IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CASE NO: 204/CAC/JUL22

In the matter between:

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

Heard virtually on 27 July 2022 by Victor J and Davis AJA
Judgment handed down electronically on 03 August 2022

JUDGMENT

DAVIS AJA

Introduction

[1] At the heart of this matter lies the proper approach to the interpretation of section 38 (2A) (d) of the Competition Act (the Act)[1]. This dispute calls into question the scope of this section.[2] The judgment has been delivered at great haste in that a decision is required of this Court before 2 August 2022.

[2] Section 38(2A) (d) provides:

"The Judge President, or any other judge of the Competition Appeal Court designated by the Judge President, may sit alone to consider an- (d) application to suspend the operation and execution of an order that is the subject of a review or appeal."

[3] Briefly the background to this application is the following: Impala Platinum Holdings Limited ("Implats") intends to acquire control over Royal Bafokeng Platinum Limited ("Royal Bafokeng"). That transaction has been notified to the third respondent which has recommended that the transaction be approved.

[4] The merger relates to Implats' (first respondent) intention to acquire 37.83% of Royal Bafokeng (second respondent) issued share capital and seeks to increase its shareholding beyond 50%. Northam Platinum Holdings Limited ("Northam") holds 334.5% of Royal Bafokeng's issued share capital.

[5] Implats is involved in the production and sale of the platinum group metals (PGM) It is vertically integrated with a presence at each level of the PGM value chain. The PGM market has three major participants Amplats, Implats and Sibanye. The remaining participants are referred to as junior members. Royal Bafokeng, the target

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[1] No 89 of 1998 as amended

[2] In the time available to this Court, only one previous determination of the meaning and scope of s38(2A) could be found. In their heads respondents submit thus in relation to that authority: In **Community Health Care Holdings (Pty) Ltd v The Competition Tribunal and others** CAC case no 46/CAC/Feb05, at paras 9 and 13 the court recognised the applicant in that case would have had no case for a suspension under section 38(2A) (d) had it not also applied to review the approval of the merger. The fact that that the applicant had appealed/reviewed the Tribunal's decision to refuse its application to intervene in the Tribunal proceedings and, thereafter, to postpone the Tribunal's hearing was said "not [to] to take the matter [section 38 (2A) (d) application] any further. A careful reading of this judgement reveals that it is only authority for the proposition that prospects of success are an important part of the s38(2A) enquiry, and thus are considered later in this judgment.

firm in also in the PGM market upstream but not downstream. There are three levels in the value chain. These are the mining and concentration market, the smelting and conversion market, and the refining market. It is applicant's case that the Commission incorrectly dealt with these three categories in the value chain which would result in the Tribunal making a finding based on incorrect facts. The entire foundational edifice of the merger would collapse and if the merger were to run its course without suspending the process, enormous resources would be lost. Should Northam (the applicant) ultimately succeed in an appeal and review and the merger process not suspended, the entire merger proceeding would be set aside and would have to be repeated. This would be a needless waste of resources not only of a financial nature but also the waste of time resources as well.

[6] The applicant brought an application to intervene in the merger proceedings. In granting Northam the right to participate, the Competition Tribunal found that;

> "*Northam … could assist the Tribunal in gaining deeper insights.*"

It granted Northam participation rights specifically in respect of,

> "*the vertical effects of the proposed merger, including the effect on competition in the local upstream market for the production and sale of primary concentrate*" and "*the extent to which the merger effects could be prejudicial to junior miners in South Africa.*"

[7] Applicant is itself *not* a junior miner, which meant that in order to properly exercise its participation rights, it contended that it required certain procedural rights, which the Tribunal denied it. Applicant submits that the Tribunal erred in granting Northam participation rights but then refusing it the procedural rights which were inextricably linked to and necessary for applicant to properly ventilate the theories of harm identified by the Tribunal as relevant to its consideration of the merger.

[8] On that basis, applicant has; launched an appeal against part of the Tribunal's order in the intervention application. In addition to that appeal, applicant seeks to review the Tribunal's decision on the basis that the Tribunal made findings against applicant in circumstances where the latter argues it was refused a fair hearing on those issues.

[9] Applicant submits that in order to show the vertical effects in the local upstream market for the production and sale of primary concentrate and the extent to which the merger could be detrimental in particular to junior miners and the anticompetitive effects in the market, it had to place sufficient evidence before the Tribunal.

[10] In essence the applicant takes issue with the order of the Tribunal which denied applicant the following rights (i) to call for discovery, (ii) to suggest names of witnesses that the tribunal should call to appear before it, (iii) to request the Tribunal to require production of certain relevant documents, (iv) to have access to relevant portions of the merger record. Applicant contends that the refusal of these basic litigation rights is legally unjustifiable.

[11] This was not a case where the applicant for intervention was held not to have put up the necessary case. In the context of the present merger proceedings, the Tribunal was satisfied that applicant has identified two credible theories of harm which may flow from the merger and that it must consider before approving the transaction. The Tribunal confirms at paragraph 59, that:

> "... *we do appreciate the fact that Northam ... could assist the Tribunal in gaining deeper insights.*"

[12] In order, therefore, for applicant to properly ventilate these theories of harm and present a complete picture to the Tribunal regarding them, it has contended that it was necessary that it be afforded certain procedural rights. In particular, applicant sought permission to:

12.1 Call for further and better discovery[3] - this was necessary because, as explained in Northam's intervention application, the Commission appeared to have neglected to call for the agreements between junior miners and third party smelters or Implats.[4] The Commission, and in turn, the Tribunal, could only ever properly interrogate the foreclosure effects of the merger on junior miners if it had these agreements before it. Clearly, in order to meaningfully exercise its rights and complete the picture regarding

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[3] Prayer 5.3 in Northam's notice of motion in the intervention application at page 40 of the Bundle.
[4] Intervention application para 116 – 117 at page 297 of the Bundle.

foreclosure to junior miners, Northam required the right to call for further and better discovery regarding these relationships.

12.2 Subpoena certain persons and/or documents[5] – this was necessary to ensure that the Tribunal was presented with a complete picture of the competitive dynamics in the relevant markets.

12.3 Adduce this evidence to the Tribunal for it to be tested through cross-examination.[8]

[13] The Tribunal denied Northam all of those procedural rights. As a result, the Tribunal identified two credible theories of harm for consideration but disabled Northam's ability to assist it in its consideration of each as required by section 12A.

[14] Applicant thus submits that the Tribunal erred in granting Northam participation rights but then refusing it the procedural rights which were inextricably linked to and necessary for Northam to properly ventilate the theories of harm identified by the Tribunal as relevant to its consideration of the merger.

[15] On this basis, applicant is appealing parts of the Tribunal's order in the intervention application. In addition to that appeal, applicant is reviewing the Tribunal's decision on the basis that the Tribunal made findings against applicant in circumstances where it refused it a fair hearing on those issues

The present application

[16] In oral argument counsel for the applicant clarified the relief that was sought. In terms of s38(2A) (d) what was sought was an order which would ensure that the applicant's participation in the merger proceedings could not be finalized until the review and appeal applications had been determined by this court. Thus the hearing, scheduled to commence on 2 August (hence the urgency of these proceedings) could proceed but the Tribunal would not be able to complete the hearings and issue its

[5] Prayer 5.4 in Northam's notice of motion in the intervention application at page 40 of the Bundle. Prayers 5.6 and 5.7 of Northam's notice of motion in the intervention application at page 40 of the Bundle

decision until the full extent of the applicant's rights had been determined by this court after deciding the merits of the review and appeal which has been launched by applicants.

[17] The essence of the argument presented was that there was acceptance by the Tribunal that applicant's participation could assist in respect of two important theories of harm that the Tribunal was mandated to consider.

[18] In this connection the finding of the Tribunal was justified as follows at paras 89 -90 of its determination: However, it may be that Northam, from its own experiences and its unique position in the market could assist the Tribunal in improving its understanding of the market dynamics at a local level. Recall that Northam is a miner that straddles the gap between the junior and the major players. As a mid-sized miner, it is both a customer of the larger players and a supplier to the smaller junior players.

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

[20] Counsel for the applicants submitted that for the hearing to proceed in circumstances where key documents that were necessary for the applicants to vindicate its rights to participation as expressly recognized by the Tribunal would run the risk of a legally proper hearing unless its circumscription of the applicant's rights were justified by the decision of this Court upon the determination of the review and appeal applications.

[21] Counsel for the first respondent argued that what was being sought by applicant was interdictory relief which on these papers was legally untenable. No proper case had been made out for an interdict on applicant's papers. Counsel

submitted that even if the Tribunal has made an order formally dismissing the procedural relief sought by applicant, this Court could not be called upon to suspend the dismissal of that relief. That was, in his view, plainly not the purpose of the relief contemplated in section 38(2A), which is to restore the *status quo* as it existed before the Tribunal's Order. As the Supreme Court of Appeal stated in **MV Snow Delta:**[6]

> *"[a] dismissal of a claim or application is not suspended pending an appeal, simply because there is nothing that can operate or upon which execution can be levied".*

[22] First respondents' case was thus that section 38(2A) empowers this court to suspend the operation and execution of a Tribunal order. If the Tribunal has not made an order, or its order is one dismissing an application or part of an application, there is nothing to suspend because there is nothing in operation.

[23] The argument presented by first respondent elides over the wording and thus the significance of s38 (2A). It is the legal effect of this section and not the common law relating to interdicts that is in play in this application. And the wording is wide. It says in express terms that this Court can suspend an order of the Tribunal that is subject to a review or any appeal. There appear to be no fetters on the power so granted which means that the Court is surely empowered to suspend part of an order, in this case suspend the rush to complete the participation of the applicant, which right has been recognized by the Tribunal, before the full ambit of its rights being determined by this Court. It is for this specific reason that this Court has rejected the arguments relating to the common law of interdicts which were so enthusiastically presented by respondents' counsel.

Peremption

[24] The legal principles pertaining to peremption are well-established. In **Gentiruco AG v Firestone SA (Pty) Limited,**[7] Trollip JA stated:

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[6] **MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd** 2000 (4) SA 746 (SCA) para 6.
[7] **Gentiruco AG v Firestone SA (Pty) Limited** 1972 (1) SA 589 (A) at 600A-B.

"*The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be perempted if he, by unequivocal conduct inconsistent with an intention to appeal, shows that he acquiesces in the judgment or order.'*

This principle has been recently confirmed by the Constitutional Court that peremption is only established where the conduct of the party in question leaves no shred of reasonable doubt that the party has resigned itself to the unfavourable order that could otherwise be appealed against."[8]

[25] Regrettably the first respondent appears to have elided over the requirement of shred of reasonable doubt and that is fatal to its peremption argument.

[26] The basis of its case concerns the conduct of applicant's advisers in accessing the confidential merger report. Accessing the merger report can in no way be interpreted as Northam clearly and unequivocally waiving its right to challenge those parts of the Tribunal's order that denied it the procedural rights necessary to meaningfully participate in the merger proceedings. It cannot argue that because its advisers accessed the merger report, Northam waived its constitutional right to challenge that part of the Tribunal's order that denied it the right to cross-examine witnesses in the merger proceedings.

Prospects of success

[27] First respondent's counsel pressed the point of this Court having to consider the prospects of success on review/appeal in order to determine this application. In this, he correctly cited this Court's decision in of **Community Health Care Holdings (Pty) Ltd v The Competition Tribunal and others** CAC case no 46/CAC/Feb05 at paras 9 and 13 in support of this proposition. The threshold for this enquiry is at the most set at a prima facie level. Most certainly this court cannot delve into the merits of the review /appeal application save for peeking into the case to determine whether there is a legal basis for the application which has clear prospects of success.

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[8] **Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others** [2021] ZACC 28; 2021 (11) BCLR 1263 (CC).

[28] The core problem for the first respondent's argument is that it was based on a review/ appeal application that was drafted of necessity in broad terms in that the Tribunal had not at that point delivered its reasons for the order against which the review and appeal had been lodged.

[29] Reverting again to the ratio of the Tribunal in paras 89-90 of its determination, it is apparent that it based its decision on a balancing of interests which hardly makes clear why it arrived at the balance it reached. It is not the task of this court to do more than determine whether is an arguable case on review/appeal which may succeed. Nothing suggested by the first respondent other than basing his argument on the preliminary notice disturbs the fact that the range of the rights of participation already granted by the Tribunal will require careful interrogation by this Court in the consequent proceedings, particularly in that the reasoning is based on a balancing of competing interests which full argument may reveal to be flawed. But this conclusion, of necessity, is based on a judicial peek and no more.

[30] Much was made by respondents of the wide discretion available to the Tribunal in determining rights of participation. In this connection reliance was placed on the recent judgement in **Africa Data Centre SA Development (Pty) Ltd v Digital Titan (Pty) Ltd** [2022] ZACAC 6. However, as para 25 of that judgement makes crystal clear this Court in Africa Data left open for latter determination what is the exact nature of the discretion available to the Tribunal. In the present dispute the decision relates not to rights of participation but to related ancillary rights relating to the information that the right so granted should permit. In itself this is a question that will have to be determined by this Court in the review/appeal proceedings.

Prejudice

[31] A great deal of emphasis was placed by both parties on the prejudice which could be caused by either result. Mergers are inherently urgent but in this case the longstop date is now set as being at 26 September 2022. In my view, the review and appeal proceedings can and should be determined by the end of August as a matter of urgency. The Tribunal would thus be free to complete the hearing and issue an order prior to the longstop date. It would of course have the power to set a confined

timetable for applicant's participation even if the latter succeeds in its review/appeal application to ensure expedition of the completion of the hearing.

[32] First respondent contends that there is no prejudice that arises to applicant if this application is not granted. In its view there is no reason why the appeal and the review cannot be heard after the merger hearing – a favourable ruling in respect of either the appeal or the review after the merger hearing would ground a basis for setting aside any approval of the merger, which may have been granted in the interim.

[33] By contrast, the prejudice to the merger parties that would flow from a delay in the determination of the merger is manifest. As indicated the proceedings can be completed without prejudice to the respondents. But and what makes this case different from an application for intervention is that the Tribunal has granted the applicants these rights. If the review /appeal succeed and the hearing has by then been completed and an order granted, the proceedings would be susceptible to being set aside precisely because applicants rights of participation had been wrongly circumscribed.

[34] These considerations dictate that a very narrow order in favour of applicant should be granted, far more modest in its relief from that sought by applicant in a draft order that it produced upon the request of the Court and which order has taken careful account of a written submission of the first respondent which followed the production of the draft order.

[35] In response to the draft order presented on request of the Court, respondents filed a note of objection based on the arguments presented to the Court during the hearing. In essence the argument was the following: The relief sought by applicant was in the form of an impermissible interdict seeking a form of positive relief that does not flow from a suspension of the Tribunal's order, or any part thereof. In the view of respondents, it would place applicant in a better position than it occupied before the Tribunal gave its intervention order. This would constitute a decision that was inimical to the notion of a suspension application, whether based on common law or under section 38(2A) (d). In the circumstances, the interdictory relief now sought in new prayer 2 of the "draft order" cannot be granted by the currently constituted Court under

section 38(2A) (d) of the Act. It would have to be sought, if at all, from a fully constituted Court under another section of the Competition Act.

[36] As was set out earlier in this judgement, arguments based on the common law, or the jurisdiction of this Court fails to come to grips with the wording of the section. The power granted to this Court in terms of s38 (2A) (d) is wide. It allows this Court to suspend the execution of an order of the Tribunal that is the subject of a review or an appeal. In the present dispute part of an order has been taken on review/appeal. There is nothing in the section that would suggest that only a complete as opposed to part of an order can be subject of a suspension. What relief is being sought by applicant is that the effect of the narrow rights to information granted to the applicant be suspended in that its rights of participation can only be put into effect upon the determination of the review/appeal. There is nothing inimical to the notion of suspension as provided for in the section nor, significantly could counsel point to any authority to support his argument, neither at the hearing nor when completing the additional written submission generated on the following day. The section is concerned with the doing of justice in that once a review /appeal has been lodged, the effect of the order or part thereof should be held in abeyance for a defined period, being the determination of the review/appeal. In this way the purpose of the review /appeal is safeguarded, as for example, in this case where the contours of the rights granted to applicant are clarified before the hearing is completed.

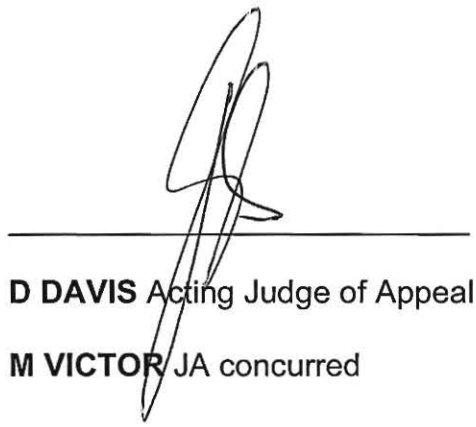
Order

[37] In the result the following order is made: The Tribunal's hearing in respect of the large merger under case number LM156Dec21 may not conclude until Northam's rights of participation in the hearing have been determined in the appeal and review under case numbers 202/CAC/Jul22 and 203/CAC/Jul22, in respect of:

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

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

37.3 the first and second respondents are to pay applicant's costs including costs of two counsel the one paying the other to be absolved.



D DAVIS Acting Judge of Appeal

M VICTOR JA concurred

Appearances

Counsel for Applicant:	Adv Michelle Le Roux SC
	Adv Shannon Quinn
	Adv Kerry Williams
	Adv Jabu Chanza
Instructed by:	Webber Wentzel
Counsel for First Respondent:	Adv Jerome Wilson SC
	Adv Tembeka Ngcukaitobi SC
	Adv Gavin Marriott
	Adv Sarah Pudifin-Jones
Instructed by:	Nortons Inc
Date of hearing:	27 July 2022
Date of judgment:	03 August 2022