TAKEOVER SPECIAL COMMITTEE

In the application of:

ARTEMIS INVESTMENTS PROPRIETARY LIMITED	First Applicant
(Registration No: 1995/000365/07)	
LOUIS MARIE JOSEPH ROBERT MAINGARD	Second Applicant
KARL MAINGARD FAMILY TRUST	Third Applicant
ANTON MAINGARD FAMILY TRUST	Fourth Applicant
PAUL CYRIL MAUJEAN	Fifth Applicant
MARIE JOSEPH GERHARD GUY FRANCOIS MAMET	Sixth Applicant

and

MAGISTER INVESTMENTS LIMITED	First Respondent
(Registration No: C125293 GBL)	
and	
TONGAAT HULETT LIMITED	Second Respondent
(Registration No: 1892/000610/06	

TAKEOVER SPECIAL COMMITTEE RULING

Introduction

1. On 16 November 2021, Tongaat Hulett Limited ("**THL**" or "**Second Respondent**" or **"Company"**) entered into an underwriting, subscription and relationship agreement (the "**Agreement**") with Magister Investments Limited ("**Magister**" or "**First Respondent**") in terms of which, *inter alia*, and subject to the fulfilment or waiver of certain conditions precedent that:

1.1 THL will make a renounceable Rights Offer of up to R4 billion to THL shareholders (the "**Rights Offer**");

1.2 Magister will partially underwrite the Rights Offer, by subscribing for THL shares not taken up under the Rights Offer up to a maximum amount of R2 billion (the "**Underwrite**") and Magister, as a 0.15% THL shareholder, might also participate in the Rights Offer as a THL shareholder (the "**Magister transaction**");

1.3 as part of the Agreement, THL and Magister agreed that the total shareholding of Magister and other members of the Magister Group in THL, post implementation of the Magister transaction, will not exceed 60%, unless THL and Magister agree otherwise; and

1.4 The Magister transaction is subject to the agreement by THL shareholders contemplated in Regulation 86(4) ("**Regulation 86(4)**") of the Companies Regulations, 2011 ("**the Takeover Regulations**") in which THL shareholders waive the requirement for, and the benefit of receiving, a mandatory offer from Magister, Magister related parties, Magister inter-related parties, other members of the Magister Group and Magister concert parties, which might be otherwise be triggered by the Rights Offer and Underwrite (the "**Mandatory offer waiver resolution**").

2. THL announced the Agreement through the Johannesburg Stock Exchange ("**JSE**") Stock Exchange News Services Announcement ("**SENS**") on 17 November 2021.

3. Prior to 10 December 2021, THL provided the Takeover Regulation Panel ("**TRP**") with a circular (the "**Circular**") in order to obtain its approval for the posting and the publication of the Circular by THL to shareholders.

4. On 15 December 2021, THL distributed the Circular.

5. On 18 January 2022 at a general meeting (the "**GM**") of THL, the THL shareholders passed the Mandatory offer waiver resolution. The results of the vote on the Mandatory offer waiver

resolution were that 56 463 289 shares were voted for the resolution, 16 577 959 shares were voted against the resolution and 7 004 389 shares voted to abstain.

6. This led to THL, on 19 January 2022, making an application to the TRP in terms of section 119(6) of the Companies Act, No. 71 of 2008 (the "**Companies Act**") for a ruling exempting, *inter alia*, Magister from the obligation under section 123 of the Companies Act to make a mandatory offer to shareholders of THL (the "**Exemption Application**").

7. On 20 January 2022, the TRP approved the Exemption Application. The TRP exemption approval letter of 20 January 2022 stated, *inter alia*, that:

*"3. The Takeover Regulation Panel (*the *"**Panel**") hereby exempts the applicant from compliance with the aforesaid Takeover Provisions relevant thereto.*

"4. Having considered the above, we are of the view that there is no reasonable potential of the transaction prejudicing the interests of any existing holder of the securities of Magister and that dispensation is reasonable and justifiable in the circumstances having regard to the principles and purposes of the Takeover Provisions."

8. On 25 January 2022, THL requested the TRP to amend the exemption approval letter by *inter alia*:

substituting "*the applicant*" referred to in paragraph 3 of the approval letter with "*Magister, Magister Related Parties, Magister Inter-Related Parties, other members of the Magister Group and Magister Concert Parties*"; and

substituting the reference to "the securities of Magister" in paragraph 4 of the approval letter with a reference to THL.

9. In its amendment request, THL specifically indicated the parties which it wanted to substitute for Magister, to be "*Magister, Magister Related Parties, Magister Inter-Related Parties, other members of the Magister Group and Magister Concert Parties*".

10. On 25 January 2022, the TRP issued a ruling exempting, Magister, Magister Related Parties, Magister Inter-Related Parties, other members of the Magister Group and Magister Concert Parties from the obligation under section 123 of the Companies Act to make a mandatory offer to shareholders of THL per the amendment request made by THL.

11. On 27 January 2022, the Applicants gave notice of their intention to appeal the ruling given by the TRP to the Takeover Special Committee (the "**TSC**").

12. The TSC heard the Applicants appeal on 25 February 2022.

13. On 11 March 2022, the date which TSC was scheduled to deliver its ruling on the matter, the Applicants' requested the TSC to re-open the proceedings and make additional supplementary submissions on account of a written communication received by their attorneys on that day concerning the sole shareholder of Betelgeux Investments (Pty) Ltd ("*Betelgeux*"), Adamjee Group Enterprise (Pty) Ltd, the director of which was said to be *"Mr Adamjee"*.

14. On 14 March 2022, following an indication of no objection/s from the Respondents, the TSC permitted the Applicants' supplementary submissions and the Respondents' responding submissions which were duly delivered by the respective parties by 15 March 2022.

15. The TSC now gives its ruling pursuant thereto.

Issues before the TSC

16. The Applicants raised the following issues on a cascading basis;

16.1 The first issue for adjudication is whether the jurisdictional requirements for a waiver in terms of Regulation 86(4) were complied with at the time that the relevant resolution was put to the GM. The Applicants say they were not and that, for this reason, the resolution purporting as it did to establish a waiver in terms of Regulation 86(4) was a nullity which should be considered by the TSC as *pro no scripto*.

16.2 The second issue for adjudication, in the event of the TSC finding against the Applicants in relation to the first issue is whether, in any event, regulation 86(4) was complied with by means of the vote on the relevant resolution and if not, what effect that should have had on the decision of the TRP and the decision of this TSC.

16.3 The third issue for adjudication, which only arises in the event of the TSC finding against the Applicants in relation to the first and second issues above, is whether the provisions of regulation 86(5) of the Takeover Regulations have been impugned.

16.4 The fourth and final issue for adjudication, which only arises in the event of the TSC finding against the Applicants in relation to all and each of the first, second and third issues is whether in granting the amended approval, the TRP gave proper consideration to the precepts of section 119 of the Companies Act and the Takeover Regulations, and if not, what the decision of the TSC should be in relation to the amended approval of 25 January 2022.

16.5 We deal with each of these 4 issues in detail below.

17. ***First issue: the jurisdictional requirements for a waiver in terms of Regulation 86(4) were not met***

17.1 Regulation 86(4), which for ease of reference is repeated below provides as follows:

"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 a mandatory offer in accordance with the principles detailed in Section 125(3)(b)(ii)"

17.2 The Applicants' complaint in this regard, is that the Mandatory offer waiver resolution needs to be preceded by an actual (formal) rights offer, and that the Magister transaction does not qualify as a rights offer. The Applicants view and refer to the Magister transaction as only a "potential" rights offer.

17.3 The Applicants contend that (paragraph 27 of their principal submissions): "*certainly to constitute an offer in law, the offer would at the very least need to be made on behalf of a known offeror and the price of the offer would be known or at least readily ascertainable*". In support for this contention they, quote Levy J in *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 633D who says *"It is fundamental to the nature of an offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted it will bind the offeror."*

17.4 We do not agree with the Applicants on this point. The Applicants argument is in our view, as rightly contended by THL, misconceived for, *inter alia*, the following reasons:

17.4.1 The Applicants' contention is not borne out by the wording of Regulation 86(4) and is in fact contrary to a proper interpretation thereof;

17.4.2 Regulation 86(4), properly construed, does not require the shareholder vote or "*agreement*" to be preceded by a formal rights offer already made to shareholders and capable of acceptance in its terms;

17.4.3 the rationale of Regulation 86(4) is to permit shareholders to waive the requirement of the making of a mandatory offer after such publication, but before the transaction is given effect to. Typically, as this sub-regulation itself recognises, these types of corporate actions are usually accompanied by a desire on the part of the acquirer of the securities not to be saddled with the consequences of a mandatory offer. The company is issuing the securities to promote a corporate action in the best interest of the company which is not aimed at an acquisition of control *per se*;

17.4.4 the practicalities in rights offers are such that it would make no sense for the company concerned to reach a point where a mandatory offer is triggered rather than first seeking (and in turn, obtaining) a waiver of the need for such an offer;

17.4.5 In the context of a rights offer, the JSE timetable for a rights offer requires the fulfilment of conditions precedent before a rights offer opens. Accordingly, a rights offer circular will not be approved by the JSE and the Second Respondent will not be able to proceed with the rights offer without prior shareholder approval, including of an increase in the number of unissued ordinary shares, the filing of the resultant amendment to the memorandum of incorporation with the Companies and Intellectual Property Commission and the waiver of the benefit of a mandatory offer;

17.4.6 In our view, there is no merit in the contention that in order to qualify as a "rights offer" for purposes of Regulation 86(4), the transaction should comply with the common law principles relating to the content of offers which are capable of acceptance;

17.4.7 The purpose of the exercise in Regulation 86(4) is not for shareholders to consider the detailed terms of the final rights offer or issue itself, but rather to enable them to make an informed in-principle decision on the rights offer or issue. The relevant query therefore is whether the Circular has sufficient information for the THL shareholders to make an informed decision in-principle about the rights offer or issue. We think it does; and

17.4.8 Inevitably, as is the case in this matter, the party that potentially could exceed the 35% threshold as a consequence of a corporate action described in Regulation 86(4) will not proceed with the transaction unless the waiver is obtained.

18. We are accordingly of the firm view that the jurisdictional requirements for a waiver in terms of Regulation 86(4) were met.

19. ***Second issue: the agreement of the shareholders of THL as contemplated by regulation 86(4) was not obtained by means of the resolution put to the shareholders at the general meeting of shareholders***

19.1 The essential contention of the Applicants on the second issue is that Regulation 86(4) requires the actual agreement of more than 50% of the general voting rights of all issued securities, rather than the passing of a resolution as the yardstick for the waiver of the right to receive a mandatory offer. The Applicants however modified this submission midstream as it appears in paragraph 19.2.3 below.

19.2 The Applicants contend that:

19.2.1 properly construed, Regulation 86(4) in using the words "*agree to waive*" envisages agreement other than by way of an ordinary resolution because there is a difference between the two of which the legislature must have been aware when the sub-regulation was drafted and this is understandable because the sub-regulation provides for the waiver of an important right;

19.2.2 there is a common law presumption against waiver and therefore personal agreement on the part of each eligible shareholder is required;

19.2.3 Notwithstanding the above, it is not to say, that the agreement of "*the independent holders of more than 50% of the general voting rights of all issued securities of the regulated company*"

as contemplated by Regulation 86(4), could not be obtained by means of a resolution put to shareholders at a general meeting. This may well be indeed an appropriate resolution and most practical manner for a company to procure the necessary agreement;

19.2.4 the resolution put to the company's shareholders could not be an ordinary resolution passed by more than 50% of the independent shareholders present and voting at such meeting;

19.2.5 it would have to be a resolution which as a matter of fact procured and demonstrated the assent of the independent holders of more than 50% of the general voting rights of all issued securities of the regulated company (not merely those present and voting at the meeting);

19.2.6 As such the relevant resolution put to the independent THL shareholders at the GM did not garner the necessary agreement of more than 50% of the independent holders of the general voting rights of all issued securities in THL;

19.3 On the other hand the Respondents argue that the Applicants' argument is untenable, *inter alia*, because:

19.3.1 whilst it is correct that on a literal reading the word used is "agree" and an ordinary resolution is not referred to, it is obvious that the legislature had the latter in mind as the means in which such agreement should be obtained;

19.3.2 this unduly literalistic approach ignores the context and in particular the reference in Regulation 86(7) which provides that a "waiver", in certain circumstances, requires a fair and reasonable opinion to be included "*in the circular…*". The reference to a circular only makes sense if the waiver is to be obtained at a shareholders' meeting, (which in turn is required to be preceded by the necessary circular) and where a resolution would be sought;

19.3.3 The need for a shareholder decision typically stems from requirements in the Companies Act and/or the company's Memorandum of Incorporation and/or the JSE Listings Requirements

and/or the Takeover Regulations. Shareholders make decisions (ie signify their agreement or otherwise) to a proposed course of action by the company, by exercising their vote at a general meeting of shareholders; shareholder resolutions are typically required for material matters. Regulation 86(4) requires a simple majority but affords an additional layer of protection by limiting the vote to independent shareholders, and of course there is also TRP oversight.

19.3.4 There is no justification for the notion that a waiver in this context attracts some special methodology to obtain more than 50% of the vote of eligible shareholders in general meeting, so the Respondents say;

19.3.5 listed companies would always be regulated companies and can have shareholders numbering in the tens of thousands. It would be absurd to expect large public companies to communicate with and seek the agreement of shareholders other than by way of circularisation and the convening of meetings; no doubt, this state of affairs accounts for the observation in paragraph 49 (page 20) of the Applicants' submissions that the Applicants are not saying that the necessary agreement "*…could not be obtained by means of a resolution put to shareholders at a general meeting, indeed an appropriate resolution might be the most practical manner for a company to procure the necessary agreement*"; however, notwithstanding this acceptance of reality, the Applicants would still require something more than the ordinary resolution being passed by more than 50% of the votes exercised by shareholders present and voting at the general meeting. The Applicants would require that "*the resolution … as a matter of fact procured and demonstrated the assent of the independent shareholders of more than 50% of the general voting rights of all issued securities of a regulated at the company (not merely those present and voting at the meeting)*"; in other words, on the Applicants' version, the votes in favour of the waiver would have to be measured against the voting rights attaching to all independent shareholders even if they voluntarily elected and did not attend the meeting physically or by proxy out of choice. This, we find, is an absurd proposition.

19.3.6 This could never have been the intention of the legislature; and the Applicants' interpretation would thus effectively disempower those independent shareholders that are present in person or by proxy. If a sufficiently large contingent of independent shareholders were generally apathetic or in some cases untraceable or even not still alive, a mandatory offer waiver resolution would be incapable of being passed, even if the mandatory waiver were supported by those who did vote. Once again, this could never have been the intention of the legislature. It is to be noted that the Panel Guideline 2/2011 dealing with waivers of mandatory offers in term refers to a shareholders' meeting, what is to be contained in the relevant circular, and that the Panel will consider an exemption application only after the "*required resolution has been passed in terms of Regulation 86(4)*".

19.3.7 We accept the proposition that the agreement contemplated in Regulation 86(4) is most likely to be or would practically best be represented in a form of a resolution of the shareholders of the company, THL in this case. It is accepted that this is how companies generally take decisions requiring shareholder approval. It would not necessarily be an agreement which is negotiated with each the shareholders, as it were. We therefore conclude that to suggest that the reference to *"agreed"* in Regulation 86(4) requires some degree of formal, contractual structure, is strained and incorrect.

19.3.8 Furthermore, the TRP's Guideline 2/2011 which deals with waivers of mandatory offers specifically records in paragraph 3 thereof that "*After the shareholders' meeting is held and the required resolution has been passed, an application can be submitted to the TRP together with supporting documents indicating that the requisite resolution has been passed in terms of Regulation 86(4)*".

19.4 Despite a contrary argument by the Applicants, we are of the view that this guideline accords with the practical implementation of regulated transactions and is not offensive to Regulation 86(4).

19.5 The crisp and narrow matter for the TSC to determine in so far as the second issue is concerned, is the nature and/or type of the resolution (agreement instrument) (on the one hand) and the calculation base for the resolution required for Regulation 86(4)'s application (on the other hand). The TSC's assessment and conclusions on the third issue are as follows:

19.5.1 Regulation 86(4) uses the wording *"independent holders of more than 50% of the general voting rights……"*). not "*an ordinary resolution"*). Clearly an ordinary resolution is not what is required. Otherwise the legislator would have said so;

19.5.2 An ordinary resolution is defined in section 1 of the Companies Act as follows:

> ***"ordinary resolution"*** *means a resolution adopted with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage as contemplated in section 65(8)-*
>
> > *at a shareholders meeting**;** or*
> > *(b) by holders of the company's securities acting other than at a meeting, as contemplated in section 60;" (emphasis)*

19.5.3 The whitewash resolution cannot be in a form of an ordinary resolution, that is, "*a resolution adopted with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage as contemplated in section 65(8)"* because it excludes those shareholders of the company who are not independent. The independent holders are defined in Section 125(1) and only those holders can vote on the whitewash;

19.5.4 We note, as contended by the Applicants, that the Circular at page 24, paragraph 9.1 (ii) and at page 50 (where the Mandatory offer waiver resolution is set out) incorrectly and rather confusingly refers to an adoption of an ordinary resolution for purposes of compliance with the requirements of Regulation 86(4). Requiring the adoption of an ordinary resolution for purposes of Regulation 86(4) is indeed misconstrued. However, irrespective and

notwithstanding this error and/or misconception, in our considered view, if in fact the shareholders who voted were independent holders of the general voting rights of all the issued securities and more than 50% of them voted in favour of the resolution, then that resolution would be competent to signify the agreement of the shareholders for compliance with the requirements of Regulation 86(4);

19.5.5 The critical issue remains as to what is the correct and competent base for the calculation of the shareholder vote for purposes of Regulation 86(4). The applicable base must be defined with reference to, importantly, *"independent holders of the general voting rights of all issued securities"* in THL. Accordingly, the calculation base is comprised in the phrases "*independent holders*" and *"of the general voting rights"* of THL*;*

19.5.6 Independent holders are defined in Section 125(1) as follows:

"(1) In this section

(a) ''independent holder of voting rights'' mean a person who

(i) holds any securities of a company that entitle that person to exercise general voting rights; and

(ii) is independent of an offeror or any related or inter-related person, or person acting in concert with any of them;"

19.5.7 On the other hand, the phrase *"general voting rights"* is defined in section 1 of the Companies Act as: "…*voting rights that can be exercised generally at a general meeting of a company;*"

19.5.8 In contrast, the phrase *"voting rights"* with respect to any matter to be decided by a company is defined in section 1 as (in the case of a profit company): *"(a) The rights of any holder of the company's securities to vote in connection with that matter, in the case of a profit company;"*

19.5.9 There is a clear difference between the two definitions quoted above. The phrase *"voting rights"* is defined with reference to the rights of any holder of securities, without apparent

limitation. By contrast, the definition of *"general voting rights"* refers only to those voting rights that can be exercised generally at a general meeting of a company;

19.5.10 The linguistic, contextual difference is this: holders of general voting rights can only exercise those rights either by physical presence at a meeting, or by proxy. It is these holders that constitute the cohort of independent holders of securities that form the basis for the calculation of the 50% threshold in Regulation 86(4).;

19.5.11 The Respondents have submitted that the calculation performed by the Applicants in paragraph 52 of their submissions is consequently incorrect in utilising 121 426 622 as the number of general voting rights. Rather, the calculation should utilise as the base cohort the number of independent holders in attendance at the meeting, either personally or represented by proxies which is those holders who were in attendance, and excludes Magister and Braemar who were not in attendance;

19.5.12 According to the minute of the GM (annexure "A3" to the Applicants' submissions), a total of 77.3% of the independent holders voted in favour of the resolution;

19.5.13 Therefore the relevant question of fact for purposes of Regulation 86(4), is to whether the relevant resolution put to the independent THL shareholders at the GM did garner the necessary agreement of "more than 50% of the independent holders of the general voting rights of all issued securities in THL; and

19.5.14 The Applicants argument regrettably ignores and attaches no meaning or at best the meaning attributable to the phrase *"voting rights"* to the phrase *"general voting rights"* of Regulation 86(4). This is clearly incorrect.

19.6 In the end, on a plain and literal interpretation of the phrases "*independent holders*" and *"of the general voting rights"* as defined in the Companies Act, the Applicants' submission with

regards to the second issue must fail. In our view, Regulation 86(4) is unambiguous and does not require the use of the cannons of statutory interpretation used in case of ambiguity.

Third issue: the waiver is a nullity by virtue of the provisions of Regulation 86(5)

20. The Applicants submitted that if, the TSC finds against them in respect of the first two issues set out above, then the provisions of regulation 86(5) of the Takeover Regulations come into consideration.

21. Regulation 86(5) provides that:

"(5) Irrespective of whether an issue of securities is made conditional upon a waiver, a waiver by the independent holders of more than 50% of the general voting rights of all issued securities of the regulated company is a nullity if any acquisitions are made by an acquirer or a subscriber or underwriter, or by any of their respective concert parties, in the period between the transaction announcement and date of the waiver".

22. In essence, both in their principal and supplementary submissions, the Applicants allege that Adamjee is an inter-related party with Magister and that Betelgeux is "*probably*" an inter-related party with Magister, through Adamjee. The Applicants also assert that Adamjee and Betelgeux are or "*likely*" concert parties as the term is defined in the Companies Act.

23. The Respondents have denied the Applicants' contentions in this regard. They have argued that these allegations are at best speculative and shear conjecture. In any event, the TSC concludes that these allegations are largely questions of fact with many of their aspects requiring evidence to be adduced. Needless to say that, the TSC views the alleged transgressions in a very serious light. The TSC is of the firm view that these allegations must be investigated extensively and fully to get to the bottom of this issue. The TSC accordingly directs that the complaint contained in this issue be dealt with comprehensively by the TRP in the first instance.

Fourth issue: the TRP failed to take into account the precepts of section 119 of the Companies Act and the Takeover Regulations.

24. The Applicants raise this issue premised on the TSC failing to find for the Applicants on any of the issues traversed above. Section 119 of the Companies Act sets out certain general principles regarding the regulation of affected transactions.

25. Section 119 of the Companies Act and particularly sub sections 119(1)(a) and (b), provide as follows:

"119 Panel regulation of affected transactions

(1) The Panel must regulate any affected transaction or offer in accordance with this Part, Part C and the Takeover Regulations, but without regard to the commercial advantages or disadvantages of any transaction or proposed transaction, in order to-

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

(b) ensure the provision of-

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

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

85. Subsections 2(b)(ii), (c) and (d)(ii) provide further that:

"(2)… (b) that all holders of-

… (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-

… (ii) are provided sufficient information, and permitted sufficient time, to enable them to reach a properly informed decision."

26. In response to the Applicants complaints of a number of contraventions of Section 119 of the Companies Act and particularly sub sections 119(1)(a) and (b) above, the Respondents responded, *inter alia*, as follows:

26.1 the Applicants complain that shareholders were not given sufficient time to consider and obtain advice on the Circular for various reasons. As regards the timing of the Circular there is no suggestion in the Companies Act or Regulations that the December holiday period should be disregarded or in some way treated differently for the purposes of convening a general meeting and the publication of a circular.

26.2 In this instance, the Circular was published to shareholders a full month before the date of the meeting; and the Applicants ignore the fact that the time pressures imposed by the South African Lenders placed the Second Respondent in a position where it could not wait a month before sending out the Circular.

26.3 Sufficient information is contained in the Circular to enable an informed decision to be made (for the reasons dealt with above).

26.4 The corporate structure of the First Respondent was identified with sufficient particularity and any interested shareholder could have undertaken the investigations that the Applicants now have, and were, of course, entitled to put any relevant questions at the meeting.

26.5 As regards the Circular's failure to "*identify Betelgeux and Adamjee as inter-related or concert* parties", this was not, and is still not, something within the Second Respondent's knowledge and has not been demonstrated.

26.6 As regard the contention that minority shareholders are not being treated equitably because those shareholders who cannot afford to follow their rights will be "radically diluted", suffice to say that this is a prospect inherent in every rights offer and is a commercial consideration to be

weighed by shareholders against the benefits of the rights offer in the particular circumstances of the issuing company. This is not territory into which the TRP and TSC are required to tread.

26.7 To the extent that the Applicants' complaint is that by virtue of the waiver there will be no exit mechanism in the form of a mandatory offer this is merely a function of the operation of Regulation 86(4) and not a basis to question the TRP's exemption. In this regard the dissentient shareholders must defer to the vote of the eligible shareholders at the meeting and the TRP will not withhold its consent absent some sound basis to do so.

26.8 We emphasise also that an exit mechanism in certain circumstances is provided for in the Circular. Ordinarily, once a shareholder waiver has been obtained, and the transaction exempt from the requirement of a mandatory offer, an acquiring party is entitled to increase its shareholding without attracting any further obligation to make such an offer. Notwithstanding this, the Circular provides that the second respondent and other members of the Magister Group and Magister Concert Parties will be compelled to make a general offer, if after implementation of the Transaction, either of the circumstances referred to in clause 3.6 (iii) of the Circular arises, unless a fresh Regulation 86(4) waiver is obtained.

26.9 There is no merit in the conclusion that the whitewash resolution, when account is taken of the two provisos thereto, is some unlawful attempt to bypass or avoid the making of a mandatory offer by the First Respondent.

27. Having considered the submission of all the parties regarding the forth issue, we are of the view that there has been no breach of the provisions of Section 119 of the Companies Act.

28. **Commercial Considerations**

We record that the Respondents canvass numerous commercial advantages of the mechanics of the Mandatory offer waiver resolution. It is trite that the TRP and the TSC must have no regard to the commercial advantages or disadvantages of any transaction (section 119(1) of the Companies Act).

In relation thereto, we point that the TSC is very mindful that a discussion or debate on the commercial advantages or not of a particular transaction falls outside of its mandate and ought not to influence its ruling. The TSC was so guided in giving this ruling.

The TSC Ruling

The Applicants' complaints under all 4 issues raised above are dismissed. The TSC confirms the TRP ruling of 20 January 2022 as amended on 25 January 2022.

Mr NA Matlala dissents from the majority decision above as follows:

I have read the majority decision and do not agree with the decision arrived at that Regulation 86.4 of the Regulations has been complied with by the Respondents resulting in the granting of an exemption from an obligation to make a mandatory offer.

The facts of this matter are substantially common cause, and it is not necessary repeating same as they have been eloquently summarised by the chairperson of the TSC. I will however refer to facts not covered by the majority decision in support of my decision. My dissent is based on specific portions of paragraph 9 of the circular to shareholders, notice of general meeting and results of general meeting.

My decision deals with the application of regulation 86.4 read with sections 125 of the Act, Promotion of Administrative Justice Act, 2000, the Constitution Act,1996 and relevant legal authority.

The circular to shareholders

Paragraph 9 of the circular to shareholders deals with “the mandatory offer waiver” and the relevant portions that I will be addressing *seriatim* reads as follows:

“9.1 The rationale

(i) Section 123(3) of the Companies Act provides that if, pursuant to the acquisition of a beneficial interest in voting rights attached to any securities of a regulated company, a Person (together with its related and inter-related parties and concert parties) is able to exercise at least 35% (thirty five percent) of all the voting rights attached to the securities of that regulated company, the Person is required to make a Mandatory Offer to the holders of the remaining securities of that company

to acquire those securities <u>on terms determined[1] in accordance with the Companies Act and the Takeover Regulations.</u>

(ii) Regulation 86.4 of the Takeover Regulations provides for an exemption from an obligation to make a Mandatory Offer if an acquisition contemplated in paragraph 9.1(i) is made pursuant to <u>rights offer, provided that independent holders[2] of more than 50% (fifty percent) of the general voting rights of all issued securities of the company concerned have agreed, by adoption of an ordinary resolution, to waive the benefit of such a Mandatory Offer</u>

Paragraph 9.1(ii) can be compared to a reserved rights clause in a shareholders agreement for the protection of minority shareholders. The ordinary resolution referred to in this paragraph can only be exercised by such independent holders of securities and if adopted will result in a waiver of the mandatory offer but if it falls short of the 50 plus per cent it can be concluded that the independent holders of securities have exercised their veto right and the TRP would not exempt the mandatory offer. The argument that the ordinary resolution is passed by holders of securities even when conflicted defies legal logic and common law. No one can be a judge in his/her own cause (*nemo iudex in rem suam*). Regulation 86.4 is explicit and unequivocal regarding the category of security holders vested with voting rights *viz*. independent holders of securities for passing such a resolution empowering the TRP to grant a waiver to make a mandatory offer. The legislature has deemed it fit to restrict the voting rights on the independent as have disparate and/or opposite interests to related and inter-related holders of securities who are aligned to the offeror and lacks independence. Madimetja A L Phakeng in his doctoral thesis states that regulation 86.4 "*ensures transparency and avoids conflicts of interests"*[3].

Section 125(1)(a) of the Act defines **"independent holder of voting rights"** as a person who

[1] The Takeover Regulation Panel has been established as an oversight authority in this regard and it has to satisfy itself that the terms of the mandatory offer are in accordance with the Act and the regulations.
[2] As defined in section 125(1) of the Act.
[3] Regulation of Takeovers and mergers with an emphasis on the mandatory offer rule: a comparative and critical analysis of the law and institutions that have been set up to enforce the law, page 232, APRIL 2019 Doctoral thesis, Stellenbosch University.

(i) Holds any securities of a company that entitle that person to exercise general voting rights; and

(ii) Is independent of an offeror or any related or inter-related person, or any person acting in concert with any of them

The granting of the exemption does not pass muster of regulation 86.4 read with section 125(1)(a) rendering it a tainted ordinary resolution subject to attack under a list of grounds in section 6 of PAJA. The specific grounds listed in section 6 of PAJA that I base my reasoning against the majority decision provide as follows:

"6(2) A court or tribunal[4] has the power to judicially review an administrative action if-

(e)(i) the action was taken for a reason not authorized by the empowering provision.

(iii) the action was taken because irrelevant[5] considerations were taken into account or relevant considerations were not considered.

(f)(ii) (bb) the action itself is not rationally connected to the purpose of the empowering provision.

During the hearing of this matter, I posed a question to Counsel of the respondent whether if THL has 11 independent holders of securities who attend the general meeting but only 5 votes in favour of the exemption of the mandatory offer and what the effect thereof will be. To my surprise counsel said the resolution would pass as it doesn't need a majority of independent holders of securities. This in my view is irrational and ignores the protection afforded independent holders of securities in fundamental transactions who are given a choice to either waive the benefit of a mandatory offer or veto it. The independent holders of securities can veto the mandatory offer so that they can be bought out of the offeree on equal terms similar to those offered by the offeror before the trigger of a mandatory offer. Madimetja A L Phakeng[6] put it succinctly as follows:

"The mandatory offer requirement is one of the strongest expressions of the equality rule in takeovers and mergers. The mandatory bid rule is also known as the Equal Opportunity Rule……There are a number of interlinked principles for the enforcement of the mandatory offer in takeovers. Scholars assert that after a change of control, the future hopes

[4] The Takeover Special Committee is such tribunal.
[5] The irrelevant consideration in my view is the commercial advantage of the transaction.
[6] Ditto pages 85-86, footnotes omitted.

and interests of the shareholders lie with the new controlling shareholder. Minority shareholders of the controlled company can be prejudiced should the new controlling shareholder not conduct the affairs of the company properly. Once there is a change of control of a company, shareholders must be given an opportunity to leave the company[7] and sell their shares to the new controlling shareholder on the same terms as those who sold theirs to the new controlling shareholder. The opportunity to sell should not depend on the willingness of the new controlling shareholder to voluntarily make a general offer but should instead be compulsory. The essence of the mandatory offer requirement is contained in two principles: Firstly, shareholders should have the opportunity to sell and exit the company whose control has changed, and secondly, the shareholders should have the opportunity to sell their shares on the same terms as those who sold theirs to the new controlling shareholder[8]"

Notice of General Meeting

The Executive Director granted the waiver to make a mandatory offer based on the outcome of the "adoption of Ordinary Resolution Number 1" at a general meeting held on 18 January 2022. Ordinary Resolution Number 1 (the impugned resolution) is referred to in the notice of general meeting as **Waiver of Mandatory Offer provisions of the Companies Act.**

I deem it important to reproduce the relevant portions of the impugned resolution which read as follows:

"In order for this ordinary resolution number 1 to be adopted, it must be supported by more than 50% (fifty percent) of the voting rights exercised on it by independent holders of shares[9].

Reason and effect:

The reason for ordinary resolution number 1 is that:

(i) section 123(3) of the Companies Act provides that, in the event that pursuant to the acquisition of a beneficial interest in voting rights attached to securities of a company, a Person (e.g. an underwriter of a rights offer) and Related and Inter-related Persons and Persons Acting in Concert are able to exercise at least 35%

[7] Or such non conflicted shareholders remain by voting in favour of a waiver of a mandatory offer.
[8] However unpalatable it might be and the illiquid position of the new controlling shareholder to buy them out. See also Abraham Albertus Cilliers and Distell Group Limited TSC Ruling 31 January 2018 at trpanel.co.za link: Rulings and ConvergeNet Holdings Limited and Yellow Star Group Holdings Limited TSC Ruling 10 May 2013 at trpanel.co.za link: Rulings
[9] My underlining.

(thirty five percent) of all the voting rights attached to the securities of that company, the Person, Related and Inter-related Persons and Persons Acting in Concert are required to make a Mandatory Offer to acquire any remaining securities of that company on terms determined in accordance with the Companies Act and the Takeover Regulations;

(ii) a vital consideration in Magister's decision whether or not to enter into Magister Transaction is whether this might result in an obligation to make a Mandatory Offer.

(iii) Magister has advised that it will not proceed with the Magister Transaction unless the Mandatory Offer Waiver Resolution is adopted, and Magister, Magister Related Parties, Magister Inter-related Parties, other Members of Magister Group and Magister Concert Parties are exempted from the obligation to make a Mandatory Offer; and

(iv) regulation 86(4) of the Takeover Regulations provides that a transaction is exempt from the obligation to make a Mandatory Offer, provided that independent holders of more than 50% (fifty percent)[10] of the general voting rights of all issued securities of a company have agreed to waive the benefit of such a Mandatory Offer in accordance with such regulation.

The effect of adopting ordinary resolution number 1 will be a waiver of the right of the Shareholders to receive a Mandatory Offer from Magister, Magister Related Parties, Magister Inter-related Parties, other Members of the Magister Group and Magister Concert Parties in the event that, pursuant to the Rights Offer and the Underwrite, Magister, Magister Related Parties, Magister Inter-related Parties, other Members of the Magister Group and/or Magister Concert Parties is/are able to exercise at least 35% (thirty five percent) of all of the voting rights attached to the securities of the Company"

The contents of the impugned resolution are in accordance with regulation 86(4) but the outcome of the voting is tainted in that it was not approved by independent holders of securities. All shareholders were allowed to vote on ordinary resolution number 1 even though they were palpably conflicted. The evidence is found in the outcome of the results which is recorded as follows:

[10] My underlining.

"RESULT OF GENERAL MEETING

THL Shareholders are advised that in (sic) at the General Meeting held today, 18 January 2022, all resolutions tabled were passed by the requisite majority of votes exercised by THL Shareholders.

Details of the results of voting at the General Meeting are as follows:

(i) Total number of THL ordinary shares in issue on the date of the General Meeting: 135,112,506;

(ii) Total number of issued THL ordinary shares voted in the General Meeting: 80 045 647 (which represents 59% of THL's total issued ordinary shares)

Ordinary resolution Number 1 being the purported waiver of THL Shareholders' entitlement to a mandatory offer voting in favour of the resolution is recorded as 56 463 289 representing 77.30% of shareholders that attended the meeting. Shareholders that voted against the resolution were recorded as 16 577 959 representing 22.70% of the shareholders that attended the general meeting and lastly the shareholders that abstained are recorded as 7 004 399 representing 5.18% of shareholders that were in attendance. The gross percentage gives 105.18% which is 5.18% in excess of the total. Strangely Special Resolution Number 5 has a 100.16% which is 0.16% in excess of the total number of shareholders in attendance. The percentage for Resolution Number 2 is 114.07% of the total shareholders who attended the General Meeting.

The purported approval of the impugned resolution was not voted by independent holders of securities and the Results of General Meeting nor the Notice for General Meeting has disclosed the number of independent holders of securities and the total number of the percentage in compliance with regulation 86(4).

It is also curious to note that the Conditions Precedent as appears at paragraph 3 Results of General Meeting does not state that regulation 86(4) has been complied with. This paragraph reads thus:

"The Rights Offer and the transaction with Magister remain subject to the fulfilment, or waiver (to the extent permissible), of the remaining conditions precedent set out in the Circular."

Approval by independent holders of securities of THL is part of such Conditions Precedent[11].

They say so of THL at paragraph 3.13 of the Application letter for Waiver dated 19 January 2022 that:

"It is our understanding[12] that none of Magister, Braemar or any other member of the Magister Group or Magister Concert Party voted on the Mandatory Offer Waiver Resolution, and that

[11] See paragraph 3.4 of the Circular at page 20 thereof.

only independent holders of THL Shares exercised votes on the Mandatory Offer Waiver Resolution. Accordingly, independent holders of more than 50% of the general voting rights of all issued THL Shares have agreed to waive the benefit of a Mandatory Offer."

This is not borne out by any evidence of how many such independent holders of securities were in attendance and what percentage voted for or against. The assumption (understanding) is devoid of substance.

In **Comparex Holdings Limited Employee Share Purchase Trust and Others v Allan Gray Limited and Others- In re: Comparex Holdings Limited 3 December 2003 (Trpanel.co.za pages 3-4)** (**Comparex**) a clinical calculation and analysis of shareholders was undertaken to determine a percentage of securities held by various asset managers in an affected transaction which exercise one would have expected to have been undertaken in this matter rather than making an assumption without evidence. The analysis was undertaken to determine whether the prescribed percentage was triggered resulting in a mandatory offer. I will be doing this minority decision an injustice if I do not produce the relevant Comparex paragraph which reads thus:

"2. Analysis of Shareholdings in Comparex of The Asset Managers

2.1 For the purposes of the analysis hereunder the shareholding managed by each of the Asset Managers during what is considered to be the relevant period are summarized in Annexure A hereto. Such information has been based on information submitted by each of the Asset Managers.

2.2 The shareholding appearing in annexure A[13] are also broken down, for each of the Asset Managers, to reflect various categories of client mandates held by each of them, namely:

2.2.1. those held in terms of discretionary mandates from clients where the asset manager enjoys the authority to determine how to exercise the voting rights attaching to the shares for so long as the mandate remains in force (the "fully discretionary mandates"). Note that in the case of RMB Corporate Finance it is itself the beneficial holder and thus there is no client asset manager relationship;

2.2.2. those held where the client retains the right to vote any share being managed by the asset manager, but where the asset manager may request the registered holder of any such shares to issue the asset manager with a proxy to vote such shares at a shareholders'

[12] My underlining.
[13] See pages 11-14 of Comparex.

meeting, subject to any such request having to be advised to the client and the client having the right to revoke any such proxy issued to the fund manager (the "partially discretionary mandates"). An example of the relevant wording as extracted from an Alan Gray partially discretionary client mandate agreement is reproduced in Annexure B[14]; and

2.2.3. all other cases (the "other mandates")

2.3. The Executive Committee is not aware of any client mandates which entitled an Asset Manager to enter into an agreement, arrangement or understanding with other shareholders that they would acquire securities for the purposes of an affected transaction. There is also no evidence that any client instructed an Asset Manager to enter into an affected transaction."

For these reasons I am constrained to dissent to the majority decision and conclude that the requirement for a waiver to make a mandatory offer as set out in regulation 86(4) has not been complied with. The majority decision has denied the Applicants the benefits afforded them by section 123 of the Act and such denial in my view is unconstitutional as it is tantamount to expropriation of property without compensation while the concert parties obtained such benefit. The Applicants can also challenge the decision in terms of the Constitution Act, 1996.

I would therefore uphold the Applicants' appeal and that the cost of the TSC should be paid by the Respondents.

NA MATLALA (Dissenting).

_____

SB SIYAKA

CHAIRPERSON

(Duly authorised to sign)

For and on behalf of the TSC Members

[14] See page 15 of Comparex.

NP DONGWANA (Concurring);

EA MOOLA (Concurring);

CH EWING (Concurring); and

NA TSHIVHASE(Concurring).

Applicants

Represented by: Adv. Roy Gordon

Briefed by Adam Pike of Pike-Law

Magister Investments Limited

Represented by: Adv. Noel Greaves SC

Briefed by: Alex Parel / Charles Ancer of Fluxmans Attorneys Inc.

Tongaat Hullet Limited

Represented by: Adv. Arnold Subel SC

Briefed by: Trevor Boswell / David Hertz of Werksmans Attorneys & Lance Fleiser of Bowman Gilfillan Inc.