

112 SAUNDERS v. JOHANNESBURG STOCK EXCHANGE,  
COMMITTEE OF.

1914. November 5. BRISTOWE, J.

Ultra vires.—*Stock Exchange.—Committee.—Control of business.—  
Alteration of completed bargains.*

A resolution passed by the committee of a stock exchange that interest should be paid on all postponed bargains made by members of the exchange constitutes an alteration of a completed bargain.

Such resolution is *ultra vires* the committee under a clause authorising them to manage and control the mode in, and the conditions subject to which, the business of the exchange shall be transacted.

Application for an order declaring a resolution passed on October 29th, 1914, by the respondents, *ultra vires*, and restraining them from putting the same into effect.

The applicant was a member, and the respondents, the chairman and the members of the Committee of the Johannesburg Stock Exchange. On account of a state of war existing between certain European and other powers, the respondents on August 1st, 1914, decided to close the Exchange and passed a resolution to the effect that all bargains at that time existing should mature on the expiration of the war. On October 29th, 1914, the respondents passed the resolution to which the applicant objected, and which read as follows:

“ All bargains which have matured since the Stock Exchange closed or which may hereafter mature before the Stock Exchange reopens, shall bear interest at the rate of eight per cent. per annum from the date of maturity until the completion of the bargain by payment and delivery, or until tender of payment by the buyer, or until seven days from the reopening of the Stock Exchange as the case may be.

“ The purchaser upon exercise of an option or call which under ordinary circumstances would have matured during the period the Exchange is closed, shall pay interest upon the purchase price at the rate of eight per cent. per annum, from the date of maturity.

“ Interest at the rate of eight per cent. per annum shall be charged on moneys paid in respect of loans of shares from the date upon which return of the shares may hereafter be tendered.”

The resolution had in terms of the Rules and Regulations of the Johannesburg Stock Exchange been posted in the hall of the Exchange and the respondents had announced their intention of

enforcing the provisions thereof against all members of the Exchange.

An affidavit filed by the Chairman of the respondent committee denied that the resolution was *ultra vires*. He stated that the position was practically the same in respect of share transactions between members as though a moratorium had been declared. That respondents, recognizing the equity of the principle of charging interest and otherwise assisting persons, the payment of whose debts had been postponed owing to the war, which principle had been recognised by the legislature in the Public Welfare and Moratorium Act (No. 1 of 1914, Special Session), decided, in the exercise of their powers, to make provisions which they considered fair and equitable for the members of the Exchange in their dealings, and accordingly they passed the said resolution. That the resolution was not an alteration of or addition to the rules, but a temporary measure adopted by them in the best interests of the members and in a time of great stress, upheaval and necessity. That owing to the Exchange being closed the procedure prescribed by Rules 20 and 21 could not be followed in respect of the said resolution.

The relevant rules of the Johannesburg Stock Exchange were as follows:

Rule 2. The Committee shall have the entire management and control of the affairs of the Stock Exchange, including the regulation of the transaction of business on the Stock Exchange; . . . the mode in and conditions subject to which the business of the Stock Exchange shall be transacted, and the conduct of the persons transacting the same; . . .; and for the regulation of any of the matters hereinbefore mentioned; and may from time to time amend, alter or repeal such rules or regulations, and make any new rules and regulations for the purposes aforesaid.

Rule 20. Any member of the committee may propose in writing any alteration of, or addition to, the rules. Such proposals shall be left with the Secretary, and a copy of the proposed alteration or addition shall be sent by the Secretary to each member of the Committee, and shall also be posted on the Notice Board of the Stock Exchange for fourteen days, after which it shall be considered by the Committee.

Rule 21. Any alteration of, or addition to, these Rules shall, after adoption by the Committee, be posted on the Notice Board of the Stock Exchange for three business days, and shall then come

into force, unless a ballot be demanded by a requisition signed by not less than fifty members, in which case a ballot shall be taken on a date to be fixed by the Committee. The adoption or rejection of the alteration or addition shall be decided by a majority of votes recorded at such ballot.

Rule 91. The Stock Exchange does not recognise in its dealings any other parties than its own members. Every bargain, therefore, whether for account of the member effecting it, or for account of a principal, must be fulfilled according to the Rules, Regulations and usage of the Stock Exchange.

Rule 118. All options, time bargains, and other Stock Exchange transactions, expiring or falling due on a Sunday, or on a Stock Exchange holiday, shall become due on the first business day following.

*J. van Hoytema*, for the applicant: The resolution imposes a new condition on completed contracts and therefore is an alteration of an existing contract. This is *ultra vires* the respondents under Rule 2, which gives them power over the procedure in transactions only. (*Laws of England*, vol. 27, p. 215; *Union Corporation v. Charrington*, 8 Com. Cas. 99; *Benjamin v. Barnett*, 8 Com. Cas. 244; *Mew's Digest*, 1903, Col. 245; *Yabbicom v. King*, 1899, 1 Q.B. 444). Further, once the committee have closed the Exchange they cannot make regulations.

[BRISTOWE, J.: You would have to go the length of arguing that as long as the exchange is closed the committee has no power to act.]

Next, the resolution is void for unreasonableness. While the vendor is not bound to deliver shares, the purchaser is obliged to pay interest. Not only that, but the resolution is retrospective. See *Laws of England* (vol. 23, p. 396), and *Kruse v. Johnson* (1898, 2 Q.B. 91).

[BRISTOWE, J.: The mere fact that the Court thinks a resolution unreasonable is not sufficient; there is no evidence of unreasonableness here. LORD ESHER laid down in *Dawkins v. Antrobus* (1881, 17 Ch.D. 615), that a bye-law is only void if it is so unreasonable that an ulterior motive must be inferred.]

*P. Duncan*, for the respondents: As to unreasonableness the Court can only consider whether the resolution was honestly arrived at (*Herzberg v. Johannesburg Stock Exchange*, 1903, T.H. 336).

Rule 2 is wide enough to allow the Committee to pass the resolution in question; the resolution is a necessary sequel to the resolution closing the Exchange.

[BRISTOWE, J.: It seems to me to amount to a claim that the Committee is not bound by its own Regulations, No. 91, for instance.]

Under Rule 33 the Committee has power to dispense with the enforcement of any of the rules, but I admit that that power was not employed here.

*Van Hoytema*, in reply.

BRISTOWE, J.: This is an application by Mr. Saunders, who is a member of the Stock Exchange, for a declaration that a certain resolution passed by the Committee of the Stock Exchange on the 29th October, 1914, is *ultra vires*, and asking for an order restraining the Committee from carrying that resolution into effect. This is an important matter and if I had any doubt about it, I would certainly have taken time to consider what decision I ought to give. But I do not think that any further deliberation would alter my opinion and therefore I give judgment at once.

There is no doubt that rules and regulations of a body like the Stock Exchange, just like the rules and regulations of an ordinary club, or the Articles of Association of a Company constitute a contract between its members and that is the reason why any particular member, if the contract is broken to his disadvantage, has the right to come to the Court for the appropriate remedy. In this case, two resolutions were passed by the Committee of the Stock Exchange. The first is not challenged. It was a resolution closing the Stock Exchange during the war period and postponing the settling of bargains until it was re-opened. I am not concerned with the validity of that resolution. It is not disputed that the closing of the Stock Exchange is within the powers of the Committee, and if so then the postponing of bargains follows as a matter of course. With all that I am not concerned. But on the 29th October a further resolution was passed which is challenged and which is to the effect that in the case of all postponed bargains interest shall be paid at the rate of eight per cent. up to the date on which these bargains are carried out. Mr. *Van Hoytema* objects to this on several grounds, on two of which I am against him. He says that the Committee have no power to pass a resolution of this kind because it amounts to making bargains while the Stock Exchange is closed. I do not think that this is so. It seems to me that in order to substantiate that objection Mr. *Van Hoytema* would have to go so far as to say that during any time

the Stock Exchange is closed the Committee has no power to pass resolutions. I do not think on the construction of these rules it is possible to say that. Then he says that this resolution is unreasonable. I am not prepared to say on the evidence before me that it is unreasonable. As I understand it—I do not know whether I understand it rightly—but so far as I understand it, the resolution means that all persons, who by reason of the fact that the settlement day is postponed remain in possession of money which they would otherwise have to pay, would have to pay interest on the money. I am not prepared to say that this is unreasonable. It sounds *primâ facie* reasonable. But even if it were unreasonable, I doubt whether the Court would have power to interfere. The rule in these cases is laid down in *Dawkins v. Antrobus* (17 Ch. D. 615), which says that the only question which the Court has to consider is whether the regulation challenged is *bona fide* and within the terms of the power of the framing body. If so then the Court has no right to interfere even if the Court thinks it is unreasonable. The persons who have to make the regulation are the judges, and unless the unreasonableness is so great that the Court can say the regulation is not *bona fide*, the Court cannot interfere. On both these points therefore I am against the arguments put forward on the part of the applicant.

The other objections stand on a very different footing. They are serious objections. One is that the Committee of the Stock Exchange have no power by resolution to alter a contract which has been already made, and the other is that the Committee have no power to interfere with the rights of parties by resolution. Unfortunately, in the present case the resolution has not taken the form of a regulation. It is not necessary to decide the point, but it seems to me, as far as I have gone into the rules, that if this had been done through the forms provided by Rules 20 and 21 and put into the form of a regulation, it might have been valid. I know there is a difficulty in making a regulation because the Stock Exchange is closed, but it might have been done before the Stock Exchange was closed. If it had been done in that way I doubt very much if the objection could have arisen. But the resolution in question is not a regulation and it has not the validity of a regulation. It was passed by the Committee under the powers vested in it by regulation 2. Now I do not think that the powers conferred by Regulation 2 are wide enough to authorise this resolution. First I do not think it authorises any

interference with bargains already made. The clause speaks of regulating the transaction of business on the Stock Exchange and the mode in, and conditions subject to which, such business is to be transacted. It is a mere power to regulate the mode in which and the conditions subject to which members of the Stock Exchange are to do business with each other. This is a very different thing from a power to alter or amend actual bargains which members of the Stock Exchange have already made, and I do not think the Regulation wide enough to cover that. Another difficulty is that the resolution amounts to saying that the Committee of the Stock Exchange are not bound by their own regulations. Now it seems to me that the regulations are as binding on the members of the Committee as they are binding on every other member. Rule 91 provides that every bargain, whether for account of a member effecting it, or for account of a principal, must be fulfilled according to the rules and regulations and usage of the Stock Exchange. So that every bargain must be carried out according to the Rules and Regulations of the Stock Exchange, and if the Committee say that a particular class of bargains are to be carried out in some other way, carried out in a way which is not justified by any regulation, they are assuming a power to suspend the regulations. It seems to me that the regulations of the Exchange are binding on the members of the constituted committee just as much as they are binding on other members. For these reasons I do not think that Rule 2 gives the Committee the power to make this resolution. One does not want to interfere with what may be a very proper provision, having regard to the abnormal circumstances existing at the present time, and if this had been done by way of regulation there would probably never have been any difficulty, but when it comes before the Court I must deal with it on what seems to me to be the proper construction of the regulations. For the reasons given I think the application must succeed and there must be a declaration that the resolution passed on the 29th October is *ultra vires* the Committee, and there must be an interdict restraining the Committee from acting on that resolution and the applicant is entitled to his costs.

Applicant's Attorneys: *Hearle & McEwan*; Respondents' Attorneys: *Webber & Wentzel*.

[G.W.]