovaal Mining Ltd (“Avmin”), Avgold Ltd (“Avgold”), and Harmony Gold Mining Company Ltd (“Harmony”).

Avmin, Avgold, and Harmony are listed companies on the JSE Securities Exchange South Africa, owning or operating mining interests. Ubuntu is a holding company owned by the Kgabo Trust, the beneficiaries of which are Mr Patrice Motsepe and other members of the Motsepe family. Ubuntu owns African Rainbow Minerals & Exploration Investments (Pty) Ltd (“ARMI”), which has mining and other interests.

The transaction

The merger entails the transfer of various assets between the above-mentioned companies with a view to creating a coherent but multi-tiered mining house capable of competing internationally in the fields of gold, the platinum group of metals (“PGMs”), and certain base metals.

The transactions making up the merger involve four separate stages:

1. Harmony will acquire the whole of Avmin's shareholding of 42.2% in Avgold. This will be done by exchanging Harmony shares for Avgold shares on the basis of one Harmony share for every 10 Avgold shares. Avmin will, as a result of this exchange, acquire an interest of approximately 8% in Harmony.
2. Avmin will acquire ARMI's 13.6% shareholding in Harmony, thereby increasing Avmin's total shareholding in Harmony to 22.2%. Avmin will also acquire 100% of ARM Platinum (currently owned by ARMI) as well as ARMI's 41.5% interest in the Modikwa Joint Venture ("JV"), which is a platinum operation. For these assets Avmin will pay a consideration of more than R4 billion, using 87,750,000 Avmin shares. After implementation of this transaction ARMI will own 43.1% of the issued share capital of Avmin.¹
3. In a smaller transaction, Avmin will acquire from Harmony its 100% interest in Kalplats, a platinum prospect. The acquisition of Kalplats will be paid for by the issue of new Avmin shares to Harmony, boosting Harmony's shareholding in Avmin to 20%.
4. Finally, ARMI and Harmony will enter into a voting agreement in terms of which Harmony will grant to ARMI, for a period of three years, the right to exercise certain of the voting rights attributable to the Avmin shares held by Harmony. As a result, ARMI will have 63% voting control in Avmin, which will change its name to African Rainbow Minerals Limited ("ARM") upon implementation of the transactions. During the three-year period ARMI will have effective voting power in ARM (i.e. the former Avmin) on almost all issues, but not on certain reserved issues, where it will need the co-operation of Harmony.² If the shareholding structures remain the same and if the existing agreements are not amended after the expiry of the three-year period, ARMI will still be the largest shareholder in ARM with its 43% shareholding. However, it is envisaged that ARMI would in due course increase its shareholding in ARM to 50%.

As a result of the agreements linking these transactions Mr Patrice Motsepe will be appointed Avmin's chairperson. His holding company, ARMI, will, as explained above, become the controlling shareholder of ARM, and ARMI will moreover have an option to purchase Harmony's holding of 20% in ARM.

We were told at the hearing that the merger notification is premised on the interdependency of the various transactions, which will cause ARMI to have effective sole control over ARM. Thus if, after the three-year period, ARMI exercises its option to purchase Harmony's 20% interest in ARM, no further merger notification will be required. If it does not, it is possible that there will be joint control with Harmony of ARM, and this will trigger another obligation to notify a merger to the Competition Commission.³

¹ There is a reasonable likelihood that ARMI will in due course increase its shareholding in ARM to more than 50%. The parties requested the Tribunal to approve this further transaction as part of the merger transaction currently before it since it will be merely a continuation in another form of the control that will exist in the three-year lock-up period.

² The reserved issues are special resolutions and disposals, either in terms of Section 228 or in terms of Section 311 of the Companies Act, which effectively amounts to a disposal of the controlled shares.

³ See page 25 of the hearing transcript dated 7 April 2004.

Diagrams showing the pre-merger and post-merger positioning of the various companies are attached as annexures to this decision.

The rationale of the transactions

From the transactions summarised above, the largest black-owned diversified mining company in South Africa will emerge, in the form of ARM, being effectively a larger, diversified, and empowered Avmin, with Ubuntu as its controlling shareholder.

The transactions will have the effect of unlocking significant value from the assets currently held by Avmin, and will in particular allow the Avgold assets to be exploited to their fullest potential. ARM will also have a portfolio of platinum assets big enough for it to become a significant player in the PGMs market. ARM will also have a significant presence in base metals production through the current ferrous metals interests of Avmin.

The relevant market

Ubuntu is currently involved in two product markets, firstly the PGMs market, through ARMplats, which holds 50% of the shares in the Modikwa JV⁴ and secondly, the gold market, via its shareholding in Harmony.

Harmony is involved in the mining of gold, and it also owns 100% of Kalplats, a PGMs deposit where mining operations have not yet been started.

Avgold is involved in the mining of gold.

Avmin, through its shareholding in Assmang, is involved in the production of ferrous metals. It also holds a 55% interest in the Two Rivers JV, a PGMs deposit where mining will start in 2005 if market conditions are favourable.⁵ Avmin's Nkomati mine already produces small quantities of PGMs as a by-product of its nickel operations. Avmin is also involved in the mining of gold through its 42.2% shareholding in Avgold.

Based on these facts, two relevant markets are involved in this transaction, gold and PGMs. PGMs do not constitute a single relevant product market but six individual product markets, namely platinum, palladium, rhodium, iridium, ruthenium and osmium.⁶ As was decided in the Randfontein Estates Ltd and AngloGold Ltd merger (Tribunal Case No: 03/LM/Jan01) and The Two Rivers Platinum Ltd and Assmang Ltd merger (Tribunal Case No: 54/LM/Sep01) the geographic markets for both gold and PGMs are global.⁷

⁴ Modikwa JV is jointly owned by Rustenburg Platinum (50%) and ARMI (50%).

⁵ Two Rivers JV is jointly owned by Avmin (55%) and Impala Platinum (45%).

⁶ For ease of reference we will refer to these product markets collectively as PGMs.

⁷ PGMs are readily traded throughout the world and prices are set on a global level. They are sold under long-term contracts or on the metal market. The prices in long-term contracts are set relative to the spot rates determined twice daily in the London Platinum and Palladium market. The gold price is influenced by the sale of new production and the sale of reserves by financial institutions such as central banks, the World Bank, and the IMF. A single gold producer cannot influence the price in the international market and South African gold producers are essentially price-takers.

Effect on Competition

Gold

The market shares of the five largest global producers of gold are as follows:

Newmont (US)	8.6%
AngloGold	8.4%
Barrick	6.2%
Goldfields	5.4%
Harmony	4.7%

Avgold's global market share is 0.45%. After implementation of the transaction Harmony's market share in the global gold market will increase by less than 1%.

From a vertical perspective, Rand Refinery currently refines Avgold's concentrate in terms of a contractual arrangement which will not change in the short term. Harmony, which has its own refinery, has the capacity to refine Avgold's concentrate but has no means of separating the gold of one producer from that of another. As a result Harmony is not in a position to refine other producers' concentrate at this stage.

The transaction is, therefore, unlikely to substantially lessen or restrict competition in the global market for the production and supply of gold.

PGMs

As a result of this transaction Avmin, which is currently a relatively small player in the PGMs market through the Two Rivers JV and its Nkomati mine, will participate to a greater extent in this market with the acquisition of Kalplats and ARMI's share in the Modikwa JV.

Currently the only operating PGMs mine in this transaction is the Modikwa JV. It represents approximately 4% of total platinum production of the world. As mentioned earlier in this decision, Two Rivers and Kalplats are not yet in operation but their reserves are estimated to be 2% of world platinum resources.⁸

The major PGMs producers in South Africa are Anglo American Platinum Corporation Limited, Impala Platinum Limited, and Lonmin plc.

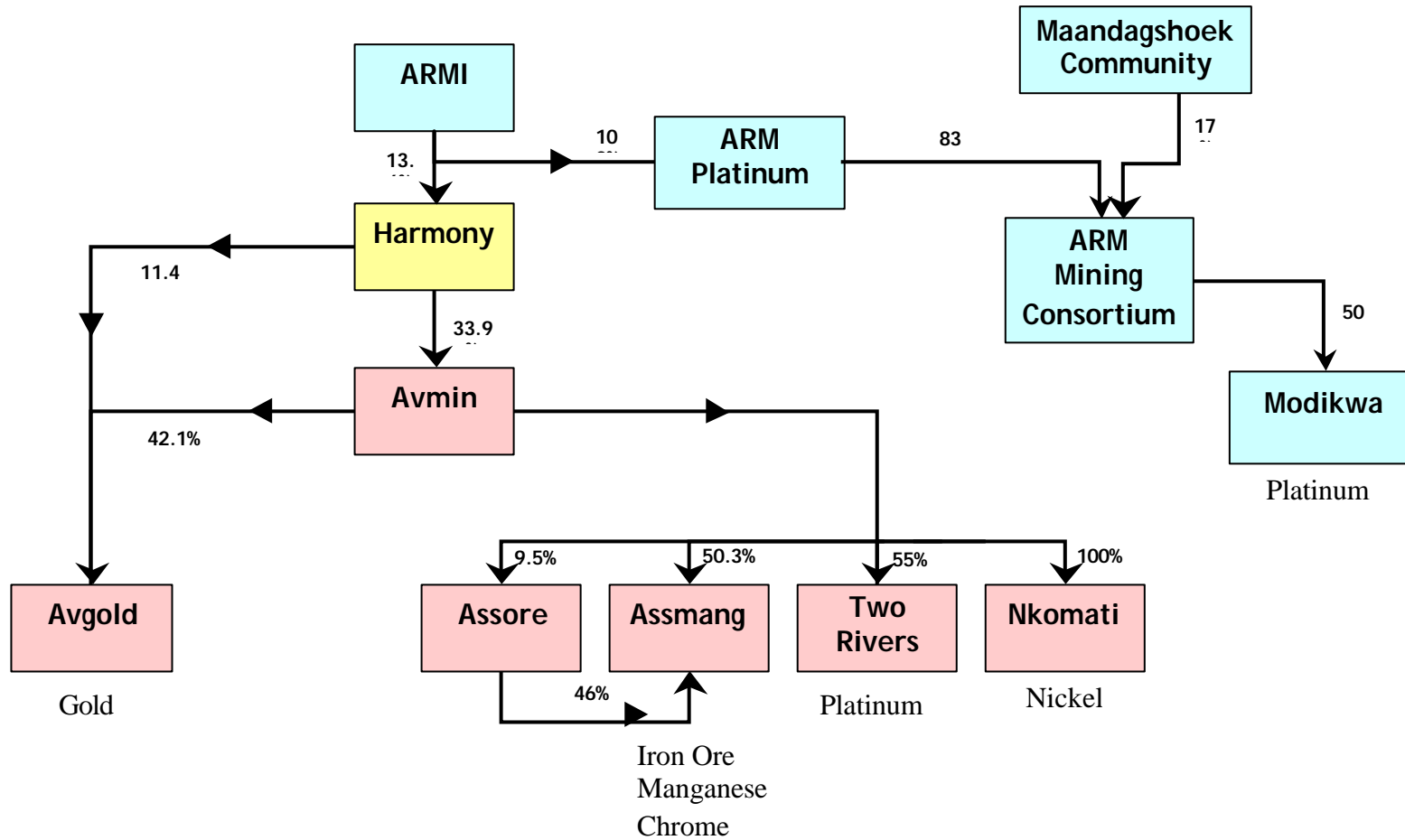
With regard to vertical integration, the parties indicated that Avmin is contractually committed to send its concentrate from the Two Rivers JV and the Modikwa JV to Implats and Anglo Platinum respectively for refining.

Based on the facts set out above we find that the proposed transaction is not likely to substantially prevent or lessen competition in the global PGM market.

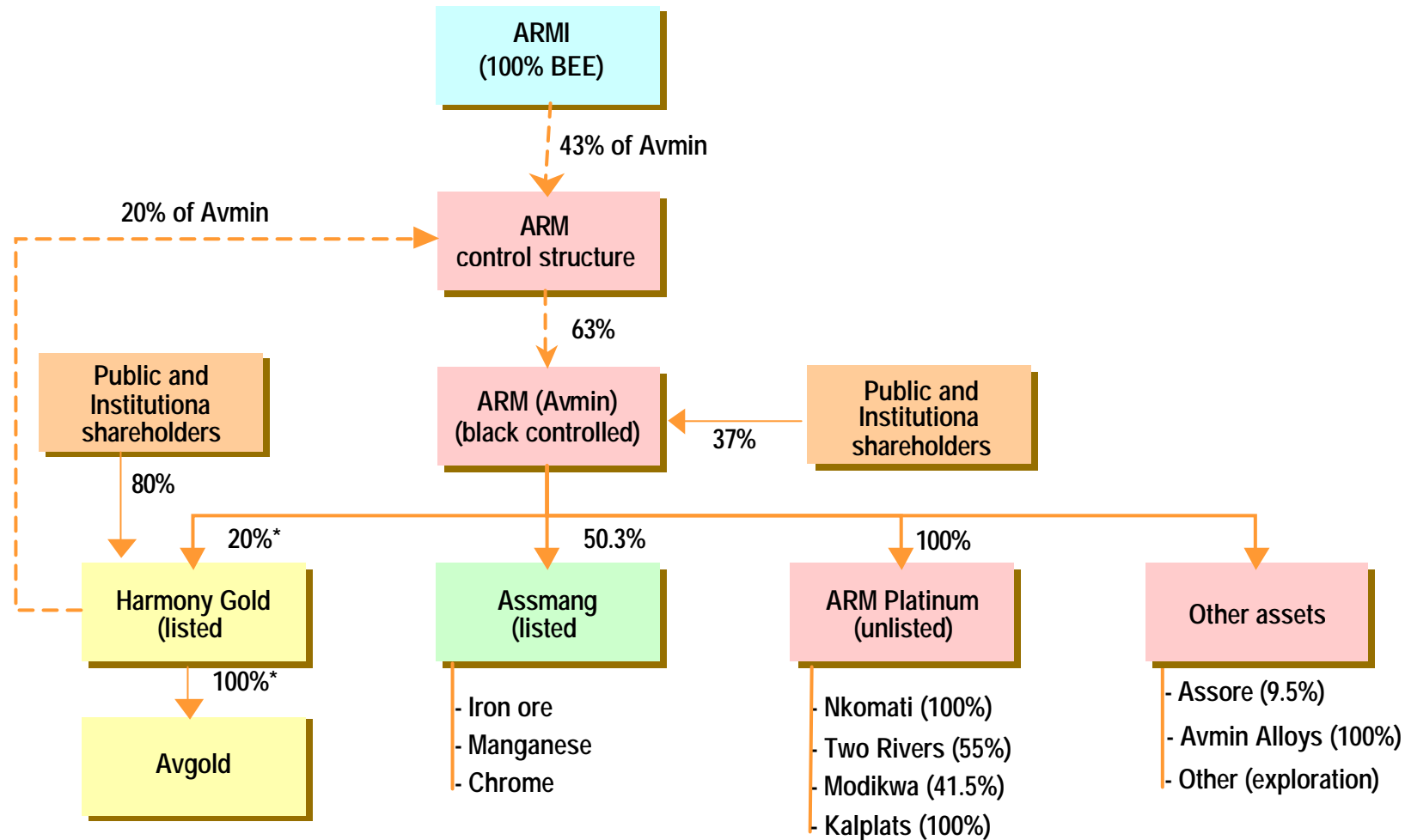
⁸ See page 16 and 17 of the transcript of 7 April 2004.

ANNEXURE

THE CURRENT STRUCTURE



THE STRUCTURE POST TRANSACTION



Post the implementation of mandatory offer

