

SECURITIES REGULATION PANEL ("SRP")

EXTRACT FROM THE RULING BY THE EXECUTIVE COMMITTEE

IN RELATION TO NEW AFRICA INVESTMENTS LIMITED ("NAIL")

APPEAL AGAINST THE EXECUTIVE DIRECTOR'S RULING OF 14 OCTOBER 2003

RULING

83. Mr Unterhalter argued that the Executive Director's ruling was ultra vires and not authorised by Rule 13. We believe that this argument must fail because it pays too little heed to the language in which the Executive Director's order was couched and it cannot succeed in substance in any event because it misunderstands the effect of Rule 13 and the consequences of a violation thereof. The Executive Director's ruling was couched as a conditional consent in terms of Rule 13 for the favourable conditions to be implemented if other shareholders were compensated in the manner prescribed by the Executive Director. In the absence of such consent, of which the Tiso Consortium has chosen not to avail itself, the members of the Tiso Consortium are in violation of section 440L of the Companies Act because the arrangements put in place by the Tiso Consortium are in violation of Rule 13 (and General Principles 1 and 11 of the Code, which Section C of the Code makes clear are not qualified by Rule 13, as suggested by Mr Unterhalter). Consequently, the members of Tiso Consortium will, as provided for in section 440M(4) of the Companies Act, be liable in damages to shareholders who accepted the Tiso offer and do not receive the same extent of benefits as Safika and Capricorn.
84. However, we believe that General Principles 1 and 11, which unlike Rule 13 are framed in positive terms, do provide authority for the type of positive order the Executive Director sought to make. We therefore find that those principles require that, in future at a time when the value of the benefits to Safika and Capricorn can be completely quantified, the Tiso Consortium will be obliged to increase the R10,50 price to such amount as represents the greater of net benefits received by Safika and the net benefits received by Capricorn when expressed as an amount per NAIL share held (indirectly, for example through Phaphama, or directly and which are disposed of in terms of the Tiso offer or an arrangement such as that between the Tiso Consortium and Phaphama) by Safika, in the case of the net benefits received by Safika, or by Capricorn (including, for the avoidance of doubt, the Hollard Group), in the case of the net benefits received by Capricorn. Such a future top-up payment should be made after all the various benefits are realised by Safika or Capricorn, in order to ascertain which benefits have realised the greatest value, and must then be accompanied by an interest factor to compensate for any delay between the receipt of the

infringing benefits by Safika or Capricorn and the payment of the top-up. This will be dependent upon a valuation of the NAIL shell. It is to be recommended that the Tiso Consortium should employ, at its own cost, independent experts (who would qualify to provide independent external advice to the board of an offeree company in terms of the Code) to certify the accuracy of the calculation of the top-up payment, as this should reduce the scope for disputes in this regard.

85. An alternative basis for making such an order could be the fact that the Tiso offer resulted in an affected transaction, which brings Rule 8.4 of the Code into play, but we need not pursue that any further.
86. The Kagiso Consortium had requested that the benefit of this order should be extended even to those NAIL shareholders who had not accepted the Tiso offer but had instead disposed of their NAIL shares to the Tiso Consortium after the date of release of the offer circular. While this point was not argued before us due to the Kagiso Consortium's sudden withdrawal from this appeal and we therefore need make no definite finding thereon, we point out that it would be unusual to extend to shareholders (who elect after the announcement of an offer to dispose of shares otherwise than in terms of that offer) the benefits of any increase in the offer price. The reason for this is that such shareholders may have enjoyed greater certainty, for example where the offer was subject to conditions, and other advantages over shareholders who accept the offer. To treat both categories similarly might in itself infringe the principle of equality.
87. We noted the announcement by the Tiso Consortium that if it was unsuccessful in this appeal that it would declare null and void all the arrangements found to be in contravention of Rule 13. We have given the Tiso Consortium the benefit of the doubt and read the announcement not as a threat that it will seek to undermine our ruling if the Tiso Consortium is unsuccessful, but a form of acknowledgement of the fact that it is prohibited from implementing arrangements in conflict with the Code. As this issue is not presently before us, we need not make a decision thereon, but point out that, in the light of section 440M(4)'s provision for damages as well as General Principles 1 and 11 and the fact that the Tiso offer has already been implemented, any such action by the Tiso Consortium may not have its desired effect.
88. NAIL shareholders who have expressed concern that the Tiso Consortium will thereby seek to avoid its obligations in terms of this ruling should bear in mind that the effect of the Code's requirement, as expressed in this ruling, that the Tiso Consortium should increase its offer price, is in any event presently uncertain and dependent on the extent to which Safika and Capricorn benefit from the favourable conditions identified above.
89. In considering the costs award to be made by us in respect of this appeal, we have had regard to the fact that the Tiso Consortium has been substantially unsuccessful and to the fact that a large portion of

the first day of the hearing was wasted while we waited upon the parties, following which the Kagiso Consortium unsatisfactorily provided no explanation and simply withdrew its representatives and its case.

90. We accordingly rule -

90.1 that the appeal by the Tiso Consortium is dismissed and paragraphs 83-90 hereof shall be published by the Tiso Consortium on SENS;

90.2 that the Tiso Consortium is obliged to increase its offer price of R10,50 to all NAIL shareholders who have accepted its offer by way of a top-up payment to be calculated and paid in the manner outlined in paragraph 84 above;

90.3 in terms of the Schedule of Fees and Charges included in the Code, that the SRP's costs in respect of this hearing, including the costs occasioned by the engagement of Werksmans Inc as experts to assist us with the formulation of this ruling, shall be borne as to -

90.3.1 60% thereof by the Tiso Consortium; and

90.3.2 40% thereof by the Kagiso Consortium,

such costs to be calculated by the Executive Director and reflected in an invoice to be sent to each of them.

The Executive Committee of the SRP
17 December 2003

Mr N Lowenthal, Chairman

Mr B van Rooyen, Member

Mr D Sylvester, Member