

CASE NO: 110/LM/OCT07

In the matter between:

PAMODZI GOLD LTD Acquiring firm

And

PRESIDENT STEYN GOLD MINES (FREE STATE) (PTY) LTD Target firm

Panel : DH Lewis (Presiding Member), N Manoim (Tribunal Member), and
U Bhoola (Tribunal Member)

Heard on : 7 November 2007

Decided On : 9 November 2007

REASONS FOR DECISION

Approval

[1] The Tribunal unconditionally approved the merger between Pamodzi Gold and President Steyn Gold Mines. The reasons for the decision follow:

The Parties

[2] The primary acquiring firm is Pamodzi Gold Ltd ("Pamodzi Gold"), and the primary target firm is President Steyn Gold Mines (Free State) (Pty)(Ltd) ("PSGM") which is ultimately owned and controlled by Thistle Mining Inc ("Thistle"), a Canadian company.

The Transaction

[3] In terms of this transaction, Pamodzi Gold will acquire 100% of the shares in and claims against PSGM from Thistle Mining. For Pamodzi Gold this is an opportunity to expand by entering the Free State gold fields. PSGM is currently in an unstable financial position and experiencing production problems¹. Pamodzi Gold avers that it will ensure continuity in production and is in a strong position to pursue PSGM's development.

[4] This merger is brought on an urgent basis as the merging parties submitted that PSGM is currently operating under limited resources and funding, which if depleted, will place PSGM in provisional liquidation resulting in the loss of approximately 4 200 jobs.

¹ PSGM is however not considered to be a failing firm

The Relevant Market

[5] The relevant market is the production and supply of gold and the relevant geographic market is international as established in the Tribunal's previous decisions in the gold mining market.²

Competition Analysis

[6] Pre-merger Pamodzi Gold has an estimated market share of 2.32%, and PSGM has no more than 0.4% estimated market share of global gold production. Post merger, there will be an inconsiderable market share accretion of less than 1%, and the merging parties' estimated market share will be 2.72%. In addition there are larger competitors including AngloGold Ashanti Limited, Gold Fields Limited, Harmony Gold Mining Corporation Limited, Barrick Gold Corporation, and Newmont Mining Corporation.

Third Party Objection

[7] The Commission and the Tribunal received a belated objection to the proposed transaction from Virgile Mining Contractors (Pty) Ltd ("Virgile Mining"). Nevertheless the representatives of Virgile Mining were given an opportunity to make submissions at the hearing of this matter.

[8] The main reasons for the objection to this proposed transaction are firstly that Virgile Mining was the first company to submit a proposal to purchase PSGM, which proposal was made twice, both in 2006 and 2007, at a higher bid, and which was not considered by PSGM. Secondly, Virgile Mining representatives argue that they are a small company which should be provided with an equitable opportunity to participate in the mining industry. Thirdly, they argue that they have a Black Economic Empowerment (BEE) partner and that their main objective is to support and advance disadvantaged communities within the Welkom area. It was not disputed that Pamodzi Gold is also equally a BEE compliant company.

[9] When deciding mergers we are mandated to determine whether the transaction before us is likely to lead to a substantial lessening or prevention of competition. We are also obliged to determine the effect that the merger will have on a number of specified public interest considerations, including the effect on a particular industrial sector or region, on employment and on the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive.

[10] Virgile Mining's submission raised one apparent competition issue, that is, that Phamodzi's acquisition of PSGM would foreclose Virgile Mining from processing the gold mined at other mines in the Free State gold fields purchased by Virgile Mining from Harmony. This contention was investigated by the Commission which found that PSGM's gold processing facilities were fully utilized in processing ore from its own mine and that, in any event, there are

²Pamodzi Gold/ARMGold Tribunal case no.: 62/LM/JUN07; Cf Harmony Gold Mining Company Limited and African Rainbow Minerals Gold Limited Tribunal case no.: 25/LM/MAY03; and AngloGold Limited and Driefontein Consolidated (Pty) Ltd Tribunal case no.: 66/LM/NOV03

other gold processing facilities owned by Gold Fields and Harmony to whom Virgile Mining could turn.

[11] Moreover, on closer examination it transpired that Virgile does not, in fact, own any gold mining assets at all. All that could be ascertained is that Virgile Mining, or the BEE partner with which it claims to be associated, has been involved in talks of an indeterminate nature with Harmony concerning, it is claimed, the possible purchase of certain gold mining assets in the Free State. Accordingly, we find that there are no competition concerns arising from this transaction.

[12] Nor will the transaction impact negatively on the public interest. On the contrary Phamodzi is an empowered company committed to maintaining production in a troubled gold mine in a distressed region of the country. If anything the public interest provides further reason for the unconditional approval of this transaction.

[13] The burden of Virgile Mining's objection is that it would be more in the public interest to have the target firm sold to it, instead of Pamodzi. Hence its representatives spent much time describing their ambitions, in particular emphasizing their connection with the local community, but they advanced no reasons as to why Pamodzi's transaction contravened the Act. In this respect Virgile Mining seems to have misconceived our function. We are not empowered to tell sellers who they must sell to. They are free to sell to whom they please, provided the transaction does not constitute one prohibited by the Act. This position is elucidated in an earlier Tribunal decision in Vodafone Group PLC/ Venfin Limited and Others in which the following was said:

"In terms of the Competition Act, the Tribunal does not have the power to tell parties whom they should sell to. At most, the Tribunal is empowered to prohibit a merger on the grounds listed in the Act. It is axiomatic that if the Tribunal cannot order a firm who they should sell to that it follows that a party who feels disaffected, because the seller has not sold the target firm to it, has no remedy under the merger provisions of the Competition Act on that ground..."³

Conclusion

[14] We conclude that the proposed transaction is unlikely to substantially prevent or lessen competition. Accordingly we approve the merger unconditionally.

D Lewis

Presiding Member

9 November 2007

Date

³ Tribunal case no.: 110/LM/NOV05 at para 16

N Manoim and U Bhoola **concur** in the judgment of D Lewis

Tribunal Researcher: L Xaba

For the merging parties : Cliffe Dekker Inc

For the Commission : M Mohala and I Selaledi
(Mergers and Acquisitions)