IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 12335/08

In the matter between:

GOLD REEF RESORTS LIMITED	Applicant
and	
NANO MATLALA	1st Respondent
SECURITIES REGULATION PANEL	2nd Respondent
TSOGO SUN HOLDINGS LIMITED	3rd Respondent

J U D G M E N T

BLIEDEN, J:

[1] This is an application brought by Gold Reef Resorts Ltd (GRR) for the review and correction or setting aside of the decision of the Securities Regulation Panel (SRP) of 1 February 2008 in which it found that GRR was in breach of rules 13, 16, 19 and 20 of the Securities Regulation Code on takeovers and mergers and ordered it to pay the costs of the SRP.

[2] The chairman of the SRP at the time is the first respondent and he is cited in his official capacity, while the SRP is the second respondent. The third respondent is Tsogo Sun Holdings Ltd (Tsogo).

[3] Tsogo has not sought to oppose the relief claimed by GRR. It has filed no papers in this application and no relief is claimed from it.

The SRP and the Code and Rules applied by it:

[4] The SRP was established and continues to operate under the provisions of section 440 A to 440 N of the Companies Act, No. 61 of 1973 (as amended) (The Act). The panel has published the Code on takeovers and mergers together with the Rules which regulate such takeovers and mergers.

[5] Section 440 A of the Act is concerned with "*affected transactions*". These have been defined in the section as follows:

"affected transactions" means any transaction (including a transaction which forms part of a series of transactions) or scheme, whatever form it may take, which –

(a) taking into account any securities held before such transaction or scheme, has or will have the effect of –

(i) vesting control of any company (excluding a close corporation) in any person, or two or more persons acting in concert, in whom control did not vest prior to such transaction or scheme; or

(ii) any person, or two or more persons acting in concert, acquiring, or becoming the sole holder or holders of, all the securities, or all the securities of a particular class, of any company (excluding a close corporation); or

(b) involves the acquisition by any person, or two or more persons acting in concert, in whom control of any company (excluding a close corporation) vests on or after the date of commencement of section 1 (c) of the Companies Second Amendment Act, 1990, of further securities of that company in excess of the limits prescribed in the rules; or

(c) *is a disposal as contemplated in section 228".*

[6] The Code and Rules have been created with the purpose that they *"….will operate principally to ensure fair equal treatment of all holders of relevant securities in relation to affected transactions"*. The Code also provides an orderly framework within which affected transactions are to be conducted (Section 1 of the Code).

[7] With special reference to the present matter and in greater detail the Code's objectives include:

1. Offers for the acquisition of shares should be made across the board to all shareholders and there should not be favourable conditions attached to that offer to only one or some and not to all the shareholders. (Rule 13)
2. Information about companies involved in an offer is to be equally available to all shareholders as nearly as possible at the same time and in the same manner. (Rule 16)
3. The board of an offeree company must not, in the absence of approval by shareholders in general meeting, take any of certain listed steps that might frustrate the offer. (Rule 19)
4. The documents issued to shareholders should satisfy the highest standards of accuracy and the information contained therein should be adequately and fairly presented. (Rule 20)

[8] In summary the rules provide that the obligations of the board of the offeree company arise under the rules from the time an approach is made to it. The approach may be taken to occur either when the offer is made and put

forward to the board of the offeree company or to its authorised advisers or when there is the communication of a firm intention to make an offer or when it may be said that such an offer is imminent. Although some steps may, in certain circumstances, occur even before this, it is specifically provided that where an approach is made to a board, the board is entitled to be satisfied on reasonable grounds that the offeror is, or will be, in a position to implement the offer. The board is required to act with complete transparency in its relationship with all shareholders.

[9] The members of the panel are persons appointed *"in the main from various bodies listed in clause 2 of the Code"*. These bodies include organisations such as the Johannesburg Stock Exchange, the South African Chamber of Business, the Merchant Bankers Association, the Association of Law Societies of South Africa and other similar bodies. In the present case the panel was made up of five persons, all but one of whom were persons who had experience in different commercial activities. The one exception was a senior counsel at the Johannesburg Bar.

The background to the present application:

[10] On 13 November 2007 this Court sanctioned the scheme of arrangement proposed by Fluxrab Investments No. 159 (Pty) Ltd between GRR and the holders of its ordinary shares as more fully set out in its circular dated 5 October 2007 which had been approved by the SRP as required by the Act.

[11] With reference to the above scheme of arrangement on 20 January 2008 the SRP published a notice in which it announced that it had received an objection *"…relating to certain terms of a scheme settlement consideration paid to Gold Reef's non executive chairman, M Krok"*. It invited written submissions in regard to the complaint by a specified date and any response to such submissions three days later, and scheduled a hearing on Thursday 31 January 2008.

[12] Written submissions were received from Tsogo and they were duly responded to by GRR. The hearing took place on 31 January 2008. Both Tsogo and GRR were represented by senior and junior counsel. The written submissions, documents produced by the parties and the arguments of counsel on behalf of their respective clients resulted in the ruling and the subsequent reasons therefore which is the subject matter of the present application.

[13] In order to place this application into perspective it is necessary to describe and deal in some detail with the three parties who constitute the parties involved in the hearing before the SRP. They are GRR, who is the present applicant, Bidco, the entity who was the successful bidder of the GRR shares, and Tsogo. Each of these entities will be dealt with separately.

Gold Reef Resorts Ltd (GRR):

[14] It is a public listed company carrying on the business of a casino operator. During 2007 it wished to dispose of its business to interested purchasers.

[15] At the material time the shares in GRR were heavily concentrated in the hands of three entities – the Krok family entities, representing 25,9% of the share capital; the BEE shareholders, being members of a consortium holding shares representing 24,9% of the share capital; Casinos Austria, a foreign investor, holding shares representing 21, 7% of the share capital.

[16] The non executive chairman of GRR was Maxim Krok, he was also one of the trustees of the trusts held for the Krok family entities.

[17] The board of GRR consisted of four executive and eight non executive directors. The Chief Executive Officer of GRR was Steven Joffe (Joffe).

[18] During 2007 Merrill Lynch was appointed by GRR's board to conduct a process in which it would approach various potential buyers of the applicant's shares to enquire from them whether they were interested in acquiring GRR and thereafter to consider any such enquiries or offers and to advise GRR's board in regard thereto. The fees of Merrill Lynch were calculated by reference to the price to be offered: the higher the price, the larger the fee.

Bidco:

[19] This was the name given to Fluxrab Investments No 159 (Pty) Ltd, also known as the “Ethos Consortium”.

[20] Bidco sought to propose a scheme of arrangement between GRR and its shareholders in order to enable it to obtain effective ownership and control of the underlying business and assets of GRR through the acquisition of scheme shares.

[21] Bidco was to offer R34 per Gold Reef share subject to an incremental increase during a specified period.

[22] Certain executives of GRR would acquire an interest in Bidco. These included Joffe. These executives had reached an agreement with Bidco in terms of which they undertook directly or indirectly to subscribe for and hold shares in the issued share capital of Holdco, the holding company of Bidco.

[23] Bidco submitted its offer to the GRR board for the GRR shareholders, through Merrill Lynch, pursuant to the process initiated by GRR.

[24] The Bidco offer was discussed and considered at GRR’s board meeting held on 10 August 2007.

[25] GRR's board resolved to recommend to shareholders the acceptance of the Bidco offer.

[26] It was a condition of the Bidco offer that the scheme was subject to fulfilment by Thursday 31 January 2008, although this cut off date could be extended by agreement between GRR and Bidco.

[27] The Bidco offer was communicated to the shareholders pursuant to the scheme of arrangement sanctioned by the court, but the conditions precedent were not fulfilled in time and the scheme has lapsed.

Tsogo:

[28] It was and is a competitor of GRR. It had on a number of occasions made offers to purchase GRR's business. Some of these offers had resulted in GRR using Tsogo's bids as a means to evoke interest in other parties for the purchase of GRR's business. It was for this reason that it had decided not to initially deal with the GRR board or Merrill Lynch, but to instead approach the representatives of the three controlling shareholders who have already been referred to.

[29] On 8 August 2007 Merrill Lynch wrote a letter to Tsogo, in which it stated:

> *"Potential Sale of Gold Reef Resorts Limited ("GRR" or the "Company")*
>
> *We understand that the Tsogo Sun Group ("Tsogo") has been in discussion with certain key shareholders of GRR in respect of a*

potential offer to acquire a stake in the Company. You are also aware that the Board of GRR has been running a process whereby it has separately solicited offers for the Company. In terms of this process the board is expecting to receive a final fully funded bid by no later than 12 noon on Friday 10 August 2007. The bid submitted will incorporate the necessary details to enable the board to assess whether it wishes to pursue the bid. It will also include a timetable and conditions precedent to both announcement and closing.

In order to afford to Tsogo the opportunity to get equal and fair consideration, we kindly request that you to submit your offer by no later than 12 noon on Friday 10 August 2007. Your offer may either be submitted to one of the key shareholder(s) or hand delivered in a sealed envelope to the offices of Merrill Lynch South Africa located at 138 West Street, Sandown and marked for the attention of Philip R Noblet. Your bid should inter alia contain a timetable and conditions to announcement and closing.

The board will meet at around 13h00 on the same day to consider offers received and determine a way forward".

[30] On 9 August 2007 a meeting took place between Tsogo and the controlling shareholders. M Krok represented the Krok interests. At that meeting a "*deal*" was proposed to the shareholders as follows:

1. Tsogo would offer a purchase price of R34.50 per GRR share.
2. Various conditions relating to regulatory approvals and certain "*competition issues*" were proposed.
3. <u>The suggested offer would not be made to the board unless there was an irrevocable commitment from the controlling shareholders to support the Tsogo offer. This was a prerequisite to any offer made by Tsogo to the GRR board. (My underlining)</u>
4. It also disclosed to the shareholders two funding letters from two recognised merchant banks indicating that it was in a financial position to fulfil its proposed offer.

5. At the meeting concerned, Tsogo provided Krok, in his capacity as chairman of GRR, with a letter (dated 10 August 2007), for delivery to the board the next day, to coincide with the GRR meeting scheduled for the following day to decide on all offers for its shares. This letter reads as follows:

   " *The Chairman*

   Potential sale of Gold Reef Resorts Limited

   We advise that we are in discussions with the major shareholders of Gold Reef Resorts which if successfully concluded to our satisfaction may result in an offer being presented to the board.".

The Merrill Lynch letter of 8 August 2007 was not responded to save for the above letter.

The GRR board meeting of 10 August 2007 and its consequences:

[31] On 10 August 2007 the GRR board met to consider the offers. It had only one offer before it, namely that of Bidco which offered R34.00 a share. It was made aware by representatives of the three majority shareholders of the Tsogo proposed offer in the amount of R34.50 a share. The letter from Tsogo referred to in the previous paragraph was handed in. The representatives of the three shareholders who were at the meeting, after having considered the Tsogo proposal decided that they were not prepared to give the irrevocable undertaking required by Tsogo as they had doubts about the Competition board's attitude to a takeover by Tsogo and the consequent delays which this could cause. This was made plain to the other members of the board.

[32] After having reconsidered the Bidco offer, which was the only offer on the table, the board resolved to recommend to shareholders that it be accepted.

[33] At the same meeting, at the instance of Joffe, the board further resolved to pay M Krok the sum of R12 000 000.00 in appreciation for his contribution to GRR over the years and also because of the part he had played in achieving the offer which had now been accepted.

[34] Because of the attitude adopted by the three majority shareholders, Krok that same afternoon, on their behalf, telephoned the chief executive officer of Tsogo, Mr Mabuso, and informed him that if Tsogo was prepared to increase its offer by 10 to 15 percent the three shareholders would provide the irrevocable undertaking requested. This was not acceptable to Tsogo and was rejected.

Tsogo's complaint to the SRP:

[35] It questioned the "*real*" purpose and nature of the payment of R12 000 000.00 to Krok as recorded in GRR's minutes of the board meeting already referred to. It sought to answer its question by saying that there had been two offers for the shares of GRR, one by it and one by Bidco. It had offered to purchase the shares at R34.50 a share while Bidco had offered R34.00 a share. It claimed that this payment to Krok was made by GRR to get the board to prefer the Bidco offer above that of the Tsogo offer although it was

less than the Tsogo offer by compensating him and the Krok entities for their loss in accepting the lower offer. This payment, consequently, it was claimed was in breach of SRP Rule 13. It also sought to prove that if one accepted certain tax obligations the R12, 000, 000 paid to Krok closely represented the difference to the Krok entities between the two offers.

[36] Tsogo further complained that its offer, which it categorised as the higher offer, was intentionally withheld from GRR shareholders in the circular published by GRR in terms of section 440 of the Act, and this was in breach of SRP Rules 16, 19 and 20. As is plain from what is stated above, the basis of the Tsogo complaint is that it had made a competing offer for GRR. This was made clear in paragraph 49 of the Tsogo submission:

> ""*…. We submit that it is simply disingenuous for [Gold Reef] now to contend that Tsogo's offer did not exist as it was not a "firm intention to make an offer"… This issue, we submit, is important because it is the very knowledge by the [Gold Reef] board of the Tsogo offer, which led to the decision by the board to succumb to Krok's demands and to pay him a separate bonus in a carefully calculated amount, so that it would equate to his higher consideration under the Tsogo offer. It is also important because, on its own, the failure by the "[Gold Reef] board to disclose the Tsogo offer and its details to the [Gold Reef] shareholders, constitutes a material breach of the code and the rules which on its own warrants the impugning of the transaction."*

[37] The significance of the underlying premise was similarly emphasised in paragraph 2.2 of the Tsogo submission:

> *" The additional consideration paid to Krok, became necessary because of a contemporaneous higher offer Tsogo had made for the [Gold Reef] shares. That higher offer, which led directly to the additional consideration, on its own, constitutes material and relevant information, which was intentionally withheld from [Gold Reef] shareholders (and indeed from the panel itself)."*

GRR's response to Tsogo's complaint:

[38] This response made at the hearing before the SRP can be summarised as follows:

1. Tsogo had made no offer to GRR's board for its shareholders; whether it might do so Tsogo had told the board depended on whether the controlling shareholders would provide an irrevocable undertaking to support the proposals Tsogo had made to them. Without such undertaking no offer would be made. It was emphasised that this was a precondition to any offer being made.
2. At the board meeting those representing the three shareholders concerned had told the board that they were not prepared to give the irrevocable undertaking required by Tsogo to support the Tsogo proposal. In the circumstances there was no offer or possibility of an offer from Tsogo before the board.
3. There was no need *" to entice "* Krok from Tsogo's offer. This was because there was never an offer in the sense referred to in the Code.
4. It was further pointed out that even if there had been an attempt to make the offer, and there was this "*enticement*" of Krok this would not be effective as all three shareholders and not only the Krok entity would have to be "*enticed*" to accept the bid of Bidco in place of that of Tsogo. There were no suggestion that anything of the sort had occurred.

5. It was further stated that the origin of the board decision regarding the payment to Krok came from the informal suggestions on the part of Joffe and some of the members of management, who were aware of Krok's contribution to GRR, including his role in securing the expected Bidco offer at R34.00 a share and who thought that it was appropriate that such contribution should be acknowledged.
6. It was further explained that the alleged correlation of the after tax amount payable to Krok was incorrect and reasons were furnished for this.

The SRP findings and the reasons therefore:

[39] Although the panel made its finding the day after the hearing, that is on 1 February 2008, it gave its "*full reasons*" on 14 April 2008. It is the latter document which it the subject matter of the present review. It should be mentioned that an answering affidavit to this application brought by GRR was filed on behalf of the SRP in which these "*reasons*" were elaborated upon. In my view what was stated in the answering affidavit takes the matter no further even if it was admissible for the SRP to file any additional reasons, which I seriously doubt.

[40] In its reasons the SRP found that it was not disputed that:

"7. *Tsogo Sun submitted a funded offer of R34.50 per share to Krok on 9 August 2007 at a meeting held in Sandton, which offer was subject to certain conditions".*

> *"8. The offer of Tsogo Sun was rejected on 10 August 2007 by the board of Gold Reef on the advice of its financial adviser and sponsor, Merill Lynch"*

and further found as an issue between the parties

> "5. *whether Tsogo Sun had submitted a funded offer, although conditional, to Gold Reef or to the Board of Gold Reef and the failure by Gold Reef to make this disclosure in the Cautionary Announcement and in the Circular constituted a breach of Rules 16.1, 20.1 or 20.2".*

[41] As is plain from its finding the SRP held that Tsogo had made a rival offer. Both parties to the present application correctly agreed that without such a finding the SRP would have not been entitled to make the order which it did.

<u>The SRP's justification for the order made by it:</u>

[42] These are contained in the reasons to which reference has already been made, as well as to the arguments submitted on behalf of the SRP by its counsel in the present proceedings. They can be summarised as follows:

1. In terms of the definitions of the provisions of the Code "*offer includes an offer in respect of an affected transaction, however effected*."

2. This is a most extensive definition, including even an oral offer such as was made to the major shareholders and conveyed to the board.
3. It is not the existence of an offer in the legal sense that triggers the duties in the code. This emerges from a number of the provisions in the Code; *inter alia* a general principle which requires equality of information to all shareholders and speaks of “during the course of an offer, or where an offer is in contemplation”.
4. General principle 3 of the Code refers not only to the announcement of an offer but also of the intention to make an offer.
5. General principle 7 triggers the duties in the Code “ *after a bona fide offer has been communicated to the board of the offerree company*” and imposes duties when an offer of that nature “*might be imminent*”, demonstrating that the applicability of the Code is to affected transactions which arise even before any offer might be made. Rule 1 in turn refers not only to an offer but also to “*an approach with a view to an offer being made*”.
6. The Code further contemplates that the next step might be an announcement of a firm intention to make an offer which is also not an offer, and that announcement might, but need not, result in an offer.
7. It was further argued that it follows that Rule 13, for instance, which prohibits an offeror or persons acting in concert with it from proposing special deals, does not in its reference to an offeror mean only a person who has made an offer in the ordinary legal sense, since “*offer*” includes an offer in respect of an affected transaction, however it is effected, and casts duties on the offeror and the board even when an

offer is merely one in contemplation. The same principles apply to Rule 16, 19 and 20. In particular, it was argued, that at all material times leading up to, during and after the board meeting of 10 August 2007, Tsogo was a prospective offeror in respect of whom an offer was reasonably in contemplation and even imminent. The only reason why it had not made a formal offer at R34.50 was that the majority shareholders declined to support it. This does not mean that it should not have been made known to minority shareholders, to the SRP itself and to the Court.

8. The panel was entitled and obliged to regard Tsogo's approach as an offer in that sense, and one which was seriously made to the extent of obtaining agreements in principle from banks to provide R12.1 billion to fund the offer.
9. It must be borne in mind too, that it is the panel who is charged with the power and responsibility to interpret the Code (see the Code Section A introduction).
10. Finally in all the circumstances it cannot be said that there was no evidence upon which a reasonable person in the position of the panel could not find the breaches of the rules as set out in the reasons for making the ruling for which it did.

<u>An analysis of the SRP's reasons in the light of GRR's case:</u>

[43] The SRP's acceptance that the proposal made to the three shareholders constitutes an offer as defined by the Code, fails to take into

account that as a precondition for such offer was Tsogo's requirement that no offer could be placed before the board until irrevocable undertakings from the three shareholders supporting such offer had been received. The SRP's failure to separate the Tsogo proposals made to the majority shareholders and its refusal to make an offer to the GRR board constituted a misdirection on its part.

[44] Tsogo's attitude carries the inevitable consequence that if no such undertaking were given, as in fact occurred, and as was made clear by GRR in its unchallenged submissions, no offer would be put on the table or could be imminent.

[45] In essence therefore, at the insistence of Tsogo, there was no offer or even suggestion of an offer by it until there had been acceptance of the precondition referred to. If the board of GRR had given notice of the Tsogo approach to the majority shareholders to the minority shareholders, this would be misleading them, as unless and until the precondition had been met there was no prospect of an offer from Tsogo. The SRP did not take cognisance of the relevant considerations to this effect which were put before it by GRR and failed to find as an undisputed fact that the possibility of Tsogo making an offer was at all times dependant on the precondition it put forward being met. If this did not occur there was no chance of any offer being made.

[46] It is somewhat ironic that the party who had insisted that no offer would be put before the board without its precondition being met, is now the

complainant that minority shareholders were not informed of its conditional approach. The attitude of Tsogo was that it was not prepared to deal with the board or Merrill Lynch because it did not wish to have its offer publicised unless it knew that such offer would be successful. As is shown in paragraph 29 Tsogo was specifically invited to make an offer. It declined this invitation. Its complaint is therefore unjustified as a result of its previous attitude.

[47] Had the SRP appreciated the argument of GRR, it would have found that there was no offer by Tsogo as defined in the Code and there was therefore no merit in its complaint. In my view it misconceived GRR's contention by classifying it in the manner in which it did.

[48] The key to understanding the status of the Tsogo approach lies in the letter it sent to the board of GRR dated 10 August 2007 which is quoted at par 30 above. It made it plain that it was in discussions with shareholders which if successful "*may result in an offer being presented to the board*". The obvious implication is that if the discussions were unsuccessful no such offer would be forthcoming. In my view this cannot be construed as an offer as envisaged in the Code and rules of the SRP. By ignoring this letter, save for a passing reference, the SRP also ignored the argument of GRR and in so doing misconstrued the Tsogo "*offer*" when in fact it was a "*non offer*" to use the words of GRR's counsel at the hearing before it and repeated in argument before this court.

Is the SRP ruling reviewable?:

[49] On behalf of GRR it was submitted that there were four grounds on which the application for a review should be granted. It seems to me that it is not necessary to deal with two of the grounds relied upon, namely bias and a failure of procedural process, the first two grounds relied upon by the GRR are dispositive of the present application.

The first ground:

[50] It is GRR's case that the SRP erred in accepting as a fact that on 9 August 2007 Tsogo had made an offer to GRR and that such offer had been rejected by the board. It was submitted on behalf of GRR that this finding:

1. did not have regard to the facts;
2. miscategorised the facts that were in dispute as undisputed facts;
3. insofar as it might have identified the existence of any such fundamental dispute at issue ignored all of GRR contentions in regard thereto;
4. did not identify or recognise such a disputed issue and thereupon declined to address them.

The second ground:

[51] The SRP listed as common cause facts, matters which were essentially in dispute.

[52] Ignored other material matters of fact which were indeed common cause and uncontested by Tsogo.

[53] Generally ignored anything GRR had said in response to the complaint.

[54] These two grounds can be dealt with together under the general heading that the SRP failed to appreciate or have regard to GRR's case before it and as a result wrongly came to the conclusion that it did. As I have already made plain, I agree that the SRP was incorrect in coming to the conclusion which it did. However the matter does not end there, the next question is whether the order made by the SRP is reviewable rather than merely appealable.

Is the order of the SRP reviewable?:

[55] It was not in dispute between the parties that the decision of the SRP is one which is subject to the provisions of the Promotion of Administrative Justice Act, No. 3 of 2000 (PAJA). It was further not in dispute that section 6 (2) of PAJA is a code of administrative review which is applicable in the present case. The relevant section reads :

> " 6*(2) A court or a tribunal has the power to judicially review an administrative action if-*
> *(a) the administrator who took it-*
> *(i) was not authorised to do so by the empowering provision;*
> *(ii) acted under a delegation of power which was not authorised by the empowering provision;*
> *(iii) was biased or reasonably suspected of bias;*

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
(c) the action was procedurally unfair;
(d) the action was materially influenced by an error of law;
(e) the action was taken-
(i) for a reason not authorised by the empowering provision;
(ii) for an ulterior purpose or motive;
(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
(iv) because of the unauthorised or unwarranted dictates of another person or body;
(v) in bad faith; or
(vi) arbitrary or capriciously;
(f) the action itself-
(i) contravenes a law or is not authorised by the empowering provisions; or
(ii) is not rationally connected to-
(aa) the purpose for which it was taken;
(bb) the purpose of the empowering provision;
(cc) the information before the administrator; or
(dd) the reasons given for it by the administrator;
(g) the action concerned consists of a failure to take a decision;
(h) the exercise of power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function, or;
(i) the action is otherwise unconstitutional or unlawful".

[56] On behalf of GRR it was correctly submitted that each of the paragraphs and sub-paragraphs of section 6(2) of PAJA constitutes a discrete ground of review. Where administrative action falls within any of the categories described in these paragraphs and sub-paragraphs it falls to be reviewed and set aside in terms of the plain meaning of section 6(2). What is relevant in the present case are the following sub-sections of section 6(2) :

1. Where the decision maker bases its decision on mistaken facts or irrelevant considerations, the decision falls to be reviewed and set

aside in terms of section 6(2)(e)(iii). See **Minister of Health No v New Clicks SA (Pty) Ltd 2006 (2) SA 311 (CC)** at para 389 – 404 and 505 – 572 and **Chairpersons' Association v Minister of Arts and Culture and Others 2007 (5) SA 236 (SCA)** at para 47.

2. Where the decision is not rationally related to the information that served before the decision-maker or the reasons provided for it by the decision-maker, that decision falls to be reviewed and set aside in terms of 6(2)(f)(ii)(cc) or (dd) respectively. See **Barto Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC)** at para 24 – 25 and 48 and **Jicama 17 (Pty) Ltd v West Coast District Municipality 2006 (1) SA 116 (C)** at para 3 and 8-13; **Total Computers (Pty) Ltd v Muncipal Manager Potchefstroom Local Municipality and Others 2008 (4) SA 346 (T)** at para 22 and 55.

3. As has already been stated the SRP in its findings failed to take cognisance of the fact that :

    1. whatever offer had been made was made only to the three shareholders and not to GRR;
    2. the offer would only come into existence if and when the three majority shareholders furnished their irrevocable undertaking to support it. Until that occurred no offer of any nature was made or would be made by Tsogo;
    3. it was at Tsogo's specific instance that no offer was to be put forward to the board, and the fact that there were discussions at the board meeting of 10 August regarding the proposals made

by Tsogo and their rejection by those representing the major shareholders could not be construed as an offer.

[57] The fact that the SRP did not deal with any of these contentions leads to the necessary conclusion that its decision was based on mistaken facts or irrelevant considerations and was not one which any rational body would have arrived at had they paid cognisance to the submissions of GRR.

[58] In the circumstances the application for review succeeds and the order of the SRP must be set aside.

[59] As regards costs counsel for both sides addressed me and it was common cause that unless it can be found that the conduct of the SRP was in any way *mala fide* or its finding was as a result of perverse or malicious conduct costs should not be awarded against a body such as the SRP. I am in full agreement with those sentiments. I am unable to find any malicious or perverse conduct on the part of SRP.

[60] The following order is made:

1. The decision of the Securities Regulation Panel of 1 February 2008 is reviewed and set aside.
2. The order made by the Panel is set aside and it is substituted with the following order:

"The complaint is dismissed".

3. There is no order as to costs.

_____

P BLIEDEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANT:	Adv. Kuper (SC) Adv. Blou Adv. Chaskelson
INSTRUCTED BY:	Deneys Reitz Inc.
COUNSEL FOR THE RESPONDENT	Adv. Solomwitz (SC) Adv. Machaba
INSTRUCTED BY:	Kenaka Hlatshwayo Radebe Attorneys