



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.



SIGNATURE

DATE: 5 September 2023

Case No. 23/40855

In the matter between:

KHALID ABDULLA

Applicant

and

JOHANNESBURG STOCK EXCHANGE LIMITED

First Respondent

ANDRE VISSER NO

Second Respondent

FINANCIAL SERVICES TRIBUNAL

Third Respondent

Summary

Administrative law – review under section 6 (2) (e) (iii) of the Promotion of Administrative Justice Act 3 of 2000 – decision assailed on the basis that two relevant considerations given insufficient or excessive weight – in such a case, the weight attached to a particular factor must be assessed in the context of all the reasons the decision-maker gives, in the context of the facts on which the decision was made, and in the context of the purpose and scope of the power the decision-maker exercises – no disproportion of weight in this sense demonstrated – application dismissed.

JUDGMENT

WILSON J:

- 1 After an investigation, the first respondent, the JSE, concluded that the applicant, Mr. Abdulla, had transgressed various provisions of its Listings Requirements. The Listings Requirements serve both as set of conditions for entry on to the stock exchange and as a system of rules governing those who are permitted to transact on the exchange. It is not necessary for me to set out the nature of Mr. Abdulla's alleged transgressions in any detail. It is enough to say that the JSE found them to warrant a R2 million fine and what is referred to in the Requirements as a "public censure". That censure took the form of a detailed statement of the facts found during the JSE's investigation and the reasons for the sanction it decided to impose. The statement was to be published on the Stock Exchange News Service ("SENS") which appears from the papers to be the primary source of authoritative information about the stock exchange and its operations.

- 2 Mr. Abdulla strongly disagrees with both the JSE's conclusions as to his alleged transgressions and with the sanction the JSE decided to impose. He applied, under section 230 of the Financial Sector Regulation Act 9 of 2017 ("the FSRA"), for the reconsideration of the JSE's finding that he had transgressed the Listings Requirements and for the reconsideration of the sanction imposed. That reconsideration is undertaken by the Financial Services Tribunal, established under section 219 of the FSRA. "Reconsideration" under the FSRA is a "reconsideration" in the fullest sense. The Tribunal may hear new evidence, make its own inquiries and investigations, and is at large to replace the JSE's decision with the decision

it would have made had it been in the JSE's shoes (see section 234 of the FSRA, read with section 218).

- 3 Section 231 of the FSRA provides, however, that an application for reconsideration does not automatically suspend the decisions sought to be reconsidered. Mr. Abdulla was required to apply to the Tribunal for the suspension of the JSE's decision while the Tribunal reconsiders it. The Tribunal, in a decision of its Deputy Chair, decided to suspend the payment of the fine that the JSE had imposed on Mr. Abdulla, but it declined to suspend the publication of the censure.

The review

- 4 Mr. Abdulla now applies to me to review and set aside the Tribunal's decision not to suspend the publication of the censure. He also asks me either to refer the suspension application back to the Tribunal for a fresh decision, or to substitute the Tribunal's decision for one suspending the whole of the sanction imposed on him.
- 5 Mr. Leech, who appeared together with Ms. Griffiths for Mr. Abdulla, motivated Mr. Abdulla's application on the grounds that the Tribunal had failed to attach sufficient weight to particular considerations, and that it had attached too much weight to others. Decisions that are flawed in this respect are in principle reviewable under section 6 (2) (e) (iii) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), but only where a relevant consideration has been ignored, an irrelevant consideration has grounded the decision, or "where a factor which is obviously of paramount importance is relegated to one of insignificance, and another factor, though relevant is given weight far

in excess of its true value” (see *Bangtoo Bros and others v National Transport Commission* 1973 (4) SA 667 (N) at 685C–D, quoted with approval in *Tellumat (Pty) Ltd v Appeal Board of the Financial Services Board* [2016] 1 All SA 704 (SCA) at paragraph 42).

6 In applying this test, the reviewing court “must be careful not to overturn a decision on review merely because it disagrees with it. It must be alive to the fact that it was primarily for the decision maker to determine which facts are relevant and which not” (*Tellumat* at paragraph 42). In addition, “[e]xcept where a legal rule shapes the procedure and substance of deliberation, there is very little, if any, room . . . for a court to order a decision-maker to attach specific weight to one or other of the considerations that they are required to assess, or to set aside a decision simply because a Judge would have weighed things up differently, or would have sought more or better information than the decision-maker thought was necessary” (see *Eloff Landgoed (Pty) Ltd v Minister of Forestry, Fisheries and the Environment* 2023 JDR 2205 (GP) at paragraph 32).

7 The question that naturally arises is where the line is to be drawn between reviewing a decision because weighty factors were treated too lightly or insignificant factors were over-emphasised (which is appropriate) and substituting the weight that the reviewing court would subjectively have attached to those factors for the weight that the decision-maker thought was wise (which is not). I am not sure that there is an easy way to draw this line, but it seems to me that, where the weight a decision-maker attaches to a particular factor deprives the decision of the logical or rational basis that the

decision-maker offers for their decision overall, or of a connection to purpose of the power being exercised, or of a connection to the facts on which the decision was made, that is a good indication that the factor concerned has been unlawfully weighed. In other words, the weight attached to a particular factor must be assessed in the context of all the reasons the decision-maker gives, in the context of the facts on which the decision was made, and in the context of the purpose and scope of the power the decision-maker exercises.

- 8 For example, if a decision-maker identifies the impact of authorising a particular activity as the primary consideration in deciding whether or not to allow the activity to go ahead, it will not generally be permissible for the decision-maker to ignore or treat lightly reliable information about the nature of the impact the activity will have. Just how much weight is to be attached to a particular consideration or kind of information depends on the nature of the power being exercised and the facts before the decision-maker. There is no easy formula for deciding just how much weight is enough, too much, or too little, independently of the context in which the decision is made.

The Tribunal's decision

- 9 The two factors which the Tribunal was said to have weighed inappropriately in this case were the capacity of publication of the censure to cause Mr. Abdulla harm, and Mr. Abdulla's prospects of success in securing a more lenient sanction from the Tribunal than the JSE imposed.
- 10 Mr. Leech accepted that the possibility that the publication of the censure would cause harm to Mr. Abdulla was present to the Tribunal's mind. This is plain from paragraph 16 of the decision, where the Tribunal replicated Mr.

Abdulla's concern that publication would "affect his reputation". That notwithstanding, the Tribunal found, consistent with the approach it seems to have developed in similar cases, that there could be no legally recognisable harm attached to the publication of a summary of the JSE's investigations and conclusions, together with the sanction it had chosen. Publication in itself has no consequences for Mr. Abdulla other than to alert those using the exchange to the fact of the investigation and its outcome. The Tribunal found that there was no reason to keep the JSE's conclusions "under wraps" pending reconsideration, just as there is generally no reason to keep the fact of an adverse judgment against a litigant secret pending appeal.

- 11 During argument, Mr. Green, who appeared together with Mr. Kruger for the JSE, emphasised the JSE's role as the provider of authoritative and useful information to those who transact on the exchange. He argued that there is a public interest in permitting publication of the JSE's findings and sanctions as soon as they are made, and that the refusal to suspend publication pending reconsideration promotes that interest. I think there is some substance in that submission, but even if there were not, I cannot conclude that the minimal weight the Tribunal attached to any potential harm to Mr. Abdulla's reputation was in any sense inappropriate or unlawful. By the time the matter was argued, Mr. Abdulla had abjured the allegation that the publication would be defamatory. At the outset of the hearing before me, Mr. Leech abandoned Mr. Abdulla's prayer for an interdict against publication pending the outcome of an action for defamation. Once he did that, it seems to me that any suggestion of legally relevant harm to Mr. Abdulla's reputation had to be discounted. The weight the Tribunal attached to the harm that would be caused by publication

of the censure seems, in these circumstances, to have been entirely appropriate, or at any rate not so out of proportion with its proper weight as to render the Tribunal's decision unlawful.

12 Mr. Green undertook on behalf of the JSE that, were I to dismiss this application, the JSE would ensure that the statement of public censure it put out would encompass the fact that Mr. Abdulla is seeking the reconsideration of its decision, and that the fine it imposed has been suspended while he does so. In these circumstances, any harm to Mr. Abdulla seems to me to be slight indeed. Anyone reading the censure will know that the process has not been completed, and Mr. Abdulla's censure may yet be expunged.

13 That leaves the question of whether the Tribunal appropriately weighed Mr. Abdulla's prospects of success on reconsideration. The Tribunal was not satisfied that Mr. Abdulla had any reasonable prospect of success on reconsideration. Mr. Leech did not urge me to find otherwise. He submitted rather that there was some prospect that, even if the findings that Mr. Abdulla had transgressed the Listings Requirements were upheld, the sanction imposed might be found, upon reconsideration, to have been excessive. Mr. Leech criticised the Tribunal for over-emphasising Mr. Abdulla's lack of prospects on the merits and for failing to deal explicitly with his prospects of reversing or materially altering the JSE's sanction.

14 Mr. Leech spent some time dealing with what he submitted was the disproportion of the fine imposed on Mr. Abdulla. But that of course is irrelevant. The fine has been suspended. The question is really whether the Tribunal overlooked any reason to think that the public censure would be

reversed. But it follows from the Tribunal's conclusions that Mr. Abdulla had poor prospects of reversing the JSE's findings on the merits, that the Tribunal must have thought Mr. Abdulla's prospects of reversing the public censure were remote at best. The Tribunal found, in essence, that Mr. Abdulla had raised no real dispute about the fact that he had conducted himself in breach of the Listings Requirements in the respects the JSE alleged, and that he had otherwise advanced what the Tribunal regarded as meritless procedural criticisms of the way the JSE conducted its investigation. Given the nature of the transgressions, the Tribunal would have had no reason to think that the relatively light penalty of a public censure would be found inappropriate.

15 For all these reasons, on reading the Tribunal's decision as a whole, I cannot say that either the harm to Mr. Abdulla of publishing his censure pending reconsideration or his prospects of success on reconsideration were weighed in a manner that deprived the decision of its underlying rationality, or of a logical connection to the surrounding facts.

16 The review application should accordingly be dismissed.

Costs

17 Mr. Green argued that Mr. Abdulla should pay the costs of the application on the attorney and client scale. The basis of that submission was that the application had started out as a wide-ranging attack on the Listings Requirements themselves. It also rested on the allegation that the JSE had defamed Mr. Abdulla. It sought a series of interdicts effectively suspending any action to enforce the outcome of the JSE's investigation until Mr. Abdulla

had been able to review it, and until he had been able to pursue an action in respect of the defamation he said it embodied.

18 Wisely, Mr. Leech abandoned all of that relief at the outset of his argument, focussing only on the narrow issue of whether the Tribunal's decision not to suspend the JSE's decision pending reconsideration was reviewable on the grounds I have outlined.

19 Punitive costs orders are appropriate only where litigation was manifestly ill-conceived from the outset, or where a party or their legal representatives have misconducted themselves in their handling of the case. I do not think that either of those conditions applies here. While some of Mr. Abdulla's more exotic prayers might have attracted a punitive costs order had they been persisted with, at the core of his case was a genuine grievance, which, while misplaced, was not completely misconceived. A reasonable decision-maker might just as easily have declined to deal with the JSE's decision piecemeal, and might appropriately have suspended both the public censure and the fine the JSE issued, reasoning that either all of the sanction should be suspended, or none of it should. Had I been at large to substitute my opinion for that of the Tribunal, I might have reached that conclusion.

20 But that I may not do. Administrative decisions are not reviewed on the basis of whether they conform to the approach the reviewing court thinks it would have taken had it been the decision-maker. They are reviewed on the basis of whether the decision taken was objectively reasonable, lawful and procedurally fair. The decision is assessed in the context of the decision-maker's reasons, the nature and purpose of the power being exercised and

the facts on which the decision was based. Applying that test, I am unable to find that the Tribunal committed any reviewable error.

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



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 5 September 2023.

HEARD ON: 31 August 2023

DECIDED ON: 5 September 2023

For the Applicant: Q Leech SC
J Griffiths
Instructed by Clyde & Co

For the First and Second Respondents: I Green SC
M Kruger
Instructed by Webber Wentzel