THE FINANCIAL SECTOR CONDUCT AUTHORITY

In the matter between:

FINANCIAL SECTOR CONDUCT AUTHORITY

and

MARKUS JOHANNES JOOSTE

ADMINISTRATIVE PENALTY ORDER IN TERMS OF SECTION 167 OF THE FINANCIAL SECTOR REGULATION ACT NO. 9 OF 2017

INTRODUCTION

1. This is an administrative penalty order in terms of section 167 of the Financial Sector Regulation Act, 9 of 2017 (the FSR Act)[1] resulting from contraventions of the insider trading prohibitions contained in section 78 of the Financial Markets Act, Act 19 of 2012 by Mr Markus Johannes Jooste. The alleged insider trading breaches were in respect of share transactions in Steinhoff International Holdings NV (Steinhoff) during November and December 2017.

2. At the time of the alleged contravention, section 78(4)(a) and (5) provided as follows:

> *(4)(a) An insider who knows that he or she has inside information and who discloses the inside information to another person, commits an offence.*

[1] "167. ***Administrative penalties***
(1) The responsible authority for a financial sector law may, by order served on a person, impose on the person an appropriate administrative penalty, that must be paid to the financial sector regulator, if the person: -
(a) *has contravened a financial sector law;"*

(5) An insider who knows that he or she has inside information and who encourages or causes another person to deal or discourages or stops another person from dealing in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence.

3. Section 77 defined "insider" and "inside information" as follows:

*'**Inside Information**' means specific or precise information, which has not been made public and which-*
(a) is obtained or learned as an insider; and
(b) if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market.

*'**Insider**' means a person who has inside information-*
(a) through-
(i) being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or
(ii) having access to such information by virtue of employment, office or profession; or
(b) where such person knows that the direct or indirect source of the information was a person contemplated in paragraph (a)

4. This order is made pursuant to an investigation by the Financial Sector Conduct Authority (the Authority) which found that, on 30 November 2017, shortly before a significant decrease in the market value of Steinhoff shares:

4.1. Mr Markus Jooste (the then Chief Executive Officer of Steinhoff), was privy to inside information;

4.2. Mr Jooste disclosed some of this information in a "warning SMS" and encouraged various individuals to dispose of Steinhoff shares prior to the publication of some of the inside information to the rest of the market;

4.3. Certain of the recipients of the warning SMS followed Mr Jooste's advice and disposed of their shares.

5. Having considered the evidence at its disposal, including Mr Jooste's submissions, the Authority finds that Mr Jooste has contravened section 78(4)(a) and (5) of the Financial Markets Act and imposes an administrative penalty accordingly.

6. We set out the reasons for this decision below.

7. In doing so we do not necessarily address each and every contention raised by Mr Jooste. Where we do not address a specific contention, this is not because the contention was not considered or taken into account by the Authority, but because it has been satisfactorily addressed in the Authority's own reasons for its decision.

THE AUTHORITY'S MANDATE

8. The Authority is established in terms of section 56 of the FSR Act. It is a financial sector regulator whose objectives are to enhance and support the efficiency and integrity of financial markets, protect financial customers and assist in maintaining financial stability in South Africa.

9. The Authority is entrusted with various powers to achieve its mandate. These include the powers to conduct investigations and impose administrative sanctions for breaches of financial sector laws.

10. The Financial Markets Act, a financial sector law administered by the Authority, is specifically designed with the objectives of ensuring that South African financial markets are fair, efficient and transparent, and promote the international and

domestic competitiveness of South African financial markets.[2] To this end, and amongst other provisions, it prohibits conduct defined as "market abuse". Such conduct includes insider trading.[3]

11. Section 167 of the FSR Act, read with section 82 of the Financial Markets Act, prescribes the method by which administrative penalties for insider trading are to be calculated, and the factors that are to be taken into account

THE INVESTIGATION

Information gathering

12. The Authority conducted an investigation into possible insider trading in terms of Part 4 of Chapter 9 of the FSR Act.

13. In particular, the Authority exercised its powers under section 136(1)(a) of the FSR Act, and obtained statements under oath from persons who were reasonably believed to have information relevant to the investigation. Those persons included, *inter alia,* Steinhoff's officers and the recipients of the warning SMS, as well as Mr Jooste.

14. The investigators also exercised their section 136(1)(a) powers to obtain relevant documentary evidence from, *inter alia,* Steinhoff's auditors, the Johannesburg Stock Exchange Limited (the JSE), Mobile Network Service Providers, Steinhoff's officers, and authorised members of the JSE.

[2] Section 2 of the Financial Markets Act.
[3] Market Abuse contraventions are set out in Chapter X of the Financial Markets Act.

15. Upon the completion of its investigation, the Authority considered the totality of the evidence and set out in a detailed investigative report its preliminary view on the merits of the alleged contraventions and proposed penalties.

Mr Jooste's opportunity to make representations

16. The Authority is enjoined by section 91 of the FSR Act to apply the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to any administrative action it undertakes.

17. In accordance with these requirements, the Authority furnished Mr Jooste with the investigation report and the supporting evidence, together with a letter explaining the Authority's preliminary view. In particular, Mr Jooste was informed that the Authority held the preliminary view that:

    17.1. he had contravened section 78(4) and (5) of the Financial Markets Act;

    17.2. he was liable for an administrative penalty of **R168 997 772** for the alleged contravention.

18. Mr Jooste was invited to make representations regarding the Authority's preliminary view. In response, Mr Jooste's counsel furnished the Authority with submissions, which were carefully considered prior to issuing this order.

FACTUAL OVERVIEW

19. At all relevant times, Steinhoff was an issuer of securities listed on the JSE, a licensed exchange as contemplated by section 7 of the Financial Markets Act. Steinhoff had its

main listing on the Frankfurt Stock Exchange (FSE) in Germany, and a secondary listing on the JSE in Johannesburg, South Africa. The JSE and the FSE are regulated markets within the meaning of section 77 of the Financial Markets Act.

20. At all relevant times, Mr Jooste was the Chief Executive Officer of Steinhoff. He was a qualified Charted Accountant with vast business experience in South Africa and abroad. He served on the Boards of various listed and unlisted Steinhoff subsidiaries.

21. Mr Jooste confirmed that although he was not an expert, he was aware of the concept of market abuse, including the prohibition against insider trading.[4] He also understood the concept of closed periods imposed by the JSE and the prohibitions on trading during those periods.

Steinhoff's accounting irregularities

22. During October 2017, Steinhoff was in a closed period[5] because the audit of its financial records was underway in preparation for the announcement of its Annual Financial Statements for the period ended September 2017. Generally speaking, during closed periods, an issuer is likely to be in possession of inside information,

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[4] Page 10, lines 12 to 25 of Mr Jooste's Examination under oath dated 20 July 2018.

[5] *Closed period is defined as*
- (a) *"the date from the financial year end up to the date of earliest publication of the preliminary report (refer to paragraph 3.22), abridged report (refer to paragraph 3.21) or provisional report (refer to paragraph 3.16);*
- (b) *the date from the expiration of the first six-month period of a financial year up to the date of publication of the interim results;*
- (c) *the date from the expiration of the second six-month period of a financial year up to the date of publication of the second interim results, in cases where the financial period covers more than 12 months (refer to paragraph 3.15);*
- (d) *in the case of reporting on a quarterly basis, the date from the end of the quarter up to the date of the publication of the quarterly results; and*
- (e) *any period when an issuer is trading under a cautionary announcement."*

and is thus required to ensure that its officers adhere to strict requirements aimed at mitigating against insider trading.

23. Therefore, because of the closed period, Steinhoff and its officers were required to maintain strict confidentiality regarding price sensitive information in their possession.[6]

24. During the same period (October 2017) Steinhoff's external auditors, Deloitte Accountants BV (Deloitte Netherlands), were in possession of information regarding a German investigation into Steinhoff, in which potential accounting irregularities and/or non-compliance with laws and regulations impacting Steinhoff's financial statements was alleged.

25. From September to December 2017, Deloitte Netherlands engaged Steinhoff's executives, including Mr Jooste, about these allegations. Deloitte Netherlands believed the alleged irregularities were serious, and required Steinhoff to commission a forensic investigation.

26. The information that Deloitte Netherlands had received identified various transactions, including allegations of wrongful revenue recognition and unjustified intangible asset transactions within the Steinhoff Group.

27. Neither Deloitte Netherlands nor Deloitte Africa Accountants (Pty) Limited (Deloitte South Africa) had previously been made aware by Steinhoff's executives of the pending investigation into certain members of Steinhoff's management, and the

[6] JSE Listings Requirements, paragraphs 3.5 to 3.8.

potentially significant financial and accounting exposure arising from the German investigation.

28. From Deloitte Netherlands' perspective the allegations were material enough that they could give rise to a claim that Steinhoff's Financial Statements (including those of previous years) were not free from the risk of material misstatement due to the risk of fraud and non-compliance with accounting standards and regulations. They therefore required further investigation.

29. Mr Jooste was integral in the engagement with Deloitte Netherlands, specifically in responding to their queries. This is evidenced *inter alia* by his e-mail response of 26 September 2017 where he informed Deloitte Netherlands that none of the issues raised were new or had not been dealt with by the Group or Audit Committee. He believed the issues could be dealt with and finalised by the end of October 2017. The only challenge he predicted was the collection of data and the preparation of a response for Deloitte Netherlands to meet the audit deadlines.

30. In this response, Mr Jooste also requested that Deloitte Netherlands allow Steinhoff's lawyers and component auditors to continue and to present Deloitte Netherlands with a comprehensive report. He informed Deloitte Netherlands that he did not expect that this would have any impact on the outcome of the 2017 audit. He did not agree to any extension or postponement of the publication of the year-end results.

31. On 9 October 2017, at a Steinhoff Audit Committee meeting, Mr Jooste assured the committee that there was no basis to Deloitte Netherland's queries. He explained

that Steinhoff's external advisors had different views to Deloitte Netherlands. Mr Jooste undertook to answer questions raised and promised that he would resolve the issue.

32. Notwithstanding this, as at 30 October 2017, Deloitte Netherlands was still of the view that it had not been provided with adequate or sufficient audit evidence, and it was dissatisfied with the conclusions reached by Steinhoff's commissioned specialists.

33. In an email sent to Mr Jooste on 30 October 2017, Deloitte Netherlands cautioned that if it was not provided with the requisite audit evidence, it would not be able to sign-off Steinhoff's financial statements on 20 November 2017 for the anticipated publication of the results on 5 December 2017.

34. On 14 November 2017, in the presence of Mr Jooste, Deloitte Netherlands raised concerns which it believed had not been addressed. It again reiterated that the scope of the investigation conducted by Steinhoff's specialists was not adequate to address the potential accounting irregularities in accordance with International Financial Reporting Standards (IFRS) and the potential non-compliance with laws and regulations.

35. By 23 November 2017, Deloitte Netherlands had indicated to Steinhoff's executives that the following remained outstanding in respect of the 2017 audit:

    35.1. Steinhoff Europe Consolidation including supporting documentation for adjustments made at the group level;

35.2. Steinhoff Group Consolidation and overview of all group adjustments, including supporting documentation;

35.3. Financial Statements of Steinhoff Group and all disclosure notes including supporting documentation, including any disclosures on the German investigation, court proceedings and significant press regarding non-compliance with laws and regulations subject to further assessment;

35.4. Goodwill impairment testing for all cash-generating units in Europe; and

35.5. FY2017 Bonus reconcilliation and supporting documentation including KPMG certificates.

36. Moreover, Deloitte Netherlands was of the view that their main concerns had not been sufficiently addressed regarding aspects such as:

36.1. the group-wide mandate of the firms engaged to perform the investigation,

36.2. the scope of the investigation; and

36.3. the impact and the usability of the specialists' reports relating to the investigation as audit evidence on which the auditors could rely on for the purposes of the 2017 audit.

37. The transactions and issues questioned by the auditors were material and mostly permeated transactions in Steinhoff's European silo of business and in respect of various previously reported periods which if there was a basis, might require restatements.

38. The know-how recharges recorded at Steinhoff Europe AG to Talgarth Capital Limited (Talgarth) totalled EUR2.6 billion in the period 2009-2013 and were broadly equal to the Steinhoff consolidated group profit before taxes over that period. Based on what Deloitte Netherlands was able to determine, Steinhoff received no payments in respect of the know-how recharges from Talgarth throughout the period with a receivable building up to EUR2.59 billion.

39. On 27 November 2017, Deloitte Netherlands advised Mr Booysen that the necessary, sufficient and appropriate audit evidence was still not forthcoming and that new concerns regarding last-minute accounting entries had arisen.

40. For example, in each of the years from 2013, since the cessation of know-how recharges, the results for the respective years were impacted by single items around or post the year-end. The late transactions for the years 2015 to 2017 amounted to EUR1.58 billion of which EUR760 million related to 2017. For 2017, the late transactions included a USD200 million reimbursement by Serta Simmons of alleged marketing costs; and a 90% share of EUR642 million in the sale of rights by GT Global.

41. In a meeting with Deloitte Netherlands on 29 November 2017, matters came to a head.

42. Mr Jooste was informed in no uncertain terms that Steinhoff's auditors believed that the management of Steinhoff (inclusive of Mr Jooste) had defrauded the company over years in respect of vast amounts of money and that the auditors were motivating for an independent forensic investigation.

43. Mr Jooste provided explanations to the auditors during that meeting regarding some of the flagged transactions. It appeared to those present that the auditors accepted some of Mr Jooste's explanations, subject to him providing the necessary audit evidence.

44. According to Mr Jooste, on 29 November 2017, after the meeting with the auditors, he was told by Dr Christoffel Hendrik Wiese (Dr Wiese), the then Chairperson of Steinhoff's Supervisory Board, that the auditors were no longer insisting on a forensic investigation. They seemed happy with the work done by Steinhoff's specialists, and they were going to proceed and finalise the 2017 audit. Mr Jooste was also apparently told that the auditors were going to supply him with a list of outstanding audit evidence so they could finalise the audit.[7]

45. According to Mr Jooste, it was only at midday on 30 November 2017 (after he had sent the alleged warning SMS) that he was told the auditors had changed their minds and were not going to sign-off the Annual Financial Statements. That afternoon, he was informed that the auditors were adamant that Steinhoff should commission an independent forensic investigation into suspected fraud and accounting irregularities.[8]

The Mattress Firm difficulties

46. During the same period, Mr Jooste was confronted with the financial underperformance of Steinhoff's American business operations.

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[7] Paragraph 28, page 22 of Mr Jooste's submissions.
[8] Paragraph 31, page 23 of Mr Jooste's submissions.

47. Steinhoff's holding in the USA is represented in its wholly owned direct subsidiary Stripes US Holding, Inc or SUSHI. SUSHI was a Delaware corporation founded on 3 August 2016 in furtherance of the acquisition of Mattress Firm Holding Corp. Mattress Firm Holding Corporation was a specialty mattress retail business under the brand name Mattress Firm.

48. As Group CEO, Mr Jooste was actively involved in the affairs of Mattress Firm. Where he was not personally involved, he was kept informed by the respective officials of Mattress Firm and the Group Chief Financial Officer, Mr Andries Benjamin le Grange (Mr le Grange).

49. Steinhoff acquired USA based Mattress Firm with effect from 30 September 2016. It represented Steinhoff's first entry into the United States. Mattress Firm was regarded as an attractive investment opportunity for Steinhoff due to its national footprint.

50. Given that it was acquired on 30 September 2016, Mattress Firm was expected to contribute to the Group's results for the full twelve months in the 2017 financial year. There were high hopes for its performance.

    50.1. Sales for the financial period were anticipated to be USD3.8 billion, excluding USD30 million restructuring charges to be expensed.

50.2. Mattress Firm was predicted by Mr Jooste, and reported to the market, to target EBITDA[9] and EBIT[10] margins of approximately 9.0% and 6.5% respectively.

50.3. Of the projected Steinhoff Group income of EUR17 billion, Mattress Firm was expected to represent EUR3,3 billion, and of the EUR2 billion EBITDA, Mattress Firm was to represent EUR277 million. The upshot was that Steinhoff would become better diversified with up to 20% currency exposure in US Dollars post acquisition.

51. However, contrary to these predictions, in the first quarter, sales were down by USD38.9 million and a loss of USD75.6 million (representing a 4.5% negative variance to budget) had been suffered.

52. Mr Jooste attended all the Board Meetings of SUSHI, incorporating the Mattress Firm, save for a Special Meeting. The first such meeting was held on 8 February 2017 in Cheltenham, UK. In the CEO report to the Board Pack distributed for the meeting, Mr Murphy the CEO of Mattress Firm confirmed:

> *"Clearly, our inaugural quarter's financial results were disappointing to all – something this management team does not take lightly, and something that would be irresponsible not to acknowledge.*

[9] The Earnings before Interest, Taxes, Depreciation and Amortization.
[10] The Earnings before Interest and Taxes.

53. Furthermore, Mattress Firm gave notice to its strategic supplier, Tempur-Sealy, of cancellation of its supply agreement, which gave rise to legal battles.

54. During its second quarter, Mattress Firm converted all branding to its new strategic supplier, Serta Simmons, at huge cost. Steinhoff agreed to pay contributions to Mattress Firm to assist with such costs, which contributions were to be allocated to gross profit, advertising, salesman expense and other income.

55. A further allocation was made to purchase price goodwill. These contributions resulted in a profit of USD22.2 million being reflected. The EBITDA for the second quarter amounted to USD71.9 million (8.9% margin) due to USD108 million contributions having been received. Excluding the contributions, EBITDA would have been USD36.1 million at a minus 4.5% margin.

56. The message that Steinhoff was sending to the market, however, would not have created any cause for alarm.

57. For example, in a SENS announcement issued by Steinhoff on 7 June 2017, it reported the following in respect of Mattress Firm:

> *"In addition, during the period under review the group was focused on the implementation and bedding down of recent strategic acquisitions. This included the repositioning phase of Mattress Firm subsequent to the rebranding of approximately 1 400 Sleepy's and Sleep Train stores.*
>
> *Mattress Firm reported revenue of €1.5 billion for the period under review, and reported an adjusted operating margin of 4.5% after adjusting for once-off €48 million rebranding costs.*

During the period under review Steinhoff announced a new strategic partnership with Serta Simmons, the largest manufacturer of mattresses in the United States. Steinhoff also announced the acquisition of Sherwood Bedding, an existing supplier of private label products to Mattress Firm."

58. Conspicuously absent from the SENS announcement was any mention of the USD108 million group contributions to Mattress Firm.

59. In the third quarter, sales were down by USD118.1 million below mid-forecast representing a minus-17.4% like for like (LFL) decline. EBITDA of minus USD51.7 million (minus 6.6% margin) was USD86 million below forecast. Operating profit (EBIT) of minus USD76.8 million (negative gross margin of 9.9%) was USD86.6 million below mid forecast. Total same-store sales year to date represented a decline of 10.6% when compared to prior year.

60. Mr Murphy (the CEO of Mattress Firm) described the third quarter – in his CEO report in the Board Pack for the third quarter Board Meeting held on 7 August 2017 in Cheltenham, Gloucestershire, England – as *"by far, the worst performing–and most disappointing–quarter in Company history"*.

61. In the fourth quarter, sales were down by USD175 million below Mid Board Scenario Projections and USD116 million compared to prior year. EBITDA was USD20 million (from a 2.3% gross margin) which was USD105 million below Mid Board Scenario projections for this period. The quarter four results included USD62 million contribution of onerous leave reserve and USD15 million Steinhoff cost reimbursement (USD67 million of the Steinhoff cost reimbursement related to quarter three items but was recorded in period 12).

62. Even after taking the group reimbursements; quarter three also amounted to a loss of USD10 million at a minus-1.3% margin. The USD28 million onerous contract reserve, initially booked in quarter two, was reversed at the Mattress Firm level in quarter four and was booked as a head office entry to be carried at the Steinhoff level and allocated to the Mattress Firm segment for internal reporting purposes.

63. The fiscal year 2017 sales were USD290 million below Mid Board Scenario Projections and USD39 million below the prior year. The loss and comprehensive loss for the period represented an amount of USD1.923 billion.

64. Again, Steinhoff's messaging to the market told a different story. In a SENS announcement issued on 31 August 2017 by Steinhoff, it reported the following in respect of Mattress Firm:

> *"In the United States of America, the Mattress Firm acquisition became unconditional in September 2016 and was part of the group for the entire nine months under review. The business delivered a satisfactory performance, generating $2.4 billion in sales, translating into €2.2 billion of euro-reported revenue in the nine months ending 30 June 2017. The group accelerated the implementation of its long-term strategy in the United States of America, resulting in the rebranding and restructuring of 40% of its store estate. The group also exited the restrictive supply arrangement with Mattress Firm's previous biggest supplier in April 2017. As reported at interim stage, these actions created short-term disruption in the business."*
>
> *"In the United States of America, the disruption caused by the acceleration of the long-term strategic plan is now largely complete, with the business's focus returning to growth. Sales and margin in the US have continued to improve following the third quarter."*

65. On 16 September 2017, SUSHI completed the merger with Mattress Firm for USD3.787 billion. The goodwill attached to the acquisition amounted to USD2.889

billion as per management's estimate on the merger date. A goodwill impairment was however raised for the 2017 financial year in the amount of USD1,654 billion.

66. The nett loss attributed to equity holders as at year end 2017 for the consolidated merged entity amounted to USD1,923 billion.

67. The SUSHI and Mattress Firm merger was financed by way of an Acquisition Facilities Agreement entered into by various entities in the Steinhoff group.[11] The agreement was for an aggregate facility amount of USD4 billion to be advanced as follows:

    67.1. to SFHG a multicurrency term loan facility in an aggregate amount equal to USD1.8 billion;

    67.2. to Steinhoff Alpha a US dollar term loan facility in an aggregate amount equal to USD2 billion; and

    67.3. to SUSHI a US dollar revolving loan facility in an aggregate amount equal to USD200 million.

68. Steinhoff guaranteed the existing and future liabilities under the Acquisition Facility Agreement.

[11] SUSHI, Steinhoff Finance Holding GmbH (SFHG), Steinhoff Alpha, and Steinhoff Europe AG (SEAG) entered into with the Bank of America Merrill Lynch International Limited, Bank of America, N.A., and J.P. Morgan Limited effective 5 August 2016.

69. The Acquisition Facility Agreement required that Steinhoff provide its audited consolidated financial statements within a period of five months after the end of Steinhoff's financial year end.

70. Together with the said financial statements, the agreement required a Compliance Certificate signed by two directors of Steinhoff certifying that for any twelve-month period ending each of September 30th and March 31st –

    70.1. the ratio of Steinhoff's EBITDA to net interest expense, in each case on a consolidated basis, did not fall below 4.5 to 1; and

    70.2. the ratio of Steinhoff's net borrowings to EBITDA, again in each case on a consolidated basis, did not exceed 3.5 to 1.

71. Events of default under the agreement included the failure to provide the financial statements within the prescribed period and compliance with the financial covenants. If a default occurred, the lenders had the right to terminate the loan, and call for accelerated payment of all outstanding amounts owed under the agreement.

72. As at 3 October 2017, the outstanding borrowings under the revolving loan facility of SUSHI amounted to USD165 million.

73. Steinhoff's failure to provide financial statements within the five-month period for the year ended 30 September 2017 represented an event of default.

74. On 27 November 2017, Mr le Grange sent an email to Mr Jooste after he had worked through the results. He pointed out to Mr Jooste that the net debt to EBITDA ratio

was just over 3.2, but that if he counted back the Mattress Firm once offs, it brought the figure to just below 3.2. The fact that Mr la Grange specifically raised the ratio with Mr Jooste is a clear indication that both were sensitive to the loan conditions and the need to avoid a default event.

75. Mr Jooste acknowledged to the Authority's investigators that Mattress Firm was one of the two biggest mistakes made by Steinhoff, and described it as a "disaster".

76. Mr Jooste claimed that, during August 2017, it was discovered that lease agreements for stores were inflated. Rent holidays were negotiated for a few years and thereafter rentals at highly inflated prices became owing and payable. Such leases would then also be signed for a long term with substantial yearly escalations.

77. According to Steinhoff's Annual Report for 2017, Mattress Firm reported disappointing results with like-for-like revenue declining by 11% and a large operating profit loss. Mattress Firm's performance was impacted by several strategic and structural issues.

78. In November 2017, Mattress Firm became embroiled in Steinhoff's broader accounting irregularities.

79. On Monday 13 November 2017, Mr Schreiber (CEO of Steinhoff Europe AG) received an email from Mr Esser of Deloitte USA requesting a copy of the journal that Steinhoff Europe AG (SEAG) posted when making contributions to Mattress Firm in the 2017 financial year of USD80 million and USD82 million, respectively.

80. Deloitte USA wanted to confirm that the SEAG posting passed through earnings and was not an adjustment through equity or somewhere else in the balance sheet.

81. Mr Schreiber forwarded an email to Mr Jooste asking how to react. Mr Jooste responded, clearly highly irate, questioning the American auditor's right to ask questions regarding processes applied by Steinhoff in Europe.

82. Ultimately, the investigation revealed that the Mattress Firm figures included contributions from Steinhoff Europe AG reflected as income and which falsely created the impression that Mattress Firm was making a profit while it was in fact suffering significant losses. The two payments that were expected as contributions were not accompanied by acceptable accounting records.

Mr Jooste's communications with Messrs Du Toit, Swiegelaar, Burger and Oosthulzen

83. On 30 November 2017 at 10: 38 Mr Jooste sent the warning SMS to Mr Jaap Du Toit. The SMS, which was written in Afrikaans, stated:

> *"Jy het altyd my opinie gevra ... Steinhoff gaan lank sukkel om al die bad nuus en Amerika te verwerk so daar is beter plekke om jou geld te belê, vat onmiddelik die huidige prys en delete hierdie sms en moenie aan enige iemand noem nie" (sic)*
>
> [Our translation: you always asked my opinion ... it will take Steinhoff a long time to work through all the bad news and America, so there are better places to invest your money, take the current price immediately and delete this SMS and don't mention it to anyone].

84. Mr Du Toit confirmed to the Authority's investigators that he received the warning SMS and that he replied to Mr Jooste and thanked him for the text message. He never acted on its contents by selling his Steinhoff shares.

85. The investigators performed an analysis of Mr Jooste's, Mr Du Toit's, Mr Oosthuizen Snr's, Dr Burger's and Mr Swiegelaar's cellphone billing statements, which revealed the following:

85.1. An SMS was sent by Mr Jooste to Mr Du Toit on 30 November 2017. The SMS reflected as four messages on Mr Jooste's billing statement, which "pinged" four times within four milliseconds, at 10:38:41; 10:38:42; 10:38:43 and 10:38:44.

85.2. The reason that the SMS pinged four times was that it contained too many characters to be sent as one message. While Mr Jooste's billing statement showed that the message was sent in four parts (and thus billed as four messages), Mr du Toit's billing statement confirmed that it was received as a single SMS.

85.3. An SMS (pinging in four parts on his billing record) was also sent on 30 November 2017 from Mr Jooste's phone to Dr Burger's phone. It pinged at 11:04:24; 11:04:25, 11:04:26 and 11:04:27 on Mr Jooste's billing statement and was received by Dr Burger as a single SMS. The pattern of the SMS sent to Dr Burger was thus the same as the pattern of the warning SMS sent 26 minutes earlier to Mr du Toit.

85.4. An SMS (pinging in four parts on his billing record) was also sent on 30 November 2017 from Mr Jooste's phone to Mr Swiegelaar's phone. It pinged at 11:56:53; 11:56:54; 11:56:55 and 11:56:56 on Mr Jooste's billing statement and was received by Mr Swiegelaar as a single SMS. The pattern of the SMS sent to Mr Swiegelaar was thus the same as the pattern of the warning SMS sent just over an hour earlier to Mr du Toit.

85.5. An SMS (pinging in four parts on his billing record) was also sent on 30 November 2017 from Mr Jooste's phone to Mr Oosthuizen Snr's phone. It pinged at 11:56:21, 11:56:22, 11:56:23 and 11:56:24 on Mr Jooste's billing statement and was received by Dr Burger as a single SMS. The pattern of the SMS sent to Mr Oosthuizen Snr was thus the same as the pattern of the warning SMS sent earlier to Mr du Toit.

85.6. Further communication on 30 November 2017 took place between Mr Jooste, and Mr Greenan, Mr Oosthuizen's broker at the time. Their communication is summarized as follows:

	Who initiated the cell phone correspondence	**Time of correspondence**	**Type of correspondence**	**Reason (known so far)**
1	Mr Jooste sent to Mr Oosthuizen Snr	11:56:21 to 11:56:24	4x SMS's pinging, received a one message	Suspected to be a warning SMS
2	Mr Oosthuizen Snr to Mr Jooste	12:06:32	SMS	Unknown
3	Mr Oosthuizen Snr to Mr Jooste	12:10:43	SMS	Unknown
4	Mr Oosthuizen Snr to Mr Jooste	12:12:53	SMS	Unknown

5	Mr Oosthuizen Snr to Mr Jooste	12:13:19	SMS	Unknown
6	Mr Oosthuizen Snr to Mr Jooste	12:14:08	SMS	Unknown
7	Mr Oosthuizen Snr to Mr Greenan	12:17:26	Outgoing cell phone call	Instruct to sell all Steinhoff shares
8	Mr Jooste sent to Mr Oosthuizen Snr	12:21:36	SMS	Unknown
9	Mr Oosthuizen Snr to Mr Greenan	12:32:17	Outgoing cell phone call	Re selling of the Steinhoff shares
10	Mr Oosthuizen Snr to Mr Jooste	12:59:54	SMS	Unknown
11	Mr Jooste sent to Mr Oosthuizen Snr	12:33:22	SMS	Unknown

86. Mr Swiegelaar, who was employed as Mr Jooste's driver at the time, has confirmed that he received the warning SMS. He explained to the investigators that the SMS instructed him to sell his Steinhoff shares immediately, mentioned troubles in America, and instructed him to delete the SMS and not tell anybody else. On 4 December 2017, Mr Swiegelaar sold all 400 of his Steinhoff shares.

87. Dr Burger admitted to investigators that he received an SMS from Mr Jooste on 30 November 2017 instructing him to sell his Steinhoff shares immediately, not to tell anybody about the contents of the SMS and to delete the text message. However, he could not remember whether the SMS he received stated anything about "America" or that there were better places to invest his money.

88. On the same afternoon that Dr Burger received the SMS from Mr Jooste, he provided two trading instructions to his brokers on the accounts of the Dieter and Lanne Burger trusts. Dr Burger has confirmed that he did so acting on Mr Jooste's advice.

88.1. The first instruction to his stockbroker was to sell half of the Steinhoff shares owned by his family trusts.

88.2. Later that day, he *"decided to comply fully with Jooste's advice" and* instructed his broker to sell the remainder of the Steinhoff shares on both accounts related to the trusts.

88.3. Dr Burger's instructions resulted in the sale of 30 090 Steinhoff shares.

89. Mr Oosthuizen Snr denied having received the warning SMS or anything like it. As summarised in the Table above, at 12:17, 20 minutes after Mr Oosthuizen Snr received the four-part SMS from Mr Jooste, he instructed his stockbroker to sell all Steinhoff shares held by Ocsan.

ISSUES IN DISPUTE

90. In sum, Mr Jooste places, *inter alia*, the following issues in dispute:

90.1. He claims that the investigators acted unreasonably and unfairly, and in a manner that undermined his constitutional right to lawful, reasonable and fair administrative action, by:[12]

[12] Paragraph 3 to 6, pages 2 to 3 of Mr Jooste's submissions.

90.2. not allowing him to attend the interviews conducted by the investigators and to test the evidence against him;

90.3. putting leading questions to the other witnesses, which evidenced bias against Mr Jooste;

90.4. refusing to provide Mr Jooste with documentation in advance, to enable him to prepare for his questioning.

90.5. If a warning SMS was sent to Mr Swiegelaar it was sent accidentally and without any intent.

90.6. In any event, the warning SMS did not contain inside information because, inter alia:

90.6.1. when Mr Jooste sent it he did not know that the auditors would insist on a forensic investigation and thus did not have inside information; and

90.6.2. it did not contain specific or precise information not already in the public domain.

90.7. Dr Burger's evidence regarding the warning SMS is vague, open to doubt and should be rejected.

90.8. Mr Oosthuizen never received a warning SMS from Mr Jooste.

THE AUTHORITY'S FINDINGS

The investigators acted fairly

91. The Authority has concluded that the investigation was conducted fairly, and that Mr Jooste was not unduly prejudiced, having regard to:

    91.1. the administrative and inquisitorial nature of the Authority's processes, which should not be over-judicialised;[13]

    91.2. the fact that the investigators were engaged in the investigative rather than adjudicative stage of the process;[14] and

    91.3. the fact that Mr Jooste was provided, prior to any decision being taken, with the investigation report and supporting documentation, and a full opportunity to make representations.

92. As regards Mr Jooste's contention that it was unfair not to allow him to question and cross-examine witnesses:

    92.1. The FSR Act does not provide for questioning or cross examination by any person other than the appointed investigators.

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[13] Gerson v Mondi Pension Fund and Others 2013 (6) SA 162 (GJ) para 51 citing Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another 1980 (3) SA 476 (T) at 486D-E.
[14] Chairman, Board on Tariffs and Trade and Others v Brenco Inc and Others 2001 (4) SA 511 (SCA). See also Meyer v Law Society, Transvaal1978 (2) SA 209 (T), Park-Ross v Director for Serious Economic Offences 1998 (1) SA 108 (C) and Van der Merwe and Others v Slabbert NO and Others 1998 (3) SA 613 (N); Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd 2003 (3) SA 64 (SCA)

92.2. In any event, at the investigative stage, fairness did not require allowing Mr Jooste to be present in the interviews of other witnesses, or to test their evidence by means of cross-examination.

92.3. The investigators accordingly acted lawfully and fairly by not permitting Mr Jooste to question and cross-examine relevant persons, and, notably, by not permitting other persons to cross-examine Mr Jooste.

92.4. Most importantly, all implicated persons, including Mr Jooste, were given every opportunity to make representations *prior to any decision being made*.

93. As regards Mr Jooste's contention that the relevant testimony and documentary evidence was not put to Mr Jooste for his comment, and that relevant portions of his testimony were not put to the witnesses for their comment.

93.1. Again, at the investigative stage, fairness did not require putting all testimony and documentation to Mr Jooste for his comment, or for his comment to be put to others.

93.2. The investigators are under no obligation to provide specific documentation to a person to be questioned.

93.3. In fact, investigators are duty-bound to maintain confidentiality regarding the evidence they collect in the exercise of their powers[15]. They are also required to ensure the integrity of their investigations. This means that they

[15] Section 251 of the Financial Sector Act.

maintain strict measures as to the sharing of documents that form part of an investigation.

93.4. In any event, to ensure fairness, prior to questioning him, the investigators issued Notices requiring Mr Jooste's attendance by arrangement with his legal team for a date and time suitable to Mr Jooste. The Notices indicated the issues that were to be traversed during questioning to enable him to prepare. He was informed that he was permitted to have legal assistance during the questioning, resulting in him being ably represented by senior legal practitioners comprising a team of no less than four practitioners during both instances when his statements under oath were taken.

93.5. He was also informed in writing that he may request adjournments during questioning where he needed to consult with his legal representatives and where he needed to collect his thoughts regarding documentation presented to him.

94. As regards Mr Jooste's contention that the investigators refused him documentation in their possession which he required in order to enable him to prepare for examination by the investigators.

94.1. The investigators owe no general duty, during the preliminary investigative phase, to provide the subject of an investigation with any and all documentation.[16]

[16] Park-Ross v Director for Serious Economic Offences 1998 (1) SA 108 (C); Leech and Others v Farber NO and Others 2000 (2) SA 444 (W) at 451E-452H.

94.2. Most importantly, before any decision was taken, the evidence collected during the investigation, together the Authority's preliminary view, was furnished to Mr Jooste and he was invited to make submissions in response. Upon his request, Mr Jooste was granted two extensions of the allocated time by which he had to make submissions. As is evident in this order, his submissions have been considered prior to issuing this order.

95. As regards the contention that it was improper to ask leading questions:

95.1. In the investigative phase, the investigators are entitled to ask any questions that are relevant to their investigation, and which are aimed at uncovering the truth.

95.2. That includes putting certain propositions to witnesses to assess whether their *prima facie* suspicions are justified. This does not amount to bias, or the reasonable apprehension thereof.

95.3. The specific complaint that the investigators asked Dr Burger leading questions regarding the contents of the SMS he received from Mr Jooste is unfounded. When the investigators questioned Dr Burger, they were already in possession of other evidence. For an investigator to ask leading questions based on existing knowledge is standard practice.

Mr Jooste sent the warning SMS intentionally

96. The Authority has concluded, on a preponderance of probability, that Mr Jooste sent the warning SMS to Mr Du Toit, Mr Swiegelaar, Dr Burger, and Mr Oosthuizen Snr. The Authority has reached this conclusion on the basis of the following facts:

96.1. Mr Du Toit has confirmed on oath that he received the warning SMS and has provided the Authority with a screenshot of its contents. Mr Jooste is not able to admit nor dispute sending the warning SMS to Mr Du Toit.[17]

96.2. Mr Swiegelaar (Mr Jooste's driver on 30 November 2017) has confirmed on oath that he also received the warning SMS from Mr Jooste on the same morning. The SMS from Mr Jooste to Mr Swiegelaar also followed the same four-ping pattern and was sent about 30 seconds after the SMS from Mr Jooste to Mr Oosthuizen.

96.3. Only 26 minutes after sending the warning SMS to Mr Du Toit, Mr Jooste sent an SMS to Dr Burger. The analysis of Mr Jooste's, Mr Du Toit's and Dr Burger's billing statements reveals that the SMS sent to Dr Burger followed the same four-ping pattern (and was thus of a similar number of characters) as the SMS sent to Mr Du Toit.

96.4. Dr Burger confirmed that he received an SMS on 30 November 2017 from Mr Jooste. He remembered that it instructed him to sell his Steinhoff shares immediately, not to tell anybody about the warning and to delete the text

[17] Paragraph 27, page 21 of Mr Jooste's submissions.

message. He could not remember whether it said anything about America and that there were better places to invest his money.

96.5. While Mr Oosthuizen denies having received the warning SMS, an analysis of Mr Oosthuizen's billing statements reveals that he:

96.5.1. received an SMS from Mr Jooste at 11h56 on 30 November 2017 which had the same "four ping" structure as the warning SMS;

96.5.2. replied to Mr Jooste with five individually typed SMS's between 12h06 and 12h14;

96.5.3. instructed his broker at 12h17 (that is, just over 20 minutes after Mr Jooste's SMS to him, and immediately after writing to Mr Jooste) to sell all the shares on the three accounts;

96.5.4. received another SMS from Mr Jooste at 12h21 and replied at 12h29;

96.5.5. called his broker again at 12h32;

96.5.6. received another SMS from Mr Jooste at 12h33.

96.6. The millisecond difference of the timing of the "four pings" in the messages sent to each of Mr Du Toit, Mr Swiegelaar, Dr Burger and Mr Oosthuizen supports the view that the same message was sent from Mr Jooste's phone to each of them, but that due to the number characters contained in the SMS, it was billed as four SMS's on Mr Jooste's phone billing records.

96.7. Moreover, each of Mr Swiegelaar, Dr Burger, and Mr Oosthuizen Snr sold their shares after receiving the warning SMS.

96.7.1. Dr Burger explained that he provided two trading instructions to his brokers on the afternoon of 30 November 2017. This was after he received Mr Jooste's warning to sell Steinhoff shares.

96.7.2. Mr Oosthuizen gave instructions and sold the entire Steinhoff shareholding held through a corporate entity he controlled; Ocsan Investment Enterprise (Pty) Limited, and that of his children on two other trading accounts.

96.7.3. While Mr Swiegelaar says that prior to 4 December 2017 he never considered selling his shares – because he did not think the warning SMS was intended for him, and because he had not seen any negative movement in the share price – on his own version, after hearing gossip that there were irregularities at Steinhoff, he was able to make sense of the warning SMS, then understood that it was probably meant for him, and sold his shares.

97. The Authority has concluded further, on a preponderance of probability, that Mr Jooste sent the warning SMS to each person intentionally.

97.1. Mr Jooste considered how to frame the SMS, then typed it and then sent it to each person.

97.2. While there may have been a basis to suggest that the SMS was sent to a particular person accidentally if the recipient was not a Steinhoff shareholder, significantly, all the recipients of the warning SMS in this case held Steinhoff shares. The wording of the SMS is clear that its intended recipients were holders of Steinhoff shares.

97.3. The purpose and objective of the warning SMS was clear, and revealed its deliberate nature. The market, and especially holders of Steinhoff shares (which included the recipients of the warning SMS), were anticipating its financial results which would reveal how their investments in the company had performed. In that context, the warning SMS warned them of the coming trouble, and told them to disinvest.

98. For these reasons, the Authority finds that, on the probabilities, Mr Jooste sent the warning SMS on 30 November 2017 to Mr Du Toit, Dr Burger, Mr Oosthuizen and Mr Swiegelaar intentionally to warn them of what he knew about Steinhoff.

99. Lastly, the Authority concludes that there is no merit in Mr Jooste's suggestion that the warning SMS was in fact sent at 10:15 and not at 10:38 as alleged by the Authority. [18]. Mr Jooste contends that this destroys the four "pings" SMS theory.[19]

100. However, it does no such thing. All that it shows is that Mr Jooste sent an SMS to Mr du Toit before he sent the warning SMS. Thus, while there was SMS communication between Mr Jooste and Mr Du Toit at 10:15, they continued

[18] Page 4, Paragraph 7.2 of Mr Jooste's submissions.
[19] Paragraph 7.5, page 5 of Mr Jooste's submissions.

communicating by SMS thereafter at 10:38 when Mr Jooste sent the warning SMS to Mr Du Toit.

Mr Jooste possessed inside information when he sent the warning SMS

101. The Financial Markets Act defines an insider as follows:

> *a person who has inside information-*
> *(a) through-*
> *(i) being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or*
> *(ii) having access to such information by virtue of employment, office or profession; or*
> *(b) where such person knows that the direct or indirect source of the information was a person contemplated in paragraph (a)*

102. The Financial Markets Act defines inside information as:

> *"specific or precise information, which has not been made public and which –*
> *(a) is obtained or learned as an insider; and*
> *(b) if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market."*

103. For the reasons set out below, the Authority finds that, when he sent the warning SMS, Mr Jooste possessed inside information, in that the information was specific or precise, had not been made public and was price sensitive.

104. We have set out in significant detail at paragraphs 22 to 82 above, the financial predicament in which Steinhoff found itself in November 2017.

105. By way of summary, as at 30 November 2017, Mr Jooste had direct access, as a result of his position as CEO, to at least the following information regarding Steinhoff that had not been made public:

105.1. There would likely be delays in announcing Steinhoff's audited results for the year ended 30 September 2017, and the announcement of a delay in the reporting of audited Steinhoff results, which were due on 5 December 2017 would have an adverse effect on the Steinhoff share price.

105.2. Such a delay in reporting audited results was probable, if not inevitable.

105.3. The group auditors were intent on unravelling transactions of past years, for which audit evidence either did not exist or could not be produced to meet the anticipated date for publication of Steinhoff's annual financial statements.

105.4. Among the issues flagged by the auditors was the figures for Steinhoff's US-based entity, Mattress Firm, which included contributions from Steinhoff Europe AG reflected as income, and which falsely created the impression that Mattress Firm was making a profit while it was in fact suffering a loss.

105.5. Mattress Firm would continue to suffer month on month losses unless contributions were paid to it to make up for the lower than expected sales, increased expenses and impairments raised.

105.6. Despite indications otherwise, Advent International Corporation[20] and/or Serta Simmons Bedding, LLC USA never agreed to reimburse Mattress Firm or Steinhoff up to USD250 million for the rebranding of Mattress Firm

[20] Advent International Private Equity Firm.

stores of which USD200 million was supposedly payable before the end of November 2017.

105.7. Similarly, there was no agreement as between GT Global Trademarks SA[21], Advent International Corporation and Serta Simmons Bedding, LLC whereby Steinhoff Europe AG would receive a 90% profit from the sale of the right to use the trade brand portfolio of Steinhoff in the USA, Canada, Mexico and China for an amount of EUR640 million.

105.8. Mattress Firm would need to continue to raise substantial impairments for onerous lease agreements concluded with landlords in the United States – a fact which was not discovered in the due diligence when Steinhoff acquired Mattress Firm.

105.9. The extent of the goodwill, intangible and store asset impairments to be raised in respect of Mattress Firm amounted to USD1.867 billion.

105.10. Steinhoff's auditors suspected that some of Steinhoff's senior executives, including Mr Jooste, might have been involved in material accounting irregularities.

105.11. The auditors' concerns were of such a serious nature that they had raised the possibility of an independent forensic investigation into the suspected irregularities.

[21]GT Global Trademarks SA (Switzerland); GT Branding together with its wholly owned subsidiary, GT Global Trademarks SA.

105.12. As at 30 November 2017, Steinhoff's auditors had informed Steinhoff's senior management that the former were concerned that, in the absence of credible audit evidence, they still could not rule out the possibility of fraud regarding Steinhoff's financial statements.

105.13. Due to the seriousness of the auditors' concerns, Steinhoff's senior executives, including Mr Jooste, were informed that the auditors had reason to believe that Steinhoff would not be able to publish audited financial statements on 5 December 2017 contrary to market expectations, unless enough and credible audit evidence was provided.

106. As explained above, Mr Jooste contends that, on the morning of 30 November 2017, the information at his disposal was that Deloitte would not insist on a forensic investigation and would instead endeavour to complete the 2017 audit, and that Deloitte only changed its mind in this regard at about midday on 30 November 2017 – after the warning SMS had been sent. He also says that the information about Mattress Firm was public knowledge.

107. However, the fact that on the morning of 30 November 2017 Mr Jooste understood that Deloitte was going to endeavour to conclude its audit on time does not alter the fact that Mr Jooste knew that the audit information had not been provided, and could not be provided, because it did not exist. He thus knew that Deloitte would seek to investigate, and that there was little if any prospect of the financial statements being published on time.

108. Mr Jooste was pivotal to providing the audit evidence. Without him providing the required audit evidence, the auditors would not have been able to finalise the audit. He knew that.

109. Without this audit evidence, the suspicions of material fraud and accounting irregularities that permeated various previous financial reporting periods could not be dispelled.

110. In the circumstances, the Authority is satisfied that by the morning of 30 November 2017, Mr Jooste knew that he had not and would not be able to produce the required audit evidence. In these circumstances, he reasonably expected that Steinhoff would likely be unable to avoid a forensic investigation and would be unlikely to publish audited results expected on or about 5 December 2017.

111. Quite clearly, therefore, as at 30 November 2017 when Mr Jooste sent the warning SMS, he was in possession of information that was specific or precise, was not public, and was price-sensitive, and he obtained this information in his position as CEO. That Steinhoff's auditors were likely not going to sign off on its Annual Financial Statements due to suspicions of material fraud and accounting irregularities going back as far as 2009 and the failure to produce audit evidence was not known by the market, and was plainly price sensitive.

112. He was, therefore, an insider, in possession of inside information, for purposes of section 78(4) and (5).

The warning SMS contained inside information

113. For the reasons set out below, the Authority finds, in addition, that:

113.1. the warning SMS contained inside information, in that the information in the warning SMS was specific or precise, had not been made public and was price sensitive;

113.2. Mr Jooste accordingly disclosed inside information to the recipients of the warning SMS in contravention of section 78(4)

The information in the warning SMS was specific

114. Information is specific or precise if it is expressed in clear and unambiguous terms. It must not lead its recipient to different interpretations or conclusions as to its meaning. However, it does not have to refer to a concluded set of circumstances; it is sufficient if it enables a recipient to reasonably expect the likelihood or probability of an occurrence of an event or set of circumstances.[22]

115. The recipients of the warning SMS received a message, from the CEO of Steinhoff, saying that Steinhoff's irreversible problems, including and in respect of its US-based operations, meant that they should sell their shares.

116. The warning SMS thus conveyed, on its face, that:

116.1. Steinhoff was experiencing serious problems;

[22] Zietsman and Another v Directorate of Market Abuse and Another 2016 (1) SA 218 (GP) para 97 paragraph 54. (referring with approval of the Australian case of Boughey v R [1986] HCA 29 65 ALR 609.

116.2. the problems were so irreversible that the recipient of the SMS should dispose of his shares at the current price to avoid imminent loss;

116.3. Steinhoff's problems involved its operations in the United States.

117. The information was clear and unambiguous. It did not lead the recipients to a different interpretation or conclusion as to its meaning.[23]

118. In the premises, the Authority finds that the warning SMS contained information that was specific.

The information in the warning SMS was not public

119. News agencies had published details regarding the suspicions of fraud and accounting irregularities in relation to Steinhoff long before 30 November 2017. Similarly, troubles regarding Mattress firm were also known by the general public prior to 30 November 2017. Mr Jooste argued, on this basis, that the warning SMS conveyed information that was already in the public domain.

120. However, Steinhoff had always publicly defended its accounting practices. Based on published information, the public would reasonably have believed either that everything was in fact under control and that the allegations were without merit, or, at a minimum, that Steinhoff itself believed the allegations to be without merit.

121. Similarly, although details of some of the challenges regarding the acquisition of Mattress Firm were publicly known, nothing in the publicly available information –

[23] Zietsman paragraph 54. (referring with approval of the Australian case of Boughey v R [1986] HCA 29 65 ALR 609.

and especially Steinhoff's SENS announcements – suggested that these difficulties were irreversible.

122. Nothing in the public domain suggested that the problems at Steinhoff were so dire and irreversible that investors should sell their Steinhoff shares immediately. Certainly, the public did not know that this was the view held by senior people within Steinhoff.

123. In short, the warning SMS painted a far more precarious picture of Steinhoff than that of which the public had knowledge.

124. Accordingly, the Authority finds that the warning SMS conveyed information regarding Steinhoff that had not been made public.

The information in the warning SMS was price-sensitive

125. Information constitutes inside information only when it has the potential to cause a material movement in the share price when published (referred to as "price sensitivity").

126. While actual movements in share price may be used to test whether information is price sensitive,[24] *"it is not necessary to examine whether its disclosure had a significant effect on the price of financial instruments. It is the capacity of such information to have a significant effect on prices that must be assessed in the light of the content of the information at issue and the context in which it arises."*[25]

[24] Zletsman *supra* at paragraphs 87 and 88.
[25] Zletsman supra at paragraph 87.

127. Price sensitivity is thus an objective inquiry. Whether information is price sensitive is determined with reference to the "*reasonable investor*" and whether he or she would regard the information in question as relevant to a decision to deal in such securities.[26] That some investors in possession of the information chose not to sell does not diminish the fact that reasonable investors would regard the information as relevant to a decision to deal in those securities.

128. In any event, the Authority has found that three of the recipients of the warning SMS took its contents into account and sold their shares.

129. The Authority finds that the warning SMS plainly constituted price sensitive information. In short:

    129.1. The CEO of Steinhoff indicated that "big trouble" was coming to Steinhoff and that the recipients of the SMS should sell immediately.

    129.2. A reasonable investor would plainly have considered this information as relevant to any decision to deal in Steinhoff shares.

    129.3. Less than a week after Mr Jooste sent the SMS, and upon publication of the various difficulties facing Steinhoff, on 4 and 6 December 2017 the Steinhoff share price reacted significantly.[27]

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[26] Zietsman, at paragraph 98.3.

[27] On 4 December 2017 at 8:25 Steinhoff published a SENS announcement. It advised the market that the Steinhoff Supervisory Board confirmed that it would release the Steinhoff 2017 consolidated financial statements *albeit* in unaudited form, on schedule on 6 December 2017.On 4 December 2017 the Steinhoff share price decreased by almost 10%. The material movement in the share price when it was disclosed that Steinhoff would publish unaudited results is further proof that what was known to Mr Jooste as an insider constituted price sensitive information. On 6 December 2017 at 7:05 Steinhoff informed the market that new information came to light, regarding accounting irregularities, which required further investigation. It confirmed in the announcement that the Steinhoff Supervisory

130. In the circumstances, the Authority finds that the information disclosed by Mr Jooste in the warning SMS consisted of price sensitive information.

Mr Jooste knew that he had inside information and that the warning SMS contained inside information

131. Both section 78(4) and section 78(5) require that the insider knew that he/she was in possession of inside information.

132. The question of Mr Jooste's knowledge requires an assessment of whether there was, on his part, an appreciation that:

    132.1. he possessed unpublished, specific or precise, price sensitive information (for purposes of section 78(4) and (5)); and

    132.2. the contents of the warning SMS constituted unpublished, specific or precise, price sensitive information (for purposes of section 78(4) only).

133. This assessment does not require that he was aware of the specific sections in the Financial Markets Act dealing with insider trading. What is required is that he appreciated the non-public, price sensitive nature of the information in his possession.

Board, in consultation with the statutory auditors instituted an independent investigation in this regard. The announcement further stated that Mr Jooste, CEO of Steinhoff, resigned with immediate effect which the Board had accepted; and that Steinhoff would publish the audited 2017 consolidated financial statements once it was able to do so. In addition, Steinhoff would determine whether any prior years' financial statements needed to be restated. The Steinhoff share price decreased by 61.42% during trading on 6 December 2017 following the announcement. This movement in the share price was very material.

134. In any event, Mr Jooste admitted to being familiar with the prohibition against insider trading.

135. On 30 November 2017, Mr Jooste knew that the market expected Steinhoff to release its financial results. Steinhoff was in a closed period due to the price sensitive nature of the unpublished information at its disposal. This alone alerted Mr Jooste to the fact that he was in possession of unpublished price sensitive information.

136. The SMS that Mr Jooste sent instructed the recipients not to disclose its contents and to delete the SMS. This clearly indicated, at a minimum, that Mr Jooste was aware that the information contained in the warning SMS was not public. It also indicated that in Mr Jooste's view, the warning SMS was unlawful (or at least incriminating).

137. Moreover, Mr Jooste knew that the information in the warning SMS was specific. He could not have been confused as to the meaning of the information. He knew that Steinhoff was in trouble and that he was telling the recipients of the warning SMS that this was so and that they should sell their Steinhoff shares.

138. Lastly, the warning SMS indicated that Mr Jooste believed continued shareholding in Steinhoff spelled financial trouble and told them to sell quickly. The SMS was, therefore, price sensitive on its own terms. The instruction that the recipients of the SMS should sell their shares immediately at the current price was a clear indication that he appreciated the capacity of the information at his disposal to have a material effect on the Steinhoff share price when published.

139. For these reasons, the Authority finds that:

139.1. Mr Jooste knew that he was in possession of inside information;

139.2. Mr Jooste knew that the warning SMS conveyed inside information; and

139.3. in any event, even if Mr Jooste genuinely believed that the information in the warning SMS was not inside information, such a belief was not based on reasonable grounds.[28]

140. Mr Jooste submitted that he regarded Mr Du Toit as an insider himself, given Mr Du Toit's position as chairperson of KAP, a company within the Steinhoff group. Mr Jooste argued that it was against this background that he might have given Mr Du Toit the advice to sell his shares.[29]

141. The Authority concludes that there is no merit in these contentions. Mr Du Toit did not have the same level of information as Mr Du Toit, and did not have the same level of insight as conveyed in the warning SMS. As explained above, Mr Jooste knew that the information he was providing to Mr Du Toit was inside information.

The warning SMS encouraged or caused the recipients to sell their shares

142. While section 78(4) of the Financial Markets Act requires that the insider discloses inside information to others, this is <u>not</u> a requirement of section 78(5). Section 78(5) merely requires that the insider "*encourages or causes another person to deal or*

[28] In Zietsman it was stated that: "*A genuine and bona fide belief that known information was not inside information, will not found a defence where such belief is not based on reasonable grounds*".
[29] Paragraphs 35 to 37, pages 25 to 26 of Mr Jooste's submissions.

discourages or stops another person from dealing in the securities listed on a regulated market or in derivative instruments related to such securities, to which the inside information relates or which are likely to be affected by it".

143. The Authority finds that the warning SMS contained both inside information (for purposes of section 78(4)) and, at a minimum, encouragement for purposes of section 78(5).

144. This is clear from its very wording of the warning SMS, and specifically the portion that said: "*daar is beter plekke om jou geld te belê, vat onmiddelik die huidige prys en delete hierdie sms en moenie aan enige iemand noem nie*". Mr Jooste told the recipients of the warning SMS, in no uncertain terms, to sell their shares. That clearly constitutes encouragement.

145. The Authority has also found that three of the recipients of the warning SMS traded their Steinhoff shares as a result of having received the warning SMS. They were, in other words, encouraged or caused by Mr Jooste to have sold their shares.

146. Moreover, Mr Jooste's encouragement plainly related to the inside information in his possession. That is, it was because of what Mr Jooste knew about the financial irregularities within Steinhoff, the fact that audited financial statements would not be published on time, and the financial position of Mattress Firm, that he encouraged the recipients of the warning SMS to sell their shares immediately.

DECISION ON MERITS

147. In conclusion, the Authority finds that, on the morning of 30 November 2017, Mr Jooste:

147.1. was an insider and was knowingly in possession of inside information as summarised in paragraph 105 above;

147.2. disclosed some of the inside information in the warning SMS to Mr Du Toit, Mr Swiegelaar, Dr Burger and Mr Oosthuizen;

147.3. thus contravened, in each instance, the provisions of section 78(4) (a) of the Financial Markets Act;

147.4. moreover, and in any event, encouraged Mr Swiegelaar, Mr Du Toit, Dr Burger and Mr Oosthuizen to dispose of their Steinhoff shares, and thus contravened, in each instance, the provisions of section 78(5) of the Financial Markets Act.

ADMINISTRATIVE PENALTY

Relevant principles

148. In terms of section 82(1) of the Financial Markets Act, and subject to subsection 82(3), any person who contravenes section 78(1) or (2) of the Financial Markets Act is liable to pay an administrative sanction not exceeding –

(a) the equivalent of the profit that such other person made or would have made if he or she had sold the securities at any stage, or the loss avoided, through such

dealing, if the recipient of the information, or such other person, as the case may be, dealt directly or indirectly in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it;

(b) an amount of up to R1 million, to be adjusted by the Authority annually to reflect the Consumer Price Index, as published by Statistics South Africa, plus three times the amount referred to in paragraph (a);

(c) interest; and

(d) cost of suit, including investigation costs, on such scale as determined by the Authority.

149. In addition, the provisions of section 167(2) of the FSR Act stipulate the necessary and permissible factors to be taken into account in the imposition of an administrative penalty, as follows:

"(a) the matters that the responsible authority must have regard to include the following-

(i) the need to deter such conduct;

(ii) the degree to which the person has co-operated with a financial sector regulator in relation to the contravention; and

(iii) any submissions by, or on behalf of, the person that is relevant to the matter, including mitigating factors referred to in those submissions, and

(b) without limiting paragraph (a), the matters that the responsible authority may have regard to include the following-

(i) the nature, duration, seriousness and extent of the contravention;

(ii) any loss or damage suffered by any person as a result of the conduct;

(iii) the extent of any financial or commercial benefit to the person; or a juristic person related to the person, arising from the conduct;

(iv) whether the person has previously contravened a financial sector law;

(v) the effect of the conduct on the financial system and financial stability;

(vi) the effect of the proposed penalty on financial stability;

(vii) the extent to which the conduct was deliberate or reckless."

150. The Authority has previously communicated to Mr Jooste that it intended to impose an administrative penalty of **R168 997 772** on him for the contraventions of **section 78(4)(a)** and **section 78(5)**. The penalty was calculated in terms of **section 82(1)** of the Financial Markets Act as follows:

	Loss Avoided	**Plus 3x**	**R1 Million**	**TOTAL**
	R	**R**	**R**	**R**
Jaap Du Toit			1,000,000	**1,000,000**
Mr Swiegelaar	18,328	54,984	1,000,000	**1,073,312**
Dr Burger	750,878	2,252,634	1,000,000	**4,003,512**
Dr Burger	750,437	2,251,311	1,000,000	**4,001,748**
Mr Oosthuizen/ Oosthuizen ETF M	51,222	153,666	1,000,000	**1,204,888**
Mr Oosthuizen/Oscan Investment Enterprise (Pty) Limited	38,622,374	115,867,122	1,000,000	**155,489,496**
Mr Oosthuizen O Jnr	306,204	918,612	1,000,000	**2,224,816**
TOTAL	**40,499,443**	**121,498,329**	**7,000,000**	**168,997,772**

151. The calculation was based on loss avoided by the recipients of the SMS. In reaching the amounts of the loss avoided, the Authority relied on the closing price of Steinhoff shares on 8 December 2017. The Authority selected this date after its analysis

showed that by that date the market had had enough time to absorb some of the inside information.[30]

Mr Jooste's submissions on penalty

152. Mr Jooste made submissions in mitigation of the administrative sanction to be imposed, including, *inter alia*:

152.1. the maximum penalty of R168 million is shockingly inappropriate for an individual as opposed to a commercial entity;[31]

152.2. the Authority was incorrect in the manner it calculated the penalty. The Authority's calculation was based on the number of transactions that ensued when the recipients of the warning SMS traded (seven instances) instead of the instances when he sent the warning SMS to the four recipients;[32]

152.3. Mr Jooste should not be punished for the collapse of Steinhoff;[33]

152.4. Mr Jooste did not benefit financially or otherwise from the insider trading. On the contrary, he lost directly and indirectly billions of Rands as the value of his Steinhoff shares plummeted. He lost his position as CEO of Steinhoff whilst he still has dependents, including his children, the youngest of whom still lives with him at home.[34]

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[30] The approach was approved in *Zietsman* at paragraph 104 where it was stated that; "*The approach is to treat the relevant profit (in this case loss avoided by the recipients of the SMS) as that gained by the insider dealer when the information was made public and the market had had a reasonable opportunity to digest the information.*"
[31] Paragraph 69, page 39 of Mr Jooste's submissions.
[32] Paragraph 65, page 37 of Mr Jooste's submissions.
[33] Paragraph 68, page 38 of Mr Jooste's submissions.
[34] Paragraph 71, page 39 of Mr Jooste's submissions.

The appropriate penalty

153. The Authority has carefully considered Mr Jooste's submissions, in the light of the factors in section 167(2) of the FSR Act and section 82 of the Financial Markets Act.

154. Regarding the seriousness of the contravention, and its impact on the integrity of the financial markets, it was held in *Zietsman*:

> *"Owing to its non-public and precise nature and its ability to influence the prices of financial instruments significantly, inside information grants the insider in possession of such information an advantage in relation to all the other actors on the market who are unaware of it. It enables that insider, when he acts in accordance with that information in entering into a transaction on the market, to expect to derive an economic advantage from it without exposing himself to the same risks as the other investors on the market. The essential characteristic of insider dealing thus consists in an unfair advantage being obtained from information to the detriment of third parties who are unaware of it and, consequently, the undermining of the integrity of financial markets and investor confidence."*[35]

155. Insider trading by its nature creates an unfair advantage between those who have the inside information and those who do not. There is clearly a need to deter such conduct, and the Authority has been guided by this objective in the imposition of the appropriate penalty.

156. The Authority also believes that the evidence shows Mr Jooste to have acted deliberately, and with full awareness of the fact that what he was doing was unlawful and/or improper. That is why he told the recipients of the warning SMS to delete it and never to speak of it.

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[35] Zietsman, paragraph 83.

157. At the same time, the Authority acknowledges that it based the penalty calculations on seven instances instead of four instances when the warning SMS was dispatched only to the four recipients. The Authority has adjusted the penalty calculation accordingly.

158. We note that the proposed penalty was not the maximum penalty permissible in terms of the Financial Markets Act. On the contrary, prior to reaching its preliminary view, the Authority decided that, notwithstanding that Mr Jooste in each instance breached two provisions of the Financial Markets Act, it would not be fair to impose the penalty on him twice. The Authority has accordingly taken the contraventions of sections 78(4) and 78(5) together (as a composite) for purposes of the imposition of an administrative penalty.

159. The Authority has not attached any significant weight to the collapse of Steinhoff in calculating the administrative penalty. The penalty calculation is strictly based on the provisions of section 82 of the Financial Markets Act read with section 167 of the FSR Act.

160. The Authority has taken into account the mitigating factors raised by Mr Jooste, including that: (i) he did not benefit from the contraventions; and (ii) he has not previously been found to have contravened a financial sector law. It has also considered that he was reasonably cooperative. However, it considers the need to deter deliberate conduct of this kind as the consideration that, in this case, weighs heaviest.

161. In the circumstances, the Authority imposes on Mr Jooste an administrative sanction calculated as follows:

161.1. in terms of section 82(2)(a), the equivalent of the total loss avoided by the trades of Mr Swiegelaar, Dr Burger and Mr Oosthuizen Snr and Ocsan Investment totalling **R40 142 017**;

161.2. in terms of section 82(2)(b), an amount of three times the total loss avoided (**R120 426 051**) plus **R1 000 000** in respect of the warning SMS sent to Mr Du Toit;

161.3. in terms of section 82(2)(c) interest on the total amount of **R161 568 068** a tempora morae to date of payment; and

161.4. in terms of section 82(2)(d), costs of suit, including costs of the investigation on the tariff as per the Auditor General Fees relevant for the period of the investigation and all disbursements incurred.

162. The penalties are payable to the Authority within 30 days from the date of this Order.

163. Lastly, in terms of section 82(3) of the Financial Markets Act, we note that, with regards to the administrative sanction described above of R161 568 068:

163.1. Mr Jooste is jointly and severally liable together with Mr Swiegelaar for the loss avoided by Mr Swiegelaar of R18 328, as well as interest and costs; and

163.2. Mr Jooste is jointly and severally liable together with Ocsan for the loss avoided by Ocsan of R38 622 374, as well as interest and costs.

MR JOOSTE SHOULD FURTHER TAKE NOTE THAT:

164. If he fails to pay the administrative penalty within the period prescribed by this order, in terms of section 169 of the FSR Act, interest, at the rate prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), will be payable in respect of any unpaid portion of administrative penalty until it is fully paid.

165. Failure to comply with this order and notice will result in the provisions of section 170 of the FSR Act being invoked, which provide as follows:

"(1) The responsible authority that makes an administrative penalty order may file with the registrar of a competent court a certified copy of the order if-

(a) the amount payable in terms of the order has not been paid as required by the order; and

(b) either-

(i) no application for reconsideration of the order in terms of a financial sector law, or for judicial review in terms of the Promotion of Administrative Justice Act of the Tribunal's decision, has been lodged by the end of the period for making such applications; or

(ii) If such an application has been made, proceedings on the application have been finally disposed of.

(2) The order, on being filed, has the effect of a civil judgment, and may be enforced as if lawfully given in that court."

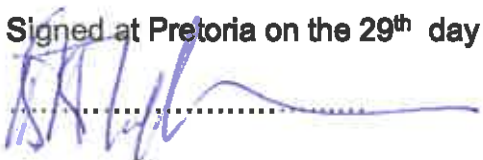
166. In terms of section 230 of the FSR Act, a person aggrieved by this decision has a right to apply for the reconsideration of the decision by the Financial Services Tribunal (the Tribunal). An application for reconsideration must be made–

(a) in accordance with the Tribunal rules; and

(b) within the time periods set out in section 230(2) of the FSR Act.

You may contact the secretary of the Tribunal at (012) 741 4302 or per electronic mail at Applications@fstribunal@fsca.co.za.

Signed at Pretoria on the 29th day of **October 2020.**



MR BRANDON TOPHAM

FOR THE AUTHORITY