

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 ON THE INDEPENDENCE OF THE INDEPENDENT BOARD

Introduction

- 1 This is an appeal and/or review against the Ruling of the Executive Director of the Takeover Regulation Panel ("**Executive Director**") in which he dismissed a complaint by Northam that the Independent Board (the "**IB**") appointed by the Board of Directors of the second respondent, Royal Bafokeng Platinum Limited ("**RBPlat**"), formed to consider an offer by Impala Platinum Holdings Limited ("**Implats**") to acquire RBPlat's shares was not independent or did not act independently in relation to that offer.

- 2 In addition to the above complaint, Northam alleged that the response circular issued by the IB in relation to Implats' offer was materially deficient and did not comply with several provisions of the Takeover Regulations,¹ principally because it did not disclose sufficient information to enable shareholders of RBPlat to make an informed decision on the Implats' offer.
- 3 In respect of Northam's complaints the Executive Director rejected the contentions that members of the IB did not meet the criteria of independence as is required by Regulation 81(i) and should be disbanded and a new IB be reconstituted. The Executive Director also rejected Northam's complaint that the response circular was deficient and should be withdrawn and a new circular which complies with the Regulations be re-published by the new IB.²
- 4 Northam's appeal and/or review was opposed by the IB. The Executive Director who was cited as the first respondent in the proceedings did not participate in the appeal and/or review. The Takeover Special Committee ("**Committee**") heard Northam's appeal and/or review on 19 March 2023. It has now considered written and oral submissions made on behalf of the parties. In what follows, the Committee describes its Ruling on Northam's appeal and/or review and the reasons and considerations which led to that Ruling.

¹ These are Regulations promulgated by the responsible Minister and published in Government Notice R351, Government Gazette no 34239 of 26 April 2011. In this decision, all references to "sections", are to sections in the Companies Act, 2008; all references to "Regulations", are to regulations in the Companies Regulations, 2011. And the "**Takeover Laws**" refers to Part B (sections 117 to 120) and Part C (sections 121 to 127) of Chapter 5 to the Companies Act and Chapter 5 of the Companies Regulations (regulations 81 to 122).

² The text of the Executive Director's Ruling on these two complaints appears in paragraphs 100(a) to (f) of Annexure A to the Ruling.

Background

- 5 Northam is a shareholder in RBPlat. It acquired 32.8% of RBPlat shares on 19 November 2021. The significance of this acquisition by Northam will be described in due course.
- 6 On 11 October 2021 Northam submitted a non-binding offer to the Board of RBPlat in which it set out its potential offer and offer consideration to acquire all of the shares in RBPlat. The potential offer and offer consideration comprised Northam's shares and a deferred cash component in the form of domestic medium-term notes. The Board of RBPlat rejected that potential offer on 18 October 2021 as it lacked a significant cash component.
- 7 On 27 October 2021 RBPlat and Implats published a joint cautionary announcement in which they notified shareholders of RBPlat of a potential acquisition by Implats of all the shares in RBPlat through a scheme of arrangement. In light of Northam's acquisition of 32.8% of shares in RBPlat, the scheme of arrangement as published in the joint cautionary announcement was no longer possible. As a result, RBPlat and Implats withdrew their joint cautionary announcement of the scheme on 19 November 2021.
- 8 On 19 November 2021 Northam announced that it had acquired 32.8% of RBPlat's shares from a subsidiary of Royal Bafokeng Holdings Proprietary Limited ("**RBH**"). On 22 November 2021, the IB's attorneys filed a request with the Panel requesting

the Panel to approve a draft announcement about Northam's notification that it had acquired 32.8% of RBPlat's issued ordinary shares and had options to acquire a further 0.58% and the legal implications of Northam's acquisition of the RBPlat shares, which according to RBPlat, were that Northam had triggered a obligation to make a mandatory offer under Section 123. The IB requested the Panel to instruct Northam to publish a firm intention announcement confirming that Northam is able to exercise at least 35% of voting rights attaching to RBPlat's voting securities and offers to acquire the remaining voting securities in RBPlat in terms of Section 123.

- 9 On 24 November 2021, Northam sent a requisition notice to RBPlat's Board of Directors ("**RBPlat Board**") requesting the RBPlat Board to convene a shareholder meeting for purposes of proposing resolutions for electing Northam's nominees as directors of RBPlat.
- 10 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 "*Co-operation Agreement*". The terms of the Co-operation Agreement were relied upon by Northam in order to support its case of lack of independence on the part of the IB.
- 11 On 2 December 2021, the IB's attorneys sent a letter to the Panel seeking guidance on the application of Section 126 in relation to convening a shareholders' meeting

to consider Northam's requisition notice directing the board to convene a shareholders' meeting to vote on the election of Northam's two nominees to RBPlat's board.

- 12 On 3 December 2021, the IB's attorneys sent a further letter following up on its letter to the Panel of 2 December 2021. The IB's attorneys requested the Panel to make a formal ruling on whether the convening of the proposed shareholders meeting would contravene Section 126(1)(a). The IB's attorneys also requested the Panel to confirm whether the Panel's and shareholder approval is required in terms of Section 126(1) for the RBPlat Board to convene the proposed shareholders meeting and stated that until the Panel consents to the proposed meeting, the RBPlat Board would not publish a notice of a general meeting in relation to the proposed shareholders meeting.
- 13 On 7 December 2021, the IB's attorneys requested the Panel to make a ruling on Northam's firm intention on the acquisition of voting securities in RBPlat as set out in the request of 22 November 2021. The IB asserted that Northam had triggered a mandatory offer and the price at which such a mandatory offer was required to be made was R180.50 for each RBPlat share.
- 14 The IB also filed a complaint about Northam's conduct: whether its conduct in relation to its acquisition of RBPlat voting securities and Implats' offer was appropriate, including the acquisition of Northam voting securities before Northam

announced that it had acquired securities in RBPlat and engagements between Northam and certain shareholders of RBPlat.

- 15 On 8 December 2021, Northam wrote to the IB and indicated its interest in continuing with engagements with the IB concerning its potential offer to acquire all or a portion of RBPlat's shares and requested RBPlat's co-operation in that regard, including a merger notification and access to due diligence information that was granted to Implats under Regulation 92(1).
- 16 On 9 December 2021, Implats announced its firm intention to acquire 35.31% of RBPlat's shares. Accordingly, it had to make a mandatory offer for those shares in terms of Section 123.
- 17 On 10 December 2021, the IB confirmed its willingness to provide Northam with access to the same due diligence information as was provided to Implats on the basis that Northam presented indicative terms of its potential offer in order to enable the IB to assess whether Northam was a *bona fide* potential offeror as is contemplated in the Takeover Regulations. The IB also indicated that it did not consider it appropriate to accede to Northam's request for a joint merger notification until Northam delivered a letter expressing its firm intention to make an offer.
- 18 Northam also informed RBPlat that it held 34.95% of the issued ordinary shares in RBPlat. Northam indicated that it could hold over 35% and thus be required to

make a mandatory offer through option arrangements between it and Royal Bafokeng Investment Holdings Company (Pty) Limited.

19 RBPlat constituted an IB in terms of Regulation 108(8) to consider Implats' offer to the IB. The IB has six members: Mr Mark Moffett (chairman and lead independent director), Ms Thoko Mokgosi-Mwantembe, Ms Zanele Matlala, Mr Mike Rogers, Ms Louisa Stephens and Mr Peter Ledger. In turn, the IB sought external advice from an Independent Expert who would provide an opinion on the fairness and reasonableness of the offer Implats' mandatory offer to RBPlat's Shareholders.

20 On 10 December 2021, RBPlat responded to Northam's letter of 8 December 2021. RBPlat informed Northam that it had constituted an IB in terms of Regulation 108, which would consider Northam's indicative proposal and provide a response. In relation to the request for information, RBPlat indicated that it was willing to accede to the request on the condition that either:

20.1 Northam confirms that the terms of Northam's indicative offer would apply if a mandatory offer is triggered; or

20.2 Northam sets out the indicative terms and conditions of the potential offer referred to in Northam's indicative proposal.

21 RBPlat refused to provide the Co-operation Agreement to Northam because it considered that the agreement did not fall within the ambit of information to be shared under Regulation 92. Further, RBPlat stated that it expected that

information provided for a due diligence would be provided on a reciprocal basis. RBPlat indicated that it would accede to Northam's requests in the letter of 8 December 2021 if Northam sent a letter to the IB expressing Northam's firm intention to make an offer with the appropriate irrevocable bank guarantees and/or cash confirmations compliant with the Regulations and confirms that it can proceed with the offer.

- 22 On 17 January 2022, Implats published and distributed its offer circular to the shareholders of RBPlat disclosing the detailed terms of the mandatory offer that it had previously announced in its Firm Intention Announcement issued on 29 November 2021.
- 23 On 31 January 2022, Northam responded to the IB's complaint who replied to that complaint on 22 March 2022. In the meantime, the Independent Expert appointed by the IB prepared its Independent Expert Report and that report was published on 11 February 2022 together with the response circular issued by the IB to the shareholders of RBPlat.
- 24 On 30 March 2022 the Panel ruled on the IB's complaint against Northam and held that Northam's acquisition of RBPlat shares from a subsidiary of **RBH** did not trigger the mandatory offer provisions in terms of Section 123 of the Companies Act. What then followed were various disputes and complaints between the parties which were filed with the Panel and some of which were determined by the Committee.

- 25 On 19 November 2022, Northam published its firm intention to acquire all the RBPlat shares in its Firm Intention Announcement. In terms of the Takeover Regulations, Northam was required to post its offer circular within 20 business days of expressing its Firm Intention Announcement, i.e. by 7 December 2022. However, Northam requested several extensions for the posting date of its offer circular the last of which was April 2023. As matters presently stand, Northam is not an offeror within Regulation 81(p).
- 26 On 26 July 2022, Northam filed its complaint with the Executive Director, asserting a lack of independence on the part of the IB in its dealings with Implats' offer and also alleging deficiencies in the response circular issued by the IB for consideration by the shareholders of RBPlat.
- 27 In respect of the complaint relating to the lack of independence on the part of the IB, Northam made it clear that it did not have sufficient facts on which it could urge the Panel and the Committee to make definitive findings on its claim of lack of independence on the part of the IB. It contended, however, that from the facts available to it on publicly available information it has gathered from the documentation presented in several regulatory authorities is sufficient to draw a credible inference of lack of independence to justify the institution of an investigation against the IB in terms of Section 169(1)(c). As we have indicated both complaints which are referred to below were dismissed by the Executive Director in his ruling of 28 October 2022.

- 28 The first complaint related to the non-independence of the IB in relation to its consideration of the Implats' offer. Northam referred to various acts that Northam submitted are a basis for a reasonable inference that the IB was not independent. Northam said the IB did not have an open mind to consider other possible transactions for the sale and purchase of RBPlat's issued shares. The complaint is that the IB was biased in favour of Implats' offer. Northam asked that the Committee direct that there be an investigation in terms of Section 169.
- 29 The second complaint was that RBPlat's response circular was defective. Northam wants an order directing RBPlat to withdraw the response circular of 11 February 2022 and reissue a compliant response circular or, alternatively, supplement the response circular of 11 February 2022.
- 30 The acts that Northam contends show bias include, amongst other complaints, the following primary complaints:
- 30.1 The fact that the IB did not conclude a non-disclosure and exclusivity agreement with Northam, and this would have ensured that the Northam transaction commenced and Northam would have conducted a due diligence.
- 30.2 Northam contends that RBPlat was obstructive and stalling from the date it submitted its non-binding expression of interest.
- 30.3 There are objective advantages in a merger between Northam and RBPlat, which Northam says the IB and/or RBPlat have ignored in favour of Implats'

offer. Northam concludes that this alleged preference for the Implats offer is irrational and shows that the IB and/or RBPlat are biased in favour of Implats.

30.4 Northam was not provided with the same and/or all the information the independent Board provided to Implats as required in Regulation 92.

30.5 The chief executive officer and the chief operating officer were issued shares in RBPlat in violation of Section 126.

30.6 RBPlat and/or the IB filed various complaints against Northam with the Panel.

30.7 Concluding agreements, including the Co-operation Agreement, that have unfavourable terms for RBPlat.

30.8 Northam refers to statements made by RBPlat's chief executive officer ("**RBPlat CEO**") in which he said RBH betrayed its heritage when it sold its voting securities in RBPlat to Northam.

31 Northam asks that the Committee should direct an investigation into the independence of the IB in the light of the shown bias or reasonably apprehended bias shown by the IB in favour of Implats.

RBPlat's grounds for opposing Northam's complaint

32 RBPlat opposed Northam's appeal and/or review and argued that the appeal and/or review was mistaken for the following reasons:

- 32.1 First, Northam has not shown that the IB violated any of the requirements for independence set out in Regulation 81(i). Northam submits that the requirements of independence are that members of the board do not have a conflict of interest in relation to the offer that would affect the way it considers an offer and advises the shareholders of the offeree.
- 32.2 Secondly, Northam misconstrues the role of the IB considering the offer by conflating independence with a requirement of neutrality when considering offers. The test of bias or the reasonable perception of bias is inapposite when determining whether an IB is not independent as defined and set out in the Regulations. Neither the Act nor the Regulations require an IB to be impartial when considering an offer or competing offers. An IB is entitled to prefer a particular offer over any competing offer.
- 32.3 Thirdly, Northam has not provided any facts that support a finding of lack of independence on the part of the IB.

33 RBPlat submits that the appeal and/or review should be dismissed.

The merits

The independence of the RBPlat Independent Board complaint

- 34 Regulation 108 provides that once a company receives an offer for a purchase of its issued ordinary shares, the company must constitute an IB to consider the offer.

The IB should then seek advice from an independent expert who will give an opinion about whether the offer is fair and reasonable. It is common cause that the IB was established pursuant to the provisions of Regulation 108.

35 Regulation 81 defines “*independent*” as follows:

“when used in relation to a particular person and a particular offer, means a person who—

(i) has no conflict of interest in relation to that offer; and

(ii) is able to make impartial decisions in relation to that offer without fear or favour;.”

36 Northam does not suggest at all that members of the IB suffer from a conflict of interest in relation to the offer in terms of Regulation 81(i). What Northam contends is that the conduct of the IB, historically assessed in relation to its dealings with Implats and Northam gives rise to inferences of lack of impartiality on the part of the IB. Northam has identified several decisions made by the IB upon which it relies for such inferences. The Committee, therefore, considers it appropriate to deal with the material decisions relied on by Northam for the inferences it seeks the Committee to draw.

37 Before the Committee addresses each of the material decisions relied upon by Northam, it is important to highlight that the mere fact that the IB expresses some preference in relation to an offer submitted by a particular offeree does not mean that it is, for that reason, unable to make impartial decisions in relation to that offer,

without fear or favour. In fact, Northam accepts that it is permissible for the IB not to treat competing offerors “*equally and without neutrality*”. Northam also accepts that the IB would not be regarded as not independent simply because it could not support an offer. Furthermore, Northam accepts that it is within the permissible limits of the IB’s power to take a view on the offer where there are competing offers where one is better than the other.³

38 Given the above concession by Northam, the Committee makes it clear that it cannot criticise the IB when it expresses a preference or expresses its support for one offer against the other, based on commercial and other considerations it considers relevant. The Panel is expressly precluded from inquiring into the commercial advantages or disadvantages of offers considered by the IB⁴. It is, therefore, clear that Northam’s complaint against the IB, insofar as they relate to the merits or demerits of the Implats mandatory offer cannot be taken into account in the assessment of its complaint of lack of independence on the part of the IB.

39 Northam also accepts that it did not make an offer for its acquisition of RBPlat’s shares. That is self-evident because after it published its Firm Intention Announcement on 19 November 2022, Northam has not published its offer circular in which it sets out the terms of the offer for consideration of the shareholders of RBPlat. The significance of this fact is that the assessment of Northam’s complaint on the alleged lack of independence on the part of the IB cannot be based on the

³ See paragraph 44 of Northam’s Heads of argument.

⁴ Section 119(1) of the Companies Act.

IB's decision not to express support for Northam's Firm Intention Announcement, compared to the offer made by Implats in its offer circular and response thereto by the IB in the response circular.

- 40 Bearing in mind the above considerations the Committee now turns to deal with each of the bases of Northam's complaint against the IB to assess whether each of them separately or cumulatively warrant(s) an investigation in terms of Section 169(1).

Alleged frustration of other potential offers in favour of Implats' offer.

- 41 The force of Northam's contention on this issue is that although the IB indicated "its apparent willingness" to pursue a transaction with Northam, it treated it differently from Implats in that it refused to commit to a confidentiality agreement, and exclusivity agreement with appropriate timelines and due diligence arrangements it had executed with Implats. In that way, the IB is alleged to have manifested partiality towards Implats in a manner that prevented the making of other potentially competing offers for the RBPlat shares.
- 42 The Committee has dealt with the relevant background relating to Northam's dealings with the IB with a view to the making of its offer to the RBPlat shareholders. There is nothing in the background to which the Committee has referred which indicates that the IB frustrated Northam's attempt to take steps that

are necessary for it to mature its Firm Intention Announcement to an offer contemplated in the Takeover laws.

43 The Committee places emphasis on the proactive steps taken by the IB to ensure that Northam's intention matured into a mandatory offer. It will be recalled that the IB went so far as to lodge a complaint with the Panel in order to direct that the conduct of Northam constituted a mandatory offer which triggered the application of Section 123. The IB's complaint was opposed by Northam and was subsequently rejected by the Panel.

44 What is crucial, though, is that Northam was not prevented from pursuing its intention to acquire RBPlat shares as a result of the conduct of the IB. As already indicated, although it has crystallised its commercial efforts into a Firm Intention Announcement it has elected not to formalise its offer and publish it in an offer circular. Instead, Northam has repeatedly sought postponement of the dates of publication of its offer circular. This delay is not one which can be attributed to the IB's conduct. It is one which results from Northam's own decisions.

The commercial terms of Implats' offer and the shift from a scheme of arrangement to a mandatory offer

45 Northam contends that the decision by Implats not to pursue a scheme of arrangement but to pursue a mandatory offer shows cooperation between the IB and Implats in a manner that shows a lack of independence in relation to Implats'

offer. Northam complains that by the time the change in the commercial terms of engagement from the scheme of arrangement to a mandatory offer took place the IB must have appreciated that Northam was a significant shareholder in RBPlat. Notwithstanding that fact, the IB is alleged to have taken steps in favour of and to support Implats whilst at the same time preventing efforts by Northam to mature its potential bid for RBPlat's shares into an offer.

- 46 The steps Northam relies on as an indication of partiality towards Implats include the Co-operation Agreement, but whose announcement was withheld for a period of 10 days during which period Implats increased its shareholding in RBPlat. In this regard Northam describes the Co-operation Agreement as a secret agreement whose commercial terms were favourable towards Implats and disadvantageous toward Northam.
- 47 The inference which Northam seeks the Committee to draw is that RBPlat and Implats restructured the terms of the Co-operation Agreement with the objective of enabling Implats to build up a sizeable shareholding in RBPlat, in secret without any possibility of intervention by Northam through its own competing proposal. Northam suggests that the terms of the Co-operation Agreement prohibited the discussion between it and RBPlat from substantively maturing into the making of any offer by Northam.
- 48 The Committee has already referenced the steps taken by the IB to compel Northam to make a mandatory offer, notwithstanding the existence of the Co-

operation Agreement. There is no basis to draw the type of inference Northam seeks. In any event, it is not for the Committee to express a view on the commercial advantages or disadvantages of the Co-operation Agreement. Even if Northam's complaint were to be legitimate in that regard, it would not, if proven, lead to a remedy under the Takeover Laws.

- 49 Northam places reliance on the period between 19 November to 29 November 2021 and claims that by that time it was a significant shareholder in RBPlat and was entitled to be engaged on its intention to acquire further shares in RBPlat. It claims that the IB fettered its ability to engage Northam because of the terms of the Co-operation Agreement. For the reasons that the Committee already elaborated upon, Northam's request to draw an inference of lack of impartiality to it is rejected.

Public statements made by the RBPlat CEO

- 50 Northam relies on statements made by the RBPlat's CEO in which it was said that the IB had genuine concerns about its intention or ability to make a *bona fide* offer for the RBPlats' shares as it did not revert to the IB's invitation to make a revised offer with indicative terms, and that Northam had not taken steps to dispel the concerns held by the IB.
- 51 Although Northam acknowledges that the statements attributed to the RBPlat CEO were not the statements of the IB, the IB did not inform the Panel, in its earlier

complaint to it, why it believed that Northam was not going to revert to it on the IB's invitation to make an offer with indicative terms.

52 In the Committee's view, there is no relevant connection between the statements made by the RBPlat's CEO and the conduct of the IB. It was the latter who was entitled to call upon Northam to make an offer within indicative terms so that it could afford the shareholders of RBPlat to consider Northam's offer once made. The fact that the IB was genuinely concerned about Northam's failure to respond to its invitation to make a firm offer with indicative terms is a matter which the IB was entitled to express, whatever the views of the RBPlat's CEO may have been.

53 Having regard to the above considerations, the Committee concludes that the facts alleged by Northam against the IB, even if proven would not lead to a remedy under the Companies Act, and for that reason, the Committee concludes that there is no basis to direct an investigation against the IB in terms of Section 169(1).

Deficiencies in the response circular

54 Northam contends that the response circular issued by the IB in response to the offer circular of Implats as the offeror was materially deficient in that it failed to address several statements contained in paragraph 2.3 of Implats circular. These statements relate to the essential feature of Implats' investment proposition in RBPlat in order to access mineral areas held by RBPlat that are contiguous and

neighbour Implats own mines and are thus vital to extend the lifespan of those mines, given their ageing lifespan.

55 Northam contends that the failure by the IB to deal with those statements in the response circular deprived RBPlat's shareholders of properly considering Implats' offer so as to decide not to accept that offer, and thus remain invested in Implats, or accept Implats offer in full, and thus divest their investment in RBPlat, or accept the offer and thus become invested in Implats itself. Northam contends that the failure of the IB to deal with these matters in the response circular contravenes the provisions of Regulation 106(7)(b) of the Takeover Regulations.

56 Regulation 106(7)(b) is to the following effect—

“An offeree response circular must contain the following disclosures and information by the independent board;

(a)...

(b) a comment on the statement contained in the offer circular, insofar as is relevant”.

57 It will be noted that the requirement prescribed in Regulation 106(7)(b) requires the IB to comment on statements contained in the offer circular insofar as the comment is relevant to the offer. The IB expressed its view on the rationale of Implats' offer

in paragraph 3.2.1 of the response circular. In the view of the Committee, that response was a sufficient comment required in terms of Regulation 106(7)(b).

58 The Committee, therefore, concludes that the complaint that the response circular was deficient was rightly rejected by the Executive Director.

Conclusion

59 The Committee's Ruling is that:

61.1. Northam's appeal and/or review of the Executive Director's Ruling set out in paragraph 100(a) to (f) of Annexure A to that Ruling is dismissed.

61.2. The Ruling of the Executive Director set out in those paragraphs of Annexure A is hereby confirmed.

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 Ngcongo and M Kruger)

Instructed by: Bowmans, Johannesburg

DATED: 31 MARCH 2023