

**SECURITIES REGULATION PANEL
(SITTING ON APPEAL FROM THE EXECUTIVE COMMITTEE)**

In the matter between :

PRUDENTIAL PORTFOLIOS MANAGER (SA) (PTY) LTD Appellant

And

**THE OFFEROR FOR THE SHARES IN PRIMEDIA LTD
(RED PEN TWO GENERAL TRADING (PTY) LTD)** Respondent

**REASONS FOR THE RULING ON 1 AUGUST 2007 OF THE SECURITIES
REGULATION PANEL (SITTING ON APPEAL)**

INTRODUCTION

1. On 5 February 2007, a consortium of investors led by the various Kirsch family interests and by the Mineworkers Investment Co (Pty) Ltd which became identified as Red Pen Two General Trading (Pty) Ltd, submitted a conditional proposal to the board of directors of Primedia Ltd to acquire the entire issued share capital of Primedia which included two inter-conditional schemes of arrangement under Section 311 of the Companies Act No. 61 of 1973. In its terms, the consortium offered R25,50 in respect of each Primedia ordinary share and R24,50 in respect of each Primedia N share. The qualitative difference between the Primedia ordinary share

and the N share is that each ordinary share enjoys 100 voting rights whereas each N share enjoys 1 voting right.

2. On 11 June 2007, Prudential Portfolios Manager (SA) (Pty) Ltd (**Prudential**) addressed a letter to the Executive Director of the SRP advising that it wished to object to the proposed offer on the grounds that the differential offer for the Primedia ordinary and the N shares did not constitute a “*comparable offer*” as required by the SRP’s Code and Rules. Prudential identified, correctly, Rule 11.1 as requiring interpretation in order to resolve the issue. The relevant portion of Rule 11.1 reads :

“11.1 Comparable offers

Where a company has more than one class of security as its capital, a comparable offer must be made for each class whether such capital carries voting rights or not.”

3. Prudential represented the interests of a substantial number of minority shareholders, who hold collectively 8 million N shares, which gives them a substantial financial interest in the outcome of the matter.
4. The objection from Prudential prompted the Executive Director to bring the matter before the SRP’s Executive Committee for determination. On 20 June 2007, the Executive Director also published a general media

announcement notifying the public of the hearing and inviting interested parties to make oral and written submissions on all aspects of the proposed offer, including the applicability of Rule 11.1 of the SRP Rules. The notice also contained a timetable for written submissions and indicated the date when the matter would be heard by the Executive Committee.

5. On 2 July 2007, the Executive Committee of the SRP heard objections to the proposed offer for the Primedia shares. The objecting shareholders who attended the hearing were Prudential, 36 One Asset Management (which also submitted substantial written representations), Mr David Gewer and Mr Alec Murray. The offeror had previously disclosed that Old Mutual and Coronation Asset Management (Pty) Ltd supported the offer and that Old Mutual held some 17,9 million ordinary shares and some 7,2 million N shares whilst Coronation held 225 000 ordinary shares and 46,4 million N shares. Their combined shareholding in Primedia represented just over 66% of the total ordinary shares and 35,8% of the total N shares, both excluding the shares held by the consortium. All those present at the hearing were invited to make representations and generally did so.
6. After hearing argument and considering the documentation that had been placed before it, the Executive Committee on the same day, ruled as follows :

“2.1 That the proposed offer by the consortium complies with Rule 11.1 of the Rules in that the intended offer price made for the ordinary and N ordinary shares of Primedia are comparable as contemplated in Rule 11.1.

3. In terms of the requirements of the Promotion of Administrative Justice Act, 3 of 2000, any party wishing to appeal this ruling is called upon to do so within three business days of the issue of the Exco’s written reasons for its decision. The written reasons will be available at the SRP’s office as from Friday, 6 July 2007.”

7. The Executive Committee presented its written reasons on 5 July 2007.

The final paragraphs read :

“4. Conclusion

After full consideration of the evidence led, the documents submitted and the oral and written agreements, the Executive Committee has unanimously agreed that, by applying the fundamental principles of the Code to the present case, the offers for the ordinary shares and for the N ordinary shares do not have to be pitched at the same price.

5. Costs

The unanimous decision of the Executive Committee is that there should be an award of costs jointly and equally against the Consortium and Prudential.”

8. On 11 July 2007, Prudential noted its appeal against the whole of the decision of the Executive Committee. Prudential advised that since the appeal constituted a re-hearing, it was unnecessary to set out the grounds of its appeal. Prudential also expressed its concern that arguments presented by their senior counsel had not been fully addressed in the

Executive Committee's written reasons and complained that no reasons were provided as to why the different prices offered for the ordinary shares and the N ordinary shares were to be regarded as comparable. Prudential's complaint was that the Executive Committee only furnished reasons as to the meaning it ascribed the term *comparable* in Rule 11.1 but gave no reasons as to why the consortium's offer met the requirement of being comparable. Prudential was also concerned that the Executive Committee had not provided any reasons or basis as to why it was held to be partially liable for the SRP's fees.

9. The letter from Prudential concluded :

"In order that we may properly consider the effects of this ruling and be in a position to advise our clients about it we request that the Executive Committee furnish reasons for the decision it took or purported to take in relation to these issues and that the furnishing of these reasons is necessary to enable Prudential to consider its position in respect of the appeal and to present its case on appeal. Until it received further reasons its right to consider its position and to protect its clients' positions are being frustrated. Prudential believed that it was entitled to these reasons in accordance with the Promotion of Administrative Act 3 of 2000 and awaited the Executive Committee's urgent response."

10. On 11 July 2007, the Executive Director confirmed that he had forwarded Prudential's letter to the members of the Executive Committee and indicated concern about the integrity of the market if an appeal before the Panel was not proceeded with expeditiously. This was also informed by

the fact that dates for meetings of the two classes of shareholders was set for 6 August 2007.

11. The fact that Prudential had appealed against the merits of the Executive Committee's decision was widely disseminated in the media as were the views of both Prudential and the offeror with regard to the correctness or otherwise of the Executive Committee's decision.
12. On 12 July 2007, Prudential advised the Executive Director that Prudential may not wish to challenge the entire Ruling and claimed that it could not determine the extent of its challenge until additional reasons were provided by the Executive Committee. Prudential also proposed a time frame for the hearing of the appeal before the Panel. This was premised on the Executive Committee furnishing additional reasons.
13. The Executive Committee advised that it would not be furnishing any reasons in addition to those contained in its written reasons of 7 July 2007. This was conveyed to Prudential.
14. On 18 July 2007, the SRP published a notice in the media. The notice referred to the Ruling of the Executive Committee that the intended offer price for the ordinary and N ordinary shares of Primedia are comparable as contemplated in Rule 11.1. The notice also confirmed that an appeal against the Ruling had been lodged and that in terms of the Rules, the

appeal would be in the form of a re-hearing before the Panel. Interested parties who had *locus standi* were informed that they would be given the opportunity to make additional or new written and oral submissions to the Panel. A timetable was provided which required written submissions to be delivered by 24 July 2007 and for the offeror's responses to be submitted by 27 July 2007. The notice confirmed that the appeal would be heard before us on 1 August 2007.

15. On 20 July 2007, Prudential forwarded a letter to the SRP advising that it intended to proceed with the appeal in respect only of the costs order and withdrew its appeal against all the other issues.
16. On 23 July 2007, a notice was published by Primedia repeating the terms of the Ruling made by the Executive Committee, advising that Prudential had withdrawn its appeal on the merits and was only pursuing an appeal in regard to costs. The notice stated that "*other interested parties with locus standi would still be afforded the opportunity to make additional or new written and/or oral submissions to the SRP in accordance with the timetable outlined in that announcement.*"
17. At the hearing of the appeal before us on 1 August 2007, Prudential's representative, Mr Beckenstrater, repeated that Prudential, on behalf of its Primedia shareholder clients, had abandoned the appeal on the merits

and that the only appeal being pursued was that for costs and then only on the ground that the Executive Committee acted outside its powers in that it could not competently order a minority shareholder to be liable for any of the SRP costs unless the shareholder acted vexatiously or unreasonably. An argument was also foreshadowed based on equity, but again this would not touch upon the merits of the decision. Mr Beckenstrater further contended that Prudential should not be responsible for any of the SRP's fees incurred in respect of the appeal from the Executive Committee. In this regard, Prudential argued :

“As is evident from Prudential's letter of 11 July 2007 and 20 July 2007 it may not even have noted an appeal had it received proper reasons from the Executive Committee initially. It is with respect evident from the reasons that the Executive Committee have only reasoned that for the purposes of Rule 11.1 “comparable” does not mean equal. The Executive Committee did not explain on what basis the different prices offered for the ordinary shares and the N shares in this matter were found to be comparable. Such reasons would have been material to the consideration of any appeal in regard to the merits”.

Prudential argued that even as an appellant, a minority shareholder should not ordinarily be visited with the costs of an appeal to the Panel.

18. Only one other minority shareholder attended the hearing before us, namely Ms Crotty. None of the other shareholders who had raised objections before the Executive Committee either attended the hearing or made representations.

19. Ms Crotty was asked whether she wished to deal with the merits of the appeal. She indicated that she did not but wished to raise matters for the consideration of the SRP at its next Panel meeting. This concerned the *in-camera* nature of the proceedings and her view that shareholders had a legitimate expectation to expect that voting and non-voting or reduced voting shareholders would be offered the same price because this had been the consistent position over the past 16 years.

SCOPE OF APPEAL

20. It is necessary to clearly distinguish between the issues that were decided upon by the Executive Committee and those which we are competent to consider on appeal.
21. It is necessary to do so for two reasons. First, it reveals an unfortunate gap in the structuring of the appeal process as we do not have the power to consider an appeal on issues that have come before the Executive Committee save to the extent appealed against, even if it is in the public interest that this occurs. We wish to make it clear that none of us have formed a view on the merits of the appeal. What is of concern to us is that it is desirable that the Panel should be able to consider the decision of the Executive Committee and either confirm or alter its ruling.

22. Secondly, it is important to confirm that we have not considered the merits of the decision by the Executive Committee to the effect that the consortium's offer passes Rule 11.1 scrutiny. We were not asked to nor do we have the jurisdiction to do so.
23. The issue before the Executive Committee was whether or not ordinary shareholders and N shareholders in Primedia had to be given an identical offer in order to meet the requirements of Rule 11.1.
24. The Executive Committee found that the requirement of a "*comparable offer*" in Rule 11.1 did not mean a similar offer. It also found that the offer of R25,50 for Primedia ordinary shares and R24,50 for Primedia N shares was a comparable offer although it is not evident from the written reasons as to how they reached this conclusion.
25. As a consequence of the withdrawal by Prudential of its appeal on the merits and no other shareholder appealing the decision, either independently or by placing reliance on the appeal noted by Prudential (whether by reference to the Primedia notice of 23 July 2007 or shareholder interest considerations where the main objector has withdrawn), the provisions of paragraph A2(d), which deals with appeals, effectively limits the hearing of an appeal to issues raised before the appeal tribunal. We point out also that an appeal from the Executive

Committee to the Panel involves a complete re-hearing unless the parties agree otherwise.

26. Mr Beckenstrater on behalf of Prudential was specifically asked whether Prudential was pursuing an appeal on the merits or, if it was not appealing the meaning ascribed to the term comparable, whether it was appealing the decision that the actual differential met the requirement of a comparable offer as that term was defined by the Executive Committee. Mr Beckenstrater confirmed that there was no appeal on any of the merits issues, whether directly or indirectly.
27. Mr Beckenstrater did not satisfactorily explain why Prudential, on behalf of the shareholders it represented, had abandoned the appeal on the merits and any appeal on the costs order that would necessitate the merits being traversed (see **East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council & Others** 1998 (2) SA 61 (CC) at para 17 and the common law cases on appealing cost orders upon which it relied). The appeal is a re-hearing in the broadest sense which does not require an appellant to demonstrate that the Executive Committee was wrong. It is a hearing *de novo*.
28. The Panel's powers are to be found in the enabling legislation (Chapter XVA (Sections 440A to 440N) of the Companies Act and the provisions of

the Securities Regulation Code and Rules promulgated under Section 440C of the Companies Act). Whilst the SRP may *mero motu* conduct an investigation into the circumstance of any offer or intended offer and may take action on its findings (paragraph 1(c) of the Explanatory Notes to the Code), this power arises where there is no objection raised to any offer.

29. The jurisdiction we enjoy is limited to the issues circumscribed by Prudential, namely :

29.1. whether the Executive Committee acted *ultra vires* the enabling legislation in making a cost order against a minority shareholder; and

29.2. whether it should bear the SRP's costs in respect of the appeal from the Executive Committee to the Panel having regard to the provisions of paragraph 5 of the Schedule of Fees and Charges.

30. Accordingly, it must be emphasised that the appeal before us does not involve a consideration of the correctness or otherwise of the decision by the Executive Committee as to what meaning is to be given to the term "*comparable offer*" in Rule 11.1 nor whether the consortium's offer constituted a comparable offer for the purposes of that rule. The principles in relation to those issues have not been considered by us, either in relation to a freezeout transaction, such as this one where those in control

of the company seek to take over all public investor shareholdings, or otherwise. They remain open questions before the Panel.

31. By reason of the Panel's obligation to conduct a full re-hearing in respect of issues raised on appeal, and since there was no such hearing nor was the Executive Committee's decision on the merits an issue before us, we have not formed any view one way or the other as to whether or not we would have reached the same decision as the Executive Committee.
32. We proceed to deal with the issues that were before us.

THE COST ORDER AGAINST PRUDENTIAL

33. Mr Beckenstrater argued that under the provisions of paragraph 5 of the SRP's Schedule of Fees and Charges, a minority holder of securities in an offeree company who participates in any hearing, including appeals, cannot be made liable for the SRP's fees unless that shareholder acted vexatiously or unreasonably.
34. Mr Beckenstrater is clearly correct. Paragraph 5 leaves no room for debate. It reads :

“Notwithstanding anything to the contrary herein contained, minority holders of securities in an offeree company who consult the Panel, or make application for a ruling in opposition to the terms of an offer or the manner in which the offer is submitted by

the offeror or is handled by the board of the offeree company, shall not be liable for fees for services under paragraphs 1.2, 1.3 or 1.4 of the Schedule : Provided that the minority shareholders who have participated in such action may be ordered jointly and severally to pay such fees if, in the opinion of the Executive Director or committee concerned or the Panel, they have in taking any such action acted vexatiously or unreasonably.”

We add that paragraph 1.4 of the Schedule expressly refers to fees for services in respect of “... *hearings, including appeals*”.

35. It is common cause between the parties that Prudential is a minority holder of securities. Mr Beckenstrater submitted that Prudential did not act vexatiously or unreasonably in pursuing its objection. He argued that this was the first time the SRP has considered circumstances where a different price has been offered for ordinary shares and N ordinary shares. Whilst acknowledging that senior counsel’s opinion obtained at the request of the Executive Director supported in part the position adopted by the consortium, Mr Beckenstrater referred to an earlier opinion forwarded to the SRP which supported Prudential’s position as did the opinion of the Executive Director of the SRP which stated that “... *it is logical that the price to be offered for the “N” low voting shares should not be lower than that offered to the high voting shares This in my view will constitute the correct interpretation of Rule 11 as well as of General Principal 1*”. Mr Beckenstrater therefore concluded that Prudential’s objection was reasonable and could not be construed as vexatious.

36. Adv. Subel SC on behalf of the consortium did not challenge Prudential's submissions that it had not acted vexatiously or unreasonably. The consortium however argued that instead of pursuing the appeal on the costs order, Prudential should have requested the Executive Committee to withdraw its order as to costs. The argument was that no cost order had in fact been made since no such order was contained in the published Ruling of 2 July 2007. It only appears at the end of the subsequent written reasons for the Ruling of 7 July 2007.
37. In our view, Mr Beckenstrater is correct in submitting that the Executive Committee's decision to rely on its decision of 7 July 2007 as constituting its final word on the matter justified Prudential in pursuing an appeal before us against the cost order. In any event, the omission of a cost order is clearly a *cassus omissus* and was correctly treated as such by Prudential.

SRP'S COSTS ON APPEAL TO THE PANEL

38. It is accepted that Prudential appealed the decision of the Panel and then abandoned the appeal on the merits. The consortium also argued that paragraph 5 of the Schedule does not apply to appeals to the Panel. We disagree. Paragraph 5 expressly envisages that the Panel will decide upon whether the actions of a minority shareholder are vexatious or

unreasonable. This can only arise precisely because there is an appeal before it.

39. We however reject Mr Beckenstrater's submission that Prudential may not have noted an appeal if the Executive Committee had given reasons as to why the different price offered for the ordinary shares and the N shares were comparable. We have already dealt with why this argument is untenable. Moreover, Mr Beckenstrater confirmed that as a matter of principle, Prudential may wish to contest the issue in future cases.
40. In our view, a further consideration as to why none of the SRP's costs in relation to the appeal from the Executive Committee to us should be borne by any party is that the Executive Committee acted *ultra vires* its powers to make a costs order against a minority shareholder. Again, this appears from the reasons already given.

CONCLUSION

41. Whilst individual shareholders may feel daunted by the prospect of presenting their views before the Executive Committee or the Panel on appeal, it is trusted that our decision in this case, which confirms that the SRP's fees cannot be imposed on any minority shareholder unless the shareholder acted vexatiously or unreasonably, will encourage more

active shareholder involvement in take over and merger issues that come before the SRP.

42. This constitutes the reasons for our Ruling on 1 August 2007 and why it is of limited scope. For sake of completeness, we repeat the terms of the Ruling :

42.1. The appeal before the SRP which relates only to the regularity of the cost order made by the Executive Committee in respect of the costs of the hearing before it, is upheld;

42.2. The order for costs made by the Executive Committee is altered to read as follows :

The SRP's costs of the appeal before that body including the hearing are to be paid exclusively by the Consortium.

42.3. There will be no order for the payment of costs of the appeal from the said decision of the Executive Committee to the SRP.

DATED 3 AUGUST 2007.

B S SPILG SC

We agree

C A JAFFE

R S BERKOWITZ

N D LOWENTHAL

W S YEOWART