

## TAKEOVER REGULATION PANEL 1/2013

### In the matter of

CONVERGENET HOLDINGS LIMITED (“ConvergeNet” or  
“the Company”)

**Applicant**

YELLOW STAR GROUP HOLDINGS LIMITED (“Yellow Star”)

**Applicant**

and

MR R BARRY  
ADAGE SA (PTY) LIMITED  
MS M KRASTANOV

**Respondent**  
**Respondent**  
**Respondent**

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REASONS FOR THE RULING OF THE EXECUTIVE DIRECTOR IN RESPECT OF A  
WAIVER OF A MANDATORY OFFER (“the waiver”) IN TERMS OF THE COMPANIES  
ACT (“the Act”) AND THE COMPANIES REGULATIONS (“the regulations”)

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### 1. INTRODUCTION

These reasons relates to a ruling waiving the requirements to make a mandatory offer, as provided in terms of regulation 86.4. On 18 March 2013, a ruling was issued by the Executive Director in terms of section 119(6) (c) of the Companies Act No. 71 of 2008 (“the Act”); waiving the requirements that Yellow Star Group Holdings Limited (“Yellow Star”) make a mandatory offer as required in terms of section 123 the Act and the relevant regulations.

The ruling provided that the reasons will be provided as soon as practical.

### 2. BACKGROUND

- 2.1 On 23 November 2012 ConvergeNet issued an announcement which among others; indicated that the Company would acquire the remaining 25% shareholding in Sizwe Africa IT Group Proprietary Limited from Yellow Star. The purchase price would be payable by the Company to Yellow Star by an issue of 100 000 000 ordinary shares in the Company at an issue price of 32 cent per share. The announcement further indicated that the issue of share will lead to a change in control, due to the fact that Yellow Star would exceed the threshold of 35%. The announcement further indicated that the transaction will constitute an Affected Transaction as defined in terms of

section 117(1) (c) of the Act, and Yellow Star will be obligated to extend a mandatory offer to the remaining shareholders of ConvergeNet at an offer price of 32 cents per share. The announcement further indicated that Yellow Star may be exempt from the obligation to make a mandatory offer in terms of regulation 86.4, if the independent holders of more than 50% of the voting shares of ConvergeNet waive the benefit of the Mandatory Offer in accordance with the principles detailed in section 125 (3) (b) (ii) of the Act.

- 2.2 The announcement advised the shareholders that the details of the waiver, a fair & reasonable opinion from an independent expert and an ordinary resolution would be contained in a circular to shareholders. Shareholders were also invited to make representations in respect of the waiver to the Takeover Regulation Panel (“TRP”).
- 2.3 On 12 February 2013 a circular, duly approved by the TRP, was posted to the shareholders of ConvergeNet with details in respect of the waiver as required by the regulations. The circular included among others; details of the proposed transactions, the opinion of the Independent Expert in respect of the waiver, the notice of a meeting, and the proposed resolution to waive the requirements for Yellow Star to make a mandatory offer in terms of regulation 86.4.
- 2.4 A meeting of shareholders of ConvergeNet was duly held and the result of the ballot show that the resolution to waive the mandatory offer was passed by 99,95% of the votes, as indicated in the minutes submitted to the TRP. According to the announcement dated 12 March 2013 submitted by ConvergeNet to the TRP the waiver resolution was approved by the requisite independent shareholders and, the announcement further indicated that the company will apply to the TRP for a waiver, and the shareholders would be advised of the outcome of the application and the ruling.
- 2.5 On 13 March 2013, ConvergeNet, applied for a waiver in terms of regulation 86.4. The application was accompanied by the following:
  - a copy of the notice of the general meeting;
  - minutes of the general meeting of the company;
  - voting of the general meeting; and
  - the Sens announcement about the voting.
- 2.6 On 15 March 2013 the TRP requested additional information about the voting, and on 18 March 2013, the Company through Werksmans Attorneys provided the following additional information:
  - 2.6.1 Voting papers prepared by Computershare Services Ltd showing that the Company had 921 285 941 voteable shares and, that 645 525 418 (70,07%) voted on the resolution;

2.6.2 A memorandum with a summary of voting showing the names of shareholders and number of shares voted. The memorandum among others; indicates that:

- i) 392 001 368 shares were voted in favour of the waiver resolution; and
- ii) only 211 500 shares voted against the waiver and were from Standard Bank Nominees, Penny Byrne and Y Indzhev;

2.6.3 an email from Werksmans confirming that:

- i) all the shareholders who gave irrevocable undertakings voted at the meeting in favour of the waiver;
- ii) 6 274 387 shares were voted by other shareholders who did not provide irrevocable undertakings. It is indicated in the memorandum that these shareholders are not known. All these votes were in favour of the waiver resolution.
- iii) only 211 500 shares were voted against the waiver and, consisted of 1 500 shares from Standard Bank Nominees, 10 000 shares from Penny Byrne and 200 000 shares from Y Indzhev;

The email concludes by indicating that the resolutions would have been passed by an overwhelming majority of shareholder, even if the irrevocables were not taken into account.

2.6.4 Subsequent to reviewing the application, the additional information and, the submissions by the various parties, the Executive Director of the TRP issued a ruling waiving the requirements for a mandatory offer.

### 3. SUBMISSIONS BY PARTIES

3.1 On 26 February 2013, the TRP received a letter from Herold Gie Attorneys (“Herold Gie”) acting for Mr. R Barry and Adage SA (Pty) Ltd (“Adage”). According to the letter, Adage holds 150 000 shares in the Company and Mr R Barry is a Director of the Company. According to the submissions by Werksmans on behalf of the Company, it appears that there is a dispute in respect of certain additional shares owned by Adage. For the purpose of the ruling, it has been accepted that Adage owns 150 555 shares reflected in the share register of the Company. In their letter, Herold Gie refers to the announcement dated 23 November 2012 and the proposed waiver. The letter concludes by demanding that the TRP should not consent or, allow the waiver of the mandatory offer.

It is not clear from the voting papers as to how the 150 555 shares held by Adage were voted.

- 3.2 On 26 February 2013 the TRP received an email from Ms Krastanov, objecting to the waiver of the mandatory offer and, indicating that certain shareholders should not vote at the meeting. The email objection was supplemented by a letter dated 8 March 2013. In this letter, detailed history of the transactions undertaken by the Company is provided. In the conclusion, the TRP is requested to compel a mandatory offer to the remaining minority shareholders of the Company.

It appears that Ms M Krastanov holds 10 000 shares in the Company which were voted against the waiver by Ms P Byrne, as indicated in the voting papers.

- 3.3 On 28 February 2013, Russell Turner Attorneys (“Russell Turner”) acting on behalf of Trinity Holdings (Pty) Ltd, M cubed Holdings Ltd and, Quinton George submitted a letter to the TRP. In their letter, Russell Turner denied the allegations made in the Herold Gie letter and, requested the TRP to ignore the submissions made by Herold Gie.

- 3.4 On 1 March 2013 Werksmans Attorneys (“Werksmans”) acting for the Company, responded to the letter from Herold Gie. In their letter, Werksmans among others; indicate that the TRP should concern itself with the waiver and, not with other contentions in the letter. We agree with this conclusion by Werksmans, and have not considered other contentions raised by various parties in their submissions.

Werksmans further indicated that, regulation 86(4) should be the starting point in the application to grant an exemption from the requirements to make a mandatory offer. In their letter, Werksmans provide detailed explanation as to what considerations the TRP should consider in order to make a ruling in respect of the waiver of the mandatory offer.

- 3.5 On 4 March 2013, Herold Gie sent a letter responding to the letter from Russell Turner 28 February 2013. In this latest letter, Herold Gie indicates that the TRP should reject the allegations and submissions by Russell Turner.

- 3.6 On 11 March 2013, Herold Gie sent a letter responding to the letter from Werksmans dated 1 March 2013. In this latest letter, Herold Gie indicates that the primary objection to the waiver concerns the determination of independent holder of voting rights as provided for in section 125 (1) (a) of the Act. It is indicated that, the Act requires that the holder be independent of an Offeror or any related or interrelated, or person acting in concert with them. It is further indicated that, certain holders of securities including Yellow Star, Trinity Asset Management, Trinity Holdings (Pty) Ltd, Mcubed Holdings (Pty) Ltd and Afrasia Corporate Finance lack independence. It is further asserted that, “by removing the aforementioned interrelated or related parties

from the table at paragraph 5.1 of Werksmans correspondence under reply, the general meeting would not have obtained a 65.67% majority vote required to pass the waiver of the mandatory offer.” The submission further indicates that the TRP should be guided by their submissions and those of Ms M Krastanov, and that the mandatory offer should be made or, “conversely that the board of CVN is not exempted from making the aforementioned mandatory offer to the minority shareholders.”

#### 4 THE RELEVANT PROVISIONS IN RESPECT OF A WAIVER OF THE MANDATORY OFFER

4.1 The requirements for waiving the mandatory offer are principally regulated by regulation 86. The regulation provides that:

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

4.2 Section 125(3)(b)(ii) provides that:

***“125. Comparable and partial offers.***

*(1)...*

*(2)...*

*(3) A person making a partial offer for any class of issued securities of a company must—*

*(a) ...;*

*(b) ...if the offer could result in the person, together with any related or inter-related person or person acting in concert with any of them, holding securities of the company entitling the person or persons to exercise more than the prescribed percentage of the general voting rights of all issued securities of the company, make the offer conditional on—*

*(i) ...; and*

*(ii) the offer being approved by the independent holders of issued securities of that class, if all such independent holders, in aggregate, control more than 50% of the general voting rights of all issued securities of that class;” our underlining*

It must be pointed out that the section has been included for the sake of completeness.

4.3 In addition, the TRP has issued Guideline 2/2011 indicating the procedure to be followed by companies seeking an exemption from the requirements to make a mandatory offer. The guideline among others indicates that the circular to shareholders should comply with the requirements of regulation 106, (the

requirements deals with detailed disclosures), and the procedural steps to obtain the waiver.

4.4 Section 119(6)(c) of the Act, which provides:

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

*(a) there is no reasonable potential of the affected transaction prejudicing the interests of any existing holder of a regulated company’s securities;*

*(b) the cost of compliance is disproportionate relative to the value of the affected transaction; or*

*(c) doing so is otherwise reasonable and justifiable in the circumstances having regard to the principles and purposes of this Part, Part C and the Takeover Regulations.” (our underlining);*

5. REASONS FOR THE RULING

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

5.1 a circular to the shareholders of the Company which complied with the requirements of the regulations in respect of the disclosures including the advice of the Independent Expert as required by regulation 86. 7;

5.2 the representations by various parties as indicated above. We have noted the submissions in Harold Gie’s letters that the waiver should not be granted. We have also noted that in paragraph 6 of their letter dated 11 March 2013, it is indicated that Yellow Star provided an irrevocable undertaking to vote. This is however incorrect. Werksmans letter does not include Yellow Star as one of the parties which provided irrevocable undertakings to vote. It must also be pointed out that, the circular to shareholders of the Company specifically indicates that Yellow Star will not be voting on the waiver of the mandatory offer. Herold Gie’s indicates that “the general meeting would not have obtained a 65.67% majority vote required to pass the waiver of the mandatory offer. According to the minutes submitted to the TRP, the result of the ballot show that the resolution to waive the mandatory offer was passed by 99,95% of the votes.

In addition, it must be pointed out that Herold Gie’s letter requests that the board of ConvergeNet should not be exempted from making the mandatory offer to minority

shareholders. This is also incorrect, the party liable to making a mandatory offer, if the mandatory offer is not waived is not the board of ConvergeNet, but Yellow Star as the Offeror.

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

5.3 the submissions by Ms Krastanov to compel a mandatory offer to the remaining minority shareholders of the Company which are not accepted. It is not clear why the waiver for the mandatory offer should be compelled where the resolution for the waiver of the mandatory offer has been passed by the requisite majority in accordance with regulation 86.4 as indicated by Werksmans submissions;

5.4 the representation by Werksmans on behalf of the Company. The representations by Werksmans are detailed, and in particular the following are relevant:

Paragraph 3 dealing with the specific matters which the TRP must rule on. In this paragraph it is indicated that the TRP should concern itself with representations relating to the waiver application, and not other additional contentions;

Paragraph 4 dealing with the requirements for a waiver of the mandatory offer in terms of regulation 86.4. In this paragraph the requirements for the waiver of the mandatory offer have been explained and, an extract from the regulations and the Act has been included.

Paragraph 5 dealing with the irrevocable undertakings. In that paragraph, a detailed explanation relating to the irrevocable undertakings including the parties who provided such undertakings have been provided.

We are in agreement with the contents of the letter from Werksmans in so far as it relate to the waiver of the mandatory offer. The letter reflects the correct requirements to be fulfilled in order to be entitled to a waiver of the requirements to make a

mandatory offer. We express no opinion to those contentions which do not relate to the waiver of the mandatory offer; and

5.5 the email dated 18 March 2013 from Werksmans providing a voting summary at the meeting of shareholders as indicated in paragraph 2.6 above. We have also noted the voting papers submitted by the Company as prepared by Computershare. The papers among others; indicates the following:

- the company have 921 285 941 voting shares;
- 16 members holding 633 744 194 shares or 70.07% of the voting shares, attended or were represented at the meeting;

The results of the meeting further show that:

- 392 001 368 or 99.9460% of the shareholders entitled to vote on the waiver of the mandatory offer voted in favour of the waiver; and
- only 211 500 or 0.05392% voted against the waiver;

6 Based on the above, it is concluded that the transaction entered into by the Company with Yellow Star is exempted from the requirements to make a mandatory offer as provided for in terms of regulation 86.4.

7 In addition, it is concluded that, having considered the facts indicated above, exempting Yellow Star from the requirements to make a mandatory offer is reasonable and justifiable as provided in terms of section 119(6)(c) of the Act.

Dated 22 March 2013

M A L Phakeng

Executive Director