

BEFORE THE TAKEOVER SPECIAL COMMITTEE

In appeal of:

MICHELLE KRASTANOV

First Appellant

ADAGE SA (PTY) LTD

Second Appellant

And

CONVERGENET HOLDINGS LTD

Respondent

YELLOW STAR GROUP HOLDINGS LTD

Respondent

The Executive Director has referred this matter to us in terms of section 202(3)(a)(ii) after having issued a ruling and given reasons for his ruling. The ruling was given on 18 March 2013 by the Executive Director in terms of Section 119(6)(c) of the Companies Act, 2008 (“**the Act**”) exempting Yellow Star Group Holdings Limited (“**Yellow Star**”) from making a mandatory offer to the Shareholders of Convergenet Holdings Ltd (CVN) in terms of Section 123 of the Act read with Regulation 86.4 of the Act.

The Executive Director gave his full reasons for granting an exemption to Yellow Star from making a mandatory offer to such shareholders who voted against the exemption on 22 March 2013. As indicated above the exemption was given under the power vested in the Panel by section 119(6)(c).

Section 119(6)(a) – (c) falls under Part B of the Act and is headed : **Authority of Panel and Takeover Regulations**. Under this section the Panel is vested with the authority to wholly or partially, with or without conditions exempt an offeror to an affected transaction. This also covers any offer with or without conditions.

The relevant provisions of this section read as follows:

“The Panel may wholly or partially, and with or without conditions, exempt an offeror to an affected transaction or an offer from the application of any provision of this Part, Part C or the Takeover Regulations if –

- (a) There is no reasonable potential of the affected transaction prejudicing the interests of any existing holder of a regulated Company’s Securities;**
- (b) The cost of compliance is disproportionate relative to the value of the affected transaction; or**
- (c) Doing so is otherwise reasonable and justifiable in the circumstances having regard to the principles and purposes of this Part, Part C and the Takeover Regulation.”**

The Executive Director is empowered to grant an exemption if all the requirements set out in regulation 86.4 read with section 125(3)(b)(ii) have been met by the offeror. In terms of regulation 86.4 of the Takeover Regulation Panel a transaction is exempt from the obligation to make a mandatory offer after publication of a circular incorporating a waiver of the benefit of a mandatory offer if such waiver is made by more than 50% of independent holders of the general voting right of all issued securities. The benefit of a mandatory offer is a share premium which should be waived by more than 50% of the independent holders of securities. Evidence should be presented to the Panel that the independent shareholders have approved the transaction in accordance with the provisions of section 125(3)(b)(iii) of the act.

The full provisions of Regulation 86.4 and section 125(3)(b)(ii) respectively read as follows:

Regulation 86.4: A transaction is exempt from the obligation to make a mandatory offer following a publication by a regulated company of a transaction requiring the issue of securities as consideration for an acquisition, a cash subscription or a right offer, if the independent holders of more than 50% of the general voting right of all issued securities of the regulated company have agreed to waive the benefit of such a mandatory offer in accordance with the principles detailed in Section 125(3)(b)(ii)” .

Section 125(3)(b)(ii) : A person making a partial offer for any class of issued securities of a company must if the offer could result in the person, together with any related or inter-related person or person acting in concert with any of them, holding securities of the company entitling the person or persons to exercise more than the prescribed percentage of the general voting rights of

all issued securities of the company make this offer conditional on the offer being approved by the independent holders of securities of that class, if all such independent holders, in aggregate, control more than 50% of the general voting right of all issued securities of that class”.

Regulation 86.4 contains three essential requirements that should be met to exempt an affected transaction from the obligation to make an offer namely:

- (a) Publication of the transaction by a regulated company (by way of a circular);
- (b) Waiver of the benefit that could be derived from a mandatory offer; and
- (c) The 50% plus one independent shareholders threshold.

Section 123(5)(b)(ii) qualifies independent shareholders as such shareholders who are neither related, interrelated or persons acting in concert. Such shareholders are excluded from agreeing to waive the benefit arising from an affected transaction and voting for the approval for the exemption of the affected transaction from making a mandatory offer. It is safe to conclude that section 125(3)(b)(ii) is cautionary and beneficial to an offeror because if the offer is not made subject to the condition mentioned therein prior to publication of the offer the offeror may be forced to make an offer to minority shareholders. This may result in an offeror being out of pocket consequential upon payment of a premium to a large number of shareholders.

The appellants' main objection against the exemption of the transaction is that not all shareholders who have waived the benefit of a mandatory offer are independent within the meaning of section 125(3)(b)(iii) read with regulation 86.4. The second objection is that the Board of Convergenet Holdings Limited has not discharged their fiduciary duty to minority shareholders.

In a letter dated 11 March 2013 addressed to the Panel by Herold Gie, attorneys of Adage SA (Pty) Ltd the objection is couched as follows:

“We advise, for purposes of clarity, that our primary objection to the waiver concerns the determination of “independent holder of voting rights” as provided for in section 125(i)(a) of the Companies Act that requires such holder be independent of “an offeror or any related or interrelated, or person acting in concert with any of them.”

Further to the above, and read with the correspondence of M J Krastanov dated 8 March 2013 (a copy of which has been directed to Mr L Phakeng of the TRP), we enclose herewith a table of related or interrelated parties, whether at

shareholder or director level, in respect of the shareholders of Convergenet Holding Limited (“CVN”), the content of which is self-explanatory.

We submit that the board of CVN has not adequately or duly discharged its fiduciary duty to minority shareholders in confirming the independence of the holders of securities for the purposes of the vote (the make up of the 65.67% vote in support), of the waiver of the mandatory offer. Had the board of CVN considered this primary issue, or had sight of the enclosed table, or applied its collective mind to the submissions of our client and M J Krastanov (in respect of previous submissions at board meetings), the board would not have considered certain parties as independent for the purposes of the vote.

It follows that the lack of independence of certain holders of securities including Yellow Star, Trinity Asset Management, Trinity Holdings, M Cubed Holdings, together with Afrasia Corporate Finance, would eliminate the abovementioned iron voting in terms of the waiver. Accordingly, by removing the aforementioned inter-related or related parties from the table, at paragraph 5.1 of Werksmans correspondence under reply, the general meeting would not have obtained a 65.67% majority vote required to pass the waiver of the mandatory offer.

In consideration of the above, the TRP should be guided by our submissions, and those of M J Krastonov, in coming to the only conclusion available, that the mandatory offer in terms of the Act is made to the minority shareholders, or conversely that the board of CVN is not exempted from making the aforementioned mandatory offer to minority shareholders.”

The notice of appeal challenged the Executive Director in his (a) failure to properly interpret definitions of related, inert-related and concert parties, (b) failure to apply his mind on the definition of the same terms,(c) failed to investigate irregularities committed by the Board of Convergenet and virtually repeated same grounds of the initial objection differently. Some grounds were not relevant to the initial objection before the Executive Director and we made this clear during the hearing.

The respondents argued that an offeree company is not included in the meaning of related, inter-related or concert party in the definition of an affected transaction. We agree with this contention. The appellants also raised objection against the inclusion of Yellow Star, Afrasia, Tim Modise¹ and Quinton George² as related parties voting in

¹ Director of CVN.

favour of the waiver. The circular to shareholders and the evidence presented to the Executive Director by Werksmans excluded these related parties from voting on the transaction. This is common cause.

The evidence presented by Werksmans further proved that the exclusion of shareholders perceived as related, inter-related or concert parties resulted in more than 51%³ independent shareholders voting on the waiver. No evidence was presented to us to rebut the evidence presented by Werksmans acting on behalf of respondents. During the hearing before us both appellants made unexpected but significant concessions. They conceded that the ruling of the Executive Director could not be faulted except that he had failed to investigate the conduct of board members and certain irregular transactions bordering on fraud. Our response was that that was a separate matter unrelated to the application for exempting the transaction from the obligation to make a mandatory offer. We advised the appellants to pursue the matter with the Executive Director or any relevant authority having jurisdiction in their complaint. It does however appear that the Executive Director addressed the unrelated complaint. This appears from his ruling which we have referred to below.

The Appellants did not question the opinion of the Independent Expert (BDO Corporate Finance (Pty) Ltd). The Independent Expert was satisfied with the accuracy of the registered shareholders of CVN and related parties to the transaction⁴. The circular spells out in detail in Annexure 9 with the heading Corporate Governance pages 88 – 93 the CVN's compliance with corporate governance as contained in the King III report. There is no mention of irregularities or fraudulent transactions in Annexure 9 to the circular.

In his Ruling the Executive Director gave the following reasons for exempting the transaction from the obligation to make a mandatory offer:

“In making a ruling in terms of section 119(6)(c) waiving the requirements that Yellow Star make a mandatory offer as required in terms of the Act and the relevant regulations, the following have been considered:

a circular to the shareholders of the Company which complied with the requirements of the regulations in respect of the disclosures including the advice of the Independent Expert as required by regulation 86.7;

² Director of Afrasia and CVN.

³ The total number of votes exceeded 99%.

⁴ Wherever reference is made to related parties or persons this includes inter-related or concert parties in this decision.

the representations by various parties as indicate above. We have noted the submissions in Harold Gie's letters that the waiver should not be granted. We have also noted that in paragraph 6 of their letter dated 11 March 2013, it is indicated that Yellow Star provided an irrevocable undertaking to vote. It must also be pointed out that the circular to shareholders of the Company specifically indicates that Yellow Star will not be voting on the waiver of the mandatory offer. Herold Gie's indicates that: "the general meeting would not have obtained a 65.67% majority vote required to pass the waiver of the mandatory offer. According to the minutes submitted to TRP, the result of the ballot show that the resolution to waive the mandatory offer was passed by 99.95% of the votes.

In addition, it must be pointed out that Herold Gie's letter requests that the board of ConvegeNet should not be exempted from making the mandatory offer to minority shareholders. This is also incorrect; the party liable to making a mandatory offer, if the mandatory offer is not waived is not the board of ConvegeNet, but Yellow Star as the offeror:

It must be noted that Herold Gie's letter deals with the lack of independence of those parties who provided the irrevocable undertakings to vote and then concludes that the waiver should not be granted based on their lack of independence. It appears that the letter did not take into account the shareholding and voting of other shareholders who did not provide undertakings to vote on the waiver of the mandatory offer, but have been represented and voted in favour of the waiver of the mandatory offer. It is also not clear in their submission if all the parties who provided the irrevocable undertakings to vote lack independence. In their submission, a reference is made that Yellow Star (it has already been pointed out that Yellow Star did not vote on the waiver), Trinity Asset Management, Trinity Holdings, Mcobed Holdings, and Afrasia Corporate Finance are the parties lacking independence. It must be pointed out that Werkman's letter to which Herold Gie's letter refers to, does not list Afrasia Corporate Finance as a party which provided an irrevocable undertaking to vote on the waiver resolution yet in their submission. Herold Gie includes their name.

The submissions by Ms Krastanov to compel a mandatory offer to the remaining minority shareholders of the Company. It is not clear why (the waiver for)⁵ the mandatory offer should be compelled where the resolution for

⁵ Sic. Words in brackets should be deleted.

the waiver of the mandatory offer has been passed by a the requisite majority in accordance with regulation 86,4.....”

We cannot fault the Executive Director in his reasoning and are therefore in agreement with him. Our view is that the appeal is a futile exercise in that it seeks to undo a transaction that is authorised by the Act and the regulations. It is also self defeating in that no mandatory offer can be forced on the respondents if the exemption was refused as it could have resulted in the transaction not going forward. It should be remembered that the offer was made conditional on the Panel approving the transaction as an exempt transaction.

In the circumstances our decision is that the ruling by the Executive Director is confirmed and that the costs of the Panel be paid by the appellants.

Dated at JOHANNESBURG on the 10th day of MAY 2013-05-10

MR N A MATLALA

CHAIRPERSON

PANEL MEMBER: E B MOOLA

I concur

PANEL MEMBER: A KHUMALO

I concur