TAKEOVER SPECIAL COMMITTEE

In the matter between:

CAXTON AND CTP PUBLISHERS AND PRINTERS LIMITED

and

TAKEOVER REGULATION PANEL

and

MPACT LIMITED

DECISION

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1 **Introduction**

1.1 This is a decision in respect of an application by Caxton and CTP Publishers and Printers Limited (**Appellant** or **Caxton**) in terms of regulation 118(8) of the Companies Act 71 of 2008, regarding the Ruling[1] of the Executive Director of the Takeover Regulation Panel (**Panel** or **First Respondent**) made on 1 September 2022 (**Ruling**).

1.2 Unless otherwise specified:

(1) Terms defined in the Companies Act, 2008 (**Act**) and the Companies Regulations, 2011 (**Regulations**) have the meaning ascribed to them therein, irrespective of whether such terms are used in capitalised form or not.

[1] See regulation 81(y)

(2) References to "section" are references to a section in the Act, and references to "regulation" are references to a regulation in the Regulations.

(3) Words and expressions defined herein shall carry the meanings ascribed to them herein.

1.3 The application, styled as an appeal against the Ruling, was heard on 17 February 2023.

1.4 Although the Panel was named as the First Respondent in this matter, it did not participate in the application, which was opposed by Mpact Limited (**Mpact**), the original complainant in this matter and cited in this application as the Second Respondent.

1.5 A complete record of the salient documents submitted as part of the application (**Record**) was prepared by Mpact's attorneys of record (**Webber Wentzel**), comprising some 323 pages. We assume that the basis upon which the Record was filed was for the convenience of the Takeover Special Committee (**Committee**) in this application. For ease of reference, we will reference specific pages on the Record for brevity and to avoid unnecessarily burdening this decision.

2 Background facts

2.1 The background to the facts of the application before this Committee appears on pages 195 to 203 of the Record[2], read with pages 116 to 118 of the Record[3].

[2] Paragraphs 7 to 23 of the Mpact's Answer to this application.
[3] Paragraphs 1 to 7 of the Statement On Grounds Of Appeal by Caxton.

2.2 On the date of the hearing of this application, counsel for Caxton (Advocate Steven Budlender SC) adopted the approach that the background facts to the dispute in this matter were irrelevant as the dispute crisply related to the question as to whether the order made in the Ruling (by the Executive Director as empowered by regulation 81(y)) was lawful otherwise legally valid seeing as it was based on regulation 117. According to Caxton, the order in the Ruling (the so-called "**impugned ruling**"[4]) was ultra vires in that the prohibition contained in it was one that the Executive Director or the Panel as a whole not empowered to give. Given this assertion, so the argument goes, there was no point dwelling on the background facts as, ultimately, the salient consideration was whether the Executive Director could even (in law) make a decision like that contained in the impugned ruling.

2.3 Counsel for Mpact (Advocate Leonard Harris SC) argued that Caxton seeks to avoid dealing with the background facts of this matter because they laid bare the unlawful conduct of their client, hence their strategy to shift focus from the facts and narrow the hearing into an argument purely based on the legality of the impugned ruling. We raise this only to note the different positions adopted by the parties as to what ought to be the focus of enquiry in this matter.

2.4 For the sake of completeness, it bears quoting in full the text of the impugned ruling, namely:

Caxton is prohibited from making any further public statements/announcements in any form and on any platform about the acquisition of Mpact without the approval of the Panel under Regulation 117.

[4] See paragraph 5 on page 118

3 **Grounds of appeal**

3.1 On pages 119 to 122 of the Record, Caxton sets out three grounds of appeal, namely:

(1) firstly, that there was no "affected transaction";

(2) secondly, that the impugned ruling purports to apply to more than "documents"; and

(3) lastly, that the Panel's interpretation and application of regulation 117 [in the Ruling] is unconstitutional.

4 **No "affected transaction"**

4.1 Regulation 117 provides as follows:

All documents relating to an affected transaction as defined under section 117[1](c) of the Act, including announcements and circulars must be approved by the Panel before being posted or published. [5]

4.2 Caxton argued that:

(1) Correctly interpreted, the reference to "affected transaction" in regulation 117 is not a reference to the mere announcement of an objective to acquire securities in a manner that might constitute an affected transaction.

(2) Given that the impugned statements do not relate to an affected transaction, regulation 117 does not apply, and the Panel erred in making the impugned ruling.

[5] Footnote 4 on page 119 correctly notes the typographical error in the text of this regulation regarding the cross-reference to section “117(c)” instead of “117(1)(c)” being the definition of “affected transaction”.

(3) That the contemplated merger is entirely inchoate[6]. There is no deal or even a proposed deal on the table. [It] has made no offer to Mpact's remaining shareholders, has not proposed a price and has made it clear that it can only make an offer after it receives competition authorities' approval.[7]

(4) Regulation 117 applies only to documents relating to "an affected transaction", i.e. an offer to acquire shares or the acquisition itself. The contemplated merger has not yet progressed to this stage, and regulation 117 cannot apply to it.[8] No deal is yet on the table and Caxton has made no offer to Mpact's remaining shareholders.[9]

(5) Furthermore, it has decided to seek competition authorities' approval for the proposed merger before making an offer to Mpact's remaining shareholders.[10] It initially sought Mpact's cooperation in filing a joint merger notification, but Mpact refused.[11]

5 Caxton's framing of the legislative framework

5.1 Caxton outlined the legislative framework for the Panel's mandate when regulating affected transactions or offers in terms of the Takeover Provisions in paragraphs 23 to 25 of its HOA[12] as follows:

(1) It asserted that the Panel's authority to regulate takeovers is aimed at achieving three broad purposes:

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[6] The use of this term is instructive in that it speaks to something that has just begun, not fully formed or developed, otherwise rudimentary. This is more so since the Panel is enjoined (in section 119(2)(a) to ensure that "no person may enter into an affected transaction unless that person is ready, able and willing to implement that transaction. See also regulations 99(1), 95(1) and (2) and 111(8).
[7] See para 2 of Caxton's Heads of Argument (HOA) at page 245 of the Record.
[8] See para 6.1 of Caxton's HOA at page 246 of the Record.
[9] See para 10 of Caxton's HOA at page 248 of the Record.
[10] See para 14 of Caxton's HOA at page 249 of the Record.
[11] See para 16 of Caxton's HOA at page 250 of the Record.
[12] At pages 252 to 254 of the Record.

(a) first, to ensure that shareholders of a target company are treated equally – in other words, that they receive equal compensation for their shares";

(b) secondly, to ensure that those shareholders receive sufficient information and time to make an informed decision as to whether to accept any offer made by the offeror; and

(c) thirdly, to prevent actions by the target company's board to frustrate the takeover.

(2) Further, in order to achieve these objectives, the Takeover Provisions contain numerous procedures and prohibitions that kick in when a takeover is in the "offing"[13], and this is evidenced by a triggering of a mandatory offer in terms of section 123 or once the offeror has 'communicated a firm intention to make an offer and is ready, able and willing to proceed with the offer'[14][15].

(3) Lastly, "in order to prevent frustrating action by the target board, section 126 of the Companies Act prohibits the target board from taking certain specified actions that could frustrate the takeover without the prior written approval of the TRP and the approval of the target's shareholders. This prohibition bites once the target board 'believes that a bona fide offer might be imminent'. Regulation 94(2) of the Takeover Regulations makes it clear that a target board may assume that a bona

[13] See para 25 at page 253 of the Record.
[14] See para 25.2.1 at page 253 of the Record.
[15] It is unclear whether Caxton's assertions, as summarised in 5.1(2) above, are meant to convey a view that the so-called "procedures and prohibitions" will only apply in instances where a mandatory offer has been triggered or a firm intention announcement has been issued. But these are the only examples proffered by Caxton in paragraph 25 of its HOA when describing instances where a "takeover is in the offing".

fide offer is imminent – and thus that the prohibition on frustrating action has kicked in – only once a firm intention announcement is published, and not before".

5.2 The framing above by Caxton appears dubious, to say the least. To properly understand the Panel's legislative mandate, it is essential to quote section 119, dealing with the Panel's authority to regulate affected transactions. Section 119 states:

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; and

(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.

(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) that no person may enter into an affected transaction unless that person is ready, able and willing to implement that transaction;

(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 offeree regulated company securities; and

(d) that all holders of relevant securities-

(i) receive the same information from an offeror, potential offeror, or 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) Subsection (2)(d) is not to be construed or applied to prohibit:

(a) the furnishing of information in confidence by an offeree company to a *bona fide* potential offeror or vice versa; or

(b) the issue of circulars by brokers or advisers to any party to the transaction to their own investment clients,

with the prior approval of the Panel.

(4) In carrying out its mandate, the Panel may-

(a) require the filing, for approval or otherwise, of any document with respect to an affected transaction or offer, if the document is required to be prepared in terms of this Part, Part C and the Takeover Regulations;

(b) issue compliance certificates, if the Panel is satisfied that the offer or transaction satisfies the requirements of this Part, Part C and the Takeover Regulations; and

(c) initiate or receive complaints, conduct investigations, and issue compliance notices, with respect to any affected transaction or offer, in accordance with Chapter 7, and the Takeover Regulations.

(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.

(6) The Panel 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 this Part, Part C or the Takeover Regulations if-

(a) there is no reasonable potential of the affected transaction prejudicing the interests of any existing holder of a regulated company's securities;

(b) the cost of compliance is disproportionate relative to the value of the affected transaction; or

(c) doing so is otherwise reasonable and justifiable in the circumstances having regard to the principles and purposes of this Part, Part C and the Takeover Regulations. [Our emphasis]

5.3 The two key features of sections 119 are:

(1) Firstly, the primary and secondary regulatory objects, that is, the perimeters of its regulatory mandate, are set out in subsections (1) to (3); and

(2) Secondly, the discretionary elements of the Panel's powers are set out in subsections (4) to (6).

5.4 The primary regulatory objects are those set out in section 119(1), namely:

(1) Ensure the integrity of the marketplace and fairness to the holders;

(2) Ensure the provision of:

(a) necessary information to holders, to the extent required to facilitate the making of fair and informed decisions; and

(b) adequate time for regulated companies and holders to obtain and provide advice with respect to offers; and

(3) 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.

5.5 Secondary to the objects outlined in 5.4 above are the subsidiary objects outlined in subsections (2) and (3). In this regard, it is essential to note that the Panel is enjoined to, among other things, "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)" by, among other things, ensuring:

(1) that no person may enter into an affected transaction unless that person is ready, able and willing to implement that transaction[16]; and

(2) that all holders of relevant securities receive the same information from an offeror, potential offeror, or during the course of an affected transaction, or when an affected transaction is contemplated[17][18].

5.6 The discretionary elements of the Panel's mandate include section 119(4)(a), referred to extensively by the parties in this matter, particularly Caxton. These also extend to initiating or receiving complaints, conducting investigations, and issuing compliance certificates, among others. Notably, section 119(5)(a) confers a discretion on the Panel to prohibit or require any action by a person

16 Section 119(2)(a).
17 Section 119(2)(d)(i).
18 Note, however, that section 119(2)(d) is not required to be construed or applied to prohibit certain necessary pre-offer information sharing between the offeree regulated company and a bona fide potential offeror, even if it results an unequal treatment of a holder who is a bona fide potential offeror of the offeree regulated company vis a vis the other holders of the same company.

to whom a compliance certificate is issued. Additionally, the Panel may even wholly or partially exempt an offeror from compliance with the Takeover Provisions if specific requirements in section 119(6) are met.

5.7 This framework is apparent for a proper reading of section 119 as a whole, and the individual provisions of this section must therefore be considered in this context.

5.8 Section 119 clarifies that the regulatory mandate extends to all the Takeover Provisions, including the Takeover Regulations. This is important when considering the legislative scheme for takeovers regulations under the Act.

5.9 Parts B and C of the Takeover Regulations deal with:

(1) General rules respecting negotiations and offers (Part B); and

(2) Announcements and offers (Part C).

5.10 Parts B and C of the Takeover Regulations set out a general basis for how takeover offers are to be regulated. In this regard, there are two broad categories for how these takeover offers are regulated in the Takeover Regulations, namely:

(1) The pre-firm offer stage; and

(2) The post-firm offer stage.

5.11 Pre-firm offer, the Takeover Regulations that primarily apply (although not exclusively) are regulations 94, 95, 99 and 100.

5.12 Post firm offer, the rest of the takeover provisions kick in.

5.13 For purposes of understanding the pre-firm offer regulatory environment, it is crucial to outline the general principles that can be said to govern this period, namely:

(1) An approach with a view to an offer being made, or an offer, must be made only to the board of the offeree regulated company;

(2) All negotiations between an independent board and an offeror must be kept confidential.

(3) Confidentiality must be observed before a cautionary or firm intention announcement containing "price sensitive information" is made.

(4) An independent board must do everything necessary to satisfy itself that an offeror can perform in terms of an offer.

(5) An independent board must ensure that all material changes to previously announced specific information concerning an offer are immediately announced.

(6) Price sensitive information may be provided to select persons on a confidential basis.

(7) If there is a leak of price sensitive information or a reasonable suspicion that such a leak has occurred, that information must immediately be disclosed in a cautionary announcement.

(8) If a potential offeror and a regulated company are negotiating on a consensual basis:

(a) an offer in good faith must be regarded as being imminent; and

(b) section 126 applies to the regulated company from the beginning of those negotiations;

(9) Until a firm intention announcement is published, a regulated company that is the subject of rumour, speculation or a cautionary announcement published by a potential offeror may presume that an offer in good faith is not imminent unless the regulated company is consensually negotiating with a potential offeror.

5.14 What is clear from the pre-firm offer principles quoted above is:

(1) Firstly, an approach[19] can only be made to the board of the offeree regulated company;

(1) secondly, all pre-firm offer negotiations between the offeror and the board must be kept confidential, and leaks of price sensitive information must immediately be disclosed in a cautionary announcement;

(2) thirdly, confidentiality must be observed a cautionary or firm intention announcement is published;

(3) lastly, the board of the offeree regulated company is permitted to play the gatekeeper role regarding an approach to satisfy itself that the offeror can perform in terms of an offer.

5.15 These principles, therefore, paint a picture of strict confidentiality on the part of the board of the offeree regulated company and the potential offeror during the pre-firm offer period. Where leaks of price sensitive information (regarding

[19] When used as a verb means, “speak to (someone) for the first time about a proposal or request”, according to the Oxford Languages dictionary.

the approach) occur or are suspected, cautionary announcements are mandatory. It also bears noting that outside of a cautionary announcement, the only other announcement referred to in the principles above wherein price sensitive is allowed to be published is in the firm intention announcement.

5.16 There is, therefore, a general prohibition regarding the disclosure of price sensitive information during the pre-firm offer period outside of the specific requirement to disclose such information in a cautionary announcement in cases of actual or suspected leaks. In all other instances, the regulatory principles provide for the observance of strict confidence regarding such approaches until the board of the offeree regulated company is satisfied that the offeree is ready, willing and able to implement the offer.

5.17 For completeness, it is important to quickly touch on the principles applying to post the post-firm offer period. In this regard, regulation 101(1) states:

> "A firm intention announcement is an announcement that must be made when a mandatory offer is required or when an offeror has communicated a firm intention to make an offer and is ready, able and willing to proceed with the offer."

5.18 All announcements contemplated in Part C of the Takeover Regulations, including cautionary announcements in terms of regulation 100, read with regulation 95 (which are only made pre-firm offer), constitute "documents" that the Panel must approve in terms of regulation 117. There can be no suggestion in this regard that such announcements do not relate to an affected transaction, whether because they talk to an approach with the view

of an offer being made (i.e. pre-firm offer) or a firm intention offer having been received or other post-firm offer announcements.

5.19 What follows then is a default regulatory position where irrespective of whether pre-firm offer or post-firm offer, there is no scope for any communications regarding either (i) an approach with a view of an offer being made (pre-firm offer) or (ii) once an announced firm offer is made, regarding such offer, outside the regulatory ambit of the Panel.

5.20 Post-firm offer, all communications regarding an offer are governed by regulations 117 and 111(8). The latter applying not just to announcements or circulars, as contemplated in regulation 117, but also to "statements" which may mislead holders or create market uncertainty even when not factually inaccurate.

5.21 Therefore, having regard to the above, the principles applying to affected transactions pre-firm offer and post-firm offer are:

(1) Pre-firm offer, a potential offeror and the board of the offeree regulated company must exercise strict confidence regarding their negotiations. There is no scope to communicate regarding such an approach outside the perimeters set out in regulations 95 and 99, whether with the holders specifically (except those selected persons contemplated in regulation 95(6), purely on a confidential basis) or the market in general. All negotiations pre-firm offer must be directed to the board of the offeree regulated company. In cases of leaks, all price sensitive information (regarding the approach) must be announced immediately

in a cautionary announcement, a document subject to the general jurisdiction of the Panel under regulation 117.

(2) Post firm offer, all documents and statements relating to an affected transaction are subject to regulations 117 and 111(8), even though there is more scope for parties, including an offeror, to issue such documents or statements, subject to the regulatory discretion of the Panel to approve or otherwise such material.

6 **Application of the law to the facts of this case**

6.1 It is common cause that Caxton issued impugned statements. Caxton points out that the impugned statements conveyed that "the contemplated merger is entirely inchoate. There is no deal or even proposed deal on the table. [It] has made no offer to Mpact's remaining shareholders, has not proposed a price and has made it clear that it can only make an offer after it receives competition approval".

6.2 Caxton contended that, having regard to the message conveyed in the impugned statements, there was no affected transaction to speak of as the merger it anticipated with Mpact could only happen once certain pre-conditions to such an offer were met. However, it is clear also that Caxton was unequivocal that ultimately it wanted to acquire control, and in fact, had initially approached the board of Mpact as required by regulations 99 and 95 and only resorted to communicating to the market after the negotiations with the Mpact board had collapsed supposedly as a consequence of Mpact's board having refused to cooperate with Caxton to file a joint merger notification with the Competition Authorities in South Africa. After the collapse

of those negotiations, Caxton considered itself unburdened by the usual restrictions that apply to announced intentions to conclude affected transactions, as set out in the Takeover Provisions.

6.3 Caxton has denied that its conduct constituted an affected transaction, despite having admitted the impugned statements which announced an intention to acquire control of Mpact by acquiring the remainder of the shares Caxton did not already have. Clearly, the impugned statements, persistently made as they were, conveyed a clear intention to conclude an affected transaction, whether by way of a general offer (section 117(1)(c)(v)) or by triggering a mandatory offer (section 117(1)(c)(vi)), both of which would confer control of Mpact to Caxton. Having regard to this, the suggestion that no affected transaction had occurred is without substance. The fact that Caxton chose to disregard all rules that would ordinarily apply to a proposed offer can never be a valid reason to avoid applying the same rules that had been disobeyed. If anything, the pre-firm offer rules confining approaches by potential offerors to the board are specifically designed to avoid such mischief. Where a potential offeror who has failed to demonstrate that it is ready, willing and able to implement the proposed offer nonetheless makes disclosures of price sensitive information to the market or subjects a regulated company to rumour or speculation without actually making an offer, such conduct would fall foul of the spirit and the text of the Takeover Provisions. The fact that Caxton has intentionally structured its takeover offer in a rudimentary manner does not excuse it from the burden of the Takeover Provisions relating to the pre-firm offer conduct by a potential offeror.

6.4 Section 119(2) specifically enjoins the Panel to ensure that no person who is not ready, able and willing may enter into an affected transaction. Having admitted that its proposed merger is still rudimentary and still subject to negotiations (consensual or otherwise) between Caxton and Mpact, there is no basis upon which it may assert an entitlement in law to have made the impugned statements.

6.5 Caxton, being a potential offeror – as that term is used in the Takeover Provisions – during the pre-firm offer period, had no right to breach the strict confidence rules relating to the disclosures of price sensitive information regarding the approach to acquire control in Mpact.

6.6 Having admitted to the impugned statements, no investigation is necessary regarding Caxton's unlawful conduct. The question is whether the restraint imposed by the Executive Director in the Ruling, premised as it is in regulation 117, is sustainable.

6.7 Considering that a number of the impugned statements were issued verbally during various media interviews, it is, in our opinion, not necessary in this case to dwell on whether there could legitimately be a basis to read such verbal statements into the ambit of regulation 117. This is because we have already concluded that Caxton failed to abide by the strict confidentiality rules relating to pre-firm offer approaches and negotiations. The only communications (outside the confidential negotiations between Caxton and Mapct) that Caxton could make were those relating to leaks of price sensitive information in cases of leaks or suspected leaks. These communications would have been conducted by way of cautionary announcements, which, among other things, warn holders and the marketplace, in general, to exercise

caution when trading the securities of Mpact during the cautionary period, in line with the primary objects in section 119(1)(a) to ensure the integrity of the marketplace and fairness to holders. Such cautionary announcements would have been, if made, subject to regulation 117. However, having not been made due to the unlawful conduct, contravening numerous Takeover Provisions, including regulations 99(1), read with 95 and 100, we agree with the need to restrain this unlawful conduct of Caxton. However, our view is that the Panel's powers to issue such restraint ought not to have been located in regulation 117 but rather on the Panel's regulatory powers pursuant to section 119(1)(a), read with sections 119(2)(a), 119(4)(b) and (c), 119(5)(a) and 171(2) as well as regulations 99(1), 95 and 100.

6.8 In light of the conclusions in 6.7 above, we are of the view that the Panel should reissue Caxton with a compliance notice, in terms of which it modifies the restraint on the non-compliant conduct of Caxton by locating its powers to do so on the Takeover Provisions set out in 6.7 above, instead of regulation 117.

7 Arguments on the correct interpretation of section 117

7.1 Having ruled on the non-compliant nature of the impugned statements as articulated 6 above, there should be no reason to entertain the arguments specifically relating to regulation 117, as such a ruling will not impact the conclusion reached regarding the impugned statements.

7.2 Be that as it may, for the sake of completeness, we will address the remainder of the argument proffered by Caxton in parts IV to VI in their HOA.

7.3 **Ad paras 26 to 30 Caxton's HOA**

(1) It is correct that the requirement for the Panel to approve documents relating to an affected transaction in regulation 117 must ideally be read with the provisions of section 119(4)(a).

(2) It is also correct that properly considered, the provisions of regulation 117 and section 119(4) kick in insofar as the documents concerned relate to an affected transaction. We would go on to say, absent of this crucial ingredient (i.e. the connection of the document concerned to an affected transaction), the Panel would have no role to play in the regulation of the subject matter of the dispute between Caxton and Mpact because the Panel's legislative mandate is expressly limited to the regulation of affected transactions and offers, to the extent provided for, and in accordance with, the Takeover Provisions[20]. There is no reasonable basis upon which the Panel would be able to regulate conduct or otherwise absent this essential ingredient of the existence of an affected transaction or offer. This means if there were no affected transaction, neither the Panel nor this Committee would have any jurisdiction to preside over these proceedings at all, not just in relation to regulation 117 but all the Takeover Provisions because the Panel's (and by necessary implication, this Committee's[21]) legislative mandate is limited to the regulation of affected transactions or offers.

[20] See sections 201(1)(a), 118(1), 119 and 121.
[21] See section 202.

(3) The Act[22] identifies the following transactions as affected transactions, which are in turn regulated by the Panel:

(a) a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking of a regulated company, as contemplated in section 112, subject to section 118(3);

(b) an amalgamation or merger, as contemplated in section 113, if it involves at least one regulated company, subject to section 118(3);

(c) a scheme of arrangement between a regulated company and its shareholders, as contemplated in section 114, subject to section 118(3);

(d) the acquisition of, or announced intention to acquire, a beneficial interest in any voting securities of a regulated company to the extent and in the circumstances contemplated in section 122(1);

(e) the announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert;

(f) a mandatory offer contemplated in section 123; or

(g) compulsory acquisition contemplated in section 124.

(4) An announced intention to acquire a beneficial interest in

[22] See section 117(1)(c)

(a) the voting securities of a regulated company to the extent and in the circumstances contemplated in section 122(1); or

(b) the remaining voting securities of a regulated company not already held by a person or persons acting in concert,

clearly constitutes an affected transaction. This should dispose of the argument that the Panel cannot entertain the complaint of Mpact.

(5) Neither of the parties suggested (in limine or otherwise) that the Panel nor this Committee had the power to consider the dispute in this matter. This is an essential point of departure when considering the meaning of "affected transaction" in the Takeover Provisions because the meaning does not change from section to section. For instance, there is no distinction in using the phrase "affected transaction" in section 201 versus section 119(4). The argument that section 119(4) applies to the so-called "live-transactions", whereas section 201 applies generally, seems not to be based on any tangible legislative basis. For this reason, we disagree with Caxton's formulation regarding the so-called "live-transaction restriction" in section 119(4) and, by necessary implication, regulation 117. Additionally, having regard to our conclusions above regarding the Panel's authority to regulate pre-firm offer conduct, including, for instance, approving cautionary announcements that may be triggered by leaks contemplated in regulation 95(7), clearly supports the conclusion that regulation does not only apply to post firm offer documents but also extends to pre-firm offer documents (namely cautionary announcements, being the only documents that should be published during this period as strict

confidence should otherwise be observed between the potential offeror and the board of the offeree regulated company). For this reason, we disagree with the suggestion that regulation only applies to so-called "live-transactions" as formulated by Caxton in its HOA.

(6) We do not deem it necessary to decide in this regard on the so-called "formal-documents restriction", which Caxton raised regarding the limits to the interpretation of regulation 117. This is because the impugned statements relate to conduct during the pre-firm offer period, where strict confidence must be observed between all parties who may have information regarding the affected transaction or offer concerned. The only documents that would be permitted to be released under the limited circumstances mentioned above are cautionary announcements which would obviously be subject to the Panel's authority under regulation 117. During the post-firm offer period, "documents" and "statements" are regulated under both regulation 117 and regulation 111(8) generally. Because in this matter, we have concluded that the publication of the impugned statements was unlawful, there is no point determining under which circumstances the impugned statements would be allowable.

(7) On the question of whether regulation 117 extends to verbal statements, we conclude that this is not the case. Documents mean documents. The legislature took care to regulate conduct relating to oral statements relating to affected transactions during both the pre-firm offer period and the post-firm offer period when one has regard to regulations 95, 99(1) and 111(8), which makes it unnecessary for this

Committee to read this into the text of regulation 117. For this reason, we agree with Caxton that regulation 117 restrictions do not extend to verbal statements.

7.4 **Ad paras 31 to 40 of Caxton's HOA**

(1) The Panel is not a court and, therefore, must necessarily limit itself to applying its rules with care not to venture over its skis on matters beyond its scope.

(2) We have tried to limit our reading of the Takeover Provisions in this matter to what we believe to be within our legislative mandate. However, if regard must be had to the fact we have already determined above that:

(a) regulation 117 does not extend to oral statements relating to affected transactions[23]; and

(b) in any event, the basis upon which the impugned statements are prohibited by the Takeover Provisions (other than regulation 117, as erroneously relied upon in the Ruling)[24],

there is, therefore, no need to dwell on the assessment upon which regulation 117 could be interpreted (in the context of the fact of this application) in line with the provisions of the constitution. This is because we have determined that regulation 117 is not the basis upon which the impugned statements ought to be restrained. For that reason, regulation 117 finds no application to the prior restraint imposed by the

[23] See paragraph 7.3 above.
[24] See paragraph 6.7 above.

Takeover Provisions on the impugned statements. The Committee is satisfied that its application of the relevant Takeover Provisions, which impose the restraint applied in this matter[25], are consistent with the provisions of the Constitution. In any event, a case to the effect that those provisions are not consistent with the Constitution cannot be made before this Committee.

(3) Unfortunately, this Committee will never make Constitutional pronouncements as we believe we are not empowered to do so in any event.

8 **Arguments on the unlawfulness of the Ruling**

8.1 Based on our conclusions above in 6.7 and 6.8, read with 7, this Committee has concluded to modify the Ruling such that Caxton will be prohibited from making any further public statements or announcements in any form and on any platform about the acquisition of Mpact without the approval of the Panel in accordance with, Parts B and C of Chapter 5 of the Companies Act, 2008 and the Takeover Regulations.

8.2 The Executive Director is authorised to issue a compliance certificate giving effect to our modified ruling above in 8.1 pursuant to section 119(5)(a), read with sections 119(4)(c) and 171(2).

9 **Additional arguments regarding the validity of the arguments proffered by Mpact and the Executive Director for the Ruling (ad pars 44 to 50)**

9.1 We do not intend to repeat the points already made above, save for reemphasising that if there is no affected transaction or offer, then neither the

[25] See paragraph 6.7.

Panel nor this Committee has jurisdiction. This Committee is satisfied that it has jurisdiction to hear this matter for reasons already articulated above in 6.

9.2 In fact, Caxton's stance in this regard is inconsistent because whilst it seeks to assert that there is no affected transaction or offer, it nonetheless subjected itself to the jurisdiction of this Committee and the Panel before the Executive Director issued the Ruling.

9.3 There is no need to say more on this score save to conclude that we are satisfied that the restrained conduct of Caxton falls within the regulatory mandate of the Panel to regulate in terms of the Takeover Provisions, including sections 119 and 201(1)(a).

10 **Decision**

10.1 For the reasons above, Caxton's application before this Committee for the setting aside of the Executive Director's Ruling is dismissed.

10.2 This Committee modifies the Ruling as set out above in 6.8, namely:

(1) Caxton is be prohibited from making any further public statements or announcements in any form and on any platform about the acquisition of Mpact without the approval of the Panel in accordance with, Parts B and C of Chapter 5 of the Companies Act, 2008 and the Takeover Regulations; and

(2) The Executive Director is authorised to issue a compliance notice giving effect to our modified ruling above in 10.2(1) pursuant to section 119(5)(a), read with sections 119(4)(c) and 171(2).

10.3 The Executive Director must do all things necessary to give effect to this decision.

10.4 Caxton is ordered to pay the costs of the Committee in respect of this matter.

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Mr Sandile Siyaka

Chairperson: Takeover Special Committee

We Agree:

Nano Matlala[26], Cami Mbulawa and Tony Tshivhase

Members: Takeover Special Committee

APPEARANCES:

For appellant: S Budlender SC (with P Olivier)

Instructed by: ENS Africa, Johannesburg

For respondent: L Harris SC (with P Smith)

Instructed by: Webber Wentzel Attorneys, Johannesburg

DATED: 08 MARCH 2023

[26] Co-opted member in terms of section 197(2).