

TAKEOVER SPECIAL COMMITTEE

In the matter between:

NORTHAM PLATINUM HOLDINGS LIMITED

Applicant

and

**THE EXECUTIVE DIRECTOR OF THE
TAKEOVER REGULATION PANEL**

First Respondent

ROYAL BAFOKENG PLATINUM LIMITED

Second Respondent

TAKEOVER SPECIAL COMMITTEE'S RULING – INDEPENDENT EXPERT'S REPORT

Introduction

- 1 One of the complaints by Northam Platinum Holdings Limited (**Northam**) to the Takeover Regulation Panel (**Panel**) on 26 July 2022 related to what Northam conceived as deficiencies in the fair and reasonable opinion expressed in the report prepared by the Independent Expert appointed by the Independent Board of Royal Bafokeng Platinum Limited (**RBPlat**) in

accordance with the requirements of Regulation 90(6) of the Regulations.¹

In the proceedings before the Committee, this complaint was referred to as the Independent Expert Report Complaint to distinguish it from the rest of Northam's complaints. In this Ruling, the Committee will refer to it as such, where appropriate.

- 2 The Executive Director upheld Northam's Independent Expert Report Complaint in the proceedings before the Panel. He directed the Independent Board of RBPlat to call upon the Independent Expert to supplement its report, having regard to the requirements of Regulation 90(6)(f) of the Takeover Regulations. The ruling of the Executive Director is dated 28 October 2022, and the direction he made appears in annexure A of that ruling. It is to the following effect:

“[T]he Independent Board of RBPlat:

- a. must instruct the independent expert to supplement the Independent Report to include the date of the fair and reasonable opinion;*
- b. must instruct the independent expert to supplement the Independent Expert Report to include a confirmation that the valuation approach and methodology [comply] with the SAMVAL code as required by Regulation 90(5);*
- c. must instruct the independent expert to supplement the Independent Expert Report to comply with Regulation 90(6)(f) and provide for the ‘most likely’ fair value for the RBPlat Shares (and, separately, the Implats Shares). Specifically, the Independent Expert Report should express:*
 - i a fair value range for an RBPlat Share;*
 - ii a fair value range for an Implats Share; and*

¹ The Takeover Regulations have been gazetted in Chapter 5 of the Regulations published in Government Notice R351, Government Gazette no 34239 of 26 April 2011, which took effect from 1 May 2011.

iii. a swap ratio range derived from these respective fair values of an RBPlat Share and Implats Share, taking into consideration the cash component of the offer; and

d. [must] publish the supplemented version of the Independent Expert Report to the RBPlat Shareholders and issue a separate announcement setting out its recommendations on the fairness and reasonableness of the [Implats] Offer in the light of the supplemented Independent Expert Report.”

3 On 21 November 2022, and acting through its attorneys, the Independent Board of RBPlat notified the Executive Director that although it considered that the report of the Independent Expert made the disclosures contemplated in Regulation 90(6)(f), it did not wish to appeal or review the ruling of the Executive Director. The Independent Board proposed to issue a short supplement to the Independent Expert Report, whose terms were set out in annexure B of the letter of its attorneys for inspection and consideration by the holders of RBPlat securities. The Independent Board considered that the supplement to the Independent Expert Report would constitute compliance with the Ruling of the Executive Director.

4 In a subsequent ruling, on 1 December 2022, the Executive Director considered the supplement sufficient to give effect to the First Ruling and authorised the Independent Board of RBPlat to issue the relevant SENS announcement notifying the holders of securities of the supplement.

- 5 Northam now seeks to appeal and/or review the Second Ruling of the Executive Director on three separate grounds;
- 5.1 First, Northam contends that the Executive Director was clearly wrong in his Second Ruling because the supplement did not provide a fair value range and most likely value for the RBPlat shares and the Implats shares separately as was required by and in terms of the Executive Directors First Ruling. On this basis, Northam contends that the supplement did not comply with the First Ruling and that the Executive Director was mistaken when he concluded that it did.
- 5.2 Secondly, Northam contends that the Executive Director acted beyond his statutory powers when he made the Second Ruling. The premise of the contention is that when he made the First Ruling, the Executive Director became *functus officio*. He did not have any power to amend, revise, modify or cancel the First Ruling, and the Second Ruling has the effect of modifying or revoking the First Ruling.
- 5.3 Thirdly, Northam contends that the Executive Director made the Second Ruling without affording Northam an opportunity to make representations on the proposed supplement and has acted procedurally unfairly.

- 6 Based on the above contentions, Northam requests the Committee to set aside and cancel the Second Ruling of the Executive Director in terms of the powers vested upon it in terms of Regulation 118(9) of the Regulations.
- 7 RBPlat opposes the relief sought by Northam. It contends that the First Ruling of the Executive Director was correct, although there was some ambiguity in paragraph 101(c) of that ruling. RBPlat also argued that the contents of the supplementary Independent Report contain information which seeks to give effect to the First Ruling and was, therefore, in compliance with that ruling.
- 8 The Committee heard this appeal and/or review on 19 March 2023. It has now considered the parties' written and oral submissions. What follows below is the Committee's ruling on the appeal and/or review, the reasons thereof , and the order it makes flowing upon its conclusion on Northam's contentions and RBPlat's rival contentions.

Background

- 9 Northam approached RBPlat about a possible transaction in which Northam would acquire all the issued ordinary shares of RBPlat in February 2021.

- 10 On 11 October 2021, Northam submitted a non-binding expression of interest letter to RBPlat indicating its interest in acquiring RBPlat's issued share capital.
- 11 RBPlat responded to the non-binding expression of interest letter on 18 October 2021. RBPlat rejected Northam's proposed offer because, among other reasons, RBPlat considered that the consideration Northam offered was unsatisfactory. RBPlat did, however, inform Northam that it was still open to having discussions on Northam's interest in RBPlat's shares.
- 12 On 27 October 2021, Impala Platinum Holdings Limited ("**Implats**") and RBPlat published a joint cautionary announcement indicating that they were discussing a proposal from Implats to make a general offer to the holders of issued ordinary shares of RBPlat to acquire all the issued ordinary shares of RBPlat, (other than treasury shares held by the RBPlat Group), that it does not already have.
- 13 On 19 November 2021, Northam announced that it had acquired 32.8% of RBPlat's shares from a subsidiary of Royal Bafokeng Holdings (Pty) Limited.
- 14 On 29 November 2021, Implats published a firm intention announcement regarding its intention to acquire all RBPlat's issued ordinary shares. On the same day, Implats and RBPlat announced that they had concluded an agreement entitled "*Cooperation Agreement*".

- 15 On 9 December 2021, Impala announced that it had acquired 35.31% of RBPlat's issued ordinary shares. Consequently, Implats had to make a mandatory offer in terms of Section 123 of the Companies Act.
- 16 On 17 January 2022, Implats announced that its offer had become a mandatory offer in terms of Section 123 of the Companies Act 71 of 2008.
- 17 RBPlat constituted an Independent Board in terms of Regulation 108(8) of the Regulations to consider Implats' offer. In turn, the Independent Board sought external advice from an Independent Expert who would provide a fair and reasonable opinion on Implats' mandatory offer to the holders of RBPlat's securities in accordance with the requirements of Regulation 90(6) of the Regulations.
- 18 On 8 February 2022, the Independent Expert issued an Independent Expert Report which the Independent Board of RBPlat included in Implats' response circular of 11 February 2022.
- 19 As noted in the introductory section of this ruling, one of the complaints filed with the Executive Director on 26 July 2022 concerns the alleged deficiencies in the fair and reasonable opinion expressed in the Independent Expert Report of 8 February 2022.

The Executive Director's First Ruling

20 In its complaint to the Executive Director, Northam argued that where, as here, the mandatory offer comprises both a cash consideration and shares of the offeror company, the report of the Independent Expert must set out the following information in its fair and reasonable opinion:

20.1 The value of the offeree company's securities (in this case RBPlat's shares), which must be expressed in a fair value range with a most likely fair value number identified and used to express the independent expert's opinion;

20.2 The value of the offeror's securities must also be expressed as a fair value range with a most likely fair value number identified and used to express the independent expert's opinion; and

20.3 A swap ratio is derived from the respective fair values of the offeree company and the offeror's securities. This swap ratio must then be compared to the swap ratio of the offer to ascertain whether the offer is fair and reasonable.

21 In the First Ruling, the Executive Director upheld Northam's complaint and required RBPlat to comply with the terms of his ruling, whose essential features the Committee has described above.

The Executive Director's second Ruling

22 PSG Capital (Pty) Limited who was appointed as the Independent Expert to the Independent Board of RBPlat addressed a letter dated 9 November 2022 to the Independent Board. In this letter, the Independent Expert addressed each of the deficiencies which the Executive Director found in his First Ruling. It indicated the following:

22.1 Insofar as the Executive Director directed in paragraph 93(a) of the First Ruling that the date of the independent expert's report must be reflected in that report, that date has already been indicated as 8 February 2022, and there has therefore been compliance with the First Ruling.

22.2 Insofar as the Executive Director directed in paragraph 93(c) of the First Ruling that the Independent Board must instruct the Independent Expert to supplement its report to comply with the requirements of Regulation 90(6)(f) of the Takeover Regulations, the report disclosed in paragraph 11 thereof, that an indicative exchange ratio range of between 0.22 and 0.34 Implats share for every RBPlat share, after accounting for the cash amount of R90.00 per RBPlat share, at which the Implats offer would be considered fair to RBPlat shareholders.

22.3 The letter of the Independent Expert also indicated that its report also provided "*a most likely value used as a core number*" as is required in

terms of Regulation 90(6)(f) the mid-point value of 0.28 Implats share for every RBPlat share to express a fair and reasonable opinion.

- 23 The Independent Expert concluded its letter of 9 November 2022 by indicating that its report of 8 February 2022 contained sufficient disclosures to enable the shareholders of RBPlat to form a view on the fairness and reasonableness of the Implats' offer and that the supplementation of that report as directed by the Executive Director in his First Ruling will not have any additional benefit to the shareholders of RBPlat.
- 24 Having considered the contents of the letter of 21 November 2022 and annexures to it from RBPlat's attorneys, the Executive Director made the Second Ruling. He emailed it to RBPlat's attorneys. He notified them that he approved the publication of the proposed SENS announcement and supplementary report as the latter was sufficient to give effect to the First Ruling and that the approval thus given constituted a ruling in terms of the Regulations.
- 25 Within the prescribed time period provided for in Regulation 118(8), Northam filed its appeal and/or review against the second Ruling of the Executive Director. That application was filed on 6 December 2022, and it is that application which was the subject matter of the hearing before the Committee on 19 March 2023.

The merits

26 Regulation 90(6) sets out the required contents of an independent expert's "fair and reasonable" opinion. It states that:

"(6) The content of the independent expert's fair and reasonable opinion in relation to an offer must, among other things, include—

- (a) the date of the fair and reasonable opinion, and confirmation that the fair and reasonable opinion has been given to the relevant board concerned for the sole purpose of assisting the relevant board in forming and expressing an opinion for the benefit of holders of relevant securities, excluding the offeror;*
- (b) a statement that the fair and reasonable opinion may be included, in whole or in part, in any required regulatory announcement or documentation;*
- (c) a clear expression of opinion dealing with the fairness and reasonableness of the offer consideration(s) in regard to holders of relevant securities, excluding the offeror;*
- (d) a detailed list of all source documentation used and reviewed and work done in accordance with the scope of the appointment;*
- (e) a statement of the valuation approach adopted, the methods employed and all material assumptions underlying the valuation approach and methodology;*
- (f) a range of final valuation values attributable to the relevant securities or assets and a most likely value used as the core number for purposes of the expression of the opinion;*
- (g) any other valuation or pricing approaches and methodologies used in corroborating the expression of the opinion e.g. the comparative approach or cost approach;*
- (h) the fee payable or paid to the independent expert*

for the fair and reasonable opinion and confirmation that the fee is not contingent on or related to the outcome of the offer; and

- (i) a declaration of the independence and competence of the independent expert, which may require evidential justification if the Panel is not satisfied with the declaration."*

- 27 In the First Ruling, the Executive Director concluded that the Independent Expert report did not comply with the requirements of Regulation 90(6)(f) of the Regulations. In the letter of its attorneys of 21 November 2022, RBPlat expressly indicated that when it communicated the letter of the Independent Expert (dated 9 November 2022), RBPlat did not seek to appeal or review the First Ruling of the Executive Director. It follows, therefore, that, by its approach, the First Ruling became final and binding on the parties, and RBPlat was obliged to give effect thereto.
- 28 The Committee has considered RBPlat's submission that the First Ruling was ambiguous in that it merely required the report of the Independent Expert to comply with Regulation 90(6)(f) without indicating how that must be done. Relying on that asserted ambiguity, RBPlat submits that the purpose of the letter from the Independent Expert and the proposed contents of the supplementary report are designed to clarify that ambiguity.
- 29 The Committee does not agree that there is any ambiguity in the First Ruling, which the supplementary report is designed to cure. The supplementary report seeks to repeat and explain the contents of the valuation performed in the expert report of 8 February 2022 and assert that the disclosures made in that report are sufficient to enable the shareholders of RBPlat to consider the fairness and reasonableness of Implats' offer.

- 30 The independent report did not disclose the fair values of the swap ratio of the RBPlat share and Implats share in rands and cents after accounting for the cash amount of R90 per RBPlat share. The suggestion that the shareholders of RBPlat will be able to work out for themselves these values in rands and cents from the disclosure of a range between 0.22 and 0.34 Implats shares for every RBPlat share is not enough, especially when the information about the rands and cents of the respective values of the RBPlat shares and Implats shares is available.
- 31 The Committee, therefore, concludes that the First Ruling of the Executive Director, properly interpreted, contained no ambiguity that was susceptible to clarification through the supplementary expert report, as proposed and published by the Independent Board of RBPlat.
- 32 RBPlat contends that even if the First Ruling of the Executive Director was not ambiguous, he or the Committee mero motu was entitled to withdraw it and issue the second report in terms of their powers provided for in Regulation 118(6) of the Regulations. Regulation 118(6) empowers the Executive Director to formally withdraw a ruling he made on the assumption that the information upon which the Ruling he made was complete and correct when such information was incomplete and incorrect.
- 33 The Committee does not accept RBPlat's contention. The clarificatory letter of the Independent Expert and supplementary report, which followed after

that, make it clear that the independent expert's report was complete and correct, as far as the Independent Expert is concerned. Neither the Independent Expert nor the Independent Board pointed to any incompleteness or incorrectness in the report. It follows, therefore, that RBPlat has not established the requisite precondition for the application of Regulation 118(6).

34 In view of our conclusion, the First Ruling of the Executive Director was clear and not ambiguous. The Ruling could not lawfully be a subject matter of withdrawal in terms of Regulation 118(6) of the Regulations. Therefore, we conclude that the Executive Director was not entitled to make the Second Ruling. We are persuaded that he acted *ultra vires* his powers when he made the Second Ruling.

35 Our conclusion is based on the following considerations:

35.1 Once the Executive Director has granted a ruling on a complaint, he has discharged his functions and duties. He is, therefore *functus officio*. His ruling is final and cannot be revisited in the absence of statutory authority. Only the Committee can reconsider the ruling. RBPlat did not apply to the Committee for it to modify or cancel (in full or in part) the First Ruling.

35.2 What is in issue before the Committee is not the First Ruling. Neither party has sought reconsideration of the First Ruling by way of appeal

or review. What is in issue before the Committee is Northam's appeal and/or review of the Second Ruling. The First Ruling and what is required of RBPlat's Independent Board in terms of that Ruling must be done.

- 36 Given the Committee's conclusion that Northam has established sufficient grounds to set aside and cancel the Second Ruling of the Executive Director on the above grounds, the Committee does not consider it necessary to express any conclusion on the complaint that the Second Ruling was made without allowing Northam to make representations on the Second Ruling before it was made by the Executive Director and the consequences of the asserted failure.

Decision

- 37 Therefore, the Committee's decision is that Northam's appeal and/or review against the Second Ruling of the Executive Director of 1 December 2022 is upheld.
- 38 The Committee rules that the Second Ruling of the Executive Director is set aside and cancelled.

Mr Sandile Siyaka

Chairperson: Takeover Special Committee
Ruling sent electronically.

We Agree:

Ms Neo Phakama Dongwana, Mr Ebi Moolla, Ms Cami Mbulawa, Mr Tony
Tshivhase and Ms Nonzukiso Siyotula

Members: Takeover Special Committee

APPEARANCES:

For Applicant: L Harris SC (with P Smith, D Wild and S Mhlongo)

Instructed by: Webber Wentzel Attorneys, Johannesburg

For Respondent: J Blou SC (with P Ngcongco and M Kruger)

Instructed by: Bowmans, Johannesburg

DATED:31 MARCH 2023