CHAIRPERSON: This is a judgement in the matter of the Directorate of Market Abuse, first applicant, Financial Services Board, second applicant and Robert Fourie, the respondent in case number 17 of 2016. This is an *ex tempore* judgement. We are indebted to counsel for the applicants for the extensive written submissions as well as the preparation of the very extensive record, which underpins this particular matter, portions of which we rely heavily on is the recording of the interrogation of Mr Fourie, the respondent, as well as Anne-Marie Coetzee and the managing director of I-Cap.

The remit of the committee was to determine whether the respondent contravened Section 80(1) of the Financial Markets Act 19 of 2012, read together with Section 80(3)(a) and (b). In terms of Section 6A(2) of the Financial Institutions Act number 28 of 2001, the Directorate referred the matter to the Enforcement Committee for determination. Adv Deva Govender who appeared on behalf of the applicant, submitted that the committee, having regard to the evidence as a whole, should find that the respondent contravened Section 80(1)(a) read together with Section 80(3)(a) and (b).

In terms of Section 80 of the Act, *"no person may, either for his own account or on behalf of another person, directly or indirectly, knowingly or negligently manipulate a trading activity or price of a security"*. The relevant provisions of Section 80 are set out as

follows: Prohibited trading practices, subsection (1), *"no person may, either for such person's own account or on behalf of another person, knowingly, directly or indirectly use or participate in any practice, which has created or is likely to have the effect of creating (i) a false or deceptive appearance of demand for, supply of or trading activity in connection with or (ii) an artificial price for that security, (b) who ought reasonably to have known that he or she is participating in a practice referred to in subparagraph (a), may participate in such practice"*.

Section 80(2) reads *"a person who contravenes subsection 1(a) commits an offence"* and we make reference also to subsection (3), as it was the submission of counsel for the applicant that Section 80(3) also has application in respect of the culpability of the respondent. This subsection reads as follows and I quote *"without limiting the generality of subsection (1), the following are contraventions of subsection (1): (a) approving or entering on a regulated market an order to buy or sell a security listed on that market, which involves no change in the beneficial ownership of that security with the intention of creating (i) a false or deceptive appearance of the trading activity in or (ii) an artificial market price for that security; (b) approving or entering on a regulated market in order to buy or sell a security listed on that market with the knowledge that an opposite order or orders at*

substantially the same price have been or will be entered by or for the same or different persons with the intention of creating a false, deceptive appearance of the trading activity in or to an artificial market price".

The committee will not deal with the issue of the provisions of Section 80(1)(b), which deals with the principle of legality relevant to whether the respondent ought reasonably to have known in order for a finding to be made in ordinary circumstances of a breach by way of *culpa.* The committee, in its judgement at a later stage, will set out the reasons why it has resorted to deal with this matter in terms of Section 80(1)(a).

Adv Govender further submitted that the respondent's conduct satisfied the trading practices described in Section 80(3) and accordingly the committee must find that a contravention of these sections had occurred. The applicant's case is based on circumstantial evidence in addition to the admitted conduct of the respondent, as it is contained in the record of today's proceedings, being the interrogation proceedings, which he attended together with two other persons of I-Cap and which have been conducted on behalf of the applicants by Ms Mohamed and Mr Alec Pascoe.

We deal with the law initially relating to that issue. In Cooper and A N Other versus Merchant Trade Finance Ltd, 2000, Volume 3

SA, page 1009 being a judgement of the Supreme Court of Appeal at page 1027F to page 1038D the Judge of appeal said, and I quote *"the court, in drawing inferences from true facts, acts in a civil case or in civil trial on a preponderance of probabilities (Elgin Fireclays Ltd v Webb 1947, Volume 4 SA, 744(750)). The inference is one which, on a balance of probabilities the most probable, although not necessarily the only inference to be drawn".*

We also have regard to the submission made by Mr Govender in respect of the matter of R v Blom in which matter it was said that in a criminal case one of the two cardinal rules of logic referred to Watermeyer JA in R v Blom, 1939 AD, 188 at page 202 is that *"the true facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. The rule is not applicable in a civil case. If the facts permit of more than one inference, the court must select the most plausible or probable inference. If this favours the litigant on whom the onus rests, he is entitled to judgement. If on the other hand an inference in favour of both parties is equally possible, the litigant will not have discharged the onus of proof".*

Viljoen JA put the matter as follows in AA Onderlinge Assuransie Assosiasie Bpk versus De Beer in 1982, Volume 2 SA,

603A at page 614 EH. He said as follows and I quote *"Dit is na my oordeel nie nodig dat 'n eiser wat op omstandigheidsgetuienis in 'n siviele saak beroep, moet bewys dat die afleiding wat hy die Hof vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewyslas wat op hom rus kwyt indien hy die Hof kan oortuig dat die afleiding wat hy voorstaan die mees voor-die-hand liggende en aanvaarbare afleiding is van 'n aantal moontlike afleidings"*. Please excuse my pronunciation.

It is apparent from the record together with the submissions made by counsel that at all relevant times the respondent was a qualified and experienced dealer and an employee of an authorised user. The respondent had been involved in the securities market for more than 20 years. It is common cause that he has a B.Com degree and as stated by him, from the University of Cape Town. In addition, he had training at the head office of I-Cap in their systems, in London.

Adv Govender further submitted that in terms of Section 3.2.85 of the JSE derivative rules every transaction concluded on the exchange by an authorised user and its employees is subject to the provisions of the Act, the derivative rules and directives. Hence the respondent was obliged to comply with the Act and the derivative rules.

He further submitted that in terms of the derivative rules, the respondent was prohibited from manipulating the market and was prohibited from being a party to, facilitating or entering a trade, which is fictitious or has a dishonest or unlawful motive. He urged the committee to assess the liability of the respondent in relation to his conduct against that background. We are persuaded that there are merits in his submission and accept its applicability to this matter.

He further submitted and we accept that an analysis of the transactions concluded by the respondent reveals the following; that bids and offers were executed at the same price and quantity within a gap of a few seconds, in most instances, so as to ensure the matching of the bid and offer. The frequency and pattern of these transactions indicated that these were synchronised trades. It is reasonable to infer that when the respondent approved and entered a passive order to buy or sell the Sun's contract, he knew that an opposite active order at substantially the same price would be entered by him; that none of the transactions concluded resulted from an instruction given by a client to the respondent; that there was no change of beneficial ownership/interest of the contracts traded. The respondent, alternatively I-Cap, had the beneficial ownership/interest in both contracts. In other words, the respondent traded with himself.

In all trades concluded, the contracts were offset, thereby eliminating any delivery obligations. These offset transactions give content to the submission that they were in fact trades with one and the same party, hence cancelling any obligation for delivery. He submitted therefore that the transactions were concluded in such a manner that it led to the creation of a false or deceptive appearance in the demand for, supply of or trading activity in respect of the Sun's contract, thereby creating an artificial price; that a pattern of the respondent's synchronised trades featured on all the days that were investigated by the applicants.

Reference is made to table 224, which appears at page 338 of the enquiry record, of the table, which analyses the trades of the respondent for the period 17 July 2013. It would be noted on an analysis of the entire trades for that period that there were 42 trades executed of which 23 were for the respondent's own account and 19 were on account of others.

In granulating this finding, it would be noted that at 09h00 on the 17th of July the respondent entered the market for the purchase of a single contract at 52.70 and thereafter at various portions of the day he continued to trade in that security and again at 9:13:43 seconds again entered the market at 52.50 and again at 9:24:03, at 9:40:48 and 9:57:33.

Going further down that particular page, there is evidence of a price manipulation where having regard to the respondent's purchase at a lower price during the course of that day, entered that day to purchase one contract at 52.30. The obvious inference was that he had entered the market at 10:46:16 for the sole purpose of manipulating upwardly the price of that particular security. The record is replete with a significant number of other instances of similar conduct.

In dealing with the respondent's version, as it appears before us, but in the absence of a documented response, we proceeded on the assumption that the respondent is deemed to have accepted much of the allegations that have been made against him. However, out of abundant caution, the committee has had careful regard to the record of the interrogation and during counsel's initial submission interrogated the proceedings of that interrogation.

The committee accordingly finds that the respondent, through the I-Cap proprietary trading account, traded for his own account or alternatively on behalf of I-Cap and traded with himself with regard to the trades he concluded. We further find that the respondent or alternatively I-Cap remained the beneficial owner or had a beneficial interest in respect of the bid and offer contracts that he traded with himself, resulting in no change in the beneficial ownership interest of the Sun contracts.

Further that he used and/or participated in the above trading practice for the following reasons: These reasons the committee has independently inferred from the record and in particular the record of the interrogation. (1), he wanted to create liquidity in the Sun's contract and profit from it; (2), to create price discovery; (3), he traded in order to induce investors in the market to enter orders and trade at a higher price; (4) that he was hoping that by conducting many trades, it would have reflected positively on his performance as a dealer and consequently this would have encouraged his clients to direct further business to him.

Adv Govender also urged the committee to find that we should bear in mind that his remuneration was dependant on the trades he conducted. We accept the submission as it was clearly supported by the clear unambiguous language of the respondent in the responses that he had given to the applicant's inspectors in the course of the interrogation.

We were further referred to other instances of the conduct of the respondent from which the only inference to be drawn was an inference consistent with the contravention of Section 80(1)(a), was that when it was put to the respondent that the trades in which he traded with himself created a false or deceptive appearance of the demand for, supply of or trading activity in connection with the Sun's

contract and created an artificial price, he responded that it was not his intention to do so and that he did not know that his pattern of trading constituted a contravention. Further, that he was not advised by his employer or the JSE that such type of trading constituted a contravention, neither did he receive training in this regard. He only realised that his trades constituted a contravention after the investigation had commenced.

Counsel submitted that the respondent's defence does not bear scrutiny and is highly improbable for the following reasons: That at all relevant times the respondent was a qualified dealer and an employee of an authorised user. The respondent had been involved in the securities market for more than 20 years and that trading with oneself with no change of beneficial ownership was the most obvious and self-evident form of market manipulation. This would be known to any professional dealer, including the respondent.

In terms of the JSE derivative rules, every transaction concluded on the exchange by an authorised user and its employees are subject to the provisions of the Act, the derivative rules and directives. Hence the respondent was obliged to comply with the Act and derivative rules. On his own admission he did not keep abreast with the statutory obligations imposed on him and the legislative developments.

We further accept that in terms of the derivative rules the respondent was prohibited from manipulating the market and was prohibited from being a party to, facilitating and entering a trade, which is fictitious or has a dishonest or unlawful motive; that the respondent signed a broker code regulation in which he agreed to abide by the code of conduct to which reference was made to the Securities Services Act 36 of 2004, which is the predecessor to the Act, which contains a similar prohibition as the Act in respect of prohibited trading practices.

We accept the submission that it is highly improbable that the respondent was ignorant of the law and of his obligations as a qualified market professional. According to the interrogation record, Mrs Coetzee, the compliance officer of I-Cap stated that during June and July 2013 she noticed that there were more frequent overnight positions and more risk being assumed by the commodities desk and when she questioned the respondent about the overnight positions, he tendered different explanations and stated that it was either an erroneous transaction or he did not have sufficient time to allocate the trade in full to a client or he did not have sufficient time to get out of the position or there was no liquidity in the market for him to exit his position.

Further, according to Mr Jones Davis, the head of I-Cap South Africa who stated that initially I-Cap accepted the respondent's explanations. However, when the JSE queried I-Cap on some of the trades, he in turn questioned the respondent on the trades where he traded with himself and he gave various explanations. The respondent stated among others that there were client orders behind his trades. The respondent's credibility is therefore questionable in the light of the responses he provided to I-Cap.

It was further submitted and we accept that the respondent, at an early stage of his interviews, speculated that some of the trades may have been a mistake. He later then said he did so out of frustration in order to induce other investors to trade. Counsel postulated that in that event, if the explanation tendered by the respondent was a *bona fide* error, why had he not reported it to the JSE? The volume of trades in which he traded with himself clearly exposed the improbability of that version, viz, that it was an error. He confirms in his later explanation that he did so out of frustration in order to induce other investors to trade because of the lack of liquidity of the Sun contract.

In applying the law in making the assessments, the committee is inclined to accept the submissions of counsel for the applicants. The committee has regard to the following and refer to the following

quote expressed by *Selke J in the matter of Govan v Skidmore, 1952, Volume 1 SA, 732N and 734C to E thus"* and I quote *"In finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence 3rd edition, paragraph 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion may be not the only reasonable one".*

This was approved of, for example, in the South British Insurance Company Ltd v the Unicorn Shipping Lines (Pty) Ltd, 1976, Volume 1 SA, 708 (71B to G) and Smith Arthur 1976, Volume 3 SA, 278(A) at page 386B to D.

Lastly, the committee has had regard to the evidential premise on which it finds that the version put before it by the applicants the one to be preferred and that appears in the record of the interrogation, which is the only evidence that we have before us as part of the assessment of liability in this enquiry. The factors which the committee took into account on the probability or improbability of the particular aspects of the version of the respondent as it's recorded, the calibre and cogency of his performance during the course of the interrogations compared together with (inaudible) **(bad spot in the recording)**... The liability is also dependent on (inaudible) the

opportunities he had regarding the quality, integrity and independence of his recall of the events. We have considered the probability of each party's version on each of the disputed issues.

In analysing the cumulative submissions of counsel for the applicants and in analysing the little we have before us on behalf of the respondent, I repeat, as recorded in the record of the interrogation, the committee has no hesitation in finding a preference for the version postulated by counsel for the applicants rather than the version or the many versions of the respondent which appear on the record of the interrogation The Enforcement Committee accordingly finds that a contravention of Section 80(1) read together with Section 80(3)(a) to (d) has occurred as a result of the conduct of the respondent and we find accordingly.

Determination of administrative sanction

CHAIRPERSON: This is a judgement in respect of the issue of the imposition of the administrative sanction, the respondent having been found to have been in breach of the allegation made against him by the applicants. In determining an appropriate administrative sanction, the committee has resolved to be guided by the famous principle of

the triad of sentencing and *mutatis mutandis* will apply the principles to the extent applicable to this particular matter.

The triad involves the committee in addressing three factors. One, is the personal circumstances of the respondent, two, the circumstances relating to the commission of what might be termed the offence or the offending conduct and three, the interest to society, which in this particular matter substantially involved in the interest of the integrity of the markets.

Furthermore, in terms of the Financial Institutions Act, also referred to as the Protection of Funds Act number 28 of 2001, the committee is entitled to take into account certain factors when determining an appropriate administrative sanction, which factors are set out in Section 3 and I will read them into the record. *"(1), the nature, duration, seriousness and the extent of the contravention; (2), any loss or damage suffered by any person as a result of the contravention; (3), the extent of the profit derived or loss avoided by the respondent from the contravention; (4), the impact which the respondent's conduct may have on relevant sector of the financial services industry; (5), whether the respondent has previously failed to comply with their fiduciary duty or law; (6), any previous finding posed or compensation paid for the contravention based on the same set of facts; (7), the deterrent effect of the administrative sanction;*

(8), the degree to which the respondent co-operated with the applicant and the Enforcement Committee; and (9), any other factor, including mitigating factors submitted by the respondent that the Enforcement Committee considers to be relevant".

Regrettably in this instance and it is common cause that there was no appearance on behalf of the respondent and therefore the committee, in addressing both the issue of liability as well as the issue of sanction, was limited to those submissions made on behalf of the applicants, as well as whatever it could glean from the record before us, either by way of inferences or by way of findings of fact.

In turning to the triad and in particular the first of the triad, we deal with the circumstances personal to the respondent. We take into account the fact that the conduct of the respondent took place over a long period of time, namely from the 26th of June to the 19th of July. By any measure in financial markets this is a long period of time during which markets can be moved significantly to the prejudice of one or more parties. Regrettably it was not possible nor was the evidence placed before us regarding the quantification of the prejudice that may have been suffered.

We will deal with the issue of the impact of the respondent's conduct on the relevant sector of the financial services industry. We have no knowledge as to whether the respondent failed to comply

with any fiduciary duty or law other than what is before us and what the committee has already found as a matter of fact under the issue of liability and we have no evidence before us as to whether there was any finding imposed or compensation paid for other contravention/s, based on the same set of facts. In fact, on the record of the interrogation, it appears that he repeatedly stated that this was his first offence and he was not involved in any such offence during his tenure as a market participant.

We will deal with the deterrent effect of the administrative sanction under the third triad of the application of the administrative penalty. As far as the degree to which the respondent had co-operated with the applicants and the Enforcement Committee, we repeat that he did not take us into his confidence and be present here today with the recordal of his version on the issue of liability; also arising from his absence it was not possible for us to benefit or be favoured with any factors in mitigation of the penalty that the committee is obliged to administer today.

It is also important to take into account another important provision of the legislation and that is that it is with the discretion of the committee to take into account any other factor, including mitigating factors submitted by the respondent that the Enforcement Committee considers to be relevant.

Now, it is obvious from what we have before us that if the cumulative conduct of the respondent is taken into account, one cannot draw any inference from that, that he was a co-operative person or a co-operative participant in respect of the allegations made against him or in respect of the entire process of the empanelment of the Enforcement Committee up to the point of the finalisation of this matter.

Now, it is common cause that, as stated previously, the respondent is a market professional. He's been in the market for many years, in fact, almost two decades. He has a financial background, being in possession of a university degree and he has training. He also has signed the declaration to abide by the JSE rules in relation to trading in regards to derivatives.

It appears to us from our reading of the record that he was not co-operative during the process of the interrogation. The record has indicated to us that he would move from one explanation to the other and his explanations, if looked at cumulatively, will lead to only one inference to be drawn from his conduct and that is an attempt to avoid the issue of liability and even at that stage it is apparent and it appears to us that he was not prepared to accept liability for his wrongdoing and attempted at various points during the interrogation process to shift the blame on others.

As far as the second factor is concerned and that is the circumstances surrounding the commission of the conduct in question and that is a breach of Section 80(1) read together with Section 80(3)(a) and (b), it is unfortunate that there was no quantification of the prejudice suffered by the individual participants of the market. Therefore in respect of that particular component of the market activity impacted negatively by his conduct, we are unable to take a very strong view, but we accept the arguments adduced to us regarding the impact of a conduct, such as the one of the respondent has on the broader market.

South Africa is an emerging market and competes with other emerging markets for the inward flow of capital. Capital flight is a well-known feature in the international financial industry and where investors find that the market is lacking integrity, then they are loathe to be market participants wanting to commit their capital to a market such as ours. The importance of the adequacy of capital investments in South Africa cannot be underestimated. South Africa is an emerging market, which requires intensive capital inflow so as to establish its infrastructure, establish its businesses and industrial environment, create jobs so that it can address historical imbalances that characterise the South African society and if our markets, which the infrastructure requirements and industrial requirements depend on

the capital, is impacted, then it would affect the position of the country as a whole and it is a point that, as I said, it cannot be underemphasised.

We have, as a committee, ruminated at length on a number and I think there was an acceptance that this was conduct which was serious in nature and did in fact warrant the imposition of a heavy administrative penalty. We have also taken into account some of the submissions made by Mr Govender, separately from our own findings that the respondent's conduct was intentional in nature; he sought to deceive investors that artificially affected the market, that the conduct itself was nothing more than a fraud perpetrated on the market and importantly that it was manifest that the conduct in question was driven largely by the promotion of self-interest.

Accordingly, having further regard to the fact that he was a gatekeeper who had a duty, in fact, to protect the participants in the market, which he failed to do in those instances on which he traded unlawfully, was an additional factor which we have taken into account. It is the majority decision of this committee that an appropriate fine would be the imposition of an administrative penalty of R2 million.

Now, we do want to read into the record that we find that there is no disconnect between the imposition of a sum of R2 million, the

fact that on the record it appears that the respondent is not a person who appears to be financially well-off, as he attempted to reiterate in different iterations throughout the record. The question of the ability to pay is an issue that he has to resolve with the administration of the FSB. The thrust of the amount of the penalty, that we have determined to be appropriate, relates to the seriousness in which we regard the conduct of the respondent, hence the high figure that we have imposed.

As far as Mr Govender's submission that we also make an order as to costs, we find that that argument has merit. It was, in fact, his own conduct that led to the genesis of the investigations, of the interrogation and the empanelment of this committee to come to the hearing in this particular matter and accordingly we believe that such an order is warranted and we make an order that the respondent pays for the costs, including the cost of the investigation and as well as the cost for the constitution of the Enforcement Committee.

MR GOVENDER: As the committee pleases.

CHAIRPERSON: Thank you very much ladies and gentlemen, not only for the participation, but for the immense work that went into this entire process and also getting the committee together. We record our appreciation with my thanks.

MR GOVENDER: If I may just add, Mr Chairperson, the credit goes to the investigator in this team, the thorough investigation that resulted in the matter being referred.

CHAIRPERSON: Thank you Mr Govender.

ADJOURNMENT

E. MOOLLA

Mr Ebi Moolla (Chairperson)

7 March 2017