

IN THE HIGH COURT OF SOUTH AFRICA

WITWATERSRAND LOCAL DIVISION

530604

SIGNATURE

Case 16026/03

In the matter between:

Securities Regulation Panel

Plaintiff

and

MGX Holdings Limited

1st Defendant

Price RS

2nd Defendant

Hills CS

3rd Defendant

Judin JM

4th Defendant

Buch R

5th Defendant

Price RS

6th Defendant

Price L

7th Defendant

EC-Hold Limited

8th Defendant

Price MR

9th Defendant

Judgment

Malan J:

A Introduction

1. On 22 December 2003, the plaintiff gave notice in terms of Rule 28(1) of the Uniform Rules of Court of its intention to amend its particulars of claim by substituting its original particulars of claim in its entirety with the proposed particulars of claim attached to the Rule 28(1) notice ("the proposed particulars").
2. In the proposed particulars the plaintiff seeks various relief against the defendants (who are cited in personal and representative capacities) in terms of s 440M of the Companies Act, No 61 of 1973 ("the Act") and Rules 8.1 and 8.2 of the Rules of the Securities Regulation Code on Takeovers and Mergers (respectively referred to as "the Rules" and "the Code"). The relief sought is primarily aimed at declaring certain share acquisitions as "affected transactions" and directing the defendants to extend a mandatory offer in terms of Rules 2.3.1 (b), 2.3.2 and 8.
3. The plaintiff is the Securities Regulation Panel, a body corporate established in terms of section 440B of the Act. The functions of and the powers conferred upon the plaintiff appear from the provisions of Chapter XVA (ss 440A ff) of the Act. The functions of the Panel are

"(a) to regulate, in such manner as it may deem necessary or appropriate – (i) all transactions or schemes which constitute affected transactions; (ii) all proposals which on successful completion or implementation would become affected transactions; and (b) supervise dealings in securities that are contemplated in this Chapter" (s 440C(1)).

"Without derogating from the provisions of subsection (1), the functions of the panel shall include the making of rules in respect of matters falling within the provisions of this Chapter, including rules relating to the following aspects of

affected transactions, namely – (i) the duties of the offeror; and (ii) the duties of the offeree company” (s 440C (3)).

The rules which s 440C(3) envisages that the plaintiff would make in the performance of its functions, and would in terms of s 440C(5) be published by notice in the Gazette, have been published (GN R29 of 18 January 1991 as amended, ie the *Securities Regulation Code on Takeovers and Mergers* (see *Henochsberg on the Companies Act Section 5A*; Blackman, Jooste and Everingham *Commentary on the Companies Act Volume 3 Appendices* 83 ff (cited as Blackman)). The Code and Rules are based on the *City Code on Take-overs and Mergers* (for the history of which see Sir Alexander Johnston *The City Take-over Code* (1980) Oxford). A comparison of some aspects of our Code and Rules and the *City Code* can be found in Blackman 15A – 3 ff and see CS Margo and SJ Naude “Take-overs and Mergers: the City Panel and the Position in South Africa” (1983) 5 *Modern Business Law* 122; Stephanie Luiz “Some Comments on the Application of the Securities Regulation Code on Take-overs and Mergers” (1997) 9 *SA Mercantile Law Journal* 239).

3. The first defendant is a company against which relief is sought in its own right. The second defendant is an individual, against whom relief is sought in his personal capacity. The third defendant is an individual, against whom relief is sought in his personal capacity only in the alternative claim. The fourth, sixth and seventh defendants are individuals, who are trustees of a trust (“The Mandy Rebecca Price Trust” – hereinafter referred to as “the trust”), and against whom relief is sought only in their representative capacities as trustees of the trust. The fifth defendant is a former trustee of the trust; no relief is sought against the fifth defendant. The eighth defendant is a company. It is the target company in which the first defendant and the trust acquired shares, upon which acquisitions the claims for relief against the first, second, third,

fourth, sixth and seventh defendants are founded. No relief is sought against the eighth defendant. The ninth defendant is an individual. She is the sole beneficiary of the trust. No relief is sought against the ninth defendant.

4. On 26 January 2004, the first, second, third, fifth, sixth and seventh defendants ("the defendants") objected to the proposed amendment. The notice of objection does not state whether the objection is directed at the plaintiff's main claim or at the plaintiff's alternative claim, but it appears from the content of the notice of objection that, for the purposes of this application, it may be regarded as directed at both the main claim and the alternative claim since the grounds upon which the objection is founded apply to both claims (and the differences between the main claim and the alternative claim are of a nature which does not affect the soundness of the grounds of objection).
5. The plaintiff now seeks the leave of the court to amend its particulars of claim in accordance with Rule 28(1) notice served on the defendants on 22 December 2003.
6. Generally, the defendants object to the proposed amendments on the basis that the proposed particulars of claim are deficient in a number of respects, lack essential allegations to constitute a cause of action, in particular against the second defendant in his personal capacity, and are vague and embarrassing in various respects set out in the notice of objection. The more important complaints of the defendants are that the plaintiff has:

(1) failed to allege the terms of the "agreement, arrangement or understanding", whether tacit or otherwise, necessary to ground liability against the defendants as persons "acting in concert" in relation to an

“affected transaction” (as defined in s 440A(1) of the Act, read with the Rules);

(2) failed to allege facts necessary to render the second defendant liable in his personal capacity (as opposed to his representative capacity as a trustee), and in particular failed to allege that the second defendant in his personal capacity acquired shares in or control over the target company, EC-Hold, as contemplated by the definitions of “acting in concert” and “affected transaction” in s 440A; and

(3) sought to hold the second defendant personally liable despite the averments in paragraph 12.2.2 of the proposed particulars being contradicted directly or by clear implication by the contents of paragraphs 12.1 and 12.2.1; paragraph 12.2.2 is thus rendered vague and embarrassing as against the second defendant in his personal capacity (contrary to its earlier ruling and the import of the aforesaid subparagraphs of paragraph 12).

B Legislation and the Code

7. The purpose of the Act and Rules relevant to this matter is to require a party (“the offeror” – s 440A(1) *sv* “offeror”) alone or together with any of the parties acting in concert (s 440A(1) – *sv* “acting in concert”) with such party, who (having regard to the shares already held) acquire “control” (being 35% or more of the voting shares (paragraph 5 of Section B) of a public company, or who already hold 35% of such voting securities and increase their holding by 5% or more between the limits of 35% and 50% (see the proviso to Rule 8.1 added by GN R929 of 6 August 1999; Henochsberg 965), to extend mandatory offers to all other shareholders to acquire all their shares at a comparable consideration unless the Panel otherwise rules (Rule 8.1). The company in which such shareholding is

acquired is the “offeree company” (s 440A(1)). The transaction whereby a 35% shareholding is acquired, or whereby 5% between 35% and 50% shareholding is acquired, is an “affected transaction” (s 440A(1) sv “affected transaction”). In paragraph 11.2 of Section C, the philosophy underlying the Act and Code is summarised as follows:

“The underlying principle is that persons holding an equity interest in an offeree company through shares or other securities in that company (whether or not such carry voting rights) shall be entitled to dispose of their said interest on terms comparable to those of any affected transaction in the relevant securities.”

[See, generally, for a discussion of the rationale of related provisions: *Sefalana Employee Benefits Organisation v Haslam & Others* 2000 2 SA 415 (SCA) paragraphs 3-7 at 417C-418B; *Spinnaker Investments (Pty) Ltd v Tongaat Group Ltd* 1982 1 SA 65 (A) 71AH; Blackman 15A-1 ff; Henochsberg Volume 1 961 ff.]

The obligation of a party who has acquired “control” of an offeree company to make such a mandatory offer to other shareholders, “the minorities”, is set out in Rule 8.1. Rule 8.2 extends this obligation to parties acting in concert with the offeror by requiring them, *in addition*, to extend an offer. It follows that this “additional offer” need be extended only after the requirements of Rule 8.1 have been met, in other words, only if an “affected transaction” has occurred. If an “affected transaction” has occurred, and the obligation to make a mandatory offer has been activated, the Securities Regulation Panel may, as in this case, in terms of s 440M(1) apply to the court for an order compelling any person to comply with his obligation to make such mandatory offer.

8. The following Rules and definitions in the Act are relevant:

Section F - The mandatory offer and its terms

Rule 8.1 The mandatory offer

Whenever an affected transaction occurs, then the person or persons who have acquired control of a company, or who acquire further securities in excess of the limits prescribed by the rules, shall unless the Panel rules otherwise, extend offers to the holders of any class of equity capital, whether voting or non-voting, and also to the holders of any class of voting non-equity capital of which such person or persons acting in concert with him are holders, to acquire all of their securities or such portion of their securities as the Panel on application may determine. In making such determination, the Panel shall have regard to the facts of the case, the general principles of the Code and equity. The offers shall be for the same or a comparable consideration. Offers for different classes of equity capital shall be comparable and the Panel shall be consulted in advance in such cases: Provided that for purposes of this rule the limit prescribed shall be the acquisition in any period of 12 months of securities carrying more than 5% of the voting rights by the person or persons holding not less than the specified percentage but not more than 50% of the voting rights of a company.

Rule 8.2 Obligations of other persons

In addition to the person specified in Rule 8.1, each of the members of a group of persons acting in concert with him shall, according to the circumstances of the case, have the obligation to extend an offer.

"Acting in concert" means, "subject to subsection (2) (a), acting in pursuance of an agreement, arrangement or understanding (whether formal or informal) between two or more persons pursuant to which they or any or them co-operate for the purposes of entering into or proposing an affected transaction". Section 440A(2)(a) provides that for the purposes of subsection (1) (a) "the following persons shall be deemed to be acting in concert with one another unless the contrary is established, namely - ... - (ii) a company with – (aa) any of its directors or holders of its securities who are beneficial owners as referred to in section 440G(1); (bb) any company controlled by one or more of its

directors; or (cc) any trust of which any one or more of its directors is a beneficiary" (s 440A(1)).

An "**affected transaction**" is "any transaction (including a transaction which forms part of a series of transactions) or scheme, whatever form it may take, which – 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 close 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 close corporation); or (b) involves the acquisition by any person or two or more persons acting in concert, in whom control of any company (excluding a close corporation) vests on or after the date of commencement of section 1 (c) of the Companies Amendment Act, 1990, of further securities of that company in excess of the limits prescribed in the rules; or (c) is a disposal as contemplated in section 228" (s 440A(1)).

"**Control**" is "subject to subsection 2 (b), a holding or aggregate holdings of shares or other securities in a company entitling the holder thereof to exercise, or cause to be exercised, directly or indirectly, the specified percentage or more of the voting rights at meetings of that company or any company controlled by it, irrespective of whether such holding or holdings confer *de facto* control" (s 440A(1)).

The following additional definition applies unless the context otherwise indicates for the purposes of the Rules (Section B paragraph 3):

A "**concert party**" means "any person acting in concert with any other person in relation to an affected transaction".

D THE CLAIMS

9. The main claim is that the first defendant and the trust (represented by the then trustees, namely the second, third, fourth and fifth defendants), acting in concert, acquired (taking into account the shares already held by

the first defendant) more than 35 per cent of the shares in the eighth defendant, and therefore the first defendant and the trust (represented by the fourth, sixth and seventh defendants as current trustees of the trust) became liable to make a mandatory offer to the minority shareholders.

It is alleged that the second defendant in his personal capacity was a concert party to the aforesaid acquisitions, and therefore also became liable to make such mandatory offer to the minorities.

An order is sought, first, to declare that an affected transaction has taken place; and, secondly, that the first defendant, the second defendant in his personal capacity, and the fourth, sixth and seventh defendants in their capacities as the current trustees of the trust, make such mandatory offer to the minorities. The identification of the precise transaction which constituted the affected transaction, and the determination of the precise price at which it took place and the mandatory offer should be made, do not form part of the grounds of objection to the proposed amendment and need not be dealt with.

The essential differences between the main claim and the alternative claim are the following. First, the cause of action is based not on an acquisition which exceeds the 35 per cent threshold, but on an acquisition which increases the holding of the acquirer and the concert parties by more than 5 per cent between 35 per cent and 50 per cent of the voting shares in the eighth defendant. Secondly, the third defendant, in his personal capacity, is added to the first and second defendants, and the fourth, sixth and seventh defendants in their capacities as current trustees of the trust, as the parties against whom relief is claimed.

There are differences between the main claim and the alternative claim but the grounds upon which the objections to the proposed amendment are founded do not bear upon these differences. The objections are founded upon grounds that are common to both the main

claim and the alternative claim. I will therefore deal with the grounds of objection with reference to the main claim.

10. The cause of action relied upon in the proposed particulars is that the first defendant and the trust (represented by the then trustees), acted in concert to acquire a shareholding in the eighth defendant which, taking into account the shares already held, vested in the first defendant and the trust a shareholding exceeding 35%, ie "control", which had not so vested before, and thereby concluded and became parties to an "affected transaction"; that the second defendant, personally, was a party acting in concert with the first defendant and the trust (represented by the then trustees), and thereby became a concert party with the first defendant and the trust (represented by the said trustees); and, thus, the first defendant, the second defendant, and the current trustees of the trust have become liable to make the mandatory offer prayed for in the relief sought by the plaintiff.

All the issued shares in the eighth defendant were voting shares. Hence any acquisition of 35% or more of any shares in the eighth defendant would vest "control" (as defined) (paragraph 3.1). Before July 1999 the first defendant held 33,19% of the issued shares in the eighth defendant; and the trust held 0,59% of the issued shares in the eighth defendant (paragraph 3.2). The combined holdings of the first defendant

and the trust, up to 15 July 1999, amounted to 33,78% of the issued shares in the eighth defendant. Thus, if the first defendant or the trust, acting in concert, acquired a further 1,22% or more of the issued shares in the eighth defendant, they would trigger an "affected transaction".

After 15 July 1999 to October 1999 the trust acquired more than 1,22% of the issued shares in the eighth defendant and in fact increased its shareholding from 0,59% to 14,92%, (paragraph 4.1), and, the first defendant also acquired further shares in the eighth defendant (paragraph 4.2).

Since the combined acquisitions of shareholding in the eighth defendant by the first defendant and the trust (taking into account the shares already held) exceeded the 35% threshold, the questions are whether any of the said acquisitions, in excess of the 35% threshold, were made by the trust and the first defendant "acting in concert"; and whether, in addition to the first defendant and the trust, the second defendant was also a party to such "acting in concert", ie a "concert party".

To support the allegations of "acting in concert" the following averments are made (a) the existence of an "agreement, arrangement or understanding" (whether formal or informal) between two or more persons (paragraph 6.1 of the main claim and paragraph 6.1 of the alternative claim); (b) that there is conduct amounting to an act or "acting" (paragraph 6.2 of the main claim and in paragraph 6.2 of the alternative claim); (c)

that the parties to the “agreement, arrangement, or understanding”, or any of them co-operates (paragraph 6.3 of the main claim and paragraph 6.3 of the alternative claim); (d) that such co-operation is pursuant to the said “agreement, arrangement, or understanding” (paragraph 6.3 of the main claim and in paragraph 6.3 of the alternative claim); and (e) that the purpose of the co-operation is the entering into or proposing of an “affected transaction” (paragraph 6.3 (including paragraphs 6.3.1, 6.3.2 and 6.3.3) read with paragraph 4 (which describes the transactions in question) and paragraph 8 (which describes the effect of such transactions as vesting “control” of the eighth defendant in the first defendant and the trustees), and paragraph 9 (which avers the conclusions that the first defendant and the trustees and the second defendant in his personal capacity were “acting in concert” and that the one or the other transactions in question was an “affected transaction”). The corresponding allegations are made in paragraphs 6, read with paragraphs 4 and 5 and 8 of the alternative claim. The allegations founding the conclusion that there was an “acting in concert”, are, in the main claim, made against the first defendant, the trustees and the second defendant in his personal capacity, and, in the alternative claim, made against the first defendant, the trustees, and the second and third defendants in their personal capacities).

The plaintiff further pleads certain facts in support of the above allegations. They are made in paragraph 10 of the main claim and in

paragraph 9 of the alternative claim. The particulars pleaded in paragraph 10 of the main claim (and in paragraph 9 of the alternative claim) set out facts which demonstrate the “affected transaction” and who the parties “acting in concert” in respect of it were. All the issued shares in the eighth defendant were voting shares. Hence the acquisition of 35% or more of shares in the eighth defendant would vest “control” (paragraph 3.1). In July 1999 the trust held only 0,59% of the issued shares in the eighth defendant; and the first defendant had acquired 33,19% of the issued shares in the eighth defendant (paragraph 3.2). When the first defendant closely approached the 35% threshold which would oblige it to make a mandatory offer to minorities, further purchases of shares in the eighth defendant were made by the trust (which proceeded to raise its shareholding to 14,92%), though the first defendant itself made a few further acquisitions (paragraphs 4.1 and 4.2, read with annexes A and B).

It is alleged that in regard to the said purchases the first defendant and the trustees and the second defendant (and, under the alternative claim, the third defendant) were “acting in concert”. The “acting in concert” of the first defendant and the trust is demonstrated by the allegation that the first defendant funded the trust to pay the purchase price for the shares acquired by the trust, which used a company, Quaheri First Investments (Pty) Limited (“Quaheri”), whose share capital was wholly owned by M Investments (Pty) Limited, which was in turn wholly owned by the trust, to make such purchases. Accordingly, the first

defendant initially debited Quaheri, in its books of account, with the amount so funded and paid directly by the first defendant to the brokers for such purchases (paragraphs 10.8, 10.9 and 10.10).

The “acting in concert” of the second defendant, who participated as a concert party with the first defendant and the trust, is demonstrated by the following allegations: the second defendant held the controlling shareholding in and was the chairman of the board of directors of, the first defendant (paragraphs 10.1, 10.2 and 10.3). The second defendant had established the trust for the sole benefit of his daughter and was a trustee thereof (paragraphs 10.5 and 1.9.1), and the other trustees were friends and/or persons who rendered services to the second defendant (paragraph 10.5). The second defendant initiated and managed the purchases of the shares in the eighth defendant for the trust and obtained the co-operation of the first defendant (which funded such purchases) and of the trustees to do so (paragraph 10.7), and further authorised, instigated, aided and advised the first defendant and the trustees to acquire the shares in the manner indicated above (paragraph 6.3.3). The second defendant caused a company, Eureka Industrial Limited, de facto controlled by him, ultimately to assume the liability for the purchase price of the shares acquired by the trust (paragraph 10.11).

The facts alleged indicate that the said acquisitions, taking into account the shares already held by the first defendant and the trust, were effected pursuant to an “agreement, arrangement or understanding”

between the first defendant, the trustees and the second defendant (and, in the case of the alternative claim, the third defendant), and that all these parties co-operated in the ways referred to above for the purposes of such acquisitions.

E The Proposed Particulars of Claim

11. The relevant proposed particulars of claim are as follows:

3.

3.1

3.1.1 At the end of June 1999 the issued share capital of the eighth defendant comprised 104 million ordinary shares of the same class, and at all times material hereto remained so.

3.1.2

The aforesaid shares, including all shares in the eighth defendant referred to hereinafter, were "securities" within the meaning of "security" as defined in section 440A(1) of the Act and entitled the holder thereof to exercise voting rights at the meetings of the eighth defendant, and were "voting securities" as defined in section B of the said Code.

3.2

3.2.1

Before 15 July 1999 the first defendant held 34 522 500 shares in the eighth defendant, which represented 33,19% of the issued shares of the eighth defendant.

3.2.2

By the end of July 1999 the trustees for the time being, and in their capacity as trustees for the trust (hereinafter referred to as "the trustees") held 613 000 shares in the eighth defendant, which represented 0,59% of the issued shares of the eighth defendant.

- 3.3 The first defendant and the trustees continued to hold the aforesaid shares at all times referred to below.
- 4.
- 4.1
- 4.1.1 During the period 15 July 1999 to 2 October 2000 the trustees acquired (and, on some occasions, sold) and became the holders of 16 126 800 shares in the eighth defendant.
- 4.1.2 Annexed hereto marked "A" is a schedule setting out for each acquisition referred to in 4.1.1 above,
- 4.1.2.1 the date of the acquisition of such shares;
- 4.1.2.2 the number of shares acquired;
- 4.1.2.3 the cash consideration payable and paid for the acquisition;
- 4.1.2.4 the aggregate holdings by the trustees after the acquisition;
- 4.1.2.5 the aggregate percentage of the issued shares in the eighth defendant acquired and held by the trustees after the acquisition;
- 4.1.2.6 the party who acted on behalf of the trustees in making the acquisition;
- 4.1.2.7 the actual purchaser and principal of the agent who made the acquisition, namely the trustees acting as aforesaid.
- 4.1.3 Included in the acquisitions referred to in annexure "A" is the acquisition by the trustees of 855 900 shares in the eighth defendant on 8 October 1999.
- 4.2
- 4.2.1 During October 1999 the first defendant acquired and became the holder of a further 950 8000 shares in the eighth defendant, resulting in the first defendant becoming the holder of 35 473 3000 shares in the eighth

defendant, which latter number of shares amounted to 34,11% of the issued shares in the eighth defendant.

4.2.2 Included in the acquisitions referred to in 4.2.1 above are acquisitions of 669 100 and 11 600 and 38 400 and 15 000 shares in the eighth defendant on 8 October 1999.

5. Annexed hereto marked "B" is a schedule, in the same particularity as annexure "A", setting out the progressive cumulative acquisitions and shareholdings in the eighth defendant made and held by the trustees and the first defendant over the period 15 July 1999 to 2 October 2002.

6. During the periods referred to in paragraph 4 above:

6.1 There was an agreement, arrangement or understanding, formal or informal, (hereinafter referred to as "the agreement") between the first defendant, the third, fourth and fifth defendants in their representative capacities as trustees of the trust, and the second defendant in his representative capacity as trustee of the trust and in his personal capacity. The agreement was concluded at Johannesburg, and was concluded orally, tacitly or by conduct, as inferred from the particulars set out in paragraph 10 below. The precise time when the agreement was concluded is not known to the plaintiff, but it was concluded between July 1999 and 8 October 1999.

6.2 The first, second, third, fourth and fifth defendants, in their respective capacities referred to in paragraph 6.1 above, acted in pursuance of the agreement as set out in paragraph 6.3 below.

6.3 Pursuant to the agreement the defendants referred to in paragraphs 6.1 and 6.2 above all co-operated for the purpose of entering into the transactions referred to in 4 above; and in particular:

6.3.1 The first defendant co-operated with the other defendants referred to in paragraphs 6.1 and 6.2 above for the purposes of and by entering into the transactions constituting the acquisitions referred to in paragraph 4.2 above, (including in particular the transactions referred to in paragraph

4.2.2 above) and the successive transactions concluded by it and reflected in annexes "A" and "B" hereto.

6.3.2 The trustees (acting as aforesaid) co-operated with the other defendants referred to in paragraphs 6.1 and 6.2 above for the purposes of and by entering into the transactions constituting the acquisitions referred to in paragraph 4.1 above (including in particular the transaction referred to in paragraph 4.1.3 above) and the successive transactions reflected in annexes "A" and "B" hereto;

6.3.3 The second defendant, acting personally, co-operated with the first defendant and with the trustees (acting as aforesaid) for the purposes of the acquisitions referred to in paragraphs 4.1 and 4.2 above, and in particular the transactions referred to in paragraphs 4.2.2 and 4.1.3 above, and the transactions reflected in annexes "A" and "B" hereto, and did so in the manner indicated in paragraph 10.7 below, and by authorising, instigating, aiding and advising the first defendant to acquire the shares referred to in paragraph 4.2 above (including in particular the shares referred to in paragraph 4.2.2 above) and the trustees to acquire the shares referred to in paragraph 4.1 above (including in particular the shares referred to in paragraphs 4.1.3 above) and both the trustees and the first defendant to acquire the shares referred to in annexes "A" and "B" hereto.

7.

7.1 The acquisition by the trustees (acting as aforesaid) referred to in paragraph 4.1.3 above, alternatively in annexes "A" and "B" hereto, formed part of a series of transactions by the trustees (acting as aforesaid) alternatively by the trustees (acting as aforesaid) and the first defendant, for the acquisition of shares in the eighth defendant.

7.2 The acquisitions by the first defendant referred to in paragraph 4.2.2 above alternatively in annexes "A" and "B" hereto, formed part of a series of transactions by the first defendant alternatively by the first defendant and the trustees (acting as aforesaid) for the acquisition of shares in the eighth defendant.

7.3 The acquisitions referred to in 7.1 and 7.2 above also formed part of a scheme for such acquisitions of shares in the eighth defendant.

7. The effect of the transaction referred to in 4.1.3 above, alternatively the effect of one or other of the transactions referred to in 4.2.2 above alternatively the effect of one or other of the successive transactions reflected in annexes "A" and "B" hereto, (taking into account the shares in the eighth defendant held by the first defendant and the trustees in their representative capacities, before the transactions referred to in 7.1 and 7.2 above and before the scheme referred to in 7.3 above - the second defendant in his personal capacity not holding any such shares) was to vest in the first defendant and in the trustees (in their representative capacities) aggregate holdings in the eighth defendant entitling them to exercise or cause to be exercised, directly or indirectly, 35% or more of the voting rights at meetings of the eighth defendant, and thereto to vest in them "control", as defined in section 440A(1) of the Act and in the Rules, of the eighth defendant, which control had not vested in them prior to the aforesaid transaction or one or other of the aforesaid transactions or scheme.

9.

9.1 By virtue of the foregoing and what is stated in paragraphs 9.2 and 10 below, the first defendant and the trustees (acting as aforesaid) and the second defendant in his personal capacity were "acting in concert" as defined in section 440A(1) of the Act and in the Rules in respect of the transactions referred to in paragraph 4, and in particular paragraphs 4.1.3 and 4.2.2 above, and in respect of the scheme referred to in paragraph 7.3 above.

9.2 By virtue of the foregoing, the transactions and scheme referred to in paragraph 4 above, and in particular in paragraph 4.1.3 above, alternatively one or other of the transactions referred to in paragraph 4.2.2 above, alternatively one or other of the transactions reflected in annexes "A" and "B" hereto, was an "affected transaction" as defined in section 440A(1) of the Act and the Rules.

10. In support of the allegations made in paragraphs 6 to 9 above, the plaintiff relies on the following facts which pertained at all times material hereto (references to defendants being made by their full names):

10.1 The chairman of the first defendant was Mr Ronald Sydney Price, and the chief executive officer of the first defendant was Mr Christopher Seymour Hills.

10.2 Mr Ronald Sydney Price and his family held the largest block of shares in the first defendant.

10.3 The directors of the first defendant, and their respective shareholdings in the first defendant as at 30 June 1999 and 30 June 2000, were as follows:

	<u>30 June 1999</u>	<u>30 June 2000</u>
Ronald Sydney Price	9 269 000	9 360 000
Christopher Seymour Hills	1 206 000	1 306 000
A J Baxter	215 900	N/A
G N Hamilton	270 000	270 000
D J McMahon	130 000	130 000
D C L Wassung	378 500	142 000
N J Webster	200 000	200 000
L Wengrowe (Mr Price)	20 000	20 000
R D Shirley	N/A	120 000
D Baloyi	Nil	Nil
John Michael Judin	Nil	Nil

(Mr R D Shirley was not a director during the year ended 30 June 1999, and L Wengrowe is Mr Ronald Sydney Price's wife.)

10.4 The trust was established by Ronald Sidney Price for the benefit of Mandy Price, who is the sole beneficiary of the trust and who is the daughter of Ronald Sydney Price.

10.5 Subject to paragraph 1.9 above, the trustees of the trust at all material times were Ronald Sydney Price, Christopher Seymour Hills (who was a longstanding colleague of Ronald Sydney Price), John Michael Judin (who over a longer period had rendered services to Ronald Sydney Price as an attorney), and Ronald Buch (who had over a long period rendered services as an accountant to Ronald Sydney Price).

10.6 John Michael Judin and Ronald Sydney Price (who was also the chairman of the board of directors of the first defendant) and Christopher Symour Hills (who was

the chief executive officer of the first defendant), were at all times material hereto directors of the first defendant.

- 10.7 Ronald Sidney Price was the person who initiated all the purchases of shares in the eighth defendant made for the trust and listed in annex "A" hereto, and managed the purchases on behalf of the trust, and he did so with the knowledge, consent and co-operation of Christopher Seymour Hills and of the first defendant and of the trustees in their said representative capacities.
- 10.8 In respect of the 16 126 800 shares in the eighth defendant acquired (subject to what is stated in 10.9 below) for the trust as shown on annex "A" hereto, the purchase prices for 16 112 800 shares were paid by the first defendant, which paid out, directly to the brokers who purchased the shares for the trust, R19 316 488,94 for the purchase prices, including brokerage costs, by means of cheques and direct bank transfers.
- 10.9
- 10.9.1 The acquisitions referred to in 10.8 above were made in the name of a company Quaheri First Investments (Pty) Limited ("Quaheri"), the share capital whereof was at all material times wholly owned by a company M Investments (Pty) Limited, the capital whereof was at all material times wholly owned by the trustees in their representative capacities as trustees of the trust.
- 10.9.2 Quaheri at all times acted as the agent of the trustees in making the acquisitions referred to in annex "A" hereto.
- 10.10 The first defendant debited, in its books of accounts, Quaheri with R8 171 520,30 in respect of the aforesaid acquisitions by Quaheri, on behalf of the trustees, as aforesaid.
- 10.11 At the financial year-end of 30 June 2000, R8 833 474,85 (representing capital and interest) was transferred by journal entry from the loan account of Quaheri to the loan account of Eureka Industrial Limited in the financial accounts of the first defendant. Eureka Industrial Limited was *de facto* controlled by Ronald Sydney Price (who was also its chairman) together with his children's trusts.

- 10.12 The facts referred to in 10.1 to 10.11 above demonstrate that, over the period 15 July 1999 to 2 October 2000, the first defendant funded all the acquisitions for the trust by lending R19 316 488,94 specifically for the purpose of acquiring the shares in the eighth defendant and actually itself paying the brokers which effected such acquisitions, by lending the said money itself and/or using Eureka Industrial Limited as a conduit for such loans.

F The Grounds of Objection

12. The main grounds of objection are (a) that the plaintiff failed to allege the terms of the alleged “agreement, arrangement or understanding” necessary to found liability of the defendants “acting in concert” in relation to an “affected transaction” (see paragraphs 23-8 below); (b) failed to allege facts to render the second defendant liable in his personal capacity (as opposed to his capacity as a trustee) and, in particular, that the second defendant in his personal capacity acquired shares in or control over the target company (see paragraphs 12-22 below) and (c) that the plaintiff seeks to hold the second defendant personally liable despite the averments in paragraph 12.2.2 of the proposed particulars being contradicted directly or by clear implication by paragraphs 12.1 and 12.2.1 resulting in paragraph 12.2.2 being vague and embarrassing vis-à-vis the second defendant in his personal capacity (see paragraph 34 below). These grounds of objection all overlap and my discussion will necessarily involve some repetition. Counsel for the plaintiff, Mr SA Cilliers SC and M Kriegler, have conveniently placed the objections in eight categories and I will deal with them in that order.

G Specific Objections

13. The **first objection** is that the plaintiff failed to allege facts to render the second defendant liable in his personal capacity (as opposed to his capacity as a trustee) and, in particular, that the second defendant in his

personal capacity acquired shares in or control over the target company, his participation being limited to his co-operation with the first defendant and the trustees as alleged in paragraph 6.3.3 of the proposed particulars (paragraphs 17 to 23 of the notice of objection).

14. Some of the provisions of the Code and Rules may seem to support the view that an actual acquisition of shares, and hence the vesting of "control", is required that a concert party to be obliged to extend an offer.

Rule 2.3.1(b) requires an announcement of a firm intention to make an offer to be made immediately upon the acquisition of securities that give rise to an obligation to make an offer under Rule 8. Rule 2.3.2 requires the announcement of a firm intention to make an offer to contain details of "any existing holding of securities in the offeree company: - which the offeror owns or over which it has control; which is owned or controlled by any person acting in concert with the offeror or in respect the offeror has received an irrevocable commitment to accept the offer; in respect of which the offeror holds an option to purchase; and in respect of which any person acting in concert with the offeror holds an option to purchase" (Rule 2.3.2(a)(iii)). The offer must also contain "[d]etails of any arrangements which exists within the offeror, with the offeree company or with any person acting in concert with the offeror or with any offeree company in relation to relevant securities, whether or not any dealings have taken place" (Rule 2.3.2(a)(v)). These provisions are not conclusive since, where the concert party holds or acquires no shares, this is all that needs be disclosed.

Rule 6.1 imposes an obligation to make an immediate announcement where an offer has been amended as a consequence of certain dealings, and, in particular, provides that: "Acquisitions of offeree company securities by an offeror or any person acting in concert with it

may give rise to obligations under Rule 5 (requirements increase offer), or Rule 8 (mandatory offer) or Rule 9 (cash offer). Immediately after such an acquisition, an appropriate announcement must be made. Whenever practicable, the announcement shall also state the number of securities acquired and the consideration therefore.” It does, however, not follow that an acquisition by a party acting in concert is required by this Rule before he or she is bound to make the offer: it seems to suffice if any of the parties acting in concert acquires securities. An “offeror” means any person or two or more persons acting in concert ...” (s 440A(1) and it would be sufficient if either or any of them acquire securities. The fact that the announcement is required to state the number of securities acquired and the consideration therefor, obviously, relates only to the securities actually acquired by the concert party who acquired them.

Nor does Rule 8.6 take the matter any further. This Rule imposes restrictions on the exercise of control by an offeror and persons acting in concert with him in the exercise of the respective votes attaching to any securities held in the offeree company to appoint a nominee of the offeror or persons acting in concert to the board of the offeree company.

The exercise of voting rights of a person or group of persons acting in concert is dealt with in Rule 8.7 which requires specific and prominent reference in respect of such voting or the possibility thereof (Rule 8.7(a)). This provision, however, can only apply in so far as the concert party in fact holds or acquires securities.

Nor does the circular nature of the reference in the definition of “acting in concert” to that of “affected transaction” (and vice versa) lead to the conclusion that for liability to extend an offer as a concert party to arise, as in the case of the second defendant (in his personal capacity), it must be alleged and proved that, not only was he party to the “agreement,

arrangement or understanding" but that the transaction concerned had the effect of vesting "control" in him and the parties to the concert agreement. There are no such allegations in the proposed particulars but, for the reasons set out, there need not be.

15. Key to the objection raised by the defendants is the words of Rule 8.2: "in addition to the person specified in Rule 8.1, each of the members of a group of persons acting in concert with him shall ... have the obligation to extend an offer". Rule 8.1 deals with "the person or persons who have acquired control ..." and imposes on him or them the obligation to extend an offer. Once the obligation to extend the offer in terms of Rule 8.1 arises an *additional* obligation is imposed "in addition to the person specified in Rule 8.1", ie in addition to the person or persons "who have acquired control", on other persons, ie on persons who have *not* acquired control, viz on "each member of a group of persons acting in concert with him". The distinguishing feature between the two sub-rules is thus clear: Rule 8.1 deals with those who have acquired "control"; Rule 8.2 with those who, themselves, have not but were "acting in concert". Rule 8.2 contains no requirement that the persons referred to in it must have acquired securities in the target company (cf Blackman 15A --16).
16. The meaning of Rule 8.2 is clear but, if any limitation should be placed on it, it must be found in the definition of "acting in concert" since the extended offer is to be made by "each of the members of a group of persons acting in concert". The definition reads as follows (s 440A (1)):

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

Section 440A(2)(a) provides that for the purposes of subsection (1) (a) "the following persons shall be deemed to be acting in concert with one another unless the contrary is established, namely - ... - (ii) a company with – (aa) any of its directors or holders of its securities who are beneficial owners as referred to in section 440G(1); (bb) any company controlled by one or more of its directors; or (cc) any trust of which any one or more of its directors is a beneficiary".

17. The words "any of them" in the definition of "acting in concert" refer to the "two or more persons" who are parties to the "agreement, arrangement or understanding". The nature of the "acting in pursuance" is not specified and needs only be the act of "any of them", ie the act of any one or more, but not necessarily all, of the parties to the "agreement, arrangement or understanding" (cf Henochoberg 964). They or any of them must "pursuant" to the "agreement, arrangement or understanding" "co-operate". Again, the act of co-operation is not specified but it must be for "the purposes of entering into or proposing an affected transaction". On the face of it, the act of co-operation is not limited to the acquisition or holding of securities and, as illustrated by Rule 8.2, should not be so restricted. Any act of co-operation and not only the combination of securities holdings or the acquisition of securities but also the funding, planning, facilitating of the acquisition or, as has been suggested, the master-minding, initiating, advising and securing the co-operation of others.
18. The concept of an "acquisition" is relevant only in relation to an "affected transaction", ie a transaction that will have the effect of vesting control in "any person, or two or more persons acting in concert" and does not limit the persons who are "acting in concert". Everyone who is a party to an "agreement, arrangement or understanding" pursuant to which "they or any of them" co-operate for the purposes of entering into or proposing an affected transaction and who acts pursuant to such agreement, arrangement or understanding is "acting in concert". The purpose of the

agreement, arrangement or understanding is irrelevant: what is of concern is the purpose of the co-operation.

An act of co-operation pursuant to the "agreement, arrangement or understanding" may consist in the acquisition of the securities, or their purchase, or proposing or facilitating it. It may also consist, as has been argued, in planning, master-minding, initiating, advising, securing the co-operation of others or paying for or funding the acquisition of the securities. The definition of "acting in concert" does not entail that a person acting in concert must either hold or acquire securities him or herself.

19. The deeming provisions in s 440A (2), particularly s 440A (2) (a) (ii) (aa), are not dependent on a person acquiring any securities in the target company and there seems to be no basis for Blackman at 15A --16 to suggest that a director might be able to rebut the presumption by showing that "he has no beneficial interests in any shares of the offeree company". A director could well be liable in terms of Rule 8.2 for the reasons stated without acquiring or holding any shares in the company.

The *City Code* contains a provision somewhat comparable to Rule 8.2. Their Rule 9.2 provides:

"In addition to the person specified in Rule 9.1, each of the principal members of a group of persons acting in concert with him may, according to the circumstances of the case, have the obligation to extend an offer."

The Note on Rule 9.2 (*Palmer's Company Law Volume 6* (Palmer R.86: July 2002: D.084) states that

"[t]he prime responsibility for making an offer under this Rule normally attaches to the

person who makes the acquisition which imposes the obligation to make an offer. If such person is not a principal member of the group acting in concert, the obligation to make an offer may attach to the principal member or members and, in exceptional circumstances, to other members of the group acting in concert. This could include a member of the group who at the time when the obligation arises does not hold any shares". [Rule 9.1 of the City Code is headed "When it is Required and who is Primarily Responsible for making it" (compare the terminology used in the previous version of our Rule 8.1) and, like our Rule 8.1 imposes primary responsibility for making the offer; see Blackman 15A - 93].

It follows that a concert party need not necessarily himself acquire shares in the target company whether under the *City Code* or under Rule 8.2.

20. The presumptions in s 440A (2) do not necessarily involve that the concert parties deemed to be such have to "acquire" or "hold" shares in the target company. In so far as the plaintiff is relying on the presumption in s 440A (2)(ii)(aa) it seems to me that, although the section has not been pleaded specifically but the facts relied upon are set out, the plaintiff is entitled to rely on them to invoke the presumption (*Van Buuren v Gien* 1913 TPD 346 at 351-2; *Ketteringham v Cape Town* 1934 AD 80 89-90). The decision in *Yannakou v Apollo Club* 1974 1 SA 614 (A) deals with a special case of illegality where it was not clearly pleaded whether reliance was placed on common-law or statutory illegality vitiating the transaction. The court said at 623 FG:

"Hence, if he relies on a particular section of a statute, he must either state the number of the section and the statute he is relying on or formulate his defence sufficiently clearly so as to indicate that he is relying on it".

In this matter, it is expressly pleaded that the second defendant was a director of and shareholder in the first defendant (paragraph 10.3 of the proposed particulars) so that the plaintiff is entitled to rely on the presumption in s 440A(2)(ii)(aa).

None of the requirements of “acting in concert” as defined entails an obligation that the person acting in concert must himself acquire or hold securities in the offeree company.

21. The first objection is that, even if the allegations made in paragraph 6.3.3 (and the paragraphs referred to) were established, they do not justify the conclusion that the second defendant, in his personal capacity, acted in concert. Paragraphs 17 to 23 the objection seeks to found the objection on the absence of an allegation that the transactions (ie acquisitions) relied upon and detailed in annexes A and B to the proposed particulars, had the effect of vesting any shares or any “control” in the second defendant personally: it is only alleged in paragraph 8 of the proposed particulars that the effect of the transactions was to vest control in the trustees and the first defendant; and that the alleged participation of the second defendant, personally, is limited to his co-operation with the first defendant and the trustees as alleged in paragraph 6.3.3 (and the paragraphs referred to) of the proposed particulars of claim. The latter point is correct. However, the real issue is the reference to “persons acting in concert” in the definition of “affected transaction”. It is clear from paragraphs 6 and 8 of the proposed particulars that the first defendant and the trustees were “acting in concert”, and that, as a result of the transactions relied upon, became vested with “control”.

However, the first defendant and the trustees were (as alleged) not the only persons “acting in concert”; the group of persons “acting in concert” also included the second defendant personally. Rule 8.2 extends the obligation to make a mandatory offer also to “each of the members of a group of persons acting in concert with him”. As far as the obligation of the second defendant in his personal capacity is concerned, the only question is therefore whether he, personally, was (as alleged) “acting in concert” with the first defendant and the trustees.

22. The answer to this question depends on the definition of “acting in concert”, and on whether the (alleged) conduct of the second defendant, personally, fell within that definition. It seems to me that sufficient allegations relating to the “agreement, arrangement or understanding” have been made in the proposed particulars of claim. Paragraph 6.1 of the proposed particulars alleges that there was such an “agreement, arrangement or understanding” between the first defendant, the trustees, and the second defendant personally. Paragraph 10 of the proposed particulars of claim supports that allegation and show that the second defendant, personally, was the controlling shareholder in and chairman of the board of directors of the first defendant, and was also the founder and a trustee of the trust; and that he initiated and managed the purchases of the shares by the trust; and to that end he obtained the co-operation of the first defendant to fund the purchases by the trust and ultimately procured a company de facto controlled by him to assume liability to pay for such purchases.

The second requirement of “acting in concert” is that there must be conduct amounting to “acting”. This is established in regard to the second defendant in paragraph 6.2, read with paragraphs 6.3.3 and 10.7, of the proposed particulars. The act or “acting” of the second defendant consisted of, firstly, the act of co-operation by the second defendant (with the first defendant and the trustees); and secondly, the acts of authorising, instigating, aiding and advising both the first defendant and the trustees to make the acquisitions of shares relied upon. These acts of co-operation and authorising, instigating, aiding and advising are alleged in paragraph 10 of the proposed particulars by the second defendant’s managing the purchases of the trust and his obtaining the co-operation of the first defendant to fund such purchases by the trust, and his procuring a

company de facto controlled by him to assume liability for the purchase price of the acquisitions by the trust.

The third requirement is that there must be co-operation by the parties to the agreement or any of them. This is alleged in regard to the second defendant in paragraph 6.3.3, and paragraphs 6.3.3 read with paragraph 10.7, of the proposed particulars. The acts or acting referred to above consisted of acts of the second defendant of co-operating with the first defendant and the trustees by initiating and managing the purchases for the trust (paragraph 10.7 of the proposed particulars), by the second defendant authorising, instigating, aiding and advising the first defendant and the trust to acquire shares in the eighth defendant (paragraph 6.3.3 of the proposed particulars), by obtaining the co-operation of the first defendant to fund such purchases by the trustees (paragraph 10.8 to 10.12 of the proposed particulars) and by procuring a company de facto controlled by him to assume liability for the purchase price of the acquisitions by the trust.

The fourth requirement is that such co-operation must be pursuant to the agreement alleged in regard to the second defendant in paragraph 6.3 of the proposed particulars. The allegation that the acts of co-operation took place “pursuant” to the said agreement also implies that such acts were envisaged by the “agreement, arrangement or understanding”. The further allegations in paragraph 10 of the proposed particulars support the allegation that, by virtue of his position of influence over the first defendant and the trust, and over the company assuming liability for the purchases by the trust, the acts described in paragraph 10.7 of the proposed particulars were the kind of acts of co-operation which were envisaged by the agreement and were acts “pursuant” to the agreement.

The fifth requirement is that the purpose of the co-operation must have been the entering into or proposing of an affected transaction (ie a transaction which would have the effect of vesting in the first defendant and the trust, acting in concert, 35% or more of the voting securities in the eighth defendant. Paragraph 6.3 and 6.3.3 of the proposed particulars make these allegations. The further allegations in paragraph 10 and the allegations in paragraph 8 of the proposed particulars that the purchases relied upon had the effect of vesting control in the first defendant and the trustees support the allegation that the purpose of the co-operation of the second defendant was to have the effect it had.

It follows that it is alleged that the second defendant, personally, has been “acting in concert” with the first defendant and the trustees in transactions which had the effect of vesting shares and control in the first defendant and the trustees (the other concert parties). That is sufficient under Rule 8.2 to render the second defendant personally liable to make the mandatory offer.

23. The **second objection** is that that the plaintiff failed to allege the material terms and object of the alleged “agreement, arrangement or understanding” pleaded in paragraph 6.1 of the proposed particulars necessary to found liability of the defendants “acting in concert” in relation to an “affected transaction” and that the plaintiff had failed to allege that it was a material term of the “agreement, arrangement or understanding” that that “control” over the target company would be achieved by “co-operation” of the defendants. Moreover, it is objected that the plaintiff has failed to allege the material facts from which a tacit “agreement, arrangement or understanding” can be inferred (see paragraphs 4 and 5, 6 to 8 of the notice of objection). In paragraphs 6 to 8 of the notice of objection it is further said that the plaintiff has failed to allege that it was a material term of the “agreement, arrangement or understanding” that

"control" would be achieved by and vest in the persons acting in concert and that "control" would be achieved by co-operation of the relevant defendants.

In the discussion of an "agreement, arrangement or understanding" Blackman 15A – 12 to 13 states that the words "arrangement" and "understanding" are

"both of wide import, and neither an arrangement nor an understanding need be legally binding in the sense of formally amounting to a contract or agreement. The significance of the words 'whether formal or informal' is unclear. Perhaps they were inserted in order to emphasise that the agreement, arrangement or understanding need not amount to a legally binding contract; and that it need not be express, but may be implied from the conduct of the parties. The agreement must contain a provision as to how the parties to it (or some of them) are to co-operate for the purpose of entering into or proposing an affected transaction; for condition (iii) requires that to be done 'pursuant' to the agreement. It would seem that the agreement must also include an agreement to combine or pool shareholdings. This is because it is only by combining the holdings of the members to the agreement that the transaction in question will, if successful, be an 'affected transaction'".

24. In coming to this conclusion Blackman 15A -- 10 relies on an analysis of the provisions of the *City Code*. The *City Code*, however, defines "acting in concert" differently:

"Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively co-operate, through the acquisition by any of them of shares in a company, to obtain or consolidate control ... of that company" (*Palmer's Company Law Volume 6* (R.86: July 2002 at [D] – 0010; my underlining).

Whereas the *City Code* requires the purpose of the "agreement, arrangement or understanding" to be the obtaining or consolidation of "control", our definition requires the co-operation, and not the "agreement,

arrangement or understanding", to be "for the purposes of entering into or proposing an affected transaction". The "agreement, arrangement or understanding" need not have as its purpose the obtaining or consolidation of "control". Moreover, the purpose of the co-operation must be the entering into or proposing of an "affected transaction". Nor is it necessary that all the concert parties "co-operate"; it suffices if "they or any of them" co-operate for such purpose. The conclusion of Blackman cited above is that the "agreement, arrangement or understanding" must include an agreement to combine holdings "because it is only by combining the holdings of the members to the agreement that the transaction in question will, if successful, be an 'affected transaction'". Our definition of "acting in concert", however, does not require an "agreement, arrangement or understanding" to this effect nor that its content or purpose be the acquisition of "control". Our definition of "acting in concert" does not require all the concert parties to enter into or propose an "affected transaction": it is sufficient if "they or any of them co-operate for the purposes of entering into or proposing an affected transaction". Not all the parties have to enter into an "affected transaction" and, consequently, not all of them have to acquire shares, nor do they have to "agree to combine" the holdings they neither have nor acquire. The suggestion that the "agreement, arrangement or understanding" be directed, among others, at the "pooling" or "combining" of holdings is inappropriate in view of our legislation.

25. The "agreement, arrangement, or understanding" covers a whole range of agreements and other acts falling short of being legally binding contracts. They need not be "formal" and may arise from conduct. Whether the *content* of the agreement, arrangement or understanding, for want of a better word, can be expressed in determinable terms does not seem possible, nor does the Act, in particular, the definition of "acting in concert" require that. The definition of "acting in concert" requires some understanding – whether it be called an "agreement", "arrangement" or

“understanding” - which indicates that the parties, or any of them, were not acting independently but together (cf Blackman 15A – 10 and see *Industrial Equity Ltd v Commissioner for Corporate Affairs (Vic)* (1989) 1 ACSR 153 159 SC (Vic) (cited by Blackman 15A –10 n1). How the arrangement came about (eg by written or oral communication, or tacitly by conduct, or in any other way) does not matter. At least some meeting of the minds of the parties involved, albeit that no binding agreement be concluded, seems to be required (see, generally, *Randfontein Transitional Local Council v ABSA Bank Ltd* 2000 2 SA 1040 (W) 1049; *S v Harksen*; *Harksen v President of the Republic of South Africa and Others*; *Harksen v Wagner NO and Another* 2000 1 SA 1185 (C) 1203I – 1204 B; *Bourbon-Leftley en Andere v WPK (Landbou) Bpk* 1999 1 SA 902 (C) 922H – 923B; *Thukela Wildlife CC v Mvelase and Others* 2000 4 SA 231 (LCC) 234B; *Ex parte Kaplan and Others NNO: In re Robin Consolidated Industries Ltd* 1987 3 SA 413 (W) 419B – 420B).

Nor does it matter what the content or object of such arrangement was. The limiting features of the definition of “acting in concert” are not to be found in the *content* of the “agreement, arrangement or understanding” but in the word “pursuant” in the definition of “acting in concert”.

26. The objection made is that the plaintiff needed to, but did not, allege that it was a material term and/or object of the “agreement, arrangement or understanding” that “control” would be achieved by and/or vest in the persons acting in concert, and that there was agreement that such “control” would be achieved by co-operation of the relevant defendants or a combining of holdings (see Blackman A15 -- 12-3 cited above), and/or the material terms of the agreement as to such co-operation (see paragraph 8 of the objection). This contention is incorrect: the definition of “acting in concert” does not require that the purpose or content of the “agreement, arrangement or understanding” must be the acquisition of “control”, and also does not require allegations of terms to show that the

“agreement, arrangement or understanding” had such purpose or content nor how it would be achieved. What the definition requires is that the co-operation by the parties to the agreement, arrangement or understanding” be “pursuant” to the “agreement, arrangement or understanding”, and that the purpose of the co-operation is the entering into or proposal of an affected transaction (ie a transaction which would have the effect of vesting “control”). The contents (or object) of the “agreement, arrangement or understanding” may be different from the purpose or object of the co-operation: the purpose of the former may be to obtain board control, or to facilitate a buy-back of the company's shares. The purpose of the co-operation has to be the entering into or proposing an “affected transaction”, ie a transaction that will vest “control” where it had not vested before. It follows that, provided the co-operation was “pursuant” to the “agreement, arrangement or understanding”, it is irrelevant what its purpose or content was.

27. But even if this conclusion is wrong, the content of the “agreement, arrangement or understanding” is implicitly pleaded because of the allegations that the acts of the first defendant, the trustees and the second defendant were performed *pursuant* (paragraphs 6.2 and 3) to the agreement, arrangement or understanding alleged (paragraph 6.1 of the proposed particulars). Inasmuch as the allegations in paragraph 6, read with paragraph 10 of the proposed particulars (and the supporting facts in paragraph 10 of the proposed particulars, by which the co-operation is demonstrated) aver that the co-operation was indeed “pursuant” to the agreement, arrangement or understanding, they necessarily contain the allegation that such co-operation fell within the scope of the “agreement, arrangement or understanding” – whatever its content were.

The facts alleged in paragraph 10 of the proposed particulars of claim are pleaded in support of inter alia the allegations made in paragraph 6 in regard to the existence of the alleged agreement,

arrangement or understanding (paragraph 6.1), the acting in pursuance thereof (paragraphs 6.2 and 6.3), and the acts of co-operation (paragraph 6.3) by the first defendant (paragraph 6.3.1), the trustees (paragraph 6.3.2) and the second defendant personally (paragraph 6.3.3) for the purposes of entering into an affected transaction. These facts justify the inference that an "agreement, arrangement or understanding" existed between all these defendants, at least tacitly, and that its ambit was that the said defendants, or any of them, would do precisely what they did.

The plaintiff would not generally have knowledge of the "agreement, arrangement or understanding", and its means of proving the same would be by relying on the facts of the relationship between the parties thereto and on the facts of the co-operation by them or any of them resulting in the vesting of "control" where it had not vested before. That is why the Act, and in particular the definition of "acting in concert", require only the existence (and not its content) of an "agreement, arrangement or understanding", and that the parties or any of them acted by co-operating "pursuant" thereto, and that the purpose of the co-operation is the entering into or proposing of an "affected transaction".

The definition of "acting in concert" (requiring only an "agreement, arrangement or understanding", pursuant to which the parties or any of them co-operate "for the purposes of entering into or proposing an affected transaction") requires only that the co-operation must be for the purposes of entering into or proposing a transaction having that effect, whether intended or not. It does not require that the purpose of the "agreement, arrangement or understanding", or of the co-operation, be to gain "control".

In any event, the content of the agreement, arrangement or understanding is implicit, as I have said, in the allegations made that the acts of the first defendant, the trustees and the second defendant, were

acts “pursuant” to it. Moreover, the contention in paragraph 5.2 of the objectors’ heads of argument to the effect that the allegations in paragraph 10 of the proposed particulars claim do not support the inference of a tacit agreement, arrangement or understanding between the first defendant, the trustees and the second defendant is not convincing. Nor do the objections in paragraphs 57-61 impress: these acts are acts attributed to the second defendant in his personal capacity and are necessary and relevant to the second defendant personally having acted in concert with the first defendant and the trustees.

28. I have been referred to the unreported judgment of Myburgh J in *Randgold and Exploration Company Limited and Another v Fraser Alexander Limited and 18 Others* (Case 21801/94). The first, second, third, fifth, sixth and seventh defendants have relied on this judgment in their submissions concerning the determination whether an “affected transaction” under the Code and Rules has occurred in view of the alleged failure of the plaintiff to have pleaded the terms of the “agreement, arrangement or understanding” and the absence of any allegation that the second defendant acquired or held shares in the target company and hence not being capable of exercising “control” as defined in s 440A(1).

Randgold concerned an urgent application for an interim order to prohibit the holding of a general meeting which had been convened to consider a scheme; alternatively, to order that no effect be given to the resolutions taken at that meeting. The order sought was to operate pending litigation that the scheme proposed would constitute a contravention of s 38 of the Companies Act; be an “affected transaction” within the meaning of the Code and Rules; be in breach of the fiduciary duties of the directors giving effect to the scheme; and vis-à-vis the second applicant, be unfairly prejudicial, unjust or inequitable conduct within the meaning of s 252. Myburgh J set himself out to determine whether the scheme amounted to an “affected transaction”. In the course of his judgment he said that

“a transaction is affected if, taking into account any securities held before such transaction, it has or will have the effect of vesting control of any company in any person, or two or more persons acting in concert, in whom control did not vest prior to such transaction. ‘Control’ is defined as the holding of 35% of the shares. It does not mean de facto control. But it is important to appreciate that what control means is that the collection of shares will be used in a particular way, and I quote from the definition of control, ‘at meetings of the company’. In other words, the present applicants have to satisfy me that there was some agreement, arrangement or understanding between various of the respondents that, beyond tomorrow’s meeting they would exercise control at future meetings of this company. If they are unable to satisfy me in that regard it is not an affected transaction. I am informed by Mr Trengove, who appeared for certain of the respondents, that his clients have stated on a number of occasions, and that the two boards in question have accepted that on each occasion, that there is no agreement, arrangement or understanding between the offerors and the supporting shareholders beyond the two resolutions to be proposed at the general meeting. There is thus no agreement, arrangement or understanding jointly to exercise control whether between the offerors inter se or between them and the supporting shareholders. The fact that the respondents have formed an alliance in order to achieve a passing of the resolution tomorrow which will give them management control and which will result in them holding 40% of the shares is not enough. They have to go further, as I have explained. In my view, they have not gone far enough.”

Although this judgment may seem to lend support for the defendants’ contentions, the judgment does not deal with the real issue in this matter, viz whether a party to an “agreement, arrangement or understanding” who does not himself acquire shares in the target company can be a concert party if any of the other parties pursuant to the agreement, arrangement or understanding co-operates to acquire shares. This question depends on the definition of “acting in concert” which was neither referred to nor considered by Myburgh J.

Moreover, while it is correct that “control” does not mean de facto control, it does not follow that “control” means that the shares will be used in a particular way. All that the definition of “control” requires is that the “holding or aggregate holding of shares” must be “entitling the holder

thereof to exercise ... the specified percentage or more of the voting rights at meetings of that company ...". Nothing more than this "mechanical" entitlement (cf the closing words in the definition of "control": "irrespective of whether such holding or holdings confer de facto control") is required: neither the way in which the voting rights are to be exercised nor the agreement, if any, providing for their exercise affects the question of "control".

Furthermore, a "mere voting agreement" obviously does not have the effect of vesting "control" and thus does not constitute an "affected transaction" per se. However, the reason is not because it is a "mere voting arrangement" but because the effect of such voting arrangement does not necessarily vest control where it did not exist before.

The judgment is therefore distinguishable both as far as the facts are concerned and the law: *Randgold* does not deal with the concept of "acting in concert" at all, even less with the question whether a party to an "agreement, arrangement or understanding" who does not himself acquire shares can be a concert party if any of the other parties co-operates by acquiring shares (nor, it should be added, do *Sefalana Employee Benefits Organisation v Haslam & Others supra* and *Spinnaker Investments (Pty) Ltd v Tongaat Group Ltd supra*).

29. The **third objection** is that the proposed particulars of claim to the extent that the "agreement, arrangement or undertaking" alleged in paragraph 6.1 of the proposed particulars is intended to constitute fulfilment of one of the criteria of "acting in concert" do not give rise to liability on the part of the second defendant in his personal capacity; alternatively, that they are vague and embarrassing (paragraph 9 of the notice of objection).

The objection is made against the second defendant's personal liability, not against that of the first defendant and the trustees acting in concert. However, in terms of the presumption in section 440A(2)(a)(ii)(aa) read with paragraph 9.3 of the proposed particulars of claim, the second defendant is deemed to be a concert party with the first defendant, and thus to have been one of the group of persons "acting in concert" as required by Rule 8.2.

Paragraph 6.3.3 of the proposed particulars gives two bases for the acts of co-operation by the second defendant personally. The first is that he co-operated in the manner described in paragraph 10.7, namely, that he initiated and managed the purchases by the trust, and that he obtained the co-operation of the first defendant and his other trustees to do so. The second is that he authorised, instigated, aided and advised the first defendant and the trustees to acquire the shares in question (see paragraphs 6 and 10, particularly 6.3.3, 10.11). The personal role of the second defendant is alleged, and provides sufficient basis for his personal liability under the Act and the Rules.

30. The **fourth objection** refers to paragraphs 6.2 and 6.3 (and, presumably paragraph 10 as well; paragraphs 10 and 11 of the notice of objection). The allegation is made in paragraphs 6.2 and 6.3 of the proposed particulars that the defendants in their capacities referred to acted "pursuant" or "in pursuance of the agreement" referred to in paragraph 6.1. The objection is that, in the absence of pleading the material terms of the "agreement, arrangement or understanding", the defendants are unable to determine whether the conduct alleged in paragraphs 6.1 to 6.3.3 constitutes conduct pursuant to it, whether it sustains the conclusions pleaded in paragraphs 8, 9.1 and 9.2 of the proposed particulars and whether the conduct alleged meets the definition of "acting in concert". The proposed particulars are said to be vague and embarrassing.

I have already dealt with the need to plead the material terms of the “agreement, arrangement or understanding” (paragraphs 23-8 above).

The use of the word “pursuant” to the “agreement, arrangement or understanding” implies that the conduct alleged (the “acts of co-operation”) falls within its scope, dispensing with the need to allege specifically that the conduct is covered by it. Paragraph 10 of the proposed particulars sets out precisely the facts on which the allegations in paragraph 6 are based. Further particularity is not required.

31. The **fifth objection** (paragraphs 12 to 16 of the notice of objection) involves a number of objections, the first of which is to the effect that the allegations in paragraph 10.7 of the proposed particulars do not state whether the second defendant carried out the acts referred to in his personal capacity. However, paragraph 6.3.3 makes it quite clear that the second defendant is alleged to have acted in his personal capacity.

Secondly, it is said that the allegations in paragraph 10.7 are vague because they do not make it clear that the conduct alleged relates to the second defendant's personal or representative capacity (paragraph 14 of the notice of objection). Again, paragraph 6.3.3 of the proposed particulars states that the second defendant “acting personally, co-operated with the first defendant and with the trustees (acting as aforesaid) for the purposes of the acquisitions referred to in paragraphs 4.1 and 4.2 above ... and did so in the manner indicated in paragraph 10.7 below, and by authorising, instigating, aiding and advising the first defendant to acquire the shares ... and the trustees to acquire the shares ...” . Paragraph 10 of the proposed particulars in detail alleges the purchases made for the trust, the company used as a vehicle to make them for the trust (Quaheri First Investments (Pty) Limited), that the liability to pay the purchase price of the shares acquired for the trust was

assumed first by the first defendant (of which the second defendant was the chairman of the board of directors and the largest shareholder) and then by Eureka Industrial Limited (which was de facto controlled by the second defendant personally together with his childrens' trusts). These liabilities for shares purchased for the trust, were not liabilities of Quaheri First Investments (Pty) Limited, and the common factors among Quaheri First Investments Limited, Eureka Industrial Limited, and the trust, were the positions and influence which, as appear from the allegations in the proposed particulars of claim, the second defendant personally held over all of them and his means of influencing all of them to commit his personal *acts of co-operation* for the purpose of the affected transactions. I fail to see why the allegations are vague and embarrassing.

Thirdly, the objection is made that the allegations of "authorizing, instigating, aiding and advising" lack particularity (paragraph 15 of the proposed particulars). However, read with paragraph 10 of the proposed particulars, it seems to me that sufficient particulars have been given to enable the second defendant to plead.

Fourthly, it is objected that, to the extent that it alleged that the conduct of the second defendant constitutes conduct in his personal capacity, such conduct may be performed only in a representative capacity (paragraph 16 of the notice of objection). I do not understand the reference to the word "authorising" to mean that the second defendant in his capacity as director or chairman authorised certain acts on behalf of a principal but rather that he, personally, acting in concert as explained in paragraphs 6, 7 and 10, "authorised" certain transactions. It cannot be said that these acts can be performed only in a representative capacity.

32. The **sixth objection** can be found in paragraph 24 of the notice of objection. The point made is that Rule 8.2, on account of the definitions of

“acting in concert” and “affected transaction”, entails that the “agreement, arrangement or understanding” pursuant to which the persons “co-operate for the purpose of entering into an affected transaction must be with the object and purpose of vesting control in all such persons, including the second defendant, being the parties to the agreement”. In other words, Rule 8.2 does not extend liability to persons who do not become shareholders or acquirers of shares and only finds application if the object of the “agreement, arrangement or understanding” is to vest “control” in them. This objection has been dealt with in paragraphs 13-22 above. As I have said, Rule 8.2 makes no reference to the acquisition of shares as a condition of liability but extends liability to “each of the members of the group of persons acting in concert” with the person referred to in Rule 8.1.

33. The **seventh objection** is that Rule 8.2, in so far as it may impose liability on persons who neither hold nor have acquired shares, impermissibly exceeds the ambit of the definitions of “acting in concert”, “affected transaction” and “control” and is thus ultra vires s 440A(1); is void for vagueness because the phrase “according to the circumstances of the case” does not sufficiently and with certainty identify the ambit of the Rule and that it does not indicate whether liability is to be determined by the court or the panel (paragraph 25 of the notice of objection).

As far as the first point is concerned, I have already dealt with the definition of “acting in concert” and it is clearly wide enough to include acts of co-operation that does not entail the acquisition of shares. See paragraphs 13 to 22 above.

Whether the words “circumstances of the case” render Rule 8.2 void for vagueness depends on what is meant by the expression. In terms of Rule 8.2 each of the members of a group of persons acting in concert “shall, according to the circumstances of the case, have the

obligation to extend an offer". The "offer" referred to can only relate to the "offers" mentioned in Rule 8.1. These "offers" may or may not be required to be made: Rule 8.1 provides that they have to be extended "unless the panel rules otherwise". If an offer has to be extended, the offers may relate to the whole or only a portion of the securities as the Panel may determine. Thus, the offer to be made under Rule 8.2 has to be made "according to the circumstances of the case", ie the circumstances of the offers that have to be extended under Rule 8.1. If no offers have to be extended under Rule 8.1 no offer needs to be made in terms of rule 8.2.

On the other hand, if "offers" relating to a portion of the shares only have to be extended under Rule 8.1 an obligation to extend a (similar) offer also arises under Rule 8.2. Rule 8.2 therefore has a clear field of application, and the phrase "the circumstances of the case" does not render that rule void for vagueness.

The use of the phrase "according to the circumstances of the case" in rule 8.2 cannot be construed so as to leave it open to or within the discretion of the Panel whether persons acting in concert with a person or persons acquiring control of a company are, in addition, to the person or persons referred to in rule 8.1 obliged to make a mandatory offer. Such a construction would negate the dominant provisions of rule 8.2 leaving concert parties unaffected by Rule 8. Rule 8.2, which provides that "each of a group of persons acting in concert shall ... have the obligation to extend an offer", cannot be construed as conferring on the plaintiff or the court the power to decide whether or not, "according to the circumstances of the case", the Rule should apply or to whom it should apply. The reference to "the circumstances of the case" refers to the standard set by an application of Rule 8.1. A different conclusion may perhaps be drawn from the provisions of the City Code. Johnston *The City Take-Over Code supra* at 274 states as follows: "Subparagraph (1) of the present (1976)

Rule assumes that there is a leader on whom the obligation falls, but it adds 'In addition to such person, each of the principal members of the group of persons acting in concert may, according to the circumstances of the case, have the obligation to extend the offer.' The reference to 'principal members' excludes not only small shareholders but also wives, and others brought within the net of persons acting concert who could not reasonably be expected to accept the responsibility if the principals fell away. The reference to 'circumstances of the case' is a pointer to the same direction." The Rule discussed by Johnston placed an obligation on "each of the principal members of the group", a provision involving a determination of who the "principal members" are, a question that does not arise exist under our Rule 8.2 which imposes liability on "each of a group of persons acting in concert".

34. The **eighth objection** is that the plaintiff seeks to hold the second defendant personally liable despite the averments in paragraph 12.2.2 of the proposed particulars being contradicted directly or by clear implication by paragraphs 12.1 and 12.2.1 resulting in paragraph 12.2.2 being vague and embarrassing vis-à-vis the second defendant in his personal capacity (paragraphs 26 and 27 of the notice of objection). This ground of objection does not relate to any of the others and applies only to paragraph 12.2.2. Paragraph 12 reads as follows:

12.1 The plaintiff has not, in terms of the powers conferred on it by Rule 8.1, ruled that an offer as prescribed by Rule 8.1 is not required to be made in respect of any of the aforesaid transactions.

12.2.1 The plaintiff has not, in respect of any of the aforesaid transactions, exempted the first defendant or the trustees or the second defendant in his personal capacity, or the current trustees from complying with the provisions of Rule 8, nor excused nor agreed to an adjusted price for a mandatory offer under Rule 8.

12.2.2 Further and in support of the allegations made in 12.1 and 12.2.1 above, the plaintiff states that on 18 March 2002 it ruled that the first defendant and the then trustees jointly and severally forthwith comply with the provisions of Rule 8.1 by making an unconditional offer to all persons other than the first defendant and the then trustees, who were shareholders in the eighth defendant on 11 October 1999, to purchase such persons' shares at R 2,40 per share.

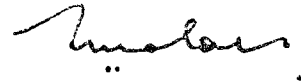
The plaintiff alleges in paragraph 1.9.2 of the proposed particulars that the second defendant has resigned and vacated his office as a trustee on 2 July 2002 and that the plaintiff seeks relief against the second defendant only in his personal capacity (paragraph 1.10.2).

The Panel is empowered under Rule 8.1 to exempt any person or persons who acquired control of a company from extending the offer. Paragraph 12.1 of the proposed particulars provides that the Panel has not made a ruling that an offer need not be made. An offer thus has to be made and paragraph 12.2.1 confirms that neither the first defendant, nor the trustees or the second defendant in his personal capacity or the current trustees have been exempted from complying with Rule 8. The only ruling made and alleged in support of paragraphs 12.1 and 12.2.21 is the one set out in paragraph 12.2.2 that the first defendant and the then trustees comply with Rule 8.1 by making the said offer. These allegations explicitly do not relate to the second defendant in his personal capacity and are not vague or embarrassing: his liability and that of the other parties are based on other grounds. Paragraphs 12.1 and 12.2.1 contain negative allegations that can be pleaded to without embarrassment.

35. I make the following order:

- i. the plaintiff is granted leave to amend its particulars of claim as set out in its notice in terms of rule 28(1) and served on the defendants on 22 December 2003;

- ii. the plaintiff is ordered to pay the costs of the notice of amendment;
- iii. the first, second, third, fifth, sixth and seventh defendants are ordered to pay the costs of objection, including the costs of two counsel.



Malan J

Judge of the High Court

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Date of judgment: 23 June 2004