

# **THE FINANCIAL SECTOR CONDUCT AUTHORITY**

In the matter between:

**FINANCIAL SECTOR CONDUCT AUTHORITY**

and

**NICOLAAS VAN DYK**

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## **ORDER INTERMS OF SECTION 167 OF THE FINANCIAL SECTOR REGULATION ACT NO.9 OF 2017**

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1. The Financial Sector Conduct Authority (the Authority) is a juristic person established in terms of section 56 of the Financial Sector Regulation Act, No.9 of 2017 (the FSR Act). The Authority's office is situated at Riverwalk Office Park, Block B, 41 Matroosberg Road, Ashlea Gardens.
2. The functions of the Authority are *inter alia* to investigate market abuse contraventions conducted on a regulated market, including the publication of false, misleading and/or deceptive statements in respect of securities listed on a regulated market.
3. Pursuant to an investigation conducted in terms of section 82 of the Securities Services Act, 36 of 2004 (the SSA), the Authority found that Mr Nicolaas Van Dyk (Mr Van Dyk) directly and/or indirectly caused the publication of false, misleading or deceptive statements, which he ought to have reasonably known were false, misleading or deceptive; and/ or caused the publication of statements, which by reason of the omission of material facts, rendered the statements false, misleading or deceptive and which omission he ought to have reasonably known, rendered the statements false, misleading or deceptive.
4. The publications were in respect of African Dawn Limited (African Dawn), a public company listed on the Alternative Exchange of the JSE Limited.

5. The salient facts which led to the Authority's determination are set out below:

5.1. Mr Van Dyk was the external audit partner for the African Dawn Group, consisting of African Dawn Capital Limited and several subsidiary companies for the 2008 financial year-end, and auditor for various subsidiaries of the African Dawn Group during the 2009 financial year end.

5.2. Mr Van Dyk was directly responsible for the audit of and he signed off on the 2008 African Dawn Group year-end financial statements and the majority of the 2009 African Dawn Group subsidiaries' year-end financial statements.

**5.3. Deconsolidation of African Dawn Property Transfer Finance 3 (Pty) Ltd**

5.3.1. Mr Van Dyk was directly responsible for the consolidation of the financial statements of African Dawn Property Transfer Finance 3 (Pty) Ltd (PTF3) into the financial statements of the African Dawn Group for the 29 February 2008 financial year-end.

5.3.2. On 5 April 2007, Praesidium Capital Management (Pty) Ltd purchased 100% of the shares of PTF3, and PTF3 was no longer a subsidiary of African Dawn for purposes of the 29 February 2008 financial year-end.

5.3.3. In terms of the management agreement concluded between African Dawn and PTF3 dated 5 April 2007, African Dawn would manage the day-to-day affairs of PTF3 and be entitled to 50% of the profits but, the agreement did not afford African Dawn entitlement to the rights and obligations of the assets of PTF3 and, therefore, African Dawn did not have control of PTF3.

5.3.4. Notwithstanding, Mr Van Dyk still accepted the recognition of PTF3 as a subsidiary of African Dawn in the 29 February 2008 financial statements, which resulted in an increase of the 29 February 2008 earnings and assets in an amount of R28 342 672.

5.3.5. In doing so, Mr Van Dyk made or caused to be published statements which he ought to have known were false, misleading or deceptive.

#### **5.4. The Goodwill Calculation of Allegro Holdings (Pty) Ltd**

- 5.4.1. At all relevant times herein, Mr Van Dyk was directly responsible for auditing the acquisition of Allegro Holdings (Pty) Ltd (Allegro) in respect of the 29 February 2008 financial statements of the African Dawn Group.
- 5.4.2. At all relevant times he was aware, alternatively should have been aware that the purchase price of Allegro amounted to the lesser of R94 912 884, or the pro rata amount by which the warranted combined after-tax profit for the three financial years of 2008, 2009 up to 28 February 2010 was less than R42 000 000.
- 5.4.3. The purchase price consisted of R57 000 000 as a cash component and R37 912 885 or less worth of shares in African Dawn, depending on the realisation of profit warranties over a three- year period (i.e. 2008, 2009 and 2010) ending 28 February 2010. The cash component (R57 000 000) was further split between an amount of R16 000 000 payable on 1 September 2007 and the balance of R41 000 000 was dependent upon and only paid when the CIA Group Investments (CIA Group Investments (Pty) Limited) shareholding and or assets were disposed of.
- 5.4.4. For purposes of the 29 February 2008 financial year-end, the maximum possible purchase consideration of R94 912 884 was utilised to calculate the goodwill arising from the acquisition of Allegro and reflected an amount of R71 100 000 goodwill in the financial statements for the year ended 29 February 2008. Furthermore, by recognising the full purchase price, Mr Van Dyk concluded that the profit warranties had been fully met in the 29 February 2008 financial year.
- 5.4.5. In fact, only the portion of the profit warranties relating to the 2008 year was met in the 29 February 2008 financial year. The remainder of the profit warranties was only fully met in the 2009 financial year.
- 5.4.6. As at 28 February 2009, CIA Group Investments (Pty) Limited was still reflected as a subsidiary of Allegro and thus not sold. An amount of R41 000 000 should never have formed part of the purchase price and therefore never recognised as part of goodwill in both 2008 and 2009 financial year ends.

- 5.4.7. By including the full share component part of the purchase price that was dependent on profit warranties yet to be reached, in the 2008 financial statements, and the R41 000 000 (for assets still to be sold) in the 2008 financial statements, Mr Van Dyk made or published statements which he ought to have known were false, misleading or deceptive.

#### **5.5. Duplicated Debtors at Nexus Personnel Finance (Pty) Ltd**

- 5.5.1. Mr Van Dyk was directly responsible for the audit of Nexus Personnel Finance (Pty) Ltd (Nexus) for the financial years ending 29 February 2008 and 28 February 2009, respectively.
- 5.5.2. The debtors were, however, duplicated increasing the assets, and resultantly the profit, by an amount of R19 382 000 in the 29 February 2008 and R17 932 000 in the 28 February 2009 financial year ends.
- 5.5.3. For purposes of the 28 February 2009 African Dawn Group audit, Mr Van Dyk gave positive assurances regarding the debtors of Nexus and wilfully failed to alert the group auditors as to any duplication in the Nexus financials.

In doing so, Mr Van Dyk made or published statements which he ought to have known were false, misleading or deceptive.

#### **5.6. Nexus Personnel Finance (Pty) Ltd Calculation of Interest on Debtors**

- 5.6.1. Mr Van Dyk audited the interest journals for the Nexus 28 February 2009 year-end. Six journal entries were passed to the interest received account in the financial records of Nexus amounting to R12 556 548. The journals had the effect of increasing the assets and net profit after tax by R12 556 548 in the financial statements of African Dawn for the 28 February 2009 year-end.
- 5.6.2. The journal entries caused the financial statements of African Dawn to contain information which was false, misleading or deceptive and which Mr Van Dyk knew or ought to have known was false, misleading or deceptive.

## **6. Mr Van Dyk's Submissions**

- 6.1. During the investigation, Mr van Dyk provided vague explanations for the misstatements and his explanations were without sufficient justification or supporting documents. Furthermore, and in his defence, he explained that he could find no issue with the financial statements that he audited, he explained that he performed the necessary audit procedures and was satisfied that the financial statements were a fair representation of African Dawn's financial performance for the periods in question.
- 6.2. The Authority rejected his explanation because there was blatant evidence that Mr Van Dyk overlooked critical information when forming his audit opinion on the financial results of African Dawn for the 2008 financial year end and the relevant subsidiaries for the 2009 financial year end.
- 6.3. The Authority afforded Mr Van Dyk an opportunity to make submissions on the findings of the investigation and intended administrative penalty. Upon his application, the Authority granted him an extension of the time period that was initially granted for purposes of making submissions. Notwithstanding, Mr Van Dyk elected not to furnish the Authority with his submissions including mitigating factors.

## **7. Administrative Penalty**

- 7.1. In respect of all the conduct discussed hereinabove, the Authority determines that Mr Van Dyk contravened the provisions of section 76 of the SSA in respect of the publication of African Dawn's financial results for the years ended 29 February 2008 and 28 February 2009 as published on 25 March 2008 and 14 May 2009 respectively.
- 7.2. After due consideration of the factors set out in section 167 of the FSR Act, the Authority hereby imposes on Mr Van Dyk an administrative penalty of R4 080 000 (four million and eighty thousand rand) inclusive of reasonable costs incurred by the Authority in connection with the contraventions) to be paid within 14 working days from the date of this order.

7.3. The Authority considered *inter alia* the factors set out below when arriving at the amount of the administrative:

- 7.3.1. the fact that Mr Van Dyk failed to fully cooperate with the investigation in that he failed to provide all the relevant information when called upon to do so;
- 7.3.2. the misrepresentations attributable to Mr Van Dyk's conduct in respect of African Dawn's 2008 and 2009 results amounted to approximately R133 million;
- 7.3.3. the misrepresentations were as a result of a serious dereliction of professional obligations on his part and a reliance on assurances made to him by African Dawn's Financial Director at the time, which assurances he did not question adequately;
- 7.3.4. his conduct of causing the publication of false, misleading and/or deceptive statements had the potential of causing financial prejudice to investors who relied on African Dawn's financial statements when making investment decisions; and
- 7.3.5. Mr Van Dyk elected not to make submissions which may have mitigated the proposed penalty.

**8. Further Take note that:**

- 8.1. If Mr Van Dyk fails to pay the administrative penalty within the period prescribed by this order, in terms of section 169 of the 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.
- 8.2. Failure to comply with this order and notice will result in the provisions of section 170 of the FSR Act being invoked, which reads 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."*

8.3. 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) 428 8012 or per electronic mail at [LEG.Tribunal@fsca.co.za](mailto:LEG.Tribunal@fsca.co.za).

Signed at Pretoria on the 31 day of **March 2020**.

  
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**Mr J A BOYD**  
**FOR THE AUTHORITY.**