FINANCIAL SERVICES TRIBUNAL

In the matter between

BLUE FINANCIAL SERVICES LTD Appellant/Applicant

And

JOHANNESBURG STOCK EXCHANGE LTD Respondent

Tribunal panel: LTC Harms (chair), Mr J Damons and Adv W Ndinisa

For the appellant: Mr J Meiring of MAP Attorneys

For the respondent: Adv G Marcus SC and Adv C McConnachie instructed by Mr J Scholtz of Webber Wentzel

Hearing: 12 February 2018

In re: APPLICATION FOR RECONSIDERATION IN TERMS OF SECTION 230 OF THE FINANCIAL SECTOR REGULATION ACT 9 of 2017 READ WITH SECTION 105 OF THE FINANCIAL MARKETS ACT 19 OF 2012

Summary: Delisting by the JSE; requirements; failure to comply with listing requirements; aims of the Act; public interest

JUDGMENT

The respondent, the Johannesburg Stock Exchange Ltd ('the JSE') on 30 January 2018 notified the appellant, Blue Financial Services Ltd ('Blue'), of its decision to terminate the listing of Blue on the JSE. Blue lodged an appeal to the Issuer Regulation Appeal Committee of the JSE on 2 February 2018. The appeal was dismissed on 21 June 2018. This dismissal gave rise to the present application for reconsideration of the decision of the Committee.

Blue was listed on the JSE in October 2006; it requested, on a voluntary basis, the JSE to suspend its securities on 26 June 2013; Blue remained in voluntary suspension; and, after due process, as said, Blue was eventually delisted after an unsuccessful internal appeal.

It is common cause that the reason for Blue's delisting was that Blue had failed to comply with the listing requirements of the JSE in the following respects, namely,

(a) the failure to prepare and publish audited annual financial statements and interim and provisional financial reports since 2012;

(b) the failure to appoint a designated adviser since November 2016; and

(c) the failure to appoint an executive financial director since July 2015.

NATURE OF THE PROCEEDINGS

Before dealing with the facts and the legal issues arising from them, it would be convenient to provide a synopsis of the statutory framework. The JSE is a licensed exchange as defined in sec 1 of the Financial Markets Act 19 of 2012 ('the FM Act') and, accordingly, falls within the definition of 'market infrastructure'. In terms of sec 105 (1)(c), a person aggrieved by a decision of an exchange to withdraw the authorisation of

an authorised user or to direct an authorised user to terminate access to the exchange by an officer or employee of such authorised user, has a right of appeal.

Appeals are since 1 April 2018 regulated by chapter 15 of the Financial Sector Regulation Act 9 of 2017 ('the FSR Act'). Section 218 states, inter alia, that for purposes of the chapter, the term 'decision' includes 'a decision in relation to a specific person by a market infrastructure, being a decision in terms of rules of the market infrastructure contemplated by the FM Act, or a decision contemplated in sec 105 of the FM Act; and that the term 'decision-maker' means in this regard a market infrastructure, i.e. the JSE.

A person aggrieved by such a decision may apply to the Tribunal for a reconsideration of the decision in accordance with part 4 of chapter 15 of the FSR Act (sec 230 (1)(a)). In other words, this matter is not an appeal in the strict sense of the word but a reconsideration of the decision of the decision-maker.

The Tribunal may, under sec 234, set the decision aside and remit the matter to the decision-maker for further consideration; or make an order setting aside the decision and substituting it with its decision; or dismiss the application.

THE FM ACT

The objects of the Act are described in sec 2. The Act aims to –

(a) ensure that the South African financial markets are fair, efficient and transparent;

(b) increase confidence in the South African financial markets by

(i) requiring that securities services be provided in a fair, efficient and transparent manner; and

(ii) contributing to the maintenance of a stable financial market environment;

(c) promote the protection of regulated persons, clients and investors;

(d) reduce systemic risk; and

(e) promote the international and domestic competitiveness of the South African financial markets and of securities services in the Republic.

In terms of sec 11(1), an exchange must make listing requirements which prescribe, inter alia,

(a) the manner in which securities may be listed or removed from the list or in which the trading in listed securities may be suspended;

(b) the requirements with which issuers of listed securities and of securities which are intended to be listed, as well as such issuers' agents, must comply; and

(c) the standards of conduct that issuers of listed securities and their directors, officers and agents must meet.

For any contravention of, or failure to comply with the listing requirements, the exchange may suspend or terminate the listing (sec 11(1)(g)(iv)).

In addition, an exchange may, subject to prescribed statutory formalities and its exchange rules and listing requirements, remove securities from the list, or suspend

the trading in listed securities, if it will further one or more of the objects of the Act referred to in sec 2 mentioned earlier (sec 12).

THE JSE LISTING REQUIREMENTS

Section 1.10 of the Listing Requirements permits the JSE to suspend the listing of an issuer (such as Blue) at the request of the issuer under defined circumstances. If an issuer's securities are suspended, it must, unless the JSE decides otherwise, continue to comply with all the Listings Requirements that apply to it (sec 1.11).

Section 1.12 specifies the following requirements for the removal of a listing by the JSE:

> 'The JSE may, subject to the removal provisions of the FMA, and if one of the following applies:
>
> > (a) if it will further one or more of the objects contained in Section 2 of the FMA, which may also include if it is in the public interest to do so; or
> >
> > (b) if the issuer has failed to comply with the Listings Requirements and it is in the public interest to do so,
>
> remove from the List any securities previously included therein; provided that the listing of such securities shall first have been suspended in accordance with the above provisions.'

A self-contained jurisdictional fact for delisting under (a) is if the delisting will further one or more of the objects set out in sec 2 of the FM Act. Failure to comply with

a listing requirement is not a jurisdictional fact under (a); neither is public interest, although it might be taken into account.

The jurisdictional facts for delisting under the alternative (b) are different: there must have been a failure to comply with the listing requirements and the delisting must be in the public interest.

Since it is common cause that Blue had failed over a long period to comply with the listing requirements, two issues only arise: under (a), whether the delisting would further the aims of the Act; or under (b), whether the delisting was in the public interest.

THE JSE APPEAL COMMITTEE PROCEEDINGS

In our reconsideration of the decision of the Appeal Committee, it is necessary to determine what was before that committee and what the basis of the appeal addressed to it was. It will be recalled that the JSE had delisted the securities and that Blue had appealed to the Committee. Blue, as said, admitted non-compliance in relation to (a) the failure to prepare and publish audited annual financial statements and interim and provisional financial reports since 2012; (b) the failure to appoint a designated adviser since November 2016; and (c) the failure to appoint an executive financial director since July 2015. It denied one alleged non-compliance relating to the number of directors, something that became a non-issue because the JSE and the Committee accepted Blue's version.

Blue gave a long explanation as to why the financials had not been finalised and submitted that it was not due to the fault of the present board of directors but to the dishonest acts of previous parties going back to 2006, problems with auditors, incomplete litigation, problems with creditors, claims against different tax authorities

for reimbursement, and the inability to conclude a new recapitalisation plan. It added that its inability to render financial statements for the financial years following 2012 was due to events outside its control and in most instances arose from events prior to an earlier recapitalization in December 2010. Blue anticipated that the audits would be completed no later than July 2018 at which juncture the annual financial statements could be completed together with the consolidated annual financial statements . (This event has to date not materialized.)

Blue then submitted that termination of the listing did not serve to bring any additional benefit or relief to current shareholders. The future recapitalization however would undoubtedly provide tremendous benefit to them . Based on this it was submitted that the Committee had erred in its decision to terminate the listing in view of the anticipated completion of the audits 'in the near future'.

In relation to the absence of a designated advisor and financial director, Blue said that without the necessary audits it resolved to delay their appointment until the various subsidiaries had completed their audits, and that the process of consolidation could then commence with the audits from 2013 onwards. The intention was to appoint a financial director and a designated advisor as part of the new recapitalization plan .

The concluding submission was that the ongoing litigation with lenders was a key determining factor towards the recapitalization envisaged and the litigation would be resolved by May 2018, at which juncture an informed decision could be made by stakeholders in respect of the potential recapitalization of the group which would then be subject JSE and shareholder approval. (At the hearing before us we were told that

all this has not yet happened and will not happen – if at all – within the foreseeable future.)

No submissions were made to the Committee in relation to the two jurisdictional issues identified above, namely the promotion of the aims of the FM Act and the public interest.

The basic relief sought in that appeal was that the delisting be set aside to enable Blue an opportunity until the end of July 2018 to submit a recapitalization plan to the JSE.

THE APPLICATION FOR RECONSIDERATION

The application for reconsideration is based on two grounds, which we will consider separately.

The first is that non-compliance with 'certain sections' of the listing requirements was not because of willful default or negligence but the result of key events which were beyond Blue's control.

The reference to 'certain sections' is probably a reference to the lack of financials because there is nothing on the papers to show that the failure to appoint a financial director or a designated advisor was otherwise than willful.

However, the question whether the aims of the FM Act are not compromised by the continued listing of Blue or that it was not in the public interest to maintain the listing of Blue has nothing to do with fault. Those questions should be considered objectively and are not related to guilt in the criminal or delictual sense.

In argument, Blue sought to rely on the principle of *impossibilium nulla est obligatio*, arguing that because it found it impossible to comply with a listing

requirement it should be released from the obligation to comply. The principle applies in the law of contract and does not enable someone to escape a public law obligation. In any event, the submission is a self-defeating one. If a company is unable to comply with the listing requirements it should be delisted because otherwise the aims of the FM Act and the listing requirements would be defeated.

The second ground for reconsideration is that the Committee did not consider whether, and did not find that, the termination of the listing was in the public interest. The ground as formulated has no merit whatsoever. The Committee dealt in detail not only with the question of the public interest but also with the objects of the FM Act in respect of each of the three transgressions. It found, in summary, that delisting was in the public interest to protect the public and ensure the integrity of the JSE, and to protect the fairness, efficiency and transparency of financial markets in South Africa.

It is not necessary to repeat what the Committee had said in respect of each transgression in this regard because its analysis and findings were not attacked in the reconsideration application papers or during argument.

The argument was different, although expected in the light of other statements made in the reconsideration application. It simply was that the delisting is not in the best interest of the shareholders of Blue; instead, the delisting is to their detriment. And, added Mr Meiring, since the decision is unfair to the shareholders it is not in the public interest to delist.

The argument does not hold water because it conflates public interest with private interests. To the extent that fairness is in issue, which it is not, in terms of the FM Act, fairness towards the financial market as a whole is what has to be considered and

not fairness to shareholders of a particular company that is unable to comply with basic listing requirements. It is unfair to the public if the fairness, efficiency and transparency of financial markets is compromised.

CONCLUSION

It follows that the application must be dismissed. The JSE asked for an order of costs against Blue. In this regard the Tribunal does not possess a general discretion. Section 234 (2) of the FSR Act states that the Tribunal may, in exceptional circumstances, make an order that a party to proceedings on an application for reconsideration of a decision pay some or all of the costs reasonably and properly incurred by the other party in connection with the proceedings.

Bad cases are not exceptional. The only exceptional circumstances in this case relate to the filing of some 568 pages of documents in conflict with the rules of the Tribunal, which state:

> 23. An application for submission of further evidence is filed in terms of section 232(5) of the Act.
>
> 24. The application must be on affidavit and be filed with the secretariat and all other parties to the proceedings as soon as the particular party becomes aware of the existence of the evidence.
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> 25. The application must show good cause including the reason why the evidence was not submitted earlier, its likely credibility, and its relevance to the decision.
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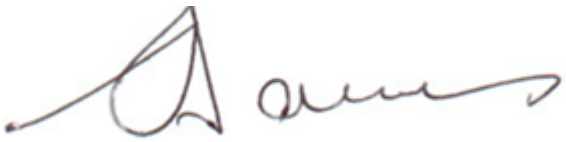
> 56. Once the pleadings are closed and/or the applicant has filed a notice to amend or augment the grounds on which the application is based, referred to in paragraph 15 above, the record is prepared by the secretariat and provided to the parties.
>
> 57. Any party may request the secretariat to augment the record with written evidence, factual information and documentation that had been submitted to the decision-maker before the decision which is the subject of the application for reconsideration.

The costs occasioned by these documents (such as perusing, consideration and preparation of argument by the JSE) must be paid by Blue.

ORDER

The application is dismissed. The applicant/appellant must pay the costs of the respondent (perusing, consideration and preparation of argument by the JSE) on the appropriate high court scale in respect of the papers filed since December 2018 in conflict with the rules of the Tribunal.

Signed on behalf of the Tribunal on 19 February 2019 at Pretoria



LTC HARMS (CHAIR)