THE SECURITIES REGULATION PANEL
(the "SRP")

RULING IN TERMS OF SECTION 440 OF THE COMPANIES ACT 61 OF 1973 AND THE RULES OF THE SRP

IN THE MATTER OF
THE COMPLAINT AGAINST
NEDBANK AND SYFRETS BY THE PINNACLE CONSORTIUM, GARDENER ROSS AND NORMAN BOSMAN

HEARD ON 19 AND 20 MAY 2010

BEFORE A FIVE MEMBER PANEL OF THE SRP

comprising

Mr N A Matlala (chairman)
Mr N D Lowenthal
Mr S B Siyaka
Ms P M Stratten
Mr B van Rooyen

1. INTRODUCTION

1.1 John Taylor & Associates Inc representing Property Promotions Management (Proprietary) Limited, New Port Finance Company (Proprietary) Limited, Pinnacle Point Holdings (Proprietary) Limited (together referred to in this document as "**the Pinnacle Consortium**"), Gardener Ross International Finance (Proprietary) Limited ("**Gardener Ross**") and Norman Bosman (collectively the "**Complainants**") filed a complaint against Nedbank Limited with the SRP on 4 February 2010.

1.2 The essence and substance of the complaint is that Nedbank Limited and/or Syfrets Securities Limited[1] caused an affected transaction[2] to occur in or about March 2007 by acquiring 35% or more of the ordinary shares in the capital of Acc-Ross Holdings Limited ("**Acc-Ross**"), albeit in order to hedge physically settled single stock futures contracts.

1.3 Acc-Ross was subsequently renamed Pinnacle Point Group Limited ("**PPG**") as a result of the reverse takeover of Acc-Ross by the Pinnacle Point Consortium in November 2008.

1.4 As a result of Nedbank's actions referred to in paragraph (b) above, the Complainants submitted that Nedbank should have made an offer in accordance with the provisions of SRP Rule 8.1, to purchase the ordinary shares of the remaining shareholders of Acc-Ross/PPG at a price to be determined by the Panel based on the prevailing trading prices for the Acc-Ross or PPG shares at the relevant time or times.

2. BACKGROUND TO THE COMPLAINT

2.1 For a better understanding of the complaint, we believe it is imperative to describe the functioning of single stock futures as listed and traded on the South African Futures Exchange ("**SAFEX**"), a division of JSE Limited (the "**JSE**"). It is common cause that the single stock futures relevant to matter were traded on SAFEX which is regulated by the JSE in terms of its Derivatives Rules. We deal below with *physically settled* single stock futures in terms of these rules and in doing so we will use our own scenarios for a better understanding by lay persons.[3]

What are physically settled single stock futures and how are they traded?

2.2 A listed single stock future is a legally binding commitment made through SAFEX to buy or sell a single equity (i.e. a listed share) at a fixed future date and at a price determined at the time of dealing. Each single stock futures contract is standardized with regard to size (i.e. each contract comprises a basket of 100 shares), expiry date (each contract is usually for a 3 month period), and tick movement (the minimum upward or downward movement in the price of the futures contract). Thus the value of a single stock future is equal to 100 times the particular share's futures price. For example, if Company X is trading on SAFEX at R52.00 then holding one futures contract in Company X is the equivalent of investing R5, 200 in Company X shares.[4]

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[1] The parties agreed that for ease of reference, Nedbank Limited, Syfrets Securities Limited, Syfrets Securities Nominees (Pty) Ltd and any other Nedbank group entity involved in the matter could collectively be referred generically to as "Nedbank", for the reason that Nedbank Limited was the 100% holding company of all the Nedbank group entities concerned. However where any actions must be ascribed in this document to Syfrets Securities or to Syfrets Nominees, or to any other Nedbank group entity, on an individual basis, reference will be made to such entity or entities specifically by name, and not to the generic term "Nedbank".

[2] As defined in section 440A(1) of the Companies Act, no 61 of 1973, as amended.

[3] The wording presented to us in the papers for the hearing contained more technical wording.

[4] www.jse.co.za. Much of the content of paragraph 2.2 has been obtained from the page on the JSE's website describing single stock futures.

2.3 A *physically* settled single stock future is a futures contract in terms of which the seller undertakes to *deliver the underlying shares* to the purchaser on the agreed future date (the expiry date) at an agreed price, and the purchaser undertakes to accept such delivery on the expiry date against payment of the agreed purchase price.

2.4 So as to ensure its ability to perform under a physically settled single stock futures contract, when a seller sells such a single stock future it usually also immediately purchases outright in the market, and takes delivery of, the relevant number of underlying shares required to be delivered to the purchaser on the expiry date.

2.5 Single stock futures are quoted on the SAFEX trading system as: Month of expiry, year of expiry, three letter code of stock followed by the letter Q e.g. Dimension Data futures expiring in March 2002 are quoted as MAR02 DDTQ.

2.6 These contracts are purchased through the intermediation of a trading member of the JSE (i.e. a broker), which (unless it is itself also a clearing member) must have appointed a clearing member of the JSE to guarantee settlement of all its trades on the market.

2.7 The price of a single stock future is negotiated through the SAFEX order matching system. Once purchased, the price of a single stock future closely tracks the price of the underlying share.

2.8 Each trade concluded is matched daily by SAFEX i.e. the JSE ensures that there is a buyer and a seller to each contract. SAFEX's clearinghouse (SAFCOM) then becomes the counterparty to each trade once each transaction has been matched and confirmed. This process is referred to as novation, whereby the clearinghouse guarantees the performance on each trade. To protect itself against non-performance, SAFCOM employs a process known as margining[5]. This mechanism is two-fold:

(i) firstly, when a position is opened, the investor is called on to pay an initial margin in cash to the clearinghouse. This amount remains on deposit as long as the investor has an open position. It attracts a market related interest rate, which is refunded to the investor once the position is closed out, or the contract expires;

(ii) secondly, the JSE re-values each position against the market price at the close of trade daily. Between 16h00 and 16h05 each day, SAFEX takes the average midpoint of a selection of bids and offers on a traded single stock future and uses this as the market price for that single stock future. This process is referred to as Marking-to-Market (MTM) with the market price being termed as the MTM price. Any difference from the previous day's market price is either paid to the investor, or paid by the investor to the clearinghouse, in cash. This payment is called variation margin.

2.9 Through this process the status of each position is managed so that each investor is aware, on a daily basis, of his cash flow commitments on an open position. In this regard, the investor must be confident that he has the resources to maintain the position for the intended period. Failure to honour a variation margin call within the prescribed time (i.e. by 12h00 on the following business day) will result in the position being closed out by the broker immediately. To mitigate this risk, many brokers generally require a deposit to be paid to them in advance.

[5] For full details relating to margining (intial, variation, additional, retained and maintenance of margin level) see Rule 8.60 of the JSE's Derivatives Rules.

2.10 Upon expiry of a contract or the closing of a position, the total of all cash flows representing margin payments or receipts must reflect the total profit or loss to the holder of a contract. Each investor's initial margin (with interest) is repaid together with any surplus margin balance – if any.

2.11 On the delivery date, the purchaser pays the agreed price to the seller and takes delivery of the underlying shares. A position in any given contract month can be liquidated (or closed out) at any time during the life of the contract prior to expiry by initiating a trade which is opposite and equal to the current position (short or long) held.

2.12 The seller and purchaser may also agree that on the delivery date the shares will not be delivered, but that a new single stock futures contract will be entered into for a further set period and at the same or a different price in respect of the same number of underlying shares (i.e. the single stock futures contract is "rolled over").

2.13 If a purchaser of a single stock future defaults on its obligation to pay for the underlying shares at maturity of the relevant single stock futures contract or if the purchaser fails to pay any additional margin at any stage prior to the delivery date, the obligation falls to the trading member to fulfil. If the trading member itself defaults, its clearing bank must assume the trading member's obligation *vis-a-vis* the seller of the relevant single stock futures contract by becoming the holder of the single stock future and thus becoming liable for meeting the purchaser's obligations thereunder.

2.14 To quote from the JSE's website: "The risk management philosophy when trading SAFEX derivatives is very simple 'You stand good for your client'. What this means is that each member will carry its client's losses if the client defaults just as each clearing member will carry its member's (for whom it clears) losses if the member defaults. The pyramid diagram [below] forms the basis of the SAFEX risk management structure…. The risk that SAFEX therefore bears is that one of the clearing members could possibly go into default, whether it is as result of a member causing it to default or as a risk of its own [making] ".

3. THE EVENTS THAT LED TO THE COMPLAINT

3.1 This complaint was triggered by the default on or about 4 December 2008 on the part of certain purchasers of single stock futures contracts relating to shares in Acc-Ross.

3.2 The purchasers of the single stock futures were clients of Cortex Derivatives[6] ("**Cortex**"), which had purchased the Acc-Ross single stock futures for its clients during the period from December 2006 until September 2008. Acc-Ross Holdings Limited was listed on Alt-X, the JSE's alternative exchange which focuses on small and medium sized high growth companies.[7]

3.3 The Acc-Ross single stock futures contracts which were purchased by Cortex will be referred to in the rest of this document as "**the SSFs**".

3.4 When the SSFs matured, the parties rolled them over for further three monthly periods, with the result that the Cortex clients never actually acquired any of the underlying Acc-Ross shares, to the extent that the SSFs were rolled over.

3.5 The default by the holders of the SSFs arose when the margin calls payable in relation to the SSFs increased suddenly on or about 4 December 2008.

3.6 As the trading member of the JSE in respect of the SSFs, Cortex was obliged to guarantee its clients' trades, and was obliged to pay the margin calls on behalf of its clients if they were unable to provide the necessary funds. However Cortex was unable to do so.

3.7 ABSA Capital, a division of ABSA Bank Limited, ("**ABSA**") was the SAFEX clearing member of Cortex on the JSE and was thus the guarantor for Cortex's trades on SAFEX. Therefore when Cortex defaulted on or about 4 December 2008, ABSA was obliged to take over all the SSF positions and ABSA thereby ended up acquiring a proprietary position (i.e. a holding for itself, not for any other party) in Acc-Ross shares equal to 27.4% of the issued share capital of PPG[8].

3.8 This was the largest derivatives default[9] by a JSE member in the history of the JSE and was widely reported in all media in South Africa[10].

3.9 Nedbank's involvement in this matter was due to its subsidiary company, Syfrets Securities Limited ("**Syfrets**"), being the seller (or so called market maker[11]) of the SSFs.

3.10 In terms of a market maker agreement concluded between Syfrets and Cortex in or about December 2006, Syfrets undertook to act as counterparty seller of Acc-Ross single stock futures contracts on SAFEX. In practice, however, the SSFs were not sold on the open market but were sold directly to clients of Cortex, with Cortex acting as agent for the purchasers in concluding the purchases and also acting as agent for Syfrets in selling the SSFs.

3.11 Whenever Cortex sold an SSF on behalf of Syfrets, Cortex was obliged by Syfrets to purchase the relevant number of Acc-Ross shares on the JSE equities market. The reason Cortex was required to do this was to ensure that when each SSF matured, Syfrets would be able to deliver the relevant number of underlying shares to the purchaser of the SSF, since the SSFs were physically settled.

3.12 During the period from December 2006 to September 2008, and mostly arising from the abovementioned market maker agreement, Nedbank acquired more than 35% of the shares of Acc-Ross. Most of the shares were acquired by Syfrets.

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[6] A trading member of the equities derivatives market of the JSE. Cortex Derivatives is the financial SAFEX division of Origen SA Limited and is managed by Cortex Securities (Pty) Limited. Advocate Loxton SC for the Complainants stated that the single stock futures had been issued via Cortex Asset Management. We do not believe that this entity would have been permitted to trade on the JSE, so for this reason, we have referred to the entity which Nedbank referred to in its papers, namely Cortex Derivatives.

[7] Description of Alt-X on the JSE's website.

[8] The percentage represents shares in issue after the reverse takeover of Acc-Ross by the Pinnacle Point Consortium in November 2008.

[9] ABSA paid R930 million to Syfrets in acquiring the PPG shares.

[10] Business Day reported this default under the heading: "ABSALUTE" presumably because of the closing out by ABSA.

[11] "So called" because a market maker would usually offer both a sale and purchase price at all times.

4. FACTS THAT ARE COMMON CAUSE

4.1 The parties agreed prior to the commencement of the hearing not to lead any oral evidence and that the matter should be dealt with on the basis of the papers filed with the SRP prior to the commencement of the hearing. The papers were voluminous in that they filled five lever arch files.

4.2 Nedbank however presented one affidavit, three unsworn statements and *viva voce* evidence (unsworn) by two Nedbank employees, which affidavit, statements and *viva voce* evidence were not objected to by Counsel for the Complainants.

4.3 The affidavit was deposed to on 16 May 2010 by Mr Deon Strydom who, until he left the employ of Nedbank in August 2009, held the position of Head: Retail Listed Products, Nedbank Equity Capital Markets.

4.4 The statements dated 17 May 2010 were as follows:

(i) from Mr Robert Wessels: Joint Head of Advisory and Distribution, Nedbank Capital, a division of Nedbank Limited;

(ii) from Ms Anel Bosman: Head of Risk for Nedbank Capital; and

(iii) from Mr Mark Weetman, a director of Cortex Securities (Pty) Limited, who liaised with Mr Strydom to obtain letters of representation from Syfrets so that the SSF holders could vote "their" shares each time a shareholder's meeting of Acc-Ross was held.

4.5 The unsworn oral statements given at the hearing occurred when Counsel for Nedbank requested Mr Wessels and Ms Anel Bosman to respond to questions posed by members of the Panel.

4.6 Subsequent to the hearing we have been provided with further documentation that was requested by the Panel during the hearing. These comprised various papers and two lever arch files. The transcript of the hearing constituted the 8th file.

4.7 We will summarise below the facts that are we understand are common cause.

4.8 Sometime in 2006 Cortex invited shareholders in Acc-Ross to purchase, through it, single stock futures based on Acc-Ross shares.

4.9 Thereafter Cortex approached Syfrets[12] to become the "market maker"[13] in single stock futures contracts relating to Acc-Ross shares.

4.10 It was agreed between Syfrets and Cortex that the single stock futures would be sold on the basis that they would be physically settled (through delivery of the underlying shares) as opposed to being settled in cash.[14] For this reason, Cortex purchased the requisite number of underlying Acc-Ross shares for Syfrets, each time it sold a single stock futures contract on behalf of Syfrets.

4.11 The shares so acquired represented the equal and opposite (hedge) position simultaneously taken by Syfrets at the time that the single stock futures were sold, so as to ensure that Syfrets would be able to meet its delivery obligations on the single stock futures' expiry dates.

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[12] Syfrets is an authorized trader on the JSE Equities and Derivatives Markets.

[13] A market maker usually acts as both seller and purchaser in the market. Syfrets only acted as seller of SSFs in this case.

[14] Single stock futures that are physically settled are given a contract code of QQ. Those settled by cash have a contract code of DQ.

4.12 When the market making agreement came to be implemented, it transpired that whenever a Cortex client holding Acc-Ross shares wished to acquire an SSF, Cortex would sell its client's Acc-Ross shares to Syfrets, and would at the same time sell the SSF to its client on behalf of Syfrets.

4.13 From the proceeds of the sale of their Acc-Ross shares, the Cortex clients would use 10% in order to acquire the SSFs (based on the shares that they had just sold) and the balance of 90% to purchase more SSFs, with the result that they would buy 10 times as many shares as they had started out with. The purchasers also used the margins that were paid to them by SAFEX (which occurred as the Acc-Ross share price increased) to acquire yet more SSFs. In purchasing the SSFs, Cortex's clients put down a 10% deposit to acquire Acc-Ross shares, and would have to pay the balance of the purchase price in 3 months' time.

4.14 The Acc-Ross shares so acquired by Syfrets were registered in the name of Syfrets Securities Nominees (Proprietary) Limited, a nominee company approved by the JSE in terms of Rule 3.90 of the JSE Equities Rules[15]. Some of the shares were registered in the name of other Nedbank nominee companies, but this is not material to the facts of the current matter requiring consideration by the Panel.

4.15 As a result of the above purchases, Syfrets' holding of Acc-Ross shares crossed the 35% threshold[16] on or about 9 March 2007[17]. Between 9 March and 13 April 2007, when its holdings crossed the 50% threshold limit, Syfrets' holdings increased by incremental amounts equal to 5% of the listed Acc-Ross shares on 22 March, 23 March and 4 April 2007[18].

4.16 Approximately seventy five percent of the abovementioned Acc-Ross shares acquired by Syfrets were transferred to it by Cortex by way of OD[19] or DQ[20] market entries. The remaining twenty five percent was were acquired by Syfrets through the Direct Market Access (DMA) system in terms of which Syfrets had given Cortex authority to purchase Acc-Ross shares in the name of and for and on behalf of Syfrets, in accordance with the JSE Equities Rules.

4.17 In the end however, very few, if any, of the shares that Syfrets purchased in order to fulfil its SSF obligations on their expiry dates were delivered to the SSF purchasers. This was because the parties agreed to roll the SSFs over[21] prior to their expiry dates.

4.18 In December 2008, the Cortex clients who held the SSFs failed to meet their SAFEX margin calls.

4.19 Cortex was unable to take over its clients' SSF positions.

4.20 ABSA, being Cortex's SAFEX clearing member, and thus its guarantor, in the equities derivatives market, was accordingly obliged to take over all the outstanding SSFs.

4.21 ABSA thereby became the owner of 27.4%[22] of PPG (formerly called Acc-Ross) shares.

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[15] A nominee arrangement arises when a registered shareholder of a company holds such shares for another party, the beneficial owner. Allthough the nominee is registered as the holder of the shares vis a vis the company, the nominee has no rights in the shares and its name is simply used by the beneficial owner for purposes of registration of the shares.

[16] Paragraph 5 of Section B of the Securities Regulation Code on Takeovers and Mergers established by the SRP in terms of section 440C of the Companies Act prescribes 35% as the specified percentage for the purposes of determining "control" as referred to in the definition of "affected transaction" in section 440A(1)of the Companies Act.

17 There was some debate as to the actual date on which the 35% threshold was crossed, whether this occurred on 7 or 9 March 2006. We understand that the agreed date is 9 March 2007.

18 Of relevance because of the 55 "creep" provisions of Rule 8.1 of the SRP Rules contained in Section D of the Code .

19 Book-overs from other trading members of the JSE, which are not reflected on the JSE trading systems.

20 Journal entries on the JSE's Broker Deal Accounting (BDA) system, which are neither reflected on the JSE trading systems nor reported to the market.

21 A roll over took place when a single stock future was extended for a further (3 month) period before the expiry or delivery date was reached – this amounts to an early cancellation and replacement of the SSF with another SSF.

5. THE ISSUES FOR DECISION

5.1 Given the abovementioned facts, our understanding is that the Complainants have asked the Panel to decide the questions listed below.

5.2 Whether a holding of the specified percentage of 35%, or more, of Acc-Ross securities by Syfrets could be held to be a breach of the Securities Regulation Code on Takeovers and Mergers ("**the Code**") established by the SRP in terms of section 440C of the Companies Act, 61 of 1973, as amended ("**the Companies Act**") when such a holding was acquired in order to hedge a contractual obligation arising from derivatives transactions. Put otherwise, does such a holding of shares constitute an "**affected transaction**" when such a holding was acquired in order to meet Syfrets' obligations on the expiry of the SSFs.

5.3 Whether the purpose (reason for) and duration of Syfrets' holding of Acc-Ross shares is relevant to the matter.

5.4 Whether any such holding of a specified percentage of Acc-Ross shares contravenes Rule 8.1[23], resulting in an obligation to make a mandatory offer.

5.5 Whether Nedbank concealed or misrepresented its holding of Acc-Ross shares.

5.6 Whether Nedbank manipulated the market price of Acc-Ross shares.

5.7 Whether the actions of Nedbank resulted in the creation of a false market in Acc-Ross shares and whether this amounted to a contravention of General Principle 6 of the Code[24].

5.8 Arising from the arguments presented by Counsel for the Complainants and Nedbank, we are of the view that we may also need to decide:

(i) whether, if the Panel finds that a mandatory offer must be made, to whom the offer should be made, the price at which such offer should be made, whether the offer should be made to acquire all or only a portion of the relevant securities, and which entity (Nedbank or Syfrets) should be required to make the offer;

(ii) whether a non beneficial holding of Acc-Ross shares by Syfrets was relevant to the question of vesting of control referred to in the definition of "affected transaction". In other words whether an economic interest (or otherwise) in the Acc-Ross shares acquired by Syfrets should be taken into account when considering the question of holding of shares and vesting of control for the purposes of the definition of "affected transaction";

(iii) whether, in acquiring 35% and more of the listed Acc-Ross shares, Syfrets gained control of Acc-Ross;

(iv) whether the fact that Syfrets was not legally obliged to hedge its risk in terms of the SSFs is relevant to the matter;

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[22] The percentage in Acc-Ross shares pre reverse takeover would have been 89.7%.

[23] Rule 8.1 entitled "The Mandatory Offer" states "Whenever an affected transactoin 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 …… to acquire all of their securities or such portion of their securities as the Panel on application may decide. …."

[24] General Principle 6 is contained in paragraph 2(6) of section C of the Code. It provides that all parties to an offer shall take all reasonable steps to prevent the creation of a false market in the securities of an offeror or an offeree company. The General Principles were devised by the SRP because it was felt that it was impracticable to devise rules in sufficient detail to cover all circumstances which can arise in relation to affected transactions.

(v) whether the fact that the Complainants are parties to a High Court action against Nedbank and others precludes the Complainants from participating in a mandatory offer;

(vi) whether section 140A of the Companies Act is relevant to this matter;

(vii) whether the Panel is entitled to take guidance from The City Code on Takeovers and Mergers ("**the City Code**") of the UK Panel on Takeovers and Mergers ("**the London Takeover Panel**") with regard to how the City Code caters for recognised intermediaries;

(viii) whether the Panel is functus officio as a result of certain decisions taken by by the full Panel during 2009;

(ix) whether as a result of the opinion given by the Executive Director of the SRP, the Complainants' only remedy was an appeal in terms of section A(2)(d) of the Code;

(x) whether, if the Panel finds that an affected transaction occurred, the Panel has the power to make a ruling to require Nedbank/Syfrets to make a mandatory offer or whether the Panel is instead obliged to make an application to court in terms of section 440M of the Companies Act; and

(xi) whether, if the Panel finds that an affected transaction did occur, the Panel should:

(1) rely on the provision in Rule 8.1 of the Rules of the Code[25] to "rule otherwise" in any particular case; or

(2) exercise its general discretion in terms of Rule 34[26] of the Code to exonerate or excuse Nedbank or Syfrets from failure to comply with Rule 8.1 of the Code.

5.9 In their submissions to the Panel at the hearing of this matter in May 2010, Advocates Loxton SC and Cilliers SC, Counsel for the Complainants and Nedbank respectively, addressed us on these issues at length. We are extremely indebted to both Counsel for their submissions which proved valuable and erudite. We deal below with the respective submissions of Counsel.

5.10 At the close of the hearing on 20 May 2010, the Chairman stated that the Panel would attempt to issue our ruling and reasons within 60 days. However, the documentation we requested was only delivered several weeks after the hearing had ended, and we were therefore unable to meet the 60 day target.

6. SUBMISSIONS ON BEHALF OF COMPLAINANTS

6.1 We now deal with Advocate Loxton SC's submissions[27]. These submissions can be summarised as follows below.

[25] The SRP Rules made in terms of section 440C of the Companies Act which are contained in Sections D to R of the Code.

[26] Rule 34 states "Without derogation from any specific provision of the rules whereby the Panel may grant exemption or dispensation from any requirement or permission or consent to depart from any requirement, the Panel shall enjoy a general discretion to authorise, subject to such terms and conditions as it may prescribe, non-compliance with or departure from any requirement of the Code and to excuse or exonerate any party from failure to comply with any such requirement.

[27] Mr Loxton's submissions include those of the attorneys acting for the Complainants, whose submissions are contained in letters addressed to the SRP which form part of the papers for this hearing and to which Mr Loxton referred in his heads of argument and in his address to the Panel.

6.2 Syfrets purchased Acc-Ross shares in excess of 35% as at 9 March 2007. This is common cause.

6.3 Syfrets concealed its purchase of Acc-Ross shares from the other Acc-Ross shareholders and failed to make a mandatory offer to such shareholders, or to obtain an exemption from having to make such an offer. Instead Syfrets and other Nedbank entities continued to purchase more Acc-Ross shares, with the result that Nedbank's holding of Acc-Ross shares exceeded the SRP "creep" limit (of a further 5% acquisition in any period of 12 months[28]) on three occasions between 9 March and 13 April 2007 and by the time that Acc-Ross was taken over by the Pinnacle Point Consortium in 2008, Nedbank held 89.3% of the Acc-Ross shares.

6.4 Nedbank's conduct artificially increased the Acc-Ross share price and created a false market. Nedbank acted recklessly and displayed a cavalier attitude in its dealings, which contributed to the creation of a false market, on which third parties relied to their detriment. Nedbank's acquisition of Acc-Ross shares could not have been inadvertent given that it was Acc-Ross' banker. Also, when it provided letters of representation to third parties to allow them to vote the Acc-Ross shares, Mr Loxton said that it must have had an idea that by buying billons[29] of shares in a very small company it would hit the SRP's 35% threshold. He argued strenuously that Nedbank was at all material times conscious that it had caused an affected transaction to occur. Further evidence of this was when it approached the Executive Director of the Panel in December 2008 requesting the Panel to condone its breach of the Code.

6.5 In order to enforce the Code, the SRP should require Nedbank Limited (on the basis that Syfrets would be deemed to have been acting in concert with Nedbank Limited in terms of section 440A(2) of the Companies Act), or alternatively Syfrets, to make a mandatory offer to all current PPG shareholders (including the Complainants) at the highest price paid by Nedbank from the date of the affected transaction, i.e. R1.00 a share.

6.6 Mr Loxton argued that the fact that some of the Complainants had not held shares in Acc-Ross at the time that the 35% and 5% thresholds were crossed did not mean that they should not be entitled to an offer. The Code requires all shareholders to be treated in a similar manner and since all of the Complainants had been affected by Nedbank's conduct, they should each be entitled to an offer.

6.7 If Nedbank were not ordered to make a mandatory offer, this would effectively amount to condonation of its breaches of the Code and its involvement in the false market in Acc-Ross shares. It would also effectively condone the untenable argument that a party who acquires shares to hedge its obligations under single stock futures (even if it is obliged to do so), falls into a category different from that of an ordinary acquirer of shares, where it need not comply with the Code. Recognising this special form of shareholding, which inhabits a sort of commercial "twilight zone" and is immune from the consequences of the Code, would create some strange being that doesn't hold shares and yet is the owner of the shares, and would further lead to regulatory confusion and exploitation, to the prejudice of other shareholders, certainty and market integrity.

6.8 In substantiating that Nedbank had crossed the specified percentage of 35%, Mr Loxton referred the Panel to an application[30] by Nedbank to the SRP Executive Director on or about 2 December 2008 for condonation in relation to Syfrets' acquisition of more than 35% of the Acc-Ross shares in issue, which application was subsequently abandoned by Nedbank after receiving a second legal opinion on the matter. Mr Loxton said that Nedbank's argument that it was not the holder of

[28] Contained in Rule 8.1
[29] From the papers it appears that Syfrets bought just over one billion shares.
[30] It appears to us that Nedbank might argue that the "application" was a submission.

the shares and that it had made a mistake in asking the SRP for condonation in December 2008 was a work of fiction, which was not borne out by the facts or the law.

6.9 In response to Nedbank's submissions that the purchase of Acc-Ross shares did not constitute an affected transaction, because the purchasing of such shares for hedging a derivatives transaction could not lead to a change of control nor for the purpose of vesting control, Mr Loxton argued that the definition of an affected transaction cannot be interpreted to exclude trading in derivatives where such trading causes the purchaser to exceed the specified percentage. He stated that one cannot divest oneself of control simply by reaching an arrangement with somebody (else) to allow them to vote the shares, because the very act of granting the other person the right to vote the shares showed that control in the shares remained vested in the person who held them. Because the arrangement was not reduced to writing, it was also possible for Nedbank to withdraw the voting rights at any time, which indicated that Nedbank retained ultimate control over the shares.

6.10 Mr Loxton further contended that the fact that Nedbank represented itself (or Syfrets) as the beneficial or registered holder of millions of Acc-Ross shares on several occasions in letters of representation issued for purposes of Acc-Ross shareholders' meetings, put an end to the matter. He referred the Panel to pages 1092 to 1103 of the record which comprise copies of eleven letters of representation (the first letter incorrectly titled "proxy") provided during the period from 3 October 2007 to 10 July 2008 by Nedbank Capital, Syfrets or Nedbank Corporate to third parties authorising them to vote the Acc-Ross shares held by Syfrets (as stated in the first letter) or Nedbank (as stated in the other 10 letters). The first letter dated 3 October 2007 stated that Syfrets was the *beneficial* holder of 820 million Acc-Ross shares. The other ten letters referred to shares *registered in the name of* Syfrets Securities Nominees Limited.

6.11 Mr Loxton also referred the Panel to parts of the record which showed how at times Acc-Ross shares had been acquired by Nedbank in a manner which indicated that it had "gotten ahead of the game" and was thus the holder of shares which could not yet constitute a hedge because the relevant SSF had not yet been sold. He argued that this behaviour was not consistent with the argument that the shares were only held for hedging purposes.

6.12 Mr Loxton stated that the Panel should reject out of hand the explanation by Nedbank's ex employee, Mr Strydom, in his affidavit at page 1270 of the record that the letters of representation were drafted very quickly and without much care and that presumably some precedent was used.

6.13 Mr Loxton pointed out that even if the letters were drafted quickly and carelessly, the fact is that one of these letters used the word "beneficial holder", and in another instance a letter was issued to the Chairman of the Acc-Ross meeting, rather than to the purchasers of the Acc-Ross SSFs. This, he said, showed that Nedbank saw itself as being the true owner of the shares. Furthermore the necessity for Nedbank to issue letters of representation arose precisely because it held the voting rights for so long as it was the owner (or holder) of the shares.

6.14 With regard to the arrangement with Cortex which allowed its clients to vote the shares, Mr Loxton pointed out how meticulous banks usually are, with internal regulatory regimes that require everything to be documented, and yet the very arrangement on which Nedbank relied in this instance was not documented at all. He also referred the Panel to the numerous instances where Nedbank's percentage shareholding in Acc-Ross was shown as being different from what it actually was, showing that the record keeping relating to the share acquisitions had been in disarray. He also picked out many contradictions in Nedbank's approach to its Acc-Ross shareholdings.

6.15 He went on to argue that the fact that Nedbank had routinely rolled over the SSFs and was the holder of Acc-Ross shares for some 20 months, contradicted Nedbank's assertion that the holdings were temporary. Furthermore, the fact that Nedbank was bound to divest itself of the shares in the future (in terms of the SSFs) was an irrelevant fact since, until it delivered the shares, ownership in them and the voting rights attached to them, vested in Nedbank.

6.16 Mr Loxton countered Advocate Cilliers' argument that Nedbank's acquisition of 35% and more of the shares in Acc-Ross could not have amounted to a change of control because the shares were to be held temporarily, by saying that the taking of a temporary position in shares (if the resultant holding of such shares is on a par with, or more than, the specified percentage) falls foul of the Code and that any contrary interpretation of the Code is legally unsustainable and risible. He emphasised that the purchasers of securities should steer clear of the specified percentage.

6.17 Mr Loxton analysed the definition of an "affected transaction" and "control", and came to the conclusion that all that the definitions require is that the shares be "held". Risk, economic interest, monetary interest and the reason for acquiring the shares are not part of the test as to whether an affected transaction has occurred. Nor is permanence or otherwise of such a holding. Furthermore the fact that the definition of "control" in section 440A(1) of the Companies Act includes the words "irrespective of whether such holding or holdings confer de facto control" indicates that the definition of an "affected transaction" is cast as widely as possible.

6.18 Mr Loxton also pointed out that Nedbank had not complied with section 140A of the Companies Act[31], which, in view of the fact that non-compliance with this section is a criminal offence, also surely meant that Nedbank had not regarded itself as a nominee shareholder.

6.19 With regard to Nedbank's assertion that the Complainants' correct remedy was to have taken the Executive Director's ruling (vis a vis Nedbank's subsequently withdrawn application for condonation) on appeal, it was pointed out that the Complainants had not known what passed between the Executive Director and Nedbank, and that any ruling given by the Executive Director was therefore not appealable.

6.20 With reference to extracts from the minutes of Panel meetings held on 18 February and 30 June 2009, at which the question of holdings of shares arising from derivative transactions was raised, Mr Loxton stated that these did not indicate a decision in relation to a request for a decision made by Nedbank. One needed to bear in mind that the Code encourages approaches to be made to the Executive Director, the Executive Committee or the Panel relating to requests for clarification as to the basis on which one can properly proceed in any set of circumstances. An informal procedure was encouraged. One could not erect *functus officio* out of that. To do so would destroy due process, administrative action, fair procedure and the audi alterem partem rule in relation to the workings of the Panel.

6.21 With regard to the question of whether the Panel was obliged to act in terms of section 440C of the Companies Act and was thus not empowered to make its own ruling to enforce compliance with the Code, Mr Loxton stated that section 440C entitles the Panel to approach the court for an order compelling a person to comply with the Rules (when such person was not exempted from compliance with the Rules). It does not however follow that because of being given such a power, the SRP has no power to enforce its own rules. To hold otherwise would be a misreading of the section. The real question was whether the Panel should or should not make an order, which is a matter within the Panel's discretion.

[31] Section 140A(3) requires the registered holder of shares who is not the beneficial holder of such shares to disclose the identity of the beneficial holder of such shares to the issuer of such shares at the end of each calendar quarter.

6.22 With regard to the High Court action brought by the Complainants against Nedbank, Mr Loxton stated that this was irrelevant to the exercise by the Panel of its jurisdiction. The Panel was obliged to follow its own rules and the Companies Act.

6.23 Mr Loxton urged the Panel to consider Nedbank's defence in this light: how could Nedbank buy 90% of a company, drive the (share) price up, not declare its position, and walk away when the SSF purchasers defaulted, leaving ABSA to pick up the pieces. Could it be that this is what the legislation and the Code was intended to facilitate? This could not have been permitted by Chapter XVA of the Companies Act read with SRP Rule 8.

7. SUBMISSIONS ON BEHALF OF NEDBANK

7.1 Advocate Cilliers SC's submissions and those of the attorneys acting for Nedbank (whose submissions are contained in letters addressed to the SRP which form part of the record relating to which the Panel has been asked to make its decision), can be summarised as follows:

7.2 Nedbank did not deny that the transactions relating to Acc-Ross shares were concluded, or even that Syfrets and other Nedbank entities bought the relevant shares.

7.3 However the purchase of the SSFs and simultaneously taking an equivalent position in underlying shares for meeting an obligation on expiry of the SSFs was not a contravention of Rule 8.1 especially where the holders of the SSFs and the underlying shareholders had made an arrangement that the voting rights attaching to the shares would vest with the holders of the SSFs.

7.4 Nedbank denied that it had acquired (in the context of the Code) 35% or more of the shares in the capital of Acc-Ross. Mr Cilliers further stated that no single purchase of Acc-Ross shares by Syfrets had amounted to 35% of the issued voting shares of Acc-Ross.[32]

7.5 Mr Cilliers said that Nedbank also denied that any relationship had existed between Nedbank and Jac de Beer[33].

7.6 Mr Cilliers argued therefore that neither Syfrets nor Nedbank Limited should attract any obligation to make a mandatory offer under the Code, for reasons which will be referred to below.

7.7 Nedbank stated that Syfrets concluded the SSF contracts and purchased the underlying securities to meet its delivery obligations under the SSFs. It denied that Nedbank Limited purchased the shares and caused them to be registered in the name of Syfrets *as nominee for Nedbank Limited*. On the contrary, it stated that the shares were registered in the name of Syfrets Nominees (Pty) Limited *as nominee for Syfrets*. Only a small number of Acc-Ross shares was acquired by Nedgroup Securities (Pty) Limited and registered in the name of SMK Genomineerdes (Edms) Beperk. All other Acc-Ross shares were acquired by Syfrets and should have been registered in the name of Syfrets Nominees (Pty) Limited.

7.8 Mr Cilliers argued accordingly that in lodging the complaint against Nedbank Limited, the Complainants sought relief from the wrong party. However Syfrets was content that the proceedings were directed against Syfrets and that the invitation from the Panel to respond to the complaint should be regarded as having been accepted by Syfrets.

[32] We do not believe that this is relevant, as the definition of "affected transaction" does not require 35% of a company's shares to be acquired in one go. The definition states that it is "any transaction including a transaction which forms part of a series of transactions or scheme…".
[33] We understand that Mr de Beer was directly and indirectly the controlling shareholder in Acc-Ross before the reverse takeover by PPG.

7.9 Referring to Rule 8.1 Mr Cilliers advised that a complainant would have to be a holder of securities in a company in which control was acquired by another ("the offeror") in order to fall within the category of persons to whom a mandatory offer should be made.

7.10 Mr Cilliers told the Panel that he would refer to the history of the matter and the conduct of the Complainants so that the Panel could appreciate who the minority shareholders were (and who in corporate terms, are the majority shareholders in PPG[34]), when and under what circumstances they became minority shareholders in Acc-Ross, and what they were aiming to achieve by the relief sought by them from the Panel.

7.11 Mr Cilliers referred to the first three Complainants (listed in paragraph 1.1 above) as being "the Pinnacle Consortium" and we have used the same phrase when referring to them in this document. He advised that they had held all the shares in the Pinnacle Group of companies[35].

7.12 In or about April 2008 the Pinnacle Consortium sold its shares in the Pinnacle Group of companies to Acc-Ross in exchange for Acc-Ross shares, with the result that the Pinnacle Consortium was to have ended up holding 60% of the issued Acc-Ross shares. This agreement was thereafter renegotiated and amended between April and November 2008 (and again on 1 June 2009).

7.13 The negotiations leading to the sale agreement thus commenced more than a year after the threshold acquisition of Acc-Ross shares by Syfrets in March/April 2007 (and Mr Cilliers emphasised that this was a temporary acquisition), on which the Complainants relied in seeking the relief of a mandatory offer. Thus, had a mandatory offer been required and been made in March/April 2007, the Pinnacle Consortium would not even have been on the horizon.

7.14 Mr Cilliers stated that the Pinnacle Consortium was seeking opportunistically to capitalise on their acquisition of Acc-Ross shares in November 2008 to claim that they qualified for a mandatory offer which, on their own version of the events, should have been made 20 months before they became shareholders of Acc-Ross/PPG. In addition, even if an offer had been made to them in March/April 2007, Mr Cilliers postulated that they would not have accepted the offer since they valued the shares later (in July 2008) at 65 cents per share, whereas the highest possible offer price in March/April 2007 would have 56 cents a share[36].

7.15 Mr Cilliers told us that it was only because of the subsequent "disastrous fall" in the market , and the price of the PPG shares falling to about 9 cents that the Pinnacle Consortium sought to extract a mandatory offer to rescue them from their own poor investment (to quote Mr Cilliers). Mr Cilliers stated that this strategy rested on an attempt to abuse the approach (if founded) that a mandatory offer could pragmatically be made only to the shareholders of securities when the offer is made and closes. It could be argued that the right to an offer should have been afforded to successive shareholders, but there could never be a right to receive a mandatory offer in respect of shares that did not even exist at the time the obligation to make the mandatory offer arose. This would be fanciful and would not serve SRP General Principle 11[37].

7.16 Mr Cilliers queried why the Complainants had not disclosed the reasons for the decline in the price of PPG shares, which he said had a great deal to do with the quality of the assets which the Pinnacle Consortium had put into Acc-Ross, a decline in property developments, misleading forecasts of Acc-Ross not being met, and the continued losses sustained by Acc-Ross. He stated

[34] Post the reverse takeover of Acc-Ross.
[35] The Pinnacle Group of companies is listed in annex E to the complaint, appearing at page 557 of the record.
[36] When the 35% threshold was crossed on 9 March 2007, the "offer price" would have been 37 cents, according to our understanding of the papers presented to us.
[37] General Principle 11 states that the underlying principle [of the principles] is that persons holding an equity interest in an offeree company….shall be entitled to dispose of their interest on terms comparable to those of any affected transaction.

that the Complainants sought now to recover their losses by dredging up an alleged historical obligation on the part of Nedbank to make a mandatory offer to them at a price greatly exceeding the current share price. Furthermore their claim made no sense in that through their own actions they had reduced Syfrets' holding in Acc-Ross to about 28% in about November 2008 and yet they sought now to obtain a mandatory offer on the ground that Syfrets had acquired control of Acc-Ross in March/April 2007.

7.17 Mr Cilliers pointed out that the information concerning the SSFs had been in the public domain but it was only when the Complainants' investment lost value for other reasons that the Complainants sought to dredge up a complaint based on events going back to March/April 2007.

7.18 With regard to the High Court action brought by the Complainants, Mr Cilliers advised the Panel that the Complainants sought, through this action, to be placed in the position they would have been in if the sale agreement had not been implemented. However if this action were to succeed, they would certainly not have become entitled to a mandatory offer. The two remedies (via the SRP and High Court) were inconsistent and contradicted each other.

7.19 Turning to Gardener Ross and Norman Bosman, Mr Cilliers stated that they had been introduced as Complainants in an attempt to produce a complainant that did not suffer from the weaknesses that attached to the Pinnacle Consortium's claim. He pointed out that Gardener Ross had disposed of its holding of about 22 million Acc-Ross shares in December 2007, at 70 cents a share. This put Gardener Ross in a better situation than it would have been in had it received and accepted a mandatory offer earlier that year when the maximum price would have been 65 cents a share. Gardener Ross had thereafter briefly bought and sold Acc-Ross shares in March 2008, but it was only in January 2010 (in the same month that the summons was issued) that Gardener Ross again acquired approximately 1.2 million PPG shares. Mr Cilliers was of the view that this was a speculative effort to qualify as a person to whom a mandatory offer should be made. Accordingly there were no considerations of fairness to support their claim, nor did the General Rules of the Panel support it.

7.20 Mr Cilliers stated that Norman Bosman alone amongst the Complainants could claim to have been and remained a shareholder of Acc-Ross shares from a time prior to the reverse takeover of Acc-Ross. However Mr Cilliers drew the Panel's attention to the fact that Norman Bosman's total holding of Acc-Ross shares was unclear but it appeared that he had sold three quarters of his holding at a price higher than he would have obtained had a mandatory offer been made to him in 2007, and thus the claim by him could at most relate only to approximately 1.8 million Acc-Ross shares. Mr Cilliers stated that the circumstances relating to the retention of these shares by Norman Bosman would have to be investigated before any view could be formed as to whether there would be any justification that a mandatory offer should be made to Norman Bosman.

7.21 Mr Cilliers continued by examining the Complainants' claim that the right to receive an offer should accrue as much to a shareholder who became a shareholder after the date on which a mandatory offer should have been made, as to a person who had been a shareholder when the mandatory offer should have been made. He disputed this claim on various grounds, including the fact that to require a deemed offer period to have commenced from the time that Nedbank crossed the 35% threshold until the time of its last purchase on 22 December 2008[38] would deviate completely from the departure point of an accrual of an obligation at the time that the threshold is exceeded. To rule that an offer should be made on this basis would be completely arbitrary. His view was that the Complainants were opportunists who traded their shares at better prices than a mandatory offer would have given them, and now that the market had punished the

[38] In fact, the last settlement occurred on or around 4 to 9 December 2008, and the last purchase would have been around 4 to 9 September 2008, according to our understanding of the matter.

poor quality of their assets, they sought another retrospectively calculated exit to make yet another profit.

7.22 With regard to the price of any mandatory offer, Mr Cilliers denied that Syfrets had acquired the Acc-Ross shares in secret or that Rule 5.2[39] should apply. In his view, if any rule should apply, it would be Rule 5.1[40].

7.23 Turning to what Nedbank argued were procedural barriers in the way of the Complainants, Mr Cilliers stated that neither the Companies Act nor the Rules of the Code conferred on the Panel the duty or power to make rulings. If an offeror's conduct fell within the Act and the Rules, it would attract legal obligations. No ruling by the Panel could create or add to this obligation. Where however such an obligation had arisen, the remedy for enforcement or non-enforcement would be discretionary, and the Panel "might" (if it so chose) apply to the High Court for an order compelling compliance with the relevant Rule. It was however open to the Panel to take the view that it was not necessary to decide whether Rule 8.1 applied in the case under consideration (insofar as a mandatory offer was concerned). If it took the view that Rule 81. did apply, and that a mandatory offer had to be made,it would in this particular case have to "rule otherwise" (in terms of Rule 8.1) or "excuse or exonerate" the party in question (Syfrets or Nedbank Limited) from failure to comply with the requirements of Rule 8.1.

7.24 Mr Cilliers then turned to the question of whether or not the Panel was functus officio and therefore legally precluded from deciding the issue again. He referred to Syfrets' written submission to the SRP in December 2008 and stated that the Executive Director of the SRP had referred the submission to the Panel on 18 February 2009, which had decided that the Executive Director should further investigate how single stock futures work and then instruct the Panel's attorneys to give an opinion on the matter. On 30 June 2009 the Executive Director reported to the Panel that after investigation into single stock futures generally, he was of the view that there had been no intention on the part of Syfrets to acquire control of Acc-Ross and he did not believe that it would serve any purpose for a party to make an offer. The Panel agreed with this view and decided not to pursue the matter further[41].

7.25 Mr Cilliers stated that from the facts above, he was of the view that the Panel had made a decision on 30 June 2009 that the matter would not be pursued further. In the absence of any power to re-open the issue decided, the Panel was therefore functus officio and could not re-visit that decision. He referred us to various court cases which supported his contention. He drew the conclusion that if the Panel found that Rule 8.1 did not apply, the Complainants had no claim to the relief they sought. If Rule 8.1 did apply, then the decision taken by the Panel on 30 June 2009, which obviously affected Syfrets' interests since it exempted it from having to comply with Rule 8.1, would lead to the conclusion that the Panel was now precluded from reopening that decision, based on the functus officio rule.

7.26 Mr Cilliers then examined whether the proceedings on 19 and 20 May 2010 could be seen as an appeal (relating to the decision of the Executive Director). He stated this route was not available since the Panel could not sit on appeal from its own decision.

7.27 Turning to the merits of the complaint (in the event that the procedural barriers could be overcome), Mr Cilliers stated that the Panel had already correctly decided in June 2009 that Rule 8.1 could not apply to this case because there was no intention on the part of a market maker under SSFs to acquire control of a company. Even if the Panel was entitled to reopen the question, he was of the view that the Panel should still come to the same conclusion, namely that

[39] Rule 5.2 deals with purchases made during offer periods at above the offer price.
[40] Rule 5.1 relates to purchases prior to an offer period.
[41] We will explain below that the facts as outlined by Mr Cilliers were a bit different, which is why we do not believe that the Panel is functus officio.

where there was no intention to acquire control as envisaged by the Companies Act and the Rules, there could be no acquisition of control.

7.28 He advised the Panel that it could not be said that Nedbank held any securities in the legal sense of the word as the securities would, as a matter of fact, be disposed of at a fixed future date[42]. Rather than seeing the purchases of Acc-Ross shares as ones in which Syfrets gained control over Acc-Ross, one should see the transactions in the light that:

(i) Syfrets was the seller of Acc-Ross shares under SSFs with a pre-determined expiry date;

(ii) Syfrets chose to keep available such underlying securities temporarily so as to be able to discharge its delivery obligations as seller under the SSFs; and

(iii) Syfrets would receive payment for the shares.

7.29 Mr Cilliers went on to state that the persons who had sought increasing control over Acc-Ross were the purchasers of the SSFs. Syfrets had acted purely as market maker by transacting as seller under the SSFs, and solely to cover its delivery obligations under the SSFs. In no real sense had Syfrets ever intended to exercise control over Acc-Ross or its business.

7.30 Nedbank also denied that the securities transactions, and the holding of such securities, fell within the definition of an "affected transaction" for the reason that such holdings were of a temporary nature and because the shares were acquired for a purpose other than to vest control of Acc-Ross in Nedbank Limited or Syfrets. Mr Cilliers argued that if the words "held", "vesting", "control", "holder" and the like in the Companies Act and the Rules are contextually interpreted, it is apparent that they all connote a degree of duration or permanence to the holding and that nominal and transitory acquisitions which were disposed of simultaneously with their acquisition are not caught in the net.

7.31 In addressing the question of economic interest and risk and whether this was relevant to "control" Mr Cilliers posed the question whether "control" depends solely on whether the holder could vote the specified percentage of the votes. He contended that the words "vest", "control", "holding" and "holder" have to be interpreted. Nedbank did not concede that it held the shares within the meaning of "holder and hold" as contemplated in the definition of "control". By issuing the letters of representation, Nedbank had not *caused* the voting rights to be exercised. This was evidenced by the fact that Nedbank gave no instructions or a mandate on how to vote the shares, as this was left to Cortex or the SSF purchasers. The fact that the economic risk in the underlying shares lay with the purchasers of SSFs gave sense to the letters of representation giving purchasers of the SSFs a right to vote on the shares as requested by Cortex.

7.32 Mr Cilliers drew the attention of the Panel to the London Takeover Panel's statement in the case of *In re Canary Wharf Group plc* (22 November 2003), where the question of who is a real "offeror" was addressed. There the London Takeover Panel stated; "A genuine offeror is a person who, alone or with others, seeks to obtain control of an offeree company and who, following the acquisition of control, can expect to exert a significant influence over the offeree company, to participate in distributions of profits and surplus capital and to benefit from any increase in the value of the offeree company, while at the same time bearing the risk of a fall in its value resulting from the poor performance of the company's business or adverse market conditions". Of importance to the Panel hearing this matter was that The Canary Wharf

[42] Under the SSFs.

statement was followed and applied by the South African Panel in its ruling in the matter of *Multidirect Investment 180 (Pty) Limited v Executive Committee* (18 February 2004)[43].

7.33 The above interpretation was fortified by the way that the City Code deals with market makers and in particular those that do not have a long position in particular securities. Such persons are treated as "recognised intermediaries" who are not regarded as "interested" or as "having acquired an interest" in the relevant securities. The Panel was requested to consider Rule 9.1 of the City Code, which exempts the trading operations of a bank or securities house from making a mandatory offer if they qualify as "Recognised Intermediaries". It was argued that since the South African Code is based substantially on the City Code, the South African Panel should take guidance from the City Code. And since the City Code excludes certain intermediaries who hold positions in derivatives from making an offer, there was no reason why Nedbank as market maker and seller of the SSFs should not qualify as an intermediary and be exempted from making a mandatory offer when holding shares in a client serving capacity.

7.34 As proof of the fact that Syfrets had no intention to gain control over Acc-Ross and was therefore not the true beneficial owner of the Acc-Ross shares under consideration as this role fell to the Cortex clients who purchased the SSFs, Mr Cilliers made the following points:

(i) Syfrets was no more than a market maker in the SSFs as it enabled the SSF purchasers to enter into futures contracts through the mechanism of the derivatives market;

(ii) although this understanding was not reduced to writing, both Syfrets and Cortex (on behalf of the SSF purchasers) understood that the purchasers of SSFs would be entitled to direct how the securities purchased by Syfrets would be voted, despite the fact that the purchasers of single stock futures do not conventionally have voting rights or an entitlement to dividends in a company whose securities underlie a single stock future. If any dividends had been declared by Acc-Ross during the period when Syfrets held the shares, Syfrets would have paid such dividends over to the holders of the SSFs;

(iii) it was in recognition of the SSF purchasers' rights that Syfrets had issued the letters of representation. With regard to the Complainants' argument that the agreement between Cortex and Syfrets was a vague assertion[44] and which contradicted Nedbank's own statements in its SSF brochures, Mr Cilliers referred to Mr Strydom's affidavit which confirmed what had been agreed. Mr Cilliers argued that there would have been no need for Nedbank to have issued the letters of representation if there had been no agreement with Cortex that the SSF holders could vote the underlying shares;

(iv) Syfrets had no economic interest in its holding of the underlying Acc-Ross securities other than the fees it earned as a derivatives member of the JSE through selling the SSFs (i.e. trading fees and interest margins on the transactions). In addition such securities could be delivered, even on day one, to the purchasers of SSFs. Most, if not all, of the Acc-Ross shares purchased by Cortex on behalf of Syfrets originated from purchasers who were the very same Cortex clients as those who purchased the SSFs. In essence therefore, from an economic point of view, one could view the transactions as being loans (i.e. the purchase price of Acc-Ross shares) by Syfrets to the SSF purchasers, which loans were secured by their shares (since the shares were sold to Syfrets rather

[43] This ruling can be found on the SRP's website www.srpanel.co.za
[44] Implying that it might therefore not have existed, we assume.

than being pledged), and which same shares would be bought back when the SSFs expired, at which time the Syfrets' "loans" would be "repaid" through the SSF holders paying for the shares in terms of the SSF contracts. The legal aspects, and consequences, of each transaction which Cortex concluded for its clients was, however, very different from a simple loan and pledge transaction;

(v) the economic risk in the event of a default under the SSFs was not carried by Syfrets but rather by the purchasers of the SSFs, and failing them, Cortex (the JSE member booking the trades) and failing Cortex, ABSA in its capacity as the SAFEX clearing member of Cortex. The purchasers of the SSFs bore the economic risk because they would have to pay additional margin to SAFEX if the price of the underlying shares fell. The purchasers of SSFs would also benefit economically if the share price of the underlying securities increased;

(vi) the vesting of the true economic interest and the voting rights attaching to the Acc-Ross shares was also the reason why the 2008 audited financial statements of Acc-Ross had not reflected Syfrets as a shareholder and had stated that 820 million shares were held through Syfrets.

7.35 Mr Cilliers argued that Syfrets' acquisition of Acc-Ross shares could not be judged by only one leg of the wider transaction, The wider transaction comprised firstly a purchase of Acc-Ross shares by the SSF purchasers, secondly the sale of Acc-Ross shares by Syfrets (in terms of the SSFs), and thirdly the acquisition of Acc-Ross shares by Syfrets to provide for its delivery obligations under the SSFs. The Complainants were only focusing on the third leg of the transaction, which was an artificial approach to the matter.

7.36 Turning to the question of beneficial ownership, Mr Cilliers stated that this was a vague and unnecessary concept which did not appear in the definition of "affected transaction" or "control". He referred the Panel to the 2003 ruling in the matter of *Comparex Holdings Limited Employee Share Purchase Trust and Allan Gray Limited* (3 December 2003) in which the Panel held that fund managers who are registered shareholders with no discretionary mandate to vote the shares cannot be held to have triggered an affected transaction where such holdings reach or exceed the specified percentage. It was stated in that ruling "…it is not necessary to draw any distinction between registered and beneficial shareholders of Comparex. The proper enquiry is whether the Asset Managers were vested with the entitlement to exercise the voting rights in respect of 35% or more of the voting rights in general meeting".

7.37 As the registered holder of the underlying securities, Nedbank's position was no different from that of a fund manager without a discretionary mandate. Mr Strydom's affidavit debunked the significance that the Complainants had attached to the phrase "beneficial ownership", as he had addressed the issue of who could direct the manner in which the voting rights could be exercised. In addition, to the extent that the Complainants had tried to argue that Syfrets had purchased some Acc-Ross shares for its own account, Ms Anel Bosman's statement clarified that Syfrets had never traded for its own account and that the occasional delays between the share transactions and the linked SSF transactions had often been caused by the difference in settlement terms between share transactions and SSFs on the JSE. Mr Strydom's affidavit had also clarified that Nedbank had not sought to direct the voting, and that the letters of representation could not be seen as a means by which Nedbank was represented at Acc-Ross shareholders' meetings. The Comparex ruling had also exposed the fallacy that the registered member retains the legal entitlement to vote the shares and that any contractual arrangements were irrelevant to that entitlement.

7.38 Mr Cilliers asked the Panel to consider the complex relationship in the derivatives market between an SSF purchaser and a market maker SSF seller which hedges its exposure. This is such that the seller holds no real equity in the underlying shares as the equity stake and the voting entitlement that goes with it, reside with the SSF purchasers in reality. He argued that Mr Strydom's affidavit supported this conclusion. With reference to the point raised by the Complainants, , in relation to the case of *Securities Regulation Panel v MGX Holdings Limited and others*[45], Mr Cilliers pointed out that the facts of that case were different from this one as there Malan J was not dealing with a wider transaction arising from derivative hedging obligations.

7.39 With reference to the Complainants' argument that Nedbank and Syfrets had failed to report their shares as nominees in terms of section 140A of the Companies Act, Mr Cilliers stated that Syfrets had never held the shares as nominee (a word with a special meaning designed to cater for the situation where the registered holder has no rights to the shares), and thus section 140A had never been applicable to the Acc-Ross situation. Section 140A was designed to ensure disclosure of beneficial interests in shares and for that purpose carried its own definition of "beneficial interest" which had nothing to do with the realities of the present case. (We wish to note that in our opinion the Nedbank nominee companies did hold the shares as nominee, but as nominee for Syfrets and Nedcor Securities, not for the SSF purchasers).

7.40 The Panel was informed that the Complainants were misguided in stating that because Syfrets had held the Acc-Ross shares for 20 months, due to the rollovers of the SSFs, this undermined Nedbank's argument that Syfrets had only ever held the shares for short (3 month) periods. Mr Cilliers stated that rolling over of the contracts could not change the fact that each SSF had a 3 month expiry date. The facts of the matter were that the performance date in relation to each contract could not be extended. If all parties involved (which Mr Cilliers stated would include the SSF purchaser, the SSF seller, and the clearing member of Cortex) agreed, then a new SSF could be concluded and put in place of the expiring one. If agreement could not be reached, this could not be done. There was no certainty of a rollover. A temporary holding of 35% or more of the underlying securities could hardly constitute an affected transaction in the "offeree" company because the shares were held solely "to ensure that it (Syfrets) could in 3 months or less[46], comply with its delivery obligations under the SSF contracts which it had concluded as seller".

7.41 The design of the transactions was that Syfrets was market neutral, and not in a long position[47]. Thus the point was not per se that Syfrets held the shares for a short period of time, but rather that Syfrets would dispose of the shares at the same time as it bought them, and that this regime had to be adhered to, due to the time for delivery being so soon after each SSF was sold.

7.42 Mr Cilliers refuted the Complainants' statement that the SSFs could have been cash settled, and that this meant that it had not been necessary to purchase the Acc-Ross shares. An e-mail from the JSE was produced as proof that the Acc-Ross SSFs had to be settled physically, by delivery of the underlying shares.

7.43 Mr Cilliers also refuted the Complainants' assertion that Nedbank was asking the SRP to take into account a future obligation of the SSF purchasers which might never eventuate. The SSF purchaser is committed to take delivery and pay for the shares to which the SSF relates. If the purchaser defaults, the SSF seller (Syfrets in this case) is still obliged to deliver the shares to the clearing member against payment for such shares. As it happened in this case. ABSA took over the SSFs and paid Syfrets for the shares against delivery of them.

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[45] Case no 160 23/03 in the Witwatersrand Local Division of the High Court before Malan J. The Panel had ruled that an offer should be made to those persons who were registered shareholders at the date on which the threshold was crossed.

[46] The expiry date of a single stock future usually occurs 90 days after it was sold.

[47] i.e. a position where someone purchases shares without an equal and opposite position.

7.44 Mr Cilliers rejected the Complainants' argument that Nedbank had contributed to the creation of a false market. He argued that the Complainants had not provided an alternative to Syfrets' interpretation of the Companies Act and the Rules. Nor had they answered the approach in the Canary Wharf decision in which it was held that an offeror must have some permanent interest in the offeree company. Nor had they answered the principle adopted in the Comparex case that it was vital that an offeror must have the ability to direct how the voting rights were to be exercised, which in that case had also been based on contractual arrangements (between investors and fund managers). They also had no answer to the guidance from the City Code in relation to market players that act in a client serving capacity.

7.45 With reference to the point made by the Complainants that the reference to "beneficial holder" (in the first letter of representation given by Nedbank for an Acc-Ross shareholders' meeting) put an end to the matter, Mr Cilliers argued that this obfuscated the real question of who was entitled to direct the exercise of the voting rights. If Nedbank been the "beneficial owner" of the Acc-Ross shares, it would have given the letter to a Nedbank employee. "Beneficial owner" was incorrect terminology for the matter under consideration and in any event this phrase had been used in one letter only. The facts did not support the Complainants' argument in this regard.

7.46 Turning to the Complainants' contention that Syfrets and Nedbank had acted in concert or were deemed to have acted in concert in view of the provisions of section 440A(2) of the Companies Act, Mr Cilliers stated that this was wide of the mark and a desperate attempt to shore up a flawed complaint. To attribute the conduct of Cortex to Syfrets/Nedbank did not assist the Complainants and missed the point that Cortex initiated and drove the creation of the Acc-Ross SSF market. Syfrets only acted as market maker and had no interest and virtually no risk in the trades. It therefore never became a true holder or ever gained control of Acc-Ross.

7.47 In relation to the Complainants' point that Syfrets should not have remained as market maker after exceeding the 35% threshold and that by doing so, they increased their concentration risk in the shares, Mr Cilliers stated that this was a fallacy as concentration risk came about because of actions by the SSF purchasers, not by Nedbank/Syfrets. The concentration risk depended on the number of SSF purchasers and how many SSFs they bought.

7.48 Mr Cilliers advised the Panel that General Principle 6 (no creation of a false market) of the Code was not applicable to the facts of this matter. He was of the view that reliance on General Principle 6 was a belated effort by the Complainants on to which to hang paragraph 15 of the original complaint[48]. In any event General Principle 6 applied to all parties to an offer and related to the conduct of an offeror and offeree during the offer period. It had nothing to do with Rule 8.1 or the relief which the Complainants sought.

7.49 General Principle 11[49] was also no applicable. Mr Cilliers argued that this Principle is designed to limit the application of the Code. In the present case this limitation should be applied on the basis that the Code "could never have been intended to, and never could, cover the case of a party who is not in any ordinary sense a buyer of 35% or more of the voting securities in a company, but, acts as a counterparty seller of such securities under SSF contracts, and simply buys in such securities as are required to cover him against his delivery obligations as seller....". The commercial reality was clear that there was no acquisition of control of Acc-Ross by Syfrets.

[48] Parapraph 15 of the letter of complaint dated 4 February 2010 is entitled "The manipulation of the market price of the PPG shares".

[49] General Principle 11 falls under section C of the Code and reads 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"

7.50 Mr Cilliers urged the Panel also to consider that the Rules in the Code could never have contemplated that a mandatory offer should be made to persons who had already received a purchase price which exceeded the mandatory offer price.

7.51 Mr Cilliers told the the Panel that he was of the view that the following options were available to the Panel with regard to how it should rule in this matter:

(i) the Panel could refuse the Complainants any relief on one or more of the following grounds:

(1) the Companies Act and the Rules of the Code do not give the Panel the power to order that a mandatory offer should be made; or

(2) the Panel is functus officio; or

(3) the Companies Act and the Rules of the Code do not apply to the facts of this matter as control had not vested in Syfrets or Nedbank; or

(4) the Panel could exercise its discretion in terms of Rule 8.1 or Rule 34; or

(ii) the Panel could find that it had been given insufficient information to enable it to make a decision.

8. PANEL'S ANALYSIS AND CONCLUSIONS

The Complainants' submissions

8.1 With regard to paragraph 6.3 above in the section dealing with Mr Loxton's submissions, we note that he did not dispute that the dealing in shares could be ascertained through various sources such as the Acc-Ross share register[50] and Macgregor BFA[51]. Whether such information could be obtained from SAFEX's records, as far as the Panel has been able to ascertain, one cannot ascertain from SAFEX's records who owns shares or even futures. We note that the Circular relating to the reverse takeover of Acc-Ross dated 2 October 2008 (page 255 of the record in this matter) also sets out the names of the Acc-Ross shareholders as at the date of the Circular, as well as post the takeover. Although the full extent of Nedbank's shareholding, who actually held shares for whom, and the existence of the SSFs, was not disclosed in this Circular, in our opinion any non-disclosure in the Circular was that of Acc-Ross and its directors. In addition, information about Nedbank's shareholding in Acc-Ross could have been ascertained from the Acc-Ross 2007 and 2008 annual financial statements.

8.2 For these reasons we do not agree that the purchases of Acc-Ross shares were concealed from the other Acc-Ross shareholders or any persons who wished to make an offer for Acc-Ross. However, this submission is in our opinion irrelevant for ascertaining whether Rule 8.1 is of application and we are of the view that the Panel has no jurisdiction to make a decision on this point in any event.

8.3 Concerning paragraph 6.4[52], whilst it may be correct that Nedbank's conduct contributed to the creation of a false market, in our view the facts do not paint a picture of a buyer who had an intention to acquire control of Acc-Ross. We will deal with this further below when we address the

[50] In terms of section 113 of the Companies Act any person may apply for an extract from the register of members of a company and from any register of transfers kept by a company. A company and its directors and officers commit a crimlnal offence if they do not provide such information.
[51] www.mcgregorbfa.com McGregor BFA styles itself as the pre-eminent provider of stock market, fundamental research data and news to the financial sector and the corporate market in South Africa at large. One of its products provides comprehensive shareholding and nominee disclosure for all JSE listed companies, shareholding data down to 0.01% of shares in issue, details on all shareholders (i.e. address details, rand value of shares held, registrar etc) as well as other holdings of all shareholders for selected months.
[52] References to 6.3, 6.4 etc are references to the paragraphs in section 6 above in which we listed Mr Loxton's submissions.

purpose and duration of Nedbank's shareholding. The Panel is not vested with the power to decide whether or not a false market was created, or whether this contravened the provisions of any statute or subordinate legislation. This falls to other financial regulators or the courts to deal with.

8.4 Re 6.5, we agree that section 440A(2) of the Companies Act contains provisions which deem companies within the same group to be acting in concert, but, as alluded to in the paragraph above this one, we do not believe that the facts indicate that either Nedbank or Syfrets was engaged in an exercise of acquiring control of Acc-Ross. The whole matter is fraught with negligence and recklessness but we cannot find any indication of an intention on the part of Nedbank to gain control over Acc-Ross.

8.5 Re 6.6, 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 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 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.

8.6 Re 6.7, this submission is based on the fact that the Rule 8.1 thresholds were crossed. In terms of Rule 8.1 we note, however, that the Panel has a discretion as to whether to require a mandatory offer to be made. In this matter, as will appear below, we find that no affected transaction occurred. If we are wrong in this regard, we further believe that we may exercise our discretion in terms of Rule 8.1 to "rule otherwise" or Rule 34 to excuse Nedbank from having to make an offer. We believe that on the facts of this matter it would be unfair to require a mandatory offer to be made. We have also taken cognisance of the fact that the City Code would these days allow a market player such as Syfrets to apply to be registered as a recognised intermediary, in order to avoid the very type of complaint that has arisen in this matter. We are persuaded that even though the Rules in our Code do not contain the same provisions regarding "recognised intermediaries", we should take guidance from the City Code, as the SRP has done in the past. We will deal with this further below.

8.7 Re 6.8, we accept Nedbank's submission that it abandoned its December 2008 submission or application for condonation after receipt of legal advice not to proceed with such an application. The facts appear to indicate that until October 2008, Nedbank had not even considered the possibility that it might have breached the Code, and that when it realised what had happened, it sought legal advice, after which it made its submission to the Executive Director. That Nedbank later abandoned its condonation submission after it had sought and received a second legal opinion, we ascribe to the novelty of this set of facts. We are surprised that it appears not even the JSE's surveillance systems flagged what had occurred, and continued to occur, during 2007 and 2008. As mentioned further below, it appears that at the time the JSE decided to list single stock futures, not even the South African regulators had foreseen that the type of situation could arise that has led to this complaint.

8.8 Re 6.9, our views concerning the matter of the derivatives transactions, which resulted in holdings of shares by persons who had no intention to vest control of companies in themselves, is mentioned in paragraphs 8.3 and 8. 4 above and will be dealt with further below. With regard to Mr Loxton's submission that Nedbank's actions of, inter alia, granting letters of representation, indicated that Nedbank had always retained ultimate control over the voting right in the shares, we are not persuaded that this is the case. We believe that it is legally possible to be the registered holder of shares and to allow another party to make use of (or to cede to that party) certain rights in such shares, such as the right to vote the shares. The other party would then control the voting rights in those shares. We concede that the fact that this agreement was not made public could be unfair to a third party who is only able to rely on information in the public domain (which is why we have rules dealing with concert parties). However in this matter, and as regards the Panel's jurisdiction, we do not believe that the non-disclosure of these agreements in and of itself prejudiced the Complainants.

8.9 Re 6.10, we do not agree that the letters of representation put an end to the matter. It appears to us that the letters were drafted sloppily and without attention to detail, and we are of the view that many aspects of the letters were incorrect. However the actual facts of the agreement between Syfrets and Cortex are contained in the affidavit of Mr Strydom. We have no reason to disbelieve a sworn statement of a witness (Mr Strydom).

8.10 Re 6.11, the statement by Ms Anel Bosman explains why sometimes Acc-Ross shares were acquired prior to the relevant SSF being sold. From this Panel's collective knowledge of the market, we believe that her written statement is correct. To the extent that Mr Loxton's argument refers to Nedbank Limited's own holdings of Acc-Ross shares and whether this indicates that Nedbank (as a group) intended to acquire shares in order to acquire control of Acc-Ross, it appears to us that there were two different reasons (and possibly more) which drove Nedbank entities to acquire Acc-Ross shares. It is common cause that Syfrets acquired such shares in order to hedge its exposure under the SSFs. It appears to us that Nedbank Securities may have acquired the shares for Nedbank's own proprietary book. The point however is that if one takes the view that the acquisition of shares for hedging purposes does not constitute an affected transaction, or that the Panel will exercise its discretion not to apply Rule 8.1, the second (Nedbank Securities') shareholding alone is far from the 35% threshold. We have also taken into account that it would have been extremely unlikely that Nedbank would have been in the business of acquiring a small cap company such as Acc-Ross.

8.11 Re 6.12, we again reiterate that we do not believe that we can reject an affidavit out of hand. If we were to follow the submission by Mr Loxton, we would have to make a finding that Mr Strydom lied and is therefore guilty of perjury. We do not have any factual and legal basis for doing so. This submission is therefore rejected.

8.12 Re 6.13 (concerning the letters of representation) and 6.14 (concerning the lack of ordered documentation within Nedbank), we refer to our comments in paragraph 8.11 above.

8.13 Re 6.15, the evidence presented to us indicates that most, if not all the SSFs were rolled over and that Nedbank was the holder of Acc-Ross shares for some 20 months. However the fact of the matter is that notwithstanding such holding, Nedbank could not have (and did not) vote the shares in any of the general meetings held while it was the registered shareholder, and this was because of the arrangement with the SSF purchasers (through Cortex) that the SSF purchasers had the right to vote the shares.

8.14 Re 6.16 and 6.17, dealing with whether a change of control had occurred, we will deal with these points in detail in paragraphs 8.37 to 8. 51 below.

8.15 Re 6.18, with regard to the question of whether Syfrets acted as nominee for the SSF purchasers we note that the shares in question were all registered in the names of Nedbank nominee companies. Therefore on the face of it, it appears that section 140A of the Companies Act might apply to the facts of this matter. However we do not believe that the situation we are faced with amounted to a nominee arrangement where the SSF purchasers were the "beneficial owners" of shares held by a nominee on their behalf. This is because the SSF purchasers could not have become the beneficial owners of the shares in the usual sense of the phrase because their ownership was contingent on the SSFs expiring and their paying the purchase price for the shares. In the end, the SSF purchasers "lost" the shares when they were unable to put up the necessary margin when the SSFs expired.

8.16 Re 6.19, we fully agree with Mr Loxton on this point. We believe that the Complainants did not know what passed between the Executive Director and Nedbank, and therefore any ruling given by the Executive Director[53] could not be appealable.

8.17 Re 6.20, we will deal with the question of *functus officio* below. At this stage we wish to simply state that we do not believe that the Panel is functus officio, and agree with Mr Loxton's submissions.

8.18 Re 6.21, we are of the view that section 440C of the Companies Act does not have the effect of disempowering the Panel from making an order that a mandatory offer must be made. Having found that no affected transactions occurred, alternatively if we are wrong, that we should exercise our discretion in terms of Rule 8.1 to "rule otherwise" or Rule 34 to excuse Syfrets and/or Nedbank from making an offer, we do not deem it necessary to deal with the point of whether section 440C of the Companies Act has the effect of disallowing the Panel from making an order to require any person to make an offer in terms of Rule 8.1.

8.19 Re 6.22, with regard to the High Court action brought by the Complainants against Nedbank, and whether the fact that the Complainants are parties to a High Court action against Nedbank and others, precludes the Complainants from participating in a mandatory offer, we agree with Mr Loxton that this is irrelevant to the Panel. The Panel is obliged to follow its own Rules and the Companies Act and has no jurisdiction to opine on whether a High Court action is contradictory to this complaint.

8.20 Re 6.23, we wish to express our serious concern arising from the facts of this matter and will request the Executive Director to submit a copy of this ruling to the relevant regulators who have jurisdiction to investigate whether reckless trading and/or market manipulation took place. Having become aware of the facts of this matter, we believe that all regulators who have jurisdiction in relation to trade in single stock futures should review their systems and procedures.

Nedbank's submissions

8.21 Mr Cilliers raised two preliminary points namely:

(i) that the Panel is *functus officio* because the Executive Director had already given a ruling in this matter which was followed by a decision taken thereafter at a full Panel meeting to decide the matter; and

(ii) that the complainants should have filed an appeal within three days of the Executive Director's ruling and are therefore barred from approaching the Panel as they are out of time.

[53] We are of the view that the Executive Director gave an opinion, not a decision as such. We have also noted that the opinion was not conveyed to Nedbank in writing.

8.22 The Panel does not agree that we are *functus officio*. To the extent that Mr Cilliers is referring to the opinion given by the Executive Director in this matter in or about July 2009, one needs to take into consideration that the Panel's rules provide that a decision made by the Executive Director may be appealed to the Panel. However, since we do not believe that the Complainants could have been made aware of the opinion given by the Executive Director (see paragraph 8.30 below), we do not believe that this question is relevant to this matter.

8.23 Furthermore, although the hearing in this matter has been framed as a complaint, which could usually have been decided by the Executive Director, we believe that the Executive Director decided to refer the complaint directly to the Panel because he had already been consulted by Nedbank and had given an opinion to the effect that control had not vested in Nedbank and, for this reason, there was no need to require Nedbank to make an offer.

8.24 To the extent that Mr Cilliers is referring to the Panel meetings held on 19 February and 30 June 2009, we wish to explain that the meetings concerned were the standard quarterly Panel meetings at which the Executive Director reports to the full Panel (all 23 members) concerning administration matters and any matters of general application relating to South African takeovers and the operation of takeover panels internationally.

8.25 At the quarterly Panel meetings held on 18 February and 30 June 2009, the Panel did not consider, deliberate on, form an opinion or make a decision with regard to the specific facts of the matter now under consideration.

8.26 On 18 February 2009, as the minutes of the meeting held that day reveal, the Executive Director reported to the Panel that it had come to his attention that control in some companies may have changed as a result of single stock futures or contracts for difference transactions. He recommended that an external forensic auditor be appointed by the Panel to investigate transactions in derivative instruments in listed companies and to determine the flow of holdings of the underlying voting securities of such companies and exactly where voting control had vested from time to time. He had prepared a memorandum addressed to the Panel dated 11 February 2009, which formed part of the reading pack for the 18 February 2009 meeting. In that memorandum he set out the high level facts relating to the Syfrets/ Pinnacle submission by Nedbank and advised the Panel that Nedbank had approached him in December 2008 with a request for condonation. By doing this he was simply providing the Panel with the context in which possible change of control issues were arising. The Executive Director felt that it might be necessary for the Panel to determine whether the Code should be applied strictly by causing mandatory offers to be made where applicable. This was therefore a generic question that was to be considered.

8.27 The Panel felt that forensic auditors can be very costly and therefore requested the Executive to investigate how single stock futures worked, by speaking to Nedbank Capital and obtaining the agreements relating to the transactions underlying Nedbank Capital's request for condonation. It was also suggested that the Executive should find out what similar regulators elsewhere in the world were doing with regard to single stock futures and possible changes of control arising therefrom. The Executive of the Panel was requested thereafter to write a detailed memorandum with which to instruct attorneys to give an opinion on the matter.

8.28 At the full Panel meeting held on 30 June 2009, the Executive Director reported back that he had held several meetings with Nedbank Capital to try and better understand how single stock futures work. The minutes of that meeting reflect that the Executive Director had been considering contracts for difference as well. He reported that he did not believe that there it would serve any purpose for a party to make an offer as there was no intention to acquire control. As a result of this brief report back, the Panel agreed and decided not to pursue the matter any further. The

reference to "matter" was not a reference to Nedbank's submission, which had been addressed to the Executive Director, but to the generic topic of single stock futures and their relation to the Code. The full Panel therefore discussed single stock futures as a product generally. With this broad direction as guidance, the Executive Director applied his mind, on his own, to the Nedbank submission and reverted to Nedbank advising them of his decision.

8.29 Accordingly we do not believe that the Panel is *functus officio* in this matter.

8.30 Turning to Mr Cilliers' second preliminary point, whether the Complainants should be barred from bringing this matter to the Panel on appeal, we cannot see how the Executive Director's opinion given to Nedbank in 2009 can be held against the Complainants. It is likely that the Executive Director did not even know of the possibility of a complaint by such persons at the time he gave his opinion in 2009. For this reason, he could not have advised them of his opinion and therefore it is impossible that the time period within which an appeal has to be lodged could have commenced.

Other Nedbank submissions

8.31 We believe that we have traversed all Mr Cilliers' arguments in our analysis above in responding to the Complainants' submissions. However we wish to make some further comments and do so below.

8.32 Mr Cilliers indicated that if we find against Nedbank in relation to Rule 8.1, we should nevertheless exercise our discretion to rule that a mandatory offer should not be made, since to require this would be unfair and inequitable to Nedbank.

8.33 We agree with Mr Cilliers in this regard. The Panel is not a court of law but is an equity tribunal.

8.34 We believe that since there was no intention to acquire control of Acc-Ross, it would be both unfair and inequitable to order either Syfrets or Nedbank to make an offer in terms of Rule 8.1. We concur with Adv Cilliers when he stated that it would be unfair and against the spirit of the Code that "… a party who is itself a counterparty seller of securities, which purchases and temporarily retains (other) securities to match its delivery obligations as seller, and no more, should extend to other equity shareholders an offer enabling them permanently to exit the company"[54].

8.35 It would also be unfair to require Nedbank to make a mandatory offer now, when so much time has elapsed. We have wondered why the complaint was lodged so late and by persons who for the most part were not shareholders at the relevant times. We find it curious that complainants who were never shareholders in Acc-Ross believe that they should be entitled to be made an offer.

8.36 Accordingly if we are wrong in relation to our finding that an affected transaction did not occur (because) control had not vested in either Syfrets or Nedbank through Syfrets' acquisition of the Acc-Ross shares, we will, for reasons of equity, as stated above, exercise our discretion to "rule otherwise" in terms of rule 8.1 and should we for any reason be wrong in applying this discretion, then we will exercise our general discretion in terms of Rule 34 to excuse Syfrets/Nedbank from having to make an offer in terms of Rule 8.1.

Reasons for finding that control did not vest in Syfrets

8.37 Since we agree that the facts of this matter were that an arrangement was made between Syfrets and Cortex in terms of which the SSF holders could exercise the voting rights in the shares, and

[54] Pages 601-602 of the bundle.

seeing that this is central to the vesting of control as defined in Rule 8.1, we will deal below with the other submissions presented to us by Mr Cilliers concerning vesting of control, beneficial ownership, economic interest and the temporary nature of Syfrets' holdings.

8.38 An "affected transaction" is defined in section 440A(1) of the Companies Act as follows:

"any transaction including a 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[55], in whom control did not vest before 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)....."

8.39 The essential elements of the definition are (i) *vesting* of control of a company in a person In whom control did not vest beforehand, or (ii) acquiring or in another manner becoming *the holder of all* of the issued shares or a class of shares of a company.

8.40 The second part of the definition is not applicable to the matter under consideration for the reason that neither Syfrets nor Nedbank acquired, and therefore ever held, *all* of the Acc-Ross shares in issue, or any class thereof, however close they came to this.

8.41 As regards the first part of the definition, it is necessary to consider the definition of "control" in order to gain a full understanding of the definition. "Control" is defined in the Companies Act and in the Code as:

"**a holding or aggregate holdings of shares …… in a company entitling the holder thereof to exercise or cause to be exercised, the specified percentage or more of the voting rights at meetings of that company, irrespective of whether such holding or holdings confer de facto control"**

8.42 The Complainants rely on the first part of the definition. According to them, the fact that Nedbank acquired 35% (and then more) of the issued Acc-Ross shares, thereby giving Nedbank the right to vote 35% or more of the Acc-Ross shares, led inescapably to the conclusion that Nedbank had gained control of Acc-Ross.

8.43 A main thrust of Nedbank's argument was that neither Syfrets nor Nedbank became vested with control of Acc-Ross because they had no intention of gaining control of Acc-Ross.

8.44 We note that the definitions of "affected transaction" and "control" are silent on the question of the intention and reason for acquiring and holding shares, and also as regards the duration of the holding. The question of ownership of shares is also not part of the definitions, nor is the concept of beneficial ownership.

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[55] "Acting in concert" in terms of the Code is defined as "…..**acting in pursuance of an agreement, an arrangement or understanding (whether formal or informal) between two or more persons pursuant to which they or any of them co-operate for the purposes of entering into or proposing an affected transaction**".

8.45 However we believe that the December 2003 ruling of the Panel in the matter of Comparex Holdings Limited[56] is relevant as regards the facts of this matter, and should be followed in this case.

8.46 In that matter, the Panel ruled that where an asset manager holds shares on behalf of clients without a mandate to vote those shares at a general meeting of a company, any shareholding of that asset manager equivalent to or more than a specified percentage under the Rules will not trigger an affected transaction. The Panel also ruled, *inter alia*, that:

(i) intention is a material element of "vesting of control" as defined in Rule 8.1; and

(ii) the Panel is entitled to take guidance from Rule 9.1 and note 16 of the CityCode.

8.47 Applying the Comparex decision to this matter, we are of the view that Syfrets' role in relation to the SSFs can be likened to that of the asset managers in the Comparex who had no mandate from their clients to vote their shares. Syfrets had no intention to acquire control of Acc-Ross and only held the shares in order to hedge its risk as market maker of the SSFs.

8.48 We are also of the view that the Panel's ruling in the Comparex matter in essence recognised the concept of "independent intermediaries", i.e. trading entities which are specifically excused from making offers, even if their holdings exceed the specified percentage, due to the role that they play in the market. We have taken note that the City Code contains specific and detailed provisions with regard to such intermediaries. We have dealt with this in more detail below.

8.49 In addition to the decision in the Comparex matter, we have taken cognisance of the fact that in the matter of Multi Direct Investments (NAIL), the Panel took guidance from the London Takeover Panel's Canary Wharf decision and ruled that a genuine offerer is one that seeks to gain control and who can expect to influence control over the operation of the company. Whilst the facts of this matter are different from those in the NAIL matter, we have not been presented with any evidence of an intention to gain control over the "target" company, namely Acc-Ross.

8.50 Based on the above, we do not believe that Nedbank's actions caused an affected transaction to occur. Rule 8.1. is therefore not of application in this matter.

8.51 Having found the above, we find it unnecessary to deal with Mr Cilliers' submissions relating to whether economic interest in the securities which are the subject matter of the enquiry is relevant for purposes of deciding whether or not control has vested in the person acquiring the shares. We also do not need to address the question of whether beneficial ownership or the fact that the shares were acquired on a temporary basis is relevant.

The City Code

8.52 We understand that it should be possible for a person who has crossed the relevant threshold, genuinely by mistake, and who immediately thereafter sells the "offending" shares, to be able to approach the Panel for condonation.

8.53 The facts of this matter are different from those mooted above in that Syfrets purchased Acc-Ross shares over many months and also held such shares for many months. Such actions were also deliberate. This was not a situation where the purchaser of such shares crossed the threshold by mistake. The mistake made was that no one within Nedbank appears to have considered the consequences of a JSE member acquiring underlying shares, when issuing single stock futures, in such numbers to hedge its consequential delivery risk that, without any desire to

[56] The Comparex ruling and reasons for the ruling can be found on the SRP's website under "publications".

acquire control of the company, it would willy nilly acquire sufficient underlying shares that would cause it reach and exceed the specified percentage of 35%.

8.54 We believe it is for this reason (amongst others) that the City Code now exempts certain holders from compliance with that Code's mandatory offer requirements, if they fulfil the requirements of a recognised intermediary. We believe that this role was introduced to accommodate persons who might otherwise have to comply with the Code, under circumstances when they acquired shares only to fulfil their client mandates, and when they had no intention of gaining control over the "target" company. We understand why it was also necessary to regulate who may register as a recognised intermediary, as this exception could otherwise allow such intermediaries to act in concert with their clients and thereby allow their clients to gain control over companies by taking advantage of the exception granted to intermediaries.

8.55 The City Code requires intermediaries to apply for such status in advance of being allowed to rely on the recognised intermediaries rule. No doubt the rules were drafted in this manner to avoid the situation with which the SRP in South Africa is now confronted, namely having to consider whether to require an "innocent" third party to make an offer, or whether to grant an exemption or condonation post the event.

8.56 Rule 9.1 of the City Code defines a Recognised Intermediary as "that part of the trading operations of a bank or securities house which is accepted by the Panel as a Recognised Intermediary for the purposes of the Code".

8.57 Note 16 to Rule 9.1 of the City Code reads as follows:

> **"1. If any part of the trading operations of a bank or securities house wishes to be accepted by the Panel as a Recognised Intermediary, it must apply to the Panel to be granted such status and it will have to comply with any requirements imposed by the Panel as a condition of its granting such status.**
>
> **2. Recognised Intermediary status is relevant only for the purposes of Note 16 on Rule 9.1, Note 1(c) on Rule 7.2, Rule 8.3(e) and Note 5(b) on Rule 8, in each case to the extent only that the recognised intermediary is acting in a client-serving capacity.....and to the extent only that it is acting in a client serving capacity:….**
>
> **A recognised intermediary will not be treated, for the purposes of Rule 9.1, as interested in (or as having acquired an interest in) securities by virtue only of paragraph (3) or paragraph (4) of the definition of interests in securities; ….**
>
> **3. Where a Recognised Intermediary is, or forms part of, a principal trader connected either with an offeror or with the offeree company, the Recognised Intermediary will not benefit from the dispensations afforded by Note 16 on Rule 9.1 and Note 1(c) on Rule 7.2 after the time at which the principal trader is presumed to be acting in concert with either the offeror or pontential offeror or with the directors of the offeree company (as the case may be) in accordance with Rule 7.2(a) and Rule 7.2(b) respectively. However, in accordance with Rule 7.2(c), where a Recognised Intermediary is, or forms part of, an exempt principal trader which is connected with either an offeror or potential offeror or with the offeree company for the sole reason that it is controlled by, controls or is under the same control as a connected adviser to that party, the Recognised Intermediary will not be presumed to be acting in concert with that party and will therefore continue to benefit from the dispensations afforded by Note 16 on Rule 9.1 and Note 1(c) on Rule 7.2.**

Where a Recognised Intermediary is, or forms part of, a person acting in concert with the offeree company, it will not benefit from the exception from disclosure afforded by Rule 8.3(e) after the commencement of the offer period. Where a Recognised Intermediary is acting in concert with an offeror or potential offeror, it will not benefit from the exception from disclosure afforded by Rule 8.3(e) after the identity of the offeror or potential offer with which it is acting in concert is publicly announced. …….

For the avoidance of doubt, where a Recognised Intermediary is, or forms part of, an exempt principal trader, its recognised intermediary status will fall away only if its exempt status falls away.

4. Any dealings by a Recognised Intermediary which is not acting in a client serving capacity will not benefit from the dispensations afforded by Note 16 on Rule 9.1, Note 1(c) on Rule 7.2, Rule 8.3(e) and Note 5(b) on Rule 8 with the result that all such dealings by it will be subject to the provisions of the Code as if those dispensations did not apply.

5. Any dealings carried out by a Recognised Intermediary for the purpose of avoiding the usual application of the Code to such dealings will constitute a serious breach of the Code. If the Panel determines that a Recognised Intermediary has carried out such dealings, it will be prepared to rule, inter alia, that Recognised Intermediary status should be withdrawn for such period of time as the Panel may consider appropriate in the circumstances."

8.58 Our Code does not cater for a "recognised intermediary" similar to the City Code.

8.59 When originally drafted, our Code was modelled on the City Code and where our Code does not cover a particular transaction or eventuality we have in the past taken guidance from the City Code and the London Takeover Panel's rulings. Mr Cilliers submitted that if our Code does not find application to single stock futures we should follow the City Code.

8.60 Whilst we can and do take guidance from the City Code, we do not believe that we can apply its rules as such. Until a "recognised intermediary" type of provision is contained in the Rules of the Code, we can only take note of the fact that the London Takeover Panel has included the above provisions within its rules.

8.61 We do however believe that this type of rule is required in South Africa. For purposes of commercial certainty, it is undesirable to grant condonation or exemption post the occurrence of an event which gave rise to the possible need to make a compulsory offer. Rules to cater for bona fide intermediaries who meet defined criteria should therefore be included within the regulations governing the activities of the new South African Takeover Panel and if the Companies Act of 2008 is not brought into force within a reasonable period of time, then the current Rules should be amended to cater for such intermediaries.

Any issues not addressed above

8.62 In the light of our decision below we find it unnecessary to deal with each and every point raised by Counsel for each of the parties, to the extent that we have not have addressed these in our analysis and conclusions above.

9. RULING

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.

10. COSTS

The Complainants (as one party, jointly and severally) and Nedbank (as the other party, jointly and severally) are each ordered to pay half of the costs incurred by the SRP in relation to this hearing. We debated whether to make the costs order against the Complainants alone, but came to the conclusion that Syfrets and Nedbank employees' conduct contributed to the facts which led to this hearing and that Nedbank should therefore pay half of the SRP's costs relating to this hearing.

Signed this 16th day of August 2010

NA Matlala _____

ND Lowenthal _____

SB Siyaka _____

PM Stratten _____

B van Rooyen _____