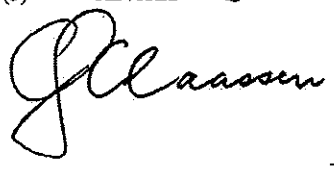
IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA
(JOHANNESBURG)

Case No: 2011/6086

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES NO
(2) OF INTEREST TO OTHER JUDGES: YES NO
(3) REVISED



15 November 2013

SIGNATURE DATE

In the matter between:

PROPERTY PROMOTIONS & MANAGEMENT (PTY) LTD	1st Applicant
NEW PORT FINANCE COMPANY (PTY) LTD	2nd Applicant
PINNACLE POINT HOLDINGS (PTY) LTD	3rd Applicant
GARDENER ROSS INTERNATIONAL FINANCE (PTY) LTD	4th Applicant
NORMAN BOSMAN	5th Applicant
And	
THE SECURITIES REGULATION PANEL	1st Respondent
NEDBANK LTD	2nd Respondent
SYFRETS SECURITIES LTD	3rd Respondent

JUDGMENT

C. J. CLAASSEN J:

[1] This is a review application in terms of Rule 53 of the Uniform Rules of Court. The amended notice of motion[1] seeks an order to set aside the decision of the first respondent being the Securities Regulation Panel (SRP) of 16 August 2010 to the effect that an "affected transaction" for the purpose of section 440A of the Companies Act 61 of 1973, did **not** occur when the second and/or third respondents' shareholding in Acc-Ross Holdings Ltd ("Acc-Ross") exceeded 35% and/or when such holding increased by three further tranches of 5% each within a twelve month period. It further seeks an order declaring that an affected transaction did in fact occur during March/April 2007 and that the matter is to be referred back to the RSP for reconsideration as to whether a mandatory offer to acquire all the minority shares is to be made.

THE PARTIES

[2] Originally five applicants lodged proceedings with the SRP for an order declaring that an affected transaction took place. When the SRP refused to make such an order, the five applicants lodged the current review application. It is necessary to deal with the status of each of the parties to the current review application.

a. The first applicant, Property Promotions and Management (Pty) Ltd, has been liquidated and no authority from the liquidator exists entitling it to proceed with the present application.

b. The second applicant is New Port Finance Company (Pty) Ltd who became a shareholder in Acc-Ross during or about December 2008.

c. The third applicant is Pinnacle Point Holdings (Pty) Ltd who was liquidated on 28 February 2013 by an order of court issued in the

[1] See Main Application p. 160

Western Cape High Court, Cape Town.[2] No authority was issued by the third applicant's liquidator to continue with this litigation.

d. The fourth applicant, Gardener Ross International Finance (Pty) Ltd, and the fifth applicant, Norman Bosman, fell out of the picture after the authority of the attorney of record, Mr John Taylor, was questioned and he withdrew as their attorney.

e. Therefore, of the five original applicants only the second applicant seeks an order of review in terms of the amended notice of motion.

[3] The first respondent, the SRP, abides the decision of this court. The second respondent, Nedbank Ltd ("Nedbank"), and the third respondent, Syfrets Securities Ltd ("Syfrets"), contest the granting of the relief sought in the amended notice of motion.

BACKGROUND FACTS

[4] It is common cause that Nedbank and Syfrets acquired, first, more than 35% of the issued voting securities in Acc-Ross and thereafter in further tranches of 5% each up to 50% of such securities.[3]

[5] Almost three years later on 4 February 2010 a complaint was lodged with the SRP by attorney John Taylor acting on behalf of five objecting parties being the original applicants in this review application. This led to a hearing before a five-member panel of the SRP on 19 and 20 May 2010 and a decision by the panel on 16 August 2010.[4]

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[2] See Annexure "X" attached to the second and third respondents' supplementary Heads of Argument filed on 10 June 20

[3] See Applicants' Founding Affidavit, Record pp. 16 – 17 par 34 and Nedbank's Answering Affidavit Record p. 21 par 21

[4] See SRP Ruling Record pp. 54 – 86

[6] The issue at stake is whether or not Nedbank was, under the SRP rules, required to make a mandatory offer to Acc-Ross shareholders in existence at the time of the application brought before the SRP. The SRP answered this question in the negative based on three alternative grounds.[5] The ruling read as follows:

> "9.1 Having considered the arguments put to us, for the reasons outlined above, we find that an affected transaction did not occur at the time when Syfrets' holding of Acc-Ross shares reached 35%, or each time that its holding increased by another 5%.
>
> 9.2 However, if we are wrong in our decision above, we hereby exercise our discretion to 'rule otherwise' in terms of Rule 8.1 of the Code, for the reasons of equity given above.
>
> 9.3 And should we for any reason be found to have incorrectly exercised our discretion in terms of Rule 8.1, we hereby exercise our general discretion in terms of Rule 34 to excuse Syfrets and Nedbank from having to make an offer to the other shareholders of Acc-Ross or PPG, for the reasons of equity given above."

[7] On 11 February 2011 the applicants commenced review proceedings to set aside the aforesaid rulings of the SRP. Originally they only sought to set aside the ruling in paragraph 9.1 of the SRP ruling. Subsequently, on 1 June 2011 the amended notice of motion was filed introducing a review also of the rulings in paragraphs 9.2 and 9.3 of the SRP ruling.

[8] The matter came before court during April 2012, but was postponed for purposes of allowing the applicants to file an ancillary review application which they did on 4 May 2012. Thereafter both parties filed supplementary heads of argument. The matter was then set down as a special motion for 14 and 15 November 2013.

POINT *IN LIMINE*

[5] See SRP Ruling par 9 at p. 85 of the Main Application

[9] In the supplementary heads of argument filed on behalf of Nedbank and Syfrets, Mr Cilliers SC and Mr Berridge SC raised a point *in limine* which, if upheld, would be dispositive of the entire review application. It concerned the *locus standi* of the second applicant to approach the SRP for the ruling sought and as a result its *locus standi* to bring the current review application.

[10] It is common cause on the papers that the first, second and third applicants were not shareholders in Acc-Ross when the 35% thresholds were crossed allegedly triggering a mandatory offer to be made by Nedbank to the minority shareholders. It was only during December 2008, some eighteen months later, that the aforesaid applicants became shareholders in Acc-Ross. At the time when the thresholds were crossed, only the fourth and fifth applicants had been shareholders in Acc-Ross.

[11] The point *in limine* was advanced in the following manner in the supplementary heads of argument of Nedbank and Syfrets:

> "3.1.1 The whole rationale of the SRP Rules is that, where control of a company (to which the SRP Rules apply, which included all public companies) changes, non-controlling shareholders are entitled to exit the company on the same terms as the controlling shareholding had changed hands and to be made a mandatory offer on such terms by the acquirer of the controlling shareholding...
>
> Thus, persons who were not shareholders in a company when the mandatory offer was to be made, are not entitled to such offer; certainly they do not fall within the rationale of the SRP Rules. A fortiori, this applies to persons who later acquired shares which did not even exist when a mandatory offer was to be made, i.e. shares which were not only acquired but indeed issued, after a mandatory offer was to be made...
>
> 3.3 ...The SRP found, as an independent ground for not giving any ruling in favour of the first, second and third applicants, that they had not held any shares in Acc-Ross at the time the mandatory offer allegedly had to be made. The correctness of this finding has not been challenged by the applicants, and is fatal to any prospects of success of the review at the instance of the only surviving applicant."

[12] As indicated in Ruling 9.1 quoted earlier in this judgment, the SRP "for the reasons outlined above" came to a finding that an affected transaction did not occur at the time when the threshold of 35% shareholding was crossed. One of the reasons which persuaded the SRP to conclude as above is contained in paragraph 8.5 of its written reasons.[6] This paragraph reads as follows:

> "8.5 ...we find it hard to accept the submission that each of the Complainants should be entitled to an offer, if we were to decide that an offer should be made. On the facts of the matter as given to us, when Syfrets' shareholding in Acc-Ross crossed the various thresholds in March/April 2007, the Pinnacle Consortium members were not yet shareholders of Acc-Ross/PPG. **In our view this would disqualify them from being eligible for an offer.** We do not agree that the right to be made an offer should (depending on the facts of the matter) necessarily accrue to anyone who acquires the relevant shares after the date on which an offer should have been made (if it must be made). Of the two Complainants who were apparently shareholders at the relevant times, we agree with Mr Cilliers' submission (and assuming the facts he put to us are correct) that Gardener Ross (the fourth applicant) was not in the end prejudiced. This was because it sold its shares in December 2007 at a higher price than it would have received if an offer had been made to it earlier that same year. We agree that it should not therefore be entitled to approach the Panel now asking for an offer to be made to it. Mr Bosman (the fifth applicant) is the only person who, it would appear, may have had a right to an offer, and possibly only relating to 1.8 million shares." (Emphasis added)

[13] Mr Quixley and Ms Reynolds for the second applicant sought to persuade me that the reasoning in paragraph 8.5 above did not constitute findings of fact which led to the ultimate ruling by the SRP. I cannot agree. It is expressly found that the applicants were disqualified from being eligible for a mandatory offer. That is a factual finding. Furthermore, such factual finding has not been challenged by the applicants in the present review application. For current purposes it must therefore be found that the review application is to be determined on the basis that the second applicant did not qualify for a mandatory offer as envisaged in the Rules. Once it is concluded that the only remaining applicant, being the second applicant, was disqualified from being

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[6] See Main Application p. 76

eligible for a mandatory offer, the entire relief sought by the second applicant in the amended notice of motion falls away.

[14] Mr Quixley attempted to counter the aforesaid conclusion by submitting that the failure to comply with the prerequisites once the threshold is crossed constitutes a breach of the SRP Code. That breach was a continuing breach which commenced during March/April 2007 and still existed at the time when the second applicant became a shareholder in Acc-Ross during December 2008. As such, it was submitted, that the right to approach the SRP redounded to the second applicant's benefit once it became a shareholder some eighteen months after the threshold was crossed. This argument was based on the contention that the second applicant suffered prejudice to the extent that had it known of the control in the hands of Nedbank to the extent of 89% of the shareholding, it may not have concluded the transaction in terms whereof it became a shareholder in Acc-Ross. I have come to the conclusion that this argument is fundamentally flawed.

EVALUATION

[15] It then becomes necessary to ascertain the rationale of the various legislative instruments dealing with affected transactions. A good starting point is to remind oneself of what was said in **Spinnaker Investments (Pty) Ltd v Tongaat Group Ltd** 1982 (1) SA 65 (A) at 72H – 73A in regard to the rationale to the legislative instruments dealing with the analogous situation of take-over offers in terms of section 314 of the Companies Act 61 of 1973. What was said is the following:

> "While the sections facilitate a take-over operation they also provide a measure of protection for shareholders in the offeree company. The mischief whereby entrepreneurs operating on a big scale can gain control of a company by buying out one or two of the large shareholders and ignoring the small shareholders is to some extent curtailed. In a word, the operations of the financier, who is

> sometimes referred to in terms that are less than flattering as a predator, a white-collar, or an early-dawn raider, are no longer unrestricted."

[16] The aforesaid reasoning was approved as also applicable to the underlying rationale of the legislative instruments dealing with affected transactions by Marais JA in **Sefalana Employee Benefits Organisation v Haslam and Others** 2000 (2) SA 415 (SCA) at 418J. The definition in both the Companies Act, section 440A(1) and the Code, section 1 of section B of affected transactions, centres around a change in control. It reads:

> "'Affected transaction' means any transaction including the transaction which forms part of a series of transactions or scheme, whatever form it may take, which –
> (a) 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, or the securities, or all the securities of a particular class, of any company (excluding a close corporation); or
> (iii) ..."

[17] The concept of "control" is defined as meaning:

> "...A holding or aggregate holdings of shares or other securities in a company entitling the holder thereof to exercise, or cause to the 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 confers *de facto* control."

[18] Section 5 of section B of the Code, determines what the specified percentage is which would establish control of the company and states:

> "For the purpose of determining control as defined in the Act, the specified percentage is hereby prescribed as being 35% or more of the voting rights of a company."

[19] Section C, "General Principles" of the Code specifically state that all holders of the same class of securities of an offeree company shall be treated

similarly by an offeror.[7] It also establishes a principle that persons holding shares in a company shall be entitled to dispose of their shares on "terms comparable to those of any affected transaction in the relevant securities."[8]

[20] Of importance for the present enquiry is the time delay after the prerequisites were to be complied with once the 35% threshold had been crossed. As will be noted here after, no express period is stipulated within which a mandadory offer is to be made. In this regard Rule 2.3 of section D of the Code states the following:

> "2.3 An Announcement of a firm intention to make an offer is an Announcement published in the press in the circumstances and containing the information set out in this Rule.
>
> ...
>
> 2.3.1 An announcement of a firm intention to make an offer shall be made –
> (a) ...
> (b) **Immediately** upon on acquisition of securities which gives rise to an obligation to make an offer under Rule 8." (Emphasis added)

[21] Rule 8 deals with the mandatory offer which is to be made when an affected transaction occurs. It states:

> "8.1 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 the 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

[7] See Section 2(1) of Section C
[8] See Section 11 of Section C

person or persons holding not less than the specified percentage but not more than 50% of the voting rights of a company." (Emphasis added)

[22] Applying these provisions to the facts of the present case, it is obvious that Nedbank indeed obtained control of Acc-Ross during March/April 2007. The question which arises is what consequences flow from Nedbank's failure to comply with the provisions of Rule 2.3. It is common cause that in breach of this Rule, no such announcement or mandatory offer was made. In fact it appears that Nedbank itself did not even appreciate that the threshold had been crossed, because it became the market-maker for Single Stock Futures in Acc-Ross ("SSF").[9] As such, it did not carry the risk in the fluctuations of the market. Thus, as the holder of these shares, it was bound to deliver them upon the effluxion of the specified time, to the then purchasers of the shares. This, however, never occurred because the purchasers defaulted.

[23] Any breach of the Code is to be remedied in terms of section 440M of the Act which provides:

"440M(1) If any person who is not exempted from compliance with the Rules acts in contravention of any of the Rules, the Panel may apply to the Court for an order compelling such person to comply with the relevant Rule, and the Court may in its discretion issue such an order.

(2) If the Panel has reason to suspect that any person who is not exempted from compliance with the Rules –

(a) ...

(b) Have so contravened any of the Rules, or that such a contravention is likely to be continued or repeated,

the Panel may apply to the Court for an order –

(i) ...

(ii) Prohibiting the continuation or repetition of a contravention referred to in paragraph (b); or

(iii) Prohibiting the person concerned from continuing with an affected transaction or proposed affected transaction.

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[9] See the unreported decision of **ABSA Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd** (Case No: 2009/35416) handed down in the South Gauteng High Court on 9 September 2013 for a full exposition of the meaning of Single Stock Futures

(3) ...

(4) Any person who contravenes any of the Rules shall be liable to any other person for any loss or damage suffered by that person as a result of such contravention."

[24] It is obvious from the above that breaches of the Code are to be remedied by action on the part of the SRP in approaching the court for the necessary order to enforce compliance of the rules and/or prevent breach of such rules. It is common cause that the SRP did not approach the court for any such relief in terms of section 440M of the Act.

[25] What the second applicant is in effect doing is to rely on section 440M(4) in contending that it had suffered prejudice because of the continued breach of the Code by Nedbank. The subsection grants the second application an independent right to sue Nedbank for any damages it may have suffered, if so advised. I am informed from the bar that indeed, the second applicant instituted just such an action for delictual damages in the North Gauteng High Court.

[26] However, once the SRP in fact ruled that an affected transaction did occur and that the Rules had been breached by the offeror, the shareholders in the offeree company cannot approach the SRP to remedy such situation on its own. It is for the SRP to approach the court, if so advised, to remedy the situation by seeking an order of court to prohibit the offending offeror from continuing its breach. At best, it would seem to me that the Rules were designed to allow affected shareholders to approach the SRP with a request that it should engage the assistance and intervention of the Court to remedy any breach of the Rules.

[27] I am therefore of the view that the second applicant has misconstrued its remedy. Either the SRP, as an independent institution, seeks the assistance of

the court to enforce its Rules in the Code or alternatively affected parties may sue the offending offeror for any damages they may have suffered. That being the case, I am of the view that the entire review application falters on the ground of reliance upon a misconceived premise.

[28] I am further of the view that the rationale of the Rules pertaining to affected transactions are to protect "existing" shareholders who wish to exit the company once a control change occurs. It is not designed to protect "entering" shareholders who became such long after the affected transaction took place. A simple example will suffice. If a company has 100 shares and an offeror purchases 35 from existing shareholders, such offeror obtains control of the company. If subsequent to such change of control the company increases its share capital a thousand fold, the purchasers of shares issued as a result of such increased capital cannot be seen to demand to be treated on the same basis as the original minority shareholders who were in existence prior to the increase of the share capital. It would be manifestly unjust and inequitable to do so. In terms of Rule 8.1 the decisions of the SRP are based on equity and the particular facts of each case. It would be surprising if in the postulated scenario above, the SRP was to find that an affected transaction took place entitling the new shareholders to be treated and bought out with a mandatory offer by the offeror at a price a thousand fold in excess of that which it paid at the time of purchasing its controlling shareholding. In effect that is what the second applicant is contending for. It wishes, as a late-comer, to be treated as if it was one of the minority shareholders at the time when the control changed.

[29] Finally it would seem to me that the general import of the Code by virtue of Rule 2.3.1(b) is for action to be taken immediately after the occurrence of an affected transaction. In my view, equity to all concerned would demand such

speedy action, otherwise it would make no sense for the Legislature to demand an announcement to be made "immediately upon an acquisition of securities which give rise to an obligation to make an offer under Rule 8."

CONCLUSION

[30] For the reasons set out above I am of the view that the point *in limine* was well taken. The SRP dealt with this very issue in its reasoning and found as a fact that the second applicant had no *locus standi* to approach it for relief arising from Nedbank's alleged breach of the Code in failing to make a mandatory offer. It follows that similarly the second applicant has no standing to review the finding made by the SRP to the effect that it was not eligible to receive a mandatory offer. The fact that this finding was never contested adds weight to the aforesaid conclusion.

[31] The following order is issued:

The review application is dismissed with costs, which costs are to include the costs of two counsel.

DATED THE 15TH OF NOVEMBER 2013 AT JOHANNESBURG

C. J. CLAASSEN
JUDGE OF THE HIGH COURT

Counsel for the Second Applicant: Adv G. Quixley SC
Adv K. Reynolds
Counsel for the Second and Third Respondents: Adv S. A. Cilliers SC
Adv B. Berridge SC

Attorney for the First Respondent: Tshievhe Gwina Ratshimbilani Inc
Attorney for the Second Applicant: John Taylor and Associates
Attorney for the Second and Third Respondents: Cliffe Dekker Hofmeyr Inc

The hearing took place on 14 and 15 November 2013