

In the matter between:

**THE FINANCIAL SECTOR CONDUCT AUTHORITY**

and

**MARTHINUS JACO SWIEGELAAR**

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

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**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)<sup>1</sup> resulting from contraventions of the insider trading prohibitions contained in section 78 of the Financial Markets Act 19 of 2012 by Mr Marthinus Jaco Swiegelaar. 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:

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<sup>1</sup> **“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;”*

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.*

3. Section 77 defined "inside information" and "insider" 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 Swiegelaar, and encouraged Mr Swiegelaar 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 Swiegelaar sold Steinhoff shares in contravention of section 78(1) of the Financial Markets Act.

5. Having considered the evidence at its disposal, including Mr Swiegelaar's submissions, the Authority finds that Mr Swiegelaar 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 Mr Swiegelaar. 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.<sup>2</sup> To this end, and

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<sup>2</sup> Section 2 of the Financial Markets Act.

amongst other provisions, it prohibits conduct defined as "market abuse". Such conduct includes insider trading.<sup>3</sup>

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 Swiegelaar 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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<sup>3</sup> 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.

#### **Mr Swiegelaar'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 Mr Swiegelaar with the investigation report and the supporting evidence, together with a letter explaining the Authority's preliminary view. In particular, Mr Swiegelaar was informed that the Authority held the preliminary view that:
  - 17.1. he had contravened section 78(1) of the Financial Markets Act; and
  - 17.2. he was liable for an administrative penalty of R1 073 312 for the alleged contravention.
18. Mr Swiegelaar was invited to make representations regarding the Authority's preliminary view. In response, Mr Swiegelaar furnished the Authority with 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. 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,<sup>4</sup> which included contributions from Steinhoff Europe AG<sup>5</sup> 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<sup>6</sup> 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<sup>7</sup>, 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.

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<sup>4</sup> 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

<sup>5</sup> 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.

<sup>6</sup> Advent International Private Equity Firm.

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

- 20.8. **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.**
- 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 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].

22. 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.

23. The investigators performed an analysis of Mr Jooste's, Mr Du Toit's and Mr Swiegelaar'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 (also pinged in four parts on his billing record) was also sent on 30 November 2017 from Mr Jooste's phone to Mr Swiegelaar's phone. It pinged at 11:56:53; 11:56:54; 11:56:55 and 11:56:56 on Mr Jooste's billing statement and was received by Mr Swiegelaar as a single SMS.

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

24. Mr Swiegelaar, who was employed as Mr Jooste's driver at the time, confirmed that he received the warning SMS. He explained to the Investigators that the SMS instructed him to sell his Steinhoff shares immediately, mentioned troubles in America, and instructed him to delete the SMS and not tell anybody else.

25. Mr Swiegelaar told the investigators that he deleted the SMS and never told anybody about it. Nor did he speak to Mr Jooste about it.

26. When the investigators showed him the warning SMS that had been sent to Mr Du Toit, Mr Swiegelaar confirmed it to be the same as the SMS he received.

27. On 4 December 2017, at 8:25 Steinhoff published an announcement on the Stock Exchange News Service (SENS). It advised the market that the Steinhoff Supervisory Board confirmed that it would release the Steinhoff 2017 consolidated financial statements in unaudited form on 6 December 2017.

28. On 4 December 2017, the Steinhoff share price decreased by almost 10%.

29. On 4 December 2017, Mr Swiegelaar sold all 400 of his Steinhoff shares.

## **ISSUES IN DISPUTE**

30. In sum, Mr Swiegelaar placed the following issues in dispute:

- 30.1. the warning SMS did not fully explain the reasons why it was advisable for him to sell, and he believes its contents were vague and thus did not constitute inside information;
- 30.2. he did not initially think the warning SMS was intended for him;
- 30.3. he did not consider selling his shares upon receipt of the warning SMS, but only once he attended the Steinhoff results presentation on 4 December 2017, at which he heard independent gossip that there were irregularities at Steinhoff, and which allowed him to make sense of the warning SMS;
- 30.4. the decline in the share price on 4 December 2017 was the real reason he decided to sell;
- 30.5. by simply receiving the warning SMS, which he did not ask for, he did not thereby become an insider, and did not breach section 78 of the FMA;
- 30.6. receipt of the warning SMS did not prejudice other shareholders, particularly because after the publication of the SENS announcement at 08:00 on 4 December 2017, other shareholders had the same level of information about irregularities at Steinhoff as him;

30.7. Mr Swiegelaar's actions meet the elements of the defense under section 78(1)(b)(ii)(aa)<sup>8</sup> of the Financial Markets Act, because when he sold his shares, he had the same level of information as other market participants.

## **THE AUTHORITY'S FINDINGS**

### ***Mr Swiegelaar was an insider when he gave instructions to sell the Steinhoff shares***

31. 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)*

32. 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."*

33. For the reasons set out below, the Authority finds that, upon receipt of the warning SMS, Mr Swiegelaar:

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

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<sup>8</sup> This refers to the private transaction defense as discussed in paragraph 62, page 19.

- 33.2. 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
- 33.3. was accordingly an insider for purposes of section 78(1) of the Financial Markets Act.

The information in the warning SMS was specific

34. 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.<sup>9</sup>
35. Mr Swiegelaar 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.
36. The warning SMS thus conveyed, on its face, that:
- 36.1. Steinhoff was experiencing serious problems;
- 36.2. the problems were so irreversible that the recipient of the SMS should dispose of his shares at the current price to avoid imminent loss;

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<sup>9</sup> 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.

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

**37. The information was clear and unambiguous. It did not lead Mr Swiegelaar to a different interpretation or conclusion as to its meaning.<sup>10</sup>**

**38. In the premises, the Authority finds that Mr Swiegelaar received information on 30 November 2017 that was specific.**

**The information in the warning SMS was not public**

**39. 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.**

**40. 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.**

**41. 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.**

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<sup>10</sup> Zietsman paragraph 54. (referring with approval of the Australian case of *Bouhey v R* [1986] HCA 29 65 ALR 609.

42. 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.
43. Based on his admitted knowledge, therefore, Mr Swiegelaar knew more than the general public.
44. In short, the warning SMS painted a far more precarious picture of Steinhoff than that of which the public had knowledge.
45. Accordingly, the Authority finds that on 30 November 2017 Mr Swiegelaar was in possession of information regarding Steinhoff that had not been made public.

The information in the warning SMS was price-sensitive

46. 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”).
47. While actual movements in the share price may be used to test whether information is price sensitive,<sup>11</sup> *“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.”*<sup>12</sup>

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<sup>11</sup> Zietsman *supra* at paragraphs 87 and 88.

<sup>12</sup> Zietsman *supra* at paragraph 87.

48. 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.<sup>13</sup> 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.
49. The Authority finds that the warning SMS plainly constituted price sensitive information. In short:
- 49.1. The CEO of Steinhoff indicated that Steinhoff was facing difficulties and that Mr Swiegelaar should sell immediately.
- 49.2. A reasonable investor would plainly have considered this information as relevant to any decision to deal in Steinhoff shares.
- 49.3. Less than a week after Mr Jooste sent the SMS to Mr Swiegelaar, and upon publication of the various difficulties facing Steinhoff, on 4 and 6 December 2017 the Steinhoff share price reacted significantly.<sup>14</sup>

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<sup>13</sup> Zietsman, at paragraph 98.3.

<sup>14</sup> 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



50. In the circumstances, the Authority finds that the information disclosed to Mr Swiegelaar on 30 November 2017 consisted of price sensitive information.

### Summation

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

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

51.2. Mr Swiegelaar 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;

51.3. Upon receipt of the warning SMS, Mr Swiegelaar was therefore an insider for purposes of section 78(1).

### ***Mr Swiegelaar knew that he was in possession of Inside Information***

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

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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.

53. The question of Mr Swiegelaar'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.
54. On his own version, the SMS that Mr Swiegelaar received instructed him not to disclose its contents and to delete the SMS. This clearly indicated to Mr Swiegelaar, 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).
55. Notably, Mr Swiegelaar complied with Mr Jooste's request. He deleted the SMS, and never mentioned it to anyone.
56. Moreover, Mr Swiegelaar knew that the information was specific. He knew prior to selling his shares that the meaning of the SMS was that Steinhoff was experiencing problems. He knew that he had to sell the relevant Steinhoff shares and did so.
57. Lastly, the SMS advised Mr Swiegelaar 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.
58. Given that Mr Swiegelaar 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.
59. While Mr Swiegelaar says that prior to 4 December 2017 he never considered selling his shares – because he did not think the warning SMS was intended for him, and

because he had not seen any negative movement in the share price – on his own version, after hearing gossip that there were irregularities at Steinhoff, he was able to *make sense of the warning SMS*, and then understood that it was probably meant for him, and sold his shares. At a minimum, therefore, the warning SMS was relevant to his decision whether to sell the Steinhoff shares.

60. While he may not have sold on that basis alone, as soon as he understood the import of the message he had received from Mr Jooste, he sold his shares.
61. For these reasons, the Authority finds that Mr Swiegelaar knew that he was in possession of inside information. In any event, even if Mr Swiegelaar genuinely believed that the information in the warning SMS was not inside information, such a belief was not based on reasonable grounds.<sup>15</sup>

**The section 78(1)(b)(ii)(aa) defence is not available**

62. Mr Swiegelaar seeks to rely on the private transaction defense<sup>16</sup> which provides that:

*"An insider is, despite paragraph (a), not guilty of any offence contemplated in that paragraph if such insider proves on a balance of probabilities that he or she-*

*(i).....; or*

*(ii) was acting in pursuit of a transaction in respect of which-*

*(aa) all the parties to the transaction had possession of the same inside information;*

*(bb) trading was limited to the parties referred to in subparagraph (aa); and*

*(cc) the transaction was not aimed at securing a benefit from exposure to movement in the price of the security, or a related security, resulting from the inside information.*

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<sup>15</sup> 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" ..

<sup>16</sup> Section 78 (1) (b) (ii) (aa) of the Financial Markets Act.

63. The Authority is of the view that the defence does not apply in this case.
64. Clearly, when Mr Swiegelaar sold his shares:
- 64.1. he was not part of a privately arranged transaction; and
  - 64.2. in any event, he did not have the same level of information as the rest of the market.
65. Whereas on 4 December 2017, the market only knew that Steinhoff would not publish audited results on 6 December 2017, Mr Swiegelaar knew that it would take a long time for Steinhoff to reverse its troubles and that the immediate disposal of his entire holding in Steinhoff was necessary. Indeed, on his own version, the SENS announcement of 4 December 2017 enabled Mr Swiegelaar to make senses of the warning SMS – a benefit other shareholders did not have.

## **DECISION ON MERITS**

66. The Authority accordingly finds that on 30 November 2017, Mr Swiegelaar 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 Mr Swiegelaar's conduct constitutes a contravention of section 78(1)(a) of the Financial Markets Act.

## **ADMINISTRATIVE PENALTY**

### ***Relevant principles***

67. 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.

68. 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.”*

69. The Authority has previously communicated to Mr Swiegelaar that it intended to impose an administrative penalty of R1 073 312 on him for the contraventions of section 78(1) 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.

70. The calculation was based on the loss avoided by the sale of shares as follows:

<b>Loss Avoided</b>	<b>Plus 3x Loss Avoided</b>	<b>Plus R1 million</b>	<b>Total</b>
R18 328	R54 984		R1 073 312

71. 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.<sup>17</sup>

### **Mr Swiegelaar's submissions on penalty**

72. Mr Swiegelaar made submissions in mitigation of the administrative sanction to be imposed, including, *inter alia*, that:

72.1. in the circumstances of this matter it is inappropriate to impose a maximum penalty inclusive of R1 million;

72.2. Mr Swiegelaar was a novice in share trading;

72.3. Mr Swiegelaar was honest and gave his full cooperation;

72.4. there is no evidence that the sale of Mr Swiegelaar's shares caused any reaction in the market or caused any prejudice to any other shareholders;

72.5. Mr Swiegelaar was retrenched at Steinhoff and currently works as a foreman on the farm previously owned by Mr Jooste and cannot afford a substantial penalty;

72.6. should Mr. Swiegelaar be found to have contravened, a warning or remission of the penalty would be a fair and appropriate sanction.

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<sup>17</sup> 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.*"

## **The appropriate penalty**

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

74. 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."<sup>18</sup>*

75. 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.

76. At the same time, however, the Authority is satisfied that Mr Swiegelaar:

76.1. has been highly cooperative;

76.2. has not previously breached financial sector laws; and

76.3. did not sell his shares immediately upon receipt of the warning SMS.

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<sup>18</sup> *Zietsman*, paragraph 83.



77. In the circumstances, the Authority has reduced the penalty provisionally contemplated, and imposes on Mr Swiegelaar an administrative sanction calculated as follows:
- 77.1. the equivalent of the loss avoided as a result of Mr Swiegelaar's sale of shares in the amount of **R18 328**;
  - 77.2. interest on the amount of **R18 328** *a tempore morae* to date of payment; and
  - 77.3. 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.
78. The penalty amounts are payable to the Authority within 30 days from the date of this Order.
79. In respect of Mr Swiegelaar's submission that the proposed penalties be remitted, the Authority will consider any application by Mr Swiegelaar for remission in terms of section 173 of the FSR Act if and when such an application is made.
80. Lastly, in terms of section 82(3) of the Financial Markets Act, we note that with regards to the administrative sanction described above, Mr Swiegelaar is jointly and severally liable together with Mr Jooste for the loss avoided of R18 328, as well as interest and costs.

**MR SWIEGELAAR SHOULD FURTHER TAKE NOTE THAT:**

81. 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 of administrative penalty until it is fully paid.
82. 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.”*

83. 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](mailto:Applications@fstribunal@fsca.co.za).

Signed at Pretoria on the 29<sup>th</sup> day of **October 2020**.

A handwritten signature in blue ink, consisting of several vertical strokes followed by a long horizontal line extending to the right.

.....  
**MR BRANDON TOPHAM**  
**FOR THE AUTHORITY**

