REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: No

7/9/2020

DATE SIGNATURE

Case No.: 16017/2020

In the matter between:

THE FINANCIAL SECTOR CONDUCT AUTHORITY Applicant

and

J P MARKETS SA (PROPRIETARY) LIMITED Respondent

JUDGMENT

Gilbert AJ

1. The Financial Sector Conduct Authority as the applicant and the responsible financial sector regulator in terms of the Financial Sector Regulation Act, 2017 ("FSRA") seeks by way of urgent proceedings the final winding-up of the respondent in terms of section 38B of the Financial Advisory and

Intermediary Services Act, 2002 ("the FAIS Act") and in terms of section 96 of the Financial Markets Act, 2012 ("the FMA"). Both the FAIS Act and the FMA are financial sector laws falling with the ambit of the FSRA.

2. The application raises issues that are *res nova* in that neither counsel for the parties were able to refer me to any authorities in relation to these two sections nor was I able to find any. The issues that arise relate both to the interpretation of these two sections and the application of those sections to the facts.

3. The respondent was authorised as a financial services provider ("FSP") under the FAIS Act on 7 June 2016, holding a Category 1 licence authorising the provision of advice and the rendering of non-discretionary intermediary services in respect of derivative instruments and deposits as defined in the Banks Act, 1990. The respondent's only director and shareholder is Justin Paulsen. Every FSP is, in terms of the FAIS Act, required to have a key individual who oversees and manages the activities of the FSP relating to the rendering of financial services. Paulsen is the chief executive officer and the key individual of the respondent.

4. Paulsen is the deponent to the respondent's answering affidavit.

5. As a licensed financial service provider, the respondent is regulated by and is subject to the FAIS Act.

6. As will appear later in this judgment, the respondent is an "OTC derivative provider" as defined in the Financial Markets Act Regulations ("the FMA Regulations").[1] Regulation 2 of the FMA Regulations expressly provides that:

> "*A person may not –*
>
> *(a) act as an OTC derivative provider; or*
>
> *(b) advertise or hold itself out as an OTC derivative provider,*
>
> *unless authorised by the Authority in terms of section 6(8) of the [Financial Markets] Act.*"

7. It is common cause that the respondent is not so authorised (licensed) by the applicant as the relevant authority in terms of section 6(8) of the FMA. The respondent lodged its application to be so authorised only on the eve of the hearing of the urgent proceedings.

8. The applicant positively asserts in both its founding affidavit and replying affidavit that the respondent is so required to be authorised.[2] The respondent does not accept in its answering affidavit that it is so required to be authorised. As will appear later in this judgment, I reject the respondent's contention that it need not be authorised under the FMA s an OTC derivative provider.

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[1] Published under GNR98 in GG41433 of 9 February 2018.

[2] Although the respondent asserts that the applicant is ambivalent as to whether the respondent is required to be authorised under the FMA as an ODP, the applicant does positively assert in its founding affidavit, such as in paragraphs 67 and 80, that the respondent is required to be authorised and again in its replying affidavit, such as in paragraphs 89, 90 and 95.

A summary of the relevant regulatory framework

9. The applicant describes in its founding affidavit the rationale and framework of the FMA in regulating over-the-counter derivatives, otherwise known as OTCs. The respondent did not take issue with that description, which accords with the regulatory framework.

10. The global financial crisis of 2008 exposed the risk experienced by one financial institution that may lead to systemic risk in respect of other institutions due to inter-relationships.

11. In particular, over-the-counter markets were not transparent and were exposed to material counterparty (bilateral) credit risk. The lessons learnt from the crisis informed South Africa's financial services reform program by *inter alia* requiring the regulation of OTC derivative providers (known as "ODPs").

12. Section 5(1)(b) of the FMA provides that the Minister may prescribe a category of regulated persons, other than those specifically regulated under the FMA itself, if the securities services provided, and the functions and duties exercised, whether in relation to listed or unlisted securities, by persons in such category, are not already regulated under the FMA, and if, in the opinion of the Minister, it would further the objects of the FMA in section 2 to regulate persons in such categories.

13. Regulation 5 of the FMA Regulations prescribes an authorised "OTC derivative provider", or ODP, as a regulated person.

14. An "OTC derivative provider" means in terms of Regulation 1 *"a person who as a regular feature of its business and transacting as principal (a) originates, issues or sells OTC derivatives; or (b) makes a market in OTC derivatives".*

15. *"OTC derivative"* means in terms of Regulation 1 *"an unlisted derivative instrument that is executed, whether confirmed or not confirmed, excluding - (a) foreign exchange spot contracts; and (b) physically-settled commodity derivatives."* The respondent accepts that the instruments that are relevant in the present instance are OTC derivatives or "OTCs".

16. By way of clarification in relation to the acronyms OTCs and ODPs, the former is the instrument (the over-the-counter derivative instrument), and the latter is the provider of those OTCs (the over-the-counter (OTC) derivative provider). The acronyms ODP and OTC derivative provider are used interchangeably in this judgment.

17. The objects of the FMA, as expressly provided for in section 2, and so applying also to OTCs, are 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 person, 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."

18. Although the FMA regulations issued in terms of the FMA for ODPs were published in February 2018, ODPs were given an extended period until 14 June 2019 to lodge their applications to be licensed.

19. The OTC market plays a significant role in our financial markets and economy. The two most common derivative asset classes are interest rate derivatives and foreign exchange derivatives. OCTs are high-risk financial products.

20. The requirement for ODPs to be authorised under the FMA is to ensure that they are prudentially sound and meet sound governance and risk management requirements. ODPs' reporting obligations facilitate the monitoring of potential systemic risks by the regulator. This is to protect the public against ODPs who may not be able to honour contracts-for-difference ("CFDs") if the market turns against them.

21. The reference to CFDs is relevant because that is the form of OTC instrument in respect of which the respondent acted as an OTC derivative provider (ODP).

22. CFDs are financial products that enable the client/investor to purchase exposure to a specific underlying product (e.g. shares, commodities, forex). The client does not purchase the actual underlying product and does not become the owner of the product. The client enters into a contract with an issuer of the CFD to the effect that, if the underlying asset price in the physical or real market) increases, the investor will make a profit on the transaction equal to the increase in the price from date of purchase to date of close-out, and if the underlying asset price (in the physical or real market) decreases, the investor will be in a loss position, and the issuer will make a profit.

23. Because CFDs are OTC (over-the-counter or unlisted) products, they are not traded on financial markets, but are issued by an issuer, and taken up by the client or investor. The issuers of CFDs have traditionally been financially resilient institutions such as banks and even when issuing a CFD, the bank will hedge its position so that it is not exposed to market forces. In simple terms, the issuer/bank will protect itself from the market moving in favour of the client and the issuer making substantial losses as a result. This happens because one party to the contract always profits and the other party always loses by the same amount; hence it is referred to as a zero-sum game.

24. To be an issuer of CFDs requires substantial financial muscle or complicated hedging and risk management processes.

25. The applicant asserts that unfortunately recent history is marred with many instances of unscrupulous operators acting as issuers of derivative products without having the means or the operational ability to do so, which has led to

substantial losses for a large number of clients. The applicant contends that it is against this background that the regulation of ODPs was introduced by the FMA Regulations. The respondent does not take issue with this other than to contend that seven out of the other eight entities of which it is aware that are also ODPs are not licensed and that as far as it is aware the applicant has neither suspended the FSP licences of those other entities[3] nor initiated winding-up proceedings against them, and that it is not clear why the respondent is being treated differently by the applicant.

26. The applicant also states that only entities that are able to show that they have operational ability and the prerequisite risk management processes in place may be authorised as ODPs. This is to protect the public against issuers who will not be able to honour CFDs if the market turns against them. Again, the respondent does not take issue with this, other than to state that the applicant has neither alleged nor shown that it cannot honour CFDs, contending that it has sufficient cash equity to honour its obligations, and that in any event it has hedging facilities that it can utilise but to date has not needed to activate in order to carry its counterparty risk.

27. The applicant also describes that the regulatory architecture under the FMA Regulations also includes a code of conduct aimed at:

[3] As distinct from an ODP licence under the FMA and the FMA Regulations.

27.1. providing appropriate disclosure to clients to enable them to understand and appreciate the risks associated with derivative transactions;

27.2. ensuring ODPs act in the best interests of the client or counterparty through the safeguarding of collateral and margin.

28. The applicant also summarises the regulatory architecture under the FAIS Act, which the respondent too does not dispute.

29. Section 7 of the FAIS Act provides that persons who render financial services must have a licence issued by the applicant as the relevant financial sector regulator. The applicant, acting as the gatekeeper, determines who may be licensed and continue to be licensed to render financial services. It does so with reference to the advisory and intermediary services rendered by providers mainly with reference to a pre-determined category of financial products as defined in the FAIS Act. The licensing of FSPs is designed to promote competence and high standards of conduct and build investor confidence in the financial services industry.

30. FSPs who wish to conduct financial services business are required to satisfy prescribed fit and proper requirements. Currently, those requirements are set out in Board Notice 194 of 2017 and encompass personal character qualities of honesty and integrity, competence, continuous professional development, operational ability and financial soundness.

31. Authorised FSPs, their key individuals and representatives are in terms of section 8A(a) of the FAIS Act required to continuously comply with the fit and proper requirements.

32. All authorised FSPs and representatives are subject to a General Code of Conduct.[4] The General Code is a comprehensive standard setting code prescribing the minimum requirements that FSPs and representatives must comply with when rendering financial services. It contains provisions relating to disclosures that must be made, information to be obtained, the avoidance of conflicts of interests, and the undertaking of an analysis of information in order to provide clients with advice.

33. The FAIS Act together with the General Code is therefore aimed at ensuring that financial services are rendered by persons who:

    33.1. are honest and have integrity;

    33.2. are competent;

    33.3. have adequate resources; and

    33.4. have adequate risk management processes, including in relation to the maintenance of financial records.

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[4] Published as Board Notice 80 of 2003, published in terms of section 15 of the FAIS Act.

34. The respondent is an authorised (licensed) FSP under the FAIS Act but is not authorised (licensed) as an ODP (an OTC derivative provider) under the FMA. It is important to distinguish between being licensed as a FSP (financial service provider) under the FAIS Act and being licensed as an ODP (an OTC derivative provider) under the FMA.

35. As described by the applicant, and in respect of which the respondent does not raise any issue, there is a fundamental difference between an FSP licence, where the licence holder renders financial services (whether advisory or intermediary) without any personal exposure to market movements, and an ODP licence, where the licence holder has extensive exposure to market movements because it acts as a principal in originating, issuing or selling of the OTCs.

36. An FSP licence does not permit a person, including the respondent, as an ODP to originate, issue or sell OTCs, which are instead regulated by the FMA and FMA Regulations.

<u>An assessment of the affidavits</u>

37. The applicant seeks a final winding-up of the respondent. The applicant must establish its case for a final winding-up on a balance of probabilities but if there is a relevant *bona fide* factual dispute, then the matter cannot be

decided on the probabilities but upon the usual *Plascon-Evans* approach where the respondent's version must be accepted.[5]

38. But for a relevant factual dispute to arise, it must be *bona fide* and on a material matter. Should the respondent's version be dismissed as farfetched and fanciful, then there is no competing version to that of the applicant[6] and so the matter can be decided on a balance of probabilities as the *Plascon-Evans* approach to resolving a factual dispute does not arise.

39. Notwithstanding the seriousness of the issues, the respondent did not seek that any issue be referred to oral evidence or "a live contest"[7] but chose to argue the application on the papers.

40. The respondent has challenged the admissibility and quality of the evidence adduced by the applicant in support of its application. The respondent contends that as the deponent to the founding affidavit does not have any personal knowledge of any of the facts but instead relies predominantly on the evidence of the applicant's statutorily appointed investigators, the evidence should be rejected as hearsay or as lacking credibility.

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[5] See, for example, *Orestisolve (Pty) Limited t/a Essa Investments v NDFT Investment Holdings (Pty) Limited* 2015 (4) SA 499 (WCC) at para 9, citing *Paarwater v South Sahara Investments (Pty) Limited* [2005] 4 All SA 185 (SCA) paras 3 and 4.

[6] See "the robust approach" to dispose of fanciful disputes in the application of the *Plascon-Evans* approach, *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 54 to 64, especially para 63.

[7] To use the phrase from *Fakie* above, para 54.

41. The respondent takes issue with the confirmatory affidavits provided by the investigators who undertook the investigation and who confirm the averments in the founding affidavit. In doing so, the respondents rely upon the Supreme Court of Appeal decisions of *Drift Supersand (Pty) Limited v Mogale City Local Municipality*[8] and *Eskom Holdings SOC Limited v Masinda.*[9]

42. By the very nature of the role played by the applicant as a regulator, it would not have first-hand knowledge of many of the relevant facts giving rise to an application for liquidation. Whether in terms of section 96 of the FMA or section 38B of the FAIS Act, an investigation must take place, which necessitates the appointment of investigators. Those investigators have furnished confirmatory affidavits of those facts that they have uncovered in support of the present application. I do not find that because the primary deponent to the founding affidavit is not one of the investigators but instead refers to the evidence of the investigators as confirmed in confirmatory affidavits by those investigators that such evidence is sufficiently lacking in credibility as to be unacceptable. In the two authorities relied upon by the respondents, although the court deprecated the manner in which the evidence of the relevant witnesses was adduced by confirmatory affidavits, the court nevertheless accepted that evidence,

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[8] [2017] 4 All SA 624 (SCA).
[9] 2019 (5) SA 386 (SCA).

43. Insofar as the respondent's challenge that much of the evidence is hearsay, subsequent confirmatory affidavits have removed that hearsay element. To the extent that those confirmatory affidavits may only have been provided at a later stage and in some instances by way of reply, that is understandable given that the application was launched urgently.

44. To the extent that the respondent contends that certain assertions remain hearsay, such as those of Saad Sidat, a former employer and consultant of the respondent explaining certain internal emails in which he featured, the court can have regard to the emails themselves. Apart from Sidat, Paulsen for the respondent was a party to the emails. Both given that Paulsen is a party to those emails and the emails are those of the respondent, it is open for the applicant to attach those emails to its founding affidavit and for the respondent to be required to respond thereto.[10]

45. Subsequent to the respondent being issued an FSP licence in June 2016, it commenced its business of dealing in CFDs. At that stage, it does not appear that the respondent was required to be authorised under the FMA to conduct such activity. This is not to say that the respondent was authorised by reason of its FSP licence to act as an ODP in relation to OTCs including CFDs but rather that such activity was not yet regulated, at least insofar as such business did not fall within the ambit of what is regulated under the FAIS Act.

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[10] In trial proceedings, as those internal emails would have to be discovered by the defendant, those emails would be capable of being adduced by the plaintiff into evidence in terms of rule 35(10), without calling any witness.

46. Upon the publication and commencement of the FMA Regulations on 9 February 2018, the conducting of the business of an OTC provider became regulated under the FMA and in particular an ODP was required to be authorised in terms of section 6(8) as read with section 5(1)(b) of the FMA. As will appear further in this judgment, the respondent would obfuscate as to what role it played in the provision of OTCs and so seek to avoid or delay regulation under the FMA and the FMA Regulations.

47. Regulation 43 provides that a person conducting the business of an OTC derivative provider (an ODP) must, within six months from the commencement of Regulation 2 (9 February 2018), lodge with the applicant an application for authorisation as an OTC provider in the manner prescribed by the applicant. This transitional arrangement recognised that there were persons such as the respondent who were conducting the business of an OTC derivative provider and so provided such persons six months in which to lodge an application for authorisation. Although not entirely clear, it appears that the intention behind the transitional regulation is that provided such application for authorisation had been timeously lodged, pending a decision upon that application for authorisation the provider could continue to conduct the business of an OTC derivative provider.

48. For reasons unexplained in the affidavits but which is common cause, the period within which persons conducting the business of an OTC derivative provider were to lodge with the applicant an application for authorisation as an ODP was extended to 14 June 2019.

49. The respondent therefore has had an extended period of some sixteen months since the commencement of the FMA Regulations regulating the business of an OTC derivative provider in which to lodge its application with the applicant.

50. The respondent did not timeously lodge an application but only would do so on 21 August 2020. This is four days before the present liquidation application was heard, and over fourteen months after the expiry of the extended period in which such application was to be lodged in terms of the FMA Regulations.

51. Pursuant to various complaints that had been received from the respondent's clients, an interview was held on 14 October 2019 by the applicant as the regulatory authority at the respondent's offices for the applicant to obtain an understanding of the respondent's business. Paulsen, as the sole director, chief executive officer and key individual under the FAIS Act contends in his answering affidavit that he explained the respondent's business model to the applicant at this interview. It is common cause that at the interview Paulsen, after explaining the nature of a CFD, confirmed that the respondent was a 'counterparty' to the client in a CFD transaction. Paulsen for the respondent would later contend in his answering affidavit in these proceedings that because of this disclosure the respondent cannot subsequently be faulted as obfuscating the role that it played in a CFD transaction.

52. Paulsen explains that when he is referring to the respondent as a 'counterparty' to the CFD transaction, he is referring to the respondent as the

opposite party to the client in the CFD transaction.[11] The applicant contends that as the other party to the CFD transaction, the respondent is the originator or issuer of the CFD. It is not merely a third-party facilitating a CFD transaction between the client and another party, or acting as an intermediary in relation thereto – it is a party to the CFD itself.

53. This contention by the applicant – that the respondent is an originator or issuer of the CFD as it is privy to the CFD as the opposite party – is, based on the material in the affidavits, well-founded.

54. The respondent denies, without any details, the applicant's assertion in its founding affidavit that the clients were purchasing CFDs issued by the respondent.[12] That the respondent was not an issuer of CFDs did not feature in argument before me. To the extent that the respondent persists in contending that there is a dispute as to whether it is an issuer of CFDs and so required to be licensed to conduct the business of an OTC derivative provider under the FMA, I do not find that this dispute as *bona fide* and can be rejected on the papers as fanciful. I say so for the following reasons:

    54.1. the respondent has admitted that it is a counterparty, or privy to the CFD as the opposite party to the client, and so has placed itself

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[11] The FMA Regulations has its own definition of a "counterparty", which appears to be different to the respondent's use of that term. But that does not detract from the analysis. In any event, a counterparty as defined in the FMA Regulations is regulated.

[12] Paragraph 65 of the founding affidavit; denial in paragraph 222 of the answering affidavit.

within the applicant's assertion of what constitutes an issuer of a CFD, namely a person that is privy to the CFD and adopts the opposite position to the client;

54.2. the respondent does not offer in its affidavit any cogent basis to gainsay the applicant's assertions in its founding affidavit that the respondent is an issuer of CFDs and so is required to be licensed as an ODP under the FMA. The respondent does not offer an alternative meaning of what constitutes an issuer, or originator;

54.3. Paulsen admits in a subsequent interview with the applicant on 25 June 2020 that as a counterparty and principal, it is an issuer, and is required to be licensed;

54.4. the conduct of the respondent, albeit belated, in applying for an ODP licence belies its contention that it need not be licensed;

54.5. the court is precluded from going beyond the affidavits. Should it be that the verbs "originate" or "issue" as used in the definition of an OTC derivative provider in the FMA Regulations have a meaning other than that contended for by the applicant, the respondent has not in its answering affidavit (or heads of argument) suggested any other such meaning;

54.6. the respondent has not taken the applicant as the regulator, or the court, into its confidence in fully describing its business and role in the CFD transaction so as to place itself beyond the ambit of an OTC

derivative provider as defined in the FMA Regulations. Instead, as appears later in this judgment, the respondent obfuscated;

54.7. on the respondent's version, there are features of its dealing in the CFDs that are only consistent with it being privy to the CFD transaction. The respondent is able to change the pricing at which it enters into the CFD transaction with its client, differentiating between different clients, and is also able to suspend, close or unwind a CFD transaction when it, on its version, forms the view that a particular client has engaged in prohibited trading practices;

54.8. I accept that it is for the applicant to demonstrate that the respondent is required to be licensed under the FMA, rather than for the respondent to demonstrate the converse. But I find, for the reasons set out above, that the applicant has so demonstrated, relying on its asserted meaning of what constitutes an issuer of CFDs and the respondent's admissions placing itself within the ambit of that meaning. The respondent has not put forward a substantiated cogent basis to refute that, whether in its answering affidavit or during argument. The respondent, which has peculiarly within its knowledge the facts relating to its business and its role in the CFD transactions, cannot content itself with bare denials or vague

unsubstantiated assertions in response to the applicant's positive assertion that it is an issuer of CFDs;[13]

54.9. the respondent has had adequate opportunity to advance facts to place itself beyond the reach of the FMA, before in interviews with the applicant in October 2019 and in June 2020, and in these proceedings. The respondent has not complained that it has not been afforded a sufficient opportunity to do so. The respondent has also not sought an referral of the issue to oral evidence.

55. To return to the narrative of facts, after the interview with the respondent in October 2019, the applicant as the relevant financial sector regulator proceeded to appoint investigators in terms of the FSRA to carry out an investigation in respect of the respondent in terms of section 135(1)(a) of the Act. The section provides that a financial sector regulator may instruct an investigator appointed by it to conduct an investigation in respect of any person, if the financial sector regulator reasonably suspects that a person may have contravened, may be contravening or may be about to contravene, a financial sector law for which the financial sector regulator is the responsible authority. The respondent has not challenged the investigation.

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[13] A denial is inadequate to raise a bona fide dispute of fact where the person making the denial is in possession of the relevant facts to amplify the denial: *Wightman trading as JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) at 375G – 376B.

56. On 10 December 2019, the investigator issued formal notice to the respondent in terms of section 136(1)(a)(ii) of the FSRA to produce various documents pursuant to the investigation.

57. Particularly important is the following enquiry in the formal notice:

> "1.4.7 *It is understood that JP Markets is the counter party or issuer of the CFDs (or any other instrument relevant in this case). Kindly confirm this. If so, …*
>
> *1.4.7.3 Has JP Markets applied for authorisation as an Over the counter derivative provider ("ODP"), and if not provide reasons for not doing so.*"

58. The respondent's written response on 6 January 2020, under the heading "Status of ODP authorisation", is telling:

> *"9. Ad para 1.4.7.3*
>
> *9.1. JPM notes the FSCA's Conduct Standard 1 of 2018 and we find ourselves in a difficult situation as we believe that the standard does not apply to us. This was the view of both our internal and outsourced compliance officers. Notwithstanding this view, we have erred on the side of caution and have since commenced the application process. Our concerns regarding the application of the Conduct Standard 1 of 2018 can be described as follows:*
>
> *9.1.1. At first blush it would seem that the company should be classified as an OTC derivative provider. <u>However, if one delves deeper it becomes apparent that the company does not originate, issue or sell OTC derivatives nor does</u>*

it make a market in OTC derivatives. The company only provides the technology for retail client to transact directly with the market. It would then follow that if we do not fit into the provided definition that the accompanying regulations would not be applicable.

9.1.2. Unlike traditional exchange-traded futures and equity markets, our clients do not execute any trades through an exchange. Thus, the key objective of the Conduct Standard would not be met as these derivatives are not cleared through a central counterparty clearinghouses. The reason as to why this objective would not be met is because the trades are negotiated bilaterally between counterparties and executed either through voice-brokering or through online trade execution directly by the client.

9.1.3. It is important to note that the online platform has an inbuilt function which mitigates negative account balances as margin is set aside from each transaction.

9.1.4. Should the FSCA require us to register as an ODP, we foresee an unintended consequence of having an intermediary ("JP Markets SA (Pty) Ltd and other online platforms) relying on another intermediary ("a clearinghouse") to settle trades which are already being executed directly by clients.

9.2. We do not see how this could be the intention of the regulator and we would appreciate your guidance regarding the points raised above."

(my emphasis).

59. A further extract from the same response of 6 January 2020 is that the respondent *"does not originate, issue or sell OTC derivatives, nor does it make a market in OTC derivatives. It only provides the technology which facilitates the trading of said OTC derivatives. Clients execute directly with the online decentralised global financial market."*

60. The applicant asserts in its affidavits that this response is false. Based upon what appears in the affidavits, and the analysis thereof in paragraph 54 above, the applicant is correct. As an admitted opposite party to the client in the CFD transaction, the respondent is not merely providing the technology for its clients to transact directly with the market. On its version, the respondent is transacting directly with the client in the CFD transaction, adopting the opposite position to the client, and is, for the reasons already stated, an originator or issuer of the CFD. There is no market with which the clients are transacting as these CFDs are being concluded directly between the client and the respondent.

61. The recordal in paragraph 9.1.4 of the response does not appear to make any sense. The respondent adduces no evidence in its answering affidavit in support of this recordal. The respondent does not rely on any other intermediary (clearinghouse) to settle trades, at least on its version that it is a counterparty or opposite party to the client in the CFD transaction. This is because the respondent itself has entered into the CFD transaction with the client; the respondent is executing the CFD transaction directly with the

client. Simply put, the respondent is not an intermediary but the opposite party to the client in the CFD transaction

62. The reason for this obfuscation by the respondent is, in my view, to seek to place itself outside the regulatory framework of the FMA and instead to create the impression that at most the services that it renders constitute some or other form of intermediary services that it is entitled to perform under its FAIS license.

63. Section 139(3) of the FSRA expressly provides that a person who is asked a question in terms of the investigation must answer the question fully and truthfully, to the best of that person's knowledge. Failure to do so constitutes a criminal offence, with a fine not exceeding R5 000 000 or imprisonment for a period not exceeding two years, or to both a fine or such imprisonment.[14] I do not mention this for purposes of making any finding that the respondent has contravened section 139(3), which is beyond what this court is called upon to decide, but rather to highlight the importance of the respondent answering the enquiry by the investigators fully and truthfully to enable the applicant to appreciate the respondent's business and whether it is required to be licensed as an ODP. To the extent that the respondent's answer is such that the applicant, and the court, draws the conclusions that it has that the respondent is an OTC derivative provider and that the respondent has obfuscated in its disclosures, the respondent was precognised of the

[14] Section 267(5) of the FSRA.

importance of a full and truthful response given its statutory obligation to so answer.

64. Consequent upon the earlier interview in October 2019, the respondent's then internal compliance officer addressed an email to the applicant enquiring whether the process for licensing for ODPs had been finalised. The applicant responded on 15 October 2019 pointing out that ODPs are to be licensed in terms of the FMA Regulations as well as referring to the Conduct Standard of 2018 entitled "Criteria for authorisation of OTC service providers". In addition, the applicant provided website details from which documents could be downloaded including an application index for non-banks and the applicant's instructions for ODPs. From this email exchange, the respondent to their knowledge had access to the necessary documents and information to lodge an application for an ODP licence from October 2019. But the respondent did not do so.

65. The respondent, although attaching this email correspondence to its answering affidavit, does not explain why it did not apply for a licence other than to state that both its internal and external compliance officers were still researching whether the respondent required an ODP licence under the FMA Regulations. But, as appears above, such a licence was required, and the applicant had referred the respondent to the relevant website for details.

66. Paulsen's version for the respondent is that on 30 January 2020 he actioned internally the process to prepare the respondent's ODP licence application, delegating the task to various staff members. He attaches to its answering

affidavit various emails addressed to the applicant seeking advice and a referral to a legal expert in the field as the list of requirements are “quite intricate as well as high-level”.

67. It is not for the applicant to refer the respondent to a legal expert. Apart from the self-professed expertise of Paulsen, the respondent, as a massive business concern on its own version having paid out over R1 billion in three months, had and has access to both external and internal compliance officers as well as access to what it contends is an attorney with expertise in the field, Johann Joosten of Joosten Attorneys. What purports to be an expert report by Joosten Attorneys, with confirmatory affidavits, features in the respondent’s answering affidavit. So too does a confirmatory affidavit by Gerhard Labuschagne, who is described as an external consultant employed by the respondent, who offers an opinion in relation to the success of the belated application lodged by him on behalf of the respondent on 21 August 2020 to be licensed as an ODP.

68. Paulsen for the respondent explains in his answering affidavit that he was of the *bona fide* belief, perhaps mistakenly, that the respondent did not require an ODP license. I have difficulty accepting this averment. But I need not make a positive finding as to what Paulsen’s belief actually was. It is sufficient to find, as I do for the reasons set out above, that the respondent obfuscated in its interactions with the applicant as the regulator as to its business and the role it played in the CFD transaction, designed to place it in a position to contend that it need not be licensed, or that it was “confused” whether it

needed to be licensed, or at the least to justify a delay in the lodging of an application for an ODP license.

69. It is apparent from the regulatory framework, particularly the FMA Regulations, that what is required of an ODP licensee is onerous, with substantial compliance and prudential requirements. The respondent was seeking to kick the proverbial can down the road by addressing innocuous emails and replies[15] to the applicant as the regulatory authority in an attempt to create a paper trail to assist it in later creating the impression that it was attempting to address its licensing obligations.

70. Throughout the respondent continued to conduct the business of an OTC derivative provider. As the respondent asserts on several occasions, it has over 300,000 clients, of which 20,000 are transacting at any particular time during the week and in respect of which it has paid out over R1 billion in three months. Although the respondent advances these figures to demonstrate that it is a major player in the derivative instrument industry, what it also demonstrates is the magnitude of the unlicensed business that the respondent was conducting, at least until June 2020.

71. On 19 June 2020 the applicant as the relevant financial sector regulator under the FAIS Act furnished the respondent notice of provisional suspension of its authorisation as an FSP. The grounds for provisional suspension set out in the notice are that the FSA was satisfied that in terms of information

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[15] Such as that in paragraph 9.2 of its formal response of 6 January 2020 that it was seeking guidance as to the points raised in its response as to why it asserted that it need not be licensed as an ODP.

available substantial prejudice to the clients or general public may occur if the respondent was allowed to continue acting as a FSP and where it does not meet or no longer meets the fit and proper requirements applicable to an FSP licensee. Amongst the reasons given by the applicant is that pursuant to an investigation in terms of section 135 of the FSRA it has established that the respondent was effectively conducting the business of an OTC derivative provider, and more particularly *inter alia* being the issuer and product supplier of derivative financial products. The notice then sets out why in the applicant's view the conduct of the respondent constituted a *prima facie* contravention of various sections of the General Code for authorised financial service providers and representatives and of the Financial Institutions (Protection of Funds) Act, 2001.

72. In addition to the applicant's recordals in relation to the transgression of the FAIS Act, the notice records that:

> "*JP Markets initially represented 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. It does not originate, issue or sell OTC derivatives. It has now become evident that JP Markets does in fact originates or issues or sells OTC derivatives and acts as the principal or product provider. Therefore, it would appear that JP Markets 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.*"

73. The applicant further recorded in the suspension notice that the contraventions were "*inconsistent with personal character qualities of*

honesty and integrity consequently upon resulting in JP Markets not complying with the Fit and Proper Requirements (honesty and integrity) and it being in breach of section 8A(a) of the FAIS Act."

74. This notice provisionally suspends the respondent's FAIS license until 30 September 2020, subject to certain conditions. Those conditions are that the respondent:

74.1. must inform all affected clients and product suppliers concerned that its licence had been provisionally withdrawn;

74.2. is prohibited from conducting any new business as envisaged by FAIS with immediate effect.

75. The respondent was also informed in the notice of its right to apply for a reconsideration by the Financial Services Tribunal of the applicant's decision to provisionally suspend the FAIS license. There is no indication in the papers that the respondent applied for such reconsideration.

76. The applicant's recordal in the suspension notice that the respondent initially represented that it only rendered intermediary services is well-founded given the response by the respondent in January 2020 to the applicant's formal request in the investigation that it did not originate, issue or sell OTC derivatives but only provides the technology which facilitates the trading of those derivatives and enabling the clients to trade directly with an online decentralised global financial market.

77. Paulsen for the respondent in his answering affidavit seeks to explain the respondent's position in response to this notice of suspension by stating that he had not misrepresented the position to the applicant in that he had already in October 2019 stated that the respondent was a counterparty to the CFDs transactions and that therefore the applicant was incorrect in its contention that the respondent had initially represented that it only renders intermediary services and that it had only become evident to the applicant in June 2020 that the respondent was a counterparty.

78. This is another instance of the respondent obfuscating. For the reasons set out above, as respondent was a counterparty in the CFD transaction, it fell within the ambit of conducting the business of an OTC derivative provider, and should have applied for a licence. But in order to avoid or delay doing so, the respondent, in January 2020 in direct response to the investigative enquiry by the applicant, created the contrary impression that it did not originate, issue or sell OTC derivatives and only provided the technology to enable the clients to transact directly with the market, and so sought to place itself outside the regulatory ambit of the FMA and the FMA Regulations.

79. The respondent, under the helm of Paulsen, sought to exploit the delay experienced by applicant in seeking to ascertain what the business of the respondent was and so whether the respondent was properly licensed, and so to continue to conduct the business of an OTC derivative provider whilst being unlicensed.

80. Once the respondent's FSP license was provisionally suspended in June 2020, Paulsen continued to obfuscate. Paulsen in his answering affidavit refers to an interview conducted at the applicant's offices on 25 and 26 June 2020. Paulsen attempts to again take the respondent's business beyond the scope of the FMA:

> "*Justin: Ja ja, maybe I can just take a step back just to give you some context, you know. So, you have, so, when you open up an MT4 platform, okay? You see prices, okay, you see pricing, right? That pricing comes from what is called a liquidity provider. Meta Quotes only provides the platform, okay, they provide the platform and the, and all the sort of infrastructure on the platform and the functionality. Okay, now, in order to give pricing for your clients to trade, you need to get prices plugged into Meta Quotes, okay? That comes from what is called a liquidity provider, okay, so, Meta Quotes, right? They provide the platform and the liquidity provider provides you with the pricing*."

81. Then later in the interview Paulsen says that:

> "*Justin: It comes through as a pre-package instrument directly through to JP Markets. We did not originate that instrument. We did not make that instrument. We did not have any control over the actual instrument. We have no influence on it.*"

82. The respondent, as late as 25 June 2020 remained intent in its obfuscation by overstating the role of a liquidity provider so as to place the respondent's business outside the regulatory framework of the FMA:

82.1. Whatever is to be made of the term originator, for the reasons set out above the respondent is the issuer of the CFDs. That the respondent may obtain various components of its pricing from a third party, such as a liquidity provider, does not detract from it as an issuer or otherwise conducting the business of an OTC derivative provider, at least on the evidence presented in the affidavits;

82.2. Paulsen's attempt to convey the impression that the respondent is an intermediary in providing services relating to CFDs over which it has no control, is incorrect;

82.3. Paulsen in his answering affidavit in response to a complaint of a client set out in the applicant's founding affidavit, explains that in relation to certain clients, the extent of the spreads in relation to the CFDs are adjusted. This demonstrates that the respondent does have the ability to affect the pricing of the CFD and then proceeds to enter into that CFD as the opposite party to the client. Contrary to what was stated by Paulsen in his interview, the CFD is not a pre-packaged instrument with pricing over which the respondent has no control.

83. Following of the provisional suspension of respondent's license on 19 June 2020, the respondent approached Joosten Attorneys seeking a report on the regulatory framework concerning ODP licences. Joosten Attorneys, as described above, asserts a specialisation in compliance in the financial services sector as well as OTC derivative trading. The respondent does not

explain why such approach was not made months earlier for purposes of considering the necessity to prepare an ODP license and to assist in preparing an application for that licence.

84. The respondent attaches the report by Joosten Attorneys dated 20 July 2020 to its answering affidavit. Although subsequently confirmed under oath, the report does not take the matter any further. Assuming the report to be admissible given that in at least certain respects it appears to be inadmissible opinion evidence on the law, nothing is said in it that explains why an ODP licence was unnecessary. Apart from also offering what is an inadmissible character reference as to the professionalism of the respondent, it points to institutional delays and inefficiencies at the applicant as the financial sector regulator. But this does not excuse the respondent's conduct in not having lodged its application for an ODP licence within the extended timeframe provided for in the FMA Regulations or its continued conducting of the business of an OTC derivative provider when it was required to be licensed to do so.

85. The report further seeks to express an opinion that the ODP application by the respondent of which a draft was furnished appears to materially comply with the requirements for such an application published by the applicant on 27 July 2018. Whatever the admissibility of such an opinion, what the report demonstrates is that the criteria for authorisation of an ODP to enable a licensing application to be made have been known since 27 July 2018.

86. It would only be on 21 August 2020, on the eve of the hearing of these proceedings application on 24 August 2020 (the notice of motion having been issued on 7 July 2020 and the matter having been called in the urgent court on two previous occasions on 21 July 2020 and 11 August 2020) that the respondent would eventually lodge its application for an ODP license.

The relevant sections providing for the winding-up of the respondent

87. The applicant has sought the liquidation of the respondent relying on both section 96 of the FMA and section 38B of the FAIS Act.

88. As appears above,:

88.1. pursuant to the FMA Regulations, OTC derivative providers were designated as regulated persons in terms of section 5(1)(b) of the FMA;

88.2. section 6(8) of the FMA provides for such regulated persons to adhere to various standards to be prescribed by the Minister, which are those in *inter alia* the FMA regulations;

88.3. an OTC derivative provider is so required to be authorised in terms of Regulation 2 where it acts as an OTC derivative provider or advertises or holds itself out as an OTC derivative provider.

89. I have already found that the respondent conducts the business of an OTC derivative provider, and so required to be licensed under the FMA.

90. Section 94(1) of the FMA provides:

> "*94. General powers of Authority*
>
> *(1) If the Authority receives a complaint, charge or allegation that a person ('the respondent') who provides securities services (whether the respondent is licensed or authorised in terms of this Act or not) is contravening or is failing to comply with any provision of this Act, or if the Authority has reason to believe that such a contravention or failure is taking place, the Authority may investigate the matter in terms of the Financial Sector Regulation Act.*"

91. As appears above, OTC service providers were designed in terms of section 5(1)(b) as regulated persons under the FMA, rendering and so render securities services. Although the respondent was not licensed or authorised to provide the securities services, section 94(1) expressly provides in defining a respondent as being the person who renders such securities services notwithstanding that the person may or may not be licensed or authorised to do so.

92. Accordingly, Chapter 12 of the FMA, which includes sections 94 and 96, applies to persons who should be licensed and authorised but who are not.

93. The applicant as the relevant authority in terms of section 94 of the FMA undertook an investigation in terms of the FRSA.[16]

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[16] Section 1A(6)(d) of the FMA expressly provides that a reference to an inspection in terms of the provision of the FMA must be read as a reference to an investigation in terms of the FSRA.

94. Section 96 of the FMA, headed *"Powers of Authority after supervisory on-site inspection or investigation"* provides:

> *After a supervisory on-site inspection or an investigation has been conducted, the Authority may, in order to achieve the objects of this Act referred to in section 2 –*
>
> *(a) if the respondent is a company-*
>
> *(i) apply to the court under section 81 of the Companies Act for the winding-up of the respondent as if the Authority were a creditor of the respondent…;*"

95. No reasons were advanced during the proceedings why section 96 would not apply if it was established that respondent was an OTC derivative provider other than the respondent contending that as the investigation had not been concluded. This defence is considered later in this judgment.

96. The FAIS Act also provides for a winding-up, albeit differently worded.

> "*38B Application by registrar for sequestration or liquidation*
>
> *(1) Subject to subsection (3), if the registrar, after an on-site visit in terms of section 4(5) or an inspection in terms of the Inspection of Financial Institutions Act, 1998 (Act 80 of 1998), considers that the interests of the clients of a financial services provider or of members of the public so require, the registrar may apply for the court for the sequestration or liquidation of that provider, whether or not the provider is solvent, in accordance with –*
>
> *(a) the Insolvency Act, 1936 (Act 24 of 1936);*
>
> *(b) the Companies Act;*

(c) the Close Corporations Act, 1984 (Act 69 of 1984); or

(d) the law under which that provider is incorporated.

(2) In deciding an application contemplated in subsection(1), the court –

(a) may take into account whether sequestration or liquidation of the financial services 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;

(b) may make an order concerning the manner in which claims may be proved by clients of the financial services provider concerned; and

(c) shall appoint as trustee or liquidator a person nominated by the registrar."

97. The respondent is a financial services provider registered under the FAIS Act. No reasons were advanced during the course of the proceedings why section 38B would not apply to the respondent other than the respondent contending that until the applicant had concluded its inspection and had obtained the leave of the court in terms of section 157(1)(d) of the Companies Act to launch the liquidation proceedings. I deal with these defences later in this judgment.

98. Section 1A(6) of the FAIS Act provides that a reference in the FAIS Act to an inspection in terms of the provision of the FAIS Act must be read as a reference to an investigation in terms of the FSRA. It is common cause that such an investigation was initiated.

99. The applicant is entitled to rely on either or both sections 98 of the FMA or section 98B of the FAIS Act, subject to the defences considered next.

Must the investigation as envisaged in section 98 of the FMA and section 38B of FAIS be concluded before the applicant can seek the winding-up of the respondent under those sections?

100. The respondent contends that as section 38B of the FAIS Act provides that the applicant may apply to the court for the liquidation of a financial services provider after an inspection, it must follow that the inspection must be concluded before the applicant can apply for the liquidation of the respondent as a provider. Similarly in relation to section 96 of the FMA which provides that the applicant may apply to court for the winding-up of the respondent after an inspection has been concluded. As it is common cause the inspection has not been concluded and is ongoing, the respondent argues that it was premature for the applicant to have launched winding-up proceedings.

101. The modern unitary approach to interpretation as set out by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593

(SCA)[17] is that meaning must be attributed to the words in the document, having regard to the context provided by reading the particular provisions in light of the document as a whole and the circumstances attendant upon its coming into existence. Consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision applies; the apparent purpose to which the provision is directed and the material known to those responsible for its production. Where, as in the present instance, more than one meaning is possible, each possibility must be weighed in the light of all these factors.

102. Wallis JA continues that the process is an objective one rather than subjective and that:

102.1. a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the provision;

102.2. a court must nonetheless be alert to, and guard against, the temptation to substitute what it regards are reasonable, sensible or business-like for the words actually used;

102.3. the inevitable point of departure is a language of provision itself read in context and having regard to the purpose of the provision and the background to and production of the document.

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17 Para 18.

103. Wallis JA continues[18] that where a court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used (and so the only ambiguity lies in selecting the proper meaning on which views may legitimately differ), the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation and that an interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences that will stultify the broad operation of the document under consideration.

104. Wallis JA continued in his subsequent judgment in *Bothma-Batho Transport v S Bothma & Seun Transport* 2014 (2) SA 494 (SCA)[19] to make it clear that the "golden rule" approach from *Coopers & Lybrandt and others v Bryant* 1995 (3) SA 761 (A)[20] was no longer consistent with the approach adopted by courts, and that whilst the starting point remained the words of the document, the process of interpretation does not stop at a perceived literal meaning of these words, but considers them in light of all relevant and admissible contract, including the circumstances in which the document came into being.

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[18] Para 26
[19] Para 12
[20] At 768A-E

105. Jafta JA held in *True Motives 84 (Pty) Ltd v Mahdi and another* 2009 (4) SA 153 (SCA)[21] that *"if the literal meaning of the subsection defeats is objective then the subsection ought to be construed differently so as to ascribe to it a meaning that promotes its purpose".*

106. The respondent argues that as winding-up is a drastic remedy and where there are a variety of other remedies available to the applicant as the regulating authority, such as those set out in the remaining subsections of section 96 of the FMA, the investigation effectively serves as a "*gate-keeping exercise*" and that until that exercise had been completed, the sections must be interpreted as requiring the investigation to be completed.

107. This argument is unsound. It would not advance the purpose of either of these sections as well as the purpose of each Act, to require that the inspection must have been concluded. It suffices that the inspection reached a stage, in relation to section 38B, that would enable the applicant to have reached the considered decision that the interests of the clients of the financial services provider or of the members of the public require application be made to court for the liquidation of that provider. Similarly, in relation to section 96 of the FMA, the investigation must have reached a stage to enable the applicant to decide whether in order to achieve the objects of the Act as referred to section 2 to apply for the liquidation of the respondent.

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[21] Paragraph 70

108. The applicant postulated the example of the applicant discovering during an investigation the misappropriation of monies by the financial service provider or respondent concerned. Must the authority first conclude its investigation before initiating liquidation proceedings under either of the sections? Surely not, the applicant reasoned. I agree.

109. The respondent argued that this is argument is fallacious and is to be disregarded. I disagree. The respondent's proposition is one of invariable legal principle – that until the investigation is concluded, there can be no liquidation. But once one accepts an investigation need not be concluded before liquidation proceedings can be brought in the instance of clear fraud or misappropriation of monies, as must be so for the remedy not to be emasculated, then it has been established that it cannot be a matter of invariable legal principle that the investigation must be concluded. The respondent's interpretation leads to insensible results and undermines the apparent purpose of the provision.

110. It is not a matter of invariable principle but a consideration of whether on the particular facts it can be said that the investigation has been conducted. In the present instance the respondent has advanced no substantive grounds, based on the facts, why the investigation must first be completed.

111. My view is further fortified by considering the statutory provisions in their context.

112. As an alternative to the investigation having been conducted or having taken place as a statutory prerequisite to enable the applicant to apply for

liquidation, each of the two sections also provide for the applicant applying to court for liquidation after a supervisory on-site inspection.[22] Supervisory on-site inspections are provided for in section 132 of the FSRA.

113. Section 132(2) of the FSRA provides:

> "*(2) The purpose for which a financial sector regulator may conduct a supervisory on-site inspection of a supervised entity is to –*
>
> *(a) check compliance by the entity with a financial sector law for which the financial sector regulator is the responsible authority, a regulator's directive issued by the financial sector regulator or an enforceable undertaking accepted by the financial sector regulator;*
>
> *(b) determine the extent of the risk posed by the entity of contraventions or the financial sector law for which the financial sector regulator is the responsible authority; and*
>
> *(c) assist the financial sector regulator in supervising the relevant financial institution.*"

114. Neither section 132 nor any other section in the FSRA requires there to have been any particular outcome in respect of that supervisory on-site inspection. Given that the applicant is empowered merely on having conducted a supervisory on-site inspection to have launched liquidation proceedings in

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[22] Sections 1A of both the FMA and the FAIS Act provide that the reference to an on-site inspection is to be read as a reference to a supervisory on-site inspection in terms of the FSRA.

terms of either section 38B of FAIS or section 98 of the FMA, it would be incongruous to require of the applicant to have concluded its investigation before it can rely upon the sections where the applicant elected to conduct an investigation rather than a supervisory on-site inspection.

115. The purpose of either the supervisory on-site inspection or the investigation is to place the applicant responsibly in a position to decide whether to approach the court for the liquidation of the particular financial service provider or respondent. A supervisory on-site inspection or investigation, as the case may be, also affords the relevant service provider or respondent an opportunity to state its position in response to that which is asserted by the applicant as the regulator. This took place in the present instance where the applicant not only afforded the respondent an opportunity to respond in writing to its concerns, which the respondent did by way of its 200-page response on 6 January 2020, but also afforded the respondent including Paulsen an interview on 25 and 26 June 2020. The investigation has served its purpose, at least for purposes of sections 96 of the FMA and section 38B of the FAIS Act.

116. In any event, should it has been required that the investigation be concluded, clear words would have been used to that effect, such as “concluded” or “completed”, rather than “conducted” as appears in section 96 of the FMA.

117. I find that the applicant not having concluded its investigation does not prevent it from seeking the liquidation of the respondent under either section 96 of the FMA or section 38B of the FAIS Act.

Is the applicant obliged to rely upon section 157(1)(d) of the Companies Act to bring itself within the ambit of the Companies Act for purposes of seeking the liquidation of the respondent as a solvent company in terms of section 38B of the FAIS Act?

118. Section 38B(1) provides that the applicant may apply to court for the winding-up of the respondent *"in accordance with… the Companies Act"*.

119. The respondent contends that as the applicant is not one of the specified persons who are entitled to apply for a winding-up of a solvent company in terms of section 81(1) of the Companies Act, it is required to demonstrate in terms of section 157(1)(d) of the Companies Act that it has the right to make such an application as a person acting in the public interest, with the leave of the court.

120. The respondent relies on the recent Supreme Court of Appeal decision of *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environment Affairs* 2019 (3) SA 251 (SCA) ("Redisa") as authority for this argument. In that matter the Minister seeking the winding-up of the respondent was not one of the persons conferred *locus standi* in terms of section 81(1) and so was not permitted to rely upon that section. The Supreme Court of Appeal went further and found that the Minister also could not rely on section 157(1)(d) to wind-up the applicant in the public interest as it did not qualify as a person acting in the public interest but continued that

even if the Minister had the right to approach the court under section 157(1)(d), leave would not have been granted in the public interest.

121. As the applicant has not sought and been granted the leave of the court to act in the public interest, the respondent contends that the applicant has no *locus standi*.

122. This argument is unsound. Unlike the Minister in *Redisa* who was not conferred any statutory right to apply for a winding-up, in the present instance section 38B of the FAIS Act expressly confers *locus standi* on the applicant to seek the liquidation of the respondent. It is because there was no comparable section to section 38B of FAIS in respect of the Minister's seeking the winding-up of the respondent in *Redisa* that the Minister was non-suited.

123. The applicant need not bring itself within one of the specified categories of persons in section 81(1) of the Companies Act in order to bring a winding-up application in respect of a solvent company in terms of section 38B, which does not refer at all to section 81 of the Companies Act but simply to the applicant applying to court for liquidation in accordance with the Companies Act.

124. Section 38B was introduced into the FAIS Act by section 201 of Act 45 of 2013. That same Act, 45 of 2013 inserted the definition of "Companies Act", being the Companies Act, 71 of 2008, into section 1 of the FAIS Act. The legislature was aware of the sections regulating the winding-up of solvent companies in the Companies Act but nevertheless did not refer to section 81

of that Act. Had it been necessary that the applicant would have to bring itself within one of the specified categories in section 81(1) of the Companies Act, section 38B of the FAIS Act would have so provided.

125. In contrast, section 96 of the FMA expressly provides that the applicant can apply to court under section 81 of the Companies Act for the winding-up of the respondent as if it were a creditor of the respondent. In expressly referring to section 81 of the Companies Act, the legislature was alive to the fact that the applicant would not fall within one of the specified categories in section 81 and so deemed the applicant to be a creditor.

126. Section 38B of the FAIS Act in invoking the Companies Act incorporates those aspects of the Companies Act, including those of the Companies Act, 1973[23] as are necessary to enable the applicant to apply for the liquidation of a financial service provider. Section 38B of the FAIS Act is complementary to and is to be read alongside the Companies Act. To the extent there is an inconsistency, section 5(4) of the Companies Act requires that the provisions of both the Companies Act and the FAIS Act apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second. I do not find any inconsistency but to the extent there is, both Acts can be applied concurrently. Section 38B of the FAIS Act does for the applicant in relation to conferring *locus standi* to seek the winding up of a financial service provider, whether solvent or insolvent, as section 81(1) of the Companies Act does for those categories of persons

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[23] By reason of the Item 9 of Schedule 5 to the Companies Act, 2008.

specified therein in relation to conferring *locus standi* to seek the winding-up of a solvent company and as section 346(1) of the Companies Act 1973[24] does for those categories of persons specified therein in relation to conferring *locus standi* to seek the winding-up of an insolvent company.

127. No argument was advanced why it would serve the purpose of the FAIS Act, which is to regulate the rendering of certain financial advisory and intermediary services to clients, to find that the applicant must apply for leave in terms of section 157(1)(d) of the Companies Act to act in the public interest. The objective and functions of the applicant set out in sections 57 and 58 of FSRA as the relevant financial sector regulator demonstrate that it is acting in the public interest. Section 7 of the FSRA sets out the object of that Act, which is also aimed at the public interest. Section 7(2) of the FSRA provides that when seeking to achieve the object of the Act, the applicant as the relevant financial sector regulator must not be constrained from achieving its objectives and responsibilities as set out in section 57 of that Act. Section 38B(1) of FAIS itself requires that regard be had to the interests of *inter alia* the members of the public and section 38B(2) provides that the court may take into account whether the liquidation of the financial service provider is reasonably necessary in order to protect the interests of the clients of the provider for the integrity and stability of the financial sector. It would be superfluous to also require of the applicant to demonstrate that it is acting in the public interest in terms of section 157(1)(d) of the Companies Act, and

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[24] As read with item 9(1) of schedule 5 to the Companies Act, 2008.

would not advance the object or purpose of either the FAIS Act or the FRSA to so require of the applicant.

128. I accordingly find that the applicant was not obliged to obtain the leave of the court in terms of section 157(1)(d) of the Companies Act.

The just and equitable requirement for a winding-up and liquidation as a remedy of last resort

129. The respondent argues that it is necessary for the applicant to demonstrate that the winding-up is just and equitable and this requires that the applicant must demonstrate that there is no alternative remedy

130. Section 96 of the FMA provides that the authority may apply for the winding-up of the respondent as a company in order to achieve the objects in section 2 of that Act.

131. The respondent's argument is that:

131.1. section 96(a)(i) of the FMA refers to section 81 of the Companies Act;

131.2. the relevant subsection is section 81(1)(c) as that is the section relevant to creditors applying for a winding-up and given that the applicant is deemed to be a creditor of the respondent for that purpose in terms of section 96(a)(i) of the FMA;

131.3. section 81(1)(c) provides that a court may order a solvent company to be wound-up if:

> *"(c) one or more of the company's creditors have applied to the court for an order to wind-up the company on the grounds that:*
>
> *(i) the company's business rescue proceedings have ended in the manner contemplated in section 132(2)(b) or (c)(i) and it appears to the court that it is just and equitable in the circumstances for the company to be wound-up; or*
>
> *(ii) it is otherwise just and equitable for the company to be wound-up.*"

131.4. the court is therefore required to consider and the applicant is required to establish that it is just and equitable for the respondent to be wound-up;

131.5. this would entail the applicant demonstrating that there is no other remedy available to the applicant other than a winding-up as a winding-up is a remedy of last resort.

132. I am prepared to accept, without finding, that the just and equitable basis for the winding-up of a company is imported into section 96 of the FMA.

133. As the respondent points out, the just and equitable basis for the winding-up of a company "*postulates not facts but only a broad conclusion of law, justice*

and equity as a ground of winding-up" and "*justice and equity*" is that between the competing interests of all concerned.[25]

134. I need not decide whether the availability of an alternative remedy is to feature under the rubric of "just and equitable" or, if an applicant having established that it is just and equitable to wind up the respondent, in the exercise by the court of its discretion to nevertheless refuse a winding up. As expressed by Stegmann J in *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and another* 1989 (4) SA 31 (T),[26] it is difficult to visualise any circumstances that would justify a refusal to issue a winding-up order that would not at the same time be relevant to the question whether it was just and equitable that the company should be wound up.

135. The respondent's further proposition is that as winding-up is a remedy of last resort, it cannot be just and equitable to wind-up a company if there is another remedy and that it is for the applicant to demonstrate that there are no other remedies available. As support for this proposition the respondent relies upon *Muller v Lilly Valley (Pty) Limited* [2012] 1 All SA (GSJ),[27] which provides that *"even if the applicant had established that it was 'just and equitable' to wind up the respondent based upon the partnership principle under section*

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[25] *Moosa N.O. v Mavjee Bhawan (Pty) Limited* 1967 (3) SA 131 (T) at 136H as referred to with approval in *Muller v Lilly Valley (Pty) Limited* [2012] 1 All SA 187 (GSJ), para 16.

[26] At 42H.

[27] At para 33.

81(1)(d)(iii), before a court will grant a winding-up solvent company, it must be satisfied that all alternative means have been investigated and failed".

136. The respondent refers to *Redisa* as supporting this *dictum: "There is one more reason why it was not just and equitable to wind-up the appellants: the court had to be satisfied that the Minister had no alternative means to address complaints before resorting to the drastic expedient of winding-up the appellants."* [28]

137. The Supreme Court of Appeal in *Redisa* continues:

> "*At the heart of the enquiry of whether an applicant should be granted to seek relief in the public interest, lies a consideration of alternative remedies …*"[29]

138. Neither *Lilly Valley* nor *Redisa* support the respondent's proposition that the applicant must demonstrate that it is seeking a winding-up order as a last resort.

139. Weiner J in *Lilly Valley* reasoned that:

139.1. as section 347(2) of the Companies Act, 1973 granted the court a further discretion to issue or refuse a winding-up order under section 344(h) where a winding-up was sought on the basis that it was just and equitable, if the court was of the opinion or was satisfied

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[28] At paras 116.

[29] At 135; see also paras 137 and 143.

that the applicants were reasonably refusing to pursue some or other remedy that was available to them;[30]

139.2. even if an applicant had established that it was just and equitable to wind-up the respondent based upon the partnership principle under section 81(1)(d)(iii) of the Companies Act, 2008;

139.3. before a court would grant a winding-up of a solvent company, it must be satisfied that all alternative means have been investigated and failed.[31]

140. Firstly, *Lilly Valley* is distinguishable. The court was concerned with a winding-up application brought by a director and member of the company in terms of section 81(1)(d)(iii) of the Companies Act and not with a winding-up brought by a creditor under section 81(1)(c)(ii) of the Act. The reason for the importance of this distinction is that section 347(2) of the Companies Act, 1973, which is the foundation for the reasoning of Weiner J, relates only to an application presented by members and is of no application to a winding-up application by creditors, even on a just and equitable basis.

141. Secondly, I, with respect, differ from by Weiner J in her application of section 347(2) in reasoning her finding that a court must be satisfied that all

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[30] At para 32.
[31] At para 33.

alternative means have been investigated and failed before a winding-up order can be granted.

142. Section 347(2) provides that:

> "*Where the application is presented by members of the company and it appears to the court that the applicants are entitled to relief, the company shall make a winding-up order, unless it is satisfied that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.*"

143. Section 347(2) does not provide that a winding-up application cannot be granted unless a court is satisfied that all alternative remedies have been investigated and have failed. To the contrary, section 347(2) provides that the court shall make a winding-up order at the instance of its members unless it is otherwise satisfied that there was some other remedy available and the applicant is acting unreasonably in seeking to have the company wound up instead. The onus in terms of section 347(2) is on those opposing the winding-up to establish on a balance of probabilities both that some other remedy is available to the applicant and that the applicant is acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.[32]

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[32] *Tjospomie* above at 60G.

144. Although *Redisa*[33] refers to *Lilly Valley* as authority that a court has to be satisfied that there are no alternative means to address complaints before resorting to the drastic expedient of a winding-up application, the situation in *Redisa* is distinguishable. As appears above, in that matter the Minister did not have *locus standi* to seek a winding-up order in terms of section 81(1) and the court found that even if the Minister was entitled to apply for the leave of the court to act in the public interest in terms of section 157(1)(d) in bringing a liquidation application under section 81(1) of the Companies Act, the availability of alternative remedies and the failure of the Minister to have pursued those remedies precluded the Minister from being able to make out a case that it was in the public interest for her to be given the right to pursue a winding-up application.[34] The approval by the Supreme Court of Appeal of *Lilly Valley* was in the context of ascertaining whether leave should be granted in terms of section 157(1)(d), and not in the context of section 81.

145. In the circumstances, I do not find that the applicant is required to demonstrate that there is no alternative remedy available to it before being entitled to seek the liquidation of the respondent, whether in terms of section 96 of the FMA or section 38B of the FAIS Act.

146. This is not to say that the availability of other remedies is an irrelevant consideration. It is a relevant consideration, whether in the court determining if it is just and equitable to wind up the respondent, whether in exercise of the

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[33] At para 116.
[34] At para 143.

court's discretion to nevertheless refuse a winding-up order or in the court considering in terms of section 38B(2) of the FAIS Act whether the liquidation of the respondent is "reasonably necessary" in order to protect the interests of the clients of the respondent and for the integrity and stability of the financial sector.

Has the applicant made out a case for the liquidation of the respondent?

147. The respondent has summarised under four headings what it contends are the applicant's grounds for winding-up as appears from the papers, namely:

147.1. allegations relating to the treatment of "*toxic clients*" and the respondent's alleged manipulation of spreads;

147.2. complaints against the respondent by some of its clients;

147.3. an alleged conflict of interest between the respondent and its clients; and

147.4. the ODP licence, or more accurately the absence of such a licence.

148. It is the failure of the respondent to have timeously applied for an ODP licence when it was conducting the business of an OTC derivative provider and its persistence in conducting that business without applying for a licence when it was required to do so, coupled with its obfuscation in its dealings with the applicant as the relevant financial sector regulator, that most strongly militates in favour of the granting of a liquidation order, whether in terms of section 96 of the FMA or section 38B of FAIS.

149. The other grounds for winding-up therefore need not be considered in any detail save to state that such grounds demonstrate the necessity for the respondent to have been licenced as an ODP.

150. As appears above, section 96 of the FMA provides for the winding-up of the respondent in order to achieve the objects of the FMA as set out in section 2 of that Act. The winding-up of the respondent does achieve the objects of the FMA. Particularly relevant are the objects to:

150.1. ensure that the South African financial markets are fair, efficient and transparent;

150.2. increase confidence in the South African financial markets by requiring that securities services be provided in a fair, efficient and transparent manner and contributing to the maintenance of a stable financial market environment; and

150.3. promote the protection of regulated persons, clients and investors.

151. To the extent that the reference in section 96(1)(a)(i) does import the requirement that the winding-up of the respondent must be just and equitable as provided for in section 81(1)(c)(ii) of the Companies Act, the establishment that the winding-up of a respondent as achieving the objects of section 2 of

the FMA would constitute a '*broad conclusion of law, justice and equity as a ground of winding-up'.*[35]

152. It serves none of these objects should a winding-up of the respondent be refused where it conducted the business of an OTC derivative provider for a protracted period, since 14 June 2019, without timeously applying for an ODP license.

153. This is particularly so in relation to the respondent which on its own version has over 300,000 clients, of which 20,000 at any point during the week are transacting on its systems, and where it has paid out over R1 billion to clients in a three-month period.

154. Although the respondent emphasises these figures to persuade the court that it is a substantial business and not, to use the phrase from the respondent's heads of argument, a "fly by night" operation, and that this is a factor to be taken into account in refusing a winding-up order, the magnitude of the scale of the respondent's unlicensed CFD business militates in favour of the granting of a winding-up order. To permit the respondent in the circumstances described above to have conducted such large scale business without having been licensed does not ensure that the South African financial markets are fair, efficient and transparent, does not increase confidence in the South African financial markets by requiring that securities services be provided in a fair, efficient and transparent manner and in

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[35] See *Moosa* as cited above, at 136.

contributing to the maintenance of a stable financial market environment, and does not promote the protection of regulated persons, clients and investors.

155. The high-water mark of the respondent's case in relation to it not being licensed as an ODP, repeated on several occasions in the respondent's answering affidavit, in its heads of argument and in argument before the court was that the court should exercise its discretion against winding-up the respondent in circumstances where the applicant as the regulating authority had (i) delayed since October 2019 in launching liquidation proceedings and (ii) not taken any similar steps against other ODPs who were similarly conducting the business of an OCT derivative provider without being licensed, and that the respondent was being singled out by the applicant.

156. Neither of these contentions have any merit.

157. That the applicant as the regulator may take time to come to grips with the nature of the respondent's business is understandable, which included initiating a formal investigation in terms of section 135 of the FSRA, and affording the respondent an opportunity to explain its position in various interviews, including on 25 and 26 June 2020. It was the respondent who obfuscated as to the nature of its business and involvement in the CFD transactions. Although the respondent may have in October 2019 stated to the applicant that it was a counterparty to the CFD transactions, and which the respondent contends should have triggered what is now a belated reaction by the applicant, the respondent adopted a contrary position in its formal response in January 2020. In any event, the respondent as an

unlicensed ODP cannot rely on the lag between the coming into force of the regulatory framework in February 2018 and the regulating authority enforcing the regulatory framework as a reason to explain why it had not complied with its licensing obligations.

158. Similarly the assertion that other unlicensed ODPs have not been pursued by the applicant cannot constitute a basis for explaining why the respondent need not be licensed or why the applicant should be excluded from pursuing what remedies may legitimately be available to it in discharging its statutory regulatory mandate. The applicant as the regulator must make a start, and that the respondent is the subject of that start cannot weigh in favour of refusing a winding-up order. Now that the applicant has caught up with the respondent and its unlicensed business, the winding-up of the respondent achieves the objects of the Act.

159. Should the respondent have applied and had been licensed as an ODP, the other grounds of complaint levelled against it such as in relation to the client complaints, its treatment of ‘toxic clients’ and its alleged manipulation of spreads would have been regulated, at least to a large extent, by its licensing. The licensing requirements would have required of it to have in place various systems that would presumably have addressed these complaints. I therefore do not rely on those grounds of complaints as a distinct basis for winding-up the respondent and therefore do not need to make any definitive finding in regard thereto, rendering irrelevant any factual disputes that may arise in respect thereof.

160. That there were complaints, whatever the merits thereof, demonstrate the importance of the respondent to have been licensed as an ODP for such complaints to be properly regulated.

161. Section 38B(2) of FAIS requires that the court may take into account whether the liquidation of a financial service provider is "reasonably necessary":

161.1. in order to protect the interests of the clients of the provider; and

161.2. for the integrity and stability of the financial sector.

162. This subsection expands rather than limits the factors that a court can take into account in deciding whether to grant a liquidation order.

163. The phrase "reasonably necessary" requires a particular degree of satisfaction. By way of comparative illustration, the phrase "strictly necessary" also requires a particular degree of satisfaction. When compared, the latter requires a much higher degree of satisfaction than the former. This comparison assists in appreciating that the court need not be persuaded that the liquidation of the respondent is strictly or absolutely necessary, i.e. that it is essential. Something less will suffice.

164. For the reasons why the objects in section 2 of the FMA are achieved by the liquidation of the respondent, so too is the liquidation of the respondent in terms of section 38B of the FAIS Act reasonably necessary in order to protect the interests of the clients of the respondent as a financial services provider, and for the integrity and stability of the financial sector.

165. The respondent contends that there are various alternate remedies available to the applicant and that therefore liquidation as a last resort cannot be granted. I have already rejected the legal proposition that the applicant must demonstrate an absence of alternative remedies to succeed in its application for winding-up. Nonetheless, as I have also found, the availability of alternative remedies is a factor to be taken into account.

166. In establishing whether the liquidation is "reasonably necessary", self-evidently the availability of other remedies feature.

167. The respondent refers to the other remedies notionally or as possibilities, without supporting facts as to their suitability in the present instance. The court is therefore not properly placed to consider whether those remedies would be a suitable alternative to a winding-up order.

168. The respondent's response to the provisional suspension of its FAIS license as a financial service provider is instructive in the consideration of alternative remedies and whether it is reasonably necessary to issue a winding up order. Although the provisional suspension notice prohibits the respondent from conducting any new business with immediate effect, the respondent continued to do new business. The respondent sought to justify its continued doing of new business, notwithstanding the suspension notice, as follows.

169. The respondent explains that various of its existing clients have "*open*" positions in respect of existing CFDs that needed to be closed out in order to prevent financial losses. This is to be distinguished from new CFD transactions entered into by existing clients. Whilst the respondent's position

may be understandable in respect of open positions as at date of suspension of its licence, the respondent was not entitled to enter into new CPD transactions with existing clients after the provisional suspension of its license. This the respondent accepted. But, the respondent explains, its information technology system is unable to distinguish between the transactions necessary to close out the open positions and new CFD transactions with existing clients. The respondent therefore justified its continued business in concluding new CFD transactions with existing clients, although prohibited under the suspension notice, on the basis that it could not do otherwise because of information technology limitations.

170. Whilst I accept on the papers that the respondent's systems could not so distinguish between the two types of trade, this does not justify the respondent in continuing to conduct new business in contravention of the conditions of the suspension notice. The inability of the respondent's information technology systems to make such a distinction demonstrates why it is reasonably necessary that the applicant pursue such remedies as may be necessary to prevent such continued but prohibited new business. As long as the respondent continues to conduct new business in contravention of the provisional suspension of its licence based upon the inability of its information technology to allow it to do otherwise, that militates against an assertion that it should not be placed under winding-up. The respondent has offered no alternate solution to the problem.

171. The respondents have not furnished any undertakings which may have assisted it, and the applicant, in crafting some form of suitable alternative

relief. The respondent has elected to oppose the liquidation proceedings but without advancing any undertakings or substantiated alternate forms of relief to mitigate against the risks of its continued conducting of unlicensed ODP business.

172. The applicant contends that a consequence of the respondent having conducted unlicensed business as an OTC derivative provider results in the CFDs concluded by it as the opposite party to its clients being void.

173. Section 111(1)(a) of the FSRA provides that a person may not provide, as a business or part of a business, a financial product, financial service or market infrastructure except in accordance with a licence in terms of a specific financial sector law, the National Credit Act or the National Payment System Act. A financial service, as defined in section 3(1)of FSRA, includes an intermediary service as defined in section 1(1) of the FAIS Act[36] and any other service provided by a financial institution, being a service regulated by a specific financial sector law.[37] A financial institution is defined in section 1(1) of the FSRA as including a person licensed or required to be licensed in terms of a financial sector law. A financial sector law is defined in section 1(1) of the FSRA as including a law listed in schedule 1 to the Act or a regulation made in terms of such a law. The laws in schedule 1 to the FSRA include both the FMA and the FAIS Act.

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[36] Section 3(1)(e) of the FRSA.
[37] Section 3(1)(i) of the FRSA.

174. Accordingly section 111(1) of the FSRA prohibited the conducting of business by the respondent of:

174.1. the business of an OCT derivative provider as it was not licensed to do so. This is also entrenched in regulation 2 of the FMA regulations;

174.2. further business falling within the ambit of the FAIS Act once its FSP licence was suspended in June 2020.

175. A contravention of section 111(1) has a fine not exceeding R15 million or imprisonment for a period not exceeding 10 years, or to both such a fine and such imprisonment.[38]

176. The applicant contends that the CFD transactions are void, whether because they are unlawful or because the respondent as an unauthorised (unlicensed) person lacked the capacity to conclude those transactions, in a similar manner to an unauthorised trustee not being able to engage in legal proceedings in respect of a trust.[39]

177. Various consequences would flow from a finding that the CFDs that have been concluded are void since 14 June 2019 from when the respondent was required to have lodged its application for a licence, which may entail claims being made by the clients against the respondent and/or the respondent

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[38] Section 266 of the FSRA.
[39] Citing *Luppachini NO and another v Minister of Safety and Security* 2010 (6) SA 457 (SCA).

being entitled to claim from the clients such profits as the clients may have made.

178. The respondent does not accept that the CFD transactions concluded by it as the opposite party to the clients would necessarily be void, even should I find that it was required to be licensed as an ODP, which I have.

179. Whether a transactions would be void was readily accepted by both parties in argument as being a legally complex issue. As the authorities demonstrate, in certain instances transactions concluded contrary to the law are void whilst in others the transactions were not found to be void.

180. I need not and am not able on the papers before me to make any definitive finding as to whether the CFD transactions are void. Nonetheless an important factor to be taken into account is that there are many hundreds of thousands of CFDs transactions may be void, and this should be taken into account in considering whether it would be reasonably necessary to wind-up the respondent in order to protect the interests of the clients of the respondent and for the integrity and stability of the financial sector for purposes of section 38B(2) of the FAIS Act. Similarly in relation to achieving the objects of section 2 of the FMA for purposes of section 96 of the FMA.

181. The respondent's counsel urged upon me that absent my finding that the CFD transactions are void, I could not take into account that the CFD transactions may be void. I disagree. That many transactions may be void cannot be ignored.

182. It is the respondent in having conducted such massive scale unlicensed CFD business that has resulted in the present predicament. Whether or not the respondent is placed under winding-up, the spectre of the CFD transactions being void remains. That spectre is more suitably addressed in a winding-up scenario. The established insolvency framework is more suited to addressing this issue than if the respondent was not placed under winding-up. A duly appointed liquidator can consider whether the transactions are void and to approach the court for the necessary relief in relation thereto. To the extent that any of the many clients wish to advance the position that the CFD transactions entered into by them are void and that they have some or other claim arising therefrom, whether by way of unjustified enrichment or otherwise, they can pursue those claims by proving claims in terms of section 44 of the Insolvency Act. To the extent that a duly appointed liquidator is of the view that the transactions are void and that those clients who profited from the CFD transactions are liable to repay those profits, such as potentially by way of a disposition without value in terms of section 26 of the Insolvency Act, he or she can then seek to advance those claims. These claims, both at the instance of the liquidator or by clients of the respondent are more appropriately addressed under the insolvency framework, for which there is precedent. [40]

183. That the respondent may presently be solvent is predicated upon the validity of the CFD transactions that it has concluded without being licensed since

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[40] See, for example, *Fourie NO and others v Edeling NO and others* [2005] 4 All SA 393 (SCA) and *Janse van Rensburg NNO v Steyn* 2012 (3) SA 72 (SCA).

June 2019. Should those transactions be void, it may be, given that it can be inferred from the papers the respondent has been profitable, the obligations of the respondent to make restoration to its various clients of those profits consequent upon those void transactions will render the respondent insolvent.

184. The winding-up the respondent to address the situation is preferable to not winding-up the respondent and leaving the respondent's 300,000 clients to their own devices in seeking to pursue, whether individually or by way of some or other class action, relief against the respondent in it having engaged in unlicensed CFD business under the umbrella of its FAIS licence.

185. The respondent argues that the applicant did not make out the illegality, and the resultant voidness, as part of its case. The applicant argues that the case can reasonably be made out on the facts that do appear in the affidavits. The applicant has throughout, including in its founding affidavit, contended that the respondent has conducted unlawful unlicensed business. The respondent was forewarned in the applicant's heads of argument of the contention that the CFD transactions were void as a result of the transgressions of the section 111 of the FSRA.[41]

186. A further factor militates in favour of why it is reasonably necessary in terms of section 38B of the FAIS Act to wind-up the respondent as a financial service provider. Section 15 of FAIS provides for a binding code of conduct

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[41] Citing *Schierhout v Minister of Justice* 1926 AD 99 at 109.

for authorised financial service providers, which includes the respondent. Section 16(1) expressly provides that the code of conduct must provide for financial services providers and their representatives to inter alia (i) act honestly and fairly, and with due skill, care and diligence, in the interests of their clients and the integrity of the financial services industry;[42] act with circumspection and treat clients fairly in a situation of conflicting interests;[43] and (iii) comply with all applicable statutory and common law requirements applicable to the conduct of the business.[44] Section 16(2) provides that the code of conduct must contain provisions relating to the making of adequate disclosures of relevant material information, including the disclosure of actual or potential own interests, in dealing with clients.

187. That code of conduct takes the form of the General Code, which has been referred to earlier in this judgment.

188. The General Code, in section 2, imposes a duty on all FSPs to at all times render financial services honestly, fairly, with due care and diligence and in the interests of clients and the integrity of the financial services industry.

189. Sections 3 and 3A of the General Code deal extensively with the duties of FSPs to avoid conflicts of interests, establish prescribed policies in respect thereof and to disclose conflicts.

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[42] Section 16(1)(a).
[43] Section 16(1)(d).
[44] Section 16(1)(e).

190. Section 11 of the General Code requires of all FSPs at all times to have and effectively employ resources, procedures and appropriate technology systems to eliminate as far as possible the risk that clients will suffer financial loss through theft, fraud, other dishonest acts, poor administration, negligence, professional misconduct or culpable omissions.

191. Section 12 of the General Code requires of FSPs to structure their internal control procedures to provide reasonable assurance that all laws are complied with.

192. Section 8A of the FAIS Act requires that the respondent as a financial service provider and its key individual must continue to comply with the fit and proper requirements.

193. The applicant expressly relies upon breaches of the General Code in its founding affidavit in motivating for a liquidation, including that the respondent failed to render financial services fairly, honestly and with due diligence and that it failed to avoid or properly disclose its conflict of interests to its clients.[45] The respondent denies these breaches. It is an issue before me whether there were such breaches, at least insofar as it impacts upon whether a winding-up order is to be granted.

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[45] The applicant also expressly stated in its provisional suspension of the respondent's FSP licence that the respondent's conduct is inconsistent with the personal character qualities of honesty and integrity required of the respondent to be a fit and proper person, as required in terms of section 8A(a) of the FAIS Act

194. The conduct of the respondent and its key individual person as described above, particularly in relation to their obfuscatory interactions with the applicant and their continued conduct of unlicensed ODP business on a massive scale over a protracted period, even after the provisional suspension of the respondent's FSP licence, supports the applicant's contention that they lack the personal character qualities of honesty and integrity required of them to be fit and proper.

195. As the opposite party to the client in the CFD transactions, there is an inherent conflict of interest. As the respondent is the opposite party to the client in a CFD transaction, it is common cause on the papers that should the client make a profit, the respondent makes a loss and *vice versa*. Notwithstanding this inherent conflict of interest, the respondent misrepresented to the applicant in its formal response of 6 January 2020 that it only provided the technology for the clients to transact directly with the market, effectively advancing that it was an intermediary.

196. In incorrectly advancing its position as an intermediary, when in fact it was a party to the CFD transactions, the applicant made use of its FAIS license as a financial service provider to represent to clients that it was authorised to conduct the business of an OTC derivative provider when the licence that was required was an ODP licence under the FMA and the FMA Regulations. There is substance in the applicant's assertion in its founding affidavit that *"[t]he liquidation of JP Markets is reasonably necessary to protect the clients of JP Markets and protect the integrity of the financial sector. A regulated*

institution luring clients under its FSP licence should not be permitted to conduct unregistered ODP business."

197. Notwithstanding the inherent conflict of interest, the respondent obfuscated in an attempt to downplay the conflict of interest by contending that it was in the nature of a CFD. But that misses the point. That it is in the nature of a CFD does not remove the conflict or absolve the respondent from seeking to take steps to mitigate that conflict, as required under the General Code.

198. I have already found that the respondent was not entitled to conduct the business of an OTC derivative provider under its FSP licence. But that does not make the respondent's conduct irrelevant for purposes of assessing whether it complied with its obligations under the FAIS Act, including to act honestly and fairly as part of its fit and proper requirements and to disclose any conflict of interests and take steps to mitigate that conflict of interests. This is particularly so as the respondent invoked its FSP licence as the basis for its being authorised to conduct its business.

199. Rather than the respondent acknowledging the conflict of interests, and seeking to take transparent steps to mitigate against that conflict of interests such as by hedging, it instead underplayed the conflict of interests and sought to manage its exposure as the opposite party to the CFD transactions by, in certain instances, changing the pricing of the spreads offered to certain clients who regularly made profits. Although the respondent took issue that this change of pricing in relation to what is described as "the toxic clients" in the papers was unacceptable behaviour, as asserted by the applicants

(which I need not decide), it is common cause that such changing of pricing did occur in respect of further transactions entered into by that group of clients.

200. The respondent argued that the appropriate disclosure was made in clause 25 of the customer account agreements it concluded with its clients:

> *"JP Markets SA may execute Commodity Contracts for Customer's account(s) either as principal or broker. As broker, JP Markets SA will execute transactions similar to Customer's transaction with another market participant in the financial market. As principal JP Markets SA may not execute transaction similar to Customer in the financial market and hold the opposing transaction in JP Markets SA's Inventory of Commodity Contracts. As a result of acting as principal Customer should realize that JP Markets SA may be acting as your counter party and that JP Markets SA may be placed in such a position that a conflict of duty occurs. JP Markets SA, its Associates or other persons connected with JP Markets SA may have an interest, relationship or arrangement that is material in relation to any Commodity Contract affected under this Agreement. By entering into this Agreement the Customer agrees that JP Markets SA may transact such business without prior reference to the Customer. In addition, JP Markets SA may provide advice and other services to third parties whose interests may be in conflict or competition with the Customer's interests. JP Markets SA, its Associates and the employees of any of them may take positions*

opposite to the Customer or may be in competition with the Customer to acquire the same or a similar Position. JP Markets SA will not deliberately favor any person over the Customer but will not be responsible for any loss this may result from such competition."

201. The applicant asserts in its founding affidavit that the disclosure is confusing and falls short of the statutory expectation of the respondent's obligations as a financial services provider.

202. I agree that the disclosure is confusing. Once the respondent was a counterparty and acting as principal, it was required to be licensed as an ODP. As broker, the respondent states that it would execute a transaction similar to the client's transaction with another market participant in the financial market. But if a broker, it is unclear why it would be itself be executing a transaction with another market participant.

203. The respondent's explanation in its answering affidavit of the disclosure in the agreement exacerbates the confusion: *"On a plain reading, the agreement states that the respondent cannot take the position of both buyer and seller where it is the counterparty to a trade. This is important, as it protects the trader from collusive trading."* The disclosure does not say this, at least not on a plain reading.

204. The disclosure appears to be verbiage to enable the respondent to adopt whichever position it sees fit without clearly disclosing its interests to the clients or what steps it has taken to address any such conflict of interests, such as by hedging. It does not comply with the requirement in the General

Code that representations made and information provided to a client by a financial service provider must be in plain language, avoid uncertainty or confusion and not be misleading.[46]

205. The respondent adopts conflicting positions on whether there is a conflict of interests. In some instances, it denies that there is a conflict of interests,[47] although this conflict is inherent as a consequence of being a counterparty in the CFD transactions. But it also acknowledges that there is a conflict of interests, as appears from its disclosure in its agreement.

206. The respondent by engaging as the opposite party in the CFD transactions placed itself in a conflict of interests position. I do not find that the existence of such conflict of interests is in itself a basis for the respondent to be placed under winding-up but rather its continued obfuscation in relation to that conflict of interests detrimentally impacts its compliance with its obligations under the FAIS Act and the General Code.

207. Paulsen, the respondent's sole director and shareholder and key individual under the FAIS Act, details his personal experience and expertise, having studied at the University of Cape Town where he obtained a BCom Degree specialising in economics and finance and excelling in subjects focusing on equities, bonds, derivatives, international finance, value at risk and investment ethics. Paulsen also describes his employment since graduation, including in the banking sector and then later in a foreign exchange

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[46] Section 3(1)(a)(ii) of the General Code.
[47] Such as in paragraph 232 of the answering affidavit.

brokerage. He describes how he was exposed to institutional level projects, was responsible for managing a team of people who worked on developing new and innovative company integration to expand its user base as well as working on the more technical aspects of the business, including integrations to the Johannesburg Stock Exchange through various platforms to ensure additional derivative instruments could be offered on the existing platform. The respondent describes how he developed a sound understanding of the compliance elements of the business, including in relation to the FAIS Act and how he passed various regulatory exams in relation to the FAIS Act.

208. Notwithstanding Paulsen's experience, the respondent, with Paulsen at the helm, engaged in the obfuscation described in this judgment. Whilst it may be that the applicant as the relevant financial sector regulator may have been slow in appreciating the nature of the derivative instrument business, which the respondent asserts to be the position, that does not constitute a valid reason for the respondent not apply for an ODP licence and for the respondent to have engaged in the obfuscation that it did.

209. When it suited the respondent, it contended that it was rendering intermediary services under FAIS and therefore it was not required to be licensed as an ODP under the FMA and the FMA Regulations. On the other hand when it suited the respondent to advance the position that it was the opposite party in the CFD transaction, it would do so.

210. That the respondent has belatedly on 21 August 2020 lodged its application for an ODP licence is not a factor of sufficient weight to militate against the

granting of a winding-up order. The continued reluctance of the respondent and its deponent Paulsen in his answering affidavit to accept that the respondent was required to be licensed under the FMA as an ODP, at least based on the nature of the respondent's business as disclosed by it, further militates against the honesty and integrity required of the respondent as a fit and proper person under FAIS.

211. The applicant's consideration that the interests of the clients of the respondent as a financial service provider and of the members of the public require that the respondent be liquidated is well-founded. The liquidation of the respondent is reasonably necessary in order to protect the interests of the clients of the applicant and for the integrity and stability of the financial sector, as provided for in section 38B(2)(a) of the FAIS Act,

212. The applicant has established that the respondent is liable to be wound-up, whether under section 96 of the FMA or section 38B of the FAIS Act, in circumstances where the respondent:

212.1. is required to be licensed as an OTC derivative business under the FMA and FMA Regulations but is unlicensed;

212.2. has engaged in the unlicensed business of an OTC derivative provider since 14 June 2019, from when it was necessary for the respondent to have lodged its application for licensing in terms of the FMA Regulations;

212.3. engaged in such unlicensed business on a massive scale, with over 300,000 clients, and in which R1 billon was paid out within three months.

212.4. continued to engage in new business after the provisional suspension of its FAIS licence;

212.5. has obfuscated in its interactions with the applicant as the relevant financial sector regulator, including during the course of a statutory investigation in terms of the FRSA in which the respondent was statutorily bound in terms of section 139(3) to answer all questions fully and truthfully, to the best of its knowledge;

212.6. has not put forward any substantiated alternate remedies to a winding-up order, including any undertakings in relation to its continued business activities if not placed under winding-up;

212.7. remains under the helm of Paulsen as its sole director and shareholder, and key individual.

213. Even should it be that the respondent was not required to be licensed as an OTC derivative provider under the FMA and the FMA Regulations, as the respondent maintains, and that the respondent is not regulated under the FMA, the respondent in any event is liable to be wound-up under section 38B of the FAIS Act for the remaining reasons set out above.

214. I have considered that the respondent employs 70 staff and that the respondent has now applied for an ODP licence. But these factors do not weigh sufficiently that a winding-up order should be refused.

215. I do not intend setting a precedent that wherever a service provider is unlicensed it is to be placed under winding-up in terms of either of the two sections. Each case must be considered on its merits. As appears above, it is not only the failure of the respondent to have been licensed to conduct the business of an OTC derivative provider but also the other factors that I have described above that persuade me that a winding-up order is to granted. To the extent that my findings may have a broader effect on the regulation of the unlicensed conducting of the business of an OTC derivative provider, particularly given the assertions that the others may similarly be conducting such unlicensed business, each case would have to be considered on its own merits.

216. Nonetheless section 96 of the FMA expressly refers to a winding-up to achieve the objects of that Act and section 38B of the FAIS Act similarly provides that the court may take into account whether the liquidation of a respondent is reasonably necessary for the integrity and stability of the financial sector, to the extent that this judgment may advance the regulation of the business of a OTC derivative provider, then that is a factor to be taken into account when deciding whether to grant a liquidation order. This court is specifically empowered, if not enjoined by the FMA and the FAIS Act, to consider interests wider than those of the respondent such as for the integrity and stability of the financial sector as a whole.

RELIEF

217. The applicant has sought a final winding-up order. I mooted with both parties' counsel whether the court was able to grant an order for provisional winding-up and if so whether it would be appropriate relief. Neither parties advanced any reason why a provisional order would not be competent but both parties expressed doubts as to the utility of the provisional order in the present circumstances. The applicant persisted in seeking a final winding-up order on the basis that it had established its entitlement thereto. The respondent contended that the grant of a provisional order would in any event be the death knell for the respondent and therefore the granting of a provisional order would not be of any assistance to it or serve as an alternate remedy to a final winding-up order to enable it to get its house in order. In the circumstances, a final order will be granted.

218. Although the respondent made submissions as to why reserved costs arising out of the matter being before the urgent court on two earlier occasions should paid by the applicant and/or the applicant should be disqualified from recovering those costs in the winding-up of the respondent, the applicant was justified in bringing the winding-up proceedings on an urgent basis. The reason why those proceedings were not heard on the two previous occasions in the urgent court was *inter alia* because of the extent of the papers and the issues concerned which required, in terms of the applicable practice manual and directives of this court, to be decided by way of expedited special motion proceedings.

219. For the sake of completeness, a third party sought to intervene in these proceedings, either as an ostensible creditor of the respondent contending that it was a client of the respondent who was owed monies by the respondent and/or as *amicus curiae*. The submissions that the intervening party sought to advance related to the appropriateness of the appointment by the Master of the High Court of co-liquidators in addition to the liquidators nominated by the applicant. Section 38B(2)(c) of the FAIS Act provides that the court shall appoint as liquidator a person nominated by the applicant. In light thereof, the court is required to appoint those persons nominated by the applicant as liquidator. The submissions that the intervening party sought to make were, in my *prima facie* view, premature, as such representations would only arise consequent upon such decisions the Master may make in due course as to whether he is entitled to appoint co-liquidators in addition to the liquidators appointed by this court in terms of section 38B(2)(c). Upon expressing my *prima facie* view, the intervening party elected to withdraw its participation in these proceedings. Neither the applicant nor the respondent sought any costs against the intervening party. In the circumstances, nothing further need be said by the intervening party's transient participation in these proceedings.

220. Accordingly, I grant the following order:

220.1. the respondent is placed under final winding-up in the hands of the Master of the High Court, Johannesburg in terms of section 38B of the Financial Advisory and Intermediary Services Act, 37 of 2002 and section 96 of the Financial Markets Act, 19 of 2012;

220.2. Corné van den Heever and Tebogo Malatjie are appointed as the joint liquidators of the respondent in terms of section 38B(2)(c) of the Financial Advisory and Intermediary Services Act, 2002;

220.3. the applicant's costs, including any previously reserved costs, are costs in the winding-up of the respondent.

Gilbert AJ

Date of hearing:	25 August 2020
Date of judgment:	7 September 2020
For the Applicant:	E Theron SC
Instructed by:	Mamatela Attorneys Inc, Johannesburg
For the Respondent:	J Muller SC and P R Long
Instructed by:	Hanekom Attorneys, Cape Town