In re:

CHOPPIES ENTERPRISES LIMITED

OPINION FROM COUNSEL ON CERTAIN LABOUR LAW ISSUES

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Introduction and summary of advice

1. We have been instructed by Neill Armstrong Attorneys, on behalf of Choppies Enterprises Limited ("***Choppies***" or "***the Company***"), to provide our opinion on various labour law issues arising from a corporate governance review prepared by Mr Guy Hoffman SC and Mark Meyerowitz dated 5 December 2019 (***the Hoffman Opinion***").

2. The Hoffmann Opinion concludes that there have been significant failings of corporate governance but none so serious as to warrant civil or criminal action being taken against any of the Choppies directors (with one notable exception being a possible fraud relating to stock losses in South Africa and Zimbabwe, discussed below). The authors of the opinion make the point there has been no overt impropriety in relation to the Fours Buying Group.

3. The purpose of this opinion is to consider whether any Choppies employees committed misconduct within the meaning of Botswanan labour law and, if so, to advise on what process should be followed. Obviously, the major concern is the suspension and subsequent reinstatement of the CEO Mr Ramachandran Ottapathu ("***Ottapathu***").

4. For the reasons set out below, we do not believe that the information which has been analysed in the Hoffman Opinion establishes misconduct on the part of Ottapathu or any other person which would warrant either

the sanction of dismissal or a lessor, but substantial sanction – such as a final written warning. If the Board is moved by the concerns expressed in the Hoffman Opinion about suspicious transactions and potential misconduct, including fraud, then we suggest a process of investigation and hearing in which if further evidence of misconduct comes to light, disciplinary steps can be taken in respect of Ottapathu and/or other members of management.

Factual context of opinion

5. The factual context of this opinion may be summarised as follows:

5.1. As a result of concerns raised by its auditors, PWC, Choppies was unable to timeously publish its financial results for the 2018 year-end; and it was eventually suspended from trading on both the Botswana and Johannesburg stock exchanges in November 2018.

5.2. In May 2019 the Board suspended Ottapathu pending a disciplinary hearing into allegations of misconduct pertaining to some of the concerns raised by PWC. Ottapathu challenged the legality of his suspension in court and it would appear that these proceedings are still pending.

5.3. On 14 August 2019 the Board issued a circular calling an extraordinary general meeting of shareholders ("***the EGM***") to

take place on 4 September 2019. In that circular the Board attached summarised versions of reports by Ernst & Young ("***EY***") and the Desai Law Group ("***DLG***"). The circular stated that, on the strength of these reports, the Company was in the process of instituting disciplinary proceedings against Ottapathu. The circular also invited Ottapathu to respond in writing to the DLG and EY reports by 27 August 2019 (which response would be announced to the shareholders).

5.4. On 26 August 2019 the Company formally charged Ottapathu with specific allegations of misconduct and gave him notice to attend a disciplinary hearing scheduled to take place on 30 and 31 August 2019 ("***the disciplinary charges***"). The charges preferred against Ottapathu related to:

5.4.1. his purported involvement in sham transactions that took place over March and April 2018 in South Africa which were, allegedly, designed to hide stock losses of over R130 million ("***the sham transactions allegation***");

5.4.2. two further allegations pertaining to the Fours Group arrangement (allegations which the DLG report had

stopped short of recommending for disciplinary action – discussed in the Hoffman Opinion); *and*

5.4.3. a fourth allegation that Ottapathu had misled shareholders as to the reason for his suspension.

5.5. The next day, 27 August 2019, Ottapathu published his response to the circular. In his response Ottapathu challenged the accuracy of both the DLG and EY reports and denied any wrongdoing.

5.6. On 29 August 2019 Ottapathu launched an urgent application in the Botswanan Industrial Court to interdict his disciplinary hearing from taking place until after the EGM. In the circumstances, the disciplinary hearing did not proceed.

5.7. At the EGM on 4 September 2019 the shareholders voted to replace the majority of the old Board members and a new Board was constituted. Significantly, Ottapathu was retained as a director.

5.8. On 11 September 2019 the new Board issued a notice to shareholders stating, *inter alia*, that pursuing disciplinary action against Ottapathu "*at this time*" would be inimical to interests of the business; Ottapathu was accordingly reinstated as CEO.

5.9. On 24 September 2019 a large portion of the Company's institutional investors (representing 46% of the issued share capital of the Company) wrote a letter to the chairman of the new Board expressing dismay at the fact that Ottapathu had been reinstated and requesting that the Board proceed with the disciplinary action against Ottapathu.

5.10. On 2 October 2019 the chairman of the Board wrote a letter to the institutional investors stating, *inter alia*, that:

5.10.1. the Board had to prioritise the Company's engagements with its auditors and lenders to preserve shareholders value;

5.10.2. the Board felt that Ottapathu's presence as CEO for the moment was essential to the stabilisation of the business;

5.10.3. the Company would appoint independent senior counsel to undertake a holistic review of the EY and DLG reports (as well as other available evidence) and advise on the need (if any) to proceed with disciplinary action against Ottapathu; *and*

5.10.4. the independent counsel would also consider whether the Company should take action against any other

persons, including former directors, in light of the collective responsibility of the old Board.

5.11. On 12 October 2019 we were formally briefed to undertake the envisaged "*holistic review*". Our brief is to focus on the issues pertaining to labour law, while Hoffman SC (with Mr Meyerowitz) was briefed to consider the corporate governance issues.

Documents considered by counsel

6. We have considered, *inter alia*, the following material documents:

6.1. Ottapathu's contract of employment dated 1 May 2011;

6.2. the Company's disciplinary policy;

6.3. the minutes of meetings held by the Company's Board of directors ("***the Board***") from 2014 to date (including minutes of the so-called "independent committee", discussed below);

6.4. the Desai Law Group report dated 3 June 2019 ("***the DLG report***");

6.5. the report prepared by the advisory firm Ernst & Young dated 6 August 2019 ("***the EY report***");

6.6. the circular to shareholders dated 14 August 2019 ("***the Circular***") convening the EGM to be held on 4 September 2019;

6.7. the disciplinary charges preferred against Ottapathu dated 26 August 2019;

6.8. Ottapathu's response to the Circular dated 27 August 2019;

6.9. a comment on the EY report prepared by the advisory firm Grant Thornton dated 29 September 2019;

6.10. various announcements from the new Board elected at the EGM from 11 September 2019 to date; *and*

6.11. the contract of employment of Ms Vidya Sanooj dated 25 June 2019.

The disciplinary actions taken against Ottapathu

7. On 31 October 2018 the Choppies Board resolved to form a sub-committee comprising of the Board's non-executive directors ("***NED***") which it called the Independent Committee. This committee's primary function was to investigate why the 2018 AFSs had been delayed and to resolve the underlying issues.

8. The Independent Committee commissioned both the DLG and EY reports. A first draft of the DLG report was issued to the Board in February 2019.

9. It would appear that the Board's decision to suspend Ottapathu, in April 2019, was precipitated by the first draft of the DLG report as well as, we presume, feedback on progress made in preparing the EY report. The legitimacy of Ottapathu's suspension is beyond the limits of our brief and, in any event, events have overtaken that issue. As a matter of fact and law Ottapathu is currently the Company's CEO.

10. However, what is relevant are the disciplinary charges preferred against Ottapathu on 26 August 2019 by the old Board. These four charges deal with the following allegations:

    10.1. Charge1: the sham transactions allegation;

    10.2. Charge 2: using Company funds to purchase a 90% stake in one of the companies in the Fours Group by the name of Payless Supermarkets (Pty) Ltd ("***Payless***");

    10.3. Charge 3: transferring 50% of the shares in each of the Fours Group companies into his own name; *and*

    10.4. Charge 4: misleading shareholders as to the reason for his suspension.

11. It is important to note that neither the EY report nor the DLG report explicitly recommends preferring these specific charges against Ottapathu. In this regard:

11.1. The EY report identifies a slew of accounting irregularities and makes the suggestion that these irregularities could have been used to hide significant stock losses. In particular, the tenor of the report is that Choppies management may have:

11.1.1. misused an accounting entry called Rebate SKUs by "transferring" missing stock into these Rebate SKUs;

11.1.2. used the spurious "value" of the non-existent stock contained in the Rebate SKUs to purchase four South African stores at artificially inflated prices; *and*

11.1.3. thereby make it appear that the stock had legitimately been sold (when in fact the losses remained hidden in, *inter alia*, the artificially inflated goodwill of the stores).

11.2. As a convenient shorthand we might refer to the irregularities identified as suggesting fraud on the part of Ottapathu and any management involved.

11.3. However, the report does not actually reach the above conclusion but instead leaves it for the reader to draw the inference of fraud - an inference which would eventually form the basis for Charge 1. Furthermore, the report does not state that Ottapathu was the mastermind of these transactions but merely

states that Ottapathu, and a variety of other management staff, were unable to explain the irregularities.

11.4. With regard to Charge 2, the DLG report does not state that Ottapathu used Company funds to purchase a 90% stake in Payless. Instead, it states that Choppies' subsidiary, CDC[1], provided financial assistance to one Saleem Malique ("***Malique***") so that he could purchase the shares. DLG does query the rationale for this transaction (and suggests that CDC should immediately obtain repayment of the loan), but it does not recommend disciplinary action against Ottapathu. Interestingly, in the Charge Sheet the Company alleges that Malique acted as Ottapathu's nominee to purchase the shares on Ottapathu's behalf (hence the allegation that Ottapathu obtained the shares himself by using Company funds).

11.5. With regard to Charge 3, the DLG report considered Ottapathu's defence that he held the Fours Group shares on behalf of the Company as "additional security" for the buying arrangement. This version appears to be corroborated by the fact that the Fours Group member companies have now sued Choppies for the return of these shares on precisely that basis. The DLG report did not give an opinion on whether Ottapathu's defence was true,

[1] Choppies Distribution Centre (Pty) Ltd

or whether he actually intended to purchase the shares for his own benefit. However, the report did recommend censuring Ottapathu for not disclosing this transaction to the Board; it also mooted the possibility that charges in relation to this transaction could be added to the charges it had recommended pertaining to Ottapathu allegedly misleading the Botswanan Competition Authority ("***the CA***") (discussed in the Hoffman Opinion).

12. The above analysis reveals something of a divergence between the two reports on the one hand, and the charges eventually preferred against Ottapathu by the old Choppies Board on the other.

13. Firstly, the drafters of the charge sheet seem to have ignored DLG's recommendation that charges be brought against Ottapathu in relation to misleading the CA. Secondly, the Fours Group shares issue seems to have been elevated from a concern in the DLG report to the subject of disciplinary proceedings. Thirdly, the old Board introduced the new allegation (not contained in any report) that, according to Malique himself, Malique was only a nominee shareholder in Payless (meaning that Ottapathu had actually acquired the shares for his own personal benefit). Finally, the old Board introduced the new allegation that Ottapathu had misled the shareholders about his reason for suspension.

14. On the evidence available to us we cannot account for the above divergence. Perhaps the drafters of the charges acted on additional evidence in the process of designing the charge sheet against Ottapathu. However, we have not seen such evidence.

15. It is also worth noting that we agree with Ottapathu's claim (in his application to the Industrial Court) that he would not have had enough time to prepare for the disciplinary hearing. It is therefore unfortunate that the hearing was convened on short notice on the eve of the EGM.

The motivation for, and the merits of, the existing disciplinary charges

16. Based on the analysis contained in the Hoffman Opinion, we do not believe that there is a *prima facie* case against Ottapathu relating to Charges 2 and 3.

17. First, it is overwhelmingly likely that Ottapathu held the Fours shares as security for CDC's obligations to suppliers in terms of the buying arrangement. He did not intend to hold them as the owner of the shares, or to obtain a personal financial benefit. As a matter of fact Ottapathu did not make a secret profit at the Company's expense, and there is no *prima facie* evidence to show that he had the intention of doing so.

18. Secondly, there is no evidence that Malique was holding his 90% stake in Payless as Ottapathu's personal nominee. This allegation first appears in the Charges and is not mentioned in the DLG report. The Charges

state that Malique himself confirmed that he was holding the shares as Ottapathu's nominee. However, neither the DLG report, nor the transcript of DLG's interview with Malique on 19 November 2018, make any mention of this allegation.

19. In relation to the allegation that Ottapathu misled shareholders in anticipation of the EGM, we have seen no evidence of this at all; but we shall return to this issue below.

20. In relation to Charge 1 (the allegation of stock fraud); we concur with the Hoffman Opinion that the EY report establishes the existence of highly suspicious conduct.

The stock fraud allegation

21. The Hoffman opinion has undertaken a useful analysis of the accounting irregularities listed in the EY report and provided narrative structure to the issues at hand. The opinion explains how the Rebate SKU system could have been used to hide stock losses; and how the stock losses could have been fraudulently hidden from the Company's books through simulated transactions with Devland and ANE[2]. The opinion then lists 13 pieces of circumstantial evidence which, when viewed holistically, strongly suggests that Choppies management may have perpetrated a

[2] ANE Western Cape (Pty) Ltd, a company connected with Devland

fraudulent scheme to hide stock losses. The opinion concludes by saying that the stock fraud allegations bear further investigation.

22. After careful consideration of the Hoffman opinion, it appears that conducting a physical stock count after April 2018 cannot itself reveal whether a fraud has taken place (indeed, that was purportedly the entire point of the rapid liquidation of stock over March and April 2018 ("***the Easter trading period***")).

23. In order to establish whether fraudulent conduct has taken place, it would be desirable to have, for example, direct evidence regarding the stock losses identified *before* the Easter trading period. This is because, if stock was genuinely missing prior to the Easter trading period, then there would still have been stock deficiencies after the Easter trading period. Accordingly, either there were no shortages and the Easter Transactions were legitimate; or there were genuine shortages and the Easter Transactions were a fraud.

24. An investigation might establish what was allegedly missing, when physical stock counts were done and by whom, the results of those stock counts, as well as a full reconciliation of all stock transferred into Rebate SKUs from the date that stock was first purchased.

25. Another avenue of enquiry would be to obtain evidence that Devland actually received the stock (beyond its written assurance), as well as

confirmation from the Somali wholesalers[3]. Finally, an analysis of the market value of the Zandspruit stores, as well as close scrutiny of the Distribution Centre Credit Transaction and the Stock Return, might reveal the artificial values attached to these "assets" and "receivables" (these terms are all discussed and defined in the Hoffman opinion).

26. We also point out that certain Choppies employees sought to explain away the alleged stock deficits by saying that the items had been "*relocated to a virtual location [the Rebate SKU] for implementation of ROQ[4]*"[5]. This explanation would appear inadequate because, as discussed in the Hoffman opinion, the use of a rebate SKU would have resulted, if anything, in an excess of *physically counted stock* as against the underlying store SKU (rather than a deficit)

27. If Ottapathu was involved in any fraudulent scheme to hide stock losses of R200 million[6] from the Company's books of account, this would constitute serious misconduct. In addition it would constitute a breach of his fiduciary duty as a director. Such misconduct would clearly warrant summary dismissal.[7]

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3 A further party in the purported stratagem (discussed in the Hoffman opinion).

4 Re-order quantities (discussed and defined in the Hoffman opinion).

5 The Board minutes of 24 April 2018.

6 Comprising R130 million in South Africa and $6 million in Zimbabwe

7 The fraudulent conduct envisaged by Charge 1 would, if proven, justify dismissal without notice pay as contemplated in section 26(4) of the Employment Act Cap 47:01 ("**the EA**").

Legal principles

28. Under Botswana law an employee, including a CEO, can be dismissed for serious misconduct. Not only is this a material breach of contract under the common law, it is a ground for termination of employment recognised at section 26(1) of the Employment Act (CAP 47:01).

29. However, employers have additional obligations in dismissing employees. Under Botswana law a dismissal must also be fair.[8] Internationally recognised principles concerning fairness, which the Botswana courts have adopted, require a fair dismissal to be one which is (1) for a valid reason connected with the conduct of the employee,[9] and (2) follows a fair procedure.

30. A fair procedure is one in which an employee is provided with an opportunity to defend himself (or herself) against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity.[10]

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8 *Phirinyane v Spie Batignolles* [1995] BLR 1 (IC); *Ndaba & Another v Asa Enterprises (Pty) Limited* [2011] 2 BLR 26 (IC)

9 Serious misconduct is a valid reason

10 Phirinyane, and Ndaba. See also the Industrial Court's interpretation of the EA (note 7) and the Trade Disputes Act 48:02 ("***the TDA***") in, inter alia, *Ntlhe v Pipex Plastics Botswana* 2010 2 BLR 72 IC; *Galejewe v Barclays Bank of Botswana Ltd* 2010 3 BLR 14 IC; and *Samuel Comet Mokara* v *Horizon Ogilvy* Case No. IC 468/17 (J2753) (unreported).

31. The Code of Good Practice: Termination of Employment[11] ("***the Code***") provides a guideline to employers about what constitutes a fair procedure. This guideline is appropriately flexible because procedural fairness depends on the peculiar circumstances of each case. Furthermore, the Industrial Court, as the ultimate arbiter of procedural fairness, has laid down certain principles that helps to illuminate the concept. The core principles pertaining to procedural fairness are:

31.1. the employee should be timeously notified of the allegations of misconduct made against him such that he/she fully understands the nature of the allegations and the possible consequences of being found guilty thereof;

31.2. the employee should be afforded a reasonable time to prepare for a hearing and the right to be represented at that hearing by a fellow employee;

31.3. the hearing should be held in good faith before an impartial chairperson;

31.4. both the employer and employee parties should be allowed to lead evidence and dispute the evidence of the other party (usually through cross-examination);

[11] Published under the TDA in Government Notice No. 483 of 2008.

31.5. if found guilty of misconduct, the employee should be allowed to lead evidence in mitigation of sanction; *and*

31.6. if the chairperson finds that the employee should be dismissed, the employee should be informed of his rights under law.

32. There appears to be a requirement for a hearing, but this does not need to be as formal or rigid as a hearing in a court of law; nor do the rules of procedure and evidence need to be strictly applied[12]. This echoes the sentiments expressed by the South African Labour Court (from which the Industrial Court regularly draws persuasive authority) in the case of *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration & others*[13]. This case confirms that, so long as the employee in question is afforded a proper opportunity to state his/her case, all that is required is "*dialogue and an opportunity for reflection before any decision is taken to dismiss*"[14]. What is envisaged is disciplinary hearings that are informal and which might be inquisitorial rather than strictly adversarial.

33. The Company has the onus of establishing that an employee has committed an act of misconduct. To warrant the sanction of dismissal, the conduct must be proved to be so serious that dismissal is appropriate.

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12 See *Phirinyane* (note 8) at p3 and p4.

13 (2006) 27 ILJ 1644 (LC)

14 at 1654A

34. The Code does not require an employer to facilitate an internal appeal mechanism. In *Phirinyane* the court held that the right to an internal appeal is not absolute.[15]

35. Many employers have a disciplinary policy which applies to all employees. Choppies' disciplinary policy ("***the Policy***") provides for conventional disciplinary hearings on an individual basis, and for an internal appeal. However, the policy is only a guideline and its terms may be departed from by management at its sole discretion.[16] Under South African labour law, deviations from an internal policy do not, *per se*, amount to procedural unfairness provided the employee is not prejudiced thereby.[17] A perusal of *Phirinyane* and the cases that follow it[18] reveal, in our view, that the same hold principle holds true under Botswanan labour law (particularly when the policy is explicitly framed as a "guideline").

36. There is one final issue worth considering, and that is the fact that the Choppies disciplinary Policy, at times, ambiguously states that it constitutes both a flexible policy informed by managerial prerogative *and* a term of each employee's contract of employment. As a matter of law

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15 See Phirinyane, at p4

16 See p9; p69 (paras 1 & 3); p72 (para 7.2)

17 See *Jonker v Okhahlamba Municipality & Others* [2005] 6 BLLR 564 (LC) where the Labour Court held at [32] that "*as a matter of Labour Law, the applicant has to show actual prejudice arising from the procedure followed. A procedural irregularity that does not result in prejudice is not actionable*". The court was interpreting the Labour Appeal Court judgment in *Highveld District Council v CCMA & Others* [2002] 12 BLLR 1158 (LAC). See also Myburgh & Bosch (2016) *Reviews in the Labour Courts*: Lexus Nexus page 301.

18 See note 10 (supra)

the disciplinary policy cannot be both. However, if the Policy has contractual force then the Company would, by and large, not be able to deviate from its terms.[19]

37. We have perused the employment contracts of both Ottapathu and Sanooj and neither document incorporates the Policy by reference. There is also nothing in the Policy itself which suggests that Ottapathu, Sanooj or any other Choppies employee has explicitly agreed that the terms of the Policy should have contractual force (such as, for example, an employee appending his or her signature to the document). Further evidence would be required to establish whether any particular employee has agreed to elevate the terms of the Policy to something that has contractual force. However, on the evidence available to us, we are satisfied that the Policy does not have contractual force and its terms may be departed from.

38. The overall requirement in respect of the procedure to be followed in respect of discipline or a dismissal is that it must be fair. If there is a policy an employer ought usually to follow the policy. However, if circumstances warrant, a policy may be departed from (particularly if it is a guideline), provided that what is substituted is procedurally fair. In short, an

[19] The Labour Court in *Solidarity & others v SA Broadcasting Corporation* (2016) 37 ILJ 2888 (LC) neatly describes the consequences of a incorporating a disciplinary code into a contract of employment at [49] *et seq*.

employee should not be worse off because an employer has declined to follow its own policy.

39. Accordingly, the Company's further conduct must take place cognisant of these obligations. In short, disciplinary steps as serious as dismissal can only be taken against employees where the employer can establish that the employee is guilty of serious misconduct. Before it sanctions the employee for the serious misconduct (by way of a dismissal, for example) the employee must conduct a procedurally fair hearing.

Further steps

40. The Company has commenced, but suspended, a disciplinary process against Ottapathu. As we have already indicated, in our view only one charge (Charge 1, relating to the sham transactions) has potential merit. In respect of this charge there is considerable evidence of suspicious conduct, identified in the Hoffman Opinion. But this does not, on the present evidence, amount to a conclusive case of serious misconduct.

41. That disciplinary process could be resumed. However, there is no likelihood, on current evidence, that a finding can be made that there was a fraud or breach of fiduciary duty in respect of the sham transactions. The Company may baulk at the time, effort and expense of simply ploughing on with that enquiry as it stands at present (with the likely outcome being a failure to prove misconduct).

42. Consideration can be given to adding further charges on the back of the Hoffman Opinion which criticises various breaches of corporate governance. The criticisms are in part aimed at Ottapathu, particularly in relation to his failure to make full disclosure to the Board of issues such as the pledged shares, the shares in Payless and the potential breach of the undertaking to the CA. However, as the Opinion makes clear at paragraph 108, none of these acts or omissions rises to the level of malfeasance. Much of what happened occurred because Ottapathu was given *carte blanche* by the Board. It would be difficult, in the circumstances, to establish that any of these failures of corporate governance amount to serious misconduct.

43. There then remains the considerable suspicious information concerning the sham transactions. Here, the Company may consider initiating a more focused investigation into the facts and circumstances involved (along the lines mentioned in paragraphs 23 to 27 above). Such an investigation may be conducted by a respected person with considerable legal experience. The investigation could even deal with other issues of concern which have arisen from the present enquiries and the Hoffman Opinion.

44. The investigation should ideally be focused on a limited number of issues. Once these are identified, the investigator may establish whether there is sufficient evidence of serious misconduct on the part of any person.

A careful assessment of the sufficiency and cogency of the evidence must be made. The persons implicated in serious misconduct should then be given an opportunity to respond, in writing, to the findings of the investigator.

45. At this point, the Company might adopt one of two approaches.

45.1. First, once a report is drawn up by the investigator and the persons implicated in the report are identified and given an opportunity to respond thereto, an independent decision-maker is appointed for the purpose of identifying whether there is misconduct and, if so, whether this warrants the sanction of dismissal (or some other serious sanction). In this approach there is no formal hearing or the leading of witnesses and cross-examination.

45.2. The second approach is to have a charge sheet drawn up and an enquiry convened before a Chairperson who will hear oral evidence in respect of those issues on which it is apparent there is a dispute, having regard to the investigator's report and the answering representations. In this approach an opportunity is given to those implicated to cross-examine witnesses in respect of the issues upon which there is a dispute. This approach accords more directly with the disciplinary policy.

46. A curtailed disciplinary enquiry process may be justified on the basis that it may be too disruptive to the Company's business to conduct a more formal disciplinary hearing. Provided the curtailed process grants the "accused" employee an adequate opportunity to respond to the allegations against him the requirements of natural justice and procedural fairness will have been observed.[20]

Persons likely to participate in the proposed further investigation

47. Having perused the documents available to us, we note that the EY report identifies a variety of persons who were ostensibly involved, in varying roles, in the bulk sales in South Africa, the purchase of the Zandspruit stores and the bulk sales in Zimbabwe. We recommend that such persons should be asked to participate in the proposed further investigation.

Conclusion

48. In our view the current information and evidence which is available to us, while indicating strongly that there may have been fraud and misconduct on the part of certain employees, including Ottapathu, does not reach the level of sufficiency to be confident that a defensible finding of serious

[20] In the main case on this topic, Phirinyane (*supra*) the Industrial Court held that the key aspects of procedural fairness were the overlapping requirements of natural justice and equity. Provided an employee has an opportunity to advance their version and contradict the version put up against them and make representations in respect of the issues, the basic requirements of natural justice and equity are met.

misconduct can be made. Any dismissal, it must be remembered, must be justified by the employer which has the onus to show that there is a valid reason for dismissal.

49. In the event that the Company seeks to pursue the highly suspicious transactions referred to in the Hoffman Opinion, we have suggested (with due deference) certain approaches which in our view would meet the requirements of fairness in respect of discipline for any employees.

ANDREW REDDING SC

MARK MEYEROWITZ

Chambers

6 December 2019