



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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JP Markets v FSCA (460/2021) [2021] ZASCA 148 (20 October 2021)

The Supreme Court of Appeal (SCA) today upheld an appeal brought by JP Markets SA (Pty) Ltd (JP Markets) against the decision of the Gauteng Division of the High Court, Johannesburg (the high court). The appeal was upheld with costs, including the costs of two counsel. The decision of the high court was thereby set aside.

The respondent in the appeal was the Financial Sector Conduct Authority (the Authority), a juristic person established in terms of s 56(1) of the Financial Sector Regulation Act 9 of 2017 (the FSRA). At the instance of the Authority, the high court ordered the final liquidation of the appellant, JP Markets.

The principal issues in the appeal were whether the Authority met the statutory jurisdictional requirements for the exercise of the power to institute an application for liquidation and, if so, whether it made a proper case for the winding-up of JP Markets.

For the power to launch the liquidation application, the Authority relied upon the provisions of both s 38B of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act) and s 96 of the Financial Markets Act 19 of 2012 (the FMA). The Authority alleged that it had received more than a hundred complaints from clients of JP Markets. The complaints had two main themes. The first was that JP Markets had failed to make payments that were due to clients. The second was that due to interrupted access to its online trading platform, clients had been unable to close their positions, with resultant losses. The Authority instructed investigators to conduct an investigation into the complaints. The Authority said that the investigation was ongoing but reached a stage where the information that had been gathered 'informed' the winding-up application. The Authority also alleged that there was a conflict between the interests of JP Markets and those of its clients. Further, that JP Markets operated as an over-the-counter (OTC) derivative provider (ODP) without a licence. These matters, as well as the treatment of 'toxic' clients by JP Markets, formed the mainstay of the application.

The SCA found that the evidence established with clarity that the business of JP Markets fell squarely within the definition of an ODP. It followed that JP Markets required an ODP licence to lawfully continue with its business. It had submitted a formal application for an ODP licence to the Authority on 21 August 2020. That was after the application for its liquidation had been launched on an urgent basis on 7 July 2020. In the result, JP Markets' ODP licence application was pending on the date of the hearing of the winding-up application in the high court.

The SCA held that s 38B(1) of the FAIS Act could not find application in this case. This was because the winding-up application was not about the conduct of JP Markets as a financial services provider (FSP) or about the protection of the interests of clients or the public in respect of financial advisory or intermediary services.

The SCA held further that the high court had correctly held that the Authority was authorised by s 96 of the FMA to apply for the liquidation of JP Markets. This was because the jurisdictional requirement that 'an investigation has been conducted' had been met. Further, the SCA found that the Authority had to show that it was just and equitable for JP Markets to be wound up. The determination of whether it would be just and equitable to order a winding-up under s 96 was inextricably linked to the achievement of the objects of the FMA. A consideration of alternative remedies must also take a central place in the enquiry.

In this regard, the SCA found that it could not be determined on the papers whether any of the complaints were valid. In addition, there was no evidence that the clients of JP Markets had been unaware that they transacted with it. It followed that it could not be said that there was any conflict of interest as alleged. And because traders were free to accept the spreads offered to them or not, it was not objectionable to quote differentiated spreads to clients that had been regarded as 'toxic'. Moreover, the SCA set out the interactions between JP Markets and the Authority in some detail to show that it was not guilty of obfuscation. The evidence therefore did not establish that the business of JP Markets constituted a systemic risk to its clients or to financial markets generally. It followed that the only remaining relevant factor was that JP Markets had been doing business as an ODP without a licence. In this regard, the SCA found that it was in the first place not irrelevant that it was not the only one to do so. Notably though, the Authority had not taken steps against OTC derivative brokers who were known to operate on the same business model as JP Markets. Finally, the liquidation of JP Markets prior to the determination of its ODP licence application would not achieve the objects of the FMA. And should an ODP licence ultimately be refused, the Authority would have no difficulty to obtain an order prohibiting JP Markets from continuing to do business as an ODP. In the result, the SCA held that the winding-up of JP Markets was neither just nor equitable.

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