THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: A3/2023

MARKUS JOHANNES JOOSTE APPLICANT

AND

FINANCIAL SECTOR CONDUCT AUTHORITY RESPONDENT

Tribunal panel: LTC Harms (chair), Adv Soraya Hassim SC and Attorney Zama Nkubungu-Shangisa

For Mr Jooste: Advv Francois van Zyl SC and Christopher Quinn instructed by De Klerk & Van Gend Attorneys (Ref: C Albertyn/evdw)

For respondent FSCA: Advv Gilbert Marcus SC and Michael Mbikiwa instructed by CM Inc (Ref: Sello Mahlo)

Hearing: 5 September 2023

Date of decision: 28 September 2023

Summary: Insider trading i.t.o. Financial Markets Act 19 0f 2012 – penalties – test for reconsideration of discretionary decisions

DECISION

1 The applicant applies for the reconsideration of a financial penalty of R20 million (plus interest) imposed on him by the respondent Authority in terms of sec 167 of the Financial

Sector Regulation Act 9 of 2017 ("the FSR Act") read with sec 82 of the Financial Markets Act 19 of 2012 ("the FM Act").

2 The reconsideration application is under sec 230(1)(a) of the FSR Act read with sec 105 of the FM Act.

3 The penalty was imposed in respect of three contraventions of sec 78(5) of the FM Act. Those were dealt with in the previous decision in this case of the Tribunal in *Jooste v Financial Sector Conduct Authority; Ocsan Investment Enterprises (Pty) Ltd v Financial Sector Conduct Authority* (A64/2020) [2021] ZAFST 3 (13 December 2021), and this decision is a sequel to that decision and should be read in the light thereof. The Tribunal had remitted to the Authority the issue of the penalty to be imposed on the applicant.

4 Section 78(5) states:

> *An insider who knows that he or she has inside information and who encourages or causes another person to deal . . . in the securities listed on a regulated market . . ., to which the inside information relates . . . , commits an offence.*

5 The imposition of a financial penalty involves three matters. There is firstly the procedural aspect: the administrative action must comply with the provisions of PAJA (sec 91 of the FSC Act), which does not arise in this decision. The second is the jurisdiction aspect, namely a finding of a contravention of a financial sector law (sec 167(1)), something that was finalised in the mentioned decision and is not the subject of reconsideration by the Tribunal.

6 The third aspect, the subject of this decision, is the imposition of an "appropriate" penalty (sec 167(1)) in the context of sec 167(2) of the FSR Act, which will be quoted later.

7 While the FSR Act does not prescribe any minimum or maximum, sec 82(2) of the FM Act (redacted) states the consequences of a contravention of sec 78(5):

Any person who contravenes section 78 (4) or sec 78(5) of this Act is liable to pay an administrative sanction not exceeding–

a) the equivalent of the profit that such other person made or would have made if he or she had sold the securities at any stage, or the loss avoided, through such dealing, if the recipient of the information, or such other person, as the case may be, dealt directly or indirectly in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it;

b) an amount of up to R1 million, to be adjusted by the Authority annually to reflect the Consumer Price Index, as published by Statistics South Africa [which equals R1 544 936], plus three times the amount referred to in paragraph (a);

c) interest; . . ..

8 The maximum administrative penalty is, accordingly, equal to four times the loss avoided by the recipient of the insider information plus R1 544 936.00 (the R1 million adjusted).

9 There were three recipients but only two acted on the information and avoided losses. The Authority calculated the losses avoided by them (calculated at the closing prices of the shares on the JSE of R50.25 on 4 December 2017 and R17.61 on 6 December 2017) to have been R5 701 845, which means that the maximum penalty based on losses avoided amounted to R 22 807 380; and since there were three contraventions, the penalty amount of R 4 634 808 (3 times R1 544 936) could be added, amounting to R 27 442 188 and not R24 352 318 as the Authority mistakenly calculated.

10 Whether the loss avoided was less using the average prices of the shares on the relevant days (as argued by Mr van Zyl, namely R52.04 on 4 December and R17.88 on 6 December) we shall deal with later but, in any event, his calculations lead to a threshold of R 4 634 808

(3 times R1 544 936) plus R18 866 616, namely R23 501 424 which is percentage-wise not much less than the Authority's calculation of R24 352 318.00.

11 These calculations relate to the legality of any penalty imposed or to be imposed always bearing in mind that because a penalty is permissible it does not mean that it is appropriate because, as we said in the first decision, the prescribed maximum penalties do not set a benchmark.

RECONSIDERATION OF ADMINISTRATIVE PENALTY

12 This Tribunal is an administrative "appellate" organ empowered to "reconsider" (sec 230(1)(a)) "decisions" (defined in sec 218) of various statutory administrative bodies ("decision-makers" defined in sec 218) under many financial laws (Schedule 1). Its powers on reconsideration are circumscribed, and usually (if it disagrees with the decision-maker) it may only set the decision aside and remit it for reconsideration by the decision-maker (sec 234(1)). This limitation applies also to discretionary decisions. Its own decisions are subject to review under the Promotion of Administrative Law Act ("PAJA". See sec 235).

13 The Tribunal[1] was since its inception called upon to define its jurisdiction in the sense of how it is to approach the decision of the decision-maker. The Tribunal held that a reconsideration involved a full appeal and said:

> *"Our position is, as it was with the then Appeal Board of the Financial Services Board, when the judgment in Nichol and Another v Registrar of Pension Funds and Others [2006] 1 All SA 589 (SCA), 2008 (1) SA 383 (SCA) was delivered. The Court pointed out that the*

[1] For background see: Decision - Sharemax and others - Siegrist and Bekker.pdf (fsca.co.za)

Appeal Board was a specialist and independent tribunal as contemplated in sec 34 of the Constitution:

> "It has very wide powers on appeal, including the power to confirm, set aside or vary the decision of the Registrar against which the appeal is brought; to refer the matter back for consideration or reconsideration by the Registrar in accordance with such directions as the Board may lay down; or to order that its own decisions be given effect to. In addition, it is empowered under section 26(2A) to grant interim relief by suspending the operation or execution of the decision appealed against and, under section 26(14), it can make an appropriate order as to costs. The Appeal Board therefore conducts an appeal in the fullest sense – it is not restricted at all by the Registrar's decision and has the power to conduct a complete rehearing, reconsideration and fresh determination of the entire matter that was before the Registrar, with or without new evidence or information."

In short, this Tribunal is not much different, and it exercises an appeal jurisdiction of the first category referred to in Tikly v Johannes NO 1963 (2) SA 588 (T) 590."

14 The differences between what the Appeal Board could have done and what the Tribunal may do lie in the underlined words: the Tribunal does not have those powers that the Appeal Board had. (The references to "the Registrar" in the judgment should now be read as "the Authority".)

15 Dealing with the exercise of a decision-maker of its discretion, the Tribunal adopted a somewhat contrary position by applying the ordinary appeal rule namely that a higher body is not entitled to interfere with the exercise by a lower body 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.[2] The Constitutional Court dealt with the approach to the exercise of a discretion by a higher court in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) pars 82 to 91.

16 Mr van Zyl's main argument is that the Tribunal misconstrued its functions in the latter aspect since, also on discretionary issues, it should disregard the decision of the decision-maker and make its own decision on "reconsideration" of the "merits" of the case.

17 Sentencing (and the imposition of an administrative penalty which is according to Mr van Zyl is not much different) always requires the exercise of a discretion in the true sense where on reconsideration in the general sense the principle set out above applies, and a higher court (which the Tribunal is not) may not interfere unless the test is complied with.

18 This approach, according to the argument, cannot apply to an administrative reconsideration because the quantum of a penalty also goes to the merit of the decision, which should be "reconsidered".

19 The argument requires a revisit to the approach of the Tribunal and an analysis of what *Tikly* had held.

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[2] E.g. M Mwale and another v The Prudential Authority and another.pdf (fsca.co.za) albeit on other grounds. The review was dismissed: Mwale v Financial Services Tribunal and Another (92967/2019) [2021] ZAGPPHC 297 . See further *Fletcher v Financial Sector Conduct Authority* (A16/2020) [2021] ZAFST 130 (19 April 2021); *Renault Otto Kay v Financial Sector Conduct Authority* (A19/2022) [2023] ZAFST 13 (6 February 2023); *Ramiah and Others v Financial Sector Conduct Authority* (A9/2023); 1241/2022.1; 1241.2022.2)) [2023] ZAFST 66 (22 May 2023); *Moorcroft v Financial Sector Conduct Authority* (A7/2022) [2022] ZAFST 133 (22 November 2022); *Viva Life Insurance Limited v The Prudential Authority* (PA2/2021) [2021] ZAFST 37 (13 October 2021) all quoted by Mr Marcus.

20 The issue in *Tikly* related to the powers of a revision court of a valuation by a valuator of an affected property. This required an interpretation of the word "appeal" in the applicable statute and regulations. The court said in the oft quoted section of the judgment the following:

> *The word "appeal" can have different connotations. In so far as is relevant to these proceedings it may mean:*
>
> *(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information;*
>
> *(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong;*
>
> *(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly.* [Citations omitted.]

21 In *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* (937/18) [2019] ZASCA 190; 2020 (2) SA 390 (SCA); [2020] 2 All SA 31 (SCA) (13 December 2019) Wallis JA mentioned that the taxonomy in *Tikly* provided three "broad" possibilities and that statutory appeals may have a widely varying nature and involve different types of hearing. Context is again everything.

22 The Tribunal consistently held (in relation to item (iii)) that it does not act as a review court because it is not a review court as defined in PAJA (and, one may add, it does not have the powers of such a court):

> *"Reviews are concerned with process; appeals with result. But that does not necessarily mean that review grounds may not overlap with appeal grounds. This is especially the position where a flawed process impacts on the result, for example, where the Registrar omitted to have regard to a jurisdictional fact."*

23 The Tribunal also does not exercise "ordinary" appeal jurisdiction because the FSR Act does not limit the Tribunal "to the evidence or information on which the decision under appeal was given" (sec 232(4) to (6)).

24 It is accordingly necessary to consider the extent to which a reconsideration is an appeal in the first sense. This requires a consideration of the meaning of the term "reconsideration" in the context of the FSR Act.

25 The procedure to be followed by the Tribunal is scantily set out in sec 232 and is primarily determined by the rules of the Tribunal, as the Act permits and prescribes.

26 A typical reconsideration application does not differ in any material respect from an appeal against a decision given on application in the court system. The application for reconsideration (with defined grounds) and the responses of the decision-maker form part of the record and record of the proceedings before the decision-maker is provided. Exceptionally applications for leave to file further evidence are made and hardly ever is there an attempt to lead or any need for oral evidence. Hearings follow the standard appeal format with written argument followed by a public hearing.

27 The legal provisions in *Tikly* were completely different, especially regarding the role of the valuators *vis-à-vis* that of the Authority (see earlier) and that of the revision court and *vis-à-vis* that of the Tribunal. We refer to some aspects of the judgment.

28 The Court noted that

> *Although the valuators are obliged to receive and consider written objections, their duties and functions are in essence those of a valuation and not of a judicial or semi-judicial proceeding . . .. In particular, sec. 19 does not oblige them to hear evidence, to hear any party orally, to give any reasons for their determination or to keep any record of their proceedings.*

This does not apply to the Authority.

29 The Court also mentioned that

> *As there is no record of the valuators' proceedings, the revision court must itself receive all relevant information or evidence tendered in respect of the basic value. . . .That shows that the appeal is a complete re-hearing in the sense described in (i) above.*

This also does not apply to the Authority and the Tribunal.

30 And finally:

> *As already stated, the valuators do not record their proceedings or the reasons for their valuation. Consequently, the only information that would ordinarily be before the revision court would be the amount of the valuation. If either the appellant or any other party, or the revision court, itself, wished to rely upon that valuation, he or it would generally have to call the valuators, or one of them, to testify in support of that valuation. . . . The revision court would then be in a position to decide what weight to give to that valuation.*

Without the valuators or one of them testifying in support of their valuation the revision court would ordinarily not be able to give any weight to that valuation.

31 That raises the question how does one reconsider an administrative penalty that involved the exercise of a discretion? One cannot, we believe, do it otherwise than to consider whether the penalty was imposed correctly (i.e., according to the legal prescripts) and then consider whether the penalty was appropriate. There is no correct answer to the question and that is why courts have developed (albeit in other contexts) the quoted yardsticks.

32 One can test the conclusion with reference to non-penalty cases involving the exercise of a discretion of a decision-maker. There are many under any number of financial sector laws. There the ultimate decision remains that of the decision-maker and is not that of the Tribunal. If the Tribunal sets such a decision aside, it must remit it to the decision-maker who is not bound by the views of the Tribunal and may come to the same conclusion before.

33 In the context of penalties, in the present case for instance, if the Tribunal were to conclude on a merit review that R19 million or R21 million were more appropriate, and decide to remit the matter, what is the Authority to do? One cannot rationalise any of these assessments. What one can rationalise is an interference based on a finding that the decision-maker did not act for substantial reasons; exercised its discretion capriciously; or exercised its discretion upon a wrong principle.

34 The Tribunal must be able to inform the decision-maker, the applicant, the review court and the public where the decision-maker had erred. Put somewhat differently, the Tribunal is not presented with blank page and what it does is it "reconsiders" the appropriateness of the imposed penalty.

RECONSIDERATION OF THE MERITS OF THE PENALTY: THE MAXIMUM

35 The reconsideration application contains many grounds and is argumentative and does not in any way state the grounds succinctly as the Tribunal rules require. Mr van Zyl, though, in the written and oral argument contained the scope of the matter.

36 Initially the Authority imposed a penalty of R161 million, and that says Mr van Zyl, was shockingly inappropriate. But that is not the issue before us. That penalty was based on a finding of additional contraventions and on finding of facts with which the Tribunal did not agree.

37 The Tribunal also said there that in reconsidering any penalty, the FSCA would be well advised to consider that the prescribed maximum penalties do not set a benchmark. The applicant's argument is that the Authority did not heed that advice because the determination of the maximum penalty was unduly prominent in its analysis and that the maximum was incorrectly calculated. We reject the first submission because what the Authority did was not to use the maximum as benchmark but to determine the maximum penalty that was permissible, something it had to do. It would hardly have made any sense if the Authority first determined an appropriate penalty and then sought to determine whether it could have imposed that penalty. It would be circuitous.

38 The argument on the incorrect calculation of the penalty was based on the method used of calculating the loss avoided by two of the recipients. The Authority used the closing prices of the shares on the JSE while the applicant submitted that the average prices on the two days should have been used. As indicated earlier, the difference is inconsequential for purposes of determining the maximum and only if the maximum and the penalty had to bear a relationship (which it should not have) the argument does not take the matter anywhere.

RECONSIDERATION OF THE PENALTY: SEC 167(2)

39 The sub-section states the following:

In determining an appropriate administrative penalty for particular conduct–

(a) the matters that the responsible authority must have regard to include the following:

(i) The need to deter such conduct;

(ii) the degree to which the person has co-operated with a financial sector regulator in relation to the contravention; and

(iii) any submissions by, or on behalf of, the person that is relevant to the matter, including mitigating factors referred to in those submissions; and

(b) without limiting paragraph (a), the matters that the responsible authority may have regard to include the following:

(i) The nature, duration, seriousness and extent of the contravention;

(ii) any loss or damage suffered by any person as a result of the conduct;

(iii) the extent of any financial or commercial benefit to the person, or a juristic person related to the person, arising from the conduct;

(iv) whether the person has previously contravened a financial sector law;

(v) the effect of the conduct on the financial system and financial stability;

(vi) the effect of the proposed penalty on financial stability;

(vii) the extent to which the conduct was deliberate or reckless.

40 This is a rather perplexing mixed-bag provision because it does not take account of how penalties, which require the exercise of a value judgment, are logically determined. It is not a mechanical exercise. Checking boxes does not give an answer. Why it should differ from the list in sec 45C of the Financial Intelligence Centre Act 38 of 2001 is anyone's guess.[3] One would, for instance, have expected that the nature and seriousness of the contravention (which falls under (b)) would have been prominent under (a).

41 We intend to comply with the statutory injunction without following a tick box approach and begin with the nature and seriousness of the contravention. There can be little doubt that the contravention of sec 78(5) is as serious as it gets. Mr Jooste was not only the CEO of Steinhoff, a multi-national company, but he was also Steinhoff. He knew Steinhoff and the rights and wrongs within the company. If he, uninvited, advises three friends to dispose of their Steinhoff shares and to destroy his advice SMS's, it shows, as Mr Marcus submitted, that his actions were deliberate, premeditated and calculated.

42 We accept the submission by Mr Marcus that one must

> *consider the likely effect on investor confidence if the CEO of a listed company can intentionally send a warning SMS to a few friends and associates, encourage them to sell their shares, tell them to delete the message, and yet escape serious consequences. Conduct of this kind, by its nature, undermines public confidence in financial markets and leads the general public to believe that the system is rigged and unfair. A penalty that is too lenient would result in investors concluding that South African markets are inadequately regulated and, therefore, vulnerable to abuse and manipulation.*

[3] Appeals against those penalties are also to this Tribunal.

43 Mr van Zyl submitted that a contravention of sec 78(4) is more serious than of sec 78(5) and that somehow (despite the statutory "sentencing" regime) a contravention of the latter should be treated more leniently. What the argument implied was that a penalty close to the maximum should be reserved for sec 78(4) and a discount should apply to a contravention under sec 78(5). We disagree. The Legislature sought to set the maximum of both contraventions on the same basis but since the maximum is not a benchmark the argument is self-defeating.

44 We now consider the question of deterrence. In the first decision we remarked as follows:

> *Deterrence is an elastic concept with grey borders, and it is easy to justify a sanction which is in effect retributory under the heading of deterrence. The fact that the Legislature highlighted deterrence in this manner emphasises that the provision is not penal in the criminal sense.*
>
> *Furthermore, it is not overriding. What is overriding is the appropriateness of the penalty, which means that it must be balanced, proportionate and fair.*

45 The argument was that since it is unlikely that Mr Jooste will in future be able to commit the same contravention, deterrence ought not to be of any real moment. That misses the point. Deterrence has two aspects, namely deterring the "offender" and deterring others from committing the same transgression. We believe that the message to the market should be that a transgression of sec 78(5) is serious and has serious consequences.

46 Turning to *the degree to which the person has co-operated with a financial sector regulator in relation to the contravention,* we have in effect held in the first decision that Mr Jooste's evidence as presented to the Authority "in relation to the contravention" denying the

messages was dishonest. He may have cooperated with the Authority in some other respects but that is not of any moment for present purposes.

47 The third peremptory consideration overlaps with some of the discretionary considerations. We quote Mr van Zyl's submissions:

> *The nature of the Mr Jooste contraventions; that they were once-off, so to speak; that Mr Jooste did not personally benefit from his conduct; that it had no impact on the market; and the absence of similar conduct are considerations far more important than the FSCA credits. Plainly, Mr Jooste is not a predatory inside trader habitually taking advantage of inside information in order to make a profit.*

He added:

> *Regarding the determination of an appropriate sanction, it remains only to draw attention to Mr Jooste's personal circumstances. Unlike Harmony and Steinhoff . . ., Mr Jooste is a natural person. While he was well paid when Steinhoff's CEO, those days are long gone. Mr Jooste's personal wealth was heavily tied-up in the fortunes of Steinhoff. It does not appear to be in dispute that Mr Jooste's career in business is at end, having been replaced by a raft of well-publicised legal problems.*

48 There is no reference to any misdirection by the Authority and all goes to weight. Some of the submissions are cynical in the greater context of things such as that he is married and has one child living at home at a given address in Voëlklip, Hermanus. Despite having been invited to disclose his financial position, Mr Jooste only referred to his last after-tax income from Steinhoff, which exceeded R100 million for the tax year. For the rest he kept mum. Whether his legal problems and the destruction of his business career were self-inflicted or

due to external factors over which he had not control are matters we are not called upon to speculate since Mr Jooste did not enlighten us.

49 We find the following (based on the submissions of Mr Marcus) to be compelling: While Mr Jooste did not benefit financially from sending the warning SMSs to his friends, two of them were benefitted. This, by implication, caused loss and damage to others. Indeed, those persons who were ignorant as to the problems at Steinhoff, and who therefore purchased the shares sold by the two recipients suffered substantial losses when the share price dropped dramatically. In other words, what they gained, the purchasers of their shares lost.

RECONSIDERATION OF THE PENALTY: APPROPRIATENESS

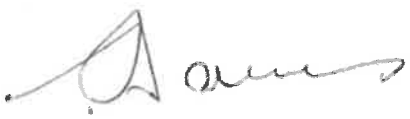
50 We have dealt to the extent necessary with the statutory considerations and we have thus reached the stage where we must consider what an appropriate penalty would be.

51 It is not a mathematical exercise but a holistic value judgment. Mr van Zyl submitted that we should not remit the matter to the Authority because we are in as good a position as the Authority to determine an appropriate penalty. That possibility could only arise if we believe that the imposed penalty was inappropriate, but we have concluded that it is not– in fact we consider it to be appropriate because it falls within the range of penalties that we would in any event have imposed.

ORDER

52 The application for reconsideration is dismissed.

Signed on behalf of the Tribunal panel on 28 September 2023.



LTC Harms (chair)