To	Mr Andile Nikani, Executive Director	**Date**	31 May 2022
Copy	Ms Zoliswa Mkwetshana, Senior Associate		
From	Mr Zano Nduli, Deputy Executive Director		

Report in terms of section 170(1), read with sections 169 and 209, of the Companies Act, 2008 regarding a complaint in terms of regulation 86(5) of the Takeover Regulations

In re:

ARTEMIS INVESTMENTS (PROPRIETARY) LIMITED	**First Complainant**
(Registration Number: 1995/000365/07)	
LOUIS MARIE JOSEPH ROBERT MAINGARD	**Second Complainant**
KARL MAINGARD FAMILY TRUST	**Third Complainant**
ATON MAINGARD FAMILY TRUST	**Fourth Complainant**
PAUL CYRIL MAUJEAN	**Fifth Complainant**
MARIE JOSEPH GERHARD GUY FRANCOIS MAMET	**Sixth Complainant**
and	
MAGISTER INVESTMENTS LIMITED	**First Respondent**
(Registration Number: C125293 GBL)	

2 June 2022

TONGAAT HULETT LIMITED

(Registration Number: 1892/000610/06) **Second Respondent**

In re:

BRAEMAR TRADING LIMITED **Alleged Concert Party**

(Registration Number: IBC/04/16/12691)

BETELGEUX INVESTMENTS PROPRIETARY LIMITED **Alleged Concert Party**

(Registration Number 2012/209209/07)

EBRAHIM AHMED ADAMJEE **Alleged Concert Party**

SIMON GEORGE WILBURN RUDLAND **Alleged Concert Party**

Dear Mr Executive Director,

1 **Introduction**

1.1 I refer to your email dated 22 March 2022, enclosing:

(1) The ruling of the Takeover Special Committee (TSC) ruling dated 18 March 2022 (TSC Ruling); and

(2) The certificate appointing me as an inspector in terms of section 209(1) of the Companies Act, 2008 (Act) in the matter above.

1.2 On 22 March 2022, following your email in 1.1 above, I addressed an email (**Commencement Email**[1]), about the commencement of the investigation initiated by

[1] A copy of which is attached marked "ZN1".

the Takeover Regulation Panel (**Panel**) at the direction of the TSC in paragraph 23 of the TSC Ruling[2], to some[3] the following parties (predominantly through their advisors):

(1) Tongaat Hulett Limited (**THL**);

(2) Magister Investments Limited (**Magister**);

(3) Braemar Trading Limited (**Braemar**);

(4) Betelgeux Investments Proprietary Limited (**Betelgeux**);

(5) Ebrahim Ahmed Adamjee (**Ebrahim**);

(6) Simon George Wilburn Rudland (**Simon**);

(7) Hamish Bryan Wilburn Rudland (**Hamish**);

(8) Aadil Ebrahim Adamjee (**Aadil**); and

(9) The complainants.

1.3 For ease of reference, I will quote the contents of the Commencement Email verbatim:

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[2] Which reads, *"[t]he Respondents have denied the Applicants' contentions in this regard. They have argued that these allegations are at best speculative and shear conjecture. In any event, the TSC concludes that these allegations are largely questions of fact with many of their aspects requiring evidence to be adduced. Needless to say that, the TSC views the alleged transgressions in a very serious light. The TSC is of the firm view that these allegations must be investigated extensively and fully to get to the bottom of this issue.* ***The TSC accordingly directs that the complaint contained in this issue be dealt with comprehensively by the TRP in the first instance****."* [My emphasis]

[3] The parties in paragraph 1.2(3) to (6) and (8) above had initially not been involved in the TSC hearing which gave rise to the TSC Ruling. Therefore, they were not copied in my email of 22 March 2022. However, I was subsequently able to reach out to them once it became clear that they were directly involved in the subject matter of the investigation.

"Dear All[4]*,*

*We refer to the TSC ruling dated 18 March 2022 (**TSC Ruling**), wherein the majority decision of the TSC, among other things, at paragraph 23 directed that the allegations outlined in the TSC Ruling relating to the "third issue" be investigated comprehensively by the Panel, through the office of the Executive Director.*

*Subsequently, the Executive Director has decided to appoint the Deputy Executive Director (me) as an inspector in terms of section 209 (read with section 169(2)(a)) of the Companies Act, 2022 (**Act**), to conduct the investigation. In this regard, I attach copies of the TSC Ruling and the Inspector Certificate (Form TRP 209.1, issued in terms of section 209 of the Act).*

Having regard to the narrow context of the scope of our investigation, as well as the decision of the TSC in its ruling (i.e., to dismiss all four issues presented to it during the hearing, subject to this investigation), we propose proceeding with this investigation as follows:

1. *The complainants (Applicants in the TSC matter) provide to the Panel such information that they consider relevant concerning the matter under consideration (i.e., the third issue), including such questions that they deem necessary to be explored by the Panel, through the inspector in this matter;*

[4] The recipients of the Commencement Email were the following: Trevor Boswell at Werksmans, Adam Pike at Pike-law, Lance Fleiser at Bowmans, David Hertz at Werksmans, Charles Ancer at Fluxmans, Simon Venables at PWC, Tracy Botha at PWC, Alex Peral at Fluxmans together with Panel executive staff, including you.

2. *The information to be furnished under paragraph 1 above must be provided urgently (and in any event, by no later than close of business (5 pm) on Friday, 25 March 2022), provided that the inspector may in his discretion extend this deadline on good course shown;*

3. *Upon receipt of the information contemplated in paragraph 1 above, the Panel shall thereafter reach out to Tongaat, Magister and/or any other parties alleged to be relevant for purposes of considering the regulation 86(5) allegations for their comment;*

4. *The parties contemplated in paragraph 3 above must endeavour to respond to the Panel as soon as possible thereafter (and in any event, by no later than the later of the close of business (5 pm) on Friday, 8 April 2022, or 10 business days after being approached by the Panel under paragraph 3 above), provided that the inspector may in his discretion extend this deadline on good course shown; and*

5. *After that, the inspector shall consider the information provided by all the parties and may, where necessary, request such additional information and interview such parties as he may deem necessary for purposes of resolving this matter as he deems it necessary under section 169 of the Act, and thereafter report to the Executive Director pursuant to section 170 of the Act.*

The above is designed to facilitate a speedy resolution of this matter but does not preclude the parties referred to above from proposing a more streamlined process for consideration by the inspector."

1.4 After the dispatch of the Commencement Email, the following became apparent:

(1) That Adam Pike (**Pike**) of Pike Law would continue acting for the complainants, who had been the applicants[5] at the prior hearing before the TSC;

(2) Werksmans and Bowmans would continue acting for THL, with Trevor Boswell (**Boswell**) and David Hertz (**Hertz**) of Werksmans and Lance Fleiser (**Fleiser**) of Bowmans; and

(3) Fluxmans would continue acting for Magister and Hamish, through their partners Alex Peral (**Peral**) and Charles Ancer (**Ancer**).

1.5 On or about 28 and 29 March 2022, the complainants' counsel delivered their representations[6] to me and the parties referred to in 1.4 above.

1.6 On or about 14 April 2022, THL's counsel delivered their representations[7] to me and the parties referred to in 1.4above.

1.7 On or about 15 April 2022, Magister's and Hamish's counsel delivered their representations[8] to me and the parties referred to in 1.4 above.

[5] Namely, Artemis Investments Proprietary Limited (“First Applicant”), Louis Marie Joseph Robert Maingard (“Second Applicant”), Karl Maingard Family Trust (“Third Applicant”), Anton Maingard Family Trust (“Fourth Applicant”), Paul Cyril Maujean (“Fifth Applicant”) and Marie Joseph Gerhard Guy Francois Mamet (“Sixth Applicant”).

[6] Entitled “note on relevant information”, attached here marked “ZN2”.

[7] Entitled “second respondent’s limited responses to the applicants’ ‘note on relevant information’ dated 28 March 2022”, attached here marked “ZN3”.

[8] Entitled “Magister Investments Limited's (“Magister") and Hamish Bryan Wilburn Rudland’s (“Hamish”) response to the applicants’ ‘note on relevant information’”, attached here marked “ZN4”.

1.8 On or about 21 April 2022, the complainants' counsel delivered their representations[9] to me and the parties referred to in 1.4 above.

1.9 The approaches of each of the parties referred to in 1.4 above to this investigation were fundamentally similar. This is clearly apparent when one reads the representations of in annexures ZN2 to ZN5, which for brevity I will not repeat in the body of this report (unless necessary). The representations in the said annexures comprise some three lever arch files, copies of which are available for purposes of the record of this investigation. Where appropriate, I included extracts from the respective representations in this report, but for the most part these annexures speak for themselves and do not merit any further discussion in this regard.

1.10 It is important to note at this stage that the Panel's executive staff had not actively participated as a party in the hearing that led to the TSC Ruling. Therefore, my approach to the information contained in the representations received from each of the parties referred to in 1.4 above was to consider such information *de novo* insofar as the current complaint is concerned. This allowed me to engage with the submissions with a fresh eye unburdened by the submissions of the respective parties during the TSC hearing, bearing in mind that the TSC had ruled against the complainants, save directing a further investigation with regards to one of the aspects that were raised by the complainants.

1.11 Therefore, whilst I was grateful for the assistance provided by the parties through their respective submissions in annexures ZN2 to ZN5, I did not consider myself fettered in how I looked at the evidence presented to me in that regard, instead I

[9] Entitled “further note on relevant information”, attached here marked “ZN5”.

considered those representations as a point of departure for an investigation and analysis of the allegations, in the context of regulation 86(5) of the Takeover Regulations[10].

1.12 Regulation 86(5) of the Takeover Regulations states:

> *"Irrespective of whether an issue of securities is made conditional upon a waiver,* ***a waiver by the independent holders*** *of more than 50% of the general voting rights of all issued securities* ***of the regulated company is a nullity if any acquisitions are made by an*** *acquirer or a subscriber or* ***underwriter, or by any of their*** *respective* ***concert parties, in the period between the transaction announcement and date of the waiver****."* [My emphasis]

1.13 Following the receipt and review of each of the representations in annexures ZN2 to ZN4, I addressed an email dated 25 April 2022[11] to Pike (with the other parties' representatives in copy) asking him to address me as follows:

> *"Dear Adam,*
>
> *In an effort to streamline the investigation and simplify the issues under consideration, can you please diagrammatically illustrate the connection between Magister on the one hand and the parties who acquired shares in Tongaat, potentially in contravention of Regulation 86(5)?*
>
> *A point that bears repeating in this matter is that the circumstances contemplated in Regulation 86(5) and the effects thereof will not be affected*

[10] Defined in section 1 of the Act as "Regulations made by the Minister in terms of sections 120 and 223".

[11] Annexed here as "ZN6".

by the outcome of the current investigation. If the triggering of Regulation 86(5) is established factually at any stage, then the whitewash resolution is a nullity. The effect of the ruling in relation to Regulation 86(5) will be to trigger a mandatory offer once Magister has breached the prescribed percentage.

However, the triggering of Regulation 86(5) must be established factually. There is no doubt that members of the Rudland family, referred to in the submissions, for the most part, are related to each other. Equally, the members of the Adamjee family referred to in the submissions are legally related to each other at face value. What still needs to be done, for purposes of this investigation, is to connect some (or all) of the members of each family (the Rudlands vis a vis the Adamjees) as "interrelated" parties. However, this is not done in a vacuum, meaning that for legally unrelated individuals to be deemed "interrelated" to each other, they must be so by virtue of their unbroken relatedness to common juristic entities.

Another point that bears noting at this stage is that members of each of these families may not claim to be unaffected by the relational presumptions set out in section 2 of the Companies Act, 2008 (Act), in the absence of the requisite application in terms of section 2(3) of the Act. This applies to members of each of the above-mentioned families.

Lastly, are there specific allegations regarding the presence of the circumstances contemplated in Regulation 84 relating to any of the parties referred to above?"

1.14 On 30 April 2022[12], Pike responded to my email in 1.13 above as follows:

> *"Dear Zano*
>
> *Please see attached[13] the diagrammatic illustration of the connection between Magister on the one hand and the parties who acquired shares in Tongaat in contravention of Regulation 86(5). We will consider and respond to your query concerning Regulation 84 during the course of next week.*
>
> *As previously requested, please advise whether the information and documents we suggested have been requested and received from the other parties."*

1.15 On 3 May 2022[14], I addressed a separate email to Pike, without the other parties in copy, as follows:

> *"Dear Adam,*
>
> *Can you confirm your availability to discuss the illustration between today and tomorrow? Please propose times for both days?"*

He thereafter got back to me with proposed times, and we ultimately settled on a Microsoft Teams video conference at 12:30 that afternoon.

1.16 Following our discussion, Pike supplemented his diagrammatic illustration[15], which admittedly had originally been quite difficult to understand, particularly in the context

[12] Annexed here as “ZN7”.

[13] Annexed here as “ZN7.1”.

[14] Annexed here as “ZN8”.

[15] Annexed here as “ZN9”.

of the alleged link between the members of the Rudland family (and their related entities) in relation to the members of the Adamjee family (and their related entities). The supplementary illustration was sent to all the parties referred to in 1.4 above at the same time as it was sent to me and the Panel staff.

1.17 During my discussion with Pike, I had asked him to unequivocally outline the thrust of his clients' claims that there was an inter-related relationship between the Rudland and Adamjee families. Prior to that point, I had been of the view that the complaint had been unfocused as it appeared to me as though:

(1) The complainants had seemingly laboured under the false assumption that at face value, Simon and Hamish were not related as contemplated in section 2(1)(a)(ii) of the Act or that Simon and Magister were not inter-related as contemplated in section 1 of the Act;

(2) Equally, the complainants had seemingly laboured under the false assumption that at face value, Ebrahim, his wife Sahair Adamjee and their son Aadil were not respectively related as contemplated in section 2(1)(a) of the Act or that Ebrahim and Adamjee were not inter-related as contemplated in section 1 of the Act;

(3) As a consequence of the above-mentioned seemingly false assumptions, the complainants had convoluted their analysis of the thrust of their complaint that regulation 86(5) of the Takeover Regulations had been breached by some of the parties referred to 1.2 above; and

(4) Having regard to the statutory definition of inter-related parties, as expounded in the commentary of Richard Jooste[16] on how does one apply that definition in practice, the only question that necessitated any further factual analysis was whether there was any common thread between the parties referred to 1.17(1) above and those referred to in 1.17(2) above.

1.18 Pike was then able to point to East London Cut Rag Processors Proprietary Limited (**ELCR**) and Gold Leaf Tobacco Corporation Proprietary Limited (**GLTC**) as the entities that, in his clients' view, were the common thread, providing evidence of an unbroken series of relationships contemplated in the statutory definition of inter-related parties.

1.19 Once the analysis in 1.17 above was settled, following my discussion with Pike and receipt of “ZN9”, I was then able to focus once more on the contents of each of the representations by each of the parties referred to in 1.4 above. Of particular interest were the LexisNexis company searches annexed to “ZN2” as "AR8" and "AR9". Copies of these documents are attached to this report as annexures "ZN10" and "ZN11" respectively.

1.20 "ZN10" comprises the data obtained from the Commission records as at 12:38 pm on 14 February 2022 regarding, inter alia, (i) the active directors of ELCR as at that date together with (ii) details as to what this company's business status is according to CIPC records. In both regards, the following is apparent:

[16] See in this regard Jooste’s commentary on page 211 of Contemporary Company Law, 2nd Ed, also referenced on page 5 of the complainants’ “note on relevant information” (“ZN2”), under footnote 7.

(1) This company had on that date two "active" directors according to the Commission's records, namely Ebrahim and Simon; and

(2) Its operating status was listed as being "in business", having been registered on 16 May 2000.

1.21 "ZN11" comprises the data obtained from the Commission records as at 12:42 pm on 14 February 2022 regarding, inter alia, (i) the active directors of GLTC as at that date together with (ii) details as to what this company's business status is according to CIPC records. In both regards, the following is apparent:

(1) This company had on that date two "active" directors according to the Commission's records, namely Ebrahim and Simon; and

(2) Its operating status was listed as being "in business", having been registered on 02 April 2001.

1.22 Therefore, based on "ZN 10" and "ZN11", the probative value of which has not been challenged by any of the parties referred to in 1.2 above, I concluded that it is common cause that ELCR and GLTC are domestic companies whose boards of directors comprise only of Ebrahim and Simon and were listed as being operationally active (i.e. "in business") as at the date that both reports were issued. The last time any other person, other than Simon and Ebrahim, was listed as a director in either company was 12 July 2010, with Simon and Ebrahim having been appointed as directors of both companies since 1 July 2009.

1.23 Having regard to 1.22 above, and placing reliance the provisions of section 66(1) of the Act, which states:

> *"The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise"*,

I concluded that an objective analysis of the evidence before me strongly suggested that the control of the boards of both ELCR and GLTC was shared equally between Simon and Ebrahim such that both Simon and Ebrahim reasonably fit the description of the person contemplated in section 2(2)(d) of the Act, in light of the apparent shared control of both companies.

1.24 The basis for my conclusion in 1.23 above was that one would ordinarily expect a board with only two members to – almost by necessity – manage the business and affairs of such company by the consensus of its two members. Whilst such presumption could be rebutted by objective evidence to the contrary, for instance shareholder arrangements reflected in the memorandum of incorporation and/or the shareholders agreement, alternatively by way of some resolutions of the board or some other objective evidence demonstrating some form of de facto control, all of which would seem to meet the criteria of satisfactory evidence contemplated in section 2(3) of the Act. No such evidence was adduced by any of the parties, particularly Simon and Ebrahim. In fact, the only averments to the contrary in this regard were simply bald denials contained in the sworn statement provided to me by

Ebrahim dated 16 May 2022[17] and confirmed by a sworn statement from Simon of the same day[18].

1.25 Nothing in "ZN12" comprises objectively supported evidence, which is why on 17 May 2022 at 11:55 am[19] and at 2:20 pm[20] I sent two emails to the legal counsel for Simon, Ebrahim and Betelgeux in this matter[21], Mr Raees Saint (Saint), requesting various information relating to both ELCR and GLTC.

(1) "ZN14" read as follows:

"Dear Raees,

Thanks again for your e-mail below. Following on the submissions made by Mr Ebrahim Adamjee, kindly let me have the following documents on an urgent basis:

1. *The share registers of ELCRP and Gold Leaf;*
2. *The MOIs and shareholders agreements of the companies mentioned above;*
3. *All the documents related to the liquidation proceedings of ELCRP;*

[17] Annexed here as “ZN12”.

[18] Annexed here as “ZN13”.

[19] Annexed here as “ZN14”

[20] Annexed here as “ZN15”.

[21] Which in and of itself is curious, considering the vehement denials of any collaboration between Simon, Ebrahim and Betelgeux in relation to matters under consideration in this investigation.

4. *Copies of all the minutes of meetings of directors and shareholders of the companies mentioned above;*

5. *Copies of funding agreements in place between the companies mentioned above and their respective shareholders and/or third-party funders;*

6. *Details of industry bodies that the companies mentioned above are members of;*

7. *Copies of annual financial statements for each of these companies for the last ten years, including details of the respective auditors during that period; and*

8. *Details of the banks that have serviced the companies mentioned above over the last ten years, including the respective account numbers.*

When submitting this information, kindly procure that the directors of these companies must provide sworn statements that the information provided in response to this request is a complete record of the type of information requested above. Regard must be had to the provisions of section 215 of the Companies Act, 2008 and the consequences thereof when providing the requested information.

If the parties prefer summons to be issued in this regard, please advise urgently."

(2) "ZN15" read as follows:

"Dear Raees, Ebrahim and Simon,

Please urgently advise the current shareholding of ELCRP and Gold Leaf, including details of these companies' ultimate beneficial ownership? For example, is it correct that Simon and Ebrahim jointly (directly or indirectly) own these companies on a 50-50 basis?

Please advise before the close of business today."

1.26 Not only did Saint fail to respond to "ZN15" within the time stipulated in my emails, on 19 May 2022 he delivered a letter[22] attached to an email[23] received by me at 8:40:39 am effectively refusing to respond to either “ZN14” or “ZN15”. My response to “ZN16”, which I sent via email at 9:58 am[24] on the same day, is annexed to this report for the sake of completeness.

1.27 The significance of the exchange with Saint, in annexures "ZN14" to "ZN18", is that Simon and Ebrahim were afforded an opportunity to address the concerns that were obviously apparent regarding their relationships with both ELCR and GLTC in the context of this investigation, and the potential consequences thereof. But instead of candidness – in the context on an investigation wherein I had already alerted[25] all the parties concerned of where I was leaning, based on my assessment of the evidence to date – they choose to stonewall and claimed that the Panel, among other things, had no jurisdiction to investigate this matter.

[22] Annexed here as “ZN16”.

[23] Annexed here as “ZN17”.

[24] Annexed here as “ZN18”.

[25] See my email addressed to the parties referred to all the parties dated 09 May 2022 at 21:14, and annexed here as “ZN19”.

1.28 Whilst the Panel has the ability to subpoena the information that is the subject matter of annexures "ZN14" to "ZN18", I am confident that a prima facie case exists that both Ebrahim and Simon ought to be factually and legally declared to fit the descriptions of joint controllers of both ELCR and GLTC in terms of section 2(2)(d) of the Act, and therefore should (in the absence of satisfactory evidence to the contrary in terms of section 2(3) of the Act) be deemed to be respectively related to each of these companies.

1.29 For the sake of completeness, I wish to record that the THL, Hamish and Betelgeux also delivered sworn statements[26] to me via email, in response to "ZN19", on or about 16 May 2022. These statements contain very little, in the way of any direct evidence. Primarily, they simply advance legal submissions designed to question legal soundness of the preliminary, prima facie, findings I had shared with the parties in "ZN19". To that end, nothing materially turns on these from a factual perspective, save to say these are addressed below, in no particular order, from my reading of the circumstances of the case.

2 Issues

2.1 The background above is, in my view, necessary for your to better understand the history of this matter and the events that led to the release of this report.

2.2 There are a few issues that have been raised in the representations of the parties to this investigation, including their individual sworn statements. However, it appears to me that these can broadly be grouped as follows:

[26]See in this regard the sworn statements of Hamish, THL's Company Secretary (Johan Van Rooyen) and Betelgeux's director (Issa Ebrahim), annexed here as "ZN20", "ZN21" and "ZN22", respectively.

(1) (Issuer 1) Can members of the Rudland family (and the entities they control, including Magister) be said to be related or inter-related to each other as contemplated in section 2 of the Act, read with the definition of "inter-related" in section 1 of the Act;

(2) (Issue 2) Can members of the Adamjee family (and the entities they control, including Betelgeux) be said to be related or inter-related to each other as contemplated in section 2 of the Act, read with the definition of "inter-related" in section 1 of the Act;

(3) (Issue 3) Assuming that 2.2(1) and 2.2(2) above are established in the affirmative, can it then be said that the parties referred to in 2.2(1) and 2.2(2) above are collectively inter-related in terms of the Act by virtue of the common relationships vis a vis ELCR and GLTC; and

(4) (Issue 4) Lastly, assuming that the question in 2.2(3) above is answered in the affirmative, can it then be said that Ebrahim and Betelgeux are concert parties Magister such that regulation 86(5) finds application in this matter so that the waiver granted by the independent holders of THL on 18 January 2022 (**Waiver**) is rendered a nullity?

3 Analysis

3.1 (Issuer 1) Can members of the Rudland family (and the entities they control, including Magister) be said to be related or inter-related to each other as contemplated in section 2 of the Act, read with the definition of "inter-related" in section 1 of the Act

(1) The Rudland family and the entities that they control in the context of this matter can roughly be summarised as follows:

(a) Hamish and Simon are brothers, whose mother is Adrienne Rudland (**Adrienne**). Therefore, these are three individuals are related to one another in terms of section 2(1)(a)(ii) of the Act[27];

(b) Hamish is the director of Magister on behalf of his family trust[28], which owns the majority of the shares in Magister. Therefore, Hamish can be said to be related to Magister by virtue of section 2(1)(b), read with 2(2)(a) or (c) or (d), of the Act. The claim that Magister and Hamish are related is in fact uncontested in this matter and therefore is treated as common cause for purposes of this report; and

(c) I didn't see a need to deal extensively with other members of the Rudland family and/or the other entities related or inter-related to the Rudland family. In fact, I was strongly of the view that going down such rabbit warren of relationships served no purpose for the subject matter of this investigation.

(2) Considering the conclusions in 3.1(1) above, I am satisfied that Simon and Hamish are related, and Simon and Magister are inter-related.

3.2 **(Issue 2) Can members of the Adamjee family (and the entities they control, including Betelgeux) be said to be related or inter-related to each other as contemplated in section 2 of the Act, read with the definition of "inter-related" in section 1 of the Act**

[27] This section reads, "[f]or all purposes of this Act… an individual is related to another individual if they… are separated by no more than two degrees of natural or adopted consanguinity or affinity".

[28] The Casa Trust

(1) The Adamjee family and the entities that they control in the context of this matter can roughly be summarised as follows:

(a) Ebrahim and Sahair Adamjee (**Sahair**) are spouses, whose son is Aadil. Therefore, these three individuals are related to one another in terms of section 2(1)(a)(ii) of the Act[29]; and

(b) Sahair and Aadil are the only directors of the holding company[30] of Betelgeux. Therefore, Sahair and Aadil can be said to be related to Betelgeux by virtue of section 2(1)(b), read with 2(2)(a) and (d), of the Act. The claim that Sahair, Aadil and Betelgeux are related is seemingly uncontested and therefore is treated as common cause for purposes of this report.

(2) Considering the conclusions in 3.2(1) above, I am satisfied that (i) Sahair, Aadil and Ebrahim are related, (ii) Sahair, Aadil and Betelgeux are related, and (iii) Ebrahim and Betelgeux are inter-related.

3.3 **(Issue 3) Assuming that 2.2(1) and 2.2(2) above are established in the affirmative, can it then be said that the parties referred to in 2.2(1) and 2.2(2) above are collectively inter-related in terms of the Act by virtue of the common relationships vis a vis ELCR and GLTC**

(1) The facts surrounding the common relationships in ELCR and GLTC have already been touched on in 1.12 to 1.28 above. Therefore, there is little value in regurgitating these here, save to highlight what I considered to be the

[29] See footnote 26 above

[30] Adamjee Group Enterprise (Pty) Ltd (**AGE**)

material aspects of the submissions of THL, Hamish and Betelgeux in their sworn statements in response to "ZN19".

THL'S SUBMISSIONS

(2) The material aspects of THL's submissions in the context of "ZN19" and whether the parties above ought to be considered to act in concert appear from paragraph 7 onwards of THL's company secretary's sworn statement in "ZN21", which *inter alia* states:

At para 8:

"It is thus understandable that the organogram and notes of the Inspector on which the parties have been asked to comment does not refer to any such agreement but instead seeks to conclude that the presumption in section 117(2) of the Companies Act has been triggered…"

At para 9:

"It bears emphasis that in order for this presumption to be triggered, it must be established that either Ebrahim or Betelgeux are either related or inter-related to Magister which is the party that has concluded the affected transaction."

At para 10.3:

"It is common cause that… neither Ebrahim nor Betelgeux are related to Magister in the manner contemplated in the definition of "related" which provides…"

At para 11:

"Accordingly, the aspect of the presumption that pertains to related parties (referred to in paragraph 8 above) does not apply."

At para 12:

"The next question is whether that part of the presumption pertaining to inter-related parties finds application as is the prima facie view of the Inspector."

At para 14:

"In paragraph 6 of the "notes on slide 2", it is noted that Simon Rudland ("Simon") and Ebrahim are the only directors of two companies: ELCR (which is dormant) and GLTC."

At para 15:

"Contrary to a repeated misconception on the part of the applicants, co-directors, even if they are the only two directors of a company, are not "related" for purposes of the relevant definition nor are they "inter-related." They are no more than co-directors."

At para 16:

"Simon or Ebrahim can only be said to control ELCR or GLTC if they fall into one of the categories set out in section 2(2)(a) or (d) of the Companies Act. Whether this is so is a question of fact and no conclusion can be drawn in the absence of evidence that either of Simon or Ebrahim –

16.1 are able to control the exercise the majority of voting rights of ELCR or GLTC;

16.2 have the right to determine the majority of votes at directors' meetings; or

16.3 are able to materially influence the policy of ELCR or GLTC in a manner comparable to a person enjoying either of the rights set out in paragraphs 16.1 and 16.2 above."

At para 17:

"According to the Inspector's note 6 at paragraph 6 it is "safe to assume" that both Simon and Ebrahim have joint control of ELCR or GLTC. This assumption is, we respectfully submit, patently incorrect. There is no evidence in any of the submissions and documentary material that has been placed before the Inspector to warrant such a conclusion, which we repeat relates to questions of fact."

At para 18:

"18 In addition, that conclusion is not sustainable as a matter of law. In this regard -

18.1 there is no room in the Companies Act, having regard to the applicable definitions, to regard "joint control" as a relevant species of control for purposes of the enquiry. The definition of "related" in relation to a company clearly entails sole control vesting in a person (or persons who together exercise sole control);

18.2 even if Ebrahim or Betelgeux (on the one hand) and Simon (on the other) are both related to ELCR or GLTC, this does not render Ebrahim or Betelgeux inter-related to Simon;

18.3 this is because the definition of "inter-related" contemplates a situation where, by virtue of a linked series of relationships, -

18.3.1 A (in this case Hamish) is related to B (in this case Simon); and

18.3.2 A (Hamish) or B (Simon) is related to C (in this case Hamish to Magister), so that it can be said that B (Simon), by virtue of his relatedness to A (Hamish), is inter related to C (Magister);

18.4 the fact that two or more persons (Simon or Ebrahim) are each related to a third (ELCR or GLTC) does not per se make them inter-related to one another."

At para 19:

"In the circumstances, there is no factual or legal basis to conclude that Simon and Ebrahim are "inter-related" by virtue of their relationships with ELCR or GLTC."

(3) I will now attempt to deal with each of the arguments made in the quoted portions of "ZN21" in the paragraphs below.

(4) **Ad para 8**

It is common cause that the basis for the complaint is simply the alleged relationships between the parties referred to in 1.2 above and the statutory presumptions that apply to those relationships pursuant to, inter alia, sections 2(3) and 117(2) of the Act. The common cause facts of this matter also speak to those relationships. Therefore, it makes sense in that context to limit the thrust of my investigation to determining whether factually there is evidence that points to the existence of such relationships and apply the legislative

principles thereto to our jurisdiction, including in the context of the consequential presumptions if those relationships are prima facie established.

(5) **Ad para 9**

See in this regard to my analysis of the relevant facts in 1.17 to 1.28 above.

(6) **Ad paras 10.3 and 11**

It is true that neither of Ebrahim nor Betelgeux are related to Magister. However, when one has regard to my analysis of the relevant facts in 1.17 to 1.28 above, it is clear that the only basis my prima facie findings was that it should be common cause that these parties are inter-related when regard is had to the proper interpretation of that definition in the Act.

(7) **Ad paras 12 to 14**

These paragraphs restate the facts accurately in that it is an undisputed fact that both of ELCR and GLTC are companies whose only directors are Simon and Ebrahim as already addressed in my analysis in 1.17 to 1.28 above.

(8) **Ad para 15**

(a) The bald assertion that co-directors, in a company with only two directors, are not inter-related patently wrong.

(b) This assertion appears to be based on the misreading of section 2(2)(d) and the genesis of the introduction of that provision into South African company law from South African competition law. As the authors of Henochberg[31] make this point patently clear, this section of the Act is

[31] Henochsberg on the Companies Act, 71 of 2008 at page 30(4)

identical to section 12(2)(g) of the Competition Act, 1998 (Competition Act). Therefore, one must have regard to competition authorities as to how does one approach the issue of control in the context of these two sections. There is a number of competition law precedents[32] in this regard. It is trite that competition law recognises various forms of control, from joint to sole control and from positive to negative control, as well as de facto and de jure control. To state the most common examples.

(c) Therefore, the idea that co-directors, in a company with only two directors, cannot be regarded as inter-related could only be arrived at when one completely disregards the principles that generally apply to section 2(2)(d) of the Act, having regard to how competition authorities have dealt with cases dealing with section 12(2) of the Competition Act.

(d) As already articulated in 1.22 to 1.24 above, the objective facts clearly point to both ELCR and GLTC being jointly controlled by Simon and Ebrahim – both of who fit the scenario set out in para 15 of "ZN21" – and it is clear to me that such a scenario would more often than not result in both of the co-directors in fact being deemed to control the company concerned by virtue of section 2(2)(d), thereby each of them

[32] See the Competition Tribunal decisions in Naspers Ltd/Electronic Media Networks Ltd and Supersport International Holdings Ltd - 23/LM/Feb07; Media 24 Ltd and Paarl Coldset (Pty) Ltd/Natal Witness Printing and Publishing Company – 15/LM/Jun11; and Life Healthcare Group (Pty) Ltd/Joint Medical Holdings Ltd – 74/LM/Sep11. See also Viresh Ranchod, "Joint to Sole Control – as you were or as you will be?"

being deemed to be related to the company concerned and consequently inter-related as against each other.

(9) **Ad paras 16 to 17**

My analysis in 3.3(8) above apply equally to these paras 16 and 17 of "ZN21".

(10) **Ad para 18**

(a) For reasons already advanced in my analysis in 3.3(8) above, the proposition advanced in 18.1 of "ZN21" is just unsupported in law.

(b) The argument advanced in the rest of para 18 of "ZN21" is essentially based on the question of the correct interpretation of the definition of "inter-related" in the Act as set out in section 1 of the Act.

(c) Curiously, the approach advanced by THL in "ZN21" makes no attempt to even engage with the most common authority for the proposition advanced by the complainants in "ZN2" and I in "ZN19", i.e. Richard Jooste's[33] commentary who provides the following example of inter-related relationships:

"So, for example, if Company X is related to Company Y and Company Y is related to Mr A and Mr A is related to Mr B and Mr B is related to Trust C and Trust C is related to Close Corporation D, then Company X, Company Y, Mr A, Mr B, Trust C and Close Corporation D are interrelated persons."

[33] See 1.17(4) above in this regard.

(d) To be clear, if one has regard to the commentary of Richard Jooste, then there is no doubt that Magister, Ebrahim and Betelgeux are inter-related by virtue of the links created by Simon and Ebrahim, through their joint control of ELCR and GLTC.

(e) In fact, having regard to the mischief contemplated regulation 86(5), read with sections 117(2) and 2(3) of the Act, it seems clearly to me that public policy considerations by necessity dictate that the more generous interpretation to the definition of "inter-related" in the Act – as suggested by Richard Jooste – should be favoured over the overly narrow one proposed by THL in this matter.

(f) This is more so, having regard to the fact that the effect of both these sections, i.e. sections 117(2) and 2(3) of the Act, is to create a rebuttable presumption that the parties concerned are inter-related, which then simply shifts the burden of proving independence to the alleged to be inter-related or acting in concert.

(g) To adopt the interpretation preferred by THL would be to allow parties who are clearly in business collaboration, through common related relationship to avoid the responsibility to explain those relationships (if they deny that they act in concert) by providing satisfactory evidence to the contrary. It is worth noting in this investigation that, when Ebrahim and Simon were given an opportunity to provide satisfactory evidence that demonstrates that Simon has no control of either of ELCR or GLTC they chose to stonewall instead of candidness.

(h) When considering the facts of this matter, I was reminded of a zulu idiom of *"ukucasha ngesithupha"* – literally meaning hiding behind one's thumb - which describes a situation where a person clumsily obfuscates in an attempt to shirk responsibility. This idiom aptly describes the situation one is dealing with in this matter. Magister, Hamish and Simon have jumped from pillar to post trying to explain why the claims against them insofar as their relationships with the Adamjees and Betelgeux are concerned other ought not to exist or should be ignored entirely unless establish (as it were) beyond a reasonable doubt. For instance:

(i) Initially they attempted to create doubt as to whether Simon and Hamish, despite being brothers, ought to even be regarded as related;

(ii) When that failed, they then moved to question whether Simon and both ELCR and GLTC should be regarded as related; and

(iii) After that move on to question, whether even if Simon and Ebrahim were said to be related to each of ELCR and GLTC, such relationships would not render Simon and Ebrahim (let alone, Simon and Betelgeux) as inter-related.

(i) Yet, not a shred of evidence has been provided that could satisfactorily explain why the statutory presumption ought not apply to them. As I had already mentioned earlier, I find the interpretational approach by Richard Jooste persuasive and to my mind preferrable to that proposed by THL in "ZN21". Interestingly, no authorities are cited for THL's proposition. Whilst I do not suggest that Richard Jooste's commentary

in this regard is precedence but, having regard to the mischief sought to be prevented in regulation 86(5) as well as in other similar instances, including section 123 of the Act, such approach seems to be aligned with the objects of section 119(1) of the Act.

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(11) The statement under oath from Ebrahim (as confirmed by Simon and Betelgeux, in their own statements) is fascinating in that it contains a lot of averments which, for the most part, are unsubstantiated. In this regard, I deal with these averments below.

(12) Briefly, it is worth noting that the preliminary findings in "ZN19" did not conclude that Simon and Ebrahim were related parties are section 2(1) of the Act. Instead, the conclusion was that both Simon and Ebrahim were individually related to each of ELCR and GLTC by virtue of their joint control of these companies in terms of section 2(2)(d). Therefore, Simon and Ebrahim are inter-related by virtue of their common relatedness to each of ELCR and GLTC. This is apparent when one has regard to the presentation attached to "ZN19".

(13) Having regard to paragraph 6 of "ZN12" (Ebrahim's statement), there is an apparent misconception about the operation of the legal presumptions in the Act and the Takeover Regulations concerning parties deemed to be related or inter-related. These presumptions operate by law if certain criteria are met, thereby creating a prima facie case of relatedness or inter-relatedness that can be rebutted provided that "satisfactory evidence" is adduced.

(14) The fact that a party does not control, conduct business with or hold any shares in another party alleged to be inter-related to them has very little to do with

whether the presumption in law is correct or not. The existence of objective facts that ought to rebut the presumption does not mean that the presumption is incorrectly applied to a particular case. Clearly the legislature contemplated a scenario where the alleged related or inter-related parties could avoid the statutory presumptions by seeking an exemption in terms of section 2(3) of the Act. If a party is successful in discharging the onus in section 2(3) then the presumption in s117(2) automatically falls away and consequently regulation 86(5) (in the context of the current matter) would also not find application.

(15) Therefore, when one is looking at this matter sequentially, I am of the view that the following must be done:

(a) Determine whether the claim that 3 or more parties are inter-related in terms of the Act, having reference to the meaning of that term (i.e. taking into account an unbroken series of relationships between the parties alleged to be inter-related);

(b) Once the presumption of inter-relatedness between the parties referred to in 3.3(15)(a) is established, then the question is whether that presumption can be rebutted by the parties deemed to be inter-related.

(16) Going back to the facts of this matter, I remain of the firm view that:

(a) It is common cause that:

(i) Magister is related to Hamish, and Hamish is related to Simon;

(ii) Betelgeux is related to Sahair and Aadil (through AGE), and Sahair and Aadil are related to Ebrahim;

(iii) Ebrahim and Simon are the only directors of ELCR and GLTC. Therefore, having regard to section 66(1) of the Act they should each be regarded (at face value) as having material influence over the affairs of these companies such that they should be regarded as being related to them by virtue of section 2(2)(d) of the Act.

(b) Having regard to the common cause facts in 3.3(16)(a) above, it seems reasonable to conclude that:

(i) Magister is related to Hamish;

(ii) Hamish is related to Simon;

(iii) Simon is related to ELCR and GLTC;

(iv) ELCR and GLTC are related to Ebrahim;

(v) Ebrahim is related to Sahiar and Aadil;

(vi) Sahair and Aadil are related to AGE and Betelgeux,

(c) and by virtue of this unbroken series of relationships (in the context of the definition of "inter-related" parties in the Act, and as elaborated in Jooste's commentary referred to above), it is clear that the parties referred to in this 3.3(16)(b) are inter-related. Having regard to the conclusion in 3.3(16)(b) above then the prima facie view expressed in "ZN19" seems reasonable considering the statutory presumptions in the Act. This then places an onus on those parties to rebut those

presumptions in order to avoid the legal consequences of these presumptions, including under regulation 86(5) of the Takeover Regulations.

(d) No evidence has been put forward in the rebuttal of the preliminary prima facie conclusions set out in "ZN19", save to question the legal basis for concluding that the parties are inter-related. Section 2(3) clearly sets out the process for rebutting the statutory presumptions on related or inter-related parties. There is no denying that this process has not occurred which means that these presumptions remain in place.

(e) Having established inter-relatedness between the parties referred to 3.3(16)(b) above, then the presumption of acting in concert in section 117(2) of the Act applies by operation of the law, which then places a onus on those parties to then adduce "satisfactory evidence" of having acted independently in a particular matter.

(f) In this case, most of the evidence adduced has focused on whether these parties ought to be treated as inter-related parties. Other than bald denials of acting in concert (by reference to there being no evidence of any agreement between them to act in concert) there has been nothing resembling objective evidence adduced by these parties in order to discharge the onus of providing "satisfactory evidence" of having acted independently in this matter.

(g) Therefore, I remain of the firm opinion that the onus for rebutting the statutory presumptions in section 117(2) have not been discharged.

Consequently, the presumption is left unchallenged and must then be treated as parties acting in concert and the intendent consequences of such conclusion in the Act.

3.4 **(Issue 4) Lastly, assuming that the question in 2.2(3) above is answered in the affirmative, can it then be said that Ebrahim and Betelgeux are concert parties Magister such that regulation 86(5) finds application in this matter so that the waiver granted by the independent holders of THL on 18 January 2022 (Waiver) is rendered a nullity**

(1) Having concluded that the parties referred to 3.3(16)(b) above are acting in concert, then one simply applies that conclusion to regulation 86(5) of the Takeover Regulations as follows:

(a) It is common cause that in the period between the announcement of the Waiver transaction and the date of the Waiver being granted by the independent holders of THL:

(i) Ebrahim and Betelgeux acquired securities in THL;

(ii) Ebrahim and Betelgeux submitted proxy forms (as shareholders of THL);

(iii) The Waiver could only be granted by more than 50% of the independent holders of THL securities;

(iv) Upon receipt of proxy forms from Ebrahim and Betelgeux, THL staff raised concerns about their purported independence from

Magister such that they could vote in respect of the granting of the Waiver in this matter; and

(v) Pursuant to these enquiries from THL, Ebrahim and Betelgeux withdrew their proxies in respect of the vote by THL's independent holders and did not participate in the meeting to grant the Waiver[34].

(b) Having established that concert parties made acquisitions during the period contemplated in regulation 86(5) of the Takeover Regulations, it follows therefore that this regulation finds application in this matter rendering the Waiver a nullity.

(c) Whilst this determination places the underwriting promised by Magister to THL in a potentially precarious position, the reality is that the Panel

[34] Curiously, not explanations have been offered by either of these parties as to why they chose to withdraw their proxies based on the concerns raised by THL's staff, who presumably were just taking precautions to ensure that only independent shareholders voted for the Waiver. Obviously, no one is suggesting that these parties had acquired these shares illegally and did not enjoy the full universe of rights associated with their ownership of such shares. However, it is strange that a genuinely independent party who had already expressed a desire to participate in a vote by the company in which they hold shares would change their intention based on incorrect concerns on the part of the company about their independence in relation to such vote without challenge. A reasonable response in this regard would be to simply dismiss these concerns as baseless and maintain their original stance. Nothing has been put forward in this matter as to what caused a change of heart by either of Ebrahim or Betelgeux. In fact, it appears (when one has regard to the behaviour of Ebrahim, who did not even liaise directly with THL staff in this regard) that the suggestion that they were not independent of Magister went unchallenged implying at face value an acknowledgement of such fact.

cannot avoid making such determination based on commercial considerations[35].

(2) Having reached the conclusion in 3.3(16) above, my recommendation is that the Waiver be declared a nullity as contemplated in regulation 86(5) of the Takeover Regulations. Consequently, the exemption granted by the Panel to THL on behalf of Magister in this matter be withdrawn in terms of regulation 118(5) of the Takeover Regulations.

4 Please consider the conclusions above and, should you agree with them, advise the parties.

Kind regards

Mr Zano Nduli

Deputy Executive Director

[35] See section 119(1) of the Act.