TAKEOVER SPECIAL COMMITTEE

In the matter between:

MR CRAIG KEVIN ALLAN BUTTERS	**APPLICANT**
MR ANDILE NIKANI, IN HIS CAPACITY AS THE EXECUTIVE DIRECTOR OF THE TAKEOVER REGULATION PANEL	**FIRST RESPONDENT**
MR ZANOKUTHULA NDULI, IN HIS CAPACITY AS THE INSPECTOR FOR THE TAKEOVER REGULATION PANEL	**SECOND RESPONDENT**
VARIOUS IMPUGNED PARTIES WHO WERE COUNTERPARTIES TO THE SETTLEMENT AGREEMENT CONCLUDED WITH THE TAKEOVER REGULATION PANEL (PANEL) RELATING TO THE CONCLUSION OF AN INVESTIGATION INITIATED BY THE PANEL CONCERNING ALLEGED BREACHES OF THE PROVISIONS OF CHAPTER 5, PARTS B AND C, OF THE COMPANIES ACT, 2008, READ WITH THE TAKEOVER REGULATIONS	**IMPUGNED PARTIES /THIRD RESPONDENTS**
AFRICAN PHOENIX INVESTMENTS LIMITED	**FOURTH RESPONDENT**
ENX GROUP LIMITED	**FIFTH RESPONDENT**
EXTRACT GROUP LIMITED	**SIXTH RESPONDENT**
ZARCLEAR HOLDINGS LIMITED	**SEVENTH RESPONDENT**

DECISION

1. This is an interlocutory ruling (Ruling) in the context of an application for review (Application) against the decision of the Executive Director to settle with certain parties (Impugned Parties) pursuant to the Panel's investigation (Investigation) relating to certain allegations of non-compliance with the provisions of the Companies Act, 2008 (Act) and the takeover regulations, in terms of the Companies Regulations, 2011 (Regulations).

2. Mr Craig Butters (Applicant) is represented by Robert de Rooy Attorneys (RDR), and the Impugned Parties are represented by Herbert Smith Freehills South Africa LLP (HSF).

3. On 16 August 2023, the Takeover Special Committee (TSC), through the Chairperson of that committee, produced a calendar for the delivery of various processes for purposes of the Application, which is to be heard on 4 September 2023.

4. Among the processes mentioned in the calendar above was the directive for the Panel to deliver the full Investigation record to all the parties before the close of business on 18 August 2023.

5. On 17 August 2023, the Panel, through the Deputy Executive Director (DED), delivered the record in the following manner:

5.1. In the first instance, he shared a portion of the record marked "Part A: non-confidential aspects", which he shared with the TSC and all the other parties to the Application; and

5.2. In the second instance, he shared another portion of the record marked "Part B: confidential aspects", which he delivered to HSF (who had contended, on behalf of the Impugned Parties, that some of the contents of the record were confidential and ought

not to be revealed to the Applicants as part of the record) and the TSC for further deliberations.

6. Between 17 August 2023 and 22 August 2023, various correspondence was exchanged between HSF, RDR, the Panel (through the DED) and the TSC relating to how and to what extent the Panel should comply with the TSC's directive regarding the delivery of the entire record. In this regard:

6.1. The substance of HSF's contentions is that before the Panel (or the TSC, for that matter) can release the so-called "confidential aspects" of the record, it must first comply with the requirements of section 212(6) of the Act, essentially allowing the Impugned Parties (who have claimed confidentiality) 10 days' notice before releasing that portion of the record; and

6.2. On the other hand, RDR (for the Applicant) argues essentially that the purported reliance upon the provisions of section 212 to prevent access by the Applicant to the entire record is somewhat dubious, seeing that it does not seem that the Impugned Parties and the Panel (through the DED as an inspector) do not appear to have complied with the requirements of section 212 when determining whether the claim for confidentiality was valid. In any event, RDR contends further that even if the information was to be regarded as confidential, he is entitled to access the entire record in regulation 177(3)(c).

7. We will deal with these contentions in more detail below.

8. Section 212 is headed "Confidential information" and reads as follows:

> *"(1) When submitting information to the Commission, the Panel, the Companies Tribunal, the Council, or an inspector or investigator appointed in terms of this Act, a person may claim that all or part of that information is confidential.*
>
> *(2) Any claim contemplated in subsection (1) must be supported by a written statement explaining why the information is confidential.*
>
> *(3) The Commission, Panel, Companies Tribunal, Council, inspector, or investigator, as the case may be, must-*
>
> *(a) consider a claim made in terms of subsection (1); and*

(b) as soon as practicable, make a decision on the confidentiality of the information and access to that information, and provide written reasons for that decision.

(4) Section 172, read with the changes required by the context, applies to a decision in terms of subsection (3).

(5) When making any ruling, decision, or order in terms of this Act, the Commission, the Panel, the Companies Tribunal, or the Council may take confidential information into account.

(6) If any reasons for a decision in terms of this Act would reveal any confidential information, the Commission, the Panel, the Companies Tribunal, or the Council, as the case may be, must provide a copy of the proposed reasons to the party claiming confidentiality at least 10 business days before publishing those reasons.

(7) Within five business days after receiving a copy of proposed reasons in terms of subsection (6), a party may apply to a court for an appropriate order to protect the confidentiality of the relevant information."

9. At the core of the current interlocutory dispute is the extent to which section 212 applies to any part of the record in this Application.

10. As mentioned above, HSF contends that the status of the undisclosed portion of the record is confidential. They state that this claim was made at the outset, and the Panel (through the DED, in his capacity as an inspector) accepted it. Therefore, any purported reversal of such a decision should comply with section 212(6) requirements, inter alia, by giving their clients at least ten business days' notice. This would, in turn, allow their clients to decide if they will challenge the disclosure of their confidential information to the court for appropriate relief to protect that confidentiality.

11. RDR argues that the TSC had already determined that disclosing the entire record is necessary. This directive cannot be revisited. In any event, whether any portions of the record meet the requirements of section 212 for what constitutes confidential records is also up for debate as the Act stipulates strict requirements for the declaration by the Panel or the inspector of any information as confidential. Therefore, it was incumbent

upon the Impugned Parties and the Panel to demonstrate that they complied with these requirements before being able to rely upon the protections set out in section 212 of the Act.

12. The TSC, through its chairperson, asked HSF to provide evidence that the requirements of section 212(2) of the Act had been complied with when the claim for confidentiality was made, as required in the Act. Despite acknowledging receipt of the email which contained this request and responding to it, no attempt was made by HSF to provide such a written statement or even explain why the written statement, which is peremptory in the context of any claim for confidentiality, was nonetheless not necessary in this case. Instead, they persisted with their bald assertion that the information the Impugned Parties provided to the inspector is confidential and, consequently, enjoys the protection of section 212(6) of the Act. Unfortunately, it is not for the TSC, an administrative functionary, to ignore what the legislature deemed peremptory requirements for any claim for confidentiality. Ours is to apply the law as it is.

13. In arriving at its decision in this matter, the TSC has considered that patently experienced external counsel represents both the Applicant and the Impugned Parties and, therefore, must be assumed to have been adequately advised of their rights when addressing the TSC. We raise this point in the context of regulation 119(1) regarding the principles of informality and *audi alteram partem*. Every effort was made to allow both parties to be heard in this regard whilst at the same time not being overly formalistic in this regard. The Panel representatives elected to abide by the decision of the TSC.

14. An analysis of section 212 of the Act reveals the following:

14.1. **Part A: The process for determining confidentiality**

14.1.1. A claim for confidentiality may be made by any person (including the Impugned Parties) at the time of submission of such information to the Panel or the inspector, among other regulatory agencies;

14.1.2. The claim for confidentiality must be supported by a written statement setting out why the relevant information is confidential; and

14.1.3. The Panel or the inspector must then consider the claim for confidentiality and thereafter decide on the question of confidentiality and how access to that information (if any) will be given. The reasons for that decision must accompany the decision.

14.1.4. The decision by the Panel or the inspector (as the case may be) is reviewable by the TSC in terms of section 172 of the Act.

14.2. **Part B: Subsequent disclosures of confidential information**

14.2.1. Once the determination in terms of 14.1 above has been made, if any reasons for a decision[1] in terms of this Act would reveal any confidential information, the Panel must provide a copy of the proposed reasons to the party claiming confidentiality at least 10 business days before publishing those reasons.

14.2.2. Within five business days after receiving a copy of the proposed reasons in 14.2.1 above, a party (e.g. the Impugned Parties) may apply to a court for an appropriate order to protect the confidentiality of the relevant information.

14.3. From the above breakdown down of section 212, what is clear is that before a party may rely on the protections referred to in Part B (in 14.2 above), they must first demonstrate that the requirements of Part A (in 14.1) were followed and that the relevant regulatory agency made the decision regarding confidentiality.

15. The facts available to the TSC, having given both parties a reasonable opportunity to address this section 212 issue, are that no evidence has been provided to the TSC demonstrating that Part A[2] of section 212 of the Act was complied with. In that case, there is no legal basis upon which the Impugned Parties can validly rely upon the protections provided in Part B[3] of section 212 of the Act.

16. Furthermore, having already determined that the relevant portions of the record do not constitute confidential information, we have also considered whether the information should be made available to the Applicant per regulation 177(3) of the Regulations. In this regard, we have determined that the Panel and the TSC may permit the release of these portions of the record in accordance with the provisions of that sub-regulation because even though those portions of the record may justifiably be said to fall within

[1] See Regulation 81(y), section 170(1)(g)(ii), section 212(3)(b) read with section 172(2) and regulation 118(9) for examples of "decisions" that can reasonably be said to be contemplated in this regard.
[2] See paragraph 14.1 above.
[3] See paragraph 14.2 above.

the ambit of regulation 176(2)(e) of the Regulations, the Applicant's request for access thereto nonetheless meets the requirements of the information that can legitimately be released in terms of regulation 177(3)(c) of the Regulations since the request is solely for the TSC review.

17. Having established the above regarding the confidentiality of the record or parts thereof in terms of section 212 of the Act, it bears noting that the request for the record is not made by the Applicant purely out of curiosity. Instead, it is sought to prepare the Applicant's statement of claim in the Application. Therefore, it is clear that access to the record by the Applicant is not sought for a trivial reason but in pursuance of the purposes of the Act.

18. It is trite law that access to the record of the administrative functionary is one of the elements of fair administrative procedure. However, it is not lost on the TSC that this right of the Applicant to procedural fairness must be balanced against the legitimate interest of the Impugned Parties to privacy in respect of the information, which is intrinsically confidential, including but not limited to intra-company communications of those parties such as minutes of meetings of the boards, trustees, or shareholders, as the case may be. This is notwithstanding whether section 212 of the Act was complied with. It bears noting also that the Panel's (and, by extension, the TSC's) obligation to regulate affected transactions to ensure the integrity of the marketplace and fairness to holders of the securities of the regulated companies. Therefore, even if we concluded that section 212 is not applicable in this case, this does not mean our ruling should result in a careless dispersal of potentially confidential information of the Impugned Parties.

19. Taking the above into account, we direct the parties as follows:

19.1. Subject to 19.2 below, over and above the information already provided by the Panel in 5.1 above, the Panel shall also deliver to all the parties all correspondence, in whatever form, exchanged between the inspector and the Impugned Parties or their professional advisors.

19.2. Despite 19.1, all documents containing non-public intra-company communications of the Impugned Parties and the relevant regulated companies shall not be delivered in printed or electronic form to the Applicant, but access will be given to the legal representatives of the Applicant (who must undertake to maintain the confidentiality therefore, save for purposes of advancing the Applicant's review) via a physical data

room. Any information in the physical data room may not be copied except with the Executive Director's express consent considering the principles articulated in this decision.

19.3. Any disputes relating to the disclosures permitted by the Executive Director under 19.2 above shall be determined during the main hearing in the Application.

19.4. The Panel must share or permit access (as the case may be) to the rest of the record as directed in this paragraph 19 by close of business on Friday, 25 August 2023.

20. The Impugned Parties shall pay the costs of the TSC.

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SB SIYAKA
CHAIRPERSON
(Duly authorised to sign)

For and on behalf of TSC Members

NP DONGWANA (concurring); and

N MBULAWA (concurring).

DATED: 23 August 2023