

FSCA Press Release

30 October 2020

FSCA fines Mr Markus Jooste and three others around R241 million for insider trading related breaches

The Financial Sector Conduct Authority (the Authority) has imposed an administrative penalty of R161 568 068 on Mr Markus Johannes Jooste (Mr Jooste) for breaches of section 78 (4) (a) and section 78 (5) of the Financial Markets Act, 19 of 2012 (the Financial Markets Act). The provisions prohibit, respectively, an insider from disclosing inside information and/or encouraging or discouraging another person to deal in securities which the inside information relates to.

The insider trading breaches were in respect of share transactions in Steinhoff International Holdings NV (Steinhoff) during November and December 2017.

The administrative penalty imposed on Mr Jooste is pursuant to an investigation by the Authority which found that on 30 November 2017, shortly before the much-publicised significant decrease in the market value of Steinhoff shares, Mr Jooste was privy to Steinhoff related inside information. Whilst privy to inside information, he disclosed some of the information in a “warning SMS” encouraging four individuals close to him to dispose of their Steinhoff shares prior to the publication of some of the inside information to the rest of the market. Three recipients acted on his disclosure and encouragement and sold Steinhoff shares.

Liability Resulting from Insider Trading Breaches

The legislated approach in calculating insider trading related penalties, as outlined in the Financial Markets Act, requires as a starting point a determination of the losses avoided, or profits made (“the ill-gotten gains/ benefit”) by those who traded whilst in possession of inside information.

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The applicable provisions permit the Authority to order them to pay back their ill-gotten benefit (in this case the losses they avoided). This is a legal principle called disgorgement. In addition, they may be required in each case to pay an amount for penalty purposes that does not exceed three times their benefit.

In cases of disclosure or encouragement (as in Mr Jooste's case as a "tipper"), the applicable provisions permit the Authority to order the tipper to be jointly and severally liable with those he tipped for their ill-gotten gains. Additionally, for penalty purposes, the tipper may also be liable to pay an amount not exceeding three times the gains made by those he tipped, an additional amount of up to R1 million, cost of the investigation and interest.

In arriving at the amount of the administrative penalty imposed on Mr Jooste, and in line with the provisions of section 82 (2) and 82 (3) of the Financial Markets read with section 167 of the Financial Sector Regulation Act, 9 of 2017, the Authority considered amongst other factors, the amounts of the losses avoided by the recipients of the warning SMS as a result of the offending transactions; Mr Jooste's level of cooperation during the investigation; the seriousness of the breaches; the need to deter such conduct; and his submissions regarding the merits of the case against him (including his submissions regarding an appropriate penalty).

The penalty of R161 568 068 imposed on Mr Jooste includes a multiple of three times the losses avoided due to the transactions executed by the recipients of the warning SMS, plus the amounts discussed further in this statement regarding his joint and several liability with two recipients of the SMS.

The penalty imposed on Mr Jooste also includes an amount of R1 million for disclosing inside information and encouraging Mr Jaap du Toit (Mr Du Toit) to sell his Steinhoff shares. Notwithstanding the disclosure and encouragement, Mr Du Toit never acted on the contents of the warning SMS.

Mr Jooste has also been ordered to pay interest on the penalty amount of R161 568 068. The interest is in respect of any unpaid portion of the administrative penalty until the penalty

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is fully paid. He has also been ordered to pay the Authority's costs incurred in connection with investigating the contraventions in this matter.

Other Recipients of the Warning SMS

One of the recipients of the warning SMS was Dr Gerhardus Diedericks Burger (Dr Burger), an acquaintance of Mr Jooste. The Authority found that he breached section 78 (2) of the Financial Markets Act when on 30 November 2017, shortly after receiving the warning SMS, he sold the entire Steinhoff holding held by two of his family trusts.

After due consideration of the relevant factors, including his submissions, the administrative penalty imposed on Dr Burger represents two times the loss avoided as a result of his offending transactions resulting in a penalty amount of R3 002 630.

The Authority has imposed a penalty of R18 328 on Mr Marthinus Swiegelaar (Mr Swiegelaar) for a breach of section 78 (1) of the Financial Markets Act. Mr Swiegelaar was Mr Jooste's chauffeur at the time of the contravention, and he also received the warning SMS on 30 November 2017.

The Authority found Mr Swiegelaar, comparatively speaking, to have provided the highest level of cooperation during the investigation and he sold significantly less shares than the rest of the investigated parties. The penalty imposed on him represents the loss he avoided when he sold his shares a few days after he received the warning SMS. Mr Swiegelaar is jointly and severally liable with Mr Jooste to pay the R18 328.

The Authority imposed a penalty of R115 867 122 on Ocsan Investment Enterprises (Pty) Limited (Ocsan), a company that was controlled by a long -time acquaintance of Mr Jooste - the late Mr Ockie Oosthuizen. Mr Oosthuizen instructed Ocsan's sale of Steinhoff shares on 30 November 2017 following receipt of the warning SMS and thus caused Ocsan to breach section 78 (1) of the Financial Markets Act.

Amongst other relevant considerations, the Authority found that Mr Oosthuizen deliberately misled investigators during questioning and thus failed to provide meaningful cooperation.

Out of R115 867 122 penalty, Ocsan is solely responsible for R77 244 748 and the remaining portion being R 38 622 374 is payable by Ocsan based on joint and several liability with Mr Jooste.

Effectively, Mr Jooste is solely liable for R122 927 366 out of the R161 568 068. The difference consisting of the R38 622 374 and R18 328 being Ocsan and Mr Swiegelaar's ill-gotten benefits that qualifies for disgorgement may be recovered once. The Authority may recover these two amounts from Mr Jooste or from Ocsan or Mr Swiegelaar for their respective liabilities.

The Authority is only entitled to order joint and several liability regarding the ill-gotten gains in respect of breaches of section 78 (1) where the trading was for one's own account and not for breaches of section 78 (2) where the trading as in Dr Burger's case was for another's account.

Mr Jooste is also liable together with Ocsan and Mr Swiegelaar, to pay interest on their respective portion of the penalties where he is jointly and severally liable with them as well as costs of suit including the Authority's investigation costs.

Detailed information of the Authority's decisions are available on the Authority's website: <https://www.fsca.co.za/Enforcement-Matters/Pages/Enforcement-Actions.aspx>

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