

## TAKEOVER SPECIAL COMMITTEE

In the application of:

**IMPALA PLATINUM HOLDINGS LIMITED**

Applicant

*In re:*

**Ruling of the Takeover Regulation Panel dated 31 December 2021**

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### TAKEOVER SPECIAL COMMITTEE RULING

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#### **1 JURISDICTION**

- 1.1 The Takeover Special Committee (the “TSC”) has been established as provided for in the Companies Act No. 71 of 2008 (“the Act”) for the purpose of hearing an application made by Impala Platinum Holdings Limited (“the Applicant” or “Impala” or “Implats”) regarding the ruling (“the Ruling”) made by the Takeover Regulation Panel (“the Panel”) in response to a request (“the Request”) for a ruling made by Implats to the Panel.
  - 1.2 Before the TSC deals with the background of this application we are compelled to address the issue of jurisdiction of the TSC, the exclusion of which was sought in the submission of Counsel on behalf of the Panel.
  - 1.3 The Panel has argued that the TSC has no jurisdiction to determine the issue before it as the relief sought as at the date of the hearing was and is different from the basis and grounds originally relied upon; that accordingly it would amount to an exclusion of the executive authority of the Panel represented by the executive director.
  - 1.4 Having considered the proposition put forward by the Applicant as to how the TSC should rule in the matter we find that there is not a material difference in the Applicant’s latest submission from the one originally made.
  - 1.5 It is substantially a re-statement of the Applicant’s original position and no new grounds are raised by the Applicant. To the extent that there are differences, such differences are not sufficiently material to warrant the exclusion of the jurisdiction of the TSC,
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neither are they sufficiently significant to be subordinated to the compelling need to address what otherwise is an important corporate issue which requires a ruling from the TSC in the interests of all parties.

## **2 BACKGROUND**

- 2.1 This application has been brought before the TSC in terms of section 118(8) of the Companies Regulations 2011 (“the Regulations”) (in terms of which any person issued with a ruling may apply for a hearing regarding that ruling) regarding the Ruling and in response to the Request.
- 2.2 The Request arose in the context of the firm intention announcement of Implats on 9 December 2021 to make an offer for the acquisition by Implats of shares in Royal Bafokeng Platinum Limited (“the Company” or “RBPlat”) at an offer price of R90.00 in cash plus 0.3 Implats shares (valued at R60.00 based on the three-day volume weighted average price of Implats shares determined at the end of trading on 24 November 2021) for each share in the Company (“the Mandatory Offer”). The Applicant published the Mandatory Offer on 17 January 2022. The Mandatory Offer remains open for acceptance until the expiry of the Mandatory Offer period.
- 2.3 The Applicant is interested in acquiring shares in the Company on the market (but outside the Mandatory Offer) for an all cash consideration of up to (but not above) the offer consideration of R150.00, during the Mandatory Offer period (“the Distinct Acquisitions”).
- 2.4 The Applicant’s view is that if Distinct Acquisitions were to be made during the Mandatory Offer period, that would not oblige the Applicant to amend the terms of the Mandatory Offer in any way. The Applicant approached the Panel for a ruling on this issue and framed the question as follows:

*“If Implats were to acquire RBPlat Shares for an all-cash consideration of up to R150 per RBPlat Share during the Offer Period and whilst its Offer remains open for acceptance, then Implats would not have acquired the relevant RPPlat Shares at above the offer consideration for purposes of regulation 111(6) of the Takeover Regulations and will not be required (i) to increase its offer consideration under regulation 111(6), or (ii) to amend the terms of its Offer (or extend an alternative offer) giving participants an election whether to receive the Offer Consideration in the form of (1) the current R60 cash and 0.3 Implats share combination or (2) the R150 all-cash*

*consideration, or (iii) to change the consideration already settled in respect of prior acquisitions of RBPlat Shares.”*

2.5 The Panel, in the Ruling, considered and analysed two “scenarios” described as follows:

2.5.1 a cash offer of R150, with no shares offered to the shareholders of the Company by Impala (scenario one) or

2.5.2 a cash offer of less than R150, with no shares offered to the shareholders of the Company by Impala, but only offered to those shareholders who do not wish to wait and would be happy to accept a lesser cash amount (being an amount less than R150) (scenario two).

2.6 The wording in paragraphs 2.5.1 and 2.5.2 is as it was used by the Panel and fits the description by the Applicant of the Distinct Acquisitions.

2.7 The Ruling then dealt with what the Panel described as scenario one and used the following wording:

*“Having regard to the aforesaid, our ruling, in so far as scenario one, is that:*

- a) the offer consideration remains as published in the Firm Intention Announcement as it mandatory and Impala is obligated to make under Section 123;*
- b) the cash only offer of R150 can only be offered as the alternative to the published offer consideration in respect of the Mandatory Offer;*
- c) all the shareholders of the Company can either accept the published offer consideration as set out in the Firm Intention Announcement offer as a matter of law under Section 123, being the Mandatory Offer, or the cash only offer of R150;*
- d) no distinction finds application in relation to off market sales and early acceptances as the offer is mandatory in law; and*
- e) a revised cash confirmation or bank guarantee that assumes that all shareholders of the Company will accept the cash only consideration of R150 (not the R90 cash) be provided to us forthwith.”*

2.8 The Ruling then dealt with what the Panel described as scenario two and used the following wording:

*“Our ruling, in so far as scenario two is concerned, is that:*

- a) *the offer consideration remains as published in the Firm Intention announcement as it mandatory and Impala is obligated to make under Section 123;*
- b) *the cash only offer of R150 can only be offered as the alternative to the published offer consideration in respect of the Mandatory Offer;*
- c) *all the shareholders of the Company can either accept the published offer consideration as set out in the Firm Intention Announcement offered as a matter of law under Section 123, being the Mandatory Offer, or the cash only offer of R150;*
- d) *those shareholders that wish to accept a lesser cash price (price less than the cash amount of R150) can only do so if they have waived their right to the Mandatory Offer;*
- e) *such a waiver must be in writing in respect of each shareholder that has decided to accept a lesser cash price than the Mandatory Offer i.e. shareholders that have waived their right to a Mandatory Offer; and*
- f) *the nature and wording of the waiver must first be approved by us for signature by a waiving shareholder and the signed copy of same be submitted to us for our records.”*

### **3 THE ACT AND THE REGULATIONS**

3.1 Section 119(1) of the Act reads as follows:

#### **119 Panel regulation of affected transactions**

(1) The Panel must regulate any affected transaction or offer in accordance with this Part, Part C and the Takeover Regulations, but without regard to the commercial advantages or disadvantages of any transaction or proposed transaction, in order to –

- (a) ensure the integrity of the marketplace and fairness to the holders of the securities of regulated companies;
- (b) ensure the provision of –
  - (i) necessary information to holders of securities of regulated companies, to the extent required to facilitate the making of fair and informed decisions; and
  - (ii) adequate time for regulated companies and holders of their securities to obtain and provide advice with respect to offers; and
- (c) prevent actions by a regulated company designed to impede, frustrate or defeat an offer, or the making of fair and informed decisions by the holders of that company’s securities.

3.2 Section 127(1) of the Act reads as follows:

**127 Prohibited dealings before and during an offer**

(1) During an offer, or when one is reasonably in contemplation, an offeror or a person acting in concert with that offeror, must not –

- (a) make arrangements with any holders of the relevant securities;
- (b) deal in, or enter into arrangements to deal in, securities of the offeree regulated company; or
- (c) enter into arrangements which involve acceptance of an offer,

if there are favourable conditions attached that are not being extended to all holders of the relevant securities.

3.3 Regulation 111(6) reads as follows:

If, after the firm intention announcement and before the offer closes, an offeror or any person acting in concert with it acquires relevant securities in the offeree regulated company at above the offer consideration per relevant security, the offeror must –

- (a) increase the offer consideration per security to not less than the highest consideration paid for the securities so acquired; and
- (b) immediately announce the revised offer consideration per relevant security and relevant dates, which announcement must be posted to the offeree regulated company's relevant securities holders.

**4 REGULATION 111(6)**

During the hearing Counsel for the Applicant placed considerable emphasis on the effect of Regulation 111 (6) arguing that the wording contained in that Regulation created a situation in which Distinct Acquisitions made during the Mandatory Offer period up to the offer consideration of R150 per RBPlat share would not oblige the applicant to (a) increase the consideration of the Mandatory Offer, or (b) to offer an alternative all-cash consideration. Accordingly, the Applicant contended that the TSC should set aside the Ruling and replace it with a ruling in terms of the Request.

## **5 THE VIEWS OF THE TSC**

The TSC, having considered the arguments by the Applicant and the conclusions reached by the Panel in the Ruling, is of the view that –

- 5.1 the primary and most important obligation of the Panel (and accordingly of the TSC) is to ensure the integrity of the marketplace and fairness to the holders of the securities of regulated companies, as is more fully set out in section 119(1) of the Act;
- 5.2 creating a situation in which some of the shareholders in the Company receive an all-cash offer whilst others have no such option and can only accept the Mandatory Offer, is inherently unfair to the second category of shareholders. This unfairness is, in the view of the TSC, exactly the type of situation which section 119(1) of the Act seeks to prevent;
- 5.3 in addition to the foregoing, the TSC is obliged to take into account the wording contained in Section 127 (1) of the Act which, inter alia, prohibits an offeror, during the offer period, from making arrangements with shareholders of the Company in a situation in which there are favourable conditions attached to such arrangements that are not being extended to all of the shareholders of the Company. The Distinct Acquisitions have that effect;
- 5.4 the Distinct Acquisitions are arbitrary in nature and as a natural consequence would benefit those shareholders who are party to the Distinct Acquisitions who would be able to sell their shares in the Company without exit costs in view of the cash nature of the second offer whilst other shareholders, not subject to the Distinct Acquisitions, would have their fate decided entirely in terms of the Mandatory Offer;
- 5.5 the Distinct Acquisitions also allow some shareholders who are party to the Distinct Acquisitions, to be paid immediately and in cash whilst others have to wait for the end of the Mandatory Offer period, for payment;
- 5.6 the argument raised by Counsel for the Applicant with regard to Regulation 111(6) cannot overcome the issues raised by Section 119(1) and 127(1) of the Act.

## **6 THE TSC RULING**

- 6.1 The TSC hereby modifies the paragraphs marked “(a)” in the ruling of the Executive Director of the Panel (as reflected in paragraphs 58 and 59 of that ruling), to read as follows:

“(a) the offer consideration remains as published in the Firm Intention Announcement as it is mandatory and Impala is obligated to make the offer under section 123 of the Act.”

- 6.2 Save as set out in paragraph 6.1 above, the TSC, in accordance with the provisions of regulation 118 (1) of the Regulations, unanimously hereby confirms the ruling of the Executive Director.

Signed for an on behalf of the Takeover Special Committee.

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**C.H. EWING**  
CHAIRPERSON  
(Duly authorised)

For an on behalf of the following TSC Members

N. DONGWANA  
M. MATLALA  
E. MOOLA  
S. SIYAKA  
T. TSHIVHASE

Applicants  
Represented by: Adv A Subel SC  
Briefed by: Wildu du Plessis of Alchemy Law  
Briefed by: Doron Joffe of ENS Africa  
Impala Platinum Limited

Takeover Regulation Panel  
Represented by: Adv R Pearse SC & Adv T Seroto  
Briefed by: Peter Tshisevhe of TGR