

SOUTH AFRICA / JUDGMENT

**Pather and Another v Financial Services
Board and Others (57617/10) [2014]
ZAGPPHC 303; [2014] 3 All SA 208 (GP);
2014 (9) BCLR 1082 (GP) (20 March 2014)
[2014] ZAGPPHC 303**

COURT

North Gauteng High Court, Pretoria

BEFORE

N F Kgomo

CASE / FILE NUMBER

57617/10

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REPUBLIC OF SOUTH
AFRICAIN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

CASE NO: 57617/10

DATE: 20 MARCH 2014

REPORTABLE

OF INTEREST TO OTHER

JUDGES

In the matter

between:

MASLAMON

THEEGARAJAN PATHER.....First

Applicant

AH-VEST

LIMITED.....Second

Applicant

and

THE FINANCIAL

SERVICES BOARD.....First

Respondent

THE ENFORCEMENT

COMMITTEE

(Constituted

under the Securities
THE MINISTER OF
FINANCE (RSA)Third
Respondent

JUDGMENT

N F KGOMO, J:

INTRODUCTION

[1] The applicants approached this Court for an order in the following terms:

1.1 Declaring that the Enforcement Committee had no jurisdiction to make the decision that the applicants contravened section 76 of the Securities Services Act 36 of 2004 (as amended by the Financial Services General Laws Amendment Act, 22 of 2008 (“the Act”) by operation of section 79 of the Act,

alternatively,

by operation of the doctrine of ultra vires;

1.2 Reviewing and setting aside the decision of the Enforcement Committee that the applicants contravened section 76 of the Act as ultra vires and incompetent;

1.3 In the alternative, reviewing and setting aside the decision that the applicants contravened section 76 of the Act for the reason that the Enforcement Committee applied the incorrect standard of proof;

1.4 In the further alternative, declaring that sections 102 to 105 of the Act are unconstitutional in relation to conduct under section 76 inasmuch as a finding that conduct contravened section 76 of the Act is akin to a finding of criminal guilt, which finding only a court of law is competent to make;

1.5 Declaring that the costs of this application be paid jointly and severally by such of the respondents who oppose the relief; and

1.6 Granting the applicant such further and/or alternative relief as this Court may deem appropriate.

[2] The application was opposed by all three the respondents. At the argument of this matter, the applicants were represented by Adv A Subel SC, duly assisted by Adv J J Meiring. The first and second respondents were represented by Adv Alec Freund SC, duly assisted by Adv Johan de Waal. The third respondent was represented by Adv Wim Trengove SC, duly assisted by Adv Leah Gcabashe.

THE PARTIES

- [3] The first applicant, Maslamon Theegarajan Pather, is an adult male businessman, at all relevant or material times hereto employed as the chief executive officer of the second applicant. He was also at all material times chief executive officer as well as managing director and chairman of the second applicant's predecessor, All Joy Foods Limited ("All Joy"). Any reference in this judgment to Ah-Vest (second applicant) ("Ah-Vest") should be taken to include ("All Joy"), unless specifically otherwise indicated.
- [4] The second applicant, Ah-Vest Limited, is a limited liability company, duly registered and/or incorporated in terms of the company

laws of South Africa ("RSA") and which has been listed on the Alternative Exchange of the Johannesburg Stock/Securities

Exchange since July 2004 (initially under the names, All Joy Foods Limited). Its principal place of business is at 103 Booyens Reserve Road, Crown Mines, Johannesburg.

- [5] The first respondent, The Financial Services Board, ("FSB"), is an independent body established in terms of the Financial Services Board Act, 97 of 1990 (as amended) in order to oversee the South African non-banking financial services industry in the public interest. The first respondent's offices or principal place of business is situate at Rigel Park, 446 Rigel Avenue South, Erasmusrand, Pretoria.
- [6] The second respondent, The Enforcement Committee ("EC") is a functionary falling under the control of the first respondent, set up in terms of the Securities Services Act, 36 of 2004 ("the Act"), which in late 2009 handed down a decision that found that both the company Ah-Vest and the first applicant had on two counts contravened section 76(1)(a) read with section 76(2) of the Act.
- [7] The third respondent, The Minister of Finance, RSA, is a ministry in the Government of the RSA. It is cited in this application by virtue of the interest he (Minister) or it (Department) may have in the outcome. No order for costs was sought against the third respondent save insofar as he or it elects to oppose this application, which he or it did.

THE OBJECT OF THIS APPLICATION

- [8] The applicants are asking this Court to have the decision of the Enforcement Committee in terms of which the latter body found, in late 2009, that Ah-Vest and the first applicant had contravened section 76(1)(a) read with section 76(2) of the Act, reviewed and set aside. In the alternative the applicants are asking the court to declare sections 102 to 105 of the Act (which relate to conduct under section 76 of the Act) unconstitutional.

[9] In the decision of the Enforcement Committee both Ah-Vest and the first applicant were found to have contravened section 76(1)(a) read with section 76(2) of the Act on two counts which had been referred to it by the Directorate of Market Abuse ("the Directorate"), purportedly under the Act before it was amended by the Financial Services Laws General Amendment Act, 22 of 2008 ("the 2008 Act"). This decision was subsequently, on 16 August 2010, confirmed by the Appeal Board of the first respondent

[10] From the conspectus of the totality of the facts and circumstances in this application it appears as if or that the applicants do not take issue with the merits of the findings made against them because they contend and submit that –

10.1 the second respondent lacked jurisdiction to act against them as it did by operation of section 79 of the Act;

10.2 the second respondent lacked jurisdiction because, on a proper interpretation of section 78(4) of the 2008 Amendment Act, it no

longer retained jurisdiction;

further alternatively,

10.3 the second respondent's decision falls to be reviewed and set aside for reason that it applied the incorrect standard of proof; and

10.4 the applicants seek an order declaring that sections 102 to 105 of the Act are unconstitutional in relation to conduct under section 76 of the Act, inasmuch as a finding that the conduct contravened section 76 is akin to a finding of criminal guilt, which finding only a court of law is competent to make.

[11] This Court assumed and accepts that it is the applicants' case that if such a finding of constitutional invalidity is made, this would constitute a further ground for reviewing and setting aside the second respondent's decision, which was made purportedly in terms of the impugned provisions.

[12] Prayer 1.1 of the applicants' Notice of Motion refers to the "Securities Services Act, 36 of 2004 (as amended by the

Financial Services General Laws Amendment Act, 22 of 2008" as "the Act", presupposing that inter alia, the constitutional

relief sought in respect of sections 102 to 105 of "the Act" pertains at face value to "the Act, as amended by the Amendment Act". This appears to be a mistake or inconsistency because an attack on the Amended Act would not make sense given that it (amended Act) does not contain the challenged sections. Furthermore, the applicant's replying affidavit[1] can only be construed as pointing to the fact that their challenges should be determined with reference to Act 36 of 2004 prior to its amendment in 2008.

[13] I will deal with these issues in line with the above understanding.

RELEVANT FACTUAL BACKGROUND

[14] Chapter VIII of the Securities Act, 36 of 2004 (hereinafter referred to as “the old 2004 Act”) prohibits three forms of market abuse, namely,

14.1 insider trading (sections 73 and 74 thereof);

14.2 various prohibited trading practices (section 75 thereof); and

14.3 false, misleading or deceptive statements, promises and forecasts (section 76 thereof).

[15] This application concerns contraventions of section 76 of the old Act of 2004 which took place before the Act was amended by the Financial Services Laws General Amendment Act, 22 of 2008 {“the Amendment Act of 2008”}.

[16] Section 97 of the old Act required the first respondent to establish an enforcement committee (“the Enforcement Committee or second respondent”). Section 104 of the old Act further, empowered a panel of the Enforcement Committee –

“...if satisfied that a respondent has contravened or failed to comply with this Act...”

to impose a financial “administrative penalty”.

[17] In terms of section 83(1) of the old Act, the Directorate of Market Abuse (“DMA”) exercises certain and specified investigative powers of the Board of the first respondent. Exercising those powers, it conducted an investigation into the conduct of the applicants.

[18] Section 94(e) of the old Act empowered the DMA to refer a matter investigated by it to the Enforcement Committee. It indeed referred two counts of alleged contraventions of section 76 of the old Act on the part of both applicants to the Enforcement Committee as would appear fully hereunder.

[19] Although the investigation and actual decision to refer the matter took place before the new Act came into force, the physical referral to the Enforcement Committee took place thereafter.

[20] The DMA conducted the investigation into the applicants’ alleged transgressions between 31 May 2005 and 14 October 2005 and drafted a report concerning the affairs of the second applicant in terms of section 102(1) of the old Act. The conclusion or recommendation of the report was the following:

“In my view, All-Joy and Carroll contravened section 76 of the Securities Services Act, 2004 ...”

[21] The Carroll mentioned above is one Cedric Carroll, a former financial director of All-Joy.

[22] Between November 2006 and May 2007, a number of investigations took place in which, in terms of section 82 of the old Act, members of the Financial Services Board (“FSB”) took evidence under oath from witnesses concerning the applicants’ affairs concerning their

conduct of business affairs. The first applicant was one of the witnesses interrogated. In 2007, using its powers under section 82(2)(d) of the old Act, the DMA twice more questioned the first applicant. The DMA then elected to refer the matter to the Enforcement Committee under Case Number 11/2008. The report initiating the referral bore the date 5 May 2009. The matter was enrolled for consideration by the Enforcement Committee in July 2009. The Enforcement Committee dealt with the referral or matter as one referred to it under the old Act.

[23] The Enforcement Committee handed down its findings during late 2009 in respect of the two counts under its consideration.

[24] On the first count, the Enforcement Committee found that the first applicant had, in April 2005, for the purpose of the audit of its accounting records in preparation of its financial statements for the year ending 28 February 2005, through its records, represented to its auditors that some of the recorded credit sales transactions to the total value of R830 486,18 were genuine transactions in the ordinary course of business, well knowing that those representations were false. Specifically, the Enforcement

Committee found that the above representation had been in circumstances where the first applicant knew or should have known that it was false, misleading or deceptive inasmuch as the transactions were fictitious sales which caused credit sales and accounts receivable to be overstated by the amount stated above.

[25] The second count concerned the first applicant's causing the publication on 31 May 2005 on the Stock Exchange News Service

("SENS") of its audited financial statements for the year ended 28 February 2005. On 14 October 2005, this was followed by the publication of an announcement of SENS to the effect that "accounting errors" had caused the overstatements in the financial statements. The latter SENS announcement also stated that those accounting errors were due to human error and that no misappropriation of funds had taken place. The Enforcement Committee held that both the applicants knew or ought to have known that those financial statements were false, misleading or deceptive in that they overstated trade and other receivables by R1 633 377,00; capital and reserves after tax by R1 007 023,00; and profit after tax by R295 747,00.

[26] On 16 August 2010 the decision of the Enforcement Committee was confirmed by the Appeal Board of the FSB.

APPLICANTS' SUMMARY POSITION

[27] The nett summary position of the applicants' challenge comes down in my view to the following:

27.1 That firstly, the Enforcement Committee had no jurisdiction to make the findings it purported to make in relation to the two counts brought against them under section 76 of the old Act - neither on the merits or in respect of the penalty. This is so because, since the Enforcement

Committee is a creature of statute, its powers are to be found within the four corners of the constituent Act, being, the old Act. Furthermore, it was the applicants' contentions that section 79(1) of the old Act clearly stipulates that only a High Court or a Regional Court is clothed with jurisdiction to do what the Enforcement Committee sought to do here. Consequently, the decision of the Enforcement Committee went beyond the bounds of section 79 of the old Act and is accordingly ultra vires the powers bequeathed to it by the old Act.

27.2 That secondly, in the alternative, if it were to be found that section 79 of the old Act does not limit the powers of the Enforcement Committee in the manner or way described above, then this Court should find that the Enforcement Committee misinterpreted the transitional provision contained in section 78(4) of the 2008 Act. In the above context, so argued the applicants, on a careful reading of the situation, it is plain that there was no statutory basis upon which the Enforcement Committee could become seized with or of a matter after 1 November 2008, this date being the date upon which the amendments occasioned by the 2008 Amendment Act came into effect.

27.3 Thirdly, and in the further alternative, even if the Enforcement Committee is found to have been properly empowered, it still erred in applying a civil standard of proof to proceedings which were in character nothing other than criminal or at the very least quasi-criminal. This is so because the repercussions of being found to have infringed the old Act then and of having an administrative penalty imposed are very serious. The proceedings under sections 102 to 105 in respect of section 76 of the Act are designed to punish an offender and to hold him or her up as an example to the securities community and to the public at large. The applicants concede that the Act is silent on this point. Nevertheless, it was incumbent on or upon the Enforcement Committee not to apply the civil standard of proof, which weighs up two versions at hand and asks which of them was, on a balance of probabilities, more probable, but instead to apply the more stringent criminal standard of proof. The applicants submitted that where or had the criminal standard been applied in this instant case, the Enforcement Committee would have had to have been convinced that the version put up by the first applicant was reasonably possible. As a result, so the argument proceeded, this misapplied standard of proof fundamentally undermined the presumption of innocence, and accordingly breached the rule of law, which is entrenched in section 1(c) of the Constitution of the RSA[2] ("Constitution").

27.4 Fourthly, and in another further alternative, sections 102 to 105 of the Act relative to conduct in terms of section 76 contravene several provisions of the Constitution, among others, sections 1(c), 2, 7(2), 34 and 35(3) thereof inasmuch as they infringe upon a person's right to a fair trial. This is so because according to the applicants, proceedings under sections 102 to 105 of the Act are extremely closely akin to criminal proceedings. Under the Constitution, only courts of law are competent to conduct such proceedings and to make findings of criminal guilt, and by implication, of those which approximate to criminal guilt.

27.5 Fifthly, the applicants contended that the legislative history traversed in the respondents' answering affidavit is irrelevant to the issues to be decided by this Court.

27.6 Sixthly, the applicants further submitted that the picture sought to be created in the answering affidavits or papers of the respondents of a worldwide move towards the use of a system of administrative penalties in the context of securities regulation is not only irrelevant to the issues before this Court, but also untrue and devoid of any merit.

RELEVANT STATUTORY SCHEME AND LEGISLATIVE BACKGROUND

[28] Contrary to the applicants' submission or contention that the legislative history sketched out by the respondents in their

answering papers is irrelevant, I find that this history in the context of issues to be decided in this case is relevant. This Court will be called upon to decide which legislative regime is applicable to the issues and questions raised by the parties as the processes under the DMA and the Enforcement Committee straddled the 2004 and 2008 legislation. It is also so that this Court may or will be called upon or expected to make a ruling or rulings on proper constructions to be given to relevant and alluded to legislation. In that regard the historical path of an Act may be very relevant. Evidence as to the reasons underlying the policy decisions to which effect was given in legislative provisions is admissible for the purposes of determining the constitutional attack launched by the applicants, especially as in this case the applicants are claiming that a constitutional right(s) has been limited. The court should determine or establish whether there has been such limitation and if so, whether it is justified.[3]

Why system of administrative penalties was introduced

[29] During the mid-1990's the JSE had gained an unhealthy reputation of being lackadaisical about enforcing the provisions regulating its markets, including insider trading legislation. This was a great concern. A perception existed that insider trading was rife on or in the South African financial markets and that the JSE was some sort or kind of a "wild-west stock exchange. The general concern was the belief that South Africa was missing out on significant investment from major foreign investment houses because of this reputation.[4] It was recognised and acknowledged that the South African market depends for its success and survival on foreign investors and that it was imperative to establish appropriate standards and to rigorously enforce them in order to establish a reputation for the market.

[30] Prior to 1999, such legislation as existed to regulate market abuse, including insider trading and price manipulation, was not well enforced. The FSB did not have a substantial role in the enforcement of the legislation. At the time, its (FSB) role related primarily to regulating the solvency of players in the market. The regulatory framework then provided for only three enforcement tools, namely, registrars' financial penalties; the withdrawal of approval or licence of the transgressor; and the criminal prosecution of the wrongdoer. Each of these had serious shortcomings.

[31] The first option (registrars' financial penalties) only applied to minor non-compliances. This sanction was almost exclusively utilised in cases of late returns and submissions and minor investment spread-type transgressions. The penalties imposed were very low and/or negligible. For example, in terms of the Friendly Societies Act, 1956 and the Pension Funds Act, 1956, the fines for late returns of documentation were R50 per day. In the Unit Trust Control Act, 1981, a maximum fine of R200 in total

was prescribed. In the Banks Act, 1990, a fine of R100 per day was prescribed. The Stocks Exchanges Control Act, 1985 and the Financial

Markets Control Act, 1989 prescribed fines of R200 per day.

[32] The second option (withdrawal of approval or licence) is only suitable in very limited circumstances, i.e. where the transgression or non-compliance is of such a severe nature that it warrants the "big stick". It is common cause that the majority of transgressions did not and still do not fall within this category (deserving of a "big stick"). The withdrawal of a licence invariably and inevitably leads to the demise of the business and sometimes accompanied by job losses, for example. In addition to the above, this sanction is only applicable if the transgressor is actually the licence holder or an approved person. It is not applicable when enforcement action is required against a person doing or running an unregistered business.

[33] The third option (criminal prosecution) is even more problematic: The responsibility or prerogative for prosecution lies with the Director of Public Prosecutions ("DPP") and not with regulatory authorities such as the FSB. A criminal prosecution is a time-consuming and difficult activity. Prosecutors do not always possess the necessary specialised knowledge or skills or expertise to prosecute regulatory contraventions or transgressions, which might result in active and serving private legal practitioners being approached and appointed as ex officio prosecutors of such matters. Furthermore, the stigma attached to a criminal conviction will always or often mean that industry professionals are likely to fight a relatively minor contravention tooth-and-nail. - a time - wasting or and expensive exercise.

[34] Criminal prosecution may not be the appropriate or industry suitable recourse in situations such as these. Mostly, transgression in this regard are less serious contraventions of financial regulatory legislation. The regulatory environment of the financial industry is detailed and widespread. Many cases amount to an industry player simply not adhering to the rules, as opposed to committing an offence which truly warrants a criminal prosecution or sanction. Not that criminal prosecutions cannot be instituted for transgressions here: the facts of a specific case may not be sufficiently serious to warrant this. For instance, whilst making a false statement relating to a listed security is in principle a serious offence, it may be that a bona fide mistake was made by the company making such a statement. If the mistake is rectified within hours or sufficiently credible explanation is tendered therefor, that would place the transgression in a completely different light or category which may not require a criminal prosecution.

[35] The above and other industry related deeds and misdeeds precipitated a state of affairs that was not easily or adequately remediable. It was so that many a minor and major transgressions and non-compliance with rules did not have an appropriate and/or readily ascertainable

enforcement process. There were cases where there would be a definite need to punish the transgressor but not close its business down or saddle the transgressor with a criminal record. This problem was, in my view, sufficiently identified and articulated by the deponent of the respondents' answering affidavit.[5]

[36] To address the shortcomings in the enforcement processes legislative reform and refinement was instituted over a three-stage process. The first stage was when the Insider Trading Act 135 of 1998 ("the Insider Trading Act") was enacted. This was followed by the enactment of the Securities Services Act[6] ("SSA") (second stage) and then the enactment of the Amendment Act. (Third stage) The above Acts gradually served to

streamline the enforcement processes to the level they are today.

First set of reforms: Introduction of a civil action in respect of insider trading (1999-2005)

[37] The Policy Board on Financial Services and Regulation ("the Policy Board") appointed a committee named "the King ask Team" to look into issues of insider trading. In its recommendation the King Task Team recorded that –

37.1 It was well known that there has not been one prosecution for alleged insider trading in the RSA since prohibition against insider trading was first introduced into our law in 1973 by the Companies Act, 61 of 1973;

37.2 In the context of the RSA's re-integration into the international financial markets and the Government's desire to create an environment conducive to foreign investment, there was justified concern over the adequacy of the existing insider trading regulations in the RSA;

37.3 The Board was requested to make such recommendations as would enhance public and international confidence in the South African statutory and regulatory measures to prevent all insider trading practices.

[38] The King Task Team recommended the adoption of new insider trading legislation and that the responsibility for enforcement be transferred from the Securities Regulatory Panel ("SRP") to the FSB. It also recommended the introduction of civil penalties for insider trading, in addition to possible criminal sanction.

[39] The Insider Trading Act was promulgated on 17 January 1999. The Act established the Insider Trading Directorate consisting of senior lawyers and market professionals, to consider insider trading cases and decide on enforcement on behalf of the FSB. The Act also empowered the FSB to bring a statutory civil action before the High Court for a civil penalty. The FSB could sue an alleged offender for the profits made or the losses avoided through offending transactions, plus a penalty of three times such amount as had been made or

avoided. The Act further created a mechanism to distribute the funds from a successful action to persons who were prejudiced by the insider trading.

- [40] The Insider Trading Directorate operated between 1999 and 2005 when it was replaced by the Directorate of Market Abuse (“DMA”). It utilised the civil enforcement action extensively to address insider trading on the financial markets. This process proved reasonably effective in dealing with insider trading cases. The FSB settled numerous cases for substantial sums of money and the incidence of suspicious trades dropped noticeably. The standard applied by the courts in such litigation was the civil - and not the criminal
- standard. During this period, the Insider Trading Directorate interacted with the prosecuting authorities as well those agencies tasked with criminal investigations with regard to insider trading cases. Of interest is that no criminal prosecution followed as a result of this interaction.

Second set of reforms: Introduction of administrative sanctions in respect of capital market contraventions (2005-2008)

- [41] Despite the fact that the Insider Trading Act’s civil action process was successful, it did not nevertheless address the problems besetting enforcement. It was unduly time-consuming, with matters taking too long to be concluded as a consequence of the delays incumbent therewith. It was common cause between all involved with such processes that an effective and credible financial regulatory system must be capable, at least in its design, to produce reasonably speedy results. Furthermore, the penalty provisions of the civil action process were seen as not appropriate for forms of market abuse other than insider trading, such as making false statements and price manipulation. With insider trading it is generally possible to quantify the gains made by culprits during the period from when they start trading to when the insider information becomes public. This formed the basis from which penalties were calculated. With other forms of market manipulation it is not so easy to quantify the gains made by the perpetrator. For example, an asset manager may cause false statements to be circulated in order to push up the price of a particular share and thereby present a false picture of the value of shares held. In such a scenario it is difficult, if not well-nigh impossible, to quantify the profit made or loss avoided by the asset manager. The scheme applied in respect of insider trading penalties can therefore not be applied.
- [42] The above concerns, among others not mentioned herein, led to the repeal in 2005 of the Insider Trading Act and its replacement by the SSA. The SSA consolidated into one Act and then amended various existing Acts affecting financial markets

[43] The SSA retained the existing civil and criminal sanctions for insider trading. The applicants however contended that the civil action process was abandoned. That cannot be correct. This Act went further: It replaced the Insider Trading Directorate with the DMA and extended its jurisdiction to cover three forms of market abuse, namely, insider trading,[7] market manipulation,[8] and false statements.[9] The Act ("SSA") also created an enforcement committee and empowered it to impose administrative penalties.

[44] The provisions on "market-abuse" contained in Chapter VIII of the SSA and "administrative penalties" provisions contained in Chapter IX thereof are fashioned in line with section 2 of the SSA, which section articulates the objects of the Act in the following terms:

"This Act aims to -

- (a) Increase confidence in the South African financial markets by-
 - (i) requiring that security services be provided in a fair, efficient and transparent manner; and
 - (ii) contributing to the maintenance of a stable financial market environment.
- (b) Promote the protection of regulated persons and clients;
- (c) Reduce systemic risks; and
- (d) Promote the international competitiveness of securities services in the Republic."

[45] The rationale for the amendments was captured in the presentations made by the FSB and the Treasury to the Parliamentary Portfolio Committee on 12 August 2004 by then FSB Deputy Executive Director and subsequent Executive Director, Mr Barrow. Mr Barrow focussed in his presentation on the background, ambit, objects, application, prohibitions, structure and general provisions of the SSA at the time it was still a Bill. He pointed out among others that the Bill provided for the establishment of an enforcement committee with the power to impose an administrative penalty on any person who contravenes or fails to comply with it. Clearly or at least,

ostensibly having in mind provisions of this Bill such as section 106(6) and (7) thereof, Mr Barrow stated then that –

"Insofar as insider trading is concerned, one may not take both civil and administrative sanctions on the same set of facts. However, criminal sanctions may be added to civil or administrative sanctions. However if the Enforcement Committee deals with a person and criminal sanctions are later instituted, the judge would be required to take into account any administrative sanctions that might already have been imposed."

[46] Our courts have on numerous occasions had to deal with the admissibility of the evidence when interpreting provisions of the SSA insofar as they relate to enforcement.[10]

[47] After its formation, the Enforcement Committee imposed numerous administrative penalties between 2005 and 2008. In many instances

cases were finalised on the basis of agreed upon penalties or admissions between the DMA and the FSB. Cases are generally determined on the papers and determinations are generally made relatively quickly. The Committee's work attracted positive remarks from the media, the industry and foreign regulators.

[48] During this period (2005-2008) the DMA and the FSB continued to discuss suspected contraventions with the prosecuting and criminal

investigations authorities. On a few occasions the criminal courts convicted people or persons for market abuse offences and imposed

criminal fines. However, in general, most cases were dealt with exclusively through the Enforcement Committee process.

Third set of reforms: Establishment of the New Enforcement Committee (2008 to the present day)

[49] The Amendment Act considerably expanded the "administrative penalties" regime, primarily so by the introduction of sections 6A to 6I into the Financial Institutions (Protection of Funds) Act, No 28 of 2001 ("the FI Act"). The amendments came into force on 1 November 2008.

[50] In terms of these amendments, the original Enforcement Committee (the present second respondent) was replaced by a new Enforcement

Committee created in terms of section 10(3) of the Financial Services Board Act, 9 of 1990 ("the FSB Act"). The main difference between the two committees is that the new Enforcement Committee was given jurisdiction to deal with contraventions of or non-compliance with all FSB-administered legislation. This becomes quite clearer when one looks at the reference to the concept "a law" in section 6A(1) of the FI Act, especially when one reads it together with the definition of "law" introduced into section 1 of the FI Act.

[51] As against the above scenario, the jurisdiction of the old Enforcement Committee to impose administrative penalties was limited to contraventions of the old SSA. This extension of jurisdiction appears on all probabilities to have been informed by the efficient and successful enforcement processes.

[52] The Amendment Act of 2008 repealed those provisions of the SSA which empowered the old Enforcement Committee to impose administrative

penalties for contraventions of or failure to comply with that Act subject of course to the transitional provisions contained in section 78 of the (Amendment) Act.

[53] Section 78(4) of the 2008 Act reads as follows:

"(4) the deletion by virtue of section 33 of the Act of the definition of 'Enforcement Committee' in section 1 of the Security Services Act 2004 and the repeal of sections 94(e), 67, 68 and 69 of this Act do not affect any proceedings of investigations instituted, the fine to be imposed or the payment of a compensatory amount to be required by the Enforcement Committee referred to in that Act and which

was pending at the date of coming into operation of this Act; and any such proceedings, investigation, fine or payment of a compensatory amount may be continued, instituted or enforced as if this Act had not been passed."

[54] The above subsection does refer to referrals to the Enforcement Committee. What is therein preserved is "any proceeding and/or

investigation instituted ... which is pending as at 1 November 2008 The interpretation that can be placed on the above is that what is being preserved is the continuation of such proceedings and investigations, which may be proceeded with, instituted or enforced as if this Act (2008 Act) had not been passed.[11]

[55] The referral to the Enforcement Committee becomes a step in the continuation of the proceedings. This boils down to the following: If any part of the proceedings undertaken by the FSB occurred before 1 November 2008, the repeal of the sections I referred to hereinbefore does not affect that which has taken place or is taking place in consequence of the investigations.

Market manipulation and false statements

[56] Market manipulation is referred to in the relevant legislation as manipulative practices or prohibited trading practices. It was originally made a criminal offence in section 40 of the repealed Stock Exchange Control Act 1 of 1985. In terms of this legislation, market manipulation included certain illegal methods of trading in securities as well as the making of false statements.

[57] An insignificant number of prosecutions relating to market manipulation were instituted during the period when the above Act was in force. The sanctions handed down were exclusively fines. No term of imprisonment was imposed.

[58] In 2005 the making of false statements was separated into an independent offence.[12] The definition of "market manipulation" was re-written[13] to be more specific, and it was restricted to illegal activities. In the same breath or simultaneously, from an enforcement point of view, market manipulation (section 75) and false statements (section 76) could now be referred to the original Enforcement Committee for the imposition of an administrative penalty.

[59] With the above introductory and background information, the stage is now set for the interrogation of the applicants' grounds of review. As set out in paragraphs 10.1 to 10.4 above: These are couched in alternative terms.

LACK OF JURISDICTION BY OPERATION OF SECTION 79 OF THE ACT

[60] The applicants' first ground of review is that the Enforcement Committee lacked jurisdiction to impose an administrative penalty in respect of a contravention of or failure to comply with section 76 of the SSA because section 79(1) does not allow for that to happen.

[61] Section 76 of the SSA reads as follows:

"76. False, misleading or deceptive statements, promises and forecasts

- (1) No person may, directly or indirectly, make or publish in respect of listed securities, or in respect of the past or future performance of a public company –
 - (a) any statement, promise or forecast which is, at the time and in the light of the circumstances in which it is made, false or misleading or deceptive in respect of any material fact and which the person knows, or ought reasonably to know, is false, misleading or deceptive; or
 - (b) any statement, promise or forecast, which is, by reason of the omission of a material fact rendered false, misleading or deceptive and which the person knows or ought reasonably to know, is rendered false, misleading or deceptive by reason of the omission of that fact.
- (2) A person who contravenes subsection (1) commits an offence."

[62] The section 79(1) which the applicant relies on reads as follows:

"79. Jurisdiction

- (1) Only a High Court or a regional court has jurisdiction to try any offence referred to in sections 73, 75 and 76 and to impose a penalty up to the maximum set out in section 115(a)."

[63] Section 115(a) of the SSA reads as follows:

"A person who -

- (a) commits an offence referred to in section 73, 75 or 76 is liable to a fine not exceeding R50 million or to imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment;"

[64] As already alluded to above, section 73 of the SSA deals with insider trading. Section 75 deals with prohibited trading practices. I have already quoted section 76 above, which deals with false, misleading or deceptive statements, promises and forecasts.

[65] I agree with the applicants' contention that when dealing with this aspect of jurisdiction, rules relating to the interpretation of statutes play a very important part.

[66] It is the applicants' case hereon further that –

66.1 the plain language of a statutory provision is the primary purveyor of its meaning;

66.2 the broader textual context of a statutory provision and the purpose of the statute as stated inter alia in its preamble, are important factors of which account ought explicitly to be taken when the language referred to above is vague or ambiguous;

66.3 while the notion of context is more important now than it was in the pre-constitutional era, its new-found function is primarily to satisfy the demand of section 39(2) of the Constitution of the RSA which decrees that statutory provisions are to be understood through the “prism of the Bill of Rights”, and

66.4 accordingly, if there is greater scope now for overriding the plain wording of a statutory provision, the Constitution requires in quite explicit terms that this be in favour of the values framed in the Bill of Rights.

[67] The respondents’ contention or submission is that the applicants’ argument is incompatible with the very provisions of the SSA which explicitly or expressly confer jurisdiction on the Enforcement Committee to impose administrative penalties, relying among others on sections 104(1) and (2) of the Act, which incidentally were repealed by the 2008 Amendment Act.

[68] For completeness’ sake, the repealed sections 104(1) and (2) read as follows:

“Imposition of administrative penalty

104.

(1) If a panel is satisfied that a respondent has contravened or failed to comply with this Act and -

- (a) the respondent did not admit as contemplated in section 103; or
- (b) if the panel and the respondent could not agree on the appropriate amount of a penalty in terms of that section; or
- (c) if the respondent has paid the penalty imposed under section 103(1)(a) but failed to take the remedial action instructed under

section 103(1)(b),

the enforcement committee may cause to be delivered by hand to that respondent a written notice that must contain the particulars

contemplated in subsection (2).”

[69] Subsection (2) of section 104 enumerates what should be in the notice referred to in subsection (1). The list includes the personal particulars of the “offender” or “transgressor”, the specifics of the contravention; the administrative penalty imposed as well as the reasons therefor, the date the penalty should have been paid and remedial action, if any, taken; appeal rights and warning of the fact that failure to comply with the penalty or to act accordingly may trigger the provisions of section 104(3).

[70] Sections 104(6) and (7) of the SSA contain important provisions which in my view are geared at or towards explaining or elucidating issues contextually. Section 104(6) decrees that the Enforcement Committee may not impose a penalty contemplated in this section if the

respondent has been charged with a criminal offence in respect of the same set of facts. Section 104(7) decrees that a court imposing a sentence on a respondent in respect of the same set of facts that led to an administrative penalty being imposed earlier should take that administrative penalty into account when so considering a sentence.

- [71] In my considered view and finding, the Enforcement Committee is empowered to impose administrative penalties on recalcitrant or deviant respondents whereas, where a respondent is referred to a criminal court in respect of those facts and circumstances that the Enforcement Committee was called upon to adjudicate on, then the Committee should not impose a penalty as the criminal court would evaluate whether to do so and if found to be appropriate, what quantum of penalty to impose.
- [72] As such there is a problem with the applicants' ground of review that states that on a proper construction of the SSA, the Enforcement Committee lacked the necessary jurisdiction to consider the two counts brought against them under section 76 in order to make a finding as to whether the applicants had contravened or failed to comply with section 76 and to impose the penalties it purported to impose.
- [73] Section 104(1) of the SSA read with section 104(2)(d) empowers a panel of the Enforcement Committee to impose an administrative penalty if it is satisfied that a respondent has contravened or failed to comply with the Act. It is common cause that a person who commits the conduct prohibited by section 76(1) is a person who has contravened or failed to comply with this Act. The words "this Act" on their plain, ordinary and unambiguous meaning includes, in my view, sections 73, 75 and 76 of the Act.
- [74] When one critically looks at the wording of section 79(1), despite the wording to the effect that only a High Court or Regional Court has jurisdiction to hear such an offence, on a proper construction, when regard is had to the context as well as the intention of the Legislature, the Enforcement Committee is clearly empowered to impose such administrative penalties irrespective of the fact that the respondent involved may be tried in the High Court or Regional Court and convicted and/or sentenced there. I am thus persuaded and am satisfied that the exclusive jurisdiction of the High Court or Regional Court to "try any offence" referred to in section 73, 75 and 76 and to impose a penalty as contemplated in section 115(a) was not directed at excluding the possibility of the imposition of an administrative penalty for the same conduct which could lead to a conviction and/or sentence. The purpose of section 79(1) in my view is rather to identify which courts have jurisdiction to try a criminal offence under the sections concerned, not to exclude the Enforcement Committee from acting in accordance with the mandate conferred on it by the SSA to determine transgression of the Act and impose administration penalties.
- [75] Section 103(6) of the Act also in my view points in the same direction. It provides that:
- "The enforcement committee may not impose a penalty contemplated in this section if the respondent has been charged with a criminal offence in respect of the same set of facts."*

[76] On a proper construction therefore, this provision confers on the authorities an election as to whether or not to pursue a criminal charge. Once a respondent has been charged with a criminal offence, the Enforcement Committee may not impose an administrative penalty. The net result of the above finding is thus that if the authorities elect not to pursue a criminal charge, the Enforcement Committee may impose an administrative penalty, notwithstanding the fact that the respondents could have been charged with a criminal offence.

[77] There are other provisions in the SSA which, read together, show, in my further view, that the lawgiver must have intended the Enforcement Committee to have jurisdiction to impose an administrative penalty for a contravention of or failure to comply with sections 73, 75 or 76.

[78] Section 82(2)(a) empowers “the Board”, i.e. the first respondent, subject to section 83, to –

“... investigate any matter relating to an offence referred to in sections 73, 75 and 76, including insider trading in terms of section 440F of the Companies Act and the Insider Trading Act committed before the repeal of that section and that Act.”

[79] In terms of section 83(1)(c)(i) of the Act the DMA exercises the power of the Board to investigate any matter relating to an offence

referred to in section 82(2)(a). This means that the DMA is the agency or body which is empowered to investigate any matter and

relating to an offence relating to in sections 73, 75 and/or 76.

[80] Equally, section 94 provides, in parts relevant hereto, as follows:

“After an investigation or inspection has been done under section 93, the registrar may, in order to achieve the object of this Act referred to in section 2 –

...

(e) refer the matter to the enforcement committee to be dealt with in accordance with sections 102 to 105: Provided that in the case of an investigation carried out by the directorate under Chapter VIII, such referral must be done by the directorate.”

[81] For a proper and contextual understanding of what the Act provides, section 94 above must be read together with sections 102(1) and 99(1) of the Act.

[82] Section 102(1) reads as follows:

“The referral of a matter to the Enforcement Committee must be accompanied by a report on the investigation or inspection referred, to in section 93, or on an investigation done under Chapter VIII, as the case may be, and all other evidence relevant to the alleged contravention or failure and in the possession of the registrar or the directorate.”

[83] Section 99(1) provides that –

If the registrar or the directorate refers a matter to the enforcement committee under section 94, the enforcement committee must deal with the matter in accordance with sections 102 to 105, to the extent that those sections are applicable to the matter in question."

[84] The applicants conceded that the Directorate had the authority to investigate any matter relating to an offence referred to in sections

73, 75 and/or 76 but submitted that it is not entitled to refer such a matter to the Enforcement Committee to be dealt with under sections 102 to 105. It is their further submission that the DMA is only permitted to refer section 87 offences to the Enforcement Committee.

[85] Section 87 offences are offences under section 440F of the old Companies Act 61 of 1973 and the Insider Trading Act 135 of 1998.

[86] When one critically analysis the above applicants' submission, it becomes inescapable to conclude that they are asking this Court to find that –

86.1 Criminal prosecution is the only potential sanction in respect of contraventions of sections 75 and 76 of the Act;

In respect of insider trading, a criminal sanction is available, as is the civil remedy provided for in section 77;

86.3 The Act did not introduce the system of administrative penalties for contravention of sections 73, 75 and 77 of the Act;

86.4 The Act continues to permit criminal prosecutions for contraventions, prior to their appeal, of section 440F of the old Companies Act, 1973 and of the Insider Trading Act, yet also permits administrative penalties to be imposed in respect of - but only in respect of - such contraventions; and

86.5 Insofar as the subject matter of Chapter VIII is concerned, the only conduct susceptible to the imposition of administrative penalties is conduct prior to the enactment of the Act.

[87] Section 440F of the old Companies Act, 1973 provides as follows:

"Prohibition of use of fraud, deceit or artifice in dealings in securities.

- (1) Any person who, directly or indirectly, in connection with the purchase or sale of any security -
 - (a) employs any devise, scheme or artifice to defraud any person;
 - (b) makes any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

- (c) engages in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, shall be guilty of an offence.”

[88] It is not proper to place an interpretation on the statutory provisions material hereto in such a manner that an absurdity follows or ensues. I recount: Section 82(2)(a) read with section 83(1)(c)(ii) of the Act empowers the DMA –

“... to investigate any matter relating to an offence referred to in sections 73, 75 and 76. including insider trading in terms of section 440F of the Companies Act and the Insider Trading Act committed before the repeal of that section and that Act.. ,”[14]

I find that when section 94(e) of the Act refers to “... an investigation carried out by the Directorate under Chapter VIII it is referring to any such investigation, and not merely to an investigation into insider trading in terms of section 440F of the Companies Act, 1973 and the Insider Trading Act committed before the repeal of that section and that Act.”

[89] Section 93(1) permits the registrar to investigate any complaint or belief that a person is contravening or is failing to comply with any provision of the Act. Section 94(e) permits the registrar to refer any such matter to the Enforcement Committee, to be dealt with in accordance with sections 102 to 105.

[90] In the peculiar circumstances of this application, I tend to agree with the respondents’ submission that the registry is not prohibited from and is in fact indeed entitled in terms of these provisions to investigate an alleged contravention or failure to comply with sections 73, 75 and 76, and to refer such a matter to the Enforcement Committee.

[91] I concede that the interpretation of sections 94(e) and 83(1)(c) of the SSA lend itself to some sort of conundrum. It is apparent that section 94(e) only applies in those cases where the Directorate rather than the registrar has carried out an investigation under Chapter VIII. On the other hand one cannot with certainty say that section 83(1)(c) of the Act, which provides that the Directorate exercises the powers of the Board to investigate any matter relating to an offence referred to in section 82(2)(a) precludes or does not preclude the registrar from investigating a Chapter VIII offence. Nevertheless, when the section is interpreted contextually and in the light of the rest of the sections dealing with the same matter, it becomes apparent, as I so find, that it does not preclude the registrar from investigating such offences.

[92] In *Ebrahim v Minister of the Interior*[15] Joubert AJA held as follows:

“The rule of literal construction to ascertain the meaning of the language used in a statutory provision is often referred to as the golden or general rule of construction, namely, that words must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent from the context or such other consideration as a court of law is justified in taking into account, that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction.” (my emphasis)

[93] in *Protective Mining & Industrial Equipment Systems (Pty) Ltd (formerly Nampo (Pty) Ltd v Audiolens (Cape) (Pty) Ltd*[16] Grosskopff JA followed this approach, adopting the formulation of Innes CJ in *R v Venter*[17] by stating as follows:

“In ascertaining this intention, regard is to be had both to the language of the enactment and to the context, using this word in a wide sense ... However, it has often been laid down that where the language of a statute is unambiguous, and its meaning is clear, the court may only depart from such meaning –

‘if it would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the court is justified in taking into account.’,[18]

[94] The importance of contextual interpretation in the light of our Constitution was emphasised by Ngcobo J (as he was then) in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[19] in the following terms:

*“The technique of paying attention to context in statutory construction is now required by the Constitution, in particular section 39(2) ... That provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the ‘spirit, purport and objects of the Bill of Rights’. In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smith NO and Others*, this court explained the meaning and the interpretative role of section 39(2) in our constitutional democracy as follows:*

‘This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition transformation characterises the constitutional enterprise as a whole.’

[95] Taking into account the constitutional imperatives herein involved and after a thorough consideration of both the applicants’ and the respondents’ contentions I am persuaded that the effect of the above provisions was to –

95.1 empower the Directorate to investigate any matter relating to offences referred to in section 76 of the Act, among others;

95.2 empower the Directorate to refer any such matter to the Enforcement Committee; and

95.3 oblige the Enforcement Committee to deal with any such matter in accordance with sections 102 to 105 of the 2004 Act.

[96] It is thus my further finding that the exclusive power of a High Court or Regional Court "... to try any offence referred to in section 73, 75 and 76 ..." and to impose a penalty as contemplated in section 115(a) does not imply that the Enforcement Committee may not impose an administrative penalty for a contravention of or failure to comply with sections 73, 75 and 76. The criminal jurisdiction and the administrative penalty regime exist side by side.

[97] Consequently, the applicants' first ground of review cannot stand.

THE POINT RELATING TO THE TRANSITIONAL PROVISIONS CONTAINED IN SECTION 78(4)

[98] The applicants' second ground of review, which was couched as the first alternative to the first ground already discussed above was that the respondents lacked jurisdiction because on a proper construction or interpretation of section 78(4) of the 2008 Amendment Act, the enforcement committee no longer retained such jurisdiction. In short, what the applicants are submitting is that even if section 79 of the Act does not limit the powers of the Enforcement Committee, there was nevertheless no statutory basis upon which it (EC) could be seized with their matter after 1 November 2008, i.e. the date upon which the amendments introduced by the 2008 Act came into effect.

[99] To re-cap, Section 78(4) of the Amendment Act of 2008 reads as follows:

"(4) This deletion, by virtue of section 33 of this Act, of the definition of 'enforcement committee' in section 1 of the Securities Services Act, 2004, and the repeal of sections 94(e), 97, 98, 99, 100, 101, 102, 103, 104, 105, 106 and 111(1)(b) and (3) of that Act by sections 67, 68 and 69 of this Act, do not affect any proceeding of, investigation instituted fine to be imposed or the payment of a compensatory amount to be required by the enforcement committee referred to in that Act and which is pending at the date of coming into operation of this Act, and any proceedings, investigation fine or payment of a compensatory amount may be continued, instituted or enforced as if this Act had not been passed."

[100] The applicants submitted that the Board had misconstrued the import and/or meaning of section 78(4) of the Amendment Act. They further

contended that this provision was sloppily or opaquely or confusingly drafted. They thus submitted that –

100.1 a central canon of statutory construction is that the starting point in seeking the meaning of a provision is its plain wording;

100.2 in seeking to understand the plain words in a statute, the ordinary rules of syntax and grammar should be adhered to as far as possible;

and

100.3 the Board erred through its disaggregating the central underlying sentence(s) in section 78(4).

[101] Their main gripe with the Board's interpretation of section 78(4) appears to be, further, that it had ignored the basic syntactic structure of the sentence(s) in question. Their contention hereon is that, despite the obvious awkwardness of the drafting of this sentence(s), a plain reading of it makes it clear that the legislature sought to connect four phrases or verbal structures to "... the enforcement committee referred to in that Act...". Those four phrases or verbal structures are identified as -

101.1 "any proceedings of";

101.2 "in vestigation instituted";

101.3 "fine to be imposed", and

101.4 "the payment of a compensator amount to be required by".

[102] The applicants elaborated on this aspect as follows in substantiation of their submission that the Board's interpretation of section 78(4) is untenable: Instead, owing to the fact that the phrase "investigation instituted" does not have the preposition "/by" alongside it despite the appearance of the plainly "by" a few words later, the Board elected (wrongly in their opinion) to excise the phrase "investigation instituted" from the syntactical whole and to give it an entirely different, free-floating meaning. They advanced three reasons for their above contention, namely -

102.1 That such a construction runs counter to the basic tenets of grammar. That despite the presence of a measure of ambiguity, a sentence must be read and interpreted as a whole. Smaller parts or components should not be disentangled from the whole in the way the Board sought to do. That where ambiguity exists, it is arguably so that the interpreter should stick even more firmly to the sense provided by the sentence as a whole. Further, that upon a fair reading, therefore, it should be clear that the entire sentence in question centres upon the Enforcement Committee which, owing to the passage of the 2008 Act, no longer exists.

102.2 That the Board at first reached a conclusion that the Enforcement Committee never undertakes a task that might be characterised as an "investigation", yet, in the same breath, it concedes that the Enforcement Committee sometimes orders oral evidence to which the verb "investigate" might quite conceivably apply, which renders the Board's rejection of the obvious meaning of the sentence as a whole all the more suspect.

102.3 That the interpretation accepted or applied by the Board fails to take account of the fact that the 2008 Act uprooted the old Enforcement

Committee and its procedural framework as contained among others in sections 102 to 105 from the SSA, but left intact the investigatory

powers and processes of the Directorate.

They therefore concluded in their submission that accordingly, to the extent that the statutory basis for investigations of which the Directorate was seized and which had not yet been referred to the Enforcement Committee remained unaffected by the 2008 Act as a matter of basic statutory interpretation and as such the transitional provisions of section 78(4) of the 2008 Act cannot apply to such investigations. Furthermore, the transitional provisions can apply only to investigations which had already been referred to the Enforcement Committee and which, owing to the effect of the 2008 Act, rested on an uncertain foundation.

[103] This Court must accordingly determine a proper interpretation to section 78(4). However, it should not be lost to mind that the fundamental question is primarily not the meaning and effect of section 78(4) of the 2008 Act, but whether or not the Enforcement Committee which determined the applicants' case had jurisdiction to do what it did. Yes, looked at from both sides, the two scenarios above appear to be mirror images of each other, in my view.

[104] The chronology of events leading to this application for review can be narrowed down to the following:

104.1 The contraventions concerned took place in 2005;

104.2 The DMA instituted an investigation which involved or included the taking down of evidence during or about the period 2006 November to June 2007;

104.3 The DMA made a decision to refer the matter to the Enforcement Committee on 13 June 2007;

104.4 The Amendment Act came into force on 1 November 2008; and

104.5 For reasons related to the DMA's resources or lack thereof, the referral documentation and the report initiating the referral were only completed on 5 May 2009 and were forwarded to the Enforcement Committee on 12 May 2009.

[105] It is clear therefore that the contraventions and the DMA's investigation took place well before the Amendment Act came into force, but the referral documentation and report were only forwarded to the Enforcement Committee after that Act came into force. The question is whether in these circumstances the Enforcement Committee which considered the matter and imposed the administrative penalties had jurisdiction to do so.

The common law presumption against retrospectivity

[106] It is common cause that the applicants' conduct as alleged, of contravening section 76 took place before the Amendment Act came into force. At that stage, the law provided for the imposition of administrative penalties for such conduct. The question to ask is: what would the position have been if we think section 78(4) away, and thus applying established common law principles? In short, to what extent, if any, did the promulgation of section 78(4) alter the common law position?

- [107] The respondents submitted that three conceptual possibilities exist, brought about by the repeal, by the Amendment Act, of the provisions of the old 2004 SSA which authorised the imposition of financial and/or administrative penalties for conduct which took place before the Amendment Act came into force.
- [108] The first possibility was that the repeal rendered the conduct immune from administrative penalties; the second possibility was that, despite the repeal, administrative penalties could still be imposed, but only by the new Enforcement Committee. The third possibility proffered was that despite the repeal, the Amendment Act preserved the jurisdiction of the old Enforcement Committee to impose administrative penalties.
- [109] At a glance, the first possibility does not hold any water because this would offend against or be incompatible with the common law presumption against retrospectivity.
- [110] In terms of that principle or presumption –

“...the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.”[20]

There is a general presumption that, in the absence of contrary intention appearing from a statute –

“... it is not treated as affecting completed transactions .. .”[21]

In *Chairman of the Board on Tariffs and Trade v Volkswagen of South Africa (Pty) Ltd and Another*[22] the court held inter alia that –

“Pre-repeal business must generally speaking be dealt with, unless a contrary legislative intention is apparent, as if no repeal had been enacted.”[23]

- [111] It is so that the presumption against retrospectivity can be rebutted by express terms or clear implications of or in a statute. However, the law as existing before the enactment must be applied if the court is left in doubt as to the operation of the statute.[24]
- [112] Unless the Amendment Act expressly or by clear and/or necessary implication provides otherwise, the effect of the common law presumption is that administrative penalties may still be imposed on persons who contravened or failed to comply with the SSA prior to the Amendment Act coming into operation or force.
- [113] The respondents further submitted that there is nothing in the Amendment Act which expressly or by clear implication provided otherwise. They further submitted that although, in form, provisions authorising the imposition of administrative penalties for such conduct were repealed, in substance the Amendment Act was clearly directed at extending - and not repealing - the scope for the imposition of such penalties. It not only extended the administrative penalty jurisdiction to cover many more forms of conduct,[25] but also continued to provide for administrative penalties for contraventions of Chapter VIII of the SSA. Instead, so they argued,

it increased the remedial powers of the Enforcement Committee in respect of both such categories of contraventions. It was thus their conclusion on this aspect that these extensions of the administrative penalty jurisdiction point strongly against any intention on the part of the law-maker to render contraventions of Chapter VIII of the SSA committed prior to the Amendment Act coming into operation or force, immune from administrative penalties.

[114] They may have a point there: The Constitutional Court's not so old judgment in *S v Acting Regional Magistrate, Boksburg*[26] deals with a similar matter. That case concerned the Criminal Law (Sexual Offences) Amendment Act, 32 of 2007, which had repealed the common law crime of rape and replaced it with a statutory crime, extending those situations in which a person can now be convicted. A transitional provision, section 69 of that Act, kept the common law form of rape in force for purposes of disposing of any investigation,

prosecution or other criminal proceedings already instituted in relation to conduct committed prior to the commencement of the Act. The High Court had held that section 69 precluded the prosecution and punishment of common law rape committed before the commencement of the Act, but only reported afterwards, i.e. where no investigation had been commenced, or prosecution instituted, by the time that the new legislation came into force. The Constitutional Court overturned this, essentially on the basis of the common law presumption against retrospectivity.[27] The Constitutional Court held further that section 69 made no mention of crimes committed before the commencement of the Act but only reported or investigated thereafter. It further held that section 69 was not enacted to cover the entire field of prosecutions for common law rape, and did not apply to prosecutions not yet instituted. Common law rape prosecutions could therefore continue to be brought in respect of rapes before the new legislation came into effect, even in cases not covered by section 69.

[115] I thus cannot disagree with the respondents' submission that, as in *S v Acting Regional Magistrate, Boksburg* (supra) the common law presumption against retrospectivity applies in our present case and as in that case again, the present legislation extends the range of conduct subject to sanction and negates any suggestion that the lawgiver intended that transgressions, either not detected or not referred for determination prior to the amendment, were to be exempt from sanction.

[116] From the totality of the circumstances sketched out before this Court, it is my considered view and finding that the above conclusion or contention is not undermined by, but is in fact fortified by, section 78(4). In those cases where it is applicable, contraventions prior to the Amendment Act coming into force can plainly still be referred to the old Enforcement Committee. It would be unthinkable that the lawgiver intended that cases not falling within the ambit of section 78(4) should be immune from administration penalties altogether. It is my corresponding finding that those transgressions not yet discovered prior to the Amendment Act coming into force ought to fall outside the purview of section 78(4).

[117] As regards the second and third possibilities,[28] the question as to whether the new or old Enforcement Committee has jurisdiction depends on whether or not the amendments affected by the Amendment Act are purely procedural in nature or whether they also impact on substantive rights.

[118] It is the law that statutes which deal purely with matters of procedure regulate all such procedure even where the cause of action arose before the date of promulgation thereof.

[29] The rule however does not apply to amending statutes which may appear to be procedural in nature but in fact impact on substantive

rights.[30]

[119] The law hereon is set out in Minister of Public Works v Haffajee NO[31] as follows:

“In other words, it does not follow that once an amending statute is characterised as regulating procedure, it will always be interpreted

as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive

rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. Aliter if they are not.”

[120] Are the amendments introduced by the 2008 Amendment Act procedural in nature or do they also impact on existing substantive rights and obligations?

[121] Once the new Enforcement Committee is satisfied that there has been a contravention, the administrative penalty or sanction which it may impose include, not only a penalty in terms of section 6D(2)(a) of the Protection of Funds Act 28 of 2001 - which corresponds

substantially with a penalty in terms of section 104(2)(d) of the SSA

- but also a compensatory order in terms of section 6D(2)(b) of the Protection of Funds Act. Under the SSA as it stood prior to the Amendment Act coming into force, no order of the type contemplated in section 6D(2)(b)(i) of the Protection of Funds Act could have been imposed. This in my view and finding points to substantive rights and obligations being in issue.

[122] Section 6D(5) of the Protection of Funds Act now empowers the Enforcement Committee, as part of its “determination”, to make an order as to the costs of constituting the Enforcement Committee panel, as well as to all expenses reasonably incurred by the DMA in investigating the contravention and referring the matter to the Enforcement Committee. Such orders could not be made in terms of the old Enforcement Committee where section 104(5) of the SSA was of application. This also in my view and finding points to substantial rights and obligations being involved.

[123] The factors that the old Enforcement Committee “must consider when determining an appropriate administrative penalty in terms of section 104(9) of the old SSA are not the same as those to which the new Enforcement Committee “may have regard to” when determining an appropriate administrative penalty, and the following points of difference adequately illustrate this point:

123.1 The factors referred to in section 6D(3)(f), [32] (g) [33] and (h) [34] are not provided for in section 104(9) of the old SSA.

123.2 Under section 104(9)(b) of the old SSA, the Enforcement Committee “must consider ... the extent to which the contravention or failure was deliberate or reckless”. There is no such provision in section 6D(3) of the Protection of Funds Act.

123.3 Although section 104(9)(b) of the old SSA requires the Enforcement Committee to consider the level of profit derived from the contravention or failure to comply, the same does not apply to the extent of any loss avoided even though this is a consideration referred to in section 6D(3) of the Protection of Funds Act.

123.4 Section 104(9)(e) of the old SSA requires the Enforcement Committee to consider only whether the respondent has previously been found to have contravened that Act. Section 6D(3) provides for regard to be had to whether the respondent has previously failed to comply with “a fiduciary duty or law”, which is a far wider consideration.

[124] It is thus clear that it is almost impossible to say with any certainty that an Enforcement Committee applying section 104(a) of the SSA will necessarily reach the same conclusion as to the quantum of penalty to be imposed as an Enforcement Committee applying section 6D(3) of the Protection of Funds Act. This too impacts on substantial rights.

[125] A conclusion is consequently inescapable that since the amendments impact on existing substantive rights and obligations, at common law (subject to section 78(4) the amendments introduced by the Amendment Act cannot apply in respect of contraventions which occurred before the Amendment Act came into force. The relevant jurisdiction must thus vest in the old Enforcement Committee.

SECTION 78(4) OF THE 2008 AMENDMENT ACT

[126] The respondents submitted in this regard that the interpretation of section 78(4) adopted by the Appeal Board was correct and also

confirms the old Enforcement Committee’s continued jurisdiction in respect of this matter. In the alternative, the respondents

submitted that even if this Court finds the above submission to be incorrect, it must still find in its favour that section 78(4) does not displace or override the jurisdiction of the old Enforcement Committee by virtue of the common law presumption against

retrospectivity and/or section 12(2) of the Interpretation Act 33 of 1957 (“Interpretation Act”).

[127] Section 12(2) of the Interpretation Act provides as follows (where material):

"(2) Where a law repeals another law, then unless the contrary intention appears, the repeal shall not –

- (a) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
- (b) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
- (c) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced; and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."

[128] The Appeal Board used the following words when rejecting the interpretation proposed by the applicants in its ruling:

"[12] As to the proper construction of the subsection, it is a model of poor drafting. However, if the words 'investigation instituted' had been intended to mean proceedings pending, that concept was already sufficiently covered by the words 'any proceedings of ... the EC pending at the [relevant date]'. They must therefore have another meaning. Having regard to the fact that the EC did not, under the old law, investigate, the words in question must bear the meaning which they ordinarily convey and that is an investigation by the Respondent [i.e. the DMA] giving rise to the referral. Just such an investigation had been instituted and the alleged contraventions were awaiting referral when the new law came into force. The investigation was thus 'pending' at that date and could be 'continued' (or even further 'instituted' in the sense of being taken forward) under the old law. It follows that the proceedings before the EC were legally competent and the first issue is decided in favour of the respondent

[129] I cannot agree more!

[130] The above finding is consistent with the view taken by the Enforcement Committee itself in its earlier decision in the case of The

Directorate of Market Abuse v Brown and Two Others[35] whereat the panel led by retired justice, Eloff J stated the following:

"What is preserved is any proceeding and/or investigation instituted ... which is pending as at 1 November 2008. And the concluding phrase in this subsection states that any such proceeding or investigation may be continued, instituted or enforced as if this Act had not been passed. Plainly what is preserved is the continuation of such proceeding and investigations. The referral to the Enforcement Committee is a step in the continuation of the proceedings. The subsection in our analysis means that if any part of the proceedings undertaken by the Financial Services Board occurred before 1 November 2008, the repeal of the sections I referred to earlier does not affect which has taken place in consequence of the investigation."

- [131] The facts and circumstances of the above case are on all four's with our present case. By agreeing with the panel's above finding, I am also agreeing with the respondents submission on this aspect.
- [132] Section 78(4) also provides that the relevant amendments "do not affect any ... fine to be imposed by, the Enforcement Committee referred to in that Act and which is pending at the date of coming into operation of this Act'. The stage at which "a fine to be imposed' is "pending" is not confined to cases which have already been referred to the Enforcement Committee. This also applies to cases where the DMA has investigated a matter and decided to refer it to the Committee, even if no such referral has not yet been effected. This is so because the process of referral to the Enforcement Committee is but a step in the continuation of the proceedings. As such I also find that an as yet unreported matter may still be regarded as "pending", at least in situations where the decision to refer it, as in our present case, has already been taken or made.
- [133] Although the syntax of section 78(4) is unhelpful, the applicants' interpretation or construction thereof is irreconcilable with the applicable substantive provisions of the SSA as well as the intention of the legislature and/or the legislation. Section 93(1) of the SSA provides that it is the Registrar - and not the Enforcement Committee
- who investigates alleged contraventions of the SSA. When it comes to alleged contraventions of Chapter VIII of that Act, the investigation is required to be carried out by the Directorate - and not the Enforcement Committee. Section 102 too makes it clear that the Enforcement Committee does not institute investigations of alleged contraventions as referred to in section 78(4): Sections 102(1) and (2) specify the documents which must be furnished to the Enforcement Committee by the referring party[36] and by the first respondent.[37] Sections 102(3) and (4) then provide as follows:
- "(3) The panel to which a specific matter has been assigned must consider the documentary evidence before it without hearing further evidence, subject to sub-section (4).*
- (4) The panel may, in exceptional circumstances and when it is necessary to come to a just decision, by written notice, summons a person to appear before the panel to be questioned or to produce a document specified in the summons."
- [134] It is thus clear that, in the ordinary course, the Enforcement Committee is required to determine the matter purely on documentary

evidence referred to it. It therefore does not "institute" an "investigation" into the alleged contravention: It adjudicates an already investigated case. The investigations are instituted and conducted by the Registrar and/or Directorate. The powers, in exceptional circumstances, to summon a person to give oral evidence or to produce a document does not convert the Enforcement Committee into a body that institutes investigations.

[135] I reiterate that when section 78(4) provides that the repeal of the relevant provisions “do not affect any ... investigation

instituted” and that “any such ... investigation may be continued (or) instituted ... as if this Act had not been passed”

it in fact preserves the jurisdiction of the original enforcement committee in respect of any matter under investigation by the

Directorate or Registrar at the relevant or material date or time.

[136] To conclude on this aspect, it is my finding therefore that the object underlying section 78(4) is to preserve the right of the Directorate (and the Registrar) to refer to the original Enforcement Committee any contravention which took place subsequent to the enactment of the SSA but prior to the date on which the Amendment Act took effect. It is significant that the last part of the section 78(4) provides that “... any such proceeding, investigation ... may be continued, instituted ...as if this Act had not been passed ...”. This in my view confirms the right of the Directorate or Registrar to commence an investigation into an alleged contravention which took place prior to the date on which the Amendment Act took effect, only after the Amendment Act has come into force or operation. It confers a right to continue the proceedings by referring it to the old Enforcement Committee. In the same breath therefore and/or as a matter of logic and common sense, the Enforcement Committee is entitled to determine a matter already investigated by the Directorate or Registrar before the Amendment Act came into force.

[137] The respondents argued in the alternative further, that in the event that this Court should find that section 78(4) does not in itself confer jurisdiction on the old Enforcement Committee in this case, it should nevertheless still find that section 78(4) does not deprive it of the jurisdiction it in any event has, by virtue of the presumption against retrospectivity and/or the Interpretation Act.

[138] Assuming a hypothetical situation where for instance, a matter investigated by the DMA but not yet referred to the old Enforcement Committee by the date when the Amendment Act came into force and thus is not covered by section 78(4). The question to be answered will be whether section 78(4) covers the entire field of matters which may still be disposed of by the old Enforcement Committee or whether the Enforcement Committee may also dispose of other matters where this would be the effect of the common law presumption against retrospectivity and/or the Interpretation Act.

[139] The Constitutional Court held as follows in *S v Acting Regional Magistrate, Boksburg*: [38]

“It is clear from the face and context of s. 69 that it does not confer prosecutorial power on the state in respect of common-law crimes, but rather confirms it. It would therefore be inappropriate to interpret it as a provision that could curtail the state’s prosecutorial power, which is sourced elsewhere: In the National Prosecuting Authority Act, ultimately, the Constitution.”

- [140] Similarly, section 78(4) does not confer jurisdiction on the Enforcement Committee in respect of contraventions occurring prior to the coming into force of the Amendment Act, but rather confirms it. It would therefore be inappropriate to interpret section 78(4) as a provision which curtails the Enforcement Committee's jurisdiction to the extent that this is sourced elsewhere, i.e. in the common law presumption against retrospectivity and/or the Interpretation Act.
- [141] Care should be exercised not to construe section 78(4), just because the jurisdiction of the old Enforcement Committee was confirmed, as impliedly excluding such jurisdiction as would otherwise be conferred on it by the common law presumption of retrospectivity or by the Interpretation Act. The maxim "expressio/inclusio inus est exclusio alterius" was found not to be applicable in the *S v Acting Regional Magistrate, Boksburg* case (supra). I do not find it applicable in this case either. The averred provision (section 78(4)) does not disclose any intention on the part of the lawgiver to visit different legal consequences on conduct than those applicable at the time that that conduct took place.
- [142] My conclusion is thus that the old Enforcement Committee retains jurisdiction.
- [143] Consequently, the applicants' second jurisdictional argument stands to be dismissed.

WRONG STANDARD OF PROOF

- [144] The applicants' third ground of review is that the second respondent's decision falls to be reviewed and set aside by reason that it applied an incorrect standard of proof, being the civil standard of proof, on a balance of probabilities.
- [145] The applicants further submitted that the applicants are entitled to the in section 35(3)(h) guaranteed protection of being presumed innocent. The argument goes further to contend that the Enforcement Committee ought to have applied the higher criminal standard of proof, namely, proof beyond reasonable doubt, in this matter as it is a universally accepted standard of proof as applicable and indeed necessary in proceedings such as these that according to them are criminal in nature. They correctly aver that the criminal standard of proof when applied in appropriate criminal cases serves to buttress the presumption of innocence and is, as such, a basic tenet of the rule of law.
- [146] The applicants appear to have been persuaded to some extent by the judgment of the Supreme Court of Appeal in the competition law case of *Woodlands Dairy (Pty) Ltd and Another v Competition Commission*[39] where the Honourable Court held as follows at 112B-E:

"The Act unnecessarily, reminds us that it must be interpreted in a manner that is consistent with the Constitution and which gives effect to the purposes set out in s. 2 of the Constitution. Importantly, in the context of this case is that the Constitution is based on the rule of law, affirms the democratic values of dignity and freedom, and guarantees the right to privacy, a fair trial and just administrative action. Also important is the fact that the actions of the commission in relation to Chapter 2 complaints, which are administrative, may lead to punitive measures. The so-called 'administrative penalties' (more

appropriately referred to as 'fines' in section 59(2) bear a close resemblance to criminal penalties. This means that its procedural powers must be interpreted in a manner that least impinges on these values and rights. I accordingly disagree with the view of the CAL that because it is difficult to establish the existence of prohibited practices a generous interpretation of the commission's procedural rights would be justified. This approach would imply that the more difficult it is to prove a crime, such as corruption, the fewer procedural rights an accused would have."

[147] It is a debatable point whether or not the administrative penalties in terms of the SSA are purely criminal in nature. In any event, I have already found that the peculiar nature of administrative penalties in terms of the SSA are both criminal and civil in nature. It only depends whether the authorities elected to institute criminal proceedings - in which case the criminal standard would be applied in the appropriate criminal court - or civil or administrative proceedings standard would be applicable in the enforcement

committee.

[148] It deserves mention at this stage that the applicants' constitutional challenge against sections 102 to 105 of the SSA is

only to be proceeded with in the event this Court dismisses their "incorrect standard of proof" point.

[149] It is common cause that the applicants were not arraigned as "accused persons" before the Enforcement Committee where section 35 of the Constitution would have found application, resplendent with all the applicable constitutional rights reserved for accused persons. The question to be answered therefore is whether the criminal standard of proof applies even where the applicants are not "accused persons" within the meaning of section 35(3) of the Constitution.

[150] The SSA makes quite clear that, unlike proceedings in terms of section 79 and 115, proceedings before the Enforcement Committee are not criminal proceedings. The sanction imposable is explicitly characterised by the lawgiver as an administrative penalty. Section 104(8) of the SSA expressly provides that, unlike in a criminal trial, an administrative penalty does not constitute a "previous conviction". Section 103(2) provides that, if a respondent concerned fails or refuses to pay an administrative penalty imposed, the DMA may file with the Clerk of the Court or Registrar of the High Court of any competent court a certificate stating the amount of the penalty imposed, which then "has all the effects of a civil judgment lawfully given in that court in favour of the Board". Section 102 of the Act explicitly distinguishes between civil, criminal, administrative and/or disciplinary proceedings under the SSA.

[151] I am inclined to concur or agree with the respondents' submissions that proceedings before the Enforcement Committee are manifestly administrative and not criminal for purposes of this provision.

- [152] Sections 104(6) and (7) explicitly distinguish between a penalty imposed by the Enforcement Committee (in terms of section 104) and criminal proceedings (in terms of the Criminal Procedure Act, 51 of 1977. Case law overwhelmingly is on the side of the view that administrative penalties are not criminal proceedings. I will return to this aspect later.
- [153] Section 104(1) provides that such a penalty may be imposed if a panel (of the Enforcement Committee) is “satisfied” that a respondent has contravened or failed to comply with the Act. It is so that proceedings before the Enforcement Committee are administrative. Consequently, it may be and I find that no formal standard of proof - whether criminal or civil - applies as a matter of law. Some quarters characterise the proceedings as being of a quasi-civil nature. What is material, in my view, is that the Act requires the Enforcement Committee to be “satisfied”. This boils down to the following: If the Enforcement Committee is “satisfied” in a manner which is not reviewable on any of the grounds provided for in section 6 of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”), it is a matter for the Enforcement Committee - and not for a court - to decide whether there is sufficient evidence for it to be “satisfied” as required. Of course, where the Enforcement Committee reaches a decision so unreasonable that no reasonable person could have reached it on the evidence before it, the matter may be reviewable.
- [154] The applicants have not alleged such unreasonableness and after going through the papers filed of record herein and factoring in arguments in court I did not come across any evidence or indications of such unreasonableness.
- [155] I equally do not find any wrongdoing on the part of the Enforcement Committee panel that heard the appeal in this matter in electing to apply the civil standard of proof.
- [156] In an earlier Enforcement Committee ruling in *Financial Services Board v Berman and Another*[40] the panel held as follows:
- “As regards the second respondent, the issues are mainly factual. The question of standard of proof was considered by the panel. Its ruling is that proof on a balance of probabilities is indicated. That will accord with the criteria laid down by various disciplinary bodies in this country, and will meet the needs of natural justice. It should be stressed that this is an administrative enquiry and not a criminal case and proof beyond reasonable doubt is not required.”*
- [157] The above quotation is on all fours with the findings I have already made as well as the respondents’ submissions. This is the standard of proof by a securities commission exercising an administrative penalty jurisdiction in a country like Canada[41]
- [158] In South Africa the criminal standard of proof was found to be applicable to a person who is not an accused person in terms of the Constitution in *Fakie NO v CCII Systems (Pty) Ltd.*[42] That case concerned the imprisonment of a person alleged to be in contempt of a civil court order. The court accepted that the

respondent was not an accused person for purposes of section 35(3) of the Constitution (Bill of Rights). However, it further held that the procedural protection afforded by section 12 of the Bill of Rights, which protects the right "... not to be deprived of freedom arbitrarily or without just cause" required proof beyond reasonable doubt before imprisonment for contempt could be ordered.[43]

[159] There is no "freedom" interest or "arbitrary deprivation" of any liberties of an individual at stake in the present matter, let alone the powers to order the applicants' imprisonment or incarceration for their alleged transgressions. Consequently, the Fakie judgment is distinguishable from the present case we are dealing with. This is the more so when regard is had to the fact that in the Fakie case there was another difficulty or impossibility: the court had to disentangle the reasons why committal for contempt of court can be validly sought and/or granted in cases "criminal as opposed to 'civil contempt'. It is my considered view that such a debate has no relevance to the present case.

[160] To bolster their case further the applicants relied on Davidson & Tatham v FSA[44] and Parker v FSA.[45] Both are decisions by the Financial Services and Market Tribunal ("FSMT") regarding the determination of administrative penalties in which Article 6 of the European Convention on Human Rights ("the European Convention") was applied.

[161] In their reference to the above cases in their heads of argument in argument the applicants did not make it clear that in those very cases they were relying upon, the FSMT held that it is the civil standard of proof, and not the criminal standard, which was applied. Even in the "Davidson v Tatham case, even though the FSMT took a view that a penalty for market abuse is a criminal charge for purposes of Article 6 of the European Convention, it nonetheless held[46] that –

the appropriate standard of proof is the civil standard (the balance of probabilities ...).[47]

[162] The same line was followed in the Parker case.[48] Subsequent other judgments of FSMT followed the same line.[49]

[163] It is so that when applying the civil standard of proof, the principle applied is that –

"The more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.[50]

[164] Unfortunately, the above principle is of no assistance to the applicants: it is not their case that the civil standard of proof was misapplied. Their case is that the criminal standard had to be applied.

[165] Consequently, this ground of review i.e. that the Enforcement Committee was obliged to, but did not or failed to apply the criminal standard of proof cannot succeed.

THE CONSTITUTIONAL ATTACK ON SECTIONS 102 TO 105

- [166] This is a further alternative ground of review by the applicants. They submitted that should this Court find against them on all the other or foregoing grounds of review, then the court should rule that sections 102 to 105 of the SSA are unconstitutional.
- [167] The applicants are basing this ground of review on two premises, firstly, that insofar as sections 102 to 105 empower the Enforcement Committee to make findings as to whether persons have contravened section 76 of the SSA and if they are found to have done so, administrative penalties are imposed, such conduct of the respondents contravene section 35(3) of the Constitution and as such the sections should be struck down. Secondly, and in the alternative, the applicants submitted that even if this Court were to find that section 35(3) of the Constitution does not apply to those subject to proceedings under sections 102 to 105 in respect of alleged contraventions of section 76 of the SSA, the complained about sections should still be declared unconstitutional as they offend against section 34 of the Constitution, which guarantees the right of access to court.
- [168] The applicants further contended that inasmuch as the Enforcement Committee is not “an independent and impartial tribunal or forum”, proceedings in terms of sections 102 to 105 of the SSA breach or offend against section 34 of the Constitution.
- [169] The applicants’ founding affidavit summarises their constitutional challenge to sections 102 to 105 of the SSA as follows:[51]

“It is submitted that sections 102 to 105 of the Act (as relating to conduct under section 76 of the Act) contravene several provisions of the Constitution, inter alia sections 1(c); 2; 7(2); 34 and 35(3); inasmuch as they infringe upon an individual’s right to a fair trial. This is so because (irrespective of whether someone found in breach is burdened with a criminal conviction) proceedings under sections 103 to 105 are closely akin to criminal proceedings. Under the Constitution, only courts of law are competent to conduct such proceedings and to make findings of criminal guilt (and those which approximate a criminal guilt)”

- [170] The applicants only came up with the additional challenged relating to section 34 of the Constitution in their heads of argument. It was not part of the initial papers. There might be a problem there.
- [171] In *Prince v President, Cape Law Society*[52] the Constitutional Court held as follows: “[22] Parties who challenge the constitutionality of a provision in a statute must

raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the Court information relevant to the issue of justification. I would emphasise that all this information must be placed before the Court of first instance. — The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality

of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal."

[172] In its constitutional challenge of the sections on the basis of section 34 of the Constitution, the applicants allege only for the first time in their heads of argument that sections 102 to 105 of the SSA are contrary to section 34 of the Constitution because the Enforcement Committee is not an independent forum or tribunal, among others.

[173] The question of the independence of the Enforcement Committee is not merely a legal one but also depends on facts. I agree with the respondents in their submission that the FSB will be prejudiced if this attack (based on section 34 of the Constitution) is considered without it been given a proper opportunity to deal with it in their answering affidavits. The system of imposing administrative penalties by specialised administrative tribunals is a crucially important enforcement mechanism created by a properly passed Act of Parliament, in this instance, the SSA. A constitutional attack on its independence cannot and should not be raised for the first time in heads of argument.[53] Furthermore, it would appear as if the applicants' reliance on section 34 is misplaced and ostensibly appears not appropriate for such a constitutional attack. The applicable provision of the Constitution in my view could have been section 33, which in any event does not impose a comparable "independence" obligation on administrative functionaries.

Section 33 of the Constitution entrenches the right to just administrative action. However, section 33 does not require a court to take decisions in respect of administrative acts.

[175] Section 35(3) of the Constitution reads as follows:

"Every accused person has a right to a fair trial, which includes the

right –

- (a) to be informed of the charge with sufficient detail to answer it;
- (b) to have adequate time and facilities to prepare a defence;
- (c) to a public trial before an ordinary court;
- (d) to have their trial begin and conclude without unreasonable delay;
- (e) to be present when being tried;
- (f) to choose, and be represented by, a legal representative/practitioner; and to be informed of this right promptly;
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

- (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
- (i) to adduce and challenge evidence;
- (j) not to be compelled to give self-incriminatory evidence;
- (k) to be tried in a language that the accused understood, or, if that is not practicable, to have the proceedings interpreted in that language;
- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
- (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
- (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (o) of appeal to, or review by, a higher court.”

[176] It is correct that the right to a fair trial, as stated in the initial component of section 35(3) is a residual right which includes, but is not limited to, the enumerated fair-trial rights following in the quoted parts of section 35 of the Constitution.[54]

[177] In *S v Mazingane*,^[55] the erstwhile Witwatersrand Local Division (the name by which the Gauteng Local Division, Johannesburg was then known) observed that while the right to a fair trial in section 35(3) of the Constitution included fifteen distinct rights governing the procedure and process of a trial, it was also broader than this: it encompassed “substantive fairness” or a residual fair-trial right.

[178] In *Coetzee & Others v Attorney-General, KwaZulu-Natal & Others*^[56] {he former Durban and Coast Local Division held that the specific rights listed in section 35(3) should be interpreted as extending the ambit of the main provision rather than restricting it.. }^[57]

[179] However, as the clear, ordinary, everyday and unambiguous wording and context of the content of the enactment provides, this sub-section is clearly meant for purely criminal trials held in properly constituted criminal courts of law.

[180] In the context in which the applicants raised their constitutional attack on sections 102 to 105 of the SSA, it is proper that the

constitutional safeguards for the fairness of the Enforcement proceedings, both procedurally and substantively, be determined.

Thereafter, the next step would be to look at our courts’ interpretation of section 35(3), in particular the meaning given to the term, “accused person consider the jurisprudence of comparable foreign jurisdictions (as has already been scantily

alluded to above); and draw certain conclusions.

CONSTITUTIONAL SAFEGUARDS

[181] Starting from the premise this Court has already adopted, the proceedings before the Enforcement Committee are administrative in nature and accordingly stand to be governed by section 33 of the Constitution which entrenches the right to just administrative action. It is also governed by the PAJA. Section 33 does not necessarily require a court to take decisions in respect of administrative acts.

[182] I arrived at the decision that proceedings before the Enforcement Committee as well as those before the Appeal Board amount to administrative action based among others on the following grounds:

182.1 The decisions of the Enforcement Committee and the Appeal Board amount to administrative action within the definition of section 1 of PAJA. This is so because those decisions amount to the exercise of public power or the performance of public functions in terms of legislation. Furthermore, the exercise of powers may adversely affect the rights of respondents and thus have direct external legal effect or consequences.

182.2 The lawgiver made it explicitly clear that the power in issue is an administrative one in nature by providing that the penalties imposed are "administrative penalties" as well as by making clear in various provisions that the imposition of an administrative

penalty is not to be regarded as the imposition of a criminal sanction, which (criminal sanction) leaves the respondent with a

previous conviction or record. The imposition of an administrative penalty does not leave the respondent with a previous record.

182.3 Even the applicants themselves do admit that South Africa, along with general other jurisdictions, have adopted a system of administrative penalties.

[183] The FSB's Board of Appeal has consistently taken the view, as already shown elsewhere in this judgment, that proceedings before the Enforcement Committee and itself are not criminal proceedings but administrative proceedings.

[184] It is so that since they are governed by section 33 of the Constitution, the proceedings before the Enforcement Committee or the Appeal Board may be reviewed in a court of law on grounds of unlawfulness, procedural unfairness or unreasonableness. PAJA contains the circumstances under which an administrative decision may be reviewed and/or set aside. Any aggrieved respondent has a right to approach a court of law for relief by way of review if it can show that the imposition of the administrative penalty complained of was reviewable on any of the grounds in law or as set out in section 6(2) of PAJA.

[185] With due regard being had to this protection that the applicants are entitled to in terms of section 33 of the Constitution and PAJA, this Court must have that in mind when dealing with the applicants' constitutional challenge to sections 102 to 105 of the SSA. It must also determine whether or not the applicants' interpretation of the term "accused person" in the light of section 35(3) of the Constitution is tenable in the context of the provisions of the SSA.

[186] In *Bernstein v Bester NNO*, [58] the Constitutional Court stated as follows in respect of an attack on sections 417 and 418 of the Companies Act 61 of 1973 ("the old Companies Act"):

"[24] Moreover, judicial control over the manner in which the examination is conducted complements the control which the Court exercises over whether the examination should take place in the first place. Courts have long recognised that the examination is open to abuse and that the proceedings ought to be watched carefully. It has been held that the judiciary is to ensure that 'the examination is not made an instrument of oppression, injustice or needless injury to the individual'. In one Australian case, Mortimer v Brown, the Court held that even though a witness could rarely be excused from answering a question on the basis that an answer might incriminate him, there may be questions so remotely relevant that the harm done to the individual in compelling him to answer outweighs any benefit that the answer may afford.

[36] The purpose of this brief survey is not to lay down or develop the legal principles which the Supreme Court in this country should apply in controlling

s. 417 enquiries. It is not the function of this Court, but that of the Supreme Court, to do so. The purpose is to point out that the Supreme Court has the power to prevent the oppressive, vexatious and unfair use of s. 417 proceedings, for it is against the background of such power that the applicants' remaining attack on the unconstitutionality of ss. 417 and 418 of the Act must be considered."

[187] It deserves mention at this stage that some of the foreign jurisdictions whose decision I will refer to in comparison to ours do not have an equivalent of our section 33 of the Constitution.

How our courts interpret "accused persons"

[188] Section 35 of the Constitution entrenches the rights of "accused persons" in a criminal trial specifically. No mention is made of civil trials in section 35 of the Constitution.

[189] In *Ferreira v Levin NO*; *Vryenhoek v Powell NO* [59] as well as in *Bernstein v Bester NNO* [60] the Constitutional Court held among others that an examinee at an enquiry in terms of sections 417 and 418 (of the old Companies Act) is not an accused person and accordingly, he or she cannot, at the time of his/her examination, rely on section 25(3) (now section 35(3)) of the Constitution.

[190] In *Nel v Le Roux NO* [61] the Constitutional Court was dealing with an examination in terms of section 205(1) of the Criminal Procedure Act 51 of 1977. It held as follows among others:

“[11] The s. 25(3) rights to a fair trial accrue only to an accused person. The recalcitrant examinee who, on refusing or failing to answer a question, triggers the possible operation of the imprisonment provisions of s. 189(1) is not, in my view, an ‘accused person’ for purposes of the protection afforded by s. 25(3) of the Constitution. Such examinee is unquestionably entitled to procedural fairness, a matter which will be dealt with below, but not directly to the s. 25(3) rights, for the simple reason that such examinee is not an accused facing criminal prosecution. The s. 189(1) proceedings

are not regarded as criminal proceedings, do not result in the examinee being convicted of any offence and the imprisonment of an examinee is not regarded as a criminal sentence or treated as such. If, after being imprisoned, an examinee becomes willing to testify, this would entitle the examinee to immediate release; in American parlance such examinees ‘carry the keys of their prison in their own pockets’. The imprisonment provisions in s. 189(1) constitute nothing more than process in aid of the essential objective of compelling witnesses who have a legal duty to testify to do so; it does not constitute a criminal trial, nor make an accused of the examinee.”

[191] In *De Lange v Smuts NO*[62] the Constitutional Court held as follows:

“[66] A recalcitrant examinee at an insolvency enquiry is not an accused person and does not, any more than the recalcitrant examinee at an examination under s. 205 of the CPA, have the right under s. 35(3) to claim a trial before an ordinary court.”

[192] The above judgment put paid in my view, the applicants’ contention that a denial to the applicants herein of the protection of section 35(3) is tantamount to them being unreasonably and unlawfully excluded from their constitutional right to their day in a court of law.

[193] In *Geuking v President of RSA*[63] the court considered an extradition hearing in terms of the Extradition Act 67 of 1962. It held as follows insofar as is relevant to this matter:

“[47] The appellant also relies on the fair trial provisions enshrined in s. 35(3) of the Constitution. What must be stressed here is that the fact that the enquiry envisaged in s. 9(2) must proceed in the manner in which a preparatory examination is held does not transform the enquiry into a trial. The person facing extradition is not an accused person for the purposes of the protection afforded by s. 35(3) of the Constitution. As pointed out earlier, the enquiry does not result in a conviction or sentence. This does not mean, however, that the person concerned is not entitled to procedural fairness at all stages of the extradition proceedings.”

[194] All the above judgments say one thing in common: an “accused person” is a person facing a criminal prosecution and a risk of a conviction and/or sentence in cases where section 35(3) of the Constitution should come into play. Proceedings before an Enforcement Committee of the FSB are not dissimilar to those covered in the above cases when their natures are anything to go by. The respondent at such proceedings is not an “accused person” and the respondent at those proceedings also does not risk the imposition of a criminal sentence.

[195] The applicants place heavy reliance on the judgment in *S v Baloyi*[64] where the question before the court was the constitutionality of section 3(5) of the Prevention of Family Violence Act.[65] And the significance or import of section 170 of the Criminal Procedure Act in breach of domestic violence interdicts. The onus provision of section 170 was one of the primary object of the case.

[196] I have already dealt with the principles applicable to and/or in the above case. I will reiterate the position when the objects and purport of the SSA is under consideration. It may suffice to state that the High Court had declared the section to be unconstitutional

in the Baloyi case. When the matter served before the Constitutional Court for confirmation, Sachs J repeated the words uttered by the court in *Nel v Le Roux CC*[66] but distinguished the issues inherent in that case (imprisonment) when ruling that

"...To sum up: the objective is not to coerce the will to desist from ongoing defiance, but to punish the body for completed violation; and the convicted person carries no keys in this pocket - indeed there is nothing in the Act to suggest that he can be released early if either the complainant wishes, or the judicial officer so decides. I accordingly conclude that an alleged violator of the interdict, who faces conviction and imprisonment for up to 12 months (and a fine), is not an 'accused person' as contemplated by s. 35(3)(h) of the Constitution and entitled to the benefit of the presumption of innocence." (my emphasis)

[197] It is my finding that the Baloyi case either is distinguishable from our present case in certain material respects or does not just support the applicants' case.

[198] Section 3(4) of the Domestic/Family Violence Act, 133 of 1993 provides that the judicial officer concerned is empowered to "convict the respondent of the offence contemplated in section 6". Section 6 provides that a person who contravenes the interdict shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 12 months". This case is clearly distinguishable from our present case.

[199] In Baloyi, the court noted that the objective was "not to coerce the will to desist from ongoing defiance, but to punish the body for completed violation". That is not the object of section 104 of the SSA, or more broadly, the imposition of administrative penalties for contraventions of financial regulatory provisions. The object of the Enforcement Committee's proceedings is not the punishment of acts involving moral guilt but the protection of the integrity of the markets in the interests of the public. The orientation of the Enforcement Committee and the Appeal Board with the imposition of administrative penalties is prospective and preventative, not punitive. The object is to protect the public and to promote confidence in the market, and not to punish the transgressor primarily.

[200] Further indication of how comparable situation under different tribunals were determined the same way as at the Appeal Board in this matter in my view point to the respondents not having erred in the manner in which they (Appeal Board) approached this matter.

200.1 The Competition (Commission) Appeal Court in *Federal Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission and Another*[67] the court found that section 35(3) of the Constitution is not applicable to the imposition of administrative penalties under the Competition Act, 89 of 1998. Section 59 of the Competition Act provides that the Competition Tribunal may impose administrative penalties for certain specified offences created by that Act.

200.2 The Tax Court found in Case No 11641 [2007] JOL 19881 (ITC) that additional tax imposed under section 76(1) of the Income Tax Act 58 of 1962 is a penalty of an administrative nature which cannot be equated with a fine imposed by a criminal court.

200.3 Section 50(1)(g) of the Employment Equity Act (“EEA”) empowers the Labour Court to impose a fine for the contravention of certain provisions of that Act. In *Director- General, Department of Labour v Win-Cool Enterprises (Pty) Ltd*[68] the Labour Court also affirmed this view.

JURISPRUDENCE OF COMPARABLE FOREIGN JURISDICTIONS

[201] Both the applicants and respondents agree that an exercise to compare what the foreign jurisdictions did in relation to comparable cases must be undertaken with caution. I add, if it is absolutely necessary to do so.

[202] There is sufficiently settled jurisprudence from our Constitutional Court on this issue for this Court to deal with how foreign jurisdictions dealt with comparable cases.

[203] Section 39(1)(c) of the Constitution permits the court, in interpreting the Bill of Rights, to consider foreign law.

[204] Both sides/parties herein broadly dealt with the comparative study or exposition from foreign jurisdictions, especially Canada, United States of America and the United Kingdom, to mention a few.

[205] In the light of what I have already stated hereinbefore (in this judgment) I do not find it necessary to say much about the jurisprudence of comparable foreign jurisdictions. Suffice to state that the general consensus is that where administrative penalties are decreed by enabling legislation, then forums or tribunals imposing same are administrative and not criminal courts.

[206] I can sum up the gist of the aggregate view of those jurisdictions by quoting from an article by Kenneth Mann titled, “Punitive Civil Sanctions: the Middle Ground between Criminal and Civil Law”[69] in which Mann explained that the decision of the US Supreme Court in *Atlas Roofing Co Inc v Occupational Safety and Health Review Commission*[70] facilitated “... the use of money sanctions” and

“... further legitimised the shift of sanctions from the criminal into the civil paradigm, a setting which permitted the imposition of a penalty with an efficiency not attainable in the thickets of criminal procedure ...”

[207] Conclusions drawable from the description of the jurisprudence in Canada, the United Kingdom and the United States of America can be summarised as follows:

207.1 When a penalty is not by its very nature a criminal punishment, the courts have resorted to a number of factors to determine whether

constitutional protections afforded to accused persons should be available to such persons.

207.2 The magnitude of the penalty to be imposed is but one of the factors to be considered. The purpose of the sanction is more revealing.

207.3 The purpose of penalties to be imposed in terms of securities legislation under consideration in matters such as the present case is regarded to be regulatory in nature and designed to enhance public confidence in the integrity and reliability of capital markets. Such penalties are not regarded to be criminal sanctions.

207.4 It follows thus, that respondents to proceedings before the Enforcement Committee are not "accused persons".

[208] The applicant's constitutional challenge stands to fail.

WHETHER LIMITATION OF SECTION 35 IS JUSTIFIED

[209] Analysis of whether the limitation to section 35 of the Constitution by section 36 thereof is justified would have been necessary had this Court found that the applicants herein were "accused persons". I found that in the context of the applicable legislative framework they cannot be "accused persons" who are entitled to the protection of section 35(3) of the Constitution.

[210] For completeness' sake, section 36 of the Constitution provides as follows:

"36. Limitation of rights.

(1) The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is

reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights,”[71]
- [211] The SSA is a law of general application. IF it was necessary to deal with this aspect, this Court would have had to determine whether the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, having regard to all relevant factors, including those set out in sub-paragraphs (a) to (e) of section 36(1) of the Constitution.
- [212] The test involved in such a determination has been described as a proportionality analysis, or test which involves the balancing of different interests: On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand, there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relationship between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.
- [213] The applicants have also made heavy weather of the so-called reverse onus.
- [214] The court held in *S v Manamela* (CD-G of Justice Intervening)[72] that the purpose of the presumption of innocence is to minimise the risk that innocent persons may be convicted and imprisoned. It does so by imposing on the prosecuting authority the burden of proving the essential elements of the offence charged beyond a reasonable doubt, thereby reducing to an acceptable level the risk of error in a court’s overall assessment of evidence tendered in the course of a trial.
- [215] The Constitutional Court has struck down the so-called reverse onus type of presumption on the basis of inconsistency with the presumption of innocence in a number of cases such as *S v Zuma*;^[73] *S v Bhulwana*^[74] *S y Mbatha*;^[75] *S v Julies*;^[76] *Scagell v Attorney-General, Western Cape*;^[77] *S v Coetzee*;^[78] *S v Ntsele*;^[79] *S v Mello*;^[80] and *S v Manyonyo*;^[81] to mention a few.
- [216] The majority of the court in *S v Manamela* (supra) re-emphasised that it is clear from the wording of section 36(1) that no right enshrined in Chapter 2 of the Constitution is absolute and that the effective prosecution of crime is a societal objective of great significance which could, where appropriate, justify the infringement of fundamental rights, including the presumption of innocence.^[82] Then, and importantly for present purposes, the court added the following statements that in my considered view are definitive and dispositive of arguments in this regard:

“[29] A broad context in which the use of reverse onus provisions might be justified concerns ‘regulatory offences’ as opposed to ‘pure criminal offences’. Thus, regulatory statutes dealing with licensed activity in the public domain, the handling of hazardous products or the supervision of dangerous activities, frequently impose duties on responsible persons, and then require them to prove that they have fulfilled their responsibilities. The objective of such laws is to put pressure on the persons responsible to take pre-

emptive action to prevent harm to the public. Although censure might be acute, there is generally not the same stigma or the severe penalties as for common law offences. Similarly, there are cases involving the existence or authenticity of public documents or licences, where practicalities and common sense dictate that, bearing in mind the reduced risk of error involved, it would be disproportionately onerous for the state to be obliged to discharge its normal burden in order to secure a conviction. Traffic regulation provides a further example, such as when a statute states that the owner of a car is presumed to be the person who parked it illegally; in the great majority of cases, there is simply no way in which the state could prove who parked the car."

- [217] A factor which weighed heavily with the majority of the court was that the statute in question permitted sentences of long-term imprisonment and it was not open to the trier of fact to attenuate the sentences on the basis that he or she might still have had a doubt as to the guilt of the accused.
- [218] The above circumstances where the reverse onus was applicable, prompting the Constitutional Court to strike down parts of legislation are not present in our current case.
- [219] Firstly, the burden of proof is not shifted from the State to the accused or respondent rather. Instead, the burden is reduced from the criminal standard of proof beyond reasonable doubt to the civil standard of balance of probabilities. If the probabilities are equal, no "conviction" or finding of impropriety follows. In my view, the effect of the reduction of the burden is therefore different from the reverse onus presumptions.
- [220] Secondly, if it was to be found that the imposition of administrative penalties in the case of rulings in the Enforcement Committee is to be regarded as being akin to a conviction of "a criminal offence", the fact will remain that the transgression was a regulatory offence of the nature referred to by the Constitutional Court in the passage quoted above,[83] which in any event is not primarily aimed at punishment but at restoring the integrity of the market.
- [221] Thirdly, and more importantly, the respondents in these proceedings are not at risk of imprisonment or any deprivation of their liberties. The consequences of error are much less than in criminal matters where the accused faces imprisonment if convicted. The consequences in my further view and finding are similar or akin to or appropriate civil proceedings. The worst case scenario for instance, is the loss of money or property. In respect of civil proceedings, the Constitutional Court has held that there is nothing rigid or cast-in-steel in relation to the question of the incidence of the onus of proof.[84]
- [222] Consequently, the infringement of section 35(3)(f) is of a different nature and extent and far less onerous than the reverse onus presumptions invalidated by the Constitutional Court in the case referred to hereinbefore.

CONCLUSION

- [223] From all of the foregoing it is my finding that the Enforcement Committee of the first respondent had the requisite jurisdiction to act against the applicants. Furthermore, on a proper construction of section 78(4) of the 2008 Amendment Act, i.e. the so-called “sun-set clause” or transitional provision ensuring orderly transition from the old 2004 SSA to the new 2008 Act, the Enforcement Committee and/or the Appeal Board that heard the applicants’ appeal from the Enforcement Committee retained the requisite jurisdiction to proceed with the referral of the applicants’ matter to them even when the 2008 Amendment Act was already in force as the decision to refer was taken before the coming into operation of the Amendment Act, which conduct is in line with the spirit of section 78(4) of the SSA.
- [224] It is my finding further, that the standard of proof applied in the determination of the applicants’ contravention was the correct one. The facts, circumstances and the law applicable did not allow for the deployment or application of the criminal standard of proof, i.e. proof beyond reasonable doubt.
- [225] The constitutional challenge to sections 102 to 105 of the SSA launched by the applicants is inappropriate and misplaced. The protection afforded accused persons in section 35(3) of the Constitution cannot be extended to the applicants when regard is had to the nature of the proceedings, the penalty regime involved - which is administrative in nature or character. The applicants have not succeeded in persuading this Court that they should qualify to be categorised as “accused persons” for the purposes of section 35(3) of the Constitution.
- [226] There is no justification to limit the import, extend and protection ingrained in section 35 of the Constitution in terms of section 36 of the Constitution.
- [227] By analogy as it was found in respect of a military court decision in *Minister of Defence v Potsane, Legal Soldier (Pty) Ltd v Minister of Defence*[85] the Constitutional Court held among others, that –
- “[38] Lastly, and in itself virtually dispositively, it is hard to see how control by the NDPP of the prosecution function in the military justice system could possibly work. The prosecution of crime on behalf of the state and the development and maintenance of military discipline and its enforcement by means of the MDC may have features in common, but they serve two fundamentally different public objectives. Military discipline is not about punishing crime or maintaining and promoting law, order and tranquillity in society. Military discipline, as Chap. 11 of the Constitution emphasises, is about having an effective armed force capable and ready to protect the territorial integrity of the country and the freedom of its people”*
- [228] It is the finding of this Court further that the deviations from the essential features of “an ordinary court” the importance of entrusting the imposition of administrative penalties to an expert tribunal as well as the safeguards accompanying this entrustment in my view militates against the Enforcement Committee of the FSB operating during its

determination and disposal of matters referred to it being said to be acting in a capacity akin to a criminal court of law. It decidedly remains administrative. The SSA clearly and categorically made this distinction. It has a choice of electing to refer matters to the prosecuting authority as criminal matters or referring them to the Enforcement Committee. In this case, the referral to the Enforcement Committee resulted in procedures that are not criminal trial-related or orientated being applied.

[229] From the evidence contained in the papers filed as supplemented by the parties' heads of argument, I am persuaded that even several foreign regulators, operating in open and democratic societies, impose administrative penalties through bodies other than courts of law for comparable contraventions, for instance, the United Kingdom's Financial Services Authority; the Spanish Financial Regulator; the Banco de Portugal; and the Mauritian Financial Services Commission; to mention a few.[86]

[230] The application for review therefore stands to be dismissed.

COSTS

[231] Both sides are ad idem that costs should follow the suit and also that the costs awarded should include the costs attendant on the appointment and deployment of two counsel.

[232] I have considered this issue of costs independently. I tend to agree that costs should follow the suit. The deployment of two counsel is justified by the complexity of the matter.

ORDER

[233] The following order is made:

- (a) The application launched by the applicants for the review of the decision of the Enforcement Committee as set out fully in the Notice of Motion is dismissed.
- (b) The applicants' constitutional challenge against sections 102 to 105 of the Securities Services Act, 36 of 2004 as amended by the Financial Services General Laws Amendment Act, 22 of 2008 is also dismissed.
- (c) The applicants are ordered to pay the costs of the application in respect of the respondents who applied for them, jointly and severally, the one paying, the other to be absolved.
- (d) The costs payable by the applicants to the respondents shall include the costs attendant on the employment of two counsel.

N F KGOMO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

FOR THE APPLICANTS: ADV A SUBEL SC

ASSISTED BY : ADV J J MEIRING

INSTRUCTED BY : STAN FANAROFF & ASSOCIATES

c/o CAWOOD ATTORNEYS GROENKLOOF, PRETORIA TEL NO: 011 880 2091

FOR THE FIRST AND SECOND

RESPONDENTS : ADV ALCE FREUND SC

ASSISTED BY : ADV J DE WAAL

INSTRUCTED BY: JAY MOTHOBHI INC

c/o FINANCIAL SERVICES BOARD MENLO PARK, PRETORIA TEL NO: 011 268 3500

FOR THE THIRD

RESPONDENT: ADV WIM TRENGOVE SC

ASSISTED BY: ADV LEAH GCABASHE

INSTRUCTED BY: THE STATE ATTORNEY

PRETORIA

TEL NO: 012 309 1576

DATE OF HEARING: 5 AUGUST 2013

DATE OF JUDGMENT: MARCH 2014

[1] Paras 9.1 to 9.4 of applicants' replying affidavit at folio 422 of the paginated papers herein.

[2] Constitution of South Africa Act, 108 of 1996.

[3] Minister of Home Affairs v Nicro

[2004] ZACC 10; 2005 (3) SA 280 (cc) at paras [32] to [36],

[4] The founding affidavit of Robert James Gourlay Barrow, para 4 at folio 379-10 of the paginated record.

[5] Tshidi Phineas Dube's Main Answering Affidavit, page 78 of record, para 27; and the FSB's Executive Officer, Mr Robert James Gourlay Barrow's affidavit, page 384 of record, at paras 18-20.

[6] Supra

[7] Sections 73 and 74.

[8] Section 75.

[9] Section 76.

- [10] See *Minister of Health v New Clock SA (Pty) Ltd & Others* 2006 (2) SA 311 (CC) at paras [199] to [201].
- [11] *The Directorate of Market Abuse v Brown and Two Others*, Case No 12/2008 (EC determination) per The Hon Mr Justice C F Eloff, Mr Johnson and J S M Henning delivered on 15 March 2010 at p 3.
- [12] Section 76 of the SSA
- [13] Section 75 of the SSA.
- [14] See paragraph 78 of this judgment.
- [15] 1977 (1) SA 665 (A) at 678A-B.
- [16] 1987 (2) SA 961 (A) at 991G-H.
- [17] 1907 TS 910 (later also re-affirmed by De Villiers JA in *Shenker v The Master and Another* 1936 AD 136.
- [18] At 991D-E (*Protective Mining* case).
- [19] (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC) 2004 (7) BCLR 687 (CC).
- [20] As held in *Kaizer Aluminium & Chemical Corporation et al v Bonjorno et al* [1990] USSC 50; 494 US 827 (1990) at 855, as quoted with approval in *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) at paras [11] and [12].
- [21] *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1148G.
- [22]
- [2001] 1 All SA 519 (A) at para [13],
- [23] See also *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 805F-806C
- [24] *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (A) at 1130C.
- [25] See section 6A(1)(a) of the Financial Institutions (Protection of Funds Act, 28 of 2001 as introduced by section 43 of the Amendment Act as well as the new definition of "law" introduced into section 1 of the Protection of Funds Act by section 41 of the Amendment Act.
- [26] 2011 (2) SA SACR 274 (CC).
- [27] The court noted that the section which repealed the common law relating to the crime of rape "... does not specify that the crime is repeated retrospectively. If it did, that would result in the extinction of criminal liability

incurred before the commencement of the Act. However, in our common law there is a presumption against retrospectivity. It is presumed that a statute does not operate retrospectively, unless a contrary intention is indicated, expressly or by clear implication”.

[28] See paragraph [108] of this judgment

[29] *Curtis v Johannesburg Municipality* 1906 TS 308 at 312.

[30] *Transnet Ltd v Chairman, National Transport Commission* 1999 (4) SA 1 at para [15].

[31]

[1996] ZASCA 17; 1996 (3) SA 745 (A) at 753B.

[32] Relating to any previous fine imposed or compensation paid for a contravention based on the same set of facts.

[33] The deterrent effect of the administrative sanction.

[34] The degree to which the respondent co-operated with the applicant and the EC.

[35] Case No 12/2008, Enforcement Committee per Eloff J et al, handed down on 15 March 2010.

[36] The Report and the Referral itself.

[37] Affidavit in support.

[38] *Supra* at para [20].

[39] 2010(6) SA 108 (SCA).

[40] Case No 1/2007.

[41] See *Alberta Securities Commission v Brost* 2008 ABCA 326.

[42] 2006 (4) SA 326 (SCA).

[43] *Fakie NO v CCII (supra)* at 342B

[44] Hearing from the FSMT sitting in London finalised in 2006.

[45] Decision of FSMT sitting in London on 11 May 2006.

[46] At para 197.

[47] *Parker v FSA*, at para [13],

[48] See *Chhabra v FSA* and *Patel v FSA*.

[49] *In re: H & Others* [1995] UKHL 16; [1996] AC 563 at 586.

[50] *In re: H & Others* [1995] UKHL 16; [1996] AC 563 at 586.

[51] Founding Affidavit para 45 at page 17

- [52] 2001 (2) SA 388 (CC).
- [53] See also *Financial Services Board v Pepkor Pension Fund* 1999 (1) SA 167 (C).
- [54] See *S v Zuma & Others* [1995] ZACC 1; 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC).at 651J to 652B.
- [55] 2002 (6) BCLR 634 (W) at 637.
- [56] 1997 (1) SACR 546 (D), 1997 (8) BCLR 989 (D).
- [57] At 556E.
- [58] 1996 (2) SA 751 (CC).
- [59] 1996 (1) SA 984 (CC) at paras [22] to [24] read with para [158],
- [60] *Supra*.
- [61] 1996 (3) SA 562 (CC).
- [62] 1998 (3) SA 785 (CC).
- [63] 2003 (3) SA 34 (CC).
- [64] 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC); 2000 (1) SACR 81 (CC).
- [65] Act 133 of 1993.
- [66] *Supra*. See para [190] of this judgment for the quoted words.
- [67] 2005 (6) BCLR 613 (CAC).
- [68]
- [2007] 28 ILJ 1774 (LC).
- [69] 1992 102 Yale Journal 1795.
- [70] 430 US at 442 (1997).
- [71] *Johncom Media Inv Ltd v M and Others* 2009 (4) SA 7 (CC).
- [72] 2000 (3) SA 1 (CC) at para [26],
- [73]
- [1995] ZACC 1; 1995 (2) SA 642 (CC).
- [74] 1996 (1)SA 388 (CC).
- [75]
- [76] 1996 (7) BCLR 899 (CC).

- [77] 1997 (2) SA 368 (CC).
- [78] 1997 (3) SA 527 (CC).
- [79] 1997 (11) BCLR 1543 (CC).
- [80] 1998 (7) BCLR 908 (CC).
- [81] 1999(12) BCLR 1438 (CC).
- [82] *S v Manamela* (supra) at para [27],
- [83] At para [216] of this judgment.
- [84] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para [38],
- [85] 2002 (1) SA 1 (CC).
- [86] See the Affidavit of Mr Van Zyl at para 4, page 196; para 5.1, page 197; and para 5.2 at page 197 respectively.
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Prepared on 12 October 2026 · Esheria