

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no: LM148Nov22

In the large merger between:

Epiroc Holdings SA

Primary Acquiring Firm

And

**K2022596519 (South Africa) (Pty) Ltd and Polkadots
Properties 117 (Pty) Ltd**

Primary Target Firms

Panel:	M Mazwai (Presiding Member) A Wessels (Tribunal Panel Member) J Wilson (Tribunal Panel Member)
Heard on:	15 February 2023
Date of last submission:	24 February 2023
Order issued on:	10 March 2023
Reasons Issued on:	14 April 2023

REASONS FOR DECISION

Introduction

- [1] On 10 March 2023, the Competition Tribunal (“the Tribunal”) conditionally approved the large merger whereby Epiroc Holdings South Africa (Pty) Ltd (“Epiroc Holdings”) intends to acquire the entire issued share capital of K2022596519 (South Africa) (Pty) Ltd (“New Aard”) and Polkadots Properties 117 (Pty) Ltd (“Polkadots”).
- [2] Prior to the implementation of the proposed transaction, there will be an internal restructuring process, in terms of which the business currently carried on by Aard Mining Equipment (Pty) Ltd (“Aard”) will be sold and transferred, as a going concern, to New Aard.

Parties

Primary acquiring firm

- [3] The primary acquiring firm is Epiroc Holdings, a private company registered in accordance with the laws of the Republic of South Africa.
- [4] Epiroc Holdings is wholly owned by Epiroc Rock Drills AB Sweden (TMGL) (“Epiroc Rock Drills”). Epiroc Rock Drills is, in turn, wholly owned by Epiroc AB Sweden (ACE) (“Epiroc AB”). Epiroc AB is a public company listed on the Nasdaq Stockholm Stock Exchange.
- [5] In South Africa, Epiroc Holdings directly controls, among other firms, Epiroc South Africa (Pty) Ltd (“Epiroc SA”).
- [6] Epiroc AB and all the firms it controls are referred to below as the “Acquiring Group”.
- [7] The Acquiring Group is a supplier of rock excavation equipment and mining machinery, and provides solutions that increase utilisation and productivity in the mining, natural resources and infrastructure industries. The Acquiring Group develops and produces equipment, consumables and services for use in surface and underground mining, infrastructure, civil works, well-drilling and geotechnical applications.
- [8] In South Africa, the Acquiring Group (through Epiroc Holdings and Epiroc SA) is active in the development, manufacturing, marketing and distribution of equipment for use in mining and other applications. Of relevance for purposes of this transaction, the Acquiring Group currently supplies, amongst others, the following mining equipment: (i) drill rigs intended for both low seam and standard mass mining applications; (ii) bolting rigs intended for standard mass mining applications; and (iii) load, haul and dump (LHD) loaders for standard mass (10-ton) mining applications. The Acquiring Group also provides maintenance and support services in respect of the equipment they supply to customers.

Primary target firms

- [9] The primary target firms are New Aard and Polkadots (the “Target Group” or the “Target Firms”).

- [10] New Aard is a newly incorporated company and is wholly owned by AME Investment Holdings (Pty) Ltd (“AME Investment Holdings”).
- [11] New Aard is solely intended to acquire Aard which currently supplies, amongst others, the following mining equipment: (i) LHD loaders intended for low seam (profile) and mass (10-ton) mining applications; (ii) drill rigs intended for low seam (profile) mining applications; and (iii) bolting rigs. Aard also provides maintenance and support services in respect of the equipment it supplies to its customers.
- [12] Polkadots is a company incorporated in accordance with the laws of the Republic of South Africa and is also wholly owned by AME Investment Holdings. Polkadots does not control any firms and owns immovable property for the purposes of providing business premises to Aard.

The proposed transaction

- [13] The proposed transaction is comprised of two legs:
- 13.1. In the first leg, Aard will sell its business as a going concern to New Aard, and the leases between Polkadots and Aard will be transferred to New Aard.
- 13.2. In the second leg, Epiroc Holdings will purchase the entire issued share capital in New Aard and Polkadots. The net result will be that Epiroc Holdings will acquire sole control over the business carried on by Aard pre-merger.
- [14] The Competition Commission (“Commission”) took the view that these two legs should be considered as part of a single indivisible transaction given, *inter alia*, that both of the Target Firms are under the common control of AME Investment Holdings; both legs of the transaction will occur simultaneously; and Polkadots owns the immovable property from which New Aard operates.
- [15] The Tribunal, in line with its prior decisions,¹ agrees with this approach.

¹ *Crown Gold Recoveries (Pty) Ltd, the Industrial Development Corporation of SA Ltd and Khumo Bathong Holdings (Pty) Ltd*, Case No. LM012May02 at pp 2-3; *Peermont Holdings (Pty) Ltd and LCI (Overseas) Investments (Pty) Ltd*, Case No. LM059Jun19 at paras 7-9.

Rationale for the proposed transaction

- [16] Epiroc Holdings submitted that the Acquiring Group has a presence in a number of underground mining segments, but not in low seam mining, due to a lack of low profile and utility vehicles in its product portfolio. The proposed transaction will fill this gap because Aard provides loaders, drill rigs, and utility vehicles that are used in low seam mining operations.
- [17] Epiroc Holdings submitted further that, by combining two businesses with complementary product portfolios, the Acquiring Group will be in a position to increase its presence and market share in Africa. In addition, the Acquiring Group believes there is an opportunity to grow Aard's aftermarket sales through the footprint and service coverage of the Acquiring Group. The acquisition of the Target Group will also result in an additional production site in South Africa for the Acquiring Group, which it believes will increase the production flexibility of its underground division.
- [18] AME Investment Holdings submitted that the transaction will enable it to realise value arising from the growth of the Target Group over the last 30 years. From the perspective of the Target Group, the Acquiring Group is viewed as being a capable group of firms with significant experience and expertise in the mining sector generally. The Target Group believes that the expansion of its product offering through the inclusion of the Acquiring Group's products will enable the Target Group to further grow its business through access, *inter alia*, to additional efficiency enhancing resources and economies of scale.
- [19] The Commission confirmed that the Acquiring Group's internal documents were consistent with its expressed rationale for the proposed transaction.

Competition assessment

- [20] The Commission found that proposed transaction raises a horizontal overlap insofar as the merger parties' activities relate to (i) the supply of drill rigs for low seam mining applications; (ii) the supply of 10-ton LHDs for standard mass mining applications; and (iii) the provision of maintenance and support services for mining equipment.
- [21] As regards the last-mentioned overlap, the Commission found that the merger parties' services are not substitutable from a demand-side perspective, because customers that

have purchased mining equipment from the Epiroc group are unlikely to be able to service their Epiroc-branded equipment at Aard, and *vice versa*. As such, the Commission concluded that the merger parties are unlikely to constrain each other in terms of these services, and therefore did not conduct any further assessment in relation to this overlap.

The relevant product markets

The supply of drill rigs for low seam mining applications

- [22] In defining the relevant product market for the supply of drill rigs for low seam mining applications, the Commission considered whether these are substitutable with standard mass mining drill rigs from a price perspective. In this regard, the Commission found that the price differential between low seam and standard mass mining drill rigs ranges from 30% to 155%. On this basis, the Commission concluded that low seam and standard mass mining drill rigs are unlikely to be substitutable from a price perspective.
- [23] The Commission found that this conclusion was supported by evidence from customers that they would not switch to standard mass mining drill rigs if the price of low seam mining drill rigs were to increase by 5 to 10%. This is because their ore body dictates that they can only use low seam drill rigs.
- [24] As such, the Commission, without being conclusive, decided to consider the competitive effects of the proposed merger on the relevant product market for the supply of drill rigs supply for low seam mining applications.

The supply of LHDs for standard mass mining applications

- [25] In defining the relevant product market for the supply of LHDs for standard mass mining applications, the Commission considered whether these are substitutable with low seam LHDs from a price, characteristics and intended purpose perspective.
- [26] In terms of price, the Commission found that there is a wide price differential between low seam and standard mass LHDs. On this basis, the Commission concluded that low seam and standard mass mining LHDs are unlikely to be substitutable from a price perspective.

[27] The Commission also considered the extent to which low seam LHDs and LHDs used for standard mass mining applications are substitutable by reason of characteristics and intended purpose. In this regard, the Commission found that LHDs for standard mass mining applications cannot be used in low seam mining operations because they are too big and are designed for mass mining operations. Conversely, the Commission found that low seam LHDs are not likely substitutes for standard mass mining LHDs because (i) the former are designed for low profile navigation, which provides limited visibility in standard mass mining applications; and (ii) low seam LHDs attract higher operating costs per ton than standard mass mining LHDs.

[28] Therefore, again without being conclusive, the Commission decided to assess the competitive effects of the proposed transaction in the relevant product market for the supply of LHDs for mass mining applications.

The relevant geographic markets

[29] The Commission noted that, in the *Komatsu America Corp. v Joy Global Inc.*² case, it had considered the relevant geographic market for the supply of mining equipment to be national in scope.

[30] The Commission decided not to deviate from that approach in this case given that both the Acquiring Group and the Target Group supply their respective low seam drill rigs and mass mining LHDs (which form part of the broader market segment for mining equipment) throughout South Africa.

Market share analysis and countervailing buyer power

The relevant market for the national supply of drill rigs for low seam mining applications

[31] The merger parties estimated their combined market share in the relevant market for the national supply of drill rigs for low seam mining applications, to be approximately 9% (i.e. 1% for the Acquiring Group and 8% for the Target Group), with the remainder of the market share being held by GHH Mining Machines (Pty) Ltd (“GHH”) and Sandvik. However, this estimate was not based on any empirical evidence such as calculated revenues or volumes.

² *Komatsu America Corp v Joy Global Inc* (2017), Case no. LM174Nov16.

- [32] The Commission was also unable to obtain any readily available revenue or sales data from competitors to calculate the market size of the relevant market for the national supply of drill rigs for low seam mining applications. However, the Commission obtained market share estimates from GHH (a competitor of the merger parties), which indicated that the merged entity is likely to have a combined market share of approximately 13% in the relevant market, with Sandvik being the biggest player with a market share of approximately [REDACTED].
- [33] The Commission also considered the extent to which countervailing power is present in the market and is likely to prevail post-merger. In this regard, the Commission considered (i) the ability of customers to negotiate prices; (ii) the ability of customers to negotiate favourable terms and conditions of contracts; and (iii) the ability of customers to switch across different suppliers.
- [34] As regards the first factor, the Commission found that customers can negotiate the prices at which they purchase low seam mining drill rigs in South Africa. This was confirmed by three third parties, namely GHH as well as Eland Platinum and Sibanye Stillwater (customers of the Target Group).
- [35] In order to determine whether customers can negotiate better terms with suppliers of mining equipment (including drill rigs for low seam mining applications), the Commission relied on the internal documents of the merger parties. In this regard, the Commission found that the Target Group's agreements with most customers contained terms and conditions that were more favourable to the customers than to the Target Group. These included narrow limitation of liability clauses, favourable termination rights, extensive warranties and penalties for delays in performance.
- [36] The Commission also found that customers are able to switch between different suppliers of low seam mining drill rigs, and that this will not be materially affected by the merger. This was confirmed by evidence from the merger parties and from existing customers such as Eland Platinum and Sibanye Stillwater.
- [37] The Commission concluded that the proposed transaction is unlikely to confer market power on the merged entity (owing to its low estimated combined market share and the existence of countervailing buyer power), and is accordingly unlikely to result in the

substantial lessening or prevention of competition, in the relevant market for the national supply of drill rigs for low seam mining applications.

The relevant market for the national supply of 10-ton LHDs for standard mass mining applications

[38] The merger parties estimated their combined market share in the relevant market for the national supply of 10-ton LHDs for standard mass mining applications, to be approximately 17% (i.e. 15% for the Acquiring Group and 2% for the Target Group), with the remaining market share being held by GHH, Sandvik, Rham and Caterpillar. Again, however, these estimates were not based on any empirical evidence such as calculated revenues or volumes.

[39] The Commission was also unable to calculate the market size of the market due to a lack of readily available revenue or sales data from competitors. The Commission therefore again utilized market share estimates provided by GHH (a competitor of the merger parties). GHH's estimates indicate that the merged entity is likely to have a combined market share of approximately 18%, with the biggest player in this relevant market also being Sandvik (with a market share of approximately [REDACTED]).

[40] The Commission also considered the extent to which countervailing buyer power is prevalent in this market.

[41] The merger parties submitted that there is significant countervailing power in the market, which will not be affected by the merger, because the choice of both low seam and mass mining machinery is vast. The merger parties also provided evidence of three instances where the Target Group had lost customers to other suppliers of LHDs for mass mining applications.

[42] The Commission found that customers can negotiate the prices at which they purchase low seam 10-ton LHDs for standard mass mining applications, and this was confirmed by GHH and Barloworld Equipment/CAT (both competitors to the merger parties) as well as Sibanye Stillwater (a customer of the Target Group).

[43] The Commission also found that customers are able to negotiate favourable terms and conditions of contracts, with the internal strategic documents of the Target Group

indicating that their agreements with most customers contained terms and conditions that were favourable to such customers.

[44] In addition the Commission found that customers for 10-ton LHDs are able to switch across suppliers. In addition to the merger parties' evidence of customer switching referred to above, this was confirmed by existing customers such as Sibanye Stillwater.

[45] The Commission concluded that the proposed transaction is unlikely to confer market power on the merged entity (owing to its low estimated combined market share and the existence of countervailing buyer power), and is accordingly unlikely to result in the substantial lessening or prevention of competition, in the relevant market for the national supply of 10-ton LHDs for standard mass mining applications.

[46] Given the merger parties' relatively low combined market shares and the ability of customers to switch to other suppliers, the Tribunal agrees that the proposed merger is unlikely to give rise to significant anti-competitive effects either in the relevant market for the supply of drill rigs for low seam mining applications, or in the relevant market for the supply of 10-ton LHDs for standard mass mining applications.

Public interest

Employment

[47] The merger parties unequivocally stated that the proposed transaction will not result in any job losses or retrenchments of employees of either of the merger parties.

[48] The employees of the Acquiring Group are not represented by any trade unions. However, the employee representative of the Acquiring Group confirmed that its employees were notified about the proposed transaction and did not raise any employment related concerns.

[49] The employees of the Target Firms are represented by two trade unions, namely Solidarity and the National Union of Metalworkers South Africa ("NUMSA"). Solidarity indicated to the Commission that it had not been notified about the proposed transaction. However, the Commission was satisfied by a proof of service from the merger parties that Solidarity had been duly notified. NUMSA was also notified about the proposed transaction and did not raise any employment-related (or other) concerns.

[50] Based on the above, the Tribunal agrees with the Commission's conclusion that the proposed transaction is unlikely to raise any employment concerns.

Effect on the ability of SMMEs to enter into, participate in or expand in the markets

[51] The Commission also investigated the impact of the proposed merger on the ability of small businesses to participate in or expand in the market. This followed a concern raised by Fermel (Pty) Ltd, a competitor to the merger parties, that the size of the merged entity, and the breadth of its combined offering (in particular, the combination of mining machines and support equipment such as support carriers and shuttles), may prejudice smaller players with smaller product portfolios.

[52] The Commission noted that the merged entity will generally only be able to engage in an exclusionary conduct if it has sufficient market power in one or more of the relevant markets (i.e. low seam and/ or standard mass mining equipment in this case) post-merger.

[53] Given the Commission's finding that the merged entity is unlikely to have market power post-merger in either of the relevant markets, it concluded that the proposed transaction is unlikely to hinder and/ or lessen the ability of SMMEs to participate effectively in any market. Customers in the relevant markets have the ability to purchase the different kinds of equipment they require from different independent suppliers of mining equipment (irrespective of the size of such suppliers), depending on their brand preferences, and this will continue to be the case post-merger.

[54] We concur with the Commission's conclusion in this regard.

Spread of ownership

[55] The merger parties submitted that the Target Group currently has a level 2 Broad-Based Black Economic Empowerment ("B-BBEE") status with 98.65% black ownership and 52.45% black women ownership, in terms of the applicable B-BBEE legislation; and that, post-merger, both of the Target Firms will initially be 100% owned and controlled by Epiroc Holdings, a foreign owned company that does not have any ownership by historically disadvantaged persons ("HDPs").

- [56] The merger parties submitted further, however, that the Acquiring Group is entrenched in the South African market, and is committed to providing meaningful contributions under, and compliance with, the applicable B-BBEE Codes and also the Mining Charter (to which its customers are subject). The merger parties explained in this regard that the Implementation Guide for the Mining Charter recognizes B-BBEE compliant companies as having achieved a rating of Level 4 or better and being at least 25 % + 1 vote owned by HDPs.
- [57] Having regard to this requirement, the merger parties submitted that, post-merger, the Acquiring Group will implement a suitable B-BBEE transaction in respect of New Aard which will consider a variety of factors, including ownership, management control, skills development, enterprise and supplier development and socio-economic development.
- [58] As regards the ownership pillar, the merger parties submitted that the Acquiring Group would implement a B-BBEE transaction to address ownership by HDPs in New Aard (the “B-BBEE Restructure”) – which they intend to complete within 12 months (and no more than 24 months in the event of unforeseen delays) of the implementation of the proposed merger.
- [59] The B-BBEE Restructure initially contemplated by the Acquiring Group involved the transfer of 100% of the shares acquired by Epiroc Holdings in New Aard to Epiroc SA, which has 26% ownership by HDPs. However, pursuant to further engagements with the Commission and the Department of Trade, Industry and Competition (“dtic”), the Acquiring Group ultimately also agreed to establish an employee share ownership programme (“ESOP”) that would hold 5% of the shares in New Aard for qualifying employees, approximately 70% of which would be HDPs. The merger parties submitted that they intend to implement the ESOP within 18 months after the implementation of the proposed merger.
- [60] The net effect of the B-BBEE Restructure and the ESOP will therefore be that:
- 60.1. Epiroc SA will hold 95% of the issued share capital in New Aard, as a result of which HDPs will have an effective interest of 24.7% in New Aard by virtue of holding 26% of the shares in Epiroc SA; and

60.2. the remaining 5% of the issued share capital of New Aard will be held by an ESOP, as a result of which there will be a further 3.5% HDP ownership in New Aard by virtue of the fact that approximately 70% of the beneficiaries of the ESOP will be black people.

[61] In sum, therefore, the B-BBEE Restructure and the ESOP will give rise to a 28.2% HDP ownership in New Aard.

[62] Based on the commitments made by the merger parties in respect of the B-BBEE Restructure and the ESOP, the Commission recommended the approval of the proposed merger subject to conditions reflecting those commitments.

[63] At the Tribunal hearing on 15 February 2023, we queried whether the proposed conditions were sufficient to justify the merger from a public interest address given the very significant reduction it would bring about in the effective HDP ownership of New Aard from 98.65% to 28.2%. We also queried various aspects of the design and timing of the proposed ESOP, and whether the trade unions representing the Target Group employees had been consulted on the terms of the draft ESOP condition (the response was that they had not been).

[64] Arising from the responses given at the merger hearing, we requested the merger parties to provide (i) details of the HDP shareholders/ beneficiaries in the direct and indirect shareholding structure of the Target Firms; (ii) the number of employees (total and HDP) of the Target Firms; (iii) details of the public interest benefits of the merger that are cognisable in terms of section 12A(3) of the Competition Act; and (iv) details of any additional public interest commitments the merger parties were prepared to include in the proposed conditions. We also requested the Commission to obtain the views of the relevant trade unions regarding the proposed ESOP condition.

[65] In their response dated 24 February 2023, the merger parties provided details of the HDP shareholders and beneficiaries in the shareholding structure of the Target Firms. They also provided details of the number of employees of the Target Firm and confirmed that approximately 70% of the employees that would qualify to participate in the ESOP were HDPs.

- [66] As regards the public interest benefits of proposed merger, the merger parties submitted that the public interest analysis contemplated by section 12A(3) of the Act was a holistic one, in which negative effects under one or more subsections could be compensated for by positive effects under others, and they proceeded to make submissions in respect of each of the factors listed in section 12A(3).
- [67] As regards section 12A(3)(a), the merger parties submitted that, as a result of the proposed transaction, the Acquiring Group will be able to expand the existing activities of New Aard's manufacturing facility to produce Epiroc products that are currently manufactured outside South Africa. The merger parties submitted that this localisation of manufacturing, coupled together with Epiroc's advanced technology and research and development ("R&D"), will result in positive benefits flowing to the sector as a whole as well as to end-consumers. In particular, the increased local manufacturing of products used in underground mining will likely result in increased employment opportunities in South Africa, and also increased demand by the merged entity for products and services from local suppliers (many of which are small, medium and micro enterprises ("SMMEs") and HDP firms). In addition, the Acquiring Group is a leading supplier of Battery Electric Vehicles, and the merger will enable New Aard to obtain access to this technology and the Acquiring Group's considerable R&D in order to make safer and more efficient products to service local and foreign markets.
- [68] As regards section 12A(3)(b), the merger parties confirmed that there would be no retrenchments as a result of the merger and, to provide certainty in this regard, agreed to impose a moratorium on any merger-related retrenchments for a period of two years. They also referred under this heading to the likely growth that New Aard will experience in its manufacturing volumes as a result of the merger, and the positive impact that this is likely to have on employment both at New Aard and within its supply chain.
- [69] As regards section 12A(3)(c), the merger parties submitted that, arising from the likely growth and increased production that New Aard will experience as a result of the merger, SMME and HDP firms that supply New Aard are likely to benefit from this growth and to expand within their respective markets. In addition, the Acquiring Group agreed to increase New Aard's supplier development and enterprise development spend post-merger (as set out below).

[70] As regards section 12A(3)(d), the merger parties submitted that a key rationale for the proposed merger from the Acquiring Group's perspective is to expand the sale of the Target Group's products (in particular, its low profile and utility vehicles used in low seam mining operations) into the numerous markets in which the Acquiring Group has a presence internationally. The Acquiring Group submitted further (with reference to its acquisition of New Concept Mining (Pty) Ltd in 2019), that it has a proven track record of increasing the ability of South African businesses to compete internationally.

[71] As regards section 12A(3)(e), the merger parties acknowledged that the proposed transaction will result in the reduction of ownership of HDPs in the Target Firms. However, they submitted that the following countervailing factors should be taken into account when assessing this factor:

71.1. the exiting HDP shareholders will receive considerable value for their interest in the Target Firms, which will likely flow into the South African economy; and

71.2. the Acquiring Group has committed, through the B-BBEE Restructure and the ESOP commitments, to an HDP ownership in New Aard of 28.2%, the broad-based component of which (the ESOP) will be greater than that in New Aard currently.

[72] As regards the element of ownership by workers, the merger parties submitted that there is currently no worker ownership in the Target Group, and that the ESOP will accordingly introduce worker ownership and participation into the merged entity. The merger parties submitted further that the participating employees will be able to appoint at least 50% of the trustees in the ESOP and will not be required to pay anything to participate in the ESOP.

[73] The merging parties also tendered additional commitments in order to enhance the public interest benefits of the proposed merger, namely that:

73.1. New Aard will continue to implement its existing skills development initiatives and enterprise and supplier development initiatives post-merger;

73.2. an additional R10 million will be allocated towards skills development initiatives in New Aard over a four-year period; and

73.3. an additional R10 million will be allocated to various enterprise and supplier development initiatives to the benefit of, *inter alia*, black firms, communities and SMMEs over a four-year period.

[74] The Commission also contacted NUMSA and Solidarity for their comments on the proposed ESOP condition. Only Solidarity responded to this request and raised various questions that were answered by the merger parties. Solidarity did not express any objections in relation to the proposed ESOP. We are of the view that the Commission should obtain comments from the representatives of the relevant employees whenever the establishment of an ESOP is sought to be included in proposed merger conditions.

[75] As regards the public interest analysis under section 12A(3) of the Act, the Tribunal has previously explained that it is a holistic one, in terms of which the different public interest grounds listed in section 12A(3) must be separately assessed, and then, if necessary, weighed against each other in order to arrive at a net conclusion on the public interest effects of the merger.³

[76] Whilst this previously expressed approach predates the amendments to section 12A brought about by the Competition Amendment Act, 2018, we do not believe that those amendments impact upon the holistic approach to be followed in the assessment.

[77] Therefore, even if, on a consideration of all the evidence, a merger would have a substantial negative effect insofar as section 12A(3)(e) is concerned, that effect might be mitigated or outweighed by positive effects in relation to one or more of the other factors listed in section 12A(3).

[78] In this case, therefore, the significant reduction in HDP ownership of New Aard that will result from the proposed merger must be balanced against the establishment of an ESOP to promote worker ownership as well as against the positive public interest effects brought about by the merger (having regard to the enhanced conditions tendered by the merging parties) in relation to the other factors listed in section 12A(3).

³ *Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Ltd*, Case no. 08LM/Feb02, at paras 217-219; *Harmony Gold Mining Company Ltd/ Gold Fields Ltd* (Case no. 93/LM/Nov04) at para 54.

[79] In this case, we have amended the proposed ESOP condition to provide that the beneficiaries of the ESOP will only cease to participate for bad leaver events such as resignations and dismissals, and that resignations or retirements in the ordinary course of business and death will not affect participation in the ESOP.

[80] Holistically, and subject to the above amendment, we are satisfied with the public interest commitments of the merger parties.

Conclusion

[81] We conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market, and approve the proposed transaction subject to the public interest conditions annexed hereto as “**Annexure A**”.

Signed by: Jerome Wilson
Signed at: 2023-04-14 15:56:19 +02:00
Reason: Witnessing Jerome Wilson

Jerome Wilson

14 April 2023

Mr Jerome Wilson

Date

Ms Mondo Mazwai and Mr Andreas Wessels concurring

Tribunal Case Manager:

Juliana Munyembate

For the Merger Parties:

Advocate Nontokozo Mahlangu instructed by Kelly Nevin, Sarah Charlton and Greg Shapiro of Eversheds Sutherland; Judd Lurie and Ashleigh Hale of Bowmans; and Albert Aukema, Reece May and Roelof Bonnet of CDH.

For the Commission:

Zukile Sokapase and Grashum Mutizwa