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

CASE NO: **11/2009**

In the matter of:

THE DIRECTORATE OF MARKET ABUSE The Referring Party

and

Mr MARIUS MEYER Respondent

DETERMINATION OF THE ENFORCEMENT COMMITTEE

Before The Hon Mr Justice C F Eloff, R J G Barrow, Ms K Dlepu, and E A Moolla.

The committee has come to a conclusion. I shall now give short reasons for the conclusion presently to be announced. This committee was, in terms of Section 94(e) of the Act, entrusted with the task of deciding whether the charges brought against the respondent by the DMA of insider trading were adequately established. The evidential material to be considered is that established by a series of interrogations conducted in terms of the Act, an answering affidavit handed up by the respondent and various affidavits tendered thereafter.

The statutory enactment in question is Section 73, which renders it an offence for *"an insider who knows that he or she has inside information and who deals ... in the securities listed on a regulated market to which the inside information relate or which are likely to be affected by it..."*

In the light of the arguments addressed herein it is relevant to observe that a proviso was added, which dealt with a situation where a person becomes an insider after having given instructions to trade in the shares. The company whose shares were dealt with is Wescoal Holdings Limited. Its shares are listed securities on the alternative exchange maintained by the JSE.

The company, Exchange Sponsors (Pty) Limited, of which the respondent was at all relevant times a director and approved executive and largely under his control was at the relevant time the designated advisor to Wescoal. The witness, André Boje, was the CEO of Wescoal. The evidence shows that at the end of November 2007 Boje had discussions with the directorate of the company Vuselela Mining (Pty) Limited concerning the possibility of acquiring coal mining options from Vuselela and the company Razorbill Properties 269 (Pty) Limited.

Initially the representative of these two companies was only willing to sell on condition that the company, Waterberg Portion Properties (Pty)

Limited, acquired a controlling interest in Wescoal. These discussions continued until February 2008. On 12 February 2008 Boje advised the other parties that Wescoal was not interested in conferring any controlling interest.

However, Boje testified at the interrogation that on 25 February 2008 the director of the two companies agreed to sell prospecting rights without acquiring a controlling interest in Wescoal. The next day, 26 February 2008, Boje was handed two *"binding term sheets"* (draft agreements) for the sale of the prospecting rights that had previously been drafted for the two respondents. On that same day Boje handed these drafts to the respondent for comment. His prime interest at that stage was as director of a designated advisor.

The draft agreements recorded, *inter alia,* (i), that Wescoal was negotiating the purchase of prospecting mining rights over portions 12 and 16 of the farm Vlakvarkfontein 213 IR and over the farm Mooiplaats 165 JS; (ii), that Wescoal would acquire those prospecting right at the rate of R5.00 per minable ton of coal. The purchase consideration would be paid by the issue of Wescoal shares at 107c per share; and what the conditions precedent to the agreement must be and should be satisfied.

The response to the respondent after receipt of the draft is of fundamental importance in the context to be discussed later. He sent Boje an e-mail, a copy of which we find at page 19 of the record of the interrogation. It was addressed to André Boje and Piet and it reads *"my recommendation to André is that he asks Kim to change these into final agreements. Wescoal can then sign it and we can announce it"*

We infer that the drafts were thereafter converted into final agreements. On 10 April 2008 Wescoal announced on SENS that pursuant to the negotiations referred to in a previous announcement it had concluded an agreement subject to certain conditions precedent to purchase the coal mining rights over portions 12 and 16 of the farm Vlakvarkfontein 213 IJ; portions 8, 9 and 10 of the farm Mooiplaats; and portion 10 of the farm Bankfontein 216 IR.

Wescoal would acquire these rights at the rate of R5.00 per minable ton of coal. The purchase consideration would be the issue of Wescoal shares at 107c per share.

The rationale for these transactions was published to be that Wescoal would benefit largely by the acquisition. This notice was preceded by a cautionary announcement published by the respondent. The terms of the announcement are relevant. It reads *"shareholders are advised that Wescoal had entered into negotiations, which, if successfully*

concluded, may have a material effect on the price of the company's securities".

The possible involvement of the respondent arises from the fact that in this period he purchased a large number of Wescoal shares, which, if he was an insider, he should not have done. In his answering affidavit the respondent states that the background of what he did was the cessation of a joint venture with one Van der Merwe. In consequence of the agreement he decided to acquire a large number of Wescoal shares.

What has to be considered is the proof of the extent of respondent's participation in the contract with the two companies and his knowledge of what was going on and to what extent the negotiations had progressed. We know from his evidence that on 15 February 2008 he obtained clearance from Boje to trade in Wescoal shares. He commenced purchasing on 19 February 2008 when he instructed RMB to purchase 100 000 Wescoal shares at 86c per share from and on behalf of a closed corporation owned by him. RMB instructed BJM to execute the trade.

On 20 February 2008 BJM purchased 36 665 shares at 86c per share for the respondent. On 27 February 2008 the respondent instructed RMB to increase his bid to 87c per share and at 14:07 on that day BJM

entered a bid for 200 000 Wescoal shares at 87c per share. 19 310 shares matched on 3 March 2008 at 09:48.

On 3 March 2008 the respondent instructed RMB to increase his bid to 90c per share and on 3 March 2008 at 16:52 BJM entered a bid of 20 000 Wescoal shares at 90c per share. On 4 March 2008 15 000 matched at 09:16 and 5 000 at 09:46 respectively. Later that day the respondent instructed RMB to cease trading in Wescoal shares.

10 We now know that by 26 February at the latest the respondent had knowledge of the negotiations mentioned earlier and had sight of the draft agreement, which he approved. *Prima facie* these facts may well attract the inference that he was fully aware thereof that there had been negotiations, that the draft agreement had been exchanged and that the negotiations had been far advanced. We now consider the question whether this makes him an insider.

In his answering affidavit the respondent says that when Boje sent him the draft agreement he *"communicated to me that the proposal was*
20 *subject to a material condition; that the proposer acquired majority control in Wescoal".* He goes on to say that this requirement is unacceptable. He also states that Boje said that he thought that insufficient investigation had been conducted into the reserves. Only on 4 March 2008, says the respondent, did Boje tell him that the major

obstacle put up by the sellers of the coal rights had fallen away. On these grounds the respondent contended until 4 March 2008 he did not become an insider.

It is accordingly the duty of this committee to decide whether the evidence of the respondent that the receipt by him on 26 February 2008 of the draft agreement was accompanied by statements of Boje that the selling companies still insisted on acquiring a controlling interest. Our conclusion is that this averment of the respondent cannot be accepted.

First of all, the evidence by Boje at page 72, lines 40 to 45 was clear that the insistence on gaining control of Wescoal had been waived on 25 February 2008. Clearly then Boje would not have sent the respondent the draft agreements and plainly he would not have told the respondent that the sellers were still insisting on acquiring a controlling interest. It would have been a pointless exercise for Boje on 26 February 2008 to send the drafts to respondent for approval if this major stumbling block was still in existence.

The second factor is that Boje's e-mail on 26 February to Cordier of which a copy was sent to the respondent, which we find at page 19, is plainly inconsistent with the notion that the sellers were still insisting on gaining control. Also on 26 February 2008, having heard from the

respondent that the drafts should be cast in final form, Boje sends an e-mail to Kim, page 40, reading *"attached please find two agreements for your comment. Both Marius"* that's the respondent *"and I are of the opinion that the agreements are comprehensive enough not to require additional contracts, as per clause 2(i). You can panel beat them and maybe add an annexure for directors, your warranty. Regards André Boje".*

When it was put to respondent at his interrogation that he knew when sending the abovementioned e-mail to Boje that the lawyers would go ahead with the task of converting the draft into a final agreement, his response was *"ja, my advice was to say go and do it that way"*

Respondent did not initially, in his interrogation, state that he was not as at 26 February 2008 aware thereof that WWP had waived it's insistence on acquiring a controlling interest in Wescoal. He merely said that up to 4 March 2008 *"the deal was not completed"* and *"it is very difficult to say when it is final".*

The respondent was at the interrogation inconsistent on the issue of progress in the negotiations. He first conceded that the negotiations had reached an advanced stage. Later he denied that. It is also a relevant factor in our estimation that the draft agreements were not

changed in any material respect between 26 February 2008 and 4 March 2008.

Reference was made in the course of argument to a provision in the draft concerning the rights of minority shareholders. This clause is difficult to interpret, but in our estimation it does not at all bear on the defence raised by the respondent that Boje had told him that the sellers were still insisting on the right of effective control.

In regard to the point made by the respondent that Boje was insisting on considering the reserves, it is plain that the draft agreements provided for Wescoal completing a due diligence and in particular to satisfy itself as to the available reserves.

We need at this stage to deal with the statement made by Boje that the respondent was not privy to these discussions until 4 March 2008. This was plainly an error, having regard to the clearly established fact that on 26 February 2008 Boje sent the respondent the drafts and asked for his comments. His letter thereafter, on receipt of respondent's letter to Kim, is also completely inconsistent with the statement under consideration.

In our opinion the true picture is that as at 26 February 2008 the negotiations had crystallised and reached the stage when it should be

said that the parties were very close to the conclusion of signed agreements, that they had agreed subject only to signature on the terms of their agreement and that negotiations become very far advanced. The situation as at 26 February 2008 aptly fitted the statement on 6 March 2008 published by the respondent *"that Wescoal have entered into negotiations, which, if successfully concluded, may have a material effect on the price of the company's securities".*

The test of materiality is whether an outsider may well, on learning of the facts known at the time by the respondent, be prompted to deal in Wescoal shares. The conclusion of a signed contract is not necessary. The reality of the respondent's knowledge by 26 February 2008 that the negotiations were on the point of being converted into a signed contract should have prompted the respondent not to acquire further Wescoal shares and he should have terminated the mandate to the broker. That he did not do until 4 March 2008 at 12:14. The instructions on 27 February 2000 at 12:40 to RMB should not have been given and all purchases after 26 February 2008 should not have been made.

It is necessary to add that clauses 12(6) and 12(7) of the listing requirements cast a duty on respondent's company, as approved executive of Wescoal, to advise the company of its obligations. The inference can and should be drawn that he was fully aware of his

obligations in that capacity, that he was fully aware of what constitutes an insider and it seems to us that the charge has been established.

The possible effect on the security of Wescoal can be gleaned from the fact that when the agreement was finally signed and that was made public, the shares of Wescoal increased rapidly from 117c per share on 11 April 2008 to 233c per share on 18 April 2008. We conclude that counts 1 and 2 of the charge were adequately established.

That leaves us to the duty of considering whether an administrative penalty should be imposed. It is now just on 1 o'clock. Will it be convenient if we were to adjourn until 13:45 and counsel can then deal with that? I thank you.

Adjournment

On resumption

We are on record again. This morning we directed whether the question of a possible administrative penalty should be considered. The parties have apparently negotiated and the result relieves us from what might well have been a difficult duty, having regard to the factors that should, in terms of the Act, be borne in mind. The figure that is agreed upon is R150 000.00 and the order, which we make, is that an

administrative penalty for the two contraventions, taken together, is R150 000.00. It remains for me for thanking the parties for the way in which they have made their submissions. It's been of value to us and I'm also grateful for the spirit in which this took place. Thank you. We stand adjourned.

10

CHAIRPERSON

21 October 2009