IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Reportable

Case No: 202/CAC/Jul22 and 203/CAC/Jul22

In the Appeal between:

NORTHAM PLATINUM HOLDINGS LIMITED	Appellant

and

IMPALA PLATINUM HOLDINGS LIMITED	First Respondent
ROYAL BAFOKENG PLATINUM LIMITED	Second Respondent
THE COMPETITION COMMISSION	Third Respondent
THE MINISTER OF TRADE, INDUSTRY AND COMPETITION	Fourth Respondent

And in the Review Application between:

NORTHAM PLATINUM HOLDINGS LIMITED	Applicant

And

YASMIN CARRIM NO	First Respondent
ENVER DANIELS	Second Respondent
IMRAAN VALODIA NO	Third Respondent

IMPALA PLATINUM HOLDINGS LIMITED	Fourth Respondent
ROYAL BAFOKENG PLATINUM LIMITED	Fifth Respondent
THE COMPETITION COMMISSION	Sixth Respondent
THE MINISTER OF TRADE, INDUSTRY AND COMPETITION	Seventh Respondent

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JUDGMENT:

Davis AJA

Introduction

[1] This is an appeal and review against a decision of the Competition Tribunal ('The Tribunal') of 22June 2022 in which, in terms of s53 (c) of the Competition Act 89 of 1998 ('the Act'), it granted appellant a restricted suite of rights of participation in a large merger proceeding involving first and second respondent. Dissatisfied with the restrictive nature of the rights of participation so granted, the appellant approaches this court for relief in terms of an appeal and review which it has launched against the order of the Tribunal. It has been heard by this Court on an expedited basis; hence this judgment has unfortunately been prepared under considerable pressure.

[2] The disposition of these proceedings trigger a set of related legal issues. In the first place it concerns an enquiry as to the nature of rights of participation as envisaged in terms of s53 of the Act and what rights flow therefrom. Coupled thereto is the question

of the nature and scope of merger proceedings to be conducted by the Tribunal in terms of sections 12 A and 14 of the Act. Finally, it raises the question of the nature of the discretion exercised by the Tribunal when faced with an application by a party to be admitted as a participant and the nature of its participation.

The background

[3] Briefly the background to this application can be summarised thus: first respondent (Impala Platinum Holdings Limited) intends to acquire control over second respondent (Royal Bafokeng Platinum Limited). That transaction has been notified to the third respondent which has recommended that the transaction be approved.

[4] The merger relates to first respondent's intention to acquire 37.83% of second respondent's issued share capital and seeks to increase its shareholding beyond 50%. Appellant holds 34.5% of second respondent's issued share capital.

[5] First respondent 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. Second respondent, the target firm is 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 appellant's case that the Commission incorrectly dealt with these three categories in the value chain which it followed and would

result in the Tribunal making a finding based on incorrect facts. In its view, the entire foundational edifice of the merger would collapse if the merger were to run its course without suspending the process, enormous resources would be lost.

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

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

It granted the appellant 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] Appellant 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. Appellant submits that the Tribunal erred in granting it participation rights but then refused it the procedural rights which were inextricably linked to and necessary for appellant to properly ventilate the theories of harm identified by the Tribunal as relevant to its consideration of the merger.

[8] On the basis of its legal dissatisfaction with the order so granted, appellant has launched an appeal against part of the Tribunal's order in the intervention application. In addition to that appeal, appellant seeks to review the Tribunal's decision on the basis that

the Tribunal made findings against appellant in circumstances where the latter argues it was refused a fair hearing on these issues.

[9] Appellant 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 appellant 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. Appellant contends that the refusal of these basic litigation rights is legally unjustifiable.

[11] It is important at the outset to emphasise the following: this is not a case where the applicant for intervention as a participant has been held not to have put up a case to justify participation. In the context of the present merger proceedings, the Tribunal was satisfied that appellant 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 appellant to properly ventilate these theories of harm and present a complete picture to the Tribunal regarding them, it has contended that it was necessary to have sight of the Commission's report and that it be afforded certain procedural rights. In particular, appellant sought permission to:

12.1. Call for further and better discovery[1] - 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.[2] 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 foreclosure to junior miners, appellant considers that it is required the right to call for further and better discovery regarding these relationships.

12.2. Subpoena certain persons and/or documents[3] – 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]

[1] Prayer 5.3 in appellant's notice of motion in the intervention application at page 40 of the Bundle.
[2] Intervention application para 116 – 117 at page 297 of the Bundle.
[3] Prayer 5.4 in appellant's notice of motion in the intervention application at page 40 of the Bundle. Prayers 5.6 and 5.7 of appellant's notice of motion in the intervention application at page 40 of the Bundle

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

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

[15] On this basis, appellant appeals against parts of the Tribunal's order in the intervention application. It contends that the Commission had failed to procure the necessary documents to properly interrogate the vertical theories of harm referred to above, and (ii) those missing documents are not within appellant's possession. For the appellant, in order for it to meaningfully exercise its rights and to complete the picture, further and better discovery was necessary. Thus it argued

15.1. By denying appellant the right to require that certain persons appear before the Tribunal and/or produce documents, the Tribunal overlooked the fact that the specific theories of harm in respect of which appellant was granted intervener status relate, first and foremost, to firms other than appellant. Appellant argues that it is not itself in possession of the information necessary to properly ventilate the identified theories of harm. Thus, it argues that if it was to properly assist the Tribunal in its statutorily mandated merger

assessment, it needed the right to require certain persons to appear and/or produce documents.

15.2. Having granted appellant intervener status, the Tribunal denied it the right to adduce any oral or documentary evidence. It contends that it is artificial to admit someone in as an intervener but to deny them the ability to adduce evidence. That is particularly so where in the appellant's view the Commission's merger investigation was demonstrably deficient, as was the case here.

15.3. Having granted appellant intervener status, the Tribunal then disallowed it access to the Commission's merger record. Absent a full appreciation of what the Commission's merger record comprises, appellant – a successful intervener – is left in the dark. The Tribunal is also, in some respects, in the dark because it is being called on to determine a large merger based on an incomplete investigation and insufficient evidence. And it will remain in the dark because it has refused to allow appellant to supplement the evidence.

In addition, appellant contends that the bases on which the Tribunal disallowed it all of those procedural rights are also unsustainable, given procedural irregularities committed by the Tribunal.

<u>The issue of participation: the relevant law</u>

[16] Section 53 of the Act provides thus: The following persons may participate in a hearing contemplated in section 52, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing: (a) the Commissioner, or any person appointed by the Commissioner; (b) the complainant; (c) the firm whose conduct forms the basis of the hearing; and (d) **any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Competition Tribunal, that interest is adequately represented by another participant**. (my emphasis)

[17] S 52 of the Act provides thus: (1) The Competition Tribunal must conduct a hearing into every matter referred to it in terms of section 50(a) or section 51 (1), 15 (2) The Competition Tribunal must conduct its hearings in public — (a) in an inquisitorial manner; (b) as expeditiously as possible; (c) as informally as possible; and (d) in accordance with the principles of natural justice.

[18] Rule 46 (2) of the Rules of the Tribunal also merits consideration in the context of this case:

> 'No more than 10 business days after receiving a motion to intervene, a member of the Tribunal assigned by the Chairperson must either
>
> (a) make an order allowing the applicant to intervene, subject to any limitations –
>
> (i) necessary to ensure that the proceedings will be orderly and expeditious; or

(ii) on the matters with respect to which the person may participate, or the form of their participation; or

(b) deny the application, if the member concludes that the interests of the person are not within the scope of the Act or are already represented by another participant in the proceeding.'

[19] These sections reveal the following: Once granted rights of participation, than in terms of this decision by the Tribunal, the successful applicant becomes a party to proceedings and thus is in a distinctively different legal position to an amicus curiae. While the participant such as the appellant is required to apply to assist the Tribunal in its inquiry, once admitted, it has the status of a party. So much is clear from the underlined provision contained in s53 of the Act; that is the right to ask questions of witnesses and inspect documents.

[20] Rule 46(2) does qualify this right in that a right to participate can be restricted by the Tribunal in order to promote expedition of decision. This balance between rights granted to a participant against the need for expedition was confirmed by this Court in *ADC v Digital Titan* [2022] ZACAC 6 at para 17 where the Court held that the decision by the Tribunal to admit a participant 'entails taking into account the likelihood of assistance promised by the prospective intervener, balanced against the consequences of the intervention in terms of the expedition and resolution of the proceedings. If the likelihood of the prospective intervener assisting the Tribunal's enquiry is doubtful, while the impact of the intervention is more

than likely to impact on the expedition of the proceedings, then the Tribunal should decline the intervention or curtail its extent'.

[21] As s52 makes clear, the Tribunal is required to conduct proceedings in an inquisitorial manner. This approach is particularly important in the case of merger control which, at root, is concerned with the determination of how the structure of the relevant market will be affected by the proposed merger and where, when compared to the counterfactual, will result in a substantial preventing or lessening of competition. Whereas a hearing which concerns a restrictive practice or an abuse of dominance by one dominant firm is concerned to examine and determine whether an existing practice or form of conduct infringes the relevant section of the Act, merger control looks into the future and compares an informed prediction with the status quo in the relevant market.

[22] Two consequences follow. Firstly, the inquisitorial model of adjudication as provided for in s52 of the Act is well suited to a merger hearing. Secondly, this model mandates the Tribunal to act in a manner in which it conducts its hearing with an inquiring mind. By this, is meant that the Tribunal should fulfil its inquisitorial role in a fashion similar to that laid out by Nugent JA in *Public Protector v Mail and Guardian Ltd and others* 2011 (4) SA 420 (SCA) where, on behalf of the unanimous court, albeit in the context of an inquiry conducted by the Public Protector, the learned judge of appeal said:

> 'A proper investigation might take as many forms as there are proper investigators. It is for the Public Protector to decide what is appropriate to each case and not for this Court to supplant that function…but I think there is nonetheless at least one feature of an

investigation that must always exist – because it is one that is universal and indispensable to an investigation of any kind which is that the investigation must have been conducted with an open and inquiring mind. An investigation that has not conducting with an open and inquiring mind is no investigation at all.' [4]

[23] It is now possible to examine the present appeal through the prism of this analysis of the relevant law. To do so it is necessary to examine the reasoning adopted by the Tribunal in order to justify its order.

The Tribunal's determination

[24] Regrettably the Tribunal's reasoning is somewhat difficult to follow and, in significant part, read as a whole, the determination appears to be at war with itself. This reluctantly expressed criticism is based upon the initial part of the Tribunal's reasoning that none of the theories of harm put up by appellant held much weight. Nonetheless, it found that the appellant had passed the threshold for admission as a participant, reasoning thus:

'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. In balancing the potential delays that could occasion the expedition of proceedings, especially in the context of a public offer, were

[4] This test was confirmed by the Constitutional Court in *The Public Protector v The President of the Republic of South Africa and Others* 2021(9) BCLR 929(CC) at para 139

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 recommendation. (paras 80-82) Accordingly, we granted Northam limited rights to participate in the large merger proceedings ….'

[25] The Tribunal's reasoning is truly thin on justification for admission of appellant as a participant. As to the alleged vertical theory of harm, it said that:

'Northam's foreclosure of capacity for third parties (junior miners) was challenged by the Commission's assessment that capacity arrangements were governed by contracts and the unlikelihood of foreclosure. Its theory of foreclosure was further weakened by Implats' evidence that any move away from Amplats could only occur in 2027 (if at all) and of increased capacity in its own processor. Overall, we found that Northam's horizontal effects had little to offer. On the vertical, while its theory was challenged by both the Commission and Implats, we took cognisance of its unique position as a mid-level miner and that it might be able to provide. Its central concern relates to the potential effects of the merger on junior miners, including concerns related to remaining smelting capacity. As both customer of the larger players and supplier to the junior miners, Northam presumably has insights related to, in particular, POC, offtake and smelting agreements. This could assist the Tribunal in its deliberations.' (para 83)

[26] On the argument related to public interest grounds, it held:

'We found that Northam has little to add. Northam as shareholder can provide input into the ESOS process in that capacity if it so wishes. Northam could not point to any other

public interest concerns which were not adequately addressed by the proposed conditions to the merger. It was not clear in which way Northam could meaningfully contribute to this process as an intervenor in these proceedings. The fact that Northam is a rival bidder, is relevant to the exercise of our discretion in this matter, balanced against the possible assistance an intervenor could provide us with.' (paras 84-85)

[27] Notwithstanding its tepid response to appellant's case, the Tribunal granted an order in favour of appellant's participation in the merger and which provided rights which allowed appellant's legal and economic legal advisors access to the confidential version of the Commission's recommendations subject to the appropriate confidentiality undertakings been given. It permitted the making of written submissions to the Tribunal within 15 business days of its order and further permitted the appellant to make oral submissions subject to a maximum provision of one hour to at the merger hearing.

[28] In terms of this order, the Tribunal denied to appellant rights which it requested, including access to the Commission's record, a call for discovery of further relevant documents from the merging parties, the right to request the Tribunal to summon third parties to produce relevant documents at the merger hearings and to call and to cross examine witnesses.

The appellant's case

[29] In arguing that the Tribunal had committed both appealable and reviewable errors in how it decided to conduct the hearing of the proposed merger as a result of its

restriction of rights of participation to the appellant, Ms Le Roux, who appeared together with Mr Quinn, Ms Williams and Ms Chanza on behalf of the appellant, contended that the order issued by the Tribunal hollowed out appellant's participation in the merger proceedings to the extent that the Tribunal would not be able to properly assess the proposed merger and the competition and public interest effects thereof or, alternatively whether conditions were required to remedy these effects. In particular, Ms Le Roux contended that by making this order, the Tribunal had effectively ensured that it would not be able to properly assess the two vertical theories of harm raised by appellant and whether its overall assessment of the merger would undoubtedly benefit from obtaining further facts given the incomplete picture which it had before it.

[30] Ms Le Roux contended further that, by way of its restricted order, the Tribunal had ensured that it remained ignorant of these key facts which could only be found by the merging parties disclosing further documents, particularly respondents' POC / off take agreements with junior miners and the considering of further documents which were required from third party junior miners, particularly the junior miners' POC / off take agreements with Sibanye, and Amplats as well as Amplats, Implats, Sibanye as well as enabling appellant to provide the relevant smelting and base metal removal capacity and utilisation information.

[31] Ms Le Roux further submitted that the errors committed by the Tribunal in refusing to grant appellant meaningful rights of participation meant that the entire merger was now based on the Commission's flawed report. Appellant's case was directed to what it

considered were various material errors in the Commission's analysis, including in respect of junior miner foreclosure. In particular, Ms Le Roux contended that the Commission's assessment of the implications for junior miners had been premised on a misunderstanding of the operation of junior miners. Further, there was insufficient evidence for the Tribunal to make its own informed determination and in more general terms, by refusing to lift its gaze and enquire into the complete picture which was triggered by appellant's contention in respect of its vertical theory of harm. It needed to deal with the argument of the extent to which the effects of merger could be prejudicial to junior miners in South Africa. Thus, the Tribunal by relying almost exclusively on the Commission's report would fail to meet the standard required of it in terms of the inquisitorial process which it was mandated to conduct, particularly with regard to a merger hearing.

[32] Mr Wilson, who appeared together with Mr Ngcukaitobi, Mr Marriott and Ms Pudifin-Jones on behalf of first and second respondents, submitted that the appeal had no merit. In the first place an appeal of this nature had to fail because the grant of intervention was discretionary and accordingly a court would not interfere because it might have reached a different decision. In Mr Wilson's view, the appellant was required to show that the Tribunal had misdirected itself and this he contended it plainly failed to do.

[33] The core of Mr Wilson's argument was in effect that appellant had sought to intervene in the Tribunal process on the basis that it had unique inside knowledge and possession of facts which it could place before the Tribunal and which would assist the

latter in its determination of the merger. Thus, appellant's case for intervention was based on the strength of claims that it had made regarding its ability to assist the Tribunal based on its own experience in the market; in particular insofar as market definition and the understanding of purchase – of – concentrate (POC) agreements were concerned. It therefore did not behove the appellant to now argue that, notwithstanding its claim to extensive personal knowledge and evidence necessary to sustain its theories of harm, it, without the further procedural rights of access to the record, discovery and the ability to call the evidence of third parties, including junior miners, would not be able to contribute significantly to the overall assessment, or as appellant claimed its participation was now 'illusory at best'.

[34] In support of this submission, Mr Wilson referred extensively to the founding affidavit of Ms Beale in support of appellant's application for participation in which she claimed that appellant:

1. "is a mid-tier mining company which also understands the challenges faced by junior miners – especially when it comes to the challenges in securing capacity for the processing of primary concentrate from the aforementioned "Big 3". Northam has knowledge and facts that straddle the divide between being a junior miner and major – knowledge and facts that will be useful to the Tribunal.
2. "understands the unique and complex dynamics of the PGM industry. It is a customer when it comes to selling primary concentrate to Implats and it is further a provider of smelting facilities for primary concentrate to junior miners. It accordingly has experience in implementing off – take agreements for the sale of primary

concentrate (vis-à-vis Implats) and it has experience negotiating off – take / purchase of concentrate agreements for the junior miners it services".

3. "understands and appreciates the challenges junior miners face in South Africa … The aforementioned features of Northam' s business mean that it has knowledge and facts that straddle the divide between being a junior miner and a major".
4. "has extensive experience operative as a junior miner, implementing its off – take agreements, occasionally negotiating sales of primary concentrate agreements when these are necessary, negotiating refining agreements, and developing and operating smelting, converting and base metals removal facilities. Northam is also a substantial employer in the PGM industry, with extensive practical experience in the realities of large scale labour negotiations, community engagement and regional development.
5. "will be able to assist the Tribunal in its analysis of the relevant market. If Northam's application to intervene is granted, it intends to place evidence before the Tribunal to demonstrate that the PGM industry should be divided into three functional markets that each comprise one of the different levels of the PGM supply chain".
6. "its factual input will be helpful as it is a market participant and operator of its own smelting, converting and base metal removal facilities that processes primary concentrate. It sometime enters into POC agreements with junior miners which require its services".
7. "…Northam can assist the Tribunal in assessing whether the proposed merger gives rise to a substantial lessening of competition in the downstream market for the smelting of primary concentrate. As explained above, Northam is uniquely positioned to do so as it straddles the divide between junior miner and major. Northam can assist the Tribunal by providing and electing facts which will demonstrate at least three possible anti-competitive effects".

8. “Northam can also give nuanced evidence on the incentives for both junior miners and major – the former will be particularly helpful as it may be that junior miners are unable or unwilling to speak frankly in relation to some of the issues being considered by the Tribunal”.

9. “Due to Northam’s extensive experience in the PGM industry, operating in the Bushveld Complex, having operated as a junior miner and now as a mid-tier miner, implementing off – take agreements, occasionally concluding POC agreements, negotiating refining agreements, developing and operating the necessary facilities … Northam is uniquely placed to assist the Tribunal in its consideration of proposed merger”, and

10. “has insight into the experiences of junior miners … Northam is uniquely placed as a mid-tier miner to give this input to the Tribunal … Northam also has the benefit of being on multiple sides of the negotiations between miner / concentrator and smelter / converter / BMR and refinery and is able to assist the Tribunal’s consideration of these valuable and relevant perspectives on the proposed transaction”.

[35] Having been granted the right to participate on the basis of its claim that its specialised inside knowledge would assist the Tribunal in the overall assessment of the merger, its belated attempt at broadening its rights of participation represented no more than a fishing expedition to try to find some evidence to support a theory of harm which had already considered and dismissed by the Commission. Mr Wilson contended, in a theme which ran through much of the respondents’ argument, that appellant’s objective was to delay the determination of the merger given that it was a rival bidder.

[36] Ms Le Roux countered by submitting that the respondents had only relied on part of Ms Beale's affidavit and that there were further passages which clearly indicated to the Tribunal that appellant required a broadening of its rights beyond those which were granted in the order.

[37] In dealing with the question of assistance to the Tribunal, Ms Beale in her affidavit went on to say, after the passages cited by Mr Wilson:

> 'Northam intends to call its own witnesses who can explain the PGM industry, the three functional stages in the PGM production cycle and the negotiation and contracting dynamic associated with agreements that regulate the sale of primary concentrate. Northam can also give nuanced evidence on the incentives for both junior miners and majors – the former will be particularly helpful as it may be that junior miners are unable or unwilling to speak frankly in relation to some of the issues being considered by the Tribunal. Northam was not asked by the Commission to supply its agreements with Implats whereby Implats smelt the Everest mines primary concentrate. Further, Northam was not required to provide the Commission with any of the POC agreements, off – take agreements and return of metal agreements it has concluded with junior miners for the smelting of primary concentrate. If Northam was not asked for its POC agreements off – take agreement and return of metal agreements the Commission probably did not ask any other customers for these agreements. Without an analysis of these POC agreements off – take agreements it is impossible to understand the market's competitors dynamics and relationships for the smelting of primary concentrate. Northam accordingly would want to ensure that the merger parties discover such agreements and further the Tribunal consider subpoenaing these agreements from customers or Amplats and

Sibanye so that the Tribunal can understand the competitors dynamics when these agreements are negotiated and concluded.'

[38] Ms Beale stated further that:

'To vindicate its interest and render full assistance to the Tribunal Northam's external representatives should (subject to providing appropriate confidentiality undertakings) be granted access to all documents while in the merger proceedings under the claim of confidentiality. Northam should also be permitted to call witnesses at the hearing; to cross examine any witnesses called by the merging party, the Commission, or any other parties, to seek discovery concerning specific concerns raised in this affidavit and to adduce argument at the hearing. It is submitted that Northam should also be permitted to participate in all prehearing procedures before the Tribunal including applications for further discovery and access confidential information and all other interlocutory proceedings before the Tribunal. Northam accordingly seeks full procedural rights should have been granted an entitlement to participate in the merger proceeding requested in their company notice of motion.'

[39] In Ms Le Roux's view, read as a whole, Ms Beale's affidavit, while clearly asserting that 'Northam is uniquely placed to assist the Tribunal in its consideration of the proposed merger' (para 123 of the founding affidavit), sought the grant of extensive rights to gain further information so that it could contribute meaningfully to the proceedings. And Ms Beale said so in her affidavit. Therefore, its argument for participation was not based on exclusive knowledge alone but exclusive knowledge which through the prism of further

documents and evidence would be extremely helpful to the Tribunal in the overall assessment of the merger.

[40] Ms Le Roux submitted that once the Tribunal had admitted the appellant as a participant in terms of s 53 (c) of the Act, it had effectively decided that further input was needed in respect of vertical effects of the proposed merger, including the effects of competition in the local upstream market for the production and sale of primary concentrate and specifically the effects of the merger on junior miners; hence the grant to appellant of the status of a participant. In her view, since these effects had not been properly considered by the Commission in its recommendations to the Tribunal, a body such as the Tribunal, which was required to approach the merger hearing with an independent investigative mind, would have surely crafted an order to ensure that further input, which it acknowledged were required by it in order to come to a proper determination of the merger, could be presented to it. By 'hobbling' appellant's participation in the merger proceedings, it had acted in a manner which would undermine the Tribunal's ability to investigate and enquire into the proposed merger as required in terms of s 12 A of the Act.

[41] By contrast, Mr Wilson submitted that the Tribunal had exercised its discretion in a perfectly justifiable manner as reflected in the following passage from its determination:

> '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 is midlevel miner, who is both customer of the larger players in supply to the junior miners, could provide us with,

we have limited participation in such a way as to granted entry on the issues that will be of most assistance to Tribunal's deliberations (sic) while limiting Northam's access to the confidential recommendation.' (para 90)

[42] Mr Wilson further submitted that, were appellant to be granted the full suite of rights which it demanded in terms of its notice of motion, it would in effect have unnecessarily replicated the functions of the Commission and would open the door to any admitted participant invariably enjoying such wide rights of participation that the necessity of balancing enquiry against expedition would be tilted in an unfair manner in favour of the former and against the latter objective.

Evaluation

[43] In turn to evaluate the core arguments raised by counsel.[5] The first key issue is the context of the judgment in *Africa Data Centre SA Development (Pty) Ltd v Digital Titan (Pty) Ltd* [2022] ZACAC 6 relied upon by Mr Wilson. This recent judgment of the Court confirmed the need to balance enquiry against expedition. The Court in that case was required to determine whether the Tribunal had been correct in denying a party rights of participation in terms of s 53 (c) of the Act. In the present case, notwithstanding the equivocal and somewhat contradictory language employed in the determination by the Tribunal, appellant has been admitted as a participant.

[5] There were numerous ancillary arguments concerning the motives of the appellant, the merits of the Competition Commission's recommendations and its analysis of the market the possible, application of the doctrine of peremption and the question of confidentiality which was triggered by overlapping legal teams from the same firm of attorneys acting on behalf of the appellant. None of these interesting issues require assessment in that, in my view, they are irrelevant to the ultimate determination of the appeal and the review which turns, as indicated on a narrow set of questions.

[44] It follows therefrom that a range of arguments presented about the rights of the appellant to participate in the light of alleged improper motives and the desire to delay are irrelevant. This Court is not concerned with whether the appellant should be admitted as a participant. Simply put, the only question for determination is the content of the participation which has been granted to it on the basis that it can assist the Tribunal in respect of the possible vertical effects of the proposed merger and the extent to which the merger effects could be prejudicial to junior miners in South Africa. Accordingly, arguments with regard to the reasons for why junior miners have absented themselves from the merger proceedings and the invitation to this court to involve itself in the merits of the arguments are not relevant to the disposition of this case. To this extent the judgment of this Court in *ADC supra* must be analysed accordingly.

[45] A further important preliminary consideration in the evaluation of the arguments of counsel, was a submission correctly made by Ms Le Roux that each of the rights of participation sought by the appellant in terms of the appeal and/or review before this Court needs to be analysed separately. Each requires assessment on its own merits; that is the extent to which each such right should have been granted by the Tribunal to the appellant, having granted the latter rights of participation.

[46] Accepting therefore the invitation to examine each of the rights on their own, this Court was confronted with varying degrees of opposition or justification to the granting or denying of these rights. The test to be employed in assessing the order of the Tribunal is that the decision to restrict rights granted to a participant must be based on rational

grounds. The approach adopted by the Constitutional Court to the importance of a hearing and the need for a rational justification for a limitation thereof in *Albutt v Centre for the Study of Violence and Reconciliation* 2010(3)SA 293(CC) at para 51, albeit within a different context is equally applicable to the merger proceedings before the Tribunal . Mr Wilson was forced to concede that to grant the appellant an hour to make submissions was hardly justifiable. As indicated, the appellant is not an amicus; it is a participant. In turn, this means that, if it were dissatisfied with the final decision taken by the Tribunal, it would have a right to appeal in terms of s 58 (1) of the Act, which right in itself marks it out as a completely distinct party from an amicus. By the grant of a maximum of an hour, the Tribunal appears to have equated a participant with an amicus.

[47] The Tribunal is manifestly entitled to exercise a discretion to run the proceedings as it deems fit. Needless to say this is a trite proposition. However, to employ the guillotine of a one hour argument does not appear to have any justification nor could Mr Wilson find any. The Tribunal should exercise its discretion in a reasonable fashion in order to ensure that the appellant is able to contribute constructively to the two theories of harm which have been accepted as the basis of its rights of participation. It is not however for this Court to determine the timetable to be adopted by the Tribunal. For this reason an order in favour of the appellant needs to be carefully crafted.

[48] Mr Wilson experienced difficulty in justifying why, having granted the appellant access to the Commission's report there was a rational basis for it to have denied the appellant access to the Commission's record, subject to two important caveats. Mr Wilson correctly proposed that only that section of the record relevant to the theories of

harm for which the appellant has been admitted should be provided to the appellant and, secondly, this should be done on a confidential basis, namely that access should be restricted to appellant's legal representatives. On these conditions, there was agreement between the parties.

[49] By contrast, there does not appear to be any justification to interfere with the Tribunal's decision to deny appellant wide discovery and subpoena powers which it seeks. Mr Wilson is correct to note in this connection that such a right would ignore the requisite balancing exercise and would result in an inevitable delay in the merger proceedings to the extent that the balance would be tilted significantly against the legitimate objective of expedition of a merger hearing. These requested rights would thus expand the scope of participation which, as the relevant law suggests, is subject to reasonable curtailment.

[50] That leaves two issues which require more anxious consideration namely; appellant's argument that it should be entitled to request the Tribunal to summons third parties to produce relevant documents at the merger hearing and the right to call or cross examine witnesses.

[51] These rights need to be evaluated in terms of a series of further considerations. Section 55 (1) of the Act provides that, subject to the Tribunal's rules of procedure, the Tribunal member presiding at the hearing may determine any matter of procedure for that hearing with due regard to the circumstances of the case and the requirements of s 52 (2). Section 52 (2), as indicated, provides that the Tribunal must conduct its hearing in

public as expeditiously as possible and in accordance with the principles of natural justice. Furthermore, Rule 46 (2) (a) provides that a member of the Tribunal, assigned by the chairperson, can make an order allowing the applicant to intervene subject to any limitations (2) on the matters with respect to which the person may participate or the form of participation and in particular in an orderly and expeditious manner.

[52] These provisions caution against this Court interfering in the manner in which the Tribunal conducts its proceedings. Clearly the Tribunal is entitled to make its own judgment call in order to consider the consequences of intervention and to ensure that steps are taken to avoid a hearing from becoming unduly delayed. To the extent relevant, the judgment in *AVC* at para 17 accepted that, where a perspective intervenor's assistance to the Tribunal is doubtful, the Tribunal should at the very least curtail its extent. The Tribunal itself said in *Mihevc Commerce Holdings (Pty) Ltd t/a LLX South Africa and We Buy Cars (Pty) Ltd* Case Number: LM183Sep18 at para 22:

> 'A potential intervenor's probable contribution to merger proceedings must be weighed up against the foreseeable consequence of intervention in terms of the expedition and resolution of the proceedings.'

[53] This *dictum* has however to be considered in terms of the mandate of the Tribunal to conduct its hearings in an inquisitorial way and, more so, in the case of a merger, which, as set out above, entails a prospective inquiry into the effect on the market of the proposed merger as compared to the counterfactual; that is the existing structure of the relevant market absent the merger. While the Tribunal must ensure that a merger hearing is conducted expeditiously as a result of which the decision whether to approve

or disallow the merger is made timeously within the context of the inherent urgency of mergers, once it grants a right to participate, as it did in this case, on the basis of two distinct theories of harm, it must exercise an independent investigative mind regarding the merits thereof. It must ensure that the admitted party is able to provide it with the assistance which in the first place justified the right of participation and where it so limits rights of participation it does so on a clearly justifiable basis.

[54] While granting the appellant the right to summons third parties to produce relevant documents and to call for discover of further relevant documents from the merging parties and affording it a blanket right to call witnesses at its discretion will inevitably result in considerable delays in the completion of the hearing, care must be taken to ensure that the participant is able to exercise the rights which it has been granted in a meaningful fashion.

[55] In this case, on the basis of the conclusion to which I have arrived, the appellant should be entitled to examine the relevant portions of the Commission's record. Including the report on the basis set out earlier. It would then be placed in a situation whereby it would be able to argue that certain contracts have not been properly examined, as it has already submitted to this Court. It could be justified in requiring the Tribunal to hear from a witness who could provide suitably relevant tailored evidence to the Tribunal which would be helpful in its overall assessment. To exclude the possibility of a participant making an application for a document to be produced which has been improperly ignored by the Commission, after a careful examination of the relevant portions of the record, or to refuse to hear a witness who may provide testimony which is material to the overall

assessment of the merger would not be compatible with an independent investigation conducted in terms of an inquisitorial procedure. Manifestly a participant in the position of appellant needs to make out a proper case why an document additional to the existing record placed before the Tribunal should be produced or a witness should be called. This application should be properly considered by the Tribunal which will decide thereon. In summary the ultimate decision is subject to the discretionary powers of the Tribunal but, at this stage, it would be wrong to conclude that there can be no basis to exclude such an application from being brought and considered

[56] It appears that the appellant should be entitled to apply on the basis of a clear justification to call for certain further documentary evidence to be placed before the Tribunal.

[57] In the ordinary course this Court should not deal with the possibility of such an application. The Tribunal must be allowed to craft its own procedure in terms of the relevant provisions of the Act. However, this Court is faced with a difficulty. It is anxious not trench upon the discretion of the Tribunal in the conduct of its hearing .However, he manner in which the Tribunal has crafted its order in this case could be construed as sufficiently restrictive so as to prevent even the making of an application to ensure that a relevant document is made available to the Tribunal or that a witness should be called who could provide vital information which is relevant to the mandated enquiry.

[58] This, conclusion is strengthened by the fact that an examination of the Commissions record could justify such an application. By contrast, that determination

depends upon the record which is not before this Court. Hence, we take the unusual step of confirming a procedural right of the applicant, to bring an application subject to the determination of the outcome of the relevant application by the Tribunal.

[59] Let me emphasise: This Court should refuse the invitation to impose a rigid procedure upon the Tribunal in the conduct of its hearings, by permitting the appellant to make a suitable application for the hearing of additional evidence and/or a witness this court. It must leave the ultimate decision to the Tribunal, which upon an application being made would be in the best position to balance the competing interests of a comprehensive investigation and the need for expedition of the hearing.

[60] In the light of the conclusions to which I have arrived with regard to the appeal, there is no need to traverse the further grounds which were raised in respect of the review application.

Costs

[61] The appellant has not been successful in its attempt to expand its right and obtain a right to call for discovery of further relevant documents or to call or cross examine witnesses. It has however been successful in terms of the time limits imposed upon it, the right of access to the relevant portion of the Commission's record and, to the extent that it should be entitled to make an application for the consideration of additional documentary evidence and/or the calling of a witness, even though the outcome of this application is solely within the province of the Tribunal's discretion. In this sense

appellant has been substantively successful and should be awarded its costs of this hearing. This is particularly so in the light of the very tepid opposition offered by respondents to at least two of the requested rights which required litigation.

Order

[62] The following order is therefore made:

1. The appeal of the appellant succeeds in part.
2. The order of the Tribunal of 22 June 2022 is set aside and replaced as follows:
    2.1. The applicant, Northam Platinum Holdings Limited (Northam) is permitted to participate in the large merger proceedings before the Tribunal in terms of s 53 (c) of the Competition Act 89 of 1998.
    2.2. Northam's participation in the aforementioned large proceedings shall be limited to making written and oral submissions on the following potential theories of harm:
        2.2.1. the vertical effects of the proposed merger including the effect on competition in the local upstream market from the production and sale of primary concentrate;
        2.2.2. the extent to which the merger effects could be prejudicial to junior miners in South Africa.
    2.3. Northam's participation in the merger hearing before the Tribunal shall include the right
        2.3.1. of Northam's independent legal representatives and economic advisors (Northam's advisors) to access the confidential version of

the Competition Commission of South Africa's large merger report and record in respect of the sections dealing with the two potential theories of harm set out in paragraph 2 of this order, subject to Northam's advisors furnishing the appropriate confidentiality undertakings;

2.3.2. to make written submissions within ten (10) business days of this order;

2.3.3. to make oral submissions at the merger hearing subject to reasonable time limitations being imposed by the Tribunal;

2.3.4. to make an application for the calling of any witness / witnesses and or the production of relevant documents at the merger hearing which application shall be determined by the Tribunal.

2.3.5. any party who wishes to respond to Northam's written submissions must do so within ten (10) business days of receipt of Northam's submissions.

3. First and second respondents are ordered to pay appellant's costs, the one paying the other to be absolved and such costs to include the costs of two counsel.

DAVIS AJA

VICTOR and **SAVAGE AJJA** concurred

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:	25 August 2022
Date of judgment:	5 September 2022