COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no. : LM156Dec21/INT045May22

In the *intervention application* between:

NORTHAM PLATINUM HOLDINGS LIMITED	Applicant
And	
IMPALA PLATINUM HOLDINGS LIMITED	First Respondent
ROYAL BAFOKENG PLATINUM LIMITED	Second Respondent
COMPETITION COMMISSION OF SOUTH AFRICA	Third Respondent
THE MINISTER OF TRADE, INDUSTRY AND COMPETITION	Fourth Respondent

Case no.: LM156DEC21

In re the large merger between:

IMPALA PLATINUM HOLDINGS LIMITED	Primary Acquiring Firm
And	
ROYAL BAFOKENG PLATINUM LIMITED	Primary Target Firm

Panel: Y Carrim (Presiding Member)
E Daniels (Tribunal Member)
I Valodia (Tribunal Member)

Heard on:	8 June 2022
Order issued on:	22 June 2022
Reasons issued on:	20 July 2022

REASONS FOR DECISION

INTRODUCTION

[1] This matter concerns an intervention application filed by Northam Platinum Holdings Limited ("Northam"), seeking to participate in the Tribunal's large merger proceedings between Impala Platinum Holdings Limited ("Implats") and Royal Bafokeng Platinum Limited ("RBPlats") under case number LM156Dec21 ("the proposed merger") in terms of section 53(c)(v) of the Competition Act No 89 of 1998, as amended ("the Act").

[2] The Competition Commission ("Commission") recommended the conditional approval of the proposed merger whereby Implats will acquire all of RBPlats' issued share capital[1] (that it does not already own[2]) from the other shareholders – a transaction that will be implemented by way of mandatory offer.

[3] Northam sought admission as an intervenor in the Tribunal's consideration of the proposed merger on competition and public interest grounds. The application was opposed by the merger parties. The Commission indicated that it would abide by the Tribunal's decision but filed an explanatory affidavit detailing the extent of its engagement with Northam during the investigation. The Minister of the Department of Trade, Industry and Competition ("dtic") is cited in its capacity as a participant in the proposed merger proceedings.

[1] Excluding treasury shares.
[2] 35.3%.

[4] The Tribunal after hearing Northam's application granted it limited participation rights to making written and oral submissions regarding two potential theories of harm:

4.1 the vertical effects of the proposed merger, including the effect on competition in the local upstream market for the production and sale of primary concentrate; and

4.2 the extent to which the merger effects could be prejudicial to junior miners in South Africa.

[5] These are the reasons for our decision.

Background

[6] On 15 December 2021 the merger parties - Implats and RBPlats - notified the proposed merger to the Commission.

[7] Northam is a rival bidder for the target firm: RBPlats. It first approached RBPlats in February 2021. On 27 August 2021, Northam submitted a non-binding expression of interest; and on 6 September 2021 RBPlats confirmed, by way of letter, reciprocal interest. On 11 October 2021, Northam submitted its non-binding offer letter; which offer RBPlats rejected on 18 October 2021. However, on 27 October 2021, Implats and RBPlats released a SENS joint cautionary announcement on the JSE's Stock Exchange News Service informing shareholders that they were in discussions about Implats acquiring 100% of the ordinary shares of RBPlats.

[8] On 19 November 2021, Implats and RBPlats concluded a co-operation agreement under cover of exclusivity which prevented RBPlats from being able to progress any discussions regarding a future, proposed merger with Northam.

[9] Implats has made a public offer to all shareholders of RBPlats as contemplated in section 117(1)(c)(v) of the Companies Act No. 71 of 2008 and Chapter 5 of the Companies Regulations,[3] with a long stop date of 8 August 2022.

[10] Just prior to Implats' mandatory offer, Northam acquired the majority of the shares previously held by Royal Bafokeng Holdings Proprietary Limited, and now holds a 34.52% stake in RBPlats and has a right of first refusal, put and call options which, if exercised by the relevant counterparty, will result in Northam acquiring further shares in RBPlats.

[11] Thus, Northam is currently an active rival bidder for RBPlats and confirmed this by bringing an application to make a separate merger notification in terms of Commission Rule[4] 28(1) of a Northam and RBPlats merger transaction.

[12] However, Northam has not yet made an offer to all shareholders.

[13] On 26 April 2022, the Commission recommended the conditional approval of the proposed merger to the Tribunal. The conditions relate to employment, greater spread of ownership, and the promotion of small and medium sized businesses.

[14] The Commission identified horizontal and vertical overlaps in the activities of the merger parties, and ultimately found that the proposed merger is unlikely to substantially prevent or lessen competition in the relevant markets and its public interest concerns were satisfied by the proposed conditions.

[15] The Commission's investigation involved extensive engagements with the merger parties, their customers, competitors and other stakeholders,[5] including Northam.

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[3] Merger Filing 'Annexure B3 - SENS response to Firm Intention by RBplat' (29 November 2021) large merger record, LM156Dec21 at p143).
[4] Competition Commission Rules published in *GG 22025* in GN 1 on1 February 2001.
[5] We note the National Union of Mineworkers' contributions which lead to the signature of a Memorandum of Understanding with the merger parties to address concerns about employment, the wage agreement, and the "Employee Share Ownership Planto"; as well as, the merger parties' engagements with and submissions of the Royal Bafokeng Nation. During the merger investigation, the Commission also received of a notice of intention to participate from the dtic.

[16] Other than Northam, concerns were raised by one of Implats' platinum group metals ("PGM") concentrate suppliers, Barplats Mines (Pty) Limited ("Barplats"), during the course of the Commission's investigation. However, Barplats did not seek to participate further in merger proceedings before the Tribunal as it had nothing to add to the submissions it made to the Commission during the Commission's investigation.[6] Barplats' concerns primarily revolved around ensuring its contractual supply terms post -merger.

[17] Northam sought leave to intervene in the proceedings for the proposed merger on a number of grounds, challenging almost every finding of the Commission, including:

17.1 The relevant market definition;

17.2 The relevant counterfactual applicable to the vertical effects of the proposed merger;

17.3 The vertical effects of the proposed merger, including the effect on competition in the local upstream market for the production and sale of primary concentrate;

17.4 The relevant counterfactual applicable to the horizontal effects of the proposed merger;

17.5 The horizontal effects of the proposed merger, including Implats', and similarly placed firms', incentives to shut mines and decrease production as a result of the proposed merger;

17.6 The conditions applicable to the proposed merger, including whether the conditions are implementable.[7]

[18] It sought comprehensive procedural rights, including rights of discovery, leading evidence and cross-examining witnesses. Northam also sought a costs order, including costs of senior and junior counsel, in the event that the merger parties opposed the application.

[6] Email from Dave Goosen of Barplats to the Tribunal on 9 June 2022.
[7] Northam Replying Affidavit (6 June 2022) hearing bundle p305-306 para 30.

Parties Arguments

[19] The papers in these proceedings are voluminous. In order to avoid prolixity, we summarise only the key submissions made by the parties at the hearing of the matter.

Northam's submissions

[20] Northam argued that it had an interest in participating in the merger proceedings on multiple grounds namely as a market participant in the various PGM markets;[8] an occasional and existing customer of Implats; an existing shareholder of RBPlats (with a shareholding of 34.52%); and an alternative acquirer of RBPlats.

[21] In relation to its interests as a market participant, at the hearing Northam clarified that it was advancing concerns purportedly on behalf of junior miners. It argued that because it occupies a unique position in the market as an intermediate miner between junior miners and the larger miners, it could assist the Tribunal in understanding the state of competition at the different levels of the value chain.

[22] Northam argued that the Commission's findings contain significant errors which have affected the assessment of the relevant markets. From these errors multiple theories of harm were inappropriately overlooked.

[23] Northam also submitted that the Commission did not give it enough time to submit a meaningful and complete submission during the investigation of the proposed merger.

[24] Northam's concerns could broadly be categorised as vertical, horizontal and public interest. We deal with these in turn below.

[8] It is an integrated PGM producer active in the mining, concentrating and smelting of PGMs, operates mining complexes, and recycles PGMs through Northam Recovery Services.

The merger parties' submissions

[25] The merger parties argued that although Northam claims to have an interest as a market participant in various PGM markets, it does not claim to be prejudiced by the merger *qua* competitor or as a participant in any of those markets. Northam also makes no claim that the proposed merger will affect its rights as an RBPlats shareholder. Rather Northam's main theory of harm implies prejudice to third-party junior miners, none of whom have requested leave to intervene in these proceedings. On this basis alone, Northam did not satisfy the requirements of section 53(c) read with Tribunal Rule[9] 46(1) and ought not be permitted to intervene.

[26] As to the vertical and horizontal concerns, the merger parties submitted that Northam had not put up any facts to support its allegations of adverse vertical or horizontal effects. Ultimately Northam's application was based on speculative theories of harm.

[27] The merger parties argued that Northam's application was made for the sole purpose of causing delays to the proposed merger which contained a public offer that was time sensitive. Northam was well aware of this and had brought the application simply to scupper the deal.

[28] We turn now to consider each of these grounds in detail.

ANALYSIS

[29] Before turning to the specific theories of harm advanced by Northam we deal with the debate between the parties as to whether an applicant was required to show a material interest in the proceedings for purposes of intervention.

[9] Competition Tribunal Rules published in *GG* 22025 in GN 2 on 1 February 2001.

[30] The merger parties argued that Northam has not adequately demonstrated a material interest in the proposed merger as required by Tribunal Rule 46(1).[10]

[31] Adv Ngcukaitobi, for the merger parties, argued that the test for intervention in merger proceedings provided in section 53(1)(c) of the Act – "*if the hearing is in terms of [merger control] … any other person whom the Tribunal recognised as a participant"* – is given teeth through Tribunal Rule 46(1)(a) – "*at any time after an initiating document is filed with the Tribunal, any person who has a material interest in the relevant matter may apply to intervene in the Tribunal proceedings by filing a Notice of Motion in Form CT 6, which must include a concise statement of the nature of the person's interest in the proceedings, and the matters in respect of which the person will make representations"* (emphasis added).

[32] The merger parties alleged that Northam failed to demonstrate a material interest. It is inappropriate for a potential intervenor to argue, as Northam has, that it does not have the evidence but hopes to obtain it after gaining access to the record.

[33] Northam, on the other hand, argued that Tribunal Rule 46(1) which requires a party to have a material interest cannot be read to qualify the provisions of section 53(c)(v) which do not require a party to have a material interest. At intervention stage, all that Northam should be required to show is that its competition and public interest concerns are genuine and plausible.

[34] Adv Le Roux stated that the test as characterised by Adv Ngcukaitobi is too stringent an interpretation of the jurisprudence on determining the scope and

[10] Rule 46(1) reads:
"At any time after an initiating document is filed with the Tribunal, any person who has a material interest in the relevant matter may apply to intervene in the Tribunal proceedings by filing a Notice of Motion in Form CT 6, which must –
(a) include a concise statement of the nature of the person's interest in the proceedings, and the matters in respect of which the person will make representations; and
(b) be served on every other participant in the proceedings."

substance of merger intervention. In *Anglo v IDC*,[11] where the CAC held as follows, is particularly instructive on the point:

> "*The language of the statute is clear. There is no reference to interest at all. The mere requirement is that a party must be recognized by the Tribunal as a participant. The recognition could be on the basis of some other grounds, other than an interest in the matter as stipulated in the common law. Even if it were to be argued that the party must have an interest, such interest is not qualified. In other words, there is no threshold for the interest for a party to participate. In the absence of specified criteria for participation this Court should be reluctant to read in a test such as 'substantial and material interest*'."[12]

[35] In our view, the provisions of section 53(c)(v) are clear - all that is required is for a party to be recognised as a participant by this Tribunal.

[36] Furthermore, there is a distinction between the intervention regime in mergers and in restricted practice proceedings. In *Community Healthcare*[13] the CAC made a distinction between the intervention regime in merger proceedings and restrictive practices. It held that the intervention regime in mergers is more liberal than that provided in Tribunal Rule 46(1) and while the threshold for admission may not be as high as in restrictive practices, this does not mean that the Tribunal should let in any party seeking leave to intervene.[14] A party seeking leave to intervene must justify such application based on evidence. Intervention is not there simply for the asking and this is why the Tribunal is required to enquire whether a party applying to intervene will assist in its section 12A enquiry.

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[11] *Anglo South Africa Capital (Pty) Ltd and Others v Industrial Development Corporation of South Africa and Another* [2003] ZACAC 2; [2003] 1 CPLR 10 (CAC) (28 March 2003) ("***Anglo v IDC***"),
[12] Anglo v IDC at p 16.
[13] *Community Healthcare Holdings (Pty) Ltd and Another v Competition Tribunal and Others* (44/CAC/Feb05) [2005] ZACAC 3; [2005] 1 CPLR 38 (CAC) (26 April 2005) ("***Community Healthcare***").
[14] *Community Healthcare* at para 28.

[37] This is a matter of the Tribunal's discretion. In *Anglo v IDC* the CAC confirmed this and that while such discretion was wide it was not unfettered. It must be exercised judicially in accordance with the rules of reason and justice.[15]

[38] In the recent case of *ADC v Digital Titan,*[16] the CAC confirmed the principles enunciated in *Anglo v IDC* and *Community Healthcare* and held that when the Tribunal assesses whether a party is able to assist it in its section 12A enquiry it must take into account–

> "*the likelihood of assistance promised by the prospective intervenor, balanced against the consequences of the intervention in terms of the expedition and resolution of the proceedings. If the likelihood of the prospective intervener is doubtful, while the impact of the intervention is more than likely to impact on the expedition of the proceedings then the Tribunal should decline intervention or curtail its extent*."[17]

[39] This much is now settled law.

[40] Notwithstanding its status of a rival bidder, Northam has raised theories of harm and we turn now to consider the merits of these.

Vertical concerns

[41] As we stated earlier, Northam's vertical concerns are located in what it alleges are the interests of junior miners (which it purports to represent).

[42] It argued that there were several errors in the Commission's market definition which led to its vertical assessment being deficient. The Commission had incorrectly conflated the smelting of primary concentrate stage and refining of PGM concentrate and had defined both as international markets.

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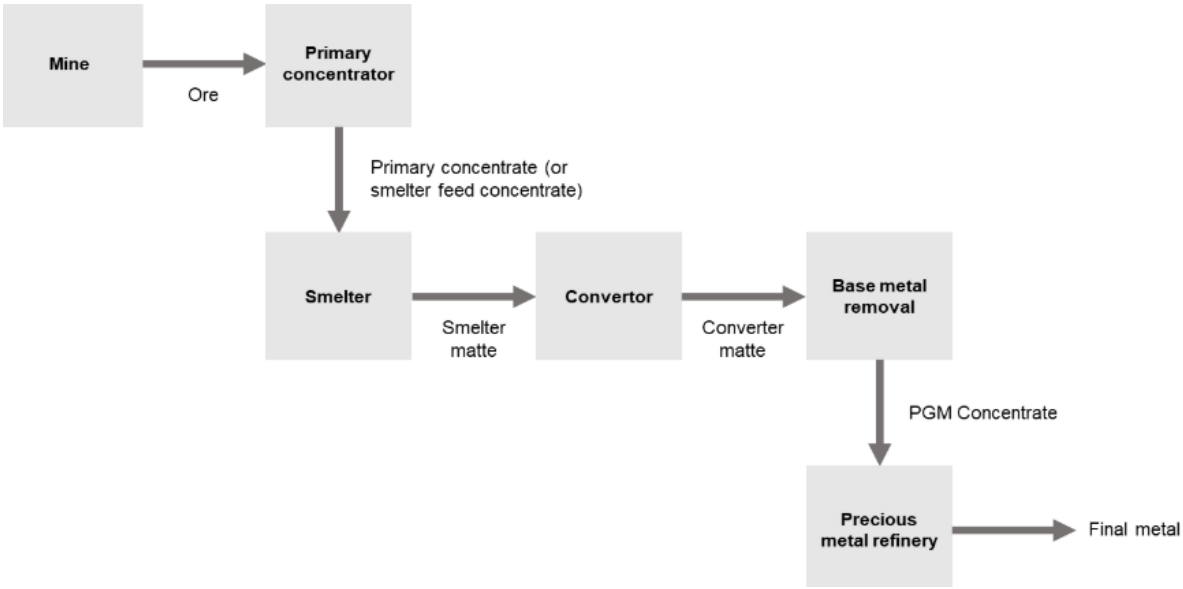
[15] *Anglo v IDC* at p 22.
[16] Africa Data Centres SA Development (Pty) Ltd v Digital Titan (Pty) Ltd and Others (200/CAC/May22) [2022] ZACAC 6 (8 July 2022) ("***ADC v Digital Titan***").
[17] *ADC v Digital Titan* at para 17 (emphasis added).

42.1 As opposed to two, there are three functional stages of the PGM production cycle. The Commission's recommendation incorrectly conflates smelting in stage 2, for which there is local South African trade in respect of primary concentrate (this stage 2 input); and refining in stage 3, for which there is international trade of PGM concentrate (this stage 3 input).



42.2 Primary concentrate is too heavy to transport over large distances. Therefore, junior minors are constrained by the South African options available namely Amplats, Implats, Sibanye and Northam (with Northam holding 5% market share with the next rival holding over 10%).

42.3 The Commission, in concluding that the market for primary concentrate was international, also misinterpreted *Sibanye/Lonmin;*[18] it is not precedent for an international upstream market. Rather, the Tribunal in the *Sibanye/Lonmin* decision found that the market for the junior miner's production of primary concentrate was local.[19]

[18] *Sibanye Gold Limited (T/A Sibanye-Stillwater) v Lonmin PLC* (LM315Mar18) [2018] ZACT 102 (13 December 2018).

[19] The Tribunal in *Sibanye* (*id.*) explained:

"*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*

42.4 Regarding the second level of the supply chain – smelting, converting and base metal removal – the Commission has limited its consideration to platinum, palladium and rhodium ("3E metals"); paying insufficient attention to the other PGMs and other valuable by-products, such as nickel and copper, that are also extracted for sale at this level.

[43] Northam argued that due to its participation at this level of the value chain, it has vital insight into local market dynamics.

[44] Related thereto is Northam's concern that the Commission did not review the contracts that junior miners have with smelters, namely the off-take / return of metal / purchase of concentrate ("POC") agreements.

[45] The Commission is also mistakenly assessed the smelting market and its associated capacity issues, says Northam. For example, by suggesting that Kellplant is a purchaser of significant amounts of primary concentrate for processing.

[46] Pre-merger RBPlats uses Amplats for processing its primary concentrate. Northam claims that the proposed merger will create incentives for Implats to shift as much of RBPlats' present primary concentrate output as is feasible to Implats' own downstream smelting facilities. If Implats were to take on RBPlats' concentrate, this would result in the displacement of junior miners who are currently using Implats. They would thus have fewer options available and would likely pay higher prices because Implats traditionally offered better terms and conditions to junior miners.

[47] This in turn would result in significant reduction in competition in PGM processing and refining markets which will reduce furthermore the incentives for junior miners to invest, enter, and develop at the level of mining and concentrating PGMs.

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production and supply of other precious metals … that are considered by-products to the PGM production process" (at para 17).

[48] According to Northam, the Commission rejected on an incorrect basis Northam's submission that the proposed merger will result in foreclosure of smelting capacity for the local South African trade. The Commission had calculated Implats' market share at the refining level as 17% PGM refining leaving 83% in the market for junior miners to sell PGM concentrate to[20] – a finding based on the Commission conflating the smelting and refining stages into one market.

[49] Northam argued further that it could assist the Tribunal in the merger proceedings by *providing and eliciting foundational facts* which could lead to anti-competitive effects whereby: a move of RBPlats' primary concentrate from Amplats to Implats might not free up that much capacity for junior miners at Amplats; even a neat shift of primary concentrate volume from one firm to another can harm competition; and that exhausting Implats' primary concentrate processing capacity is bad for competition from the perspective of these customers and perhaps overall.

[50] Northam submitted that even if junior miners could obtain alternative smelting or refining capacity, they would not be able to access these on the same terms as those offered by Implats, which were more favourable than others.[21]

[51] This theoretical harm to junior miners put forward by Northam however is rebutted by both the merger parties and the Commission.

[52] Furthermore, it is clear from the Commission's recommendation that it did not overlook the likelihood of post-merger foreclosure for junior miners. The Commission in its investigation found, primary concentrate processing was subject to contracts of long duration, and contracts for processing of PGM concentrate could at times be for life of mine. Hence third parties such as junior miners are: (i) contractually protected; (ii) account for very small volumes for which there would be competing options for processing (including Anglo

[20] Northam citing the Commission's Recommendation at paragraph 205, (Northam Founding Affidavit (27 May 2022) hearing bundle p109-110 para 73-74).
[21] Northam Founding Affidavit hearing bundle p113-114 paras 84.3, 87 and 88.

Platinum, Sibanye and Northam, with Trafigura also having offered Platreef processing capacity); and (iii) are too small to affect the downstream price in a manner sufficient to incentivise the merged entity to foreclose them. If concentrate is directed from one processor to another, it will open up additional capacity at the processor from which it is being moved.

[53] Hence at a structural level there would be no loss of capacity. If there was any foreclosure at all which was unlikely, this was likely to be very insignificant.

[54] The merger parties put up factual evidence to demonstrate why foreclosure of junior miners was unlikely to occur. Meroonisha Kerber, Implats' CFO[22] in her answering affidavit to this application, averred that even if there was an incentive (for argument's sake) on the part of Implats to move RBPlats primary concentrate away from Amplats to Implats post-merger this could only happen at the earliest in 2027.[23] Furthermore, such a move would, firstly, free up capacity at Amplats. Secondly, Northam's theory of harm ignores Implats' availability of significant additional domestic capacity as there is anticipated decrease in output of Implats' Impala Rustenburg mine. Implats has already announced its planned increase in capacity.[24]

[55] Even if, as argued by Northam, Implats had traditionally given better contractual terms and conditions to specific PGM miners (which Northam has not proved that this holds true for all PGM miners), Implats would retain the capacity and desire to do so, because Implats is increasing capacity and has no incentive to keep this capacity from third-party miners.

[56] Northam in its replying affidavit did not dispute this evidence. However, it went on to challenge the Commission's conclusion that the transfer of volumes from Amplats to Implats would not result in an overall reduction in capacity on the basis that the Commission's calculations did not take into account that:

[22] Chief Financial Officer.
[23] Implats Answering Affidavit (31 May 2022) hearing bundle p168-169 paras 30 and 33.
[24] Implats Answering Affidavit hearing bundle p 162-163 para 16.2.

56.1 Capacity utilisation is not a zero-sum game. A smelter's capacity depends on the mix of different primary concentrates being fed into the smelter, and "may be over/understated" according to the Commission;

56.2 It does not take account of the fact that spare capacity is not even between firms, and a shift may change the distribution of spare capacity and allow one firm to unduly influence price where it is the firm with the only available capacity and can therefore determine price (as a demand monopsonist); and

56.3 It does not take account of new, unallocated volumes of primary concentrate, which are not tied into an agreement with any smelting and concentrating firm. These new and unallocated volumes may emerge in the future with the discovery of reserves or the issue of mining rights.

[57] The last point is completely speculative – how could the Commission take into account "new and unallocated volumes" which may or may not emerge in the future. As to the issue of distribution of spare capacity and the ability of one firm to unduly influence price, Northam could not provide any facts to support the likelihood of this occurring as a result of this merger.

[58] Implats, on the other hand, was able to show that it would have spare capacity and as a consequence would be incentivised to make this available to third parties.

[59] However, we do appreciate the fact that Northam occupies that unique intermediate position in the PGM market and that it could assist the Tribunal in gaining deeper insights.

Horizontal concerns

[60] Northam accused the Commission of simply accepting the merger parties' say-so that post-merger there would be no shaft closures and it ought not to have accepted Implats' evidence regarding efficiencies.[25] Northam posits that the merger would likely result in shaft closures.

[61] However, Northam does not say why the Commission ought not to have accepted this and why the merger parties' commitments not to close shafts post-merger should be doubted.

[62] If the counterfactual is indeed that there will be mine closure, Northam has produced nothing to refute Implats' evidence on this. In argument, Northam's representatives averred that they will provide facts which demonstrate Implats' past approach to closing down mines and reducing production; and, by way of cross-examination of Implats' witness, would assist in determining if the counterfactual is the one Implats contends.[26]

[63] Mere arguments put up by legal representatives as to what cross-examination of witnesses *might* elicit does not suffice to establish a plausible theory of harm for purposes of intervention.

[64] In any event, the Commission is entitled to rely on submissions and commitments made by merger parties in its assessment, which if found to be false and misleading could form the basis of a revocation of the merger.

[65] Northam argued further that the Commission's emphasis on only the 3E PGM metals and ignoring nickel and copper failed to fully explore the competitive dynamics of the market. But an examination of the Commission's analysis demonstrates that the emphasis on the 3E PGM metals, and not including copper and nickel in the competition assessment, has a rational basis. These are by-products of PGM mining and are not the merging parties' main business.

[25] Tribunal Transcript of Proceedings *LM156Dec21/INT045May22* (8 June 2022) p45-46.
[26] Northam Note for Argument (8 June 2022) at para 32.

Being by-products of PGM production the quantities in which these other metals are mined as part of the PGM production process is insignificant relative to the markets in which they are primarily sold. The Commission found that the merging parties' estimated post-merger market shares in the supply of gold is 0.75%, 0.78% in nickel %, copper 0.06%, and cobalt 0.12%. Thus, not much store could be put on Northam's alleged basis of competitive dynamics in this regard.

[66] Finally, Northam submits that RBPlats is one of the most promising junior miners and we should guard against Implats' – one of the big three - acquiring it.

[67] In reiterating this point, Northam emphasises the gap between the top 3 – Amplats, Sibanye and Implats – and the rest of the market. However, these concerns fail to take account of the fact that, on Northam's own version, the combined shares are only 20% with an increment of 3% in the market for the share of the global supply of primary 3E concentrate from South African producers for 2021.[27]

[68] It was argued further that the test on competitive effects also includes an analysis of whether competition will be prevented (not only lessened) and that by this standard it is would be significant if RBPlats' exit would result in the prevention of any competitive constraint.[28] These submissions were put up without any facts about the type of constraints placed by RBPlats on Implats in the first instance; and how the merger would somehow prevent RBPlats from remaining a competitive constraint. In light of Northam's own ambition to acquire RBPlats, one would have expected to it demonstrate a little more knowledge of the alleged constraints imposed by RBPlats on Implats or why its removal would result in a prevention of competitive constraints. Ultimately, its concern was summarised in the submission that the "*the opportunity for a*

[27] Northam Note for Argument at para 26 and Transcript at p47.
[28] Transcript at p18.

potentially smaller mining house (itself) to purchase the best junior miner is lost".[29]

Public interest concerns

[69] Northam posits its interest as a shareholder as a strength because Northam can provide guidance on the most workable version of the proposed RBPlats employee share ownership scheme ("ESOS"). It argued that Northam's input on these issues will help the Tribunal because as a shareholder its consent or approval would need to be obtained for the implantation of the proposed RBPlat ESOS.

[70] It was not completely clear to us whether Northam was suggesting that it would prevent the implementation of the proposed ESOS, which if true would be contrary to the public interest.

[71] However, the merger parties submitted that the proposed ESOS was adopted pursuant to an entirely independent and separate process between RBPlats and the relevant trade union; and RBPlats' management and the trade unions will be responsible for the implementation thereof.

Insufficient consultation

[72] There were several residual complaints by Northam about obstructiveness on the part of the RBPlats' independent board. The merger parties on the other hand pointed out that Northam could have stolen a march on Implats' offer if it made an offer to all shareholders (as Implats had done) but it had not done so.[30] Instead it has elected to derail the Implats/RBPlats transaction. While all these matters emphasise the hostility between the rival bidders, it is sufficient for our purposes to note that Northam is a rival bidder and has attempted to

[29] Northam Note for Argument at para 30 and footnote 34.
[30] RBPlats Answering Affidavit (31 May 2022) hearing bundle p184 para 13.

suggest we delay these proceedings to await the Commission's investigation of its own notification.[31]

[73] This leaves us with the last ground relied upon by Northam to justify its intervention application namely that it had not been afforded sufficient time to make submissions to the Commission during its investigation.

[74] The Commission in its answering papers set out details of its engagements with Northam, referring to specific dates and the nature of the engagement it had with Northam.[32] All of these are included in the merger record.

[75] The Commission initiated contact with Northam in pursuit of investigation less than a month after merger notification on 15 December 2022.[33] Where Northam's operatives were unavailable, the Commission issued formal information request to Northam on 20 January 2022 and Northam first submitted its merger concerns on 9 February 2022. Amid quarrels between parties regarding the confidential nature of their submissions, the Commission was only able to share the merger parties' response to Northam's concerns with Northam by 9 March 2022. On 17 March 2022, Northam submitted a more substantive overview of its concerns but, before a non-confidential version could be generated to put to the merger parties, the Commission recommended the merger's conditional approval on 26 April 2022.[34]

[76] The Commission also avers that it had investigated Northam's alleged theories of harm and found them to be unlikely. We have already dealt with those under the relevant theories of harm.

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[31] Northam Founding Affidavit at para 63 and Northam Replying Affidavit at para 8.4. This point is later disavowed during argument (see Transcript at p7).
[32] The Commission did not oppose this application and abides with the Tribunal's decision; but it filed an explanatory affidavit detailing the steps taken to investigate the merger and engage with Northam - rejecting the allegations that it did not provide Northam with sufficient time to make submissions and did not properly engage with Northam's submissions.
[33] Keeping in mind also that the Commission was closed over the holiday season from 23 December 2021 until 3 January 2022.
[34] Commission Answering Affidavit (2 June 2022) hearing bundle p275-280 paras 10-35.

[77] What is patently evident from the Commission's affidavit is that there is no basis for Northam to claim that it had not been afforded sufficient time to make meaningful submissions to the Commission.

[78] It is appropriate to emphasise here that the Act places the obligation of investigation squarely on the shoulders of the Commission. If the Commission would neglect to consult relevant third parties adequately, this would only serve to suggest that the Commission's investigation was rushed and inadequate (which is what it ultimately argued by Northam). But even if arguably Northam had some basis to complain about deficiencies in the Commission's engagement with it (which we do not accept), Northam was unable to demonstrate how it or the junior miners on behalf of whom it seeks to intervene, were prejudiced as a result. The Commission has, as is evident in its report, assessed any likely harm to junior miners.

CONCLUSION

[79] In exercising our discretion whether to permit Northam participation rights, if any, we engaged in weighing up the following factors.

[80] The first is to note that the PGM mining industry, like the gold mining industry has been the subject of close interrogation by the competition agencies. This sector is familiar to competition agencies the world over.

[81] As discussed earlier, Northam's alleged horizontal effects of alleged shaft closures and questionable efficiencies was completely speculative. Its suggestion that the Commission's competition assessment was defective was not supported by the findings (among others) on the low market shares.

[82] As to the alleged vertical theory of harm, Northam's foreclosure of capacity for third parties (junior miners) was challenged by the Commission's assessment that capacity arrangements were governed by contracts and the unlikelihood of foreclosure. Its theory of foreclosure was further weakened by Implats'

evidence that any move away from Amplats could only occur in 2027 (if at all) and of increased capacity in its own processor.

[83] Overall, we found that Northam's horizontal effects had little to offer. On the vertical, while its theory was challenged by both the Commission and Implats, we took cognisance of its unique position as a mid-level miner and that it might be able to provide. Its central concern relates to the potential effects of the merger on junior minors, including concerns related to remaining smelting capacity. As both customer of the larger players and supplier to the junior miners, Northam presumably has insights related to, in particular, POC, offtake and smelting agreements. This could assist the Tribunal in its deliberations.

[84] On the public interest grounds, we found that Northam has little to add. Northam as shareholder can provide input into the ESOS process in that capacity if it so wishes. Northam could not point to any other public interest concerns which were not adequately addressed by the proposed conditions to the merger. It was not clear in which way Northam could meaningfully contribute to this process as an intervenor in these proceedings.

[85] The fact that Northam is a rival bidder, is relevant to the exercise of our discretion in this matter, balanced against the possible assistance an intervenor could provide us with.

[86] As a rival bidder for RBPlats, Northam has every incentive to delay and scupper the deal. It is aware that Implats' public offer is time sensitive with a longstop date of 8 August 2022.[35] Furthermore Northam as a rival bidder also stands the most to gain, commercially, than any other market participant, from access to Implats' confidential information, which in this case would include competitively sensitive information.

[87] Northam conceded that it was a rival bidder. It went as far as suggesting that the Tribunal ought to delay the assessment of the proposed merger, wait until

[35]Annexure "PB1": "Implats' SENS announcement of Friday, 27 May 2022" Northam Replying Affidavit hearing bundle p308 para 2(d).

the Commission has completed its assessment of the Northam proposed merger and then somehow consolidate the two matters into one hearing at some future date.[36] (A point which is later disavowed during argument.[37])

[88] There is no certainty that Northam will be allowed to submit a separate merger filing under Commission Rule 28, so the Commission's investigation into its transaction has not taken place. Moreover, there is no legal basis for such a consolidation of merger proceedings at the Tribunal between two rivals as if this was a bidding process for a licence. The Tribunal is enjoined to assess the effects of a particular merger as set out in section 12A, and not to choose between winners and losers in a bidding war.

[89] However, it may be that Northam, from its own experiences and its unique position in the market could assist the Tribunal in improving its understanding of the market dynamics at a local level. Recall that Northam is a miner that straddles the gap between the junior and the major players. As a mid-sized miner, it is both a customer of the larger players and a supplier to the smaller junior players.

[90] In balancing the potential delays that could occasion the expedition of proceedings, especially in the context of a public offer, were Northam to be granted the full suite of procedural rights against the degree of assistance that Northam as a mid-level miner, who is both customer of the larger players and supplier to the junior miners, could provide us with, we have limited its participation in such a way as to grant it entry on the issues that will be of most assistance to Tribunal's deliberation, while limiting Northam's access to the confidential recommendation.

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[36] Northam Founding Affidavit hearing bundle p25 para 63:
"I note by way of introduction that concerning Northam's interests as a suitor and its Rule 28 Application, there are public policy reasons of regulatory and public resource efficiency, as well as reasons of convenience and expedition, for the Tribunal to hear the two merger applications concurrently or by way of consolidation. There are resource conservation reasons for doing this as well as substantive reasons for doing this: …"

[37] Adv Le Roux: "*But nowhere do we insist that you consolidate, and hear the two transactions together. Nowhere do we say that you should wait until our transaction is ripe for hearing. That is all premature for today.*" (Transcript at p7.)

[91] Accordingly, we granted Northam limited rights to participate in the large merger proceedings between hearing as per the following order:

ORDER

HAVING read the documents placed on record and having heard counsel for the parties, the Tribunal makes the following order:

[1] The applicant, Northam Platinum Holdings Limited ("Northam") is permitted to participate in the large merger proceedings before the Tribunal under the above case number in terms of section 53(c) of the Competition Act No 89 of 1998.

[2] Northam's participation in the aforementioned large merger proceedings shall be limited to making written and oral submissions on the following potential theories of harm:

2.1 the vertical effects of the proposed merger, including the effect on competition in the local upstream market for the production and sale of primary concentrate; and

2.2 the extent to which the merger effects could be prejudicial to junior miners in South Africa.

[3] Northam's participation in the merger hearing before the Tribunal shall include the right:

3.1 of Northam's independent legal representatives and economic advisors ("Northam's advisors") to access the confidential version of the Competition Commission of South Africa's ("Commission") large merger recommendations: subject to Northam's advisors furnishing the appropriate confidentiality undertakings and the Commission obtaining the consent of the information's owner, where required;

3.2 to make written submissions, within fifteen (15) business days of this order;

3.3 to make oral submissions not exceeding one (1) hour at the merger hearing, the date of which will be decided in due course.

[4] Any party who wishes to respond to Northam's written submissions must do so within ten (10) business days of receipt of Northam's submissions.

[5] Northam's participation as detailed above will be subject to adherence by Northam to any timetable or time allocation set by the Tribunal for the large merger proceedings before it.

[6] There is no order as to costs.

Signed by:Yasmin Tayob Carrim
Signed at:2022-07-20 15:06:50 +02:00
Reason:I approve this document

Ms Yasmin Carrim **20 July 2022**
Date

Mr Enver Daniels and Prof Imraan I. Valodia concurring.

Tribunal case managers:	Mpumelelo Tshabalala and Sinethemba Mbeki
For Northam:	Adv Michelle Le Roux assisted by Adv Kerry Williams instructed by Webber Wentzel
For the merger parties:	Adv Tembeka Ngcukaitobi assisted by Adv Sarah Pudifin-Jones instructed by Northam for the merger parties
For the Commission:	Ms Maya Swart assisted by Beverly Chomela and Omphemetse Kgaladi