

# **THE FINANCIAL SECTOR CONDUCT AUTHORITY**

**CASE NO: 11/2020**

In the matter between:

**FINANCIAL SECTOR CONDUCT AUTHORITY**

and

**TONGAAT HULETT LIMITED**

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

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### **1. Introduction**

- 1.1. 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 offices are situated at Riverwalk Office Park, Block B, 41 Matroosberg Road, Ashlea Gardens.
- 1.2. The functions of the Authority are *inter alia* to investigate market abuse contraventions as set out in sections 78, 80 and 81 of the Financial Markets Act, 19 of 2012 (the FMA). Relevant to this matter is section 81 of the FMA which prohibits the publication of false, misleading or deceptive statements in respect of a company listed on a regulated market.
- 1.3. Tongaat Hulett Limited (Tongaatt), with company registration number 1892/000610/06 is an agriculture and agri-processing business, mainly focusing on the production of refined sugarcane and maize based carbohydrate products through its sugar and starch operations as well as wet- milling operations. The

company has also extended its operations to land conversion and development operations.

- 1.4. Tongaat is an issuer of securities listed on the Johannesburg Stock Exchange (the JSE), a regulated exchange operated by the JSE Limited.

## **2. Administrative Penalty Order in terms of Section 167 of the FSR Act**

- 2.1. Pursuant to an agreement between the Authority and Tongaat, the Authority has determined that Tongaat has breached the provisions of section 81 of the FMA. The breach relates to the misrepresentation by Tongaat of its financial performance in prior years which resulted in the restatement of the 31 March 2017 and 31 March 2018 financial results. The prior period errors extend back over the past six years and the cumulative correction has been reflected in the 31 March 2017 financial statements.
- 2.2. When considering an appropriate penalty, the FSCA considered the factors set down in section 167 (2) (a) and (b) of the Financial Sector Regulation Act, 2019 (the FSR Act) and strived to balance conjunctively the need for deterrence, Tongaat's level of cooperation and the company's submissions in respect of an appropriate administrative penalty.
- 2.3. The FSCA noted that Tongaat's current management gave full cooperation during the investigation and enforcement process, accepted that the company contravened and undertook to put measures in place to ensure that the company mitigates the risk of similar contraventions occurring in the future.
- 2.4. Notwithstanding, it is the FSCA's view that Tongaat's conduct that resulted in the contraventions influenced the financial system and caused significant financial losses to investors. In assessing the extent and seriousness of the contraventions, the FSCA had regard to the extent of Tongaat's restated results for the financial years ended 31 March 2017 and 2018, which was a restatement of Tongaat's previously misrepresented financial performance.

- 2.5. The FSCA also had regard to Tongaat's income/ earnings during the period of the contraventions which was a relevant figure regarding its reported performance from an investor point of view.
- 2.6. In its considerations the Authority arrived at amount of **R118 340 000**. In arriving at the penalty amount, the Authority considered *inter alia* that the misstatements were material and when disclosed had a significant impact on the Tongaat share price and Tongaat's current financial position.
- 2.7. After due consideration of the factors set out in section 167 of the FSR Act, the Authority hereby imposes an administrative penalty of **R118 340 000 (inclusive of costs reasonably incurred by the Authority in investigating the contraventions)** on Tongaat.

### **3. Application for Remission**

- 3.1. Prior to the publication of the above order, Tongaat approached the Authority and applied for the remission of the above penalty as provided by section 173 of the FSR Act.
- 3.2. The request was for full remission of the administrative penalty and interest. In the case that the full penalty and interest could not be remitted, Tongaat requested in the alternative that the Authority consider a penalty in line with 3% of the R118 340 000 including a remission of interest. This equated to an amount of R3 552 000.
- 3.3. In support of its request for remission, Tongaat submitted to the Authority that it is under severe financial pressure and this position is mainly driven by the company's high levels of debt and the associated interest charges.
- 3.4. While Tongaat has refinanced its debt, the lenders require a further reduction in its debt by 31 March 2021. In addition, the cost of its borrowings has increased, and the higher interest payments are placing significant pressure on Tongaat's liquidity. In an already tight cash flow position, the imposed penalty threatens Tongaat's ability to continue as a going concern.

- 3.5. Tongaat has embarked on various initiatives to cut costs and the latest development was the closure of one of its mills which led to further job losses. The total number of job losses across the group is in excess of 10 000 people and any further pressure from a financial point of view will inevitably lead to further job losses. This at the back of an already excessive unemployment rate in the country.
- 3.6. Tongaat made every attempt through cost saving initiatives to continue to make sure that people remain employed. The Tongaat property division is also under pressure due to the slow property market and low investor confidence for property. Sugar sales are under immense pressure in South Africa due to the sugar tax and a shrinking local market demand as well as lower sales in Zimbabwe due to the low disposable income of Zimbabweans and the lower demand locally.
- 3.7. Tongaat is also in negotiations as published on the Stock Exchange News Service to sell its Starch division to repay debt and to ensure that Tongaat stabilise from a debt perspective. This is a disposal of a core asset due to the already stated financial pressure.
- 3.8. The Authority considered Tongaat's application for remission and has agreed to reduce a portion of the R118 340 000 penalty. The Authority orders in terms of section 173 of the FSR Act that Tongaat pay **R20 million (Inclusive of investigation costs)** as an administrative penalty.
- 3.9. The Authority agreed to the remission of the penalty more so to avoid further penalising innocent shareholders.
- 3.10. Tongaat has undertaken to continue cooperating with the Authority to ensure that those responsible for contravening the FMA are also brought to book.

#### **4. Further Take note that:**

- 4.1. If Tongaat 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.

4.2. 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."*

4.3. 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 [Applications@fstribunal@fsca.co.za](mailto:Applications@fstribunal@fsca.co.za).

Signed at Pretoria on the 21<sup>st</sup> day of August 2020.

Signed electronically

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Mr J A BOYD  
FOR THE AUTHORITY.