

**IN THE APPEAL BEFORE THE SECURITIES REGULATION PANEL**

in the matter between:

**MULTI-DIRECT INVESTMENT 180  
(PROPRIETARY) LIMITED**

**First Appellant**

**SAFIKA HOLDINGS (PROPRIETARY) LIMITED**

**Second Appellant**

**MINEWORKERS INVESTMENT COMPANY  
(PROPRIETARY) LIMITED**

**Third Appellant**

**INVESTEC BANK LIMITED**

**Fourth Appellant**

**CAPRICORN CAPITAL PARTNERS HOLDING  
COMPANY (PROPRIETARY) LIMITED**

**Fifth Appellant**

and

**THE EXECUTIVE DIRECTOR:  
SECURITIES REGULATION PANEL**

**First Respondent**

**THE EXECUTIVE COMMITTEE:  
SECURITIES REGULATION PANEL**

**Second Respondent**

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**DECISION AND RULING**

1. This is an appeal against the Ruling, dated 17 December 2003, of the Executive Committee of the Securities regulation Panel (SRP) in relation to an offer (Tiso offer) by the Appellants to acquire securities in New Africa Investments Limited (“NAIL”). That Ruling was given on appeal from a ruling dated 14 October 2003, by the Executive Director of SRP.

2. The facts relevant to this decision are mainly set out in the ruling by the Executive Committee and need not be repeated here. Those facts referred, *inter alia*, to evidence adduced before the Executive Committee which was available to the Panel for the purposes of this appeal.
3. The Appellants were represented by Senior and Junior Counsel and we are indebted to them for the lengthy argument which was presented to us. Some additional evidence was adduced at the hearings before us and the facts of the matter appear not to be in dispute.
4. At my request Counsel dealt with the question of whether or not there was an onus upon the Appellants to satisfy us that the ruling of the Executive Committee was not correct. Counsel argued that the proceedings before the Panel were of the nature of an investigation by us, on which we would make a finding but without the Appellants having to discharge an onus. The argument went as far as to suggest that the Panel had to satisfy itself that the Appellants were acting in breach of the SRP Code and that if we were in doubt we could not find that there had been such a breach. We believe that may be stating the position too strongly.
5. We have found it unnecessary to decide the point, particularly because no objector was present or represented to place other argument or facts before us. Our decision in this matter, therefore, does not create any precedent for the SRP on the issue of onus. We find that if there were an onus, the Appellants have discharged it.
6. There is no doubt that the Appellants concluded an agreement "*inter se*" in regard to the assets of NAIL and the future disposal of some or all of those assets. That agreement did not form part of the general offer to shareholders although it was disclosed in the circular to shareholders. However Counsel

argued successfully, that on a proper construction of Section D Rule 13 of the SRP Code those arrangements did not breach Section D Rule 13 because it was not an arrangement which required acceptance of the Tiso offer made to the holders of the relevant securities, namely shares in NAIL. The agreement between the Appellants was not made between them to induce them to accept the Tiso offer. They were the offerors, not offerees.

7. Counsel referred us to the decision, dated 21 November 2003 of The Panel on Takeovers and Mergers of London (the Takeover Panel) which applies the City Code and the Rules Governing Substantial Acquisition of Shares. That decision - In re Canary Wharf Group PLC - dealt with the interpretation of General Principle 1 and Rule 16 of the City Code, (corresponding to our General Principle 1 as set out in Section C2.1 of our Code) and Section D Rule 13).
8. There are minor textual differences between the two Codes which in our opinion do not affect the interpretation thereof. It must be borne in mind that our Code was based upon the City Code and the minor differences were, no doubt, made by the draughtsman of the SRP Code for the sake of clarity.
9. The Canary Wharf decision was one on appeal from a decision of the Executive of the City Panel and is, in effect, the last word on the matter in the United Kingdom since the Court there has previously stated its reluctance to interfere in the decisions of that Panel. The decision was published after the Executive Director had made his decision in regard to the Tiso offer and was also probably not known to the Executive Committee when it made its Ruling.
10. In the course of its ruling the Takeover Panel made crisply the following point: -
 

“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 distribution of profits and surplus capital and to

benefit from an 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."

11. The ruling proceeded to describe the criteria which the Executive of the Takeover Panel had developed when considering such offers, but in the interest of brevity we do not propose to repeat them here. They are to be found in Paragraph 16 of The Takeover Panel's ruling. Suffice it to say that we found that the Appellants in this matter qualified as offerors and are not hit by the provisions of Rule D 13 of the SRP's Code in relation to the arrangement made by them *inter se* in connection with the Tiso offer to the holders of securities in NAIL.
12. We are of course not bound by the decisions of the The Takeover Panel applying the City Code but we regard them as highly persuasive and have decided to follow and to apply the Canary Wharf Ruling in this case.
13. It is, however, necessary to give special consideration to the position of Phaphama Holdings (Pty) Limited ("Phaphama") which at the time of the offer held 52.5% of the issued ordinary share capital of NAIL as well as some of its "N" shares. Altogether Phaphama controlled in excess of 48% of the voting power over NAIL.
14. Phaphama was clearly not an offeror in this matter but an offeree. However we have been satisfied that by agreement with the Appellants and for their benefit alone, Phaphama agreed not to accept the offer made to all shareholders but to grant a call option to the Appellants to acquire its shares subsequently at the offer price plus only interest on the offer price calculated from the date on which the offer to the other holders of securities became unconditional to the offer. That interest was to have been payable at a call rate plus 2% per annum. There were other conditions imposed for the benefit of the Appellants as offerors.

15. On the facts proved, Phaphama must be held to have acted in concert with the Appellants but that was not in any way a benefit to it. In this connection we were referred to the decision of the Australian Takeovers Panel in the matter of PowerTel Limited (NO.3) 2003 A.T.P.28 which also dealt with an allegation of a Bid tainted by an alleged offer to a shareholder on a beneficial basis not available to the remaining shareholders. The Australian Code states in paragraph 602 (c)

“as far as practicable, the holders of the relevant class of voting shares or interest all have a reasonable an equal opportunity to participate in any benefits accruing to the holders under any proposal under which a person would secure a substantial interest in the company body or scheme.”

The similarity in effect to our General Principle 1 is manifest.

16. The other facts in that case are quite different from those before us but after an examination of Australian cases and judgment, the Australian Panel at paragraphs 49 & 51 stated:-

“49. Accordingly, the balance of judicial authority (including the reasons of the majority of the High Court in “Sagasco”) and the basis of the Panel decisions which have considered the issue of benefits in C.A. s623 supports “net benefits” approach looking at the commercial balance of advantages flowing to or from the non bidder from a transaction which is sought to be impugned”

“51. On that approach, we must consider all advantages and disadvantages of the transaction for the shareholder to determine whether the advantages of the relevant transaction outweigh the detriments suffered in connection with the relevant transaction so as to constitute a net benefit.” (We have omitted the balance of this paragraph for the sake of relevance and brevity).

17. The benefit to Phaphama in this case, if it is considered to be a benefit at all, was simply to compensate it for its lost time value of the offer price because it had agreed not to accept the offer. There were two reasons for Phaphama having so agreed. Firstly the Appellants sought to avoid the delays occasioned by reporting the takeover to the Competition Commission on the ground that there would not be a change of control. We understand however that the Commission decided (with respect, we believe correctly) that its jurisdiction was not ousted by the device. The second reason was to enable Phaphama to ensure that the arrangements between the Appellants – *inter se* – were carried out.
18. The only possible benefit which accrued was a possible excess over other shareholders caused by the interest rate of a call rate plus 2%. Some shareholders might not have achieved the extra 2%. In our view, however, that possible benefit was so small as to fall within the ambit of the maxim “*de minimis non curat lex*.”
19. The South African Constitution encourages us to have regard to other legal systems and we have no hesitation in this case of applying and following the City Panel judgment in the Canary Wharf case. However, we do not necessarily subscribe to the net benefit principle applied in Australia and it should not be regarded as a precedent for the SRP, bearing in mind again that contrary argument has not been advanced due to the absence of an objector or complainant. However if it is applicable it reinforces the “*de minimis*” factor which we have applied.
20. In the premises, the Appeal is upheld and the decisions of both the Executive Director and the Executive Committee are set aside.
21. We requested Counsel for the Appellants to deal with the question of costs and his submission was that in view of the position of the SRP as a regulator it would be fair in the circumstances for the Appellants to bear the costs of the members of the Panel in dealing with the matter.

22. We interpret that as comprising the fees and expenses paid to our members who presided at the meetings of the Executive committee and on this appeal, together with the costs of recording and preparing the transcripts which were essential for our deliberations. However in view of the apportionment of costs at the Executive Committee level, i.e. 40% to be borne by the Kagiso Consortium, we order the same apportionment at the Executive Committee level, but the Appellants to bear the balance of the costs as described above.

Dated this 18<sup>th</sup> day of February 2004.

**C A JAFFE**

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**N BHANA**

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**F DWINGER**

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**N MATLALA**

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**M SIMELANE**

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