IN THE SECURITIES REGULATION PANEL

In the matter between:

TSOGO SUN HOLDINGS LIMITED Applicant

And

GOLD REEF RESORTS LIMITED Respondent

REASONS FOR THE PANEL RULING OF 1 FEBRUARY 2008

On 1 February 2008 the Securities Regulation Panel (the Panel) consisting of Messrs. N Matlala, N Lowenthal, B Spilg SC, W S Yeowart and Ms P Stratten made the following ruling after having heard the parties' counsels' argument and considering documentation presented to the Panel :

> "*Gold Reef City Resorts Limited is in breach of Rules 13, 16, 19 and 20.*
>
> *The effect of such breach is that the Securities Regulation Panel would not have approved the transaction as presented to it at that time.*
>
> *In view of the announcement on 31 January 2008 by Gold Reef Resorts Limited that the deadline for meeting the conditions precedent under the Scheme of Arrangement would expire at 5.00 p.m. today, it is desirable that our ruling be given before then. The Securities Regulation Panel will give its full reasons within the statutory period provided*."

THE COMPLAINTS

The applicant, Tsogo Sun Holdings (Tsogo Sun), approached the Panel with a complaint that Gold Reef Resorts (Gold Reef), the respondent, had contravened the Securities Regulation Code and the Rules in that:

1. in breach of the provisions of Rules 13 and 19, Gold Reef had resolved to make an improper payment of R12 million to a major shareholder of Gold Reef in order to obtain irrevocable support for an offer made by a rival bidder, namely a consortium identified in the next section of this document, and that by doing so Gold Reef had frustrated the offer of Tsogo Sun;

2. in breach of the provisions of Rules 16.1, 20.1 and 20.2, Gold Reef had failed to disclose certain important information to the shareholders of Gold Reef in a cautionary announcement and in a circular to shareholders.

THE UNDISPUTED FACTS

During the hearing of this application the following facts were not put in dispute by the parties and are as such common cause :

1. In accordance with a proposal by the executive officer of Gold Reef, the board of Gold Reef resolved on 10 August 2007 to make a payment of R12 million to Mr Maxim Krok (Krok), the non-executive chairman and director and also a major shareholder of Gold Reef.

2. The resolution by the board of Gold Reef to make the payment of R12m was made before Krok furnished his irrevocable undertaking to vote in favour of the offer of the rival bidder.

3. The rival bidder (Bidco) was a consortium comprising Whitehall Street International Real Estate Limited Partnership 2005, Ethos Private Equity Fund V, ELQ Investors Limited, Fluxrab Investments No 157 (Proprietary) Limited, Fluxrab Investments No 159 (Proprietary) Limited and Fluxrab Investments No 160 (Proprietary) Limited .

4. Bidco was aware of the proposed payment of R12m.

5. The resolution to make the payment to Krok was incorporated into a written agreement between Krok and Gold Reef dated 3 September 2007.

6. Tsogo Sun had approached Gold Reef during February 2007 to acquire 100% of Gold Reef's shares.

7. Tsogo Sun submitted a funded offer of R34.50 per share to Krok on 9 August 2007 at a meeting held in Sandton, which offer was subject to certain conditions.

8. The offer of Tsogo Sun was rejected on 10 August 2007 by the board of Gold Reef on the advice of its financial adviser and sponsor, Merrill Lynch.

9. Merrill Lynch had been formally appointed in writing by Gold Reef on 11 July 2007 as the "*…exclusive financial adviser and transactional sponsor to Gold Reef Resorts Ltd in connection with the proposed acquisition by the Company of Tsogo Sun Holdings (Pty) Ltd and/or in connection with any proposed sale of the company to Tsogo or any company that may extend a higher offer in direct competition with Tsogo"*. In terms of this appointment letter Merrill Lynch would receive a success fee if Gold Reef were to be sold.

10. Tsogo Sun rejected a proposal of the management of Gold Reef to make a retrenchment payment of R100m to the management of Gold Reef and made a counter offer of R30m.

11. Tsogo Sun stated that it would not take over the chief executive officer of Gold Reef if it were to succeed in its offer to acquire 100% shareholding in Gold Reef.

12. By the time of the Gold Reef Board meeting of 10 August 2007, Bidco had submitted a conditional offer of R34.00 per share.

13. On the same date, i.e. 10 August 2007, the offer of Bidco in the sum of R34.00 per share was accepted at a board meeting of Gold Reef.

14. The Bidco consortium included the management of Gold Reef and also its chief executive officer.

15. On 13 August 2007 Gold Reef issued a Further Cautionary Announcement (the Cautionary Announcement), which contained the following wording:

    "*As of the date of this announcement no statement of a firm intention to make an offer has been received by the board of the Company*"

    See Annexure 9 page 333 of the bundle presented to the Panel - Further Cautionary Announcement (paragraph 2).

16. The executive director of the Securities Regulation Panel (SRP) approved Gold Reef's circular to shareholders dated 5 October 2007 (the Circular) seeking approval of a scheme of arrangement in terms of section 311 of the Companies Act, 1973.

17. The scheme was sanctioned by the High Court on the 13 November 2007.

THE ISSUES

In order to determine whether there was a breach of the SRP's Rules, the following issues in dispute were required to be addressed:

1. Whether the payment of an amount of R12m to Krok by Gold Reef constituted a special deal with favourable conditions as contemplated in Rule 13.

2. Whether the payment was further in breach of Rule 13 in that it constituted an arrangement involving the acceptance of an offer by Krok which was not extended to all other holders of relevant securities.

3. Whether the payment also constituted frustrating action as contemplated in Rule 19.

4. Whether the failure to disclose in the Circular the statement contained in Gold Reef's board minutes of 10 August 2007, namely that a second reason for payment of the amount of R12m to Krok (the payment) was that Krok was "*instrumental in extracting a higher offer for the company*", amounted to a contravention of Rules 16.1, 20.1 or 20.2.

5.. Whether Tsogo Sun had submitted a funded offer, although conditional, to Gold Reef or to the Board of Gold Reef and the failure by Gold Reef to make this disclosure in the Cautionary Announcement and in the Circular constituted a breach of Rules 16.1, 20.1 or 20.2.

6. Whether in the circumstances the Circular satisfied the highest standards of accuracy and whether the information contained therein was adequately and fairly presented as required under Rule 20.1.

7. Whether, knowing what the Panel now knew, the Panel would have approved the

transaction as had been presented to it.

We will now deal with these issues under the following general headings.

THE NATURE OF THE R12M PAYMENT AND WHETHER THERE WAS A SPECIAL DEAL UNDER RULE 13

The payment to Krok was proposed by the chief executive officer of Gold Reef who was also part of Bidco. The reason given for the payment in the minutes of the Gold Reef board meeting of 10 August 2007 when making the proposal was that it was for "*the significant role and contribution of MK to the company which included being instrumental in extracting a higher offer for the company*".

However, this explanation does not withstand scrutiny for the following reasons.

Firstly, it is factually incorrect as Bidco's offer was not higher than that of Tsogo Sun. The documentation presented to the Panel revealed that Tsogo Sun's offer was fully funded as bank guarantees from RMB and Nedbank had been presented to Krok and the other controlling shareholders who met with Tsogo Sun on 9 August 2007. These bank guarantees were presented to the controlling shareholders on 9 August although the covering letter from Tsogo Sun was dated 10 August 2007.

Secondly the role of Krok in extracting the "*higher*" offer for Gold Reef was not a service rendered to Gold Reef but to the shareholders of Gold Reef. The target company does not benefit if a bidder makes a higher offer. All the holders of relevant securities will benefit as the offeror may not pay a particular shareholder a higher amount than is paid to the other shareholders, save with the consent of the SRP.

Since Gold Reef's explanation for the payment is rejected, and because of its co-incidence with the rival bid that had been presented to the controlling shareholders , it is difficult to reject Tsogo Sun's contention that this payment represented the equivalent of a sale of Krok's shares at R34.50 per share which was the offer price made by Tsogo Sun. The factual inaccuracies contained in the minutes and the amount of the payment which was not insubstantial but, as demonstrated by Tsogo Sun's legal representatives, equated favourably to the difference between the Tsogo Sun bid of R34.50 per share and the lower Bidco offer of R34.00 a share, lead us to accept this argument. In this regard the sum of R12m payable to Krok is effectively equal to the difference between the value of Krok's shareholding calculated in terms of the Bidco offer of R34.00 per share on the one hand and that of Tsogo Sun of R34.50 per share on the other (taking capital gains tax into account).

In such a case one would expect the offeror company to be aware of such payment. The facts reveal that they were in fact made aware. The minutes of the Gold Reef board meeting on 10 August 2007 state that Bidco was aware of the payment of R12m. The payment was therefore effectively paid by Bidco because it was in contemplation of the acceptance of the Bidco offer by Gold Reef. Bidco did not object to the payment of the sum of R12m to Krok. Moreover on Krok's part he insisted on a written agreement from Gold Reef confirming this payment.

The question then is whether the purpose of the payment of R12m to Krok amounted to a special deal in terms of Rule 13.

The provisions of Rule 13 read :

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

In the Panel's view, the only reasonable inference to be drawn from these facts is that the payment to Krok constituted a special deal with favourable conditions during an offer or when an offer was reasonably in contemplation, which offer was not extended to all other holders of securities, in contravention of Rule 13.

WHETHER THE PAYMENT TO KROK WAS A PROHIBITED CONTRACT UNDER RULE 19

Without an acceptable explanation, the fact that the controlling shareholders (some of whom were also part of the group of directors of Gold Reef who constituted what was termed "the independent committee" established by Gold Reef to consider any offers) were possessed of a fully funded higher offer which contained the usual standard conditions one would expect and which the evidence reveals was seriously made (backed by bank guarantees as it was), leads us to conclude that the payment to Krok of this amount constituted a contract entered otherwise than in the ordinary course of business as contemplated under Rule 19(e). In such a case approval of shareholders in general meeting is a prerequisite where the contract is entered into during the course of an offer or where a bona fide offer might be imminent. This was not done and is therefore in breach of Rule 19(e) which identifies such a contract as constituting frustrating action (see the title of Rule 19).

Rule 19(e) of the Code provides as follows:

> "***During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, the board shall not, except in pursuance of a contract entered into earlier, without the approval of holders of relevant securities in general meeting .....***
>
> ***(e) enter into contracts otherwise than in the ordinary course of business;...***"

As stated above, the role of Krok in extracting the "*higher*" offer for Gold Reef was not a service rendered to Gold Reef but to the shareholders of Gold Reef.

The agreement concluded by Gold Reef to pay Krok an amount of R12m therefore constitutes a contravention of Rule 19(e) as it is an agreement not concluded in the ordinary course of business and it was also not incorporated in the Circular to the shareholders of Gold Reef to seek their approval of a contract in terms of Rule 19. It was mentioned in the Circular but only in relation to Directors' Emoluments and then only as a payment which the Board had resolved should be made "as an expression of Gold Reef's gratitude for the significant role and contribution of Mr Krok to Gold Reef's success".

It is also interesting to note that the Circular states that this decision was taken on 12 August 2007. It therefore appears that the Circular information was also incorrect as to the

date of the board meeting as the other papers placed before the Panel show that this meeting was held on 10 August 2007.

WHETHER THERE WAS EQUALITY OF INFORMATION

Rule 16.1 of the Code provides :

> ***"Information about companies involved in an offer shall be made equally available to shareholders as nearly as possible at the same time and in the same manner…."***

And Rule 20.2 provides :

> ***"Holders of relevant securities shall be given sufficient information and advice to enable them to reach a properly informed decision as to the merits or demerits of an offer. Such information shall be available to holders of relevant securities early enough to enable them to make a decision in good time."***

The Panel finds that Gold Reef contravened Rules 16.1 and 20.2 for the reason that information about the Tsogo Sun offer that was known to the Board of Gold Reef, in particular to Krok and some of the other independent committee directors, was not disclosed in the Cautionary Announcement.

WHETHER THE CIRCULAR SATISFIED THE HIGHEST STANDARDS OF ACCURACY

In the Circular Gold Reef failed to disclose certain material information to the shareholders, firstly that Tsogo Sun had submitted an offer which the board did not support and secondly that the other reason for the R12m payment to Krok was because he had been instrumental in extracting a "higher" offer for Gold Reef.

The truth of the matter is that Tsogo Sun had submitted a funded offer, which was known to some of the directors of Gold Reef and to the controlling shareholders. We have dealt with the actual facts relating to the R12m payment above. The Circular partially covered the reason for the payment to Krok, namely the significant role and contribution of Krok to Gold Reef's success. The role of Krok in being instrumental in extracting a "higher" offer for Gold Reef was omitted.

The failure to disclose important information in the Circular is a contravention of rule 20.1 of the Code which provides as follows:

> ***"20.1 Each document issued to holders of relevant securities ….in connection with an offer shall, as in the case of a prospectus, satisfy the highest standards of accuracy and the information contained therein shall be adequately and fairly presented. …."***

The Panel concludes that shareholders of Gold Reef were denied material and accurate information to enable them to make a proper decision on the merits and demerits of the offer. Save for the shareholders whose interests were represented on the board, no shareholder knew that a higher offer than the Bidco offer had been presented. In consequence the Circular constituted a further breach of the provisions of Rules 16.1 and 20.2.

WHETHER THE PANEL WOULD HAVE APPROVED THE TRANSACTION HAD THERE BEEN PROPER DISCLOSURE

It is manifestly obvious that the breaches were material and significant. There was both a withholding of relevant information and a failure to disclose the true facts.

Accordingly, had proper disclosure been made to the SRP at the relevant time when its approval was sought, it would not have approved the transaction as presented to it at that time.

The Panel is of the view that these omissions are material and have resulted in inaccurate information being presented to the Gold Reef shareholders.

THE EMPOWERMENT TRANSACTION

At the hearing of this application mention was made that at the time of the negotiation between Tsogo Sun and Gold Reef the latter was negotiating with empowerment shareholders in Gold Reef which led to an empowerment consortium buying shares in Gold Reef at R20.50 per share. The empowerment transaction was subject to the Code but the SRP was not approached to approve that transaction at the time. This omission was queried by the Panel but counsel for Gold Reef demurred as he had not been briefed on the empowerment transaction. During the hearing the Panel therefore requested the executive director of the SRP to investigate the empowerment transaction and report to the full Panel.

CONCLUSION

This matter was not about whether or not an offer was made but whether the conduct of parties involved in an affected transaction was in compliance with the Rules and the Code of the SRP and whether there had been full disclosure of information to the shareholders of Gold Reef.

We have found serious contraventions of the provisions of Rules 13, 16.1, 19 and 20. We are also concerned that the empowerment transaction referred to in the previous paragraph may well be a further transgression of the Rules. It will undergo the scrutiny of the SRP.

Whilst we are unable to apportion responsibility, it is apparent that a responsibility must lie at the very least with Gold Reef's management who formed part of the Bidco consortium. We were advised that this included Mr SJ Joffe, the chief executive officer of Gold Reef.

We wish to draw the attention of all parties concerned, in particular directors and professional advisers, as to the extent of the duty of care owed by them both to shareholders and to the SRP when engaging in matters which fall under the oversight of the SRP.

Clause 2(b) of Section A: Introduction of the Code provides:

> ***"The boards of an offeror and the offeree company and their respective advisers have a duty to act in the best interests of the holders of the***

respective securities. The General Principles and the Code will, inevitably, impinge on the freedom of action of boards and persons involved in affected transactions.

Each director of an offeror and of the offeree company has a responsibility to ensure, so far as he is reasonably able, that the Code is complied with in the conduct of an affected transaction.

Financial advisers have a particular responsibility to comply with the Code and to ensures so far as they are reasonably able, that an offeror and the offeree company, and their respective directors, are aware of their responsibilities under the Code and comply with them. Financial advisers shall ensure that the Panel is consulted whenever necessary or desirable and shall co-operate fully with the Panel on any enquiries made by it. Financial advisers should also be mindful of conflicts of interest."

Directors and professional advisers need to be meticulous in ascertaining what is required to be disclosed in the given circumstances, and of equal significance, in ascertaining what is required in relation to verifying information presented for the purposes of proper compliance with the requirements of Rules 16.1 and 20. In relation to professional advisers we would mention the case of **Durr v ABSA Bank Limited and Another** 1997 (3) SA 448 (SCA) which deals with the duty of care expected of persons who hold themselves out as having expertise in specialised fields.

Tsogo Sun invited us to determine the effect or consequences of our decision if we came to the conclusion that there had been a breach of the Rules. We have had regard to the interests of all affected shareholders, our obligation to determine whether there has been a breach of the Code when complaints are brought to our attention, as well as the deterrent effect of our decision.

Fundamentally we must have regard to our statutory obligations to oversee take-over and merger transactions and to enforce compliance with the requirements of the Code. Individual shareholders may well have recourse against those responsible for a contravention of the Code which resulted in an offer not proceeding.

In the present case there exists a court order sanctioning the transaction. This has placed an impediment on the type of effective order that the Panel could make.

In our view, the appropriate ruling in the particular circumstances of this case was to hold that Gold Reef was in breach of Rules 13, 16 (specifically Rule 16.1), 19 and 20 and that the effect of such breach is that the SRP would not have approved the transaction as presented to it at that time, had it known then what the Panel now knows.

COSTS

In the order given on 1 February 2008, the Panel did not deal with the question of the Panel's costs. Therefore, in accordance with the provisions of the Rules, the Panel orders that Gold Reef must pay the costs of the Panel in relation to this hearing.