



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 71/LM/Oct09

In the matter between:

Harmony Gold Mining Company Limited

Acquiring Firm

And

Pamodzi Gold Free State (Pty) Ltd (in provisional liquidation)

Target Firm

Panel : N Manoim (Presiding Member) Y Carrim (Tribunal Member),
and A Wessels (Tribunal Member)

Heard on : 11 December 2009

Order Issued : 11 December 2009

Reasons Issued: 5 February 2010

Reasons for Decision

Approval

[1] On 11 December 2009, the Tribunal approved with conditions the merger between Harmony Gold Mining Company Limited and Pamodzi Gold Free State (Pty) Ltd (in provisional liquidation). The reasons for approving the transaction conditionally follow.

The parties

[2] The primary acquiring firm is Harmony Gold Mining Company Limited ("Harmony Gold"), a public company listed on the JSE Securities Exchange. Harmony Gold is not controlled by any firm.¹ The largest shareholders of Harmony Gold are ARM Limited ("ARM") with a 14.87%; and Allan Gray Unit Trust Management Limited with a 13.8% shareholding.

¹ Approximately 42% of Harmony's shares are held by South African shareholders and 32% are held by American shareholders.

- [3] Harmony controls in excess of 50 companies around the world.² In South Africa, Harmony Gold has various subsidiaries including Avgold Limited (“Avgold”), a wholly owned subsidiary.³
- [4] The primary target firm is the Pamodzi Gold Free State (Pty) Ltd (in provisional liquidation) (“Pamodzi Free State”). Pamodzi Free State is a wholly owned subsidiary of Pamodzi Gold Limited (in provisional liquidation) (Pamodzi Gold).⁴ Pamodzi Gold controls in excess of 20 companies in South Africa.⁵
- [5] Harmony Gold holds 32.4% interest in Pamodzi Gold and Pamodzi Gold is regarded as an associate of Harmony for accounting purposes.

The transaction

- [6] In terms of the proposed transaction which is concluded in terms of a Sale of Assets Agreement (South), Harmony will acquire the gold mining, processing and related business carried out by Pamodzi Free State under the name President Steyn South Division (“PSSD”) which business includes the operation of the South Steyn Shafts. In terms of the Sale of Assets Agreement (North), Avgold, Harmony’s subsidiary, will acquire the gold mining, processing and related business carried out by Pamodzi Free State under the name President Steyn North Division (“PSND”), which business includes the operation of the North Steyn Shafts.
- [7] In a nutshell, the PSSD is directly acquired by Harmony Gold and the PSND is directly acquired by Avgold, a wholly owned subsidiary of Harmony. Upon completion of the merger, the business of Pamodzi Free State comprising PSSD and PSND will be controlled by Harmony Gold and Avgold.

The parties’ activities

Primary acquiring firm

- [8] The primary acquiring firm is involved in the production and supply of gold. Its operations are located primarily on the Witwatersrand Basin, encompassing ten

² See Harmony’s Organogram marked Annexure “B”,

³ Harmony’s subsidiaries in South Africa include African Rainbow Minerals Gold Limited (“ARM Gold”), Rand Uranium (Pty) Ltd (“Rand Uranium”), Envader Gold Mines Limited (“Envader Gold”), Venda Gold Mining Company (Pty) Ltd (“Venda Gold”), and Lesila Gold Mines Limited (“Lesila Gold”).

⁴ On 17 April 2009, the primary target firm was placed under provisional liquidation by the High Court of South Africa as a result of being unable to meet its financial obligations when they fell due.

⁵ See Pamodzi Organogram marked Annexure C.

underground operations, an open pit mine and surface operations in four provinces namely, Gauteng, North West, Mpumalanga and Free State.

Primary target firm

- [9] The primary target firm was involved in production and supply of gold until it was placed under liquidation and ceased operations on the Free State assets in February 2009.

Rationale for the transaction

- [10] Harmony Gold's reasons for concluding this transaction are numerous.⁶ Harmony Gold was the preferred bidder⁷ as it has a lot of experience mining gold in South Africa. This transaction enables Harmony Gold to take advantage of the potential of the Pamodzi Free State's assets and the synergies it provides with its own operations.
- [11] Pamodzi Free State was placed in provisional liquidation by the High Court of South Africa as a result of being unable to meet its financial obligations and liabilities, thus the assets have been sold to raise funds.

The relevant market

- [12] The Commission and the parties, in line with previous Tribunal decisions,⁸ submitted that the relevant product market is the market for production and supply of gold.
- [13] In line with previous Tribunal decisions,⁹ the geographic market has been defined as international by the Commission and the merging parties. This is largely because all South African gold is sold to the international bullion banks and Rand Refinery Limited acts as an agent for most of the South African gold producers in the process. In addition gold is priced extraneously by reference to the London daily price fixings of the London Bullion Association.

Competition analysis

⁶ See record pp43-44.

⁷ The other company that bid to buy Pamodzi Free State's assets is Virgile Mining whose bid was rejected. Virgile Mining raised objections to this merger though the objections were not competition related. Virgile Mining was to make representations to the Tribunal and only withdrew at the last minute (See Transcript p3.

⁸ See Tribunal cases 05/LM/Jan02, 31/LM/May02, 03/LM/Jan01, 93/LM/Nov04, 66/LM/Aug06, and 83 & 84/LM/Oct06.

⁹ Pamodzi Gold/President Steyn 110/LM/Oct07, Pamodzi Gold/ARM Gold 62/LM/Jun07, Harmony Gold Mining Company Limited/ African Rainbow Minerals Gold Limited 25/LM/May03, and AngloGold Limited/ Driefontein Consolidated (Pty) Ltd 66/LM/Nov03.

[14] The table below shows international market shares for the production and supply of gold in 2008.

Table 1: International market shares for the production and supply of gold

Market Participant	Estimated market share (%)
Barrack Gold Corporation	14.61
Newmont Mining	10.08
AngloGold Ashanti	9.67
Gold Fields	5.82
Gold Corp	4.37
Freeport-McMoran Copper & Gold	4.20
Kinross Gold Company	3.10
Harmony	3.05
Newcrest Mining	2.75
Buenaventura	2.13

Source: Merging parties' submission based on Brook Hunt – February 2009

[15] From the above table, it is clear that Harmony has 3%, and Pamodzi's share is estimated to be 0.23%. The post merger market share of the merged entity will be 3.28%, which is small and as a result, does not raise competition concerns.

Public Interest

[16] The merging parties argued that without the merger being approved, a total of 3 606 employees of Pamodzi Free State will permanently lose their employment as Pamodzi Free State will be placed in final liquidation. The proposed merger will limit the loss of employment to approximately 1 600 employees. At the time the target firm was placed under provisional liquidation, all employment contracts were suspended. Employment contracts were not terminated however but employees have not been paid for many months causing great hardship. Harmony has signed Union Termination and Recall Agreement in terms of section 197(6) of the Labour Relations Act 66 of 1995 and the Separation Agreement with the National Union of Mineworkers and Solidarity, the two unions representing the largest number of employees of Pamodzi Gold Free State. In terms of those agreements Harmony has undertaken that it will re-engage 2400 employees within 24 months. Approximately 1600 employees will permanently lose their jobs as they will not be recalled. The merging parties have argued that the loss of employment is not due to the transaction as all employment contracts had been suspended prior to the transaction being implemented. The unions have provided letters of comfort in support of the

merger and the recall process. In order to protect the interest of the employees to be recalled, the Tribunal made Harmony's undertakings conditions for the approval of this merger.

- [17] There are two reasons for this. In the first place it would appear that the job losses have been made merger specific by Harmony's insistence that the liquidators dismiss the workforce subject to the recall agreement as a condition of their offer to purchase. Secondly, although Harmony has negotiated with the unions over the job losses and arrived at an agreement with them, the agreement is with the unions not the individual employees and requires the unions to act to enforce compliance with its terms. Given the number of employees at risk we do not consider this sufficient protection and hence we proposed the condition which the merging parties to their credit had no objection to.

Conclusion

- [18] The merger is approved subject to the conditions as contained in the order issued by the Tribunal attached hereto as Annexure "**HP1**".

N Manoim
Presiding Member

5 February 2009
DATE

A Wessels and Y Carrim concurring.

Tribunal Researcher : R Kariga

For the merging parties: R Bhana (SC) and M Derwance instructed by Cliffe Dekker Hofmeyr Attorneys and Knowles Hussain Attorneys

For the Commission : M Van Hoven and L Madihlaba (Mergers and Acquisitions)