

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

**CASE NO: 21/2013**

In the matter of:

**THE DIRECTORATE OF MARKET ABUSE**

Referring Party

and

**JACOBUS MICHIEL VAN TONDER**

Respondent

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**ORDER**

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WITH DUE CONSIDERATION to the documents placed before this Panel, including the admissions made by the respondent, the Panel finds that the respondent has contravened section 75(1) of the Securities Services Act, No 36 of 2004. We hereby impose a penalty of R1 000 000 on the respondent in terms of section 103(1)(a) of the Securities Services Act.

Signed at **PRETORIA** on the **11<sup>TH</sup>** day of **DECEMBER 2013**.



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**C F Eloff**  
**Chairperson of the Enforcement Committee**

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**ADMISSIONS BY THE RESPONDENT IN TERMS OF SECTION 103(1)  
OF THE SECURITIES SERVICES ACT, 36 OF 2004**

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1. I, Jacobus Michiel Van Tonder, confirm that I have read and understood the particulars of contravention. I hereby under oath make the following admissions in terms of section 103(1) of the Securities Services Act, No.36 of 2004 (Act) and state the following facts:

1.1. I am an adult male residing at 89 6<sup>th</sup> street, Hyde Park, Johannesburg.

1.2. At all relevant times, being September and October 2008, I was the chief executive officer of African Dawn Capital Limited (Afdawn).

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- 1.3. Afdawn is a public company whose shares are listed on the Alternative Exchange (ALTX) of the JSE LTD (JSE), which is a regulated market.
- 1.4. At all relevant times I had invested significantly in Afdawn shares, single stock future contracts (SSFs) and later Contracts for Difference (CFDs) through companies I owned and/or controlled.
- 1.5. In respect of my Afdawn SSFs and CFDs, being highly leveraged products, I was exposed to the movement in the Afdawn share price, in that any decrease in the Afdawn share price would result in me having to pay a variation margin call and any increase in the Afdawn share price would result in a variation margin call being paid to me.
- 1.6. Mr David Martin Sweeney (Sweeney) was the dealer at Watermark Securities (Pty) Ltd (Watermark) that mainly executed all the trades on my instructions in respect of the share trading accounts at Watermark that I owned and/or controlled and/or could direct trading (hereafter referred to as the controlled accounts).
- 1.7. With regard to Afdawn shares, Sweeney had a standing instruction from me to purchase Afdawn shares for and on



behalf of the controlled accounts whenever these accounts had available funds.

- 1.8. At all relevant times I also had the authority to purchase Afdawn shares for and on behalf of Afdawn, through the Afdawn share trading account held at Watermark, for the benefit of the Afdawn share incentive scheme.
- 1.9. I authorized Sweeney to exercise his own discretion as to the manner in which he executed my instruction in purchasing Afdawn shares for the controlled accounts and the Afdawn account subject to any limitations I may have imposed relating to volume or price. Therefore the price, volume and the time when Afdawn shares were purchased on behalf the controlled accounts or the Afdawn account, was determined by Sweeney subject to any limitations I may have imposed.
- 1.10. Sweeney knew of my Afdawn SSF exposure. If I was required to pay a variation margin call, Sweeny would call me to inform me of the amount due.
- 1.11. Due to the decline in the Afdawn share price especially during September and October 2008, I was placed under significant financial stress to meet my variation margin obligations.

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- 1.12. During this period Sweeney advised me that it was futile purchasing all the Afdawn shares I wanted during the continuous trading period because there were sellers of Afdawn shares that were selling below the prevailing price just before the close of market that caused downward pressure on the Afdawn share price. Sweeney advised that I should rather purchase some or all of the Afdawn shares, depending on the circumstances, during the close of market in order to support the Afdawn share price and this would have the consequent benefit that I would avoid or pay a reduced variation margin payment or alternatively I would receive a variation margin payment.
- 1.13. On the advice of Sweeney, and instead of paying variation margin to the issuers of the SSFs and CFDs, I decided to rather use the same funds to trade in the Afdawn share near the close of market, the primary purpose of which was to cause the Afdawn share to close at a higher price. I did this with the assistance of Sweeney in order support the Afawn share price and to avoid paying or paying a reduced variation margin call and in some instances to receive a variation margin payment.
- 1.14. Since I was also buying Afdawn shares for Afdawn's share incentive scheme, I decided to also use these funds and with the assistance of Sweeney to trade in the Afdawn share in order support the share price and to avoid paying or paying a

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reduced variation margin call and in some instances to receive a variation margin payment.

- 1.15. The agreement and understanding that Sweeney and I had was that I would make funds available to Sweeney relating to the controlled accounts and the Afdawn account. Sweeney would use his discretion to buy Afdawn shares at or near the close of market the primary purpose of which was to ensure that the Afdawn share closed at a higher price in order to avoid paying variation margin or paying a reduced variation margin and to support the Afdawn share price.
- 1.16. In pursuance of this common purpose strategy, Sweeney bought Afdawn shares through the controlled accounts and Afdawn account and through accounts of other clients of Watermark that resulted in the trades referred to in Annexure "A" of the particulars of contravention.
- 1.17. Whilst I was not familiar with the exact details as to how Sweeney was going to execute our strategy, I understood that he would use the funds that I made available to buy shares during the close of market in order to cause the Afdawn share price to close at a higher price and/or to prevent the share price from falling to lower levels. I later learned that in certain instances

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Sweeney combined my bid together with other bid/s in order to cause the Afdawn share price to close at a higher price.

- 1.18. With regard to the shares that I bought together with Mr van Niekerk, I admit that I gave the instructions for these trades. These funds were made available to Sweeney to buy Afdawn shares but to acquire them pursuant to the strategy to manipulate the share price. I was under the impression the shares would be bought through an account in Van Niekerk's name. What I was not aware of was that the shares were initially acquired through the Dreamcast account.
- 1.19. Therefore in respect of each trade referred to in Annexure "A" of the particulars of contravention, I admit that I, acting in common purpose with Sweeney of Watermark, contravened Section 75(1)(a) read with section 75(3)(d) of the Act in that:
- 1.19.1. I instructed and approved the entry of a bid during the closing auction period which was near the close of market.
- 1.19.2. I used and knowingly participated in a manipulative, improper, false and deceptive trading practice by instructing and approving the entry of a bid during the closing auction call phase near the close of market,

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the primary purpose of which was to cause the closing price of the Afdawn share to change to a higher price or to maintain the closing share price.

- 1.19.3. My bid was successfully matched at end of the closing auction process. My bid caused the Afdawn share price to close at a price that was higher than it would have closed for that particular day thereby causing the closing price of the Afdawn share to change to a higher price.
- 1.19.4. These shares were purchased for my own account through companies that I owned and/or controlled and in certain instances for Afdawn. Afdawn shares were also purchased for clients of Watermark.
- 1.19.5. The purpose of causing the shares to close at a higher price was to support the Afdawn share price and to benefit myself as I had a significant exposure to Afdawn shares, SSFs and later CFDs and the consequent exposure to variation margin calls. These transactions benefited me in that I either avoided or paid a reduced variation margin call in respect of our Afdawn SSFs and later Afdawn CFDs and in certain instances it enabled a margin call to be paid to me.

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1.19.6. As a result, these trades created a false or deceptive appearance of the trading activity in connection with the Adawn share and the Afdawn share price was maintained at an artificial level.

## 2. MITIGATING FACTORS

- 2.1. I am truly remorseful for the manner in which I purchased the aforesaid shares and the artificial effect these transactions had on the Afdawn share price.
- 2.2. I have not in the past been found guilty of contravening any provision of the Act.
- 2.3. I have suffered considerable personal, financial and reputational loss as a result of my investment in African Dawn shares.
- 2.4. As a result of my derivative exposure, and despite any temporary benefit I received, I ultimately ended up losing R38 million. The three companies through which I acquired the Afdawn shares were all liquidated.
- 2.5. I lost my employment with Afdawn in January 2009 and was unemployed for a period of approximately 4 years thereafter.

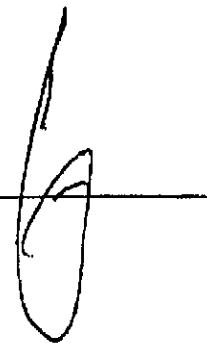
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- 2.6. The only assets I now own is a house and a motor vehicle that are both financed.
- 2.7. My financially distressed situation resulted in my wife divorcing me.
- 2.8. The entire ordeal resulted in me being diagnosed with stress for which I receive medical treatment.
- 2.9. I have co-operated and assisted where possible during the enforcement process.

### 3. PENALTY

- 3.1. I tender to pay a penalty of R1 000 000.

Deponent



I certify that:

- I. the deponent acknowledged to me that:
- (a) he knows and understands the contents of this declaration;
  - (b) he has no objection to taking the prescribed oath;



(c) he considers the prescribed oath to be binding on his conscience;

II. the deponent thereafter uttered the words "I swear that the contents of this declaration are true, so help me God";

III. the deponent signed this declaration in my presence at the address set out hereunder on this the 14 day of December 2013.

*[Handwritten signature]*

FASHAAD V. MOOSA EX OFFICIO COMMISSIONER OF OATHS PRACTISING ATTORNEY 48 TWICKENHAM AVE AUCKLAND PARK JOHANNESBURG TEL: (011) 482-9933 / FAX: (011) 726-8850
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