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

CASE NO: **10/2009**

In the matter of:

THE DIRECTORATE OF MARKET ABUSE	The Referring Party
and	
LABAT AFRICA LIMITED	First Respondent
VAN ROOYEN, BRIAN GEORGE	Second Respondent

DETERMINATION

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

FINDING

CHAIRPERSON: The Committee has come to a conclusion. I shall give very short reasons for the conclusion to which we have come. This Committee is entrusted with the task of considering a charge brought against the respondents by the DMA. The essence of the charges is that they published the result of the first respondent for the year ending '07 in

words that were false or deceptive in contravention of Section 76 of the Security Services Act, 2004.

It should at once be stated that the first respondent (Labat) is a public company whose shares are listed on the JSE and the second respondent was at the time a chairman and managing director.

The announcement was performed on 13 June 2007. The sections underlying the charge read *"76, false, misleading or deceptive statements, promises and forecasts, (1) no person may directly or indirectly make or publish in respect of listed securities or in respect of the past or future performance of a public company – (a) any statement, promise or forecast which is at the time and in the light of the circumstances in which it is made false or misleading or deceptive in respect of any material fact, which the person knows or ought reasonably to know is false, misleading or deceptive; or (b) any statement, promise or forecast which is, by reason of the omission of a material fact rendered false, misleading or deceptive and which the person knows or ought reasonably to know is rendered false, misleading or deceptive by reason of the omission of that fact. (2) A person who contravenes Section 1 commits an offence."*

I should at once observe that the charge brought by the DMA refers to (1)(a) but in all the circumstances it is clear having regard also to the content of the charge that subsection (b) was also contemplated. That is

the section which refers to the omission of a fact and plainly this omission to, in so many words, refer to sub (b) is not insignificant.

It appears from the papers that the DMA conducted an interrogation of persons who could throw light on the publication and each was required to confirm his answers under oath. Mr Van Rooyen was one of those interrogated and also Labat's auditors. Their testimony was duly recorded and transcribed and that constitutes part of the evidential material before the Committee.

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In addition, the second respondent made an affidavit on behalf of the respondents to which I shall at once refer. The affidavit was made by the second respondent. In the first part thereof he had embraced the question whether the DMA was obliged to answer a very lengthy response for further particulars filed by the lawyers retained by the respondents.

At the outset of argument this morning, counsel for the respondents repeated the request and it was ruled that the request need not be complied with. I need to give short reasons for the conclusion on the basis

20 of which that finding was made.

The question of cardinal importance in relation to the request for particulars and also for other reasons is to consider the scope of the charge under consideration. All that the charge avers, which calls for discussion relative to the issue now under consideration, is that the

publication of 13 June 2007 omitted reference to the review or opinion dated 5 June 2007 issued by Labat's accountants, which highlighted matters in issue between the auditors and Labat's directors and that the publication stated that the auditors were unable to give a complete approval of the accounts.

The request for further particulars adumbrates a series of matters relative to accounting issues, which in our estimation is not relevant or hardly of great significance in the context now under discussion. I should add that at the commencement of the hearing I informed the parties present that in view of the fact that we consider that the scope of the inquiry is severely limited, that also it limited the references and the debates before us.

However, to come to a point in regard to the request for particulars, in our estimation the issues engendered by this view of the charge renders it unnecessary to respond to the lengthy request for particulars and that was declined.

I return now to what I conceive to be the fundamental issues in this case. I should merely add that the evidential material on which this Committee is invited to make a decision was the transcription of the interrogation of the parties who could throw light on the matters, as also the affidavits filed by the second respondent and in particular an affidavit by an accountant dealing with accountancy matters. While on that topic, I should observe that to a very large extent the evidential material presented by the

respondents involves a criticism of the conclusion reached by the accountants. That is of very limited significance in relation to what I shall presently discuss.

It was common cause before the parties what the content was of the statement issued by the respondents for which they are now being taken to task. A copy of the statement in question was before the interrogators and is presently before us, as also the review opinion of the auditors, the content of which looms large in the discussion which follows.

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I think it can by said quite plainly that there should not be a dispute thereon that the announcement by the company and by the respondents was inaccurate, was incorrect, more particularly because while it does refer to discussion on the correctness of the financial statement, it omits reference to this very important part of the review report of the auditors. *"Based on our review, because of the pervasive effect on the financial statements of the matters discussed in the preceding paragraph, we express no assurance on these financial statements".*

20 The review also discusses various problems of the companies concerned, and it also for instance says *"These matters indicate the existence of a material uncertainty which may cast significant doubt about the subsidiary and group's ability to establish as a going concern."* It seems therefore that in the background of the fact that the announcement by the respondent, which underlies the charge, the text of the review by the auditors is

admitted. It follows, I think, that the announcement by the company falls short of what should have been announced.

Of particular significance is the use of the words that because of the pervasive effect of the financial statements of the matters discussed, we express no assurance on these financial statements. There was some debate in the papers on whether this is a disclaimer or not. In our estimation that matters not. The simple fact of the matter is that this is much stronger than the words used by the respondents in their statement where they refer simply to a qualified review opinion. A qualified review opinion is by no means an approximation of what should be set out in the announcement.

So, the starting point in the discussion which follows is that there was this publication, the omission to refer to significant parts of the review of the auditors and in particular the omission to attach the review report of the auditors to the publication. That means that the statement was incorrect, misleading and deceptive. I find it convenient now to refer to an argument addressed by counsel for the respondents, namely that no member of the investing public is reported to have complained or to have referred to a lost made. In our estimation that is not significant. What is important is the potential of harm of the statement.

So, there was then a statement which was inaccurate, incomplete and misleading to the extent that I've indicated, and that gives rise to what was

perhaps more discussed and debated than anything else, was the state of mind of the second respondent when he drafted the publication attributed to him. In a lengthy affidavit he admits that a mistake had been made, but he says that he was ignorant, had limited knowledge, very limited knowledge of preparation of financial statements and of all of that is involved that he did this in good faith.

We have considered the various factors which were alluded to in the context of the ascertainment of the state of mind. Counsel for the Directorate of Market Abuse urged that there were various factors which attract the inference that Van Rooyen was not as innocent as he tries to make out, that he deliberately, with knowledge of falsity made the statement.

We have considered all these factors and certainly there are cogent reasons for thinking that he may have been less innocent than he holds out. He was of course the managing director. He was also in a practical sense the financial director. There was an audit committee of the respondent, but of great importance is the obligation cast on him by the Company's Act as a director of ensuring that the financial records of Labat were correct and acceptable.

There is also the significant fact that he did not, before making the announcement, refer back to the auditors. There is a debate about that, but I think the probabilities are that he did not. He claims that he

approached the sponsors, but that they could not assist, but I don't think that is of any significance.

However, on balance, the Committee has considered that while there may be some debate about whether he had actual intention to defraud, he ought to have known that the publication was incorrect, was misleading and was inadequate.

We considered that not only on all the circumstances alluded to, but also by virtue of the provisions of the Company's Act, which, as I have said, cast the obligation on him to make sure that what he was publishing was correct. He should, at the very least, we think, have published the entire review. It is in this context relevant that the listing requirements dictate that a company which called for a listing should annexed the full text of the reports of the auditors.

For all these reasons we conclude that Mr Van Rooyen should have known that he was publishing a statement in contravention of Section 76(1)(a) and (b) and he is liable. As far as Labat is concerned, it as a company has to bear the consequences of what is done in its name by its directors and on the basis of vicarious responsibility this can be attributed to him.

Our finding is then that the two respondents contravened Section 76 on the basis that they ought to have known what they were doing was

incorrect. So, what remains to be considered is the question of the quantum of an administrative penalty that usually follows on a finding such as this.

PENALTY

CHAIRPERSON: We resume. The Committee has given consideration to the question of an administrative penalty and the quantum thereof. We've had the benefit of submissions by both sides and we take note of all the factors that were quoted. I do not think it necessary to recite all that was said, except to highlight certain aspects, which in our view are important.

I begin with the self-evident factor that this sort of conduct of incorrect statements to the public are usually viewed and certainly should be viewed in a serious light. They negatively affect the markets. they possibly bring about a discredit of the trading in the market, but there are in our estimation very important mitigating factors.

The first and foremost is the fact that whilst the respondents have been found to be guilty as charged because of the inaccurate statement in the publication, they did use words which indicate not necessarily to the necessary degree, but did indicate that there were difficulties with the auditing. They used the words "qualified review", which fall short of what should have been said, but it certainly indicates the absence of an

indication deliberately to deceive and would serve as some sort of warning to the investing public that there was a difficulty with the auditing.

The fact also that the JSE did not take any steps at de-listing indicates that it did not think that the intromissions of the respondent were adequate to call for such severe steps. Our attention was drawn to awards of administrative penalties made by this Committee. It is of course necessary to emphasise that each case is dependent on its own facts, and while it may be desirable to achieve some sort of consistency or relative consistency in awards, one can never get away from the fact that each case is different and calls for its own assessment.

Counsel for the Directorate of Market Abuse mentioned a figure which is in our estimation substantially in excess of what we would consider to be an appropriate award. The figure on which we have decided is an administrative penalty in regard to the first respondent of R25 000 and in the second respondent an award of R25 000.

I next have to consider the question of costs. It was urged that a costs order should be made in this matter. I recollect that when this Act first came into operation I presided over hearings where the costs question was debated and I think the view then taken though was that the operation of the new system had not yet crystallised efficiently to justify any order of that nature. Certainly the statute permits the making of an order for costs,

but I think account has to be taken of the circumstances of each individual case.

In the present case there was no obstructive opposition to the inquiry. Speaking for myself, I found the contribution made by the lawyers for the respondents useful and played a vital factor in the decisions which we have come to. Their contribution was significant and for fear of laying down a precedent, I indicate that in the present case we do not think that making of an order for costs is justified. So, no order will be made.

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In summary then the respondents, having been found guilty of the contravention attributed to them, are each required to pay an administrative penalty of R25 000. That adjourns the enquiry. Thank you very much everybody who has taken part in it and thank you for the spirit in which this was conducted.

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CHAIRPERSON

29 September 2009