

In the matter between:

THE FINANCIAL SECTOR CONDUCT AUTHORITY

and

GERHARDUS DIEDERICKS BURGER

**ADMINISTRATIVE PENALTY ORDER IN TERMS OF SECTION 167 OF THE
FINANCIAL SECTOR REGULATION ACT NO 9 OF 2017**

INTRODUCTION

1. This is an administrative penalty order in terms of section 167 of the Financial Sector Regulation Act, 9 of 2017 (the FSR Act)¹ resulting from contraventions of the insider trading prohibitions contained in section 78 of the Financial Markets Act, Act 19 of 2012 by Dr Gerhardus Diedericks Burger. The alleged insider trading breaches were in respect of share transactions in Steinhoff International Holdings NV (Steinhoff) during November and December 2017.

2. At the time of the alleged contravention, section 78(2) provided as follows:

¹ **167. Administrative penalties**

- (1) *The responsible authority for a financial sector law may, by order served on a person, impose on the person an appropriate administrative penalty, that must be paid to the financial sector regulator, if the person: -*
 - (a) *has contravened a financial sector law;*"

2(a) *An insider who knows that he or she has inside information and who deals, directly or indirectly or through an agent for any other person in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence.*

3. Section 77 defined “insider” and “inside information” as follows:

'Inside Information' means specific or precise information, which has not been made public and which-

- (a) is obtained or learned as an insider; and*
- (b) if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market.*

'Insider' means a person who has inside information-

- (a) through-*
 - (i) being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or*
 - (ii) having access to such information by virtue of employment, office or profession;**or*
- (b) where such person knows that the direct or indirect source of the information was a person contemplated in paragraph (a)*

4. This order is made pursuant to an investigation by the Financial Sector Conduct Authority (the Authority) which found that, on 30 November 2017, shortly before a significant decrease in the market value of Steinhoff shares:

4.1. Mr Markus Jooste (the then Chief Executive Officer of Steinhoff), was privy to inside information;

4.2. Mr Jooste disclosed some of the information in a “warning SMS” sent to Dr Burger and encouraged Dr Burger to dispose of Steinhoff shares prior to the publication of some of the inside information to the rest of the market;

4.3. Acting upon this inside information, Dr Burger sold Steinhoff shares held by his children's trusts in contravention of section 78(2) of the Financial Markets Act.

5. Having considered the evidence at its disposal, including Dr Burger's submissions, the Authority finds that Dr Burger has contravened section 78(2) of the Financial Markets Act and imposes an administrative penalty accordingly.
6. We set out the reasons for this decision below.
7. In doing so, we do not necessarily address each and every contention raised by Dr Burger. Where we do not address a specific contention, this is not because the contention was not considered or taken into account by the Authority, but because it has been satisfactorily addressed in the Authority's own reasons for its decision.

THE AUTHORITY'S MANDATE

8. The Authority is established in terms of section 56 of the FSR Act. It is a financial sector regulator whose objectives are to enhance and support the efficiency and integrity of financial markets, protect financial customers and assist in maintaining financial stability in South Africa.
9. The Authority is entrusted with various powers to achieve its mandate. These include the powers to conduct investigations and impose administrative sanctions for breaches of financial sector laws.
10. The Financial Markets Act, a financial sector law administered by the Authority, is specifically designed with the objectives of ensuring that South African financial markets are fair, efficient and transparent, and promote the international and

domestic competitiveness of South African financial markets.² To this end, and amongst other provisions, it prohibits conduct defined as “market abuse”. Such conduct includes insider trading.³

11. Section 167 of the FSR Act, read with section 82 of the Financial Markets Act, prescribes the method by which administrative penalties for insider trading are to be calculated, and the factors that are to be taken into account.

THE INVESTIGATION

Information gathering

12. The Authority conducted an investigation into possible insider trading in terms of Part 4 of Chapter 9 of the FSR Act.
13. In particular, the Authority exercised its powers under section 136(1)(a) of the FSR Act, and obtained statements under oath from persons who were reasonably believed to have information relevant to the investigation. Those persons included, *inter alia*, Steinhoff’s officers and the recipients of the warning SMS, including Dr Burger and Mr Du Toit.
14. The investigators also exercised their section 136(1)(a) powers to obtain relevant documentary evidence from, *inter alia*, Steinhoff’s auditors, the Johannesburg Stock Exchange Limited (the JSE), Mobile Network Service Providers, Steinhoff’s officers, and authorised members of the JSE.

² Section 2 of the Financial Markets Act.

³ Market Abuse contraventions are set out in Chapter X of the Financial Markets Act.

15. Upon the completion of its investigation, the Authority considered the totality of the evidence and set out in a detailed investigative report its preliminary view on the merits of the alleged contraventions and proposed penalties.

Dr Burger's opportunity to make representations

16. The Authority is enjoined by section 91 of the FSR Act to apply the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to any administrative action it undertakes.

17. In accordance with these requirements, the Authority furnished Dr Burger with the investigation report and the supporting evidence, together with a letter explaining the Authority's preliminary view. In particular, Dr Burger was informed that the Authority held the preliminary view that:

17.1. he had contravened section 78(2) of the Financial Markets Act;

17.2. he was liable for an administrative penalty of R8 005 260 for the alleged contravention

18. Dr Burger was invited to make representations regarding the Authority's preliminary view. In response, Dr Burger furnished the Authority with an affidavit as well as written submissions by his counsel, which were carefully considered prior to issuing this order.

THE FACTS

19. At all relevant times, Steinhoff was an issuer of securities listed on the JSE, a licensed exchange as contemplated by section 7 of the Financial Markets Act. Steinhoff had its main listing on the Frankfurt Stock Exchange (FSE) in Germany, and a secondary listing on the JSE in Johannesburg, South Africa. The JSE and the FSE are regulated markets within the meaning of section 77 of the Financial Markets Act.
20. Dr Burger and Mr Jooste had a close relationship that spanned over thirty-one years. Their wives were friends, and Dr Burger's children were employed by Steinhoff-owned companies prior to the events of November 2017.
21. As at 30 November 2017, Mr Jooste had direct access to information regarding Steinhoff that had not been made public. In particular, by virtue of his position, he knew that:

 - 21.1. 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.
 - 21.2. Such a delay in reporting audited results was probable, if not inevitable.
 - 21.3. The group auditors 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.

- 21.4. Among the issues flagged by the auditors was the figures for Steinhoff's US-based entity, Mattress Firm,⁴ which included contributions from Steinhoff Europe AG⁵ reflected as income, and which falsely created the impression that Mattress Firm was making a profit while it was in fact suffering a loss.
- 21.5. Mattress Firm would continue to suffer month on month losses unless contributions were paid to it to make up for the lower than expected sales, increased expenses and impairments raised.
- 21.6. Despite indications otherwise, Advent International Corporation⁶ and/or Serta Simmons Bedding, LLC USA never agreed to reimburse Mattress Firm or Steinhoff up to USD250 million for the rebranding of Mattress Firm stores of which USD200 million was supposedly payable before the end of November 2017.
- 21.7. Similarly, there was no agreement as between GT Global Trademarks SA⁷, Advent International Corporation and Serta Simmons Bedding, LLC whereby Steinhoff Europe AG would receive a 90% profit from the sale of the right to use the trade brand portfolio of Steinhoff in the USA, Canada, Mexico and China for an amount of EUR640 million.

⁴ Mattress Firm Holding Corp, a company incorporated under the laws of the United States of America and registered under number EIN – 20-8185960, together with its subsidiaries, Mattress Firm Inc

⁵ Steinhoff Europe AG, a company incorporated under the laws of Austria and registered under number FN 38031d. A wholly owned subsidiary of Steinhoff N.V.

⁶ Advent International Private Equity Firm.

⁷ GT Global Trademarks SA (Switzerland); GT Branding together with its wholly owned subsidiary, GT Global Trademarks SA.

- 21.8. Mattress Firm would need to continue to raise substantial impairments for onerous lease agreements concluded with landlords in the United States – a fact which was not discovered in the due diligence when Steinhoff acquired Mattress Firm.**
- 21.9. The extent of the goodwill, intangible and store asset impairments to be raised in respect of Mattress Firm amounted to USD1.867 billion.**
- 21.10. Steinhoff's auditors suspected that some of Steinhoff's senior executives, including Mr Jooste, might have been involved in material accounting irregularities.**
- 21.11. The auditors' concerns were of such a serious nature that they had raised the possibility of an independent forensic investigation into the suspected irregularities.**
- 21.12. As at 30 November 2017, Steinhoff's auditors had informed Steinhoff's senior management that the former were concerned that, in the absence of credible audit evidence, they still could not rule out the possibility of fraud regarding Steinhoff's financial statements.**
- 21.13. Due to the seriousness of the auditors' concerns, Steinhoff's senior executives, including Mr Jooste, were informed that the auditors had reason to believe that Steinhoff would not be able to publish audited financial statements on 5 December 2017 contrary to market expectations, unless enough and credible audit evidence was provided.**

22. At all relevant times, Dr Burger was authorized to give share dealing instructions on the accounts of the Dieter and Lanne Burger trusts. As at 30 November 2017, both trusts held Steinhoff shares.

23. On 30 November 2017 at 10: 38 Mr Jooste sent the warning SMS to Mr Jaap Du Toit. The SMS, which was written in Afrikaans, stated:

*“Jy het altyd my opinie gevra ... Steinhoff gaan lank sukkel om al die bad nuus en Amerika te verwerk so daar is beter plekke om jou geld te belê, vat onmiddellik die huidige prys en delete hierdie sms en moenie aan enige iemand noem nie”
(sic)*

[Our translation: you always asked my opinion ... it will take Steinhoff a long time to work through all the bad news and America, so there are better places to invest your money, take the current price immediately and delete this SMS and don't mention it to anyone].

24. Mr Du Toit confirmed to the Authority's investigators that he received the warning SMS and that he replied to Mr Jooste and thanked him for the text message. He never acted on its contents by selling his Steinhoff shares.

25. The investigators performed an analysis of Mr Jooste's, Mr Du Toit's and Dr Burger's cellphone billing statements, which revealed the following:

25.1. An SMS was sent by Mr Jooste to Mr Du Toit on 30 November 2017. The SMS reflected as four messages on Mr Jooste's billing statement, which “pinged” four times within four milliseconds, at 10:38:41; 10:38:42; 10:38:43 and 10:38:44.

- 25.2. The reason that the SMS pinged four times was that it contained too many characters to be sent as one message. While Mr Jooste's billing statement showed that the message was sent in four parts (and thus billed as four messages), Mr du Toit's billing statement confirmed that it was received as a single SMS.
- 25.3. An SMS (pinging in four parts on his billing record) was also sent on 30 November 2017 from Mr Jooste's phone to Dr Burger's phone. It pinged at 11:04:24; 11:04:25, 11:04:26 and 11:04:27 on Mr Jooste's billing statement and was received by Dr Burger as a single SMS.
- 25.4. The pattern of the SMS sent to Dr Burger was thus the same as the pattern of the warning SMS sent 26 minutes earlier to Mr du Toit.
26. Dr Burger admitted to investigators that he received an SMS from Mr Jooste on 30 November 2017 instructing him to sell his Steinhoff shares immediately, not to tell anybody about the contents of the SMS and to delete the text message. However, he could not remember whether the SMS he received stated anything about "America" or that there were better places to invest his money.
27. On the same afternoon that Dr Burger received the SMS from Mr Jooste, he provided two trading instructions to his brokers. Dr Burger has confirmed that he did so acting on Mr Jooste's advice.
- 27.1. The first instruction to his stockbroker was to sell half of the Steinhoff shares owned by his family trusts.

27.2. Later that day, he “*decided to comply fully with Jooste’s advice*”⁸ and instructed his broker to sell the remainder of the Steinhoff shares on both accounts related to the trusts.

28. Dr Burger’s instructions resulted in the sale of 30 090 Steinhoff shares.

ISSUES IN DISPUTE

29. In sum, Dr Burger placed the following issues in dispute:

29.1. He has no recollection of receiving the warning SMS. The SMS that Dr Burger allegedly received from Mr Jooste referred to Mr Jooste’s advice that he should sell the shares, an apology, a request that Dr Burger look after two of Mr Jooste’s children and a request that Dr Burger delete the SMS.⁹ He does not remember it saying that “*Steinhoff gaan lank sukkel om al die bad nuus en Amerika te verwerk*”.

29.2. Dr Burger contended that the SMS he received did not disclose any information but rather disclosed Mr Jooste’s opinion. He argued that its contents necessitated that he deduced its meaning.¹⁰

29.3. Dr Burger believed he was disadvantaged during the investigation because he was not permitted to cross examine the deponents from the Mobile Network Providers and the Authority’s data analysts so that he could

⁸ Paragraph 32, page 12 of Dr Burger’s affidavit.

⁹ Paragraph 49, page 33 of Dr Burger’s submissions.

¹⁰ Paragraphs 10 and 11, page 6 of Dr Burger’s submissions.

challenge the veracity of their findings regarding the similarities in the SMSs received by him and Mr Du Toit.¹¹

29.4. It was further submitted on behalf of Dr Burger that even if it was found that the SMS he received contained the words "*Steinhoff gaan lank sukkel om al die bad nuus en Amerika te verwerk...*", such words did not constitute inside information. He described "*Bad nuus en Amerika*" as innocuous and as information that was already publicly available¹².

29.5. Dr Burger submitted further that the disclosures in the SMS were unlikely to cause a material reaction to the Steinhoff share price. The share price reaction, according to the submissions, was due to different reasons¹³.

29.6. Dr Burger suggested that Mr Jooste was clearly in a different position to him in that Mr Jooste as an insider knew much more than the opinion he disclosed in the SMS. Dr Burger sold the relevant Steinhoff shares merely because he was encouraged to do so by Mr Jooste whom he trusted unreservedly; not because he possessed any of the inside information, and certainly not to the level that was known to Mr Jooste.¹⁴

¹¹ Paragraph 56, page 35 of Dr Burger's submissions.

¹² Paragraph 18, page 10 of Dr Burger's submissions.

¹³ Paragraph 21, page 11 of Dr Burger's submissions.

¹⁴ Paragraph 11, page 7 of Dr Burger's submissions.

29.7. Dr Burger did not believe the prohibition against insider trading was directed at prohibiting receipt of an opinion and, as such, he did not believe he contravened section 78(2) of the Financial Markets Act.¹⁶

THE AUTHORITY'S FINDINGS

Dr Burger received the warning SMS

30. The Authority has concluded, on a preponderance of probability, that Dr Burger received the warning SMS. The Authority has reached this conclusion on the basis of the following facts:

30.1. Mr Du Toit has confirmed on oath that he received the warning SMS and has provided the Authority with a screenshot of its contents.

30.2. Only 26 minutes after sending the warning SMS to Mr Du Toit, Mr Jooste sent an SMS to Dr Burger.

30.3. The analysis of Mr Jooste's, Mr Du Toit's and Dr Burger's billing statements reveals that the SMS sent to Dr Burger followed the same four-ping pattern (and was thus of a similar number of characters) as the SMS sent to Mr Du Toit.

30.4. Mr Marthinus Jaco Swiegelaar (Mr Jooste's driver on 30 November 2017) has confirmed on oath that he also received the warning SMS from Mr

¹⁶ Paragraph 10, page 6 of Dr Burger's submissions.

Jooste on the same morning. The SMS from Mr Jooste to Mr Swiegelaar also followed the same four-ping pattern.

30.5. Dr Burger is unable to deny having received the warning SMS. He simply does not recall the SMS he received referring to “bad news” or “America”.

31. In the circumstances, the Authority’s view is that the probabilities support a finding that Dr Burger received the same warning SMS that was sent to Mr Du Toit and Mr Swiegelaar.

The investigation was conducted fairly

32. Dr Burger claimed to have been placed at a disadvantage due to the fact that his legal representatives did not have the opportunity to cross-examine experts in relation to the warning SMS.

33. The Authority has concluded that the investigation was conducted fairly, and that Dr Burger was not unduly prejudiced, having regard to:

33.1. the administrative and inquisitorial nature of the Authority’s processes, which should not be over-judicialised;¹⁶

33.2. the fact that the investigators were engaged in the investigative rather than adjudicative stage of the process;¹⁷

¹⁶ *Gerson v Mondi Pension Fund and Others* 2013 (6) SA 162 (GJ) para 51 citing *Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another* 1980 (3) SA 476 (T) at 486D-E.

¹⁷ *Chairman, Board on Tariffs and Trade and Others v Brenco Inc and Others* 2001 (4) SA 511 (SCA). See also *Meyer v Law Society, Transvaal* 1978 (2) SA 209 (T), *Park-Ross v Director for Serious Economic Offences* 1998 (1) SA 108 (C) and *Van der Merwe and Others v Slabbert NO and Others* 1998 (3) SA 613 (N); *Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd* 2003 (3) SA 64 (SCA)

- 33.3. the fact that Dr Burger was provided, prior to any decision being taken, with the investigation report and supporting documentation, and a full opportunity to make representations; and
- 33.4. the fact that the FSR Act does not provide for questioning or cross examination by any person other than the appointed investigators.

Dr Burger was an insider when he gave instructions to sell the Steinhoff shares

34. The Financial Markets Act defines an insider as follows:

a person who has inside information-

- (a) *through-*
- (i) being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or*
 - (ii) having access to such information by virtue of employment, office or profession;*
- or*
- (b) *where such person knows that the direct or indirect source of the information was a person contemplated in paragraph (a)*

35. It defines inside information as:

“specific or precise information, which has not been made public and which –

(a) is obtained or learned as an insider; and

(b) if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market.”

36. For the reasons set out below, the Authority finds that, upon receipt of the warning SMS, Dr Burger:

- 36.1. possessed inside information, in that the information was specific or precise, had not been made public and was price sensitive;

- 36.2. obtained or learned this information as an insider in that he knew that the source of the information, Mr Jooste, had obtained the information in his capacity as an insider at Steinhoff; and
- 36.3. was accordingly an insider for purposes of section 78(2) of the Financial Markets Act.

The information in the warning SMS was specific

37. Information is specific or precise if it is expressed in clear and unambiguous terms. It must not lead its recipient to different interpretations or conclusions as to its meaning. However, it does not have to refer to a concluded set of circumstances; it is sufficient if it enables a recipient to reasonably expect the likelihood or probability of an occurrence of an event or set of circumstances.¹⁸
38. When questioned by the investigators, Dr Burger explained under oath, his understanding of the SMS he received as follows:

*"... het ek geweet, as gevolg van daardie boodskap dat hier kom groot gemors met Markus Jooste of met Steinhoff"*¹⁹

(translated – I knew that, as a result of this message, big trouble was coming with Markus Jooste or with Steinhoff).

39. The warning SMS conveyed, on its face, that:
- 39.1. Steinhoff was experiencing serious problems;

¹⁸ Zietsman and Another v Directorate of Market Abuse and Another 2016 (1) SA 218 (GP) para 97 paragraph 54. (referring with approval of the Australian case of Boughey v R [1986] HCA 29 65 ALR 609.

¹⁹ See Annexure GB3 page 108 from line 7 and on.

- 39.2. the problems were so irreversible that the recipient of the SMS should dispose of his shares at the current price to avoid imminent loss;
- 39.3. Steinhoff's problems involved its operations in the United States.
40. Dr Burger admitted that he understood the warning SMS to convey that *"big trouble was coming with Markus Jooste or with Steinhoff"*. In other words, Dr Burger received an SMS, from the CEO of Steinhoff, saying that Steinhoff's irreversible problems, including in respect of its US-based operations, meant that he should sell his shares.
41. The information was clear and unambiguous. It did not require Dr Burger to deduce its meaning. Nor did it lead Dr Burger to a different interpretation or conclusion as to its meaning.²⁰
42. In the premises, the Authority finds that Dr Burger received information on 30 November 2017 that was specific.

The information in the warning SMS was not public

43. News agencies had published details regarding the suspicions of fraud and accounting irregularities in relation to Steinhoff long before 30 November 2017. Similarly, troubles regarding Mattress firm were also known by the general public prior to 30 November 2017.

²⁰ Zietsman paragraph 54. (referring with approval of the Australian case of *Bouhey v R* [1986] HCA 29 65 ALR 609.

44. However, Steinhoff had always publicly defended its accounting practices. Based on published information, the public would reasonably have believed either that everything was in fact under control and that the allegations were without merit, or, at a minimum, that Steinhoff itself believed the allegations to be without merit and would defend itself against them vigorously.
45. Similarly, although details of some of the challenges regarding the acquisition of Mattress Firm were publicly known, nothing in the publicly available information – and especially Steinhoff's SENS announcements – suggested that these difficulties were irreversible as far as Steinhoff was concerned.
46. Nothing in the public domain suggested that the problems at Steinhoff were so dire and irreversible that investors should sell their Steinhoff shares immediately. Certainly, the public did not know that this was the view held by senior people within Steinhoff.
47. Based on his admitted knowledge, therefore, Dr Burger knew more than the general public.
48. In short, the warning SMS painted a far more precarious picture of Steinhoff than that of which the public had knowledge.
49. Accordingly, the Authority finds that on 30 November 2017 Dr Burger was in possession of information regarding Steinhoff that had not been made public.

The information in the warning SMS was price-sensitive

50. Information constitutes inside information only when it has the potential to cause a material movement in the share price when published (referred to as “price sensitivity”).
51. While actual movements in share price may be used to test whether information is price sensitive,²¹ *“it is not necessary to examine whether its disclosure had a significant effect on the price of financial instruments. It is the capacity of such information to have a significant effect on prices that must be assessed in the light of the content of the information at issue and the context in which it arises.”*²²
52. Price sensitivity is thus an objective inquiry. Whether information is price sensitive is determined with reference to the “*reasonable investor*” and whether he or she would regard the information in question as relevant to a decision to deal in such securities.²³ That some investors in possession of the information chose not to sell does not diminish the fact that reasonable investors would regard the information as relevant to a decision to deal in those securities.
53. The Authority finds that the warning SMS plainly constituted price sensitive information. In short:
- 53.1. The CEO of Steinhoff indicated that “big trouble” was coming to Steinhoff and that Dr Burger should sell immediately.

²¹ Zietsman *supra* at paragraphs 87 and 88.

²² Zietsman *supra* at paragraph 87.

²³ Zietsman, at paragraph 98.3.

- 53.2. A reasonable investor would plainly have considered this information as relevant to any decision to deal in Steinhoff shares. Indeed, on Dr Burger's version, he took the information into account on 30 November 2017 when he instructed the sale of the Steinhoff shares. He admitted that he sold as a result of the SMS he received.
- 53.3. Less than a week after Mr Jooste sent the SMS to Dr Burger, and upon publication of the various difficulties facing Steinhoff, on 4 and 6 December 2017 the Steinhoff share price reacted significantly.²⁴
54. The fact that Mr Du Toit did not sell his shares does not suggest that the warning SMS did not contain price sensitive information. Indeed, as a result of his decision not to sell, Mr Du Toit made significant losses, suggesting that selling may have been the more reasonable investment decision.
55. In the circumstances, the Authority finds that the information disclosed to Dr Burger on 30 November 2017 consisted of price sensitive information.

²⁴ On 4 December 2017 at 8:25 Steinhoff published a SENS announcement. It advised the market that the Steinhoff Supervisory Board confirmed that it would release the Steinhoff 2017 consolidated financial statements *albeit* in unaudited form, on schedule on 6 December 2017. On 4 December 2017 the Steinhoff share price decreased by almost 10%. The material movement in the share price when it was disclosed that Steinhoff would publish unaudited results is further proof that what was known to Mr Jooste as an insider constituted price sensitive information. On 6 December 2017 at 7:05 Steinhoff informed the market that new information came to light, regarding accounting irregularities, which required further investigation. It confirmed in the announcement that the Steinhoff Supervisory Board, in consultation with the statutory auditors instituted an independent investigation in this regard. The announcement further stated that Mr Jooste, CEO of Steinhoff, resigned with immediate effect which the Board had accepted; and that Steinhoff would publish the audited 2017 consolidated financial statements once it was able to do so. In addition, Steinhoff would determine whether any prior years' financial statements needed to be restated. The Steinhoff share price decreased by 61.42% during trading on 6 December 2017 following the announcement. This movement in the share price was very material.

Summation

56. The Authority is satisfied, on the available evidence, that:

56.1. Mr Jooste (an insider) disclosed specific or precise, unpublished price sensitive information to Dr Burger in the warning SMS;

56.2. Dr Burger knew that the direct source of the information in the warning SMS was Mr Jooste, the CEO of Steinhoff, and that Mr Jooste was an insider at Steinhoff;

56.3. Upon receipt of the warning SMS, Dr Burger was therefore an insider for purposes of section 78(2).

Dr Burger knew that he was in possession of inside information

57. Section 78(2)(a) of the Financial Markets Act provides that:

"An insider who knows that he or she has inside information and who deals, directly or indirectly or through an agent for any other person, in the securities listed on a regulated market or in derivative instruments related to such securities, to which the inside information relates or which are likely to be affected by it, commits an offence (our emphasis).

58. The question of Dr Burger's subjective knowledge requires an assessment of whether there was, on his part, an appreciation that the contents of the SMS constituted unpublished, specific or precise, price sensitive information.

59. Contrary to Dr Burger's submissions, this assessment does not require that he was aware of the specific sections in the Financial Markets Act dealing with insider trading.

What is required is that he appreciated the non-public, price sensitive nature of the information in his possession.

60. On his own version, the SMS that Dr Burger received instructed him not to disclose its contents and to delete the SMS. This clearly indicated to Dr Burger, at a minimum, that the information contained in the SMS was not public. It also indicated that in Mr Jooste's view, the SMS was unlawful (or at least incriminating).
61. Moreover, Dr Burger knew that the information was specific. He was not confused as to the meaning of the information. On his own version, he knew as a result of the SMS, that big trouble was coming to Mr Jooste or Steinhoff. He knew that he had to sell the relevant Steinhoff shares.
62. Lastly, the SMS advised Dr Burger to sell the relevant Steinhoff shares immediately. The contents of the SMS thus indicated that the CEO of Steinhoff believed continued shareholding in Steinhoff spelled financial trouble. The SMS was, therefore, price sensitive on its own terms. Given that Dr Burger acted upon the SMS and sold his shares, it cannot be suggested that he did not appreciate the price sensitive nature of the information contained in the SMS.
63. For these reasons, the Authority finds that Dr Burger knew that he was in possession of inside information. In any event, even if Dr Burger genuinely believed that the information in the warning SMS was not inside information, such a belief was not based on reasonable grounds.²⁵

²⁵ In *Zietsman* it was stated that: "A genuine and bona fide belief that known information was not inside information, will not found a defence where such belief is not based on reasonable grounds".

DECISION ON MERITS

64. The Authority accordingly finds that on 30 November 2017, Dr Burger became an insider as a result of the information that was conveyed to him by Mr Jooste, the CEO of Steinhoff. He knew that he was in possession of the inside information detailed in the warning SMS, and he dealt in Steinhoff shares. The Authority finds that Dr Burger's conduct constitutes a contravention of section 78(2)(a) of the Financial Markets Act.

ADMINISTRATIVE PENALTY

Relevant principles

65. In terms of section 82(1) of the Financial Markets Act, and subject to subsection 82(3), any person who contravenes section 78(1) or (2) of the Financial Markets 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, plus three times the amount referred to in paragraph (a);

(c) interest; and

(d) cost of suit, including investigation costs, on such scale as determined by the Authority.

66. In addition, the provisions of section 167(2) of the FSR Act stipulate the necessary and permissible factors to be taken into account in the imposition of an administrative penalty, as follows:

“(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.”

67. The Authority has previously communicated to Dr Burger that it intended to impose an administrative penalty of R8 005 260 on him for the contraventions of section 78(2) of the Financial Markets Act, subject to receipt of his submissions. The penalty was calculated in terms of section 82(1) of the Financial Markets Act.

68. The calculation was based on the loss avoided by the accounts related to the trusts and was calculated as follows:

	Loss Avoided	Plus 3x	R1 Million	TOTAL
	R	R	R	R
Die Dieter Burger Trust	750 878	2 252 634	1 000 000	4 003 512
Die Lanne Burger Trust	750 437	2 251 311	1 000 000	4 001 748
Total:	1 501 315	4 503 945	2 000 000	8 005 260

69. In reaching the amounts of the loss avoided, the Authority relied on the closing price of the Steinhoff share on 8 December 2017. The Authority selected this date after its analysis showed that, by that date, the market had absorbed most of the inside information.²⁶

Dr Burger's submissions on penalty

70. Dr Burger made submissions in mitigation of the administrative sanction to be imposed, including, *inter alia*:

70.1. Dr Burger is a 75-year-old semi-retired general medical practitioner. His wife, whom he is married to for 49 years, is dependent on him. He submits that his personal circumstances and unblemished career ought to weigh in his favour.

²⁶ This is the approach approved in Zietsman at paragraph 104 where it was stated that "*The approach is to treat the relevant profit (in this case loss avoided by the recipients of the SMS) as that gained by the insider dealer when the information was made public and the market had had a reasonable opportunity to digest the information.*"

70.2. Dr Burger understood Mr Jooste's SMS as an encouragement to disinvest in Steinhoff shares. He never intended to contravene the Financial Markets Act.

70.3. Nevertheless, he expressed remorse for his actions and accepted responsibility for the decision to sell the shares.

70.4. He submits that his "moral guilt" is not commensurate with the penalty that is sought to be imposed.

The appropriate penalty

71. The Authority has carefully considered Dr Burger's submissions, in the light of the factors in section 167(2) of the FSR Act and 82 of the Financial Markets Act.

72. Regarding the seriousness of the contravention, and its impact on the integrity of the financial markets, it has been stated in Zietsman:

"Owing to its non-public and precise nature and its ability to influence the prices of financial instruments significantly, inside information grants the insider in possession of such information an advantage in relation to all the other actors on the market who are unaware of it. It enables that insider, when he acts in accordance with that information in entering into a transaction on the market, to expect to derive an economic advantage from it without exposing himself to the same risks as the other investors on the market. The essential characteristic of insider dealing thus consists in an unfair advantage being obtained from information to the detriment of third parties who are unaware of it and consequently, the undermining of the integrity of financial markets and investor confidence."²⁷

²⁷ Zietsman, paragraph 83.

73. There is clearly a need to deter such conduct, and the Authority has been guided by this objective in the imposition of the appropriate penalty.
74. The Authority also believes that the evidence shows Dr Burger to have acted deliberately. He clearly intended to avoid a loss that was likely, if not certain to eventuate upon publication of the difficulties that Steinhoff was experiencing.
75. At the same time, however, the Authority is satisfied that Dr Burger has been cooperative, and that he has not previously breached financial sector laws.
76. In the circumstances, the Authority has reduced the penalty provisionally contemplated, and imposes on Dr Burger an administrative sanction calculated as follows:
- (a) in terms of section 82(1)(a), the equivalent of the loss avoided by the trades in respect of both accounts in the amount of **R1 501 315**; plus
 - (b) in terms of section 82(1)(b), a penalty of one times the total loss avoided of **R1 501 315**;
 - (c) interest on the total amount of **R3 002 630** *a tempore morae* to date of payment; and
 - (d) costs of suit, including costs of the investigation on the tariff as per the Auditor General Fees relevant for the period of the investigation and all disbursements incurred.
77. The penalties are payable to the Authority within 30 days from the date of this Order.

DR BURGER SHOULD FURTHER TAKE NOTE THAT:

78. If he fails to pay the administrative penalty within the period prescribed by this order, in terms of section 169 of the Act, interest, at the rate prescribed in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), will be payable in respect of any unpaid portion until it is fully paid.

79. Failure to comply with this order and notice will result in the provisions of section 170 of the FSR Act being invoked, which reads as follows:

"(1) The responsible authority that makes an administrative penalty order may file with the registrar of a competent court a certified copy of the order if-

(a) the amount payable in terms of the order has not been paid as required by the order; and

(b) either-

(i) no application for reconsideration of the order in terms of a financial sector law, or for judicial review in terms of the Promotion of Administrative Justice Act of the Tribunal's decision, has been lodged by the end of the period for making such applications; or

(ii) if such an application has been made, proceedings on the application have been finally disposed of.

(2) The order, on being filed, has the effect of a civil judgment, and may be enforced as if lawfully given in that court."

80. In terms of section 230 of the FSR Act, a person aggrieved by this decision has a right to apply for the reconsideration of the decision by the Financial Services Tribunal (the Tribunal). An application for reconsideration must be made –

(a) in accordance with the Tribunal rules; and

(b) within the time periods set out in section 230(2) of the FSR Act.

You may contact the secretary of the Tribunal at (012) 428 8012 or per electronic mail at

Applications@fstribunal@fsca.co.za.

Signed at Pretoria on the 29th day of October 2020.



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MR BRANDON TOPHAM
FOR THE AUTHORITY

