IN THE TAKEOVER SPECIAL COMMITTEE

In the matter between:

IMPALA PLATINUM HOLDINGS LIMITED	Applicant
and	
THE EXECUTIVE DIRECTOR OF THE TAKEOVER REGULATION PANEL	First Respondent
NORTHAM PLATINUM HOLDINGS LIMITED	Second Respondent

COMPLIANCE CERTIFICATE COMPLAINT RULING

Introduction

1. This is a decision of the Takeover Special Committee **(the Committee**) in the application by Impala Platinum Holdings Limited (**Implats**) brought in terms of Regulation 118(8) of the Takeover Regulations, 2011.[1] In that application, Implats seeks the cancellation of the ruling of the Executive and Deputy Executive Directors of the Takeover Regulation Panel (**Panel**) made on of 27 January 2023 (**Ruling**).[2] In that Ruling the Panel refused to issue a compliance certificate sought by Implats,

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[1] These Regulations were promulgated in Government Notice R 351, Government Gazette no 34239 of 26 April 2011. Regulation 118(8) states:

> "*Any person issued with a Ruling may apply to the Takeover Special Committee for a hearing regarding the Ruling within –*
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> *(a) 5 business days after receiving that Ruling; or*
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> *(b) such longer period as may be allowed by the Committee on good cause shown.*"

[2] 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 (**Companies Regulations**). And, in line with the nomenclature adopted by Implats and Northam during the application, 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).

as the offeror in terms of Section 121 of the Companies Act 71 of 2008 (the Companies Act). The Panel:

1.1. concluded that it was not satisfied that a compliance certificate may be issued to Implats at this stage in respect of a mandatory offer made by Implats to the shareholders of RBPlat; and

1.2. consequently, rejected an application by Implats for a compliance certificate for its mandatory offer to the RBPlat shareholders until such time as certain complaints by Northam in respect of RBPlat's obligations, as an offeree that were or are before the Panel and/or this Committee have been resolved.

2. Implats submits that it is entitled to be issued with a compliance certificate for its mandatory offer to the RBPlat shareholders. It therefore requests the Committee to replace the panel's Ruling with a ruling that requires the Panel to issue Implats with a compliance certificate for its mandatory offer.

3. The application was supported by the Independent Board of RBPlat but was opposed by Northam. Although the Panel was named as a first respondent, the Panel neither participated in the application nor made submissions in support of its Ruling. The Committee heard the parties' submissions on behalf of Implats, the Independent Board of RBPlat and Northam. It has also considered the written submissions made on behalf of these parties. What follows below is the Committee's decision based on the material before it.

The background

4. The background to the application is common cause and is as follows.

5. On 29 November 2021, Implats announced a firm intention to make a general offer to acquire the issued ordinary shares in RBPlat that Implats did not already hold.

6. On 9 December 2021, Implats announced that it had concluded agreements to acquire 35.31% of RBPlat's issued ordinary shares and, as a result of those acquisitions, Implats' offer as announced on 29 November 2021 would convert to a mandatory offer under Section 123 ("**Implats' Mandatory Offer**").

7. Implats subsequently published an offer circular to the RBPlat shareholders for its mandatory offer on 17 January 2022. That circular, among others, detailed the terms and conditions of Implats' Mandatory Offer, as well as the conditions precedent to which Implats' Mandatory Offer was subject, effectively being:

    7.1. the Panel will issue a compliance certificate to Implats as required under Section 121(b) and Regulation 102(13);

    7.2. the JSE approving the listing on the main board of an exchange operated by the JSE of all shares in Implats to be issued pursuant to Implats' Mandatory Offer; and

    7.3. Implats and RBPlat obtaining – to the extent required – all approvals required for the implementation of Implats' Mandatory Offer and the acquisition by Implats of the relevant RBPlat Shares pursuant to Implats' Offer from *inter alia* the Competition Commission and/or the Competition Tribunal (as the case may be), as are required under the Competition Act, 1998.

8. By a letter dated 16 November 2022, Implats informed the Panel that all the conditions precedent to Implats' Mandatory Offer – except the compliance certificate to be issued by the Panel – had been satisfied. It consequently requested that the Panel issue Implats with a compliance certificate for Implats' Mandatory Offer.

9. The Executive Director replied to Implats on 18 November 2022. He informed Implats that the Panel was of the preliminary view that it may be premature for the Panel to issue a compliance certificate to Implats and certify Implats' Mandatory Offer as compliant in terms of the Takeover Laws.[3] This was for the simple reason that there were several outstanding complaints that were before the Panel and this Committee pertaining to Implats' Mandatory Offer. In the same breath, he requested Implats to engage further with the Panel and seek to convince the Panel that the Panel could indeed issue a compliance certificate to Implats in the face of outstanding complaints of non-compliance.

10. The complaints foreshadowed in the correspondence the Executive Director exchanged with Implats involved complaints initiated by Northam about compliance by the RBPlat Independent Board with certain of that board's obligations under certain provisions of the Takeover Laws (**Northam's RBPlat complaints**).

11. The bulk of those Northam's RBPlat complaints are in some shape or form the subject of pending applications before the Committee and were, in fact, heard by it

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[3] He stated insofar as relevant in his letter to Implats (which is at page 59 of the Applicant's Record of Documents):

"*3. The Panel is of the view that due to several outstanding matters relating to the mandatory offer, a compliance certificate may not be ripe to be issued at this stage, and requests herein that Implats address it as to the reasons that would justify the issue of a compliance certificate. In our view, a compliance certificate can only be issued if the Panel is satisfied that a transaction or offer, in its totality, complies in full with the Companies Act and the Companies Regulations, 2011 (the "**Takeover Regulations**") (collectively, the "**Takeover Provisions**" or "**takeover laws**"), save for where the Panel has granted an exemption or dispensation.*" (Own emphasis.)

on 19 and 21 March 2023. Three of them are the subject of separate Rulings that the Committee will deliver together with this Ruling.[4]

12. For present purposes, it suffices to say that Northam's complaints include:

    12.1. a prior ruling by this Committee that RBPlat has contravened the provisions of Section 126(1)(b) when it issued certain authorised but unissued shares of RBPlat to certain of its Executive Directors and has failed to comply with that Ruling of the Committee;

    12.2. a complaint by Northam filed with the Panel alleging that the RBPlat Independent Board failed to conduct itself independently; and

    12.3. a complaint lodged by Northam with the Panel alleging that the fair and reasonable report issued by the Independent Expert appointed by the RBPlat Independent Board and incorporated in the response circular published by the RBPlat Independent Board did not comply with the requirements of Regulation 90(6)(f) of the Takeover Regulations.

13. Accepting the Executive Director's invitation, on 5 December 2022 Implats through its attorneys[5] delivered its written representations in support of its request for a compliance certificate for the Implats' Mandatory Offer to the Panel.

14. These were followed by written representations on 9 January 2023 from Northam –

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[4] There is another matter that is currently on review by RBPlat in the High Court. As Implats aptly remarks in its statement of case and heads of argument in this application, it is common cause in this application that "*Northam's RBPlat complaints, which the Panel referenced in the Panel Preliminary Views Letter, had all been dealt with by the Panel and TSC without Implats' being cited or given an opportunity to make submissions.*" (Implats HoA para 14 page 7.)

[5] Edward Nathan Sonnenbergs Incorporated.

through its attorneys[6] – after an invitation by the Executive Director.

15. Implats filed a written reply to Northam's response on 20 January 2023.

16. The Panel thereafter issued the Ruling on 27 January 2023.

17. Before this Committee, Implats and Northam lodged *inter alia* a statement of case and statement of response (as the case may be) setting out their bases for the relief they respectively sought before us in this application.[7]

18. Although not formally cited, RBPlat also delivered a short statement of response before us. In its statement, RBPlat makes common cause with the legal submissions advanced by Implats in this application.

19. Each of Implats, Northam and RBPlat additionally filed comprehensive heads of argument before us. We are grateful for the assistance received from the useful heads of argument and oral submissions of Messrs Subel SC (for Implats), Harris SC (for Northam), and Blou SC (for RBPlat).

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[6] Webber Wentzel Attorneys.

[7] A record of these statements submitted by each of the parties as part of this application was prepared by Webber Wentzel comprising some 122 pages. This was accompanied by a further record titled "*Applicant's Record of Documents*" dated February 2023 prepared by ENSAfrica comprising some 148 pages (**Applicant's Record of Documents**).

The arguments in a nutshell

20. The central issue before the Committee pivot upon the proper interpretation of the provisions of Section 121. The keystone of Implats' contention is that those provisions, properly interpreted, only require Implats as the offeror to comply with all the reporting or approval requirements referred to in Section 121(a), unless compliance with those requirements has been exempted by the Panel. Once compliance with those requirements has been met, then the Panel is obliged to issue a compliance certificate referred to in Section 121(b)(i).

21. Northam, for its part, contended that the interpretation urged by Implats and supported by RBPlat is narrow, and ignores the regulatory objectives which the Panel is required to promote as is required by Section 119(1) of the Companies Act. Northam also contended that the narrow interpretation favoured by Implats ignore the wide discretionary powers which require the Panel to be satisfied that the mandatory offer or transaction satisfy the requirements of Parts B and C of Chapter 5 of the Companies Act and the Takeover Regulations.

The proper approach to interpretation of Section 121 of the Companies Act

22. The Committee was referred to several judgments of the Supreme Court of Appeal on the modern principles relating to interpretation of legal instruments, including interpretation of statutory provisions, such as *Endumeni*,[8] and *Capitec 1*,[9] and also the Constitutional Court's judgment in *Auckland Park*.[10]

23. In paragraph 25 of *Capitec 1*, the SCA usefully summarized the relevant principles

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[8] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), paras 18 to 26.

[99] *Capitec Bank Holdings Limited and Another v Coral Lagoon* Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA), para 25.

as follows:

> "*It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitute the unitary exercise of interpretation. I would add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined.*"

24. In what follows the Committee sets out its interpretation of Section 121 of the Companies Act, taking into account the above approach.

The language used in Section 121 of the Companies Act

25. The judgments of our Courts make it clear that the starting point of the interpretation enterprise is the language of the contested provision. The heading of Section 121 of the Companies Act is titled "*General requirements concerning transactions and offers*". That heading gives some indication that the provisions of Section 121 do not deal with or regulate the powers of the Panel to issue or withhold a compliance certificate. The general requirements of the offer or transaction are referred to in Section 121(a). The express provisions of paragraph (a) of Section 121 make it clear that they expressly cover a wide field of compliance than is contended for by Implats. That wider field of compliance expressly include all reporting or approval requirements set out not only in Part B and C of Chapter 5 of the Companies Act, but also those that are set out in the Takeover Regulations.

26. Much more significant is the express language of paragraph (b)(i) of Section 121 of

[10] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC), paras 65 and 66.

the Companies Act. That language makes it clear that it imposes an express prohibition on the offeror "not to give effect to an "*affected transaction*" unless the Panel has issued a compliance certificate. What this language clearly indicates is that Section 121 does not deal at all with the powers or duties of the Panel to issue or withhold a compliance certificate. It merely requires that whatever transaction that flows from the offeror's offer cannot lawfully be implemented unless the Panel has issued the requisite compliance certificate.

27. Had the provisions of Section 121 of the Companies Act, objectively considered, been designed to constitute the power of the Panel, or to the sum total of those powers, there would have been no need at all to provide for the powers of the Panel to issue a compliance certificate in Section 119(4)(b) of the Companies Act, which makes use of a language far wider than the provisions of Section 121(a) of the Companies Act.

Context of Section 121 of the Companies Act

28. Section 121 is part and parcel of chapter 5 of the Companies Act which regulates affected transactions as defined in Section 117(1)(c) of the Companies Act. The regulatory powers of the Panel in respect of affected transactions require the Panel to ensure compliance not only with reporting and approval requirements referred to in Section 121(a) of the Companies Act, but also those contemplated in Parts B and C of the Companies Act, as well as the Takeover Regulations. The degree of compliance required under Section 121(a) is replicated in similar terms in Section 119(4)(b).

29. Whether or not those requirements have been met is a matter of the proper exercise of a discretion by the Panel referred to in Section 119(4) of the Companies Act. It is the Panel which must be satisfied that those requirements have been met before it can lawfully issue a compliance certificate. Whilst all the parties accept that the satisfaction of the Panel in terms of 119(4)(b) is a justifiable discretion, namely a power conferred upon the Panel coupled with a duty to exercise that power lawfully and justifiably, the parties sharply differ on the extent of that power.

30. The Committee considers that, as a matter of context, the power of the Panel in terms of Section 119(4) cannot be confined to the application of Section 121 only. The extent of the Panel's power in Section 119(4)(b) must take into account and give effect to the express objectives described in Section 119(1)(a) to (c) , more importantly, the objective of ensuring that the holders of securities that are the subject of regulated transactions are provided with the necessary information to make fair and informed decisions on those securities.

31. Having regard to the objectives set out in Section 119(1) , it is not surprising that the Takeover Regulations require the establishment of an independent board of the offeree company and the appointment of an independent expert who are required to fulfil specific duties relating to the offer of the offeror company. Those requirements imposed upon the independent board and independent expert in terms of the Takeover Regulations must be fulfilled and it is the duty of the Panel to be satisfied that they have been complied with before it can consider the issuing of a compliance certificate in terms of Section 119(4)(b).

32. The Committee is persuaded and holds that the provisions of Section 119(1) and (4)(b) , as well as the Takeover Regulations, especially those Regulations which impose specific duties on the Independent Board of the offeree company and the independent expert appointed by it constitute appropriate and relevant context for the proper interpretation of Section 121(b)(i). The Committee thus takes into account these provisions in its interpretation of Section 121(b)(i) .

The purpose of Section 121 of the Companies Act

33. The purpose of Section 121 appears from the provisions of paragraph (b)(i) thereof. It is to prevent the taking of any precipitous action by the offeror company by implementing the affected transaction flowing from its offer before the Panel has issued a compliance certificate in terms of Section 119(4)(b) . The purpose of Section 121 is not to regulate or limit the power of the Panel to determine whether it should or should not comply with Section 119(4)(b) .

34. The interpretation of Section 121 which limits the wide powers of the Panel as is reflected in Section 119(4)(b) will lead to absurd consequences. The facts of the present application are illustrative of a clear example of such absurd consequence. On Implats interpretation, the Panel will be obliged to issue a compliance certificate to it when the report of the Independent Expert has not complied with the express requirements of Regulation 90(6)(f), and when the dispute between the independent board of RBPlat and Northam on this issue has not finally been resolved by the Committee.

35. That interpretation makes a mockery of the purpose of the takeover laws as is expressed in Section 119(1) which Section expressly indicates what must be considered by the Panel whenever it considers the issuance of a compliance certificate.

36. A compelling consideration exists which leads the Committee to uphold a broader interpretation of the provisions of Section 121 . Due to its significance, a compliance certificate, once issued, will permit the offeror company to implement its offer and the transaction that flows from it. It is thus a crucial final step in the Regulation of an affected transaction. It cannot lawfully and justifiably be granted until the Panel is satisfied that the provisions of Parts B and C of Chapter 5, and Takeover Regulations have been complied with.

37. Having regard to the above considerations the Committee is satisfied that the interpretation contended by Implats and supported by RBPlat is mistaken and therefore rejects it.

38. It is necessary for the Committee to consider other submissions made by Implats and RBPlat in support of their contentions that the Ruling of the Panel not to issue a compliance certificate to it should be set aside, even though the Panel's Ruling cannot be faulted upon the proper interpretation of the provisions of Section 121.

Reliance on the Panel's Guideline

39. The first is the contention that the Panel has previously relied on Guideline Number 6 of 2011 issued by the Panel on 12 August 2011 (**2011 Guideline**). Paragraph 2.1 of the 2011 Guideline provides that "*a compliance certificate may be issued once all conditions precedent required to give effect to or implement the transaction have been satisfied in all respects or waived*". Paragraph 2.2 of the 2011 Guideline indicates the extent of information which parties who seek a compliance certificate must submit to the Panel in order to prove that the applicable conditions precedent have been fulfilled or waived.

40. The Committee considers Implats' reliance on the 2011 Guideline to be misplaced

for the following reasons:

40.1. The contents of the 2011 Guideline do not exhaustively reflect the full import of the powers and duties of the Panel to issue a compliance certificate. That is clear from the fact that the 2011 Guideline does not refer at all to the power and duty of the Panel in terms of Section 119(4)(b) read with Section 119(1) .

40.2. Secondly, the question of the proper interpretation of the provisions of Section 121 is a matter of law, which is an objective exercise free from subjective consideration of the administrative decision-maker. The views of the Panel expressed in the 2011 Guideline cannot override the need for a proper interpretation of those provisions, having regard to the triad considerations of text, context and purpose which the Committee has dealt with above.

40.3. Thirdly, and more important, caselaw of the Constitutional Court makes it clear that a subordinate legislative instrument cannot be used to properly interpret a primary legislative provision.[11] In this case the 2011 Guideline cannot be used to interpret Section 121.

41. Section 119(1) makes it clear that in exercising the powers conferred upon it in terms of Section 119(4) the Panel must promote the objectives set out in Section 119(1)(a) to (c).

42. Lastly in the context of the 2011 Guideline: the reliance by Implats on the recent decision by the SCA in the case of *Commissioner for the South African Revenue*

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[11] *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC).

Service v Medtronic International Trading S.A.R.L [2023] ZASCA 20 is unavailing.

43. First, what was under consideration in the *Medtronic International* case is an "*Interpretational Note*" denoting in substantial detail an administrative body's interpretation of legislation – not a two-page guideline devoid of detail.

44. As is apparent from the decisions of the SCA and the Constitutional Court respectively in *Marshall SCA*[12] and *Marshall CC*, and thereafter in *Medtronic International* which Implats cites, not only do interpretative notes issued by SARS emanate from a legislative scheme under the Tax Administration Act, 2011 that effectively couch them as '*practice generally prevailing'*, but they further employ more direct language that strongly suggests that they are binding on SARS and are far more comprehensive that the Panel's Guideline. [13]

45. On the other hand, the Panel's 2011 Guideline was issued pursuant to Section 201(2) t which provides that the Panel may "*issue, amend or withdraw information on current policy in regard to proposed affected transactions contemplated in Parts B and C of Chapter 5, to serve as guidelines for the benefit of persons concerned in such proposed transactions*".

46. To us, contrary to Implats' submissions there is simply no practice along the lines that Implats posits when it comes to the request for and issuing of compliance certificates.

47. Notably, save to quote the Guideline, Implats did not – in both its written and oral submissions before this Committee – furnish anything remotely serving as evidence

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[12] *CSARS v Marshall NO* [2016] ZASCA 158; 2017 (1) SA 114 (SCA) para 31–33.

[13] *Medtronic International* (above) para 10 (including footnote 11) and para 24 - 27.

that the 2011 Guideline evidences a practice which comprises "*an impartial application of a custom recognised by all concerned*".[14]

48. Nor did Implats demonstrate how the Panel's Guideline serves as a fact that the legislative provisions requiring a compliance certificate and the issue thereof by the Panel "*had been construed by all concerned in a certain way [which Implats contends for in this application] ever since it [i.e. the Panel's Guideline] came into operation*". [15]

49. In any event, our reading of the Constitutional Court's decision in *Marshall* is that the Court there merely explained – in response to a query whether a unilateral practice of one part of the executive arm of government plays a role in the determination of the reasonable meaning to be given to a statutory provision – that that position "*might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned*". [16]

50. In our opinion, there is no such practice that evidences an impartial application of a custom recognised by all concerned along the lines contended for by Implats in this application.

Implats' complaints that it was not involved nor invited by the Panel to participate in the process relating to Northam's RBPlat complaints

51. The second contention by Implats is that it was not joined as a party to Northam's complaints which gave rise to the Ruling of the Panel and thus was denied an

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[14] *Marshall v Commission for the South Africa Revenue Service* [2018] ZACC 11; 2019 (6) SA 246 (CC) (*Marshall CC*) para 10 (cited by Implats in its heads of argument).

[15] *Marshall* (above) para 10 footnote 15 (cited by Implats in its heads of argument).

[16] *Marshall CC* (above) para 10 footnote 15 (cited by Implats in its heads of argument).

opportunity to make representations before the Panel made the decision to refuse the issuance of the compliance certificate.

52. This complaint cannot change the simple fact that it is incumbent on the Panel to exercise its powers under Section 119(4)(b) read with Section 121 to issue a compliance certificate in relation to any offer or transaction in a manner that promotes the objectives in Section 119(1)(a) to (c).

53. The fact that the outstanding complaints have nothing to do with an offeror's (in this case Implats') own conduct or complicity therein cannot justify the interpretation that Implats advances in this application. It certainly may be one of the factors that the Panel considers when exercising its powers under Section 119(4)(b) read with Section 121 when called upon to issue a compliance notice in regard to an offer or affected transaction.

The RBPLAT Independent Board unique point on carving out frustrating action

54. The second is RBPlat's Independent Board's contention that "*Section 121 is concerned with "reporting or approval" requirements, whilst Section 119(4) is concerned with the offer or transaction itself satisfying the requirements of the legislation*".

55. According to the RBPlat Independent Board, regardless of the contested interpretations by Impala and Northam this Committee prefers, neither Section 121 nor 119(4) is "*concerned with the requirements that cannot be said to be requirements for making and proceeding with an offer*".

56. For the RBPlat Independent Board, if one considers the legislative scheme governing frustrating action, "*it cannot reasonably be said that a probation on deliberate frustrating action by the offeree ([covered in] Section 126(1)(b) to (g), or*

action covered by Section 126(1)(a), is in any sense a "requirement" of an offer"".

57. It is therefore not permissible, so the RBPlat Independent Board argument goes, to suggest that a frustrating action can serve as a reason to delay a compliance certificate as doing otherwise would be to lend a hand to a frustrating action and thus enable the very mischief sought to be remedied.

58. We find the framing of the issues above by the RBPlat Independent Board unconvincing. It is not supported by the express and clear language of Section 121.

59. First, contrary to the RBPlat Independent Board's narrow characterisation of the provision, Section 121 is not merely concerned with "*reporting or approval requirements*". Only the first part of that Section (viz. Section 121(a)) deals with "*reporting or approval requirements*". The rest of the Section (Section 121(b)(i) and (ii)) deal with entirely different matters.

60. Secondly, the RBPlat Independent Board's contention completely ignores the opening phrase to Section 121(a) ; viz. "*<u>Any person making an offer</u> must … comply with all reporting or approval requirements, whether set out in this Part or in the Takeover Regulations*" (own emphasis).

61. The duty in Section 121(a) to comply with all reporting or approval requirements set out in the Takeover Laws is expressly imposed on "*[a]ny person making an offer*". It is not, as the RBPlat Independent Board appears to contend, imposed on an offeree.

62. Given the importance of the issue, we turn to address a further submission by Implats that interpreting Section s 119(4) and 121(b) and Regulation 102(13) in the manner portrayed in the Ruling and supported by Northam in this application will countenance the gaming of the takeover regulatory system under the Takeover Laws by non-neutral (potential) rival bidders such as Northam.

The spectre of never-closing transactions due to abuse of the complaint's machinery under the Takeover Laws

63. As further support for its preferred interpretation of Section 121, Implats raises a further contention (supported by the RBPlat Independent Board) around the spectre of never-closing offers or affected transactions. However, the Companies Act makes a provision in Section 169(1)(a) for the Panel to retain the discretion to investigate only those complaints that it does not deem to be frivolous or vexatious or those that do not allege any facts, that if proven would constitute grounds for remedy under the Act.

64. The argument is as follows: Should this Committee reject the narrower approach to interpreting and applying Section 119(4)(b) and 121(b)(i) advanced by Implats, rival bidders to offerors, such as Northam, who "*have an overarching commercial interest in preventing the making of Implats' Mandatory Offer*" [17] may train all their energies on preventing or delaying an offeror from obtaining a compliance certificate by lodging and pursuing endless complaints before the Panel, this Committee and/or the courts with respect to the actions or failures of an offeree company and/or its independent board during an offer period.[18]

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[17] Implats' Reply to Northam's Answer (record p97 – 98) para 8. This point is articulated as follows in Implats' letter dated 5 December 2022 to the Panel (Applicant's Record of Documents p72 para 5.5)—

> "*…If the Panel fails to issue a compliance certificate in this matter and now, it is difficult to see how in a contested matter (involving two competing bidders or a hostile board), the Panel will ever be in a position to issue a compliance certificate. The South African takeover regime will be halted by endless appeals, reviews, and court applications – all without merit – brought solely to delay and frustrate the offer. It will simply make a contested bid too hard to achieve, to the detriment of the economy and the spirit and objects of the Takeover Provisions. Northam's actions should be viewed in this light. None of the outstanding items fall within the gift of Implats.*"

[18] In its heads of arguments in this application, Implats *inter alia* aptly complains—

65. To paraphrase the RBPlat Independent Board's supporting submission on this score, an offeree would by its own conduct perversely have the ability to delay, impede and ultimately frustrate an offer.

66. We accept that these are indeed genuine concerns and/or considerations. However, to us the legislative scheme set out in the Takeover Laws does envisage solutions to deter and/or neutralise any such conduct. Each of the purported delaying tactics will have to be determined on their own facts and circumstances. Where the alleged delaying tactics have no foundations on the proper application of Takeover Laws, they cannot be countenanced by the Panel or the Committee.

67. Section 119(2) confers considerable powers on the Panel to 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 objectives set out Section 119(1). Those objectives set out in Section 119(1)(a), (b) and (c) include that the Panel must:

    (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

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"*4 Northam, a rival bidder that desires to acquire RBPlat, supports the Panel Ruling. …Northam's actions and approach have all been underpinned and animated by Northam's commercial desire to prevent or slow down the implementation of Implats' offer – which was made over a year before Northam's proposed offer – despite the obtaining of merger approval from the competition authorities (notwithstanding Northam's opposition). This includes raising new issues belated before the Takeover Special Committee (**TSC**) when these were not raised before the Panel.*" (Footnotes omitted.)

(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.

68. The Takeover Laws embody extreme flexibility. The Panel is legislatively empowered to apply the provisions of the Takeover Laws with a degree of flexibility where the circumstances demand.

69. By Section 119(6)(a) to (c), the Panel may wholly or partially and conditionally or unconditionally exempt an offeror to an affected transaction or an offer from the application of any provision of the Takeover Laws if:

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

– the cost of compliance is disproportionate relative to the value of the affected transaction; or

– doing so is otherwise reasonable and justifiable in the circumstances having regard to the principles and purposes of the Takeover Laws.

70. No other regulatory body established pursuant to the Companies Act enjoys as much latitude as the Panel to grant exemptions from the application of any provision of the Companies Act and/or Takeover Laws - including many of the most fundamental - as the Panel does.[19]

[19] By sections 2(3), 6(2), and 72(5), the Companies Tribunal – established in terms of section 193 – may grant exemptions from specific provisions of the Companies Act.

71. As an aside, we note that Implats in its initial engagements with the Panel leading up to the Ruling had sought – in the alternative – the Panel to exempt it from the possible effect of Northam's RBPlat complaints in order to facilitate the issuance of a compliance certificate.[20] However, Implats apparently abandoned this quest for an exemption.[21]

Decision

72. Therefore, for the reasons above, the relief sought by Implats (supported by RBPlat) in this application is refused. The Committee confirms the Panel's ruling of 27 January 2023.

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

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[20] Ruling para 6b; Applicant's Record of Documents page 134.

[21] Ruling para 7; Applicant's Record of Documents page 135. As recorded by the Panel in the Ruling:

> "*8. Therefore, this ruling deals only with the submissions on whether this transaction is ripe for compliance certificate according to the Takeover Provisions and does not address the exemption application.*"

APPEARANCES:

For Applicant: A Subel SC (with A Coutsoudis)

Instructed by: Edward Nathan Sonnenbergs Inc, Johannesburg

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

Instructed by: Webber Wentzel Attorneys, Johannesburg

For the RBPlat Independent Board (not cited): J Blou SC (with P Ngcongo and M Kruger)

Instructed by: Bowman Gilfillan Inc, Johannesburg

DATED: 31 MARCH 2023