THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: A16/2020

JUSTIN FLETCHER APPLICANT

and

FINANCIAL SECTOR CONDUCT AUTHORITY RESPONDENT

For the applicant: Norton Rose Fulbright Inc (Mr Andrew Strachan)

For the respondent: Mr Barend Bredenkamp

Application for reconsideration of the quantum of an administrative penalty.

DECISION

[1] The applicant applies for the reconsideration of the quantum of an administrative penalty of R1.5 million imposed on him by the respondent, the Financial Sector Conduct Authority. The application is in terms of sec 230 of the Financial Sector Regulation Act 22 of 2017.

[2] The parties have waived their right to a formal hearing and the application is decided on the papers with reference to the argument filed on behalf of both parties.

[3] Section 167 of the FSR Act provides for the imposition by the FSCA of administrative penalties in the event of a contravention of a financial sector law. In this case, the contravention

took place before the commencement of the Act, but the section nevertheless applies as was explained in *MET Collective Investments (RF) (Pty) Ltd v Financial Sector Conduct Authority*[1].

[4] It is now common cause that the applicant during 2008 contravened section 75(1) read with (3) of the now repealed Securities Services Act 36 of 2004 (the SSA), which is a financial sector law. Section 75(1) read as follows:

> **(1) No person may -**
>
> **(a) Either for such person's own account or on behalf of another person, directly or indirectly use or knowingly participate in the use of any manipulative, improper, false or deceptive practice of trading in a security listed on a regulated market, which practice creates or might create –**
>
> > **(i) a false or deceptive appearance of the trading activity in connection with or**
> >
> > **(ii) an artificial price for that security;**
>
> **(b) place an order to buy or sell listed securities which, to his or her knowledge will, if executed, have the effect contemplated in paragraph (a) . . ..**

[5] The following acts were, inter alia, deemed by ss (3) to be manipulative, namely,

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[1] Case A23/2019 (section I) available at https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20MET%20Collective%20Investments%20(RF)%20(Pty)%20Ltd%20v%20FSCA%20and%20another.pdf.

(d) approving or entering on a regulated market an order at or near the close of the market, the primary purpose of which is to change or maintain the closing price of a security listed on that market;

(g) maintaining at a level that is artificial the price for dealing in securities listed on a regulated market;

(h) employing any device, scheme or artifice to defraud any other person as a result of a transaction effected through the facilities of a regulated market; or

(i) engaging in any act, practice or course of business in respect of dealings in securities listed on a regulated market which is deceptive or which is likely to have such effect.

[6] The "salient" facts on which the FSCA based its decision were the following:

ConvergeNet and Sallies were issuers of securities listed on the Johannesburg Stock Exchange, a licenced and regulated market in terms of the SSA and the Financial Markets Act, 19 of 2012.

Mr Fletcher was an experienced registered securities trader with lmara SP Reid (Pty) Limited (lmara). lmara was an authorized user of the JSE offering stockbroking services in respect of equities and equity derivatives.

During November and December 2008, Mr Fletcher received instructions from Mr Quinton George of Trinity Asset Management (Pty) Limited to execute certain transactions on the JSE central order book. In most of his instructions Mr George

requested Mr Fletcher to purchase ConvergeNet and Sallies shares at high prices near or at the close of the market.

It was clear from the context of the instructions that the intention behind the instructions was to create an artificial closing share price.

In the premises and in respect of these transactions, Mr Fletcher directly or indirectly used and/or knowingly participated in the use of prohibited trading practices to create a deceptive appearance of the trading activity and/or to create artificial closing prices for the ConvergeNet and Sallies shares in contravention of section 75 of the SSA.

The offending transactions in respect of the ConvergeNet shares took place on 23 days, and in respect of Sallies shares on 12 days during November and December 2008.

[7] This summary should be read with the synopsis in para 17.22 to 17.31 of the report of the investigation which, without annexures, runs to nearly 300 pages. It led to a change of heart, as the FSCA explained:

The Authority afforded Mr Fletcher an opportunity to make submissions on the findings of the investigation, over and above his explanations tendered during the investigation. In summary Mr Fletcher admits that Mr George would generally instruct him to conclude transactions in the closing auction. He did not question this at the time as he thought Mr George was attempting to obtain a fair price for the shares. He also understood at the time of the instructions that Mr George was concerned that the relevant share prices in the market did not reflect their true value due to a lack of liquidity. Mr Fletcher believed at the time that Mr George's trading strategy was aimed

at guarding against those people Mr George believed were manipulating the share prices.

Mr Fletcher now argues that with the benefit of hindsight he accepts that the effect of Mr George's conduct amounted to the use of a prohibited trading practice in that Mr George's instructions may have been intended to maintain or increase the closing price of the relevant securities and in doing so Mr George created an artificial price for the securities.

Notwithstanding, Mr Fletcher disputes that he intended to contravene section 75 of the SSA. He suggests that his actions may have been negligent rather than intentional.

[8] To form an idea of the trading pattern one need only look at the timing of the trading activities on Christmas and New Year's Eve, 2008:

1	2	3	4	5	6	7	8	9
		BID ENTERED			MATCHED TRADES			
Count	Date	Time	Volume	Price {c)	Time	Volume	Price (c)	Closing share price Cc)
						100,000	109	
						5,000	114	
						355,000		114
14	12-Dec-08	16:59:15	600,000	MKT	17:00:28	**675,000**	117	117
		16:59:15	75,000	MKT				
15	15-Dec-08	16:59:18	5,000	MKT	17:00:16	5,000	117	117
16	17-Dec-08	16:59:36	225,000	MKT	17:00:20	**225,000**	117	117
17	18-Dec-08	16:59:40	500,000	MKT	17:00:06	**500,000**	117	117
18	22-Dec-08	16:59:37	265,000	MKT	17:00:18	**265,000**	116	116
19	23-Dec-08	16:59:47	160,000	MKT	17:00:15	**160,000**	116	116
20	24-Dec-08	11:59:47	325,000	MKT	12:00:05	**325,000**	114	114

21	29-Dec-08	12:35:05	110,000	109	12:35:05	110000	109	109
22	30-Dec-08	16:59:48	100,000	MKT	17:00:04	**100,000**	109	109
23	31-Dec-08	11:47:52	150,000	108	11:47:52	106,000	107	
					11:47:52	35,000	108	
					11:48:21	9,000	108	
						150,000		107

[9] As mentioned, the application for reconsideration is limited to the amount of the administrative penalty. The applicant's case is that the penalty should have been R500 000 and not R1.5 million. The applicant has already paid the "admitted" amount and payment of the balance was suspended pending the finalisation of this application.

[10] The question then is whether this Tribunal may interfere with the discretion exercised by the FSCA in determining the level of the penalty. The rule adopted by this Tribunal is it is not entitled to interfere with the exercise by the FSCA of its discretion unless it failed to bring an unbiased judgment to bear on the issue; did not act for substantial reasons; exercised its discretion capriciously; or exercised its discretion upon a wrong principle.

[11] The applicant did not address these requirements head-on in the heads of argument which is a repeat of the submissions made to the FSCA in response of the inspection report and which the FSCA took cognisance of in its final determination.

[12] This case has much in common with the matter of *Berman v The Financial Services Board*[2] heard by the Board of Appeal (in a sense the predecessor of the Tribunal). In that matter a penalty

[2] https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/2009MBerman.pdf.

of R1 million was imposed for a similar transgression save that it was a single instance and not many over two months. If one considers the time lapse since that decision, the penalty of R1.5 million in the present instance is approximately the same.

[13] Many of the arguments raised by the applicant were disposed of in the *Berman* decision and it is unnecessary to traverse the same area again. Reference is here especially made to the issues of deterrence, the scope of loss and the personal financial circumstances of the applicant.

[14] In the main, the applicant takes issue with the finding in the final determination that he "foresaw the possibility that by executing Mr George's instructions his actions would result in creating artificial closing prices for the relevant shares. Despite appreciating this, he reconciled himself with this possibility and executed such instructions in contravention of section 75 of the SSA."

[15] In this regard, however, the FSCA essentially adopted the applicant's submission which was and is the following:

> There is accordingly (and correctly, we submit) no suggestion in the FSCA order of Fletcher having intentionally and knowingly participated in such trading practices. He did not knowingly hatch a scheme with George but acted on the instructions of George, who was the main instigator and architect of the unlawful conduct. <u>The question is rather one of Fletcher having foreseen the possibility that his conduct may constitute such conduct and having proceeded notwithstanding such foresight.</u> The matter as a whole and the appropriate administrative penalty must therefore be approached and considered on this basis. [Underlining added.]

[16] It is doubtful that this rather lenient interpretation of the facts could be justified but since the FSCA determined the penalty on the basis submitted, it follows that it cannot be said that the FSCA's decision is subject to "review" in the light of the test mentioned.

[17] The submission that there is no evidence that any person or entities suffered a loss because of the contravention nor is there any evidence that the contravention undermined or threatened the stability of the financial system, notwithstanding the significant time which has elapsed since the commission of the contravention has no merit. The market was manipulated for two months to protect George, his company and clients and must therefore have had material consequences on the market's stability. The applicant and his employer benefited financially from the trades. Any manipulation, successful or unsuccessful, is detrimental to the system, even if it cannot be quantified.

[18] As to deterrence, which, had been dealt with repeatedly by this Tribunal, there is need to consider it as a material issue in a case such as this where the applicant was and still (in a sense) is in denial. The penalty should also serve as notice to all that manipulation will not be countenanced.

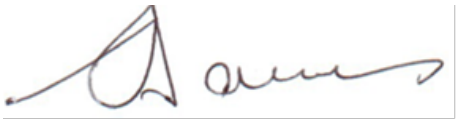
[19] There is one unfortunate aspect of the matter and that relates to the delay. The events took place during the close of 2008. As far as can gathered from the record, the investigation began in or about September 2015. Why, when, and how the irregular transactions came to the notice of the regulator is not apparent. The investigation was completed during February 2020 and the final decision taken, after further submissions by the applicant, on 27 May 2020. The investigation had a material effect on the applicant since 2017, when he left Imara, his employer.

[20] The delay was not such that it could affect the penalty. It was a difficult enquiry and the applicant during the period of the investigation persisted in his defence of innocence. It was only

after February 2020 that the applicant, reluctantly, accepted qualified responsibility for his actions. This disposes also of the submission that the applicant co-operated with the investigators – yes, he did, up to a point. A Mr van Dyk who was also involved, accepted responsibility and his matter was disposed of already during 2016.

The application is dismissed.

Signed on behalf of the Tribunal on 19 April 2021.



LTC Harms (deputy chair)