

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 28/LM/Apr06

In the matter between:

FLAMINGO OAK TRADING 8 (PTY) LTD

Acquiring Firm

and

IMPALA REFINING SERVICES LTD

Target Firm

Panel : D Lewis (Presiding Member), N Manoim (Tribunal Member), and M Mokuena (Tribunal Member)

Heard on : 22 June 2006

Delivered on : 17 July 2006

REASONS FOR DECISION

Approval

[1] On 22 June 2006, the Competition Tribunal unconditionally approved the proposed merger between Flamingo Oak Trading 8 (Pty) Ltd ("Flamingo") and Impala Refining Services Ltd ("IRS").

The merger transaction

[2] Flamingo is a privately owned South African company which is to change its name to Royal Bafokeng Tholo Investment Holding Company (Pty) Ltd ("RBTIH"). RBTIH is a company newly formed for the purposes of this transaction and a wholly owned subsidiary of Smokey Mountain Trading 564 (Pty) Ltd ("Smokey Mountain").¹ IRS (created in 1998 to provide toll refining services to third parties and to refine metal concentrate held by the Implats

¹ Smokey Mountain is a wholly owned subsidiary of Afropulse 108 (Pty) Ltd ("Afropulse") - which will change its name to Royal Bafokeng Holdings (Pty) Ltd - and which in turn is a wholly owned subsidiary of the Royal Bafokeng Nation ("RBN"). RBN is a *universitas personarum*, being a community of approximately 300 000 black, predominantly rural South Africans living in the Rustenburg valley of the North West province. RBN holds investments in a number of industries including companies having activities relating to platinum group metals ("PGMs"), such as Royal Bafokeng Resources Holdings (Pty) Ltd ("RBRH"); RBTIH; Royal Bafokeng Resources (Pty) Ltd ("RBR"); and Royal Bafokeng Resources Platinum (Pty) Ltd ("RBRP").

Group) is a wholly owned subsidiary of Impala Platinum Holdings Ltd (“Implats”).²

[3] The proposed transaction involves RBTIH acquiring an undivided 49% share in the business of IRS (referred to as the ‘business interest’), which will immediately be contributed to an unincorporated joint venture (“IRS-RBIH JV”) to be formed between the parties. IRS itself will contribute the use of the remaining 51% in the business of IRS to the IRS-RBIH JV. We are told that the proposed transaction is part of a series of inter-related transactions all of which make-up the so-called “Project Crown”, which is a BEE transaction in terms of which the Royal Bafokeng will ultimately hold a fully diluted shareholding of approximately 9% in Implats.³

[4] The parties submit that in the interim period, there is conceivably a change in the quality of control over the business of IRS.⁴ Before Project Crown, IRS has sole control over its business, but until ‘transaction conclusion’ it will be held by the IRS-RBIH JV, through which the Royal Bafokeng will acquire control.

Rationale for the transaction

[5] Royal Bafokeng is motivated in entering into Project Crown by the prospect of developing a mutually beneficial relationship with the Implats Group. The majority of the land which is mined by Impala Platinum belongs to the Royal Bafokeng. According to the Royal Bafokeng not only will its people benefit by working at those mines, but they also ensure that members of the community benefit at a management level and in a shareholding capacity. Pursuant to Project Crown, the Local Economic Development Trust (the “LED Trust”) will be created whose ultimate objective is the economic upliftment of members of the Bafokeng community, and of those in the North West region.⁵ In addition, the Royal Bafokeng asserted that the proposed transaction is entirely in line with RBN’s “2020 Vision” whereby the RBN aims to create self-sufficiency in the community by the year end 2020. According to RBN, this entails that every Mofokeng should be employed, employable, or have the capacity to create jobs.

[6] The Implats Group’s stated commercial rationale is the promotion of empowerment in the mining industry in conformity with the requirements of the Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRD Act”) and the Mining Charter. According to the Implats Group the conclusion of

² Implats is a public company listed on the JSE and controls a number of firms listed on page 5 of the Commission’s Mergers and Acquisitions Report. The following shareholders hold in excess of 5% in Implats’ issued share capital: Public Investment Corporation (6.0%); Old Mutual Group (5.8%); and Remgro Ltd (5.0%).

³ According to the parties, this Project Crown will take between 2 to 10 years to complete, the so-called “transaction conclusion”. Please see pages 65-68 of the merger record, for the relevant steps involved in the Project Crown.

⁴ See also page 1 of the transcript dated 22 June 2006.

⁵ Both Implats and the Royal Bafokeng will contribute equally to the LED Trust for the period 2006 to 2016.

Project Crown, including its employee share ownership programme, will result in approximately 26% of the ownership of Impala Platinum being placed in the hands of BEE entities.

The relevant market

[7] **RBITH**⁶ is a newly formed entity for the purposes of this transaction, and is not involved in any other business. As already indicated above, RBTIH is a wholly owned subsidiary of **Smokey Mountain**, a wholly owned subsidiary of **Afropulse** (which will change its name to Royal Bafokeng Holdings (Pty) Ltd), which in turn is a wholly owned subsidiary of the RBN. RBN is a community of approximately 300 00 black, predominantly rural South Africans living in the Rustenburg valley of the North West province. It holds investments in companies operating in numerous activities some of which are unnecessary to detail here. However, the only companies having activities relating to platinum group metals (“PGMs”) are as follows: Royal Bafokeng Resources (Pty) Ltd (“RBRH”); RBTIH; Royal Bafokeng Resources (Pty) Ltd (“RBR”); and Royal Bafokeng Resources Platinum (Pty) Ltd (“RBRP”). The activities of each of these firms are explained below.

RBRH, a wholly owned subsidiary of RBN, is an investment holding vehicle for RBN’s mineral rights and mining interests, and does not sell any products nor provide any services, such as mining and refining, for its own account. **RBR**, a wholly owned subsidiary of RBN, holds a 50% interest in the Bafokeng Rasimone Platinum Mine (“BRPM”).⁷ The mine produces PGMs, all of which are sold to RPM following their off-take agreement. **RBRP** is a wholly owned subsidiary of RBRH. The parties have indicated that RBRP and Impala Platinum have signed heads of agreement to enter into a joint venture to carry on prospecting over certain properties adjacent to the Impala Platinum Rustenburg mine.⁸ Below are the activities of the IRS, the target firm.

[8] IRS’ main activity is to negotiate and manage contracts with third parties for the refining of PGM concentrate, but the actual refining is sub-contracted to Impala Platinum. The business of IRS is nothing more than to simply conclude and manage the contracts with third parties.⁹

⁶ Note that Flamingo is to change its name to RBTIH.

⁷ BRPM is an unincorporated joint venture with Rustenburg Platinum Mines Ltd (“RPM”), a wholly owned subsidiary of Anglo Platinum Ltd (“Anglo Platinum”).

⁸ According to the parties, the Royal Bafokeng held mineral rights over a portion thereof, before the MPRD Act came into force, and Impala Platinum acquired mineral rights over a portion from Lonmin. They further submit that should the prospecting be fruitful, they may continue with the joint venture in order to mine on those properties, but this is by no means certain and will be some years in the future.

⁹ The parties submitted that IRS was created in 1998 to provide toll refining services to third parties and to refine metal concentrate held by the Implats Group. The process involved is this that after platinum is mined, the minerals need to be extracted from the rock which is done through a refining process. In doing so IRS sources material from North and South America, Southern Africa, Australia and Asia. We are also advised that typically mining houses mine and refine PGMs for their own account. According to the parties, the Implats Group had in the past

[9] Following the above, the Commission is of the view that no product overlap exists between the activities of the merging parties as RBN does not hold any interest in a firm that provides similar services to that of IRS or by the refining plant of Impala Platinum.

Competition analysis

[10] In its analysis, the Commission found that any vertical integration that could arise from the proposed transaction would be between PGM mines controlled by RBN and IRS. According to the Commission, RBN has – in addition to its interest in Implats – a joint venture with Anglo Platinum through Bafokeng Resources, which holds a 50% interest in BRM. The platinum mined by this entity is refined by Anglo Platinum itself. The Commission submit that such a vertical integration is not substantial given the fact that the market remains unchanged as IRS existed pre-merger, and being owned and controlled by Impala Platinum. We were advised that third parties would still be provided with toll refining services as before. The parties contended that Project Crown, and in particular this merger, would not result in any substantial lessening and prevention of competition in the relevant markets in that although the Royal Bafokeng will acquire joint control post-merger as part of the IRS leg of Project Crown, they will, however, leave the decision making in the hands of Impala Platinum (as managers of IRS) alone. They further contended that the Project Crown ultimately results in the Royal Bafokeng increasing their shareholding in Implats to 9%, but does not result in a change of control over Implats or Impala Platinum, and only a temporary change in the quality of control in relation to IRS. The merging parties do not envisage an impact on the production and marketing of PGMs in South Africa subsequent to this merger.¹⁰

Public Interest

[11] No public interests issues are at stake here. The merging parties submit that the proposed merger will afford RBN the opportunity to increase its activities in the mining industry. In addition, the merging parties submit that it is through the Project Crown that the Implats Group would be able to achieve the objectives of the MPRD Act and the Mining Charter.

Conclusion

[12] We share the Commission's view that the proposed transaction is unlikely to result in the substantial prevention or lessening of competition in the

and in the anticipation of a merger between Gencor and Lonrho (which was subsequently turned down) installed extra capacity at its base and precious metals refineries in Springs. Following the prohibition of the said *Gencor/Lonrho* merger, the Implats Group was left with excess capacity and ultimately began offering refining services not only internally, but also to outside entities.

¹⁰ See pages 80-81 of the merger record.

relevant markets. We accordingly approve the proposed transaction unconditionally.

D Lewis
Presiding Member

N Manoim and M Mokuena concur in the judgment of D Lewis.

Tribunal Researcher: T Masithulela

For the merging parties : L Morphet assisted by L Vundla (Deneys
Reitz Inc.)

For the Commission : T Kekana (Mergers & Acquisitions)