IN THE PROCEEDINGS BEFORE THE ENFORCEMENT COMMITTEE ESTABLISHED IN TERMS OF SECTION 10 (3) OF THE FINANCIAL SERVICES BOARD ACT, NO. 97 OF 1990

CASE NO: **15/2013**

In the matter of:

DIRECTORATE OF MARKET ABUSE	First Applicant
FINANCIAL SERVICES BOARD	Second Applicant
and	
ZIETSMAN, GAVIN LYONEL	First Respondent
HARRISON AND WHITE INVESTMENTS (PTY) LIMITED	Second Respondent

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DETERMINATION OF THE ENFORCEMENT COMMITTEE

Before The Hon Mr Justice C F Eloff, Prof S M Luiz, Ms C Maynard, and E A Moolla.

The committee has come to a conclusion and I shall now shortly set out the findings of the committee. This committee is charged with the task of considering and pronouncing on the merits of charges of insider trading brought by the Financial Services Board and the Directorate of Market Abuse, which is a committee of the FSB, against the two respondents, namely GL Zietsman, hereinafter referred to as Zietsman

and the company of which he was at all relevant times the chairman of its board, namely Harrison and White Investments (Pty) Limited (to be referred to hereafter as Harrison and White).

The essence of the charges is that while in late 2010 and early 2011 they were in the process of conducting negotiations on behalf of Harrison and White and its subsidiary, AJP Investments (Pty) Limited, (hereinafter referred to as AJP), of which Zietsman was also their chairman, to acquire a substantial interest in the company African Cellular Towers Limited, referred to (hereinafter by use of the capital letters ACT), they came to know that the Industrial Development Corporation had agreed to grant ACT a loan facility in the amount of R99 million. Zietsman is alleged to have known that the grant would substantially boost the working capital requirements of ACT and would enable it to bid for valuable contracts. Applicants allege that that was also the knowledge of Mr Trevor Ralston, the then managing director of Harrison and White who was also instructed in early 2011 to acquire ACT shares. It was also the knowledge of JK Collins, a chartered accountant who was financial director of AJP, who also purchased ACT shares for Harrison and White.

The applicants allege that the reality of the loan and that the lender who was the IDC was not known to the public until on 11 March 2011 when ACT disclosed those details in a SENS publication. Applicants

aver that the respondents were, until 11 March 2011, insiders as defined in Section 72 of the Securities Services Act No. 36 of 2004, (hereinafter referred to as the SSA) and, while they and Ralston and Collins were insiders, they, from 15 February 2011 to 10 March 2011 purchased various quantities of ACT shares totalling 19 301 977 at prices varying from 10 to 12c per share. When the March 2011 SENS publication appeared, the price of ACT shares closed at 17c per share. Applicants contend that the disclosure in the SENS publication had a material effect on the security price of ACT. The information pertaining to the amount of the IDC loan and that the lender was IDC is alleged by the applicants to constitute insider information. The potential profit gained by the second respondent is alleged to amount to R1 203 819.00.

It appears that when the Financial Services Board received a notification from a committee of the JSE that the dealings by the respondents in ACT shares in February and March 2011 might be suspect, it, in the exercise of its statutory powers, conducted an investigation and interviewed a number of persons who testified under oath. The content of what was testified to constitutes a significant portion of the information available to the main deponent to the application. The essential features of the applicant's case are mainly articulated in the affidavit of E van Kerken, senior forensic investigator in the Market Abuse Department of the Financial Services Board.

Zietsman presented the main answering affidavit to which a few supporting affidavits were filed. Then, with the leave of the chairman of this committee, a further answering affidavit by a chartered accountant, one PJ Strydom, was filed. Replying affidavits by the main deponents to the founding affidavits were filed, to which affidavits were annexed, that of De Villiers who was the chief executive officer of AC Towers at the relevant times and a Mr Joseph Sithole, the main accounts manager of the IDC and who personally dealt with the loan. There was also a replying affidavit by Henk Engelbrecht who dealt with provisions concerning the duties of ACT concerning the grant of the loan. The respondents' counsel submit in their Heads that these supporting affidavits contain new matter. However, in their Heads of Argument they deal with the facts set out in the answering affidavits and a few days ago Zietsman filed a supplementary affidavit dealing with the affidavits of De Villiers and Sithole.

The committee, in the exercise of its powers, granted leave for all of these affidavits to be filed. It can once be said that the main issues endangered by the papers appeared to be (a) the status, essential features and likely impact of the IDC loan, and (b), the extent of knowledge of the respondents of the essential features of the IDC loan. The relevant statutory provisions are fully set out in the Heads filed on behalf of the respondents and there is no need to repeat them.

Specific reference should, however, be made to the definition of inside information. It has to be specific or precise information, which has not been made public and which is obtained or learned by an insider and which, if made public, would be likely to have a material effect on the price or value of any security listed on a regulated market. Also, that Section 6D(ii) of the PFA provides that if the EC is satisfied that there was a contravention, it may impose administrative sanctions.

It will be convenient now to give a brief resumé of the facts, which are common cause or beyond dispute. Harrison and White is an investment holding company with interest in the construction and engineering sectors. Zietsman, his wife and his children are the beneficiaries of the Josade trust, which indirectly owns 69% of the shareholding of Harrison and White through its shareholding in Circle Way Trading 69 (Pty) Limited. Zietsman is also a trustee of the Josade Trust. ACT, prior to its liquidation in July 2012, was a manufacturing company conducting business as a manufacturer of telecommunication infrastructure, power lines, portal factories, steel fencing, solar structures and general steel engineering. Prior to its liquidation in 2012, its shares were listed on the alternative exchange of the JSE.

During 2010 Harrison and White adopted a strategy which involved participation in the renewable energy sector. AC Towers was identified as a suitable company to offer capacity for the project because of its

transition line capabilities. Harrison and White intended to acquire 34.5% of the issued shares of ACT. The board of Harrison and White agreed with Zietsman that he would buy the shares in his personal capacity and that he would, at a later stage, transfer the shares to Harrison and White. One of the subsidiaries of Harrison and White was AJP Investments (Pty) Limited, (referred to as AJP). It was identified as a suitable vehicle within the Harrison and White group to house the new acquisitions.

10 Between 30 August and 4 November 2010, Zietsman purchased 855 803 ACT shares on behalf of Harrison and White, but in the period from 15 February 2011 to 10 March 2011 19 491 970 ACT shares were acquired on behalf of Harrison and White. On 19 November 2010 AJP instructed DP Cohen Consulting (Pty) Limited, (referred to herein as DPCC), to undertake a due diligence on the business of ACT. It is apparent that the object was to determine what advantages there might be in collaboration with ACT. The necessary investigations commenced in December 2010. One of the role players in the investigation was JK Collins who, as previously mentioned, was the
20 financial director of AJP. Zietsman avers that DPCC did not complete a due diligence, but attempted a valuation of the business of AC Towers.

In November 2010 ACT reported its interim results for the six months ended August 2010. It stated that it sustained a loss of R83.6 million.

ACT then decided on a turnabout strategy to return the group to profitability. Significant to the turnabout strategy was the development of a newly established power lines division within ACT, which at the time performed much better as compared to the other businesses of the group. To give effect to the new strategy and to gain Eskom contracts, ACT required more machinery and equipment for which capital resources were required. At about this time the IDC came onto the scene on suggestions from the Department of Trade and Industry. On its suggestion Mr Joseph Sithole, a senior accounts manager of the IDC, met with the then CEO of ACT and Mr Jacques De Villiers. Sithole was informed of the turnabout strategy of ACT. ACT intimated that it intended to apply to the IDC for a loan and Sithole set out its requirements. The application for funds was presented on 20 September 2010.

ACT was told that a business plan was required, which was duly presented. An engagement letter was signed on 8 November 2010. Sithole required a due diligence, which commenced during November and December 2010 and a thorough investigation of the financial position of AC Towers was undertaken. The due diligence was completed in the first week of January 2011. In various discussions with De Villiers it was indicated that a loan of the order of R99 million would be granted and it required written and signed agreements. The scope of the agreements was discussed and De Villiers and Sithole

agreed that the scope and content of the agreements were acceptable. The policy of the IDC in assisting companies who encounter financial distress differ markedly from that of commercial banks. It has a higher risk appetite than commercial banks because of the strategic objectives, which include economic growth and job creation. Its association with lenders is akin to a partnership.

At the time of the negotiations with Sithole, De Villiers started to engage with officers and advisors of Harrison and White and AJP who were very interested in the manufacturing capacity of ACT and the power lines division. It was plain that Harrison and White and AJP were vitally interested in the outcome of the approach to the IDC. The approval letter was sent on 24 January 2011. It reads "*we refer to your application for finance and have pleasure in informing you that the IDC has agreed to make available to your organisation a total funding package of R99 million. The funding has been approved substantially on the base terms and conditions as discussed with you. The agreements are being prepared, which will contain all the terms of the facilities and which will, when duly signed, form the agreement between the IDC and yourselves. Those documents will be forwarded to you in due course for signature. Please find attached for your information a broad outline of the funding approved*" and the broad outline was duly attached.

De Villiers decided that it was incumbent on ACT to publish the fact that financial assistance had been secured and a fairly non-committal notice was published in SENS. It did not evoke any price reaction on the purchase of ACT shares. It was also decided that fuller details should be published, once the agreements referred to in the approval letter had been signed. Those agreements were signed during March 2011 and that necessitated a further SENS announcement; about that more later. De Villiers also decided to communicate to the AJP and Harrison and White representatives the news of the IDC grant. There is a dispute concerning what De Villiers said at that meeting, which will be discussed later.

I continue with my narrative of undisputed and indisputable facts. The disclosure in SENS had an immediate material effect on the share price of ACT. On 11 March 2011 its share price increased from an opening price of 11c per share to a close of 17c per share, in other words, an increase of 54.5%. Later the price decreased somewhat, but the reality is that on 11 March the second respondent could have sold those shares at 17c per share. ACT duly accessed the loan and continued to conduct its business based on the turnabout plan. It later, about a year after the approval letter, experienced insuperable financial difficulties and it was liquidated.

I now address the question of the quantum of proof about the status and essential features of the IDC loan. We find that the letter of approval plainly establishes that the IDC had indeed granted a loan facility of R99 million on the terms set out. While the agreement still had to be signed, the Industrial Development Corporation and ACT had discussed the likely terms and agreed that they were acceptable. The loan was duly accessed. The grant of the loan would, on the evidence, have a significant effect on the ability of ACT to take steps to return to profitability and importantly the public was unaware of these facts until the publication of the second SENS statement. The applicants had plainly established the positive significance of the fact that the IDC was the lender. The evidence of Sithole is preferable to any contrary statement that the IDC is viewed as a concerned partner that is known to act as a partner and for its strategic objectives. The witness, Strydom, endeavoured to put forward facts relative to the business ethos of the IDC. His views cannot stand in the face of Sithole.

The committee also places reliance on the evidence of an asset manager who testified on why he believed that the announcement of 11 March 2011 was positive to the ACT share price "...*because it confirmed the amount of the debt facility, which was R99 million, I believe that this amount would be significant for a company like ACT who were in need of funding. The notice also confirmed that it was the IDC that would be providing the finance. The fact that it was the IDC*

was significant in my opinion, because it is less likely to apply overly onerous terms compared to commercial banks. Also, for a company, the IDC can be viewed as a partner whereas a commercial bank is viewed as a lender. I thought that these were positive developments for the company".

Suggestions by Zietsman and supporters that the grant was dependent on a due diligence, that the grant was dependent on conditions precedent, that it was only an indication of approval in principle, that it was vague and so on are rejected as unsupportable. The committee considers the affidavits of De Villiers and Sithole to be preferable to any contrary suggestions. The committee finds that the facts on 24 January 2011 were specific and precise within the meaning of the statutory requirements and that it was not made public until 11 March 2011 and it would, if made public, have a material effect on the value of the shares of ACT.

I turn then to the next important issue and that is the extent of knowledge of the vital facts of the ACT loan to Zietsman. The important occasion of which De Villiers reported as the approval letter was on 26 January 2011 when he met with representatives of Harrison and White and AJP to report on the outcome of the request for financial assistance. The applicant's version of what De Villiers said is summarised in his affidavit as follows: "*During a meeting held at the*

offices of ACT in the afternoon of 26 January 2011, Mr Jacques De Villiers, the CEO of AC Towers disclosed to the attendees that ACT had secured a loan facility of R99 million from the IDC. The loan consisted of 35 million revolving credit for project funding, of 48 million capital facility and a 16 million credit facility". De Villiers explained that the amount of the IDC loan was significant and it would enable ACT to tender for large power line contracts. This would have a beneficial effect on the earnings of ACT.

10 In reply Zietsman deposed at page 380 "*during the meeting of 26 January 2011 De Villiers told us that a potential loan had been approved 'in principle' by the IDC, but it was apparent that no agreements had been concluded between the IDC and ACT with regard to such funding and it was highly improbable that such funding would be advanced, and even if such funding were to be advanced, it would not have had by itself a positive effect on the value of the business of ACT*". In his further replying affidavit De Villiers refers to the terms of the letter of approval of 24 January 2011, which clearly shows (a) not an approval in principle, but a clear manifestation of an actual loan; (b)
20 that agreements would be prepared and signed, but on terms as discussed and approved by the parties and merely to create formal recognition of the loan; (c) that the funding would plainly be advanced and in this regard De Villiers is cogently supported by Sithole who said "from my point of view, once the IDC credit committee approved the

facility, my file was closed and the matter was referred to the IDC legal department"; (d), that the funding would, by itself, has a positive effect on the business of ACT; (e) De Villiers also refuted the suggestion that was made at one stage that the IDC grant was dependent on the outcome of a due diligence.

The committee considers that it is highly improbable that De Villiers would, at the meeting of 26 January 2011, present a misleading or incorrect version of the IDC loan, he knew exactly the circumstances of the IDC loan and he knew that clarity in the circumstances of the loan was essential for the respondents and ACT. De Villiers was aptly supported by Sithole and the committee has confidence in the version of these two persons. Another factor, which demonstrates the unreliability of Zietsman, is that a few days after 26 January 2011 it was recorded by Rhembe and Cohen on behalf of DPCC "*it is understood that ACT has incurred the following additional funding from the IDC – capital facility of 48 million – revolving credit facility of 35 million – guarantee facility of 16 million*".

An event which should also be referred to in this regard is the admitted fact that on 9 February 2011 the deponent, Rhembe, sent an e-mail to inter alia Zietsman and Ralston. It contained a preliminary valuation report of ACT compiled by DPCC. It was to be discussed at a meeting between Zietsman, Ralston, Rhembe and Cohen scheduled for 10

February 2011. On page 9 of this report mention is made of the fact that the IDC granted a loan of 99 million to ACT. On the same page the details of how the loan is structured is also stated. Proof of knowledge by Zietsman, Ralston and Collin of the main features of the IDC loan and its impact is substantial. Strydom, in the first of these three points, contends that the information imparted to the respondents is not inside information, because they did not have specific or precise information about the loan facility. He relies in this regard on the version of the respondents as to the extent of their knowledge. The committee rejects the version of the respondents and holds that on the version of De Villiers the information imparted was adequate, precise and definite. Strydom also deals with the significance of the fact that the lender was the IDC. He places his view on the knowledge which he gained in the years 1978 to 1983. The committee has a clear preference for the version of Sithole.

In conclusion, it is necessary to deal with the question of the knowledge of Zietsman that he had inside information. As in all matters of this sort, the question of proof of knowledge is to be inferred from the essential facts. We draw the clear inference that Zietsman in fact knew that the IDC loan had been granted, that it was important and that his knowledge thereof was inside knowledge. It is also relevant that Zietsman and Ralston were at the relevant time warned of the significance of the fact that they had

gained knowledge of the IDC loan. Consequently the committee finds that the two respondents are guilty as charged of insider trading.

The committee then turns to the quantum of the administrative penalty. The statutory dictates have been considered. It is important that insider trading is considered to be a serious contravention and as against that, it appears to be clear that the second respondent sustained severe financial losses in consequence of the purchases in all the circumstances. In all the circumstances a penalty of R1 million payable by the respondents jointly and severally is proper. The complete order and finding of the committee is then (a), the respondents are found guilty of insider trading as charged; (b), they are to pay the sum of R1 million jointly and severally; (c), they are jointly and severally liable for the costs of the case, which will be on the appropriate high court scale and which will include the fees of the members of the committee. That concludes the meeting of the day. Thank you very much for your contributions. The committee adjourns.

CHAIRPERSON

5 August 2014