

THE FINANCIAL SERVICES TRIBUNAL

Pierre Lofaro LL.D. – Chairman
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FST 06/2018

Signia Holding Ltd (C 62958);
and
Satabank plc (C 45026)

Vs.

Malta Financial Services Authority

Today, Monday, the ninth (9th) day of December of the year two thousand and nineteen (2019)

The Tribunal,

Having seen that the case was adjourned for today for the Tribunal's decision on a preliminary plea raised by the Malta Financial Services Authority ('the Authority') in this appeal lodged by Signia Holding Ltd and Satabank plc ('the Appellants'); Signia Holding Ltd ('the Shareholder') being the holder of practically all the shares of Satabank Plc ('the Bank').

Having seen the appeal lodged by the Appellants on 13 November 2018 whereby for the reasons mentioned in their appeal application and '*all those that shall result from the evidence and pleadings in this appeal*' they requested, *inter alia*, the Tribunal to revoke a number of decisions taken by the Authority, namely:

"(1) The Directive of 15 October 2018 appointing Ernst & Young Ltd (EY) as a competent person (the "Competent Person") to advise and monitor the Bank in the proper conduct of its business in terms of Article 29(1)(b) and fixing the remuneration of the Competent Person in terms of Article 29(1)(g) of the Banking Act (limitedly in respect of the fees fixed in favour of the Competent Person in terms of Article 29(1)(g) for the purposes of this appointment at the rates for the so-called "International team"; (2) The Directive of the 20 October 2018 issued in



terms of Article 9 and 4B of the Banking Act by which the Bank has been directed as follows: (i) to refrain, cease and desist from taking further deposits into accounts of its current customers, (this includes the acceptance of any payment in any account of a customer held with the Bank); (ii) to refrain, cease and desist from accepting any new customers; (iii) to refrain, cease and desist from affecting or processing any withdrawal or outward transfers from any accounts held by the Bank; and (iv) to refrain from effecting any transfer, sale, placement or any other movements of the Bank's or the customers' assets; and (3) The Directive of the 20 October 2018 to upgrade the appointment of the Competent Person from an appointment in terms of article 29(1)(b) of the Banking Act to an appointment in terms of article 29(1)(c) and 29(1)(d) of the Banking Act; and to give such directions within its power as it may consider necessary or appropriate."

In paragraph 58 of their appeal application the Appellants made the following reservation:

"As of the date of this appeal, the Bank's shareholders have not been formally notified with the Authority's Directive dated 20 October 2018 and the reasons (if any) therefor. The Bank's shareholders were made aware of this Directive through the Public Notice issued by the MFSA on 20 October 2018. The Bank's shareholder through its legal counsel requested the Competent Person for a copy of the Directive/s of 20 October 2018 regarding the matters concerning the Bank set out in the Authority's public notice dated 20 October 2018. This request was refused by the Competent Person, and this notwithstanding the fiduciary and other duties it owes to the Appellants. The Appellants are therefore submitting the extant appeal to preserve all their rights. Given that the Appellants were not provided with the reasons for the Authority's Directive dated 20 October 2018 nor were they provided with a reasonable opportunity to contest such reasons they reserve the right to bring such evidence, make such submissions and file any other proceedings according to law in order to contest the measures taken by the Authority, once they are given access to the Directive dated 20 October 2018 (and/or any other directive) in full."

Having seen the Authority's reply whereby, *inter alia*, it rebutted the Appellants' appeal as follows:-

"Preliminary, Dr Zammit Pace and Dr Shaw must provide evidence of their mandate;"

Having seen the minutes of the hearing of 6 December 2018 wherein, amongst other matters



- (1) The Appellants (a) stated that the full text of the Authority's directive of 20 October 2018 was handed over to their lawyers on 3 December 2018, (b) referred to their reservation made in paragraph 58 of their appeal application, quoted above, and (c) asked the Tribunal to authorise them to file an application wherein they will request the Tribunal to amend their demands as a result of new information emerging from the wording of the full text of the directive of the 20 October 2018.

The Authority did not object to the Appellants' request. However, it reserved its right to reply to any amendment made to the demands of the original appeal application.

The Tribunal acceded to the Appellants' demand.

- (2) The Authority clarified its preliminary plea regarding Dr. Zammit Pace's and Dr. Shaw's mandate, stating that it referred only to the Bank and not to the Shareholder.

Having seen the Appellants' application¹ whereby they requested the Tribunal to add another demand in their appeal application, namely that Tribunal revokes:

"(Without prejudice to the request in Paragraph (3) herein above). The Directive of 20 October 2018 in respect of: (i) the fees fixed in terms of article 29(1)(g) in favour of the Competent Person for the purposes of its appointment under article 29(1)(c) and 29(1)(d) of the Banking Act at the rates for the so-called "International team": and (ii) that part of the Directive of 20 October 2018 whereby the Competent Person is authorised to issue to the Bank an invoice in the amount of Euro 100,000 upon its appointment as a Competent Person against which incurred costs and expenses will be charged"

Having seen the Authority's reply² whereby, as far as the preliminary pleas are concerned, after reiterating that Dr. Zammit Pace and Dr. Shaw must provide evidence of their mandate in representing the Bank, the Authority added the following preliminary plea:

"The Appellants filed the Amended Application in question on 14 December 2018 whilst the Directive was notified to Satabank plc on 20 October 2018. In terms of Article 21(8) of the MFSA Act, an appeal to this Tribunal shall be made in writing by not later than thirty (30) days from the date the decision or act in question has been notified to the

¹ Commencing on page numbered 8.

² Commencing on page numbered 10.

aggrieved person. The Appellants have therefore failed to file their appeal application within the prescribed time and accordingly the Amended Application should be struck out from the records of this case.”

Having seen the note filed by the Authority on 14 March 2019³ wherein it stated, *inter alia*, that:

“Following a review of the documents filed by the Appellants as evidence in the proceedings before this Tribunal in the sitting of 6 March 2019, the MFSA is hereby withdrawing its preliminary plea for Dr. Zammit Pace and Dr. Shaw to provide evidence of their mandate to represent Satabank plc. This is without prejudice to the other preliminary plea raised by the MFSA in the context of the Amended Application filed by the Appellants on 14 December 2018 and which preliminary plea still remains in effect.”

Having seen the minutes of all the hearings which were held by the Tribunal, the transcripts of the oral submissions of the parties’ counsels, the documents which were filed by the parties and all the other acts of the proceedings.

Having seen that the appeal was adjourned for today for the Tribunal’s decision on the preliminary plea raised by the Authority in its reply to the Appellants’ application to amend their appeal application, namely that the Appellants’ request cannot be entertained because more than thirty days elapsed from the date of the Authority’s directive of 20 October 2018 till the date of the Appellants’ application to amend their appeal application which was filed on 14 December 2019.

The Tribunal,

Will, prior to making its considerations, summarise the arguments of the parties.

The Authority argues that there are two issues involved, namely

- (1) The right of any aggrieved person to lodge an appeal against a decision of the Authority taken under the Banking Act as is envisaged in Article 10 of that Act, and
- (2) The obligation of the Authority to notify an aggrieved person with its decision.

³ Page numbered 15.

With regard to the latter issue the Authority maintains that it was only bound to notify the licenced holder (in this case the Bank) with its decision and no one else. Were it not so, the Authority would find itself in the impossible situation of having to determine who all the aggrieved persons are. In the case of a bank these would include the shareholders, depositors, creditors and who knows who. It is for this reason that the Authority notifies only the licenced holder, as the licenced holder is the only definite aggrieved person and the only person regulated by the Authority. Trying to determine all potential aggrieved persons is an impossible task. It is also for this reason that the Authority immediately issues a public notice so that all potential aggrieved persons become aware that the Authority has made a decision. In present case, the thirty day period, according to the Authority, began to run from the date when the Authority's decision was notified to the Bank.

The Authority further argues that the Bank was notified with the full decision on 20 October 2018 at 13.30 hours when it was delivered to the Bank's CEO, Mr. Mario Gauci. At that point in time Ernst & Young were not yet the Competent Person in charge of the Bank. Ernst & Young were still providing an advisory service to the Bank. It was only after the notification of the decision to Mr. Mario Gauci that Ernst & Young took over its role as the Competent Person. If the Bank's CEO did not advise the Bank's shareholders, it was certainly not the Authority's fault.

On their part, the Appellants state that the Authority's preliminary plea should be rejected because the Authority did not object to their request, made during the Tribunal's hearing on 6 December 2018, to file an application requesting the Tribunal to allow them to amend their demands. As a result the Tribunal acceded to their request. The Authority cannot now argue that the additional demand was made after the thirty day period established by the law elapsed.

As far as the Bank is concerned, the Appellants argue that no evidence was produced by the Authority that there was an agreement between Mr. Mario Gauci, the Authority and the Competent Person that Mr. Gauci was to advise the rest of the Board of Directors or that Mr. Gauci did indeed advise the rest of Board of Directors. Once the directive was notified to Mr. Gauci, Mr. Gauci became answerable only to the Competent Person as Article 29 of the Banking Act clearly states that as soon as the Competent Person is appointed such person takes over the powers of the Board of Directors and the Shareholders.

As far as the Shareholder is concerned, the Appellants argue that Mr. Gauci does not represent it. They state that the Shareholder was made aware of the Authority's directive of 20 October 2018 through the public notice which was issued by the Authority on that same day. This public notice was a redacted



version of the full text of the Authority's decision and did not contain the facts which led to the Appellants' request to amend their demands in the appeal application.

The Appellants refer to a letter dated 12 November 2018⁴ sent by the Shareholder's counsel to Ernst & Young, the Competent Person, requesting it *'to provide us with a copy of the directive/s concerning the Bank referred to in the MFSA public notice dated 20 October 2018' by not later than 'close of business at 5.30pm today'*.

Ernst & Young replied on the same day⁵ stating:

'The terms on which the Competent Person has been appointed in order to carry out its duties and the directives set by the MFSA are confidential between the MFSA and the Competent Person. Consequently, Signia Holding Ltd., as a shareholder of the Bank, does not have a right to view these terms.'

'Should you have any further queries in relation to the MFSA directives, I would suggest that you contact the MFSA directly.'

As a result the Appellants made the reservation in paragraph 58 of their appeal application which was filed on the following day, 13 November 2018.

On 13 November 2018 as well, the Shareholder requested, *via* email, the Director General of the Authority to provide it with a full version of the text of the directive issued on 20 October 2018⁶. The Authority did not even acknowledge this email. On 27 November 2018 the Shareholder, through their counsel, again requested the Authority to provide it with a full text of the directive of 20 October 2018. A copy of the directive was eventually received by the Shareholder on 3 December 2018.

The Appellants further argue that the Authority should have notified the Shareholder, as clearly it is an aggrieved person that has a right to lodge an appeal to this Tribunal under Article 10 of the Banking Act and furthermore the Authority was aware that the Shareholder considered itself to be an aggrieved person precisely because of the correspondence that was exchanged between its legal counsel and the Competent Person and the Authority within the thirty-day period following the 20 October 2018 when the Authority issued its directive.

⁴ Document marked with the letter C appended to the appeal application.

⁵ Document marked with the letter D appended to the appeal application.

⁶ Documents marked with the letters E and F on page numbered 9 *et seq.*

The Appellants also refer to Article 21(8) of the Malta Financial Services Authority Act which states that an appeal is to be made by not later than thirty (30) days *'from the date the decision or act in question has been notified to the aggrieved person.'* According to the Appellants here the law is not referring to the licenced holder only but also to any aggrieved person.

The Appellants state as well that the Shareholder is appealing both in its own name and on behalf of the Bank. This could not be otherwise as Ernst and Young, the Competent Person controlling the Bank with immediate effect on 20 October 2018 when the directive was issued, had no interest in appealing the directive appointing it and establishing its significant fees. The Appellants referred to a decision which this Tribunal gave regarding Nemea Bank⁷.

For ease of reference the Tribunal will now reproduce the articles of the law which are relevant to determine the Authority's preliminary plea.

Article 10 of the Banking Act states:

Any person who is aggrieved by a decision and, or measure taken pursuant to the Act, and any regulations made or Banking Rules issued thereunder, or the CRR by the competent authority, may appeal against the decision and, or measure to the Financial Services Tribunal within such period and under such conditions as established under the Malta Financial Services Authority Act.

Article 21(8) of the Malta Financial Services Authority Act states:

An appeal within the terms of sub-article (9) to the Tribunal shall be made in writing explaining clearly the grounds for the appeal by not later than thirty days from the date the decision or act in question has been notified to the aggrieved person, and the Tribunal shall proceed to deal with any matter before it with utmost urgency and shall give its decision without delay.

The Tribunal will now proceed to make its considerations.

Both parties agree that an aggrieved person may lodge an appeal to this Tribunal from a decision taken by the Authority under the Banking Act as is

⁷ Heikki Niemelä, Mika Lehto each in their personal capacity as directors of Nemea Bank plc; Nemea Plc; Nevestor SA; and Nemea Bank plc vs. Malta Financial Services Authority decided on 16 January 2017. The Tribunal's decision was confirmed on 5 November 2018 by the Court of Appeal in its Inferior Jurisdiction.

envisaged in Article 10 of that Act. Both parties also agree that in this case the Shareholder is an aggrieved person.

The Appellants' argument that the Authority's preliminary plea should be rejected on the ground that the Authority did not object to their request, made during the Tribunal's hearing on 6 December 2018, to file an application requesting the Tribunal to allow them to amend their demands is unfounded. It is true that the Authority did not object. However, the Authority stated that it was reserving its right to reply to an amendment made to the demands of the original appeal. The exact wording of the minutes being: ' *Dr. Degabriele, għall-Awtorità appellata ma joġġezzjonax salv illi jkollu d-dritt li jirrispondi għal kwalunkwe emenda fir-rikors li se jsir kif mitlub*'. The Authority's stance was very clear. It was not objecting to the Appellants' request but it was not relinquishing its right to defend itself in such a manner as it would deem fit.

The Tribunal agrees with the Authority that the Bank was duly notified on 20 October 2018 as the full text of the directive of same date was served on the Bank by delivering it to Mr. Mario Gauci, the CEO of the Bank. The Tribunal refers to Article 187(4)(a) of the Code of Organisation and Civil Procedure which states that '*In the case of a body having a distinct legal personality, service on such body shall be effected by leaving a copy of the pleading at its registered office, principal office, or place of business or postal address with an employee of such body...*'. The Tribunal sees no reason why this principle should not also apply to the service of directives made by the Authority.

As for the Shareholder, the Appellants are correct in stating that that Mr. Mario Gauci does not represent it. Once more, the Tribunal refers to Article 187 of the Code of Organisation and Civil Procedure and notes that in the Shareholder's case it was not served with the full text of the the Authority's directive of 20 October 2018.

Although the Tribunal is conscious of the fact that the Authority cannot possibly determine who all the aggrieved persons are in circumstances similar to the circumstances of this case. However, in the Tribunal's opinion and in this particular case, the Authority was manifestly unfair with the Shareholder. The Shareholder begged the Authority to provide it with a copy of the full text of the directive of 20 October 2018. The Authority knew that the Shareholder was an aggrieved person and therefore had a right to lodge an appeal to this Tribunal under Article 10 of the Banking Act. Yet it failed to deliver the required document to the Shareholder when the latter asked for it. As a result of this manifestly unfair treatment the Authority cannot now complain that the Appellants' request to amend their original demands was filed after the thirty-day period had elapsed. Therefore, the Tribunal is dismissing the Authority's preliminary plea.

The Tribunal is conscious that cases such as the one being decided depend entirely on the particular facts of the case for their determination and in similar cases the manner in which an Appellant or the Authority act or fail to act is detrimental.

The Tribunal is therefore dismissing the Authority's preliminary plea with costs against it.

Three handwritten signatures in blue ink are arranged horizontally. The first signature on the left is highly stylized, featuring a large loop at the top and a long horizontal stroke at the bottom. The middle signature is more legible, appearing to read 'Ayman' with a long horizontal stroke underneath. The signature on the right is also stylized, with a large circular loop at the top and a long horizontal stroke at the bottom.