THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: A42/2020

JP MARKETS SA (PTY) LTD APPLICANT

and

FINANCIAL SECTOR CONDUCT AUTHORITY RESPONDENT

Tribunal panel: LTC Harms (chairman), Adv W Ndinisa and Adv K Magano

For the applicant: Adv J Muller SC and Adv P Long instructed by Hanekom Attorneys, Wynberg, Cape Town

For the respondent: Mr S Rossouw and Mr B Bredenkamp

Virtual hearing on 26 February 2021

Application for reconsideration – must be against a "decision" – requirements for decision – withdrawal of FSP licence – lapsing of licence on liquidation.

DECISION

[1] The applicant is JP Markets (Pty) Ltd. The applicant received authorisation to act as a financial service provider under the Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act") on 7 June 2016. It was a Category 1 licence which

authorised the applicant to provide advice and render non-discretionary intermediary services in respect of derivative instruments and deposits as defined in the Banks Act.

[2] The respondent is the Financial Sector Conduct Authority ("the FSCA") established under the Financial Sector Regulation Act 9 of 2017 ("the FSR Act"). One of the functions of the FSCA is supervision of compliance with and enforcement of the FAIS Act.

[3] The procedural history of the case is this: On 19 June 2020, the FSCA gave formal notice in terms of sec 9(3) of the FAIS Act to the applicant of the urgent provisional suspension of the applicant's FSP licence.

[4] The ground was in essence that the applicant had represented to the FSCA that it only renders intermediary services on behalf of clients; it only offers a trading platform for clients to trade virtual over the counter (OTC) derivatives in respect of currencies and commodities; and it does not originate, issue, or sell OTC derivatives.

[4] The FSCA, however, believed that the applicant originated, issued or sold OTC derivatives and acted as a principal or product provider and that it therefore appeared to the FSCA that the applicant acted as an OTC derivatives provider without authorisation in breach of section 2 (read with section 43) of the Regulations issued in terms of the Financial Markets Act 19 of 2012.

[5] On 24 June 2020, the applicant responded to the FSCA's suspension requesting, inter alia, that the suspension be lifted and tendering its full cooperation in resolving

the matter. The applicant did not apply for a reconsideration of the decision by this Tribunal.

[6] Following the notice of provisional suspension, the FSCA launched an application on 7 July 2020 seeking to liquidate the applicant. The FSCA relied on the provisions of sec 38B of the FAIS Act and sec 96 of the Financial Markets Act 19 of 2012.

[7] The former states (in redacted form) that if the FSCA considers that the interests of the clients of a provider or of members of the public so require, the FSCA may apply to court for liquidation of that provider, whether or not the provider is solvent, in accordance with the Companies Act. In deciding the application, the court may take into account whether liquidation of the provider concerned is reasonably necessary (i) in order to protect the interests of the clients of the provider; and (ii) for the integrity and stability of the financial sector.

[8] And the latter, sec 96, states that the Authority may apply to court under section 81 of the Companies Act for the winding-up of a provider in order to achieve the objects of the Act as if the Authority were a creditor of the provider. (Compliance with the pre-conditions in not an issue.)

[9] Before the liquidation application was heard the FSCA notified the applicant on 14 July 2020 of its intention to withdraw its licence. The applicant was afforded an opportunity to make submissions by no later than 28 July, and it was informed that if no response were received within the prescribed period, the FSCA would proceed with the proposed regulatory action. The applicant responded within the time limit, which meant that the FSCA could not proceed with that action before consideration of the submissions.

[10] Meanwhile the parallel liquidation procedure carried on and the application was enrolled for hearing on 21 July but postponed to 25 August, when it was argued. There is no evidence that the FSCA proceeded with the regulatory action either before or after the final liquidation order was granted on 7 September by Gilbert AJ in the High Court, Gauteng Division, Johannesburg.

[11] The effect of such an order is spelt out in sec 11(1)(b) of the FAIS Act: A licence lapses once a licensee is finally liquidated.

[12] The FSCA issued a press release about the judgment on 8 September where it stated that the liquidation application was granted on 7 September, that the applicant is now in final liquidation, and that "on liquidation, the licence of JP Markets was automatically withdrawn."

[13] On 23 September, the applicant launched an application under sec 230 of the FSR Act for the reconsideration of the FSCA's decision "to withdraw the applicant's FSP licence, which was conveyed by way of a press release" – the press release referred to earlier. That is not what the press release stated.

[14] The FSCA filed a notice of a point in limine in response, stating that it had not in fact taken a decision to withdraw the applicant's licence – the licence lapsed not because of any decision by the FSCA but because of the order of court it lapsed as a matter of law. This is the issue that we must decide.

[15] In this regard it is well to remember that this Tribunal is not a court of law and that in terms of sec 232(1), its procedure is, subject to the financial sector laws and the

Tribunal rules, determined by the Chairperson and the proceedings are to be conducted with as little formality and technicality, and as expeditiously, as the requirements of the financial sector laws and a proper consideration of the matter permit.

[16] The jurisdiction of this Tribunal is set out sec 230(1) of the FSR Act and permits "a person aggrieved by a decision" to apply to the Tribunal for a reconsideration of the decision by the Tribunal in accordance with this part of the Act. For purposed of the part, decision is defined in sec 119 (a) and (g) to mean (inter alia)

> "a decision by a financial sector regulator or the Ombud Council in terms of a financial sector law in relation to a specific person" "and includes an action taken as a result of such a decision."

[17] The applicant's case is no longer the case as set out in the application but morphed into something different. Quoting counsel's heads of argument:

> "It is the applicant's case that by instituting the liquidation proceedings against the applicant, the respondent simultaneously made a decision, cognisant of the effects of an order for liquidation, that it would cause the withdrawal of the applicant's FSP licence."

[18] During argument the submission was more subtle: it was the decision to proceed with the liquidation application that was the subject of the reconsideration application. Be that as it may, the applicant wishes this Tribunal to reconsider the decision to institute and proceed with the liquidation application, set it aside, and thereby demolish the foundation of the liquidation order of the High Court. It is a breath-taking submission that an administrative body can interfere with court procedures and undo a High Court decision.

[19] The problem with the submission is that equates lapsing of a licence because of regulatory action and lapsing because of a liquidation order. The conscious decision to proceed with liquidation in terms of the quoted provisions and not the process prescribed by sec 9 of the FAIS Act for administrative withdrawal is inconsistent with a decision to withdraw the licence by itself.

[20] The liquidation application may have been dismissed and the Court could have held that the applicant did not act in breach of its licence conditions, and that would have been the end of the matter.

[21] The appeal may succeed in which event the licence would be reinstated ex tunc and the alleged decision of the FSCA would have no legal effect.

[22] During oral argument counsel also took another line. It was that the FSCA's "decisions" must be considered as a composite decision – he did not use the term "holistically" but that is probably what he intended to convey. Counsel had to adopt this approach because he was unable to pinpoint the decision that he wished the Tribunal to reconsider. He accepted that if the court had dismissed the liquidation application, the licence would still have been extant. That can only be because a decision to withdraw had not been made. The letter of 14 July did not purport to and did not amount to a withdrawal of the licence.

[23] Section 9(2) of the FAIS Act sets out the procedure which must be followed in withdrawing a licence: Where the FSCA[1] contemplates the withdrawal of any licence, it must inform the licensee of any terms to be attached to the withdrawal. It must consider any response received, and may thereafter decide to suspend or withdraw, or not to suspend or withdraw, the licence, and must notify the licensee of the decision. Where the licence is suspended or withdrawn, the FSCA must make known the reasons for the suspension or withdrawal and any terms attached thereto by notice on the official web site and may make known such information by means of any other appropriate public media.

[24] Although the word "decision" is defined for purposes of our jurisdiction, it does not mean that it lost its inherent meaning. The decision referred to is an adjudicative decision where the FSCA is the final arbitrator and not a decision taken during an investigative process which is not determinative of the issue. This basic principle appear from several decisions, albeit in different statutory contexts such as *Chairman: Board on Tariffs and Trade and Others v Brenco Incorporated and Others* 2001 (4) SA 411 (SCA); *Simelane NO and Others v Seven-Eleven Corporation SA (Pty) Ltd and Another* [2003] 1 All SA 82 (SCA) and *Corpclo 2290 CC t/a U-Care v Registrar of Banks* [2013] 1 All SA 127 (SCA).

[25] Applying this principle, the FSCA's decision to apply for liquidation is not a decision capable of being reconsidered under sec 230 of the Act. The same applies to the notification of 14 July (which, on its face, was one under sec 9(2)(b) of the FAIS Act

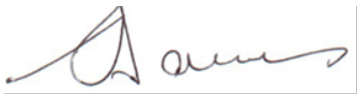
[1] References in the Act to "the registrar" must be read as references to the FSCA.

and not one under sec 9(2)(c)) and to the "composite" decision. Any in-house decision has no legal effect absent due notification.

[26] Although the application is to be dismissed it is not an instance where a costs order could be justified because there are no exceptional circumstances as required by sec 234(2) of the FSR Act.

Order: The application is dismissed.

Signed on behalf of the Tribunal panel:



LTC Harms (chair)

2 March 2021