BEFORE THE TAKEOVER SPECIAL COMMITTEE

In the matter between:

PEPPERCLUB HOTEL INVESTMENTS LIMITED Applicant

and

DEPUTY EXECUTIVE DIRECTOR: TAKEOVER REGULATION PANEL Respondent

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DECISION

INTRODUCTION

1 This case is adjudicated against the following backdrop. First, citizens in democracies around the world now frequently choose to conduct their business affairs through the vehicle of corporate entities such as private or limited liability companies in South Africa. There are obvious benefits to this, such as the protection of personal assets and easy access to funding. Second, an increasing number of governments around the world are growing alert, first, to the dangers of a culture of secrecy and unresponsiveness in relation to companies, and, secondly, to the need for corporate decisions to be taken in an open and transparent manner. The South African government is no exception. This much was reflected by its Parliament - driven by, amongst others, the need for the companies' proper disclosure and accountability to their shareholders - in enacting section 7 of the Companies Act, 71 of 2008 ('the Act'), which provides, amongst others, that, 'the purposes of this Act are' '[e]ncouraging transparency and high standards of corporate governance as

appropriate, given the significant role of enterprises within the social and economic life of the nation'.[1]

2 The preamble to the Act, in turn, provides, amongst others, for the establishment of regulatory bodies such as the Takeover Regulation Panel ('the Panel'), whose mandate (the Panel's) is, *inter alia*, '[t]o administer the requirements of the Act with respect to companies'[2] and, as provided for in section 201 of the Act, to, amongst others, '[r]egulate affected transactions and offers to the extent provided for, and in accordance with, Parts B and C of Chapter 5 of the Act and the Takeover Regulations'.[3]

3 It is just as well that we record at the outset that those who choose to carry on their activities through the medium of artificial legal persona must accept, not only the privileges that go with their choice, but also the responsibilities attached to it. This includes, amongst others, the statutory obligations of proper disclosure and accountability to shareholders. Viewed in this light, transparency, the high standards of corporate governance and the statutory obligations of proper disclosure to shareholders, together constitute the enterprise by recourse to which a meaningful protection of shareholders can be achieved. It is, accordingly, unsurprising that the legislature has rightly seen fit to cater for these imperatives in the Act.

4 The present application stems from a refusal by the Panel, on 27 March 2026, to grant an exemption to the applicant, Pepperclub Hotel Investments Limited ('PHI'), pursuant to the provisions of section 119(6) of the Act. Thus, central to the determination of this case is the proper interpretation of section 119(6) of the Act and, we show below, the need for companies, in executing their decisions, to: (i) act transparently, (ii) observe high standards of corporate governance, and (ii) comply

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[1] Section 7(b)(iii) of the Act.

[2] Preamble to the Act.

[3] Section 201(1)(a) of the Act.

with their statutory obligations of proper disclosure to their shareholders. The matter is thus of importance not only to PHI and the Panel, but also for the wider public.

5 The background of the application, including the details of the Panel's and PHI's respective stances regarding PHI's exemption application, and the applicable provisions of the Act, are set out in the ensuing paragraphs.

THE ESSENTIAL BACKGROUND

6 On or about the 21st of October 2025, PHI issued a notice to its shareholders of the then impending annual general meeting ('AGM') which was to be held at PHI's premises in Cape Town, on 13th of November 2025 ('the AGM notice" or simply 'the notice').[4] The shareholders were invited to attend, - physically or by way of virtual Teams or Zoom platforms - to speak and to vote at the AGM, or to appoint a proxy to do so on their behalf. The notice itself dealt with a number of issues, the most pertinent of which, for present purposes, was the passing of special resolution number 4, which dealt with the 'Amalgamation Transaction'. It is common cause that the Amalgamation Transaction constitutes an 'affected transaction' between PHI, as the 'Amalgamated Company' and PHI Equity Ltd as the 'Resultant Company' ('PHI Equity'), which was to be concluded by way of a written Amalgamation Agreement[5] on the 1st of July 2026 ('the Amalgamation Transaction' or simply 'the transaction').[6] The first one and a half pages of the notice contain the agenda and enumerate the items which fell to be discussed at the AGM. As appears from item 11 of the agenda, the shareholders were also going to be requested at the AGM, 'to authorise the Company to enter into an amalgamation transaction and to apply to

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[4] Record p97.

[5] Record p74.

[6] Clause 12 of the Amalgamation Agreement provides that it is subject to the fulfilment of the suspensive conditions enumerated in clauses 12.1.1 to 12.1.5 thereof.

the Takeover Regulation Panel to exempt the Company from compliance with Parts B and C of Chapter 5 of the Companies Act and the Takeover Regulations'.

7 Indeed on 27 January 2026, PHI submitted an application to the Panel for an exemption in terms of section 119(6) of the Act ('the application').[7] PHI sought to be exempted from compliance by it with the provisions of Parts B and C of Chapter 5 of the Act and the applicable Takeover Regulations ('the regulations'), in respect of the Amalgamation Transaction.

8 In the application, PHI recorded, inter alia, the following facts and circumstances:

8.1 PHI had been established as a venture capital company ("a VCC") in accordance with section 12J of the Income Tax Act of 1962, which limited its ability to invest to only certain asset classes and specified asset allocation percentages.

8.2 The Amalgamation Transaction entailed the disposal by PHI of its business (i.e. its assets and liabilities) to a new tax-neutral company, being PHI Equity Ltd ("PHI Equity"), in exchange for shares in the new company, which shares are then to be distributed to PHI's shareholders as one indivisible transaction, with the consequence that:

8.2.1 the former shareholders of PHI will become shareholders of PHI Equity (the tax-neutral company) in the same proportions, and that PHI Equity will not be constrained by the section 12J investment constrictions that apply to PHI due to the latter's VCC status;

8.2.2 the administrative costs in relation to the current structure of PHI will not burden PHI Equity (a tax neutral company); and the

[7] Record p162.

distributable profits of PHI Equity will not be reduced by the administrative and tax burdens currently borne by PHI;

8.2.3 PHI Equity will not be required to comply with any of the requirements of section 12J and will be relieved of the section 12J investment and other restrictions and burdens currently borne by PHI,

8.2.4 the holding of shares in PHI Equity will, for all intents and purposes, be a mirror image of the holding of shares that the shareholders held in the former company, PHI; and

8.2.5 given that PHI Equity will be a tax neutral company, the consequences that are to flow from the proposed amalgamation can only benefit the current shareholders of PHI, and there is no reasonable potential of the transaction prejudicing the interests of the existing shareholders of PHI. On the contrary, the shareholders benefit;

8.3 For all intents and purposes, PHI Equity will replace PHI in that the former's balance sheet, shareholder composition and status will in every sense mirror exactly what the position would be vis-à-vis PHI prior to the amalgamation, save that PHI Equity will not be bound by the strictures of section 12J in the same manner that PHI is: and

8.4 PHI's shareholders were and are geographically spread out throughout South Africa and elsewhere, which rendered it logistically impossible to obtain a signed physical waiver document from each of them within a reasonable time or at all, taking into account that some shareholders, including large corporate entities, might not be bothered to deal with and to return a signed original waiver document to PHI.

9 The application drew a detailed response from the Panel which is dated 29 January 2026.[8] In its aforesaid letter the Panel, amongst others, (i) provided preliminary guidance to PHI on the applicable statutory framework, and (ii) proceeded to identify seven fundamental concerns it had with the application. It expressed its overall concerns thus:

> *'The Panel has conducted a preliminary review of the application and supporting annexures. We have identified certain apparent fundamental concerns… Our preliminary assessment is that the application rests on a flawed legal premise and contains material deficiencies that must be addressed before we can properly assess whether the criteria for exemption under section 119(6) are met'.*

10 At paragraphs 1 to 1.6 of its letter, the Panel expressed its views in relation to the applicable legal framework that it contended related to exemption applications. This included paragraph 1.2.2, in which the Panel underscored that Parts B and C of the Act were aimed at shareholder protections, whose objective the Panel had to ensure were upheld:

> *"Parts B and C (sections 117-127 and the Takeover Regulations) constitute a separate public law regulatory regime administered by this Panel. They provide protections, including independent expert reports, regulated announcements and circulars, and overall Panel oversight, that exist precisely because shareholders cannot adequately protect their own interests through corporate voting alone."*

11 The Panel next addressed the "deemed waiver" mechanism in the AGM notice, identifying, in paragraphs 2.1 to 2.3 of its letter, four reasons why it posed a difficulty for the Panel, namely that:

11.1 there is no statutory authority permitting a company to unilaterally waive the rights of shareholders conferred on them by Parts B and C of the Act;

[8] Record p125.

11.2 the waiver was prejudicial and overbroad: it purported not only to bind shareholders who did not vote against the resolution, but it also had the potential effect of binding:

11.2.1 shareholders who voted in favour of the proposed Amalgamation Transaction without fully appreciating that they were waiving their statutory rights (to transparency and the disclosure of information for instance), and the effect of that waiver;

11.2.2 absentee shareholders who never consented to the waiver of their statutory rights; and

11.2.3 shareholders who abstained from either attending or voting at the AGM, about whom it could not be said had foregone their statutory rights simply because they did not vote in favour or against the proposed transaction.

12 The Panel also pointed out, at paragraph 2.2.3 of its letter, that voting to pursue a transaction did not mean that shareholders had agreed to waive their statutory rights to transparency, information disclosure and the like; and if the mechanism employed by PHI was valid, any company could entirely circumvent Panel oversight.

13 At paragraph 3 of the Panel's letter, it dealt with the "*Material Factual Deficiencies and Misstatements* in the application. Three of these bear mentioning:

13.1 Paragraph 3.1 noted a discrepancy between the applicant's claim that PHI had "more than 280 shareholders" (on the one hand) and PHI's statutory register (on the other hand), which revealed that PHI had 204 shareholders, not more than 280, as PHI had claimed in its application. The Panel requested PHI "*to reconcile this discrepancy and confirm the precise number of holders of relevant securities as at the date of the AGM*";

13.2 Paragraph 3.2 noted that if 104 of 204 shareholders attended the AGM, approximately 100 shareholders were absent and had not consented to anything, yet the approach that PHI had adopted sought to extinguish those shareholders' statutory rights. It is apparent that what the Panel was querying was whether all of PHI's shareholders were given timeous and proper notice of the proposed transaction; and whether all of PHI's shareholders had sufficient knowledge of the proposed transaction, its mechanics and the purpose therefor; and

13.3 In paragraph 2.4, the Panel noted that the exemption application suggested that PHI had seemingly failed to appoint an independent board, contrary to, and violation of, the board neutrality principle. This observation – pertaining to the lack of the board neutrality or conflicts of interests of the board – was echoed in paragraph 3.4 of the Panel's letter, under the heading "*Related Party Interests*". The Panel's concern was that certain shareholders of PHI, who were also PHI's directors, were advocating for the consummation of the proposed transaction – including by soliciting proxies from other shareholders, to vote for the passing of the proposed transaction. The Panel sought an explanation regarding the independence of the board in light of certain members of board soliciting proxies from PHI's shareholders.

14 Paragraphs 4.1 to 4.3 of the Panel's letter noted that the annexures to PHI's exemption application undermined its claim that all of PHI's shareholders were adequately informed about the transaction, its mechanics and the purposes (i.e., the rationale) thereof. This the Panel said was apparent from correspondence and WhatsApp messages, which showed shareholders explicitly requesting transaction circulars, valuations, liquidity analysis, exit options, and intrinsic benefits analysis, which is precisely the matters that a Panel-approved circular and independent expert report are designed to address.

15 At paragraph 4.3, the Panel noted that "*The application already acknowledges that the company's board is not able to track down all shareholders, which implies that some of those shareholders were not privileged with access…*" We note in this regard that paragraphs 23 to 23.4 of the exemption application recorded that:[9]

> *"23.3. [PHI's] more than 280 shareholders are geographically spread throughout the country and also beyond its borders. In order to obtain an executed written waiver from each such shareholder, will require that:*
>
> *23.3.1. the <u>current precise physical location of each of them</u> **<u>is established</u>**, and in respect of corporate shareholders, <u>the board of each of them is to be identified and approached</u> ….*
>
> *23.3.2. <u>This will be a major logistical exercise that will take months to implement</u>….*
>
> *23.3.3. The likelihood is that **<u>complete</u>** implementation of the process of obtaining written waivers from **<u>all</u>** shareholders will take much more than between the present lime and July 2026.*
>
> *23.3.4. [PHI] will require <u>the appointment of agents</u> to conduct the process throughout South Africa and beyond. The costs thereof cannot currently be determined with accuracy, but it is likely to be significant."*

16 Paragraph 5.1 of the Panel's letter noted that PHI obtained AGM approval on 13 November 2025 but only submitted its exemption application on 27 January 2026, presenting the Panel with a *fait accompli* that was untenable, given that "*the correct sequence*" is to engage the Panel before obtaining final shareholder approval.

17 Paragraphs 5.2 and 5.3 raised concerns about the use of WhatsApp to deliver notice to PHI's shareholders about the then impending AGM, and the Panel also queried the use of both Zoom and Microsoft Teams concurrently, in the context of compliance with the fair disclosure requirements set out in section 119(2) of the Act.

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[9] Exemption Application at Record p 169.

18 Finally, at paragraph 5.4 the Panel questioned why the material tax risk under section 12J of the Income Tax Act, stated to be the proposed transaction's primary rationale, was not itself an argument for the standard disclosure process. In this regard, the Panel raised questions as to why PHI had not submitted any evidence pertaining to its alleged tax exposures, in the following terms:

> *'The application's primary rationale is avoidance of significant tax risks under section 12J. If this risk is material enough to justify urgency, please explain why a detailed analysis of this tax exposure, and its implications for shareholder value, would not ordinarily be disclosed in the fairness opinion and circular that the Takeover Regulations require. Is the materiality of this risk not itself an argument for, rather than against, the standard disclosure process?'*

19 PHI responded to the Panel's letter of 29 January 2026 by way of two letters, both of which it sent to the Panel on 17 February 2026.

20 PHI's first letter of 17 February simply repeated the nature of the proposed transaction. It did not address the concerns that the Panel had raised in its letter of 29 January 2026.

21 PHI's second letter of 17 February was a more comprehensive response to the issues that the Panel had raised in its 29 January 2026 letter but was itself still vague in material respects in relation to the rationale and justifications that PHI had put forth.[10]

22 In PHI's second 17 February letter, it did not furnish the Panel with any contemporaneous evidence that:

22.1 shed any light on, or substantiated, PHI's tax position;

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[10] Second 17 February Letter at Record pp 51 – 55.

22.2 substantiated PHI's persistent contentions that it was in a precarious financial position, given the tax liabilities and other risks that it faced as a consequence of being a VCC; and

22.3 the proposed transaction was the only means by which to rescue its business from the (unsupported and thus unproven) tax risks and other limitations it allegedly faced.[11]

23 Indeed, the second 17 February letter did nothing more than **repeat**, for the most part, the submissions that were already contained in the exemption application, to the effect that:

23.1 it was the board that had identified the alleged tax risks and had concluded that the proposed transaction would avert those risks (Record p 53 para 13);

23.2 the notice had explained, to PHI's shareholders, the rationale for the proposed transaction;

23.3 "*advisors at the AGM*" had also explained the rationale for the proposed transaction to PHI's shareholders at that the AGM, and that the shareholders were satisfied with the explanations (Record p 53 paras 14 – 15);

23.4 the adverse tax implications of PHI remaining a VCC were explained to the shareholders at the AGM, such that no independent expert report was required (Record pp 53 – 54 paras 15 – 17); and

[11] 17 February Letter at Record p 53 para 13.

23.5 the proposed transaction would not prejudice shareholders from an economic and procedural perspective, as "*explained in paragraph 21 [of the exemption application]*" (Record p 54 para 19).

24 The Panel responded to PHI's 17 February letters by way of a letter dated 25 February 2026.[12] This letter was the Panel's preliminary ruling on the exemption application, and it was comprehensive.

25 On the issue of the lack of tangible, contemporaneous evidence supporting PHI's assertions relating to the rationale and justifications for the proposed transaction, the Panel expressed its criticisms in the following terms:[13]

> "*5.1.4. If you are correct that the restructure produces an economically neutral result ("mirror image"), then you should be able to disclose, without difficulty or consequence, the precise mechanics explaining how 'enormous tax liabilities' are eliminated while the shareholder position remains unchanged. The detailed explanation of the tax mechanism, the company restructuring, and the professional verification of economic equivalence should be entirely unproblematic to provide.*
>
> *5.1.5. If you cannot or will not provide such disclosure, that silence itself suggests the transaction has material effects that shareholders need to understand.*
>
> *5.1.6. Section 119(1)(b) requires shareholders to receive 'necessary information to the extent required to facilitate the making of fair and informed decisions.'*
>
> *5.1. 7. You cannot argue that the restructure is 'necessary' to address material tax liabilities and then exempt yourself from explaining, through proper disclosure channels with professional verification, how this is achieved. That is precisely the information section 119(1)(b) exists to ensure shareholders receive, in the manner set out in the takeover provisions.*
>
> *5.1.8. The statute requires this disclosure. Your attempt to minimise the effect ("mirror image") does not excuse the disclosure obligation; it reinforces it. If the effect is truly minimal, disclosure should be straightforward. If disclosure is not straightforward, the effect is not truly minimal.*
>
> *…*

[12] Panel 25 February 2026 Letter at Record pp 30 – 46.

[13] 25 February 2026 Letter at Record pp 38 – 39.

> 5.2.2 *By seeking exemption, you seek to avoid exactly the scrutiny that shareholders require to exercise their independent judgment on a informed basis.*"

26 On 20 March 2026, after a period of silence, PHI responded to the Panel's letter of 25 February 2026. In its aforesaid letter, PHI abandoned the 'mirror image' argument and instead advanced statutory interpretation arguments.

27 On 26 March 2026 the Panel delivered its ruling ('the ruling').[14]

28 In its ruling, the Panel considered all three criteria under section 119(6) and found that PHI's exemption application fell short on all of the three grounds.[15]

29 The Panel also found that section 119(6) of the Act establishes three alternative factual bases for exemption: criterion (a), where there is no reasonable potential of prejudice; criterion (b), where the failure to grant an exemption would give rise to disproportionate compliance costs; and criterion (c), where granting an exemption would be otherwise reasonable and justifiable having regard to the principles and purposes of the Act.[16]

30 The Panel found that the use of "may" in section 119(6) – i.e., that the Panel "may" grant an exemption – confers a discretion on the Panel, but that the Panel' discretion is not unfettered and must be exercised reasonably within the statute.

31 What the Panel found underpinned its discretion to grant or refuse an exemption under all three criteria stipulated in section 119(6), was the Panel's statutory mandate (its duties and functions), which it found resided primarily in sections 119(1) and 119(2) of the Act. It referred to the duties set out in section 119(1) as "*the Panel's foundational mandate.*"

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[14] Record pp 5 -14.

[15] Ruling at Record pp 5 – 14.

[16] Ruling pp 7 – 8 paras 2.1 – 2.1.1.3.

32 Paragraphs 2.3 to 2.5 addressed what the Panel described as the "*Inseparability of discretion from statutory purpose.*" In those paragraphs, the Panel reiterated that whether under criterion (a), (b) or (c), when exercising its discretion to grant or refuse an exemption the requirement to consider the principles and purposes of the Act, as well as its statutory mandate as contemplated in section 119(1), is an ever-present requirement that exists every time that a public body, such as the Panel, exercises its discretionary power under a statute. Thus, the Panel rejected PHI's contention that criterion (a) is self-contained: the Panel can refuse an exemption on the basis of criterion (a) alone where to grant the exemption based on that criterion would not be a reasonable exercise of the Panel's statutory mandate.

33 Accordingly, where granting an exemption would entrench procedural non-compliance, information asymmetries, or the absence of independent oversight – each of which directly undermines the purposes of section 119(1) – it cannot be said to be a reasonable exercise of discretion, regardless of which criterion under section 119(6) the applicant invokes. Furthermore, the Panel restated that one of its foundational mandates, as stipulated in section 119(1) was that the Panel is required to regulate affected transactions without regard to their commercial advantages or disadvantages, and must safeguard marketplace integrity, equivalent treatment of shareholders, and the right to informed decision-making.

34 Against these broad principles, the Panel made the following six findings "*based on the full record before the Committee, including [PHI's] own submissions*":[17]

34.1 That the shareholder disclosure regime was inconsistent, creating a bifurcated information environment in which select shareholders received different information through informal channels than others received through formal notice;

[17] Ruling at Record pp 3.1 – 3.6

34.2 That the notice of the shareholder meeting failed to meet the mandatory disclosure requirements established by the takeover provisions;

34.3 That approximately 100 shareholders (approximately 49% by headcount) did not participate in the meeting, rendering the issue of the shareholders' non-participation at the AGM as an ambiguity which could not be resolved based on the evidence that was before the Panel, and that to do so might undermine the protective purpose of the Act;

34.4 That no independent expert assessment had been commissioned to report on the transaction's fairness and reasonableness under regulation 90, which constituted a further fatal flaw in the notice of meeting;

34.5 That PHI had made no genuine effort to engage with or satisfy the mandatory board independence criteria in regulation 108, nor had it demonstrated a clear separation of functions between the general board and those discharging independent board functions. This was characterised as a fatal flaw in the transaction process; and

34.6 That material information regarding the transaction's core rationale — the R400 million tax exposure and proposed remedy — was disclosed selectively to certain shareholders via WhatsApp rather than uniformly through a formal offer circular accessible to all shareholders.

35 The Panel then applied these findings to each of the criteria under section 119(6) and reached the following conclusions.[18]

35.1 In relation to criterion (a), the Panel found that prejudice is not limited to economic harm; it encompasses procedural prejudice (deprivation of notice compliance), informational prejudice (asymmetric disclosure), and

[18] Ruling at Record pp 12 – 13 paras 5.1 – 5.3.

governance prejudice (absence of genuine independent board oversight). The Panel found that all three forms of prejudice were present in this case; and that granting an exemption based on criterion (a) would permit these prejudices to persist, contrary to the duty and mandate of the Panel (as stipulated in section 119(1), to protect shareholders from such prejudice. Criterion (a) was accordingly not satisfied.

35.2 Regarding criterion (b), the Panel found that PHI did not substantively invoke this criterion. In any event, the Panel held that the core compliance steps — disclosure to shareholders in accordance with section 119(2) and establishment of a genuinely independent board under regulation 108 — are the very mechanisms by which the purposes of section 119(1) are served and cannot rationally be characterised as disproportionate. Criterion (b) was not satisfied.

35.3 Regarding criterion (c), the Panel held that granting the exemption would not be reasonable and justifiable. It would signal that statutory disclosure protections and board independence requirements are optional if sought after the fact; would reward procedural non-compliance; would entrench information asymmetries; and fundamentally undermine the public-law protections offered by the regulatory scheme. Criterion (c) was not satisfied.

LEGISLATIVE FRAMEWORK

36 It is apposite to outline, right at the beginning, the applicable provisions of the Act and the Takeover Regulations, which regulate affected transactions and exemption applications. This will enable an early appreciation of the statutory basis for the Panel's and PHI's respective stances, provide the backdrop to an evaluation of the facts and make it easier to follow the chronology of events and the respective contentions of the parties.

37 The preamble to the Act is, *inter alia*, in these terms:

> '*To provide for the incorporation, registration, organisation and management of companies … to define the relationship between companies and their respective shareholders or members and directors; to provide for equitable and efficient amalgamations, mergers and takeover of companies; … to establish a Companies and Intellectual Property Commission and a Takeover Regulation Panel to administer the requirements of the Act with respect to companies, … as necessary to provide for a consistent and harmonious regime of business incorporation and regulation; and to provide for matters connected therewith'.*

38 Section 5(1) of the Act provides that the Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7.

39 Section 7, for its part, sets out the purposes of the Act. It provides, amongst others, that the 'the purposes of this Act are to' –

> *'(b) promote the development of the South African economy by –*
>
> *(iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation'.*

40 Other relevant purposes of the Act are set out in section 7(i), (j) and (l), namely to:

> *'(i) balance the rights and obligations of shareholders and directors within companies;*
>
> *(j) encourage the efficient and responsible management of companies;*
>
> *(l) provide a predictable and effective environment for the efficient regulation of companies'.*

41 Properly construed, section 7 gives express recognition to the culture of openness and transparency by companies.

42 Chapter 5 of the Act, comprising sections 112 to 117, deals with 'fundamental transactions, takeovers and offers'.

43 Section 117(1) of the Act deals with the definitions applicable to Parts B and C of Chapter 5 of the Act and the Takeover Regulations and defines, in s117(1)(i), a 'regulated company' as meaning 'a company to which this Part, Part C and the Takeover Regulations apply, as determined in accordance with section 118(1) and (2)'.

44 Section 117(1)(c)(ii) of the Act defines an 'affected transaction' as meaning 'an amalgamation or merger, as contemplated in section 113, if it involves at least one regulated company, subject to section 118(3)'.

45 Section 65 is headed 'shareholder resolutions' and provides, in material part, that:

> *"(1) Every resolution of shareholders is either an ordinary resolution or a special resolution.*
>
> *(2) The board may propose any resolution to be considered by shareholders and may determine whether that resolution will be considered at a meeting, or by vote or written consent in terms of section 60.*
>
> *…*
>
> *(4) A proposed resolution is not subject to the requirements of section 6(4), but must be—*
>
> *(a) expressed with sufficient clarity and specificity; and*
>
> *(b) accompanied by sufficient information or explanatory material to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution."*

46 Section 113 of the Act deals with 'proposals for amalgamation or merger' and provides, in material part, as follows:

> *'(1) Two or more profit companies, including holding and subsidiary companies, may amalgamate or merge if, upon implementation of the amalgamation or merger, each amalgamated or merged company will satisfy the solvency and liquidity test'.*

47 Section 113(5) provides that:

> *'(5) subject to subsection (6), a notice of a shareholders meeting contemplated in subsection (4) (b) must be delivered to each shareholder of each respective amalgamating or merging company, and must include or be accompanied by a copy or summary of –*
>
> *(a) the amalgamation or merger agreement; and*
>
> *(b) the provisions of section 115 and 164 in a manner that satisfies prescribed standards'.*[19]

48 Section 115, for its part, provides, amongst others, that no amalgamation may be implemented unless it has been approved by the Panel or the Panel has issued a compliance certificate in respect of the transaction or exempted the transaction in terms of section 119(6) of the Act.

49 Section 119 deals with the 'Panel regulation of affected transactions' and provides in sections 119(1) and (2), respectively, as follows:

> *"(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*

[19] Emphasis supplied.

(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 securities; and

(d) that all holders of relevant securities—

(i) receive the same information from an offeror, potential offeror, or offeree regulated company 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."[20]

50 Section 119(6) deals with the exemption regime and is in these terms:

"(6) The Panel may wholly or partially, and with or without conditions, exempt an offeror to an affected transaction or an offer from the

[20] Emphasis supplied.

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."

51 Section 201, provides, in material part as follows.

"(1) The Panel is responsible to—

(a) regulate affected transactions and offers to the extent provided for, and in accordance with, Parts B and C of Chapter 5 and the Takeover Regulations;

…

(3) In exercising its powers and performing its functions the Panel must not express any view or opinion on the commercial advantages or disadvantages of any transaction or proposed transaction."[21]

52 Regulation 90 is headed 'independent experts' and deals with the necessity for companies executing affected transactions to retain independent experts to report on the proposed affected transactions. It provides, in material part, as follows:

'(1) In any transaction contemplated in section 117(1)(c)(i), (ii), (v) or (vi), section 125(2), or in regulation 88, the offeree regulated company must –

(a) request a ruling from the Panel whether an independent expert must be retained to report on the proposed transaction; and

(b) retain such an independent expert if the Panel so requires'.

[21] Emphasis supplied.

53 Regulation 106 is headed 'Circulars' and deals, in comprehensive terms, comprising as it does, eleven sub-regulations, each with its own extensive requirements, with the necessity for the preparation and submissions of circulars for purposes of implementation of, amongst others, affected transactions.

54 Finally, as regards the regulations, Regulation 117 prescribes that:

55 'All documents relating to an affected transaction as defined under section 117(c) of the Act, including announcements and circulars, must be approved by the Panel before being posted or published'.[22]

INTERPRETATION OF SECTION 119

56 It is now a settled principle that statutory interpretation is a unitary exercise, considering the classic triad of language, context and purpose of a provision to render a sensible interpretation.[23] The starting point remains the ordinary, grammatical meaning of the words, which must be read purposively, properly contextualised, and construed consistently with the Constitution.[24] An interpretation that results in absurdity or that frustrates the apparent purpose of the statute or leads to unbusinesslike results is not to be preferred.[25] In *AfriForum v University of the Free State*, the Constitutional Court expressed itself as follows regarding the contextual interpretation of statutes:

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[22] Emphasis supplied.

[23] *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012* (4) SA 593 (SCA); [2012] ZASCA 13 para 18 (*Endumeni*); *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC); [2019] ZACC 12 paras 29-30 (*Road Traffic Management Corporation*), affirming *Endumeni*; *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC); [2021] ZACC 13 paras 64-66; *The Road Accident Fund v Mudawo and Others (Case no: 1185/2024) and The Road Accident Fund v Lyton and Others* (Case no: 1468/2024) [2026] ZASCA 54 (16 February 2026) para 29 (*The Road Accident Fund*); *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC); [2014] ZACC 16 para 28 (*Cool Ideas)*; *South African Human Rights Commission v Agro Data CC & Another* [2026] ZACC 16 (22 April 2026) paras 40-41.

[24] *Cool Ideas*, *id* para 28; *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC); [2018] ZACC 33 para 29, affirming *Endumeni*.

[25] *Endumeni* above n 18 para 18; *Cool Ideas* above n 18 para 28; *G.U.D Holdings (Pty) Ltd v Companies and Intellectual Property Commission and Others* (818/2024) [2026] ZASCA 10 (4 February 2026) para 11 (*GUD Holdings)*.

> *'(C)ontextual interpretation requires that regard be had to the setting of the word or provision to be interpreted with particular reference to all the words, phrases or expressions around the word or words sought to be interpreted. This exercise might even require that consideration be given to other subsections, sections or the chapter in which the key word, provision or expression to be interpreted is located'.*[26]

57 The Constitutional Court, in *Business Zone*, held that:[27]

> *"When interpreting a statutory provision the point of departure is that the words employed must be construed in accordance with their ordinary grammatical meaning provided an absurdity does not result. The jurisprudence is clear that this is subject to the requirement that statutory provisions must be interpreted purposively and be properly contextualised."*

58 Translated, this means that, generally, the ordinary grammatical meaning of the words used must be given their ordinary meaning. One can deviate from this general rule where the application of the ordinary meaning of the word would lead to absurdities, undermine the purpose of the statute or the specific statutory provision or if the ordinary meaning of the word is at odds with the applicable context.

59 In *Amabhungane*, the Constitutional Court expressed the principles to be applied when embarking on statutory interpretation (which it held were equally applicable to the principles pertaining to contractual interpretation) as follows:[28]

> *"As always, in interpreting any statutory provision, one must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution. This is a unitary exercise. The context may be determined*

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[26] *AfriForum and Another v University of The Free State* 2018 (2) SA 185 (CC); [2017] ZACC 48 para 43 (*AfriForum v UFS*).

[27] *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others* (CCT09/16) [2017] ZACC 2 at para 46. For this proposition, the Constitutional Court relied on *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16 at para 28 and *Natal Joint Pension Fund v Endumeni Municipality* [2012] ZASCA 13 at para 18.

[28] *Amabhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* 2023 (2) SA 1 (CC) para 36.

> *by considering under sub-sections, sections or the chapter in which the key word, provision or expression to be interpreted is located. Context may also be determined from the statutory instrument as a whole. A sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome."*

The scheme of section 119 of the Act

60 As previously indicated, section 7 of the Act gives express recognition to the culture of openness and transparency. It provides, in material part, that 'the purposes of the Act are to' –

> *'(b) promote the development of the South African economy by –*
>
> *(iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation'.*

61 Other relevant purposes of the Act are, as we have pointed out, set out in section 7(i), (j) and (l), being to:

> *'(i) balance the rights and obligations of shareholders and directors within companies;*
>
> *(j) encourage the efficient and responsible management of companies; and*
>
> *(l) provide a predictable and effective environment for the efficient regulation of companies'.*

62 Section 119 of the Act was enacted with precisely these 'purposes' in mind. Properly construed, and as the Panel rightly contended in its ruling, section 119(1) establishes the Panel's foundational mandate. It enjoins the Panel to regulate any affected transaction or offer in accordance with Parts B and C of Chapter 5 of the Act and the Takeover Regulations, in order so as to ensure: (i) the integrity of the marketplace and fairness to shareholders, (ii) the provision of *necessary information* to the shareholders to the extent required to facilitate the making of *fair and informed*

decisions, (iii) the provision of adequate time for regulated companies and shareholders to obtain and provide advice with respect to offers, and (iv) the prevention of actions by a regulated company designed to impede the making of fair and informed decisions by shareholders.

63 All this the Panel must do 'without due regard to the commercial advantages or disadvantages of any transaction or proposed transaction'. We would also make the observation that, there can be no hard and fast rule as to how to make the determination regarding whether, in any given set of facts, the *necessary information* has been provided to the shareholders for the purposes of facilitating the making of *fair and informed decisions.* A practical and convenient way, it seems to us, to make this determination is to have regard to the facts and circumstances of each case as they present themselves.

64 As regards subsection 119(2) of the Act, the Panel is commanded to regulate, not only any affected transaction, but also, *the conduct of the parties* in respect of any transaction or offer, in a manner that ensures the objects set out in subsection (1) of the Act.

65 As regards section 119(6) (a) to (c) of the Act, it provides the basis upon which the Panel *may* grant exemptions if the specific statutory criteria contained in that subsection are complied with: (i) criterion (a) - where there is no reasonable potential of prejudice (s119(6)(a); (ii) criterion (b) – where the costs of compliance are disproportionate relative to the value of the transaction (s119(6)(b); and (iii) criterion (c) – where doing so is otherwise reasonable and justifiable in the circumstances having regard to the principles and purposes of the provisions of Parts B and C of the Act and the Takeover Regulations (s119(6)(c).

66 Furthermore, the Panel's exercise of its regulatory discretion under section 119(6) must be informed by the clear meaning of the subsection, derived from the text of

the subsection, understood in the context of section 119, read as a whole, and its proclaimed purpose – the regulation of 'any affected transaction or offer in accordance with this Part [B], Part C and the Takeover Regulations, *but without due regard to the commercial advantages or disadvantages of any transaction or proposed transaction*'. Thus understood, in exercising its regulatory discretion under section 119(6) of the Act, the enquiry by the Panel is aimed primarily at determining whether granting the exemption would serve the statutory principles and purposes proclaimed in section 119(1) of the Act, or whether it would serve to undermine those purposes. Where the latter outcome would eventuate, the Panel must rightly decline to grant the exemption sought.

67 There is some divergence of views between the Panel and PHI regarding whether the requirements in section 119(6)(a)–(c) of the Act are to be interpreted disjunctively or cumulatively. We agree with the Panel that, for present purposes, the debate is ultimately of limited consequence because the Panel considered each requirement individually and concluded that PHI failed to satisfy any of them. More fundamentally, however, even if the language of section 119(6) is taken to suggest that paragraphs (a), (b) and (c) operate disjunctively, it does not follow that the Panel may consider any one of those criteria in isolation from the broader statutory framework within which the exemption power is conferred.

68 The key point is that even where the text of section 119(6) appears to create three separate grounds for exemption, the meaning of those grounds must be derived from their context and purpose. The Panel is therefore not "adding" a requirement from s 119(1) and (2); rather, it is interpreting and applying s 119(6) through the lens of the statutory scheme as a whole.

69 We stress, moreover, that the interpretation advanced by PHI would be inconsistent with the settled approach to statutory interpretation. The meaning of section 119(6) cannot be determined by reference to its language in isolation. Rather, the

subsection must be interpreted in the light of its text, context and purpose. Section 119(6) is located within section 119 itself and forms part of a comprehensive regulatory framework directed at ensuring market integrity, shareholder fairness, transparency and informed decision-making. The exemption power is therefore not an autonomous power divorced from those objectives. To the contrary, the content and application of each of the exemption criteria in section 119(6)(a), (b) and (c) must necessarily be informed by the purposes and principles embodied in section 119(1) and (2).

70 Thus, even if the criteria in section 119(6)(a), (b) and (c) are read disjunctively, the Panel cannot lawfully determine whether any one of those criteria has been satisfied without considering the statutory interests that section 119 requires it to protect. For example, whether there is a “reasonable potential of prejudice” under section 119(6)(a) cannot be assessed without reference to the interests of shareholders, the integrity of the market and the adequacy of disclosure. Likewise, an assessment under section 119(6)(b) of whether compliance costs are disproportionate necessarily requires consideration of the regulatory benefits which compliance is intended to secure. The Panel's mandate under section 119(1) and (2) therefore informs, and in practice permeates, the application of each exemption criterion.

71 The result is that, although the language of section 119(6) may suggest alternative routes to an exemption, those routes all lead through the same statutory landscape. The Panel is required in every case to evaluate the exemption request against the broader purposes of the takeover regime. Any other interpretation would permit the granting of exemptions in circumstances that undermine the very objectives that Parliament charged the Panel with protecting, a result that would be inconsistent with both the structure of section 119 and the purposes of the Act as a whole.

72 In our view, it would therefore be both artificial and undesirable to interpret section 119(6) as permitting the Panel to grant an exemption solely because one of the

criteria in paragraphs (a), (b) or (c) is ostensibly satisfied, without regard to whether the exemption would undermine the very purposes which the Panel is statutorily obliged to protect. Such an approach would sever the exemption power from the regulatory scheme within which it is located and would permit outcomes inconsistent with the objects of section 119 itself. The Panel cannot be expected, on the one hand, to safeguard market integrity, shareholder fairness, equal treatment and informed decision-making, and, on the other, to disregard those considerations when determining whether an exemption from the regulatory regime should be granted.

73 In practical terms, and emphasis of the above, the inquiry under section 119(6)(a) will almost invariably require consideration of the matters protected by section 119(1) and (2), because an assessment of whether there is “no reasonable potential of prejudice” necessarily requires the Panel to identify the interests capable of being prejudiced and to evaluate the nature and extent of that prejudice. The same is true of section 119(6)(b): determining whether the costs of compliance are disproportionate to the value of the transaction cannot occur in a vacuum but requires an assessment of the regulatory benefits that compliance serves. Likewise, even though section 119(6)(c) expressly directs attention to the principles and purposes of Parts B and C of Chapter 5 and the Takeover Regulations, the same contextual considerations necessarily inform the application of paragraphs (a) and (b). Accordingly, while the statutory criteria may be framed disjunctively, their application is inextricably linked to the Panel’s overarching mandate under section 119 as a whole.

74 This is not a novel approach adopted by the Panel in the present matter. It is consistent with the reasoning of the Takeover Special Committee in *Country Bird Holdings (Pty) Ltd v Sovereign Food Investments Ltd*, where the Committee emphasised that the Panel’s powers must be exercised in a manner that advances the objectives identified in section 119(1) and (2), including market integrity, fairness

to shareholders, the provision of adequate information and the equal treatment of shareholders. The Committee expressly held that conduct which undermines those objectives may properly be prohibited notwithstanding arguments based on private law rights or contractual principles. The decision demonstrates that the Panel's statutory mandate is not a peripheral consideration but the lens through which its regulatory powers must be exercised.

75 Properly construed, therefore, the discretion conferred by section 119(6) is not a free-standing discretion divorced from the remainder of section 119. Rather, it is a discretion that must be exercised consistently with the purposes that the Act requires the Panel to promote. Whether the criteria in section 119(6)(a), (b) and (c) are viewed as disjunctive or cumulative, the Panel remains obliged to ask the same overarching question: would the granting of the exemption advance, or at least not undermine, the statutory objectives of fairness, transparency, market integrity and informed shareholder decision-making embodied in section 119(1) and (2)? If the answer is in the negative, the exemption ought not to be granted.

THE EXEMPTION APPLICATION

<u>Section 119(6)(a)</u>

76 As already indicated, PHI instituted its exemption application on 21 January 2026. It contended in its application, amongst others, that 'detailed explanations of the Amalgamation Transaction, its mechanics, and the reasoning were provided in the notice [and], in response to questions from some shareholders before the meeting, and at the meeting itself.

77 Our analysis must accordingly commence with the examination of the contents of the notice itself to determine whether it did in fact provide a detailed explanation of the mechanics of the transaction, this being one of the most fundamental ways in

which the shareholders of PHI would have been put in a position to make *fair and informed decisions* regarding the transaction.

78 Special resolution number 4 of the notice dealt with the Amalgamation Transaction and, given its centrality to PHI's application, it bears quoting in full:

> ***'AMALGAMATION TRANSACTION***
>
> ***Special Resolution Number 4***
>
> *Resolved, in terms of section 115(2) read with section 116(1) of the Companies Act, that the terms of the Amalgamation Transaction be and are hereby approved, that the Company is authorised to enter into the Agreement, and that the Company is authorised to apply to the TRP for an exemption from compliance with Parts B and C of Chapter 5 of the Companies Act and the Takeover Regulations in terms of section 119(6) of the Companies Act.*
>
> *The Company was established as a venture capital company ("VCC") as defined in section 12 J of the Income Tax Act. 58 of 1962 ("the Income Tax Act"). A VCC's ability to invest is limited to only certain assets classes and specified asset allocation percentages in terms of section 12J. The Board therefore proposed that the Company escape the onerous requirements and limitations under section 12J by having the Company dispose of its business (including all its assets and liabilities) to a new public company (to be named "PHI Equity Limited") in exchange for shares in PHI Equity Limited and thereafter disposing of those shares in PHI Equity Limited to the Company's shareholders after which the Company's existence will be terminated. The transaction will take the form of a tax-neutral amalgamation transaction as contemplated in section 44 of the Income Tax Act (the "Amalgamation Transaction"). The result of the Amalgamation Transaction will be that PHI Equity Limited (which is not a VCC) replaces the Company (which was a VCC), and the shareholding in PHI Equity Limited will be the same as the shareholding in the Company. Hence, the shareholders will not be prejudiced. In fact, they stand to benefit from the transaction, as PHI Equity Limited will not be subject to the same stringent investment, investor, and other regulatory requirements that were previously applicable to the Company due to its VCC status. The result is that, as a result of the amalgamation, the administrative costs associated*

with the existing Company structure may be significantly reduced, including, for example, by reducing the number of subsidiaries that it currently holds through amalgamating these into one. This will apply to PHI Equity Limited, but is something that is not possible currently for the Company, given the onerous requirements of section 12J. Additionally, many shareholders of the Company currently hold put options concerning their shares in the Company against a single counterparty. If exercised, these put options may result in a single shareholder's interest in the Company exceeding the permissible thresholds in section 12J, thus triggering significant tax costs for the Company. Such a tax event would materially reduce the distributable profits of the Company, thereby diminishing the dividends payable to shareholders. In short, the financial impact would be shared across the shareholder base, regardless of who exercised the option. To avoid this outcome and exit the restrictive 12J framework, the Board proposes the Amalgamation Transaction.

In order to give effect to the Amalgamation Transaction, special resolution number 4 is proposed. A draft amalgamation agreement (the "Agreement") is attached for approval, and it is suggested that the Amalgamation Transaction be implemented on 1 July 2026.

Since the Amalgamation Transaction constitutes an "affected transaction" as contemplated in section 117(1)(c)(ii) of the Companies Act, Parts B and C of Chapter 5 of the Companies Act and the Takeover Regulations apply to it. The Company intends to apply to the Takeover Regulations Panel (the "TRP'") for an exemption from compliance with the aforesaid provisions in terms of section 119(6) of the Companies Act since none of the shareholders will be prejudiced by the transaction. By not objecting to, or voting against, this Special Resolution 4, each shareholder acknowledges that they:

- *Have been advised and made aware of the provisions of the Companies Act and the Companies Regulations 2011 ("Regulations") relating to the regulation of affected transactions, as defined in the Companies Act.*
- *The Amalgamation Transaction is an "amalgamation or merger" as contemplated in section 113 of the Companies Act, and the Company is a "regulated company" as defined in section 117(1)(i) read with section 118(1)(a) of the Companies Act as it is a public*

company. Therefore, the Amalgamation Transaction constitutes an affected transaction as defined in section 117(1)(c)(ii) of the Companies Act.

- *Are aware of the obligation of the parties to the proposed Amalgamation Agreement to comply with the provisions of the Companies Act and the Regulations in respect of affected transactions in order to ensure fairness to shareholders of regulated companies (as defined in the Companies Act).*
- *Have been provided with a copy of the Agreement in terms of which the Amalgamation Transaction will be implemented, and have read through and considered the said Agreement.*
- *Have been advised of all the relevant provisions of the Companies Act and the Regulations relating to the Amalgamation Transaction.*
- *Have received sufficient information and advice to enable them, in adequate time, to reach a properly informed decision on the merits of the Amalgamation Transaction and how it affects the shareholders.*
- *Hereby waive their rights to receive a circular (including the fairness opinion and financial information) from the directors of the Company as required in terms of the Companies Act and the Regulations and confirm that sufficient disclosure of all the material facts in respect of the Amalgamation Transaction has been made timeously, and they are satisfied with all the disclosures made to them in terms of the Amalgamation Transaction.*
- *Hereby irrevocably consent to the Company and all the parties to the Amalgamation Transaction being exempted from compliance with all the relevant provisions of the Companies Act and the Regulations by the TRP.*
- *Each shareholder hereby authorises any director of the Company to sign and submit a letter to the TRP, in their name and stead, confirming the above matters, to the extent it is required for the purposes of obtaining the relevant exemptions or approvals from the TRP'.*

79 The contents of special resolution number 4 quoted above constituted the full extent of PHI's explanation to its shareholders of the mechanics of the transaction.

80 This purported explanation of the mechanics of the transaction fell far short of providing the shareholders with the *necessary information* to enable them to make *fair and informed* decisions regarding the transaction. Not only was this a contravention of section 119(1)(b) of the Act, but it was severely prejudicial to the interests of the shareholders. Indeed some of the basic questions which were raised by some of the shareholders *after* receiving the notice, not only underscore the apparent paucity of the information contained in the notice regarding the mechanics of the transaction, but flatly contradict one of the application's propositions, namely that the reasons for the transaction '*were explained in great detail in the notice'*. As the Panel recorded in its letter dated 29 January 2026 to PHI,[29] annexures C1 and C2, respectively, to the application reveal that:

80.1 Mr Tshepo Mahloko wanted to know about transaction circulars and valuations, the purchase price, and what shareholders would hold post-valuation;

80.2 Mr Gareth Bleazard wanted to know about liquidity options;

80.3 Mr Urin Ferndale wanted to know about the exit strategy and wished to understand the impact of special resolutions 4 and 5 (the latter dealing with the deregistration of PHI after the implementation of the Amalgamation Transaction), respectively, on his investment; and

80.4 Mr Stefan Olivier wanted to know about the intrinsic benefit analysis and wished to know what the position would be, post-amalgamation, if a shareholder wanted to trade his shares.

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[29] Record p125, para 4.1.

81 If, as PHI contended in its application and in its statement of case, that the notice of the AGM set out ‘detailed explanations of the Amalgamation Transaction, its mechanics and the reasoning’, then there would have been no need for the above shareholders to raise some of the most basic questions with PHI’s board regarding the transaction. The very basic nature of some the shareholders’ questions dealt with above demonstrate the striking paucity of the information contained in the notice, more specifically, under special resolution number 4, regarding the transaction. The Panel was accordingly entitled to refuse to grant PHI the exemption solely on this ground.

82 More crucially, perhaps, to all of this is the fact that, when the notice was sent to PHI’s shareholders, - and as the Panel rightly pointed out in its ruling - no exemption under section 119(6) had been sought and obtained. This meant that the notice was required to comply, in all respects, with the peremptory statutory disclosure regime established by the Act and the regulations. This includes the mandatory requirements of section 119(1) and (2) and regulations 90 and 106, respectively.

83 There are, in our view, three fundamental difficulties with PHI's reliance on the notice of AGM as the document through which shareholders were allegedly provided with sufficient information regarding the Amalgamation Transaction.

84 First, and most importantly, the notice was never approved by the Panel as required by regulation 117(1) of the Takeover Regulations, which provides that "*an offeror, offeree regulated company or any person acting in concert with either of them must obtain the approval of the Panel before publishing any information concerning an affected transaction or offer*". The omission is not a mere procedural irregularity. It strikes at the heart of the statutory scheme established by Parts B and C of Chapter 5 of the Act and the Takeover Regulations. The requirement of prior Panel approval exists to ensure that information disseminated to shareholders concerning an affected transaction is accurate, complete, balanced and not misleading, and that

shareholders are not required to make decisions on the basis of partial or inadequate disclosures.

85 The breadth of regulation 117 is significant. The regulation is not confined to circulars or formal takeover documents. It applies to "*any information concerning an affected transaction or offer*". The notice of AGM plainly constituted information concerning the Amalgamation Transaction. Indeed, PHI's case is that the notice itself contained the information upon which shareholders were expected to understand and evaluate the transaction. Since that is so, the notice fell squarely within the ambit of regulation 117 and required prior approval by the Panel before publication. The failure to obtain such approval deprived shareholders of the very regulatory safeguard which the legislature regarded as necessary in the context of affected transactions.

86 The reason for this safeguard is self-evident. The Panel's supervisory review under regulation 117 gives practical effect to its statutory obligations under section 119(1) and (2) of the Act. It enables the Panel to ensure that shareholders receive the information necessary to make fair and informed decisions, that no material information is omitted, that shareholders receive equivalent information, and that the integrity of the market is preserved. Without prior review and approval, there is an obvious risk that incomplete, inaccurate or one-sided information may enter the market, thereby undermining shareholder protection, distorting the decision-making process and potentially contributing to false or uninformed market activity. Regulation 117 therefore serves as one of the principal mechanisms through which the legislature sought to protect shareholders and maintain confidence in the integrity of South Africa's capital markets.

87 The rationale for requiring prior approval is readily apparent when regard is had to the Panel's statutory mandate under section 119 of the Act. The Panel is required to ensure the integrity of the marketplace and fairness to holders of securities, to ensure that shareholders receive the information necessary to facilitate fair and

informed decision-making, and to ensure equivalent and equitable treatment of shareholders. These objectives cannot be achieved if parties are permitted to circulate documents concerning affected transactions without prior scrutiny by the Panel. The approval process constitutes one of the principal mechanisms through which the legislature sought to protect shareholders, maintain confidence in capital markets and prevent conduct capable of undermining market integrity.

88 Put differently, the regulatory regime is designed to ensure that shareholders receive information that has first been subjected to independent regulatory oversight. Were parties free to substitute unapproved documents for the disclosure documents contemplated by the Act and Regulations, the Panel's supervisory function would be substantially undermined. The requirement of prior approval is therefore not a technical formality but a substantive protection for shareholders and the market as a whole.

89 Second, PHI's argument overlooks the fact that the statutory framework does not contemplate a notice of meeting as a substitute for the disclosure documents required in connection with an affected transaction. To the contrary, the notice forms only one component of a broader disclosure architecture. The Act and Regulations require shareholders to receive a suite of interrelated documents, each serving a distinct purpose and collectively ensuring that shareholders are placed in a position to make properly informed decisions.

90 Amongst these are the circular contemplated by the Regulations, together with the report of an independent expert appointed in accordance with regulation 90 by an independent board. These documents are not optional. They constitute central features of the takeover regime because they provide shareholders with the information, analysis, opinions and assessments required to evaluate the merits and consequences of the proposed transaction. The legislature plainly recognised that

shareholders should not be left to rely solely upon information generated by those promoting the transaction.

91 The independent expert's report is particularly important in this regard. It provides an objective assessment prepared by a person who is independent of the parties to the transaction and who is appointed by an independent board for precisely that purpose. The requirement reflects a legislative judgment that shareholders should receive expert guidance regarding the fairness, reasonableness and implications of the transaction before being called upon to exercise their voting rights or dispose of their securities.

92 The omission of these documents is therefore not cured by the circulation of a notice of meeting. A notice cannot perform the functions assigned by the Act and Regulations to a circular, an independent board and an independent expert. Nor can it compensate for the absence of the detailed disclosures, explanations and analyses that those documents are specifically designed to provide.

93 Third, and relatedly, the notice itself was incapable, by reason of its nature and purpose, of providing the information contemplated by the Act and Regulations. A notice of meeting is, by design, a concise document intended to inform shareholders of the time, place and business of a meeting and to identify the resolutions upon which shareholders are required to vote. It is not intended to serve as a comprehensive disclosure document for a transaction of the nature contemplated by Parts B and C of Chapter 5.

94 The inadequacy of the notice is demonstrated by the statutory disclosure regime itself. Circulars issued in connection with affected transactions frequently extend to hundreds of pages. They contain detailed descriptions of the transaction structure, the rationale for the transaction, its anticipated consequences, financial information, risk factors, expert opinions, fairness assessments, regulatory approvals, material

interests, directors' recommendations and numerous other matters regarded by the legislature as sufficiently important to require disclosure. Independent expert reports similarly involve detailed analysis that cannot sensibly be condensed into a brief notice of meeting.

95 It follows that the notice relied upon by PHI could never realistically have discharged the disclosure obligations imposed by the Act and Regulations. Its brevity, format and purpose rendered it incapable of conveying the volume and quality of information which the statutory scheme requires shareholders to receive before deciding whether to support or oppose an affected transaction. The questions subsequently raised by shareholders merely illustrate the practical consequences of that deficiency.

96 For all these reasons, the notice of AGM cannot be regarded as an adequate substitute for compliance with the disclosure regime established by the Act and the Regulations. The fact that shareholders received the notice does not answer the central concern identified by the Panel, namely that shareholders were deprived of the comprehensive, independently verified and regulator-approved information which the legislature regarded as essential to the making of fair and informed decisions in the context of an affected transaction.

97 As regards regulation 90, PHI's contentions, first, that it deals with '*the potential necessity* to engage an independent expert to report on the proposed transaction, and, second, that the transaction is 'a relatively straightforward and uncomplicated transaction', are unavailing. Regulation 90 is couched in peremptory terms: 'in *any* transaction contemplated in section 117(c)(ii)', the offeree regulated company *must* - no *ifs* and no *buts* - request a ruling from the Panel whether an independent expert must be retained and retain such an independent expert if the Panel so requires.

98 It was accordingly not open to PHI to make the unilateral determination that the transaction is a ‘straightforward’ one, thus obviating the need for compliance with regulation 90. This constituted an unacceptable usurpation of the role of the Panel to regulate affected transactions.

99 The significance of regulation 90 becomes apparent when regard is had to the broader statutory framework governing affected transactions. The regulation is not concerned merely with the appointment of an expert. Rather, it forms part of a carefully constructed system of independent oversight intended to protect shareholders and ensure the integrity of the market. That system begins with the requirement that an independent board be constituted in accordance with regulations 108, 109 and 110. The legislature recognised that directors who are involved in, interested in, or otherwise connected to a proposed transaction may not be best placed to evaluate that transaction objectively on behalf of shareholders. Accordingly, the Regulations require the establishment of an independent board whose members satisfy stringent independence requirements.

100 The concept of independence is central to the statutory scheme. Regulation 81(i) defines an "independent board" as a board composed exclusively of independent directors. The purpose of requiring an independent board is to ensure that the interests of shareholders are assessed and protected by individuals who are free from conflicts of interest, personal financial incentives or other relationships capable of influencing their judgment. Independence in this context is not a matter of form but of substance. It is intended to secure objective decision-making in circumstances where the interests of management, controlling shareholders and minority shareholders may diverge.

101 It is that independent board, and not the company's ordinary board or management, that is entrusted with overseeing the transaction from the perspective of shareholders. One of its most important functions is the appointment and supervision

of the independent expert contemplated by regulation 90. The requirement that the expert be appointed by an independent board ensures that the expert's mandate is not controlled by those promoting or benefiting from the transaction. The independence of the expert is therefore reinforced by the independence of the body responsible for appointing that expert.

102 Regulation 90 itself imposes further safeguards. The expert must be independent of the parties to the transaction and capable of providing an objective assessment of the transaction and its implications for shareholders. The Panel has consistently emphasised, including in Guideline 5 of 2011, which reenforces independence to include the appearance such independence. The independent expert serves as an important counterweight to information provided by the company or transaction proponents and assists shareholders in understanding matters that may be complex, technical or not readily apparent from the transaction documents themselves.

103 The rationale for these requirements is self-evident. Affected transactions frequently involve questions of valuation, fairness, control, strategic rationale, financial consequences and competing shareholder interests. The legislature plainly considered that shareholders should not be expected to evaluate such matters solely on the basis of information provided by those advocating the transaction. The independent expert provides an objective assessment which enables shareholders to make informed decisions and provides the Panel with an additional safeguard against incomplete, misleading or one-sided disclosures.

104 It follows that the independent expert's report is not a peripheral or optional document within the takeover regime. It is one of the principal mechanisms through which the Act and Regulations seek to give effect to the objectives set out in section 119(1) and (2), namely ensuring fairness to shareholders, the provision of necessary information, informed decision-making, equivalent treatment and the integrity of the marketplace. The report represents an independent analytical assessment

specifically designed to assist shareholders in evaluating whether the proposed transaction is in their interests.

105 Against that backdrop, PHI's contention that the transaction was "straightforward" misses the point entirely. The Regulations do not confer upon the offeree regulated company the power to determine whether a transaction is sufficiently uncomplicated to dispense with the independent expert process. The legislature deliberately entrusted that determination to the Panel. To permit an offeree company unilaterally to conclude that regulation 90 need not be followed because, in its own estimation, the transaction is uncomplicated would defeat the purpose of the regulation and undermine the Panel's supervisory role.

106 PHI’s approach effectively involved a self-granted exemption from the requirements of regulation 90. Yet the very purpose of the regulation is to prevent parties to an affected transaction from acting as judges in their own cause. The question whether shareholders require the protection afforded by an independent expert is one that the legislature entrusted to an independent regulator, not to the proponents of the transaction themselves.

107 PHI’s unilateral determination therefore constituted an impermissible usurpation of the Panel's statutory functions. It substituted PHI's own assessment for the assessment which the Regulations require the Panel to make. In doing so, it deprived shareholders of the possibility of receiving an independent expert report and deprived the Panel of the opportunity to determine whether such a report was necessary in order to protect shareholders and ensure compliance with the objectives of section 119 of the Act.

108 The failure to comply with regulation 90 was accordingly not a technical or inconsequential omission. It represented a departure from one of the central shareholder-protection mechanisms embedded in the takeover regime. The Panel

was therefore fully entitled to regard that non-compliance as a material consideration weighing heavily against the granting of the exemption sought.

109 As regards regulation 106, PHI's contentions in this regard, namely, first, that the transaction is of an 'uncomplicated nature' and, second, that the details which would otherwise be contained in the regulation 106 circular were 'fully set out' in the notice, cannot prevail. First, much like regulation 90, regulation 106 is also framed in mandatory terms. It provides in regulation 106(4) that 'an offeror offer *must* contain'[30] –

> *'(g) the fair and reasonable opinion provided in conformity with the applicable disclosure requirements in regulation 90'.*

110 Second, and as we have demonstrated above, the notice contained no fair and reasonable opinion provided in conformity with the applicable disclosure requirements in regulation 90. There was accordingly, in the circumstances, no basis for PHI's contention in its application that the purpose and effect of each of regulations 101-106 were substantively achieved by 'the detailed explanations and information set out in the notice, thus rendering any circular superfluous'.[31]

111 Third, and as we have pointed out in respect of regulation 90, given the mandatory terms of regulation 106, it was simply not open to PHI to make the unilateral determination that the transaction is of an 'uncomplicated nature', and that, therefore, it was 'appropriate to enclose the applicable details in a less formal document, being the notice of the meeting'. This, as we have said, amounted to a usurpation of the statutory role of the Panel to regulate affected transactions. The Panel was accordingly, in the circumstances, also entitled to refuse to grant PHI its

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[30] Emphasis supplied.

[31] PHI's application para 21.5.

exemption application for want of basic compliance with regulations 90 and 106, respectively.

112 Fourth, and as it appears from the preceding paragraphs, the outcome of the shareholder vote cannot retrospectively cure defects in the regulatory process. The purpose of the protections created by Chapter 5 of the Act and the Takeover Regulations is to ensure that shareholders are furnished with prescribed information and independent assessments before they are called upon to exercise their voting rights. The immanent value of these protections lies in their availability prior to the vote. To permit parties first to solicit shareholder approval and only thereafter seek exemption from the very requirements designed to inform that vote would, in our view, undermine the purpose of the legislative framework and diminish the supervisory role assigned to the Panel.

113 Regulation 106 occupies a central position within the disclosure regime established by the Act and the Takeover Regulations. Its primary purpose is to ensure that shareholders are furnished, before they are required to exercise their voting rights or make decisions concerning an affected transaction, with a comprehensive body of information regarding the transaction, its rationale, its consequences, the interests of the parties involved, the views of the independent board and, where applicable, the opinion of an independent expert. In this way, regulation 106 gives practical effect to the objectives set out in section 119(1) and (2) of the Act, namely the provision of necessary information, the facilitation of fair and informed decision-making, the equitable treatment of shareholders and the preservation of market integrity.

114 The regulation accordingly does far more than require the circulation of a formal document. It prescribes an extensive framework of mandatory disclosures designed to ensure that shareholders receive all information reasonably necessary to assess the merits and demerits of the proposed transaction. These include, amongst other

matters, the reasons for the transaction, the intentions of the offeror, details of beneficial interests and holdings of securities, material agreements, relevant financial information, details of dealings in securities, the views of the independent board, and, significantly, the fair and reasonable opinion contemplated by regulation 90. The breadth and detail of these requirements demonstrate a legislative recognition that shareholders should not be expected to make decisions concerning affected transactions on the basis of abbreviated summaries or limited disclosures.

115 Equally significant is the fact that regulation 106 imposes responsibility for the circular upon identified persons who must expressly assume accountability for the accuracy and completeness of the information disclosed. Depending on the nature of the transaction, responsibility rests with the offeror, the independent board, or both. Regulation 106 requires those responsible for the circular to state that they accept responsibility for its contents, that the information contained therein is true to the best of their knowledge and belief, and that the circular does not omit anything likely to affect the importance of that information. These accountability provisions are themselves important shareholder protections and form part of the regulatory architecture designed to ensure accurate and reliable disclosure.

116 The central role of the independent board within regulation 106 further underscores the purpose of the provision. In the case of an amalgamation or merger contemplated in section 117(1)(c)(ii), the circular is not simply a communication from management to shareholders. It is a disclosure document prepared under the supervision of an independent board constituted in accordance with regulations 108, 109 and 110 and informed by the independent expert process contemplated in regulation 90. The purpose of this structure is to ensure that shareholders receive information that has been subjected to independent scrutiny and objective evaluation before being called upon to make a decision.

117 This is reflected most clearly in regulation 106(4)(g), which provides in mandatory language that an offer circular "must contain" the fair and reasonable opinion provided in conformity with the applicable disclosure requirements in regulation 90. The requirement is neither incidental nor optional. The legislature plainly regarded the independent expert's opinion as a critical component of the information package that shareholders are entitled to receive before deciding whether to support or oppose an affected transaction.

118 The importance attached to the independent expert's opinion is further demonstrated by regulation 106(7)(h), which requires the offeree response circular to contain not only the fair and reasonable opinion itself, but also the independent board's opinion after taking account thereof in compliance with regulation 110. The statutory scheme therefore contemplates a sequential process: an independent board is constituted; an independent expert is appointed where required by the Panel; the expert provides an objective assessment; the independent board evaluates the transaction taking account of that assessment; and the resulting information is disclosed to shareholders through the circular. Each component serves a distinct purpose and contributes to the overall objective of informed shareholder decision-making.

119 Against this backdrop, the proposition that a notice of meeting could serve as a substitute for a regulation 106 circular is unsustainable. A notice of meeting is intended to inform shareholders of the resolutions to be considered at a meeting. A regulation 106 circular, by contrast, is intended to provide shareholders with the detailed information necessary to evaluate the transaction underlying those resolutions. The two documents perform fundamentally different functions within the statutory scheme.

120 Nor is there any merit in the contention that the transaction was sufficiently uncomplicated to justify departure from the requirements of regulation 106. Much like regulation 90, regulation 106 is framed in mandatory terms. The legislature did

not create an exception permitting parties unilaterally to dispense with the prescribed disclosure framework whenever they regard a transaction as straightforward. To permit such an approach would undermine the uniform operation of the takeover regime and substitute the judgment of transaction proponents for that of the regulator charged with overseeing affected transactions.

121 Furthermore, the content of regulation 106 itself demonstrates why such an approach is untenable. The regulation requires extensive disclosure of matters that extend far beyond a description of the transaction's mechanics. It requires disclosure of financial information, beneficial interests, material agreements, dealings in securities, directors' interests, independent assessments, board opinions and numerous other matters which shareholders may regard as relevant in deciding whether to support the transaction. The question is therefore not whether management considers the transaction to be uncomplicated, but whether shareholders have received the information which the legislature has determined is necessary for an informed decision. Regulation 106 answers that question by prescribing the information that must be disclosed.

122 There was accordingly, in the circumstances, no basis for PHI's contention that the purpose and effect of regulations 101 to 106 were substantively achieved through the notice. The notice contained neither the fair and reasonable opinion contemplated by regulation 90, nor the independent board opinion contemplated by regulation 110, nor the extensive disclosures required by regulation 106. It therefore failed to fulfil the primary purpose of the regulation, namely to provide shareholders with a comprehensive, independently scrutinised and accountable disclosure document before they were called upon to vote on the proposed transaction.

123 The Panel was therefore fully entitled to conclude that the absence of compliance with regulation 106 constituted a material deficiency in the disclosure process and a compelling reason for refusing the exemption sought.

124 In all the circumstances, there is, in our view, logical force in the Panel's finding that the regulatory non-compliance of the notice was material to its assessment of whether granting the exemption would serve the proclaimed purpose of section 119(1) of the Act. PHI's notice failed to meet the minimum disclosure requirements. As the Panel rightly found, a notice that fails to meet mandatory disclosure requirements demonstrates a procedural deficiency that strikes at the heart of *fair and informed* decision-making mandate in section 119(1) of the Act. Indeed, we agree with the Panel that a deficiency of this kind cannot be cured by a retrospective exemption, as doing so would signal to the market that compliance with the statutory obligations of disclosure is optional if one is willing to seek an exemption after the fact.

125 There is one additional point which we need to deal with on this score: this is the manifestly inadequate amount of time that was given to the shareholders between the date of dispatch of the notice, namely on 21 October 2025, and the date of the annual general meeting, i.e. 13 November 2025. This period constituted a total of sixteen (16) business days. PHI's contention that the sixteen (16) business-day period which was given to its shareholders constituted 'adequate time' - as envisaged in s119(1)(b)(ii) - for its entire body of shareholders - all 204 of them - to: (i) review and understand the draft amalgamation agreement, (ii) raise questions with the board and obtain answers thereto and/or (iii) seek further advice from their personal financial advisors, cannot, accordingly be sustained.

126 In our view, the statutory regime established by section 119 of the Act is concerned not merely with the provision of information to shareholders, but also with ensuring that shareholders are afforded sufficient time to consider that information before being required to make decisions concerning an affected transaction.

127 Section 119(1)(b) of the Act expressly requires the Panel to regulate affected transactions so as to ensure both the provision of necessary information to

shareholders and "adequate time" for regulated companies and holders of securities to obtain and provide advice with respect to offers. The legislature's deliberate coupling of these requirements reflects an important principle: information and time are mutually reinforcing safeguards. The provision of information alone does not fulfil the objectives of the Act if shareholders are not afforded a meaningful opportunity to analyse that information, seek professional advice where necessary, consult with advisers and fellow shareholders, and properly evaluate the implications of the proposed transaction.

128 The importance attached to the temporal dimension of shareholder protection is further emphasised in section 119(2)(d)(ii), which requires the Panel to ensure that all holders of relevant securities are both "provided sufficient information" and "permitted sufficient time" to enable them to reach a properly informed decision. The subsection is significant for what it reveals about the legislative conception of an informed decision. A decision is not properly informed merely because information has been disclosed. It is properly informed only where shareholders have received the information and have been afforded a reasonable opportunity to consider it before exercising their rights.

129 This requirement serves several important purposes. First, it recognises that affected transactions frequently involve complex legal, financial, strategic and governance considerations that cannot reasonably be evaluated immediately upon receipt of information. Second, it recognises that shareholders are not necessarily experts in corporate finance, valuation or takeover regulation and may therefore require independent professional advice before deciding how to vote. Third, it acknowledges that shareholders are entitled to consider not only the information supplied by the proponents of the transaction but also independent assessments, expert opinions and competing viewpoints before reaching a conclusion.

130 The requirement of sufficient time is therefore not a procedural formality. It is a substantive component of shareholder protection. The legislature understood that a shareholder's right to receive information is of limited practical value unless accompanied by a meaningful opportunity to consider and interrogate that information. The objective is not simply to ensure that shareholders are informed, but that they are informed in circumstances that permit genuine deliberation and reasoned decision-making.

131 This consideration assumes particular significance in the context of regulations 90 and 106. The independent expert's report contemplated by regulation 90 and the circular contemplated by regulation 106 are not merely disclosure documents. They are intended to provide shareholders with the information and analysis necessary to evaluate the transaction and to facilitate the obtaining of further advice where appropriate. Their circulation prior to the shareholder vote creates the period during which shareholders may reflect upon the transaction, assess the independent expert's conclusions, consider the views of the independent board and seek professional advice if required.

132 The omission of those documents therefore had consequences extending beyond the mere absence of information. It also deprived shareholders of the opportunity to consider that information over the period contemplated by the statutory scheme. Shareholders were denied not only the independent expert's assessment and the comprehensive disclosures required by regulation 106, but also the time which the legislature regarded as necessary for those materials to be digested and evaluated before a decision was made.

133 The prejudice arising from such a failure cannot be answered by pointing to the eventual outcome of the shareholder vote. The protections embodied in section 119 are designed to operate before shareholders exercise their voting rights. Their purpose is to ensure that the vote itself is the product of a process characterised by

adequate disclosure, independent scrutiny, informed deliberation and sufficient time for reflection. Once the vote has occurred, the opportunity for shareholders to obtain the benefit of those protections has irretrievably passed.

134 It follows that the statutory emphasis on adequate time reinforces the conclusion that compliance with regulations 90 and 106 cannot be dispensed with on the basis that shareholders ultimately approved the transaction. The legislative framework is concerned not merely with outcomes, but with the integrity of the process by which those outcomes are reached. A process in which shareholders are not provided with the prescribed information sufficiently in advance to consider it, obtain advice and make a properly informed decision is inconsistent with the objectives that section 119 requires the Panel to protect.

The rationale for the application

135 The central predicate of the exemption application by PHI was initially the commercial advantages which PHI asserted would inure to the benefit of its shareholders. This was, effectively, a wholesale regurgitation of the scant 'benefits' identified in special resolution number 4 of the notice.

136 We say the central predicate of the exemption application by PHI was initially the commercial advantages which it asserted would inure to the benefit of its shareholders because in its letter dated 20 March addressed to the Panel, the primary basis for the application appeared to undergo a seismic shift. PHI now advanced the correct statutory interpretation of section 119(6) of the Act as being central to its application.

137 As already indicated, subsection 119(6) (a) to (c) of the Act provides the bases upon which the Panel *may* grant an exemption if the specific statutory criteria contained in that subsection are complied with:

137.1 criterion (a) – where 'there is no reasonable potential of the affected transaction prejudicing the interests of any existing holder of a regulated company's securities' (s119(6)(a);

137.2 criterion (b) – where 'the cost of compliance is disproportionate relative to the value of the affected transaction' (s119(6)(b); or

137.3 criterion (c) – where 'doing so is otherwise reasonable and justifiable in the circumstances having regard to the principles and purposes of the Act' (s119(6)(c).

138 Insofar as the alleged commercial advantages of the transaction are concerned, and as the Panel rightly found, section 119(1) of the Act expressly prohibits the Panel – a prohibition so stringent that it is repeated in s203(1) of the Act – from considering a transaction's commercial advantages or disadvantages. Regulatory decisions must accordingly be grounded in statutory factors, not commercial ones. Section 119(6)(a) of the Act could not accordingly be satisfied on the basis of PHI's alleged commercial advantages emanating from the transaction - even if these had been proven to be true.

139 The central question as to whether, when subsection 119(6)(a) of the Act refers to 'no reasonable potential of the affected transaction prejudicing the interests of any existing holder of a regulated company's securities', it also refers to the shareholders' interests protected by section 119 of the Act, must, in our view, be answered in the affirmative. Translated, this means that, each of the procedural irregularities identified by the Panel at paragraph 3 of its ruling was - in and of itself - prejudicial to the interests of PHI's shareholders. Indeed, in our view, 'prejudice' in section 119(6)(a) of the Act is to be given a wide meaning to include non-compliance with the statutory disclosure obligations stipulated in section 119 of the Act. A narrow interpretation of 'prejudice' in section 119(6)(a) as meaning purely commercial

and/or economic harm, would, in our view, be subversive of the scheme of section 119 of the Act and would result in manifest absurdities, as the facts and circumstances of this case clearly demonstrate. We are accordingly of the view that criterion (a) of section 119(6) of the Act was not satisfied and that the Panel was entitled to refuse PHI the exemption on the basis of this ground too.

Section 119(6)(b)

140 As it appears from PHI's application, it did not engage meaningfully with this criterion. It merely asserted, without more, that the costs of compliance would burden PHI and PHI Equity with unspecified additional costs and require a repeat of the process contemplated in the Takeover Regulations, which 'would undermine the purpose of the transaction without adding value to shareholders'. Quite how these unspecified additional costs of compliance would undermine the purpose of the transaction, or worst still, be disproportionate relative to the value of the transaction, was left entirely unexplained.

141 But these unsatisfactory aspects aside, and as the Panel found, even if PHI had engaged meaningfully with this criterion, the prescriptive disclosures to shareholders in accordance with section 119(2) of the Act and the process contemplated in the Takeover Regulations are the very core mechanisms by recourse to which the proclaimed purposes of section 119(1) of the Act are served. We accordingly agree with the Panel that this criterion too was not satisfied and make the determination that the Panel was entitled to refuse PHI the exemption also on the basis of this ground.

Section 119(6)(c)

142 It is indeed so, as PHI rightly pointed out in its application, that the principles and purposes of Parts B and C of Chapter 5 of the Act and the Takeover Regulations can be derived from section 119(1) of the Act, which prescribes the role of the

Panel.[32] These principles and purposes have been dealt with above and require no repetition here [**under the heading the scheme of s119 – see also if all of the subpars here are captured thereunder**]. can be summarised, accurately, as being to:

142.1 ensure the integrity of the marketplace and fairness to the holders of the securities of regulated companies;

142.2 ensure the provision of necessary information to shareholders in order so as to facilitate the making of fair and informed decisions;

142.3 ensure the provisions of adequate time for regulated companies and their shareholders to obtain and provide advice with respect to offers; and

142.4 prevent actions by a regulated company designed to impede the making of fair and informed decisions by shareholders.

143 In support of the application under this criterion, PHI contends that, (i) *'all'* shareholders were provided with the necessary information regarding the transaction and, (ii) were afforded adequate time to make an informed decision. But none of this is borne out by the facts, as we have shown above. PHI has never demonstrated, simply and unambiguously, that *all* of its shareholders received the necessary information regarding the transaction, nor could it be seriously contended that they were afforded adequate time to make an informed decision, in circumstances where they were given a mere 16-business-day period, between the date of dispatch of the notice and the date of the AGM. As the Panel rightly concluded, granting PHI the exemption in these circumstances, would signal that statutory disclosure protections and the processes contemplated in the Takeover Regulations are optional if sought *post-hoc*. We are accordingly satisfied that this

[32] PHI exemption application: Record p170.

criterion was also not satisfied and that the Panel was entitled to refuse to grant PHI the exemption also on this basis too.

144 PHI's much-repeated contention that, if an applicant for an exemption from compliance in terms of section 119(6) is nonetheless required to comply with Parts B and C of Chapter 5 of the Act and the applicable regulations, there would be no reason for an exemption being sought, or for an exemption dispensation to exist, simply cannot prevail.

145 Indeed were PHI's contention on this score to prevail, this would entrench procedural non-compliance by companies with the provisions of Parts B and C of Chapter 5 of the Act and the applicable regulations, of the kind identified by the Panel at paragraph 3 of its ruling: (i) non-uniform disclosure, (ii) statutory non-compliant notices of the shareholders' meetings, and (iii) the absence of independent board oversight. The exemption dispensation does not exist to enable companies to do patent violence to the provisions of Parts B and C of Chapter 5 of the Act and the applicable regulations, much less to enable companies to avoid their statutory disclosure obligations to their shareholders, which they require to make *fair and informed decisions*. Such an interpretation of section 119(6) would lead to manifest absurdities which must, as matter of trite principle, be avoided.

146 PHI also contended that the Panel's complaints as set out at paragraph 3 of its ruling 'are exaggerated' and 'place form over substance'. We disagree. In our view, the Panel supplied a legitimate basis for its requests for the information set out at paragraph 3 of its ruling. It was entitled to this information, both: (i) for purposes of regulating the transaction in terms of subsections 119 (1) and (2) of the Act, and (ii) to exercise its regulatory discretion under section 119(6) of the Act. PHI's contention in this regard is accordingly devoid of any merit, and the Panel was also entitled to refuse its exemption application on the basis of its failure to have suppled this information.

The antecedent procedural irregularities

147 As already noted, section 113(5) of the Act stipulates, in peremptory terms, that a notice of a shareholders meeting *must* be delivered to *each* shareholder of each respective amalgamating company. The receipt by *all* of the shareholders of PHI of the notice was crucial in the context of this case, given that it was on the basis of the notice that the shareholders were, amongst others, deemed to have waived certain of their statutory rights, a subject we come to shortly. Of course, there could be no talk of the shareholders having waived their rights unless they had received the notice in the first place. It was accordingly incumbent upon PHI to see to it that *all* the shareholders of PHI did in fact receive the notice.

148 However, despite PHI's contention that the notice was issued 'to all of its shareholders',[33] it has never been able to demonstrate how this was done. This is so despite the Panel having made numerous requests for this information and, despite PHI having had multiple opportunities to demonstrate this in its numerous letters to the Panel dealt with above. In its statement of case, PHI contends on this score that, it is, in hindsight, clear that 'the shareholders of PHI to whom the notice had been addressed – by way of email and WhatsApp[34] - *would have received the notice* of the meeting in their email inboxes'.[35] This is wholly unsatisfactory, given the far-reaching implications the notice purported to have, including the deemed waiver of certain of the shareholders' statutory rights.

149 PHI's failure, therefore, to demonstrate, simply and unambiguously, that the notice of the meeting was in fact delivered *to each shareholder* of each of PHI and PHI Equity, constituted an insurmountable hurdle, and the Panel was right to refuse it the exemption on the basis of this consideration too.

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[33] PHI's statement of case para 3.5

[34] PHI's letter of 17 February 2026 Record p54, para 18.

[35] PHI's statement of case para 5.

150 An application for exemption under the takeover provisions is not assessed on the basis of whether a majority of shareholders support the transaction. Rather, the statutory enquiry is whether the granting of the exemption would result in prejudice to *any* shareholder whose rights have been affected by the non-compliance. Where a company or offeror has failed to comply with the procedural requirements of the Act and Regulations, particularly those designed to ensure that shareholders receive material information and are afforded an opportunity to exercise their statutory rights, the burden rests squarely on the applicant to satisfy the Panel that no shareholder will suffer prejudice if the exemption is granted.

151 This principle assumes particular significance where the non-compliance concerns the failure to deliver a circular, an independent expert report, or other documents required to be furnished to shareholders under the takeover regime. Such documents are the very mechanism through which shareholders are informed of their rights and are placed in a position to make an informed decision concerning the transaction. In these circumstances, an applicant seeking an exemption must demonstrate, clearly and unequivocally, that every shareholder whose rights may have been affected has not suffered, and will not suffer, any prejudice arising from the non-compliance.

152 PHI failed to discharge this burden. Rather than demonstrating the absence of prejudice to all affected shareholders, PHI relied principally on the fact that approximately 66% of shareholders voted in favour of the amalgamation resolution. That reliance is misplaced. The support of a majority of shareholders does not answer the relevant statutory enquiry, namely whether the remaining shareholders, who did not consent to the transaction or to the waiver of their statutory rights, would be prejudiced by the granting of the exemption.

153 The significance of this distinction is underscored by section 113(5) of the Act, which stipulates in peremptory terms that notice of the shareholders' meeting must be

delivered to each shareholder of each amalgamating company. As the Panel correctly observed, the receipt of the notice by all shareholders was crucial because it was through that notice that shareholders were informed of the transaction and were, in certain circumstances, deemed to have waived rights afforded to them by the Act and the takeover regulations. There can be no lawful waiver of statutory rights by shareholders who were never placed in possession of the information necessary to exercise those rights.

154 PHI was therefore required to demonstrate, not merely that a majority of shareholders supported the transaction, but that every shareholder received the requisite notice and associated information, or alternatively that no shareholder who did not receive such information would be prejudiced by the granting of the exemption. PHI failed to provide either assurance. Instead, it ignored the position of the approximately 34% of shareholders who did not vote in favour of the amalgamation resolution and who did not consent to waiving rights conferred upon them by the Act and Regulations.

155 In these circumstances, the Panel was entitled to conclude that PHI had failed to establish the absence of prejudice to all affected shareholders. The inability to demonstrate that the notice and accompanying information had been delivered to each shareholder, coupled with the failure to address the position of those shareholders whose statutory rights may have been compromised, constituted a fundamental obstacle to the granting of the exemption. The Panel was therefore correct to refuse the application.

156 Finally, in this regard, and as we have already pointed out, section 65 (4) of the Act prescribes that a proposed resolution be expressed with sufficient clarity and specificity and that it be accompanied by sufficient information or explanatory material:

> *'to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution'.*

157 PHI's special resolution barely met the requirements of section 65. On its own terms, it was not expressed with sufficient clarity and specificity and could not, accordingly, enable the shareholders - even those who received the notice – to determine whether to participate in the meeting and to seek to influence the outcome of the vote on special resolution number 4.

158 Lastly, in this regard we wish to deal, albeit briefly, with the exchange between the members of the Committee and PHI's Counsel pertaining to Regulation 90, the independent expert requirement and the timing of any exemption application. This revealed a recurring theme in PHI's conduct, namely that its failure to comply with the takeover provisions was not the product of impossibility or uncertainty, but rather of a conscious decision that compliance was not worth the effort, or inconvenience.

159 When questioned on this score about why PHI had not approached the Panel before proceeding with the shareholder vote, PHI's Counsel repeatedly suggested that there was little point in doing so because the Panel would simply refuse the request. Significantly, he stated that if PHI approached the Panel before the vote, *'I am going to be refused'* and later referred to the prospect of being *'chucked out'* by the Panel. When pressed on what he meant, he explained that an application for exemption before the vote would likely fail because he would not yet be able to point to shareholder support for the transaction. In effect, his complaint was not that the law prevented PHI from seeking an exemption beforehand, but that compliance with the statutory process was inconvenient because it required the company to engage the regulator before obtaining the shareholder mandate on which it later sought to rely.

160 The exchange between the Panel and PHI's Counsel foreshadowed in the preceding paragraph is particularly revealing because it demonstrates that PHI deliberately

chose to proceed outside the statutory framework and only, thereafter, sought exemption from the very requirements it had ignored. PHI's Counsel argued that PHI could not seek an exemption before the vote because it wished to tell the Panel *'what the shareholders want'*, and that the shareholder vote itself was a factor that should influence the exercise of the Panel's discretion. However, this submission effectively amounts to saying that PHI preferred to complete the very step that the legislation seeks to regulate before asking whether compliance with the regulatory safeguards could be excused. As Mr Nikani pointed out during the hearing, the legislation contemplates that the Panel determines whether protections such as a circular or independent expert are required before shareholders vote, not afterwards.

161 What is indeed striking about the above exchange is that PHI's Counsel's explanation was not that compliance was impossible, impractical, or beyond PHI's control. Rather, his position was that compliance was unnecessary because the transaction was, in his words, *'one plus one is two'*, *'simple'*, and *'obvious'*. He repeatedly questioned why PHI should incur the costs and delay associated with compliance, asking: *'Why must we pay thousands of rands to get no benefit?'* and *'What do you want to achieve by doing that?'*. The thrust of his submission was, therefore, that the statutory requirements should not apply because PHI regarded them as adding no value to a transaction that it had already determined was beneficial.

162 The reference, in our view, to being *'chucked out'* is particularly telling. It suggests an awareness that had PHI engaged the Panel at the stage contemplated by the legislation, the Panel mighty have insisted on compliance with the statutory requirements before shareholders were asked to vote. Rather than following that route, PHI proceeded on the basis of its own assessment that the requirements were unnecessary and sought retrospective relief once the shareholder vote had been secured. In substance, the complaint was not that the regulatory framework could

not be complied with, but that compliance would have required PHI to submit its own views to the scrutiny of the regulator before implementing its chosen course of action.

163 Viewed holistically, the hearing revealed a consistent theme: PHI's case was premised on the proposition that compliance should be dispensed with because it was inconvenient, expensive, time-consuming, and, in PHI's assessment, unnecessary. The repeated references to *'formalities'*, *'box-ticking exercises'*, the costs of experts, the supposed redundancy of a circular, and the prospect of being *'chucked out'* if the matter were presented to the Panel beforehand, all point to a conscious decision to bypass the prescribed regulatory process and then seek an exemption after the fact. The issue before the Committee was, therefore, not whether compliance had been impossible, but whether a party may unilaterally decide that statutory safeguards are dispensable because it regards them as inconvenient or unlikely to alter the outcome it seeks to achieve. The stance adopted by PHI's Counsel in this regard left little room for doubt: compliance by PHI with the statutory disclosure obligations was not worth the effort, it was simply too much of an inconvenience.

Waiver

164 As appears from the notice of the AGM, it made provision for the waiver of the shareholders' right to receive a circular from the directors of PHI as required in terms of the Act and the Regulations.

165 PHI's contentions in support of the waiver are, amongst others:

165.1 first, that there is no requirement in the Act and the regulations to the effect that a section 119(6) exemption application requires to be accompanied by a signed or any other type of waiver by each shareholder of an applicant for exemption;

165.2 second, that each shareholder received all relevant information and that, therefore, there was in reality no need for a waiver to be obtained from him, her or it; and

165.3 third, that requiring PHI to obtain individually signed waivers would be onerous in terms of delay, costs and logistics.

166 PHI's contentions in this regard cannot be sustained.

167 First, and as the Panel rightly pointed out, there is no provision in the Act or the regulations that permits statutory rights conferred by Parts B and C of Chapter 5 of the Act and the regulation to be waived unilaterally by a company through a clause in a meeting notice.

168 Second, our courts have repeatedly stressed that, in considering whether waiver has been established, in any given case, they must take cognisance of the fact that persons do not as a rule lightly abandon their rights.

169 The Constitutional Court has left open the question whether a fundamental right – such as that to fairness, entrenched by section 33 of the Constitution – is capable of being waived[36]. It preferred to approach that matter – involving the rendition to the United States (to face the death penalty) of a suspect accused of being involved in the embassy bombings in Nairobi and Dar-es-Salam – by stressing the high factual threshold of the onus: ***"[t]o be enforceable, however, it [the waiver] would have to be a fully informed consent and one clearly showing that the applicant was aware of the exact nature and extent of the rights being waived in consequence of such consent"***[37].

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[36] Mohamed v President of the RSA 2001 (3) SA 893 (CC) at 918-919.
[37] *Id* at 919A.

170 Applying these principles to the present matter, it is clear that PHI’s claim of the shareholders having waived their rights is unavailing. PHI can hardly contend for an unequivocal abandonment of its shareholders’ statutorily conferred rights, in circumstances where it cannot show, simply and unambiguously, that *all* of the shareholders received the notice on the basis of which they are deemed to have waived their rights, in the first place.

171 Furthermore, the mechanism adopted by PHI is fundamentally inconsistent with the protective purpose of the takeover provisions in Parts B and C of Chapter 5 of the Act. The resolution effectively deemed those shareholders who failed to take any action to have consented to the waiver of important statutory rights. In other words, silence or inaction was treated as constituting consent.

172 That approach is difficult to reconcile with the philosophy underlying takeover regulation. The takeover regime exists precisely to protect shareholders, particularly minority and passive shareholders, by ensuring that they receive adequate information and procedural safeguards before decisions affecting their rights are implemented. The statutory requirement that shareholders receive a circular prepared by independent directors serves that very purpose.

173 The law generally recognises that shareholders who do not actively participate in corporate processes are often the persons most in need of protection. It is for that reason that takeover legislation typically proceeds on the basis that rights are preserved unless they are knowingly and unequivocally relinquished. The notion that a shareholder's failure to respond to a notice can be construed as consent to the abandonment of statutory protections runs counter to that principle.

174 The effect of the resolution was therefore not to obtain consent from shareholders, but rather to impose a form of negative consent whereby shareholders were required to take positive action in order to retain rights conferred upon them by statute. Such

an approach reverses the protective structure established by the Act and the Regulations.

175 In our view, a waiver mechanism that deems silence or inaction to constitute consent to the relinquishment of statutory takeover protections is neither fair nor just. It is particularly objectionable where there is uncertainty as to whether all shareholders in fact received the notice and understood its consequences. To permit statutory rights of this nature to be lost through mere inaction would be inconsistent with the principles of fairness, shareholder protection and informed decision-making that underpin the takeover regime. In these circumstances, the purported waiver is not only legally unsustainable but also unfair, unjust and, in the circumstances, unconscionable.

<u>The approach of PHI leading up to the Panel's ruling</u>

176 We now turn, briefly, to PHI's attitude reflected in the correspondence leading up to the ruling by the Panel on 26 March 2026.

177 As we have already indicated, following upon the institution of the application by PHI on 27 January 2026, the Panel issued a detailed letter on 29 January 2026 in which it, amongst others, (i) provided preliminary guidance to PHI on the applicable statutory framework, and (ii) proceeded to identify seven fundamental concerns it had with the application.

178 PHI responded to the Panel's aforesaid letter on 17 February 2026 by way of two letters, both dated 17 February 2026.

179 As appears from the contents of both of PHI's aforesaid letters, neither of them engaged in any meaningful way with the Panel's seven fundamental concerns. In one of the two letters, PHI responded with what the Panel described (in its letter dated 25 February 2026) as 'striking dismissiveness'. Thus, rather than engage with

the Panel's seven fundamental concerns, PHI, first, stated that those issues were 'strictly irrelevant to the interpretation of section 119(6)(a)' and accordingly declined to respond to them, and, second, persisted in its commercial argument, namely that the transaction was a 'mirror image' and that, therefore, no prejudice could exist. It then demanded that the Panel 'issue a decision' immediately and offered no substantive engagement.

180 On 25 February 2026, the Panel addressed yet another comprehensive letter to PHI and indicated that, in its replies of 17 February 2026, PHI had, amongst others, 'failed to engage with the mandatory statutory framework that section 119(6) presupposes', and that it demanded an 'exemption based on a commercial argument that section 119(1), explicitly forbids the Panel from making'. Finally, having advised PHI at paragraph 9.3 of its letter of what it regarded as being the pathway, the Panel recorded that, whilst it was prepared 'to work toward a lawful outcome', it would not, however, 'circumvent the statutory framework because a party finds compliance administratively inconvenient'.

181 To this, PHI dithered. Its reply to the Panel's letter of 25 February 2026 only came on 20 March 2026. PHI's latter letter did not engage meaningfully with the Panel's 17-page letter of 25 February 2026. Having stressed that 'the current impasse essentially arises from different interpretations of section 119(6) of the Companies Act, which involves a question of law', it requested that 'the Panel reconsider the application originally sought'.

182 On 26 March 2026, the Panel proceeded to issue its ruling and, in it, declined PHI the exemption it sought.

183 As we previously indicated, the Panel was well within its right, as a steward of the market and a regulator of affected transactions, to request the information set out at paragraph 3 of its ruling. It was perfectly entitled to this information, both: (i) for

purposes of regulating the Amalgamation Transaction in terms of section 119 of the Act, and (ii) to exercise its regulatory discretion under section 119(6) of the Act. That each of the disclosure it sought from PHI is statutorily mandated can afford of no doubt.

184 It is not to PHI's credit, having invited the Panel in its application, to contact it should it 'have any further questions regarding the above matter',[38] to then assume an obstructive and contrived approach to statutorily mandated requests for information which could only assist in the determination of its own application. It would not be too harsh for the Committee to make the finding that the concluding invitation (repeated in PHI's letter of 17 February 2025)[39] 'to contact us should [y]ou have any further questions regarding the above matter' was humbug: it was hardly honoured when the requests for information came through.

185 Corporations wishing to operate within our borders - whether local or international – must be left in no doubt that in relation to the high standards of corporate governance and the statutory obligations of proper disclosure to shareholders, there is no room to hide and that the Act and the regulations promulgated thereunder will be enforced.

186 In the light of all of the above facts and circumstances, the Committee concludes that the Panel was entitled to refuse PHI's exemption application.

ORDER

187 For all of the above reasons:

187.1 The application by PHI in terms of regulation 118(8) is dismissed;

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[38] PHI's application Record p171.

[39] Record p50.

187.2 The final ruling issued by the Panel on 26 March 2026 refusing the exemption application under section 119(6) of the Act is confirmed;

187.3 PHI may not implement the Amalgamation Transaction unless and until the Panel has issued a compliance certificate in respect of the Amalgamation Transaction or has granted an exemption under section 119(6) of the Act, to the extent required by the Act and the regulations;

187.4 The prescribed fees and charges of the Panel and the Committee, if any, remain payable in accordance with the Act and the regulations and

187.5 The decision is binding, subject to any right of review or appeal to a court.

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Tintswalo Mthembi (Ms.)

Chairperson: Takeover Special Committee

We concur:

Professor T Mongalo, A Nikani, I Ngalonkulu, L Sonqishe

Members: Takeover Special Committee

APPEARANCES:

For the applicant: CM Eloff SC

Instructed by: AJM

For the Takeover Regulation Panel: L Sisilana SC
(with M Salukazana)

Instructed by: Peyper Attorneys

DATED: 23 June 2026