IN THE MATTER OF:

NOVUS HOLDINGS LIMITED (OFFEROR/NOVUS)

AND

DK TRUST (ALLEGED CONCERT PARTY/DK TRUST)

IN RELATION TO:

MUSTEK LIMITED (OFFEREE REGULATED COMPANY/MUSTEK)

RULING

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1. **Introduction**

1.1. This ruling addresses whether the DK Trust acted in concert with Novus Holdings Limited ("**Novus**") in relation to the mandatory offer announced on 15 November 2024 ("**Mandatory Offer**"). The Takeover Regulation Panel's (the "**Panel**") determination hinges on whether the DK Trust's actions, particularly its irrevocable undertaking in favour of Novus – wherein it undertook not to accept the latter's Mandatory Offer nor dispose of its shares in Mustek until completion of the offer, were integral to the Mandatory Offer and whether they align with the definition of "acting in concert" under Section 117(1)(b) of the Companies Act, 2008.

1.2. On 14 November 2024, the Panel met with legal representatives of Novus, namely Edward Nathan Sonnerberg Inc. ("**ENSafrica**"), to discuss certain disclosures related to the Mandatory Offer, which was set to be announced the following day. Of particular concern was how certain parties would be treated under the takeover regulations concerning concert parties. Based on the information presented to the Panel at that time, it indicated that it believed such information demonstrated a concert party relationship with Novus; however, it was prepared to consider further representations to the contrary should the parties seek a formal ruling on this matter.

1.3. On 26 November 2024, ENSafrica, on the instructions of Novus, submitted written representations[1] ("**Submission**") contending that the DK Trust should not be considered a concert party.

1.4. Unless otherwise specified:

1.4.1. terms defined in the Companies Act, 2008 (the "**Act**") and the Companies Regulations, 2011 (the "**Regulations**") hold the meanings attributed to them therein unless otherwise defined herein, regardless of whether such terms are used in capitalised form.

1.4.2. all references to a "section" refer to a section of the Act, and all references to a "regulation" refer to a regulation in the Regulations.

1.4.3. words and expressions defined herein shall carry the meanings ascribed to them herein.

1.5. In this ruling, salience is given to the following provisions of the Act and the Regulations:

1.5.1. Section 1 of the Act;

1.5.2. Chapter 5 of the Act and Chapter 5 of the Regulations (collectively **Takeover Provisions**); and

1.5.3. Chapter 7, Part D, of the Act.

2. Regulatory framework

2.1. Definition of "Act in Concert":

Section 117(1)(b) of the Act defines "act in concert" as: "*any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate for the purpose of entering into or proposing an affected transaction or offer*."

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[1] Annexed hereto as **Annexure A**.

Section 119(1), *inter alia*, requires the Panel to regulate affected transactions to ensure: "*the integrity of the marketplace and fairness to holders of relevant securities.*"

2.2. Mandatory Offer Obligations:

Section 123(2) of the Act prescribes mandatory offer obligations:

2.2.1. A person must make an offer to all holders of any particular class of issued securities of a company if:

2.2.1.1. that person acquires a beneficial interest in sufficient securities of a class such that, together with any other securities of that class already held by that person, they then hold in aggregate at least the *prescribed percentage*[2] of securities of that class; or

2.2.1.2. a person acting in concert with one or more persons has acquired a beneficial interest in sufficient securities of a class such that, together with any other securities of that class already held by any of them, they then hold in aggregate at least the prescribed percentage of securities of that class.

2.3. Section 123(4) further stipulates that the compliance obligation outlined in subsection (2) applies to a person irrespective of whether any acquisition was made deliberately, inadvertently, or directly or indirectly.

2.4. Regulatory Mechanisms:

2.4.1. Regulation 84(1) of the Regulations establishes presumptions regarding concert party relationships.

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[2] The prescribed percentage is 35% as per regulation 86(1)

2.4.2. Regulations 111(4) and 111(5)[3] prescribe the offer[4] guarantee requirements, specifically:

2.4.2.1. The requirement for appropriate guarantees

2.4.2.2. The calculation methodology for such guarantees

2.4.2.3. The timing and form of guarantee submissions

2.5. **Integrated Regulatory Framework:**

2.5.1. These provisions operate collectively to:

2.5.1.1. Protect shareholder interests

2.5.1.2. Ensure market transparency

2.5.1.3. Maintain regulatory oversight of control transactions

2.6. **Application to Concert Party Determination:**

2.6.1. The following factors are considered decisive in determining concert party status:

2.6.1.1. Coordination of actions

2.6.1.2. Integration of transaction elements

2.6.1.3. Economic alignment of interests

2.6.1.4. Patterns of collaboration

2.6.1.5. Documentary evidence

2.6.1.6. Regulatory impact

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[3] Read with regulations 101(7)(b)(vi) and 106(4)(a)(ii)

[4] Defined in section 117(1)(f) of the Act as *"when used as a noun, means a proposal of any sort, including a partial offer, which, if accepted, would result in an affected transaction other than such a transaction that is exempted in terms of section 118(3)"*

3. Background to the investigation

3.1. On 28 November 2024, the Submission was delivered to the Panel for Consideration. Receipt of the Submission coincided with my going on leave over the festive season and thus could only be dealt with upon my return at the beginning of the year.

3.2. The matter was addressed in earnest in January 2025. The Panel began sending various requests for information, via email[5], between 20 and 22 January 2025.

3.3. On 22 January 2025, the Panel received a response[6] from ENSafrica regarding some of the initial queries referred to in 3.2 above. Of particular interest from Annexure B was the suggestion that the DK Trust (an alleged concert party) might refuse to provide some of the information that the Panel in Annexure A had requested due to the fact that it was not a related party of Novus nor any of the admitted concert parties in the matter.

3.4. In response to Annexure B, I sent an email[7] to ENSafrica, warning that it was imperative that DK Trust be sufficiently appraised of the consequences of this investigation relating to their status as a potential concert party. There was a significant risk that negative inferences could be drawn against not only the trust but also its wholly owned company, Mustek Electronic Properties Proprietary Limited ("**MEP**"), relating to arrangements leading to the initiation of the mandatory offer by Novus in November 2024.

3.5. On the same day, ENSafrica responded to the Panel by email[8] advising that they only represented Novus in the matter and did not advise other parties.

3.6. In response, also by email[9] on the same day, I pointed out that Novus had admitted that it was actively collaborating with some of the executives of Mustek, including one whom Mr Hein Engelbrecht (**Engelbrecht**) was one

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5 Annexed hereto as **Annexure B1** to **Annexure B4**.

6 Annexed hereto as **Annexure C**.

7 Annexed hereto as **Annexure D**.

8 Annexed hereto as **Annexure E**.

9 Annexed hereto as **Annexure F**.

of the trustees for the Alleged Concert Party. I, therefore, requested that ENSafrica provide us with his contact details so that we could inform them of this investigation to avoid later claims of having not been afforded an opportunity to make representations in connection with an investigation relating to their potential status as a concert party.

3.7. No immediate response was received to Annexure F, and by 24 November 2024, the Panel addressed correspondence by email[10] to the sponsor for Mustek, Deloitte, requesting the contact details for Mr CJ Coetzee (**Coetzee**) and Engelbrecht. Deloitte provided this information later that day via email[11]. Later that same day, ENSafrica also responded by email[12] to us regarding the request in Annexure F, supplying the contact details of one of the trustees for DK Trust, Mr M Kan (**Michael Kan**).

3.8. On 27 January 2025, the Panel addressed further correspondence[13] to ENSafrica, copying both Michael Kan and Engelbrecht. Annexure J1 was the cover email attaching our letter (Annexure J2), which comprised a request for certain information from the impugned parties. This information was required within seven business days of receipt of that request, meaning it had to be delivered to the Panel on or before 4 February 2025.

3.9. On 4 February 2025, ENSafrica addressed correspondence[14] to the Panel in terms of which it requested an extension of the period within which it had to respond to the request in Annexure J2. In this regard, it sought an extension of another 7 business days to collate such information such that this information would then be due on 14 February 2025. In response via email[15], on the same day, I sought clarification on whether this request was only limited to the obligations of the admitted concert parties, namely Novus

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10 Annexed hereto as **Annexure G**.

11 Annexed hereto as **Annexure H**.

12 Annexed hereto as **Annexure I**.

13 Annexed hereto marked **Annexure J1** and **Annexure J2**.

14 Annexed hereto marked **Annexure K1** and **Annexure K2**.

15 Annexed hereto marked **Annexure L**.

and those executives that it had acknowledged as its concert parties, but excluding DK Trust and MEP.

3.10. In response[16], ENSafrica said that the request for extension was on behalf of each of "(i) Novus; (ii) Mustek; (iii) the Novus concert parties; (iv) MEP; and (v) the DK Trust".

3.11. I found this odd as I was under the impression that ENSafrica had only acted for Novus in this matter, thus I sought clarity[17] whether they were now purporting to represent all parties from whom the information referred to in Annexure J2 had been sought. I also indicated in a separate email[18] that we were granting the extension.

3.12. Some four hours later, ENSafrica, responded[19] to my query in Annexure M2 reasserting that they only represented Novus, although they were nonetheless obtaining all information requested in Annexure J2 from all the parties, including the DK Trust and MEP.

3.13. To ensure there was no misunderstanding regarding each party's involvement in the investigation, particularly that of the DK Trust and MEP, I replied[20] to ENSafrica's response in Annexure M4 (with Michael Kan copied in) and addressed Michael Kan directly, encouraging the Trust and MEP to actively participate in this investigation as there was potential for adverse findings, ensuring that no prejudice was suffered by any of the entities they represented.

3.14. Following my response in Annexure M5, Michael Kan confirmed in reply[21] that they would be actively involved in this matter.

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16 Annexed hereto marked **Annexure M1**.

17 Annexed hereto marked **Annexure M2**.

18 Annexed hereto marked **Annexure M3**.

19 Annexed hereto marked **Annexure M4**.

20 Annexed hereto marked **Annexure M5**.

21 Annexed hereto marked **Annexure M6**.

3.15. On 14 February 2025, ENSafrica delivered by email[22] copies of the affidavits from:

3.15.1. Michael Kan , one on behalf of the DK Trust[23], and another on behalf of MEP[24];

3.15.2. Ms S A B Ebrahim[25] (**Ebrahim**) in her capacity as a member of the Consortium;

3.15.3. Engelbrecht[26] in his capacity as a member of the Consortium;

3.15.4. Coetzee[27] in his capacity as a member of the Consortium.

It is worth noting that Coetzee, Ebrahim and Engelbrecht are all members of Mustek's executive management.

3.16. Additionally, an unsigned copy of an affidavit from Mr A Zelter (**Zelter**) was delivered with an undertaking to share a signed copy the following Monday as they had not been able to secure his signature beforehand. The following week, the signed copy[28] was delivered as promised.

4. Chronological development of arrangements as provided in Annexures N2 to Annexure N7

4.1. According to the version of events presented in the affidavits provided in Annexures N2 to N7, the following outlines the sequence of events leading to the establishment of the Consortium, as well as the conclusion of both the DK Trust undertaking and the MEP share sale, prior to the announcement of the mandatory offer:

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22 Annexed hereto marked **Annexure N1**.

23 Annexed hereto marked **Annexure N2**.

24 Annexed hereto marked **Annexure N3**.

25 Annexed hereto marked **Annexure N4**.

26 Annexed hereto marked **Annexure N5**.

27 Annexed hereto marked **Annexure N6**.

28 Annexed hereto marked **Annexure N7**.

4.1.1. **Initial Engagement Phase (May-August 2024):**

4.1.1.1. **22 May 2024:** First meeting between Novus (Andre van der Veen and Zetler) and members of the Mustek executive management referred to in 3.15 above. The accounts of the alleged participants at this meeting, according to the affidavits above, are as follows:

4.1.1.1.1. In paragraph 10 of the affidavits of Engelbrecht, Ebrahim and Coetzee, they say, "*On 22 May 2024, representatives of Novus, namely Zetler and Andre van der Veen, met with the Consortium to discuss a possible investment in Mustek by Novus*".

4.1.1.1.2. Similarly, in paragraph 10 of Zelter's affidavit, he says, "*On 22 May 2024, representatives of the Company, namely myself and Andre van der Veen, met with the Consortium Members to discuss a possible investment in Mustek by the Company. Following this discussion, the Company decided to initiate a purchase of Mustek shares (through contracts for difference) on the stock exchange operated by the JSE Limited ("Stock Exchange")*".

4.1.1.2. What is intriguing about this disclosure is not necessarily what is said about it, but rather what is unsaid and undocumented. For example, both parties (the executive management of Mustek and that of Novus) spontaneously attend a meeting where the fate of one of those companies is discussed for the first time, yet nothing had occurred prior to this meeting. Furthermore, following a seemingly uneventful meeting (where, aside from the vague expression of interest in acquiring Mustek, not much else is discussed), Novus begins

trading in Mustek securities. While none of this should raise suspicions to an untrained observer, it is helpful for addressing the central question of this investigation. And this is why: the accounts of the impugned parties are that the concert party relationship was established upon the conclusion of the consortium agreement on or around 13 November 2024 (**Consortium Agreement**). Thus, seemingly before that date, the Mustek executive management members who were involved in these discussions were merely engaged in these discussions in their official capacities as contemplated in regulation 99 of the Regulations[29]. Yet, this assumption cannot be reconciled with their subsequent conduct, which culminated in their conclusion of the Consortium Agreement and their active engagement in concert party conduct, as discussed later on in this ruling. Thus, it seems unavoidable that these parties (i.e. the two sets of executive management for Mustek and Novus) had, from the get-go, been engaged in concert party behaviour. However, this conclusion does not have in itself an ultimate bearing on the central question in this investigation, namely, whether the DK Trust is a concert party of Novus.

4.1.1.3. **2 August 2024:** Second strategy meeting between the same parties. The accounts of the alleged participants at this meeting, according to the affidavits above, are as follows:

4.1.1.3.1. In paragraph 11 of the affidavits of Engelbrecht, Coetzee and Ebrahim they say, "*On 2 August 2024, a second meeting was held between the Consortium and*

[29] Which states in sub-regulation (1): "An approach with a view to an offer being made, or an offer, must be made only to the board of the offeree regulated company".

representatives of Novus, namely Zelter Zetler and Andre van der Veen, to further discuss Novus investing in Mustek".

4.1.1.3.2. However, in paragraph 11 of Zelter's affidavit, he says, "O*n 2 August 2024 a second meeting was held between the Consortium Members and the representatives of the Company. The Company had (through contracts for difference), at this point in time, already purchased c.12 700 000 (twelve million seven hundred thousand) Mustek shares on the Stock Exchange. Following such meeting, the Company continued to purchase additional Mustek shares on the Stock Exchange, through contracts for difference*".

4.1.1.4. Although these disclosures remain evasive about the nature of these so-called initial meetings, what remains illuminating is that Novus was emboldened to trade in Mustek securities after each one.

4.1.2. **Implementation Phase (October–November 2024):**

4.1.2.1. **17 October 2024:** Direct engagement between Novus CEO and Engelbrecht regarding share acquisition opportunities. The accounts of the alleged participants on this call, according to the affidavits above, are not fully captured because one of the participants on the call did not depose to an affidavit. Instead, we have the following accounts from Engelbrecht and Zelter:

4.1.2.1.1. In paragraph 12 of Engelbrecht's affidavit, Annexure N5, he says: "*On 17 October 2024, Andre van der Veen (from Novus) and*

I had a telephone discussion and Andre van der Veen queried, verbally, as to whether I was aware of any additional shareholders of Mustek who were desirous of selling their Mustek shares. I communicated that I would reach out to certain Mustek shareholders and revert with feedback".

4.1.2.1.2. For his part, Zelter, in paragraph 12 of his affidavit, Annexure N7, says the following: "*On 17 October 2024, representatives of the Company, namely myself and Andre van der Veen, had a Microsoft Teams call with Hein Englebrecht, who is a member of the Consortium, and queried, verbally, as to whether he was aware of any additional shareholders of Mustek who were desirous of selling their Mustek shares. Hein Engelbrecht communicated that he would reach out to certain Mustek shareholders and revert with feedback*".

4.1.2.1.3. Zelter, in paragraph 13, of the same affidavit, further states: "*During the subsequent three week period following the meeting of 17 October 2024, the Company awaited a response from Hein Englebrecht. Andre van der Veen made further enquiries on a number of occasions as to whether any progress had been made but there had not been any success. Hein Englebrecht indicated that the DK Trust might be interested in selling some Mustek shares but the trustees of the DK Trust had not yet had the opportunity to formally discuss their options and way forward*".

4.1.2.2. Besides the patent discrepancies in the two versions presented above regarding the engagement of 17 October 2024, it is noteworthy that the only other individual who seemingly served as the primary counterpart to these engagements is curiously absent from the evidence presented to the Panel concerning them. The limited account of these engagements, along with the unexplained absence of a record of one of the main protagonists involved in the transactions to which this investigation pertains, raises significant questions about the honesty of the accounts. Importantly, these are not merely tangential engagements to the matters under investigation; instead, they go to the very heart of the relationship between Novus and the DK Trust, marking the beginning of their association, which culminated in the conclusion of the DK Trust undertaking. This conclusion is central to the question of whether this relationship characterises both parties as collaborators concerning Novus's offer to Mustek.

4.1.2.3. **8 November 2024:** DK Trust resolution authorising MEP share sale.

4.1.2.3.1. On 8 November 2024, a special resolution of the trustees of the DK Trust was passed. No other account for how this was secured, save for that of Michael Kan , in his affidavit in Annexure N2 wherein he says the following:

4.1.2.3.1.1. In paragraph 7: "*Paragraph 3.3 of the Information Request concerns itself with certain information and documentation pertaining to the Trust*".

4.1.2.3.1.2. In paragraph 8: "*At paragraph 3.3.1 of the Information Request, the TRP requests all trustee deliberations and decisions regarding the sale of shares involving MEP and the accompanying waiver undertaking*".

4.1.2.3.1.3. In paragraph 9: "*All deliberations and decisions undertaken by the trustees, on behalf of the Trust, in relation to the disposal by MEP of shares in Mustek to novus ("MEP Share Sale") and the accompanying waiver undertaking, were conducted verbally and are not substantiated by any written documents. I however attach, as Annexure "MK2", hereto the signed resolution of the trustees of the Trust, pursuant to which the trustees of the Trust resolved to authorise MEP to dispose of 3,685,605 shares in Mustek to Novus at R12.00 per Mustek share*".

4.1.2.3.2. For the sake of completeness, I note that annexure "MK2" to the affidavit referred to in 4.1.2.3.1 above records the following resolution of the trustees of the DK Trust on 8 November 2024: "*The board of directors of Mustek Electronic Properties Proprietary*

Limited are hereby authorized to sell the 3 685 605 shares held in Mustek Limited to Novus Packaging Proprietary Limited at R12 a share". Further, the resolution was signed by Michael Kan and Hein in their capacity as trustees.

4.1.2.3.3. No other trustee of the DK Trust confirmed this version, not even Engelbrecht, whom we assume was intimately aware of the nature of this investigation due to his active involvement, including responding to Annexure J2, to which Michael Kan was partly replying in the quoted extracts in 4.1.2.3.1 above. In paragraph 14 of Annexure N5, he simply states: "*All information and/or documents referred to in Paragraph 3.3 of the Information Request, titled "DK Trust Documentation*", *which relates to information and documentation of the DK Trust, should be obtained from the DK Trust*." To be clear, this statement from Engelbrecht is manifestly absurd, considering that he was the person who, by his own admission, presented the opportunity for the DK Trust to explore the MEP share sale, and he is also one of the two trustees who signed the resolution referred to in 4.1.2.3.2 above. The notion that he was somehow not in a position to contribute insight into the deliberations of the DK Trust, which led to the trust resolving to authorise its wholly owned company, MEP, to dispose of its entire shareholding in its namesake listed company, is evidently

absurd. This is particularly true when considering the fact that Engelbrecht is the only surviving trustee among the DK Trust's founding trustees who still hold office. I need not elaborate on the trustees' responsibilities regarding trust assets and the nature of the trustee's office, to emphasise the point. It suffices to say that the absurdity of Engelbrecht's statement should be evident to an experienced businessperson of his calibre.

4.1.2.3.4. The fact that none of the parties advising the deponents of the affidavits above thought it prudent to obtain confirmatory affidavits is a peculiarity that perhaps goes beyond the scope of this ruling. Again, it suffices to note this tactic without elaborating.

4.1.2.4. **12 November 2024:** MS Teams call finalising consortium arrangements. The accounts of the alleged participants at this meeting, according to the affidavits above, are as follows:

4.1.2.4.1. In paragraph 12 of Ebrahim's and Coetzee's affidavits, as well as paragraph 13 of Engelbrecht's affidavit, it is stated that: "*On 12 November 2024, an MS Team call between Andre van der Veen, Zetler and the Consortium occurred. Hein confirmed that approximately 3 685 000 (three million six hundred and eighty five thousand) Mustek shares at R12.00 (twelve Rand) per Mustek share were available for sale from MEP. The Consortium and Novus thereafter verbally*

agreed that they would enter into a consortium agreement".

4.1.2.4.2. However, in paragraph 14 of Zelter's affidavit he says *"On 12 November 2024, an additional Microsoft Teams call between representatives of the Company, namely myself and Andre van der Veen (together with the Company's legal counsel from ENS (Doron Joffe)) (on behalf of the Company) and the Consortium Members occurred. The Consortium Members confirmed that approximately 3 685 000 (three million six hundred and eighty five thousand) Mustek shares at 12.00 (twelve Rand) per Mustek share were available for sale from MEP. The Consortium Members and the Company thereafter verbally agreed that they would enter into a consortium agreement to facilitate the purchase of the MEP share sale shares, on condition that the DK Trust furnishes the Company with an undertaking not to accept the mandatory offer (as it had already previously communicated that they would not sell any of its Mustek shares to the Company)".*

4.1.2.5. An unavoidable conclusion about how the Consortium Agreement was suddenly finalised on 12 November 2024 —when, prior to that date, little if any hint had been given regarding the possibility that such an agreement was actively being discussed — is that this did not need to be hinted at, as the parties had been in active collaboration regarding this offer from the very beginning.

4.1.2.6. On 19 February 2025, I sent an email to ENSafrica requesting copies of all correspondence relating to the authorship of the Consortium Agreement. From the records provided to the Panel by these advisors, it is apparent that the first version of the agreement was circulated on 11 November 2024. No evidence was presented that the executive management members of Mustek sought independent counsel regarding this agreement, nor did they show any material changes to the documents. This not only evidences exceptional legal skills but also reflects the amicable nature of the engagements between the Mustek management members and their partners at Novus. Such conduct is not particularly unusual in management buy-out transactions. A common characteristic of these relationships in management buyouts is the shared purpose of all acquiring parties, established well before an offer is made. Without overstating this point, I must note that I make it to emphasise the earlier conclusion regarding my belief that the concert party relationship between the executive management of Mustek and Novus was established much earlier than disclosed to the Panel during this investigation, specifically on or around 22 May 2024, if not even earlier.

4.1.2.7. Of particular significance to the central question of this investigation is when Engelbrecht commenced discussions with his fellow trustees about securing their backing to facilitate the MEP share sale and the DK Trust undertaking. Both appear to have been central pillars regarding the conclusion of the Consortium Agreement, which in turn solidified the benefits for the Mustek executive management in this offer. The vague nature of the disclosures made by the implicated parties in this investigation concerning when these discussions at the

DK Trust level began, as well as the substantive content of those talks, reveals a noticeable lack of candour in how the implicated parties have sought to engage with this investigation. Notwithstanding this general observation, which I have repeated in my earlier comments, the parties still left enough breadcrumbs for the Panel to reconstruct a picture of the true nature of these engagements. For instance, in paragraph 14 of Zelter's affidavit, Annexure N7, he concedes that entering into the Consortium Agreement was to facilitate the conclusion of the MEP share sale, which would be conditional upon the DK Trust agreeing to provide the DK Trust undertaking not to accept the mandatory offer. Consequently, the Consortium Agreement would confer certain rights and benefits[30] to the parties involved. Curiously, the same paragraph 14 of Zelter's affidavit also mentions a share transfer whereby Novus would purchase approximately 3.685 million Mustek shares from MEP at an aggregate consideration of R12 per Mustek share. The Consortium Agreement also mentions[31] Novus's intention to acquire 3.6 million Mustek shares at an aggregate consideration of R12 per Mustek share (which shares are referred to therein as "First Tranche Shares"). Later on in the same agreement, we learn that 25% of these "First Tranche Shares" would, as soon as reasonably possible thereafter, be on-sold to Manco[32]. These would be sold for the same consideration (R12)[33] as that paid by Novus to MEP, which, as we are told, is a wholly owned company of the

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30 Regarding the relationship between Novus and the Mustek executive management members who would establish a new company, Manco, which would receive Mustek shares funded by Novus, contingent on certain conditions.

31 See clause 3.1 of the Consortium Agreement.

32 See clause 3.3.1 of the Consortium Agreement.

33 See clause 3.5.1 of the Consortium Agreement.

DK Trust. Thus, what is established above are the motives of the Mustek executive management members for collaborating with Novus. Effectively, they were incentivised to do so as this would facilitate their acquisition of up to approximately 20% of Mustek, being the promised 25% of potential Novus's ultimate stake in Mustek were the mandatory offer to be fully accepted by the other shareholders to whom the offer is made. This assumes[34] that the DK Trust's shares not sold in the MEP share sale are approximately 20%.

4.1.2.8. **13 November 2024:**

4.1.2.8.1. Consortium Agreement executed. See in this regard my comments in 4.1.2.4.

4.1.2.8.2. MEP share sale agreement concluded.

4.1.2.8.2.1. Michael Kan (as a director of MEP[35]), in paragraphs 6 of his affidavit, says, "*In this regard, all board minutes, resolutions (other than the board minutes already furnished to the TRP, but, for ease of reference, are annexed hereto marked "**MK2**", supporting documentation and internal correspondence between the directors of the Company relating to the MEP Share Sale were conducted verbally and*

[34] The ultimate accuracy of these estimates is irrelevant to the overall assessment of the central question in this matter, except to demonstrate the significance of the financial amounts that were at stake when these arrangements were made.

[35] Annexure N3 hereof.

are not substantiated by any written documents, save for the Consortium Agreement. Further, no financial reports or financial analyses documents were prepared in relation to assessing the MEP Share Sale". [**My emphasis**]

4.1.2.8.3. Paragraph 6 of Michael Kan's trustee affidavit presents the strongest evidence of collaboration between the parties acknowledged as acting in concert - namely, Novus and the aforementioned Mustek executive management members - and the DK Trust. In this regard, the underlined portion of Michael Kan's affidavit is frankly quite absurd. To illustrate this, it merits reiteration of his claim: "all board minutes, resolutions... supporting documentation and internal correspondence between the directors of the Company relating to the MEP share sale were conducted verbally and are not substantiated by any written documents, save for the Consortium Agreement."

4.1.2.8.4. Firstly, there is no concept of verbal meeting minutes. Similarly, there is no notion of a verbal "supporting document." I need not speculate further regarding the validity of the assertion that all internal discussions (correspondence) by the board of MEP concerning this sale were entirely verbal, as that would be unnecessary for the current context, given that the absurdity of Michael

Kan's general claim in paragraph 6 of his affidavit has already been established.

4.1.2.8.5. However, I would be remiss not to highlight the most crucial admission contained in that paragraph, and to expand on the absurdity of the claim. Specifically, that somehow, MEP (and by extension, the DK Trust—two of the three directors of MEP are not only descendants of the founding family of Mustek but also current trustees of the DK Trust) was involved in the deliberations surrounding the conclusion of the Consortium Agreement, which, by Novus's own admission, would classify the aforementioned Mustek executive management members as concert parties, yet somehow MEP retained its purported status as a non-concert party.

4.1.2.8.6. Moreover, Michael Kan's assertion that the trustees relied on no written documentation when approving the MEP share sale is patently absurd. The MEP share sale and the DK Trust undertaking, by all parties' admissions, formed an integral composite transaction whereby the quid pro quo by Novus for receiving the DK Trust undertaking was the conclusion of the MEP share sale and the payment involved. Both the sale and undertaking were put in writing, which, on a balance of probabilities, suggests that the parties would have engaged with each other on the terms prior to agreeing to proceed with that aspect of the transaction. It is highly improbable that the

DK Trust, especially with experienced businesspeople like Engelbrecht as trustees, would have approved such a significant transaction without relying on any written documentation.

4.1.2.8.7. To emphasise this point, it is worth posing the following rhetorical questions: "Why would a non-concert party be involved in pre-offer deliberations among would-be concert parties?" and "How could the DK Trust approve a significant transaction like the MEP share sale, intrinsically linked to the DK Trust undertaking, without relying on any written documentation?"

4.1.2.8.8. **DK Trust waiver provided**:

In paragraph 15 of Zelter's affidavit, he says, "On 13 November 2024 the DK Trust signed a written waiver document pursuant to which it irrevocably and unconditionally undertook to not accept the mandatory offer and dispose of any Mustek shares that it holds until the mandatory offer closing date (the "**DK Waiver Undertaking**")".

4.1.2.9. **15 November 2024:** Mandatory offer announced.

5. Analysis of the contents of the Submission

5.1. As mentioned above, the Submission was received at the end of November 2024. Upon reviewing its contents and initial engagements with Novus's legal representatives, it became clear that for this matter to be properly assessed, the issues contained therein needed to be addressed in the context of an investigation conducted by the Panel, still under the auspices

of the Panel's executive, to facilitate the collection of the necessary information for all affected parties.

5.2. Furthermore, it was essential that all parties be afforded an opportunity to engage in the matter, as the Submission had highlighted the potential for prejudice in the event that the Panel concluded that the DK Trust was a concert party of Novus, as had been suggested during its meeting with ENSafrica on 14 November 2024.

5.3. Upon the Panel's initial assessment of the Submission, it became clear that the Submission was fundamentally flawed as it contained a material contradiction that appeared unresolvable for the following reasons:

5.3.1. Paragraph 3.11 thereof explicitly acknowledges[36] the DK Waiver Undertaking's purpose as follows:

> "*solely for the purpose of reducing Novus' exposure in respect of the bank guarantee... by approximately R123,921,746.00*".

5.3.2. Paragraph 5.8 contends failure of the "Fifth Element test"[37] regarding purpose as follows:

> "*The essence of our submission is that the DK Waiver Undertaking fails to satisfy the Fifth Element of the essentialia applicable as to whether a person meets the definition of "acting in concert" (even if we assume that all of the other elements of the definition are met, which we do not concede is necessarily the position)*".

5.3.3. Explaining how the principles of the Mediclinic Case were applied, in paragraph 5.7, the Submission stated the following:

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36 See also paragraph 16 of Zelter's affidavit, Annexure N7.

37 A concept borrowed from the Panel's previous ruling in the Al Noor/Mediclinic/Remgro case ("**Mediclinic Case**"), which it cited as authority for its proposition that the essential elements for determining whether the DK Trust undertaking constituted a concert party arrangement between the trust and Novus was missing.

5.3.3.1. In considering the definition of the term “act in concert”, the Takeover Special Committee, in the Mediclinic Case confirmed that the definition of this term “acting in concert” can be separated into six different components, namely:

5.3.3.1.1. there must be an action;

5.3.3.1.2. there must be an agreement between two or more persons;

5.3.3.1.3. in terms of which any of them;

5.3.3.1.4. co-operates;

5.3.3.1.5. for the purposes of (“**Fifth Element**”); and

5.3.3.1.6. entering into or proposing an affected transaction.

5.3.4. In paragraph 5.9, the Submission proceeded to contend as follows:

5.3.4.1. In the Mediclinic Case, the Takeover Special Committee had further confirmed that –

5.3.4.1.1. the Fifth Element in the definition of “act in concert” must be understood as relating to an objective of acquiring control[38]; and

5.3.4.1.2. “if the purpose of the agreement and the action pursuant to that agreement do not directly and immediately point to an objective of acquiring control, then, there is a break in the chain and that will mean that the purpose that the parties are faced with is not the

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38 Paragraph 3.52 of the Mediclinic Case.

same purpose as contemplated under section 117".

5.3.5. In paragraph 5.10 of the Submission, it proceeds to argue:

> *"In this regard, as mentioned in paragraph 3.10, the DK Trust had provided the DK Waiver Undertaking to Novus for the purpose of MEP disposing of 3,685,605 Mustek Shares and not in any way "for the purpose of" proposing an effected transaction.*" [sic]

5.3.6. The Submission then proceeded to contend[39] that the DK Waiver Undertaking was merely an undertaking that the DK Trust will not:

5.3.6.1. accept the Mandatory Offer (to the extent that Novus is required to make a mandatory offer in terms of section 123 of the Companies Act); or

5.3.6.2. dispose of any of its Mustek Shares until the closing of the Mandatory Offer.

5.3.7. Furthermore, the Submission proceeded[40] to argue that it was "noteworthy that the offer consideration offered by Novus to Mustek Shareholders for their Mustek Shares is, as at the date of the Novus FIA:

5.3.7.1. a discount to the trading price of Mustek Shares in respect of both the (i) Cash Consideration; and (ii) the Combined Consideration; and

5.3.7.2. a premium to the fair market value thereof (at approximately 9%), in respect of the Share Consideration[41].

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[39] See paragraph 5.11 of the Submission.

[40] See paragraph 5.12 of the Submission.

[41] However, tempering this premium point somewhat by stating in 5.13 of the Submission by stating, "*However, as regards the Share Consideration, it is noteworthy that the Mandatory Offer will only be implemented once all*

5.3.8. Repeating the statement in paragraph 3.11 of the Submission, paragraph 5.17 thereof argued:

> "*As mentioned in paragraph 3.11, Novus had required the DK Waiver Undertaking solely for the purpose of reducing Novus' exposure in respect of the bank guarantee required to be provided by Novus to the TRP in terms of Regulations 111(4) and 111(5) of the Takeover Regulations by approximately R123,921,746.00, and not for the purposes of proposing an effected transaction.*" [sic]

5.3.9. Lastly, in paragraph 5.18, argues:

> "*Had the DK Trust not provided the DK Waiver Undertaking, Novus would have nonetheless proceeded to make the Mandatory Offer and issue the Novus FIA, but would have been required to issue a bank guarantee of no less than R427,828,488.00*[42] *(calculated as total number of Mustek Shares in issue, less the aggregate number of Mustek Shares held by Novus and its related entities, less the Mustek Shares held by the Management Individuals, multiplied by the offer price of R13.00 per Mustek Share), as opposed to the current bank guarantee of R335,000,000.*"

5.3.10. The assertion in paragraph 5.18 of the Submission that Novus would have proceeded with the Mandatory Offer regardless of the DK Waiver Undertaking contradicts the evidence presented by the parties. This evidence demonstrates that reducing Novus's financial exposure, achieved through the DK Waiver Undertaking, was

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regulatory approvals have been obtained. It is anticipated that all regulatory approvals will only be obtained mid-2025 and accordingly, between the date of the Novus FIA and the date of implementation of the Mandatory Offer, it may well be the case that the Share Consideration no longer constitutes a premium to the fair market value of Mustek Shares."

[42] We note the slight arithmetic error made the total guarantee without the DK Waiver Undertaking would be R455,921,746

essential for implementing the offer, including the consummation of the Consortium Agreement. Furthermore, Novus went as far as concluding the MEP share sale, which resulted in the DK Trust realising R44.2 million from its indirect shareholding of circa 3.7 million Mustek shares. This action further underscores the importance of the DK Waiver Undertaking for Novus and its determination to secure it, even at a significant cost. While the parties might contend that the offer could have proceeded without the undertaking, the reduction in Novus's financial exposure, coupled with the substantial financial benefit provided to the DK Trust through the MEP share sale, was clearly crucial for the offer's implementation.

5.3.11. Despite the vigorous assertions to the contrary, every significant fact acknowledged in the Submission indicated that the DK Trust undertaking was not merely coincidental to the affected transaction that Novus and its concert parties intended to pursue soon thereafter but was indeed a sine qua non for it. In this regard, I note the following from the Submission:

5.3.11.1. Paragraphs 3.11 and 5.17 make it clear that the sole purpose of the DK Trust undertaking was to secure the reduction of the Panel guarantee requirements in regulation 111(4) and (5), without which Novus (and its concert parties) would have had to come up with an additional R123,9 million, increasing the guarantee from R335 million to R458,9 million. Thus, by the Submission's own admission, the DK Trust undertaking was a critical piece in determining whether the mandatory offer could be pursued or not. The very essence of the definition of "act in concert" in section 117(1)(b) and the so-called "Fifth Element" in the Mediclinic Case.

5.3.11.2. While the above assessment would have been sufficient, in my opinion, to demonstrate the fatal contradiction

mentioned earlier, the Submission repeated the mistake (noted previously) of leaving obvious “breadcrumbs” for the Panel to follow during its investigation of this matter. In this respect, the assertions made in paragraphs 3.10 and 5.10 of the Submission regarding how the DK Trust had provided its undertaking to facilitate MEP’s disposal of its circa 3.7 million Mustek shares, and “not in any way “for the purposes of” proposing an [a]ffected transaction,” are astounding in their absurdity, with or without the insights that the Panel would later gain from the affidavits analysed in paragraph 4 above. MEP had no purpose for the DK Trust undertaking, considering that it was disposing of its entire shareholding in Mustek, which rendered the entire exercise of securing such an undertaking (insofar as it (i.e. MEP) was concerned) utterly fruitless. Conversely, the undertaking represented a more than 25% reduction in the overall financial commitment (in the form of a Panel guarantee requirement under regulation 111) that Novus would have had to provide upon announcing the offer to the market but for the DK Trust undertaking.

5.3.11.3. While the above provides another clear basis for why the DK Trust undertaking was indeed sine qua non for Novus’s offer, I feel compelled to revisit this matter by speculating on why DK Trust itself thought it necessary to provide such an undertaking, given that it was purportedly not a party to the MEP share sale (a claim suggested by two of its trustees who feigned participation in this investigation, namely Engelbrecht and Michael Kan). The sale itself realised an immediate financial benefit of approximately R44.2 million for the ultimate benefit of the beneficiaries of the DK Trust (the majority of whom are the trustees of the same trust) in a stock whose liquidity, according to insiders, is reportedly not

the best from an off-market arrangement. Viewed in this way, the MEP share sale, instead of being facilitated through the DK Trust undertaking, was, in fact, a form of consideration from Novus to the DK Trust for securing the undertaking. Ultimately, the only ongoing relationship that would remain following the completion of both the MEP share sale and the DK Trust undertaking would be that established in the latter document, which would prevail until the end of the offer period for Novus's then-intended mandatory offer. Thus, I contend that the undertaking was a sine qua non to the offer that Novus intended to make.

5.3.12. Consequently, having concluded that the contradiction noted above irreparably undermined the fundamental basis of the Submission, I determined that it was only fair to convert the request for a ruling into an investigation of the papers aimed at better understanding these arrangements. Thus, all affected parties would have the opportunity to participate in a matter of such fundamental importance concerning Novus's Mandatory Offer.

6. **Conclusion**

6.1. Having carefully considered the factual background, legal framework, and submissions presented in this matter, the Panel concludes that the DK Trust acted in concert with Novus for the purposes of the Mandatory Offer. This conclusion is based on the following key findings:

6.1.1. The Dk Trust's undertaking was integral to the Mandatory Offer:

The DK Trust's waiver undertaking, provided on 13 November 2024, was not merely incidental but a critical enabler of the Mandatory Offer. By irrevocably committing not to accept the offer or dispose of its Mustek shares, the DK Trust reduced Novus's financial exposure under Regulation 111 by approximately R123 million. This reduction was essential for Novus to proceed with the offer, as it lowered the required bank guarantee from R458.9 million

to R335 million. The Submission itself acknowledges this, stating that the undertaking was provided “solely for the purpose of reducing Novus’s exposure in respect of the bank guarantee.”

6.1.2. The Dk Trust’s involvement in pre-offer deliberations[43]:

6.1.2.1. The evidence demonstrates that the DK Trust was actively involved in discussions and arrangements leading to the Mandatory Offer. For example:

6.1.2.1.1. On 17 October 2024, Engelbrecht , a trustee of the DK Trust, engaged with Novus regarding potential share acquisitions and subsequently facilitated discussions with the DK Trust.

6.1.2.1.2. On 8 November 2024, the DK Trust passed a resolution authorizing the sale of Mustek shares by its wholly owned subsidiary, MEP, to Novus.

6.1.2.1.3. On 12 November 2024, the DK Trust’s undertaking was made a condition of the Consortium Agreement, which solidified the terms of the Mandatory Offer.

6.1.2.2. These actions indicate a level of collaboration that goes beyond mere coincidence and aligns with the definition of “act in concert” under Section 117(1)(b) of the Act.

6.1.3. Financial and strategic benefits to the DK Trust:

The DK Trust derived significant financial benefits from its involvement in the transaction, including the sale of MEP’s Mustek shares to Novus for approximately R44.2 million. This sale, coupled with the waiver undertaking, suggests that the DK Trust had a

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[43] See paragraph 4.1.2, read with 5.3.10.2, above.

vested interest in facilitating the Mandatory Offer. The Submission's contention that the undertaking was provided solely for the MEP share sale is untenable, as MEP had no need for such an undertaking given its complete divestment of Mustek shares.

6.1.4. Inconsistencies and lack of candour in the submissions:

6.1.4.1. The affidavits and submissions provided by the parties contain material inconsistencies and omissions. For example:

6.1.4.1.1. The DK Trust's trustees, including Engelbrecht and Michael Kan, failed to provide a coherent account of their deliberations regarding the undertaking.

6.1.4.1.2. The assertion that all board minutes and resolutions related to the MEP share sale were conducted verbally and without written documentation is implausible and undermines the credibility of the DK Trust's position.

6.1.4.2. These inconsistencies further support the Panel's conclusion that the DK Trust was not acting independently but in concert with Novus.

6.2. In light of the above, the Panel finds that the DK Trust's actions satisfy the definition of "act in concert" under Section 117(1)(b) of the Act and the principles established in the Mediclinic case. The DK Trust's undertaking was not only directly linked to the Mandatory Offer but was also a sine qua non for its implementation.

6.3. Accordingly, the DK Trust is deemed to be a concert party of Novus in relation to the Mandatory Offer. This finding has the following implications:

6.3.1. Novus and its concert parties, including the DK Trust, must promptly adhere to the mandatory offer obligations outlined in Section 123 of

the Act and the takeover regulations, which include disclosing the DK Trust as a concert party.

6.3.2. Novus and its concert parties must immediately assess whether the offer remains compliant with the requirements of Regulation 111(2) and (3), taking into account the trading activities of all concert parties, including those of the DK Trust and MEP, immediately preceding the triggering of the mandatory offer as contemplated in the Takeover Provisions.

6.4. The parties are directed to take the necessary steps to give effect to this ruling.

6.5. Lastly, Novus and Mustek must announce to the market, within 24 hours of receiving this ruling, the outcome of this matter. This includes publishing a copy, either directly in the announcement or by referring to the relevant pages on their respective websites (and that of the Panel) where this ruling is published.

7. Your attention is also drawn to Regulation 118(5), stating that all rulings of the Panel will be given on the assumption that all information provided is correct and complete.

8. Further, your attention is drawn to Regulation 118(8) stating:

> "Any person issued with a Ruling of the Panel may apply to the Takeover Special Committee for a hearing regarding the ruling within –
>
> *(a) 5 business days after receiving that Ruling; or*
>
> *(b) Such longer period as may be allowed by the Committee on good cause shown."*

9. Please do not hesitate to contact the Panel should you wish to discuss

Dated at Johannesburg on this 24 day of February 2025

Zano Nduli

Deputy Executive Director[44]

Takeover Regulation Panel

[44] Pursuant to section 200(3) of the Act.