THE FINANCIAL SERVICES TRIBUNAL

CASE NOS.: A45 / A46 / A47 / A48/2021

In the reconsideration applications of

VICEROY RESEARCH PARTNERSHIP LLC	FIRST APPLICANT (A45/2021)
FRASER JOHN PERRING	SECOND APPLICANT (A46/2021)
AIDEN LAU	THIRD APPLICANT (A47/2021)
And	
GABRIEL BERNARDE	FOURTH APPLICANT (A48/2021)
against	
FINANCIAL SECTOR CONDUCT AUTHORITY	RESPONDENT

Tribunal panel: LTC Harms (chair), Mr Jay Pema and Adv Michelle le Roux SC

For the applicants: Adv Nigel Riley instructed by Snaid & Morris attorneys (Mr J Morris)

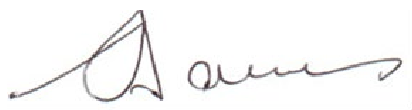
For the respondents: Adv Alfred Cockrell SC and Adv Michael Mbikiwa instructed by

Hearing: 26 October 2022

Re: Imposition of an administrative penalty by the Authority for a contravention of a financial sector law – sec 167(1)(a) of the Financial Sector Regulation Act 9 of 2017 - sec 81 of the Financial Markets Act 19 of 2012 – personal jurisdiction over foreign peregrinus.

ORDER: The decision of the Tribunal is that the application for reconsideration is granted, and the order of the respondent is set aside. The decision is a majority decision.

Signed on behalf of the Tribunal panel on 15 November 2022.



LTC Harms (chair)

MAJORITY DECISION (per LTC Harms (chair) and Mr Jay Pema)

1 The respondent, the Financial Sector Conduct Authority ('the Authority'), is the responsible authority for the Financial Markets Act 19 of 2012 ('the FM Act') and may, by order served on a person, impose on that person an appropriate administrative penalty, if the person has contravened a financial sector law, in this case the FM Act – see sec 167(1)(a) of the Financial Sector Regulation Act 9 of 2017 ('the FSC Act').

2 The Authority found, after an investigation that Messrs Perring, Lau and Bernarde (as partners) had contravened the sec 81(1) and (2) of the FM Act and imposed an administrative penalty of R50 million on them, jointly and severally. They apply in identical form for a reconsideration of the decision under sec 210(1) of the FSR Act.

3 The order of the Authority is misleading because it quoted Viceroy Research Partnership as a respondent, and this led to a separate application by the first applicant, which is a limited liability company. It must be accepted that the Authority's intention was not to make an order against any other entity or person but Messrs Perring, Lau and Bernarde acting in partnership, and in this decision any

reference to the applicants or Viceroy is to them as partners only. The striking off of the LLC's application is thus a mere formality and does not reflect any decision for or against the LLC or the LLP of the same name.

4 The essence of the Authority's findings that underlie the penalty is the following: During or about 30 January 2018 the [applicants] published [in the 'Wolf' report – see later] the following false, misleading or deceptive statements, promises or forecasts regarding material facts in respect of Capitec Bank Holdings Limited (Capitec) which they ought reasonably to have known were false, misleading or deceptive:

- Capitec had to write-off more than 42% of the gross collectable principal due to it in FY2017.
- Capitec had a pervasive practice of rescheduling the loans of its delinquent clients through the issuance of new loans to those clients.
- Capitec's loan book is irreconcilable (R3bn).
- Capitec will lose a court case that will trigger a class action lawsuit.
- The class action judgment will be that Capitec must pay R12.7bn to its former and current clients.
- Capitec's board "is largely and unsurprisingly made up of several executives from both PSG and Steinhoff'.
- Capitec must recognise an additional R11.37bn of impairments to accurately reflect its liabilities.

5 Section 81 reads as follows:

(1) No person may, directly or indirectly, make or publish in respect of securities traded on a regulated market, or in respect of the past or future performance of a company whose securities are listed on a regulated market–

(a) any statement, promise or forecast which is, at the time and in the light of the circumstances in which it is made, false or misleading or deceptive in respect of any material fact and which the person knows, or ought reasonably to know, is false, misleading or deceptive; or

(b) any statement, promise or forecast which is, by reason of the omission of a material fact, rendered false, misleading or deceptive and which the person knows, or ought reasonably to know, is rendered false, misleading or deceptive by reason of the omission of that fact.

(2) A person who has made a statement as contemplated in subsection (1) and who was unaware that the statement was false, misleading or deceptive, and who becomes aware of the fact that such statement was false, misleading or deceptive, must, without delay, publish a full and frank correction with regard to such statement.

(3) A person who contravenes subsection (1), or who fails to comply with subsection (2), commits an offence.

6 The facts that follow by way of introduction are taken from the investigation report on which the decision of the Authority is based and are undisputed.

7 During December 2017 an entity named Viceroy Research Group (with undisclosed members or partners) published a document regarding Steinhoff International Holdings N.V. The publication coincided with a material negative drop in the share price of Steinhoff and it was widely perceived to have been prescient, and accurate. (There were also other reasons for the drop discussed in a decision of this Tribunal[1] but that is merely an aside.) Therefore, when Viceroy announced that it would soon publish a "report" on another South African listed company, there was much speculation, expectation, and panic about the identity of the next target. Companies

[1] *Jooste v Financial Sector Conduct Authority* (case A64/2020).

thought to be the subject of Viceroy's next report saw their share prices decline significantly.

8 At 09:45:33 on 30 January 2018 Viceroy used its Twitter handle to bring to the attention of the JSE, the South African Reserve Bank (‘SARB’), Capitec, and financial analysts, traders and finance commentators, as well as to the public at large, that Viceroy's report on Capitec was now ‘live’.

9 The link that Viceroy provided in the tweet led to Viceroy's website with Uniform Resource Locator www.viceroyresearch.org where Viceroy provided a full copy of the publication, titled ‘Capitec: A Wolf in Sheep's Clothing’, for access by anyone.

10 In the Wolf document Viceroy made statements regarding Capitec which formed the basis of the penalty, and it called on the SARB and the Minister of Finance to place Capitec immediately under curatorship.

11 Viceroy ensured immediate onward publication of its allegations through tweeting excerpts of the Wolf document at intervals of approximately every five minutes, sending copies of the Wolf publication to the media, and by appearing on television to discuss the Wolf document.

12 Media outlets then started reporting on the content of the Wolf document, and Viceroy's statements regarding Capitec went viral on social media platforms such as Twitter. The report drew the immediate attention of the SARB and the Parliamentary Standing Committee on Finance.

13 Capitec was at the time the fourth biggest bank in South Africa and regarded as a systematically important financial institution. Failure of such a bank would have posed a clear and present threat to the stability of the financial system – especially,

we add, when the failure is in part due to the implied incompetence or negligence of the SARB.

14 By 11:46 on the day, the Capitec share price had traded down by 23.12%, to reach an intraday low of R705. Between the time when the statements were first published and the intraday low price of R705 per share, a total of 1 956 695 shares traded at an average price of R836.40. That price was R80.56 lower than the share price immediately prior to publication, representing an approximate R9 345 million decrease in Capitec's market capitalization during that period.

15 Conversely, the share prices of the companies that had previously been speculated to be the next Viceroy target staged relief rallies on the news that they were not the target of the report.

16 The SARB intervened by issuing a statement (PG0451) wherein it noted the Wolf report and stated that

> ‘as part of our mandate we monitor the safety and soundness of all banks, including Capitec Bank Limited. According to all the information available, Capitec is solvent, well capitalized and has adequate liquidity. The Bank meets all prudential requirements.’

17 The effect was that calm returned to the market and that at close of business the Capitec securities recovered most of the lost ground and closed at 5% down on the previous day.

18 Viceroy responded to the SARB’s statement and stated categorically that

> ‘Viceroy's allegation is that Capitec’s balance sheet, income and solvency numbers are not reliable and that the mechanism of underrepresenting losses is

to pretend that uncontrollable loans are collectible and still accruing income.' (PG00455.)

19 It concluded to say that the SARB has a responsibility to determine whether the information provided to them and on which they base their regulatory decisions is accurate because Viceroy does not think it is. The Bank, it said, has the responsibility to perform a full regulatory inspection of Capitec and that Viceroy remains firm in its belief that this will result in SARB placing Capitec into curatorship. (PG00454.)

20 A third detailed report called 'A rolling stone gathers no loss' followed wherein Viceroy sought to deal with the answers provided by SARB, Capitec and other commentators and where it again concluded that Capitec is uninvestable and that it believed that it should be placed under curatorship to protect the borrowers. (PG00455-00478.)

21 It is not said that the Viceroy reports had any lasting effect on the market value of Capitec and one gains the impression that the market chose to accept the assurances of the SARB and ignore the views of Viceroy.

22 Viceroy did not prepare the Wolf report for altruistic reasons, something it freely disclosed in the 'disclaimer' where they state that they may continue transacting directly and/or indirectly in the securities of issuers covered in this report for an indefinite period and may be long, short, or neutral at any time hereafter regardless of their initial recommendation. (PG00409.)

23 The simplified facts are these: Viceroy had an agreement with a hedge fund, Oasis, under which it, at a monthly retainer of $10 000.00, would prepare reports that would assist Oasis in shorting securities in any chosen company. In addition, Oasis

would on a yearly basis pay Viceroy 12.5% of the net profit it made in the particular year on trades based on Viceroy's reports.

24 The applicants produced the report under the agreement and supplied it to Oasis to enable Oasis to take positions on Capitec securities. Oasis did, and to be able to profit, Viceroy had to make its bearish report public, which led to panic sales as described. Oasis made an estimated profit of R 82 million and the share of Viceroy in the profit from short positions taken by Oasis on Capitec was estimated by the Authority to be close to $744 482 (R10m at the time), which was shared equally between the applicants. The applicants chose not to disclose the actual amount.

JURISDICTION

25 The applicants' first submission is that the Authority did not have jurisdiction to impose an administrative penalty on them.

26 For purposes of establishing jurisdiction, one must assume the correctness of the allegations of the Authority, namely that the applicants did contravene sec 81(1) and (2) in the manner set out. Whether those allegations are indeed correct is something that can only arise once jurisdiction is established: *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) ; [2009] 8 BLLR 721 (SCA) ; [2009] 4 All SA 146 (SCA); (2009) 30 ILJ 1539 (SCA).

27 The submission of the applicants has two legs, namely, that the acts committed by the applicants were not committed in South Africa and, second, that they are foreign peregrini of South Africa: Mr Perring is a British citizen whose domicile is in the USA and Mr Lau and Mr Bernarde are Australian citizens domiciled in Australia.

28 This *in limine* defence has many aspects. First, the Authority is not a 'court' as defined by the Constitution and its jurisdiction is not to be found in statutes that confer

jurisdiction on particular courts. The Competition Appeal Court, for instance, has by statute the status of a High Court (and can develop the common law within the context of its jurisdiction), but neither the Authority nor this Tribunal has that status or competence.

29 The second is the nature of the administrative penalty. It has become axiomatic that it is not criminal. On the other hand, to describe it as purely civil would be an over-simplification. The rules of civil procedure do not apply. It is administrative and the Authority is in a sense an administrative court, acting as 'judge' and 'prosecutor' at the same time.

30 However, by sec 170, the order on having been filed with the registrar of a competent [superior] court 'has the effect of a civil judgment, and may be enforced as if lawfully given in that court' (sec 170(2) of the FSR Act). That implies, at the very least, that the requirements for superior court jurisdiction would apply to the jurisdiction of the Authority – and that is how counsel approached the matter during argument. Two issues arise, namely jurisdiction over conduct and jurisdiction over person.

JURISDICTION OVER CONDUCT

31 The applicants submitted that the Authority had no jurisdiction over their conduct because their conduct consisted of compiling a report and transmitting it – and all happened beyond the borders of the Republic.

32 It appears that it is universally recognized that

> 'any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognise'

(*United States v Aluminium Company of America* ('ALCOA') 148 F2d 419 (2d Cir, 1945)).

See also *American Natural Soda Corporation v Competition Commission* 2003 (5) SA 633 (CAC) and *The Competition Commission v Bank of America Merrill Lynch and others* [2021] 1 CPLR 26 (CAC).[2]

33 The facts do not support the applicants. Accepting that the Wolf report was compiled in the USA and Australia and 'sent' from there, this conduct had consequences in South Africa – irrespective of where the originating acts occurred. The impugned statements were 'directly and indirectly' published (made public) by the applicants in South Africa and they 'made a concerted effort to publish the statements as widely as possible in South Africa (B2224)'.

34 To use sec 81(1)(a) as an example, the Authority's case is in essence that the applicants are persons who, directly or indirectly, published in respect of securities traded on a regulated market Capitec shares on the JSE, and the statements were, at the time and in the light of the circumstances in which they were made, false or misleading or deceptive in respect of any material fact and which applicants ought reasonably to know, were false, misleading or deceptive.

35 The following facts are undisputed:

- The applicants brought the accusations to the attention of regulators such as the NCR and the SARB at the same time and also Capitec and the whole market.

[2] Both at https://www.comptrib.co.za/other-court-judgments.

- The applicants used the Twitter $, #, and @ interactive operators to alert forums and entities to the publications and ensure that the posts were seen by those forums/ entities. These entities included South African entities such as the JSE, the SARB etc.
- This South African reach through Twitter included the use of interactive operators in front of the Capitec name and share code to ensure that their comments were seen by anyone on Twitter with an interest in South African listed Capitec.
- They distributed the statements to South African journalists.
- They repeated the narrative on South African television broadcasts.
- They repeated some of the statements on South African radio.

JURISDICTION OVER PERSON

36 That brings us to the question whether the Authority had jurisdiction over the persons of applicants who are foreign peregrini.

37 The Authority alleged boldly that the applicants consented to the Authority's jurisdiction. There is no evidential basis for the allegation. *National Arts Council v Minister of Arts and Culture* 2006 3 All SA 395 (SCA); 2006 1 SA 215 (C) pars 37–38; *Purser v Sales* 2001 (3) SA 445 (SCA) ; [2001] 1 All SA 25 (A); *Maschinen Frommer GmbH & Co KG v Trisave Engng & Machinery Supplies (Pty) Ltd*, [2003] 1 All SA 453; 2003 (6) SA 69 (C); *Supercat Inc v Two Oceans Marine CC,* [2001] 3 All SA 1 (2001 (4) SA 27) (C).

38 We know that the applicants refused to cooperate with the Authority and that, to obtain Mr Perrin's evidence, the Authority used the powers of the SEC of the USA to

have him subpoenaed for an interrogation in New York. We also know that the applicants refused to respond to the notice of intention of the Authority (B2221 fn 1).

39 Counsel's submission that by lodging the application for reconsideration, which involves a rehearing, the applicants consented to the jurisdiction of the Tribunal is without merit. The cases relied on by the Authority do not support its submission.[3] The jurisdiction of the Tribunal depends on the jurisdiction of the decision-maker, in this case the Authority. The Tribunal does not have original jurisdiction. Confronted by (in their view) illegal decision, which has the effect of a superior court judgment, the applicants were obliged to apply for reconsideration of the decision on the ground of lack of jurisdiction. One should beware of the trap discussed in *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) ; [2009] 8 BLLR 721 (SCA) ; [2009] 4 All SA 146 (SCA); (2009) 30 ILJ 1539 (SCA).

40 Relying on *Bid Industrial Holdings (Pty) Ltd v Strang* 2008 3 SA 355 (SCA) paras 55 to 56 and also *Competition Commission v Bank of America Merrill Lynch International Ltd* supra paras 45 to 59, the Authority made the following submission:

> 'The Tribunal would in any event have jurisdiction over the applicants on the basis of the "sufficient connection" test. This test asks whether there is a sufficient connection between the suit and the area of jurisdiction of the forum concerned, so that the disposal of the case by that forum is appropriate and convenient. The

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[3] They are *Hay Management Consultants Ltd v P3 Management Consultants (Pty) Ltd* (439/2003) [2004] ZASCA 116; [2005] 3 All SA 119 (SCA) and *American Flag plc v Great African T-Shirt Corporation CC*; *American Flag plc v Great African T-Shirt Corporation CC*: *In re Ex parte Great African T-Shirt Corporation CC* 2000 (1) SA 356 (W).

test is plainly satisfied in the present case: the Wolf document dealt with a share listed in South Africa; was published and publicised in South Africa; and had financial effects in South Africa.'

BID INDUSTRIAL HOLDINGS

41 The problem with the reliance on *Bid Industrial* is that it did not hold that satisfaction of the 'sufficient connection' is enough for establishing personal jurisdiction in respect of a foreign peregrinus. What follows is an analysis of the judgment and, as always, context may be everything.

42 The issue in the case was the constitutionality of the arrest of a foreign peregrinus to found or confirm jurisdiction. As the Court said, to found jurisdiction, two requirements had to be satisfied, namely cause (jurisdiction over conduct) AND arrest of the foreign peregrinus or attachment of assets. As was said in para 2 (see also para 30):

> 'At common law even if a jurisdictional cause (for example, contract or delict within the jurisdiction) was present, if the defendant was a foreigner there had to be arrest or attachment.'

43 The Court proceeded to find that the requirement of arrest was unconstitutional (at para 45) and it then had to decide how to develop the common law to comply with the doctrine of effectiveness. As it said (at para 48),

> 'if the common law is to be developed by abolishing jurisdictional arrest, that development must necessarily involve providing practical expedients for cases where jurisdiction is sought to be established and there can be neither arrest nor attachment.'

44 The Court concluded as follows:

> 'In my view it would suffice to empower the court to take cognisance of the suit if the defendant were served with the summons while in South Africa and, in addition, there were an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of the appropriateness and convenience of its being decided by that court. Appropriateness and convenience are elastic concepts which can be developed case by case. Obviously the strongest connection would be provided by the cause of action arising within that jurisdiction.' (Underlining added. At para 56.)

> 'The common law must be, and is hereby, developed by abolition of the rule and the adoption in its stead, where attachment is not possible, of the practice according to which a South African High Court will have jurisdiction if the summons is served on the defendant while in South Africa and there is sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by that court is appropriate and convenient.' (Underlining added at para 59.)

45 The Authority's argument omitted the underlined phrases and did not represent the decision of the SCA fairly or correctly. In other words, 'sufficient connection', which the SCA recognised was not much different from the conduct requirement, is insufficient to establish jurisdiction over a foreign peregrinus – as is the case under English law (para 52).[4]

[4] A similar principle applies in the case of recognition of foreign judgments: *Richman v Ben-Tovim* (674/05) [2006] ZASCA 121; 2007 (2) SA 283 (SCA); [2007] 2 All SA 234 (SCA) where reference is also made to the position in England.

46 This decision of the Competition Appeal Court is more complex to understand and apply. Apart from the many procedural issues the Court had to deal with, its main concern was the scope of the jurisdiction of the Competition Commission in enforcing the vision of the Competition Act 89 of 1998, which applies to all economic activity within or having effect within the Republic.

47 The relevant issue for present purposes that the Court had to consider was

> 'the common law requirement that, before a South African court can adjudicate upon a dispute in which a party happens to be a [pure or foreign] peregrinus, both personal and subject matter jurisdiction must be present.' (Para 5.)

48 Subject matter jurisdiction was found in sec 3(1) of the Competition Act and the question was then whether it had abolished the personal jurisdiction requirement (para 45). After analysis the facts of *Bid Industrial*, the CAC (in para 49) quoted paras 55 and 56 of that judgment. Two matters are striking: the CAC did not quote para 59 of the judgment (quoted earlier) and it did not, as counsel before us also did not do, underline the phrase <u>if the defendant were served with the summons while in South Africa</u>, which set the first requirement for personal jurisdiction.

49 The CAC (at para 50) then quoted from the judgment in *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Ltd v Blue Label Telecoms Ltd*, [2013] 4 All SA 346 (GNP), 2014 (3) SA 265) (GP) at para 23, which dealt with connecting factors and the applicability of *Bid Industrial* to artificial persons such as companies, which are not the issues under consideration.

50 The CAC proceeded to describe its challenge in these words:

> [53] In my view, the challenge posed to this court is not about a full-blown development of the common law regarding personal jurisdiction. It turns essentially on whether the law relating to personal jurisdiction can be rendered congruent with the objectives of s 3 (1) of the Act and more generally with the overall purposes of the Act, including the promotion of efficiency, adaptability and development of the economy and the provision to consumers of competitive prices and product choices as set out in s 2 (a) and (b) of the Act.

51 This means that the judgment is not a binding precedent in an analogous case in a different hierarchy. It does, nevertheless, require serious and respectful consideration but does not endow this Tribunal to develop the common law in an indirect manner.

52 The service requirement was dealt with by the CAC with reference to the rules of the Tribunal and the CAC said the following:

> [60] Turning to the argument about service, the Tribunal rules do not appear to distinguish between service within the Republic and service abroad. While valid service under the Tribunal rules can be affected by any means authorised by the High Court, the former rules appear to be more permissive than the High Court rules and provide for service by fax and email. Therefore, it appears not to constitute an obstacle to the general approach to service for the Commission to serve on any peregrinus firm <u>without the need for a local domicilium</u>, an approach which clearly would deal with the problem of responding to conduct based upon an overarching conspiracy between peregrini and incolae, the overall effect of which is to breach s 4 (1) (b) of the Act. Certainly, on the facts, all the

parties were 'hailed' to the Tribunal for the purposes of the present litigation. (Underlining added.)

53 The underlined words create a problem. The SCA did not say that local *domicile* is required for personal jurisdiction. It said that local presence and service are required. And the CAC did not express any intention to overrule or correct the SCA.

54 The CAC, as does my colleague, assumes that if rules permit service in a particular way, jurisdiction is thereby established. I cannot subscribe to such view. Jurisdiction is a matter of substantive law. Service is one of procedural law. For instance, the Uniform rules of the high court do not establish jurisdiction and proper service in terms of the rules does not establish jurisdiction. Jurisdiction is established by statute and the common law.

55 They also implicitly assume that that rules (subordinate legislation) can develop the common law or can supplement a statute, novel concepts.

56 Importantly, the CAC recognised (footnote 7) that this development of private international law (conflict of laws) is not recognised in the USA despite its tendency to claim long-arm jurisdiction and, as mentioned in *Bid Industrial* (para 52), physical presence in the UK is essential for jurisdiction. Service merely fixes the time for presence.

57 It is noteworthy that the CAC did not make a finding of personal jurisdiction despite all (at para 81 in fine). The Commission was granted leave to file a new referral that had to set out facts sufficient to establish personal jurisdiction against all the respondents (para 3.3 of the order).

CONCLUSION ON JURISDICTION

58 The FSR Act does not deal with jurisdiction and whether the Authority has jurisdiction to impose an administrative penalty on a foreign peregrinus depends on the question whether a superior court would, under common law, have such jurisdiction. The common law has been restated by the SCA, and this tribunal is bound by that restatement. According to the SCA, a superior court would not have had jurisdiction in a civil case against the applicants. It therefore ought to follow that the Authority did not have jurisdiction to impose a penalty on the applicants.

59 One can test this conclusion in the following manner. A contravention of sec 81 has three potential consequences. The first is criminal. But a criminal court would not be able to try the applicants under the Criminal Procedure Act unless they were apprehended in South Africa and brought before court. A criminal court may therefore not consider whether the applicants had, indeed, committed an offence under sec 81.

60 The second is civil. Capitec (or some other affected party) could have claimed delictual (tort) damages from the applicants for breach of a statutory duty (*Callinicos v Burman* 1963 (1) SA 489 (A) pp. 497–498) or defamation (*Caxton Ltd v Reeva Forman (Pty) Ltd* [1990] 2 All SA 300 (A), 1990 (3) SA 547 (A)) or some or other declarator (sec 21(1)(c) of the Superior Courts Act 10 of 2013) but, again, our courts would not have had jurisdiction absent personal jurisdiction created by local presence and service or local attachment to decide the claim.

61 The third consequence is administrative, namely the present instance. In principle, what was said about civil jurisdiction applies. We are not concerned with the Prudential Authority or the SARB's investigative powers but the power of the Authority to impose a penalty pursuant to an investigation on a foreign peregrinus.

62 Section 170 does not assist the Authority where it states that the the imposition of the penalty 'has the effect of a civil judgment, and may be enforced as if lawfully given in that court' because 'that court' could not have given any order 'lawfully' against the applicants.

63 The question may be tested by asking whether a South African court would recognise such an order given by a foreign court and the answer is in view of the SCA's judgment in the negative: e.g., *De Naamloze Vennootschap Alintex v Von Gerlach*, [1958] 1 All SA 283; 1958 (1) SA 13 (T) and cases cited earlier. A related question, which need not be answered, is whether recognition and enforcement would be compatible with the rule of private international law about the direct or indirect enforcement of penal and revenue orders of foreign countries: e.g., *Attorney-General of New Zealand v Ortiz* [1984] AC 1 at 20.

64 The order set out above accordingly followed.

MINORITY DECISION (per M <u>LE ROUX SC)</u>

[1] I have had the enormous benefit of reading the majority decision with which I respectfully disagree on the limited basis set out below. Despite the narrowness of this dissenting view, its consequence would have been to grant jurisdiction over the applicants in the reconsideration application.

[2] Given the provisions of section 233 of the Financial Sector Regulation Act 9 of 2017, this minority view does not continue to then address all of the issues in dispute on the merits of the reconsideration since that is unnecessary and futile in the circumstances of a clear majority decision to the contrary.

[3] The disagreement between the majority and minority views appears to be the answer to the question: is personal service in the Republic required to establish personal jurisdiction over a party where there was no attachment to found jurisdiction and where there are sufficient connecting factors between the reconsideration application and the Tribunal?

[4] I agree with the majority decision with respect to its analysis of the two-step test for jurisdiction (with regard to the need for both personal and conduct or subject matter jurisdiction to be established). I also agree with the finding of the majority view that there is jurisdiction over the conduct of the applicants which underpinned the finding of their contravention of section 81(1) and 81(2) of the Act.

[5] My disagreement is with respect to the requirements for personal jurisdiction. As I understand the reasoning of the majority decision, it turns on paragraph 59 of the decision in *Bid Industrial Holdings (Pty) Ltd v Strang* 2008(3) SA 355 (SCA). The majority decision rests upon what it says is the requirement laid down there that personal jurisdiction requires that *"the summons is served on the defendant while in South Africa"*.

[6] Paragraph 59 in *Strang* reads as follows in full:[5]

> *"For all these reasons the common-law rule that arrest is mandatory to found or confirm jurisdiction cannot pass the limitations test set by section 36(1). It is contrary to the spirit, purport and objects of the Bill of Rights. The common law must be, and is hereby, developed by abolition of the rule and the adoption in its stead, where attachment is not possible, of the practice*

[5] The final sentence was omitted in the majority decision

according to which a South African High Court will have jurisdiction <u>if the summons is served on the defendant while in South Africa</u> and there is sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by that court is appropriate and convenient. It goes without saying that the new practice could itself be subject to development with time.”

[7] The majority decision then finds *“the Authority’s argument omitted the underlined phrases and did not represent the decision of the SCA fairly or correctly. In other words, ‘sufficient connection’, which the SCA recognised was not much different from the conduct requirement, is insufficient to establish jurisdiction over a foreign peregrinus …”*

[8] The Authority’s argument, as recapitulated in the majority decision, relied on the further development of the rule in *Strang* that occurred by the Competition Appeal Court in the case of *The Competition Commission v Bank of America Merrill Lynch and Others* [2021] 1 CPLR 26 (CAC).

[9] The CAC decision is the only authority of which I am aware applying *Strang* in circumstances of the regulation of online conduct. Digital conduct occurs in a dynamic and evolving context in which regulators, and the Courts that guide them, develop the law to ensure the effectiveness of South Africa’s regulatory and legal framework.

[10] I therefore am of the view that the CAC’s decision took up the invitation in the final sentence of paragraph [59] of *Strang* to develop “the new practice” regarding personal jurisdiction over time and taking into account the online or digital conduct

that occurs in a modern and global economy such as ours. The CAC described its task as determining whether the law relating to personal jurisdiction can be rendered congruent with the specified objectives of the Competition Act (section 3(1)) and the overall purposes of that Act.

[11] Whether this was a further development of the common law or not does not, in my view, detract from the utility of considering the *Bank of America* decision in these proceedings. It is authority for an approach here that protects and promotes the objects of the Act in which this Tribunal sources its powers.

[12] Since the CAC and the SCA are courts at an equal level in our appellate hierarchy (both are subject only to the Constitutional Court's oversight), I am of the view that the requirement for service of process on a party while physically in South Africa set out in *Strang* has been updated further by the CAC's consideration and application of the common law on personal jurisdiction over online or digital conduct occurring outside of the Republic in *Bank of America*. While the Tribunal falls under the appellate hierarchy of the SCA, I see no reason not to have regard to the CAC's wrestling with the challenges posed to a strict application of *Strang* to digital circumstances.

[13] Further, while paragraph 59 of *Strang* sets out a requirement that *"the summons is served on the defendant while in South Africa"*, I find that this process requirement was satisfied here given a reading of section 230(3) read with Tribunal rules 6 and 12, together with the prescribed form A, as was done analogously in *Bank of America*. I take comfort in this approach since the issue of service by other means permitted in terms of the applicable statute and rules was not squarely considered by the SCA in *Strang,* but was squarely considered by the CAC in *Bank of America*.

[14] Section 230(3) provides that *"an application in terms of subsection (1) must be made in accordance with the Tribunal rules"*. The Tribunal rules and prescribed form require the particulars of the parties to a reconsideration application to be specified, including their telephone numbers, email addresses, residential addresses and business or registered address, and imposes the obligation that *"the application for reconsideration may be sent to the Tribunal secretary by registered post, fax, email or may be hand delivered to the abovementioned address. … It remains the responsibility of the applicant to ensure that the application for reconsideration is received by the Tribunal secretariat <u>and</u> all the other parties to the decision"* (emphasis in original).

[15] Read in combination, and in the absence of any other service provision in the Act, service of process on parties in reconsideration proceedings therefore may occur electronically. This development also was anticipated by the SCA in *Strang* in the final sentence of paragraph 59 of that decision, which stated that *"it goes without saying that the new practice could itself be subject to development with time."* A distinction must be drawn between the permitted method of service in terms of an Act (and the rules promulgated to give effect to its provisions) and the determination of personal jurisdiction utilising sufficient "connecting factors". The availability of electronic service does not alter or expand jurisdiction, it merely satisfies the requirement of service set out in *Strang* as it did in *Bank of America.*

[16] The availability of electronic service in place of personal service as contemplated under the Act and Tribunal rules is, in my view, consistent with being confronted with the challenges posed by our global economy and the manner in which economic intercourse is now frequently conducted globally by way of electronic or

digital media targeting domestic markets. A requirement of physical service on the defendant while in South Africa is, in my view, unduly restricted and onerous and runs the risk of defeating the objects of the Act (set out in section 7).

[17] The objects of the Act in section 7 include:

> *"(7)* ***Object of the Act***
>
> *(1) The object of this Act is to achieve a stable financial system that works in the interests of financial customers and that supports balanced and sustainable economic growth in the Republic, by establishing, in conjunction with the specific financial sector laws, a regulatory and supervisory framework that promotes: —*
>
> *(a) financial stability;*
>
> *(b) the safety and soundness of financial institutions;*
>
> *(c) the fair treatment and protection of financial customers;*
>
> *(d) the efficiency and integrity of the financial system;*
>
> *(e) the prevention of financial crime;*
>
> *(f) financial inclusion;*
>
> *(g) transformation of the financial sector; and*
>
> *(h) confidence in the financial system."*

[18] These objects or purposes of the Act, and specifically the obligations on the Authority and Tribunal to apply section 81, must take account of the digital or online and global nature of financial markets, and research and analyst reports such as that prepared here by the applicants regarding the Capitec shares listed in the South African regulated market.

[19] I am therefore of the view that the rule as set down in paragraph 59 of *Strang* as strictly applied by the majority to require personal service on the defendant while in South Africa ignores the commercial, practical and policy context in which these proceedings arise. I would therefore have found that personal service is not the only mechanism by which to satisfy the service requirement of the *Strang* test, in line with *Bank of America*.

[20] For completeness I record my view that the remainder of the requirements set down in *Strang* and *Bank of America* – the presence of sufficient "connecting factors" where attachment has not occurred – are satisfied here.

[21] I accept the majority decision's view that this Tribunal does not have the inherent jurisdiction of a Court that is empowered to develop the common law. However, it is my view that both personal and subject matter jurisdiction are established here by way of an application of the Act and Rules and the common law as set out in *Strang* and *Bank of America,* all of which does not make this decision an impermissible development of the common law by the Tribunal.