TAKEOVER SPECIAL COMMITTEE OF THE TAKEOVER REGULATION PANEL

EX PARTE:

REMGRO LIMITED First Applicant

And

MEDICLINIC INTERNATIONAL LIMITED Second Applicant

And

AL NOOR HOSPITALS GROUP PLC Third Applicant

Panel	*Ebi Moola (Chairperson)*
	Sandile Siyaka
	Andile Nikani
Heard	*26 November and 10 December 2015*
Order Issued	*14 December 2015*

RULING - SECTION 115(4) OF THE COMPANIES ACT

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1. INTRODUCTION

1.1 This was an *ex parte* application brought by Remgro Limited and its wholly owned subsidiary, Remgro Healthco Proprietary Limited (collectively, "Remgro"), Mediclinic International Limited ("Mediclinic") and Al Noor Hospitals Group plc ("Al Noor") (collectively, the "parties''). The parties wished to know whether Remgro's vote at a meeting (the

"scheme meeting") of the ordinary shareholders in Mediclinic would be counted in calculating the percentage required to form a quorum and to pass a special resolution, to approve a scheme of arrangement proposed by the board of directors of Mediclinic.

1.2 This matter was brought to us by the Executive Director of the Panel in terms of section 119 of the Companies Act, 72 of 2008 (the "Act"). The executive director did not provide us with his views in respect of the questions raised, but found it prudent (given the importance and complexity of this matter) to have this matter heard directly by us. A decision that we support. We heard this matter on 26 November 2015 and 10 December 2015 on urgent basis, as the scheme meeting was scheduled to take place on 15 December 2015. It was important to Remgro, and indeed to all parties involved, to know whether or not Remgro's vote will be taken into account at the scheme meeting. We issued the order on 14 December 2015, based on the reasons set out hereunder.

1.3 The transaction envisaged the acquisition of all the shares in Mediclinic by Al Noor including the shares held by Remgro in Mediclinic. The consideration payable for the shares in Mediclinic were the shares in Al Noor. This transaction was to be achieved by way of a scheme of arrangement pursuant to the provisions of section 114 of the Act. Remgro was the largest shareholder in Mediclinic as it held 41.9% of the ordinary shares therein. One of the features of the scheme was that Remgro will subscribe for between 41% and 45% of the shares in

Al Noor, which will result in it becoming the largest shareholder in Al Noor.

1.4 At the hearing of this matter and in the documentation submitted by the parties, the parties described this aspect of the scheme as Remgro's change of direct control of Mediclinic to indirect control of Mediclinic through Al Noor, as Al Noor will be interposed between Remgro and Mediclinic. Further, that Al Noor was a mere instrument used to give effect to the acquisition of Al Noor by the shareholders of Mediclinic. We return to this point later in this Ruling. The aforementioned subscription by Remgro of the shares in Al Noor was to be given effect as part of the scheme, pursuant to the subscription agreement concluded between Remgro and Al Noor.

2. BACKGROUND

2.1 According to the circular, Mediclinic is a leading multi-country private hospital group and is the third largest listed acute hospital operator (by revenue) in the world (excluding the US). Mediclinic was founded in South Africa in 1983 and has since extensively grown its operations in South Africa and has also established operations in Namibia, Switzerland and the UAE. Today, Mediclinic operates 49 hospitals and two day clinics throughout South Africa and three in Namibia with 7,885 beds in total; Hirslanden (the Mediclinic Group's Swiss business) operates 16 private acute care facilities in Switzerland with 1,655 beds in total; and Mediclinic Middle East operates two hospitals and ten clinics with 382 beds in the United Arab Emirates. Mediclinic has been

listed on the JSE since 1986 and has had a secondary listing on the NSX since December 2014.

2.2 Founded in 1985, Al Noor is among the leading private hospital services providers in Abu Dhabi. In 2006, Al Noor was established in Al Ain followed by the inauguration of its unique, purpose-built hospital at Airport Road in 2008. It soon evolved into a state-of-the-art healthcare provider. It has since achieved remarkable progress in the healthcare industry and has recently expanded to Abu Dhabi's Western region, opening specialized clinics in Madinat Zayed, Mirfa and Mussafah, offering medical services as well as emergency referrals to its Abu Dhabi branches. It is affiliated with the United Kingdom's National Health Service and the Health Authority Abu Dhabi in addition to a number of international health institutions.

2.3 The scheme was proposed by the Mediclinic board of directors as an arrangement between Mediclinic and its shareholders, to which arrangement Al Noor was a party. In terms of the scheme, the shareholders of Mediclinic (other than Remgro) were entitled to elect what the parties have termed the Repurchase Option or the Exchange Option, in respect of shares they offered to Al Noor.

2.4 Under the Repurchase Option, the shareholders of Mediclinic undertook to subscribe for 0.62500 newly created Al Noor shares (rounded up or down to the nearest whole number of newly created Al Noor shares, as applicable, in respect of the entire holding of the relevant shares of Al Noor offered to the shareholders of Mediclinic in exchange for their

shares in Mediclinic), and Al Noor undertook to allot and issue such shares to the shareholders of Mediclinic (credited as fully paid, free from encumbrances and ranking *pari passu* with each other and all other shares held by the current shareholders of Al Noor).

2.5 Under the Exchange Option, Al Noor would on the date on which the scheme became effective, acquire ownership of the shares held by the shareholders of Mediclinic in Mediclinic for a consideration comprised and settled by the allotment and issue, by Al Noor to the shareholders of Mediclinic, of 0.62500 newly created Al Noor shares (rounded up or down to the nearest whole number of the newly created Al Noor shares, as applicable, in respect of the entire holding of relevant shares of Al Noor offered to the shareholders of Mediclinic in exchange for their shares in Mediclinic), credited as fully paid, free from encumbrances and ranking *pari passu* with each other and all shares held currently by the shareholders of Al Noor.

2.6 One of the features of the proposed scheme was that Remgro had agreed, subject to the scheme becoming operative, to subscribe for 72,115,384 newly created Al Noor shares at a fixed price of £8.32 per share to raise proceeds of £600 million, regardless of the outcome of the tender offer. In fact, certain shareholders of Al Noor, will exit their investment in Al Noor by way of a tender offer (share repurchase). Remgro will partly fund this process. In addition, a special dividend will be paid to the current shareholders of Al Noor. This too will be partly funded by Remgro.

2.7 We were advised that the executive director had, in terms of section 119(6) of the Act, granted the parties an exemption from the provisions of section 127(1) of the Act in connection with the above equity subscription by Remgro to partly fund the cash payments to existing shareholders of Al Noor. Accordingly, we were not requested to consider the effect of the proposed funding under section 127 of the Act.

2.8 The tender offer referred to above, was the offer by Al Noor to holders of Al Noor shares for Al Noor to cancel up to 74,069,109 of Al Noor shares for a cash payment of £8.32 per Al Noor share, subject to the scheme becoming operative and to the UK Court (in accordance with the UK Companies Act 1998) confirming the associated reduction of capital.

2.9 The special dividend referred to above entitled the current shareholders of Al Noor to receive a special dividend of £3.28 per share they held in Al Noor (or such other amount as may be agreed), conditional on implementation of the scheme. The special dividend was not payable on any newly created shares of Al Noor issued to the shareholders of Mediclinic pursuant to the scheme. The shares issued pursuant to the Remgro subscription did not entitle Remgro to a special dividend.

2.10 In explaining the tender offer and the special dividend, Mr Cilliers who appeared for the parties, stated that in order to achieve the desired relative values between Al Noor and Mediclinic, Al Noor will declare a special dividend to its current shareholders. In addition, Al Noor wished

to afford its shareholders the opportunity to partially exit their investment in Al Noor by way of a tender offer to be effected by means of a repurchase of their shares by Al Noor. To fund the tender offer and the special dividend, Remgro will subscribe for further shares in Al Noor. It is important to note that this subscription was effected by Remgro, not as a shareholder in Mediclinic, but rather as a subscriber for shares in Al Noor.

2.11 In addition to the subscription agreement concluded by Remgro and Al Noor for Remgro to fund the tender offer and the special dividend, Remgro and Al Noor concluded two further agreements between themselves, to the exclusion of other shareholders of Mediclinic. The agreements were the relationship agreement and irrevocable undertaking that Remgro will vote in favour of the scheme.

2.12 Regarding the relationship agreement, following the completion of the scheme, Remgro was expected to own between [41% and 45%] of the shares in Al Noor, such that Remgro would be a "controlling shareholder" of Al Noor for the purpose of the UK Listing Rules. As required by the UK Listing Rules, Al Noor and Remgro agreed the terms of the relationship agreement that would govern the ongoing relationship between them following the completion of the scheme, the principal purpose of which was to ensure that Al Noor was capable of carrying out its business independently of Remgro and its associates.

2.13 As a consequence of the implementation of the scheme, the listed shares of Mediclinic will be wholly owned by Al Noor, and Remgro will

be the largest shareholder of Al Noor. In addition, Mediclinic's listing on the main boards of the JSE [and NSX] will be terminated and all the newly created shares of Al Noor, issued pursuant to the scheme, will be listed on the LSE, and Al Noor will be listed on the main board of the JSE [and NSX] by way of an inward secondary listing.

3. THE CASE

3.1 As noted above, the board of Mediclinic proposed a scheme of arrangement between Mediclinic and its ordinary shareholders in terms of section 114(1) of the Act. The implementation of the scheme required, under section 114(1), the approval in terms of Part A of chapter 5 of the Act.

3.2 In terms of section 115(1) of the Act, a company may not implement a scheme of arrangement unless the scheme has been approved in terms of section 115, and to the extent that Part B and Part C of chapter 5 apply, the Panel has issued a compliance certificate in terms of section 119(4)(b) or exempted the scheme in terms of section 119(6).

3.3 The approval required in section 115 is by way of a special resolution that is passed at a general meeting of shareholders by persons that are entitled to vote at the meeting. In addition, section 115 requires sufficient persons to be present that will exercise, in aggregate, at least 25% of all the voting rights exercisable at that meeting (a quorum).

3.4 That said however, the provisions of section 115(4) of the Act have the effect of disqualifying votes of certain persons from being taken into count at the scheme meeting. This section reads as follows –

115(4) For the purposes of subsection (2) and (3), any voting rights controlled by an acquiring party, a person related to an acquiring party, or a person acting in concert with either of them, must not be included in calculating the percentage of voting rights –

(a) required to be present, or actually present, in determining whether the applicable quorum requirements are satisfied; or

(b) required to be voted in support of a resolution, or actually voted in support of the resolution.

3.5 According to the parties, the construction of section 115(4) connotes that the votes cast by the following persons will not be calculated in determining the percentage required to pass a special resolution and in determining a quorum –

3.5.1 an acquiring party;

3.5.2 a person related to such acquiring party; or

3.5.3 a person acting in concert with either the related person or the acquiring party.

3.6 We agree that this is the correct construction of section 115(4).

3.7 The parties raised two arguments in support of their claim that Remgro's vote can be taken into account in determining the percentage required to pass a special resolution and in determining a quorum. The first argument was raised on 26 November 2015 and the second was raised on 10 December 2015. It is important to note that the second argument was heard on a different day after we ruled against the parties in respect of their first argument.

First argument

3.8 At the centre of the parties' first argument was that a person must be an acquiring party in order to be disqualified from having its vote taken into account in calculating the percentage required to pass a special resolution and in calculating a quorum under section 115(4) of the Act. We agree with this assertion. We further agree with the parties that, as a matter of law, in the absence of an acquiring party the question of whether a person is acting in concert becomes irrelevant. We return to this point later as it forms the parties' second argument, and the reason the parties refused to raise the second argument on the first day of the hearing.

3.9 The parties asserted that Remgro was not an acquiring party as defined in the Act and as such it was entitled to vote its shares at a scheme meeting to approve the scheme of arrangement proposed by the board of Mediclinic. In the same breath, the parties concluded that given that

Remgro was not an acquiring party, the question of whether Remgro is acting in concert with Al Noor became irrelevant.

3.10 The parties asserted that an acquiring party is defined in section 1 of the Act to mean:

> *"acquiring party", when used in respect of a transaction or proposed transaction, means a person who, as a result of the transaction, would directly or indirectly acquire or establish direct or indirect control or increased control over all or the greater part of the company, or all of the greater part of the assets or undertaking of a company."*

3.11 The effect of the above definition is that in a scheme of arrangement the acquiring party is a person, who as a result of the scheme, will acquire or establish direct or indirect control or increase control over the scheme company.

3.12 According to the parties, Remgro would not, as a result of the transaction, acquire or establish control or increase its control over Mediclinic. The basis for this submission by the parties was that Remgro already controlled Mediclinic through its 41.9% shareholding. This control existed prior to the transaction and will continue, albeit in an indirect form, following the implementation of the scheme when Remgro holds between 41% and 45% of the shares in Al Noor. The essence of the parties' argument was that a move from direct control to indirect control would not constitute an acquisition or establishment or

increase of control as contemplated in section 1 of the Act, and as such, Remgro was not an acquiring party and was therefore entitled to have its vote taken into account for the purpose of the resolution and its shares calculated for the purpose of determining a quorum.

3.13 To us, the fundamental question was whether the reference to an acquiring party would exclude an immediate party in instances where there has not been change in the ultimate controller of the scheme company. This of course was based on the assumption that the meaning of control accords to the parties' understanding of this term. It must be noted that we do not seek to define control in this Ruling. Further, we are not making a finding on whether or not the parties are correct in asserting that Remgro controls Mediclinic. We are in the main concerned with testing the parties' notion of control.

3.14 Not surprising, the parties asserted that control referred or related to the ultimate controller, to the complete exclusion of the immediate party.

3.15 In support of this view, the parties submitted an opinion drafted by ENS Africa dated 16 October 2015, where the parties stated –

"6.4.1 in order to test the position by raising the converse position, if it was contended by a Regulator or other party that Remgro and not Al Noor controls Mediclinic after the implementation of the scheme it would be difficult for Remgro to argue against this and to contend that it does not control Al Noor and thus Mediclinic. Assume that Remgro currently held 10% of Mediclinic and by

virtue of the scheme increased its holding to 42% of Al Noor, it would be difficult for Remgro to contend that it had not acquired control of Mediclinic and thus could vote its shares in a scheme that could have that effect. In my view, the critical issue is the ultimate controlling position in Al Noor and thus Mediclinic. Had Remgro had less than 35% of Mediclinic to start with, I think that Remgro would have been the acquirer of control. Since it commences with 42% and ends with 42%, it is that factor that saves it from being classified as the acquirer of control and not the fact that Al Noor is the actual acquirer of control. Remgro is retaining as opposed to acquiring, control of Mediclinic.

6.4.2 *the mischief which section 115(4) aims to regulate is where a scheme has the effect of converting a non-controlling shareholder to a control position. This is not the case here;*

6.4.3 *by way of reinforcing the submissions as set out above it is instructive to refer to the provisions of section 123 of the Companies Act, which deals with mandatory offers. As set out above, the provisions of section 115 of the Companies Act deal with schemes of arrangement including a change of control pursuant to a scheme of arrangement. Section 115(4) regulates the right to vote when control is acquired pursuant to a scheme of arrangement. Section 123 of the Companies Act triggers a mandatory offer when there is an acquisition of control outside of a scheme of arrangement. It is of vital importance to note that control is not considered to be acquired for the purposes of*

section 123 if a party which acquires control pursuant to the acquisition possessed control prior to the acquisition. This demonstrates the policy of the legislature not to apply the mandatory provisions of section 123 or the regulatory provisions of section 115(4) in cases of acquisitions where the party which acquired control pursuant to an acquisition possessed control prior to the acquisition."

3.16 In addition, the parties argued at the hearing that the very structure of the transaction and the very nature of the scheme of arrangement is to allow for a reverse takeover where the vehicle holding the shares changes but control remains the same. In effect, the parties argued that the transaction ought to be perceived as an acquisition of Al Noor by the shareholders of Mediclinic, with Remgro retaining control of Mediclinic, indirectly.

3.17 Having concluded that Remgro is not an acquiring party, the parties submitted that Remgro's votes are not disqualified under section 115(4). They further asserted that since Remgro is not an acquiring party as defined, it was not necessary for them to consider the position of related parties and concert parties.

3.18 For the parties to succeed on this argument, we must agree that the only relevant form of control is the one that is held by an ultimate controller. A proposition that we simply cannot accept.

3.19 The difficulty that we find with the parties' proposition is that it seeks to limit control to ultimate control and that control could never be acquired by an immediate party even in circumstances where the immediate party is not controlled by the ultimate controller prior to the implementation of the transaction. It would be easier to accept the parties' proposition if both Al Noor and Mediclinic were in some form controlled by Remgro prior to the implementation of the scheme. For instance, if both Al Noor and Mediclinic were controlled by Remgro. In such a scenario Al Noor's acquisition of Mediclinic would have been a mere interposition of Al Noor between Remgro and Mediclinic, an internal restructuring if you may. That is not the case here, because Al Noor was not controlled by Remgro prior to the scheme, it will only be controlled by Remgro as a result of the scheme.

3.20 During the hearing, and in documents submitted leading up to the hearing, the parties submitted that Al Noor was merely being used as an instrument to give effect to the acquisition of Al Noor by the shareholders of Mediclinic. They made this argument in spite of the fact that Al Noor was a fully-fledged business that owned hospitals in the Middle East, listed on the LSE and has its own shareholders. The impression that the parties portrayed of Al Noor was that Al Noor was merely a vehicle to give effect to the proposed scheme. We find this difficult to accept.

3.21 Even if we were to accept the parties' proposition that Remgro did not acquire control on the basis that it simply moved from direct control to indirect control, this will have no bearing on our finding. The point is,

we cannot accept the proposition that Al Noor is not an acquiring party as defined in section 1 of the Act. We do not accept the proposition that Al Noor is a mere instrument used to give effect to the scheme. In our view, Al Noor is an acquiring party as it will acquire control of Mediclinic.

3.22 It could never be argued that Al Noor will not acquire control of Mediclinic in that Al Noor is not a shareholder in Mediclinic and will become the sole shareholder of Mediclinic following the implementation of the scheme. The fact that Al Noor will be controlled by Remgro does not detract from the fact that Al Noor will acquire control of Mediclinic. Even on the parties' version, they considered the transaction to involve the acquisition of Mediclinic by Al Noor.

3.23 In the relationship agreement concluded between Al Noor and Remgro, it is stated that -

> *"(A) On the date of this Agreement the Company and Mediclinic International Limited ("Mediclinic") jointly announced that they had agreed terms of a combination of their respective businesses, to be structured as an acquisition of Mediclinic by the Company pursuant to a scheme of arrangement under South African law (the "Combination")" (our emphasis)*

3.24 The reference to the company in the passage quoted above means Al Noor. It is clear from the above passage that when the parties conceptualised the scheme of arrangement and their relationship in

relation thereto, they did not envisage a case of a reverse takeover in terms of which Al Noor was simply being acquired by the shareholders of Mediclinic. This is not to be read to mean that the only form of control that is relevant for defining an acquiring firm is sole control. What the parties envisaged was the acquisition of Mediclinic by Al Noor, with Remgro remaining the largest shareholder of Mediclinic, albeit indirectly.

3.25 This conclusion is given further credence by the fact that when the parties were engaging the Executive Director of the Panel on this issue, they sent various letters including a letter dated 1 October 2015. In this letter, the parties stated that –

"7.1 Al Noor and Mediclinic wish to combine their respective businesses, such combination to be effected by way of a takeover by Al Noor of Mediclinic." (our emphasis)

3.26 Further, the combined circular to Mediclinic shareholders that was prepared by the parties to give effect to the proposed scheme, described the effect of the scheme as –

"5.1 The Scheme is being proposed by the Mediclinic Board as a mechanism to enable Mediclinic to become a wholly owned subsidiary of Al Noor." (our emphasis)

3.27 The passages quoted above clearly indicate that the parties, by their own version, considered Al Noor to be acquiring Mediclinic. Our

assessment of the nature of the acquisition by Al Noor of Mediclinic leads us to conclude that Al Noor is an acquiring firm as defined in section 1 of the Act as it will be acquiring sole control of Mediclinic as a result of the scheme.

3.28 When some of the passages quoted above were put to the parties at the hearing, the parties responded by saying –

"Adv. Cilliers: Let me answer that directly. What Section 115(4) deals with is voting rights and voting rights of an acquiring party or its concern. Now, an acquiring party is not a party who acquires something in the transaction. Just generally it is a party in respect of a transaction, it means a person who, as a result of the transaction, acquires control, not just acquires anything. We know that the control here was with Remgro directly and after the transaction remained with Remgro indirectly."

3.29 The parties further added that Al Noor's acquisition of Mediclinic was merely a step in a series of steps that would give effect to the shareholders of Mediclinic acquiring Al Noor. The parties stated that –

"Prof Katz: …Otherwise your question would be well founded and if you look at Lord Denning's judgment in Wallersteiner versus Moir, he said and where you look at a preordained series and the House of Lords approached the matter in the same way in Furniss and Dawson, in the

Commissioner for Taxes versus Burma Oil, they say where you've got a preordained series, you look at the beginning and you look at the end. You don't just extract one step. That's the answer to why you don't look at Al Noor."

3.30 We have difficulty accepting this explanation in that Al Noor is not just acquiring "anything", it is acquiring Mediclinic, it does not control Mediclinic, but as a result of the transaction it will control Mediclinic, in spite of whether or not ultimate control resides with Remgro. So it is incorrect to reduce Al Noor's role in the proposed transaction to a mere step in a series of transactions, as in our view (not just our view but the views of the parties as reflected in the letter dated 1 October 2015, the relationship agreement and the circular), is the very essence of the transaction. At the very least, the shareholders of Mediclinic will acquire Al Noor on the condition or understanding that Al Noor will acquire Mediclinic.

3.31 It is worth pointing out that the competition law regulators in South Africa and elsewhere have dealt extensively with matters relating to *acquisition or establishment of control* in the context of acquisitions. In South Africa, the Competition Appeal Court in *Distillers Corporation (South Africa) Limited and other v Bulmer (SA) Proprietary Limited and other*[1] rejected the notion that control is unitary in nature. Davis JP, in that case was not convinced that control could be limited to ultimate control and as such, rejected this notion. He noted that it would

[1] Case no. 08/CAC/MAY01

compromise the mandate of the authorities if control was narrowly conceptualised. We find ourselves faced with a similar problem where a narrow definition of control will limit the mandate of the Panel. For these reasons, we rather err on the side of caution.

3.32 Having held that Al Noor is the acquiring party as defined in section 1 of the Act, the only question that was left for us to answer was whether Remgro was acting in concert with Al Noor.

3.33 At the hearing we requested the parties to deal with the question of whether Remgro was acting in concert with Al Noor. The parties submitted that the question was irrelevant as it was merely hypothetical in light of the fact that in their version there is no acquiring party and in the absence of an acquiring party there could not be a concert party. This meant that we had no other version of the parties in this regard other than the papers submitted by the parties to the Panel. The fact that the parties did not raise the concert party argument as an alternative, we had no choice but to find against them. It was at this point that the parties requested to be heard on the second argument. We reconvened on 10 December 2010 to hear the second argument, but we had concerns on whether or not we were *funtus officio* and as such we could not hear the second argument. We requested that the parties, in addition to the second argument, to address us on whether or not we could hear the second argument.

Funtus officio

3.34 Having held that Al Noor is an acquiring party and that the notion of control cannot be limited to the ultimate controller, what was left for us to decide was whether or not Remgro was acting in concert with Al Noor. We were of the view that Remgro was acting in concert with Al Noor based on the written submission of the parties provided to the Panel.

3.35 Although during the hearing of 27 November 2015, we had agreed that we would hear the parties if any further arguments were required, at that time we felt that it was not necessary to hear any further arguments as the written submissions were conclusive on this point. However, because we had agreed to hear the parties should further submissions be necessary, we agreed to hear the second argument, but first we had to be addressed by the parties on the issue of *functus officio.*

3.36 The parties raised various points in support of their argument that we were not *functus.*

3.37 The first point was that our decision was not final on this point. It was only final in relation to the first argument relating to control/acquiring party. The parties expressed that they certainly thought that they would have an opportunity to make the second argument. The parties pointed out that the fact that we did not extend an opportunity for them to argue the second argument, boiled down to a misunderstanding between ourselves and them.

3.38 The parties submitted that when they refused to deal with the second argument at the hearing when we asked them to address us, at that time they felt that the second argument would have been hypothetical. In any event, they felt that they had reserved the opportunity to address us on this point at a later stage should we find against them on the first argument. The parties stated that they did not draw our attention to the second argument because they deferred the opportunity. The parties further argued that even in our assessment on whether or not Remgro was a concert party, we did not hear them on the fundamental point on which their entire argument rested in relation to the meaning of "*act in concert*" under the Act, and because we did not hear them on this point and that none of the documents submitted to us thus far addressed the point they would have wished to raise, meant that the matter was still left open and therefore our decision was a mere indication of our view in the absence of their complete submissions on the second argument. Therefore, on these bases, this matter was never concluded and was in fact left open. We are therefore not *functus officio* in respect of the second argument, they concluded.

3.39 The second point that the parties raised was that in instances where the Panel has been requested to consider a point of law that falls outside part B and C of Chapter 5 of the Act and the Takeover Regulations, the Panel's decision in respect thereof is merely advisory in nature and as such has no binding effect. The parties argued that the powers of this Panel appear in section 119(6) where the Panel can exempt a party. The Panel can exempt somebody from complying, but the Panel's power to exempt is only in respect of matters falling under part B and C

of Chapter 5 of the Act and the Takeover Regulations. Therefore, the Panel cannot exempt any person from part A of the Act, and section 115 is in part A of the Act and not part B and part C of Chapter 5 of the Act. Accordingly, rulings of the Panel in respect of matters that are outside part B and part C of Chapter 5 of the Act are merely advisory in nature. They further submitted that because our decision in respect of whether or not Remgro's vote could be counted appears in section 115 of the Act, our decision was advisory in nature, as only a court can make a binding decision on section 115. The parties' argument was that they came to us for good practical reasons only as they seek the opinion of the Panel and this opinion of the Panel is not determinative legally, because the Panel does not have the power to change the law or to exempt parties from the law on matters that appear in part A of the Act.

3.40 The parties argued that, in essence, it made no difference whether we made a ruling whichever way in respect of section 115 on the basis that 115 falls outside part B and Part C of Chapter 5 of the Act. The Panel, argued the parties, is not capable of bringing a party inside section 115, and on the same token, we cannot declare a person to be outside this section. Therefore, whether we hold a view that Remgro is a concert party and its votes cannot be counted for the purpose of establishing a quorum and for passing a special resolution, carried no legal weight.

3.41 In emphasis of this point, the parties argued that had they approached us seeking a compliance certificate before they could implement the scheme of arrangement then our decision would carry legal weight and

would be binding. However, the question before us was not that of issuing a compliance certificate, but rather that of determining whether or not Remgro is a concert party, a question that falls outside part B and part C of Chapter 5 the Act. The parties' interest in persuading us to find in their favour is to ensure that they receive a compliance certificate ultimately, so that they may implement the scheme of arrangement.

3.42 The parties argued that if there was to be a dispute between ourselves and them and the dispute resulted in us not issuing a compliance certificate ultimately, the parties would have an option of going to court and the court will not be reviewing our decision because our decision would merely be advisory. The court would simply make a declaratory on whether or not the parties fall within or outside the provisions of section 115 of the Act. Meaning that this matter would be independently decided by a court.

3.43 The third point raised by the parties on the question of *funtus officio* was that in instances where an administrative body is vested with powers which can create rights and duties, then that power ordinarily can only be exercised once, because the legislator would have endowed that body with the power to make a decision. The parties submitted this point in building further on their view that any decision we take that relates to a section of the Act that falls outside part B and part C of Chapter 5 of the Act was merely advisory. They submitted that because our decision is advisory in nature, it does not create any rights or duties. Therefore, we cannot white wash the parties if they are

outside the section and we cannot forbid them if they are inside the section. Therefore, the ruling did not affect their legal rights.

3.44 The fourth point submitted by the parties was that no third party was prejudiced by us hearing the second argument. Even if a party were to challenge the fact that we reheard this matter, that party would not challenge our decision to rehear the matter, but would most likely challenge the Executive Director's decision to issue the compliance certificate. In other words, grounds for raising any challenge could not be on the basis of what we think about the second hearing. The grounds for the challenge would be an interpretation of section 115(4) read with the definition of "act in concert". It will be at that point when the court decides whether the parties are inside the law or outside the law. According to the parties, given that our view is only advisory in nature in respect of the point raised, it would not matter for the court whether this hearing took place or not. Further, even if the challenge were to be on our decision to issue the compliance certificate, a court's decision would relate to whether Remgro's shares qualify to be counted or not. This meant that although the issuing of a compliance certificate was an important and practical step on whether or not the parties will implement the transaction, the ultimate question would be whether Remgro was inside or outside section 115(4) of the Act.

3.45 Finally, the parties submitted that it is usually when the rights are granted and not when the rights are refused that one becomes *functus* as it is considered unfair to take rights away after they have been initially granted. Therefore, when we made a decision that Remgro's

share cannot be calculated in determining quorum or a special resolution, we were not granting rights. Accordingly, our decision did not fall within the ordinary circumstances of decisions that are *functus officio*.

3.46 Having heard the parties, we are of the view that because of the misunderstanding, for which the parties have apologised, no third party was prejudiced and the fact that we did not hear the point on which the parties would have relied upon in relation to the second argument, we agree with the parties that we are not *functus officio.* It is not necessary for us to deal with the other points raised by the parties in respect of this question in particular the argument that deals with the weight and perceived limitation of our rulings.

Second argument – concert parties (the meaning of “for the purpose of”)

3.47 Having concluded that Al Noor is the acquiring party, the only question that needed to be answered was whether Remgro, given the fact that it signed a relationship agreement and a subscription agreement with Al Noor, acted in concert with Al Noor. The relevance of this question is brought to bear by the provision of section 115(4) of the Act, which disqualifies the inclusion of the voting rights in the calculation of the percentage of the voting rights necessary to establish a quorum and to pass a special resolution. Further arguments and written submission were submitted by the parties in respect of this question.

3.48 The meaning of “act in concert” appears under section 117 of the Act and is defined to mean –

> *“117(1)(b) “act in concert” means any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate for the purpose of entering into or proposing an affected transaction or offer.”*

3.49 Mr Cilliers submitted that the definitions of “act in concert” under section 117 can be broken down into six components. The first component is that there must be an action. The second component is that there must be an agreement between two or more persons. The third component is in terms of which any of them. The fourth component relates to co-operates. The fifth component is *for the purpose of*, and the sixth component relates to entering into or proposing an effected transaction.

3.50 The parties’ submission focused primarily on the fifth component, “for the purpose of”. The parties acknowledged the existence of the first two components, being the action and the agreements. They admitted that the subscription agreement and the relationship agreement met the agreement component, and that the action is pursuant to those agreements. But at the centre of the argument is that although the action is pursuant to the agreement, the purpose does not link directly to the remainder of the components that form the definition of “act in concert”. The parties’ submission is that a proper construction of the meaning of “for the purpose of” is narrow in application and it takes the same explanation and interpretation as it was under the old Securities

Regulation Panel (“SRP”) rules. In this regard, the parties relied on cases that were decided on the old SRP rules.

3.51 The parties are indeed correct that the definition of “acting in concert”, particularly the meaning of “for the purpose of”, has not changed its legal application when the new Act was introduced, therefore the parties are correct in relying on previous decisions in dealing with the meaning of the phrase “for the purpose of”. Having said that, under the old SRP rules, the phrase ‘for the purpose of’ was limited only to the acquisition of control. Under the new Act, this phrase is extended to include entering into or proposing an affected transaction. Nothing turns on this point, but it is worth mentioning in order to give the correct effect introduced by the new Act.

3.52 The parties submitted that the use of the phrase “for the purpose of” in the definition of “act in concert” must be understood as relating to an objective of acquiring control. In other words, if the purpose of the agreement and the action pursuant to that agreement do not directly and immediately point to an objective of acquiring control, then, there is a break in the chain and that will mean that the purpose that the parties are faced with is not the same purpose as contemplated under section 117.

3.53 For example, a bank extends a loan to a company and take shares in that company as security for the loan. Assume thereafter the company defaults on the loan and the bank now exercises its right over the securities in question. Assume that the securities in question would

give the bank 35% or more of the voting rights in that company, it could never be said that the purpose of acquiring those securities is for the bank to acquire control of the company, and therefore the bank would not be compelled to make a mandatory offer under section 123 of the Act. Reason being, the direct and immediate purpose under such circumstances, the parties argued, is the protection of the loan advanced by a bank. Therefore, the fact that a bank will hold 35% of the shares in the company would not detract from the fact that the purpose is not to acquire control or enter into an affected transaction.

3.54 We accept the example given as sound and demonstrative of the limits of the phrase “for the purpose of”. It is clear to us that this phrase is not to be applied beyond its immediate or direct purpose. When one builds up the six components that constitute the definition of “act in concert”, such a build-up or construction shows that the meaning of “for the purpose of” is pointed and limited in its scope. It is therefore important to realize that a single action can give rise to multiple purposes and the functions, and we must be mindful to identify the intended purpose from the context in which it is used and align it to the context under section 117. The interpretational inquiry under the current circumstances is that there are multiple purposes and as such it is important that we keep in mind that the Act advocates for a narrower meaning to the exclusion of a wider meaning. In fact, we are of the view that the very essence of section 117 particularly the meaning of “for the purpose of” bears a narrower meaning.

3.55 In support of this point, the parties argued that the definition deals with action which is pursuant to an agreement. This is an indication that the action must flow from, or at least follow, the objective contained in the agreement, otherwise it won't be pursuant to an agreement or to that agreement. We accept this view as in assessing the second and third components, these components, being the agreement in terms of which the parties co-operate, connote that the corporation must follow the provisions of the agreement. If the corporation does not follow the provisions of the agreement, the corporation is not in terms of the agreement and therefore the corporation falls outside the agreement for the purpose of section 117.

3.56 In our view, for co-operation to be of a nature contemplated under the Act, the Act implies that the parties' must at the very least know what is required or expected of each of them, therefore any distant objective does not align with the construction of the definition of "act in concert" under section 117. In fact, the treatment of all the components must be directional, as they are pointing towards an ultimate target, an identifiable target pursuant to an agreement in terms of which co-operation is for the purpose of, indicates that the meaning of, "for the purpose of" is a narrowly directed phrase.

3.57 In addition, when conjoining all these phrases of "pursuant", "in terms of which" and "co-operate", all show that the purpose is a specific co-operation provided for in a specific agreement in terms of the specific terms of the agreement. Accordingly, the test is not that of an 'effect' that may lead to an acquisition of control, rather the test focuses on the

direct and immediate purpose of the actions which are pursuant to an agreement in terms of which parties co-operate.

3.58 This interpretation is settled in our law, but it becomes necessary that we go through the aforesaid exercise for the purpose the new Act and for us to assist the Executive Director. In *Gardner v Margo,* the Supreme Court of Appeal stated that –

> "*In Lipschitz NO v UDC Bank Ltd, this court appears to have accepted the distinction drawn by Schreiner JA in Gradwell (Pty) Ltd v Rostra Printers Ltd between the 'ultimate goal' of the transaction in question and its 'direct object, and to accept that it is only the direct object of the transaction that is relevant. If the direct object is not the provision of financial assistance by the company for the purpose of or in connection with a purchase of its shares, then it is irrelevant that the ultimate goal of the transaction was to enable a person to purchase such shares."*

3.59 In the aforesaid case, the Supreme Court of Appeal was dealing with financial assistance under section 38 of the old Act, the relevant parts of which stated –

> '*No company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company....*'.

3.60 This concept can be quiet illusive and there are obviously always many purposes down the line and it is therefore a question of focus.

3.61 We then considered the background of the agreements in order to ascertain whether the purpose relates to acquisition of control or entering into or proposing an affected transaction. The facts seem to have unfolded in the following fashion. When the shareholders of Mediclinic wanted to acquire Al Noor, Al Noor wanted to give some of its shareholders an exit if they wanted, hence the tender offer and the special dividend. If it was not for that, Remgro would not have had an agreement with Al Noor. Al Noor wished to enter into a scheme of arrangement by becoming a party thereto where it will issue shares and in returned will acquire Mediclinic's shares. For Al Noor to become party to the agreement it had some shareholders who wanted to exit. Al Noor therefore needed to see them off. Al Noor was not prepared to be a party to the scheme of arrangement unless it could first see off some of its shareholders who wanted to exit. This means that the purpose for Remgro coming at all was the restructuring of Al Noor and not the restructuring of Mediclinic. Therefore, the agreement between Remgro and Al Noor had an entirely different purpose which was the restructuring of Al Noor's shareholding where Al Noor simply wished to see off some of its shareholders.

3.62 This means that, had Al Noor not be faced by potential shareholders that would have wished to exit, Al Noor would not have concluded the subscription agreement with Remgro. Therefore, the real purpose of

the Remgro and Al Noor subscription agreement was simply to fund Al Noor, for Al Noor to get rid of those shareholders who wanted to exit. This purpose cannot be extended to include the scheme of arrangement between the shareholders of Mediclinic and Al Noor. Based on this point, if a choice has to be made between a narrow and a wide assessment of the meaning of 'for the purpose of', it is clear to us that not only does legislation call for the narrow interpretation, but the wider purpose becomes less predictable as it will include a whole host of other purposes which will make law unpredictable and uncertain.

3.63 The parties' submission is simply that the proposed scheme of arrangement is between Mediclinic and its shareholders to which Al Noor becomes a party. That is the primary arrangement that the scheme of arrangement envisages. Al Noor becomes a party to the scheme mainly due to the fact that certain of its shareholders wish to exit. This however does not detract from the fact that the scheme of arrangement is between Mediclinic and its shareholders with Al Noor as a party. Remgro is not a party to the arrangement between Mediclinic and Al Noor. Remgro, like all the shareholders, is a party to the scheme of arrangement, but its role is to vote at the scheme. In fact, Remgro is not doing anything else to facilitate the scheme between Mediclinic and its shareholders. Therefore, it does not co-operate with Al Noor for the purpose of entering into or proposing a scheme of arrangement. Having said that, it could never be argued in this case that the ultimate purpose or objective of the role played by Remgro is to effectively assist with the acquisition of control over Al Noor. However, the test that is necessary is not to consider the ultimate purpose, but

merely the immediate purpose as it was advocated in the *Lipschitz NO v UDC Bank Ltd*[2] case, therefore we steer away from ultimate purpose and seek to find the immediate purpose.

3.64 The very essence of the subscription agreement is that Mediclinic wanted to enter into an agreement with Al Noor and use the scheme of arrangement as the vehicle, but Al Noor is faced with a situation of having to deal with recalcitrant shareholders. Therefore, for Al Noor to become party to the scheme, between Mediclinic and its shareholders, it first has to get rid of the recalcitrant shareholders, and therein comes Remgro. The argument here is that the agreement between Al Noor and Remgro is an agreement to facilitate the exit of unhappy shareholders, and it is not to bring about a scheme of arrangement.

3.65 Remgro's role is that it is not a party with whom Al Noor is contracting for the purpose of its scheme, Mediclinic is that party. This however does not mean that Remgro is not an interested party as it has a big share in Mediclinic. Therefore, the manner in which the transaction is structured is that before Al Noor becomes party to the agreement between Mediclinic and its shareholders, Remgro agreed to assist Al Noor to see off some of its shareholders. Hence, Remgro funds Al Noor by way of a share subscription. Once the funds are received by Al Noor, it is for Al Noor to pay the special dividend and to allow for the tender offer as an option which will then allow the restructured Al Noor to become party to the agreement between Mediclinic and its shareholders.

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[2] 1979 (1) SA 789 (A)

3.66 We accept that it could never be said that the parts of the entire proposed scheme of arrangement do not connect. The reality is that they do, however the focus is on the agreements, the purpose of which is to bring about or propose an affected transaction in the form of the scheme of arrangement. Therefore, the funding by Remgro which allows Al Noor to see off its shareholders, emanates from an agreement that serves a different purpose to the agreement that gives an effect to an affected transaction. As indicated, under the Act an affected transaction is not only an affected transaction in instances where control changes, but also in instances where a transaction constitutes an affected transaction as defined in section 117 of the act.

3.67 Our view is that the new regime of Takeover Regulations does not alter this position. When one considers the definition of affected transactions under section 117(1)(c) of the Act, the Act deals with various forms. The form of an affected transaction that is relevant for the purpose of this case is the scheme of arrangement between a regulated company and its shareholders. The other forms of affected transactions listed in section 117 do not arise for the purpose of this case. In light of the fact that we hold that unless a party acts for the purpose of either acquiring control or acts for the purpose of entering into or proposing a scheme of arrangement, such a party will not be acting in concert for the purpose of section 117 of the Act and will therefore not be bound by the limitations of section 115(4) of the Act.

3.68 The scheme of arrangement is a form in which a transaction may be implemented and as indicated, it is one of the listed forms of affected transactions, and often arises in instances where a party wishes to restructure the arrangement between a company and its shareholders. It is clear from the wording of the Act under section 117 that the scheme of arrangement is a scheme as defined or set out in section 114 of the Act and may be effected in many ways, as set out in that section. The nature of the scheme of arrangement is pertinent to this case, in that, the scheme is often implemented through an exchange of shares as is contemplated in this case. The shareholders of Mediclinic will transfer their shares to Al Noor in exchange for shares in Al Noor. For Remgro to have acted in concert with Al Noor, the subscription agreement concluded between them must give rise to an affected transaction in order to make Remgro a concert party. That is not the case here.

3.69 In our view, the agreement concluded between Al Noor and Remgro relates to the payment or the funding that will see off certain shareholders of Al Noor. That agreement does not have a purpose of giving effect to the scheme. Putting the above differently, it can be argued that when Al Noor sought to see off certain of its shareholders, it had a different purpose compared to the purpose that the shareholders of Mediclinic had when giving effect to the scheme. In this case, the purpose relating to the funding is far too remote from the purpose relating to the scheme.

3.70 It may be argued that this approach seeks to emphasize form over substance. That is not the case. This approach seeks to identify the direct purpose of the action that gives rise to an agreement. It therefore becomes important to identify the purpose to which the agreement relates and not confuse same with the overall objective especially when that agreement does not give direct effect to that objective.

3.71 We considered the two agreements, individually and, with greater detail. Firstly, the relationship agreement concluded between Al Noor and Remgro has merely given rise to by the listing rules in England. It does nothing more than to comply with the legal requirements under the listing rules in that country. In addition, it does not create any special relationship between Remgro and Al Noor and it is required for all entities that hold 30% or more shares of an entity that is listed in the United Kingdom. Therefore, the relationship agreement bears no relevance to the question of whether Remgro is a concert party.

3.72 When considering the subscription agreement, paragraphs 3.1 and 3.2 state as follows:

> *"3.1 subject to the satisfaction of the conditions, the company shall allot the subscription shares to the subscriber and issue the subscription shares to the subscriber; and*
>
> *3.2 the subscriber shall pay or procure one of its affiliates to pay the subscription price."*

3.73 It appears to us that this forms the very basis of the agreement. It simply states that Remgro will subscribe for shares and Al Noor will allot and issue same to Remgro. Viewed from this perspective, the purpose of the subscription agreement is not to bring about the scheme of arrangement. The agreement stipulates that a scheme must happen for the subscription to happen but the purpose of the agreement is not to bring about a scheme, but rather the subscription for shares. This is not to mean that there is no connection between the subscription for shares and the scheme of arrangement. A connection or a condition is not the same as the purpose, especially in light of the fact that we have concluded that the purpose must be given a narrow meaning and must be limited to a direct purpose to the exclusion of an ultimate purpose.

3.74 It appears to us that, although we are bound by previous decisions on the issue of a narrow definition of the meaning ‘of the purpose of’, we endorse this approach in order to avoid an open ended situation where a fundamental right of the shareholders, such as a right to vote, could be easily compromised.

3.75 In this case, it is clear that the scheme of arrangement has three parties namely, Mediclinic, the shareholders of Mediclinic and Al Noor. In respect of the purpose between Remgro, the other shareholders of Mediclinic and Mediclinic, this relationship does not need any agreement for it to exist. What the scheme purports is that they will have to go and vote at the meeting. This means that they have their own purpose which is to acquire the Al Noor shares which will give them a merger and a broader asset base.

3.76 It can therefore be argued that different relationships and different agreements have different purposes, and it is important to deal specifically with the purpose that flows from that agreement which gives rise to an affected transaction or an acquisition of control. Therefore, one will have to be mindful of attributing a purpose contemplated in one agreement to the overall objective of the transaction. It would indeed be unfair, and it would complicate commercial transactions, if the definition of a purpose were to be widened beyond the direct purpose as this will result in instances where parties are dragged into purposes that they themselves are not party nor wished to be party.

3.77 In our view, this approach will not make it easy for parties to conduct their affairs in a manner that will conceal the true purpose in order to avoid being caught by section 117. In our view, even if a transaction were to have a number of steps or it were to be implemented in phases, it ought to be relatively easy to identify the purpose of each and every agreement that gives effect to such steps or phases. For instance, in the case of subscribing for shares, an agreement which gives rise to a share subscription and allotment thereof would be easy to identify. In addition, an agreement that gives rise to a scheme of arrangement or any form of an affected transaction will also be easy to identify. In a case like this, we have different steps that involve different parties, each with its own purpose, and do not permit for the purpose relating to the share subscription agreement to be brought within the ambit of acting in concert.

3.78 We accept that without the share subscription agreement, the transaction cannot happen because Al Noor's shareholders require a cash injection to facilitate their exit. Otherwise, the shareholders of Al Noor, would not be prepared to enter into the scheme of arrangement. Therefore, the share subscription agreement is an important agreement that will facilitate the transaction. It can be said that there is a clear causal connection between the exiting of the shareholders of Al Noor which is funded through the subscription by Remgro and the scheme. However, the fact that the steps are inter dependant or various aspects of the transaction are conditional on each other for the transaction to happen, it cannot justify the linking of the purpose of one agreement to the entire transaction. The approach that we believe is correct is to identify the purpose of each agreement.

3.79 We considered whether the prudent approach would not be to ascertain from the surrounding circumstances the purpose of the agreement especially in light of the fact that section 1 of the Act defines the agreement broadly to include a contract, or an agreement or understanding between two or more parties that purports to create rights and obligations between or among those parties. In our view, although 'agreement' is given a broad definition, once an action has been identified to give rise to an agreement as defined, the purpose must directly flow from that agreement. This is in line with the wording of the Act and its definition of "act in concert". This means that the action appears to be the only aspect or component of the definition that could be drawn from surrounding circumstances. Once that action has been identified as giving rise to an agreement, then one cannot move

beyond the boundaries of the agreement in ascertaining the direct purpose of that agreement. In this case, the agreement has been identified as the share subscription agreement (and the relationship agreement), it was therefore not necessary for us to consider the action in relation to the surrounding circumstances.

3.80 Earlier we made reference to transactions that have been structured in such a way that they are implemented through various steps or phases. It is important when considering the direct purpose, to assess each stage and the agreement in respect thereof and see which purpose flows from that agreement. One of the things that will be helpful in ascertaining whether an agreement is a true agreement or a sham will be to identify the rights and obligations created by that agreement, particularly the risk that the parties to that agreement assume.

3.81 We have already concluded that the mere fact that agreements are conditional upon each other, does not give rise to the same purpose or to a purpose that runs across the entire transaction, especially in circumstances where there are different parties that operate at different levels of the transaction. This is not to mean that the transaction cannot have one purpose that will give effect to an affected transaction.

3.82 Our concern is that each transaction must be assessed on its own merits. It would be easy for parties to conflate purposes and say that all the purposes joined together give rise to a scheme and therefore the parties are concert parties. This is the very approach against which we guard. In this case, it is clear that Al Noor needed to restructure itself

so that its shareholders would be prepared to go into an agreement of which the purpose was the scheme of arrangement. This means that the share subscription agreement had a different purpose and that purpose was not to bring about a scheme of arrangement, but rather to assist Al Noor with the structuring. Which means that the funding by Remgro of the special dividend and the tender offer was merely to assist Al Noor to get rid of its recalcitrant shareholders.

3.83 As indicated, if one were to cut through all the various parts of the proposed transaction and look at the commercial substance of the transaction, one will see that there are various transactions. These transactions are however borne out of the same opportunity. From the role players' perspective, they see different opportunities and they each seek different outcomes. The one player is Al Noor, the other is Remgro, and the other is Mediclinic and its shareholders. The transactions include the share exchange transaction, which in truth is the merging of the two entities, Al Noor and Mediclinic, this transaction made it possible for certain shareholders of Al Noor to see an opportunity to exit the investment in Al Noor at a very attractive price. From that set of circumstances an opportunity for funding arose where Al Noor sought to satisfy those shareholders that needed to exit by requesting Remgro to make a further investment in Al Noor. That opportunity is the real purpose of the subscription agreement.

3.84 It can therefore be said that from Remgro's perspective, the opportunity to subscribe for further shares allow Remgro to make a further investment, an opportunity which differs from those shareholders of

Mediclinic that are simply swopping their shares in giving effect to the scheme. There is no question that the subscription for further shares by Remgro has the effect of Remgro being an enabler, both in terms of the Al Noor exit which relates to the exiting of Al Noor's shareholders through a tender offer and the declaration of the special dividends and, in terms of the share swop, but the primary purpose is for Remgro to make additional investment so that it has a larger investment by virtue of being a shareholder in a larger group.

3.85 On aforesaid basis, we are of the view that Remgro is not a concert party for the purpose of section 117(1)(c) of the act.

4. FINDINGS

We find that –

4.1 control cannot be limited to an ultimate controller;

4.2 Al Noor is an acquiring party for the purpose of section 1 of the Act;

4.3 the Special Takeover Committee is not *Funtus Officio*; and

4.4 Remgro is not acting in concert with Al Noor,

accordingly, Remgro's shares qualify to be counted at the Mediclinic scheme meeting for the purpose of establishing a quorum and passing a special resolution.

Mr Andile M. Nikani

Concurring:	Mr Ebi Moola and Mr Sandile Siyaka
For the Applicants:	Mr Fanie Cilliers SC (with Professor Michael Katz of ENS Africa). Mr Cilliers SC is instructed by Cliffe Dekker Hofmeyr. Also present was Webber Wentzel, Rand Merchant Bank, and Roth Childs (the UK office)