

## IN THE TAKEOVER SPECIAL COMMITTEE

In the matter between:

**NORTHAM PLATINUM HOLDINGS LIMITED**

Applicant

and

**THE EXECUTIVE DIRECTOR OF THE  
TAKEOVER REGULATION PANEL**

First Respondent

**ROYAL BAFOKENG PLATINUM LIMITED**

Second Respondent

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### COMPLIANCE NOTICE RULING FOR THE TSC SECTION 126 RULING

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#### Introduction

1. On 30 June 2022, Northam Platinum Holdings Limited (**Northam**) filed a complaint to the Takeover Regulation Panel (**Panel**) alleging that certain arrangements and/or agreements concluded by Royal Bafokeng Platinum Limited (**RBPlat**) represented by its Remuneration Committee, a subcommittee of the board of directors of RBPlat, and its chief executive officer and chief operations officer (**the executive directors**) had violated *inter alia* Section 126(1)(b) of the Companies Act, 71 of 2008.<sup>1</sup> The arrangements and agreements concerned included the issuing by RBPlat of a certain quantity of authorised but unissued RBPlat shares to the executive directors without prior shareholder approval during an offer period of the mandatory offer made by Impala Platinum Holdings Limited for consideration by the Board of RBPlat and its

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<sup>1</sup> In this decision, all references to “sections”, are to sections in the Companies Act, 2008; all references to “Regulations”, are to regulations in the Companies Regulations, 2011. And the “**Takeover Laws**” refers to Part B (sections 117 to 120) and Part C (sections 121 to 127) of Chapter 5 to the Companies Act and Chapter 5 of the Companies Regulations (regulations 81 to 122).

shareholders.<sup>2</sup>

2. On 24 August 2022, the Executive Director of the Takeover Regulation Panel (**Executive Director**) dismissed Northam's 30 June 2022 complaint.
3. Northam applied to this Committee to modify or cancel the Executive Director's ruling under Regulation 118(8).<sup>3</sup>
4. Following a hearing on 19 October 2022, the Committee upheld Northam's contentions and ruled on 31 October 2022 that RBPlat had violated Section 126(1)(b) (**TSC Section 126(1) Ruling**). It directed that, insofar as the complaint related to the issuing of RBPlat's shares to the Executive Directors that "*RBPlat must correct the contravention ... in a manner provided for in the Companies Act and the Regulations.*" For the rest of Northam's complaint, the Committee directed that an investigation must be undertaken and concluded expeditiously in terms of Section 169(1).
5. Seemingly prompted by the TSC Section 126(1) Ruling, the Executive Director sent a letter to RBPlat on 7 November 2022 (**ED November 2022 Letter**) pursuant to Section 171, stating, *inter alia*, that—

*"We are of the view that the finding made by the TSC in this regard requires the Executive Director to issue a Compliance Notice against RBPlat in terms of the relevant provisions of the Companies Act. This is necessitated by the*

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<sup>2</sup> Section 126(1)(b) states that the board of directors of a regulated company must not issue any authorised but unissued securities without the prior written approval of the Panel, and the approval of the holders of relevant securities, or in terms of a pre-existing obligation or agreement entered into before the time contemplated in section 126(1) if the board company believes that a *bona fide* offer might be imminent or has received such an offer.

<sup>3</sup> Regulation 118(8) states:

*"Any person issued with a Ruling may apply to the Takeover Special Committee for a hearing regarding the Ruling within –*

*(a) 5 business days after receiving that Ruling; or*

*(b) such longer period as may be allowed by the Committee on good cause shown."*

*finding of the TSC that directs RBPlats to “correct” its contravention of s126(1)(b) of the Companies Act.”*

6. The Executive Director proceeded in the ED November 2022 Letter by indicating that -

*“In order for the Executive Director to decide on the appropriate sanction under s171(2) of the Companies Act, RBPlat is hereby instructed to make submissions in mitigation regarding the imposition of the sanction by the Executive Director. RBPlat has 10 business days to provide such submissions to the Executive Director from the date of receipt of this letter.”*

7. The Committee shall, in a moment return, to the overall content of the ED November 2022 Letter as it may have been the genesis of what the Committee considers to be a fundamental misconception that led Northam and RBPlat embarking upon an internal appeal before this Committee under Regulation 118(8) to (10) (read together with Regulation 119) in circumstances not contemplated by Regulation 118(8).
8. Because Northam read the ED November 2022 Letter as purporting to embody a ruling by the Executive Director envisaged in Regulation 118(1) to (4) (**Deemed Section 171 Ruling**), on 20 December 2022 Northam applied to the Committee under Regulation 118(8) for relief to cancel or modify the Deemed Section 171 Ruling pursuant to Regulation 118(9).

### **Procedural timeline for and the parties’ submissions in the application**

9. In accordance with a timetable agreed by Northam and RBPlat for the hearing before the Committee, Northam – through its attorneys, Webber Wentzel – lodged a comprehensive statement of case on 21 February 2023 with this Committee substantiating its application for relief under Regulation 118(9) against the Deemed Section 171 Ruling.

10. RBPlat followed suit and delivered – through its attorneys, Bowmans - a statement of response on 3 March 2023. Northam filed a reply to RBPlat’s response on 8 March 2023.
11. Northam and RBPlat subsequently delivered comprehensive heads of argument in support of their respective positions in the application before us.
12. The Executive Director did not participate nor make any submissions in these proceedings before the Committee although his office was cited as the first respondent.
13. In broad strokes, Northam argues that by making the Deemed Section 171 Ruling the Executive Director effectively revised or supplemented the TSC Section 126(1) Ruling and thereby acted *ultra vires* his powers, and that he has done so in a procedurally unfair manner.
14. In answer to Northam’s application, RBPlat submits that:
  - 14.1. The Committee should stay the hearing and/or adjudication of Northam’s application pending the outcome of review proceedings launched by RBPlat against the TSC Section 126(1) Ruling on or about 10 February 2023; and *alternatively*
  - 14.2. Northam’s application should be dismissed for its lack of merit because the Section 171 Ruling was made lawfully and issued by the Executive Director under Section 171(1), and consequently Northam’s *audi* rights were not infringed by the Section 171 Ruling.
15. In its review application before the High Court based on the Promotion of Administrative Justice Act, 2000 (**PAJA**) or the principle of legality in (**Legality Review**) RBPlat primarily seeks orders:

- reviewing and setting aside the TSC Section 126 Ruling; and
  - substituting the TSC Section 126 Ruling with a ruling dismissing the Share Issue Complaint; *alternatively* remitting Northam’s appeal against the Executive Director’s Ruling to the Committee and directing the Committee to confirm, modify or cancel the TSC Section 126 Ruling with due regard to any findings by the High Court as soon as this is practicable.
16. The Committee heard oral arguments on behalf of the parties on 21 March 2023. It has also considered the written submissions made by the parties on this application. What follows below is the Committee’s Ruling on the Northam application directed against the Deemed Section 171 Ruling.

#### **RBPlat’s request for stay of the proceedings**

17. RBPlat contends that the Committee has the power to hold in abeyance the proceedings about the Deemed Section 171 Ruling pending the outcome of its review because it is in the interests of justice to do so. It claims that the Committee has a discretion to stay the proceedings. It points to two considerations which trigger the interests of justice for the stay: the first is that the review would be prosecuted expeditiously; and the second is that a successful review would render the decision of the TSC Section 126(1) Ruling moot.
18. The powers, functions and duties of the Committee on the Rulings made by the Executive Director on complaints submitted to him are regulated by Regulation 118(9). That Regulation empowers the Committee to “*confirm, modify or cancel all or part of a Ruling*” made by the Executive Director. There is nothing in the provisions of Regulation 118(9) which empowers the Committee to stay its own proceedings, pending the outcome of a review of its proceedings.
19. The Committee has considered the proposition that it has implied powers to direct a

stay of its proceedings pending the outcome of RBPlat's review application, on the proper interpretation of the Takeover Regulations. The Committee cannot uphold that proposition, having regard to the following considerations:

- 19.1. First, the Committee is a creature of statute and is required to exercise its powers and fulfil its duties within the confines of the controlling and empowering provisions of the enabling legislation. As the Committee has noted, nothing in the enabling powers conferred upon the Committee in Regulation 118(9), or any other part of the Takeover Regulations expressly provide for the powers of a stay.
- 19.2. Secondly, unlike a Court, the Committee does not have the inherent common law power to regulate its own proceedings, including the power to order to stay such proceedings where the interests of justice so require.
- 19.3. Thirdly, the structure of the Takeover Regulations, and the time period within which Rulings of the Executive Director must be brought before the Committee by way of review or appeal indicate a degree with which such appeal or review must be disposed of by the Committee to bring about finality on such Rulings, and leave it up to the affected party to institute review proceedings, once finality has been reached. It will be subversive to the need for expeditious decisions by the Committee to import by implication the power or discretion to interrupt its proceedings by means of a stay.
- 19.4. Fourthly, even in Court proceedings where the Court has the power to order a stay, those powers are exercised in rare cases where there are exceptional circumstances. The prospects of success and demonstrable interests of justice are key considerations which are considered in the exercise of a Court's discretion. RBPlat has not presented any evidence on which the Committee can make a credible assessment of what the interests of justice

require, even if there could conceivably be an implied power vested upon the Committee to stay the TSC Section 126(1) Ruling. The mere possibility of an expedited review is not a credible consideration that demonstrates the prospects of success or the interests of justice.

20. Finally, on this issue, we emphasize that there is already a binding Section 126(1) Ruling of the Committee. The review by RBPlat to set aside that Ruling in its review application does not automatically suspend that Ruling. The Committee was referred to several Court decisions which explain the legal status and effect of an administrative decision such as the TSC Section 126(1) Ruling. It is enough for present purposes to refer to the following dicta of the Constitutional Court in the *EFF (1) judgment* -

*[74] ... No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would “amount to a licence to self-help”. Whether [a state functionary’s or regulatory body’s] decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained. ...*

*[75] The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by*

*those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.”<sup>4</sup>*

21. Having regard to the above considerations the Committee concludes that it does not have the statutory powers to stay the present proceedings pending the outcome of RBPlat’s review proceedings of the TSC Section 126(1) Ruling. The Committee also concludes that even if it were to have the implied power to stay, it would not exercise those powers as RBPlat has not advanced sufficient reasons to justify the exercise of a discretion to stay.

### **The Committee’s jurisdiction to deal with Northam’s application**

22. It is quite plain that Northam’s application comes before the Committee from the compliance notice issued by the Executive Director of 7 November 2022. However, that letter makes it clear that it is a compliance notice issued in terms of Section 171, although it purports to be a Ruling in terms of Regulation 118.
23. The Committee considers it necessary to consider the import of the Executive Director’s letter in order to assess whether its jurisdiction to deal with Northam’s application is properly engaged.

### **The Deemed Section 171 Ruling does not trigger the Committee’s jurisdiction under Regulation 118**

24. Given its centrality to what follows, it is as well to quote the Deemed Section 171 Ruling in detail. It read, in material part—

*“Dear Ezra and David*

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<sup>4</sup> *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11.



**TSC RULING AGAINST ROYAL BAFOKENG PLATINUM LIMITED IN RESPECT OF THE MATTER BROUGHT BY NORTHAM PLATINUM HOLDINGS LIMITED UNDER SECTION 126 OF THE COMPANIES ACT**

**INTRODUCTION**

1. We refer to the Ruling made by the Takeover Special Committee (“**TSC**”) on 31 October 2022 against Royal Bafokeng Platinum Limited (“**RBPlat**”) in respect of the complaint that was brought to the Takeover Regulation Panel (the “**Panel**”) by Webber Wentzel, acting in its capacity as attorneys for Northam Platinum Holdings Limited (“**Northam**” or “**Complainant**”) dated 30 June 2022 (the “**Complaint**”). The Complaint was filed in terms of s168(1)(a) of the Companies Act, 71 of 2008 (the “**Companies Act**”) alleging that the board of RBPlat contravened s126 of the Companies Act.
2. The Complaint was founded on:
  - a. the mandatory offer made by Impala Platinum Holdings Limited (“**Implats**”) to acquire the remaining ordinary shares in RBPlat, other than treasury shares, in terms of s123 of the Companies Act announced on 9 December 2021, as further detailed in the circular issued by Implats on 17 January 2022 to the shareholders of RBPlat in respect of the Implats offer;
  - b. the SENS announcement published by RBPlat in respect of the retirement of Mr Steve Phiri, the Chief Executive Officer of RBPlat and Mr Neil Carr, the Chief Operating Officer of RBPlat, collectively (the “**Executives**”) dated 26 April 2022; and
  - c. the rules relating to the Royal Bafokeng Platinum Limited Full Share Plan 2017 (the “**RBPlat’s Full Share Plan**”).
3. More specifically, Northam alleged that the board of RBPlat contravened s126 of the Companies Act by agreeing to:
  - a. the Executives’ retirement as at 7 April 2022, RBPlat contravened s126 of the Companies Act as such agreements were not in the ordinary course of

*business, nor were they entered into in terms of a pre-existing obligation or agreement;*

- b. the pro-rata accelerated vesting of the Executives' share awards which arose from their retirement and the RBPlat shares that were issued to settle the awards, RBPlat contravened s126 of the Companies Act as this was done without a pre-existing obligation or agreement; and*
- c. allow the unvested awards that would otherwise be forfeited on retirement for same to vest in respect of the Executives' awards and make them subject to the discretionary accelerated vesting, RBPlat contravened s126(1)(f) of the Companies Act in that they were not done in the ordinary course of business of RBPlat nor was this done in terms of a pre-existing obligation or agreement.*

*4. The Complaint was limited to s126(1)(a), (b) and (f). Meaning that the board of RBPlat was alleged to have breached s126 by (i) engaging in a frustrating action of a bona fide offer, (ii) issuing authorized but unissued shares and (iii) entering into contracts outside the ordinary course of the business of RBPlat. S126 of the Companies Act is titled "Restrictions on Frustrating Actions" and states ....*

*5. In arriving at its decision, the TSC crystalised the issues before it as follows:*

*"First, the issue of 560,176 new shares to the Executives during the offer period, without shareholder approval. The shares (along with other shares transferred under the same arrangements but which were already in issue) were immediately sold by the Executives to Implats outside the Offer for R56,115,787.27 and R33,546,342.46, respectively.*

*Second, the decision during the offer period to change the terms under which the Executives would be entitled to shares in terms of the RBPlat Full Share Plan, 2017 RBPlat Full Share Plan to terms which nullified the Remcom's previous decision taken in July 2021 and which differed from its terms. This entailed (i) the immediate pro-rated vesting of share awards (i.e. the pro-rated accelerated vesting) which would otherwise have vested over a*

*three year period in terms of the July 2021 decision; and (ii) the exercise by Remcom of its alleged discretion during the offer period to allow the balance of the share awards (i.e. the discretionary accelerated vesting) to vest immediately on the “retirement” of the Executives which would otherwise have vested over a three year period in terms of the July 2021 decision (or which would otherwise have been forfeited by the Executives in terms of the rules of the RBPlat Full Share Plan. This decision in turn resulted in an immediate obligation on the part of RBPlat to issue new shares and to deliver shares to the Executives. The fact that this decision was subsequently **further** changed such that the share awards subject to the discretionary accelerated vesting were converted to an equivalent cash award which precluded the need to issue such shares does not detract from the fact that the arrangement entered into during the offer period contravened s 126. The fact that these share awards were converted to a cash award illustrates that the second respondent appreciated that this contravened s 126 and desperately attempted to reverse the transgression, which in itself amounted to a contravention of s 126 since it was an agreement entered into outside of the ordinary course of business.*

*Third, the agreements with the Executives were concluded outside of the ordinary course of business, without Panel and shareholder approval. The Executives were permitted to receive substantial additional discretionary retirement benefits (totalling approximately R53 million and R32 million respectively) while remaining in RBPlat’s employ, which benefits are linked to the success of the Offer. The arrangements differ markedly from the arrangements applicable to past instances (before the Offer) where RBPlat extended the Executives’ tenure.*

*Fourth, the cumulative effect of RBPlat’s conduct, taken without Panel and shareholder approval, is that it has supplanted RBPlat’s judgment on the merits of the Offer for that of its shareholders. In doing so, RBPlat has*

*effectively denied its shareholders an opportunity to decide on the merits of an offer.”*

6. *The TSC ruled, inter alia, that:*

*“RBPlat has contravened s 126(b) of the Companies Act. This conclusion is indisputable based on RBPlat’s own version set out in its answering statements before the Panel and the TSC. Accordingly, Northam’s complaint in respect of the issue of 560,176 new shares to the Executives during the Offer period without the approval of shareholders has merit and ought to be upheld with regards the provisions of s126(b) of the Companies Act. RBPlat must correct the contravention of the provisions of s126(b) of the Companies Act in a manner provided for in the Companies Act and the Regulations.”*

7. *This letter is limited to the finding made by the TSC against RBPlat with regards to the contravention of s126(b) of the Companies Act. It is addressed to RBPlat pursuant to the provisions s171 of the Companies Act. We are of the view that the finding made by the TSC in this regard requires the Executive Director to issue a Compliance Notice against RBPlat in terms of the relevant provisions of the Companies Act. This is necessitated by the finding of the TSC that directs RBPlat to “correct” its contravention of s126(b) of the Companies Act.*

8. *It is worth pointing out that we do not read the aforesaid ruling of the TSC to direct RBPlat to correct its contravention of s126 in terms of the same Section. Meaning that we do not read the reference, by the TSC, to the phrase “in a manner provided for in the Companies Act and the Regulations”, to mean that RBPlat must correct the contravention of s126 by seeking shareholder approval and/or Panel approval. This construct is sensible in that s126 forms the basis upon which the finding of the wrongdoing was made by the TSC. Accordingly, the same Section cannot rationally be the basis upon which the same wrongdoing is corrected.*

9. *In fact, the construct of takeover law empowers the Executive Director to issue a Compliance Notice to any person that the Director reasonably believes to have contravened the Companies Act. In this regard, the ruling of the TSC against RBPlat*

in relation to s126(b) of the Companies Act establishes the necessary reasonable grounds upon which the Executive Director may act under s171 of the Companies Act. In this regard, we are of the view that s171(1)(a) has been established, and that the Executive Director is entitled to proceed with the issuance of the Compliance Notice, and may impose any of the sanctions provided for in s171(2).

10. S171 states ...
  11. In order for the Executive Director to decide on the appropriate sanction under s171(2) of the Companies Act, RBPlat is hereby instructed to make submissions in mitigation regarding the imposition of the sanction by the Executive Director. RBPlat has 10 business days to provide such submissions to the Executive Director from the date of receipt of this letter.
  12. *In issuing this decision, which constitutes a Ruling, the Panel did not consider the commercial advantages or disadvantages of the Repurchase Transaction in accordance with s201(3) of the Act. Further, the parties' attention is drawn to Regulation 118(8) stating ...." (Own emphasis.)*
25. A cursory glance at the letter quoted above demonstrates that it was issued by the Executive Director pursuant to Section 171.
26. Section 171 provides, in material part, that—

**"171 Issuance of compliance notices**

- (1) *Subject to subSection (3), ... the Executive Director of the Panel, may issue a compliance notice in the prescribed form to any person whom the ... Executive Director ... on reasonable grounds believes—*
  - (a) *has contravened this Act; or*
  - (b) *assented to, was implicated in, or directly or indirectly benefited from, a contravention of this Act,*

*unless the alleged contravention could otherwise be addressed in terms of this Act by an application to a court or to the Companies Tribunal.*

- (2) *A compliance notice may require the person to whom it is addressed to-*
- (a) *cease, correct or reverse any action in contravention of this Act;*
  - (b) *take any action required by this Act;*
  - (c) *restore assets or their value to a company or any other person;*
  - (d) *provide a community service, in the case of a notice issued by the Commission; or*
  - (e) *take any other steps reasonably related to the contravention and designed to rectify its effect.*
- (3) *When issuing a notice in terms of subSection (1) to a regulated person or entity, the ... Executive Director ... must send a copy of the notice to the regulatory authority that granted a licence or similar authority to that regulated person or entity, and in terms of which that person is authorised to conduct business.*
- (4) *A compliance notice contemplated in subSection (1) must set out-*
- (a) *the person or association to whom the notice applies;*
  - (b) *the provision of this Act that has been contravened;*
  - (c) *details of the nature and extent of the non-compliance;*
  - (d) *any steps that are required to be taken and the period within which those steps must be taken; and*
  - (e) *any penalty that may be imposed in terms of this Act if those steps are not taken.*
- (5) *A compliance notice issued in terms of this Section, or any part of it, remains in force until-*
- (a) *it is set aside by-*
    - (i) *...; or*

*(ii) the Takeover Special Committee, or a court upon a review of the notice, in the case of a notice issued by the Executive Director; or*

*(b) the ... Executive Director ... issues a compliance certificate contemplated in subSection (6).*

*(6) If the requirements of a compliance notice issued in terms of subSection (1) have been satisfied, ... the Executive Director ... must issue a compliance certificate.*

*(7) If a person to whom a compliance notice has been issued fails to comply with the notice, ... the Executive Director ... may either-*

*(a) apply to a court for the imposition of an administrative fine; or*

*(b) refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of Section 214 (3),*

*but may not do both in respect of any particular compliance notice.”*

27. The Executive Director’s powers to issue compliance notices referred to in Section 171 are linked to the Takeover Laws by Section 119(4)(c) which provides that the Panel may 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.

28. In the Committee’s view the issuing of a compliance notice by the Executive Director under Section 171 does not comprise a ruling of the Executive Director or the Panel in the manner contemplated in Regulation 118. On the facts of the present application the compliance notice by the Executive Director manifestly accepts and relies on the existing Ruling by the Committee, namely, the TSC Section 126(1) Ruling. That Ruling made it clear that RBPlat’s version regarding the issuing of authorised but unissued shares of RBPlat to the executives was a contravention of the Companies Act and must be remedied in a manner permitted under that Act.

29. On a plain reading, Section 171 comprises a self-contained provision which empowers the Executive Director to issue compliance notices to any person whom the Executive Director believes – on reasonable grounds – to have:

29.1. contravened the provisions of the Companies Act; or

29.2. assented to, was implicated in, or directly or indirectly benefited from, a contravention of the Companies Act.

30. As recorded in the Deemed Section 171 Ruling—

*“...[T]he construct of takeover law empowers the Executive Director to issue a Compliance Notice to any person that the Director reasonably believes to have contravened the Companies Act. In this regard, the ruling of the TSC against RBPlat in relation to s126(b) of the Companies Act establishes the necessary reasonable grounds upon which the Executive Director may act under s171 of the Companies Act. In this regard, we are of the view that s171(1)(a) has been established, and that the Executive Director is entitled to proceed with the issuance of the Compliance Notice, and may impose any of the sanctions provided for in s171(2).” (Own emphasis.)*

31. Section 172 – titled “*Objection to notices*” – speaks to the process that any person against whom a compliance notice has been issued by the Executive Director (**affected person**) ought to follow when seeking to object to such a compliance notice.

32. Section 172(1) provides that an affected person may apply to this Committee, or to a court, to review the notice within 15 business days after receiving that notice or such longer period as may be allowed on good cause shown.

33. In terms of the provisions of Section 172(2), this Committee or a court may confirm, modify, or cancel all or part of a compliance notice after considering any representations by the applicant and any other relevant information. However,



Northam has not approached the Committee under Section 172(2). It purported to invoke the jurisdiction of the Committee in terms of Regulation 118(9).

34. And, in terms of Section 172(3), the applicant must (subject to the right of review or appeal to a court in Section 172(4)) comply with that notice as confirmed or modified, within a specified period, if it is confirmed or modified (wholly or in part) by this Committee.
35. Section 172(4) records that a decision of this Committee under Section 172 is binding, subject to any right of review by, or appeal to, a court.
36. On a plain and objective reading of the Deemed Section 171 Ruling, the Executive Director has not issued a compliance notice under Section 171 to anyone yet; least of all RBPlat.<sup>5</sup> He:
  - 36.1. merely alerted RBPlat that he planned to issue a compliance notice to RBPlat given the violation of the provision of Section 126(1)(b) by RBPlat confirmed by the TSC Section 126 Ruling; and
  - 36.2. invited RBPlat to make submissions “*in mitigation regarding the imposition of the sanction by the Executive Director*”.

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<sup>5</sup> As recently explained in *Coral Lagoon Investments 194 (Pty) Ltd v Capitec Bank Holdings Limited* [2022] ZASCA 144; [2023] 1 All SA 1 (SCA)—

“[15] *It is trite that interpretation is, generally speaking, an objective process of attributing meaning to the words used in a document, read in the context of the document as a whole and having regard to the apparent purpose of the words. It is a unitary exercise which must be approached holistically: simultaneously considering the text, context and purpose. In addition, extrinsic evidence may be admitted as relevant to context and purpose.*

[16] *The point of departure in interpreting the subject clauses is the text.*” (Footnotes omitted.)

Crucially, interpretation is a matter of law and not of fact (see *KPMG Chartered Accountants (SA) v Securefin Limited* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 39).

37. Under Section 171(2), a compliance notice may require the person to whom it is addressed to:
- (a) cease, correct or reverse any action in contravention of the Companies Act;
  - (b) take any action required by the Companies Act;
  - (c) restore assets or their value to a company or any other person;
  - (d) provide a community service, in the case of a notice issued by the Commission;  
or
  - (e) take any other steps reasonably related to the contravention and designed to rectify its effect.
38. Section 171 does not prescribe that Northam – as a complainant behind the TSC Section 126 Ruling – ought to be afforded *audi* rights at the stage where the Executive Director issued correspondence to RBPlat inviting RBPlat to make submissions to the Executive Director on the nature and extent of a compliance notice to issue under Section 171(2)(a) to (c) and (e).
39. In any event, as recorded in correspondence exchanged between Northam – through its attorneys – and the Executive Director in December 2022, Northam was subsequently alerted by the Panel in an email dated 12 December 2022 (timed 10:55) about the contents of the Executive Director’s 7 November 2022 letter to RBPlat and invited to participate in the process that the Executive Director had embarked upon to issue a compliance notice to RBPlat. Believing that the Executive Director’s 7 November 2022 letter to RBPlat constituted a Ruling envisaged in Regulation 118(3), Northam chose to launch this application under Regulation 118(8).
40. As we noted above, the Executive Director’s powers to issue compliance notices are self-standing powers which are regulated by the provisions of Section 171.

41. Once the Executive Director has issued a compliance notice, that notice or his decision to do so is capable of challenge under Section 172 – not Regulation 118(8).
42. In our view, the delivery by the Executive Director of his letter to RBPlat dated 7 November 2022 letter does not objectively constitute a ruling as is contemplated in Regulation 118(3). This is so despite the Executive Director himself seemingly characterising that correspondence as a ruling. It is plain to us that the wording in paragraph 12 of the Executive Director’s 7 November 2022 letter is standard wording that the Executive Director employs with parties in correspondence whenever communicating on a live offer or affected transaction.
43. Even if the Committee were persuaded to conclude that we have jurisdiction to consider Northam’s application flowing from the Executive Director’s letter of 7 November 2022 because the remedy provided for in Regulation 118(9) is similar in terms and substance to the remedy provided for in Section 172(2), and thus invoke its jurisdiction to deal with Northam’s application, the Committee finds it inappropriate to do so to the extent that the Executive Director’s letter of 7 November 2022 may have purported to prescribe how RBPlat should comply the TSC Section 126(1) Ruling. As the Committee has made it clear, that Ruling afforded RBPlat the option to take remedial action in a manner permissible under the Companies Act.
44. The effect of the Committee’s conclusion is that the Executive Director was entitled to issue the letter of 7 November 2022, and to call upon RBPlat to comply with the TSC Section 126(1) Ruling and not to in anyway prescribe the manner of compliance with the TSC Section 126(1) Ruling.
45. The contents of that letter did not adversely affect or infringe Northam’s rights so as to affect its right to a fair hearing because it was not a ruling contemplated in Regulation 118.

46. Admittedly, in the TSC Section 126(1) Ruling this Committee directed that “*RBPlat must correct the contravention of the provisions of s126(b) of the Companies Act in a manner provided for in the Companies Act and the Regulations*”.
47. The Committee did not specify a time within which RBPlat must comply with the TSC Section 126 Ruling. Nor did it specify any particular manner through which RBPlat must correct the contravention of Section 126(1)(b) which it ruled upon. The Committee gave RBPlat alternative(s) to correct the contravention in any manner provided for in the Companies Act and the Regulations.
48. By Regulation 118(11), the TSC Section 126(1) Ruling remains extant, and must be complied with, unless and until it is set aside by a court.
49. On the papers before us, RBPlat has neither complied with the TSC Section 126(1) Ruling nor voluntarily taken any corrective action to remedy the violation of SSection 126(1)(b) confirmed through the TSC Section 126(1) Ruling.

### **Ruling**

50. In light of the reasons set out above, we find that the Deemed Section 171 Ruling does not constitute a ruling which triggers this Committee’s jurisdiction under Regulation 118(8).
51. RBPlat must comply with its obligations under the Section 126(1) of the TSC Ruling.
52. Northam’s application is dismissed.

Mr Sandile Siyaka

Chairperson: Takeover Special Committee  
*Ruling sent electronically.*

We Agree:

Ms Neo Phakama Dongwana, Mr Ebi Moolla, Ms Cami Mbulawa, Mr Tony Tshivhase and  
Ms Nonzukiso Siyotula

Members: Takeover Special Committee

**APPEARANCES:**

For Applicant: L Harris SC (with P Smith, D Wild and S  
Mhlongo)

Instructed by: Webber Wentzel Attorneys, Johannesburg

For the Second Respondent: J Blou SC (with P Ngcongco  
and M Kruger)

Instructed by: Bowman Gilfillan Inc, Johannesburg

**DATED: 31 MARCH 2023**