

# Merger between mining companies approved

A merger between mining companies Sibanye Gold and Newshelf 1114 has been approved by the Competition Tribunal, subject to a condition that for the first two years after the implementation of the merger, no merger-related retrenchments may occur. Newshelf 1114 is controlled by Gold One International, a publicly listed Australian company.



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Natalie von Ey, director in the Competition Practice at Cliffe Dekker Hofmeyr, says that this once again highlights the interplay between the Labour Relations Act (LRA) and the Competition Act.

"Typically, the LRA regulates what happens to employees in the event of a commercial transaction, for instance to protect employees' continuity of employment in the event of a transfer of a business as a going concern," Von Ey explains.

"However, not all merger transactions will be considered as a going concern transfer, as was the case in this merger which was a share acquisition. One of the purposes of the Competition Act is to promote and maintain competition in South Africa in order to promote employment and advance the social and economic welfare of South Africans. The competition authorities are consequently enjoined to consider public interest issues including the effect that the merger will have on employment."

## Possible retrenchments

"In the merger notification lodged with the Competition Commission, the merging parties indicated that no retrenchments were envisaged as a result of the proposed transaction. During the Commission's investigation however, the Commission became aware of possible retrenchments following from LRA section 189 notices having been issued by the target firm, Gold One, regarding the possible retrenchment of 82 employees in its Cooke Mining operations. Section 189 deals with

retrenchments based on operational requirements. The notice of possible retrenchments was given to the relevant trade unions prior to the merger notification being filed with the Commission," Von Ey says.

She explains that the section 189 process was subsequently withdrawn as there was a concern from Gold One that the retrenchment exercise would impact adversely on the proposed transaction. The Commission made various enquiries regarding these employment effects and reviewed the information submitted by the merging parties, but was not able to conclusively determine whether the retrenchments were merger specific or not.

## **Voluntary retirement**

"In the circumstances, the Commission elected to recommend to the Tribunal that the merger be approved subject to the condition that the merged entity is prevented from retrenching any employee as a result of the merger for a two-year period following the merger implementation date. The condition does not however cover retrenchments as a result of voluntary separation arrangements or voluntary early retirement packages. The merging parties elected not to contest the condition.

"An entity looking to merge or expand into South Africa should keep the interplay between the competition and labour legislation in mind when considering any transaction, particularly when retrenchments for operational reasons may be contemplated prior to or during any proposed transaction," Von Ey adds.

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