TAKEOVER SPECIAL COMMITTEE

THE TAKEOVER REGULATION PANEL

COUNTRY BIRD HOLDINGS PROPRIETARY LIMITED Applicant

and

SOVEREIGN FOOD INVESTMENTS LIMITED Respondent

Panel:	*Mr. Nano Matlala (Chairperson)*
	Prof. Stephanie Luiz
	Mr. Ebi Moola
	Mr. Andile Nikani
Heard On:	*07 November 2016*
Ruling Issued On:	*08 November 2016*

RULING - SECTION 117(1)(C)(V) OF THE COMPANIES ACT

---

1. **INTRODUCTION**

1.1 This was an application brought by Sovereign Food Investments Limited ("**Sovereign**"). Sovereign sought a ruling under section 119(1) of the Companies Act 71 of 2008 (the "**Act**") from the Executive Director

of the Takeover Regulation Panel. The ruling sought was for the Executive Director to determine whether or not the offer made by Country Bird Holdings Proprietary Limited ("**CBH**") to the shareholders of Sovereign had lapsed and, as such, was not valid as to acceptance.

1.2 CBH made an offer to the shareholders of Sovereign to acquire all of their shares, other than the shares already held by CBH and its concert parties, under section 117(1)(c)(v) of the Act (the "**offer**"). Sovereign's assertion was that the offer had lapsed due to the non-fulfilment of a condition precedent to which the offer was subject. CBH opposed the application on the basis that it had validly waived the condition precedent resulting in the offer being unconditional as to acceptance.

1.3 It was common cause that, should the offer lapse because of the non-fulfilment of one or more of the suspensive conditions, then the share certificates and any document evidencing title to shareholding would be returned to their respective holders. In terms of the Offer Circular sent to the shareholders of Sovereign detailing the offer (the "**circular**"), CBH could not implement the offer until such time as the suspensive condition to which the offer was subject had been fulfilled.

1.4 The Executive Director chose not to rule on the matter, and referred the matter to this Special Takeover Committee (the "**committee**"), as he was entitled to do so in terms section 202(3)(a)(ii) of the Act. Accordingly, the matter came to this committee for the committee to deal with the question posed. The committee supported the Executive Director's decision to send this matter directly to it due to its complexity.

1.5 The committee heard this matter on 7 November 2016, and gave its ruling in favour of Sovereign on 8 November 2016, based on the reasons set out hereunder.

2. BACKGROUND

2.1 In terms of the circular, CBH was incorporated in 2005 by Kevin James and listed on the Johannesburg Stock Exchange (the "**exchange**") in 2007. CBH was delisted from the exchange in 2014. CBH is an agricultural firm that is engaged in the integrated poultry and stock feed business in South Africa. It also operates in seven other countries in Africa namely, Nigeria, the Democratic Republic of Congo, Zambia, Botswana, Swaziland, Mozambique and Zimbabwe.

2.2 It operates breeder sites, hatcheries, broiler sites and processing plants. It provides frozen chicken under the brand name, Supreme. In addition, it produces a range of animal feed products for chickens, dairy and beef cattle under the NUTRI Feeds brand name. Further, CBH is active in the production and sale of day broilers and hatching eggs, broiler genetics and broiler breeding production and the distribution of frozen products to the retail and wholesale markets.

2.3 With regard to Sovereign, and based on publicly available information, Sovereign is in the chicken farming business and operates from the Eastern Cape, dating back to 1948. It started as a family business in the Rocklands Valley near the town of Uitenhage. Over time, it grew

into a fully-fledged and integrated poultry business. To this day, the entire operation is still based in and around the Rocklands and Uitenhage region. In 1991, Sovereign was sold to an investment group and subsequently listed on the exchange. In 2007 it was elected as one of the Top 20 JSE-listed companies in South Africa. Currently, Sovereign remains one of the major poultry producers on the African continent, and the 4th largest producer in South Africa.

2.4 CBH made a general conditional offer, as contemplated in section 117(1)(c)(v) of the Act, to purchase all of the shares held by each shareholder of Sovereign, other than those shares already held by CBH and its concert parties, on the terms and subject to the suspensive conditions set out in the circular. The purchase consideration payable by CBH to the shareholders of Sovereign for every share disposed of by such shareholders was R9.00 *cum* any dividends paid from the date on which the Firm Intention Announcement was made. The shareholders could elect to accept the offer in whole or in part.

2.5 The shareholders of Sovereign were notified of CBH's offer in the Firm Intention Announcement made by CBH on 6 July 2016. The offer was open for acceptance from 09:00 on Monday, 11 July 2016 and remained open until closing date. Closing date was defined in the circular to mean 10 business days after the date of the fulfilment of the last condition precedent, unless the shareholders are notified to the contrary. CBH reserved the right, in its absolute and sole discretion, to extend the offer period. It however reserved this right subject to the provisions and requirements of the Act and the takeover regulations.

2.6 It is common cause that the offer was an "*affected transaction*" as defined in section 117 of the Act and, as such, regulated by the Act and the takeover regulations.

2.7 It is worth pointing out from the onset that, in terms of the circular, the purpose of the circular was to –

2.7.1 set out the terms on which CBH made the offer to the shareholders of Sovereign for CBH to purchase all or some of their shares;

2.7.2 provide the shareholders of Sovereign with relevant information on CBH; and

2.7.3 inform the shareholders of Sovereign of the manner in which the offer may be accepted and the manner in which the offer will be implemented.

2.8 The circular clearly spelled out the fact that the offer was subject to the fulfilment of the following suspensive conditions –

2.8.1 the approval by the relevant competition law regulators of CBH acquiring control of Sovereign;

2.8.2 Sovereign and its shareholders not implementing any transaction or similar transactions in any form as contemplated in the

circulars issued by Sovereign to its shareholders dated 11 December 2015, 24 February 2016 and 24 June 2016;

2.8.3 the offer would only become unconditional once sufficient acceptance has been received from shareholders such that CBH, together with its concert parties, hold at least 50% plus 1 shares of the total issued share capital of Sovereign after the implementation of the offer; and

2.8.4 the receipt of the necessary approvals from the Takeover Regulation Panel.

2.9 Having regard to the aforesaid, and as stipulated in the circular, CBH could not implement the offer until such time as the suspensive conditions had been fulfilled. It is further worth noting that the takeover regulations issued in terms of the Act impose a time limit as to when the offer must be declared unconditional as to acceptances, failing which the offer would terminate and not be valid as to acceptances.

2.10 Applying regulation 103(4) of the takeover regulations meant that the offer was set to terminate on Tuesday, 14 September 2016, unless it had been declared unconditional as to acceptances on or before midnight of that date which was the 45th business day after the opening date of 11 July 2016. There was a tacit acknowledgement by the parties before us that the offer would have expired by 13 September 2016 had 03 August 2016 not been declared a Public Holiday in South Africa to accommodate the local government elections. In any event,

Sovereign did not take issue regarding the actual date on which the offer may have terminated.

2.11 The stated rationale, as per the circular, for the transaction was that the offer consideration represented a premium of 25.4% and 21.9% to the Sovereign share price and the 30-day volume weighted average price at close of business on Tuesday, 5 July 2016, respectively. The offer consideration payable represented a premium of between 21.3% and 12.8% to the fair value of between R7.42 and R7.98 determined by the independent expert appointed by Sovereign's board of directors and disclosed in its circular sent to the shareholders of Sovereign on 24 June 2016 as reflected on page 59 of that circular. In any event, the premium represented by the offer increased as the trading share price of Sovereign appreciated during the offer period.

2.12 For CBH, the offer represented an opportunity to increase its operating footprint, particularly in the Eastern Cape in which it is currently under-represented. The offer would have allowed CBH to gain scale and a more sustainable product mix and gave it an enhanced ability to sell further processed and fully cooked solutions, including into the quick service restaurant segment and export markets.

2.13 Be that as it may, although the aforesaid rationale provides context to the offer, we are precluded by the Act from considering the commercial advantages and disadvantages in our decision making process. The relevant section of the Act is section 119(1), which states –

"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,…"

3. THE CASE

3.1 The key issue before us was whether or not the offer had lapsed. As indicated above, the offer was subject to a number of conditions and takeover regulation 103(4) requires that the offer be declared unconditional as to acceptance by midnight of the 45th business day from the date the offer is open for acceptance. It is worth reproducing the relevant part of takeover regulation 103(4), which states –

"*A general offer contemplated in subregulation (3) terminates unless –*

a) *it has been declared unconditional as to acceptance before midnight on the 45th business day after the opening of the offer*"

3.2 The real issue that brought the parties before us was the minimum acceptance requirement which stated, "*the offer will only become unconditional once sufficient acceptance have been received from shareholders such as that CBH, together with its concert parties, hold at least 50% plus 1 share of the total issued share capital of Sovereign after the implementation of the offer*". It became apparent to CBH that it would not reach its target of acquiring 50% plus 1 of the total issued

share capital of Sovereign before 14 September 2016. As a consequence, on 13 September 2016, CBH announced that it had waived this condition. The announcement read –

> "*…the offer is subject to a number of conditions precedent including, inter alia, that the Offer will become unconditional once sufficient acceptance have been received from Sovereign Shareholders such that CBH, together with its concert parties, will hold at least 50.0% plus 1 of the total issued share capital of Sovereign (including treasury shares) after the implementation of the offer ("Acceptance Condition").*
>
> *Sovereign Shareholders are hereby notified that CBH has waived the Acceptance Condition and as such, the Offer is now unconditional as to acceptances…*"

3.3 The following day, which was 14 September 2016, CBH made a further announcement declaring that the offer was unconditional as to acceptance; supposedly in line with takeover regulation 102(10).

3.4 The independent board of Sovereign took issue with the lawfulness of the purported waiver. Sovereign asserted that the waiver was in fact unlawful under the Act and the takeover regulations, (alternatively it was invalid and of no force or effect) and that as the offer had not become unconditional as to acceptances, it had lapsed in terms of regulation 103(4) .

3.5 Mr. Cilliers, who appeared for CBH, challenged Sovereign's case on a number of grounds. The first such ground was to challenge this committee's jurisdiction to hear this matter. Mr. Cilliers argued that this committee was not competent to hear this matter in that it was a matter of contract law. Like any contractual matter, asserted Mr Cilliers, it could only be properly ventilated in court, not by this committee. The second ground was raised in the alternative in case this committee finds that it had jurisdiction. The second ground was that this committee needed to distinguish between a term in a contract and a condition in a contract. Mr. Cilliers asserted that what CBH waived was a condition and not a term. He concluded this point by saying that a condition could be unilaterally waived by a party in whose favour the condition it was created.

3.6 CBH framed the jurisdiction point in two ways. First, that the Act and the regulations demonstrate precisely this submission. The first submission was that the Act does not permit this committee to pronounce on contractual matters such as a waiver of a condition. Secondly, in the broad scheme of CBH's argument, CBH asserted that it was not a ruling that Sovereign sought from this committee, but rather a declaratory finding (declarater), which this committee was not empowered to make.

3.7 Prior to arguing the jurisdiction point as it affected this committee, CBH attacked Sovereign's legal standing (*locus standi)* to pursue this matter. CBH asserted that Sovereign had no standing to try and defeat an offer made by CBH to the shareholders of Sovereign. In support of this

proposition, CBH stated that Sovereign is not the addressee of the offer; the shareholders are such addressees. Therefore, it is not for Sovereign to ask this committee to block a situation between a seller who wants to implement his sale and a buyer who wants to implement his purchase. Further, Sovereign cannot rely on the non-fulfilment of a condition between parties where itself was not a party to that contract.

3.8 CBH made its attack on Sovereign's standing even in the face of takeover regulation 118, which in our view clearly granted Sovereign such standing. The regulation reads, *"any person may approach the panel through the executive director in accordance with Section 201".* CBH stated that section 118 makes reference to section 201 that deals with the powers of the Panel. CBH asserted that the reference to "*any person*" in section 118 is limited by the fact that section 201 limits the powers of this committee to matters that appear in Parts B and C of chapter 5 and the takeover regulations. CBH concluded that Sovereign could therefore not bring before this committee a matter which this committee was not empowered to hear.

3.9 Section 201(1)(a) of the Act states –

> "*The Panel is responsible to regulate affected transactions and offers to the extent provided for, and in accordance with, Parts B and C of Chapter 5 and the Takeover Regulations*"

3.10 It was on the basis of the wording of section 201 of the Act that CBH challenged our competence to hear this matter and Sovereign's

competence to bring this matter to this committee. CBH argued that it was only within Parts B and C of Chapter 5 of the Act and the takeover regulations that this committee finds its powers. Therefore, this committee did not need to concern itself with matters that fell outside Parts B and C of Chapter 5 of the Act and the takeover regulations. CBH took this committee through the provisions of the Act that appeared in Parts B and C of Chapter 5 of the Act and the takeover regulations. CBH concluded that, *"So, there is nothing there that entrusts you with obligations to deal with private law disputes whether an offer or acceptance is valid or whether a waiver is effective. That's not what you regulate. There's nothing there."*

3.11 The effect of this attack meant that if we were to find that we had jurisdiction to hear this matter, it would logically mean that Sovereign had standing, since according to CBH we were restricted by section 201 to hear only those matters that fall within Parts B and C of Chapter 5 of the Act and the takeover regulations.

3.12 As indicated above, it was submitted that should the committee decide that it had jurisdiction to hear this matter, CBH would raise the alternative argument that it had (in any event) the right to waive a unilateral condition. In support of this argument, CBH explained the difference between a term and a condition of a contract. CBH argued that contracts, generally speaking, have two broad categories of provisions. The one category includes provisions that create rights and obligations which typically arise from negotiations between contracting parties. The second category is that of conditions, which are simply

uncertain future events upon which the enforceability of a contract depends. CBH's case primarily focused on suspensive conditions as these were the relevant type of conditions for the purpose of this case. CBH explained that the effect of such a condition is that it suspends the enforceability and operation of a contract. It is upon a fulfilment of the condition that a contract becomes unconditional and enforceable. CBH concluded by stating that a failure to fulfil a condition means that a contract dies a natural death.

3.13 CBH submitted that it was important that we understand this difference. It submitted at the hearing that "*so we must very clearly distinguish between a condition, which suspends the operation of all the other provisions and a term which contains the rights and obligations themselves.*"

3.14 After a detailed explanation regarding the difference between a term and a condition, CBH concluded that whoever imposes a condition, sends a message to the other contracting party that says that, I am not prepared to be bound by the terms unless a specific event occurs. That is the reason a person can waive a condition that is created for their own benefit, CBH submitted.

3.15 CBH asserted that the committee would then appreciate its unilateral right to waive the condition. Further, CBH asserted that when the committee assesses the unilateral nature of the condition it should not imagine extraordinary situations where the condition so waived could possibly benefit somebody else. The committee must instead look at

the contract to ascertain the identity of the person in whose favour the condition is to be waived. CBH supported this proposition by relying on case law and leading textbooks, which are not necessary for us to cite or reproduce for reasons that will soon become apparent.

3.16 Mr. Kuper, who appeared for Sovereign, argued that shareholders are not to be treated as sophisticated lawyers with an intimate understanding of the complications of common law. That is why the requirements of the statute with regard to the clear expression of the terms of the offer are so vital. He argued that shareholders would have read the essence of the offer and believed that the offer before them is the offer that they needed to decide upon. The shareholders of Sovereign would have understood that the offer was conditional on CBH acquiring 50% plus 1 of the Sovereign shares, and failing which the offer would not proceed. It was on this understanding that the shareholders dealt with the offer, concluded Sovereign.

3.17 Sovereign sought to demonstrate to us the importance of the condition by taking us through the announcements and the circular as formulated by CBH. At paragraph 1 of the Firm Intention Announcement, CBH stated "*Sovereign shareholders are advised that CBH hereby makes a conditional cash offer to acquire the entire ordinary share capital of Sovereign"* and at paragraph 1 reads, *"…and is conditional upon the fulfilment of the conditions precedent set out in paragraph 3 and 4."* Sovereign asserted that without having to read further, a shareholder immediately became aware that there was an offer, but it was

conditional upon the fulfilment of the conditions precedent, concluded Sovereign.

3.18 Sovereign further drew this committee's attention to the announcement made by CBH under the heading "Principal Terms of the Offer", which stated that CBH will set out in the circular to be posted to Sovereign shareholders that *"CBH offers to purchase the offered shares or such lesser number of offered shares in respect of which the offer is accepted, such that CBH, together with its concert parties holds at least 50.0% plus 1 sovereign share of the total issued share capital of Sovereign including treasury shares following the conclusion of the offer."*

3.19 The first few words of the circular at paragraph 1.1, stated that the *"Shareholders of Sovereign were notified in the firm intention announcement made by CBH on Wednesday… to shareholders, to acquire all shares other than those already held by CBH and its concert party, other than the treasury shares."* Further, the circular at 1.4 included a clear statement that *"CBH cannot implement the offer until such time as the suspensive conditions have been fulfilled."*

3.20 Mr Kuper highlighted the fact that at 5.1.1 of the circular, it was stated that *"CBH hereby makes a general conditional offer as contemplated in section 171(1)(c)(v) of the Act, to purchase all of the shares held by each shareholder other than those already held by CBH and its concert parties, other than the treasury shares, for the offer consideration on the terms and subject to the suspensive conditions set out in this*

circular." At 5.4 of the circular it was again stated that *"This offer is subject to the following suspensive conditions being fulfilled."* At 5.4.3 of the circular it was further stated that, *"The offer will only become unconditional once sufficient acceptances have been received from shareholders, such that CBH, together with its concert parties, hold at least 50% plus 1 share of the total issued share capital of Sovereign including treasury shares after the implementation of the offer."*

3.21 Mr. Kuper argued that the purpose of the circular was to set out the terms on which CBH made the offer to shareholders to purchase all or some of their shares. He further submitted that shareholders were assured through the circular that the offer before them was complete and backed by a guarantee.

3.22 It was further stated at 7.1.1 of the circular *"If the offer lapses because of the non-fulfilment of one or more of the suspensive conditions, then documents of title will be returned to their respective certificated shareholders by registered mail with 5 business days of the offer so lapsing."*

3.23 It was pointed out by Mr Kuper that (at para 15 of the circular) that shareholders were assured that *"There have been no material changes to the proposed terms of the offer as set out in the firm intention announcement released by CBH."* Further, at para 16.3 of the circular, it was stated that, *"The directors, the CBH directors whose names are set out on page 9 of the circular, individually and collectively confirm that*

…, this circular does not omit anything likely to affect the importance of the information."

3.24 Mr Kuper submitted that this committee must view the offer as a whole, and if the offer does not stipulate that CBH could withdraw a condition, CBH should not be able to so. He stressed the point that the shareholders of Sovereign would have engaged with the offer in its nature and status as being subject to conditions from the onset. This was their reality, which affected their decision making process, asserted Mr. Kuper. He further stated that the effect of the purported waiver by CBH would lead to the unfair treatment of shareholders in breach of section 119 of the Act.

3.25 CBH stated that the committee need no concern itself with this issue in that the shareholders that did not accept the offer prior to the waiver were not affected by the waiver and those that did accept the offer prior to the waiver could walk away under takeover regulation 105(2) or enforce the offer based on having accepted same. Therefore, from CBH's view point there was no need for this committee to make any ruling to protect shareholders.

3.26 CBH was of the view that what Sovereign was trying to do was to destroy the mechanism so that shareholders who wanted to implement their sale and the buyer who wanted to implement the purchase, would be deprived of this mechanism. What CBH meant was that Sovereign was trying to destroy a contract between parties that wanted to implement the offer. CBH felt that it would be unjust to destroy the

entire mechanism of a sale and purchase, as this committee could make an order to the effect that shareholders may walk away. CBH asked us to be careful of actions that may be taken by a regulated company that are designed to defeat a valid transaction. In this regard, CBH referred this committee to section 119(1) which states -

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

3.27 CBH warned that the committee should not follow the literalistic approach that Sovereign had advanced which was aimed at destroying a valid offer. CBH further asserted that neither in the Act nor the takeover regulations nor in the offer was it ever stated that there can be no waiver of this condition.

3.28 The committee found CBH's position on this matter difficult to accept, as the committee's mandate did not accord with CBH's position. The relevant part of the Act that sets out the committee's mandate in relation to this matter is section 119, which states –

> *(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

3.29 Section 119 further states –

(2) Subject to subsection (6), the Panel must regulate any affected transaction or offer, and the conduct of the parties in respect of any such transaction or offer, in a manner that promotes the objects set out in subsection (1) and, without limiting the generality of that subsection, ensures –

a. ….

b. that all holders of –

i. any particular class of voting securities of an offeree regulated company are afforded equivalent treatment; and

ii. voting securities of an offeree regulated company are afforded equitable treatment, having regard to the circumstances;

c. *that no relevant information is withheld from the holders of relevant securities; and*

d. *that all holders of relevant securities –*

   i. *receive the same information from an offeror, potential offeror, or offeree regulated company during the course of an affected transaction, or when an affected transaction is contemplated; and*

   ii. *are provided sufficient information, and permitted sufficient time, to enable them to reach a properly informed decision.*

3.30 This committee is further empowered under the very section to prohibit actions that are inconsistent with its mandate as aforesaid, and the section reads –

> *(5) To the extent necessary to ensure compliance with this Part, Part C and the Takeover Regulations, and to fulfil the purposes contemplated in subsection (1), a compliance notice contemplated in subsection (4) (c) may, among other things –*
>
> a. *prohibit or require any action by a person; or*
>
> b. *order a person to –*
>
>   i. *divest of an acquired asset; or*
>
>   ii. *account for profits."*

3.31 It is this committee's view that the words of the offer were clear enough to allow for no misapprehension. In fact, at 7.1.1 of the circular, it was

stated, *"If the offer lapses because of the non-fulfilment of one or more of the suspensive conditions, then documents of title will be returned to their respective certificated shareholders by registered mail with 5 business days of the offer so lapsing."* Thus it seems clear that the state and frame of mind of the conscientious reader of this particular offer would be that the offer was (i) conditional and (ii) if any of the suspensive conditions, which have been identified and set out in the circular are not met, the offer would lapse.

3.32 This conclusion is given further credence by the fact that a week before the offer expired CBH wrote to the Executive Director through Investec requesting an extension (the "**Investec letter**"). The Investec letter repeated the conditions to which the offer was subject including the condition under discussion. The Investec letter provided a rationale for the extension which, *inter alia,* included paragraph 5.5.1 which stated *"In addition, the extension request will be beneficial for Sovereign shareholders for the following reasons: If approved, the extension request will increase the likelihood of the offer becoming unconditional, thus benefiting 10.9% of the Sovereign shareholders who have accepted the offer and wish to receive R9 per share."* Even on CBH's version, the offer period needed to be extended as the shareholders of Sovereign would have been aware of the fact that the offer was conditional and would terminate upon non-fulfilment.

3.33 There is therefore no doubt in this committees mind that the shareholders of Sovereign would have engaged with the offer in its nature and status as being subject to conditions from the onset.

Therefore, this was indeed their reality which was factored in their decision of whether or not to sell their shares to CBH, keep their shares, sell them in the market or offer them to Sovereign.

3.34 In our view, the reality was that there was a conditional offer at a price of R9.00 which condition could have played a part in the choice of the individual shareholders, depending upon a huge range of particular interests, understanding and desires. The reality was that the shareholders had a choice between selling in the market at the market price, or taking the conditional offer. By waiving the condition, the question of achieving 50% plus 1 fell away entirely, resulting in a situation where one segment of the shareholders of Sovereign who had not yet made their decision, were faced with a different market reality from all of those who had already made their decision in the earlier and almost complete phase of the offer.

3.35 The committee is mandated by section 119(1)(a) of the Act to ensure the integrity of the marketplace and fairness to the holders of securities. Therefore, to allow a waiver of the provisions of the offer would in the circumstances undermine this mandate. It would undermine the integrity of the market place, and would not be fair to shareholders, because the market would have been led to believe and to act upon one set of circumstances, without any prior intimation of the possibility of another set of circumstances intervening.

3.36 In addition, on the point of fairness to the shareholders, many of whom who had made the decision to sell at a particular price under certain

rules of the game, because they thought that the acceptance condition could never be achieved and also those who were in the market at the time when the supposed waiver occurred, would be in a different position from all their colleagues as shareholders, who had acted previously and committed one way or the other.

3.37 Further, section 119(1)(b)(i) mandates this committee to ensure the provision of necessary information to holders of securities, in order to facilitate the making of informed decisions. The shareholders of Sovereign were never made aware of the possibility that an essential aspect of the offer may be removed from the offer. Therefore, they were not afforded knowledge from inception (that could have informed their deliberations) that a waiver of conditions was permissible and therefore a possibility.

3.38 It further matters not whether what was waived was a condition or a term. What matters to the committee is that if CBH was to be allowed to remove the condition by waiving same, such a waiver would have resulted in an unfair and unequal treatment of the shareholders of Sovereign, caused by the provision of different information at different times in the life of the offer. This information in our view would have been required to facilitate the making of an informed decision. Shareholders must not be left to guess the inner workings of the mind of the offeror and whether or not that mind may change down the line. This is the very thing that the Act and the takeover regulations mandate to this committee to guard against.

3.39 Furthermore, under section 119(2)(b), the Committee is mandated to ensure that all shareholders of the same class receive equivalent treatment. Granted the matter before us related to a single class of shareholders, but the removal of the condition, which CBH claimed to have done lawfully, has the effect of an unequal treatment of those shareholders of Sovereign who acted prior to the waiver and those that acted thereafter. Therefore, it appeared to this committee that if CBH had reserved a waiver in a competent way so that it was clearly on the table, then it was unlikely that this committee would have had an issue with the waiver. The committee took issue with the fact that there was no prior indication to the shareholders of Sovereign that a waiver was possible because shareholders could not have taken such a possibility into consideration when making their decisions.

3.40 This committee's understanding of the takeover regulations is that when they require an offeror to commit to an offer, as they require the offeror to be ready, able and willing to proceed with the offer under section 119, the regulations say to us that the offeror must proceed with the offer as announced by it in the firm intention announcement and as spelled out in the circular.

3.41 The issue before us (as asserted by Sovereign) is not whether or not CBH could waive the condition. Sovereign's argument is not on the basis of whether such a waiver was competent; it was rather on the basis that the circular did not expressly retain a right to waive. This meant that this matter was not a contract law matter as alleged by CBH. This matter was about the offer made by CBH and its effect on

shareholders given the attempted change of a material provision. This meant that the jurisdiction point, and by extension the standing point, raised by CBH were without bases.

3.42 This committee found it unnecessary to deal with whether or not CBH had a right in law to waiver. This committee was dealing with an attempt to alter the offer by changing a material provision without the shareholders being warned of the possibility. Therefore, issues of whether or not this was a contract law matter bear no relevance. It was sufficient to this committee that the provision that was purported to have been removed was material in the decision making process of shareholders. This committee was dealing with a regulated offer, not just any offer, as CBH would like us to believe.

3.43 The offeror must deal with the offer in the manner in which the offer was presented by it to the shareholders. This is a compulsion which takes an offer out of the bounds of contract law. It puts the offer under a specific regime, a regime that governs the offer and the manner in which an offeror deals with that offer. Therefore, the case placed before us was not of contract law.

3.44 Even if this committee were to entertain the contract point made by CBH, that the condition was for its sole benefit and as such it was entitled to unilaterally waive it, it would be difficult for this committee to accept that shareholders had no interest in how an offer operates or is handled by the offeror after it had been made. By making the offer to shareholders in a regulated environment, the offeror brings a dynamic

into a market that affects shareholders. The offeror may not bring such a dynamic into a market that may result in a firm having different controllers, and claim that only it has an interest in the operation of that market or in the offer. This committee would suggest that this was simply not tenable, and not reflective of market realities.

3.45 The committee regards the law to mean that the moment CBH made the offer to the shareholders of Sovereign on clearly stated terms, and once those terms have been established to be material to the decision-making process, then the offer was no longer that of CBH to do with it as it pleased, unless the shareholders were forewarned in a specific way of such a possibility.

3.46 If this committee were to accept CBH's proposition, then this committee will be sending a message to the market that it would be an acceptable practice for offerors to introduce or remove a material provision at any stage after the offer is open for acceptance. Part of the difficulty with CBH's proposition is that even if this committee wished to hold in CBH's favour, it would be difficult to limit CBH's proposition to the facts of this case.

3.47 The Executive Director of the panel should not find himself having to decide on such matters on a daily basis. Once the circular has been approved by the Executive Director and presented to the public by the offeror, that is the offer. The offeror is not allowed to chop and change the offer or play chess with shareholders. That would be in stark

contrast with this committee's mandate under the Act and the takeover regulations.

3.48 Besides, as indicated above, Sovereign's case did not hang on whether or not CBH had a legal right to waive a condition and whether or not this committee could decide on CBH's ability to effect such a waiver as a right. Sovereign's case, is on the basis that CBH did not reserve the right to waive. Shareholders did not get the information that they should have received.

3.49 CBH suggested that no shareholder was prejudiced and Sovereign failed to prove such prejudice. In our view, Sovereign was not obligated to prove prejudice. Besides, we arrived at our decision to hold in favour of Sovereign by relying of section 119 of the Act.

3.50 The parties made use of domestic and foreign law which we found unnecessary to rely upon as our Act and takeover regulations are clear on the issue before us. With regard to domestic law, we found the cases relied upon irrelevant. With regard to foreign law, we note the *Standard Bank Investment Corporation v Competition Commission*[1], case where the Supreme Court of Appeal[2] ("**SCA**") acknowledged that foreign law can be helpful in assisting courts in interpreting certain principles of law, especially in instances where local law is silent on a point under consideration. In the same breath the SCA warned that "*the ransacking of legal libraries of the world may, where it is not*

---

[1] *Standard Bank Investment Corporation v Competition Commission* [2000] 2 All SA 245 (A), 2000 2 SA 797 (SCA) par 30

[2] This is a court of final instance on non-constitutional law matters

appropriate, lead to more paper, more costs, more delay and even more confusion, without any commensurate benefit".

3.51 Our law is clear and prescriptive under section 119 of the Act, as such we did not fall into the temptation of exploring global law libraries. Section 119 compels us to regulate affected transactions to ensure, *inter alia* –

3.51.1 the integrity of the market and fairness to shareholders;

3.51.2 that the necessary information gets to shareholders to enable them to make fair and informed decisions;

3.51.3 that all shareholders are afforded equivalent treatment;

3.51.4 that no relevant information is withheld from shareholders; and

3.51.5 that all shareholders receive the same information from an offeror.

3.52 We are further empowered under section 119 to prohibit actions that are inconsistent with the aforementioned obligation and to issue an order. CBH suggested that we are not empowered to issue a ruling on the basis that the matter before us fell outside Part B and Part C of Chapter 5. We have demonstrated that we need not deal with this matter as presented by CBH to arrive at our decision. We did not rule

on whether or not CBH has a right to waive. We dealt instead with the effect of such a waiver on the regulated offer.

3.53 The committee considered the purported waiver to be an unlawful attempt to change a material provision of the offer in breach of section 119. It was on this basis that we can prohibit an attempt to make a material change to the offer in accordance with section 119(5) of the Act. Based on the aforesaid, it is difficult for us to consider this decision to be just a literalistic approach to our mandate as CBH would like us to believe.

We therefore ruled that the purported waiver by CBH is not permissible and therefore of no force or effect and the offer did not become unconditional as to acceptance and accordingly it terminated on 13 September 2016 or 14 September 2016.

Mr. Andile Nikani

Concurring: Prof. Stephanie Luiz, Mr. Ebi Moola and Mr. Nano Matlala

For the Applicants: Adv. M. Kuper SC and Adv. J Cane SC with Adv. A. Kollori briefed by Cliffe Dekker Hofmeyr

For the Respondents: Adv. F Cilliers SC and Adv P Roodt briefed by Kern & Partners