competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: IDT079Jun18

In the matter between:

Murray & Roberts Holdings Limited	**Applicant**
and	
Aton Holdings GmbH	**First Respondent**
Aton Austria Holdings GmbH	**Second Respondent**
The Competition Commission	**Third Respondent**

Panel	:	E Daniels (Presiding Member) AW Wessels (Tribunal Member) M Mazwai (Tribunal Member)
Heard on	:	15 June 2018
Last Submission	:	16 June 2018
Decided on	:	18 June 2018
Reasons issued	:	6 July 2018

REASONS FOR DECISION

INTRODUCTION

[1] The Applicant instituted an urgent application on 15 June 2018 for an order in the following terms:

i. Enrolling this application as an urgent application and dispensing with the forms, time-periods and service provided for in the Rules for the Conduct of Proceedings in the competition Tribunal.

ii. Interdicting and restraining the first and second respondents or their agents from voting, or otherwise exercising any rights attached to, any shares in the ordinary issued share capital of the applicant in excess of the approximately 29.99% of the shares (translating to approximately 30.2% of the voting rights) in the applicant the first and second respondents acquired after close of business on 22 March 2018, pending final approval of the proposed acquisition of control by the South African competition authorities.

iii. Ordering the first and second respondents to pay the applicant's costs, on a joint and several basis.

iv. Granting further and /or alternative relief.

[2] At the hearing of the matter, the first and second respondents, Aton Holdings Gmbh and Aton Austria Holdings Gmbh respectively, made a preliminary application to have the Murray & Roberts Holdings Limited's interdict application dismissed on the grounds of a lack of urgency. That application was dismissed and the arguments were heard in full.

[3] The Applicant, Murray & Roberts Holdings Limited's urgent application was granted, subject to an undertaking given by the Respondents, on 18 June 2018.

[4] For the sake of convenience, the Applicant is hereafter referred to as M&R and the First and Second Respondents jointly as Aton. Although M&R cited the Competition Commission ("the Commission") as the Third Respondent, it sought no order against it.

BACKGROUND

[5] In 2015, Aton acquired 19 974 339 shares in M&R. In 2017, Aton acquired an additional 113 440 000 shares. The 2017 share acquisitions increased Aton's shareholding to 29.9% of the shares in M&R. It is not clear whether the 2017 share acquisitions was part of a strategy, at the time, on the part of Aton to eventually take over control of M&R. It's possible, had that been Aton's intention, that the 2017 acquisitions may have been notifiable. However, on 23 March 2018, Aton indicated in a letter to M&R that it intended to make a firm offer to M&R's shareholders for control of the company. On 26 March 2018 it announced

that it would make an offer to M&R shareholders to acquire all the shares (other than the shares it did not already own) in M&R at R15.00 per share.

[6] Whilst it is not necessary to go into detail, two further events are significant. The first is that on 23 March 2018 Aton acquired another 13 671 480 shares in M&R. Its shareholding then amounted to 33.1% of the shares in M&R. The second event was an irrevocable undertaking given to it by Allan Gray to accept the offer in respect of 48 434 209 shares which Allan Gray held in M&R on behalf of its clients. Together with the Alan Gray shares, Aton's shareholding would comprise 44.0% of M&R's issued share capital. When Aton's offer circular was issued on 9 April 2018, it noted that Alan Gray had in fact sold 29 005 926 shares to it. This resulted in Aton holding 176 091 745 of the ordinary shares in M&R. That constituted approximately 39.8% of the voting rights in M&R. Further share acquisitions by Aton in May 2018 increased Aton's shareholding in M&R to 194 855 660 shares, which, according to the Applicant's Heads of Argument, represents an ownership interest of approximately 43.81% which, in turn, constitutes 44.06% of the voting rights in M&R.

[7] According to Independent Board of M&R, the Alan Gray forward sale agreement took Aton's shareholding over the 35% statutory threshold prescribed by the Takeover Regulation Panel ("the TRP") that compels the acquirer to make a mandatory offer to all current shareholders. The Independent Board of M&R accordingly complained to the TRP on 12 April 2018 that Aton had not made a mandatory offer to all the shareholders. The complaint was heard by the Takeover Special Committee ("the TSC"). The TSC upheld the complaint on 25 May 2018 and in its unanimous ruling directed Aton to withdraw the offer which it made and to make a mandatory offer to all shareholders of M&R on terms similar to those contained in the Alan Gray Forward Sale Agreement.

[8] Aton then issued two SENS announcements on 28 May and 5 June 2018 respectively in which it withdrew the voluntary offer to shareholders and informed the market of its mandatory offer.

[9] On 20 April 2018, before the TSC had delivered its ruling, the Independent Board of M&R had responded to the initial, voluntary offer by Aton by recommending to

shareholders that they reject the offer as, they stated, the offer price of R15.00 per share was too low. It reasoned that the fair value range should be between R20.00 – R22.00 per share.[1]

[10] Both Aton and M&R have accepted that the offer, and any other related transactions, constitute a notifiable merger in terms of section 13A of the Competition Act and have both filed merger reports separately in terms of Competition Commission Rule 28.

[11] According to M&R, it has since October 2017 been assessing the possibility of acquiring and combining with Aveng Limited ("Aveng"). M&R entered into discussions with Aveng's management team who indicated that they would only engage with M&R after the conclusion of Aveng's strategic review. On 5 March 2018, M&R submitted an expression of interest to Aveng. The discussions were put on hold upon receiving Aton's firm intention letter on 23 March 2018.

[12] According to M&R, at all material times it engaged with the TRP regarding the potential Aveng transaction. It apparently conducted itself diligently in accordance with whatever guidance the TRP may have provided.[2]

[13] Pursuant to an approach by Coronation, motivated by Aveng's apparently deteriorating financial position, M&R again issued a revised expression of interest in Aveng on or about 4 May 2018.[3]

[14] On 18 May 2018, M&R and Aveng signed a non-binding offer and M&R released a cautionary announcement in relation to that proposed transaction on the same day.[4] That announcement mentioned the effect which the non-binding offer may have on the Aton offer and further that M&R may issue new ordinary shares pursuant to the offer. The announcement also contained details of a general meeting to be held on 19 June 2018 to consider an ordinary resolution on the matter in accordance with section 126 of the Companies Act.[5]

---

[1] Para 15 of the Founding Affidavit.
[2] Para 40 of the Founding Affidavit.
[3] Para 41.
[4] Para 42.
[5] Ibid.

[15] Mindful of the fact that by 30 May 2018, Aton had acquired approximately 44.06% of the voting rights in M&R, M&R sought an undertaking from Aton that it would not vote more than the percentage of shares which it held on 22 March 2018, until it had received merger approval from the Competition authorities.[6] The request for the undertaking was contained in a letter addressed by Webber Wentzel, the attorneys acting for M&R to Bowmans, the attorneys representing Aton on 31 May 2018. M&R required the undertaking by 1 June 2018, failing which it would apply for an interdict preventing Aton from exercising all the voting rights which may be attached to its shares.[7] Aton refused to give the undertaking requested in a letter addressed to Webber Wentzel on its behalf by Bowmans on 4 June 2018 and this application was launched by M&R on an urgent basis on 6 June 2018, mindful of the abovementioned general meeting to be held on 19 June 2018.

URGENCY

[16] At the hearing of this application, Aton made a preliminary application to have M&R's application in this matter dismissed on the basis that it was not urgent and that any urgency was self-created.

[17] After a consideration of Aton's preliminary application, we dismissed the application.

[18] M&R had convened a meeting for 19 June 2018. In doing so, M&R was guided by the directions of the TRP. The meeting was to seek the approval of the shareholders "... *whether or not M&R should proceed, in order to keep the tight timelines in relation to the fulfilment of the pre-conditions to be achieved by each of M&R and Aveng to enable M&R to make an offer to Aveng and ultimately implement the proposed transaction (in the event that it is approved by shareholders).*"[8]

---

[6] On 22 March 2018, Aton held 29.99% of the shares in M&R and approximately 30.2% of the voting rights.
[7] Para 54.
[8] Para 44 of the Founding Affidavit.

[19] M&R contended that Aveng's financial situation was deteriorating and that the proposed transaction was time-sensitive for that reason.[9] Aton disputed that the matter was urgent, arguing that any urgency was self-created.[10] The fact of the matter is, though, that Aton had, through its attorneys, Bowmans, refused to give the requested undertaking and had also not tendered an undertaking along the lines of the undertaking contained in para 77 of its Answering Affidavit. It did, however, indicate, through its attorneys that it had no intention of pre-implementing a notifiable merger".[11] The difficulty with Aton's response is that it does not address the assurance sought by M&R and does not fully explain what is meant by this intention. M&R was, therefore, justified in seeking the relief which it claims in its application on an urgent basis, as the meeting was scheduled to take place on 19 June 2018.

[20] Meetings of the kind convened on 19 June 2018 by M&R to consider important resolutions in terms of section 126 of the Companies Act are important in the context of mergers and acquisitions and should not be frustrated simply by a party being able to challenge urgency. In this matter, when considering the timelines as set out above,[12] it would appear that M&R had convened the meeting of the 19 June 2018 with some haste. However, whatever the motives may have been, M&R were entitled to know how Aton would exercise its voting rights with respect to its significant shareholding in M&R, especially in the light of it having to notify the Competition Commission of the acquisition of the shares and Aton's stated intention to acquire all of the shares in M&R which it did not already own. In other words, Aton hoped through its offer to shareholders to eventually acquire 100% of the shares in M&R.

[21] Furthermore, if Aton were to vote 44.06% of its voting rights at the meeting which was scheduled to take place on 19 June 2018 and was, due to a low turnout of shareholders at the meeting, able to veto the proposal of the independent board of M&R, M&R and Aveng would suffer irreparable harm.

---

[9] Ibid.
[10] Para 10 of the Answering Affidavit.
[11] Para 56 of the Founding Affidavit. See para 4 of the material parts of the letter referred to in Para 56.
[12] See paras 9 – 18 herein.

[22] The principles governing urgent applications in the High Courts, as set out in section 12 of the Uniform Court Rules, are of guidance when considering Aton's claim that the matter is in fact not urgent. In terms of these rules: the usual forms and service provided for in an application may be disposed of if an applicant can set forth explicitly the circumstances which it avers render the matter urgent and the reasons why it claims that it could not be afforded substantial redress at a hearing in due course. As discussed in the High Court judgement of East Rock Trading 7 (Pty) Ltd and Eagle Valley Granite (Pty) Ltd:[13]

"[6] ... this rule allows the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress."

[23] It is clear that in the instant case, where the application was being heard a matter of days before Aton would exercise its voting rights at the meeting, allowing an interdict in the ordinary course could not be said to give the applicants an opportunity for substantial redress as an interdict cannot be sought against past conduct.

[24] The Court in East Rock Trading states further:

"[8] In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given... A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto".

[25] Upon consideration of the relevant timelines set out above, we are not of the opinion that M&R has indeed created this urgency through its own delays in making this application, as argued by Aton.

[13] Johannesburg High Court; Case No: 11/33767

[26] For that reason, we dismissed Aton's application to dismiss M&R's application on the basis that it was not urgent. The importance of the issues raised by the parties required the application to be fully argued.

ACQUISITION OF CONTROL

[27] The M&R application raises a very important issue which is when precisely a firm acquires control over another firm.

[28] Mergers are defined as follows in section 12 of the Competition Act:

> *(1) (a) For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.*
>
> *(b) A merger contemplated in paragraph (a) may be achieved in any manner, including through-*
>
> *(i) purchase or lease of the shares, an interest or assets of the other firm in question; or*
>
> *(ii) amalgamation or other combination with the other firm in question.*
>
> *(2) A person controls a firm if that person-*
>
> *(a) beneficially owns more than one half of the issued share capital of the firm;*
>
> *(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;*
>
> *(c) ...*
>
> *(d) ...*
>
> *(e) ...*
>
> *(f) ...*
>
> *(g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).*

[29] The question of when a firm acquires control over another firm has received the attention of this Tribunal as well as the Competition Appeal Court. The Appeal Court decision in the Harmony case was relied on by M&R at the hearing.[14] The salient facts as detailed in Gold Fields were that Harmony approached the Gold Fields board of directors with a proposal for a merger between the two companies. At the time, the Goldfields board was in discussions with a Canadian company, IAMGold Corporation, to merge the two firms. Harmony made a hostile bid to acquire all the shares in Gold Fields in exchange for the issue of shares in Harmony to Gold Fields shareholders. Although the board asked for further particulars, Harmony not only made a public announcement but also issued a circular about its bid for Gold Fields. The Harmony offer was structured in two stages:

(1) In the first stage Harmony would offer to acquire 34.9% of the shares in Gold Fields; and

(2) The second stage.

[30] In the second stage, Harmony noted that its offer was subject to it receiving valid acceptances for more than 50% of Gold Fields entire share capital; the proposed transaction involving Gold Fields and IAMGold Corporation not being approved by the Gold Fields shareholders and all the regulatory authorities, including the competition authorities, approving the merger. What is significant about the Gold Fields case is that Norilsk, another entity which owned 20.03% of Gold Fields shareholding also did not approve of the proposed transaction with IAMGold Corporation and had publicly expressed its intention to vote against the proposed transaction at the shareholders meeting which was to be convened for the purposes of allowing the shareholders to consider and to vote on the proposal. It had also given an irrevocable undertaking to Harmony to vote against the IAM Gold transaction. The CAC found that the initial stage, if implemented would constitute a large merger that must be notified in terms of section 13A of the Act. Furthermore, the acquisition by Harmony of 34.9% of the Gold Fields shares together with the irrevocable undertaking by Norilsk to vote against the

[14] *Gold Fields Ltd v Harmony Gold Mining Company Ltd and another* [2005] 1 CPLR 74 (CAC).

IAMGOLD transaction would constitute an assumption of control in terms of section 12(2)(g) of the Act.[15]

[31] Upon a consideration of all the issues, the CAC concluded that:

> *"Were the first respondent to exercise its voting rights in terms of the shares acquired pursuant to the proposed notifiable merger, it could effect a significant restructuring of appellant. Were this to occur, by means of first respondent exercising its voting rights, this effectively constitutes an implementation of a merger in breach of section 13A(3). The acquisition of 34,9% of the shareholding of appellant would thus empower first respondent to materially influence the strategic position of appellant and scuttle a significant transaction contemplated by the directors of appellant as contained in the cautionary announcement. The damage effected to appellant in the event that the merger was not approved could not probably be commercially undone. In the circumstances, appellant would have no viable remedy available to it."*[16]

[32] We pause to mention that there are significant differences between Gold Fields and the instant matter. In Gold Fields, Harmony sought, first, to acquire 34.9% of the shareholding in Gold Fields and, thereafter, to acquire all the remaining shares, subject to certain conditions. Crucially, with reference to a meeting which was to take place to consider a proposal of the Gold Fields board in respect of a proposed transaction with IAMGold, Norilsk which held 20.03% of the Gold Fields shares had given Harmony an irrevocable undertaking not to vote in favour of the IAMGold transaction and to accept the offer made by Harmony. The Norilsk undertaking together with Harmony's 34.9% shareholding, gave Harmony control over Gold Fields and the ability to material influence the Gold Fields policies. Because the merger was a notifiable transaction in terms of the Competition Act, Gold Fields sought to interdict Harmony from exercising its voting rights in respect of the shares pending approval by the regulatory authorities, including the competition authorities. The time lines in respect of Gold Fields also assisted

[15] Ibid. Page 92. Para g.
[16] Gold Fields. Page 95. Paras e-g

us to consider this application with reference to Gold Fields and were the following:

i. In March 2004, Norilsk acquired 20,03% of the shares in Gold Fields;

ii. On 11 August 2004, Gold Fields announced the agreement with IAMGold; and

iii. On 16 October, 2004, Harmony approached Gold Fields with a merger proposal.

[33] The time lines suggest that the Harmony approach was made two months after Gold Fields had already announced the agreement with IAMGold.

[34] Gold Fields provides sound guidance as to when a merger becomes notifiable, but, in our view, each merger must be considered on its own merits to determine whether the merger is notifiable and when control is acquired by the acquiring firm over the target firm.

[35] M&R has not explained why it did not wait for the outcome of the complaint to the TRP before it issued its response circular recommending the rejection of Aton's offer. Its actions may have been precipitated by the approach by Coronation but we shall not know this as M&R has not taken us into its confidence. M&R on its own facts, though, appear to have acted with haste after being approached by Aton. The Aton firm intention as expressed in its letter to M&R clearly indicated that it intended to make an offer to M&R's shareholders for control of M&R.[17]

[36] Aton's refusal to give M&R the undertaking with regard to the exercise of its voting rights was also unhelpful and prompted M&R to launch these proceedings, particularly in the light of the tender which it made during the proceedings.[18] At the hearing of the matter, Aton amended an undertaking which it had given in para 77 of its Answering Affidavit and confirmed that "...*in the (highly unlikely) event that Aton's voting rights would otherwise constitute*

[17] See para 9 of the Founding Affidavit.
[18] These issues are canvassed earlier in our reasons.

more than 50% of the votes cast on the section 126 resolution at the meeting on 19 June 2018, Aton will not vote that percentage of its voting rights that represent more than 50% less 1 vote of the votes cast in respect of that resolution."

[37] M&R was of the view that the undertaking would not cure the issue of prior implementation and that on a practical level would be difficult to implement. It was later conceded that the undertaking would be capable of implementation at the shareholders meeting.

[38] M&R contends that it is entirely unclear how many shareholders will vote at any shareholders' meeting and that attendance cannot be determined in advance. Moreover, M&R states that according to average historical voter turnout, 80% of shareholders attend a shareholders meeting.[19] In the light of these historical attendances at shareholder meetings, M&R contends that Aton, with 44% of the voting rights, will be able to unilaterally decide the outcome of the vote.[20]

[39] In this regard, after analysing the shareholdings in M&R, M&R states that, based on voting at ten past shareholders' meetings between 2012 and 2017, Aton's 44% shareholding would give it more than 50% of the votes cast. They also indicate that there is no reason to conclude that the attendance at meetings where strategic issues are to be discussed will be higher.[21] In fact, they advance this argument by stating that "*At the very best for Aton, the proper approach is first to ask whether Aton has, by virtue of the various transactions since 22 March 2018, and by means of which it acquired 44.06% of the voting rights in M&R, acquired de facto control of M&R. This is not determined with reference to what might happen at the special general meeting on 19 June 2018, but by reference to the evidence of the history of voting <u>at past</u> shareholders' meetings, coupled with the evidence of the distribution of current shareholders.*"[22]

---

[19] Para 61 of the Founding Affidavit.
[20] Ibid. para 62.
[21] See paras 102 – 105 of M&R's heads of argument.
[22] Para 82 of M&R's heads of argument.

[40] Aton, disputes these contentions. Its own shareholder analysis reveals that the top 10 shareholders are "*large and sophisticated institutional shareholders which account for 54.16% of the voting rights in M&R*". It argues strongly that the institutional shareholders will attend the meeting and vote their shares on 19 June 2018.[23]

[41] In a letter dated 4 June 2018, in response to M&R's demand for an undertaking to not vote its full shareholding, Bowmans (for the respondents) states that the attendance at the last meeting of M&R shareholders in November 2017 was 90%.[24] The Aton voting rights of 44.06% would, according to M&R, enable Aton to influence the vote even with a 90% shareholder turnout. If the turnout was as low as 80%, then Aton would win the vote. This is, therefore, an important issue for M&R, as Aton could effectively implement the merger without approval if it voted its 44.06% of the voting rights.

[42] It is clear that one must consider *inter alia* the historical voting patterns at past shareholder meetings. The issue however is what information is likely to be the best indicator of the possible shareholder attendance at the meeting of 19 June 2018 with due regard to more recent developments.

[43] M&R has referred us to foreign law authorities in Canada, Germany and the European Union. What for the purposes of this matter and our reasons, is relevant is the following from the Commission Notice on the Concept of Concentration:

> *"Based on the past voting pattern, the Commission will carry out a prospective analysis and take into account foreseeable changes of the shareholders' presence which might arise in future following the operation. The Commission will further analyse the position of other shareholders and assess their role. Criteria for such an assessment are in particular whether the remaining shares are widely dispersed, whether other important shareholders have structural, economic or family links with the large minority shareholder or whether other shareholders have*

[23] Paras 82 – 93 of Aton's heads of argument.
[24] Para 56 of the founding affidavit which sets out material parts of the Bowmans' letter.

a strategic or a purely financial interest in the target company; these criteria will be assessed on a case-by-case basis. Where, on the basis of its shareholding, the historic voting pattern at the shareholders' meeting and the position of other shareholders, a minority of shareholder is likely to have a stable majority of the votes at the shareholders' meeting, then the large minority shareholder is taken to have sole control."[25]

[44] This suggests to us that quite apart from considering the past voting patterns at shareholders' meetings, we also have to analyse and take into account a number of other factors, including the relationship between the large minority shareholder (in this case Aton) and other large shareholders (such as the PIC, Alan Gray, Old Mutual etc).

[45] It would appear to us that we have not been provided with any evidence which suggests that Aton has relationships with the institutional investors and others upon which Aton may rely for support at the meeting to be held on 19 June 2018 as was the case in Gold Fields where Harmony knew that it had the support of Norilsk.

[46] This case has, though, generated a great deal of media interest. M&R clearly believes that the transaction with Aveng will benefit its shareholders. According to Mr. ED Jardim's statement as reported in the Business Day, "*Given the context of the vote there might be a larger turnout. We've done a lot of work canvassing our shareholders and we believe we have good support.*"[26]

[47] We are mindful of the fact that M&R takes issue with the way in which Mr Jardim has been quoted and the way in which Aton has used and interpreted the quote, but the fact of the matter is that Mr Jardim did not provide us with an affidavit setting out his version of the events, when clearly he could have done so.

---

[25] Para's 84 – 101.3 of M&R's heads of argument, more particularly para 100 from which this quote has been taken.
[26] See para 56 of the Founding Affidavit

[48] In our consideration of the matter, we looked at, *inter alia,* the historic voting patterns,[27] the relationship between the shareholders, recent consolidations of voting rights and Mr Jardim's comments which suggest that there might be a larger turnout at the meeting of 19 June 2018. If that were to happen (i.e. the high shareholder turnout predicted by Mr Jardim), then it's highly unlikely that Aton would be able to materially influence the policy of M&R as envisaged in section 12(2)(g) of the Act. On that analysis, we may have been inclined to dismiss the application, as Aton's voting of its full voting rights would be unlikely to veto the resolution if the shareholder turnout was as high as 90%. However, we have not had to decide the matter on that basis.

[49] In our view, in the context of its offer to acquire all of the shares in M&R, we are of the view that Aton has rights which it needs to protect under circumstances where the actions of the M&R board could possibly be designed to frustrate Aton's stated goal of acquiring all the shares in M&R. It may well be that under these circumstances, Aton should perhaps be allowed to exercise its vote in respect of all the shares it had purchased, including the shares which it had acquired after 22 March 2018, provided that it does not confer Aton with control over M&R in terms of section 12(2)(a) to (g) of the Competition Act. The question being what redress, if any, does an investor and shareholder in the position of Aton have when its efforts to acquire control of a company could be frustrated. We do not have to consider and deal with the issue of the rights which Aton may have in respect of the shares it had acquired by 22 March 2018 and the additional shares which it purchased after that date and which increased its shareholding in M&R substantially, because of the approach which we have adopted in this matter, given the tender made by Aton.

[50] Aton made a tender in relation to the exercise of its voting rights in its answering affidavit. That tender was repeated at the hearing and amended to remove doubt. In our view, we cannot on rational grounds simply reject a tender made by Aton that in our opinion would potentially resolve the conflict.

---

[27] Insert reference to EU case that specifically considered turnout at last meeting. Explain that turnout at last M&R meeting was high at approximately 90%.

[51] Aton has made it clear that it does not intend to exercise control of M&R in contravention of the Act and has offered this undertaking to ensure such.[28]

[52] The tender by Aton contained in para 77 of its answering affidavit and amended during argument reads as follows:

> *"...in the (highly unlikely) event that ATON's voting rights would otherwise constitute more than 50% of the votes cast on the section 126 resolution at the meeting on 19 June 2018, ATON will not vote that percentage of its voting rights that represent more than 50% less 1 vote of the votes cast in respect of that resolution."*

[53] This tender will ensure, that for the purposes of the meeting scheduled to take place on 19 June 2018, Aton will not be able to vote more than 50% less 1 vote of the votes cast at the meeting. In other words, when it votes its shares in accordance with its tender, there will be no prior-implementation as envisaged in section 12(2) and no change in control of M&R will result. This will address M&R's immediate concerns about exercising the voting rights at the meeting.

[54] However, we cannot extend the order which we have made to all future meetings of shareholders which M&R may want to call, as prayed for by M&R in para 2 of its Notice of Motion. We have not been provided with details of any future meetings which may be called. We have also not been informed about the nature of those meetings, what issues will be discussed and what resolutions will be placed before such meetings. In the absence of that information we are unable to conclude that the extended order sought should be granted and have consequently restricted our order to the meeting of 19 June 2018. M&R is free to approach us for an appropriate order in respect of future meetings, once it has decided upon the nature and content of those meetings, if it still has concerns about Aton exercising its voting rights in the future, prior to the merger having received regulatory approval.

---

[28] See para 76 of the answering affidavit.

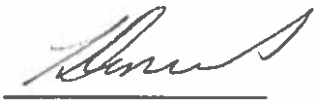
ORDER

[55] For the reasons set out above, we made the following order:

1. The First and Second Respondents' application for the Applicant's application to be dismissed on the grounds of lack of urgency is dismissed.

2. For the purposes only of exercising its voting rights at the shareholders' general meeting of the Applicant which will take place on 19 June 2018 and which has been convened to consider an ordinary resolution, relating to the Applicant's proposed acquisition of Aveng Limited, to be tabled in accordance with section 126 of the Companies Act, 2008 (Act No. 71 of 2008) at that meeting, the First and Second Respondents or their agents are interdicted and restrained, as undertaken by them, from voting, or otherwise exercising any rights attached to, any shares in the ordinary issued share capital of the Applicant that in the calculation of its voting rights percentage represent more than fifty per cent (50%) less one (1) of the votes cast in respect of that resolution.

[57] No order is made as to costs.



Presiding Member
Mr E Daniels

6 July 2018
Date

Concurring: Mr AW Wessels and Ms Mondo Mazwai

Tribunal Researcher:	Kameel Pancham and Jonathan Thomson
For Applicants:	Leonard Harris SC and Anthony Gotz instructed by Webber Wentzel
For the Respondents:	Jerome Wilson SC instructed by Bowmans
For the Commission:	Lebogang Phaladi