

# COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 014795

In the merger between:

**GLENCORE INTERNATIONAL PLC**

**Primary Acquiring Firm**

and

**XSTRATA PLC**

**Primary Target Firm**

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Panel : N Manoim (Presiding Member),  
A Wessels (Tribunal Member) and  
M Holden (Tribunal Member)

Heard on : 18 January 2012

Order issued on : 22 January 2012

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## ORDER

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Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that –

1. The merger between Glencore International plc and Xstrata plc be approved in terms of section 16(2)(b) of the Act subject to the conditions in Annexure A; and
2. A Merger Clearance Certificate be issued in terms of Competition Tribunal Rule 35(5)(a).

  
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Presiding Member  
N Manoim

**Concurring:** A Wessels and M Holden

## ANNEXURE A

### Glencore International plc and Xstrata plc

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#### CONDITIONS

##### 1. DEFINITIONS

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings:

- 1.1. **"Commission"** means the Competition Commission of South Africa;
- 1.2. **"Competition Act"** means the Competition Act 89 of 1998, as amended;
- 1.3. **"Conditions"** means these conditions;
- 1.4. **"Glencore"** means Glencore International plc, the primary acquiring firm in this merger;
- 1.5. **"Effective Date"** means the date of the last antitrust approval in respect of the merger in any applicable jurisdiction;
- 1.6. **"Merger"** means the transaction in terms of which Glencore will acquire the issued share capital of Xstrata, which it does not already own, pursuant to a Scheme of Arrangement under Part 26 of the Companies Act (UK) 2006, which transaction was notified to the Commission on 26 March 2012;
- 1.7. **"Merging Parties"** means Glencore and Xstrata;
- 1.8. **"merged entity"** means Glencore and Xstrata post-merger;
- 1.9. **"NUM"** means the National Union of Mineworkers;
- 1.10. **"Patterson Grading System"** refers to the job grading system set out in Annexure C to these conditions;
- 1.11. **"Review Date"** means a date which is 90 days after the Effective Date;
- 1.12. **"Skilled Employees"** means South African employees of the Merging Parties who are identified as falling within Patterson Grade D to Patterson Grade F;
- 1.13. **"Unskilled and Semi-skilled Employees"** means South African employees of the Merging Parties who are identified as falling within Patterson Grade A to Patterson Grade C; and
- 1.14. **"Xstrata"** means Xstrata plc, the primary target firm in this merger.

## 2. CONDITIONS

- 2.1. The merged entity shall limit the number of retrenchments of Skilled Employees to a maximum of 80 (eighty) Skilled Employees. For the sake of clarity, retrenchments do not include
  - 2.1.1. Voluntary separation arrangements;
  - 2.1.2. Voluntary early retirement packages;
  - 2.1.3. Refusals to be redeployed whether on reasonable or unreasonable grounds; and
  - 2.1.4. Termination due to resignation or retirement.
  
- 2.2. By the Review Date, the merged entity will have finalised the analysis for the purposes of determining an accurate number and employment role descriptions of the Unskilled and Semi-skilled Employees who would be affected by retrenchments.
  
- 2.3. Following the Review Date, and only if the merged entity determines that retrenchments will be required, the merged entity shall limit the number of retrenchments of Unskilled and Semi-skilled Employees to a maximum of 100 (one hundred) Unskilled and Semi-skilled Employees. These retrenchments may only be effected after a period of 2 (two) years from the Review Date. For the sake of clarity, retrenchments do not include:
  - 2.3.1. Voluntary separation arrangements;
  - 2.3.2. Voluntary early retirement packages;
  - 2.3.3. Refusals to be redeployed whether on reasonable or unreasonable grounds; and
  - 2.3.4. Termination due to resignation or retirement.
  
- 2.4. The merged entity will comply with all labour law obligations imposed on it in connection with any retrenchments and, in particular, its obligations to engage with any affected employee/ trade union in this regard before making any announcement of the analysis in paragraph 2.2.

- 2.5. Upon the expiry of the 2 year period mentioned in paragraph 2.3 above, and should the merged entity proceed to retrench any of the 100 (one hundred) Unskilled or Semi-skilled Employees ("**affected employees**"), the merged entity shall make available a training fund for the re-skilling of the affected employees, with an amount of R10 000.00 (ten thousand rand) being available to each affected employee. The training fund shall be administered in accordance with the terms and conditions as specified in Annexure B, attached hereto.

### **3. MONITORING OF COMPLIANCE WITH THE CONDITIONS**

- 3.1. The merged entity will inform NUM and the Commission of any antitrust approval contemplated in paragraph 1.5 as soon as possible after such approval is granted.
- 3.2. The merged entity shall circulate a copy of the conditions to all employees in South Africa within 10 (ten) business days of the Effective Date.
- 3.3. As proof of compliance herewith, the merged entity shall within 5 (five) business days of circulating the conditions, provide the Commission with an affidavit by a senior official attesting to the circulation of the conditions and attach a copy of the said notice.
- 3.4. With respect to conditions 2.1 and 2.3 above, the merged entity shall report on a six monthly basis to the Commission detailing the number of employees retrenched as a result of the Merger and their skill levels as identified in the Patterson Grading System.
- 3.5. The Training Committee (as specified in Annexure B) shall report to the Commission on a six monthly basis, after the initial two years following the Review Date, detailing the number of employees that have applied for training, their names, selected courses, duration and cost of the training course and progress made or being made in such training.
- 3.6. The Training Committee shall, at the time of submission of the report referred to in paragraph 3.4 above, also submit a report secured from the trustee of the training fund, detailing the opening and closing balance of the trust account, any interest of other funds accrued during the period, any payment

of funds made by the trustee during the period, indicating the recipient of the funds, and any withdrawals by the merged entity of interest or capital for the purposes of payment of the trustee's fees.

- 3.7. The merged entity shall submit a final report to the Commission providing proof of completion of the training for each affected employee and indicating the balance of funds remaining in the holding account.
- 3.8. All reports and correspondences in relation to these conditions must be submitted to the following email address: [mergerconditions@compcom.co.za](mailto:mergerconditions@compcom.co.za).

## ANNEXURE B

1. Once the merged entity has determined the number of employees likely to be retrenched who also qualify for the training, it must appoint a trustee that is an independent qualified chartered accountant, alternatively the merged entity's then current auditors, to administer the training funds on behalf of the merged entity.
2. The trustee shall in turn open an interest-bearing trust account to receive the training funds.
3. The merged entity shall deposit an amount equal to the product of R10 000.00 (ten thousand rand) and the total qualifying employees into the trust account.
4. The merged entity and NUM shall each appoint 2 (two) members to form a committee ("Training Committee") to manage and facilitate the training process.
5. The Training Committee shall conduct a skills audit to determine the skill levels of the affected employees. The skills audit shall comprise an investigation into and report on the current/ existing skills of the qualifying employees. The cost of the skills audit shall be borne by the merged entity.
6. The Training Committee shall identify relevant training courses, accredited training institutions that can provide the training, the cost, duration and other relevant details and provide these to the affected employees so that they can make an informed decision.
7. Any affected employee may apply to the Training Committee for identified training courses within 2 (two) years from the date of his/ her dismissal.
8. The Training Committee shall approve the training application and secure the necessary funds from the trustee on behalf of the employee.
9. No portion of the training fund shall be paid directly to any of the affected employees.

10. Where an amount paid by the trustee to any training institution becomes repayable (in whole or in part) for any reason, the institution in question shall be required to deposit such amount back into the trust account. The trustee shall be entitled to recover any amount erroneously paid to another person.
11. The trustee's fees shall be agreed between the merged entity and the trustee and shall be for the merged entity's account. The merged entity shall use any interest received on the capital amount and any portion of the capital amount left over in the trust account at the end of the two year period to pay the trustee's fees.
12. If, at the end of the two year period, and once all of the trustee's fees have been paid in full, there remains any capital amount or interest in the trust account, such amount may be returned to the merged entity and the trust may be closed.

ANNEXURE C

CONFIDENTIAL