

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM005Apr15

In the matter between:

Hebei Zhongbo Platinum Co. Limited

Primary Acquiring Firm

And

Eastern Platinum Limited

Primary Target Firm

Panel	:	Andreas Wessels (Presiding Member) Imraan Valodia (Tribunal Member) Medi Mokuena (Tribunal Member)
Heard on	:	02 and 14 September 2015
Last additional information received on	:	15 September 2015
Order issued on	:	15 September 2015
Reasons issued on	:	16 October 2015

Reasons for Decision

Approval

[1] On 15 September 2015, the Competition Tribunal ("Tribunal") unconditionally approved the acquisition by Hebei Zhongbo Platinum Co. Limited ("Hebei") of the interests and operating assets of Eastern Platinum Limited ("Eastern Platinum").

[2] The reasons for approving the transaction follow.

Background

[3] The Competition Commission ("Commission") referred the abovementioned large merger to the Tribunal on 14 August 2015 recommending that the proposed transaction should be approved without conditions. The Tribunal set the matter down for a hearing on 26 August 2015.

[4] On 20 August 2015 the Tribunal informed the Ba Bina Ba Noko Ba Mampuru Community (hereinafter referred to as the "Community Trust") of the date of set down since the Community Trust raised certain concerns with regard to the proposed transaction during the Commission's investigation of the matter. This community is located on the land alongside the "Eastern limb" assets to be acquired by Hebei from Eastern Platinum. The Eastern limb assets are made up of the following projects of Eastern Platinum: (i) Mareesburg; (ii) Spitzkop; and (iii) Kennedy's Vale (collectively referred to as the "Eastern Limb Projects").

[5] On 24 August 2015 the Community Trust requested a postponement of the Tribunal hearing in order to participate in the process and to make representations. The Tribunal contacted the merging parties who indicated that they had no objection to the Community Trust making representations at the hearing and further agreed to a postponement of the matter until 02 September 2015 to allow the Community Trust to prepare for the hearing. The Tribunal then set the matter down for 02 September 2015 and directed the Community Trust to make written submissions by 28 August 2015.¹

[6] The Community Trust attended and made oral submissions at the hearings of 02 September 2015 and 14 September 2015. In essence it requested the Tribunal to approve the proposed transaction subject to certain public interest conditions. The concerns raised by the Community Trust included the following issues:

- a. the shipping of chrome out of South Africa after the proposed transaction, without any regard to some form of beneficiation which, they argued, is a key imperative for the development of South Africa and its mining industry. According to the Community Trust, this continued conduct undercuts and undermines the South African ferrochrome industry. It suggested that a local ferrochrome smelter

¹ As noted above, the Community Trust also made submissions to the Commission prior to the Commission's referral of the matter to the Tribunal.

must be built instead of the chrome being shipped out of the country in its raw and unbeneficiated state;

- b. alleged post-merger “anti-competitive” free reign of trade to a foreign market, as opposed to the development of the local communities; and
- c. extensive and continued delays in the development of Eastern Platinum’s mines/mining operations. The Community Trust *inter alia* requested a (social) development plan for the assets being acquired, including details of when such plans will be implemented and effected by the merged entity after the proposed transaction.

[7] The Community Trust informed us that the communities that would be affected by the merging parties’ mining operations in South Africa and that should benefit from the relevant mining activities include:

- (i) the Mampuru community;
- (ii) the Phasha community;
- (iii) the Malekane community;
- (iv) the Bengweneyana community;
- (v) the Makola community;
- (vi) the Mainela community;
- (vii) the Moretsele community; and
- (viii) the Mosehla community.

[8] We note that the Tribunal after the hearing of 02 September 2015 requested submissions from the Department of Minerals (DMR)² in relation to *inter alia* applications to the DMR for mining rights in general and specifically applications by the merging parties; the black economic empowerment (BEE) requirements of the relevant legislation pertaining to mining regulation/mining licences; the (time) requirements for the development of mines and potential sanctions should mining development be delayed; and consultations with the

² DMR’s Office in Limpopo.

merging parties and the Community Trust in relation to the proposed transaction.

[9] The DMR's Limpopo Office advised the Tribunal that it does not have any record of an application for mining rights from the merging parties relating to the acquisition of the interests and assets of Eastern Platinum. According to the DMR, the merging parties sought guidance from it based on their intent but had not formally lodged an application. It further advised that if the merging parties intend to continue with the proposed transaction, they would have to lodge an application with the DMR as prescribed in terms of Section 11 of the Mineral and Petroleum Resources Development Act (Act No. 28 of 2002) (as amended by Act 49 of 2008) ("the MPRDA").

[10] The DMR's Limpopo Office also advised that in the event that such an application is lodged, the Community Trust's interest will be considered in line with Broad Based Black Economic Empowerment (BBBEE).

[11] The merging parties clarified that in respect of the Western limb, i.e. the Crocodile River Mine ("CRM") to be acquired by Hebei from Eastern Platinum, the DMR applications have been lodged and are being considered,³ but an application for the Eastern limb⁴ has not as yet been lodged.⁵ As indicated above, the community represented by the Community Trust is located on the land alongside the Eastern limb assets.

[12] The Tribunal also requested further submissions from the merging parties relating to past retrenchments by Eastern Platinum, the current employment levels at Eastern Platinum's mines and development projects, as well as future employment by the merged entity in South Africa both at the relevant mines and the development projects.

³ This application was lodged in the DMR's Klerksdorp Office (i.e. in the North West).

⁴ This application will be lodged in Limpopo.

⁵ Transcript of 14 September 2015, pages 8 and 9.

Parties to proposed transaction

Primary acquiring firm

[13] The primary acquiring firm is Hebei, a firm incorporated in the People's Republic of China. Hebei is controlled by Hebei Taihang Jiye Mineral Resources Co. Limited ("Taihang"). Taihang is in turn controlled by Mr Yunpu Ma. Mr Yunpu Ma controls a number of firms, none of which are active in South Africa. Hebei does not control any firms.

[14] The Hebei group of companies is focused on the mining and beneficiation of chrome ore, smelting of ferrochrome and ancillary investment and trade.

Primary target firm

[15] The primary target firm is the interests and operating assets of Eastern Platinum. Eastern Platinum is incorporated in Canada. The interests and assets forming part of the proposed transaction are the following:

- Eastplats Holdings Limited ("Eastplats"), a firm incorporated in the British Virgin Islands;
- Eastplats Acquisition Co. Limited ("Eastplats Acquisition"), a firm incorporated in the British Virgin Islands;
- Gubevu Consortium Investment Holdings Proprietary Limited ("Gubevu"), a firm incorporated in South Africa;
- Barplats Investments Limited ("Barplats Investments"), a firm incorporated in South Africa;
- Barplats Mines Limited ("Barplats Mines") including the "CRM Project" currently being run by Barplats Mines, a firm incorporated in South Africa;
- Barplats Mines (North West) Proprietary Limited (a dormant company) ("Barplats Mines (NW)"), a firm incorporated in South Africa;
- Rhodium Reefs Limited ("Rhodium Reefs") including the "Kennedy's Vale Project" which is currently being run by Rhodium Reefs, a firm incorporated in South Africa;

- Eastplats International Incorporated (“Eastplats International”), a firm incorporated in Barbados;
- Eastern Platinum Holdings Limited (“Eastern Platinum Holdings”), a firm incorporated in the British Virgin Islands;
- Royal Anthem Investments 134 Proprietary Limited (“Royal Anthem”), a firm incorporated in South Africa;
- Afrimineral Holdings Proprietary Limited (“Afrimineral”), a firm incorporated in South Africa;
- Lion’s Head Platinum Proprietary Limited (“Lion’s Head”), a firm incorporated in South Africa;
- Spitzkop Platinum Proprietary Limited (“Spitzkop”), a firm incorporated in South Africa;
- the Mareesburg Joint Venture (the “Mareesburg JV”), a firm incorporated in South Africa; and
- the Spitzkop Joint Venture (“Spitzkop JV”), a firm incorporated in South Africa.

[16] The abovementioned firms will collectively be referred to hereinafter as the “Target Firms”.

[17] Eastplats is active in the mining and supply of platinum group metals (PGMs) and owns a number of mines held by the various subsidiaries of Eastplats.

[18] It is important to note that the abovementioned mines consist of (i) the CRM mine, a PGMs mine located in South Africa’s Bushveld Igneous Complex, which while it was operational, was put under a care and maintenance programme since August 2013; and (ii) three mines that were in various stages of development and which did not produce any metal. Thus, none of the mines in this transaction are fully operational. The merging parties submitted that under Eastern Platinum’s ownership, the CRM would remain under care and maintenance until such time as conditions improve, including the global market for PGMs.

[19] The CRM, in addition to producing PGM's, produced chrome ore as a by-product and small amounts of copper and gold (also as by-products).

[20] Eastplats further owns the mining rights to concessions that form part of the company's Spitzkop project located on the Eastern limb of the Bushveld complex. The Spitzkop project is also under care and maintenance. This project was planned to be developed after the Mareesburg project became a producing mine. Eastplats also operated the Kennedy's Vale project where work was done on the development of a concentrator on the Kennedy's Vale site which would have been used to process ore from the Mareesburg and Spitzkop mining projects. According to the merging parties this work was however terminated in mid-2012 due to depressed PGM prices.

Proposed transaction

[21] Prior to the proposed transaction, Eastern Platinum underwent a restructuring process whereby it acquired the minority shareholding in the Target Firms so as to hold [...] % of the issued share capital in each firm, save for Afriminer where it increased its shareholding to [...] %.

[22] In terms of two Share Purchase Agreements, Hebei intends to acquire [...] % of the issued share capital in the Target Firms save for Afriminer where it intends acquiring [...] % of the issued share capital. Post-merger Hebei will have sole control of the Target Firms.

[23] In relation to the post-merger participation of historically disadvantaged South Africans (HDSAs) in the Target Firms, the merging parties submitted that subsequent to the proposed transaction, Hebei will transfer 26% of its interest in the Target Firms to HDSAs.

Rationale for proposed transaction

[24] Hebei submitted that the main focus of the Hebei Group is the production of ferrochrome. The chrome ore mined and produced by the Primary Target Firms will ultimately largely be sold to the Hebei Group as feedstock for new ferrochrome furnaces being established in China.

[25] Eastern Platinum submitted that the resource sector is under considerable pressure and that PGMs have been disproportionately impacted upon as a result of a number of local and global factors unique to the sector. It further submitted that Hebei has the ability to deploy its resources at this time and this will assist in stimulating production in respect of the Target Firms. Furthermore, according to Eastern Platinum, Hebei's foreign investment and the creation of much needed jobs will contribute to the ongoing socio-economic development in areas surrounding the (CRM) mine and projects.

Competition assessment

[26] The Commission found that Hebei is not active within any market in South Africa and that it has not generated any income in South Africa. Therefore, the Commission concluded that the proposed transaction does not result in any horizontal competitive overlap.

[27] The Commission however noted Hebei's intention to export the chrome ore mined in South Africa to China to be used in the production of ferrochrome. In light of the above, the Commission sought to ascertain whether the merger is likely to result in the foreclosure of ferrochrome producers in South Africa from chrome feedstock.

[28] The Commission however found that the proposed transaction is unlikely to result in any foreclosure concerns in South Africa given that:

- (i) the Target Firms have since the end of 2013 not sold any chrome ore;
- (ii) prior to the end of 2013, the Target Firms had a combined market share of less than 2% of the chrome ore produced in South Africa;
- (iii) the majority of the chrome ore produced by the Target Firms pre-merger was sold to Chinese firms; and
- (iv) the major ferrochrome producers in South Africa such as Merafe Resources (Pty) Ltd, Samancor Chrome Pty (Ltd) and Hernic Ferrochrome (Pty) Ltd are vertically integrated firms with access to their own mines with chrome ore reserves.

[29] The Commission therefore concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market.

[30] We concur with the Commission's above conclusion.

Public interest

[31] The Commission assessed the impact of the proposed transaction on a number of public interest considerations including the effect on (i) employment in South Africa; (ii) a particular industrial sector or region; and (iii) the ability of firms controlled or owned by historically disadvantaged persons to become competitive.

[32] We shall first consider the employment effects and thereafter the other public interest considerations, including the concerns raised by the Community Trust in relation to each public interest consideration.

Employment

Merging parties' submissions

[33] The merging parties submitted that it is not expected that the proposed transaction will result in any reduction in the Target Firms' current work force. On the contrary, the merging parties submitted that Hebei's foreign investment will likely result in the creation of jobs in the areas surrounding the Target Firms' mines and projects. They however did not quantify the alleged future job creation.

Trade unions' submissions

[34] The merging parties served a non-confidential version of the merger filing on the National Union of Mineworkers ("NUM") and the United Association of South Africa ("UASA") which represents employees at Eastplats.

[35] On 24 April 2015, NUM filed a *Notice of Intention to Participate* with the Commission. NUM informed the Commission that it is currently engaged in a legal battle with Eastern Platinum over unfair dismissals and for alleged

unauthorized and unlawful deductions. NUM therefore was of the view that its members have financial interests in the mines and requested that the merger either be prohibited or approved on condition that the merging parties must honour the judgements of the courts in the event that such judgements are in favour of the employees.

[36] The Commission communicated the concerns raised by NUM to the merging parties and they in response submitted that the retrenchments and alleged deductions are not in any way related to the proposed transaction.

Commission's assessment

[37] The Commission investigated NUM's concerns and came to the conclusion that the proposed transaction is unlikely to result in any employment concerns based on the following:

- a. the past retrenchments that have occurred at the Target Firms are not related to the proposed transaction since they were the result of the mine(s) being put under care and maintenance, i.e. the retrenchments are not "merger-specific";
- b. negotiations for a buyer of the Target Firms occurred several months after the Target Firms' relevant mines were mothballed;
- c. any future order by the labour court will be legally binding on the mines irrespective of who the shareholder will be. The Commission communicated this view to NUM; and
- d. Hebei's planned investment in the Target Firms is likely to result in a positive employment outcome compared to the Target Firms' current employment numbers.

Community Trust's submissions

[38] At the hearing the Tribunal sought clarity from the Community Trust regarding its employment concerns. Counsel for the Community Trust raised two issues in relation to employment at the Eastern limb: (i) job security for

current employees, i.e. the guarantee that jobs will be retained; and (ii) in addition, benchmarks for post-merger employment by the merged entity.⁶

Our assessment

[39] The Tribunal requested additional information from the merging parties on a number of issues relating to employment, including (i) the date on which the process to dispose of the Target Firms commenced; (ii) the date on which operations at the Target Firms were mothballed; (iii) the number of employees at the Target Firms when they were fully operational in 2012, split between permanent and contract employees; (iv) the number of retrenched employees since 2012, the dates of such retrenchments and the reasons for the retrenchments; (v) the current number of employees at the Target Firms, split between permanent and contract employees; and (vi) the likely number of additional jobs to be created by the proposed merger (relative to the current employment numbers).

[40] We shall first consider the past retrenchments and thereafter the likely impact of the proposed transaction on employment.

Past retrenchments

[41] In relation to past retrenchments at the Target Firms, the merging parties advised that Eastplats on 19 April 2013 decided to suspend funding for the CRM "Development Plan"⁷ (the "CRM Project"). On 22 April 2013, Barplats Mines⁸ issued notices to employees in terms of Section 189 of the Labour Relations Act No. 66 of 1995 with respect to a care and maintenance and restructuring proposal for the CRM Project.

[42] Development work and mining operations at the CRM Project ceased on 31 July 2013 with the effect that approximately 1 185 of the CRM Project's then permanent employees were either retrenched or their employment terminated by mutual agreement. In addition to the 1 185 permanent

⁶ Transcript of 02 September 2015, pages 49, 53 and 54.

⁷ Previously announced on 12 June 2012.

⁸ A South African subsidiary of Eastplats which ran the CRM Project.

employees being retrenched or terminated by mutual agreement, Barplats Mines also eliminated approximately 400 contract positions on 31 July 2013.

[43] The merging parties further submitted that from 01 January 2011 to 31 July 2013, approximately 1 500⁹ persons were retrenched as a result of cost-cutting measures implemented at the start of 2011. The bulk of these retrenchments (approximately 1 200) occurred in September 2012 following a decision to suspend development work at the CRM.

[44] With regard to the sale of the interests and operating assets of Eastern Platinum, the merging parties submitted that prior to Eastplats being introduced to Hebei in 2014, neither the Eastern limb nor the CRM assets were put up for sale by Eastplats.

[45] We have found no evidence that the past retrenchments that took place at the Target Firms are in any way related to this proposed transaction. Furthermore, we concur with the Commission that that any future orders by the labour courts in relation to NUM's abovementioned legal action will be legally binding (on Barplats Mines) irrespective of who the shareholder will be.

Likely effect on jobs

[46] When the Target Firms' operations were fully operational in 2012 and prior, they employed approximately 2 000 permanent employees and 1 300 contract employees. However, these numbers have drastically reduced.

[47] Concerning current employment at the Target Firms' operations, the merging parties informed us that at the CRM (which, as stated above, is on the Western limb of the Bushveld Complex) and which comprises of three mine sites, namely Zandfontein, Maroelabult and Crocette, both Zandfontein and Maroelabult are currently under care and maintenance, while the development at Crocette was stopped in 2012 and the workings allowed to flood.

⁹ Of the 1 500 positions eliminated, approximately 700 were permanent employees and approximately 800 were contract employees.

[48] The merging parties at the hearing confirmed that there is currently no mining taking place at the Target Firms. Given that the CRM is under care and maintenance, production has stopped whilst still ensuring that the infrastructure is kept in good working condition and keeping the mine afloat, for example by continuing with pumping operations to avoid flooding.¹⁰

[49] The merging parties further submitted that if the transaction proceeds, it is likely that Zandfontein and Maroelabult would be brought back into production in phases. The scope and timing of these phases would be planned in relation to market conditions and other operational factors. However, the merging parties claimed that they could not indicate when the CRM will again become fully operational. They did however submit that once the mine is fully operational, there is every likelihood that the number of people employed at the CRM will be in line with the position prior to it being placed under care and maintenance. They also submitted that most of these positions would be earmarked for local labour with the exception of a few senior and/or technical positions which may be sourced from a wider pool of qualified talent.

[50] Given that the CRM is under care and maintenance, the mine currently has only 98 permanent employees and 34 contract employees. In addition to the above, the Eastern Limb Projects currently employ 13 permanent employees and 13 contract employees.

[51] We have found no evidence that the proposed transaction will result in a reduction in the current workforce at the Target Firms in South Africa. From the above it is clear that the labour components at the Target Firms have been severely reduced since the mines went into care and maintenance over two years ago.

[52] In light of the above we concur with the Commission's recommendation that there is no justification for imposing any employment conditions on the proposed transaction.

¹⁰ Transcript of 14 September 2015, page 6.

Effect on a particular industrial sector or region

[53] The Commission assessed whether the proposed transaction will have an (adverse) effect on the particular region in and around the Target Firms' mines, particularly the Ga Mampuru village located in Limpopo. The Commission noted that this region is under-developed with a youth unemployment rate of nearly 90%.¹¹ The Commission further noted that the need to develop the mines in this geographic region is underscored by the dire socio-economic situation in and around the area of the mines. Most recently, there was violent protest action in and around the region concerned with protesters demanding clarity from the mining companies in the area about their empowerment and hiring policies.¹²

[54] The Commission therefore requested information from the merging parties in order to ascertain their plans for the development of the Eastern limb assets, including information on the investment that Hebei will be making in the Target Firms in South Africa.

Merging parties' submissions

[55] In relation to the future development of the Eastern limb assets, the merging parties submitted that while Hebei intends to continue with the development of the Mareesburg project and the Kennedy's Vale concentrator, which Eastplats suspended in late 2012, significant work will need to be undertaken to determine what this will entail and the time period within which the work is to be carried out. At the time that the work was suspended, approximately [...] % of the development was deemed completed, although test work will have to be performed to determine whether and to what extent work has to be redone. Post-transaction, Hebei will reassess the economic feasibility of completing the development of Mareesburg and the Kennedy's Vale concentrator.

¹¹ Commission's source: Sekhukhune District Municipality 2014/15 Final IDP Review.

¹² Refer to <http://www.salabournews.co.za/index.php/component/content/article/70-labour-news/26117-qamampuru-still-burnino-over-construction-of-new-road-and-mining-jobs-for-locals.html>

- [56] The merging parties further submitted that they do not have any formal business plans regarding their intentions for the aforementioned projects, but stated that Hebei intends to invest an estimated \$[...] million into its operations in South Africa.

Commission's recommendation

- [57] In relation to the development of the relevant mines, the Commission noted that in terms of section 25(1)(b) of the MPRDA, the holder of a mining right must commence with mining operations within one year from the date on which the mining right becomes effective in terms of section 23(5) or such extended period as the Minister may authorise. This is intended to avoid a mining rights holder to significantly delay the development of a mine.

- [58] The DMR informed the Commission that it will assess Hebei's technical and financial capability once a formal mining rights application has been submitted (in respect of the Eastern limb).¹³ This is to ensure that Hebei will have the capability to develop and bring into operation the mine(s) within a prescribed period. The Commission noted that due to the specific jurisdiction of the DMR in relation to mining development, the Department is best placed to deal with this issue.

- [59] The Commission ultimately recommended that no conditions be imposed on the proposed transaction in relation to the effect of it on a particular industrial sector or region.

Community Trust's concerns

- [60] As indicated above, the Community Trust raised concerns about the significant and continued delays in the development of the Target Firms' mines/mining projects. Counsel for the Community Trust stated that *"In as far as the granting of a prospecting right is concerned, it has to be informed by certain – after acceptance of the application it has to be social development*

¹³ Commission's meeting with the Limpopo Regional Director of the DMR.

*labour plans, which have to be done, in this case initially by East Plats*¹⁴ and *"Yes, the mines are under care and maintenance, they are not operating yet. We understand and appreciate that, but there's a process which precedes that, which is the prospecting application. What was submitted to the department in as far as that is concerned? That's relevant."*¹⁵

[61] The Community Trust explained that the community which it represents is only affected by the Eastern limb assets and not by the CRP. The fear of the Community Trust was that attention will only be given to the CRP, which is developed and which was running, as opposed to the Eastern limb which is still under development. The Community Trust therefore submitted that a condition must be imposed on the merging parties in relation to providing particularity and details of the amounts to be spent and the timelines for when development plans will be implemented and effected by the merged entity in relation to the Eastern Limb Projects.¹⁶ If the acquiring party delayed developments of the Eastern limb, the Community Trust wanted the opportunity to then develop it.¹⁷

[62] As indicated above, the Community Trust also raised a concern regarding the post-transaction export of chrome ore to China without local value being added to the chrome ore. It suggested that a smelter could be built in Limpopo to beneficiate and add value to the ore.¹⁸

[63] Counsel for the Community Trust submitted that in relation to (the lack of) local beneficiation this issue should be put to the DMR. He said *"there have been attempts in the form of Bills to deal with the issue of beneficiation and to actually make it law, and for it to be applicable, but those have not been really followed up and come into law. So the relevant department which*

¹⁴ Transcript of 02 September 2015, page 30.

¹⁵ Transcript of 02 September 2015, page 30.

¹⁶ Transcript of 02 September 2015, pages 54 and 55.

¹⁷ Transcript of 02 September 2015, page 31.

¹⁸ Transcript of 02 September 2015, page 54.

is not here today to make submissions in this regard and answer those questions, would be the Department of Minerals”.¹⁹

Our assessment

Development of the Eastern limb

[64] The Eastern Limb Projects are all development projects. The merging parties informed us that none of these projects had started production by the time they were placed under care and maintenance midway through 2012 (due to the deteriorating economic and social conditions at that time). All planned development was mothballed when the Eastplats’ operations were put under care and maintenance.

[65] From a timing perspective, Eastplats had intended to develop the projects in series, on the basis that the smaller and shallower Mareesburg project would be developed first. Once Mareesburg was in production, it was intended that Spitzkop would be developed, followed by the larger and deeper Kennedy’s Vale project. At the time that work was suspended in respect of the Eastern Limb Projects, approximately [...] % of the required development to place the Mareesburg project into production was deemed to have been completed. Hebei will, however, have to perform tests on the “completed” development in order to determine whether (and to what extent) work has to be redone.

[66] As stated above, the Community Trust’s concern related to the lack of progress with regard to the development of the Eastern Limb Projects of Eastern Platinum pre-merger and potentially post-merger in Hebei’s hands. The Tribunal therefore requested certain information from the DMR in relation to its regulation of mining development. The Tribunal, more specifically, requested the DMR to indicate if it has the ability to impose licence conditions in relation to development deadlines for mines (i.e. to prevent delays in the

¹⁹ Transcript of 02 September 2015, page 37.

development of mines), as well as potential sanctions should development deadlines not be met by a mining rights holder. The DMR submitted that in the event that the holder (of a right/licence) fails to comply, the DMR can invoke the provisions of either Section 93 or Section 47 of the MPRDA. Section 93 would be an order or instruction to rectify or suspension of a mining operation whereas Section 47 would entail suspension or cancellation of a mining right.

[67] We understand the frustration of the Community Trust with the delays in the development of the Target Firms' mining assets and as a result the lack of benefits flowing to the affected communities living on the Eastern limb. However, the evidence was that this situation existed prior to the proposed merger and therefore is not caused by the proposed transaction under consideration. As stated in *Walmart*,²⁰ one of the issues that we need to consider is whether or not a specific public interest concern is related to the proposed transaction under consideration. *Walmart* describes this as follows: *"Expressed in less technical language, unless the merger is the cause of the public interest concerns, we have no remit to do anything about them. Our job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction. This narrow construction of our jurisdiction has not always been appreciated by some of the intervenors who have sought remedies whose ambition lies beyond our purpose. It is not our task to determine whether those ambitions are legitimate public policy goals; only whether they lie within our powers."*²¹

[68] Given the above, we could find no justification for imposing a condition on the proposed transaction in relation to the post-merger development of the mining assets to be acquired.

²⁰ See Tribunal Decision in the larger merger involving *Walmart Stores Inc* and *Massmart Holdings Limited* (Tribunal Case No: 73/LM/Dec10).

²¹ See *Walmart* decision, paragraph 32.

Post-merger export of chrome ore

[69] In relation to the intended export to China after the proposed transaction of the chrome ore produced by the Target Firms, we note that this chrome ore forms a very small portion of the chrome ore mined in South Africa. The Commission found that prior to the end of 2013, the Target Firms had a combined market share of less than 2% of the chrome ore produced in South Africa. Furthermore, the Commission found that, pre-merger, the majority of the chrome ore produced by the Target Firms was already sold to Chinese firms.

[70] We have no evidence before us that the post-merger export of a relatively small amount of chrome ore to China will have a significant adverse effect on a particular industrial sector or region. Furthermore, as noted above, this situation already existed pre-merger.

Ability of firms controlled or owned by historically disadvantaged persons to become competitive

Commission's recommendation

[71] The Commission found that the proposed merger will not have any direct effect on BEE participation in the mining sector. Pre-merger, the BEE shareholders held a 26% shareholding in the Target Firms and post-merger Hebei shall offer the same percentage to BEE shareholders. The Commission noted that this 26% requirement is mainly due to the MPRDA which enforces strict empowerment quotas.

[72] The Commission further made enquiries regarding the intended structure of the abovementioned 26% BEE shareholding in the Target Firms after the proposed transaction. The merging parties submitted that this 26% is proposed to be split as follows: (i) 15% to be shared between the various mining communities in the area, including the Mampuru Community; (ii) 6%

to be allocated to one (or two) black entrepreneurs identified by Hebei; and (iii) 5% to an employee share scheme ("ESOP").

[73] The merging parties at the hearing of 14 September 2015 explained the abovementioned proposed split in the three components as follows: *"under the new one [Mining charter] they have got a concept of meaningful economic participation and they tell you there that an empowerment entity or an empowerment vehicle or if you want to use separate vehicles, the empowerment profile of a mining company must have a community component so it is compulsory, there must be a community component. It is also compulsory that there must be an employee's component, as well as an entrepreneurial component, so all of those three are articulated in the concept of meaningful economic participation, which is part of the 2010 Mining Charter".*²² They further submitted *"The question that then follows is how do you distribute that equity? That issue is not regulated in the Mining Charter so the Mining Charter doesn't tell you what percentage must go to which of these three categories and that is normally a product of commercial negotiations, but all three of them must be there".*²³

[74] The Commission further noted that the merging parties' BEE proposal for the Target Firms would still have to be considered by the DMR who may elect to impose a different set of BEE obligations on the merging parties. The DMR confirmed that it is engaging with the merging parties with regard to this. The Commission was of the view that the DMR was better placed to determine the spread of the BEE shareholding that will result in meaningful economic participation and a greater share in ownership and to ensure compliance with the legislative empowerment quotas.

[75] The Commission ultimately recommended that no conditions be imposed on the proposed transaction in relation to BEE.

²² Transcript of 14 September 2015, page 18.

²³ Transcript of 14 September 2015, page 19.

Community Trust's submissions

[76] The Community Trust raised the following issues in relation to BEE:

[76.1] the actual value of the proposed transaction to BEE shareholders since these shareholders often receive no form of dividend because all the dividend pays for is the equity obtained.²⁴ This is not an issue that we can deal with as a Competition Tribunal and we do not discuss it any further; and

[76.2] a concern that the abovementioned planned 15% BEE shareholding in the Target Firms to be shared between various mining communities (see paragraph 72 above), may be diluted to less than 15% due to (future) changes in the structure. It argued that the equity that pertains to the community must not be affected by any change in the (future) structure.²⁵

Our assessment

[77] As indicated above (see paragraph 71), the proposed transaction will not have a negative overall effect on BEE. Current BEE shareholders hold a 26% shareholding in the Target Firms and post-merger Hebei shall offer the same percentage shareholding in the Target Firms to BEE shareholders.

[78] Regarding this 26% and its structure, the DMR in its submission to the Tribunal confirmed that in terms of the MPRDA each applicant should have a minimum of 26% allocated to HDSAs (inclusive of communities and employees as part of BBEE). With regard to how this is determined and implemented in practice, the DMR advised that this is done in line with the Broad Based Socio Economic Empowerment Charter. The DMR further confirmed to the Tribunal that if an application for mining rights is lodged by the merging parties in relation to the Eastern limb, the BEE

²⁴ Transcript of 02 September 2015, page 55.

²⁵ Transcript of 02 September 2015, page 31; transcript of 14 September 2015, pages 30 to 32.

participation/quotas would in such case include shareholding by communities.

[79] Furthermore, with regard to the communities' 15% shareholding in the Target Firms post-merger (see paragraph 72 above), as intended by the merging parties, the proposed transaction represents a positive outcome for the relevant communities since they currently have no meaningful BEE shareholding in the Target Firms.²⁶ There is no evidence to suggest that this intended 15% would be diluted, as feared by the Community Trust.

[80] We conclude that the proposed transaction will not have an adverse effect on the ability of firms controlled or owned by historically disadvantaged persons to become competitive and therefore impose no condition on the approval of the proposed transaction in relation to this.

CONCLUSION

[81] Given the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, we have found no evidence that the proposed transaction will raise significant public interest concerns. We therefore approve the proposed transaction without conditions.


Mr Andreas Wessels

13 October 2015
DATE

Prof. Imraan Valodia and Ms Medi Mokuena concurring

[1] I concur with the decision of my colleagues. However, I take this opportunity to make a few remarks about the approach of the Commission to public interest issues. Public interest is not limited to employment issues only.

²⁶ Transcript pages 22 and 23.

Public interest touches on the effect of the merger on the industry and the community, economic participation of the affected communities etc. If the bill of rights issues are not taken into consideration or glossed over when merger investigations are conducted, then, the Commission is failing to carry out its mandate embodied in the Act.

[2] The Commission must be alive to the purpose of the Act and the rights embodied in the Constitution at all times. In instances where communities raise *social and economic welfare* issues, the Commission must pause, and look a little closer into such concern. These issues should not be left to the Tribunal to raise, in response to communities submissions, when the Commission could have adequately addressed them during the investigation.

[3] It is imperative that both the Commission and the Tribunal administer and implement the Act, alive to the Constitution.

Ms Medi Mokuena
Ms Medi Mokuena

16 October 2015
DATE

Tribunal Researcher	:	Caroline Sserufusa
For the merging parties	:	Ryan Goodman of ENS Africa for Eastern Platinum Paul Tindle of Prinsloo, Tindle and Andropoulos Attorneys for Hebel
For the Commission	:	Seabelo Molefe and Xolela Nokele
For the Community Trust	:	Adv. M C Makgato instructed by Badal Inc