IN THE ENFORCEMENT COMMITTEE
ESTABLISHED IN TERMS OF SECTION 97 OF THE SECURITIES SERVICES ACT, 36 OF 2004 ("THE ACT")

CASE NO: **35/2017**

In the matter of:

THE FINANCIAL SERVICE SECTOR CONDUCT AUTHORITY (The Directorate of Market Abuse substituted in terms of Section 300(3) of the Financial Sector Regulation Act, 2017)	**THE REFERRING PARTY**
and	
HARMONY GOLD MINING COMPANY LIMITED	**RESPONDENT**

JUDGMENT

This matter involves the determination of an administrative penalty by the Enforcement Committee (EC).

The members of the EC are as follows:-

- EA Moolla (chairperson)
- Bobby Johnston (member)
- Hlaleleni Dlepu (member)
- Carmen Maynard (member)

IN LIMINE:

The Enforcement Committee (EC) has resolved to deal with this matter by Round Robin where otherwise, even in the event of a consensus tender of an administrative penalty in an agreed sum, a personal empanelment of the EC would have otherwise endured.

There are both statutory governance recognitions for the EC's election. Section 100 (2) of the Securities Services Act No 36 of 2004 provides as follows:-

- **A Panel determines its own procedure for the performance of its functions**

Those statutory provisions are sufficiently flexible to accommodate the discharge of the EC's obligations by Round Robin.

The EC further recognises that transparency and accountability are the cornerstones of our constitutional architecture and in particular public regulation aimed at the protection of financial markets.

These precepts impose upon the Committee an obligation not only to explain the rationale for its decision but also the process by which it has come to its decision.

The EC is of the view that the robustness of our democracy together with a pro-active financial regulator and its attendant publication of outcomes such as this as well as a constitutionally guaranteed free press are sufficient

protections for the EC's resolve to determine its process by Round Robin.

At all relevant times Harmony Gold Mining Company Limited (Harmony) was subject to the provisions of the Securities Services Act, No 36 of 2004 (the "Act") prior to its repeal.

The Referring Party has alleged that:-

- On or about 25 April 2007 at 08:00:08, Harmony published on the Johannesburg Stock Exchange News Services ("SENS") its financial results for the quarter ending 31 March 2007 (the "results")

- In publishing the results, Harmony directly or indirectly, made or published in respect of the past and future performance of Harmony, a statement, promise or forecast that was false, misleading or deceptive in respect of a material fact and which Harmony ought reasonably to have known was rendered false, misleading or deceptive, in contravention of Section 76(1) of the Act because Harmony:
  - Omitted costs relating to the March 2007 quarter of approximately R250 million;
  - Overstated its profits; and
  - Stated a March 2007 headline profit of 58 cents per share instead of a headline loss per share

Harmony:

- Subsequently admitted that the results were not accurate and it had provided incorrect financial information in that some of the third quarter's costs of financial year 2007 were omitted from the results. This resulted in an overstatement of profits

- Claimed that at the time of the publication of the results, it was unaware that the results were inaccurate

- Has asserted that its conduct was neither fraudulent nor dishonest and that the results were published by it in the bona fide belief that they were accurate

- Stated that the inaccuracy was due to the fact that not all material costs for the third quarter of financial year 2007 were reflected in and captured by Harmony's accounting software system. This omission occurred due to inadequacy in the process employed in connection with the complex implementation of the newly installed accounting and software system. This installation process of the newly installed accounting and software system failed to reveal the omission described above

- On becoming aware that the results were inaccurate, Harmony:
    - Immediately undertook a detailed investigation, which led to the publication on SENS of a further trading statement on 6 August 2007, in which investors were advised of the circumstances. To quote extracts from the 6 August 2007 trading statement:

      "Harmony Gold Mining Company Limited (Harmony) announces that its financial results for the quarter ending 30 June 2007 are expected to differ significantly from those of the three previous quarters as well as from the analyst consensus.

Shareholders are advised that Harmony expects to announce a headline loss per share between 130 and 160 SA cents per share for the June 2007 quarter, compared with the March 2007 quarter headline profit of 58 SA cents per share. It is expected that a headline profit of between 20 and 30 SA cents per share will be reported for the 2007 financial year compared with a headline loss of 269 SA cents per share for the 2006 financial year.

The combination of lower production and higher cost will result in the June 2007 quarter's cash cost per kilogram being up between 35% and 45%. Harmony's total cash operating costs are up by between 25% and 28% quarter-on-quarter The company ascribes this in part to the newly installed accounting software system that resulted in some of the March quarter's costs being captured in the June 2007 quarter and thus the average of the last six months' costs would be a more accurate reflection of the company's current cost base."
and

Harmony:

- Undertook various road shows, meetings and presentations, during which in-depth discussions with investors were held in order to fully advise them of what had taken place, and what had given rise to the issuing of the 6 August 2007 trading statement

➢ The documented facts admitted to by Harmony are acceptable to the Referring Party.

- Harmony has accordingly agreed to pay a penalty of R30 million inclusive of costs

- The EC accordingly is requested to impose a penalty of R30 million in terms of Section 103(1)(a) of the Act inclusive of costs which sum will be paid by Harmony within 10 (ten) days of the determination made by the EC

- In support of its admission Harmony has tendered an offer of an administrative penalty of R30 million inclusive of costs. Certain mitigating factors in the determination of an appropriate administrative penalty were recorded in a document attached hereto marked Annexure "A"

- The said Annexure "A" sets out in great minutiae the factors which it exhorts the Committee to take into account in the determination of an administrative penalty

- In essence the factors in mitigation are as follows:-
    - The errors contained in the results at the time of publication on the 25 April 2007 were unknown to Harmony. It became aware of the error during mid July 2007

    - On becoming aware of the mistake, Harmony immediately investigated what may have caused the mistake and took immediate steps to have the mistake corrected

    - The error had reflected for a period of less than four months

- While the share did devalue after the correction, the share price did return to almost what it was (five weeks later)

- The devaluation following the correction was primarily due to the subsequent departure of the CEO (at the time of the announcement), because he was highly respected (in the gold mining industry) and was regarded as synonymous with the Harmony brand

- Harmony's mistake was neither deliberate nor reckless

- A class action instituted in the United States had been settled without admission of liability, negligence, fault or wrong doing on the part of Harmony and the proceeds of the settled amount was used to pay certain claimants

- In South Africa no class action has been instituted notwithstanding the lapse of eleven years since the occurrence of the incident

- Although Harmony has been listed on the JSE for 67 years, there has been no previous or subsequent contraventions of financial regulations or laws

- Harmony has co-operated with the regulator and the regulator has accepted this as a fact

- The potential of harm is unlikely to re-occur as the people involved at the time of the announcement and the lead up to the announcement are no longer

employed by Harmony. The persons who were meant to oversee the implementation of the new accounting system, were held accountable and consequently a number of prominent employees were released from their posts

Factors to be taken into account:

1. Whether a contravention was deliberate and very serious and if there was a potential for harm which could prompt investors in the market to question the trustworthiness and credibility of the market;

2. Social consequences of this type of contravention and the actual or potential effects on a number of people who can ill afford such loss. There is also a matter of potential harm;

3. Whether there was a level of profit derived

4. Whether the Respondent has a clean record

5. Whether the Respondent admitted liability and the assistance that was rendered to the investigating team

6. Whether there are other mitigating factors including a (delete) remorse and contrition

7. The possible deterrent effect of the imposition of a large penalty

8. The criminal section of the Security Services Act 115

REASONING:

- Deterrence is clearly the principal object which the EC should seek to achieve when determining the level of an administrative penalty although regard must also be had to other relevant factors as it needs to deter others from breaches of financial regulation as well as the protection of the integrity of financial markets

- However, in this instance, given the significant and compelling factors in mitigation of the quantum of the penalty, the EC is of the view that the element of deterrence does not come to the fore in relation to the other factors which must be taken into account in the determination of an appropriate administrative penalty

- Harmony has also submitted to the EC, in its representations, other important principles which emerge from the judgment of the Supreme Court of Appeal in:

  Pather & Another v Financial Services Board & Others 2018 (1) SA 161 (SCA):

"the mischief with which the Act seems principally concerned, is protecting the public and promoting confidence in the market;

the purpose of an administrative penalty is to ensure compliance with the legislation and to give the regulatory authority an effective means of enforcing it;

an effective and credible financial regulatory system must be capable, at least in its design, to produce reasonably speedy results;

the proceedings before the enforcement committee are not criminal in nature and the enforcement committee is primarily concerned with the exercise of a disciplinary power in respect of a limited group of persons possessing a special status;

the nature of an administrative penalty is not penal in nature. Rather, it is intended to have a deterrent effect."

- Harmony has further submitted, by way of analogy, that if it was charged and convicted of an offense under section 76(1)(a), the maximum sentence that could be imposed would be a fine of R50 million. Having regard to the fact that section 76(1)(a) distinguishes between intent and negligence, if Harmony were convicted on the grounds that it ought reasonably to have known that the publication was false, misleading or deceptive, it is highly unlikely that the maximum fine would be imposed. Moreover, having regard to all of the surrounding circumstances and mitigating factors, it is equally unlikely that the maximum fine would be imposed even if Harmony were to be convicted on the grounds that it knew the publication to be false, misleading or deceptive.

- In any adversarial process it is an accepted practice as an opening gambit to commence with a large sum which over time results in the arc of the regulator meeting that of equity

"Deterrence as a justification for the punishment of crime is based on the notion that punishment is warranted by reference

to its crime prevention consequences. The deterrence approach to punishment has historically been associated with classical utilitarian philosophy, famously advocated by the English jurist and philosopher Jeremy Bentham in the nineteenth century, based on utilitarian goals of deterring future unlawful behaviour. According to Bentham, punishment was justified primarily in order to prevent others from committing the same offence, the disutility visited on the offender being outweighed by the utility to society arising from the deterrent effect of punishment, thereby preventing future crime.

The fundamental aim of the deterrence model is the pursuit of economic efficiency. Economics is concerned with allocating society's resources efficiently, based on the view that by so doing, the overall welfare of society is maximised."

See Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective by Karen Yeung

- It was of concern to the panel that eleven years has endured since the genesis of the matter, largely attributable to a highly regulated process, prolix documentation and extended negotiations as is wont to happen in matters with as large a stake as this matter. Consequently some inter-generational inequity will have occurred, where today's shareholders are held to account for an event which occurred over a decade ago. This is a regrettable feature inherent in lengthy processes such as this and it behoves both the authorities and Respondent to consider the impact on shareholders.

We are of the view that having regard to the lesser role of deterrence in view of the cumulative weight of the circumstances in mitigation of sanctions postulated, that there is a rational connection between the economic interests of Society as seen through the prism of the requirements of the financial markets and the quantum of penalty tendered.

The penalty tendered unanimously finds favour with the Committee.

In the event the following order is made:-

- That Harmony is to pay an administrative penalty of R30 million inclusive of costs

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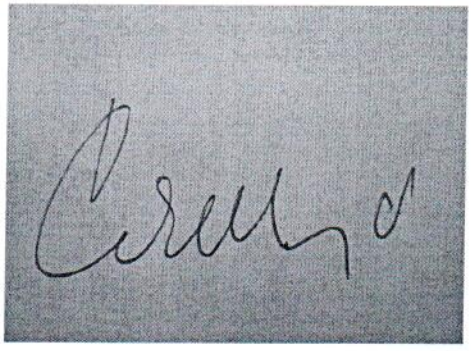
EA Moolla

Chairperson



C Maynard

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H Dlepu

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B Johnston

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H Dlepu

ANNEXURE "A"

HARMONY GOLD MINING COMPANY LIMITED

In re:

MITIGATING FACTORS IN DETERMINATION OF APPROPRIATE ADMINISTRATIVE PENALTY

1. **The nature, duration, seriousness and extent of the contravention or failure.**

   1.1. On 25 April 2007 Harmony published, per SENS announcement, its financial results for the quarter ending 31 March 2007. The published results, at that stage, unknown to Harmony, were incorrect.

   1.2. The first indication that the results published on 25 April 2007 for the quarter ended March 2007 were erroneous, was during mid-July 2007.

   1.3. On becoming aware of the mistake, Harmony immediately investigated what may have caused the mistake and took immediate steps to have the mistake corrected. Numerous meetings with the implementation partner of the new financial system, the internal implementation team and with Harmony's internal and external auditors were held to establish how and why the mistake occurred. It was found that the mistake was due to the implementation of the new financial accounting system Harmony had purchased and was busy implementing. Several executive committee meetings and board meetings were held in order to discuss what actions were necessary in order to address and correct the variances reported. By the end of July 2007 it was established that the figures were indeed incorrect. Harmony was able to publish the correction ("the correction") within three weeks of the first indication that the results published on 25 April 2007 were incorrect.

1.4. The error had reflected for a period of less than four months. The discrepancy in actual costs versus what was reported was approximately R250 million. This amount must be seen in the context of its percentage of the overall earnings figure, that percentage being 13%, and the costs in that computation, the costs being only 6% down from the actual figure.

1.5. While the share did devalue after the correction, the share price did return to almost what it was (five weeks later). As at 6 August 2007, the share price was R95.00. On 24 August 2007, the share price was R63.00. As at mid-September (only some five weeks later), the share price had risen again to R87.00. That the share price then devalued again after mid-September 2007, and that recovery was delayed again until 2011, is due to world economic market decline. What is significant is that at the time of the 6 August 2007 announcement, the share price was already in decline. In the prior month the price had been as high as R103.50. In May 2007 the price had been as high as R108. We quote from a press article dated 6 August 2007 (per News 24 Archives), the article by Robb Stewart entitled "*Harmony Bleeds as Boss Bails Out*':

> "The stock ended R15.20, or 16% lower at R80,60, outpacing a decline in the wider market and a 5.4% drop in Anglo Gold to 272.50. Ahead of Monday's drop, Harmony shares were already down 14% on the start of the year.
>
> Harmony's gold production fell by between 8% and 12% in the fourth quarter, from the previous three months, due mainly to incidents at its Bambanani and Joel operations, lower grades mined at Tshepong as well as the under-performance at Mt Magnet's underground operations in Australia. It also said its fourth-quarter's cash cost per kilogram were up by between 35% and 40%."

1.6. The devaluation following the correction was primarily due to the subsequent departure of the chief executive officer (at the time of the announcement), because he was highly revered and was regarded as synonymous with the Harmony brand. We quote again from the same press article :

> "Johannesburg – Shares in Harmony Gold Mining Company took a pounding on Monday after the world's third largest gold producer

announced the unexpected resignation of Chief Executive Bernard Swanepoel.

Swanepoel, 45, at the helm of Harmony for 12 years, has long been the public face of the gold company he helped grow from a single mine to the fifth largest gold producer globally.

His leaving sparked a sharp fall in Harmony's share price".(our emphasis)

2. **The extent to which the contravention or failure was deliberate or reckless**

Harmony's mistake was neither deliberate nor reckless.

3. **Any loss or damage suffered as a result of the contravention or failure**:

3.1. A Class Action was instituted in the United States, which was settled. In this regard:

3.1.1. A payment of US $9 000 000.00 to the Class Action Claimants was made. The settlement amount, reached pursuant to arms-length negotiations, and undertaken in the context of a mediation between the parties, reflected a voluntary submission to the terms of the settlement. It is important to note is that these negotiations, on the part of Harmony, were conducted and driven by Harmony's insurers.

3.1.2. In terms of the settlement agreement, the settlement was not to be construed to be evidence of any presumption, concession or admission by Harmony, with respect to the truth of any fact alleged in the action or the validity of any claim that has been or could have been asserted in the action, or the deficiency of any defence that had been or could have been asserted in the action, or of any liability, negligence, fault or wrong doing on the part of Harmony.

3.1.3. The settlement proceeds were used to pay the Class Action Claimants, and included their attorney's fees and expenses (those fees and expenses totalling US $3,303,887); the attorneys' fees and expenses payable first.

3.1.4. There was no specific methodology used in coming up with a US $9 million figure. It was arrived at through back and forth negotiations. Both sides had expert reports with economic analysis, and in debating and negotiating over the correct settlement number, those analyses were used, but at the end of the process, the figure was simply a number that the Plaintiffs agreed to accept, and the insurers agreed to pay (this per Harmony's US attorney).

3.1.5. We emphasize that no admission of liability was made; that the settlement figure agreed was at the instance of insurers and that at best can be considered entirely commercial and made to discount risk in litigation and costs.

3.2. In South Africa, some eleven years after the fact – no claims have been instituted out of a South African Court, and any potential claims have probably prescribed.

4. **The level of profit derived from the contravention or failure.**

4.1. Harmony did not derive any profit.

4.2. To the contrary, Harmony sustained reputational harm, and it has taken a number of years for Harmony to restore its credibility.

5. **Whether the Company has previously been found in contravention of this Act.**

Harmony has been listed on the JSE for 67 years. There has been no previous or subsequent contravention.

6. **Any other factor that the panel considers relevant**

6.1. **Co-operation**

It remains Harmony's view that it has co-operated at all times with the then FSB, prior to and post the issuing of subpoenas in 2010. All requests for documentation were honoured, and every assistance accorded to the FSB in the course of its investigation. Harmony has furthermore been entirely candid/frank with the FSB, at all times, having provided the FSB with a document/letter dated 18 February 2010 which sets out in detail the chronology leading up to the publication of the results in April 2007. Harmony thereafter also furnished the FSB with all documents requested.

6.2. **Potential of harm unlikely to reoccur**

6.2.1. The people involved at the time of the announcement, and in the lead up to the announcement, are no longer employed by Harmony. The persons who were meant to oversee the implementation of the new accounting system, were held accountable, and it was in consequence of the April 2007 publication that a number of prominent employees were released from their post.

6.2.2. In consequence of the error, Harmony caused an external review of its procedures. In this regard :

6.2.2.1. more chartered accountants were employed;

6.2.2.2. a segregation of duties was implemented;

6.2.2.3. the system operative at the time was re-implemented, and bedded down, without further incident;

6.2.2.4. the entire system was revamped, through substantial upgrade, in 2013; and

6.2.2.5. the system has proven to be incident free since 2007.

6.2.3. Accordingly, substantial corrective and preventative measures have been taken, at great expense, and there is no potential for harm in the future.

6.3. **Negligence**

6.3.1. In relation to negligence the only standard of care which is legally required is that of the reasonable person, with regard to the particular circumstances of the case. There is no higher onus simply because the entity is large. It would be incorrect to assert that because the entity is large, it must be more careful. To quote from The Law of South Africa, Second Edition, Volume 8(1):

> "The general answer seems to be that the law surrounds the reasonable person with the external factors which accompanied the alleged actus reus, but does not attribute to him the personal characteristics of the accused" and "... if all the characteristics of the accused are taken into account, or ascribed to the reasonable person, standard of judgment wholly disappears, for we can then compare the defendant's (accused's) conduct only with the (presumably identical) conduct of a fictitious construct who is like the defendant (accused) in every conceivable way".

If the size of the entity is any consideration at all in a determination of penalty, that can only be considered in parallel with the deterrence principle.

6.3.2. **The Administrative Law / Arbitrariness**

6.3.2.1. We quote the following:

> "In the context of our constitution, the requirement of the rule of law that the exercise of public power should not be arbitrary is not limited to non-rational decisions. It refers to a wider concept and a deeper principle : fundamental fairness. It does not only demand that decisions must be rationally related to the

purpose for which the power was given. The constitution requires more; it places further significant constraint on how public power is exercised through the bill of rights and the founding principle in shrining the rule of law." Masetlha v The President of the Republic of South Africa and Another 2008 (1) BCLR 1 (CC) Page 52.

"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that an order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our constitution for such action. The question whether a decision is rationally related to the purpose for which the power was given, calls for an objective enquiry". Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others 2000 (3) BCLR 241 (CC) Page 272.

"The general tenor of the Act evinces a concern that a stock exchange licenced thereunder should conduct its business with due regard for the public interest ... The public interest is served by the stock exchange, inter alia, controlling the securities which are bought and sold on the market which it conducts. This control is exercised by way of the listing system, which enables the committee to refuse a listing in respect of securities, if it so decides, and also to remove or suspending listed securities it is of opinion that it is desirable to do so. ... Where Section 17(1) speaks of "desirable" it means, in my view, desirable in the public interest, which in practice means, for the most part, in the interests of the company concerned or its shareholders or persons who might wish to purchase the shares on the stock exchange." Johannesburg Stock Exchange and Another v Witwatersrand Nigel LTD and Another 1988 (3)

SA 132 (A) Page 152. "This brings me to my second point, which is that, as I have shown, the purpose of the suspension was not to protect the public interest, as I have broadly identified it, but rather to discipline or punish Wit Nigel for disobeying what was thought to be a valid instruction given by Gair . It seems to me that this was an improper purpose..." Johannesburg Stock Exchange and Another v Witswatersrand Nigel LTD and Another 1988 (3) SA 132 (A) Page 154.

6.3.2.2. We submit that with due regard to the above quotations, to insist on a substantial penalty as recommended by the FCSA would be to punish the Company (incorrectly so) to the detriment of the public interest/shareholders. To do so would, given the current market conditions pertinent to resources, - and especially resources in the current SA environment - carry with it a real potential to duplicate the 2007 experience and prejudice investors.