RULING OF THE TAKEOVER SPECIAL COMMITTEE

In re the matter of:

THE INDEPENDENT BOARD OF MURRAY & ROBERTS HOLDINGS LTD

HENRY LAAS

And

ATON GmbH

1. The chronology of events that led to a formal Takeover Special Committee hearing in the above matter on 15 and 16 May 2018 is as follows:

    1.1. On 26 March 2018 ATON made a Firm Intention Announcement on SENS indicating its intention to make an offer (through its wholly-owned subsidiary ATON AT) to the shareholders of M&R to acquire all the remaining ordinary shares of M&R not already owned by ATON or any of its affiliates at R15.00 per share (after having informed the Board of M&R of its intention to do so on 23 March 2018).

    1.2. On 27 March 2018 the Independent Board of M&R issued its Response Announcement on SENS indicating that ATON's offer was opportunistic as it was being made at a time of unprecedented weakening of the value of shares in M&R's field of industry as a result of low liquidity. The SENS announcement further stated that ATON materially undervalues M&R's shares based on M&R's prospects and it stated that it would recommend that its shareholders should reject the offer when it is made.

    1.3. On the same day, the Independent Board of M&R held a teleconference of investors attended by the Independent Board as well as Mr Henry Laas, the Chief Executive Officer of M&R. Mr Laas participated in the discussion and put his views forward on the merits of the proposed offer and in particular the price to be offered by ATON.

    1.4. On 4 April 2018 the Independent Board of M&R published a further SENS announcement indicating after having reference to the Independent Expert's valuation report, the Independent Board is of the view that that a fair and reasonable offer for M&R shares is between R20.00 and R22.00 per share.

1.5. On 9 April 2018 ATON issued an Offer Circular to the Shareholders of M&R detailing its offer to acquire all or a portion of their M&R shares for a consideration of R15.00 for each share. It was stated in the Offer Circular that the offer was based inter alia on the assumption that "M&R has 268,644,373 Offer Shares in issue being determined as the total number of issued M&R Shares of 444,736,118 less 147,085,819 M&R Shares held by ATON prior to the Opening Date [of the Offer], less 29,005,926 M&R Shares to be acquired by ATON from Allan Gray after the Opening Date, pursuant to the Forward Sale Agreement" and that Offer was conditional on ATON obtaining 50% plus one share in M&R.

1.6. On 10 April 2018 the Independent Board of M&R informed its shareholders through SENS of the Offer Circular of ATON sent to shareholders the previous day and informed them not to take any action pending its response to the Offer Circular not later than 10 May 2018. It reminded the shareholders that their view remains that a fair value price range for control is between R20 and R22 per M&R share.

1.7. On 12 April 2018 Legal Counsel for the Independent Board of M&R addressed a letter to the Takeover Regulation Panel raising various concerns about the ATON offer which was subject to various conditions. One of the major concerns related to the Forward Sale Agreement concluded between ATON and Allan Gray on 29 March 2018 which it was alleged resulted in an obligation on ATON to make an unconditional mandatory to all the M&R shareholders. The complaint was that ATON acquired securities in M&R which resulted in its shareholding in M&R exceeding 35% (the prescribed percentage) of M&R securities and was therefore required to make a mandatory offer as provided by section 123 of the Act.

1.8. On 18 April 2018 ATON responded to the concerns raised by the Independent Board of M&R. It was stated that although ATON's ownership interest in M&R had crossed the mandatory offer threshold, it was not required to make a mandatory offer as it had already made a voluntary offer to all M&R shareholders.

1.9. On the 19 April the Financial Mail publication had a leading article on the hostile takeover of M&R by ATON which featured Mr Laas prominently and it included his photo on the cover page with him dressed and armed as a gladiator. The cover page read: "WHY MURRAY & ROBERTS IS PREPARING FOR BATTLE". The lead story heading was titled "Under Siege". Chairperson of the Independent Board. Mr Suresh Kana also contributed to the lead story. The Financial Mail article presented a reader with various reasons as to why was the Independent Board was opposed to the hostile takeover of M&R by ATON. The Public Investment

Corporation, one of the biggest Pension Funds in the world and the biggest in Africa issued a negative statement in the same article through its head of corporate affairs, Mr Deon Botha, stating that the government pension fund does not support the takeover by ATON because it has materially undervalued it. Readers are also taken 10 years back and informed that the bid offer is 84% below the value of M&R and that ATON would change its business strategy and destroy value.

1.10. On 19 April 2018 the Executive Director of the Panel referred the matter between ATON and M&R for a hearing in front of the Takeover Special Committee (in terms of section 202(3)(a)(ii) of the Companies Act.

1.11. On 20 April 2018 M&R posted its Response Circular on its website and sent it to its shareholders on the same day. The Response Circular contained similar defensive strategies and did not support ATON's takeover bid.

1.12. On 26 April 2018 ATON submitted a formal complaint against M&R to the TRP in terms of Section 119(4)(c) of the Companies Act read with Section 168 regarding various contraventions and instances of substantial non-compliance with the Companies Act and Takeover Regulations in relation to ATON's offer.

1.12.1. ATON's complaint concerned the various frustrating actions by the Independent Board of M&R and Mr Laas and it was suggested that this conduct denied M&R shareholders an opportunity to decide on their own the merits of the Offer as they are entitled to (as evidenced by sections 119 and 126 of the Act.) ATON alleged that M&R's frustrating action is repetitive and believes[1] that the offending conduct denies the shareholders of M&R the right to decide on the merits of the offer and further that the conduct has adversely affected its offer.

1.12.2. ATON's overarching complaint related to what it suggested was continuous frustrating actions on the part of the Independent Board and Mr Laas, including *inter alia,* the following:

1.12.2.1. the Independent Board's Response Announcement, and the conduct of the Independent Board since the publication of the Firm Intention Announcement, which it asserted contravenes and is inconsistent with the requirements of Regulations 109 and 110 of the Takeover Regulations, in that in was unduly premature, hasty and made without all details or information pertaining to the Offer.

[1] Our underlining.

1.12.2.1.1. Mr Henry Laas's involvement in and apparent coordination of the Independent Board's consideration of and response to ATON's Offer.

1.12.2.1.2. the independence of the Independent Board having been compromised, due to the involvement of Ms Dianne Radley who, in terms of Regulation 108 (8)(c) of the Takeover Regulations, is regarded as non-independent.

1.12.2.1.3. the Independent Board making repeating various misleading statements to M&R Shareholders regarding ATON's Offer, which is contrary to, *inter alia, the* requirement in Regulation 111 (8) of the Takeover Regulations to exercise care not to issue statements that may mislead holders of relevant securities and the market or may create uncertainty.

1.12.2.1.4. the Independent Board's unjustified and highly irregular withdrawal of its published cautionary announcement.

1.12.2.1.5. M&R's conduct, in raising technical points without basis in fact and law is contrary to the principles underpinning Sections 119 and 126 (1) of the Companies Act.

1.12.2.1.6. the Independent Board's open statement of its intention to delay the regulatory process in connection with the Offer;

1.12.2.1.7. the Independent Board's open instructions to M& R Shareholders to act contrary to the terms of the Offer and contrary to the Takeover Regulations;

1.12.3. In letters to the Panel dated 3, 4 and 9 May 2018 Legal Counsel for the Independent Board of M&R and Mr Laas addressed the various complaints lodged by ATON.

1.12.4. A formal TSC hearing was held on 15 and 16 May 2018 where Legal Counsel for the parties addressed the Committee.

2. At the hearing the complaints by the parties focused mainly on two provisions of the Companies Act, namely sections 123 and 126. The relevant portions of these two sections respectively provide as follows:

Section123 Mandatory offers,

(1) - In this section "prescribed percentage" means percentage prescribed by the Minister in terms of subsection (5)

(2) This section applies if-

(a) either –

(i) ...;or

(ii) a person acting alone has, or two or more related or inter-related persons, or two or more persons acting in concert, have, acquired a beneficial interest in voting rights attached to any securities issued by a regulated company;

(b) before that acquisition a person was, or persons contemplated in paragraph (a)(ii) together were, able to exercise less than the prescribed percentage of all the voting rights attached to securities of that company; and
(c) as a result of that acquisition, together with any other securities of the company already held by the person or persons contemplated in paragraph (a) (ii), they are able to exercise at least the prescribed percentage of all the voting rights attached to securities of that company.

(3) Within one business day after the date of an acquisition contemplated in subsection (2), the person or persons in whom the prescribed percentage, or more, of the voting rights beneficially vests must give notice in the prescribed manner to the holders of the remaining securities, including in that notice –

(a) a statement that they are in a position to exercise at least the prescribed percentage of all the voting rights attached to securities of that regulated company; and
(b) offering to acquire any remaining such securities on terms determined in accordance with this Act and the Takeover Regulations.

...

(5) For the purposes contemplated in this section, the Minister, on the advice of the Panel, may prescribe a percentage of not more than 35% of the voting securities of a company.

Section 126 Restrictions on frustrating action

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

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

(i) a bona fide offer being frustrated; or
(ii) the holders of the relevant securities being denied an opportunity to decide on its merits

3. The main complaint by the Independent Board of M&R focused on the issue of the mandatory offer. It was common cause that ATON acquired securities in M&R which pushed its shareholding to over 35% of M&R securities after it had made a firm intention announcement to acquire all or a portion of securities of M&R not already owned by ATON. The acquisition of securities, which caused ATON to move over the 35% threshold, took place pursuant to the conclusion of a Forward Sale Agreement between ATON and Allan Gray.

4. M&R submits that because the acquisition took place independently and outside the provisions of the general offer, ATON should make a mandatory offer to all holders of M&R securities. ATON on the other hand contends that the acquisition of securities in excess of the prescribed percentage during an offer period does not trigger a mandatory offer in terms of the Act and regulations. However, what is in issue, is whether the acquisition was outside and independent of the general offer and if so whether such acquisition falls foul of the provisions of subsection 123(2) of the Act.

5. The provisions of subsection 123(2) as quoted above do not provide for a qualification or a proviso. The provisions are clear and unambiguous. Given the fact that ATON has not disputed that the acquisition in terms of the Forward Sale Agreement was independent and outside the general offer such acquisition does fall foul of the provisions of subsection 123(2) of the Act.

6. This conclusion leaves us with no choice but to rule that ATON should make a mandatory offer to all holders of M&R securities on the same or terms similar to the Forward Sale Agreement.

7. Before addressing the complaints by ATON it should be noted that a week before the hearing of this matter the Chairperson issued a directive enquiring from the parties whether oral evidence will be led and that the parties should indicate which facts were not in dispute. There was no response to this directive.

8. At the hearing of this matter the Chairperson asked the legal representatives of the parties whether oral evidence will be led and the answer was in the negative. Our question was because of the statement by ATON that it believes that the offending conduct denies the shareholders of M&R the right to decide on the merits of the offer and further that the conduct has adversely affected its offer. Counsel advised that no oral evidence will be led and that the matter be decided on the papers filed and on admissions made on the papers and during argument.

9. M&R's main defence against Aton's overarching complaints was based on fiduciary duties of the directors of any company to act in the interest of the company and shareholders which inter alia include advising the shareholders whether the offer price per share is fair and reasonable and ward off any conduct by the offeror that is prejudicial to the interest of the shareholders of the offeree.

10. During argument counsel for the Independent Board of M&R and conceded the following:

    10.1. The Conference call transcript and its participants which included Mr Laas;
    10.2. The Financial Mail of 19 April to 25 April 2018 with prominent featured the face of Mr Laas;
    10.3. That the Response Announcement to Firm Intention Announcement(FIA) of ATON was made a day after FIA; (the FIA was made on 26 March 2018 and the Response announcement on 27 March 2018).
    10.4. That the Response Announcement was made before the Independent Board had knowledge of the independent expert's report on the valuation of the securities
    10.5. That the Response announcement was based on a 2017 valuation;

11. Besides the concession made by counsel on the prominent featuring of Laas in Financial Mail, the Independent Board of M&R did not materially dispute the interviewing of Laas (the managing director of M&R) who obviously spoke on behalf of the board.

12. There is a good reason why the legislature has provided for the constitution of an independent board in takeover laws in South Africa. The obvious reason is that non-independent board members including senior management are conflicted as the potential for losing their jobs in a successful takeover is high. Senior management which includes executives will invariably protect their interest as "[e]mpirical studies show that CEOs of target companies in hostile takeovers are very likely to lose office and not find a position on the board of the acquirer-a strong self-interested reason for target CEOs to resist such bids."[2]

13. There is however no general rule or a legal prohibition that a CEO cannot advise an independent board if in his strong view the offer is not in the interests of the company and may lead to the destruction of the company if successful. The risk as stated above is that the CEO in resisting a hostile takeover which is successful will likely lead to him losing his job. It is however dangerous for any CEO to resist a hostile takeover solely to protect his interest.

14. ATON argued and correctly so that:
"Regulation 110 of the Takeover Regulations requires the Independent Board to obtain appropriate external advice from the Independent expert in the form of a fair and reasonable opinion, and that the Independent Board "must take cognizance of the fair and reasonable opinion received in forming its own opinion on an offer consideration" (Regulation 110(2))" *(page* 305 of the record para 18).

15. The concession referred to in para 10 above without any doubt makes it clear that the Independent Board contravened Regulation 109(c) of the Takeover Regulations which reads as follows: ***"While respecting regulatory timetables, allow sufficient time to discharge all duties and responsibilities and resist haste and pressured time deadlines".***

16. The timeline between the FIA and the Response is in our view very short and th Response was hastily made. No evidence was led to justify the failure to allow sufficient time and why haste was not resisted.

17. The TRP is empowered to follow international practices absent our own authorities. It has been said that **"whilst it is acknowledged that directors may use their powers to defend their company against what they consider to be an undesirable takeover bid, it must be**

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[2] Duncan Angwin, Philip Stern and Sarah Bradley: Agent or Steward: The Target CEO in a Hostile Takeover ;Long Range Planning Vol 37 (2004) at p251.

emphasised that any defensive action that they take must be designed to benefit the company. Although the courts recognise that the directors have the right to resist potentially harmful takeover offers, the directors' decision to oppose the same must not be motivated solely and primarily to entrench themselves in control of the company or to serve their own interests the or those of their friends or other irrelevant purposes. Further, the defensive measures adopted must be reasonable and informed,[3] for there is no protection for directors who have made an unintelligent or unadvised judgment. As Berger J. proclaimed:'The directors must act in good faith. Then there must be reasonable grounds for their belief. If they say that they believe there will be substantial damage to the company's interests, then there must be reasonable grounds for that belief. If there are not, that will justify a finding that the directors were actuated by an improper purpose.[4]'

18. The conduct of the Independent Board of M&R as conceded is prohibited by section 119(1)(c) read with section 126(1)(a) of the Act.

19. In light of the above and based on the facts that are common cause and concessions made during the hearing the Committee made the following ruling on 25 May 2018:
    19.1. ATON is directed to withdraw the offer it made (through its wholly owned subsidiary ATON AT) to the M&R shareholders (other than ATON and ATON AT) and it is ordered to made a mandatory offer on the same or similar terms to those contained in the Forward Sale Agreement entered into between ATON and Allan Gary (Pty) Ltd dated 29 March 2018 to all the shareholders of M&R in accordance with the mandatory offer provisions as set out in the Act and the Takeover Regulations.
    19.2. The conduct of the Independent Board of M&R constituted a contravention of section 119(1)(c) read with section 126(1)(a) of the Act.
    19.3. Mr Laas in his capacity as CEO of M&R is ordered to refrain from making any public statements regarding or concerning the offer.
    19.4. The rulings of the Committee must be published by the Takeover Regulation Panel in terms of Regulation 119(4).
    19.5. The parties are ordered to pay the costs of the Panel in equal proportions.

DATED 12 JULY 2018

TAKEOVER SPECIAL COMMITTEE MEMBERS

1. NANO MATLALA (Chairperson)

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[3] Our underlining.

[4] James Mayanja: Defending Against Hostile Takeovers: Darvall v North Sydney Brick& Tile Company Limited & Others; Monash University Law Review (Vol 14, September 1988) p234.

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2. SANDILE SIYAKA

   I concur_____

3. STEPHANIE LUIZ

   I concur_____

4. TONY TSHIVHASE

   I concur _____

DATED 12 JULY 2018

TAKEOVER SPECIAL COMMITTEE MEMBERS

1. NANO MATLALA (Chairperson)
   
   _____

2. SANDILE SIYAKA

   I concur_____

3. STEPHANIE LUIZ

   I concur_____

4. TONY TSHIVHASE

   I concur 
   _____