THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 866/2016

In the matter between:

MASLAMONY THEEGARAJAN PATHER	**FIRST APPELLANT**
AH-VEST LIMITED	**SECOND APPELLANT**
and	
FINANCIAL SERVICES BOARD	**FIRST RESPONDENT**
THE ENFORCEMENT COMMITTEE	**SECOND RESPONDENT**
THE MINISTER OF FINANCE (RSA)	**THIRD RESPONDENT**

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

Bench: Ponnan, Cachalia and Tshiqi JJA and Lamont and Rogers AJJA

Heard: 24 August 2017

Delivered: 28 September 2017

Summary: Securities Services Act 36 of 2004 – proceedings before enforcement committee – not in the nature of criminal proceedings – civil standard of proof applies – administrative penalties imposed by enforcement committee – not in the nature of a penal sanction.

ORDER

On appeal from: Gauteng Local Division, Pretoria (Kgomo J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Ponnan JA (Cachalia and Tshiqi JJA and Lamont and Rogers AJJA concurring):

[1] During 2005, the Directorate of Market Abuse (the DMA) conducted an investigation in terms of s 83(1) of the Securities Services Act 36 of 2004 (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), which since 2004 has been listed on the alternative exchange of the Johannesburg Securities Exchange. At that stage, Mr Cedric Carroll, a former financial director of All Joy, was also subject to scrutiny by the DMA, but his whereabouts subsequently became unknown and the action against him was accordingly discontinued. Between November 2006 and May 2007 a number of persons, including Mr Pather, were interrogated under oath in terms of s 82 of the Act by the first respondent, the Financial Services Board (the FSB).[1] The investigation concluded that 'All Joy, Pather and Carroll [had] contravened s 76 of the [Act]'. In consequence, two counts of alleged contraventions of that section on the part of both appellants were referred to the second respondent, the Enforcement Committee (the EC), in terms of s 94(*e*) of the Act.

[1] The FSB is an independent body established by the Financial Services Board Act 97 of 1990 (the FSB Act) to oversee the South African non-banking financial services industry in the public interest.

[2] The contraventions referred to the EC were:

'Count 1

During April 2005, for the purpose of the audit of the company's accounting records in preparation of its financial statements for the year ending 28 February 2005, the appellants, through the records, represented to the auditors that portion of the recorded credit sales transactions to the value of R830 486 18 were genuine transactions concluded in the normal course of business when they knew or ought reasonably to have known that the representation was false, misleading or deceptive in that these were fictitious transactions which resulted in credit sales and accounts receivable being overstated by the sum in question.

Count 2

On 31 May 2005 the appellants caused the financial statements for the 2005 year to be published on the Stock Exchange News Service (SENS) which they knew or ought to have known were false, misleading or deceptive in overstating

1. Trade and other receivables by R1 633 377,
2. Capital and reserves after tax by R1 007 023 and
3. Profit after tax by R295 747.'

[3] The matter was enrolled to be considered by the EC in July 2009. The EC, chaired by Justice Eloff, found that 'it was established on a balance of probability that Pather authorised the manipulations, and participated with Carroll in "cooking the books" of the company'. On 7 September 2009 the EC arrived at the following conclusion:

'In our judgment the administrative penalty on the company in count 1 should be R500 000.00. The administrative penalty imposed on Mr Pather on count 1 should likewise be R500 000.00.

In regard to count 2, the administrative penalty imposed on the company is R1 million and the administrative penalty imposed on Mr Pather personally is R1 million.'

The appellants appealed the decision in terms of s 111 of the Act to the Board of Appeal established under s 26 of the Financial Services Board Act 97 of 1990 (the FSB Act). On 16 August 2010 the Board, chaired by Justice Howie, confirmed the EC's decision.

[4] On 6 October 2010 the appellants applied to the North Gauteng High Court, Pretoria for an order in the following terms:

'1. Declaring that the Enforcement Committee had no jurisdiction to make the decision that the applicants contravened s 76 of the Act (as amended by the Financial Services Laws General Amendment Act 22 of 2008) by operation of s 79 of the Act, alternatively by operation of the doctrine of *ultra vires*;

2. Reviewing and setting aside the decision of the Enforcement Committee that the applicants contravened s 76 of the Act as *ultra vires* and incompetent;

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

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

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

6. Granting the applicant such further and/or alternative relief as this court may deem appropriate.'

In addition to the FSB and EC, who were cited respectively as the first and second respondents, the Minister of Finance (the Minister) was cited as the third. Kgomo J dismissed the application, but granted leave to the appellants to appeal to this court. It is noteworthy that the factual findings made by the EC and the Board against the appellants were not challenged in the court a quo or in this appeal.

[5] Three contentions were advanced on behalf of the appellants on appeal, namely: first, 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, 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, the court below erred in not finding ss 102 to 105 of the Act unconstitutional.

[6] The prohibition against insider trading was first introduced into our law in 1973 by the Companies Act 61 of 1973. But, as the King Task Group observed in its Final Report on Insider Trading Legislation dated 21 October 1997, there had not been a

single prosecution since the introduction of the prohibition. The Task Group accordingly recommended that insider trading should be regulated under a separate statute outside of the Companies Act. In the result, the Insider Trading Act 135 of 1998 (the ITA) was enacted on 17 January 1999. It established an Insider Trading Directorate and 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 as a result of the offending transactions, plus a penalty of up to three times the amount. The ITA also created a mechanism to distribute the funds recovered from a successful action to persons who had been prejudiced by the insider trading. In 2005, the ITA was repealed and replaced by the Act, which replaced the Insider Trading Directorate with the DMA and extended its jurisdiction to cover three forms of market abuse, namely insider trading,[2] market manipulation[3] and false statements.[4] It also created the EC and empowered it to impose administrative penalties.

[7] The Act was amended by the Financial Services Laws General Amendment Act 22 of 2008 (the Amendment Act), which came into force on 1 November 2008. The Amendment Act expanded the 'administrative penalties' model. It did so primarily by introducing ss 6A to 6I into the Financial Institutions (Protection of Funds) Act 28 of 2001 (the FI Act). In terms of those amendments, the original EC was replaced by a new EC, created in terms of a new s 10(3) of the FSB Act, the main difference between the two being that the new EC has jurisdiction to deal with contraventions of, or non-compliance with, all FSB-administered legislation.[5] There are also some changes in the

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[2] Sections 73 and 74.
[3] Section 75.
[4] Section 76.
[5] Section 6A(1)(*a*) of the FI Act provides: 'Despite anything to the contrary in any other law, if a registrar is of the opinion tht a person has contravened a provision of a law in respect of which the registrar is not authorized to impose a penalty or a fine, the registrar may refer the alleged contravention to the enforcement committee.'
According to s 1 of the FI Act:
'Law', for the purposes of s 6, means –
'(i) this Act;
(ii) the Financial Services Board Act, 1990;
(iii) the Inspection of Financial Institutions Act, 1998 (Act 80 of 1998);
(iv) the Financial Services Ombud Schemes Act, 2004 (Act 37 of 2004);
(v) an Act referred to in the definition of 'financial institution' in s 1 of the Financial Services Board Act, 1990;
(vi) the Medical Schemes Act, 1998 (Act 131 of 1998), and any subordinate legislation, enactment or

procedure to be followed by the EC. In what follows, references to the EC are to the body created by and functioning under the Act, ie prior to the coming into force of the Amendment Act. It became common cause at the hearing of the appeal that the Amendment Act did not apply to the EC's consideration of the complaints against the appellants. I shall accordingly refer to the repealed provisions of the Act in the present tense since they reman applicable to the determination of this appeal.

[8] Prior to the legislative reforms brought about by the Act, the regulatory framework provided for only three enforcement tools, namely registrars' financial penalties, the withdrawal of the approval or licence of the transgressor and criminal prosecution of the wrongdoer. That regulatory scheme only catered, on the one hand, for very minor transgressions and, on the other, for major fraud-type events. It followed that most contraventions that fell in between those two extremes did not have appropriate enforcement mechanisms.

[9] The mischief with which the Act seems principally concerned is protecting the public and promoting confidence in the market. That finds expression in s 2(*a*) of the Act, which describes the purposes of the Act, inter alia, as being to increase confidence in South African financial markets by: (a) requiring financial services to be provided in a fair efficient and transparent manner; and (b) contributing to the maintenance of a stable financial market environment. The Act empowers the DMA to investigate contraventions and to refer them to the EC, which the latter is statutorily obliged to consider in the manner prescribed by s 102. As appears from subsections (1) to (3) of s 102, the EC is obliged to determine matters on the basis of an assessment of the documentary evidence submitted to it by the DMA. According to s 99(1), if the DMA refers a matter to the EC under s 94, the latter must deal with it in accordance with ss 102 to 105, to the extent that those sections are applicable to the matter in question. In terms of s 102(1), the referral of a matter to the EC must be accompanied by a report on the investigation and by all other evidence relevant to the alleged contravention or failure, in the possession of the registrar or the DMA. The EC must serve a copy of that report and

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measure made under these Acts.'

evidence on the respondent and direct such respondent to respond thereto by way of affidavit.[6] Section 102(3) provides that the panel of the EC '. . . must consider the documentary evidence before it without hearing further evidence, subject to subsection (4)'. According to subsection (4), the panel 'may, in exceptional circumstances and when it is necessary to come to a just decision' summon a person to appear before it to be questioned or to produce a document.

[10] The Act recognises that a single act may give rise to more than one consequence. Ordinarily, the purpose of an administrative penalty is to ensure compliance with the legislation and to give the regulatory authority an effective means of enforcing it. Contraventions have to be discouraged and offences punished for the system to be viable. In addition to the fact that the penalty itself is described as an 'administrative penalty', the following are important pointers against the appellants: First, s 112 of the Act explicitly distinguishes between 'civil, criminal, administrative or disciplinary proceedings under this Act'. Second, s 104(3) provides that if the respondent concerned fails to pay the administrative penalty, the DMA may file with the clerk or registrar 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'. Third, ss 104(6)[7] and (7)[8] draw a clear distinction between a penalty imposed by the EC in terms of s 104 and criminal proceedings. Fourth, s 104(8)[9] expressly provides that an administrative penalty does not constitute a 'previous conviction'. These regulatory provisions are collateral to the other provisions of the Act and whilst some have a punitive aspect they are not criminal or quasi criminal in nature.

[11] An effective and credible financial regulatory system must be capable, at least in its design, to produce reasonably speedy results. Relative to the courts, the process

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[6] Section 102(2).
[7] Section 104(6) reads: '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.'
[8] Section 104(7) reads: 'If a court assesses the penalty to be imposed on a person convicted of an offence in terms of this Act, the court must take into account any administrative penalty imposed under this section or s 103(1)(*a*) in respect of the same set of facts.'
[9] Section 104(8) reads: 'An administrative penalty imposed and paid in terms of this section does not constitute a previous conviction as contemplated in Chapter 27 of the Criminal Procedure Act.'

adopted by the EC is informal and inexpensive. The Act contemplates that the EC shall be staffed with personnel with specific knowledge and experience in law, as well as the subject matter under consideration.[10] Further, its proceedings must be open to the public[11] and any decision must be by majority, in writing and include reasons.[12] Furthermore, s 102(5) affords a respondent the right to be legally represented when summoned to appear in person before the panel envisaged by s 105(4). The EC does not fall under the control of the FSB. The DMA is generally represented in proceedings before the EC (and the Appeal Board) in the same manner as the respondent to the proceedings is. A person aggrieved by a decision of the EC has a right of appeal to the Appeal Board, which is staffed by at least two advocates or attorneys with a minimum of ten years' experience or judges.[13] The powers of the EC and Appeal Board are limited to the imposition of a monetary penalty. They do not include the power to impose imprisonment or indeed any form of deprivation of liberty. What is more, those proceedings are susceptible to review by a court inter alia on the ground that the monetary penalty is unreasonably high or severe.

[12] Whilst the meaning of the Act must ordinarily be found within its four corners, some guidance, say the appellants, can be derived from foreign jurisprudence. The appellants accordingly seek to avoid the consequences of the analysis that the lawgiver had in mind administrative – not criminal – proceedings before the EC by various arguments based principally on foreign authorities. They invoke *Davidson & Tatham v Financial Services Authority*[14] – a decision by the United Kingdom Financial Services and Markets Tribunal (FSMT) – regarding the determination of administrative penalties. Although the Tribunal determined that the penalties for the market abuse were criminal charges for the purposes of article 6 of the European Convention on Human Rights (the Convention), it held that the civil – not criminal – standard applied.[15]

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[10] Sections 98(1) and (2).
[11] Section 100(3).
[12] Sections 100(4) and (5).
[13] Section 26A(2)(*a*) of the FSB Act.
[14] *Davidson & Tatham v Financial Services Authority* [2006] UKFSM 31.
[15] Ibid para 197.

[13] The appellants also rely on the jurisprudence of the European Court of Human Rights (EHHR), the Hong Kong Court of Final Appeal and the decision of the England and Wales Court of Appeal in *Han v Customs and Excise Commissioners*.[16] In *Han,* the court held that the imposition of penalties pursuant to the provisions of the VAT Act 1994 gave rise to criminal charges within the meaning of article 6 of the Convention. In arriving at that conclusion the court applied the United Kingdom Human Rights Act 1998 (HRA). Article 6 is a 'Convention right' within the meaning of s 1 of the HRA. In terms of s 2(1) of that Act, '[a] court or tribunal determining any question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the [EHHR]'. Article 6(1) of the Convention provides: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' Article 6(2)[17] enshrines the presumption of innocence in criminal matters. Article 6(3)[18] provides further 'minimum rights' for those facing criminal charges.

[14] However, the case law of the EHHR makes clear that the concept of a 'criminal charge' under article 6 has an 'autonomous' Convention meaning.[19] Three criteria are applied by the EHHR in order to determine whether proceedings are criminal: first, the classification of the proceedings in domestic law; second, the nature of the offence; and third, the nature and degree of the severity of the penalty that the person concerned

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[16] *Han v Customs and Excise Commissioners* [2001] EWCA Civ 1040.

[17] Article 6(2) enshrines the presumption of innocence in criminal matters as follows:
'Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.'

[18] Article 6(3) provides further 'minimum rights' for those facing criminal charges as follows:
'Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

[19] *Engel & others v The Netherlands* [1976] 1 EHHR 647 para 81.

risks incurring.[20] The EHHR 'does not in practice treat these three requirements as analytically distinct or as a 'three stage test', but as factors to be weighed together in seeking to decide whether, taken cumulatively, the relevant measure should be treated as "criminal".'[21] In determining whether an individual is the subject of a criminal charge, the first criterion, namely the categorisation of the allegation in domestic law, is no more than the starting point and is not decisive of the enquiry.[22] A finding that the proceedings are classified as criminal in domestic law is likely to be conclusive.[23] If the offence, the subject of the allegation, is not criminalised by national law, the court proceeds to determine whether it is nonetheless criminal in character for the purposes of article 6 by proceeding to the second and third criteria.[24] In the context of disciplinary proceedings, the EHHR has placed great emphasis on the seriousness of the penalty for holding the proceedings criminal rather than disciplinary.[25] It bears emphasis that the treatment of the categorisation of the allegation in domestic law merely as a starting point largely renders irrelevant the rationale underlying a national law which seeks to decriminalise conduct.[26]

[15] The principal questions in *Koon Wing Yee v Insider Dealing Tribunal*[27] were whether articles 10 and 11 of the Hong Kong Bill of Rights[28] applied to proceedings before the Insider Dealing Tribunal and if so, whether, inter alia, the standard of proof applied by the Tribunal complied with these provisions. The provisions of articles 10 and 11 are in the same terms as articles 14(1), (2) and (3)(*g*) of the International Covenant

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[20] *AP, MP & TP v Switzerland* [1998] 26 EHRR 541 para 39.
[21] *Engel* supra fn 17 para 26.
[22] Ibid para 65.
[23] *Regina (McCann & others) v Crown Court at Manchester and another* [2002] UKHL 39 para 57D.
[24] *Han* supra fn 16 para 65.
[25] Ibid para 67.
[26] Ibid para 68.
[27] *Koon Wing Yee v Insider Dealing Tribunal* [2008] HKCFA 21.
[28] Article 10 of the Bill of Rights provides: ' In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'
Article 11 provides:
'(1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law;
(2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality –
. . .
(g) not to be compelled to testify against himself or to confess guilt.'

on Civil and Political Rights (ICCPR).[29] Neither the Convention nor the ICCPR explicitly mandate a specific standard of proof.[30] The court held that the Tribunal's findings were 'impaired', inter alia, because of a failure to apply the criminal standard of proof. Importantly, that conclusion was preceded by a finding that the proceedings before the Tribunal involved the determination of a criminal charge. It thus stood to reason that the applicable standard would have had to be the criminal standard of proof. The court had regard to the principles enunciated by the EHHR in relation to article 6 of the Convention and applied by UK Courts in the interpretation and application of the HRA. The decisions of those courts on provisions which were the same as (or similar to) the Hong Kong Bill of Rights, so observed the court, were of high persuasive authority. In arriving at its conclusion, reliance was also placed by the court on a general comment by the United Nations Human Rights Committee relating to article 14 of the ICCPR.[31]

[16] Following *Han* and *McCann,* the Hong Kong Court of Final Appeal took the view that 'if the proceedings are classified as civil in domestic law, that, though important, is by no means conclusive because the second and third criteria are more significant'.[32] Under the second criterion, so said Potter LJ in *Han*:[33]

'[T]he court considers whether or not, under the law concerned, the "offence" is one which applies generally to the public at large or is restricted to a specific group. If the former, then despite its "de-criminalisation" by the national law, it is apt to be regarded as criminal. Further, if a punitive and deterrent penalty is attached, it is likely to be regarded as criminal in character, even in cases where the penalty is in the nature of a fine rather than imprisonment. On the other hand, where the offence is limited to a restricted group, as is generally the case in relation to disciplinary offences, the court is unlikely to classify a charge under the applicable disciplinary or regulatory code as criminal, at least unless it involves or may lead to loss of liberty.'

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[29] *Koon Wing Yee* supra fn 25 para 24.
[30] Ibid para 91.
[31] In that regard para 65 of the judgment reads: I note that para 15 of General Comment No 32, published by the United Nations Human Rights Committee ('the Committee") at its 90th session in July 2007, relating to article 14 of the ICCPR (article 10 and 11 of the Bill of Rights), stated: "Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity."'
[32] *Koon Wing Yee* supra fn 25 para 35.
[33] *Han* supra fn 16 para 66.

[17] The court in *Koon Wing Yee* did caution that the EHHR's 'jurisprudence is fact-sensitive so that it is hazardous to apply decisions of that Court to facts which are different'.[34] It must be appreciated that:

'The fair trial guarantee under article 6(1) applies to both "the determination of a (person's) civil rights" and "the determination of any criminal charge". On the other hand, only the latter attract the additional protections under article 6(2) and 6(3). In so far as the latter provisions apply to "everyone charged with a criminal offence" it is well established in the jurisprudence of the European Court of Human Rights that this concept is co-extensive with the concept of the determination of any criminal charge.'[35]

Moreover, as Lord Bingham of Cornhill CJ pointed out in *B v Chief Constable of Avon*:[36]

'I am aware of no case in which the European Court has held a proceeding to be criminal even though an adverse outcome for the defendant cannot result in any penalty.'

The fact of the matter therefore is that decisions of the EHHR are not a safe guide for us. It follows that properly analysed this line of authorities does not assist the appellants' case.

[18] Neither the courts in the United States nor Canada appear to support the appellants' contention that proceedings before the EC are criminal or quasi criminal in character. The leading case in the United States is *Hudson v United States*.[37] There, monetary administrative penalties and occupational debarment were imposed for the violation of federal banking statutes. Thereafter, criminal proceedings were also instituted. The US Supreme Court held that the double jeopardy clause was not a bar to the criminal prosecution because the administrative proceedings were not criminal.[38] The court stated:

'Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction . . . A court must first ask whether the legislature, '"in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." . . . Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or

[34] *Koon Wing Yee* supra fn 25 para 28.
[35] *Regina (McCann & others)* supra fn 21 at 21.
[36] *B v Chief Constable of Avon* [2011] 1 WLR 340 para 28.
[37] *Hudson v United States* 522 US 93 (1997).
[38] The Double Jeopardy Clause provides that no 'person [shall] be subject for the same offence to be twice put in jeopardy of life or limb'.

effect," . . . as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty".'

[19] *Hudson*, inter alia, observed that: (a) it had long recognised that the double jeopardy clause does not prohibit the imposition of all additional sanctions that could in common parlance be described as punishment; (b) all civil penalties have some deterrent effect; (c) the due process and equal protection clauses already protect individuals from sanctions which are down-right irrational; (d) that the authority to impose administrative penalties is conferred upon administrative agencies, is prima facie evidence that Congress intended to provide for a civil sanction; (e) quintessential criminal punishments may be imposed only 'by a judicial trial'; (f) while the petitioners have been prohibited from further participating in the banking industry - that is certainly nothing approaching the 'infamous punishment of imprisonment'; and (g) 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

[20] In Canada, the jurisprudence on the distinction between criminal and administrative proceedings was articulated in *R v Wigglesworth*[39] and *Martineau v MNR*.[40] In the latter case, a customs officer had demanded, by way of a written notice served pursuant to the Customs Act, that the appellant pay $315 458, being the deemed value of the goods he allegedly attempted to export by making false statements. This set in motion a process referred to as 'ascertained forfeiture'. The Canadian Supreme Court had to consider whether the appellant may, in the course of an action under the Customs Act, avail himself of the right against self-incrimination guaranteed by s 11*(c)* of the Canadian Charter of Rights and Freedoms (the Charter).[41] In dismissing his appeal the court pointed out that a distinction must be drawn between penal proceedings on the one hand and administrative proceedings on the other. Only penal proceedings, so observed the court, attracted the application of s 11 of the Charter.

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[39] *R v Wigglesworth* [1987] 2 SCR 541.
[40] *Martineau v MNR* [2004] 3 SCR 737.
[41] Section 11(*c*) provides that a 'person charged with an offence' cannot be compelled to be a witness 'in proceedings against that person in respect of the offence'.

[21] More recently, *Guindon v Canada*[42] affirmed the tests developed in the earlier cases. The appellant, Ms Guindon, was assessed penalties totalling $546 747 under s 163.2(4) of the Income Tax Act RSC 1985 arising from certain false statements made by her. She asserted that the penalty imposed under the section was criminal and that she was therefore a person 'charged with an offence' who is entitled to the procedural safeguards enshrined in s 11 of the Charter. In dismissing her appeal, the court held that the proceedings were of an administrative nature and that Ms Guindon therefore was not a person 'charged with an offence' and accordingly the protections under s 11 of the Charter did not apply. In arriving at that conclusion the court explained that an individual is entitled to the procedural protections of s 11 of the Charter where the proceeding is, by its very nature, criminal, or where a 'true penal consequence' flows from the sanction. The court expatiated: (a) A proceeding is criminal by its very nature when it is aimed at promoting public order and welfare within a public sphere of activity. Proceedings of an administrative nature, on the other hand, are primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity.[43] (b) A 'true penal consequence' is 'imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within [a] limited sphere of activity'.[44] (c) The criminal in nature test asks whether the proceedings by which a penalty is imposed are criminal. The test is not concerned with the nature of the underlying act, but the nature of the proceedings themselves'.[45]

[22] The first issue raised by the appellants cannot be answered without examining the nature and purpose of criminal proceedings. In the words of Lord Steyn '[t]he aim of criminal law is not punishment for its own sake but to allow everyone to go about their daily lives without fear of harm to person or property'. 'Criminal law', observed Lord Atkin, 'connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state. The criminal quality of an act

[42] *Guindon v Canada* 2015 SCC 41.
[43] Ibid para 25.
[44] Ibid para 46.
[45] Ibid para 51.

cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences?'[46] And, criminal proceedings, according to Lord Bingham of Cornhill CJ, 'involve a formal accusation made on behalf of the state or by a private prosecutor that a defendant has committed a breach of the criminal law, and the state or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant.'[47]

[23] In the proceedings before the EC, neither the police nor the prosecutorial authority is involved at all. That the facts underpinning the complaint can as well give rise to a criminal offence does not alter the nature of the complaint before the EC. The EC is primarily concerned with the exercise of a disciplinary power in respect of a limited group of persons possessing a special status.[48] There is no formal accusation of a breach of the criminal law. The proceedings are initiated by way of a complaint by the DMA to the EC, not a criminal charge. In *Martineau*[49] the court observed:

'This process thus has little in common with penal proceedings. No one is charged in the context of an ascertained forfeiture. No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the notice of ascertained forfeiture is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of civil action'.

Those considerations find equal application here.

[24] Moreover, sight cannot be lost of the fact that criminal prosecutions come with many challenges. First, the responsibility for the prosecution lies with the National Directorate of Public Prosecutions, not the regulatory authorities, such as the FSB. Given an already overburdened prosecutorial staff, such contraventions generally do not enjoy priority and the regulator, as complainant, has to stand in line with many other complainants. Second, a criminal prosecution can be both time-consuming and fraught with difficulty and the prosecuting authority may not always possess the necessary

[46] *Proprietary Articles Trade Association v Attorney General for Canada* [1931] AC 310, 324.
[47] *Customs and Excise Comrs v City of London Magistrates' Court* [2000] 1 WLR 202, 2025.
[48] As it was put in in McCann: 'Where a limited group of persons possessing a special status is involved the conclusion is more readily drawn that the proceedings are disciplinary'.
[49] *Martineau* supra fn 37 para 45.

expertise. Third, the stigma attached to a criminal conviction will often mean that industry professionals are likely to vigorously contest even relatively minor contraventions. Fourth, a criminal prosecution may not be a suitable enforcement option in respect of some less serious contraventions, especially those where an industry player simply failed to adhere to the rules, as opposed to committing an offence which is truly deserving of a criminal sanction.

[25] Accordingly, for all of the reasons given I take the view that proceedings before the EC do not lie within the criminal sphere and cannot be classified as being criminal in nature. The court below was accordingly correct in holding that the EC, when imposing administrative penalties 'decidedly remains administrative'. Its conclusion in this regard is consistent with decisions in this country by the Competition Appeal Court,[50] Tax Court[51] and Labour Court.[52]

[26] Underlying the question of the characterisation of the nature of the proceedings, are two further contentions advanced on behalf of the appellants: first, if the proceedings before the EC are not to be regarded as criminal, it is a civil proceeding of such a character that the criminal standard of proof should be applied; and, second, the proceedings before the EC may result in a penalty or have a true penal consequence.

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[50] In *Federal Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission & another* 2005 (6) BCLR 613 (CAC) the court found that s 35(3) of the Constitution is not applicable to the imposition of administrative penalties under the Competition Act. Section 59 provides that the Competition Tribunal may impose an administrative penalty for certain specified offences created by the Competition Act.

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

[52] In *Director-General, Department of Labour v Win-Cool Industrial Enterprises (Pty) Ltd* 2007 28 ILJ 1774 (LC) the court had to consider the imposition of penalties for the contravention of the affirmative action provisions of the Employment Equity Act No 55 of 1998 (EEA). The court concluded that: the relevant provision does not create an offence but a contravention for which a penalty is payable; the department bears the civil standard of proving all the elements of the contravention on a balance of probabilities; and, civil procedure for enforcement was justifiable taking into consideration our constitutional values and the purpose of the affirmative action provisions in the EEA and the scheme adopted to implement and enforce them.

As to the first:

[27] The appellants place great store by the judgment of this court in *Fakie N.O. v CCII Systems (Pty) Ltd*.[53] That case concerned the standard to be applied by a court in determining whether or not to order the imprisonment of a person alleged to be in contempt of a civil court order. This court accepted that although the respondent was not an 'accused person' for the purposes of s 35 of the Bill of Rights,[54] the protection afforded by s 12 of the Bill of Rights 'not to be deprived of freedom arbitrarily or without just cause'[55] required proof beyond reasonable doubt before imprisonment for contempt could be ordered.[56] This is consistent with the approach adopted in *In re Bramblevale Ltd*.[57] There the Court of Appeal decided that to establish a civil contempt of court, proof beyond a reasonable doubt was required. This was because imprisonment might result. The court pointed out that 'the order is made to uphold the peace and so one is immediately in the realm of law enforcement in the public rather than a private interest'. Unlike *Fakie* and *In re Bramblevale Ltd*, the present matter raises no 'liberty' issue. According to the Supreme Court of Canada, 'imprisonment is always a true penal consequence.[58] A provision that includes the possibility of imprisonment will be criminal no matter the actual sanction imposed.' Here, there is no freedom interest at stake inasmuch as the EC has no power to order the imprisonment of the appellants. Accordingly this matter is entirely distinguishable from *Fakie.*

[28] Section 104 of the Act provides that 'if a panel is satisfied that a respondent has contravened or failed to comply with the Act', it must impose an 'administrative penalty'. The appellants' argument that the EC is obliged to apply the 'criminal yardstick is, in effect, an argument that the phrase 'is satisfied' must be interpreted to mean 'is satisfied beyond a reasonable doubt'.

[29] To be sure, a generous degree of flexibility is built into the probability standard. The civil standard of proof does not necessarily mean a bare balance of probability. The

[53] *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).
[54] Ibid at 339 B-C.
[55] Ibid at 339 C-D.
[56] Ibid at 342B.
[57] *In re Bramblevale Ltd* [1970] Ch 128.
[58] *Guindon* supra fn 39 para 75.

inherent probability or improbability of an event is a matter to be taken into account when the evidence is assessed. When assessing the probabilities a court will have in mind that the more serious the allegation, the more cogent will be the evidence required. As long ago as 1939, Watermeyer JA in *Gates v Gates*,[59] put the position thus:

'Now in a civil case the party, on whom the burden of proof (in the sense of what *Wigmore* calls the risk of non-persuasion) lies, is required to satisfy the court that the balance of probabilities is in his favour, but the law does not attempt to lay down a standard by which to measure the degree of certainty of conviction which must exist in the court's mind in order to be satisfied. In criminal cases, doubtless, satisfaction beyond reasonable doubt is required, but attempts to define with precision what is meant by that usually lead to confusion. Nor does the law, save in exceptional cases such as perjury, require a minimum volume of testimony. All that it requires is testimony such as carries conviction to the reasonable mind.

It is true that in certain cases more especially in those in which charges of criminal or immoral conduct are made, it has repeatedly been said that such charges must be proved by the "clearest" evidence or "clear and satisfactory" evidence or "clear and convincing" evidence, or some similar phrase. There is not, however, in truth any variation in the standard of proof required in such cases. The requirement is still proof sufficient to carry conviction to a reasonable mind, but the reasonable mind is not so easily convinced in such cases because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal.'

[30] The application of the 'balance of probabilities' standard of proof by a securities commission exercising an 'administrative penalty' jurisdiction is accepted in Canada. In *Alberta Securities Commission v Brost*, the Court of Appeal of Alberta observed that the proceedings before the Securities Commission were regulatory not prosecutorial in nature.[60] The Commission applied the balance of probabilities standard of proof when it considered the allegations against the appellants. In rejecting the argument that the Commission could not reasonably make a determination of fraud if, on the evidence, there was room for reasonable doubt, the court held; '[w]e disagree that this standard of

[59] *Gates v Gates* 1939 AD 150 at 154-5.
[60] Ibid para 36.

proof applies. We see no error in the Commission's statement of the appropriate standard'.[61]

[31] The same approach is followed in market abuse cases by the United Kingdom's FSMT. In *Davidson v The Financial Services Authority*[62] the FSMT analysed the authorities at length, including *Han*, and reached a conclusion strikingly similar to that of Watermeyer JA in *Gates v Gates*:

'We next ask how we should apply the civil standard of proof. In the light of all the authorities we conclude that there is a single civil standard of proof on the balance of probabilities but that it is flexible in its application. The more serious the allegation, or the more serious the consequences if the allegation is proved, the stronger must be the evidence before we should find the allegation proved on the balance of probabilities.'[63]

The FSMT affirmed this approach in *Parker v The Financial Services Authority*.[64]

[32] In my view, the phrase 'is satisfied' in s 104 of the Act is not reasonably capable of being interpreted to require proof beyond a reasonable doubt. That is clearly not what the provision expressly states and such a meaning, it seems to me, is also not necessarily to be implied. There is also no reason why the Constitution would demand that the phrase 'is satisfied' be interpreted as meaning 'is satisfied on proof beyond reasonable doubt'. Whilst the presumption of innocence enshrined in s 35 of the Constitution requires that an 'accused person' cannot be convicted absent proof beyond reasonable doubt, the appellants are not such persons. A respondent in EC proceedings is not at risk of imprisonment or the deprivation of his or her liberty. The consequences are similar to civil proceedings - the worst case scenario is the loss of money or property. I accordingly hold that the applicable standard of proof is the civil standard.

[33] Importantly, it is no part of the appellants' case that the civil standard was misapplied. Their case is that the criminal standard ought to have been applied. In this,

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[61] Ibid para 51.
[62] Fn 14 above, paras 175-200.
[63] Ibid para 198.
[64] [2006] UKFSM 37 paras 13-23.

sight cannot be lost of the fact that it has been conceded before the EC that in respect of: (a) count 1, the journal entries to the value of some R830 000 were false; and (b) count 2, accounts receivable were overstated by R1 633 377, capital and reserves by R295 747 and profits after tax by R295 747. Consequently, the profits after tax for the previous financial year were also overstated by R711 276. Mr Pather maintained that Carroll was responsible and that it was he alone who had contravened s 76 of the Act. The EC did not agree. After an analysis of the evidence, it stated:

'It needs to be added that at the very least it was firmly established that Pather ought to have known of the manipulations of the books and documents of the company. He had, together with the other directors, to be satisfied that the systems employed by the company, were reliable. He knew that Carroll was unreliable. He knew that at the relevant time the company did not have an audit committee. He should have known that the discounting system was at odds with the records of the company.'

In that, the EC cannot be faulted. In any event, s 104(1) provides that a panel must impose an administrative penalty if it 'is satisfied' that the respondent concerned has contravened or failed to comply with the Act. Thus, provided the EC is 'satisfied' in a manner which is not reviewable on any of the grounds provided for in s 6 of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), it is a matter for the EC – not a court – to decide whether the evidence before it is sufficiently cogent for it to be so satisfied.

As to (b):

[34] This question looks to the nature of the penalty. The appellants contend that notwithstanding the fact that the penalty does not constitute a deprivation of liberty, it is intended to punish and deter in a manner characteristic of a criminal charge. The issue of whether a person, who is the subject of an ostensibly administrative regime, is in reality 'charged with an offence' is addressed by the second test in *Guindon* - does the sanction impose a true penal consequence?[65] According to *Guindon,* a monetary penalty may or may not be a true penal consequence. It will be so when it is, in purpose or effect, punitive. That falls to be assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether it is determined by regulatory

[65] *Guindon* supra fn 39 para 75.

considerations rather than principles of criminal sentencing and whether stigma is associated with the penalty.[66] This is not to say that very large monetary penalties cannot be imposed under administrative monetary penalty regimes. Sometimes significant penalties are necessary in order to deter non-compliance with an administrative scheme[67] and these have been upheld where it is demonstrated that the penalty serves regulatory purposes.[68] The relevant question is not the amount of the penalty in absolute terms, it is whether the amount serves regulatory rather than penal purposes.[69] The fact that the penalty is intended to have a deterrent effect does not mean it is not administrative in nature,[70] because deterrence 'may serve civil as well as criminal goals'. Accordingly, to hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' for double jeopardy purposes would severely undermine the Government's ability to effectively regulate institutions.

[35] In *Rowan v Ontario Securities Commission*,[71] the Court of Appeal for Ontario was confronted with a challenge to the constitutionality of a provision that allowed the Ontario Securities Commission to impose administrative monetary penalties. The argument advanced was that because the maximum penalty of $1 million could be imposed for each transaction in a single course of infractions, the potential size of the penalty was so large as to amount to a penal sanction. In the result, so it was contended, a party who was subject to such a penalty was a person 'charged with an offence' within the meaning of s 11 of the Charter. The challenge failed. The court held:[72]

'Penalties at the level of $1 million almost certainly have a deterrent purpose, but that does not make them penal in nature. As the Supreme Court of Canada held in *Re: Cartaway Resources Corp*., 2004 SCC 26 [2004] 1 SCR 672, in carrying out the regulatory and preventative mandate provincial securities commissions may legitimately consider deterrence when imposing a monetary penalty'.

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[66] Ibid para 76.
[67] Ibid para 77.
[68] Ibid para 80.
[69] Ibid para 81.
[70] Ibid para 83.
[71] *Rowan v Ontario Securities Commission* 2012 ONCA 208 (CanLII).
[72] Ibid para 51.

[36] Little remains of second and third contentions. Both accordingly invite a brief response. As far as the second contention goes: the submission is that inasmuch as ss 102 to 105 of the Act empower the EC to impose a penalty, those provisions contravene s 35(3) of the Constitution. Our Constitution deals separately in ss 33 and 35 with the procedural guarantees applicable to administrative and criminal proceedings. The former guarantees to everyone the right to administrative action that is lawful, procedurally fair and reasonable. The latter grants to arrested, detained and accused persons a range of fair trial rights.

[37] Given the conclusion to which I have already arrived that both the proceedings before the EC and penalty imposed are administrative in nature, it follows that constitutionality must be assessed with reference to s 33. The protection conferred by the Constitution is that administrative decisions may be reviewed in a court on grounds of unlawfulness, procedural unfairness or unreasonableness. These rights are fleshed out in PAJA. Persons in the position of the appellants are given protection by s 33 and PAJA, not s 35. The Canadian jurisprudence shows that persons subject to administrative financial penalties for contraventions of securities laws are not persons 'charged with an offence' within the meaning of the opening words of s 11 of the Canadian Charter of Rights and Freedoms. The same reasoning leads to the conclusion that the appellants are not 'accused persons'. Section 35(3) of the Constitution accordingly has no application to them.

[38] Insofar as the third contention, namely that the EC lacked jurisdiction, is concerned: Section 79(1) of the Act provides:

'Only a High Court or a regional court has jurisdiction to try any offence referred to in s 73, 75 and 76 and to impose a penalty up to the maximum set out in s 115(*a*).'

According to s 115 of the Act,

'A person who –

(a) commits an offence referred to in s 73, 75 or 76 is liable on conviction to a fine not exceeding R50 million or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment; . . .'

[39] The appellants submitted that these sections mean that contraventions of, or failures to comply with, s 76 can only be prosecuted in the High Court or a regional court. Although the present appeal relates only to the jurisdiction of the EC in respect of a contravention or failure to comply with s 76 (false statements), the appellants' argument must logically apply as well to s 73 (insider trading) and s 75 (prohibited trading practices). If that argument were correct, the EC would have no jurisdiction to impose an administrative penalty for a contravention or failure to comply with any of those sections. The power of a High Court or regional court 'to try any offence referred to in s 73, 75 and 76' 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 ss 73,75 or 76. The EC does not purport to, nor does it in fact, 'try an offence' or for that matter impose a criminal penalty contemplated in s 115(a). The criminal jurisdiction and the administrative penalty jurisdiction co-exist.

[40] The appellants, rightly appreciating that they could not support an argument which would render the EC provisions in the Act nugatory, contended that the exclusive jurisdiction of the criminal courts in terms of s 76 does not apply to contraventions of the (repealed) Insider Trading Act or the (repealed) s 440F of the Companies Act 61 of 1973 so that the EC would have jurisdiction in regard to these latter contraventions. This argument presupposes that the lawmaker introduced the whole panoply of EC provisions in the Act solely to deal with legacy contraventions under repealed legislation. Apart from the absurdity of imputing such an intention to the lawmaker, the argument overlooks that the Insider Trading Act itself contains in s 9 an exclusive jurisdiction provision in identical terms to s 76, which would apply to legacy offences governed by the Insider Trading Act. So if the appellant's argument were right in relation to s 76 of the Act, the argument would also apply to s 9 of the Insider Trading Act and thus remove the EC's jurisdiction in respect of legacy offences governed by the Insider Trading Act.

[41] It follows that the appeal must fail and in the result it is dismissed with costs, including the costs of two counsel.

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V M Ponnan

Judge of Appeal

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