

## **IN THE COMPETITION TRIBUNAL**

**CASE No: 93/LM/NOV04**

In the Discovery Application between:

**GOLD FIELDS LIMITED**

Applicant

and

**HARMONY GOLD MINING COMPANY LIMITED**

First respondent

and

**The COMPETITION COMMISSION**

Second respondent

In re: The large merger between:

**HARMONY GOLD MINING COMPANY LIMITED**

Primary Acquiring Firm

and

**GOLD FIELDS LIMITED**

Primary Target Firm

## **DECISION AND ORDER**

1. This is an application brought by the applicant, Gold Fields, for discovery of certain documents from the first respondent, Harmony.
2. The discovery application relates to merger proceedings pending before us where Harmony seeks to take control over Gold Fields. Gold Fields the target firm is seeking discovery from Harmony, the acquiring firm. This kind of discovery application between merging parties is unusual in our proceedings, because normally the merging parties at least are ad idem and hence the informational asymmetries between adverse parties, which discovery applications seek to address do not arise. In this case however the merger proposed by Harmony is being vigorously opposed by Gold Fields. Both parties have filed separate submissions with the Competition Tribunal, which form part of the record of the merger proceedings.

3. Harmony has, unsurprisingly as the acquirer, asked the competition authorities to approve the merger. The Commission has filed a recommendation in which it recommends approval subject to one condition that relates to employment effects of the merger. Gold Fields opposes the merger and has filed a submission with the Commission in which it seeks a prohibition of the merger.
4. Gold Fields has, in its founding affidavit, identified the issues that it considers are pertinent for us to determine during the merger hearing. It states that all the documents sought are pertinent to these issues and hence must be produced.
5. We outline below what Gold Fields considers these issues to be insofar as they have a bearing on the documents in dispute.
  - The potential cost savings alleged by Harmony and the cost at which these savings shall be achieved. (Gold Fields has expressed extreme scepticism about whether these savings are achievable.)
  - Employment issues;
  - Black economic empowerment issues;
  - Corporate social investment projects invested in by Harmony.<sup>1</sup>
6. This background is necessary to understand relevance of the documents that are the subject of this application.

### **Documents sought**

7. Gold Fields originally sought production of 26 items. In response to Harmony's answering affidavit it persists in its application for 7 items; the remaining items were either discovered or were alleged not to exist.
8. We deal in this decision only with the outstanding items. Usefully Gold Fields has organised its request thematically and so, where appropriate, we have decided the issues by theme rather than per line item.

### **Items 1.4, and 1.5**

Item 1.4 states: *"all correspondence, documentation, memoranda and/or agreements relating to the First Respondent's anticipated involvement in the Application following the proposed transaction as well as any intended subsequent divestment of the First Respondent's asset;"*

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<sup>1</sup> See founding affidavit record page 13-14.

Item 1.5 states: “all strategic papers, internal notes, memoranda and discussion papers prepared for the First Respondent by its advisors, or by the First Respondent, in relation to the proposed transaction and the manner in which the Applicant will be managed if the proposed transaction is successful;”

9. Although not motivated for specifically in the founding affidavit it seems that these documents are relevant as they may indicate Harmony’s future intentions in respect of Gold Fields. Nevertheless, their relevance is not disputed. Harmony’s objection rather is that the claims are overly broad and imprecise. In respect of item 1.4 Harmony alleges that no documents relating to any subsequent divestment of assets exist and Gold Fields appears to accept this, so we are left to consider the remaining part of that item and item 1.5.
10. Item 1.5 appears to be a subset of the documents sought under 1.4 It is hard to imagine a document sought under 1.5 that would not also fall under 1.4 However 1.5 is more precisely framed with its emphasis on the way in which the “applicant will be managed if the proposed transaction is successful”
11. We agree with Harmony that in their present form both these items are overbroad, but believe that this can be cured by confining the request to the issues that Gold Fields has already signalled in the discovery application as being of relevance.
12. We rule that the applicant is not entitled to further discovery in terms of the remainder of clause 1.4, on the grounds that as presently formulated it is overbroad and imprecise, but is entitled to the production of those documents set out in the reformulated item 1.5 which we set out below:

*“all strategic papers, internal notes, memoranda and discussion papers prepared for the First Respondent by its advisors, or by the First Respondent, in relation to the proposed transaction and the manner in which the Application will be managed if the proposed transaction is successful; insofar as they relate to cost saving proposals, employment, black empowerment and corporate social investment.” (Our reformulation is underlined).*

### **Items 1.7, 1.8 and 2.3**

Item 1.7 states: “all documentation, together with underlying supporting documentation, prepared by or on behalf of the First Respondent or its advisors regarding the South African Code for the Reporting of Mineral Resources and Mineral Reserves (SAMREC Code), evidencing compliance with public reporting of resources and reserves;”

Item 1.8 states: “the First Respondent’s Competent Persons Report

*(“CPR”), detailing information on the First Respondent’s audited Reserve and Resources and any draft CPR which is more recent than the most recent final CPR;”*

*Item 2.3 states: “all documentation prepared by or for the First Respondent detailing its operating shafts and plants and the projected outlook (including without limitation projected closures) in respect of such shafts and plants for the next 12 months;”*

13. Harmony objects to producing any of the documents on the grounds of relevance. Harmony further alleges that even if these requests relate to documentation that is relevant, there is, in any event, only one document in existence that qualifies for discovery in respect of all three items. This is the Competent Person’s Report (CPR) (item 1.8), which includes the documentation sought in connection with its compliance with the SAMREC code (item 1.7). Harmony added in its oral submissions that the CPR was the only document that they were aware of that would fit the description of the documents sought in terms of item 2.3
14. Absent any evidence to refute this we must accept that the CPR is the only document available to be produced in relation to these three items. It remains for us to decide whether production of the CPR is relevant for our proceedings.
15. Neither side has dealt with their views on relevance of this document in any detail. Gold Fields in its affidavit does not specifically motivate why the document may be relevant, but rather seeks to found relevance through adopting a broad- brush approach. In paragraph 12.3 of the founding affidavit it is alleged that it seeks documents relating to Harmony’s “ *compliance with public reporting requirements regarding resources and reserves*”. It also, in 12.4, states that it seeks documents “*regarding cost claims that Harmony claims it will be able to generate as a result of the merger.*”
16. Let us assume in Gold Fields favour that it seeks production of the CPR for both these purposes. It is by no means clear to us what compliance with public reporting requirements have to do with our concerns in merger evaluation. Without further elaboration its relevance in this respect is not self- evident and we cannot compel production on this ground.
17. The second ground relates to evidence of cost savings. This is the ground that Gold Fields placed reliance upon in argument. From what we understood of this argument, if it emerged from the CPR that Harmony’s state of reserves was less sanguine than Harmony has publicly held out, this might have an impact on Harmony’s ability to implement its cost savings exercise in respect of Gold Fields – the implication being that if Harmony cannot achieve those efficiencies it claims it can in its public filings, it will be compelled to introduce ruthless cost cuts into the present business of Gold Fields and those cost costs are those with a public interest impact, namely employees, corporate social investment,

suppliers etc.

18. Doubtless there are a multitude of issues that could impact on Harmony's cost reducing ambitions. Gold Fields need to show a greater link between the content of this document, which relates to Harmony, and the adverse effects of the proposed merger on Gold Fields that it alleges.<sup>2</sup> This is an onus that Gold Fields, as the applicant, must discharge and it has not done so. Unlike the documents sought under item 1.5 there is no evidence that this document has a nexus to Harmony's cost savings intentions in respect Gold Fields. The request for the production of these three items is denied.

### **Items 2.5 and 2.10**

Item 2.5 states: *"all documentation, notes or discussion papers by or for the First Respondent pertaining to current or future retrenchments by the First Respondent which retrenchments are contemplated outside of the proposed transaction;"*

Item 2.10 states: *"all documentation, correspondence or discussion papers prepared by or for the First Respondent containing information of the expected cost savings by the First Respondent from labour pursuant to the proposed transaction and the correlation of savings to employee job losses in the First Respondent's Payroll;"*

19. These requests for documents both relate to information that may be relevant to the employment impact of the proposed merger. Harmony does not dispute the relevance of employment related documents and indeed it has already discovered some in relation to other items requested in this category.<sup>3</sup>
20. Harmony's objection in relation to item 2.5 is that it relates to retrenchments that are not merger specific. It argues that as we are only concerned with merger specific effects on employment in terms of the Act, this information can never be relevant for our purposes.
21. Without deciding it let us assume the correctness of this contention. In practice differentiating operational related reductions from those that are merger related may be very difficult indeed. There is a legitimate concern that firms otherwise engaged in non-merger operational retrenchments, may use that opportunity to disguise, as operational, retrenchments that are in fact merger specific. If large operational retrenchments are contemplated it may well be relevant to the efficacy of any employment related conditions that the Commission currently proposes. In our view the documents referred to in item 2.5 are relevant and

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<sup>2</sup> Although this is not a document that Gold Fields has had sight of, given that a CPR is a standard requirement in the industry, one would assume that as a mining company they could have offered us greater insights into the likely nature of its content and linked this to its relevance to our proceedings.

<sup>3</sup> See answering affidavit paragraphs 5.18-9, 5.22-4.

should be produced.

22. In relation to item 2.10, Harmony did not object to the production on grounds of relevance, but alleged that it was difficult to understand what was being sought of it from the way the request is framed. Gold Fields, has conceded that the language used gives rise to difficulties and has proposed as a cure deleting the final phrase. We accept that with the proposed rephrasing the items are properly sought, and order their production in terms of an amended item 2.10 that now reads as follows:

“all documentation, correspondence or discussion papers prepared by or for the First Respondent containing information of the expected cost savings by the First Respondent from labour pursuant to the proposed transaction.”

### **General**

23. All items whose production has been ordered must be produced within 3 business days of this decision.
24. As we heard no argument on costs from either side, but costs were sought in the event of opposition, we will reserve the question of costs to later in the proceedings.

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4 April 2005  
**Date**

Concurring: Y Carrim and D Lewis.

For the Applicant: Adv. Gauntlett S.C, Adv. Michael Van der Nest S.C. and Adv. Alfred Cockrell instructed by Knowles Hussein.

For the First Respondent: Adv. David Unterhalter S.C., Paul McNally, and Adv. Jerome Wilson, instructed by Cliffe Dekker Inc.

For the Second Respondent: Mark Worsley (Legal Services Division, Competition Commission).