

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 2022-006399

In the matter between

TRUSTCO GROUP HOLDINGS LIMITED

Applicant

and

JSE LIMITED

First Respondent

FINANCIAL SERVICES TRIBUNAL

Second Respondent

JSE'S HEADS OF ARGUMENT

TABLE OF CONTENTS

Glossary	3
Introduction	4
The facts	6
The timeline	16
Trustco must be held to the case it pleaded in its founding affidavit	17
Res judicata bars Trustco asking for a second bite at interim relief	18
Trustco does not meet the requirements for interim relief	27
Interim relief is incompetent: the horse has bolted and Trustco remains in contempt of the Tribunal	27
Interim relief is incompetent: Trustco does not meet the <i>OUTA</i> clearest-of-cases test	29
Trustco does not have a prima facie right to interim relief	30
Trustco does not show that it will suffer irreparable harm	34
The balance of convenience weights against interim relief	35
Trustco already exhausted its alternative remedy in the proper forum	37
Conclusion	38
Annexure: the JSE's response to the impermissibly raised review arguments in Trustco's heads of argument	39

GLOSSARY

- **The JSE's Restatement Decision:** The JSE's decision, dated 11 November 2020, that Trustco's financial statements do not comply with IFRS and must be restated.
- **Trustco's First Reconsideration Application:** Trustco's application to the Tribunal, dated 10 February 2021, asking the Tribunal to reconsider the JSE's Restatement Decision.
- **The Tribunal's Dismissal of Trustco's First Reconsideration Application:** the Tribunal's decision, dated 22 November 2021, dismissing Trustco's First Reconsideration Application.
- **The JSE's Listing Suspension Decision:** the JSE's decision, dated 14 February 2022, to suspend the listing of Trustco's shares on the JSE.
- **Trustco's Second Reconsideration Application:** Trustco's application to the Tribunal, dated 18 February 2022, asking the Tribunal to reconsider the JSE's Listing Suspension Decision.
- **Trustco's Tribunal Interim Relief Application:** Trustco's application to the Tribunal, dated 18 February 2022, asking the Tribunal for interim relief to prevent the JSE from suspending Trustco's listing on the JSE pending - Trustco's Second Reconsideration Application.
- **The Tribunal's Interim Relief Order:** The Tribunal's decision, dated 13 July 2022, dismissing Trustco's Tribunal Interim Relief Application.

INTRODUCTION

1. This is a case about a company, Trustco, whose financial statements cannot be trusted. Trustco has contemptuously disobeyed the decisions of the JSE, exercising its statutory obligation to manage the financial market, and the Financial Services Tribunal. Trustco now turns to this court for assistance, on an urgent basis, after it has been refused the same relief by the Financial Services Tribunal. Trustco turns to this court in an effort to cure its contempt of the JSE's decision and the Tribunal's decision. Trustco attempts to smuggle this application in as urgent, but it knew it was going to face having its shares suspended in January unless it complied with the JSE's decision. This application is not urgent—it is simply the last roll of the dice in an extended strategy to avoid having to provide accurate financial information to the investing public.
2. Almost two years ago, the JSE decided that Trustco's financial statements do not comply with the rules of the game: a set of global accounting standards called the International Financial Reporting Standards, or IFRS for short. The JSE made its decision after considering expert input on IFRS, and after affording Trustco exhaustive opportunities to be heard. The JSE directed Trustco to correct (or restate, in accounting parlance) its financial statements.
3. Trustco then applied to the Financial Services Tribunal to reconsider the JSE's decision. The Tribunal, chaired by former Deputy President of the SCA, Justice Harms, dismissed Trustco's application.

4. After Trustco still refused to restate its financial statements, the JSE exercised its statutory, discretionary, and polycentric power to suspend Trustco's listing on the JSE.
5. Still determined to avoid restating its financial statements, Trustco asked the Tribunal for, in effect, an interim interdict against the JSE's decision to suspend its listing. The chairperson of the Tribunal, 15-year veteran of the Constitutional Court, Justice Mokgoro, dismissed Trustco's application for interim relief.
6. Having struck out at the Tribunal, Trustco forum shops back to this Court to ask for the same interim relief. *Res judicata* stands in the way of Trustco's attempt to relitigate its application for interim relief. This sequel to its application for interim relief in the Tribunal should be dismissed for that reason alone. But even if Trustco somehow overcomes the high hurdle of *res judicata*, this application should be dismissed because Trustco does not make out a case for interim relief—neither on the strict, clearest-of-cases test set in *OUTA*, nor even on the ordinary requirements for interim relief.
7. Nothing compels Trustco to list its shares on the JSE. It is free to list its shares on another exchange—after all the JSE is not the only exchange in South Africa, and Trustco is in any event a Namibian company. Having elected to list its shares on the JSE, Trustco must follow the rules that the JSE sets, and it must follow the decisions of the regulatory bodies established by statute. To allow anything else undermines the rule of law, and that cannot be tolerated. And Trustco cannot, as it attempts to do, seek to enlist the assistance of this court to prop up its blatant undermining of the rule of law. Put simply—if Trustco

wants to list its shares on the JSE then it must follow the JSE's rules, otherwise it should list its shares somewhere else.

THE FACTS

8. Two years of Trustco's filibustering means this litigation comes with many chapters. Alone, the twists and turns of internal objections, reconsiderations, and suspensions pending reconsiderations shows how many opportunities Trustco has been given to argue its case and how badly finality is needed.

9. But first, some basic facts.

9.1 Trustco is a Namibian company listed on the JSE. Dr van Rooyen is Trustco's CEO and majority shareholder. He was also the sole shareholder of Huso Investments Pty Limited.¹

9.2 Between 2015 and 2018, Dr van Rooyen loaned Huso N\$ 546 million.² In 2018, Trustco bought all of Dr van Rooyen's Huso shares. Dr van Rooyen was on both sides of the deal: he was Trustco's CEO and majority shareholder, and he was Huso's sole shareholder.³

9.3 In Huso's financial statements, Dr van Rooyen's loan was initially classified as equity (meaning it was recorded as money Dr van Rooyen invested in Huso as a shareholder).⁴ But by the time

¹ Answering affidavit; p 003-7, para 22.

² Answering affidavit; p 003-8, para 23.

³ Answering affidavit; p 003-8, para 23.

⁴ Answering affidavit; p 003-8, para 24.

Trustco acquired Huso, the loan had been reclassified as a liability (or money that Huso owed Dr van Rooyen).⁵

9.4 The sale of shares agreement between Trustco and Dr van Rooyen has an earn-out mechanism for Dr van Rooyen.⁶ The mechanism boils down to this: Dr van Rooyen gets shares in Trustco if Trustco meets stipulated profit thresholds.

9.5 A few weeks after Trustco acquired Dr van Rooyen's Huso shares, Dr van Rooyen forgave the N\$546 million loan.⁷ Because Trustco had recognised the loan as a liability, it reflected Dr van Rooyen's generosity in its financial statements as a *gain* of N\$546 million.⁸ And so after this quick stroke of Dr van Rooyen's forgiving pen, Trustco's financial statements were made to look like Trustco gained almost half-a-billion dollars. Dr van Rooyen's good deed did not go unrewarded: Trustco's gain triggered his earn-out mechanism in the sale of shares agreement.⁹

9.6 Meanwhile, in 2019, Dr van Rooyen advanced a second loan of up to N\$1 billion to Trustco.¹⁰ A few months later, Dr van Rooyen's generosity struck again, and he forgave this loan too, resulting in a

⁵ Answering affidavit; p 003-8, para 24.

⁶ Answering affidavit; p 003-8, para 25.

⁷ Answering affidavit; p 003-8, para 26.

⁸ Answering affidavit; p 003-8, para 26.

⁹ Answering affidavit; p 003-8, para 26.

¹⁰ Answering affidavit; p 003-9, para 28.

N\$1 billion gain that Trustco recognised in its financial statements (and resulting in another reward for Dr van Rooyen through his earn-out mechanism).¹¹

9.7 Then there are Trustco's properties in a development north of Windhoek, called Elisenheim.¹² In its financial statements, Trustco reclassified the properties from inventory to investment property.¹³ It justified the reclassification on the basis that a decline in demand meant that it did not anticipate selling the properties for the foreseeable future. The reclassification resulted in the properties being revalued upwards, increasing Trustco's profitability. Trustco reported a N\$693 million gain in the profit and loss account in its financial statements (or revenue of N\$984 million against a cost of sales of N\$291 million).¹⁴

10. With those facts in place, we turn to the next chapter: the JSE's decision that Trustco's financial statements do not comply with IFRS and should be restated.

10.1 This chapter starts at the end of 2019. Trustco's financial statements were selected for review under the JSE's proactive monitoring review process. This is, in effect, a spot check: the JSE reviews the financial statements of every listed company every five years.¹⁵

¹¹ Answering affidavit; p 003-9, para 28.

¹² Answering affidavit; p 003-9, para 29.

¹³ Answering affidavit; p 003-9, para 29.

¹⁴ Answering affidavit; p 003-9, para 29.

¹⁵ Answering affidavit; p 003-9, para 30.

- 10.2 For this spot check, the JSE reviewed Trustco's group annual financial statements for the year ending 31 March 2019, and Trustco's interim results for the six months ending 31 August 2018 (which we refer to as "**Trustco's financial statements**" for short).¹⁶
- 10.3 The JSE referred three issues about Trustco's financial statements to the Financial Reporting Investigation Panel, or the FRIP. The FRIP is an advisory body to the JSE. It advises the JSE on, amongst other things, technical issues about listed companies' compliance with IFRS, a global set of accounting standards. The FRIP is, in short, a panel of IFRS experts.¹⁷
- 10.4 Of the three issues that the JSE asked for the FRIP's expert input, two are relevant for now:
- **The loan issue:** Dr van Rooyen's two loans and Trustco classifying their forgiveness as gains in profit and loss (a N\$546 million gain in Trustco's 2019 annual financial statements, and a N\$1 billion gain in its 2019 interim results).
 - **The property issue:** Trustco's reclassification of the Elisenheim properties from inventory to investment property in its financial statements.

¹⁶ Answering affidavit; p 003-9, para 30.

¹⁷ Answering affidavit; p 003-10, para 31.

- 10.5 After considering all relevant information, including submissions on each issue from Trustco, the FRIP advised the JSE that, in its expert view, Trustco's reporting of the loan issue and the property issue did not comply with IFRS.¹⁸
- 10.6 In October 2020, and after giving Trustco an opportunity to comment on the FRIP's report, the JSE decided that Trustco had not complied with IFRS in respect of the loan issue and the property issue.¹⁹
- 10.7 Trustco objected to the JSE's decision in terms of paragraph 1.4 of the JSE Listings Requirements.²⁰ In November 2020, the JSE dismissed Trustco's objection.²¹ The JSE directed Trustco to take corrective action by restating its financial statements.²² Said differently, the JSE directed Trustco to reverse the gains it reflected in its financial statements after Dr van Rooyen waived the loans and after it reclassified the Elisenheim properties. We refer to this decision as **"the JSE's Restatement Decision"**.

¹⁸ Answering affidavit; p 003-11, para 33.

¹⁹ Answering affidavit; p 003-11, para 34.

²⁰ Under paragraph 1.4 of the JSE Listings Requirements, an issuer has a right to object to any decision made under the Listings Requirements. The Listing Requirements are available on the JSE's website at: <https://tinyurl.com/ListingsRequirements>.

²¹ Answering affidavit; p 003-11, para 36.

²² Answering affidavit; p 003-11, para 36.

11. The next chapter is Trustco’s attempt to avoid the JSE’s Restatement Decision, first through the Tribunal, and then through its pending review in this Court under case number 5640/2022.

11.1 As part of the carefully crafted dispute-resolution mechanism prescribed in the Financial Sector Regulation Act,²³ the Tribunal may reconsider a decision of the JSE.²⁴ A reconsideration is a “complete rehearing, reconsideration and fresh determination of the entire matter”.²⁵

11.2 Trustco applied to the Tribunal for a reconsideration of the JSE’s Restatement Decision. We refer to this as “**Trustco’s First Reconsideration Application**”—we say “First” because, as we explain later, a sequel would soon follow.

11.3 In November 2021, and after carefully considering detailed arguments by both sides, including each party’s experts, the Tribunal dismissed Trustco’s First Reconsideration Application.²⁶ We refer to this as “**the Tribunal’s Dismissal of Trustco’s First Reconsideration Application**”.

²³ Act 9 of 2017.

²⁴ See section 230 of the Financial Sector Regulation Act.

²⁵ Founding affidavit; annexure “FA1”, pp 001-24 to 001-26.

²⁶ Founding affidavit; annexure “FA1”, p 001-21.

12. The end of that chapter has this result: the JSE's Restatement Decision is a valid and binding decision.²⁷ Though Trustco is reviewing the JSE's Restatement Decision and the Tribunal's Dismissal of Trustco's First Reconsideration Application in its pending review, Trustco never applied for interim relief against the Restatement Decision (neither in the Tribunal nor in the High Court).²⁸ The Restatement Decision thus has legal consequences unless and until it is set aside in the review.²⁹ It is significant that when Trustco launched its review it did not simultaneously apply for interim relief pending the review as is typically done in a Part A-Part B type application. No explanation has been offered by Trustco for why it did not do that, and why it waited to launch this application.
13. The next chapter starts where the last left off: the Tribunal dismissing Trustco's First Reconsideration Application.
- 13.1 Recall that the JSE directed Trustco to restate its financial statements. A month or so after the Tribunal dismissed Trustco's First Reconsideration Application, Trustco had still not done what the JSE had directed it to do.³⁰ So at the beginning of December 2021, the JSE informed Trustco that it was considering suspending Trustco's

²⁷ *MEC for Health, Eastern Cape v Kirland Investment (Pty) Ltd* 2014 (3) SA 481 (CC) at para 101 ("The essential basis of *Oudekraal* was that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process").

²⁸ Answering affidavit; p 003-29, para 96.1.

²⁹ *Kirland* (note 27) at para 101.

³⁰ Answering affidavit; p 003-12, para 40.

listing on the JSE because it had failed to comply with the JSE's Restatement Decision.³¹

13.2 On 13 December 2021, and after the parties exchanged correspondence, the JSE decided to suspend Trustco's listing. We call this decision "**the JSE's Listing Suspension Decision**".³² Trustco objected to the JSE's Listing Suspension Decision. In its objection, Trustco indicated that its forthcoming financial statements, to be published about a month later at the end of January 2022, "would ... reflect the restatements that the JSE required".³³ With that assurance in hand, the JSE agreed to hold off on deciding Trustco's objection.³⁴

13.3 Trustco published its financial statements on 31 January 2022. Trustco did not restate its financial statements as the JSE required³⁵ and as it had said it would do.³⁶ The JSE accordingly dismissed Trustco's objection to the JSE's Listing Suspension Decision.

13.4 Trustco then went back to the Tribunal, where it lodged two applications:³⁷

³¹ Answering affidavit; p 003-12, para 40.

³² Founding affidavit; annexure "FA2", p 001-49.

³³ Answering affidavit; p 003-17, para 46.

³⁴ Answering affidavit; p 003-17, para 46.

³⁵ Answering affidavit; p 003-18, para 51. See also replying affidavit; p 004-22, para 69.

³⁶ Answering affidavit p 003-17, paras 46 to 48.

³⁷ Answering affidavit; p 003-19, para 56.

- First, Trustco asked the Tribunal to reconsider the JSE's Listing Suspension Decision, which we call "**Trustco's Second Reconsideration Application**".
- Second, Trustco asked the Tribunal for interim relief pending Trustco's Second Reconsideration Application, which we call "**Trustco's Tribunal Interim Relief Application**".

13.5 We pause here for a point about interim relief *in the Tribunal*. As already explained, those aggrieved by a decision of the JSE can ask the Tribunal to reconsider the JSE's decision.³⁸ Section 231 of the Financial Services Regulation Act makes clear, though, that the mere lodging of a reconsideration application with the Tribunal does *not* suspend the decision that the Tribunal is asked to reconsider. This should sound familiar to administrative lawyers' ears: in much the same way, a review in the High Court does not, without more, suspend the administrative decision being reviewed.³⁹ Section 231 allows the chairperson of the Tribunal to order otherwise; that is, section 231

³⁸ Section 230 of the Financial Sector Regulation Act.

³⁹ *Tshwane City v Afriforum* 2016 (6) SA 279 (CC) at paras 73 to 74 ("In any event, it is not clear what the Supreme Court of Appeal eventually made of these decisions. But, it certainly did not regard them as authority for the proposition that an apparently lawful decision may not be implemented purely because an application has been launched either to interdict implementation or to have the underlying decision set aside. Besides, those decisions could not even remotely have provided the legal basis for that conclusion ... It needs to be stated categorically, that no aspect of our law requires of any entity or person to desist from implementing an apparently lawful decision simply because an application, that might even be dismissed, has been launched to hopefully stall that implementation. Any decision to that effect lacks a sound jurisprudential basis and is not part of our law. It is a restraining order itself, as opposed to the sheer hope or fear of one being granted, that can in law restrain. To suggest otherwise reduces the actual grant of an interdict to a superfluity.").

allows the Tribunal to suspend the decision it is asked to reconsider pending the reconsideration application. Though section 231 talks about a “suspen[sion]”, it has the same effect as an interim interdict.

13.6 With that point made, this chapter resumes. About a week after lodging its Second Reconsideration Application and its Tribunal Interim Relief Application, and while both applications in the Tribunal were pending, Trustco launched this urgent application in this Court.⁴⁰ Trustco asked this Court for interim relief too.

13.7 The JSE pointed out the obvious *lis pendens* point: Trustco had two applications for the same interim relief pending before two competent tribunals (the Tribunal and the High Court).⁴¹ To make things easier, the JSE agreed that it would not suspend Trustco’s listing until the Tribunal decided Trustco’s Tribunal Interim Relief Application. With that agreement, Trustco put this application on hold.⁴²

14. On 13 July 2022, the Tribunal’s chairperson, Justice Mokgoro, dismissed Trustco’s Tribunal Interim Relief Application.⁴³ We refer to this decision as “**the Tribunal’s Interim Relief Order**”.

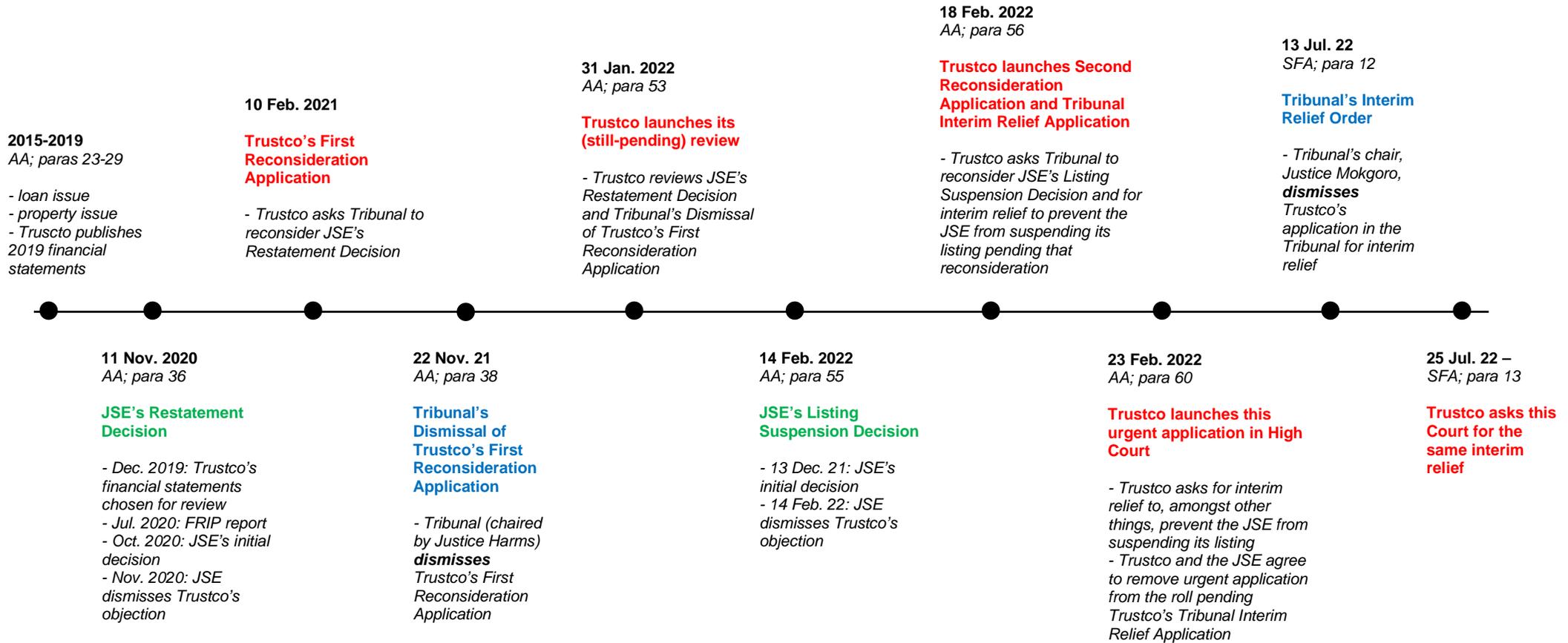
15. We try to pin all these moving parts on the timeline on the next page.

⁴⁰ Answering affidavit; p 003-20, para 60.

⁴¹ Answering affidavit; pp 003-22 to 003-26 , paras 72 to 77.

⁴² Supplementary founding affidavit; pp 008-65 to 008-66, paras 7 to 9.

⁴³ Supplementary founding affidavit; annexure RB2”, p 008-73.



- JSE's decisions
- Tribunal's decisions
- Trustco's litigation on multiple fronts

TRUSTCO MUST BE HELD TO THE CASE IT PLEADED IN ITS FOUNDING AFFIDAVIT

16. Trustco tries a Caselines trick. This is how the trick unfolds:

16.1 On 31 January 2022, Trustco launched its review of the JSE's Restatement Decision and the Tribunal's Dismissal of Trustco's First Reconsideration Application.⁴⁴ The review is under a different case number: 5640/2022.

16.2 On 23 February 2022, Trustco launched this application for an interim interdict (under case number 11121/22). Trustco's case for an interim interdict is set out in paragraphs 28 to 53 of its founding affidavit on Caselines pages 001-13 to 001-20 (under the telling heading "Interdict").

16.3 Trustco does not attach the pleadings in the review to its founding affidavit in this application. Instead, Trustco took it upon itself to load all the pleadings in the review onto the Caselines page for this application.⁴⁵

16.4 Having loaded the review onto Caselines, Trustco pretends that all the pleadings in the review are properly before this Court, and proceeds to litter its heads of argument with arguments not made in its founding affidavit in this application, but only in the review. Just look at how many footnotes in Trustco's heads of argument cite "Review

⁴⁴ Answering affidavit; p 003-18, para 53.

⁴⁵ See section "009: Review Proceedings – Founding Papers".

Application”—a citation that buries the lede that the “Review Application” is under an entirely different case number and is not properly before this Court hearing this application.

17. This is no way to litigate, especially in urgent court.

17.1 For one thing, it means that Trustco expects this Court to read over 500 pages filed on Caselines—an ask that is not allowed under this Court’s practice manual.⁴⁶

17.2 Trustco must be held to the case it pleaded in its founding affidavit. In particular, Trustco must show that it has a *prima facie* right to interim relief based on what it pleads in the five threadbare paragraphs in its founding affidavit (under the useful heading “*A prima facie right*”). Trustco cannot dump hundreds of pages of pleadings from a separate case on Caselines and use footnotes in its heads of argument to teleport to pleadings under a different case number. Rather, like all litigants— especially litigants in busy urgent court— Trustco must stand or fall by the case it pleads in its founding affidavit.

RES JUDICATA BARS TRUSTCO ASKING FOR A SECOND BITE AT INTERIM RELIEF

18. Having lost in the Tribunal, Trustco forum shops its way back to this Court to resurrect its urgent application. Like urgent-court Groundhog Day, Trustco again asks for interim relief.

⁴⁶ See, for example, *Tasima (Pty) Ltd v Department of Transport* 2013 (4) SA 134 (GNP) at para 4.

19. Trustco lost that fight in the Tribunal. *Res judicata* means that Trustco does not get a do-over.
20. A few years ago, the SCA described courts as “public institutions under severe court pressure” and lamented that the “last thing that already congested court rolls require is further congestion by an unwarranted proliferation of litigation.”⁴⁷
21. It is difficult to think of a better example of an “unwarranted proliferation of litigation”⁴⁸ than Trustco asking this Court for interim relief immediately after the Tribunal declined that very same relief. Compare Trustco’s interim relief in the Tribunal and Trustco’s interim relief in this Court:

Trustco’s interim relief application in the Tribunal	Trustco’s interim relief application in this Court ⁴⁹
<ul style="list-style-type: none"> • <u>Notice of motion:</u> <p>“...[Trustco] hereby applies in terms of section 231 of the Financial Sector Regulation Act, 2017 for the suspension of [the JSE’s Restatement Decision] and [the JSE’s Listing Suspension Decision]...”</p> • <u>Founding affidavit:</u> <p>“Pending [Trustco’s Second Reconsideration Application], Trustco seeks that [the JSE’s Listing Suspension Decision] is itself suspended in terms of section 231 of the [Financial Sector Regulation Act]...”</p> 	<ul style="list-style-type: none"> • <u>Notice of motion:</u> <p>“Pending the outcome of [Trustco’s review of the JSE’s Restatement Decision and the Tribunal’s dismissal of Trustco’s First Reconsideration Application], including any appeal, [the JSE] is interdicted and restrained from:</p> <ul style="list-style-type: none"> - suspending [Trustco’s] listing on the [JSE]; - implementing [the Tribunal’s decision to dismiss Trustco’s First Reconsideration Application]; and - implementing, or attempting to implement, [the JSE’s Restatement Decision]...” • <u>Founding affidavit:</u> <p>“This is an application to interdict the JSE from suspending Trustco’s listing, and thus the trade of its shares, on the [JSE]...”</p>

⁴⁷ *Socratous v Grindstone Investments* 2011 (6) SA 325 (SCA) at para 16.

⁴⁸ *Socratous* (note 47) at para 16.

⁴⁹ Notice of motion; pp 001-1 to 001-2.

22. The relief on the left (in the Tribunal) is, in effect, the same as the relief on the right (in this Court). There are only two formal differences:
- 22.1 The first formal difference is that the relief on the left is interim relief pending Trustco's Second Reconsideration Application, while the relief on the right is interim relief pending Trustco's review (and pending "any appeal"—a loose loophole that lets Trustco tie this litigation up for years to come as it moves from Pretoria to Bloemfontein to Braamfontein).
- 22.2 The second formal difference is that the relief on the left asks for interim relief against the JSE's Listing Suspension Decision, while the relief on the right asks for interim relief against a grab bag of other things, including the JSE's Restatement Decision.
23. The differences do not matter. In substance, Trustco asked the Tribunal to put in place an interim measure that maintains the status quo (that is, interim relief to keep Trustco's shares on the JSE for the time being). The relief that Trustco asks for in this application has the same effect; Trustco even says as much in its founding affidavit, describing this application as "an application to interdict the JSE from suspending Trustco's listing, and thus the trade of its shares, on the [JSE]...".⁵⁰
24. It is a century-old rule that "[o]nce a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated" and "[b]y the same

⁵⁰ Founding affidavit; p 001-9, para 8.

token the suit will not be permitted to revive once it has been brought to its proper conclusion”.⁵¹ In short, “[t]he same suit between the same parties, should be brought once and finally.”

25. This rule—*res judicata*—serves important policy considerations: “there should be finality in litigation and an avoidance of a multiplicity of litigation or conflicting judicial decisions on the same issue or issues.”⁵²

26. The Tribunal’s Interim Relief Order ticks all the *res judicata* boxes:

26.1 *A previous judgment by a competent court:* the Tribunal is a competent tribunal for interim relief, and its Interim Relief Order is a judgment on interim relief.

26.2 *...between same parties:* the JSE and Trustco.

26.3 *...based on the same cause of action:* Trustco asked for interim relief in the Tribunal, and the requirements for interim relief in the Tribunal overlap with the requirements for interim relief in this Court.

26.4 *...with respect to the same subject-matter:* Trustco asked the Tribunal for interim relief to keep its shares trading on the JSE, which is the same outcome that Trustco hopes to achieve in this application.

⁵¹ *Socratous* (note 47) at para 13 (citing *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) at para 16). See also *Royal Sechaba Holdings (Pty) Ltd v Coote* 2014 (5) SA 562 (SCA) at para 21.

⁵² *Royal Sechaba* (note 51) at para 21.

27. To be sure, the Tribunal's Interim Relief Order is not a final determination in the sense that it does not finally decide whether the JSE's Listing Suspension Decision should stand. That is, the Tribunal's Interim Relief Order does not decide the merits of Trustco's Second Reconsideration Application. The JSE could not, for example, argue in the forthcoming Second Reconsideration Application that the Tribunal already decided that the JSE's Listing Suspension Decision is correct. The Tribunal's Interim Relief Order does not, in other words, have *res judicata* effect on *Trustco's Second Reconsideration Application*.
28. But the Tribunal's Interim Relief Order is a final judgment *on interim relief* and so it does have *res judicata* effect on this application for the same relief in this Court. This explains why a litigant cannot bring successive applications for interim relief in the High Court. If a litigant applies for an urgent interim interdict in week 1 and the application is dismissed because the requirements for interim relief are not met, the losing litigant cannot simply re-enroll the same application and try again in week 2.
29. Even if there are some fine distinctions between Trustco's application for interim relief in the Tribunal and Trustco's application for interim relief in this Court, the requirements for *res judicata* "must not be read overly literally or applied dogmatically."⁵³ The requirements can be "relaxed ... in appropriate circumstances" where necessary to give effect to the purpose of *res judicata*.⁵⁴

⁵³ *C3 Shared Services (Pty) Limited v Grange* 2022 JDR 0987 (GJ) at para 66. See also *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) para 23.

⁵⁴ *Royal Sechaba* (note 51) at para 12.

This “relaxed” form of *res judicata* is known as issue estoppel. It involves an “enquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed.”⁵⁵

30. This Court’s recent decision in *De Freitas v Jonopro (Pty) Ltd* shows that issue estoppel applies even to interim relief.⁵⁶

30.1 The applicant owned a night club called Cheeky Tiger in Kempton Park. The respondent planned to open its own night club a few hundred metres away using the same name and similar get-up.

30.2 The applicant applied for an urgent interim interdict to prevent the respondent from opening its night club using the Cheeky Tiger name and get-up.⁵⁷ Acting Judge Georgiadis granted the following interim order:⁵⁸

- “1. The respondents are hereby interdicted from commencing and/or trading business under the name and style of Cheeky Tiger at 29 Pretorius Road Kempton Park
2. The order in prayer 1 operate as an interim interdict pending the outcome of an application for final order

⁵⁵ *Smith v Porritt* 2008 (6) SA 303 (SCA) at para 10

⁵⁶ 2017 (2) SA 450 (GJ).

⁵⁷ *De Freitas* (note 56) at para 2.

⁵⁸ *De Freitas* (note 56) at para 22.

to be instituted by the applicant within 10 days of this order.”

- 30.3 The respondent opened its night club despite Acting Judge Georgiadis’ order. The respondent did not use the Cheeky Tiger name, but it did copy the applicant’s get-up.⁵⁹
- 30.4 The applicant applied for another interim interdict, this time against the respondent using Cheeky Tiger’s *get-up*.
- 30.5 This Court held that Acting Judge Georgiadis’ order was *res judicata* on the issue of passing off. Even though his order did not mention Cheeky Tiger’s *get-up* (only the *name*), Acting Judge Georgiadis found that the applicant had shown, on a *prima facie* basis, “that there had been a passing-off of at least part of the applicant’s get-up”.⁶⁰ The applicant argued that “[t]he decision by Georgiadis AJ found that the applicant was the proprietor of the name and the get-up and that there was a passing-off” and that “[t]hese findings were binding unless and until a court on appeal said otherwise” and so the court had “no competency to revisit that decision.”⁶¹
- 30.6 This Court agreed, holding that issue estoppel applied. Noting that Acting Judge Georgiadis’ judgment, given in the throes of urgent court, should not be “scrutinised with a fine-tooth comb”, this Court

⁵⁹ *De Freitas* (note 56) at para 23.

⁶⁰ *De Freitas* (note 56) at para 32.

⁶¹ *De Freitas* (note 56) at para 33.

reasoned that Acting Judge Georgiadis “had regard to the allegations made by the applicant and, because the test is a prima facie one, accepted the applicant’s version.”⁶² In other words, issue estoppel stood in the way of the respondent’s attempt to (re-)argue that the applicant had not met the requirements for interim relief based on passing off, as this concluding paragraph makes clear:⁶³

“Accordingly the respondents’ argument that the applicant has failed to demonstrate reputation, that there will be confusion and that there are irresolvable disputes of fact are met by issue estoppel.”

31. This Court’s reasoning in *De Freitas* should put an end to Trustco’s attempt to relitigate interim relief. The Tribunal is a competent tribunal to grant interim relief against a decision of the JSE, just like the High Court was a competent tribunal to grant interim relief against the *De Freitas* respondent’s attempt to use the Cheeky Tiger name. Trustco applied for interim relief to preserve the status quo (to keep its shares trading on the JSE), just like the *De Freitas* applicant (to prevent the respondent opening a nearby night club using its name). A decision was made on in interim relief: here, the competent tribunal decided that Trustco did not make out a case for interim relief; there, Acting Judge Georgiadis decided that the applicant made out a case for interim relief.

⁶² *De Freitas* (note 56) at paras 37 to 38.

⁶³ *De Freitas* (note 56) at para 42.

The prior decision (of the Tribunal and of Acting Judge Georgiadis) means any attempt to revisit the issues already decided is “met by issue estoppel.”⁶⁴

32. *Res judicata* serves important purposes: “to prevent the repetition of law suits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue”.⁶⁵ Trustco’s second bite at interim relief imperils each: it “repe[ats]” the same law suit that Trustco lost before the Tribunal, it forces the JSE to meet and defend a “multiplicity” of litigation fronts in Trustco’s determined effort to avoid playing open cards with the market, and it risks “conflicting decisions” between the Tribunal (refusing interim relief) and this Court (granting interim relief).
33. If anything, the policy reasons that underpin *res judicata* apply with even more force here. The Financial Sector Regulation Act establishes the Tribunal as a specialist dispute-resolution mechanism for the financial sector. Trustco had a fair chance to ask the specialist Tribunal for interim relief. Trustco now asks this Court to second-guess the specialist Tribunal. This leads to an absurd duplication of functions and it undermines the statutory purpose behind having the Tribunal in the first place.
34. For these reasons, *res judicata* bars a sequel to the Tribunal’s decision to dismiss Trustco’s application for interim relief. This application should be dismissed for that reason alone.

⁶⁴ *De Freitas* (note 56) at para 32.

⁶⁵ *Goldex* (note 53) at para 23.

TRUSTCO DOES NOT MEET THE REQUIREMENTS FOR INTERIM RELIEF

35. Even if the Tribunal's Interim Relief Order does not have res judicata or issue estoppel effect, Trustco still does not make out a case for interim relief.

Interim relief is incompetent: the horse has bolted and Trustco remains in contempt of the Tribunal

36. First, interim relief is incompetent because the time for Trustco to restate its financial statements has come and gone.

37. Trustco asks for an interim interdict against, amongst other things, the JSE implementing its Restatement Decision.

38. The Restatement Decision directed Trustco to “[r]estate the Group [Annual Financial Statement] for the year ended 31 March 2019” and “[r]estate the interim results for the 6 months ended 30 September 2019”.

39. A restatement must take place at the next available opportunity.⁶⁶ The next available opportunity for Trustco to restate its financial statements was when it published its 2021 financial statements on 31 January 2022. Trustco did not restate anything in those financial statements. Trustco added commentary in the notes to the financial statements about the JSE's decision and its intention to institute a review. But JSE's corrective action was clear: there must be a restatement. Trustco admits that “there has not been a restatement”.

⁶⁶ Answering affidavit; p 003-26, para 79.

40. The chance for Trustco to restate its financial statements has now come and gone; the horse has bolted. It follows that there is nothing left to interdict. For this reason alone, Trustco's interim relief is incompetent.
41. Second, interim relief is incompetent because Trustco is in contempt of the Tribunal's Dismissal of Trustco's First Reconsideration Application.
42. The Tribunal dismissed Trustco's First Reconsideration Application. Trustco did not act on the dismissal of Trustco's First Reconsideration Application before it was required to effect the restatement. Instead Trustco told the JSE that it was going to effect the restatement, but then did not do that and instead referred in its financial statements to a review application which it launched the same day.⁶⁷ But Trustco did not take any steps to stay the effect of the Tribunal's Dismissal of Trustco's First Reconsideration Application or the JSE's Restatement Decision. This in circumstances where the JSE had agreed to hold over the reconsideration of the suspension decision on the strength of Trustco's statement that it would restate its financial statements.
43. Trustco is in contempt of the Tribunal's dismissal of Trustco's First Reconsideration Application and the JSE's Restatement Decision because it has not complied with the JSE's corrective action (in the JSE's Restatement Decision) that the Tribunal endorsed. Trustco admits there has been no restatement.⁶⁸ It now seeks the assistance of this court—after the fact—to cure its contempt. That is, we submit entirely impermissible. If a party knows that it will be in contempt—as Trustco must have been aware—then that party must

⁶⁷ Answering affidavit; p 003-17 to 003-18, paras 46 to 53.

⁶⁸ Replying affidavit; p 004-22, para 69.

approach a court before it disobeys. A party cannot commit the disobedience and then later ask a court to purge its disobedience by granting an *ex post facto* interdict. But that is what Trustco asks of this court.

44. Interim relief is an “extraordinary remedy within the discretion of the court.”⁶⁹ Trustco has shown a marked disregard for the Tribunal’s authority and has, in the end, ignored its decision. Trustco’s conduct amounts to contempt of the Tribunal. This Court should not come to Trustco’s aid.

Interim relief is incompetent: Trustco does not meet the OUTA clearest-of-cases test

45. Interim relief is also incompetent because Trustco has not even pleaded its case according to the correct—and heightened—test under *OUTA*.⁷⁰
46. The JSE derives its power to suspend listings from the Listings Requirements, the Financial Markets Act, and the Financial Sector Regulation Act. A decision to suspend a listing is a polycentric, statutory power that is entrusted to the JSE as the expert regulator of a financial market.
47. Trustco’s relief asks this Court to temporarily restrain the JSE’s exercise of a statutory power. In this way, interim relief would “intrude” onto the “exclusive terrain” of the JSE as regulator of a financial market entrusted with statutory powers to protect the investing public and the proper functioning of the market.⁷¹

⁶⁹ *Tau v Mashaba* 2020 (5) SA 135 (SCA) at para 21.

⁷⁰ *National Treasury v Opposition To Urban Tolling* 2012 (6) SA 223 (CC) at para 47.

⁷¹ *OUTA* (note 70) at para 47.

48. To make things worse—and to bring this case even squarer in line with *OUTA*'s high standard—Trustco's relief also asks this Court to interfere with—and, with respect, undermine—the authority and effectiveness of *the Tribunal*. The Tribunal's power to suspend a decision of the JSE is also a polycentric, statutory power that is entrusted to the Tribunal as the dedicated forum for financial-sector disputes.
49. On both fronts, *OUTA* applies. This means Trustco must show that this is the “clearest of cases” for interim relief.⁷² Trustco must also show that interim relief does not cause undue harm to the separation of powers.⁷³
50. Trustco says not a word about the separation-of-powers harm. The harm is acute given the JSE's role as market regulator and its statutory mandate to ensure the proper functioning of financial markets. Interim relief would tie the JSE's and the Tribunal's hands and prevent them from exercising their discretionary statutory powers. *OUTA* applies, and it rightly calls for pause. For this reason alone, this application should be dismissed.

Trustco does not have a prima facie right to interim relief

51. What does Trustco plead for its *prima facie* right, and where does Trustco plead it? A cursory look at the footnotes to Trustco's heads of argument suggests it is all to be found in Trustco's “Review Application”—a different case under a different case number that is not part of this application.

⁷² *OUTA* (note 70) at para 47.

⁷³ *OUTA* (note 70) at paras 47, 63 to 66.

52. Dumping two-hundred-plus pages of pleadings from a different case number onto Caselines is no substitute for proper pleading. Like all litigants, Trustco must stand or fall by what it pleads in its founding affidavit in this application.
53. And in its founding affidavit in this application, Trustco pleads just two bases for “[a] prima facie right”.⁷⁴
54. The first pleaded basis is the mere fact that Trustco has launched a review of the JSE’s Restatement Decision and the Tribunal’s Dismissal of Trustco’s First Reconsideration Application.⁷⁵ Trustco does not, in its founding affidavit in this application, plead any of its grounds of review. Trustco does not even plead that its review has any prospects of success. Trustco describes this application as being “sought on the basis that the foundation” of the JSE’s Listing Suspension Decision “is a decision which is presently the subject of a review”. Maybe, but so what? An interim interdict cannot be based on, without more, a pending review.⁷⁶ Nor does the mere institution of a review suspend an administrative decision.⁷⁷
55. The second pleaded basis is section 236 of the Financial Sector Regulation Act, which deals with “[e]nforcement of Tribunal orders”.⁷⁸
- 55.1 In effect, Trustco argues that section 236 does away with the need to apply for interim relief at all, claiming an “automatic and statutorily

⁷⁴ Founding affidavit; pp 001-13 to 001-14, paras 30 to 35.

⁷⁵ Founding affidavit; pp 001-13 to 001-14, paras 30 to 31.

⁷⁶ *OUTA* (note 70) at para 50.

⁷⁷ *Tshwane City* (note 39) at paras 73 to 74.

⁷⁸ Founding affidavit; p 001-14, para 32.

prescribed preclusion on the [Tribunal's Dismissal of Trustco's First Reconsideration Application] being implemented or enforced."⁷⁹

55.2 Trustco is wrong because the JSE is not "[e]nforc[ing]" the Tribunal's Dismissal of Trustco's First Reconsideration Application. Instead, the JSE's Listing Suspension Decision is based on Trustco's "fail[ure] to comply with the Listings Requirements and the [JSE's Restatement Decision]".⁸⁰ To be sure, the JSE also considered Trustco's "disregar[d]" for the Tribunal's Dismissal of Trustco's First Reconsideration Application.⁸¹ But the JSE's Listing Suspension Decision is not a means of "[e]nforc[ing]" the latter.

55.3 In any event, it makes no sense to talk about the JSE "[e]nforc[ing]" the Tribunal's Dismissal of Trustco's First Reconsideration Application. The Tribunal dismissed Trustco's First Reconsideration Application. And, of course, the dismissal had consequences for Trustco. But the consequences flow *from the JSE's Restatement Decision*, not from any "[e]nforcement" of any order of the Tribunal. And although Trustco is reviewing the JSE's Restatement Decision, the review does not, on its own, affect the legality and validity of the JSE's Restatement Decision—indeed, Trustco did not even bother to apply for interim relief against the Restatement Decision. The

⁷⁹ Founding affidavit; p 001-14, para 33.

⁸⁰ Founding affidavit; annexure "FA2", p 001-52.

⁸¹ Founding affidavit; annexure "FA2", p 001-51.

consequence is clear: the Restatement Decision is “valid and effectual” and “continue[s] ... to have legal consequences”.⁸²

56. There is also a disconnect between the interim relief that Trustco seeks and the proceedings that relief would be pending. Trustco asks for interim relief against the JSE’s Listing Suspension Decision but pending its review of the JSE’s Restatement Decision and the Tribunal’s Dismissal of Trustco’s First Reconsideration Application. Its interim relief is not pending a review of the JSE’s Listing Suspension Decision. Nor could it be, since Trustco must first exhaust its Second Reconsideration Application in the Tribunal. Trustco’s remedy was to ask the Tribunal for interim relief against the JSE’s Listing Suspension Decision. Trustco did ask the Tribunal, and the Tribunal refused interim relief, which probably explains Trustco’s attempt to patch together an application for interim relief against one self-standing decision (the JSE’s Listing Suspension) pending a review of another self-standing decision (the JSE’s Restatement Decision).
57. What’s more, Trustco does not need interim relief to preserve its right to review any of the several decisions of the JSE and the Tribunal that it is so determined to avoid. The JSE suspending Trustco’s listing does not irreparably stunt its review: if the JSE suspends Trustco’s listing on a Monday, Trustco’s review will still be live on the Tuesday. In this way, Trustco’s right to review the JSE’s Restatement Decision and the Tribunal’s Dismissal of Trustco’s First Reconsideration Application does not require interim preservation.

⁸² *Kirland* (note 27) at para 101.

58. Trustco spends most of its heads of argument rehashing its grounds of review. This is impermissible because the “Review Application” that features so often in the footnotes to Trustco’s heads of argument is not before this Court for purposes of this application.
59. This is no mere technicality. The way Trustco ends up arguing its case prejudices the JSE because the JSE was never called on to answer these review grounds for purposes of this application. The JSE was not called upon to answer these allegations because they do not appear anywhere in the founding affidavit. Nonetheless, to assist this Court, we provide a comprehensive response to the arguments raised in Trustco’s heads of argument in an annexure to these heads of argument.
60. For these reasons, Trustco has no *prima facie* right to interim relief.

Trustco does not show that it will suffer irreparable harm

61. Trustco pleads little, if any, facts to support its conclusions about irreparable harm. It alleges a “devastating consequence” that it claims “requires no further elucidation.”⁸³ But “further elucidation” is exactly what an applicant in a busy urgent court is supposed to plead in its founding affidavit.
62. The closest Trustco comes to pleading any “elucidation” of irreparable harm is in paragraph 38 of the founding affidavit. But this alleged commercial harm is not irreparable; if Trustco does not obtain interim relief but ultimately succeeds in its review, its shareholders will then be able to freely trade their shares.

⁸³ Founding affidavit; p 001-15, para 37.

Trustco's success in the review would also cure any alleged reputational damage.

The balance of convenience weights against interim relief

63. On the other side of the balance, there would be irreparable harm to the market and to unsuspecting third parties who invest in Trustco shares if Trustco obtains interim relief but is ultimately *unsuccessful* in its review. There would also be irreparable harm to the rule of law and the JSE's ability to act as an effective regulator.
64. Trustco claims that the market is "well aware" of the JSE's decision that Trustco did not comply with IFRS in respect of the loan issue and the property issue, and "well aware" of the Tribunal's decision to dismiss Trustco's objection. Trustco points to "a number of SENS announcements" in this regard. Trustco also points to the fine print in its 2021 annual financial statements.
65. None of that adequately protects unsuspecting investors who would have no reason to look out for SENS announcements about Trustco, and no reason to carefully parse the commentary to Trustco's financial statements. The only way to effectively protect investors, and to prevent them from suffering irreparable harm if Trustco's review ultimately fails but its shares remain freely tradable in the meantime, is to suspend Trustco's listing.

66. Trustco did not restate its financial statements as the JSE directed.⁸⁴ Trustco admits as much: it admits that it “did not restate its [financial statements].”⁸⁵ The corrective action was clear: Trustco must reverse the N\$546 million gain recognised in profit and loss in respect of the first loan, Trustco must reverse the N\$1 billion gain recognised in profit and loss in respect of the second loan, and Trustco must reverse the N\$693 million gain in respect of the properties.
67. Said simply, the JSE told Trustco to correct (“re-issu[e]”) *numbers*. Trustco, by its own admission, corrected no numbers.⁸⁶ Instead of correcting numbers, Trustco added *words*: it buried some commentary about the JSE’s decision in the notes to its financial statements. But this is a regulated stock exchange, not a secondhand car dealership; *buyer beware* is not enough. Those diligent enough to reach the fine print of Trustco’s financial statements may learn about court cases and lawyers’ letters. Look at the numbers, though, and you would be none the wiser.
68. This is not accountants nitpicking for the sake of it. Financial statements are there to give the market reliable financial information to inform investment decisions. Trustco’s financial statements do not do that. Even if an intrepid investor were to pore over the commentary to Trustco’s financial statements, that would still not help. The commentary does not identify the specific line items that would increase or decrease as a result of the restatements; the commentary does not specify any tax or deferred tax consequences of the

⁸⁴ Answering affidavit; p 003-18, para 51. See also replying affidavit; p 004-22, para 69.

⁸⁵ Replying affidavit; p 004-22, para 69

⁸⁶ Replying affidavit; p 004-22, para 69

restatement; the commentary does not explain the unwinding or reversal of share transactions; the commentary does not quantify the impact of the restatement on earnings per share or headline earnings per share; and the commentary does not quantify the overall impact that the restatement would have on the financial statements.⁸⁷

69. For these reasons, Trustco's commentary to its financial statements is inadequate. And ironically, the commentary about Trustco's non-compliance with IFRS does not itself comply with IFRS: IAS 1.18 in IFRS states that "[a]n entity cannot rectify inappropriate accounting policies either by disclosure of the accounting policies used or by notes or explanatory material".⁸⁸
70. There is also irreparable harm to market regulation and the rule of law. Trustco has, at every turn, ignored and disregarded the authority of the JSE and the authority of the Tribunal. The message that Trustco's conduct sends to the market is as clear as it is worrying: listed companies can, through brute litigation trench-warfare, thwart their regulator and thwart the Tribunal, and continue offering their shares to the market despite non-compliance with IFRS.
71. For these reasons, the balance of convenience weighs strongly against interim relief.

Trustco already exhausted its alternative remedy in the proper forum

72. Trustco's remedy was to use the specialist dispute-resolution procedure prescribed in the Financial Sector Regulation Act and ask the specialist Tribunal

⁸⁷ Answering affidavit; p 003-32, para 104.

⁸⁸ Answering affidavit; p 003-32, para 103.

for interim relief. Trustco had its fair chance to persuade the Tribunal to grant interim relief. Trustco lost. There are no second chances.

CONCLUSION

73. The market works only if financial statements are accurate. The JSE decided that Trustco's financial statements do not comply with IFRS. The JSE directed Trustco to fix them. The Tribunal agreed.
74. Nearly two years have passed since the JSE's Restatement Decision, and almost a year since the Tribunal dismissed Trustco's First Reconsideration Application. Trustco has still not restated its financial statements.
75. The continued listing of Trustco's shares on the JSE is a clear danger to the proper functioning of the market and to the investing public. The JSE is entitled to exercise its discretionary and polycentric statutory power to suspend Trustco's listing.
76. Trustco already asked the Tribunal for interim relief. Trustco lost, and *res judicata* stands in the way of a rematch. Even if Trustco somehow overcomes *res judicata*, it does not make out a case for interim relief—not on the heightened *OUTA* test, and not even on the ordinary test.
77. For any of those reasons, Trustco's application should be dismissed with costs.

IAN GREEN SC
JASON MITCHELL

Counsel for the JSE
21 July 2022

ANNEXURE: THE JSE'S RESPONSE TO THE IMPERMISSIBLY RAISED REVIEW ARGUMENTS IN TRUSTCO'S HEADS OF ARGUMENT

1. First, there is Trustco's argument about Mr Visser's authority.⁸⁹

1.1 Trustco did not think to raise this ground of review during its internal remedy (its First Reconsideration Application application).⁹⁰ It is impermissible for Trustco to skip over its internal remedy like this, and this ground of review should be disregarded for that reason alone.

1.2 Putting aside Trustco's belated raising of the point, the JSE's board delegated power as follows:⁹¹

“...the Board hereby delegates the powers and duties under sections 13 and 15 of the Securities Services Act, and the Listings Requirements to ... the head of the Issuer Regulation Division or the General Manager: Issuer Regulation...”

1.3 The first part— “the powers and duties under sections 13 and 15 of the Securities Services Act”—is met. Trustco accepts that this must be read as a reference to sections 12 and 14 of the Financial Markets Act⁹², which repealed the Securities Services Act.⁹³ The JSE's

⁸⁹ Trustco's heads of argument; p 007-9, paras 19 to 20.

⁹⁰ Answering affidavit (review); p 009-123, para 79; p 009-131, para 101. See replying affidavit (review); pp 009-220 to 009-221, paras 81 to 83; p 009-224, para 98.

⁹¹ Founding affidavit (review); p 009-36, para 81 (annexure omitted).

⁹² Act 19 of 2012. Replying affidavit (review); p 009-218, para 69.

⁹³ Act 36 of 2004.

decision that Trustco's financial statements do not comply with IFRS and should be restated is an exercise of power under sections 12 and 14 of the Financial Markets Act and under the Listings Requirements.

1.3.1 Sections 12 of the Financial Markets Act gives the JSE power to remove a listing and suspend trading. The JSE's decision that Trustco's financial statements do not comply with IFRS and should be restated is part and parcel of the delisting and suspension process. Section 14 of the Financial Markets Act is a broad conferral of power on the JSE to require an issuer to disclose information to the public. A restatement of financial information is just another form of disclosure, and so the JSE's decision falls well within section 14 of the Financial Markets Act.

1.3.2 The delegation to Mr Visser (quoted above) includes the JSE's powers *under the Listings Requirements*. The Listings Requirements themselves confirm that the JSE "delegated its authority in relation to the Listings Requirements... to the management of the Issuer Regulation Division."

1.3.3 Paragraph 8.65 of the Listings Requirements speaks, almost word for word, to the steps that the JSE took against Trustco:

“FRIP

8.65 The JSE and SAICA have formed a panel to be known as the Financial Reporting Investigations Panel to consider complaints and to advise the JSE in relation to compliance by issuers with IFRS and the JSE’s required accounting practices (in terms of the Listings Requirements). If, after receiving advice from the FRIP, the JSE finds that an issuer has not complied with any of the above, the JSE will be able, in its sole discretion:

- (a) to censure such issuer in accordance with the provisions contained in Section 1 of the Listings Requirements; and
- (b) instruct such issuer to publish or re-issue any information the JSE deems appropriate.”

1.3.4 The JSE delegated its “powers and duties under ... the Listings Requirements”. The decision that Trustco’s financial statements do not comply with IFRS and should

be restated is just that: an exercise of the JSE’s “powers and duties under ... the Listings Requirements”.

1.3.5 As for the second part of the delegation, Mr Visser fits the bill: he is job title is “Director: Issuer Regulation”.⁹⁴

1.4 Trustco’s retort starts at section 68 of the Financial Markets Act, which allows the JSE to delegate “to a person or group of persons, or a committee approved by the controlling body of the market infrastructure, or a division or department of the market infrastructure, subject to the conditions that the market infrastructure may determine.”⁹⁵ Holding one finger on the last phrase of section 68—“subject to the conditions that the market infrastructure may determine”—Trustco turns to the JSE’s memorandum of incorporation.⁹⁶ There, it goes to paragraph 12.11.1, which allows the board to “appoint any number of committees of Directors and delegate to any such committee any of the authority of the Board, provided that all members of these committees must be Directors.”⁹⁷ Trustco argues that the proviso “provided that all members of these committees must be Directors” at the end of paragraph 12.11.1 of the memorandum of incorporation is a “conditio[n] that the market infrastructure may determine” as envisaged in section 68. Mr Visser

⁹⁴ Answering affidavit; p 003-3 para 1.

⁹⁵ Founding affidavit (review); p 009-34, para 74.

⁹⁶ Founding affidavit (review); p 009-38, para 88.3.

⁹⁷ Founding affidavit (review); p 009-38, para 88.3.

is not a director, and so the JSE's delegation to him, so the argument goes, is invalid.

1.5 Trustco's argument is wrong. Section 68 of the Financial Markets Act allows the JSE to delegate to "a person or group of persons, or a committee...". The presumption against redundancy means each of those words mean something different.⁹⁸ Said differently, section 68 allows the JSE to delegate to a *person*, to a *group* or persons, or to a *committee*. Paragraph 12.11.1 of the JSE's memorandum of incorporation is about delegations to "committees".⁹⁹ Paragraph 12.11.1 does not apply to delegations to "a person", and so the proviso in paragraph 12.11.1 does not apply.

1.6 Taken to its logical conclusion what Trustco suggests is that the JSE cannot act in respect of listed companies other than through committees which are composed entirely of directors of the JSE. That proposition that is plainly unworkable: it would involve the JSE's directors in dealing, in committee, with the day-to-day issues of listed companies; it would require the committee of directors to be a committee of experts who are skilled and have specialist knowledge of the listings requirements and it would leave the JSE without an available board of directors to guide its own affairs. Plainly the JSE is able, and entitled to delegate powers to persons such as Mr Visser.

⁹⁸ *Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC) at para 153.

⁹⁹ Founding affidavit (review); p 009-38, para 88.3.

2. Second, Trustco argues that the JSE does not have the power to order Trustco to restate its financial statements¹⁰⁰.

2.1 Paragraph 8.65 of the Listings Requirements, quoted above, puts paid to the argument. If the JSE finds, after “receiving advice from the FRIP” (check), that an issuer “has not complied with” IFRS or the JSE’s required accounting practices, the JSE may, in its “sole discretion ... instruct such issuer to publish or re-issue any information the JSE deems appropriate.” A restatement is the same as “re-issu[ing] ... information”.

2.2 If the JSE’s broad power under paragraph 8.65 of the Listings Requirements were not broad enough, section 10 of the Financial Markets Act is even broader. It gives the JSE power to “do all things that are necessary for, or incidental or conducive to the proper operation of an exchange” that are not inconsistent with the Financial Markets Act. A market cannot operate without accurate financial information. It follows that accurate financial statements are “necessary for, or incidental or conducive to the proper operation of” the JSE.

2.3 In its heads of argument, Trustco argues that it has already “published” or “re-issued” the relevant “information”.¹⁰¹ Trustco seems to accept that the JSE has the power to direct a listed company to “re-issu[e]” *words*, but it argues that the JSE has no power to direct

¹⁰⁰ Trustco’s heads of argument; pp 007-9 to 007-11, paras 21 to 27.

¹⁰¹ Trustco’s heads of argument; p 007-10, para 24.

a listed company to “re-issu[e]” *numbers*. There is no basis in the text of the Listings Requirements and the Financial Markets Act for an ultra-fine line between words and numbers. Besides, Trustco did not restate its financial statements as the JSE directed. Trustco admits as much: it admits that it “did not restate its AFS”.¹⁰² The corrective action was clear: Trustco must reverse the N\$546 million gain recognised in profit and loss in respect of the first loan, Trustco must reverse the N\$1 billion gain recognised in profit and loss in respect of the second loan, and Trustco must reverse the N\$693 million gain in respect of the properties. Said simply, the JSE told Trustco to correct (“re-issu[e]”) *numbers*. Trustco, by its own admission, corrected no numbers.

3. Third, and now turning its aim to the Tribunal, Trustco argues that, first, the Tribunal (under Justice Harms’ leadership) was not properly qualified and lacked adequate expertise,¹⁰³ and second the Tribunal failed to consider, or failed to deal with, or otherwise overlooked Trustco’s arguments about why the JSE’s Restatement Decision is wrong.¹⁰⁴

3.1 Trustco never thought to challenge the composition and expertise of the Tribunal until now. In analogous contexts, courts have deprecated this wait-and-see approach.¹⁰⁵ Trustco’s objections are, in any event,

¹⁰² Replying affidavit; p 004-22, para 69.

¹⁰³ Trustco’s heads of argument; p 007-11, para 28.

¹⁰⁴ Trustco’s heads of argument; pp 007-11 to 007-19, paras 28 to 50.

¹⁰⁵ *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) at paras 74 to 75.

misplaced. Its argument about the composition of the Tribunal mixes up the composition of *the Tribunal* and the composition of *panels* of the Tribunal.

3.1.1 Section 220(1) of the Financial Sector Regulation Act states that the Tribunal comprises “as many members, appointed by the Minister, as the Minister may determine.”

Section 220(2) requires there to be at least two retired judges and at least two people with, broadly speaking, finance experience in the pool of Tribunal members.

3.1.2 Not every member of the Tribunal hears an application. Instead, the Tribunal sits in panels of at least 3 members. Section 224(4) of the Financial Sector Regulation Act sets the composition requirements for *a panel*: every panel must have 1 presiding member (who must be one of the retired judges) and at least 2 others (and they must either be members of the Tribunal, or non-members who have been included on a “[p]anel list compiled by the Minister”).

3.1.3 The dispositive answer to Trustco’s argument about the composition of the panel is that section 224(4) of the Financial Sector Regulation Act does not require members of *a panel* of the Tribunal to have any financial or accounting expertise. To be sure, section 220(2) does impose that requirement for members of *the Tribunal*. But the Tribunal and a panel of the Tribunal are two different

things, and two different sections of the Financial Sector Regulation Act govern their composition.

- 3.2 Trustco's complaint about the composition of the Tribunal calls into question the skill and competence of the panel members. There is no basis for this given that the panel consisted of the retired Deputy Judge President of the SCA, an experienced practicing senior counsel, and an experienced practicing attorney. Still further because the panel members are selected from a list prepared by the Minister, Trustco's complaint about the skill and competence of the panel members brings in its wake the imputation that the Minister did not consider whether those who he placed on the list of panel members had the required skill and competence.
- 3.3 Trustco then turns to the business judgment rule.¹⁰⁶ The main problem with this argument is that the business judgment rule precludes *liability*; it does not set *standards*.
- 3.4 Trustco argues that section 76(4) of the Companies Act "underpin[s]" the business judgment rule.¹⁰⁷ But section 76(4) of the Companies Act is about directors' conduct and their fiduciary duties. For policy reasons, the business judgment rule is a shield against liability if a director is found to have breached his or her fiduciary duties. But the

¹⁰⁶ Trustco's heads of argument; p 007-18, para 49.2.

¹⁰⁷ Trustco's heads of argument; p 007-18, para 49.2.

rule does not do the work of *defining those duties in the first place*.¹⁰⁸ While the business judgment rule may be a “shield” available to Trustco’s directors against liability for Trustco’s failure to comply with IFRS, the rule does not give them a licence to interpret and apply IFRS as they please. After all, the point of IFRS—International Financial Reporting *Standards*— is, as its name suggests, to set the standards. There would be nothing standard about IFRS if each board could apply it as they please. Paragraphs 2.10 and 3.4 of the Listings Requirements do not suggest otherwise, at least not as far as compliance with IFRS is concerned.¹⁰⁹ The Tribunal was not asked to decide whether Trustco’s directors should be held liable for some management decision that did not work out. The Tribunal was asked whether Trustco’s financial statements complied with IFRS. The business judgment rule is no answer to that question.

¹⁰⁸ JL Yeats et al *Commentary on the Companies Act of 2008* at p 2-1323 to 2-1324 (“This provision, generally known as the ‘business judgment’ rule, provides a significant shield (which some commentators have called a ‘safe haven’) against liability for a director whose conduct has failed to satisfy the duty of care imposed by the Act ... The structure of the inter-relationship between s 76(3)(c) (which imposes a duty of care, skill and diligence) and of s 76(4) (which lays down a business judgment rule) seems to be that the statutory criteria applicable to the duty of care, skill and diligence in s 76(3)(c) will first be applied, and only if the director in question is found to have failed to satisfy those criteria will the secondary question arise as to whether the director in question has avoided liability on the basis that his conduct has satisfied the statutory business judgment rule in s 76(4).”).

¹⁰⁹ Trustco’s heads of argument; p 007-18, para 49.2.

4. Fourth, Trustco also argues that the JSE does not have the power to suspend Trustco's shares.¹¹⁰ Trustco correctly quotes the relevant "regulatory framework" in its heads of argument, but its application of that "framework" to the facts of this case is wrong.

4.1 Paragraph 1.6 of the Listings Requirements allows the JSE to suspend a listing on *either* of two grounds: one, suspension "will further one or more of the objects contained in [s]ection 2 of the [Financial Markets Act], which may also include if it is in the public interest to do so"; or two, if the issuer "failed to comply with the Listings Requirements and it is in the public interest to do so".

4.2 Section 2 of the Financial Markets Act lists five statutory objects, which Trustco quotes in paragraph 54 of its heads of argument. Paragraph 1.6 of the Listing Requirements allows the JSE to suspend a listing if suspension furthers just *one* of those five objects. Suspending Trustco's listing furthers *at least three*.

4.2.1 The first object is to ensure that "South African financial markets are fair, efficient and transparent". Suspending Trustco's listing "further[s]" that object because Trustco's financial statements are not accurate and do not reflect a fair picture of Trustco's financial performance. It is unfair for Trustco's existing shareholders, including Dr van Rooyen, its majority shareholder, to continue to

¹¹⁰ Trustco's heads of argument; pp 007-19 to 007-21, paras 51 to 57.

benefit from Trustco's inaccurate and wrong accounting. The only way for Trustco to be "transparent" with the market was to restate its financial statements, which it refused to do. And an efficient market relies on accurate information; allowing Trustco to continue to trade on the back of inaccurate and misleading financial statements is an inefficiency that market regulators like the JSE, and the Tribunal, are there to police and stamp out.

4.2.2 The second object is to "increase confidence in the South African financial markets". Suspending Trustco's listing "further[s]" that object because suspension is the only effective way to protect the market and potential investors. The JSE has already determined that Trustco's financial statements do not comply with IFRS. The Tribunal agreed. It erodes confidence in the market—and erodes confidence in the authority of the market's regulatory ecosystem—for Trustco's shares to continue trading as normal and for Trustco to be allowed to continue to contemptuously ignore the JSE and the Tribunal.

4.2.3 The third object is to "promote the protection of regulated persons, clients and investors". Suspending Trustco's listing "further[s]" that object because suspension prevents unsuspecting investors buying Trustco's shares on the strength of misleading financial statements.

- 4.3 Trustco also failed to comply with the Listings Requirements—an independent basis for suspension. Trustco failed to comply with the Listings Requirements in the way it reported the loan issue and the property issue, and it failed to comply when it disregarded the Restatement Decision and the Tribunal's Order.
- 4.4 Trustco also failed to comply with IFRS.¹¹¹ Section 8 of the Listings Requirements prescribes how listed companies must report their financial information. Paragraph 8.62 and 8.65 require listed companies to comply with IFRS. Trustco repeatedly makes the boilerplate point that the JSE is “unable to assert precisely which, if any of the IFRS principles it alleges Trustco has breached.”¹¹² Not so. The FRIP's report pointed to non-compliance with IFRS.¹¹³ So did the JSE's initial decision.¹¹⁴ And its final decision. And in the Tribunal, where the JSE produced two sets of reasons and an expert report.¹¹⁵
- 4.5 Perhaps because it can find no firm footholds in statute, the Listings Requirements, or IFRS itself, Trustco looks for help elsewhere. All it can offer is what the House of Lords once said almost a century ago—long before IFRS was even invented.¹¹⁶ Needless to say, the case has nothing to do with listed companies, nothing to do with auditing,

¹¹¹ Answering affidavit (review); pp 009-126 to 009-129, paras 92 to 93.

¹¹² Trustco's heads of argument; p 007-8, para 16.

¹¹³ Answering affidavit; p 003-10, para 33.

¹¹⁴ Answering affidavit; p 003-11, paras 34 to 36.

¹¹⁵ Answering affidavit (review); p 009-124, para 84.

¹¹⁶ Trustco's heads of argument; p 007-17, para 49.1.

and nothing to do with financial reporting. But Trustco's resort to old English law on unrelated topics misses the point for a more fundamental reason: the substance over form doctrine *is part and parcel of IFRS*, as the JSE's expert explained in the Tribunal.¹¹⁷

4.6 Finally, suspending Trustco's listing is "in the public interest".¹¹⁸ The public interest favours transparency in the market. The public interest also favours—requires even—effective regulators taking decisive action to protect the investing public. If anything, *not* suspending Trustco's listing undermines the public interest: it will send a message that listed companies can continue to trade with inaccurate and misleading financial statements and ignore decisions of the JSE and the Tribunal.

¹¹⁷ Founding affidavit; annexure "FA1", pp 001-26 to 001-32. See also answering affidavit (review); pp 009-125 to 009-126, paras 87 to 90.

¹¹⁸ Paragraph 1.6 of the Listings Requirements.