IN THE ENFORCEMENT COMMITTEE
ESTABLISHED IN TERMS OF SECTION 97 OF THE SECURITIES SERVICES ACT, 36 OF 2004

CASE NO: **2 AND 3/2009**

In the matter of:

THE DIRECTORATE OF MARKET ABUSE The Referring Party

and

HITTLER, NATHAN LINDSAY Respondent

DETERMINATION OF THE ENFORCEMENT COMMITTEE

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

DETERMINATION ON THE MERITS

I shall now give short reasons for the findings to be announced in a few minutes. This Committee was, in terms of section 94(e) of the Act, entrusted with the task of considering several charges brought by the DMA against the respondent. The essence of the first four charges is that in his capacity as managing director of the company Corwil Investments Limited (Corwil), he conducted manipulative, false or deceptive trading practices in contravention of section 75 of

the Act in his dealings by Corwil in the shares of the company Marshall Monteagle Holdings Societe Anonyme Limited (Marshall) incorporated in Luxemburg.

This matter was referred to the DMA by the surveillance department of the JSE. The essence of the fifth charge is that the respondent caused the publication of a false or misleading statement in contravention of section 76 of the Act to the effect that he had acquired 473 407 Corwil shares while in fact he had not paid for the shares.

Before referral to this Committee, the DMA conducted a series of interrogations of persons who could throw light on the trades in question, and each deponent was required to confirm his answers under oath. The respondent was interviewed in this process and his answers were duly recorded. Numerous statements and other relevant documents were handed up.

Thereafter the DMA handed the respondent the charges to be relied upon. He was called on to file any answering affidavits in one month. No such affidavit was adduced and I need to add that this morning the respondent chose not to be present at the hearing, which proceeded in his absence. The foregoing constitutes the evidential material on which this Committee is invited to make its conclusions.

It appears that the following facts were common cause or beyond dispute.

(i) At all relevant times the respondent was the managing director of Corwil.

(ii) He was authorised to conclude transactions in the following share trading accounts that are held at Investec (Investec Securities Limited). The Zelpy number 2 account (1264878), the Corwil account (2570637) and the Zelpy number 1 account (1264852). These accounts belong to Corwil.

(iii) The respondent was also authorised to conclude transactions on the Zelpy 4845 account (6000475) held at BJM (Barnard Jacobs Mellet Securities Limited). The respondent acted in the capacity of an *"investment manager"* in respect of trading concluded on this account. As at 31 September 2007 Corwil held 1 022 853 Marshall shares. The respondent was the main driver of Corwil trading strategy in Marshall. He computed an evaluation of the Marshall shares and he decided at which prices additional shares could be acquired.

(iv) The respondent gave an instruction of all the transactions mentioned in the POC.

(v) The details of the various trades alluded to in the interrogation and in the charge were common cause and beyond dispute.

So much for the common cause factors.

The sections of the Act, which were allegedly contravened, should now be set out. Section 75(1) prohibits market manipulation and reads:

> *"(i), no person may, (a), either for such person's own account or on behalf of another person directly or indirectly use or knowingly participate in the use of any manipulative, improper, false or deceptive practice of trading in a security listed on a regulated market, which practice creates or might create – (i) a false or deceptive appearance of the trading activity in connection with; or (ii) an artificial price for that security; (b), place an order to buy or sell listed securities, which to his or her knowledge will, if executed, have the effect contemplated in paragraph (a)".*

Also relevant is subparagraph (g), which deems the following to be manipulate, improper, false or deceptive trading practices. *"(g), maintaining at a level that is artificial the price for dealing in securities listed in a regulated market".* Section 76(1)(a) and (b) provide that no person may make or issue a statement, which he knows or ought to have known would be false.

I turn now to the first count. It alleges that on 2 October 2007 the respondent, in breach of section 75(1)(a) and (b) instructed Investec to enter orders in the market to purchase Marshall shares at successively higher prices for the purpose of influencing the market price of Marshall shares. A list is appended of details of the purchase

in question and I need to repeat that these details on the list were common cause at the interrogation.

It is also alleged that the respondent's actions amount to a manipulative practice in terms of section 75(3)(d) of the Act. The evidence adduced at the interrogation established that in the period of two weeks before 2 October 2007 the highest trading price for Marshall shares was 1800c per share. At the hour of 16h24 on 2 October 2007, near the close of the market for the day, the respondent purchased 5 700 Marshall shares at 1699c per share, in other words, well in excess of the current market trading price.

He followed this transaction up shortly by the further purchase of 280 shares at 1700c per share, 500 shares at 2400c per shares and 100 at 2899c per share. He clearly revealed his intentions by his remark to the market participant at Investec, Catherine Ramaphakela *"let's make a new high"* and when she informed the respondent that his price of 1700c per share was significantly higher than the then ruling market price, his response was *"it will be a new high for the day"*. His other remarks to the dealer indicate that he wished to counteract persons who he believed was causing Marshall shares to be traded at low levels.

This Panel concludes that the aforesaid conduct of the respondent amounts to an attempt to manipulate the market in terms of the Act.

The next question is whether the respondent *"knowingly"* made the attempt. We are here concerned with inferences to be drawn from the established facts. In our view the only reasonable inference to be drawn is that for his own purposes the respondent planned a process, which could only be described as a deceptive appearance of Marshall shares, which is manipulation.

He was an experienced market participant and cannot be heard to say that he did not intend to harm anybody. The necessary intent was adequately established. The result of the respondent's actions was to establish an artificial reference price, well in excess of the ruling market price. We conclude that count 1 was adequately sustained and proved.

Count 2 is basically similar to the outline of count 1. The conduct attributed to the respondent is that on 3 October 2007 the respondent again endeavoured to maintain Marshall shares at an artificial level of 2325c per share to 2850c per share. Table B lists the transactions in question. It appears that the details of the transactions were common cause.

At the interrogation of the respondent it was also established that on 3 October 2007 Marshall shares opened at 1400c per share, substantially lower than the closing price of 2 October 2007. It was also shown that the seller at 1400c per share responded to a pre-

existing bid for 1975 shares at 1400c per share. This sale was part of a series of sales by Bevan and Ronan Trust. Almost all of its Marshall shares were purchased by the respondent at the artificial level created by him.

The dealer who was used by the respondent in regard to this purchase that is now under discussion was the witness, Myerson. He recommended to the respondent that he could acquire Marshall shares at a much lower price, but the respondent persisted in his scheme. This attracts the inference that the respondent did not intend to enter into genuine market related transaction, but was intent on creating an artificial high price. He has also explained to Myerson that he was intent of countering the effects of others who wished to keep Marshall shares at relatively low prices.

It is necessary to deal with evidence given by the respondent that when asked why he did not endeavour to acquire Marshall shares at lower prices, he said that he instructed Myerson to bid for Marshall shares at lower levels. This statement, we find, was untrue and is at odds with all the other admissions and the evidence. There was in particular the evidence of Myerson and of Redman of the JSE who testified Myerson did not on 3 October 2007 enter any bids for 1400c per share or 1500c per share.

On a parity of the reasoning relative to count 1, the Committee finds that the conduct of the respondent on 3 October 2007 amounted to an endeavour to manipulate and that was done knowingly. Count 2 has been established.

The factual component in the third alleged contravention is that on 10 October 2007 he proved of entered in orders either to sell or purchase Marshall shares with the knowledge that opposite orders of substantially the same size, at substantially the same time and at substantially the same price had been entered or were to be entered on his behalf. He intended, so it is alleged, to create a deceptive appearance of active trading to Marshall shares at an artificial price. Table C sets out details of the transactions.

At his interrogation the respondent accepted responsibility for the transactions in question. The dealer who carried out the respondent's transaction was the witness Machado, also Ramaphakela. What happened was that the respondent brought about a number of transactions involving the accounts of two companies, which are subsidiaries of Corwil by using the market while the transactions could have been done as a simple journal entry. While executing the transactions in the market, the respondent created the impression that there were real trades in the Marshall shares while in reality there was no change in the beneficial ownership of the shares. The respondent clearly intended to paint a false picture of the tradability

of Marshall shares against the reality that there was hardly any significant trading of the market in the shares.

In our view this conduct falls squarely in the definition of section 75(3) of the Act. This count was also adequately established. It is necessary to add that there was proof that these transactions took place after the Directorate of Market Abuse wrote to the respondent informing him of the effect of section 75 of the Act. This count was also adequately established.

Count 4 contains the factual averment that on 6 November 2007 the respondent placed orders to purchase Marshall shares, which he know would, if actually executed, create a false impression of market activity. Table D sets out the details of the transactions in question. The evidence relative to this count indicates that by this time the respondent took his trading actions to BJM, because he was frustrated by Investec.

The evidence proved that on 5 November Marshall shares closed at 1800c per share. During the morning of 6 November 2007 there was an offer to sell 590 Marshall shares at 2200c per share. The next day the respondent purchased small odd lots of the shares on offer at the prices quoted. It is clear that he could have acquired these at significantly lower prices and the inference to be drawn is that the

respondent actively set about to create an artificial price level of Marshall shares. This conduct again falls squarely within the deeming provision of section 75(1) read with section 75(3). This count also has been adequately established.

That brings us to the fifth count, which was that he caused a publication in SENS of a statement, which was that on 4 April 2008 he was the purchaser of 473 407 Corwil shares, which he acquired at an overall price of R3 313 804. In fact, according to the charge the shares had not been paid for. In our view the reasonable inference from all the evidence is that the respondent had at best an option to purchase these shares for the above quoted price. To that extent the statement in SENS was incorrect and it is our view that a reasonable inference from the facts is not that the respondent deliberately intended to make a false statement, but that he negligently, in contravention of this section, made the statement alluded to. This conclusion must be that the respondent was guilty of negligently making this statement incorrectly and to that extent the contravention against him on the fifth count was established.

In summary then the respondent is found to have contravened the sections in accordance with counts 1, 2, 3, 4 and to the limited extent set out in count 5.

DETERMINATION ON THE PENALTIES

I will now proceed to give the reasons for the fixing of the administrative penalty in the case of Hittler to be announced in a few minutes. The committee has given thought to the question of what an appropriate administrative penalty to be imposed on the respondent. It is at once necessary to indicate that for logical reasons it will be convenient to fix an administrative penalty for counts 1 to 4, taken together for the purpose of fixing of the amount. The conviction on count 5 calls for separate consideration.

It is beyond doubt that the contravention was a serious one. It has harmful effects on the market as a whole and the seriousness of the contravention has to be reflected in the quantum of the administrative penalty. The Act enjoins the committee to bear in mind the personal circumstances of the respondent. The difficulty is that these are matters peculiar within his knowledge and he has not seen fit to attend this hearing or to give us information as far as that is concerned. All that we know about him is that he is an experienced market participant and should have known better.

It has been mentioned in previous matters dealt with by this committee and confirmed on appeal in one matter that the deterrent effect of the quantum of the administrative penalty is a factor to be seriously considered. It will serve as a deterrent on the respondent. It

will serve as a deterrent in regard to persons who are minded to commit serious such offences.

An aggravating fact alluded to in our reason is that the respondent was warned of the conduct of the sort that he was indulging in and nevertheless proceeded to carry on with the same type of activity. There is no indication of any remorse, nor is there any indication that the respondent is aware of the grossness of his conduct. In the estimation of the Committee an appropriate administrative penalty on counts 1 to 4 taken together is R1 million.

In regard to count 5, different considerations arise. The finding of the Committee is that the respondent was guilty of negligence, which is much less serious than would otherwise have been the case. In the estimation of the Committee an appropriate administrative penalty on count 5 is R10 000.

In summary then, the administrative penalty on counts 1 to 4, taken together, is R1 million and the penalty in count 5 is R10 000.

CHAIRPERSON

22 September 2009