

# 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 ought to have 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 Alliance Mining Corporation Limited (Alliance Mining), a public company listed on the JSE Limited.
5. The salient facts which led to the Authority's determination are set out below:

## **5.1. Misstatements in respect of the 2008 Financial Statements**

- 5.1.1. At all relevant times herein, Mr Van Dyk was a qualified Chartered Accountant and the auditor of the Alliance Mining Group, consisting of Alliance Mining (the listed entity) and several subsidiary companies. This was in respect of the financial year ended 29 February 2008. He was also auditor of the subsidiaries of the Alliance Mining Group for the financial year ended 28 February 2009. The annual financial statements for both years were published as per the JSE Limited Listings Requirements.
- 5.1.2. Alliance Mining signed an agreement on 26 May 2008 to acquire Stilfontein Mining (Pty) Ltd with effect from 1 June 2008. Mr Van Dyk audited the acquisition in respect of the 2008 financial statements but considering the acquisition date, it fell within and should only have been accounted for in the 2009 financial year. The misstatement inflated Alliance Mining's net profit by R3 212 218 for the 2008 financial year.
- 5.1.3. Actual figures were adjusted in respect of Alliance Mining and its subsidiaries to inflate and cause an overall increase of approximately R139 million in profit in the financial results for the 2008 financial year-end. The adjustments caused the financial statements to contain information which was false, misleading or deceptive and which Mr Van Dyk, as the auditor, ought to have known was false, misleading or deceptive.
- 5.1.4. The adjusted 2008 year-end Alliance Mining financial statements and results were released and published on SENS on 29 May 2008 at 13:29.

## **5.2. Misstatements in respect of the 2009 Financial Statements**

- 5.2.1. Actual figures were adjusted in respect of the subsidiaries of the Alliance Mining Group to inflate and cause an increase of approximately R200 million in profit in the financial results for the 2009 financial year-end. The adjustments caused the financial statements to contain information which was false, misleading or deceptive and which Mr Van Dyk, as the auditor of the subsidiaries, ought to have known was false, misleading or deceptive.

- 5.2.2. The adjusted 2009 year-end Alliance Mining Group financial statements and results were released and announced on SENS on 15 June 2009 at 17:34.

### **5.3. The Restatements**

- 5.3.1. On 16 November 2009, Alliance Mining announced on SENS that:
- 5.3.1.1. the financial results for the 2008 and 2009 financial years were overstated; and
  - 5.3.1.2. an adjustment to the 2008 financial statements may result in a break-even position as opposed to the R80.7 million after-tax profit previously reported; and
  - 5.3.1.3. an adjustment to the 2009 financial statements may result in a loss as opposed to the R149 million profit previously reported.
- 5.3.2. On 16 November 2009 Alliance withdrew the annual financial statements for the year ended 28 February 2009 which were published on 15 June 2009 and advised shareholders not to place any reliance on these financial statements.

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

- 6.1. During the investigation, Mr van Dyk provided vague explanations for the adjusted financial statements and his explanations were without enough justification or supporting documents. Furthermore, and in his defence, he explained that he relied on the Financial Director of Alliance Mining at the time and was satisfied that the financial statements were a fair representation of Alliance Mining's financial performance for the periods in question.
- 6.2. The Authority rejected his explanation because Mr Van Dyk was unable to provide details of his audit to substantiate his defence. Furthermore, the evidence suggests that Mr Van Dyk did not conduct a proper audit to support his audit opinions.
- 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 Securities Services Act in respect of the publication of Alliance Mining's financial results for the years ended 29 February 2008 and the relevant subsidiaries for the year ended 28 February 2009 as published on 29 May 2008 and 15 June 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 R1 777 500 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 penalty:
  - 7.3.1. Mr Van Dyk relied on assurances and statements made to him by the Financial Director of Alliance Mining at the time and neglected to question same including applying professional scepticism to information and documentation provided to him;
  - 7.3.2. his conduct that led to these contraventions involved a dereliction of his professional obligations which resulted in a material misrepresentation of Alliance Mining's financial performance;
  - 7.3.3. the misrepresentations had the potential to cause financial prejudice to investors who relied on Alliance Mining's published financial results when making their investment decisions;
  - 7.3.4. the seriousness of his conduct is reflected by the fact that the total misrepresentations attributable to him in respect of the financial performance of Alliance Mining for 2008 and 2009 amounts to approximately R139 million and R200 million respectively.

**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**.

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