RULING

1. INTRODUCTION

1.1 This is the latest episode in the long running dispute between ATON GmbH and ATON Austria Holding GmbH (collectively referred to as "ATON") and the Board, as well as the Independent Board, of Murray & Roberts Holdings Limited ("M&R" or "the Board" or "the Independent Board").

1.2 In the hearing before the Takeover Special Committee ("TSC") ATON, in its heads of argument, at paragraphs 154 to 156, asked for the following relief -

> *"154 It is submitted that the Panel should have refused its approval to the Potential Transaction on the basis that the Potential Transaction was by design and so precluded in terms of section 119(1)(c).*
>
> *155 Alternatively, in the event that the Committee finds that the Potential Transaction was not by design, alternatively that even frustrating action by design can be approved under section 126, it is submitted that upon the application of the two-tier approval process in section 126(1) the Panel was obliged to consider the matter with a particular emphasis on the need to balance the competing interests of all the M&R shareholders and other stakeholders, including the offeror, and that in any event the Panel should have refused its approval of the Potential Transaction as frustrating action.*
>
> *156 It is submitted that the Committee should uphold the appeal and withdraw the TRP section 126 Ruling, alternatively set it aside and substitute it with a refusal of the approval sought by M&R to proceed and/or continue with the Potential Transaction."*

1.3 M&R submits that the decision of the Panel should be upheld and the appeal by ATON should be dismissed.

2. THE ACT

2.1 Sections 119(1) and 126(1) of the Act read as follows:

> ***119 Panel regulation of affected transactions***
>
> *(1) The Panel must regulate any affected transaction or offer in accordance with this Part, Part C and the Takeover Regulations, but without regard to the commercial*

advantages or disadvantages of any transaction or proposed transaction in order to -

(a) ensure the integrity of the marketplace and fairness to the holders of the securities of regulated companies;

(b) ensure the provision of -

(i) necessary information to holders of securities of regulated companies, to the extent required to facilitate the making of fair and informed decisions; and

(ii) adequate time for regulated companies and holders of their securities to obtain and provide advice with respect to offers; and

(c) prevent actions by a regulated company designed to impede, frustrate, or defeat an offer, of the making of fair and informed decisions by the holders of that company's securities.

126 Restrictions on frustrating action

(1) If the board of a regulated company believes that a bona fide offer might be imminent, or has received such an offer, the board must not-

(a) take any action in relation to the affairs of the company that could effectively result in-

(i) a bona fide *offer being frustrated; or*

(ii) the holders of relevant securities being denied an opportunity to decide on its merits;

(b) issue any authorised by unissued securities;

(c) issue or grant options in respect of any unissued securities;

(d) authorise or issue; or permit the authorisation or issue of, any securities carrying rights of conversion into or subscription for other securities;

(e) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount except in the ordinary course of business;

(f) enter into contracts otherwise than in the ordinary course of business; or

(g) make a distribution that is abnormal as to timing and amount;

without the prior written approval of the Panel, and the approval of the holders of relevant securities, or in terms of a pre-existing obligation or agreement entered into before the time contemplated in this section.

3. **RELEVANT EVENTS**

3.1 On 9 April 2018 ATON, having already acquired a material stake in the issued share capital of M&R, issued a circular to the shareholders of M&R offering to acquire all or a portion of their shares in M&R ("the Voluntary Offer").

3.2 On 29 March 2018 ATON entered into a Forward Sale Agreement with Allan Gray (Pty) Ltd dated 29 March 2018 ("the Forward Sale Agreement") in terms of which it agreed to acquire a number of shares in the issued share capital of M&R which, together with the shares already held by ATON, would result in ATON holding in excess of 35% of the issued share capital of M&R.

3.3 M&R, as a consequence of the acquisition in terms of the Forward Sale Agreement, applied to the Takeover Regulation Panel ("TRP") to convene a hearing before a takeover special committee ("the First TSC") *inter alia* to compel ATON to withdraw the Voluntary Offer and to make a mandatory offer to the shareholders of M&R on the same or similar terms to those found in the Forward Sale Agreement in accordance with the mandatory offer provisions set out in the Act and the Takeover Regulations ("the Mandatory Offer").

3.4 The First TSC hearing took place on 15 and 16 May 2018 and the ruling of the First TSC was issued on 25 May 2018. ATON was, in terms of the ruling, required to withdraw the Voluntary Offer and make the Mandatory Offer.

3.5 On 18 May 2018 M&R published an announcement on SENS advising its shareholders of the Potential Aveng Transaction. It is important to note that the First TSC was not notified by M&R of the Potential Aveng Transaction even though the hearing took place only two days before the announcement.

3.6 On 21 May 2018 M&R issued a notice of general meeting to its shareholders containing a resolution to be passed in terms of section 126 of the Act granting the Board permission to undertake any actions necessary to achieve the Potential Aveng Transaction. At the general meeting the holders of 52.06% of the entire issued share capital voted in favour of the resolution thereby complying with the requirements of

section 126 with regard to *"the approval of the holders of relevant securities"*.

3.7 M&R then applied to the TRP for approval under section 126 of the Act. This approval was granted on 20 June 2018 and reasons therefor were given in a letter dated 26 June 2018 addressed by the Executive Director of the TRP to the M&R attorneys. As a result of that approval ATON then requested that the TSC be convened and the TSC hearing was duly held on 11 July 2018.

4. FRUSTRATING ACTION

4.1 There are very few issues on which ATON and M&R are prepared to agree.

4.2 However one of those issues is that the Potential Aveng Transaction indeed constitutes frustrating action.

5. COMMERCIAL ADVANTAGES OR DISADVANTAGES

The TSC is acutely aware that the powers of the Panel are limited where it regulates affected transactions and offers and in doing so the Panel must not have regard to commercial advantages or disadvantages of any transaction or proposed transaction. In addition, the Panel must not express any view or opinion on the commercial advantages or disadvantages of any transaction or any proposed transaction.

6. SECTION 119(1)(c) OF THE ACT

6.1 ATON argues that -

6.1.1 the Potential Aveng Transaction contravenes the provisions of section 119(1)(c) of the Act in that it is *"designed"* to impede, frustrate or defeat the Mandatory Offer;

6.1.2 once it is established that the frustrating action is by design the TRP is compelled to prevent that frustrating action on the basis of section 119(1)(c) of the Act alone and there is no scope for approval of that frustrating approval under section 126(1) of the Act.

6.2 M&R argues that -

6.2.1 section 119(1)(c) must be read with section 126(1) and is not a self-standing operative provision;

6.2.2 section 119(1)(c) and section 126(1) must be read together as to their purpose;

6.2.3 the inclusion of the word *"designed"* in section 119(1)(c) suggests that frustrating action under section 126 must have the specific intent, object or purpose of frustrating an offer or misleading shareholders.

6.3 The TSC is of the view that the duty of the Panel pursuant to section 119(1) is a stand-alone duty and that subject to the wording contained in section 119 the Panel must, if the relevant action is demonstrated by the evidence to be *"designed to impede, frustrate or defeat an offer"***,** prevent that action from taking place.

6.4 In this matter, there is no evidence upon which the TSC can rely which clearly demonstrates that the Potential Aveng Transaction was *"designed"* to frustrate the Mandatory Offer and should be prevented from taking place.

7. SECTION 126(1) OF THE ACT

7.1 The TSC has been referred to the relevant provisions relating to frustrating action under the United Kingdom Takeover Panel Rules. The provisions of the City Code require the Board of the offeree company not to take any action which could effectively result in a *bona fide* offer being frustrated or in the shareholders being denied an opportunity to decide on its merits.

7.2 We were also referred to a Guidance Note 12 issued by the Australian Takeovers Panel in which reference is made to the matter of *Bigshop.com.au Limited 01:*

"...frustrating action must be defined in terms of action which prevents a transaction which would bring about a change of control of the target company in a manner, and at a time, when a decision about control of the company should properly be taken by shareholders, rather than directors (even though the relevant decision may be fully within the directors' area of responsibility when the target is not subject to a takeover.)"

7.3 The TSC accepts that the South African system of takeovers is designed to be shareholder-centric and that it is accordingly similar, for example, to the United Kingdom system and to the Australian system.

7.4 There is, however, one important provision which the Act contains and which is not contained in the United Kingdom or Australian systems. The provision is to be found

in the first part of the final paragraph of section 126(1) and provides that in addition to the approval of the holders of the relevant securities, the frustrating action cannot take place *"without the prior written approval of the Panel"*.

7.5 The difference between the provisions regulating frustrating action that were found in the old South African Securities Regulation Code and its rules as compared with section 126 of the Act should also be noted.

7.6 In terms of General Principle 7 of the Securities Regulation Code (which regulated takeover offers prior to the introduction of the Act) the board of an offeree company could not take any action that could result in a bona fide offer being frustrated or in the holders of relevant securities being denied the opportunity to decide about the offer on its merits, without the approval of the holders of the relevant securities in general meeting. Rule 19 of the Code made the general principle more specific by prohibiting certain listed conduct, unless the approval of the holders of the relevant securities had been obtained. The conduct prohibited under the old rule 19 is substantially similar to the conduct prohibited under the present section 126(1).

7.7 The difference between the two approaches identified above, which deal with frustrating action, is clear. Under section 126(1) of the Act frustrating action is required to be approved not only by the holders of the relevant securities, but must also receive the written approval of the Panel. This stands in contrast to the position that existed under the Securities Regulation Code.

7.8 The Panel has now been vested with a discretion as to whether to approve the frustrating action or not. When the Legislature inserted the requirement that Panel approval was also required it must have intended those words to have some meaning. It does not seem likely that the intention was simply that the Panel should "rubber stamp" the approval of the shareholders or act merely as a "document checker".

7.9 If the shareholders have approved the frustrating action, the question arises as to what the Panel should consider before it makes its decision. Unfortunately, no specific guidelines have been provided to the Panel.

7.10 The parties have expressed their different views on the matter.

7.11 In a previous hearing before the Competition Tribunal which took place on 15 June 2018, counsel for M&R argued that –

7.11.1 *"section 126 of the Act is designed precisely to protect the rights of ATON in*

this particular situation, because it does not only require shareholder approval, it also requires approval of the takeover regulation panel. This is only the first hurdle in relation to the Aveng transaction. It still has to go back to the takeover regulation panel, who will take the interest of all stakeholders into account, including ATON..."

7.11.2 *"And so one does have a balancing of rights here. You have the rights of ATON, a shareholder on the one side, but you have the rights of all the other shareholders on the other side, and that protection, in our submission, is provided by the takeover regulations promulgated in terms of the Companies Act, and the locus of that regulatory control, resides with the takeover regulation panel."*

7.12 In the present matter M&R expressed its views (rather differently) in paragraphs 33 – 36 of its "Written Submissions Opposing ATON section 126 Appeal" in the following manner:

"33. Having regard to the purpose of section 126, it is clear that in exercising its discretion under section 126(1), the TRP must have regard primarily to the views of shareholders canvassed in a general meeting.

34. In other words, the objective of section 126 read together with section 119(c) is to ensure that, under the takeover regime, during the course of an offer, the ultimate decision-making power regarding any conduct of the company which might impact on the offer, is solely and properly vested in the shareholders (and not in the directors).

35. When the TRP exercises its discretion under section 126, it too needs to give effect to this objective. It does so by having full regard to the resolution of shareholders in a general meeting taken under section 126. That is precisely what the scheme of the Act envisages.

36. Section 126 thus vests the TRP with a critical role and discretion to give effect to the objective of ensuring that decision-making power regarding any conduct of the company which might impact on an offer, is solely vested in the shareholders. The TRP is required to ensure at least the following:

36.1 that a shareholders meeting is held;

36.2 that such a shareholders meeting complies with the requirements of the memorandum of incorporation of the relevant company and the provisions of the Act

(including in relation to quorum and notice);

36.3 generally, that the meeting is not a sham or a fraud orchestrated by the directors for purposes of exercising control over the conduct of the company (and thereby wresting such control from shareholders) in order to respond to an offer that was made to the company; and

36.4 that in exercising its discretion under section 126(1), the TRP has regard to the primacy of the resolution of shareholders in a general meeting."

7.13 In the present matter ATON agreed that the Panel should take into account the fact that the shareholders of M&R have voted to approve the frustrating action but they suggest that the Panel should have considered other factors as well. In their Heads of Argument (at paragraphs 121- 122) ATON stated:

"121. Other factors that the Panel should have considered, other than what the shareholders may have decided, are dealt with in more detail below. They are taken largely from Australian Panel decisions but accord with common sense. It is convenient to list them here and we apply them below. They are:

121.1 whether the offeror is committed to seeing the offer through and whether it has acted accordingly. This will be clear if a firm intention announcement is made and a cash confirmation furnished;

121.2 the materiality of the proposed frustrating transaction and its potential effect on the offer. Transactions can vary widely in this regard. Obviously the less material the transaction the less it will disrupt the offer;

121.3 the timing of both the offer and the proposed transaction relative to one another. This is relevant both to design and overall fairness;

121.4 the degree to which the proposed transaction has progressed. Clearly there is a range from a pre-existing agreement to one which is the subject of mere negotiation."

7.14 As indicated above, we would add:

7.14.1 whether the Potential Aveng Transaction was designed to frustrate the offer;

7.14.2 whether approval of the frustrating action would, if given, deter investment;

7.14.3 whether such approval would prejudice market integrity;

7.14.4 whether such approval would ensure fairness to the holders of relevant securities.

7.15 There can be no formula that dictates which of the relevant factors should play a role and to what extent in any given situation. It is clear that the Panel has a discretion to be exercised on the basis of all available information so as to achieve the objects of the legislation.

7.16 When the Legislature, included the relevant wording as part of section 126(1), it provided a role for the Panel which it must play in such a situation. The role cannot be as limited as suggested by M&R. In exercising its discretion the Panel must take a broader approach which means that the interests of all stakeholders, not only the shareholders, must be given appropriate weight and proper consideration.

7.17 The Panel must

7.17.1 take into account the broad purposes of the Act as reflected in section 7 which, *inter alia*, specifies that the Act is intended to promote the development of the South African economy and to promote innovation and investment in the South African market;

7.17.2 take note of its obligations under section 119(1)(a) of the Act to "ensure the integrity of the marketplace and fairness to the holders of relevant securities" when regulating affected transactions, including the obligation to prevent actions by the company to frustrate offers or the making of fair and informed decisions by the holders of the securities;

7.17.3 take note of whether the meeting at which the shareholders voted on the frustrating action was properly held and whether the shareholders were properly and fully informed;

7.17.4 give considerable weight to the fact that a majority of the shareholders approved the frustrating action but the Panel is not bound thereby.

7.18 The Panel cannot act in a vacuum and simply ignore the specific circumstances of the situation. The Panel must take the particular situation of the pre-existing offer into account and the impact of the frustrating action on it, bearing in mind, in particular, the fact that the Mandatory Offer was imposed on ATON by the First TSC. In this particular instance the Panel must take note of the following:

7.18.1 the fact that this is a hostile offer by ATON to the M&R shareholders and it is not supported by the Independent Board;

7.18.2 the fact that the offer commenced as a voluntary offer which (as a result of a ruling by the First TSC) was required to be withdrawn and made in the form of the Mandatory Offer. The Mandatory Offer is, by its nature, unconditional, save for the conditions relating to regulatory approval, and does not include certain of the protections and other conditions which formed part of the Voluntary Offer;

7.18.3 the manner in which the Independent Board conducted itself, particularly in relation to its failure to take the First TSC into its confidence regarding the Potential Aveng Transaction. The Board failed to disclose to the First TSC the fact that the Potential Aveng Transaction was to be announced on 18 May 2018, a mere two days after the conclusion of the First TSC hearing on 16 May 2018 and even before the decision of that Committee had been made;

7.18.4 the overlap between major shareholders in M&R and Aveng. The TSC notes that there is some debate about the extent of that overlap with the figures given by the parties differing considerably. At the same time the fact that such an overlap exists is not disputed. This applies also to the overlap between those shareholders in their capacities as shareholders in M&R or Aveng and their capacities as bondholders in Aveng. Whilst shareholders remain entitled to vote in their own interests, the overlap is nevertheless an issue for the TSC to take into account;

7.18.5 the potential impact of the Potential Aveng Transaction on the mandatory offer made by ATON. In this context it should be noted that in terms of the detailed Cautionary Announcement Regarding the Potential Combination of Murray and Roberts and Aveng Limited, released on 18 May 2018 M&R:

"proposes to make an all share offer for the entire issued share capital of Aveng and also to accelerate the redemption of Aveng's outstanding R2.0 billion convertible bonds, maturing in 2019, at par value";

7.18.6 the fact that it was stated in the aforesaid Cautionary Announcement that the *"final Potential Aveng Transaction Value will be settled by way of an issue of new Murray & Roberts shares …"*;

7.18.7 the manner in which the Potential Aveng Transaction permits the target, M&R, unilaterally to substantially change the basic principles applicable to the Mandatory Offer, including the effect of the Potential Aveng Transaction on ATON as offeror in the Mandatory Offer;

7.18.8 the extent to which the Potential Aveng Transaction increases substantially the amount payable by ATON under the Mandatory Offer as well as the amount in respect of which ATON will be required to give an additional guarantee confirming its ability to proceed with the Mandatory Offer at the higher amount;

7.18.9 the uncertainty created in the financial markets by the announcement of the Potential Aveng Transaction which, if allowed to continue, will run concurrently with the Mandatory Offer (which cannot be withdrawn);

7.18.10 the fact that the Potential Aveng Transaction is not a competing offer. It is not a question of M&R shareholders having to choose between the offer from ATON and the Potential Aveng Transaction. The Mandatory Offer will continue in force and the shareholders of M&R will retain the option to accept or reject the offer made to them by ATON;

7.18.11 the fact that there is no legal imperative for the Potential Aveng Transaction to be continued with at present. Once the Mandatory Offer has run its course, it is possible for M&R to continue with the Potential Aveng Transaction should it so desire. If the Potential Aveng Transaction is put on hold while the ATON offer remains capable of acceptance, it does not deprive the shareholders of either M&R or Aveng of the opportunity of exercising their rights regarding both transactions.

8. SUMMARY

The TSC must accordingly:

8.1 give appropriate weight to the views of the shareholders of M&R;

8.2 take into account all the factors listed above; and

8.3 act in the best interests of, and take into account, the effect of the frustrating action on all stakeholders.

9. **RULING**

The TSC accordingly -

9.1 upholds the appeal by ATON;

9.2 refuses the approval sought by M&R to proceed or continue with the Potential Aveng Transaction; and

9.3 orders that the costs of the TSC be borne by M&R.

DATED 31 JULY 2018

TAKEOVER SPECIAL COMMITTEE MEMBERS

CHRIS EWING (Chairperson)

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NEO DONGWANA

I concur_____

STEPHANIE LUIZ

I concur_____