

Inside information interpreted by the courts

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Matters relating to insider trading do not often come before the South African courts as the Enforcement Committee of the Financial Services Board ("FSB") routinely investigates and deals with such matters.

Introduction

The matter of *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP) involved an appeal to the High Court against a finding of the FSB and is one of a very few reported judgements in South Africa dealing with insider trading.

Although in this matter, the charges of insider trading were brought under the **Securities Services Act 36 of 2004** ("[SSA](#)"), which has since been repealed by the Financial Markets Act 19 of 2012, this judgement remains relevant as the definition of "inside information" and the offence of "insider trading" are identical in both Acts.

The pertinent facts in this matter were that Mr Zietsman and his company, Harrison and White Investments ("Appellants") embarked on a strategy of acquiring a controlling interest in Africa Cellular Towers Limited ("Listco"), a company listed on the alternative exchange of the JSE.

A due diligence investigation and valuation of the business of Listco were undertaken, during the course of which the Appellants came into possession of information that Listco had secured a loan from the Industrial Development Corporation to the amount of R99 million, subject to the finalisation of the agreements relating to such loan ("Relevant Information").

Certain Listco shares were acquired by the Appellants at a time when it was public knowledge (as a result of a SENS announcement) that Listco had secured a loan, but neither

- (i) the identity of the lender, nor
- (ii) the amount of such loan had been disclosed to the public.

After the shares were acquired by the Appellants, the details of the loan were announced on SENS and the share price of Listco shares increased dramatically.

The question before the court was whether –

- the Relevant Information constituted "inside information" which was defined in the SSA as follows –
 - "specific or precise information, which has not been made public and which –
 - a. is obtained or learned as an insider; and
 - b. if it were made public would be likely to have a material effect on the price or value of any security listed on a regulated market."
- the acquisition by the Appellants of the Listco shares contravened the insider trading provisions of the SSA, which prohibit a person who knows that he or she has inside information from dealing in the listed securities to which the inside information relates or which are likely to be affected by it.

By way of defence, the Appellants contended that the Relevant Information did not constitute "inside information" as the Relevant Information was, amongst other things –

- not "specific or precise" information as the loan was merely approved in principle, no loan agreement had been concluded in writing, there were conditions precedent to the loan and there was uncertainty whether Listco would ultimately be able to access the funds;
- not "likely to have a material effect" on the price or value of Listco's shares.

The Appellants consequently did not believe or "know" that they had inside information as contemplated in the SSA and accordingly did not contravene the insider trading provisions of the SSA.

The Court's Decision

After reviewing the law on insider trading in Europe and the United Kingdom, the court rejected the Appellants' contentions and held that

- a circumstance or event need not be in final form in order for the information relating to such circumstance or event to qualify as "specific and precise". Information relating to circumstances or an event in an intermediate phase could still be specific and precise and therefore constitute inside information;
- whether the information is price sensitive is determined with reference to the reasonable investor and whether he would regard the information as relevant to a decision to deal in such securities; and
- a genuine and *bona fide* belief that known information is not inside information will not constitute a defence if such belief is not based on reasonable grounds.

Conclusion

Accordingly, the court held there was no basis for setting aside the FSB's finding that the Appellants were guilty of insider trading.

In determining an appropriate administrative sanction, the court was of the view that it was irrelevant that the Appellants had made no actual profit from the insider trading, but ultimately suffered a loss (they did not sell their shares following the share spike and Listco was subsequently placed in liquidation).

The penalty of R1 million that was imposed by the FSB was informed by (but not equal to) the potential profit the Appellants could have made from the insider trading and the court found there was no basis to set aside that penalty.



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