

SECURITIES REGULATION PANEL

RULING RE: OFFER BY A CONSORTIUM CONSISTING OF MULTI-DIRECT INVESTMENT 180 (PTY) LIMITED (“TISO”), SAFIKA HOLDINGS (PTY) LIMITED (“SAFIKA”), NEWSHELF 730 (PTY) LIMITED (to be renamed CAPRICORN CAPITAL PARTNERS HOLDING COMPANY (PTY) LIMITED (“CAPRICORN”)), INVESTEC BANK LIMITED (“INVESTEC”) AND MINEWORKERS INVESTMENT COMPANY (PTY) LIMITED (“MIC”) (TOGETHER “THE TISO CONSORTIUM”) FOR ALL OR ANY OF THE ISSUED ORDINARY AND “N” ORDINARY SHARES IN THE CAPITAL OF NEW AFRICA INVESTMENTS LIMITED (“NAIL”).

- 1. This ruling is made in respect of an application for a ruling made on 3 October 2003 by Webber Wentzel Bowens acting for Kagiso Media Limited (“Kagiso”) and Johnnic Communications Limited (“Johncom”), two of the members of a consortium of three which, together with Caxton and CTP Publishers and Printers Limited (“Caxton”) are collectively referred to as “the Kagiso Consortium”. The Kagiso Consortium has made a binding conditional offer to acquire the majority of the operating assets of NAIL coupled with a conditional offer to acquire all of the shares in NAIL.**
- 2. On 2 October 2003, the Tiso Consortium announced the terms of its conditional offer to acquire all of the shares in NAIL, other than those held by Safika and Investec.**
- 3. The Kagiso Consortium has requested that the Executive Director of the Panel rules as follows:**
 - 3.1 that the Tiso Consortium should be obliged to increase its offer to all NAIL shareholders; and**
 - 3.2. that all of the members of the Tiso Consortium, as well as Phaphama Holdings (Proprietary) Limited (“Phaphama”), should be disqualified from voting on any resolution under s228 of the Companies Act at any general meeting of shareholders of NAIL convened to consider the proposals made by the Kagiso Consortium to implement that Consortium’s offer for the major operating assets of NAIL.**
- 4. This ruling is made by myself in my capacity as Executive Director of the Securities Regulation Panel. It constitutes a ruling on the interpretation of certain of the rules of the Securities Regulation Code on Takeovers and Mergers as they apply to this matter.**

5. Background

- 5.1 On 5 May 2003 NAIL invited interested parties to express an interest in making an offer for NAIL. On 24 July 2003 NAIL announced that it had received notification of a firm intention to make an offer from a consortium comprising Tiso, Safika, Investec and MIC (“the Initial Tiso Consortium”) at R9,00 per share. NAIL’s price had closed at R7,25 the previous day. Safika and Investec are both direct shareholders into Nail.**
- 5.2 Phaphama, holding at 52.5% of the ordinary shares, the controlling shareholder of NAIL, was not a party to the Initial Tiso Consortium. Safika, who is a member of the Initial Tiso Consortium, has a substantial but not controlling shareholding in Phaphama. Phaphama is held by Wiphold (25%), Hollard (34,9%), Safika (34,9%), and others (5%).**
- 5.3 On 17 September 2003 NAIL announced that it had received a letter from the Initial Tiso Consortium, increasing the offer to R10,50. On 22 September 2003 NAIL announced that the Kagiso Consortium had made an offer to acquire the majority of the operating assets of NAIL in terms of s228 of the Companies Act, coupled with a conditional offer to acquire all of the NAIL shares.**
- 5.4 On the same day the NAIL board also announced that it supported the Kagiso Consortium offer.**
- 5.5 Next, on 2 October 2003, the Initial Tiso Consortium announced on SENS that a new party, Capricorn (Newshalf 730 (Pty) Ltd to be renamed), had joined the Initial Tiso Consortium (“the Tiso Consortium”). Later on the same day the Tiso Consortium offer circular to NAIL shareholders was issued.**
- 5.6 The essence of the offer contained in the circular is the following. The Tiso Consortium makes an offer to all NAIL shareholders (at R10,50), excluding only Investec and Safika. Thus, at least in theory, the offer is made also to Phaphama, the 52.5% majority shareholder of NAIL’s ordinary shares.**
- 5.7 However, Phaphama undertakes not to accept this offer, but grants Tiso an option to acquire all of its NAIL shares after the general offer will have closed. The price is the same as the general offer, except for interest at call plus 2% from the date the option become operative. The option is said to be at "no cost", but the circular discloses, under "special arrangements", the following agreements.**

- 5.7.1 The Tiso Consortium and Phaphama (who already controls NAIL) will use their best endeavours to procure that NAIL**
- 5.7.1.1 grants Tiso and Safika certain calls on NAIL's interest in KFM;**
 - 5.7.1.2 grants Tiso and Safika a first refusal in respect of Jacaranda and Radmark;**
 - 5.7.1.3 grants Safika a mandate to sell the Sowetan newspaper at a corporate finance fee (commission) of R500 000;**
 - 5.7.1.4 sells to Capricorn 36.3 million shares in NAC.**
- 5.7.2 The Tiso Consortium will pay a corporate finance success fee of R500 000 to Safika if the general offer becomes unconditional.**
- 5.7.3 Prime Media will pay Safika R1 million if Safika abandons any prior entitlement to a potential 15% shareholding in KFM and Prime Media acquires KFM**
- 5.7.4 The Tiso Consortium will in the latter event also pay a further R1 million to Safika.**
- 6. It seems reasonably clear that between 17 September 2003 and 2 October 2003 the Tiso Consortium secured the support of the majority shareholders in Phaphama, and so also Phaphama, for the Tiso Consortium offer. In fact, the circular records expressly that Phaphama will oppose the Kagiso offer.**
- 7. On the same day (2 October 2003) Webber Wentzel Bowens, representing Kagiso and Johncom, met with the Executive Director, and raised concerns about the Tiso Consortium offer. They requested rulings as set out in 3 above.**
- 8. This meeting was followed by a letter the next day, 3 October 2003, formally setting out the basis for the request for the two rulings. After Webber Wentzel Bowens had inspected the documents that lay for inspection in terms of the Tiso Consortium offer circular, they added to their submissions in a letter of 6 October 2003.**
- 9. On 9 October 2003, at the invitation of the Executive Director, the Tiso Consortium responded in writing to the Webber Wentzel Bowens submissions. The documentary material on which this response to the request for rulings is based, is completed by a Tiso consortium agreement dated 29 September 2003, and an unsigned document headed "Consortium Arrangements".**

10. THE FIRST RULING SOUGHT

10.1 The argument advanced by Webber Wentzel Bowens is that two major shareholders of Phaphama (Safika and Hollard, the latter in the guise of Capricorn) were induced to support the Tiso offer. That inducement was a reward outside of the price offered for the shares, and is not being made to the other NAIL shareholders (the minorities). Therefore the offer to the minorities should be increased to the extent of that inducement. Reliance is placed on SRP Rule 13.

10.2 That rule provides:

"13 Except with the consent of the Panel, an offeror or persons acting in concert with it shall not make any arrangements with holders of the relevant securities and shall not deal or enter into arrangements to deal in securities of the offeree company, or enter into arrangements which involve acceptance of an offer, either during an offer or when one is reasonably in contemplation, if there are favourable conditions attached which are not being extended to all holders of the relevant securities."

10.3 In considering whether the first ruling sought should be given, two matters are pertinent. First, it will be noted at once that the rule does not entitle the SRP to compel the offeror to increase the offer to minorities. It simply prohibits the offeror from attaching favourable conditions to arrangements with some offeree shareholders that are not extended to all offeree shareholders.

10.4 Second, although the Tiso circular extends the offer to all NAIL shareholders, the substance of the transaction is that the offer is being extended only to the minorities. Since Phaphama, now controlled by the Tiso consortium for present purposes, has undertaken to reject the offer, the offer to them is in fact illusory.

10.5 This is however not the full picture. What has in reality occurred is that the Tiso Consortium, to secure the Phaphama support, has made certain inducements available to its two major shareholders, Safika and Hollard; and in that process it has in any event acquired the right to purchase the Phaphama 52.5% holding in NAIL ordinary shares for R10,50 (plus some interest). Therefore, although Tiso did not, according to the letter of Rule 13, attach favourable conditions to its arrangements with Safika (a holder of "relevant securities"—as is

The Tiso's Consortium's contention), the Tiso Consortium did attach favourable conditions to its arrangements with Phaphama (which is a holder of "relevant securities") by inducing the two major controlling shareholders of Phaphama, i.e. Safika and Hollard. (In regard to Capricorn, it cannot seriously be disputed, and it is not clear that the Tiso Consortium does, that it may for present purposes be taken that Capricorn is the alter ego of Hollard.)

- 10.6 the Tiso Consortium's contentions concerning the "special arrangements" cannot be upheld. It is said that Rule 13 does not apply to Safika for the reason indicated above again; for the answer given above, this contention is not upheld.
- 10.7 It is said that the arrangements involving NAIL are not binding on NAIL and may never become binding on NAIL. It is said that they constitute nothing more than a non-exigible "best endeavours" obligation on the Tiso Consortium to procure that NAIL post offer undertakes certain corporate action. The commercial reality is of course that between the Tiso Consortium and Phaphama they undoubtedly control NAIL, so that whether or not NAIL undertakes the corporate action will depend entirely on the Tiso Consortium and Phaphama. As regards the "best endeavours" argument, the advantages referred to above are all advantages that enure for the benefit of either the Tiso Consortium members or Phaphama and its major shareholders. Again, commercial reality dictates that at least for present purposes one must assume that the Tiso Consortium and Phaphama will not simply use their "best endeavours" but will in fact procure that the resultant benefits flow.
- 10.8 It is said that the corporate finance success fee is payable on the basis that Safika has been involved from the outset. However, what is not plain is that this fee had been finally agreed pre-offer; the possibility (even a probability) is that it was agreed later. The Tiso Consortium was in a position to clarify this but did not. It cannot accordingly object if it were accepted for present purposes that the fee was only agreed upon later, as an inducement (or at least a partial inducement) to persuade Phaphama to give the undertakings it did.
- 10.9 The same answer, with the necessary changes, applies to the argument as regards payment of the R1 million to Safika.
- 10.10 It is said that the corporate finance mandate to sell the Sowetan newspaper is not arrangement that is binding on NAIL. This argument has been addressed and answered above. The same applies to the option to acquire the NAC shares.

10.11 It has been pointed out that Rule 13 does not explicitly afford the power to compel the offeror to increase the offer. That is not the end of the matter. The general principles may apply to a situation not specifically covered by a rule. General Principle 11 provides:

"11 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."

10.12 The minorities in NAIL are entitled to receive the same compensation for their shares and its concert parties, which amounts to R10,50 per share plus the value of the greatest inducement, measured as a value per share.

10.13 The SRP is entitled to withhold or to grant its consent under Rule 13. Accordingly, the ruling which is made is as follows.

10.13.1 The "special arrangements" contained in paragraphs 8.1 to 8.5 of the Tiso Consortium's offer circular to NAIL shareholders dated 2 October 2003 contain arrangements by the Tiso Consortium and its concert parties including Phaphama, in conflict with SRP Rule 13.

10.13.2 Consent is given to those arrangements subject to the condition that the Tiso Consortium increases its offer to "NAIL minority shareholders" as defined in the circular by an amount equivalent to the value of the highest inducement to which reference is made above.

10.13.3 Such increase in the offer price will be calculated after the "special arrangements" have been carried out by the parties concerned. The aggregate amounts received individually from the "special arrangements" shall be divided by the attributable number of ordinary shares held through Phaphama added to the number of ordinary and "N" ordinary shares held directly in NAIL respectively by Safika and Hollard as at 17 September 2003.

10.13.4 The calculation of the increase in the offer price shall be verified by Deloitte & Touche for the account of the Tiso Consortium.

10.13.5 On completion of this calculation such increase in the offer price shall be paid forthwith, as an “agterskot” payment to those NAIL shareholders who have accepted the Tiso Consortium offer in terms of and in accordance with that offer.

11. **THE SECOND RULING SOUGHT**

11.1 Rule 29(d) provides as follows

"Where the directors of a company will require the authority of a general meeting of shareholders of the company pursuant to the provisions of section 228 of the company in order to enter into an affected transaction, the Panel shall have the right in its sole and absolute discretion, to direct that any shareholder, whose vote may as a result of any direct or indirect conflict of interest result in an inequity to any other shareholder, shall not vote or cause its votes to be exercised in whole or part at the said general meeting or any adjournment thereof."

11.2 The SRP is not given similar powers in respect of an affected transaction implemented by way of other means, such as the outright Tiso Consortium offer being made to NAIL shareholders.

11.3 Section 228 requires the approval of shareholders for the disposal by a company of its ownership of the company's assets. Phaphama as the major shareholder is vitally interested in the ownership of the NAIL assets. To prevent Phaphama from voting on the resolution in terms of Section 228 would effectively place Phaphama, as the major shareholder, in the hands of minority shareholders. Phaphama is not a member of Kagiso Consortium and accordingly is not, directly or indirectly, a party to the offer for the NAIL assets which has given rise to the Section 228 resolution. It is therefore not in the position of a "related party" as the concept would be understood in terms of the Listings Requirements of the JSE Securities Exchange South Africa. It therefore has no conflict of interest in the sense that it will be voting in respect of an offer proposed by itself.

11.4 Phaphama is a concert party of the Tiso Consortium in the competing offer launched by the Tiso Consortium but this is a fact of commercial life and does not result in an inequity to any other shareholder. The fact that Phaphama and the Tiso Consortium may vote against the resolution arising out of the offer by the Kagiso

Consortium, does not compel any other shareholder to accept the offer made by the Tiso Consortium..

- 11.5 Furthermore, to prevent Phaphama voting in these circumstances would create a potentially untenable position for possible offers in the future in that it would inhibit the ability of existing shareholders to propose offers under Section 440 of the Companies Act in the future for fear of being placed in a similar situation to that in which Phaphama and the Tiso Consortium find themselves currently. The creation of restraints of this nature is considered to be not in the interests of minority shareholders generally.**
- 11.6 It should also be noted that Phaphama has no interest or right, in a legal sense, which would constitute the Phaphama shareholding a different class of shares to those held by other NAIL shareholders and accordingly there is no basis in this regard to treat Phaphama differently to other shareholders.**
- 11.7 Accordingly, the Second Ruling which was sought is refused.**

**R J CONNELLAN
EXECUTIVE DIRECTOR**

14 October 2003