COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case No: 020453

In the matter between:

SIBANYE GOLD LIMITED APPLICANT

and

THE COMPETITION COMMISSION OF SOUTH AFRICA RESPONDENT

Panel:	Anton Roskam	(Presiding Member)
	Mondo Mazwai	(Tribunal Member)
	Prof Fiona Tregenna	(Tribunal Member)
Heard on:	28 January 2015	
Order issued on:	17 April 2015	
Reasons issued on:	17 April 2015	

ORDER AND REASONS FOR THE DECISION

INTRODUCTION

[1] This is an application in terms of which the applicant, Sibanye Gold Limited ("**Sibanye**"), seeks to review and set aside the Form CC19 Notice issued by the respondent, the Competition Commission of South Africa ("**the Commission**"), on 11 November 2014. The Form CC19 Notice is a **Notice of Apparent Breach** issued in terms of section 14 of the Competition Act, 1998 (Act 89 of 1998) ("**the Act**") and Rule 39 of the Rules for the Competition Commission ("**the Commission Rules**"). It relates to the conditions that the

Competition Tribunal imposed in respect of a large merger conditionally approved between Sibanye and Newshelf 1114 (Pty) Ltd ("**Newshelf**").

[2] In the alternative, the applicant seeks an order in terms of Rule 39(2)(b) of the Commission Rules to the effect that Sibanye has substantially complied with its obligations with respect to the conditional approval of the merger.

[3] The applicant also sought condonation in terms of Rule 54 of the Rules for the Conduct of Proceedings in the Competition Tribunal for the late filing of its notice to review the issuing of the Form CC19 Notice. The Commission did not oppose this. We therefore grant Sibanye condonation for the late filing of the review application.

MATERIAL FACTS

[4] On 12 September 2013 a merger referral was filed at the Commission regarding Sibanye's intended acquisition of sole control over Newshelf. At the time Gold One International Limited ("**Gold One**") ultimately controlled Newshelf. Newshelf was the corporate vehicle in which Gold One housed its Cooke Mining Operation, which comprised Cooke Shafts 1 to 4. Pre-merger, Cooke Shafts 1 to 3 were housed in Rand Uranium (Pty) Limited, a subsidiary of Gold One and Cooke Shaft 4 was housed in Ezulwini Mining Company (Pty) Ltd, also a subsidiary of Gold One.

[5] On 5 February 2014 the Competition Tribunal approved the merger, subject to certain conditions, including that:

> *The Merging Parties shall not retrench any employee, as a result of the Merger for a period of two years following the Merger Implementation Date. For the sake of clarity, retrenchments do not include (i) voluntary separation arrangements; or (ii) voluntary early retirement packages.* ("**Merger Conditions**")

[6] On 16 September 2014 Sibanye's attorneys informed the Commission in writing that Sibanye had issued a notice in terms of section 189 of the Labour

Relations Act[1] ("**LRA**") on all relevant stakeholders. In this letter Sibanye's attorneys stated that Sibanye had been "unable to curtail or reverse the sustained losses that the Cooke Shaft 4 had incurred over a substantial period of time as a result of, *inter* alia, continued production shortfalls, high overhead costs, safety related stoppages which occurred as a result of 2 fatalities that occurred at Cooke Shaft 4 earlier that year, certain unexpected geological complications *et cetera*."

[7] The letter reported that Cooke Shaft 4 had experienced significant losses over a specified period. The letter stated that there was a need for Sibanye to either put Cooke Shaft 4 on "care and maintenance" for the foreseeable future or for Cooke Shaft 4 to be closed indefinitely. Notwithstanding this, the letter stated that the section 189 process was in its infancy and was intended to commence a consultative process whereby the relevant parties sought ways to minimize or avoid the retrenchments and accordingly no outcome could be determined at that stage.

[8] The letter concluded with an offer to meet the Commission to provide it with further information as regards the Section 189 Process, namely the process of consultation about contemplated dismissals for operational requirements or, what is often more loosely referred to as, retrenchments. The Commission neither responded to this letter nor did it take up the offer to meet.

[9] On 5 November 2014 the Commission received a complaint from the National Union of Mineworkers (NUM). It appears that this complaint was initially telephonic and was later followed up in writing. In the Commission's answering affidavit it is stated that NUM alleged that Sibanye's conduct was in breach of the merger conditions because it intended to retrench employees as a result of the merger before the end of the two-year moratorium. The answering affidavit also stated that NUM alleged that during the section 189 consultation meeting held on 21 October 2014, Sibanye advised it that services provided to Cooke Shaft 4 by Support Services were costly and that Sibanye could provide the same services more cheaply. In support of this,

[1] Act No 66 of 1995.

NUM submitted the presentations and minutes of the section 189 consultation meeting with Sibanye held on 21 October 2014 to the Commission.

[10] The NUM letter of 5 November 2014 stated that the 60-day period for the retrenchments would lapse on 12 November 2014 and requested the Commission to attend to the matter on an urgent basis. It alleged that after 12 November 2014 Sibanye would retrench and that the retrenchment would be an irreversible process. The letter also went on to state that the NUM intended to approach the Labour Court on an urgent basis to interdict the retrenchment process, but that the Commission's failure to act would leave NUM "with no option but to approach court wherein ... the Competition Commission [would] be cited as one of the respondents."

[11] NUM confirmed in an email to the Commission dated 6 November 2014 that it was not opposing the proposed retrenchments of all affected employees but only to the retrenchment of 217 employees at Cooke 4.

[12] On 11 November 2014 the Commission served on Sibanye the Notice of Apparent Breach.

[13] At the instance of Sibanye, a meeting was convened on 17 November 2014 attended by representatives of Sibanye and the Commission. At this meeting Sibanye raised its concern that the Commission issued the Notice of Apparent Breach without affording it an opportunity to engage with the Commission. The Commission, in this meeting and later in a letter addressed to Sibanye on the same date, indicated to Sibanye that it should provide a detailed written submission regarding its section 189 consultation process. The Commission indicated that the time periods contemplated in Commission Rule 39 were still applicable.

[14] In a letter dated 25 November 2014, Sibanye denied that it had breached the merger conditions and questioned whether a remedial plan was appropriate or possible. Notwithstanding this, and in an attempt to resolve the matter through co-operation, Sibanye submitted the information requested by the Commission and enquired from the Commission whether the information

satisfied the requirement for the submission of a remedial plan as contemplated in Commission Rule 39(2)(b).

[15] After receiving these submissions the Commission indicated on 9 December 2014 that it would only be in a position to give formal feedback to the proposed remedial plan in January 2015. The Applicant launched its application in these proceedings on 10 December 2014.

[16] In its replying affidavit the Applicant indicated that since it had filed its founding affidavit:

> *"Sibanye has been able to reach a solution, in terms of which all employees on the operational staff could be retained, save for a limited number of employees who accepted voluntary separation packages. As regards support service staff, the jobs of all remaining employees could be retained, save only for a potential fifteen members of the medical ill health gang."*

[17] At the hearing of this application we were informed by Mr Gauntlett, who appeared for Sibanye, that the "medical ill health gang" are sick employees whose futures are uncertain.

CONSIDERATION OF THE LEGAL ISSUES

COMMISSION RULE 39

[18] It is apposite to set out Rule 39 in full:

> ***Breach of merger approval conditions or obligations***
>
> *(1) If a firm appears to have breached an obligation that was part of an approval or conditional approval of its merger, the Commission must deliver to that firm a Notice of Apparent Breach in Form CC19, before taking any action –*
>
> *(a) in terms of section 15(1)(c) to revoke that approval or conditional approval; or*

(b) in terms of section 59 or 60.

(2) Within 10 business days after receiving a Notice of Apparent Breach, a firm referred to in subrule (1) may –

(a) submit to the Commission a plan to remedy the breach; or

(b) request the Competition Tribunal to review the Notice of Apparent Breach on the grounds that the firm has substantially complied with its obligations with respect to the approval or conditional approval of the merger.

(3) If a firm submits a plan to the Commission in terms of subrule (2)(a), the Commission may either –

(a) accept the proposed plan; or

(b) reject the proposed plan, and invite the firm to consult with the Commission concerning the apparent breach, with the aim of establishing a plan satisfactory to the Commission by which all of the firm's obligations with respect to the approval or conditional approval may be satisfied.

(4) If the Commission accepts a proposed plan, in terms of either subrule 3(a) or (b), the Commission must monitor the firm's compliance with the plan.

(5) The Commission may act in terms of section 15(1) to revoke the approval or conditional approval of a merger referred to in subrule (1), or in terms of section 59 or 60, only if –

(a) the firm concerned does not respond to the Notice of Apparent Breach within 10 business days after receiving it, in the manner anticipated in subrule (2);

(b) the firm concerned does not agree to meet, or fails to meet as agreed, with the Commission, as required by subrule (3)(b);

(c) the firm and the Commission are unable to agree a plan as contemplated in subrule (3)(b);

(d) the firm acts in a manner calculated to frustrate the Commission's efforts to monitor compliance with a plan, as required by subrule (4); or

(e) the firm fails to employ its best efforts to substantially comply with a plan established in terms of subrule (3).

[19] The wording of the above rule makes it clear that the issuing of a Notice of Apparent Breach may have serious consequences. It could lead to the approval of the merger being revoked, the imposition of administrative penalties or an order of divestiture.

[20] Before these kinds of measures may be taken, the rule provides for engagement between the merged entity and the Commission and the drafting of a remedial plan or plans.

[21] It also provides in sub-rule 2(b) for a "review" before the Competition Tribunal. This review is peculiar in the sense that it is coupled to an implied declaration that the firm has substantially complied with its obligations with respect to the approval or conditional approval of the merger. In essence, the effect of Rule 39(2)(b) appears to be that, if it is found that the merged entity has substantially complied with its obligations with respect to the merger conditionally approved, then the Notice of Apparent Breach should be set aside.

[22] The wording of Rule 39(1) is also important. The first phrase of this rule is written in the past tense – "*If a firm appears to <u>have breached</u> an obligation ...*" (emphasis added). This indicates that the breach must have occurred. It cannot be a breach that is imminent or about to occur.

[23] It would appear, therefore, that the Commission is not entitled to issue a Notice of Apparent Breach if the breach has not occurred. All it can do if a breach appears imminent is to warn the merged entity that should it breach the merger conditions, it will issue a Notice of Apparent Breach, which could have the consequences referred to above.

THE REASONS FOR THE DECISION

[24] The Commission justified its decision to issue the Notice of Apparent Breach as follows: From an analysis of the presentations and minutes of the 21 October 2014 section 189 consultation meeting, which were submitted to it by NUM, it appeared that employees working at Cooke 4 were to be retrenched in order to eliminate the duplication of services and functions, as a result of the merger. Therefore, in the eyes of the Commission, the proposed retrenchments were as a result of the merger. It also appeared that the retrenchments were imminent because the 60-day period[2] for consultations was due to end. Moreover, during the investigation of the merger by the Commission, Gold One had issued a section 189 Notice and then had withdrawn it for fear that it might delay the Commission's approval of the merger. This signified to the Commission that the imminent retrenchments were also as a result of the merger. The Commission was also of the view that "once the retrenchments pass muster in respect of procedural and substantive fairness in terms of the labour laws, the retrenchments [would] not be reversible based upon a breach of the merger conditions." For the Commission this meant that there was an apparent breach of the merger conditions.

[25] Sibanye relied on four grounds in its review application; namely that: (1) No retrenchments had in fact taken place. (2) The section 189 consultation process was not the result of the merger. (3) The Notice of Apparent Breach exceeded the Commission's remit and usurped the labour authorities' power. (4) The Notice of Apparent Breach was issued, on a misconceived legal premise that the retrenchments, once effected, would not be reversible.

[2] The 60-day period is a minimum period prescribed for retrenchment consultations in terms of section 189A of the LRA.

[26] Besides the above, the Commission also argued that since Sibanye had submitted a remedial plan and the parties were in the process of engaging about this plan, Sibanye was precluded from bringing the review application. This argument was based on the ground that Sibanye had elected to submit a remedial plan by way of its attorneys' letter of 25 November 2014 which followed the meeting between Sibanye and the Commission on 17 November 2014. It is, however, apparent that the Commission's contentions in this regard are based upon a misreading of Sibanye's attorneys' letter.

[27] While the Commission is to be commended for acting pro-actively when faced with an apparently imminent breach of merger conditions, the Commission jumped the gun by prematurely issuing the Notice of Apparent Breach. This is because no retrenchments had in fact taken place. The Commission's argument that the apparent breach was imminent is not sufficient; there must be an actual apparent breach before a Notice can be issued. The term "apparent" also does not rescue the Commission because apparent means ostensible and not imminent.

[28] The argument that if such a Notice had not been issued the horse would have bolted because the retrenchments would have been irreversible is also not legally valid. This is because a court of competent jurisdiction could order the re-instatement of the dismissed workers.[3]

[29] The Commission is not empowered in terms of Rule 39 to prevent or pre-empt a breach through the issuing of a Notice of Apparent Breach. In the context of the breach being a retrenchment as a result of a merger, the Commission is not empowered through Rule 39 to prevent the retrenchments through the issuing of a Notice of Apparent Breach. The employees are, however, at liberty through their trade union to apply to the Labour Court to interdict the retrenchments.[4]

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[3] However, once employees are retrenched and leave the employer's premises such as a mine it may be difficult to locate them to effect re-instatement.

[4] This accords with this Tribunal's approach established in *Shell South Africa (Pty) Ltd v Tepco Petroleum (Pty)* Ltd CD 66/LM/Oct06 at para 58 that competition authorities ought to show deference to other regulators in dealing with questions which are contained in the public interest considerations

[30] While we are sympathetic to the Commission's efforts to safeguard employment, being one of the public interest issues it is enjoined to do in terms of section 12A(3) of the Act (especially when employment conditions have been imposed in the approval of a merger as is the case here) we are constrained by the provisions of Rule 39 and the Form CC19, which are plain in their meaning as explained above.

[31] The arguments ably made by Mr Quilliam, who appeared for the Commission, justifying the issuing of the Notice of Apparent Breach cannot avail the Commission in the face of the plain wording of the Rule 39. As the Commission argued, it may well be that the horse has bolted by the time the requisite jurisdictional fact (i.e. actual retrenchments) to issue the Notice of Apparent Breach arises. However, there is nothing in section 15(1)(c) of the Act, Rule 39 or the Notice of Apparent Breach that indicates that this is the ill that the legislature intended to cure by giving the Commission powers to intervene before the retrenchments, otherwise it would have said so.

[32] The Tribunal is empowered in terms of section 27(1)(c) of the Act to review any decision made by the Commission that may be referred to the Commission.[5] We are constrained on the basis of the legality principle to review and set aside the Notice, as the Commission was not empowered to issue it in terms of Rule 39.

[33] In the light hereof it is not necessary to consider many of the numerous legal issues raised by the parties in this matter, including whether the intended retrenchments are as a result of the merger and whether section 6 of the Promotion of Administrative Justice Act[6] applies to review applications.

ORDER

[34] Accordingly, we order that the Notice of Apparent Breach is reviewed and set aside. In accordance with our normal practice and in light of the recent

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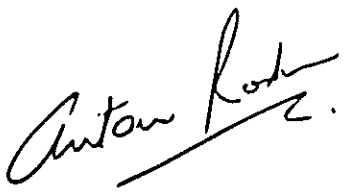
of the Act because "the role played by the competition authorities in defending even those aspects of the public interest … is, at most, secondary to other statutory and regulatory instruments".

[5] *Agri Wire (Pty) Ltd v Commissioner of the Competition Commission* 660/2011 para14

[6] Act No 3 of 2000.

Constitutional Court decision in this regard we are not competent to make a cost award against the Commission.[7] Therefore there is no order as to costs.

[35] Notwithstanding the review order, the Commission is entitled, and legally obliged to continue to monitor Sibanye's compliance with the merger conditions and to act in accordance with its Rules insofar as an apparent breach has occurred.



ANTON ROSKAM

17 April 2015

DATE

Mondo Mazwai and Prof Fiona Tregenna concurring

Tribunal Researcher:	Derrick Bowles
For Sibanye Gold Ltd:	Adv. G. Gauntlett SC and Adv. F. Pelser, as instructed by Edward Nathan Sonnenbergs
For the Competition Commission:	L. Quilliam, Legal Counsel

[7] *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others* (CCT 58/13) [2013] ZACC 50; 2014 (3) BCLR 251 (CC); 2014 (2) SA 480 (CC) (18 December 2013).