

SECURITIES REGULATION PANEL - PRIMEDIA LIMITED RULING

EXTRACTS FROM THE RULING OF THE EXECUTIVE COMMITTEE OF THE PANEL IN AN APPEAL AGAINST A RULING GIVEN BY THE EXECUTIVE DIRECTOR

on 29 March 2000 in terms of Section A clause 2 (d) of the Securities Regulation Code Rules of the Securities Regulation Panel (the code)

1. The relevant parties to the Appeal for the purposes of this judgment are as follows:
 - 1.1 MIC MEDIA AND TECHNOLOGY HOLDINGS (PROPRIETARY) LIMITED
 - 1.2 KIRSH CONSORTIUM being the parties reflected as members of the Kirsh Consortium in the second voting pool agreement referred to hereinafter.
 - 1.3 For the purpose hereof, the parties referred to in 1.1 or 1.2 are referred to herein as “the Applicants” and were represented on the first day of the hearing (8 September 2003) by Advocate A Subel SC, with him Advocate P Rood instructed by Attorney M King, supported by Edward Nathan Friedland (“EN&F”).
 - 1.4 Active Value Advisors Limited/Active Value Funds (“the Appellants”), represented by Advocate C Cohen SC, with him Advocate A Bham, instructed by Webber Wenzel Bowens. The Appeal was heard by the Executive Committee (“EC”) appointed by the Securities Regulation Panel, comprising Norman Lowenthal as Chairman, Bernard Van Rooyen and Reggie Berkowitz as members.

- 1.4.1 At the outset, Mr Cohen handed in a letter from Allan Gray (not represented) recording inter alia its objection to the ruling of the Executive Director ("ED"), (referred to in 3 hereunder).
- 2 In terms of clause 2 (d) of section A of the code, the Appeal constituted a rehearing; reference herein to the "Appeal" or "the hearing", shall be deemed to relate to the rehearing, unless the context indicates otherwise.
- 3 The Appeal referred to above stems from a ruling ("the ruling") given by the ED on 29 March 2000 absolving the applicants from the provisions of rule 8 of the code requiring them to make a mandatory offer to Shareholders of Primedia Limited ("Primedia"); the reasons relating to the ruling of the ED are set out in his letter to Primedia dated 29 March 2000, and which should be read in conjunction with the letter from EN&F to the ED dated 9 March 2000 with particular reference to clause 2 of the draft new voting pool agreement referred in that letter. The correspondence read with the draft voting pool agreement sets out the background relating to the proposed Black Empowerment transaction and the influence of the Kirsh family in Primedia which we will refer to more fully hereafter.
- 4 The Appeal was initially set down for hearing on 8 September 2003. At that hearing it was argued on behalf of the Applicants that the decision was not appealable and that the EC lacked jurisdiction to entertain what was referred to as the "so called appeal". After hearing argument by the representatives of the Applicants, the EC ruled that the ruling "was appealable" and that the hearing would continue. The matter was adjourned from 8 September to 29 & 30 September for a full hearing ("the hearing").

- 5 The hearing commenced on the morning of the 29th September and Advocate Cohen competently developed the argument set out in the Heads of Argument, which he handed in at the first hearing on 8 September. He also handed in an affidavit from Alan Gray substantially supporting the views advanced by Mr Cohen.
- 6 Mr Kirsh gave evidence and in doing so he responded to questions from Mr Cohen and the EC. Mr Kirsh also dealt with questions from Advocate Rood, who attended the hearing on behalf of Mr Kirsh personally. Mr Kirsh endeavoured to deal in particular with the “exceptional circumstances” relating to the waiver of the provisions of rule 8 of the code and to the formal non-publication of the decision having taken place at the time of the making of the decision.
- 7 After considering the representation made by the parties and their representatives, the EC concluded as follows, specifically with reference to the points mentioned in the Heads of Argument submitted on behalf of the Applicants.

7.1 THE EX PARTE RULING

We consider it unnecessary to make a finding in regard to whether the publication of the decision was required at the appropriate time. We find that the appeal constitutes a rehearing in terms of the code and the Appellants have accordingly had an opportunity to make submissions and to be heard. In our view, they can no longer be heard to say they have been prejudiced. We understand the view of Mr Cohen that the Appellants were entitled to a formal hearing and he may be correct; however having regard to the provisions of the code, with particular reference to the test of fairness as opposed to the

rigid application of the law, it may not be necessary to require that the decision should have been published in a formal way.

Having regard, inter alia, to

- 7.1.1 the article which appeared in the Business Times of the Sunday Times on 19 March 2000
- 7.1.2 the code makes provision for ex parte rulings
- 7.1.3 it does not impose any obligation on a party to publish a ruling,
- 7.1.4 possibly other pertinent factors,

it may not have been necessary to formally publish the decision of the ED. For the purpose hereof we have not taken into account suggestions made in correspondence, newspaper articles and the evidence of Mr Kirsh relating to details of the decision either having been known on a “widespread basis” and/or having been disclosed by Mr Kirsh at a Directors meeting. Notwithstanding all of the aforesaid and as we have said the decision has now not been dealt with on an ex parte basis and we find that the Appellants have had a proper hearing.

7.2 EXCEPTIONAL CIRCUMSTANCES

We are satisfied that the Black Empowerment Component of the Applicant’s Application to the Executive Director in March 2000, constituted “exceptional circumstances” entitling the ED to use his discretion in terms of rule 34 of the code and waive the requirements of rule 8. It is unfortunate that Mr Kirsh did not articulate the hardship that would have been caused had it been necessary for an offer to be made to minorities. We are

satisfied however, we can infer it was necessary for the applicants to make the application it did; it is possible, if not likely, that the Black Empowerment transaction may well not have taken place had the ED not used his discretion; without making a specific finding in this regard we are satisfied that “exceptional circumstances” existed, in particular, after taking into account the circumstances referred to by the ED in making his decision.

7.3 KIRSH CONSORTIUM

Mr Cohen placed considerable significance on the identity of the Kirsh Consortium. On the basis that the appeal constituted a rehearing we do not consider it necessary to deal with the change in the identity of the Kirsh Consortium between the two voting pool agreements; the Kirsh Consortium is one of the applicants for the purpose of the hearing and we do not consider it is necessary to be concerned with the identity of the Kirsh Consortium in the first pool agreement; the rehearing has taken place on the basis that there has been an affected transaction and the purpose of the rehearing is to determine whether the panel can exercise its discretion and waive compliance with the provisions of rule 8.

Mr Cohen is correct that there has been a change in the constitution of the Kirsh Consortium in the second voting pool agreement, compared with the first pool agreement; Mr Kirsh testified however that the Kirsh family influence has dominated at all relevant times and to the extent necessary we accept his testimony in this regard; it is this view which the ED accepted at the time he made his decision.

7.4 DURATION OF THE RULING

We are inclined to the view that it would have been prudent for the ruling to apply for a specified period of time. However, we do not think it is fatal. From a practical point of view, the ruling was made in March 2000 but it was only relied upon for the first time in or about June 2003. We find that the ruling should not be able to be relied upon indefinitely.

8 JUDGMENT

For the reasons set out above, we do not find we can justify in coming to a conclusion different to that of the Executive Director in March 2000; as indicated we consider it necessary to make a new ruling with reference to the duration of the ruling;. We accordingly find as follows:

8.1 On the basis that the Appeal constituted a rehearing, we find that the panel is entitled to exercise its discretion in terms of rule 34 of the code and direct that the provisions of rule 8 be waived and not applied arising from the shareholding of the Applicants in Primedia exceeding in aggregate 34.9%.

8.2 That

8.2.1 the Applicants may not increase their combined shareholding in Primedia above the level prevailing on the date hereof, without seeking a new exemption from the provisions of rule 8.1 of the code.

8.2.2. in the event of the combined shareholding of the applicants in Primedia falling below 35%, the finding referred to in 8.1 shall forthwith lapse and in the event of the Applicants wishing to

increase their combined holding above 34.9%, the Applicants will be required to make an application to the ED for a dispensation with the provisions of rule 8.1 of the code.

N LOWENTHAL
Chairperson - Executive Committee

R BERKOWITZ
Member - Executive Committee

BR VAN ROOYEN
Member - Executive Committee

Date: 13 October 2003