SECURITIES REGULATION PANEL HEARING: Appeal in the proposed transaction between Gold Fields Limited (GF) and Harmony Gold Mining Company Limited (Harmony)

29th October 2004

Judgement

In the matter between :

Gold Fields Limited Appellant

and

Harmony Gold Mining Limited Respondent

and

Norilsk Nickel Respondent

Before the Executive Committee :

Chairperson: Adv. M Simelane

Member : Prof S Luiz

Member : Mr J Damons

Member : Mr S Moloko

Background to the facts

Chairperson: On the 15 October 2004 Harmony Gold Mining Limited (Harmony), through its attorneys Cliffe Dekker Inc, approached the Executive Director of the Securities Regulation Panel to approve the structure and proposed mechanics of Harmony's offer (the offer) to the shareholders of Gold Fields Limited (GF) to acquire all of their shares in GF (the GF shares).

Harmony advised the Executive Director that it had also approached the United States Securities and Exchange Commission (SEC) for the same approval with respect to the US shareholders but that the SEC was uncomfortable with the structure of the Offer unless Harmony makes two offers in SA and the US.

As a result of the SEC's concern Harmony advised the Executive Director that it had decided to make two offers. The first offer (the early settlement offer) related to an acquisition of a maximum of 34,9% of the GF shares on a specific date (Closing Date) and the second offer (the subsequent offer) is to be made on the Closing Date of the early settlement offer with regard to the balance of the GF shares not accepted under the early settlement offer. Both offers were subject to conditions precedent.

The early settlement offer was subject to Harmony shareholder approval and SEC form 4 becoming effective.

The subsequent offer was subject to

(a) Harmony shareholder approval;

(b) competition authorities and other applicable regulatory bodies' approval;

(c) failure of IAMGold transaction; and

(d) the early settlement offer and subsequent offer exceeding 50%.

At this meeting Cliffe Dekker Inc handed the Executive Director an offer document.

On the same day Cliffe Dekker Inc addressed a letter the Securities Regulation Panel confirming the following:

(a) that the Executive Director was satisfied with the Offer and the proposed mechanics of both the early settlement offer and the subsequent offer;
(b) that the Executive Director will review the revised offer document and Announcement for approval;
(c) that the Executive Director has consented as contemplated in Rule 32.1 to the subsequent offer being made immediately after the closing of the early settlement offer; and lastly
(d) that the Panel has waived the obligation on Harmony to keep the early settlement offer open for 21 days in terms of Rule 30.1 in the event that Harmony increases the offer consideration under the early settlement offer.

By letter dated 18 October 2004 the Securities Regulation Panel, under the hand of the Deputy Executive Director, addressed a letter to Cliffe Dekker Inc as follows:

"You letter dated 15 October refers.

The Executive hereby rules that, in so far as may be necessary, The Securities Regulation Panel ("the SRP") has consented, as contemplated in Rule 32.1, to the subsequent offer (as defined in the abovementioned letter); and the SRP has, in terms of Rule 30.1 waived the obligation on Harmony to keep the initial offer [the early settlement offer] open for the 21 day period referred to in Rule 30.1 in the event that Harmony increases the offer consideration under the initial offer [the early settlement offer]."

It is against this ruling that GF is appealing. The grounds of appeal are set out in a letter addressed to the Securities Regulation Panel by Edward Nathan & Friedland dated the 20 October 2004 and read thus:

You are requested to provide the following rulings:

8.1. that Norilsk is a concert party as defined and accordingly subject to the applicable provisions relating to concert parties set out in the Code including the mechanism for calculating whether or not an affected transaction has occurred and the effective percentage shareholding to which the offer relates.

8.2. that the panel has jurisdiction over the early settlement offer as it is effectively an offer for 54.9% of the shares in GF.

8.3. that the early settlement offer and the subsequent offer (as defined in the offer) is one composite transaction under the panel's jurisdiction and accordingly should be extended on the same terms and conditions, particularly as to settlement, and should be subject to the same conditions precedent.

As a result, this hearing of the Appeal Committee (Panel) of the Securities Regulation Panel (SRP), has been called by the Executive Director of the SRP at the request of GF. The Executive Director has referred the matter directly to a full hearing of the Panel to hear the matter. The referral is pursuant to a letter on behalf of GF dated 20th October 2004 referred to above in which it requests the Executive Director to make rulings on matters referred to in paragraph 8 of that letter.

At the commencement of the hearing the Panel had to deliberate on two points *in limine*.

First Point in limine

Recusal of the Chairperson of the Panel

Counsel for GF, Adv Kuper SC brought an application in which he argued that the Chairperson of the Panel, Adv. Menzi Simelane, should recuse himself from chairing the Panel for reasons explained hereunder. Counsel brought to the attention of the Panel that GF has filed an application with the Competition Tribunal (the Tribunal) for a variety of orders in terms of which the Competition Commission (the Commission) has been cited as a 3rd Respondent. It follows from this, he argued, that the citing of the Commission as a 3rd Respondent in that matter makes it a litigant. Adv. Simelane who is also the Commissioner of the Competition Commission therefore has a direct interest as a litigant in the matter before the Tribunal. In the circumstances, Counsel argued that it may not be appropriate that Adv. Simelane chair or sit on the Panel as an adjudicator where the facts of the matter are materially similar to the issues before the Tribunal. This he argued, is against the public interest as a perception could be created, in the mind of a reasonable man, that something improper could have or might have, taken place.

Counsel for Harmony, Adv Unterhalter SC argued quite the opposite. He argued that these are different regulatory bodies entrusted with the adjudication of the various aspects of the proposed acquisition of GF by Harmony. These regulators are performing their different statutory functions and therefore have to make rulings only in respect of those aspects of their statutes applicable to the transaction. Further, that the citing of the Commission as a 3rd Respondent in the matter before the Tribunal does not make the Commission a litigant in that matter. The Commission is called upon to provide its views as a body entrusted with the interpretation and application of the Competition Act, 1998. Therefore, it is not appropriate to view the Commission as a litigant in that matter. Counsel for Norilsk Nickel (Norilsk) Adv. Subel SC argued that its client neither supports nor opposes the recusal application. It is interested primarily in the quick resolution of the matter. Its view is that the Commission is not an interested party in these matters but rather acts in the public interest.

The Panel adjourned to deliberate on the matter. When the Panel reconvened, it held that Adv. Simelane need not recuse himself from chairing the Panel. It held that the matters before the Commission and the SRP are different matters being heard in terms of different statutes by two distinctly different regulatory bodies regulated by different legislation and whose functions are both in the public interests but on completely different matters. In terms of its statute, the Commission would be concerned with whether or not the proposed transaction amounts to a change in control as defined in section 12 of that legislation. If the transaction is defined as a merger it would therefore require notification to the Commission. The SRP is concerned with transactions which amount to affected transactions and not competition issues.

Having regard to these differences the Panel ruled that Adv. Simelane did not need to recuse himself from chairing the Panel to hear this matter.

Second Point in limine

This point related to a different application that GF has filed with the Witwatersrand Division of the High Court, in which it has asked for, *inter alia* an order to declare the Harmony offer a nullity. This application has been filed based on the facts that Harmony in its offer to the public did not include a prospectus as required in terms of section 143 and 145 of the Companies Act.

Counsel for GF argued that the High Court application, which has been set down for hearing on the 4th of November 2004 will be determinant on whether or not there is a legitimate offer to shareholders and whether there is a transaction to be adjudicated on by the Panel. Therefore, the Panel should not make a decision on a matter that will become a 'non-event' should the High Court, on the 4th of November 2004 decide that the offer is a nullity. Counsel therefore argued that the SRP should rather postpone the hearing of the matter, in the public interest, until such time as the High Court has decided on that application. In support of his argument he stated that the purpose of the hearing and decision of the Panel is to bring about certainty to the parties and the markets. Therefore any earlier decision by the Panel, which would be rendered academic by a contrary decision of the High Court, would create immense instability and uncertainty in the market. Hence, it may be prudent not to decide now and rather to wait for the High Court judgement.

Counsel further argued that should the matter continue, it would be important to note and agree certain matters. First, that the application for rulings should incorporate issues raised by GF in the letter from Edward Nathan and Friedland dated 27th October 2004. Secondly, that GF needs assurances from Harmony that there would not be an objection to the fact that GF has not appealed the ruling of the Executive Director given on the 18th of October 2004. This ruling was sent to Harmony in a letter signed by the Deputy Executive Director of the SRP, Mr Vivian Peters.

Counsel further stated that they have only been given a copy of the letter dated 18th October 2004 containing the ruling of the Executive Director of the Panel on the morning of the appeal, even though it directly impacted on GF. Had they been told about this letter they would have lodged an appeal against the ruling contained in that letter. If the Panel rules that the case should be argued now, Counsel for GF needed assurances from Harmony that there would not be an objection to the fact that GF has not appealed the ruling of the Executive Director given on the 18th of October 2004.

Counsel for Harmony argued that GF should have made the necessary enquiries as to the ruling given by the Executive Director. It is therefore not sufficient for GF to argue that it did not have sufficient notice of the rulings referred to in the letter from the Executive Director. The public announcement of the offer provided all the issues relevant for consideration by GF. These issues were clearly articulated on page 65 at paragraph 17.2 of the Circular. He argued that if GF had been more prudent by reading the circular thoroughly, its attention would have been drawn to those issues about which it now raises concerns. It would then have been in a position to respond and file an appeal to the ruling by the Executive Director. The appeal by GF should have been made and filed within three days of becoming aware of that ruling. Under the circumstances, Harmony is not in a position to guarantee any undertakings or provide any assurances to GF about whether or not it will object to any proposed appeal by GF. This means that should GF wish to raise arguments in response to the ruling by the Executive Director of the 18th of October 2004, Harmony is entitled to object to those arguments on the basis that a proper appeal has not been filed.

Further, as to the order of events, Harmony argued that the Panel should take into account the principle of presumption of legality in respect of decisions appropriately made. This means that a decision of the Panel would be presumed legal until otherwise overturned by the High Court's decision. Therefore there is no reason to wait until the High Court's decision on the application of the 4th of November 2004. Regulatory bodies like the SRP must in the ordinary course of business carry out the duties and functions and need not wait for other structures to make decisions before they themselves make a decision.

Counsel for Norilsk argued that its client did not want to be in a position where there are further delays in the matter. And therefore he urged the Panel to consider the negative consequences of such delays.

After deliberations the Panel decided as follows:

1. That the mandate of the Panel is not to deal with issues of competition or whether or not the offer was a legal offer. It is only to enquire about whether transactions are affected transactions and issues related to affected transactions.

2. That the purpose of regulation is to provide a stable and certain regulatory environment. The Panel does this in the public interest. The integrity of regulatory processes must therefore be maintained. This is done by ensuring that it is done efficiently and in a manner that creates certainty for shareholders, investors and the general public.

3. That anybody that may be affected by any decision of this Panel on this application must therefore take note of the matter in the High Court on the 4th of November 2004 and must take the necessary steps to safeguard

their interests. The Panel has taken into account the fact that the members of public that are largely concerned about this matter involve firms or persons that, in the ordinary course of dealings, would be aware of the High Court application and would at least seek advice on those matters. These are firms or persons that are educated in commercial and investment matters. The Panel notes therefore that it is not dealing with an uneducated public. It is therefore in the public interest to go ahead with the matter without further delay in order to create certainty and assure the markets of efficient regulatory processes.

In light of the above, the Panel decided:

1. That the Panel would hear the request by GF for rulings made in paragraph 8 of its letter dated 20th October 2004.

2. That the matter before the Panel was an appeal for the following reasons;

    i. The Executive Director gave a ruling in an *ex parte* application by Harmony.

    ii. The notice of the rulings was made public on 18th October 2004 by Harmony in the Circular to the shareholders and this Circular indicated the terms and conditions of the proposed transaction. As such any person with objections, particularly GF, therefore had three days within which to appeal the decision of the Executive Director.

    iii. GF responded to the ruling by letter dated 20th October 2004, within the three day requirement in terms of the Code, in terms of which it requested the Panel to make rulings on the issues raised in paragraph 8 of that letter.

    iv. The letter of the 20th of October 2004 by GF constitutes an appeal to the ruling of the Executive Director dated 18th October 2004. Therefore, the purpose and objective of the Panel hearing is to hear this appeal notwithstanding the fact that it was not couched as such in the relevant letter. For all purposes, it was always intended to be an appeal against that particular ruling. The matter is therefore an appeal and shall proceed as such.

REASONS FOR DECISION

The matter before the Panel relates to the proposed takeover of GF by Harmony. In terms of this proposed transaction, Harmony proposes to acquire all of the shareholding in GF through an early settlement offer to acquire up to 34.9% of

the entire issued share capital of GF (on the basis set out below, not subject to the tender of any minimum number of shares) and a subsequent offer for the balance of the entire issued share capital of GF not already acquired by Harmony under the early settlement offer.

In the Circular to GF Shareholders at paragraph 17, the conditions precedent with regard to the early settlement offer are stated as follows:

"17. Conditions precedent

The proposed merger is subject to the fulfillment or waiver, in whole or in part, of all or any of the following conditions precedent:

17.1. with regard to the early settlement offer:

17.1.1. the passing and, where applicable, registration by the Registrar, of the Harmony resolutions; and

17.1.2. the registration statement, with respect to the Harmony consideration shares in the US offer having being declared effective by the SEC."

In addition to the above, a subsequent offer is to be made immediately following the early settlement offer. The subsequent offer is to be for the balance of the entire issued share capital of GF not already acquired by Harmony under the early settlement offer. The subsequent offer would be subject to the conditions precedent set out in paragraph 17.2 which state:
"

17.2. with regard to the subsequent offer:

17.2.1.the passing and, where applicable, registration by the Registrar of the Harmony Resolutions;

17.2.2.Harmony receiving valid acceptances of the subsequent offer from GF shareholders -in excess of 50% of the entire issued share capital of GF (including those GF Shares settled by Harmony under the early settlement offer and those GF shares in respect of which Norilsk has irrevocable undertaken to accept the subsequent offer);

17.2.3 the proposed IAMGold transaction not being implemented for whatever reason, including, *inter alia*, GF shareholders failing to approve the proposed IAMGold transaction at the GF general meeting on 8th October 2004, GF confirmed at its presentation to the Investment Analysts Society, will be held on 7 December 2004;

17.2.4.the proposed merger being approved by the Competition

Authorities;

17.2.5. the registration statement with respect to the Harmony consideration shares in the US offering having being declared effective by the SEC; and

17.2.6. the approval of all regulatory authorities whose approval is required for the implementation of the subsequent offer."

The early settlement offer:

The early settlement offer is made on the following basis:

- Harmony will settle unconditionally valid acceptances received in respect of up to a maximum of 34.9% of the entire issued share capital of GF;

- To qualify for settlement under the early settlement offer, Harmony must receive valid acceptances, complete in all respects, by no later than 12h00 (South African time) on Friday, 26 November 2004;

- GF shareholders will be entitled to tender for acceptance up to their entire holdings of GF shares; and

- In the event that valid acceptance in excess of 34.9% of GF's entire issued share capital are received by 12h00 (South African time) on Friday, 26 November 2004, Harmony will settle only the number of GF shares which equates to 34.9% of the entire issued share capital of GF, on a pro-rata basis, with the GF shares tendered by accepting GF shareholders scaled back accordingly.

The subsequent offer

In terms of this offer, Harmony irrevocably undertakes, following completion of the early settlement offer, to make an immediate follow-on offer on the same terms as the early settlement offer for the balance of the issued share capital of GF not already acquired by Harmony under the early settlement offer. The subsequent offer would be subject to the conditions precedent set out in paragraph 17.2. of the circular. The conditions precedent referred to in 17.2, relate, *inter alia*, to the approval of the transaction by the relevant regulators, including the Securities Exchange Commission (SEC) in the United States and the Competition Authorities in South Africa and all other regulators whose approval is required for the implementation of the subsequent offer.

The Panel has to consider whether the early settlement offer and the subsequent offer were one composite offer and therefore an affected transaction. The other

issue was whether Harmony and Norilsk were acting in concert in which case the early settlement offer on its own would constitute an affected transaction. It is therefore necessary to consider the definition of an affected transaction.

An "affected transaction" means, any transaction including a transaction which forms part of a series of transactions or scheme, whatever form it may take, which -

a) Taking into account any securities held before such transaction or scheme, has or will have the effect of –

(i) vesting control of any company (excluding a closed corporation) in any person, or two or more persons acting in concert, in whom control did not vest prior to such transaction or scheme; or

(ii) any person or two or more persons acting in concert, acquiring or becoming the sole holder or holders of, all the securities, or all the securities of a particular class, of any company (excluding a closed corporation); or

b) …….

c) …….

In terms of the Code, 'acting in concert' means, subject to subsection (2) (a) of section 440A acting in pursuance of an agreement, an arrangement or understanding (whether formal or informal) between two or more persons pursuant to which they or any of them co-operate for the purposes of entering into or proposing an affected transaction.

Counsel for GF, Adv. Kuper SC, argued that what the Panel must consider is the overall transaction as opposed to the manner in which it has been structured. He referred to the definition of an affected transaction in section 440A of the Companies Act of 1973 and he emphasized the words "any transaction, (including a transaction which forms part of a series of transactions or scheme, whatever form it may take which has or will have the effect of vesting control". Counsel argued that if one takes the early settlement offer as part of the transaction (a step or series in the transaction) and then considers it together with the subsequent offer, there is a transaction that would result in Harmony acquiring control of GF. This he submitted was an affected transaction. It is obvious that this is still dependent on the overall transaction being successfully completed.

The next question addressed by counsel for GF was the issue of concert parties. It was asserted that the Panel had jurisdiction over the early settlement offer

because Harmony and Norilsk were acting in concert. If Harmony and Norilsk were concert parties, the early settlement offer would constitute an affected transaction. Counsel argued that knowledge on the part of Norilsk about Harmony's intended objective as well as the giving of the irrevocable undertakings by Norilsk made Norilsk and Harmony concert parties. In this regard, he relied on the undertakings that Norilsk had given to Harmony in respect of the overall transaction, which undertakings related to both the early settlement offer and the subsequent offer.

In terms of the agreement Norilsk made the following irrevocable undertakings:-

- not to dispose of or encumber any of its shares in GF;
- to exercise the vote attaching to its shares against the proposed IAMGold transaction;
- not to accept the early settlement offer (as defined in the offer);
- to accept the subsequent offer (as defined in the offer); and
- to vote their shares in favour of any proposed scheme of arrangement to be proposed by Harmony.

Counsel for GF argued that the irrevocable undertakings by Norilsk in respect of the early settlement offer and the subsequent offer, made it a concert party with Harmony in its quest for control of GF. Counsel argued further that the above undertakings by Norilsk confirmed that it was a concert party. Counsel submitted a document that Norilsk had submitted to the United States Securities and Exchange Commission in which Norilsk clearly explains that it was approached by Harmony to participate with it in Harmony's transaction to acquire all of the shareholding of GF. In the said discussions, it was apparent that Harmony indicated to Norilsk that in its attempt to take over control of GF, it proposed to put in place a transaction staggered in two parts, the early settlement offer and the subsequent offer.

On the question of whether or not the early settlement offer and the subsequent offer constituted a composite transaction, Counsel for Harmony, Adv Unterhalter, SC, argued that the mere fact that there was a series of transactions does not mean that each transaction in the series is an affected transaction. He argued that it was only when the trigger point of assumption of control is reached that it becomes an affected transaction. In support of his argument, he referred to the judgement of Marais JA in *Sefelana Employee Benefits Organization vs. Haslam and Others*[1] where it was said that it is only when the stage is reached at which an intended or proposed transaction will, if consummated, result in a change of

[1] 2000 (2) SA 415 (SCA)

control within the meaning of the Code that the hand of the Panel is laid upon the transaction.

As far as the early settlement offer was concerned, he argued that Harmony merely intends to acquire no more than 34.9% of the issued share capital of GF. This, he argued, would not give Harmony control of GF. The undertakings that Norilsk has given in respect of the early settlement offer need to be looked at on their own merits in relation to the early settlement offer and not the subsequent offer. He argued that the early settlement offer and the subsequent offer are two separate transactions, which are independent of one another.

He argued that if one properly considered the issues, it is clear that control of GF would not vest in Harmony as a result of the successful implementation of the early settlement offer. Control would only vest in Harmony once the subsequent offer has been implemented successfully. Further, he argued that until Norilsk had honoured all of its undertakings in respect of the subsequent offer, Harmony would not have control of GF.

On the question of whether Harmony and Norilsk were acting in concert, which would have made the early settlement offer an affected transaction, Counsel for Harmony, Adv. Unterhalter SC, argued that Harmony and Norilsk were simply pursuing their independent interests. He further argued that if one had regard to the terms of the irrevocable offer, it is clear that Norilsk was not bound to it because it could accept a better offer if one came along. Consequently, Norilsk could not be said to be acting in concert with Harmony.

Counsel for Norilsk, Adv. Subel SC, argued that Norilsk's interest in this transaction is purely one of protecting its own interests and in no way is it involved in the transaction for purposes of assisting Harmony to acquire control of GF. Counsel explained their commercial motivations for agreeing to the irrevocable undertakings. They also argued that the fact that it may have facilitated Harmony acquiring control of GF did not mean that they were co-operating for the purposes of entering into an affected transaction.

The Panel considered whether the early settlement offer and the subsequent offer constituted a composite offer in which case it would have been an affected transaction. The Panel decided that they should not be viewed as one composite offer. Although the Panel believed that the early settlement offer and the subsequent offer were connected, it also believed that they were independent of each other. The early settlement offer is made on certain terms and subject to certain conditions and the subsequent offer, which has its own terms and conditions, is only open to acceptance once the early settlement offer is completed. The fact that they follow one another does not mean that they should be viewed as one composite offer.

The Panel agreed with the view expressed by Marais JA in the *Sefelana* case. It is only when the consummation of the subsequent offer takes place that a change in control would occur. That is when the transaction becomes an affected transaction.

The Panel then considered the second issue of whether Harmony and Norilsk were acting in concert, which would make the early settlement offer, on its own, an affected transaction. The Panel considered the judgment of Malan J in *SRP v MGX Holdings Limited*, 2004 (WLD) in which the definition of 'acting in concert' was considered. The question for the Panel was whether the purpose of the co-operation between Harmony and Norilsk was for the purpose of entering into or proposing an affected transaction. The view of the Panel was that their co-operation was not for the purpose of entering into or proposing an affected transaction. The fact that Norilsk knew of Harmony's intention to make an offer to acquire the entire issued share capital of GF and the fact that the transaction would be structured in the form of an early settlement offer and the subsequent offer and that they gave the irrevocable undertakings does not automatically make them concert parties as defined. If the Panel accepts Norilsk assertions about why they acted the way they did, and there is no reason not to, it was decided that the Panel cannot conclude that they co-operated with the purpose of entering into an affected transaction. The fact that it will facilitate the acquisition of control by Harmony, does not change the view of the Panel. It is not the test for concert party activity.

Having heard the submissions of all the parties, the Panel decided that the actions of Norilsk did not make it a concert party with Harmony.