

**BEFORE THE TAKEOVER SPECIAL COMMITTEE
(JOHANNESBURG)**

In the matter between:

ABRAHAM ALBERTUS CILLIERS

Shareholder

and

DISTELL GROUP LIMITED

Company

TAKEOVER SPECIAL COMMITTEE ("TSC") RULING

1. INTRODUCTION

- 1.1 This is an application to the Takeover Special Committee by Abraham Albertus Cilliers ("Shareholder") against a ruling by the Executive Director exempting Distell Group Limited ("Distell") from making a mandatory offer in terms of Regulation 86(4) of the Regulations on Takeovers and Mergers of the Companies Act, 2008 read with Guideline 2/2011 of the Takeover Regulation Panel. ("TRP")
- 1.2 The Shareholder contends that the exemption was wrongfully granted as Distell failed to comply with a condition precedent to the scheme of arrangement referred to below (the 'Transaction') requiring more than 50% of the Distell shareholders, irrespective of their interest in the transaction, to waive a mandatory offer. Thus the shareholder submits that the Transaction is incapable of being proceeded with.
- 1.3 We need to mention at the outset that this is not a unanimous ruling with regard to Regulation 86(4). Two members namely Messrs Matlala and Ewing of the TSC agree with the ruling of the Executive Director regarding the granting of the exemption in terms of regulation 86(4). The third member Mr Siyaka finds that the provisions of regulation 86(4) have not been satisfied by Distell. Notwithstanding the dissent by Mr Siyaka on the interpretation of the provisions of regulation 86(4), the application by the Shareholder is still not sustained as all the members of the TSC agree that the Transaction falls within the purview of section 119(6) of the Companies Act.
- 1.4 On Wednesday, 20 September 2017, Distell issued a circular ("Distell circular") to its shareholders which included, inter alia, a scheme of arrangement ("the Scheme") between

Distell and the shareholders of Distell ("Distell Minorities") other than Remgro-Capevin Investments Proprietary Limited ("RCI").

1.5 RCI is the holder of 52.8% of the issued ordinary shares in Distell, the remaining shares being held by the Distell Minorities.

1.6 The notice of Scheme meeting included a resolution as follows:

"Ordinary Resolution Number 1 - Waiver by Distell Minorities of the Mandatory Offer Requirement in terms of Regulation 86(4) of the Regulations to the Companies Act

'Resolved that the Distell Minorities hereby irrevocably waive the benefits of a Mandatory Offer by Remgro International arising from the implementation of the RCI Exchange (as fully set out in the Distell Circular.'"

1.7 Prior to the issue of the Distell Circular, the attorneys for Distell wrote to the Executive Director of the TRP requesting, inter alia, that the Executive Director should confirm that he would be willing to consider an application to grant an exemption from the obligation to make a mandatory offer if the requisite majority of Distell Minorities waived their entitlement to receive a mandatory offer from Remgro Limited ("Remgro") in accordance with Regulation 86(4) of the Companies Regulations 2011 ("Regulations").

1.8 The Executive Director responded in writing confirming that subject to compliance with Regulation 86(4) and Guideline 2/2011 issued by the TRP ("the Guideline"), the TRP was willing to consider the application to grant an exemption from an obligation to make a mandatory offer if the requisite majority of Distell shareholders waived their entitlement to receive such mandatory offer.

1.9 Subsequent to the holding of the Scheme meeting, which was held on Friday, 27 October 2017, the attorneys for Remgro International Holdings Proprietary Limited ("Remgro International") wrote to the Executive Director confirming that the Waiver Resolution (being the resolution referred to in paragraph 1.6 above) was approved by more than 50% of the Distell Minorities. The same letter requested the TRP to consider and, if deemed appropriate, grant the TRP Waiver Ruling in accordance with section 119(6) of the Companies Act ("the Companies Act" or "the Act"). The TRP Waiver Ruling is defined in the Distell Circular as follows:

"TRP Waiver Ruling means the ruling, envisaged in the TRP Guideline 2/2011 as read with Regulation 86(4) of the Companies Regulations, which will be sought from the TRP by Remgro International for an exemption from the Mandatory Offer Requirement if the Waiver Resolutions are approved by the requisite majorities of Distell Shareholders and Capevin Shareholders, respectively."

- 1.10 The response from the Executive Director stated that, "having considered the application, and based on the information provided in the application and the attachments, in my capacity as the Executive Director hereby exempts Remgro International Holdings Proprietary Limited ("Remgro") from the obligation to make a mandatory offer to the remaining holders of securities of Distell and Capevin in terms of section 119(6) read with regulation 86(4)."
- 1.11 On 16 November 2017, the Shareholder delivered to the TRP a "Notice of Intention to Appeal" and "Notice of Application for a Hearing" pursuant to which he applied for a hearing before the TSC. The hearing took place on 11 January 2018.
- 1.12 There were three main issues raised at the hearing, being whether a mandatory offer to the Distell Minorities had been triggered, whether the provisions of Regulation 86(4) had been complied with and whether the TRP or the TSC could or should grant an exemption in accordance with the provisions of Section 119(6) of the Act.

2. **THE MANDATORY OFFER**

- 2.1 The Distell Circular clearly contemplated at paragraph 17.2 that the RCI Exchange ("the issue by Capevin of further Capevin Shares to Remgro International in exchange for the transfer of Capevin of all the shares in RCI held by Remgro International, as detailed more fully in paragraph 5.1 iii of this Circular") "would ordinarily require that Remgro International make a Mandatory Offer "to acquire the Distell Shares held by the Distell Minorities in accordance with the provisions of the Act."
- 2.2 The Distell Circular advised the Distell Minorities that to the extent that the Waiver Resolutions were adopted by the Distell Minorities and the Waiver Exemption was granted by the TRP, Remgro International would not be obliged to make a Mandatory Offer to the Distell Minorities.
- 2.3 The Distell Circular further notes that Regulation 86(4) permits an exemption from the obligation to make a Mandatory Offer if the Distell Minorities as independent shareholders holding more than 50% of the general voting rights of the all the issued shares of Distell agree to waive the benefit of the Mandatory Offer in accordance with the principles detailed in section 125(3)(b)(ii) of the Act.
- 2.4 Notwithstanding the wording contained in the Distell Circular, Counsel for Distell and Remgro, both in the Heads of Argument filed with the TRP and at the hearing, argued that no

exemption was required in the first place because no Mandatory Offer was triggered in respect of the Scheme.

2.5 The attorneys representing the Shareholder in turn argued that a Mandatory Offer was triggered at "Distell level".

2.6 We do not believe that it is necessary for us, in this ruling, to decide on whether or not a Mandatory Offer was necessary. The Distell Circular informs the Distell Minorities that a Mandatory Offer was necessary and requests them to grant a waiver in terms of the "Waiver Resolution". The Distell Minorities acted in the belief that a Mandatory Offer was necessary and passed the resolution contained in the Notice of Scheme Meeting. This ruling is therefore made in accordance with the information given to the Distell Minorities and on the assumption that the Distell Circular accepted the need for a Mandatory Offer.

3. **REGULATION 86(4)**

3.1 Regulation 86(4) reads as follows:

"(4) A transaction is exempt from the obligation to make a mandatory offer following publication by a regulated company of a transaction requiring the issue of securities as consideration for an acquisition, a cash subscription or a rights offer, if the independent holders of more than 50% of the general voting rights of all issued securities of the regulated company have agreed to waive the benefit of such mandatory offer in accordance with the principles detailed in section 125(3)(b)(ii)".

3.2 The crux of the matter raised before the TSC relates to the meaning of "independent holders of more than 50% of the general voting rights". The Shareholder adopts the view that this phrase means that shareholders holding more than 50% of all the issued shares in Distell must be able to vote on the Waiver Resolution. This, according to the Shareholder, means that the Waiver Resolution could not be passed simply because RCI holds 52.8% of the issued shares in Distell so that the Distell Minorities could never pass the Waiver Resolution because between them, they hold less than "50% of the general voting rights".

3.3 The Shareholder argues that "in order for a resolution to lawfully waive the benefit of a mandatory offer in terms of regulation 86(4), independent holders must hold more than 50% of the general voting rights of all issued securities of the company in question before the resolution may be considered."

3.4 The "Shareholder's Reply to the Heads of Argument filed on behalf of the Company" includes the following statements -

"What is immediately clear is that independent holders as a body must hold 'more than 50% of the general voting rights' before they have the capacity to agree to waive the benefit of the offer. The agreement to waive the benefit must be reached in accordance with the principles (plural) detailed in section 125(3)(b)(ii).

If the interpretation of Regulation 86(4) advanced by the Company... is understood, the proposed construction would render the reference to 'more than 50%' in the regulation superfluous, as the independent holders of the voting rights, general or otherwise, (after the exclusion of the interested parties) would always constitute more than 50% of the remaining voting rights."

- 3.5 As a result it is contended that the Waiver Resolution could not be properly passed and Regulation 86(4) could not be complied with.
- 3.6 Counsel for the Company in the Heads of Argument filed on behalf of the Company and Remgro and at the hearing, argued that the requirements of Regulation 86(4) were fulfilled as the regulation requires 50% "of the independent shareholders of Distell to vote in favour of the mandatory offer requirement, which occurred." He contends that the reference to "general voting rights" is a reference to general voting rights capable of being exercised at the relevant general meeting called for the purposes of approving the Waiver Resolution and that this interpretation is also consistent with the Guideline.
- 3.7 In *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)*, Wallis JA stated that - "The sole benefit of expressions such as 'the intention of the legislature' or 'the intention of the parties' is to serve as a warning to courts that the task they are engaged upon is discerning the meaning of words used by others, not one of imposing their own views of what it would have been sensible for those others to say. Their disadvantages, which far outweigh that benefit, lie at opposite ends of the interpretative spectrum. At the one end, they may lead to a fragmentation of the process of interpretation by conveying that it must commence with an initial search for the 'ordinary grammatical meaning' or 'natural meaning' of the words used seen in isolation, to be followed in some instances only by resort to the context. At the other, they beguile judges into seeking out intention free from the constraints of the language in question, and then imposing that intention on the language used. Both of these are contrary to the proper approach, which is from the outset to read the words used in the context of the document as a whole and in the light of all relevant circumstances. That is how people use and understand language and it is sensible, more transparent and conduces to greater clarity about the task of interpretation for courts to do the same."
- 3.8 We as the TSC are therefore called upon to read Regulation 86(4) in the context of the Companies Act and the Regulations. As a result, we are of the view that the interpretation which requires that the TRP can only properly grant a waiver if the independent holders hold

more than 50% of all the voting rights in Distell, including those owned by RCI, means that (in circumstances such as those prevailing in Distell) the Distell Minorities are unable to waive the right to a mandatory offer, cannot be correct. In addition, that view places an undue restriction on the powers of the TRP "to ensure the integrity of the marketplace and fairness to the holders of securities of regulated companies" as set out in section 119(1)(a) of the Companies Act. We must ensure fairness to those shareholders who are part of the Distell Minorities and should not deprive them of the right validly to pass the Waiver Resolution

- 3.9 The function of the TRP is, inter alia, the protection of minority shareholders in takeovers, mergers and share buy-backs. Reference to independent (share)holders in regulation 86(4) refers to those shareholders who do not have an interest and do not form part of the group making an offer to acquire shares in the offeree/target.
- 3.10 The Securities and Futures Commission of Hong Kong (SFC) has a similar provision to regulation 86(4) in its Code on Takeovers and Mergers relating to mandatory offers and protection of minority shareholders. In note 1 to Rule 26 of the Code reference is made to a dispensation granted by the Executive Director for a waiver from an obligation to make a mandatory offer.
- 3.11 The provision of note 1 to Rule 26 provides as follows:
- "The Executive will normally waive the obligation if there is an independent vote at a shareholders' meeting. For this purpose independent vote means a vote by shareholders who are not involved in, or, interested in the transaction in question."***
- 3.12 Section 196(4)(a) of the Companies Act empowers us to follow and apply international developments:
- "In carrying out its functions, the Panel may have regard to international developments in the field of company law."***
- 3.13 In our view independent holders referred to in regulation 86(4) is equivalent to an independent vote referred to in note 1 of Rule 26 of the Code of SFC. It will defeat the purpose and objectives of the laws regulating takeovers and mergers to put shareholders with distinct interests in one basket in takeovers and mergers and ignore the fundamentals of the laws regulating protection of minority shareholders.
- 3.14 The majority of the members of the TSC accordingly find that the Executive Director was entitled to grant an exemption under Regulation 86(4), the requirements under Regulation 86(4) having been complied with and the Waiver Resolution having been passed by a majority of the shareholders of Distell entitled to vote on the Waiver Resolution.

4. N Matlala and C Ewing concur with regard to the granting of the exemption in terms of Regulation 86(4). The views of S Siyaka are set out in paragraph **Error! Reference source not found.**

5. **SECTION 119(6)**

5.1 In terms of Section 119(6) of the Companies Act **"the TRP may wholly or partially, and with or without conditions, exempt an offeror to an affected transaction or an offer from the application of any provision of the Takeover Regulations if doing so is otherwise reasonable and justifiable in the circumstances having regard to the principles and purposes set out in the Act and the Regulations."**

5.2 This is a transaction in which it would manifestly be reasonable and justifiable for an exemption to be granted in terms of Section 119(6).

5.3 To the extent that we may be incorrect in our interpretation of the requirements under Regulation 86(4), the TSC therefore nevertheless hereby grants an exemption under Section 119(6) from the requirement that a Mandatory Offer be made.

6. The Shareholder is therefore required to pay the costs incurred by the TRP

7. SANDILE SIYAKA: I do not agree that the Transaction has satisfied the provisions of Regulation 86(4). My reasons are as follows:

7.1 I agree with the Shareholder's interpretation of Regulation 86(4) that "in order for a resolution to lawfully waive the benefit of a mandatory offer in terms of regulation 86(4), independent holders must hold more than 50% of the general voting rights of all issued securities of the company in question before the resolution may be considered." particularly if one takes into consideration that the trigger for a mandatory offer is 35% not 50%. It is possible that the independent holders could in-fact hold up to 64.99. This only means a higher bar or hurdle for the automatic exemption under Regulation 86(4) to apply in that regard.

7.2 The Shareholder's interpretation, in my considered view does provide, greater minority protection which accords with the primary function of the Takeover Regulation Panel in as far as protection of minority shareholders in takeovers, mergers and share buy-backs is concerned.

7.3 I also agree that we as the TSC are called upon to read Regulation 86(4) in the context of the Companies Act and the Regulations. I do think the Shareholder's interpretation is also aligned to the relevant context of the Companies Act and the Regulations. Where the 50% hurdle cannot be passed (in circumstances such as those prevailing in Distell) the Distell Minorities

would still be able to achieve a waiver of the right to a mandatory offer using the general exemption in 119(6), albeit that requiring a higher percentage (100%) of such minorities. Again this is greater protection for minorities in my view. Accordingly, the shareholders who are part of the Distell Minorities would not necessarily be deprived of the right to validly pass a Waiver Resolution as the general exemption in 119(6) would still be available to them.

7.4 To the contrary, I think this view enhances the powers of the TRP "to ensure the integrity of the marketplace and fairness to all the holders of securities of regulated companies" as set out in section 119(1) (a) of the Companies Act as intended by the legislature.

7.5 Simply put, I do not believe the Shareholder's interpretation of Regulation 86(4) leads to any absurd results in the context of Companies Act and the Regulations requiring us to deviate from the text. If we are to follow the Company's interpretation in these cases (which appears to be based, in the main, on an argument that it is reasonable and justifiable to do so), it would be an inappropriate modification of the text as it currently provides now. Considerations of reasonable and justifiable to grant an exemption are applicable for purposes of general exemption in 119(6)) otherwise. Accepting the Company's interpretation to be what was intended by the legislature requires the text to be modified to provide as much for clarity and to avoid ambiguity.

DATED 31 JANUARY 2018

TAKEOVER SPECIAL COMMITTEE MEMBERS

1. Mr. Nano Matlala (Chairperson)

2. Mr. Chris Ewing

3. Mr. Sandile Siyaka

