

1. **Chim-Nir Flight Services Ltd.**
 2. **Nissim Ben-Ezra**
 3. **Yoav Ben-Zvi**
 4. **Yosef Barel**
 5. **Dov Grodman**
 6. **Shlomo Haber**
 7. **Avraham Werber**
 8. **Ilan Sela**
 9. **Aryeh Etzioni**
 10. **Dov Peleg**
 11. **Baruch Rothman**
 12. **David Shavit**
 13. **Yehoshua Shamrat**
 14. **Gidon Shatil**
- v
- The Tel Aviv Stock Exchange Ltd.**

The Supreme Court sitting as the Court of Civil Appeals
[21 February 2007]

Before Deputy President E. Rivlin, Justices E. Arbel, D. Cheshin

Appeal of the decision of the Tel Aviv District Court handed down on December 22, 2003, in TA 2367/00 by Judge Dr. O. Modrik.

Legislation cited:

Securities Law, 5728-1968, s. 46

Israeli Supreme Court cases cited:

- [1] CA 4275/94 *Tel Aviv Stock Exchange Ltd. v. A.T. Management of Torah Literature Database Ltd.* [1997] IsrSC 50(5) 485.

- [2] CA 1094/95 *Tel Aviv Stock Exchange Ltd. v. Chim-Nir Flight Services Ltd.* [1997] IsrSC 55(1) 634.
- [3] CA 467/04 *Yetach v. Mifal HaPayis* (2005) (unreported).
- [4] HCJ 555/77 *Babchuk v. Tel Aviv Stock Exchange* [1978] IsrSC 32(2) 377.
- [5] CA 1326/91 *Tel Aviv Stock Exchange Ltd. v. Marcus* [1992] IsrSC 46(2) 441.
- [6] CA 6296/00 *Kibbutz Malkiya v. State of Israel* [2004] IsrSC 59(1) 16.
- [7] CA 145/80 *Vaknin v. Beit Shemesh Local Council* [1982] IsrSC 37(1) 13.
- [8] CA 2061/90 *Marzeli v. State of Israel - the Ministry of Education and Culture* [1993] IsrSC 47(1) 802.
- [9] CA 5586/03 *Freemont v. A.* (2007) (unreported).
- [10] CA 10083/04 *Gooder v. Modi'im Local Council* (2005) (unreported).
- [11] CA 2625/02 *Nahum v. Dornbaum* [2004] IsrSC 58(3) 386.
- [12] CA 10078/03 *Shatil v. State of Israel* (2007) (unreported).
- [13] CA 915/91 *State of Israel v. Levy* [1994] IsrSC 48(3) 45.
- [14] CA 243/83 *Municipality of Jerusalem v. Gordon* [1985] IsrSC 39(1) 113, 134-136.
- [15] CA 2906/01 *Municipality of Haifa v. Menora Insurance Ltd.* (2006) (unreported).
- [16] CA 1678/01 *State of Israel v. Weiss* [2004] IsrSC 58(5) 167.
- [17] CA 1068/05 *Municipality of Jerusalem v. Maimoni* (2006) (unreported).
- [18] HCJ 64/91 *Khilef v. Israel Police* [1993] IsrSC 47(5) 563.
- [19] CA 653/97 *Baruch and Tzipora Center Ltd. v. Municipality of Tel Aviv-Jaffa* [1999] IsrSC 53(5) 817.
- [20] CA 3889/00 *Lerner v. State of Israel* [2002] IsrSC 56(4) 304.
- [21] CA 862/80 *Municipality of Netanya v. Zohar* [1983] IsrSC 37(3) 757.
- [22] CA 1639/01 *Kibbutz Maayan Tzvi v. Karishov* [2004] IsrSC 58(5) 215.
- [23] CA 8526/96 *State of Israel v. A.* (2005) (unreported).

- [24] CA 429/82 *State of Israel v. Suhan* [1988] IsrSC 42(3) 733.
- [25] CA 196/90 *Yirmiyahu Eini Construction Co. Ltd. v. Krayot Committee for Local Planning and Building* [1993] IsrSC 47(2) 111.
- [26] CA 5604/94 *Chemed v. State of Israel* [2004] IsrSC 58(2) 498.
- [27] CA 3108/91 *Rabie v. Veigel* [1993] IsrSC 47(2) 497.
- [28] CA 6970/99 *Abu Samara v. State of Israel* [2002] IsrSC 56(6) 185.
- [29] CA 1081/00 *Avnel Distribution Co. Ltd. v. State of Israel* [2005] IsrSC 59(5) 193.
- [30] CA 4707/90 *Mayorkas v. State of Israel –Ministry of Health* (1991) (unreported).
- [31] CA 491/73 *Gedolei Hacholeh Ltd. v. Machruz* [1975] IsrSC 29(2) 31.
- [32] HCJ 5933/98 *Israeli Documentary Filmmakers Forum v. President of the State* [2000] IsrSC 54(3) 496.
- [33] HCJ 8850/02 *Pastinger v. Minister of Justice* [2004] IsrSC 58(2) 696.
- [34] CA 735/75 *Roitman v. Aderet* [1976] IsrSC 30(3) 75.
- [35] CA 732/80 *Arens v. Beit El – Zichron Yaakov* [1984] IsrSC 38(2) 645.
- [36] LCA 1565/95 *S'char V'Sherutei Yam Ltd. v. Shalom Weinstein Co. Ltd.* (2000) (unreported).
- [37] LCA 2422/00 *Ariel Electrical Engineering Traffic Lights and Maintenance v. Municipality of Bat Yam* [2002] IsrSC 56(4) 612.
- [38] MCApp 2236/06 *Hamami v. Ohayon* (2006) (unreported).
- [39] HCJ 731/86 *Micro Daf v. Israel Electric Co.* [1987] IsrSC 41(2) 463.
- [40] CA 294/91 *Kehillat Yerushalayim Jewish Burial Society v. Kestenbaum* [1992] IsrSC 46(2) 464.
- [41] CA 3414/93 *On v. Diamond Exchange Enterprises (1965) Ltd.* [1995] IsrSC 49(3) 196.
- [42] LCA 1784/98 *Amidar v. Manada* [1999] IsrSC 53(4) 315.
- [43] CA 4980/01 *Adv. Shalom Cohen (Official Receiver) v. Glam* [2004] IsrSC 58(5) 625.

For the appellants – A. Weinroth, O. Bar, D. Zimmerman

For the respondent – Y. Elhawi

JUDGMENT

Justice E. Arbel

In this appeal of the judgment of the Tel Aviv-Jaffa District Court (Judge Dr. O. Modrik), the Court is asked to rule that the respondent, the Tel Aviv Stock Exchange Ltd. (hereinafter: "the TASE"), is liable for the damages caused to the appellants as a result of the allegedly negligent decisions that it made during the process of the [first] appellant's share offering.

The facts

1. Appellant 1, Chim-Nir Flight Services Ltd. (hereinafter: "the Company") is a public company founded in 1991 which provides aviation services. At the beginning of June 1994, the Company sought to offer its shares to the public on the TASE. It submitted a draft prospectus to the Israel Securities Authority and the TASE, in accordance with its obligations under s. 15 of the Securities Law, 5728-1968 (hereinafter: "the Securities Law"). The TASE and the Israel Securities Authority approved the draft in principle, and the Company planned to publish the prospectus on November 30, 1994. It is also relevant to mention that the Company claims that it was of material significance that the share offering be implemented by the end of 1995 in order to qualify for a particular tax benefit. Since the financial markets were in crisis at that time, the Company decided, in consultation with its advisors and the underwriters of the offering, to add a statement to the prospectus to the effect that within no less than one month, and no more than three months from the date on which the shares were listed for trading, the Company's shareholders would offer to purchase sixty percent of the issued shares from the public at a minimum price proposed at the time of the offering (hereinafter: "the repurchase offer").

2. The TASE objected to the inclusion of the repurchase offer in the prospectus, on the grounds that its implementation was liable to reduce the public's holding of the Company's shares to below the

minimum level specified in reg. 73c of the TASE Regulations (hereinafter: "the Regulations") for public holdings in a new company seeking to list shares for trading on the TASE. This was in accordance with the provisions of s. 46(a)(2) of the Securities Law which states, *inter alia*, that the TASE may specify, in the Regulations, "the minimum ratio that will be held by the public immediately subsequent to the listing" (hereinafter: "the listing rules"). The TASE therefore decided not to approve publication of the prospectus as long as it contained the repurchase offer. The Company appealed this decision to the Tel Aviv-Jaffa District Court (MA 10/95), which granted the appeal. The court ordered that the inclusion of the repurchase offer in the Company's prospectus be approved, providing that it stated that the offer would not be implemented until at least two months had elapsed from the date that the shares were listed for trading. The TASE appealed the judgment to this court (in CA 1094/95), which, at the request of the TASE, ordered a stay of execution of the District Court's decision until a ruling on the appeal would be handed down.

As a result, in light of time constraints that the Company claims it faced, the Company decided to change the prospectus and omit the repurchase offer (hereinafter: "the amended prospectus"). The amended prospectus was approved and the Company's offering was issued on June 8, 1995.

3. This court (Justices E. Goldberg, T. Or, and Y. Zamir) dismissed the appeal of the TASE, ruling that the TASE chose to include in its Regulations listing rules that applied at the time of listing the shares for trading, as distinct from rules that would also apply when the shares were being traded on the TASE (hereinafter: "maintenance rules"). Accordingly, it was determined that the phrase "immediately subsequent to the listing" should be interpreted to refer to the time at which the shares reach the purchasers. Therefore, in the absence of maintenance rules or a directive prohibiting the inclusion of a repurchase offer in the prospectus, it was found that the Company had complied with the listing rules. The court also ruled that, under the circumstances, the repurchase offer could not be regarded as detrimental to the regular and proper management of the TASE in any way, since it was based on logical reasoning. Concluding, the court ruled that the TASE had gone too far in its interpretation of the listing rules and that its decision not to approve

publication of the prospectus which included the repurchase offer (hereinafter: "the decision of non-approval") did not have a sufficient factual basis. It found that the TASE had not showed foundation for its concern that the Company was attempting to bypass the listing rules through the repurchase offer, or that damage would indeed be caused to trading as a result of this offer (hereinafter: "the judgment in the previous proceeding").

Following the denial of the appeal, the TASE acted to amend the listing rules so that in cases in which a prospectus contains a notice regarding any kind of option or right which the interested party has regarding the offered shares, these shares will not be counted among the quota of shares being offered to the public. The amendment process lasted about two years, and about three years later the TASE added maintenance rules to the Regulations. These rules determined, *inter alia*, that a decrease in the public's holdings to less than 7.5% of the issued capital would result in the delisting of the share from trade.

4. As a result of the judgment in the previous proceeding, the Company, together with thirteen of its shareholders (hereinafter: the appellants) filed suit against the TASE, claiming that as a result of its unreasonable decisions – which led to the deferral of the offering and the need to issue it without the repurchase offer – they had incurred damages amounting to NIS 17 million.

The judgment of the District Court

5. The lower court divided its deliberations into two questions: that of liability and that of damages. After hearing the parties' arguments regarding the question of liability, it found that the TASE had not been negligent in making the decisions that led to the delay of the offering, i.e. the decision of non-approval and the decision to apply to the Supreme Court for stay of execution of the District Court's judgment until after the ruling on the appeal (hereinafter: "the application for stay of execution").

First, the lower Court ruled that the judgment in the previous proceeding created an estoppel by record on two counts: first, because the TASE's interpretation of the listing rules was incorrect; and secondly, because the decision of non-approval lacked necessary factual basis. *Secondly*, the lower court rejected the argument of the TASE that it is not liable for damages caused to the appellants as a result of the delay in the

offering, since any such damages did in fact result from the court's decision to grant the application for stay of execution. In this matter, the lower Court ruled that the TASE had not adequately considered the impact of the application for stay of execution on the Company, for the documents it submitted – the affidavit of the Director General of the TASE and the protocols from the Board of Directors' meetings – did not indicate any discussion of this problem. The lower court also rejected the TASE's claim that its request to expedite the hearing of the appeal should be viewed as a deliberate effort to minimize the damage caused to the Company, and determined that it had acted, first and foremost, in its own best interest. In light of the above, the District Court found that the TASE acted negligently, out of indifference to the potential damage that could be caused to the Company. As a result its actions should be viewed as the cause of damage resulting from the delay of the offering, if indeed such damage was caused. *Thirdly*, the lower Court ruled that under the circumstances, the Company's decision to proceed with the offering without the repurchase offer and not to wait for the outcome of the appeal was justified, and therefore it in no way detracted from the validity of their claim.

6. Subsequently, the District Court examined for the existence of the basis for the tort of negligence, and determined that the TASE owed the Company a conceptual duty of care. In the framework of this ruling, the lower court addressed the question of the existence of a "relationship of proximity" between the parties and found that, under the circumstances, such a relationship existed. This finding was based on the purpose of the Securities Law and the nature of the powers exercised by the TASE in this case. The lower Court also examined the status of the TASE as an administrative authority, and ruled that in this case the TASE had not exercised its discretion in a manner that justified limitation of its liability for negligence according to customary law. Indeed, according to the judgment in the previous proceeding, the TASE exercised its authority within the framework of specific existing rules. The District Court further ruled that in light of the TASE's expert knowledge of the financial market, it could have predicted that the deferral of the offering would have definite financial implications for the Company. It therefore bore a concrete duty of care regarding some of the damages sought. These findings notwithstanding, the Court noted that it was not proven that the TASE could have predicted that its decisions would lead to a

change in the structure of the offering and a reduced capacity to issue a dividend to the Company's shareholders.

The District Court also rejected the TASE's argument that since it acted with the full agreement and consent of the Israel Securities Authority - the administrative body which oversees it - it could not be deemed negligent. The court found that even though the procedures relating to the District Court judgment were executed in complete coordination with the Authority, it was not proven that the decisions to appeal and stay the execution were made in consultation with the Authority, and certainly not at its instruction.

7. Regarding the basis of negligence, the District Court found that both the decision of non-approval and the application for stay of execution were reasonable under the circumstances. Regarding the decision of non-approval, the court ruled that notwithstanding the determination in the previous proceeding that this decision was erroneous, it should not be inferred that it was also negligent. In order to judge the reasonableness of the decision, the court examined the decision-making process and found that it was based on the exercise of professional discretion, in consultation with the relevant professional bodies, including the Israel Securities Authority. Therefore, under the circumstances, there was no negligence in reaching this decision. The court emphasized that at the time the decision was made, the TASE had no precedent in this kind of matter to guide its decision-making. Therefore, to examine the reasonableness of its decision in light of the judgment in the previous proceeding is an exercise in the wisdom of hindsight. Regarding the factual basis that underlay the decision, the Court found that basing the decision of non-approval on concerns that the Company would circumvent the listing rules and that this circumvention would have a negative impact on trading, did not constitute a breach of the standard of reasonableness in the particular field of expertise. In light of the above, the court ruled that there was no negligence in the decision of non-approval.

8. Regarding the application for stay of execution, the District Court ruled that the failure of the TASE to consider the damages to the Company caused by its application for stay of execution was not sufficient to establish a breach of its duty of care vis-à-vis the Company. Rather, the question of how the TASE would have exercised its discretion had it taken these damages into account must

be examined as well. In this regard, the court found that the TASE's decision was based on reasons that it considered extremely important, foremost of which was the prevention of damage to share trading, which was also recognized in the court's decision to order the stay of execution. Therefore, it was determined that even if the TASE had taken the damage to the Company into account, it is reasonable to assume that the consideration of preventing harm to the investor community would nevertheless have convinced it to apply for the stay of execution. The court added that the evidentiary material before it did not show that the Company approached the TASE with a request to refrain from delaying the execution, and it did not inform the TASE of the damage that this could potentially entail. The court therefore ruled:

'You could say that since at the time that the application was filed the TASE had reasonable and serious grounds for its application and since Chim Nir voiced no protest regarding the damage it expected to sustain – the very existence of the application cannot be viewed as a breach of the proper standard of care. Or you could say that the TASE's failure to consider Chim-Nir's interest was 'redeemed' by the Supreme Court's consideration of the conflicting interests and its decision to grant the application' (at pp. 31-32 of the judgment).

The Appellants' Claims

9. The appellants' claims center on the lower court's ruling regarding the reasonableness of the TASE's decisions. *First*, they contend that the lower court erred in its ruling that the TASE did not breach its duty of care in its decision of non-approval. They claim that the TASE's interpretation of the listing rules is not erroneous, but rather that it oversteps the bounds of reasonableness. The appellants base this claim on a number of determinations in the judgment of the previous proceeding, including the determination that the TASE interpreted the existing rules in a manner that deviated from their purpose and that it presented an inconsistent position before the court. Moreover, the appellants claim that the very fact that the TASE reached its decision without sufficient factual basis automatically renders it unreasonable. The appellants further argue that in accordance with the judgment in the previous proceeding, there were

grounds to decide that the TASE bears an increased duty of care due to the fact that it is a monopoly.

10. *Secondly*, according to the appellants, the determination of the District Court that the TASE did not take the foreseeable damages to the Company into account and thus acted negligently in its application for stay of execution is sufficient to establish a breach of its duty of care vis-à-vis the Company. They claim that the court erred when it proceeded to examine what the TASE would have decided had it acted properly: it should have left this inquiry for the second part of the deliberations, in which the question of the causal connection was to be considered. Moreover, the appellants claim that the lower court's determination regarding the reasonableness of the decision is inherently flawed. They claim that since it has been established that the TASE did not fully take into account the relevant considerations – in this case, the potential damages to the Company – the decision cannot be reasonable. In any case, the appellants claim that had the TASE properly considered the relative cost of the damages, it would have concluded that it should not request the stay of execution. The appellants support this claim with the testimony of the Director General of the TASE to the effect that he did not anticipate that approval of the Company's offering would cause great harm, and with the fact that the TASE took its time in formulating the maintenance rules.

The appellants add that no significance should be attached to the fact that the Supreme Court granted the application for stay of execution, since the arguments that were raised were later found to be flawed upon in-depth deliberation. Moreover, they claim that the lower court erred in its determination that they did not inform the TASE of the damages that they were likely to incur. They say that they outlined these damages in the application for stay of execution, and they were even mentioned in the District Court's decision on the application. Furthermore, according to the District Court's own ruling, most of the damages were foreseeable by the TASE.

11. The appellants add that the lower Court erred when it determined that a concrete duty of care does not apply with regard to some of the heads of damages claimed. They maintain that since the court divided the proceedings into the questions of liability and damage, it ought to have examined the actual foreseeability of each of the heads of damage in the second stage, after the parties presented

evidence on this matter. The appellants claim that it was obvious that the delay of the offering would have ramifications determined by the fluctuations of the market. The appellants also add that the District Court's judgment in the previous proceeding created an estoppel by record in this matter, since it established that the repurchase offer could have a positive effect on the public's holdings. In any case, the appellants argue that changing the structure of the offering was a form of damage control and that the TASE bears the burden of proof in actions such as these.

Finally, the appellants maintain that the lower court did not address the claim that they have a right to compensation also by virtue of the administrative wrong that the TASE perpetrated, and this warrants the remand of the case to the District Court to complete deliberations upon this issue.

The Respondent's Claims

12. The TASE concurs with most of the determinations of the lower court and maintains that its judgment should be upheld. Moreover, the TASE claims that policy considerations, foremost of which is the importance of the smooth operation of the financial market, necessitates its protection from the pressures of actions and demands by issuing companies. Therefore, it advocates the establishment of a principle whereby the TASE will not be liable for damages caused as a result of its regulatory decisions when it acts in good faith and in accordance with the position of the Israel Securities Authority.

13. Regarding all aspects of the decision of non-approval, the TASE claims that the process that led to the decision was thorough, serious and based on the opinions of experts in the field. The TASE emphasizes that it did everything in its power to ensure that the decision was correct and reasonable – internal consultations were conducted on several levels; external legal counsel was sought; and even the advice and consent of its overseeing authority – the Israel Securities Authority – was obtained. In addition, the respondent claims that the fact that this issue had never previously been addressed and that there were no precedents to guide its decision, should be taken into account. Therefore, the respondent claims that even if it were found that its final decision was erroneous, it is nevertheless not a case of negligence. The TASE adds that the decision of non-approval was inherently reasonable, in light of the

purpose that underlies the rules of public holdings – the avoidance of a small market for shares that will increase the risk of various kinds of trade manipulations. It maintains that this purpose justifies an interpretation that applies the rules regarding the percentage of the shares that must be publicly held throughout the period of share trading in a manner that will prevent the listing rules from being circumvented. Moreover, the TASE claims that the wording of the listing rules is not unequivocal, and that it can support its proposed interpretation.

Moreover, the TASE maintains that in the judgment in the previous proceeding, the tortious significance of the decision of non-approval was not addressed at all and therefore nothing can be learned from it. The TASE adds that the finding in the judgment regarding the lack of a factual basis for the decision of non-approval relates to the possibility that the Company was attempting to bypass the listing rules. It claims that since it did not base its decision on this possibility, it has no implications for the reasonableness of the decision. Finally, the TASE maintains that the appellants' claims regarding this matter should be dismissed out of hand, since they themselves conceded during the proceedings in the District Court and in the summations submitted to it, that the decision of non-approval was reasonable.

Regarding the appellants' claims in relation to the application for stay of execution, the TASE maintains that this is an illegitimate extension of claims, since these matters were not mentioned in the pleadings filed with the District Court. Therefore, it claims that the lower court erred when it ruled on them even though no relevant evidence was submitted. Nevertheless, the TASE agrees with the Court's final decision that under the circumstances it was not negligent in the application for stay of execution.

14. The TASE further objects to the lower court's determination that the principle whereby it cannot be held liable for damage that was caused - so it alleges - as a result of a judicial order, is not applicable in this case. It argues that since it acted in good faith, in order to uphold its immediate material interest and to exercise its rights under law, a deviation from the principle that "a judicial order cannot cause damage" is unjustified. The TASE also claims that the District Court was inherently mistaken when it determined that it had not considered the damage that would be caused to the Company as a

result of the application for stay of execution, for several reasons: first, the testimony of the Chief Executive of the TASE revealed that the possible damages to the Company had indeed been considered in making the decision; secondly, the TASE acted on its own initiative to expedite the hearing of the appeal in order to enable the Company to issue its offering at such time as it was still apparently eligible for tax benefits; thirdly, in making the decision the TASE was concerned about significant harm to trading, and this concern was expressed in its amendment of the rules within a relatively short space of time, in order to address the problem.

The TASE further adds that the appellants' suit for compensation based on administrative negligence should be dismissed, since this claim first arose only during the appeal and, in any case, it is insufficiently specific.

Deliberations

15. The TASE is a private corporation which is charged with the management of the main arena for trading securities in the State of Israel. The structure of the TASE, as well as its powers, are prescribed by the Securities Law and it is subject to the oversight of the Israel Securities Authority. Whereas the Israel Securities Authority is primarily entrusted with the examination of the disclosures of companies issuing shares based on a prospectus, the TASE deals primarily with questions regarding the ongoing trading of securities, such as the distribution of securities among the public (Joseph Gross, *Securities Law and the Stock Exchange*, at p. 163 (1973)). The Securities Law provides that the establishment of a stock exchange requires a license, it defines the structure of the TASE's board of directors, and it lays down guidelines for its powers, to be determined in the Regulations. The TASE Regulations establish the rules for the proper and fair management of the TASE, which include the listing rules alongside other rules, with the primary purpose of protecting the regularity of securities trading (Moty Yamin & Amir Wasserman *Corporations and Securities* 16 (2006), hereinafter: Yamin Wasserman).

16. In light of these characteristics, even though the TASE is a private corporation, it has already been ruled that when it exercises the power granted to it by law, it should be viewed as an administrative authority operating in accordance with the principles of administrative law (see for example: CA 4275/94 *Tel Aviv Stock*

Exchange Ltd. v. A.T. Management of Torah Literature Database Ltd. [1], at pp. 507-512; CA 1094/95 *Tel Aviv Stock Exchange Ltd. v. Chim-Nir Flight Services Ltd.* [2] at p. 647; Ronen Adini *Securities Law* 97 (2004) (hereinafter: Adini)). Indeed, under the principles established by legal precedent, the TASE should be viewed as a hybrid body. Its purpose is a public purpose – to conduct the trading of securities; its powers are defined by law; it maintains a monopoly in its field and it provides a public service (see for example: CA 467/04 *Yetach v. Mifal HaPayis* [3] paras. 16-19 of my judgment; Assaf Harel *Hybrid Bodies* 37-52 (2008) (hereinafter: Harel)). Accordingly, the courts have examined the TASE's decisions through the prism of the principles of administrative law, such as the principle of reasonableness, compliance with the principles of natural justice, etc. (HCJ 555/77 *Babchuk v. Tel Aviv Stock Exchange* [4] at p. 377; *Tel Aviv Stock Exchange Ltd. v. A.T. Management of Torah Literature Database Ltd.* [1], at pp. 511-516). At the same time, the activities of the TASE are subject to judicial review. The courts tend to exercise caution in their judicial review of its decisions, in consideration of its professional discretion, insofar as it is exercised in matters regarding which it has special expertise (CA 1326/91 *Tel Aviv Stock Exchange Ltd. v. Marcus* [5], at pp. 447-452).

The tort of negligence

17. At the heart of this appeal lies an examination of the liability of the TASE regarding the tort of negligence, pursuant to the provisions of ss. 35 and 36 of the Civil Wrongs Ordinance [New Version]. In order to establish liability under this tort, the claimant must prove the existence of its basic components: a duty of care, negligence and damage caused a result thereof (see for example: CA 6296/00 *Kibbutz Malkiya v. State of Israel* [6] at p. 20). The District Court's judgment addressed only the question of liability – and in that context only the duty of care and negligence – and therefore, this appeal does not address the question of damage. At the outset I note that the question at the center of this proceeding is that of negligence. It is on this that the parties have focused most of their arguments, relegating the arguments regarding the duty of care to the sidelines. Nevertheless, I will discuss the basic components of the tort in order.

Duty of care

18. The question of when a duty of care between a tortfeasor and an injured party will be recognized has aroused extensive debate in

the decisions of this Court. In a nutshell, the prevalent approach in our judicial rulings recognizes two stages in establishing the existence of a duty of care. At the first stage, the existence of a conceptual duty of care is examined, based on the question of whether the tortfeasor, as a reasonable person, should have foreseen the occurrence of the damage. The assumption here is that damage that is foreseeable in physical-technical terms is also foreseeable in normative terms, unless considerations of judicial policy counteract the recognition of this duty. At the second stage, the existence of a concrete duty of care is examined, in view of the particular circumstances of the case relating to the particular tortfeasor and the particular injured party (see for example: CA 145/80 *Vaknin v. Beit Shemesh Local Council* [7], at p. 13; CA 2061/90 *Marzeli v. State of Israel - Ministry of Education and Culture*, [8], at p. 802. See also from recent years: CA 5586/03 *Freemont v. A.* [9], para. 8 of my judgment). According to another approach expressed in judicial rulings, there is no distinction between the conceptual and concrete duty of care, but rather the entire question should be examined as a whole (see for example: CA 10083/04 *Gooder v. Modi'im Local Council* [10], *per* Justice Rivlin, at para. 7; CA 2625/02 *Nahum v. Dornbaum* [11], at p. 386, 408; CA 10078/03 *Shatil v. State of Israel* [12], *per* Justice Levy, at paras. 15-17, 30-31). This approach found expression in the judgment in CA 915/91 *State of Israel v. Levy* [13], at p. 45, where it was determined that a duty of care will be recognized when two basic conditions are met: first, the condition of “adjacency” or “proximity”; secondly, a judicial conclusion that it is just, reasonable and fair that a duty of care be imposed. The first basic condition involves an examination of the connection between the damager and the injured party – which could be a legal or physical connection, connection by virtue of dependence, etc. – which creates the duty of care. In relation to the second basic condition, various aspects of judicial policy are considered (*State of Israel v. Levy* [13], at pp. 33-70; see also *Nahum v. Dornbaum* [11], at pp. 408-409).

Without delving deeply into the difference between these two approaches and also without resolving the question of which one is to be preferred, it would appear that in practice, despite their different points of departure – the first approach is perceived as extending the boundaries of the tort of negligence and the second as narrowing them – similar policy considerations are examined in both

approaches, in light of which the boundaries of the duty of care are determined (regarding the relationship between the approaches, see for example: Israel Gilad “On ‘Working Premises,’ Judicial Intuition, and Rationalism in Establishing the Limits of Liability in Negligence” *Mishpatim* 26 at pp. 295, 304-305 (5758), hereinafter: Gilad “*On Working Premises*”). These include general considerations which relate to imposing a duty of care upon a person – the desire to deter negligent conduct and to compensate the injured party on the one hand, as opposed to concerns for over-deterrence and overloading the courts on the other (see for example: Gilad “*On Working Premises*,” at pp. 296-297; *Nahum v. Dornbaum* [11], at p. 409). Similarly, policy considerations relating to the particular character of the damager, in our case an administrative authority, are also examined, as will be described below.

This was summarized succinctly by my colleague, (then) Justice Rivlin, in his judgment in *Nahum v. Dornbaum* [11]:

'The application of the tort of negligence is, *inter alia*, a consequence of setting the limits of the duty of care. These limits tend to distinguish those cases in which a person was negligent and in light of policy considerations it is appropriate to impose liability for his actions upon him, from those cases where the damager was indeed negligent, but policy considerations lead the court to conclude that it is not appropriate to impose liability on him' (p. 408).

The TASE's duty of care

19. As stated above, it is accepted that the activities of the TASE are examined by the same criteria as those of an administrative authority. Therefore, in determining whether the TASE owed a duty of care to the Company, which sought to list shares for trading, we must refer to judicial rulings that have dealt with the duty of care borne by administrative authorities, just as the lower court did in its deliberations. In principle, administrative authorities, like any other person or corporation, are subject to liability in torts for their activities and they do not enjoy any specific or absolute immunity from suits on grounds of negligence (Israel Gilad, “The Liability of Public Authorities and Public Servants in Torts (Part One)” *Mishpat U'Minhal* 2 at p. 339, 393 (5755); Yoav Dotan “The Tortious Liability of a Public Servant Exercising Powers of Discretion”

Mishpatim 15 at pp. 245, 246-250 (5746) (hereinafter: Dotan); CA 243/83 *Municipality of Jerusalem v. Gordon* [14], at pp. 134-136; CA 2906/01 *Municipality of Haifa v. Menora Insurance Ltd.* [15], at para. 18; *Vaknin v. Beit Shemesh Local Council* [7], at pp. 124-127). The unique characteristics of the authority, insofar as they find expression in the circumstances of the case before the court, are significant in the context of the policy considerations that limit and define the extent of the duty of care, as noted above. In *Shatil v. State of Israel* [12], Justice Levy mentioned some of the considerations relevant to the State's liability in tort, which are applicable to our case:

'On the one hand, recognition of the State's mission to promote the welfare of its citizens, the desire to prevent the abuse of the immense power that is placed in its hands, and the desire to encourage it to make informed decisions, are all considered. On the other hand, the concern that government officials will become over-cautious and their ability to act in accordance with considerations relevant to the matter will be impaired is taken into account...; harm to bodies other than this particular damager...; the acceptance that there are certain general risks to which a citizen is exposed in modern society as a result of government activities...; the concern that government activities will be slowed down..., and the concern that governmental bodies, and the legal system that must examine their activities, will be overburdened.... This list is, of course, not closed' (*ibid.* para. 31).

In addition, in relation to the authority's actions, the nature of the power granted to it is also considered. In other words, are its powers merely supervisory, or does it control the events that caused the damage? The extent of the discretion exercised by the authority is considered as well (see for example: CA 1678/01 *State of Israel v. Weiss* [16], at pp. 181-182; CA 1068/05 *Municipality of Jerusalem v. Maimoni* [17], at paras. 19-22; *State of Israel v. Levy* [13], at pp. 76-80. For a discussion of the difficulties arising from exceptional discretion as occurred in the *Levy* case, see for example: *Municipality of Haifa v. Menora Insurance Ltd.* [15], at para. 41; *Shatil v. State of Israel* [12], *per* Justice Levy, at paras. 23-24).

20. Bearing in mind all of the above, I decided to address the TASE's claim that it should bear no tortious liability whenever it

exercises its regulatory powers in good faith and in accordance with the policy of the Israel Securities Authority. In other words, acting in good faith and in accordance with the policy of the Israel Securities Authority grants it “quasi-immunity” against tortious liability. As noted above, a determination that the TASE will always be immune to negligence suits for certain kinds of activities does not conform to our own approach. Our approach involves examining the existence of the basic conditions of the tort of negligence in the circumstances of the case, while exercising extra caution if the case justifies it, rather than simply declaring that the authority has absolute immunity in some areas. In this respect, President Shamgar’s words in *State of Israel v. Levy* are particularly apt:

'The comparative model – which negates the duty of care – is unacceptable to me. The negation of a duty of care amounts to immunity. Once the duty is negated, the question of negligence does not even arise. From an analytical perspective, negating the duty of care under the given circumstances means that the suit will be rejected' ([13], at p. 81. See also e.g. HCJ 64/91 *Khilef v. Israel Police* [18], at p. 563; CA 653/97 *Baruch and Tzipora Center Ltd. v. Municipality of Tel Aviv-Jaffa* [19], at p. 817; CA 3889/00 *Lerner v. State of Israel* [20], at p. 312).

Nevertheless, as will be explained below, I think that the question of whether the TASE acted in good faith and with the assent of the Israel Securities Authority must be examined when assessing the reasonableness of the actions of the TASE. In other words, it must be examined in order to determine whether the basic conditions of negligence exist, which is the central question in this appeal (on this issue, see for example: Ariel Porat, “Torts Law: Negligence in the Rulings of the Supreme Court from a Theoretical Perspective” *Yearbook of Israeli Law 1996-1997* (Ariel Rosen-Zvi, ed., 1997)).

21. The lower court ruled, and I agree, that there exists a relationship of proximity or adjacency that in principle justifies the imposition of a conceptual duty of care on the TASE. Actually, the primary role of the TASE is to ensure proper and fair trading for the investor community in general. However, the duty of care that the TASE owes the investor community does not negate the existence of a similar duty towards companies whose securities are traded on it. The statutory powers granted to the TASE, which confer supervisory

and controlling powers upon it with regard to these companies, must also be considered. In my opinion, these powers create proximity between the TASE and the companies, justifying the application of a conceptual duty of care. This court's rulings have on numerous occasions addressed the question of the relationship between the tortious duty of care and the statutory powers of an authority. It has found that "not only does the existence of statutory powers not grant immunity or negate liability or duty, but rather the very fact that statutory powers exist serves as the foundation stone on which the conceptual duty of care is constructed" (*Municipality of Jerusalem v. Gordon* [14], at p. 134. See also: CA 862/80 *Municipality of Netanya v. Zohar* [21], at p. 766-767; CA 1639/01 *Kibbutz Maayan Tzvi v. Karishov*, [22], at pp. 215, 282-283; CA 8526/96 *State of Israel v. A.* [23], at paras. 32-33; *Municipality of Jerusalem v. Maimoni* [17], at paras. 21-22).

Thus, for example, it is indisputable that regarding a decision to terminate the trading of a share – a decision that the TASE is empowered to make under s. 46(a)(5) of the Securities Law – the TASE owes a duty to the company whose shares have been removed from trade. The same is true in our case. The powers of the TASE in determining the listing rules for share trading create a supervisory relationship, control and even proximity between it and the companies that seek to join it. Those powers generate the duty of care of the TASE toward the companies. The Director General of the TASE even said as much in his testimony before the District Court on October 10, 2002: "I think that our duty is to consider their interest [of the holders of the controlling interest of the issuing company – E.A.]... ..Obviously this does not mean that we should or that someone does ignore the needs, problems or desires of the holders of the controlling interest" (at p. 95 of the transcripts, lines 14-23). Moreover, this court has previously addressed the impact of the TASE's power to set the Listing Rules for companies whose shares are traded on it:

'The provisions of the regulations that deal with the listing of securities for trading on the TASE [establish] conditions for the listing of securities for trading. These conditions stipulate the 'rights and obligations' of the public in this regard... They determine the conditions for screening companies whose shares can be traded on the

TASE. This affects the legal status of those companies. It also has an impact on their financial capabilities. It influences their ability to raise capital and finance various activities in this manner. It impacts on the business of those companies' (the *Torah Literature Database* case, at pp. 509-510).

22. Regarding the TASE's claim that judicial policy considerations justify its exemption from the conceptual duty of care, I have found no reason to interfere with the lower court's ruling on this matter either. According to this ruling, which is based on this court's judgment in the previous proceeding, the TASE was not exercising a regulatory power in this case, but rather, applying the provisions of regulations that it determined itself. This kind of application does not involve extensive considerations of policy in a manner that justifies negation of the duty of care. Similarly, I do not accept the TASE's claim that the imposition of a duty of care vis-à-vis issuing companies will hinder its operations. This Court's rulings have rejected these kinds of arguments time and again, in light of the fact that they are not generally founded on a factual basis that justifies the granting of immunity to the authority (see for example: CA 429/82 *State of Israel v. Suhan* [24], at p. 741; CA 196/90 *Yirmiyahu Eini Construction Co. Ltd. v. Krayot Committee for Local Planning and Building* [25], at p. 127; *Shatil v. State of Israel* [12], per Justice Levy, at para. 32). Nevertheless, I will state that due to the TASE's role as the body regulating the activities of the financial market – which is by nature a speculative market – for the benefit of all investors, I believe that certain weight should be assigned to the concern that following a review of its activities from the a tort law perspective, the TASE will stop taking relevant considerations into account when making various decisions. The case at hand demonstrates that sometimes, the TASE's duty to the wider investor community is incompatible with its duty to one particular company, and we must ensure that the TASE is able to exercise its powers with confidence for the benefit of all investors. Nevertheless, this concern does not justify blanket immunity from suits for damages. Rather it is indicative of the caution that the court must exercise when it imposes liability in tort on the TASE.

As a marginal point, I will add that I have decided not to address the appellants' argument regarding the connection between the fact

that the TASE is a “monopoly” and the extent of the duty of care imposed on it. In any case, I do that think that this argument has a basis in the judgment in the previous proceeding, as the appellants contend.

23. Finally, in order to establish a conceptual duty of care, as well as a concrete one, we must examine the question of the damages that the TASE could have predicted might result from a negligent decision regarding approval of the listing of the shares for trade. In this regard, the lower court determined, as noted above, that the TASE, as a body which specializes in the financial markets, could have predicted that the delay of the offering would cause certain types of damage to the Company, such as the deferral of negotiability, a delay in benefit from the proceeds and the costs involved in producing a new prospectus. At the same time, the Court pointed out that it had not been proven that the TASE could have predicted that its decisions would lead to a change in the structure of the offering and a reduced capacity to issue dividends to the Company’s shareholders.

The question of the foreseeability of different types of damages is a complex one, but I do not think that a decision on this issue is necessary or possible in the context of this appeal. First, since the District Court’s judgment did not address the question of damage, a sufficient factual basis for each of the heads of damage claimed was not presented to it, and certainly not to us. Secondly, since we are dealing with damages that were allegedly caused to the appellants in the course of their activities in the financial markets, we must be extra cautious in issuing a ruling that imposes liability for these damages. Activities in the financial markets are speculative by nature, involving opportunities and risk for investors and issuing companies alike. In this light, there is a real conceptual difficulty in the “abstract” examination of various types of damages and the attempt to attribute these damages directly to the TASE. It must also be considered that the relevant period was a time of crisis in relation to investments in the financial markets (see for example: Adini, at pp. 91-95), and this intensified the uncertainty of financial market activities. These factors are particularly relevant when considering that in our case, two different decisions by the TASE are being examined – the decision of non-approval and the decision to apply

for stay of execution – each of which required the TASE to foresee damages of different kinds. As the lower court stated:

'I will mention that my conclusions intertwine different duties of care relating to different decisions. It is clear that the decision of non-approval *per se* did necessarily entail the delay of the offering. In any case, the damage caused by the delay of the offering should not be viewed as a component of the concrete duty of care that accompanies the decision of non-approval' (at p. 48 of the judgment, note 23).

I must emphasize that I do not think that these difficulties in determining the limits of the duty of care and foreseeability will prevent the imposition of liability on the TASE for negligent activities in other cases. For example, it would seem that regarding damages that are not directly dependent on the financial markets, such as the cost of producing a new prospectus, it could be decided that a conceptual and concrete duty of care applies. However, I do not think that this is the case in which to examine that question – both in light of the fact that sufficient factual basis has not been presented before us, and in light of my determinations regarding the basis of negligence, which will be explained below.

In conclusion, therefore, I have found that a conceptual duty of care owed by the TASE to companies listing their shares for trading with it may indeed be recognized in principle. However, the question of the extent of this duty – in relation to damages and other kinds of activities – should be left open for further inquiry and consideration when a suitable case graces the chambers of this Court.

The basis of negligence

24. Having found that the TASE's duty of care vis-à-vis the Company may be recognized in principle, even without a comprehensive definition of its extent, we must examine whether this duty of care was breached in the circumstances of the case. As I noted above, the element of negligence, which I will now address, is the central issue of the appeal before us.

In the framework of proving negligence, the question of whether the conduct of the damager was improper, deviating from the manner in which a reasonable person would act under those circumstances, is examined. To this end, an objective standard – i.e. the principle of

reasonableness – is invoked to examine the concrete circumstances of the case (see for example: CA 5604/94 *Chemed v. State of Israel* [26] at pp. 507-508; Gilad "On Working Premises," at pp. 298-299). In this context, it should be added that the actions of the TASE must be examined, first and foremost, in light of the data and information that it possessed at the time it made the various decisions, and not simply based on the judgment handed down by this court in the previous proceeding, several years after those decisions were made. In this respect, President Barak's words in *Chemed v. State of Israel* [26] are particularly apposite:

'The question is not how a reasonable person who is not faced with the particular circumstances of the case would behave; the question is how a reasonable person who finds himself in the damager's situation would behave. When an examination of reasonableness of conduct is carried out, naturally after the events took place, the goal is to examine the reasonableness of the conduct at the time that it occurred, in accordance with what was known at that time. The examination should not be in light of post-factum knowledge' (*ibid.* at p. 507. See also: CA 3108/91 *Rabie v. Veigel* [27], at p. 513; CA 6970/99 *Abu Samara v. State of Israel* [28], at p. 189).

In order to examine the TASE's conduct from the perspective of damages, we might invoke the principle of reasonableness that has been developed as the acid test for the activities of an authority in administrative law. As stated by President Barak in CA 1081/00 *Ayvel Distribution Co. Ltd. v. State of Israel* [29], at p. 193:

'An unreasonable act on the administrative plane is likely to constitute a negligent act in private law. Sometimes these are two sides of the same coin.... For a breach of administrative law the administrative remedies will apply. For a breach of duty of care in torts, the civil remedies will apply, except that essentially contradictory remedies will not be given nor multiple compensation' (*ibid.*, at pp. 203-204. See also: *Municipality of Haifa v. Menora Insurance Ltd.* [15], at para. 42).

Nevertheless, despite the interface between these two concepts of reasonableness, they are not absolutely identical, due to the different goals that underlie them and the different planes on which they are

examined (see for example: *Municipality of Haifa v. Menora Insurance Ltd.* [15], at para. 42 and the references there). For example, without establishing hard and fast rules on the matter, despite the administrative perspective that the court tends to intervene in the authority's decisions only when these deviate in an extreme manner from the bounds of reasonableness, it cannot be said that the imposition of tortious liability is reserved only for these extreme circumstances (see for example: Dotan, at pp. 279-281). The differing rationales that lie at the basis of judicial review on the administrative plane, and at the basis of judicial analysis on the civil plane, therefore result in differing degrees of judicial intervention.

25. In this case, we must examine two acts of the TASE which according to the appellants are responsible for the damage that was allegedly caused to them– the decision of non-approval and the decision to apply for stay of execution. I will state from the outset that I find no reason to interfere with the lower court's conclusion that in the circumstances of the case, the appellants did not succeed in proving that the TASE was negligent in making these decisions. Below I will explain my reasoning in relation to each of the decisions in turn.

The decision of non-approval

26. The decision of non-approval was made, as mentioned, based on the provisions of s. 46(a)(2) of the Securities Law, which authorizes the TASE to lay down in its Regulations rules for the listing of shares for trading, including the number of shares that must be held by the public immediately after they are listed. The decision of non-approval was also made on the basis of reg. 73a of the Regulations, which provides that the ratio held by the public shall be no lower than that specified in the guidelines. In the judgment in the previous proceeding this Court ruled that the decision of non-approval was mistaken, but that this error does not suffice to establish that the TASE was negligent. Not every mistaken decision by a body exercising professional discretion – be it an administrative authority or otherwise – is automatically a negligent decision (see for example: CA 4707/90 *Mayorkas v. State of Israel –Ministry of Health* [30]). In this matter I accept the District Court's distinction that when examining negligence, significant weight must be attributed to the decision-making process. In exceptional cases, where a decision appears to be obviously and absolutely mistaken, it may be

determined that even a decision made according to proper procedure was negligent. However, in this case we are not dealing with a decision of this kind.

In our case, there is no dispute that prior to making the decision, the TASE consulted extensively with all the relevant parties – senior executives at the TASE, the TASE’s Committee for Listing of Securities, the TASE’s Board of Directors, its legal advisors, and the Israel Securities Authority. Like the District Court, I am of the opinion that the decision of non-approval was made following a thorough process of clarification and deliberation, with the participation of all the relevant professional bodies. Therefore, I find that no flaw in the decision-making process can be identified, and not even the appellants themselves have claimed such a flaw.

27. As mentioned above, the appellants argue that despite this process, the TASE’s decision was unreasonable. Indeed, according to the judgment in the previous proceeding, the TASE deviated from the accepted interpretation of the listing rules and made a decision with insufficient factual basis. The judgment in the previous proceeding – which is obviously the basis of the appellants’ claims – was centered on a different question from that which we seek to clarify in our case, i.e. the question of the TASE’s tortious liability. Therefore, even though the Court’s ruling in the previous proceeding is relevant, a situation whereby a decision on the question of damages is based on “the wisdom of hindsight” must be avoided. It is therefore incumbent upon us to focus on examining the discretion exercised by the TASE at the actual time. In the course of the decision-making process, according to the testimony of the Director General of the TASE and the documents provided, the TASE considered with due seriousness the damages that it thought would be caused to the investor community as a result of the publication of the prospectus as it was, and found that these justified its non-publication (see for example pp. 58, 63, 70, 77-78 of the transcripts of the hearing of October 21, 2002 and also appendices C-F of the TASE’s summation). Indeed, the primary function of the TASE is to ensure that trading is conducted in a proper and fair manner, for the benefit of all investors (see for example: Yamin Wasserman). At the same time, as I will discuss further below, among its considerations the TASE must take into account the impact that its decision will have on the company whose case it is addressing. In this case, in light of all that has been said

about the proper conduct of the decision-making process, I am not of the opinion that there are grounds to rule that the discretion exercised by the TASE in “real time” was unreasonable.

I say this particularly in light of the fact that in the course of the decision-making process, the TASE consulted with the Israel Securities Authority, its supervisory authority. Now, I do not think that a position taken by the Israel Securities Authority binds the TASE to the extent of absolving it from all responsibility for the outcome of its decision. The TASE – just like any other authority exercising its powers – has a duty to exercise its discretion notwithstanding the supervising authority’s position (on this issue, see for example: Zamir, at pp. 862-863; *Yirmiyahu Eini Construction Co. Ltd. v. Krayot Committee for Local Planning and Building* [25], at pp. 132-133. Also cf: CA 491/73 *Gedolei Hacholeh Ltd. v. Machruz* [31], at pp. 37-38; Haim Levy, Moshe Smith and Marshall Sarnat *The Stock Exchange and Investments in Securities* pp. 118-119 (Marshall Sarnat and Joan Dilevsky, eds. 1999)). However, the consultation process, which none of the parties claimed was problematic, is generally an effective and appropriate step in the decision-making process (see also: HCJ 5933/98 *Israeli Documentary Filmmakers Forum v. President of the State* [32] at pp. 510-513; HCJ 8850/02 *Pastinger v. Minister of Justice* [33], at p. 705). The Israel Securities Authority’s position can constitute an indication of the reasonableness of the decision, as manifested in the opinion of the relevant expert bodies. In our case, the consent of the Israel Securities Authority shows that the decision made was seen as reasonable, correct and professional.

28. Another factor that I consider important in terms of the reasonableness of the TASE’s decision is the fact that its decision of non-approval was apparently the first time that the TASE had dealt with a purchase offer of the kind that the Company sought to include in its prospectus. However, I accept the lower court’s determination, which was founded on the judgment of this court in the previous proceeding, that in making this decision the TASE exercised executive powers, as opposed to regulatory powers, as will be explained below. Nevertheless, even though the TASE exercised its discretion within existing regulations, it had no guidelines regarding the treatment of this repurchase offer. Moreover, it is indisputable that this matter lies at the very heart of the TASE’s operations, and it

has the potential to impact both the investor community and the public's trust in the TASE. Under these circumstances, I am of the opinion that "the tortious range of reasonableness" of the decision should be broader.

In my opinion, this factor also has an impact on the appellants' claims regarding the making of the decision of non-approval in the absence of a sufficient factual basis. Indeed, in the judgment in the previous proceeding, this court ruled that the TASE's decision lacked factual basis, and the District Court found that this ruling created an estoppel by record. I see no reason to interfere with this determination, but I also do not think that it affects what I said earlier regarding the reasonableness of the decision, for the following two reasons. First, I found there to be substance in the TASE's claim that the ruling on the lack of factual basis was made as a marginal point, and it related to the possibility that the decision of non-approval was based on the concern that the repurchase offer was a scam and an attempt to bypass the listing rules. Secondly, in examining the reasonableness of the TASE's activities from the perspective of torts, I am of the opinion that the extent of the discretion granted to the TASE must be considered also in light of the information required to create a basis for the decision. Thus, even though it is clear that an authority may not base a decision on a flimsy factual basis, there is a range within which an authority is entitled to decide what information is essential in order to make the decision (see for example: Yitzhak Zamir *The Administrative Authority* Vol. 2 at p. 737 (1996), hereinafter: Zamir). This is its professional expertise. In our case, I do not think that TASE deviated from this range of reasonableness, in light of the fact that the decision was based on professional considerations and information. Moreover, some of the information required for the decision was data related to the operation of the financial markets and the response of the investors to the Repurchase Offer – information which is particularly difficult to obtain in advance (see e.g.: Zamir at p. 758). Under these circumstances, I am of the opinion that basing the decision on a genuine concern for damage that could be caused as a result of the publication of the prospectus as it was, does not overstep the bounds of the tortious range of reasonableness.

In conclusion, for the above reasons, I find that there was no negligence in the TASE's decision of non-approval.

The decision to apply for stay of execution

29. As noted above, a significant part of the damages claimed by the appellants is the result of the decision of the TASE to apply for stay of execution of the judgment handed down by the District Court – an application that was granted by this court. The lower court found that even though there was no impediment to examining the TASE's liability for damages caused by the decision to stay the execution of the judgment, since it did not take into consideration the damages that could be caused to the Company as a result of the application, nevertheless, the TASE did not act negligently in its decision to apply for stay of execution. I accept this determination in principle, but I find that its application in this case is not simple.

30. As we know, the approach that a judgment or other judicial order could not be the basis for a tort was once dominant in Israeli law, and as such, a litigant acting by virtue thereof was considered to be acting in accordance with legal authority and was thus immune to law suits (see for example: CA 735/75 *Roitman v. Aderet* [34] at pp. 82-83. See also: *Municipality of Jerusalem v. Gordon* [14], at p. 144). However, it has been ruled in various cases over the years that the aforementioned immunity will not apply to one who initiated legal proceedings in a negligent manner (CA 732/80 *Arens v. Beit El – Zichron Yaakov* [35], at pp. 645, 656; *Municipality of Jerusalem v. Gordon* [14], at p. 145; LCA 1565/95 *S'char V'Sherutei Yam Ltd. v. Shalom Weinstein Co. Ltd.* [36]; LCA 2422/00 *Ariel Electrical Engineering Traffic Lights and Maintenance v. Municipality of Bat Yam* [37], at p. 618). Judicial precedent has interpreted the duty of care borne by the litigant in this context as a duty to act reasonably, fairly and in good faith, and most importantly to present the full factual picture required for a decision on the dispute before the court (*S'char V'Sherutei Yam Ltd. v. Shalom Weinstein Co. Ltd.* [36], *per* Justice Mazza, at para. 21, and *per* Justice Türkel, at para. 2). Türkel's judgment). It has also been ruled that the degree of good faith required of a party to a process is dependent on the character of the relevant process and the nature of the issue in dispute (MCApp 2236/06 *Hamami v. Ohayon* [38], at para. 10).

31. As noted above, the TASE is quasi-public body with professional expertise. As such, it is required to exercise discretion before deciding to file an application with the court to stay the execution of a judgment (on the issue of the duties imposed on these

kinds of bodies, see for example: HCJ 731/86 *Micro Daf v. Israel Electric Co.* [39] at p. 499; CA 294/91 *Kehillat Yerushalayim Jewish Burial Society v. Kestenbaum* [40] at p. 491; CA 3414/93 *On v. Diamond Exchange Enterprises (1965) Ltd.* [41] at p. 196; LCA 1784/98 *Amidar v. Manada* [42] at pp. 335-336; Harel, at pp. 243-256). Within the bounds of this discretion, it must weigh the full gamut of considerations relevant to the matter, including the foreseeable damages to the other party that may result from the stay of execution, even if it cannot always know the full extent and details of the damage. I must stress that I am not of the opinion that the TASE bears a duty to take extraordinary measures to assess damages that are not claimed or presented before it. It must formulate an informed position as to whether the damage it will foreseeably incur outweighs the foreseeable damage to the opposing litigant, based on the information it possesses and its professional expertise, so that it may claim that the balance of convenience is tipped in its favor.

Indeed, one must be cautious in overburdening a litigant with obligations in regard to the initiation of proceedings, since this could violate the basic right of access to the courts (see for example: CA 4980/01 *Adv. Shalom Cohen (Official Receiver) v. Glam* [43] at p. 625; *S'char V' Sherutei Yam Ltd. v. Shalom Weinstein Co. Ltd.* [36], *per* Justice Strasberg-Cohen, at para. 5). Moreover, the litigant in our case represents the public interest of the investor community, which does not have the professional knowledge and expertise possessed by the TASE. On the other hand, I am aware of the difficulties involved in a proceeding during which the court is asked to provide temporary relief when the factual picture before it is not entirely clear and when this relief could violate on the rights of the other litigant (see for example: Dudi Schwartz *Civil Procedure* at pp. 91-93 (2007)). I am therefore of the opinion that the TASE must consider all the factors – including the damage that will be caused to the Company as a result of the stay of execution – before submitting an application, and it must do so on the basis of the information it possesses. This is based on the assumption that the opposing party will present its arguments in full and will provide the court with a detailed picture of the damages that will be caused to it since, in the nature of things, this information should be in its possession.

32. To my mind, the TASE fulfilled its duty in this regard. First, in our case it was not claimed that the TASE breached its obligation

to present the court with a full factual basis, or that it requested the stay of execution as a means of harming the Company or in a manner that abused its rights (*Adv. Shalom Cohen (Official Receiver) v. Glam* [43], at pp. 629-630; Dudi Schwartz “The Application of the Principle of Good Faith in Civil Procedure” *Iyunei Mishpat* 21 at pp. 295, 329-330 (1988)). On this point, I do not think that the appellants’ claim that the TASE presented misleading or erroneous arguments to the court should be accepted. Indeed, in the final analysis, the TASE’s arguments were rejected in the course of the appeal, but it was not determined – nor proven – that it concealed facts or that it deliberately attempted to mislead the court. As the lower court determined in the final section of its judgment, at the time when it submitted the application, the TASE had reasons which it considered to be highly significant and to justify the application for stay of execution. The foremost of these was concern for the damage that could be caused to the financial markets if companies were able to include in their prospectuses repurchase offers of the kind that the Company had inserted into its prospectus. In this sense, it seems that the TASE exercised a right granted to it by law in order to protect interests that seemed important to it both at that time and later as well, as demonstrated by the amendment of the listing rules.

Secondly, I am unconvinced that the evidentiary material presented before the lower court shows clearly that the TASE acted out of indifference to the damages that would be caused to the Company as a result of the application. The lower court based its determination that the TASE did not consider the damages that would be caused to the Company primarily on the fact that it did not present satisfactory evidence of internal deliberations concerning these considerations. In my opinion, weight should be attached to the fact that the appellants’ claims regarding negligence in the application for stay of execution were made in a tentative fashion, as noted by the lower court as well (at p. 60 of the judgment). Under these circumstances, I think that the aforementioned lack of evidence does not tip the scales in favor of a ruling that the TASE was negligent in initiating the proceeding to stay execution. Moreover, the court noted that it is possible that the Company did not even notify the TASE of these foreseeable damages (at p. 61 of the judgment). In addition, my impression is that the TASE’s request to expedite the date of the appeal hearing attests to its awareness of the difficulty that the delay could cause the Company, as well as to its willingness to facilitate a

speedy decision on the matter. It is possible that the request to expedite the hearing stemmed from the TASE's own interests, but this does not negate the fact that the Company also benefited as a result. In conclusion, this court – after hearing the arguments of both sides – found that there were grounds to stay the execution of the judgment until a ruling was issued on the appeal. In my opinion, this lends credence to the determination that the decision to apply for stay of execution was reasonable at that time.

Therefore, I do not find that the TASE was negligent in its decision of non-approval or its decision to apply for stay of execution of the judgment.

Conclusion

33. In light of all of the above, even though I believe that a duty of care between the TASE and companies issuing their securities on it should be recognized in principle, I do not find that in the circumstances of this case the extent of this duty can be clearly defined. Similarly, I do not find that the appellants have succeeded in showing that the TASE's decisions were negligent in a manner that would make it liable for the alleged damages that were caused to the Company as a result of the delay of the offering. I would further add that I have not seen fit to discuss the appellants' claim for compensation by virtue of the tort of negligence, which was claimed in a general and unsubstantiated fashion.

Therefore, I propose that my colleagues dismiss the appeal and order the appellants to cover the court costs and the respondents' legal costs in the amount of NIS 40,000. Appellant 1 will pay NIS 20,000 and the remainder will be divided equally among appellants 2-14.

Deputy President E. Rivlin

I concur.

Justice D. Cheshin

I concur.

Decided as per the decision of Justice E. Arbel.

26 Sivan 5768

29 June 2008