In the matter between:

THE FINANCIAL SECTOR CONDUCT AUTHORITY

and

OCSAN INVESTMENT ENTERPRISE (PTY) LIMITED

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 Ocsan Investment Enterprise (Pty) Limited (Ocsan). 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(1)(a) provided as follows:

> *1(a) An insider who knows that he or she has inside information and who deals directly or indirectly or through an agent for his or her own account 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.*

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[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;"

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 Mr Oosthuizen Snr (representing the directors of Ocsan) and encouraged Mr Oosthuizen Snr 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, Mr Oosthuizen Snr sold Steinhoff shares in contravention of section 78(1) of the Financial Markets Act. The shares were held in Ocsan's trading account. Ocsan was a company associated with a trust benefitting Mr Oosthuizen Snr, his wife and his three children. The Trust held the family's investments.

5. Having considered the evidence at its disposal, including Ocsan's submissions, the Authority finds that Ocsan has contravened section 78(1) 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 Ocsan. 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 Mr Oosthuizen Snr 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.

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[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.

Ocsan'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 Ocsan with the investigation report and the supporting evidence, together with a letter explaining the Authority's preliminary view. In particular, Ocsan was informed that the Authority held the preliminary view that:

    17.1. it had contravened section 78(1)(a) of the Financial Markets Act;

    17.2. it was liable for an administrative penalty of **R155 489 496** for the alleged contravention.

18. Ocsan was invited to make representations regarding the Authority's preliminary view. In response, Ocsan's attorneys, ENSafrica, furnished the Authority with submissions, 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. 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:

20.1. 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.

20.2. Such a delay in reporting audited results was probable, if not inevitable.

20.3. 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.

20.4. Among the issues flagged by the auditors was the figures for Steinhoff's US-based entity, Mattress Firm,[4] which included contributions from Steinhoff

[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

Europe AG[5] reflected as income, and which falsely created the impression that Mattress Firm was making a profit while it was in fact suffering a loss.

20.5. 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.

20.6. Despite indications otherwise, Advent International Corporation[6] 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.

20.7. Similarly, there was no agreement as between GT Global Trademarks SA[7], 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.

20.8. Mattress Firm would need to continue to raise substantial impairments for onerous lease agreements concluded with landlords in the United States –

[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.

a fact which was not discovered in the due diligence when Steinhoff acquired Mattress Firm.

20.9. The extent of the goodwill, intangible and store asset impairments to be raised in respect of Mattress Firm amounted to USD1.867 billion.

20.10. Steinhoff's auditors suspected that some of Steinhoff's senior executives, including Mr Jooste, might have been involved in material accounting irregularities.

20.11. The auditors' concerns were of such a serious nature that they had raised the possibility of an independent forensic investigation into the suspected irregularities.

20.12. 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.

20.13. 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.

21. 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 onmiddelik 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].

22. Mr Du Toit confirmed to 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.

23. The investigators performed an analysis of Mr Jooste's, Mr Du Toit's and Mr Oosthuizen Snr's cellphone billing statements, which revealed the following:

    23.1. 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.

    23.2. 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.

23.3. An SMS (pinging in four parts on his billing record) was also sent on 30 November 2017 from Mr Jooste's phone to Mr Oosthuizen Snr's phone. It pinged at 11:56:21, 11:56:22, 11:56:23 and 11:56:24 on Mr Jooste's billing statement and was received by Mr Oosthuizen as a single SMS.

23.4. The pattern of the SMS sent to Mr Oosthuizen Snr was thus the same as the pattern of the warning SMS sent earlier to Mr du Toit.

23.5. Further communication on 30 November 2017 took place between Mr Jooste, and Mr Greenan, Mr Oosthuizen Snr's broker at the time. Their communication is summarized as follows:

	Who initiated the cell phone correspondence	Time of correspondence	Type of correspondence	Reason (known so far)
1	Mr Jooste sent to Mr Oosthuizen Snr	11:56:21 to 11:56:24	4x SMS's pinging, received a one message	Suspected to be a warning SMS
2	Mr Oosthuizen Snr to Mr Jooste	12:06:32	SMS	Unknown
3	Mr Oosthuizen Snr to Mr Jooste	12:10:43	SMS	Unknown
4	Mr Oosthuizen Snr to Mr Jooste	12:12:53	SMS	Unknown
5	Mr Oosthuizen Snr to Mr Jooste	12:13:19	SMS	Unknown
6	Mr Oosthuizen Snr to Mr Jooste	12:14:08	SMS	Unknown
7	Mr Oosthuizen Snr to Mr Greenan	12:17:26	Outgoing cell phone call	Instruct to sell all Steinhoff shares
8	Mr Jooste sent to Mr Oosthuizen Snr	12:21:36	SMS	Unknown

9	Mr Oosthuizen Snr to Mr Greenan	12:32:17	Outgoing cell phone call	Re selling of the Steinhoff shares
10	Mr Oosthuizen Snr to Mr Jooste	12:59:54	SMS	Unknown
11	Mr Jooste sent to Mr Oosthuizen Snr	12:33:22	SMS	Unknown

24. As summarised in the Table above, at 12:17, (20 minutes after Mr Oosthuizen Snr received the SMS from Mr Jooste), he instructed his stockbroker to sell all Steinhoff shares held by Ocsan.

25. At all relevant times, Mr Oosthuizen Snr was Mr Jooste's friend. Mr Oosthuizen Snr was duly authorized as Ocsan's representative and possessed a resolution authorising him to act on Ocsan's behalf. The resolution appointed Mr Oosthuizen Snr as the sole representative of the company for purposes of Ocsan's trading account held at PSG Wealth (Pty) Limited.

26. When Mr Oosthuizen Snr instructed the sale of the Steinhoff shares, he was thus duly authorised by Ocsan and acted on its behalf.

THE ISSUES IN DISPUTE

27. In sum, Ocsan placed the following issues in dispute:

    27.1. Mr Oosthuizen Snr did not receive the warning SMS, and it is factually and technically untenable to infer that the SMS which Mr Jooste apparently sent between 11:56:21 and 11:56:24 to Mr Oosthuizen Snr is the same or similar to the Warning SMS received by Mr du Toit.

27.2. Even if he had received it, Mr Oosthuizen Snr sold the shares for independent reasons. He had considered selling his shares long before 30 November 2017 and had, since at least March 2017, been in contact with his stockbroker regarding whether it was advisable to sell the Steinhoff shares.

27.3. In any event, the warning SMS did not contain inside information as defined – it does not meet the requirements of being specific or precise; not having been made public; price-sensitive; or learned through the person's position as a primary or secondary insider.

27.4. ENSafrica also places on record that Mr Oosthuizen Snr was treated in a procedurally unfair manner. While it does not expressly suggest that this vitiates the investigation or should bear on the Authority's ultimate decision, it reserves its rights in relation to the prejudice it says Ocsan has suffered. It says, in sum, that the investigators acted unfairly by inter alia:

27.4.1. placating Mr Oosthuizen Snr by telling him that he would be able to answer all their questions;

27.4.2. withholding crucial information;

27.4.3. failing to respond to Mr Oosthuizen Snr's request for further particularity;

27.4.4. failing to afford Mr Oosthuizen Snr a proper opportunity to prepare;

27.4.5. pursuing an 'entrapment'-style strategy;

27.4.6. misrepresenting to Mr Oosthuizen Snr that they would obtain a copy of the warning SMS.

THE AUTHORITY'S FINDINGS

The investigators acted fairly

28. The Authority has concluded that the investigation was conducted fairly, and that Mr Oosthuizen Snr and Ocsan were not unduly prejudiced, having regard to:

28.1. the administrative and inquisitorial nature of the Authority's processes, which should not be over-judicialised;[8]

28.2. the fact that the investigators were engaged in the investigative rather than the adjudicative stage of the process;[9] and

28.3. the fact that Ocsan was provided, prior to any decision being taken, with the investigation report and supporting documentation, and a full opportunity to make representations.

29. Mr Oosthuizen Snr's first interview was held on 15 August 2018 at his place of residence in Cape Town to accommodate his ill health. In order to assist his preparations, he received a Notice that outlined the issues that were to be covered

[8] 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.
[9] Chairman, Board on Tariffs and Trade and Others v Brenco Inc and Others 2001 (4) SA 511 (SCA). See also Meyer v Law Society, Transvaal1978 (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)

during the questioning. The Notice also informed him that he was permitted to appoint a legal practitioner of his choice to assist him during questioning. He elected to proceed without the assistance of a legal practitioner.

30. The investigators were careful to explain to Mr Oosthuizen Snr all of his rights, including to legal representation and against self-incrimination, prior to commencing the first interview. They explained their processes openly and frankly. He was informed that he should indicate to the investigators at any time if he required an adjournment so that he may consult a legal practitioner. He never made such a request.

31. There was no unfairness in the investigators indicating to Mr Oosthuizen Snr that they would not need to interview him again. The investigators were at liberty to decide to interview him again, and they owed him no duty of explanation for doing so. In any event, they explained in the second interview that it was necessitated by their further investigations.

32. The purpose of the second interview was to question Mr Oosthuizen Snr regarding new information which came to light after the first interview. He was again informed of his rights and given an opportunity to respond to the new information prior to the compilation of the investigation report.

33. There is no unfairness in the investigators not informing Mr Oosthuizen Snr in advance of the precise questions that they would ask him, and their conduct did not amount to "entrapment". Nor were the investigators under a duty to inform Mr Oosthuizen Snr in advance of interviewing him that they had a screenshot of the

warning SMS, copies of billing statements, or that they would ask him about these issues. The investigators owe no general duty, during the preliminary investigative phase, to provide the subject of an investigation with any and all documentation.[10] The investigators also owed Mr Oosthuizen Snr no duty to precognise him of the questions they would ask, and they did not act oppressively or vexatiously in this regard.

34. In any event, to enable him to prepare and refresh his memory for his second round of questioning, the investigators provided him with a copy of his first interview's transcript. He was permitted to revisit certain aspects of his first interview to correct or provide clarity regarding his previous statement which the investigators considered in their findings.

35. In the premises, the Authority concludes that the investigators conducted the investigation in a manner that was reasonable and fair.

Mr OosthuizenSnr received the warning SMS

36. Ocsan denies that Mr Oosthuizen Snr received the warning SMS.

37. The Authority has concluded, however, on a preponderance of probability, that Mr Oosthuizen Snr received the warning SMS. The Authority has reached this conclusion on the basis of the following facts:

[10] Park-Ross v Director for Serious Economic Offences 1998 (1) SA 108 (C); Leech and Others v Farber NO and Others 2000 (2) SA 444 (W) at 451E-452H

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

37.2. Just over an hour after sending the warning SMS to Mr Du Toit, Mr Jooste sent an SMS to Mr Oosthuizen Snr.

37.3. 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 Jooste on the same morning. The SMS from Mr Jooste to Mr Swiegelaar also followed the same four-ping pattern and was sent about 30 seconds after the SMS from Mr Jooste to Mr Oosthuizen Snr.

37.4. The analysis of Mr Oosthuizen Snr's billing statements reveals that he:

37.4.1. received an SMS from Mr Jooste at 11h56 on 30 November 2017 which had the same "four ping" structure as the warning SMS;

37.4.2. replied to Mr Jooste with five individually typed SMS's between 12h06 and 12h14;

37.4.3. instructed his broker at 12h17 (that is, just over 20 minutes after Mr Jooste's SMS to him, and immediately after writing to Mr Jooste) to sell all the shares on the three accounts;

37.4.4. received another SMS from Mr Jooste at 12h21 and replied at 12h29;

37.4.5. called his broker again at 12h32;

37.4.6. received another SMS from Mr Jooste at 12h33.

37.5. Mr Oosthuizen Snr's denial that he received the warning SMS lacks reliability an credibility.

37.5.1. In his first interview, Mr Oosthuizen Snr denied talking to anyone at or associated with Steinhoff when he gave his broker instructions to sell the shares.

37.5.2. He only admitted to having made contact with Mr Jooste once he was presented by investigators with evidence that he had communicated with Mr Jooste shortly before selling his shares. He then said that he had only communicated with Mr Jooste about his ill-health and rugby.

37.5.3. Ocsan seeks to explain away the fact that the sale of Steinhoff shares occurred within minutes of the correspondence between Mr Oosthuizen Snr and Mr Jooste on the basis of sheer coincidence.

38. The Authority concludes, in addition, that there is no merit in Ocsan's suggestion that the screenshot of an SMS to Mr Du Toit reflects the warning SMS to have been sent at 10:15 and not at 10:38 as alleged by the Authority.

39. All that this shows is that Mr Jooste sent an SMS to Mr du Toit before he sent the warning SMS. Thus, while there was SMS communication between Mr Jooste and

Mr Du Toit at 10:15, they continued communicating by SMS thereafter at 10:38 when Mr Jooste sent the warning SMS to Mr Du Toit.

40. The Authority thus accepts that the screenshot of the warning SMS sent to Mr Du Toit is a true reflection of its contents. The finding is supported by Mr Du Toit's oral evidence, and is corroborated by his billing information. No evidence has provided to suggest that he may have tampered with the screenshot.

Mr Oosthuizen Snr and Ocsan were insiders when Mr Oosthuizen Snr gave instructions to sell the Steinhoff shares

41. 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)*

42. 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."*

43. For the reasons set out below, the Authority finds that, upon receipt of the warning SMS, Mr Oosthuizen Snr and Ocsan:

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

43.2. 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

43.3. was accordingly an insider for purposes of section 78(1)(a) of the Financial Markets Act.

The information in the warning SMS was specific

44. 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.[11]

45. Mr Oosthuizen Snr received an SMS, from the CEO of Steinhoff, saying in essence that Steinhoff's irreversible problems, including in respect of its US-based operations, meant that he should sell his shares.

46. The warning SMS thus conveyed, on its face, that:

46.1. Steinhoff was experiencing serious problems;

46.2. the problems were so irreversible that the recipient of the SMS should dispose of his shares at the current price to avoid imminent loss;

[11] 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.

46.3. Steinhoff's problems involved its operations in the United States.

47. The information was clear and unambiguous. It did not lead Mr Oosthuizen Snr or Ocsan to a different interpretation or conclusion as to its meaning.[12]

48. In the premises, the Authority finds that Mr Oosthuizen Snr (and thus Ocsan) received information on 30 November 2017 that was specific.

The information in the warning SMS was not public

49. 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.

50. 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 then vigorously.

51. 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.

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

52. 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.

53. Based on his admitted knowledge, therefore, Mr Oosthuizen Snr knew more than the general public.

54. In short, the warning SMS painted a far more precarious picture of Steinhoff than that of which the public had knowledge.

55. Accordingly, the Authority finds that on 30 November 2017 Mr Oosthuizen Snr (and thus Ocsan) was in possession of information regarding Steinhoff that had not been made public.

The information in the warning SMS was price-sensitive

56. 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").

57. While actual movements in share price may be used to test whether information is price sensitive,[13] *"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*

[13] Zietsman *supra* at paragraphs 87 and 88.

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."[14]

58. 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.[15] 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.

59. The Authority finds that the warning SMS plainly constituted price sensitive information. In short:

    59.1. The CEO of Steinhoff indicated that "big trouble" was coming to Steinhoff and that Mr Oosthuizen Snr should sell immediately.

    59.2. A reasonable investor would plainly have considered this information as relevant to any decision to deal in Steinhoff shares.

    59.3. Less than a week after Mr Jooste sent the SMS to Mr Oosthuizen Snr, and upon publication of the various difficulties facing Steinhoff, on 4 and 6 December 2017 the Steinhoff share price reacted significantly.[16]

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[14] Zietsman supra at paragraph 87.
[15] Zietsman, at paragraph 98.3.
[16] 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

60. In the circumstances, the Authority finds that the information disclosed to Mr Oosthuizen Snr (and thus Ocsan) on 30 November 2017 consisted of price sensitive information.

Summation

61. The Authority is satisfied, on the available evidence, that

    61.1. Mr Jooste (an insider) disclosed specific or precise, unpublished price sensitive information to Mr Oosthuizen Snr and Ocsan in the warning SMS;

    61.2. Mr Oosthuizen Snr and Ocsan 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;

    61.3. Upon receipt of the warning SMS, Mr Oosthuizen Snr (and thus Ocsan) was therefore an insider for purposes of section 78(1).

Mr Oosthuizen Snr knew that he was in possession of inside information

62. Section 78(1)(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 his or her own account, in the securities listed on a regulated market or in derivative instruments related to such securities, to which the inside

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.

information relates or which are likely to be affected by it, commits an offence (our emphasis).

63. The question of Mr Oosthuizen Snr's 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.

64. 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.

65. The SMS that Mr Oosthuizen Snr received instructed him not to disclose its contents and to delete the SMS. This clearly indicated to Mr Oosthuizen Snr, 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).

66. Moreover, Mr Oosthuizen Snr knew that the information was specific. He could not have been confused as to the meaning of the information. He knew that Steinhoff was in trouble and that he had to sell the relevant Steinhoff shares.

67. Lastly, the SMS advised Mr Oosthuizen Snr 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.

68. For these reasons, the Authority finds that Mr Oosthuizen Snr (and thus Ocsan) knew that he was in possession of inside information. In any event, even if Mr Oosthuizen Snr genuinely believed that the information in the warning SMS was not inside information, such a belief was not based on reasonable grounds.[17]

DECISION ON MERITS

69. The Authority finds that, on 30 November 2017, Mr Oosthuizen Snr and Ocsan became insiders as a result of the information that was conveyed by Mr Jooste to Mr Oosthuizen Snr. Ocsan and Mr Oosthuizen Snr knew they were in possession of the inside information detailed in the warning SMS, and Ocsan dealt in Steinhoff shares.

70. The Authority finds that Ocsan's conduct constituted a contravention of section 78(1)(a) of the Financial Markets Act.

ADMINISTRATIVE PENALTY

Relevant principles

71. 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

[17] 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*".

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.

72. 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."

73. The Authority has previously communicated to Ocsan that it intended to impose an administrative penalty of **R155 489 496** on Ocsan for the contravention of section 78(1) of the Financial Markets Act, subject to receipt of its submissions. The penalty was calculated in terms of section 82(1) of the Financial Markets Act.

74. The calculation was based on the loss avoided by the Ocsan account and was calculated as follows:

Transaction date	Purchases			Sales		
	Quantity	Price c	Amount R	Quantity	Price C	Amount R
30/11/2017				770 000	5 615	43 242 374
Total				**770 000**		43 242 374

Loss Avoided as at 8 December 2017 (closing at 600c)

	R
Sales	43 242 374
*If sold at 600cps (770 000 at 600cps)	(4 620 000)
Loss Avoided	**38 622 374**

75. 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.[18]

[18] 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.*"

Ocsan' submissions on penalty

76. Ocsan made submissions regarding the administrative sanction to be imposed, including, *inter alia* that:

76.1. the proposed R155 million penalty is R105 million more than the maximum fine if Ocsan had been criminally charged;

76.2. such a significant penalty is punitive and does not accord with the purpose of the South African securities legislation and the administrative nature of penalties;

76.3. deterrence will not be achieved by imposing significant penalties but rather by investigating and prosecuting offenders;

76.4. the calculation proceeds from the wrong premise: it equates the information in the warning SMS to the investigation into alleged accounting irregularities and the resignation of Mr Jooste i.e. the news released on 4 and 6 December 2017, which is submitted to have precipitated the drop of the Steinhoff share price;

76.5. in Ocsan's estimation, if the warning SMS had been published, the Steinhoff share price would have declined by 3% and Ocsan would have avoided a loss of R221 780 and not the R38 million alleged by the Authority;

76.6. a penalty in excess of the loss avoided of R221 780 by Ocsan will unfairly punish innocent shareholders especially because Mr Oosthuizen Snr acted alone when he traded whilst in possession of the alleged inside information;

76.7. at most, the loss avoided should be calculated at the closing price on 4 December 2017. This would amount to R3 236 865.

The appropriate penalty

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

78. 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."*[19]

79. 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. Deterrence is a factor that must be taken into account in determining an appropriate penalty; it is accordingly

[19] Zietsman, paragraph 83.

mistaken for Ocsan to suggest that it should only be taken into account in investigating and prosecuting offenders and not at the level of penalty.

80. The Authority also believes that the evidence shows Mr Oosthuizen Snr 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.

81. Moreover, Mr Oosthuizen Snr sought to mislead the investigators as to his communications with Mr Jooste. He initially denied having had any contact with Mr Jooste on the morning of 30 November 2017. Only when he was confronted with evidence of such communications did he admit to them. Even then, he denied that these communications had any relevance to his decision, minutes thereafter, to sell Steinhoff shares.

82. Although the penalty exceeds the maximum criminal penalty, the penalty is a result of the calculation set out in section 82 of the Financial Markets Act – which has both deterrent and compensatory objectives – and after considering the factors in section 167(2) of the FSR Act.

83. Central to this calculation is the amount of the loss avoided. Ocsan is mistaken that only a minimal loss was avoided by means of the warning SMS. Knowledge by the market that Steinhoff's CEO had lost all faith in his company and was instructing investors to disinvest immediately would have spelled financial disaster for the share price. Reliance on the closing/reference price on 8 December 2017 is thus appropriate.

84. The Authority does not believe that the proposed penalty unjustifiably punishes Ocsan's innocent shareholders. As already stated, the manner of calculation is prescribed by legislation. The result of the calculation is that ill-gotten gains (in this case loss avoided) are disgorged.

85. In the premises, and having considered all the above, the Authority accordingly imposes on Ocsan an administrative penalty calculated as follows:

    85.1. 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 **R38 622 374**;

    85.2. in terms of section 82(1)(b), a penalty of two times the total loss avoided, **R77 244 748**;

    85.3. interest on the total amount of **R115 867 122** a tempore morae to date of payment; and

    85.4. 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.

86. The penalties are payable to the Authority within 30 days from the date of this Order.

87. Lastly, in terms of section 82(3) of the Financial Markets Act, we note that with regards to the administrative sanction described above of R115 867 122, Ocsan is jointly and severally liable together with Mr Jooste for the loss avoided of R38 622 374, as well as interest and costs.

OCSAN SHOULD FURTHER TAKE NOTE THAT

88. If it 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 of administrative penalty until it is fully paid.

89. 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."

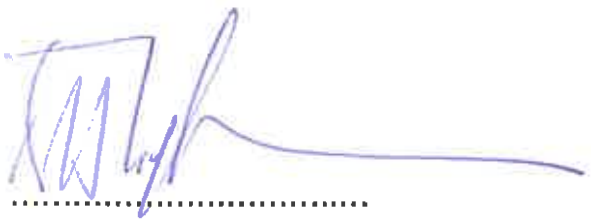
90. In terms of section 230 of the FSR Act, a person aggrieved by this decsion has a right to apply for the reconsideration of the decision by the Financial Services Tribunal (the Tribunal). An application for reconsideration must be made –

(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