COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM315Mar18

In the matter between

Sibanye Gold Limited (T/A Sibanye-Stillwater)	Primary Acquiring Firm
And	
Lonmin PLC	Primary Target Firm

Panel	: Mr Enver Daniels (Presiding Member) : Ms Yasmin Carrim (Tribunal Member) : Ms Mondo Mazwai (Tribunal Member)
Heard on	: 12-14 November 2018
Last Submission Received	: 19 November 2018
Order Issued on	: 21 November 2018
Reasons Issued on	: 13 December 2018

REASONS FOR DECISION

Approval

[1] On 21 November 2018, the Competition Tribunal ("Tribunal") conditionally approved the large merger between Sibanye Gold Limited T/A Sibanye-Stillwater ("Sibanye") and Lonmin PLC ("Lonmin") ("merging parties").

[2] The reasons for the conditional approval follow.

Introduction and background

[1] In October 2018, the Competition Commission ("the Commission") filed its Large Merger and Acquisitions Report with the recommendation that the merger be approved subject to conditions contained in Annexure A to the report which had been agreed upon between the merging parties and the Commission. The record in this matter was voluminous containing documents totalling roughly 160000 pages.

[2] The merging parties in conjunction with the Commission compiled a truncated version of the record at the request of the Tribunal which greatly assisted the Tribunal to hear and to decide the merger expeditiously. The truncated record also assisted us to peruse the record with relative ease.

[3] The Mining Forum of South Africa ("the MFSA"), the Association of Mineworkers and Construction Union ("AMCU"), the Centre for Applied Legal Studies ("CALS") acting on behalf of Sikhala Sonke, and the Greater Lonmin Community ("GLC") sought and were granted the right to intervene in the proceedings. We pause to mention that strictly speaking they were not granted the status of interveners envisioned by Rule 46 of the Rules for the Conduct of Proceedings in the Competition Tribunal ("Tribunal rules"), but were granted permission to make submissions to the Tribunal on important public interest issues, not all of which were necessarily competition related, but were taken into account in arriving at our decision.

[4] In terms of the proposed large merger, Sibanye intends to acquire sole control of Lonmin PLC ("Lonmin").

[5] Section 12 A of the Competition Act reads as follows:

Consideration of mergers.

(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to

substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and—

(a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine—

(i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

(ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or

(b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

(2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including—

(a) the actual and potential level of import competition in the market;

(b) the ease of entry into the market, including tariff and regulatory barriers;

(c) the level and trends of concentration, and history of collusion, in the market;

(d) the degree of countervailing power in the market;

(e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;

(f) the nature and extent of vertical integration in the market;

(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and

(h) whether the merger will result in the removal of an effective competitor.

(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on—

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
(d) the ability of national industries to compete in international markets.

[6] Before dealing with the issues listed in section 12A, we shall briefly outline the history of the merger.

[7] On 14 December 2017, the Boards of Sibanye and Lonmin issued a Rule 2.7 Notice in which they announced that the former will acquire the entire issued share capital of the latter.

[8] This will be effected by means of a scheme arrangement under Part 26 of the UK Companies Act 2006 whereby each Lonmin shareholder will receive 0.967 New Sibanye-Stillwater Shares for each Lonmin Share. Based on the calculated share price and the exchange rate on 13 December 2017, each Lonmin Share was valued at 100.0 UK pence and the ordinary share capital was valued at £285 million or R 5140 000 000.00.

[9] Approaches were made to Lonmin in 2014 and 2016 but were not pursued.

[10] The current merger arose out of further negotiations initiated by Lonmin in 2017, subsequent to Lonmin embarking on a strategic review of its business.

[11] The Competition and Markets Authority of the UK approved the merger, noting that there were no competition concerns and that Sibanye had no operations in the UK while Lonmin sells some PGMs into the UK market.

Parties to the transaction and their activities

Primary acquiring firm

[12] Sibanye is a mining company with a number of mineral reserves and mining assets that engages in surface and deep-level underground mining as well as various mining-related activities. It extracts and produces concentrate for a number of Platinum Group Metals ("PGMs"), as well as a number of other metals as by-products (gold, silver, copper, nickel, chrome and cobalt). Sibanye

does not currently have any downstream refining capabilities within South Africa.

[13] Sibanye is listed on the JSE and is not controlled by any firm.

Primary target firm

[14] Lonmin is a producer of PGMs and is listed on the JSE as well as the London Stock Exchange. Lonmin owns a number of mining shafts, reserves and exploration projects through which it produces PGMs and other metals as by-products. Lonmin also provides downstream smelting and refining services which are used for both their own concentrate and provided to PGM producers without these facilities.

Proposed transaction and rationale

[15] Sibanye intends to acquire the entire issued share capital and unfettered sole control of Lonmin. Sibanye will do this by issuing 0.967 shares in Sibanye in exchange for each ordinary share of Lonmin. Post-merger, the Lonmin Shareholders will hold 11.3% of the enlarged Sibanye entity.

[16] The merging parties submit that the buyout will create a larger more resilient company, expanding Sibanye's PGM operations in order to capitalise on potential synergies and will ensure Lonmin survives its current financial difficulties.

Competitive Assessment

Horizontal assessment

[17] The Commission considered the activities of the merging parties and concluded that the proposed transaction leads to horizontal overlaps in the upstream regional (SADC) market for the production of different PGM concentrates as well as the market for the production and supply of other precious metals (gold,

silver, copper, nickel, chrome and cobalt) that are considered by-products to the PGM production process.

[18] After evaluating the pre- and post-merger market structures it concluded that the proposed transaction was unlikely to lead to a SLC in any of the separate PGM markets. This is because PGM prices are determined by international exchanges, making it unlikely that the merged entity will be able to unilaterally influence prices. Further, the merging parties will continue to face significant competition post-merger from other players (including Northam, Implats and Norilsk).[1]

[19] The Commission analysed the estimated market shares of the merging parties for the production of other metals that are considered by-products in the production of PGMs and found that the combined market share was minimal, with strong competition in the market post-merger and thus the transaction was unlikely to lead to a SLC in this market either.

Vertical analysis

[20] The Commission submitted that the transaction also raised vertical overlaps as Sibanye does not have any smelting or refining operations within South Africa and instead sells its PGM concentrate to refiners and smelters in the downstream market, within which Lonmin is active. Currently, there is no vertical relationship between the merging parties themselves as Sibanye sells its concentrate to Anglo American Platinum and Implats whereas Lonmin purchases concentrate from [redacted]. This may change post-merger as Sibanye wishes to expand its PGM operations and use Lonmin's downstream facilities for its own PGM concentrate.

[21] The Commission found that no input foreclosure concerns arise as Sibanye is under contractual obligations that will ensure they continue to provide PGM concentrate to Implats post-merger. Customer foreclosure was similarly unlikely as the Commission found that there were alternative downstream firms

[1] Impala Platinum Holdings Limited; Northam Platinum Limited; Norilsk Nickel Africa Pty Ltd.

with sufficient capacity to perform the refining and smelting done by Lonmin pre-merger.

Conclusion on Competitive Analysis

[22] After considering the potential competitive effects of the merger, we agreed with the Commission's analysis that the proposed transaction was unlikely to lead to a significant lessening of competition in any relevant market. The Commission's analysis on the competitive effects was not challenged by any of the intervening parties throughout the course of the hearings and thus we do not deal with it any further in our reasons.

Public interest

[23] It was abundantly clear from the outset that there were extensive public interest concerns arising out of the merger. In addition to the numerous concerns set out by the Commission in its recommendation, the Tribunal received several notices from interested third parties wishing to participate in the hearing. To facilitate proceedings and remove the need for formal intervention applications, the merging parties consented to all third parties making written submissions to the Tribunal and to attending and participating in the hearing of the matter. As indicated above MFSA, AMCU, Sikhala Sonke, and the GLC were permitted to make submissions on this basis.

[24] The public interest issues raised and the remedies canvassed throughout the proceedings related to: the contemplated large scale retrenchments at Lonmin post-merger; the non-compliance by the merging parties with their respective Social Labour Plans; the effect of the merger on local suppliers and historically disadvantaged persons ("HDPs"); and the potential rolling out of an Agri-Industrial Development Program to create economic and social benefits for surrounding communities. Each of these issues will be dealt with individually below.

Employment

[25] The determination of the effect on employment by this merger presented difficulties at two levels. The first was that it was uncertain to determine which job losses could be classified as merger specific. The second was that ruling on the rationality of all the planned job losses would be difficult as such were based on a firm's interpretation of uncertain market and trading conditions.

[26] In the case of *BB Investment Company and Adcock Ingram Holdings* ("BB Investment"),[2] the Tribunal held that in merger proceedings, when assessing employment considerations under s12A(3), it was necessary to differentiate between any employment loss which can be shown, as a matter of probability, to have some nexus associated with the incentives of the new controller (merger specific) and those which did not (operational).[3]

[27] The Tribunal acknowledged that jobs lost as a result of an acquiring controller being more likely to shed jobs than the incumbent may be considered merger specific but held that the evidence in support of such a conclusion would need to be robust. To find such evidence, the Tribunal held that pre-merger management plans may be of some evidential weight when comparing a merger absent a counterfactual to the post-merger scenario.[4]

[28] In the matter at hand, in their merger filings, Sibanye and Lonmin each submitted independent operational plans for the future of Lonmin. Lonmin provided a standalone plan ("Standalone Plan") that envisioned 12 459 retrenchments in order to cut costs and continue operations. Sibanye, in performing its due diligence, constructed a joint operational plan with Lonmin ("Sibanye plan") which envisaged 13 344 retrenchments.

[29] Sibanye submitted that 885 retrenchments were merger specific. This number was arrived at in the following way:

29.1 Sibanye envisaged 1 283 merger specific job losses. This number was comprised of 1 132 jobs which would be lost because of the

[2] BB Investment Company (Proprietary) Limited / Adcock Ingram Holdings (Proprietary) Limited [2014] 2 CPLR 451 (CT).
[3] Ibid para 58.
[4] Ibid para 62.

implementation of Sibanye's operating model plus 151 jobs to be lost because of a duplication of roll or consolidation.

29.2 Sibanye reduced the merger specific job losses (1 283) by 398 'merger specific job savings.'

29.3 The merger specific job savings were determined as those operational retrenchments which would have happened absent the merger but would no longer happen if the merger were approved due to Sibanye injecting capital into Lonmin, thereby enabling Lonmin to keep existing shafts in operation, or in the short term, embarking on new operations subject to feasibility studies. Lonmin envisaged a total of 12 459 operational job losses in its standalone plan. Sibanye only envisaged 12 061 operational job losses.[5] Sibanye submitted that it thus envisaged 398 fewer operational job losses than Lonmin.

29.4 These merger specific job savings were subtracted from the 1 283 merger specific retrenchments contemplated by Sibanye resulting in a total net merger specific job loss of 885.

[30] The Commission took a different view. It submitted that the number of merger specific retrenchments was 3 188. The basis for this finding was that in its investigation, the Commission found an operational plan devised by Lonmin and submitted to Sibanye during the early stages of negotiation between the firms in October 2017 ("Lonmin October plan"). In the Lonmin October plan, Lonmin forecast that only 10 156 retrenchments were necessary to ensure its continued operation.

[31] The Commission examined the Lonmin October plan and several other factors surrounding the negotiations between the two firms which had been initiated in September 2017. The Commission concluded that absent the merger, Lonmin would have only considered 10 156 retrenchments to be necessary for its continued survival.

[5] The operational job losses were comprised of of 1882 job losses because of a closure of shafts plus 5179 job losses as a result of the volume reduction due to the end of projects.

[32] The Commission argued that by the time Lonmin submitted its Standalone plan to it for analysis, Sibanye had already influenced Lonmin by requiring it to inflate its operational retrenchments by 2 303 contemplated retrenchments.[6]

[33] The Commission thus accepted the 885 merger specific retrenchments admitted to by the parties and added 2 303 retrenchments thereto. Put simply, this 3 188 was the difference between the Lonmin October plan (10 156) and the Sibanye plan (13 443).

[34] AMCU, in its submissions and argument, crafted a third, different theory to the Commission and merging parties. On its argument, all the contemplated retrenchments were to be considered merger specific.

[35] AMCU submitted that Sibanye had, since 2014, expressed an interest in Lonmin. This interest took the form of two sets of failed negotiations before a third interaction matured into the deal under consideration. The first approach began in March 2014 and terminated in October 2014. The second approach started in April 2016 and ended in August 2016.

[36] AMCU took the Tribunal to letters exchanged between the management of Sibanye and Lonmin during the three interactions between the firms. Three broad conclusions were drawn from such interactions: (i) Sibanye had, in all engagements, been aware that it would retrench workers at Lonmin if it were to purchase Lonmin.[7] (ii) Sibanye foresaw that it would need to respond to public

[6] The merging parties dispute this characterisation, arguing that the increase was attributable to foreseen outcomes which were not met, i.e. finding funding for certain shafts, which did not mature and resulted in capital investment not being made on certain projects and thus increasing the retrenchments required.

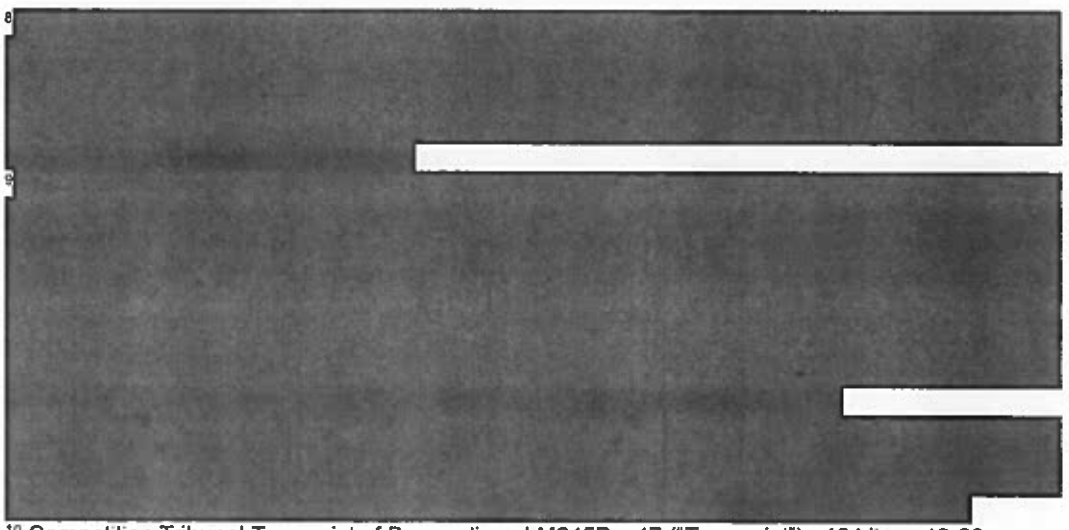
[7] In a letter dated 23 July 2014, addressed to Mr Brian Beamish ("Beamish") and Mr Ben Magara ("Magara") of Lonmin, by Mr Neal Froneman ("Froneman") the CEO of Sibanye Gold Limited (Sibanye") stated that the gold industry had been through cost reductions over the years and that the combined company (i.e. a combined Lonmin and Sibanye) would benefit from Sibanye's expertise as Sibanye had "demonstrated its ability to achieve significant costs savings over a short period of time". AMCU Submitted that whilst this did not specifically relate to retrenchments, the inescapable conclusion was that Sibanye had always been aware that costs reductions would include retrenchments.

interest concerns around a merger because of (i) above;[8] (iii) Sibanye was not adverse to retrenchments for the benefit of its shareholders.[9]

[37] AMCU concluded from the correspondence that Lonmin had been unduly influenced by Sibanye from as early as 2014 to develop retrenchment plans. On AMCU's submissions, Lonmin's true purpose in constructing any plan which envisioned retrenchments was to place itself in a position in which Sibanye would purchase it. This, on AMCU's argument, meant that all contemplated retrenchments had a sufficient nexus to the incentives of the acquiring firm to be considered merger specific.

[38] We deal with AMCU's argument first. Mr Barrie Van der Merwe ("Van der Merwe"), the Chief Financial Officer of Lonmin, submitted that Lonmin's objective since its rights issue in 2015 had been to keep the company in a cash neutral position and all plans were designed to achieve that outcome.[10] The rights issue to which Van der Merwe referred was an equities raising mechanism utilised by Lonmin to forestall its obligations under its lending facilities. Van der Merwe submitted that this move had rendered it unattractive to its lenders and unpopular with its shareholders. [11]

[39] Van der Merwe submitted that in 2017 Lonmin was again in danger of breaching its lending covenants. This fact spurred a year of planning with the intention of



[10] Competition Tribunal Transcript of Proceedings LM245Dec17 ("Transcript") p164 lines 19-22.
[11] Transcript p180 line 6-7.

driving the company towards a cash neutral position.[12] The Commission, in its report, accepted these plans and did not consider Sibanye's engagement with Lonmin in 2014 and 2016 to have any impact on the later negotiations.[13]

[40] Considering Van der Merwe's testimony and absent more robust evidence put up by AMCU, the Tribunal could not, with certainty, conclude that all retrenchments considered in Lonmin's plans were merger specific.

[41] At best then for the merging parties, the Tribunal could rule that there would be 885 merger specific retrenchments. If the Tribunal found the Commission's narrative more compelling, this number would have increased to 3150.

[42] What complicated the determination of the merger specific retrenchments further was that even the two numbers detailed above were not certain. The merging parties' 885 retrenchments were comprised of a saving of 398 jobs on operational plans and a loss of 1 283 jobs because of the implementation of Sibanye's operating model and duplication of functions. The Commission's 3 150 was comprised of the merging parties admitted 885 retrenchments as well as 2 303 operational retrenchments which the Commission believed Lonmin added at Sibanye's influence.

[43] An examination of either of the potential merger specific retrenchments would have thus entailed an analysis of the operational plans of Lonmin and Sibanye.

[44] On the submissions of both Van der Merwe and Dr Richard Stewart ("Stewart") Sibanye's Executive Vice President for Business development, these operational plans were however just that plans over a three-year period. These plans may fluctuate and change and are differentiated from the actual s189 processes undertaken.[14] Even in the realm of proposed reductions owing to a

---

[12] Transcript p165 lines 3-7.

[13] Competition Commission Recommendations LM215Dec17 p86 para 191.

[14] Transcript p462 lines 21 and Transcript p174

VAN D MERWE: Just as an overall point which I am sure will come up again, it is important to take into account that these are plans. There are not Section 189 notices, which Section 189 notices would be valid whether it is Lonmin issuing them or the combined company. But it is a plan based on a view at a point in time taking cognisance of many factors and uncertainties.

Transcript p250 (confidential):

duplication of functions, an area in which parties can conventionally easily identify the precise number necessary, the plans of Sibanye saw three different proposed numbers.[15]

[45] The issue of identifying the exact number of merger related retrenchments was thus not precise, especially as Sibanye's views on the retrenchments may have had some influence on Lonmin's plans. We are cognisant of the commercial realities and the need to cut costs at the target firm. However, the exact calculation of all merger-specific retrenchments is difficult as it is in business decisions and plans based on imperfect assumptions.

[46] This lack of certainty as to the number of proposed retrenchments impacted the Tribunal's ability to conduct the rationality enquiry as it has done in the past in the Metropolitan Holdings Ltd / Momentum Group Ltd merger (Metropolitan).[16]

[47] Whilst the Tribunal was aware that in most mergers, proposed retrenchment plans are clouded with a general uncertainty, its assessment of the rationality of the proposed retrenchments is usually safe-guarded by conditions conventionally proposed by the merging parties which protect against more merger specific retrenchments than proposed taking place. This outcome was not available to the Tribunal in this instance.

MS CARRIM: But at the level of principle, if you say for example in this case that over a three year period we are going – we plan to retrench 12 000 jobs, let us forget the debate about whether it is merger specific or not, and the price of platinum changes drastically, do you revisit that and say actually we can make adjustments on an annual basis or do you still have to wait another two years before you can readjust that outlook that you – or the forecast?

DR STEWART: Those decisions are dynamic decisions and reviewed constantly. So it is not that a decision is made once a year and then not reviewed or revisited again until the following year. So ... [intervenes].

MS CARRIM: So it is likely you might not retrench people if the platinum price changes or you might view, let us assume the merger is approved and Sibanye is a larger group and you might be able to somehow bring efficiencies or move people around, and is there a likelihood that that would happen?

DR STEWART: The principle to that is exactly correct and yes, there is a likelihood that could happen.

[15] At page 2310 the number is 1565; at p2516 its 1832; and at p64572 it is 1283.

[16] [2010] 2 CPLR 337 (CT); *see also*: Sibanye Platinum Bermuda (Pty) Ltd / Aquarius Platinum Ltd and a related matter [2016] 1 CPLR 237 (CT).

[48] The uncertainty present in this case and its impact on the Tribunal's ability to determine the rationality was not however destructive to an approval. It was merely a factor which had to be taken into account when assessing whether the public interest in preventing employment losses may be balanced by an equally weighty, but countervailing public interest justifying the job loss which is cognisable under the Act.[17]

[49] The countervailing public interest advanced by the merging parties was that absent the merger, more workers at Lonmin stood to lose their jobs. This number was said to be as high as 32 000 jobs if the merger was not approved and Lonmin's assets were to be sold by way of a fire-sale. Lonmin submitted that it was in financial distress, limiting its ability to invest in new mines and to expand the lives of existing mines. With these submissions, the Tribunal had to decide whether the workers at Lonmin would be materially better off under a Lonmin standalone plan, a potential fire-sale of its assets, or whether the retrenchments envisaged as part of the proposed transaction would be in their best interests.

[50] AMCU, in their submissions argued that recent refinancing that has been facilitated through a Metal Purchase Agreement with Pangea Investment Management Ltd ("the PIM Deal") as well as positive Q4 financial results reported by Lonmin all point to a substantial turnaround in the financial situation at Lonmin and therefore, extends the life of Lonmin beyond when Lonmin claims its debt would be due. The crux of their argument was that absent the current transaction, the improved position at Lonmin would have resulted in increased investment in other mining operations and consequently a reduction in retrenchments.

[51] The merging parties on the other hand painted a more precarious position of Lonmin's finances. The common refrain from the merging parties was that one good quarter did not reflect an overall healthy financial position and that even if there was some level of turn-around at Lonmin, its ability to raise capital to finance mine extensions and thus limit retrenchments was weak in comparison to Sibanye's.

[17] Metropolitan ibid para 70.

[52] Whilst we accept that Lonmin's financial position appears to be precarious, there are indications that the prices of the PGM's are improving and, if they continue to do so, will ease the financial pressure on Lonmin and reduce the need to retrench workers.

[53] While it was entirely possible that recent developments have the potential to save a number of jobs at Lonmin, the argument that it was a material turnaround and all dangers regarding Lonmin's sustained existence have disappeared is unlikely to succeed. This was especially clear to the Tribunal considering, *inter alia*, the in-depth analysis undertaken by the Commission into Lonmin's ailing performance and the evidence provided to us in the hearing from executives from each of the merging parties.

[54] A weigh up of the public interest concerns would therefore seemingly favour approval of the merger. However, the conditions originally agreed to between the Commission and the merging parties without a moratorium may inadvertently result in unmitigated job losses.

[55] Considering the uncertainty regarding the exact number of retrenchments and when the retrenchments are expected to take place we cannot, in the performance of our duty in the public interest, give the merging parties a free hand in the dismissal of whomever they wish without a thorough economic analysis and stakeholder engagement, especially given the extensive negative impact this would have. On the other hand, we have to balance the above commercial realities and cannot force unfeasible mines to stay open.

[56] Thus, we have decided to take a balanced approach whereby we ensure the merging parties take the required time to do a proper investigation and analysis into job saving processes. By preventing all retrenchments at the target firm for a period of six-months from implementation of the proposed transaction, we believe that it will prevent the rushed and potentially careless shedding of jobs for the sake of cost reduction. This moratorium will also allow the merging parties to consult with the relevant unions prior to embarking on section 189 processes.

[57] On top of the retrenchment moratorium, the merging parties have agreed to undertake certain job saving measures through short- and long-term projects,

which are dependent on PGM price and mining cost levels to determine their feasibility. The Commission will be informed within specified time periods when the feasibility studies have been concluded to enable the Commission to monitor the retrenchment numbers.

Social Labour Plans

[58] The SLPs are commitments made by mining firms to the Department of Mineral Resources ("DMR") that are required by the Mineral and Petroleum Resources Development Act, 28 of 2002 ("MPRDA") in order to receive a mining licence in South Africa. The SLPs involve transformational social responsibilities tailored to uplift the community in the area within which mining operations are located. The Commission engaged with the Merging Parties as to how these SLP obligations will be handled by the post-merger entity. The Commission was especially concerned because both Lonmin and Sibanye have been accused by third parties of non-compliance with these SLPs. After discussions with the Commission, Sibanye agreed to continue to honour Lonmin's SLP obligations post-merger and has agreed to the imposition of a condition to that effect.

[59] The non-compliance with the SLPs was dealt with extensively by the MFSA, Sikhala Sonke and the GLC. In their submissions, these intervenors highlighted the forms in which both the merging parties have materially failed to perform their obligations in terms of the SLPs and the adverse impact this has on the vulnerable mining communities. The interveners argued that the transaction would be a method by which Lonmin would escape its liability in terms of its SLP obligations and that the transaction in the proposed form did not go far enough to promote the interests of the underprivileged mining communities.

[60] More importantly, the intervenors painted a bleak picture of the conditions under which people in the informal settlements live, without access to basic constitutionally guaranteed rights to human dignity, housing, proper roads, accessible and reliable supplies of running water and water and a clean environment. Women are particularly disadvantaged with limited access to the few job opportunities which may be available.

[61] According to Sikhala Sonke, intolerable social and economic conditions under which the communities surrounding Marikana live, could have been partially alleviated by Lonmin complying with their SLP obligations.

[62] Lonmin has not denied its non-compliance with its SLPs and advised the Tribunal that it had lodged an amendment application in respect of its SLP2 obligations with the DMR. Sikhala Sonke requested the Tribunal to include in the conditions an obligation by Lonmin to withdraw its application for amendment before the DMR.

[63] In its report, the Commission noted the non-compliance with the SLPs and the need to ensure that no obligations are extinguished or diluted as a result of this transaction. In order to address the concerns, the Commission and the merging parties agreed that Sibanye will honour all existing and future SLP commitments of Lonmin. With regards to any positive action to be taken to increase the obligations of the merging parties towards the communities, the Commission explained that to impose conditions on the merging parties that are more onerous than existed prior to the transaction would be inappropriate as it goes further than merger specific concerns.

[64] In order to better understand the processes surrounding the SLPs, Mr Ndlelenhle Zindela ("Zindela") and Ms Rebone Nkambule ("Nkambule"), representatives of the DMR, assisted the Tribunal by making submissions at the hearing.

[65] They answered a number of the Tribunal's questions surrounding the formulation, implementation and enforcement of the SLPs. The DMR representatives made it clear that the drawing up and management of the SLPs was part of a range of performance targets that the DMR would have regard to when granting mining rights or when assessing compliance with a particular mining company.[18] They would look to see if the company had complied with BEE, procurement and supplier targets. The process involves lengthy negotiations and engagements with different stakeholders. The DMR would be

[18] Transcript p500 line 9- p502 line 17.

hesitant to withdraw the mining rights of a company due to their non-compliance with just one of these performance areas and preferred rather to engage with them to achieve compliance.[19]

[66] The decisions surrounding the nature of the SLP enforcement and whether, for example, mining rights should be revoked are clearly within the purview of the DMR. In our view a decision by us to decide on the contents or enforcement mechanisms for the merging parties, or to impose an obligation on Lonmin to withdraw its amendment application, as sought by the intervenors, would blur the lines of accountability for the SLPs which squarely fall within the remit of the DMR's responsibility as enshrined in the MPRDA.

[67] However, it was abundantly clear from the submissions made to us that communities required a greater degree of consultation by mining companies on the proposed transaction.

[68] In order to partially address the concerns of the interveners, the merging parties tendered a condition to set up a community engagement forum for the purposes of providing information and soliciting the views of stakeholders surrounding the commitments in terms of the SLPs, which we have amended slightly to reflect the concerns more holistically.

[69] In our view, the concern about consultation is adequately addressed by conditions imposed in relation thereto.

[70] The consultation that the merging parties are required to undertake is intended to lead to meaningful engagements between the merging parties and all relevant stakeholders in the hope that such engagements may serve as a blueprint for cooperation and consultation between mining companies and mining communities in the future in order to improve the lives and standards of living of people who rely on the mines for their wellbeing.

Effect on Local Suppliers and HDPs

[19] Transcript p528 lines 9-21.

[71] Throughout the course of the Commission's investigation, it engaged with representatives of the Bapo Ba Mogale ("BBM") areas surrounding Lonmin's operations. During these engagements, the Bapo Traditional Community ("BTC") explained that there are various local community-run companies that are currently contracted with Lonmin and provide services (including waste removal and management services, the procurement of security supplies and transport services) to Lonmin and who are dependent on Lonmin to stay in operation. The BTC raised concerns that Sibanye will not honour the existing obligations owed to the community and their companies.

[72] To address these concerns, Sibanye has agreed to honour the four existing contracts owed to the Bapo community companies as well as agreeing to continue to pay the community an annual amount of R5 million.

[73] Additionally, Lonmin currently has an extensive list of suppliers and service providers, many of whom are HDPs. The Commission has expressed concerns about whether Sibanye would terminate the relationships with these suppliers and has proposed a condition that Sibanye will honour all existing contracts with HDP suppliers and endeavour to ensure they comply with their current HDP procurement policies, which the merging parties have accepted.

The Agri-Industrial Development Program

[74] As an additional condition tendered to promote the economic and social upliftment of the Rustenburg areas most affected by the mining operations, Sibanye has agreed to proceed with what is termed the Agri-Industrial development program. In this regard, Sibanye is currently in the process of setting up a Memorandum of Understanding with the 'West Rand Steering Commission' that seeks to develop agricultural and social benefits for the West Rand Communities affected by Sibanye's operations in the area. Sibanye believes that if this model is effectively rolled out in the West Rand, there would potentially be large benefits for a similar initiative in the Rustenburg area.

[75] The merging parties have agreed that once the West Rand development programme is completed, they will ensure an independent body conducts a feasibility study to determine the suitability of such a project in the Rustenburg

community. If the feasibility study finds in favour of rolling out such a plan in Rustenburg, then Sibanye will donate 500ha of land for use in this initiative. Furthermore, if the feasibility does not find in favour of the rollout of the Agri-industrial development programme, Sibanye will investigate potential alternative programs and report the status of such to the Commission.

Conclusion

[76] In light of the above, we agreed with the Commission's finding that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, the substantial public interest concerns that would likely arise out of the merger have been satisfactorily ventilated throughout the numerous submissions made to the Tribunal. We are of the view that all these concerns have been addressed appropriately by the conditions imposed. Accordingly, we approved the proposed transaction subject to the conditions attached hereto in 'Annexure A'.

Mr Enver Daniels

13 December 2018
Date

Ms Yasmin Carrim and Ms Mondo Mazwai

Case Managers:	Alistair Dey van Heerden and Jonathan Thomson
For the merging parties:	Adv A Cockrell SC assisted by Adv Phumlani Ngcongo, and Adv Duncan Wild instructed by Jocelyn Katz and HB Senekal of ENS Africa for Sibanye and Chris Charter of Cliffe Dekker Hofmeyr for Lonmin.
For AMCU:	Adv C Puckrin SC, instructed by Malcom Ratz of Roestoff and Kruse Attorneys
For the MFSA:	Adv D Sekwakweng, instructed by Ntsako Risenga of Risenga Attorneys
For Sikhala Sonke:	Adv L Phasha, instructed by Louis Snyman and Robert Krause of CALS
For the GLC:	Louis Mogaki
For the Commission:	Nelly Sakata and Grashum Mutizwa