THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: JSE4/2022

MARKUS JOHANNES JOOSTE **APPLICANT**

AND

JOHANNESBURG STOCK EXCHANGE LTD **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: Advv Ian Green SC and Matthew Kruger instructed by Webber Wentzel Attorneys (Ref: M Straeuli/N Bahm)

Hearing: 18 September 2023

Date of decision:

Summary: Financial Markets Act 19 of 2012 – JSE Listing Requirements – penalties imposed by the JSE for contraventions of Listing Requirements – evidence of contraventions – penalties and disqualification

DECISION

1 The Applicant, Mr Markus Jooste, was at all relevant times the CEO of Steinhoff International Holdings NV ("Steinhoff"), a company with a primary listing in Amsterdam and a joint listing on the Johannesburg Stock Exchange. It is common knowledge that the shares of the company crashed spectacularly during December 2017, and this matter involves, in a sense, the responsibility of the Applicant in the demise of the company.

2 The Respondent, the Johannesburg Stock Exchange Ltd (the "JSE"), is a licensed stock exchange in terms of the Financial Markets Act 19 of 2012 ("the FMAct"). It is required, in terms of section 10 of the FMAct, to supervise and enforce compliance with its Listing Requirements.

3 According to sec 11(1) an exchange must, to the extent applicable to the exchange in question, make Listing Requirements which prescribe, inter alia, –

> *(c) the standards of conduct that issuers of listed securities and their directors, officers and agents must meet;*
>
> *(d) the standards of disclosure and corporate governance that issuers of listed securities must meet;*
>
> *(f) the steps that must be taken by the exchange, or a person to whom the exchange has delegated its disciplinary functions, for the investigation and discipline of an issuer, or director, officer or employee of an issuer, that contravenes or fails to comply with the listing requirements;*

4 The Listing Requirements relevant for present purposes are the following:

- Paragraph 8.62(b) requires financial statements to "be prepared in accordance with International Financial Reporting Standards ('IFRS') as issued by the Accounting Practices Committee and Financial Pronouncements as issued by the Financial Reporting Standards Council";

- General Principle (iii) requires "that full, equal and timeous public disclosure is made to all holders of securities and the general public at large regarding the activities of an issuer that are price sensitive"; and

- General Principle (v) requires that "all parties involved in the dissemination of information into the market-place, whether directly to holders of relevant securities or to the public, observe the highest standards of care in doing so".

5 Section 11(1)(g) of the FMAct allows the JSE to impose penalties for failure to comply with its Listing Requirements including a maximum fine of R7.5 million and disqualification from holding the office of director or officer of a listed company for a given period.

6 The JSE is a "market infrastructure" and a "decision-maker" as defined in the Financial Sector Regulation Act, 9 of 2017 ("the FSRAct"). Its decisions fall under the definition of "decision" in section 218(c) of the FSRAct. They are therefore subject to reconsideration by this Tribunal under section 230(1) of the FSRAct.

7 The procedure of the Tribunal is set out in sec 232 and its regulations, and it is permitted to inform itself on any relevant matter in any appropriate way.[1] In

[1] The Applicant was informed that the Tribunal will have regard to the facts in the related matters of Jooste v FSCA Case A64/2020 and A3/2023.

terms of section 234(1)(b)(ii) – namely a decision as defined in sec 218(c) – this Tribunal may set a decision of the JSE aside and remit the matter to the JSE for reconsideration or it may substitute the decision with a decision of its own.

8 The JSE found that the Applicant had contravened its mentioned Listing Requirements in two main respects, imposed the maximum penalty on each of the two "counts", and disqualified the Applicant for 20 years from being a director of a listed company.

9 The Applicant seeks to have those decisions of the JSE set aside and that the matter be remitted to the JSE for further consideration.

APPROACH ON RECONSIDERATION

10 We spent much time in the previous *Jooste* matters dealing with how the Tribunal deals with reconsideration applications and there is no need to restate it all. It should suffice to mention that since this is not a review, it is for us to decide whether the evidence before us is sufficiently cogent to satisfy us that a proper case was made out by the JSE, and that the onus rests on the JSE to persuade us on a balance of probability that its decision was correct. Our exercise is a desktop exercise before and after argument as was that of the JSE and we are in many respects as able as the JSE to assess the issues as detailed in the papers. See, e.g., *Pather and Another v Financial Services Board and Others* (866/2016) [2017] ZASCA 125; [2017] 4 All SA 666 (SCA); 2018 (1) SA 161 (SCA).

THE STRUCTURE OF STEINHOFF

11 Mr van Zyl, in his helpful argument, summarized the general structure of the holding company: Steinhoff was comprised of a vast group of companies. The group operated across 32 countries with different tax and accounting regimes. Many of the jurisdictions in which Steinhoff operated do not do business in English. Steinhoff was divided into operational silos. There was heavy reliance on local CFOs, accountants, and auditors (both external and internal), and audit and risk committees at various levels across the group. (The submission that the Applicant "was not personally responsible for the accounting of any company within the Steinhoff group" will be dealt with in due course.)

12 It is rather difficult to keep track with the company structure, but it ought to suffice for present purposes to state that the African silo contained a subsidiary of Steinhoff, named Steinhoff Investment Holdings Ltd (a local company). One of its subsidiaries was Steinhoff at Work (Pty) Ltd (hereafter @Work) that acted as the treasury of the African silo companies. One trading company in the silo was the JD Group of companies.

13 External to all this was the TG Group of companies (under many names). It is said that the TG Group provided a buying group structure, and it collected volume discounts or rebates on behalf of Steinhoff and others from manufacturing companies, which it then paid to its "members" (such as Steinhoff companies) based on their volume contribution. In other words, on the contribution of the JD Group, the TG Group would pay the African treasury, @Work, on the JD Group's

behalf from rebates collected from external manufacturers. Thus, the source of funds was not within the Steinhoff group but came from this external group.

THE COLLAPSE OF STEINHOFF

14 We refer now in detail to the decision of this Tribunal in the related matter (A64/2020) and will quote from that decision in redacted form for the sake of convenience matters that are in our judgment uncontentious.

15 On 30 November 2017, the Applicant knew that there would likely be delays in announcing Steinhoff's audited results for the year ended 30 September 2017, and the announcement of a delay in the reporting of audited Steinhoff results, which were due on 5 December 2017 would have an adverse effect on the Steinhoff share price.

16 The delay in reporting audited results was probable, if not inevitable, because the group auditors (Deloitte – this is a generic name) were intent on unravelling transactions of past years, for which audit evidence either did not exist or could not be produced to meet the anticipated date for publication of Steinhoff's annual financial statements.

17 The decision to delay the release of the audited financials was conveyed by the auditors on 30 November. This is apparent from the minutes of the meeting at 18h00 between the chairman of the supervisory board and the auditors. However, the fact that on the morning of 30 November 2017 Applicant understood that Deloitte was going to endeavour to conclude its audit on time

does not alter the fact that Applicant knew that the audit information had not been provided, and could not be provided, because it did not exist.

18 He thus knew that Deloitte would seek to investigate, and that there was little if any prospect of the financial statements being published on time. Applicant was pivotal to providing the audit evidence. Without him providing the required audit evidence, the auditors would not have been able to finalise the audit. He knew that without this audit evidence, the suspicions of material fraud and accounting irregularities that permeated various previous financial reporting periods could not be dispelled.

19 In the circumstances, by the morning of 30 November 2017, Applicant knew that he had not and would not be able to produce the required audit evidence. In these circumstances, he reasonably expected that Steinhoff would likely be unable to avoid a forensic Investigation and would be unlikely to publish audited results expected on or about 5 December 2017.

20 Importantly, Applicant, although placing the timing in dispute in his evidence and submissions, did not address the finding that he knew that the missing evidence did not exist. He even flew to Germany and returned empty-handed.

21 Steinhoff's supervisory board (without Applicant's involvement) issued a SENS announcement on 4 December confirming that its 2017 consolidated financial statements would be released on schedule on 6 December in *unaudited* form. It also advised that it expected to publish the audited financials before 31 December. The reason for the delay were matters and circumstances mostly

raised by criminal and tax investigations in Germany. The share price of Steinhoff fell steadily on 4 December and 5 December.

22 A further SENS announcement followed on 6 December. It stated that new information had come to light relating to accounting irregularities which required further investigation. The supervisory board in consultation with the statutory auditors (Deloitte) had approached another firm of auditors (PwC) to perform an independent investigation. The company would publish the audited 2017 consolidated financial statements when able to do so, and the company would determine whether any prior years' financial statements had to be restated.

23 Applicant resigned with immediate effect, which the board accepted. A new executive chairman was appointed on an interim basis.

24 Steinhoff's share price collapsed: 314.5 million shares were traded on 6 December and the closing price was R17.61, down from about R50.00. This was followed on 7 December with 245.6 million shares traded and a closing price of R10.00; and on 8 December with 198.4 million at R6.00. By 29 December, the closing price was R4.65 which is a decrease of 91.66% from the closing price of 1 December.

THE SUBSEQUENT EVENTS: THE RESTATED FINANCIALS

25 On 7 May 2019, Steinhoff published its audited annual financial statements for the year ended 30 September 2017 ("2017 AFS") wherein Steinhoff restated its 2016 consolidated financial statements and its statement of financial position as of 1 July 2015 to correct prior period errors.

26 As disclosed by Steinhoff in the 2017 AFS, the financial impact of the restatement of the 2015 and prior financial years was material in that:

- The opening balance of equity for the period ended 30 September 2016 was adjusted downward by about 62% from €13,428 billion to €5,134 billion;
- total assets inclusive of cash and cash equivalents, decreased by about 35% from circa €23 billion to €14.9 billion; and
- Steinhoff's cash and cash equivalents decreased by about 81% from €2.7 billion to €517 million.

27 The financial impact of the restatement of the 2016 financial year was material in that:

- total equity decreased by about 62% from circa €15.9 billion to €6 billion;
- total assets, inclusive of cash and cash equivalents, decreased by about 35% from circa €32 billion to €21 billion;
- Steinhoff's cash and cash equivalents decreased by about 76% from €2.8 billion to €687 million; profit of €1.4 billion decreased to a loss of €237 million, a change of approximately 116%;
- total comprehensive income of €446 million decreased to a comprehensive loss of €1 043 billion, a decrease of about 334%;
- the 2016 headline earnings per share of 37.7 cents decreased to a headline loss per share of 6.7 cents, representing a downward adjustment of about 118%; and

- the 2016 earnings per share of 37.8 cents decreased to a loss per share of 7.6 cents, representing a downward adjustment of 120%.

THE SUBSEQUENT EVENTS: THE FSCA PENALTY

28 On 12 September 2019, Steinhoff International Holdings NV and Steinhoff Investment Holdings Ltd issued the following SENS notice quoting a press release of the FSCA [slightly redacted]:

> *The Financial Sector Conduct Authority (FSCA) has concluded its investigation into alleged contraventions of the FMAct by the Steinhoff Group in the period prior to the discovery of significant accounting irregularities at the company in December 2017.*
>
> *The requirement for Steinhoff to make multiple, significant restatements of its accounts subsequent to December 2017 supports the conclusion that Steinhoff failed to meet its obligations under the FMAct.*
>
> *The FSCA has therefore found that the Steinhoff Group made false, misleading or deceptive statements, promises or forecasts in its public statements to the markets in the prior period.*
>
> *The FSCA has applied section 109 to determine the level of administrative penalty to be paid by Steinhoff and . . . imposed an administrative penalty of R1.5 billion on Steinhoff under Section 81.*
>
> *Noting Steinhoff's current financial position [etc] the FSCA has resolved, under Section 173 of the FSRAct, to remit a portion of the administrative penalty resulting in Steinhoff paying a penalty of R53 million.*

The FSCA states that events subsequent to December 2017 have highlighted the gap that existed between the Steinhoff Group's prior public statements and the financial reality.

29 The two holding companies accepted this finding of the FSCA and paid the hefty administrative penalty without demur.

THE PwC FORENSIC INVESTIGATION AND REPORT

30 As mentioned, Deloitte (Steinhoff's auditors) were dissatisfied with its earlier auditing and were not prepared to sign off on the 2017 AFS and instead proposed to the Steinhoff board that PwC conduct a forensic investigation of that and prior years.

31 It went further and on 6 December 2017 and 19 December 2017, Deloitte submitted a letter to the Independent Regulatory Board for Auditors of a potential reportable irregularity in relation to Steinhoff International Holdings Limited (previous holding company of the Steinhoff Group) and Steinhoff Investments, respectively.

32 The restated financials state that

- *As a result of the December 2017 Events PwC was, upon the instruction of the Steinhoff N.V. Supervisory Board, retained by the Group's legal advisors to conduct an independent forensic investigation. On 15 March 2019 Steinhoff N.V. published an overview of a forensic report prepared by PwC ("Investigation Report"). The Investigation Report remains confidential and legal professional privilege inheres therein. Consequently,*

the Investigation Report will not be published. Reference to the investigation and the Investigation Report in these financial statements and notes thereto is made without waiving the privileged nature of the Investigation Report.

- *The board's approach to financial reporting and the restatement process, in consultation with the Management and Supervisory Boards of Steinhoff N.V., following the findings of the various investigations undertaken, has been to assimilate and analyse as much information as possible to place management in a position to determine the likely financial impact of all transactions under investigation. In preparing the financial statements, the board has considered and applied a significant number of judgements, especially in circumstances where information was incomplete. These judgements affect the application of accounting policies and reported amounts and assets, liabilities, income and expenses. Actual results may differ from estimates and judgements have been made after taking into account all currently available information.*

33 The published overview of the PwC report stated inter alia the following:

- *a small group of Steinhoff Group former executives and other Steinhoff non-executives structured and implemented various transactions over a number of years which had the result of substantially inflating the profit and asset values of the Steinhoff Group over an extended period;*
- *the PwC investigation found a pattern of communication which shows the senior management executive instructing a small number of other*

Steinhoff executives to execute those instructions, often with the assistance of a small number of persons not employed by the Steinhoff Group;

- *fictitious and/or irregular transactions were entered into with parties said to be, and made to appear to be, third party entities independent of the Steinhoff Group and its executives but which now appear to be closely related to and/or have strong indications of control by the same small group of former executives and other non-executives - the income from fictitious and/or irregular transactions identified during the PwC investigation was recorded by the Steinhoff Group from the purportedly independent third parties for the FY 2009 to FY 2017;*
- *fictitious and/or irregular income was, in many cases, created at an intermediary Steinhoff Group holding company level and then allocated to underperforming Steinhoff operating entities as so called "contributions" that took many different forms and either increased income or reduced expenses in those operating entities. In most cases, the operating entities received cash for the contributions from another Steinhoff Group or from non-Steinhoff companies (funded by Steinhoff), resulting in intercompany loans and receivables; and*
- *the transactions identified as being irregular are complex, involved many entities over a number of years and were supported by documents including legal documents and other professional opinions that, in many instances, were created after the fact and backdated.*

34 Against that background, Mr van Zyl, on behalf of the Applicant, made several submissions, which we summarise. He says that neither the Applicant nor the JSE had seen the PwC report because Steinhoff is claiming legal professional privilege and that, accordingly, the opinions and allegations made by PwC, on which Steinhoff relied, could not be used against him and that the JSE acted irregularly by having regard to the quoted section of the report.

35 The answer to this argument is that this is a reconsideration application, and we shall, while discussing the @Works facts, test whether the facts in essence establish what PwC had found.

36 Dealing with probabilities, the question is what was the cause of the demise of Steinhoff? It was not because of Covid or some eruption of Mount Krakatoa. The Applicant did not even attempt to offer an explanation nor did he deal with any of the financial restatements. The answer, as Mr van Zyl was driven to accept, is accounting irregularities suspected by Deloitte and later confirmed by PwC and the Board and, one may add, the inability of the Applicant who alleged that audit proof was available to produce it when push came to shove. The next question is why Steinhoff would restate the financials and publish disastrous financials if they were not, on the probabilities, more correct than incorrect. Then, why would Steinhoff pay the hefty administrative fine unless it was satisfied that it had no defence to its imposition? And last, where is the @Work money (R376 649 872.00) which inflated the income of the African silo and did not enter the Steinhoff Group?

37 One cannot but agree with the JSE that –

There are therefore two sets of financial statements for the same periods that have been released to the market, i.e., the information that was published under Mr. Jooste's direction and leadership versus the information which was subsequently restated. Both versions of the same set of financial statements cannot be correct.

38 And there is no reason to doubt that

the JSE has carefully considered the restatements and the basis for it and is of view that the financial position and performance of Steinhoff for the 2016, 2015 and prior financial periods were materially misstated and required restatement.

39 It was not required of it, as the Applicant suggested, to revisit and re-audit the financials. It was entitled to rely on probabilities, as we do. (We deal with the Deloitte opinion in the context of @Works.)

MISLEADING FINANCIAL REPORTING

40 The first contravention ("misleading financial reporting") was said to be that –

The Applicant knew, or ought to have known, that due to numerous accounting irregularities, Steinhoff's published financial information failed to comply with IFRS and was incorrect, false or misleading in material respects. Mr Jooste bears ultimate responsibility for this as Steinhoff's CEO. In the result, Mr Jooste contravened:

a) paragraph 8.62(b) of the Listings Requirements for the 2015 and prior financial periods; and

b) General Principle (v) for the fifteen months ended 30 September 2016.

41 The essence of the JSE's finding was that the Applicant knew, or ought to have known, that due to numerous accounting irregularities, Steinhoff's published financial information failed to comply with IFRS and was incorrect, false or misleading in material respects and that he bore ultimate responsibility for this as Steinhoff's CEO.

42 We have already explained why we found that the financial information published under his watch was false in material respects. This was not because of language or legal issues or of some rogue employees in far-flung countries. It was about the core companies in core countries.

43 The following submission is rejected:

> *By the time Steinhoff's consolidated accounts came before Mr Jooste for approval (prior to publication), they (and the underlying accounts) had been scrutinised many times over, including by Steinhoff's group CFO, its audit and risk committee and its external auditors. The systems in place at Steinhoff, and the personnel involved in those systems, were impressive. Mr Jooste was entitled, and, to an extent, constrained, to rely on those systems and personnel.*

44 We do so because of the Applicant's own emails that show that he was intimately involved in how the finances worked within the group and how the book entries shifted funds from the one to the other. The CFO, Mr Ben le Grange,

who did not understand the machinations, had to be informed by the Applicant how things worked within Steinhoff.

45 For instance, in an email of 13 June 2015, Mr le Grange had to ask the Applicant how group income is allocated between companies, and the Applicant explained to the CFO the next day (B77). His hand in the TG Group arrangement is too apparent on 20 March 2016 (B78) and so, too, in his explanations to Le Grange on 5 November 2016 (B82) and 20 November (B85) – which make the Applicant's reliance on his "understanding" (i.e., lack of actual knowledge) unacceptable.

46 Then there is the 3 December 2017 email to his CFO (B88) after his fruitless trip to Germany to gather audit evidence and the day before his resignation, where he apologises for the Europe entries and says that it is difficult to explain the entries that they (presumably Le Grange and his section) were not responsible for and had no knowledge of, all done for tax purposes, which he would later explain to the CFO (our mild and loose translation does not reproduce the sting of the original):

> *Ek is gedaan baklei Ben en as jou lewe so naak gemaak word is dit fokken moeilik om alles te verduidelik, jammer vir al die Europese entries wat julle niks van weet of betrokke was nie en nie verstaan nie, ek sal more by die oudit meeting julle deur elkeen vat en verduidelik hoekom ons dit so gedoen het, soos jy kan dink speel tax die deurslaggewende rol.*

47 The explanation, which he in principle had to give to Deloitte and the Board, never materialised because he resigned and has since given no explanations

other than evasions and bare denials. The extent of restatement of the financials is such that the "defence" of lack of culpability sounds hollow.

48 It is unsurprising that other spurious "defences" raised by the Applicant on the papers were not argued. For instance, there was the allegation that fictitious transactions do not affect the income of Steinhoff as expressed in the financial statements because all the money flows were internal and therefore ultimately balanced out. A fictitious transaction remains fraudulent, and the problem is that in the @Works transaction the money was supposed to come from an external source, which it did not.

49 We agree in conclusion on this aspect with the view of the JSE that

> *Jooste was the Chief Executive Officer of Steinhoff throughout the periods in question. Directors of issuers fulfil a critical role in ensuring that listed companies comply with the Listings Requirements. Issuers of securities listed on the JSE are only able to comply with the Listings Requirements if their directors take the appropriate actions {or refrain from taking unlawful actions) to ensure that such issuers comply in all aspects with its provisions and to ensure that the financial information of listed companies are, in all aspects, accurate and correct and that it represents a fair and accurate exposition of the company's financial information.*

THE STEINHOFF@WORK TRANSACTION

50 The second set of contraventions concerned the “Steinhoff at Work Transaction” [“@Work”], and it was found by the JSE that the Applicant had –

a) *failed to exercise the highest standards of care in his direct involvement in the design and implementation of the “fictitious Steinhoff at Work Transaction”, thus contravening General Principle (v);*

b) *knew, or ought to have known, that the inclusion of fictitious income in respect of the Steinhoff at Work Transaction would inflate the income recorded in Steinhoff’s consolidated financial statements and contribute to the 2016 financial results being incorrect, false and misleading in material respects, thus contravening General Principle (v); and*

c) *he knew, or ought to have known, that the Steinhoff at Work Transaction was irregular and fictitious, and he failed to ensure that full, equal and timeous public disclosure was made to all holders of securities and the public at large regarding the fictitious transaction and its unlawful inclusion in Steinhoff’s consolidated, price sensitive financial information, thus contravening General Principle (iii).*

51 The following is uncontentious: The Steinhoff Group joined a structure referred to as a "buying group" through its involvement with TG in June 2014, whereby volume rebates were purported to be negotiated and collected by TG for the Group as well as other third parties. The Group issued invoices to TG related to the sharing of retail concepts and best practice, re-imbursement of fixed costs, volume rebates and marketing support and recognised the invoiced amounts either as revenue, other income, or cost reductions.

52 The material 2017 Steinhoff AFS contained this contentious “critical judgment”:

> *TG did not in fact negotiate or collect contributions from third parties on behalf of the Group. Payments received in respect of the amounts owing by TG were received from entities within the Group i.e. there were no external cash flows into the Group. Management therefore concluded that there was no substance to the income or reduction costs recognised by the Group. Management therefore reversed all the contributions received. The restatement resulted in a decrease in net assets at 30 September 2016 and 1 July 2015 of €1.2 billion and €845 million respectively. The profit or loss for the period decreased with €248 million. "*

53 Deloitte, in its auditor’s report on the financials of Steinhoff Investment Holdings Ltd, the holding company of @Works, which was released during October 2020, said the following in response:

> *During the 2016 financial year management represented their participation in the TG Group referred to as a "buying group". The Steinhoff Investments Group invoiced the TG Group for approximately R377 million for the period ended 30 September 2016. The amount was subsequently received by the Steinhoff Investments Group via a Steinhoff N.V. Group entity.*
>
> *As a result of the various investigations management concluded that the TG Group did not negotiate or collect sourcing rebates or contributions from third parties on behalf of the Steinhoff NV Group. Payments received in respect of amounts owing by the TG Group were received from entities within the Steinhoff NV Group i.e. there were no external cash flows into the Steinhoff*

NV Group resulting from these transactions. Management further concluded that the intergroup amount received in connection with the 2016 financial period was not a capital contribution to the entity and that it should be treated as intergroup income at the entity level, as disclosed in note 32. In reaching these conclusions management was required to make significant judgements and assumptions.

We were unable to obtain sufficient appropriate audit evidence supporting these conclusions on the nature and validity of these transactions.

54 The one thing Deloitte does not say is that the statement that "payments received in respect of the amounts owing by TG were received from entities within the Group i.e. there were no external cash flows into the Group" is subject to doubt. At the level of the African silo the amount was credited but it came from within the Steinhoff Group and not from TG. Strangely, a year earlier this same company, Steinhoff Investment Holdings Ltd, accepted the finding of the FSCA in the SENS report and the penalty imposed, something the auditors did mention in their caveat.

55 We proceed to discuss the history of the payment to the African silo via @Works. This was dealt with in detail in the JSE's Further Reasons (B1 p 1A et seq) read with the attached documentation. What follows is based on that.

56 Steinhoff @Work's year end was 30 September 2016. On 15 November 2016 and post @Work's year end, the Applicant prepared a handwritten document with the heading "Steinhoff@Work Pro Rata Contribution of World Wide Sourcing Global Rebate Scheme VIA the Buying Organisation TG Sourcing", to "indicate the

pro rata contributions which Steinhoff @Work would be entitled to receive from TG Sourcing". The total amount for the 15-month period ended 30 September 2016 was € 23.5 million.

57 He did the elementary calculation (with some error) in the presence of Mr Ben La Grange, the CFO, and gave the document to him, obviously to use to generate an invoice to TG Sourcing SARL, which forms part of the TG Group. Why the CFO would or could not make the calculation, no one knows and why he would rely on the note is beyond comprehension unless it was to keep his nose clean.

58 Mr La Grange then instructed Mr Iwan Schelbert, a former director of Steinhoff Africa Group Services, to raise an invoice based on Jooste's handwritten document (which he attached to his email).

59 The invoice was generated from @Work to TG Sourcing. Mr La Grange then emailed this generated invoice to Jooste on 21 November 2016 to which Jooste replied that he would organise payment. So much for Jooste’s non-involvement.

60 Jooste, on 27 November, settled (to use a neutral term) a confirmation letter to be dated 25 November 2016 from the TG Group to Steinhoff Europe AG per himself and Mr D Schreiber concerning the final reconciliation of the Steinhoff Group for the period ending 30 September 2016. He specifically instructed his underlings that the letter had to be "typed on TG Management Holdings SA letterhead!". Where they would have gotten the letterhead is not explained and if the letter was genuinely to have been from the TG company it would obviously have typed the letter on its own letterhead and would not require an emphasised instruction from a non-related person or party.

61 The content of the final signed confirmation letter (pre-dated to 25 November 2016) agrees word for word with the draft settled by Jooste two days later.

62 The letter was, on a reading, intended to provide audit evidence and contains two material statements that do not fit Jooste's explanation. The first is the opening statement namely that TG "administered and received fees, group rebates, commissions and other income that is to be distributed to your participating Group Companies". This, according to Mr van Zyl's argument (par 33) was not how the process worked or how Jooste understood it – namely that the manufacturers paid whatever Steinhoff company directly and the rest went by inter-company book entries.

63 The second material misstatement is the third last sentence which alleged that the amount due to @Work had been paid to @Work and that all had been settled in full at close of business on 25 November 2016. That was untrue as will appear from what follows.

64 Thereafter, on 28 November 2016, post the date of the invoice and post the @Work year end, members of the Steinhoff Group sent an email with the subject "Services Agreement" to the director of TG Sourcing containing two attachments being the generated invoice together with a draft agreement between Steinhoff @Work and TG Sourcing.

65 On 28 November 2016, representatives of the TG Group emailed a scanned copy of the agreement signed by the TG Group. If there ever was an ex post facto agreement, this one is on its reading a classic. The agreement confirms that the

TG Group collects the rebates and pays to @Works – all contrary to Jooste's "understanding" and despite his arrangement for payment.

66 On 29 November 2016, Jooste emailed a copy of the TG Group letter dated 25 November 2016 to Mr Xavier Botha, the audit partner at Deloitte to be used as audit evidence for the Steinhoff @Work 2016 audit. The same email with attachments was forwarded on 29 November 2016 to the audit partner at Commerzial Treuhand GmbH, the audit firm responsible for the audit of several Steinhoff European entities.

67 Payment to @Work of the generated invoice was originally arranged with Steinhoff Möbel Alpha, but it had no South African rand account and therefore payment of the invoice was made by Steinhoff Finance Holdings GmbH on behalf of TG Sourcing. (But TG Sourcing was supposed to have already paid @Work if the letter is to be believed and if Jooste is to be believed that the different Steinhoff companies had received the rebates from the suppliers and there was nothing to pay.) TG Sourcing was included in the email exchange to discuss the payment arrangement and from which Steinhoff Group account it would eventually be made. The payment from Steinhoff Finance Holdings GmbH was made to @Work on 20 December 2016, almost two months after Steinhoff at Work's year end of 30 September 2016.

68 Steinhoff @ Work's AFS for the period ended 30 September 2016 were finalised and signed by two directors on 7 December 2016. In the notes to the annual financial statements, TG Sourcing appears under "TRADE AND OTHER

RECEIVABLES (EXCLUDING INTERCOMPANY)" for R376 649 872, which is the amount on the invoice of 21 November 2016.

69 The R376 649 872 was also included in the total "Other Operating Income" of R1 248 033 238 that appears on the income statement notwithstanding that the payment was made by another Steinhoff Group company on 20 December 2016, after Steinhoff at Work's year end reporting date.

70 Since the rebates had been earned by the JD Group, one would have expected some reference to an amount due to the JD Group, which would have reduced the operating income of @Work materially. It is not surprising that the CEO of the JD Group was unaware of any relationship between the JD Group and the TG Group.[2]

71 To conclude on this topic: The JSE's finding that the whole transaction was fictitious, and that Jooste was intimately involved appears to us, on reconsideration, to have been correct. And if one tests the modus operandi against the general finding of PwC one finds, mutatis mutandis, an amazing correlation between these specific facts and the generality.

THE PENALTY

72 The Applicant submitted that the penalties imposed are not appropriate and submitted an argument that did not differ in essence from that presented in the

[2] See par 6 and 7 of the letter at B151 as to Jooste's earlier version. He relied on the truth of the letter dated 25 November. Mr van Zyl's reliance on the fax on B155 imploded during argument. It was sent on 28 November by the TG Group without the 25 November "amendments" by Jooste.

FSCA matter although accepting that the list set out in sec 167(2) of the FSRAct does not apply to penalties imposed by the JSE.

73 No submissions were made about the disqualification, presumably because of the Applicant's concession that it is highly unlikely that he will ever again be a director of a JSE listed company.

74 If we were to apply the Zinn[3] triad mutatis mutandis, namely the gravity of the offence, the personal circumstances of the Applicant, and the public interest, we, too, would have imposed the maximum penalty.

75 As to seriousness, what is particularly relevant is the loss to the shareholders of billions, the demise of an important South Africa-linked company with all its consequences, and the loss of credibility in accounting methods and financial control of listed companies.

76 There are no particular personal circumstances that have any material impact on the penalty and what weighs heavy is the protection of the public from similar future events. For the rest, the fact that the Applicant lost part of his fortune is an irrelevant consideration in this matter because he was, at least in part, responsible for the demise of Steinhoff. He did not implicate or accuse anyone else for it – and he would know.

77 As to public interest, it is important that a message be sent to the business community that playing around with book entries, creating a false image of the financial health of a company and misrepresenting to the public the true state of

[3] *S v Zinn* 1969 (2) SA 537 (A)

affairs, whether intentionally or because of gross negligence, is serious and demands appropriate penalties and not slaps on the wrist.

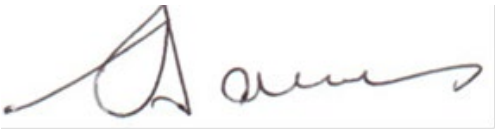
COSTS

78 The JSE, belatedly, asked for costs, something that can only be granted if the circumstances are exceptional (see sec 232(5) of the FSRAct). Mr van Zyl was not caught by surprise by the request. The exceptional circumstances must relate to the reconsideration application. The facts may be exceptional, and the application may have been without merit, but that does not make the proceedings exceptional. There was nothing untoward about the proceedings and we are accordingly not entitled to make a costs award.

ORDER

79 The reconsideration application is dismissed.

Signed on behalf of the Tribunal panel on 10 October 2023.



LTC Harms (chair)

.