SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM	The Registrar, Supreme Court of Appeal
DATE	28 September 2017
STATUS	Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

***Pather v Financial Services Board* (866/2016) [2017] ZASCA 125 (28 September 2017)**

Today the Supreme Court of Appeal (SCA) dismissed an appeal by the appellants against a decision of the Gauteng Local Division, Pretoria, which dismissed with costs an application to review and set aside decisions of the second respondent, the Enforcement Committee (the EC) established in terms of the Securities Services Act 36 of 2004 (the Act).

During 2005, the Directorate of Market Abuse (the DMA) conducted an investigation in terms of s 83(1) of the Act into the conduct of the two appellants – the first of whom, Mr Maslamony Pather, is the chief executive officer of the second, Ah-Vest Limited (formerly All Joy Foods Limited). The investigation concluded that the appellants had contravened s 76 of the Act. In consequence two counts of the alleged contraventions of that section were referred to the Enforcement Committee (the EC) which imposed an administrative penalty in the total amount of R1.5 million on each of the appellants. The appellants later appealed the decision of the EC to the Board of Appeal established in terms of the Financial Services Board Act. When that appeal failed they applied to the High Court to review and set aside the decision of the EC.

On appeal to the SCA three contentions were advanced on behalf of the appellants: first, that the court below erred in finding that the civil standard of proof is applicable to proceedings before the EC, which are criminal or, at least, quasi-criminal in nature; second, that the court below erred in concluding that the EC did have jurisdiction to make the findings that it purported to make against the appellants under s 76 of the Act: and, third, in the alternative to

the two grounds, that the court below erred in not finding ss 102 to 105 of the Act unconstitutional.

The court dealt extensively with the first ground of appeal, holding that the legislative scheme, foreign jurisprudence, and the nature of the proceedings supported the conclusion that proceedings before the EC could not be classified as being criminal in nature, thus the civil standard of proof applied. It also held that the penalties imposed by the EC are administrative in nature. Given this conclusion, the court held that the constitutionality of the impugned provisions were to be assessed in terms of s 33 of the Constitution. Relying on Canadian jurisprudence, it concluded that the appellants were not ‘accused persons’ and that s 35(3) of the Constitution accordingly had no application to them. In respect of the contention that the EC lacked jurisdiction, the court reasoned that the power of a High Court to try any offence referred to in ss 73, 75 and 76 of the Act and to impose a fine as contemplated in s 115*(a)* does not imply that the EC is precluded from imposing an administrative penalty for a contravention or failure to comply with the Act. It held that the criminal jurisdiction and the administrative penalty jurisdiction of the EC co-exist in terms of the legislative scheme.