THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: A679/14

DATE OF HEARING: 28 MAY 2015

DATE OF JUDGMENT: 24 AUGUST 2015

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

21-08-2015
DATE

SIGNATURE

In the matter between:

ZIETSMAN, GAVIN LYONEL	First Appellant
HARRISON AND WHITE INVESTMENTS (PTY) LTD	Second Appellant

and

DIRECTORATE OF MARKET ABUSE	First Respondent
FINANCIAL SERVICES BOARD	Second Respondent

CORAM: Tuchten J *et* Avvakoumides AJ

J U D G M E N T

AVVAKOUMIDES, AJ

INTRODUCTION

This is an appeal from a determination ("*the determination*") of the enforcement committee established in terms of section 10(3) of the Financial Services Board Act 97 of 1990 ("*the enforcement committee*" and "*the FSB Act*"), dated 5 August 2014. The appeal is brought in terms of section 6F (1) of the Financial Institutions (Protection of Funds) Act 28 of 2001, read with rule 51 of the rules regulating the conduct of civil proceedings in the Magistrates' Courts of South Africa. The case came before the enforcement committee in the form of a referral ("the referral") by the respondents in terms of Section 6A-D of the Financial Institutions (Protection of Funds) Act, 28 of 2001 ("the PFA").

THE CHARGES

The charges against the appellants were that the first appellant contravened the provisions of Section 73(2)(a) of the Securities Services Act, 36 of 2004 ("the SSA"), that the second appellant contravened the provisions of Section 73(1)(a) of the SSA and that as a result, the appellants ought to receive an administrative sanction including payment of penalties in terms of Section 77(1) and (2) read with Section 77(5) of the SSA.

JUDGMENT OF THE ENFORCEMENT COMMITTEE

The enforcement committee determined that information pertaining to the amount of the IDC loan facility constituted inside information as defined in the SSA and that the appellants were guilty of insider trading as charged.

ADMINISTRATIVE SANCTION

The enforcement committee, after taking all the facts into account, fined the appellants in the sum of R1 000 000.00 and ordered the appellants to pay the costs of the case, all jointly and severally.

IDENTIFICATION OF ISSUES ON APPEAL

The appeal is against the determination and the appellants submitted that the referral should have been dismissed with costs. The respondents submitted that the enforcement committee was correct in its finding and in issuing the administrative penalty.

GROUNDS OF APPEAL

The grounds of appeal relied upon are the following:

1. The enforcement committee erred in rejecting the version of the appellants on the affidavits before it.

2. The enforcement committee erred in deciding the matter against the appellants in light of the material disputes of fact which were present in the affidavits and which ought to have been resolved in the appellants' favour.

3. The enforcement committee ought to have found that, factually, the appellants were not aware at the time of the trades in question that a loan had in fact been granted to AC Towers, but only had limited, vague and unreliable information in respect of a possible future loan.

4. The enforcement committee ought to have found that the information available to the appellants at the time of the trades in question did not constitute "inside information" as defined in Section 72 of the SSA, because:

   (1) the information was not "likely to have a material effect" on the price or value of the AC Towers shares;

   (2) the information was not "specific or precise";

   (3) there is no material difference between the information available to the appellants at the time of the trades in question and information that had already been "made public" prior to the trades;

   (4) the appellants consequently did not believe or "know" that they had inside information as required by Sections 73 and 77 of the SSA.

ARGUMENTS ON APPEAL

The appellants argued that, in establishing that the IDC had approved of a loan to Africa Cellular Towers Ltd ("AC Towers"), a company listed on the alternative exchange of the Johannesburg Stock Exchange ("the JSE"), in the sum of R99

million, the appellants were not possessed of knowledge that would affect the trading price of the shares in AC Towers. The appellants submitted that at the time that they came to know about the loan, there were no details of the loan to show whether A C Towers would be able to pay the loan and neither were the terms of the loan were known.

During the middle of 2010 the second appellant initiated a strategy to commence operating in the renewable energy sector. On 28 August 2010 the first appellant opened an FNB share trading account. On 30 August 2010 the first appellant purchased the first acquisition of 15000 shares in a company called at regular intervals from 31 August 2010 with the intention of retaining the shares in pursuance of a strategy to acquire a controlling share in AC Towers and access certain operational capabilities within AC Towers.

From 31 August 2010 to 4 November 2010 the first appellant purchased more shares in 23 trades via the FNB account totalling 835805 shares. The appellants continued to acquire AC Towers shares up to and including 14 March 2011. In pursuit of the plans to acquire a stake in AC Towers, DP Cohen Consulting (Pty) Ltd ("DPCC") was instructed to compile a valuation on the business of AC Towers.

On 24 January 2011, the Industrial Development Corporation ("the IDC") addressed a letter to AC Towers ("the approval letter") which stated as follows: "*...the IDC has agreed to make available to your organisation a total funding package of R99 000 000 (Ninety Nine Million Rands). The funding has been approved substantially on the terms and conditions as discussed with you. Agreements are being prepared which*

will contain all the terms of the facilities and which will, when duly signed, form the agreement between the IDC and yourselves..."

Attached to the approval letter was a terms sheet setting out the details of the finance which had been approved and certain conditions precedent which the IDC required to be included in the agreement which would ultimately be concluded between the IDC and AC Towers. Neither the approval letter nor the term sheet was provided to the appellants prior to the referral. On 26 January 2011, a meeting was held between the respondents and members of the board of AC Towers, including Mr Jacques De Villiers ("De Villiers"). The appellants argued that what occurred at this meeting is central to the appeal and a dispute exists in this regard.

The respondents argued in turn that the appellants were aware that the IDC and AC Towers were in the process of negotiations which contemplated a loan of moneys by the IDC to AC Towers. The appellants understood that there had been an "approval in principle", but loan agreements had not been finalised.

At the meeting of 26 January 2011 De Villiers alleged that AC Towers had secured a possible loan facility of R99 million from the IDC on an "approval in principle basis", but in the same breath the AC Towers representatives indicated that contracts had not been concluded for the facility, and no substantiating information was made available in support of the granting of such funding. At that meeting, De Villiers also disclosed that the IDC had commenced, or was in the process to commence a due diligence of AC Towers.

During the meeting of 26 January 2011 nothing in writing was presented in confirmation of the alleged funding. During the meeting of 26 January 2011 De Villiers did not inform those present when requested what the conditions precedent were, whether AC Towers was capable of complying with any conditions precedent, what the repayment terms were and what any of the other terms of the alleged funding were.

On 28 January 2011 a Stock Exchange News Service announcement ("SENS") ("the first SENS announcement") was published by AC Towers in which shareholders and the market were informed that:

> *"the company was successful in securing debt funding and is in the process of finalising the terms of the debt facility with the potential funder which, when successfully concluded, could affect the price of the company's shares"*

The first SENS announcement did not disclose the amount and other details of the facility to the market nor the details of the funder as a decision was taken by the board of AC Towers that, although AC Towers had received the approval letter, those details ought not to be disclosed before the agreements with the IDC were concluded. The publication of the first SENS announcement had no effect on the share price of AC Towers.

Subsequent to the meeting of 28 January 2011, the appellants continued to acquire shares in AC Towers pursuant to the aforesaid strategy to acquire a controlling share therein. The agreements with the IDC were signed around March 2010. On 11 March

2011, AC Towers published a further SENS announcement ("the second SENS announcement"), advising shareholders that:

> *"AC Towers is pleased to announce that an agreement has been entered into with the Industrial Development Corporation (IDC) in respect of a R99 million funding facility, staggered over the next six years at market related rates to assist with capital expenditure and working capital requirements of the group"*

On 11 March 2011, after to the second SENS announcement, the AC Towers share price increased by 54% from 11 cents to 17 cents.

The respondents argued further that Zietsman was the principal person in charge of a strategy by H & W (the second appellant) to acquire a significant interest in AC Towers. In November 2010 Zietsman was authorised and instructed by H & W to acquire AC Towers shares on behalf of H & W. Ralston was also authorised and instructed by H & W to acquire AC Towers shares on behalf of H & W.

Between 26 January 2011 and 9 February 2011 Zietsman and Ralston came to know that the IDC granted AC Towers a loan facility in the amount of R99 million. The amount of the loan and the fact that the lender was the IDC were details which were not known to the public until AC Towers disclosed those details on SENS on 11 March 2011. The disclosure of the amount of the IDC loan facility had a material effect on the price of AC Towers securities.

The information pertaining to the amount of the IDC loan facility constituted inside information as defined in the SSA. The Appellants, during the period 15 February 2011 to 10 March 2011, whilst in possession of this inside information and being insiders, purchased 19 491 977 AC Towers shares at a total price of R2 096 517.00.

The potential profit that H & W would have made is R1 203 819.00. The respondents argued further that the appellants should be have been held jointly and severally liable for the potential profit of R1 203 819.00, together with a penalty calculated at 3 times the potential profit, amounting to R3 611 457.00, as well as interest and costs.

The respondents relied upon the founding affidavit by Cuthbert King Chanetsa ("Chanetsa"), a supporting affidavit by Erris Edmond van Kerken ("Van Kerken"), a confirmatory affidavit by Peter George Redman ("Redman"), a confirmatory affidavit by Kevin Michael Algeo ("Algeo") and an affidavit by Carin Meyer ("Meyer").

Although it is common cause that the appellants acquired 19 491 977 AC Towers shares at a total price of R2 096 517.00 during the period 15 February 2011 to 10 March 2011, the appellants maintained that they did not, at the time, know that AC Towers and the IDC had concluded a loan agreement. The appellants explained that the information available to them at the time did not amount to inside information and merely revealed that possible funding by the IDC, which would in any event have been insufficient to satisfy the requirements of AC Towers, had been approved in principle.

The appellants argued further that they did not believe or know that the information available to them constituted inside information as defined in Section 72 of the SSA. Furthermore the appellants argued that the respondents had limited their case against the appellants to specific trades during the relatively short period of 15 February 2011 to 10 March 2011. In focussing on that period only the respondents had effectively disregarded the fact that appellants had commenced acquiring AC Towers shares at regular intervals from 31 August 2010 (long before the 15th of February 2011), not with the intention of selling the shares to make a profit, but with the intention of retaining the shares in pursuance of a strategy to acquire a controlling share in AC Towers and access certain operational capabilities within AC Towers.

The appellants continued to acquire AC Towers shares up to and including 14 March 2011. The appellants did not acquire AC Towers shares in order to speculate with such shares, and the shares acquired by Zietsman on behalf of H & W were not sold. Thus, the AC Towers share trades did not amount to insider trading on the appellants' part.

Furthermore the appellants argued that:

1. factually, the appellants were not aware at the time of the trades in question that a loan had in fact been granted to AC Towers, but only had limited, vague and unreliable information in respect of a possible future loan;

2. the information available to the appellants at the time of the trades in question did not constitute "inside information" as defined in Section 72 of the SSA, since:

   (a) the information was not "likely to have a material effect" on the price or value of the AC Towers shares;

   (b) the information was not "specific or precise";

   (c) there is no material difference between the information available to the appellants at the time of the trades in question and information that had already been "made public" prior to the trades;

3. the appellants consequently did not believe or "know" that they had inside information as required by Sections 73 and 77 of the SSA;

4. the appellants had not contravened a law and are not liable to pay any penalty, and they furthermore disputed the penalty calculations relied upon by the respondents.

The appellants lastly argued that the procedure adopted by the enforcement committee was flawed in that:

1. A referral under Section 6A(1) or (2) of the PFA must be accompanied by:

   (a) a notice setting out the details and nature of the alleged contravention; and

(b) an affidavit by or on behalf of the respondent setting out the facts and documents supporting the notice. (SeeSection 6B(1) of the PFA).

Therefore, in terms of Section 6B(1) of the PFA the respondents were obliged to articulate and make out their case in their notice of referral, supported by evidence contained in affidavits delivered on behalf of the respondents. The procedure prescribed by Sections 6A – D of the PFA is similar to the motion court procedure provided for in the Uniform Rules of the High Courts of South Africa, more specifically Uniform Rule 6.

The appellants argued that the legal principles that have crystallised out in case law relating to the High Court motion procedure should have found application in the enforcement committee proceedings.

EVALUATION ON MERITS

In November 2010 the Board of the second appellant authorised the first appellant to purchase a majority interest in ACT, which interest was to be held in one of the second appellant's subsidiaries, namely AJP Investments (Pty) Ltd (AJP), of which company the first appellant was also Board Chairman. This is common cause as is the fact that the first appellant was the Chairman of the Board of Directors of the second appellant, and he was the principal person in charge of the strategy of the second appellant to acquire a significant interest in ACT. The Board of the second appellant also instructed its MD, Mr Ralston, to acquire ACT shares on behalf of the second appellant in pursuance of the aforesaid acquisition strategy.

ACT had a significant need for funding and had reported a loss of approximately R85 million during 2010. In the course of negotiation of a takeover with ACT directly, a due diligence was commissioned by AJP and a non-disclosure agreement was concluded with ACT in December 2010.

On 24 January 2011 the IDC approved a loan of R99 million to ACT and such approval is reflected in a letter to ACT. The terms were still to be finalised. On or about 26 January 2011 the appellants had a meeting with ACT and were notified that ACT had secured debt funding from the IDC (Industrial Development Corporation) in the amount of R99 million and that agreements were in the process of finalisation regarding such funding. The amount of the loan and the identity of the lender was not known to the public until ACT disclosed these details on the Stock Exchange News Service (SENS) on 11 March 2011.

On 28 January 2011, ACT published a SENS bulletin, advising that it had secured debt funding but without disclosure of either the identity of the lender or the amount of such funding. The first appellant and the second appellant acquired ACT shares on the open market, as set out in Table A and Table B of Count 1 and Count 2. These acquisitions were made during February and up to 10 March 2013. On 10 March 2013, a day before the SENS publication made public the amount of the loan and the identity of the lender, the second appellant transacted a share acquisition far in excess of any prior ACT share acquisition, namely for 14 131 977 shares with a value of R1 554 517.00 at a share price of 11c.

On 11 March 2011, following the SENS bulletin referred to supra, the share price increased from 11c to an average of 17c, an increase of 54.5%. The appellants did not sell their shares and suffered a loss by virtue of ACT subsequently being placed in liquidation.

The enforcement committee heard argument based on the affidavits filed (which included a fourth set of affidavits which was permitted by the EC). The proceedings are governed by Sec 6C and 6D of the Financial Institutions (Protection of Funds) Act, 28 of 2001.

The enforcement committee found that the amount of the loan (R99 million), and the identity of the lender, constituted inside information, that the respondents had established the elements of the transgression of insider trading as set out in Sec 73(1)(a) and 73(2)(a) of the Securities Services Act, 2004 (which applied at the time of the offences). The appellants were convicted and an administrative penalty of R1 million was imposed upon them jointly and severally on 5 August 2014.

The appellants contended that the disclosure of the amount of the IDC loan during January 2011 was not specific or precise information. The appellants contended further that the information was vague since no loan agreement had been concluded in writing, there were conditions precedent and there was uncertainty whether ACT would be able to access the funds. The appellants further contended that the approval of the loan was merely provisional, or an approval in principle. The appellants finally contended that the information that the appellants had did not differ

in any material respect from information that had already been made public in the 28 January 2011 SENS Bulletin.

The appellants' contentions fall to be rejected on a balance of probabilities, as they were rejected by the enforcement committee. The mere fact that final loan agreements had not been signed is not a reason why the information known to the appellants cannot be described as specific and precise. The prospect of the conclusion of a loan agreement with the IDC for R99 million describes a set of circumstances which would realistically or on the probabilities materialise.

The SENS Bulletin of 28 January 2011 does not disclose the amount of the loan or the identity of the lender, being information which the appellants had at the time they dealt in the ACT securities. The letter approving the loan dated 24 January 2011 makes it clear that the R99 million loan by the IDC had been approved and that the agreements pertaining to it were in the process of finalisation.

The enforcement committee EC found that on the probabilities, Mr de Villiers of ACT would have conveyed this information to the appellants at their meeting on 26 January 2011. The contentions by the appellants to the contrary in the record do not bear scrutiny. The approval of the loan was, although subject to finalisation of agreements and signature, a final approval. This is borne out by the evidence at the proceedings.

The appellants do not dispute knowing since 26 January 2011 of the IDC's approval of a loan to ACT in the amount of R99 million. The approval of a R99 million loan to ACT by the IDC was not known publicly until the SENS Bulletin of 11 March 2011.

De Villiers, of ACT, says that the information was given to AJP at the end of January 2011. There was a further meeting at which information was clarified on 1 February 2011. The first appellant was present at those meetings. Mr Rembe, who was part of DJ Cohen Consulting and who attended the meeting of 26 January 2011, confirms that the amount of the loan was disclosed. He however regarded it as a disclosure "in principle". He attached the same qualifications to the disclosure as the first appellant. The dispute seems to relate not to what was disclosed, but to the interpretation thereof.

The Cohen Valuation Report dated 9 February 2011 refers expressly to an IDC loan of R99 million. The Cohen Valuation Report was sent by Mr Rembe to Zietsman and Mr Ralston and copies thereof were sent to Ms Myburgh and Mr Cohen. Mr Collins confirms that such information was disclosed, at least at the 1 February 2011 meeting. Mr Sithole of the IDC testified that once the IDC Credit Committee had approved the structured funding to ACT on 24 January 2011, he closed his file. The matter would then be transferred to the legal department of the IDC for purposes of drafting an agreement in accordance with the approval.

Mr Sithole confirmed that the IDC had given its first and final approval of the loan facility in the amount of R99 million on 24 January 2011. Zietsman admitted that he knew of the IDC as lender and the amount of the R99 million, as he was told of this

during the meeting of 26 January 2011. He contended that it was only an "in principle" approval. He however knew of the breakdown of the R99 million and in which tranches it would be advanced.

Mr Zietsman, however, contends that the information disclosed to him on 26 January 2011 was echoed in the 28 January 2011 SENS Notice. This cannot be correct and should be rejected on the probabilities. The SENS Notice does not disclose the identity of the lender, the amount of the loan or the breakdown of the funding package. There is therefore an inherent flaw in Zietsman's evidence.

In respect of the Cohen Valuation Report of 9 February 2011, which expressly refers to the amount of the loan and the IDC as lender, together with its breakdown, Zietsman testified that he couldn't remember reading the report but then contends that he was "extremely dissatisfied with the outcome and its inconclusive content". This is a clear indication that he in fact read it, otherwise he could not be dissatisfied with its content.

The information contained in the letter of 24 January 2011 must have been disclosed to the appellants, and that meets the requirements for precise and specific information as contained in the definition of "inside information" in Sec 72 of the SSA.

Inside information, as defined under Sec 72(b) of the SSA, refers to information which, 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.*"

The word "*likely*" has been interpreted to mean "less than a probability but more than a mere possibility." See Tshishonga v Minister of Justice and Constitutional Development 2007 (4) SA 135 (LC) at paragraph 180 pages 167 to 168.

In the Australian case of Boughey v R [1986] 65 ALR 609, the Court considered the degree to which likelihood of an occurrence must be proved. The Australian High Court found "*likely*" to be synonymous with "*probable*". There meaning of the term "*probable*" is usually plain, but it means "more probable than not" in contrast to any lesser contingency, such as "*possible*".

The fact that the IDC was the lender and that the loan was for R99 million was only disclosed to the public in the SENS Bulletin of 11 March 2011. What was known to the appellants, on the probabilities, was what is contained in the IDC letter of 24 January 2011, as conveyed by Mr de Villiers at a meeting of 26 January 2011, and further clarified on 1 February 2011. Mr Cohen and Mr Rembe, who were present at such meetings, recorded their understanding of what was disclosed on 26 January 2011 in the Cohen Valuation Report of 9 February 2011.

While it was apparent that final loan agreements had not yet been concluded, there is no suggestion of the uncertainty and vagueness about the loan as contended for by the appellants. The conditions precedent, were not difficult to comply with. The IDC was after all not a commercial bank and the conditions were far less onerous than the conditions attached to a normal commercial loan.

The information had the capacity to materially affect the share price. The loan represented a significant lifeline to the embattled ACT and the amount of R99 million would be viewed by the reasonable investor as sufficient for a small company requiring funding. Further, the fact that the lender was the IDC would mean to the reasonable investor that terms less onerous than those of a commercial bank would probably be imposed. This would therefore have a positive effect on the share price.

Mr de Villiers of ACT said that the loan enabled ACT to tender for large power line projects. The price sensitivity of the information is confirmed by Mr Engelbrecht of the sponsor Vunani. At the relevant time Mr Engelbrecht was the JSE approved designated advisor for ACT.

Mr Engelbrecht said that he had known in January 2011 of the IDC loan of R99 million, having attended the meetings, and he regarded these developments as price sensitive. In fact, he advised ACT to publish a cautionary notice based thereon.

The 11 March 2011 SENS Bulletin which put the information regarding the IDC loan of R99 million in the public domain, in fact had an impact on the share price by increasing it from 11c to an average of 17c per share. This in itself is an *ex post facto* indicator that the information was price sensitive. It confirms what Mr Algeo, an asset manager, had said in this regard.

Therefore the information was price sensitive. Not only did it have the capacity to materially affect the share price, but the spike in the share price after disclosure of the information confirms that the information was price sensitive. The appellants had

knowledge of the identity of the lender and the amount of the loan and the breakdown of the funding package. Zietsman contended that he and Harrison and White (the second appellant) did not believe the information to constitute inside information because it was only an in-principle approval which, in their minds, was vague and uncertain.

The appellants were, however, warned at the relevant time by a number of persons not to deal in ACT shares after learning of the IDC loan. They were warned by Mr Sher of Nedbank not to buy ACT shares. This was because the information was price sensitive and also because it was acquired in the course of negotiations that were covered by a non-disclosure agreement between AJP and ACT. Mr Sher warned Mr Zietsman in this regard on 21 February 2011.

Mr Engelbrecht also warned ACT that its information was price sensitive and that a cautionary notice had to be published. Turning a blind eye to such repeated warnings establishes *mens rea* in the form of *dolus*. Nedbank played a role through its acquaintance with Fidelity in securing the significant block of shares which the appellants acquired on 10 March 2011. Nedbank had warned, however, of the risk of such an acquisition.

Zietsman's belief that the information was not price sensitive is not based on reasonable grounds. The provisions of Sec 73(2)(a) of the SSA, merely require knowledge of the insider information at the time of dealing in the relevant shares. The appellants ignored the warnings. The appellants, knowing of the inside

information regarding the IDC loan of R99 million, dealt in ACT shares, thereby committing the offence of insider trading.

EVALUATION ON ADMINISTRATIVE PENALTY

Legislative reforms regarding insider trading were brought about due to a history of non-prosecution of the offence under the former Companies Act, 61 of 1973. From 1989 till 1998 the offence of insider trading was dealt with by the Securities Regulation Panel in terms of Sec 440F of the former Companies Act 61 of 1973. That provision was revoked by the Insider Trading Act, 135 of 1998 from 17 January 1999.

The monitoring of insider trading was, thereafter, transferred from the Securities Regulation Panel to the FSB's Directorate of Insider Trading. The Insider Trading Act introduced a civil action in respect of insider trading and governed the issue of insider trading until it was repealed by the Security Services Act 36 of 2004 (SSA). Chapter VIII of the SSA introduced administrative sanctions in respect of capital market contraventions in addition to existing civil and criminal sanctions. In 2008 the new Enforcement Committee regime was introduced, with an increased jurisdiction including all financial services offences – including insider trading.

The FSB's former Directorate of Insider Trading, which operated under the Insider Trading Act, is now known as the Directorate of Market Abuse. The case of Pather v FSB [2014] 3 All SA 208 (GP) par [29] – [55] contains an extensive legislative history.

The SSA was the operative statute on insider trading relevant to the charges against the appellants and was operative in 2010 and 2011. The offence of insider trading is contained in Sec 73 of the SSA.

The relevant provisions of Sec 73 read 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.*
>
> *(b) ...*
>
> *2(a) An insider who knows that he or she has inside information and who deals, directly or indirectly, 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."*

The term "*inside information*" is defined in Sec 72 of the SSA and 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;"

The term "*insider*" is also defined in Sec 72 of the SSA and 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)."

The term "regulated market" means "any market, whether domestic or foreign, which is regulated in terms of the laws of the country in which the market conducts business as a market for dealing in securities listed on that market." It is a defence to an insider, if he proves on a balance of probabilities that he "*was acting in pursuit of the completion of an affected transaction as defined in Sec 440A of the Companies Act.*"

An affected transaction is defined in Sec 440A of the Companies Act as:

"*Any transaction (including a transaction which forms part of a series of transactions) or scheme, whatever form it may take, which:*

(a) Taking into account any securities held before such transaction or scheme, has or will have the effect of:

(i) Vesting control of any company (excluding a close corporation) in any person, or two or more persons acting in concert, in whom control did not vest prior to such transaction or scheme; or

(ii) Any person, or two or more persons acting in concert, acquiring, or becoming the sole holder or holders of, all the securities, or all the securities of a particular class, of any company ...; or

(b) Involves the acquisition by any person, or two or more persons acting in concert, in whom control of any company vests on or after the date of commencement of Sec 1(c) of the Companies Second Amendment Act, 1990, of further securities of that company in excess of the limits prescribed in the rules; or

(c) Is a disposal as contemplated in Sec 228."

A similar defence was contained in Sec 4(1)(d) of the repealed Insider Trading Act. In respect of such defences, and more particularly Sec 4(1)(d) it was held that it can only constitute a valid defence to actions or conduct of the accused in pursuit of the completion or implementation of an affected transaction that was lawful. See: S v Western Areas Limited and Others 2004 (4) SA 591 (W) at par 40.

From the defences raised before the enforcement committee and from the notice of appeal, it is apparent that a core issue in this appeal is whether the appellants had "inside information" on ACT and whether they knowingly dealt with ACT shares. The respondent drew the court's attention to the fact that there is a dearth of South African authorities on the topic, and consequently it would be necessary to refer to foreign law.

FOREIGN LAW ON INSIDER TRADING

The similarity between legislation in the EU, the United Kingdom and South Africa on the issue of "inside information" appears from the following table:

Europe	**UK**	**South Africa**
"Inside information" is defined by Article 1 of EU Directive 2003/6 as	Section 118C of FSMA defines inside information as *In relation to qualifying investments, which are not commodity derivatives, inside information is*	Section 72 of the SSA, provides that *"inside information"* means
Information of a precise nature	Information of a precise nature	*Specific or precise information,*
which has not been made public	Which – (a) is not generally	*which has not been made public*
	available,	
relating to issuers of	(b) relates, directly or	*and which –*

financial instruments or to financial instruments	indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and	*(a) is obtained or learned as an insider*
and which, if it were made public, would be likely to have a significant effect on the prices of [the] financial instruments [concerned] or on the price of related derivative financial instruments.	(c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments.	*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;*

There is a close link between the prohibition on insider dealing and the concept of inside information. "Inside information" is defined by Article 1 of EU Directive 2003/6 as "information of a precise nature which has not been made public, relating to issuers of financial instruments or to financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of [the] financial instruments [concerned] or on the price of related derivative financial instruments."

In order to strengthen legal certainty for market participants, EU Directive 2003/124 specifies the definition of two key elements of inside information, namely the precise nature of that information and the extent of its potential impact on prices. Article 1(1)

of that directive thus provides that information "[is to] be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments."

Article 1(2) of that Directive defines information likely to have a significant effect on the price of financial instruments as information which "a reasonable investor would be likely to use as part of the basis of his investment decisions."

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. See: Spector Photo Group NV, Chris Van Raemdonk v Commissie Voor Het Bank-Financie- En Assurantiewezen (CBFA) [2009] EUECJ C-45/08 (23 December 2009) at para 50-52.

In Geltl v Daimler AG [2012] EUECJ C-19/11 (21 March 2012) the Court of Justice of the EC stated the following:

> *"The fact that, in order for information to be regarded as inside information, it must be possible for it to be considered precise and, in addition to it not having been made public, it must be capable, if disclosed, of significantly affecting the prices of financial instruments or the prices of related derivative financial instruments".*

The fact to be disclosed need not be the concluding fact:

> *".... The importance of sets of circumstances which came about in the course of a process involving several temporal phases cannot be ruled out a priori. What is required is simply that the public be informed of any fact which – clearly even in the case of a protracted process – is precise in nature and capable, if disclosed, of significantly affecting the prices of financial instruments or the prices of related derivative financial instruments."*

As to the question whether or not a fact must be disclosed, significance must be attributed, not to its chronological location in a process giving rise to an event, but to its precision and, in addition to its not having been made public, its ability significantly to affect market prices.

It is not necessary, in order to determine whether information is inside information, to examine whether its disclosure actually had a significant effect on the price of the 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. However, exposed information may also be used in order to check the presumption that the ex-ante information was price sensitive.

In Daimler supra, the Court concluded as follows:

> *"Where the potential of the information for affecting share prices is significant, it is sufficient that the occurrence of the future set of circumstances or event, albeit uncertain, be not impossible or improbable.*
>
> *The consequences for the issuer will be of relevance inasmuch as that will form part of the information available ex ante, while ex post information may also be used in order to check the presumption that the ex-ante information was price sensitive."*

The EU Market Abuse Regime regulates the misuse of non-public price sensitive information, which is of a "precise nature" (inside information). To be "precise" information must:

(i) indicate that circumstances exist or that an event has occurred (or may reasonably be expected to come into existence or occur); and

(ii) be specific enough to enable a conclusion to be drawn as to the "possible effect" of those circumstances or that event on the price of the relevant investments.

In FCA v Hannam [2014] UKUT 0233, the UK Upper Tribunal held that, for information to meet the second part of the precise test, one would need to be able to draw a conclusion as to the possible direction of any price movement.

However, the EU Court of Justice has now rejected that approach in its decision in the case of Lafonta v ANF (case C-628/13). The EU Court of Justice held in Lafonta as follows:

> "[36] *The increased complexity of the financial markets makes it particularly difficult to evaluate accurately the direction of a change in the prices of those instruments ... In those circumstances – which can lead to widely differing assessments, depending on the investor – if it were accepted that information is to be regarded as precise only if it makes it possible to anticipate the direction of a change in the prices of the instruments concerned, it would follow that the holder of that information could use an uncertainty in that regard as a pretext for refraining from making certain information public and thus*

profit from that information to the detriment of the other actors on the market.

[37] *... the answer to the question referred to is that, on a proper construction of point (1) of Article 1 of Directive 2003/6 and Article 1(1) of Directive 2003/124, in order for information to be regarded as being of a precise nature for the purposes of those provisions, it need not be possible to infer from that information, with a sufficient degree of probability, that, once it is made public, its potential effect on the prices of the financial instruments concerned will be in a particular direction."*

In the Singaporean matter of Public Prosecutor v G Choudhury, the term "specific information", as referred to in its insider trading legislation was held to refer to information which has an existence of its own quite apart from the operation of any process of deduction. The "specific information" must be capable of being pointed to and identified, and had to be capable of being expressed unequivocally.

In the Choudhury-matter, the concept of "specific information" was decided with reference to the Australian case of Ryan v Triguboff (1974 – 1976) 1 ACL R337. In that matter the Court, with reference to Sec 75A of the Australian Securities Industry Act, 1970 said the following:

"*The information which he has thus acquired must not be generally known but must be of such a nature that if it were*

generally known it might reasonably be expected to affect materially the market price of the shares."

In the United Kingdom matter of David Massey v The Financial Services Authority [2011] UKUT 49 (TCC) the Tribunal had to decide on whether information relevant to a charge of insider trading was precise and whether it had the capacity to affect the share price. To satisfy the statutory definition of being "precise", the Tribunal held that the information must:

(a) Indicate circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur; and

(b) Be specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of the shares.

The Tribunal thus held that the phrase "likely to have a significant effect on the price" bears an extended meaning and refers to information "*of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions.*" On the question whether inside information was knowingly used, Massey contended that he had persuaded himself that the circumstances were such that he was entitled to trade as he did. The Court accepted that his belief was genuine, but found that "*wishful thinking is not the same as having a belief on reasonable grounds that his behaviour did not fall within the definition of market abuse.*"

The Tribunal found that a reasonable market professional, even without having in mind the precise wording of the statutory test for market abuse, would have appreciated that the transaction at least risked constituting market abuse, and would therefore have either drawn back from implementing it or sought appropriate advice to confirm that it was legitimate before proceeding. If Massey had considered the matter dispassionately and objectively, he should have appreciated the existence of each of the elements of market abuse that was found to be present.

An exercise to compare what foreign jurisdictions did in relation to comparable cases must be undertaken with caution. See: Pather v FSB [2014] 3 All SA 208 (GP) at par 200, p251 at G. Although one must be sensitive to the differences in wording of empowering provisions in foreign jurisdictions when comparing them with South African Law, the principles emerging from foreign case law confirms universally accepted propositions regarding insider trading. The respondent submitted that, in the context of this matter, it is not only instructive but necessary to do such comparison. The following emerges from such comparison:

1. For information to be specific or precise does not require the circumstances or event to which it relates to be in final form. Information relating to circumstances or an event in an intermediate phase could still be specific and precise and constitute inside information;
2. 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;

3. Whether the information is price sensitive is determined with reference to the reasonable investor and whether he would regard the information as relevant to a decision to deal in such securities or not.

CONCLUSION

Having heard and considered the arguments raised and considered the papers before me I am persuaded that:

(a) the enforcement committee is an administrative tribunal that determines the probabilities on documents serving before it. In this regard I am of the view that the rule in Plascon Evans does not apply to the proceedings before the enforcement committee.

(b) the information that the IDC had approved a loan of R99 million to ACT was specific and precise.

(c) the information was not available to the public and was price sensitive.

(d) the appellants knew they had inside information on ACT when they dealt in ACT shares between 26 January 2011 and 11 March 2011.

(e) there is no basis for setting aside the determination.

THE ADMINISTRATIVE PENALTY OF R1 MILLION

In determining an appropriate administrative sanction, the EC may have regard to the factors listed in Sec 6D(3)(a) to (i). The penalty imposed was informed by, but not equal to, the potential profit arising from the insider trading as evidenced by the

increase in the share price by 54.5% on 11 March 2011. The reliance on the potential profit is sanctioned by Sec 77(2), read with Sec 77(5) of the SSA. Since the appellants made no profit, in that they did not dispose of their shares while the company went into liquidation, the enforcement committee made a globular assessment based on a conspectus which included potential profit, but did not impose in addition thereto a penalty.

The enforcement committee exercised a judicial discretion as envisaged by Sec 6D(3), based on a multifactorial evaluation of circumstances. I am unpersuaded that the committee misdirected itself in the exercise of such discretion. Ralston (who also bought shares on behalf of the second appellant, and was found guilty of insider trading), sold all the AC Towers shares on 24 June 2011 at 11c per share, as opposed to the 10c per share for which he had bought them. A profit was thereby made for the second appellant. Further, between 24 June 2011 and 29 July 2011 the first appellant sold a total of 3 694 336 shares out of the Nedbank account at an average price of 11c per share.

The subsequent losses are in my view irrelevant. In formulating this view I rely on the case of The Insider dealing Tribunal v Shek Mei Ling (1992) 2 HKCFAR 205 where this approach was succinctly explained by Lord Nichols of Birkenhead in the matter of as follows:

> "*The approach is to treat the relevant profit 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 gain is to be measured by reference to the market value of the shares at that date. At that date, the amount of the inside dealer's profit, whether realized or not, was fixed once and for all. Subsequent changes in market prices are irrelevant."

In Dura Pharmaceutical, Inc. v. Broudo, 544 U.S. 336, 343 (2005) the following was stated:

"For one thing, as a matter of pure logic, at the moment the transaction takes place, the plaintiff has suffered no loss; the inflated purchase payment is offset by ownership of a share that at that instant possesses equivalent value. Moreover, the logical link between the inflated share purchase price and any later economic loss is not invariably strong. Shares are normally purchased with an eye toward a later sale. But if, say, the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss. If the purchaser sells later after the truth makes its way into the marketplace, an initially inflated purchase price might mean a later loss. But that is far from inevitably so. When the purchaser subsequently resells such shares, even at a lower price, that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-

specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price. (The same is true in respect to a claim that a share's higher price is lower than it would otherwise have been—a claim we do not consider here.) Other things being equal, the longer the time between purchase and sale, the more likely that this is so, i.e., the more likely that other factors caused the loss."

In SEC v. MacDonald (1983) 699 F.2d the court stated that:

"we see no legal or equitable difference....between an insider's decision to retain his original investment with the hope of profit and a decision to sell it and invest in something else. In both cases the subsequent profits are purely new matter. There should be a cut-off date."

In United States v. Mooney the court held that:

"The offense is not the purchase, but the deception. The "gain resulting from the offense" is not the gain resulting from the purchase. It is, rather, the gain resulting from the deception. The gain resulting from the deception stops when the deception stops, though there may be later gain (or loss) as the stock market gyrates along, unmolested by any deception. If someone buys stock illegally on the basis of insider knowledge, there may

be an increase in the stock's value when the insider knowledge is made public. That increase is illicit, resulting from a kind of deception to the other buyers and sellers of the stock. After the market adjusts to this information and the deception is ended, the value of the stock will, of course, continue to fluctuate according to the ordinary, legitimate vagaries of the market—with no deception—and thus, no offense…"

In the light of the above circumstances and the approach of the foreign courts to this issue I find that there is no basis for setting aside the administrative penalty. A possible defence of prior acquisition is afforded to a party in terms of Sec 73 of the SSA to the effect that if the person concerned only became an insider after he or she had given the instruction to deal to an authorised user and the instruction was not changed in any manner after he or she became an insider, there is no inside information. I am unpersuaded on the facts that this defence finds application, particularly because of the evidence of Zietsman when he contended that he did not know about the amount of the IDC loan until 11 March 2011. This was clearly untrue and does not accord with Mr Zietsman's further affidavits filed before the enforcement committee.

Consequently I am similarly of the view that there is no basis to set aside the administrative penalty.

ORDER

In the premises I make the following order:

The appeal against the conviction and the administrative penalty is dismissed with costs.

G. T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE: 24 AUGUST 2015

I agree:

N. B. TUCHTEN

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE: 24 AUGUST 2015

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