# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG, PRETORIA

Case number: 5640/22

In the matter between

TRUSTCO GROUP HOLDINGS LIMITED

**Applicant** 

and

FINANCIAL SERVICES TRIBUNAL

First Respondent

**JSE LIMITED** 

Second Respondent

# SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

## **ANDRIES FRANCOIS VISSER**

state under oath that:

- I am an adult male, employed by the JSE as the Director: Issuer Regulation.
   I am authorised to depose to this affidavit on behalf of the Second Respondent, the JSE. Its contents are true and, unless the context indicates otherwise, within my knowledge.
- 2. I respond to the founding affidavit and the supplementary founding affidavit thematically. Any allegations in those affidavits that are not expressly dealt

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with should be taken as denied to the extent that they are inconsistent with what is stated this affidavit.

### THE FACTS

- 3. This is an appeal dressed up as a review. The Applicant, Trustco Group Holdings Limited ("Trustco"), complains that the decisions it reviews are "incorrect", with its founding affidavit and supplementary founding affidavit rehashing arguments that were already considered and rejected during the decision-making process.
- 4. Trustco's impermissible attempt to shoehorn merits-based arguments into a review is yet another instalment in Trustco's determined attempt to avoid accountability and market transparency. The end result of all of Trustco's legal maneuvering is startling. In November 2020, after a careful process that afforded Trustco every opportunity to be heard, the JSE determined that Trustco, a publicly listed company, failed to comply with IFRS and should restate its financial statements. Eighteen months later, Trustco has not restated a single cent.
- 5. Trustco is a Namibian company listed on the JSE. Trustco's CEO and majority shareholder is Dr Quintin van Rooyen. Dr van Rooyen was also the sole shareholder of Huso Investments Pty Limited ("Huso").
- Between 2015 and 2018, Dr van Rooyen advanced loans totalling approximately N\$546 million (or about R546 million) to Huso and its subsidiaries. In 2018, Trustco acquired all the issued shares of Huso.

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- 7. In Huso's financial statements, Dr van Rooyen's loan was initially classified as equity (that is, it was recorded as money that Dr van Rooyen had invested in Huso as a shareholder). By the time Trustco acquired Huso, though, the loan had been reclassified as a liability (that is, money that was owed to Dr van Rooyen). The switch from equity to liability was not disclosed to Trustco's shareholders.
- 8. The sale of shares agreement for Trustco's purchase of Dr van Rooyen's shares in Huso included an earn-out mechanism for Dr van Rooyen. In short, through the mechanism, Dr van Rooyen earned shares in Trustco if Trustco met stipulated profit thresholds.
- 9. A few weeks after Trustco acquired Dr van Rooyen's Huso shares, Dr van Rooyen forgave his N\$546 million loan. Because Trustco had recognised the loan as a liability, it reflected the forgiveness of the loan as a gain of N\$546 million in its financial statements. This, in turn, triggered the earn-out mechanism in Dr van Rooyen's sale of shares agreement to his benefit.
- 10. Despite exhaustive opportunities—including in its affidavits in these proceedings— Dr van Rooyen and Trustco have never explained why Dr van Rooyen would forgive a loan of more than half-a-billion Rand.
- 11. Meanwhile, in 2019, Dr van Rooyen advanced a second loan of up to N\$1 billion (or R1 billion) to Trustco. A few months later, Dr van Rooyen

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forgave this loan too, resulting in a 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).

- 12. On a separate issue, Trustco owns properties in a development in Elisenheim, north of Windhoek. Trustco reclassified properties in the development from inventory to investment property. 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. After the reclassification, Trustco revalued the properties upwards which increased its profitability. Trustco then 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).
- In a letter to Trustco dated 5 December 2019, Trustco was advised that its financial statements were selected for review under the JSE's proactive monitoring review process. Under the proactive monitoring review process, the JSE reviews the financial statements of every listed company at least once every five years. The Trustco financials that were reviewed were its group annual financial statements for the year ending 31 March 2019, and its interim results for the six months ending 31 August 2018 (for convenience, I refer to both as "Trustco's financial statements", except where necessary to differentiate between them).
- 14. As part of the proactive monitoring review process, the JSE referred three issues to the Financial Reporting Investigation Panel. 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. The FRIP comprises a panel of

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- 15. I pause to note that the FRIP is an advisory body. It does not make binding decisions. Its role is to advise the JSE and provide expert input to assist the JSE in the JSE's decision-making process.
- 16. The JSE referred three issues to FRIP:
  - The first issue related to Dr van Rooyen's two loans and Trustco classifying a 'gain' in profit and loss after Dr van Rooyen forgave the loans (a N\$546 million gain in Trustco's 2019 annual financial statements, and a N\$ 1billion gain in its 2019 interim results). This became known as "the loan issue".
  - The second issue related to Trustco's reclassification of the Elisenheim properties from inventory to investment property in its financial statements. This became known as "the property issue".
  - A third issue also related to the sale of properties, but Trustco subsequently rectified this matter to the JSE's satisfaction.
- 17. The FRIP sent a report to the JSE in July 2020, which is attached to the founding affidavit as "FA6". After considering all relevant information, including submissions on each issue from Trustco, the FRIP advised the JSE that, in its view, Trustco's reporting of the loan issue and the property issue did not comply with IFRS. In subsequent discussions to the content of the FRIP report, the

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FRIP chair also met with representatives of Trustco, giving Trustco a further opportunity to be heard.

- 18. On 16 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.
- Trustco objected to the JSE's decision in terms of paragraph 1.4 of the JSE
   Listings Requirements.
- 20. On 11 November 2020, the JSE dismissed Trustco's objection. The JSE directed Trustco to take corrective action, which included the following:
  - The JSE directed Trustco to restate its annual financial statements for year ended 31 March 2019, with the following corrections:
    - 20.1.1 in respect of the first loan, Trustco must reverse the N\$546 million gain recognised in profit and loss; and
    - in respect of the property issue, Trustco must reverse the reclassification of the properties and reverse the N\$693 million gain recognised in profit and loss.
  - The JSE directed Trustco to restate its interim results for the six months ended 30 September 2019 in respect of the second loan by reversing the N\$1 billion gain recognised in profit and loss.
- 21. I refer to this decision as "the JSE's Decision".

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- 22. On 10 February 2021, Trustco applied to the Financial Services Tribunal for a reconsideration of the JSE's Decision under section 230 of the Financial Sector Regulation Act ("FSR Act").
- 23. On 22 November 2021, the Tribunal dismissed Trustco's reconsideration application. I refer to this as "the Tribunal's Decision". The Tribunal's Decision is attached to the founding affidavit as "FA1".
- 24. On 1 December 2021, Trustco published a SENS in which, amongst other things, it criticised the JSE's Decision and asked shareholders to participate in a non-binding advisory vote on several issues that the JSE had already considered and decided, including a vote to endorse Trustco's accounting treatment of the loan issue and the property issue. I attach a copy of this SENS notice as "AA1". Regrettably, Trustco described the JSE's diligent process as "unwarranted interference" that "undermine[d] the independence, accountability, and integrity" of Trustco's board.
- 25. On 3 December 2021, the JSE wrote to Trustco. I attach a copy of the JSE's letter as "AA2".
  - The JSE recorded its concern that Trustco had not complied with the corrective action in the JSE's Decision and noted that it was clear from Trustco's SENS announcement that it had no intention of complying (and, therefore, no intention of complying with the Tribunal's Decision).
  - Trustco's listing "due to [Trustco's] failure to comply with important



provisions of the Listings Requirements and [Trustco's] refusal to take the necessary steps to ensure that it complies, in all aspects, with the Listings Requirements and the decisions of the JSE and the Financial Services Tribunal." In the JSE's view, suspending Trustco's listing would be "in the public interest" and would "further the objects of the Financial Markets Act."

- The JSE gave Trustco an opportunity to make representations as to why the JSE should not suspend its listing.
- 26. On 9 December 2021, Trustco's attorneys, Norton Rose Fulbright, wrote to the JSE. A copy of the letter is already annexed to the founding affidavit marked "FA10".
  - 26.1 Trustco denied that it had decided not to comply with the JSE's decision and corrective action.
  - Trustco claimed it needed to "obtain independent advice on the issues, and how to treat and practically implement the Tribunal's [D]ecision."
  - Trustco confirmed that it would be reviewing the Tribunal's Decision under PAJA.
  - Trustco claimed that it would be "premature" for the JSE to suspend its listing before Trustco's review of the Tribunal's Decision was determined, describing the JSE's threat of suspension as "nothing short of an attempt by the JSE to coerce [Trustco] into compliance

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with a decision that is based on an unlawful and reviewable decision by the Tribunal".

- Trustco objected to what it deemed to be a self-standing decision by the JSE that Trustco had not complied with the JSE's corrective action (which Trustco labeled "the Non-Compliance Decision").
- Trustco demanded an undertaking by 13 December 2021 that the JSE would not suspend its listing (which Trustco labeled the "Suspension Decision") pending, amongst other things, first, a reconsideration application that Trustco intended to bring in the Tribunal against the JSE's decision that Trustco had not complied with the JSE's corrective action "and/or", second, the final determination of its review application (against the Tribunal's Decision to dismiss Trustco's first reconsideration application).
- 26.7 Trustco indicated that if the JSE was "not prepared to give the undertakings sought" then it would "approach the High Court on an urgent basis" to suspend "the Non-Compliance and/or Suspension Decision pending either the review or a reconsideration application and suspension application to the Tribunal."
- 27. The JSE responded to Trustco on 13 December 2021. I attach a copy of its letter as "AA3".
  - 27.1 The JSE confirmed that prior to its letter of 13 December 2021, it was still considering whether to suspend Trustco's listing; it had not yet taken a decision to suspend its listing.

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- The JSE pointed out, based on basic principles of administrative law, that the Tribunal's Decision is final, binding, and immediately enforceable unless it is interdicted or set aside.
- 27.3 The JSE also pointed out that the Tribunal dismissed Trustco's reconsideration application, which means that the Tribunal confirmed the JSE's Decision. The JSE took that Decision more than a year earlier, and so Trustco had ample opportunity to consider how to implement the corrective action.
- 27.4 The JSE then conveyed its decision to suspend Trustco's listing.
- The JSE declined to give Trustco any undertakings but noted that

  Trustco had a right to object to the JSE's decision to suspend its

  listing under paragraph 1.4 of the Listings Requirements.
- 28. Despite the JSE unequivocally refusing to give Trustco the undertakings it sought in its letter dated 9 December 2021, Trustco did not follow through on its threat to "approach the High Court on an urgent basis".
- 29. On 14 and 15 December 2021, the parties exchanged correspondence about Trustco's belated, and wrong, contention that I was not properly authorised, on the JSE's behalf and in my capacity as Director: Issuer Regulation, to suspend Trusco's listing. These letters are already annexed to the founding affidavit marked "FA11" and "FA12".
- 30. On 17 December 2021, Trustco delivered its objection to the JSE's decision to suspend its listing. A copy of the letter is already annexed to the founding affidavit marked "FA13".

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- 30.1 Trustco described the decision to suspend Trustco's listing as a "foregone conclusion" and that I "had already made up [my] mind" and simply "rubber stamp[ed]" the decision. According to Trustco, the decision to suspend its listing "for all intents and purposes, had already been taken". The objection process would also, according to Trustco, be a "foregone conclusion".
- 30.2 Despite these protests, Trustco set out the grounds for its objection against the JSE's decision to suspend its listing.
- 30.3 Trustco indicated that the "earliest" that it could "possibility and legitimately be expected to give effect to the JSE and Tribunal's decision is when it will be in a position to publish its audited financial statements". Trustco confirmed that its audited financial statements would "reflect the restatements that the JSE required" and indicated that it was "anticipated" that its audited financial statements would be published "by no later than 31 January 2022".
- Trustco again asked for an undertaking that the JSE would not "implement the suspension [of Trustco's listing] pending the outcome of an application for suspension of [the JSE's decision to suspend Trustco's listing] to the Tribunal and the outcome of Trustco's review application [of the JSE's decision that Trustco did not comply with IFRS in how it reported the loan issue and the property issue]".
- 31. Trustco's letter expressly stated that its audited annual financial statements, which it undertook to publish by 31 January 2022, "would ... reflect the restatements that the JSE required". On that understanding, the JSE was

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prepared to hold off on deciding on Trustco's objection to the suspension of its listing but only if Trustco gave the JSE "an unequivocal, and irrevocable undertaking that the necessary restatement of [Trustco's] annual financial statements will be implemented in [Trustco's] 31 August 2021 Annual Financial Statements", which Trustco had, in its previous letter, indicated would be published by 31 January 2022. A copy of the letter from the JSE's attorneys to this effect is already annexed to the founding affidavit marked as "FA14".

- 32. On 13 January 2022, Trustco refused to give the JSE that undertaking. A copy of this letter is attached as "AA4". Trustco did, however, undertake to publish its 2021 annual financial statements by 31 January 2022.
- 33. Because Trustco stated that it was in the process of "determin[ing] ... how to practically implement the restatements pending a review", the JSE reasonably believed that Trustco was still intending on giving effect to the corrective action that the JSE had directed. On this understanding, the JSE was prepared to hold off on deciding on Trustco's objection to the suspension of its listing until it had considered Trustco's 2021 annual financial statements. This was recorded in a letter from the JSE's attorneys attached as "AA5".
- 34. A letter from Trustco's attorneys dated 26 January 2022, attached as "AA6", confirmed that Trustco's 2021 annual financial statements would "address the restatements" that the JSE had directed in its corrective action.
- 35. Trustco published its 2021 annual financial statements on 31 January 2022.

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- 36. Trustco did not restate the comparative periods in its 2021 annual financial statements as the JSE had directed it to do. 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.
- Trustco did none of that. It ignored the corrective action that the JSE directed. Instead of "revers[ing]" any gains and instead of restating any financial statements, it buried some commentary about the JSE's decision that Trustco had not complied with IFRS in the small print to its financial statements. In short, the JSE directed Trustco to restate the numbers in its financial statements (by a total of more than NS\$2 billion). Trustco left the numbers unchanged.
- 38. On 31 January 2022, Trustco launched this review. It initially sought to review only the Tribunal's Decision.
- 39. On 14 February 2022, and after considering Trustco's 2021 annual financial statements, the JSE dismissed Trustco's objection to the JSE's decision to suspend its listing. The JSE's letter is attached as "AA7". The JSE also published a SENS announcement to this effect, which is attached as "AA8". The JSE indicated that it would give Trustco an opportunity to obtain urgent relief "from a competent tribunal" and, for that reason, the suspension would take effect from 11 March 2022 provided that any process was initiated and delivered by 18 February 2022.

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- 40. On 18 February 2022, Trustco lodged two applications with the Financial Services Tribunal:
  - 40.1 a reconsideration application under section 230 of the Financial Sector Regulation Act, asking the Tribunal to reconsider the JSE's decision to suspend Trustco's listing; and
  - 40.2 a suspension application under section 231 of the Financial Sector Regulation Act, asking the Tribunal for, in effect, an interim interdict, or a suspension of the JSE's decision to suspend Trustco's listing pending the determination of the reconsideration application.
- 41. On 23 February 2022, Trustco launched an urgent application in this Court, asking for, amongst other things, an interim interdict against the JSE suspending Trustco's listing pending this review. Trustco's notice of motion is attached as "AA9". In its founding affidavit in its urgent application, Trustco admitted that it has not restated its financial statements (I attach the relevant page of its founding affidavit as "AA10").
- 42. On 4 March 2022, following correspondence between Trustco, the JSE, and the secretariat of the Tribunal, the JSE agreed that it would not suspend Trustco's listing pending the Tribunal's decision on Trustco's suspension application (referred to in paragraph 40.2). By agreement between the JSE and Trustco, Trustco's urgent application for an interim interdict (referred to in paragraph 41) was removed from the roll.

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43. The JSE and Trustco have since filed heads of argument in Trustco's suspension application (referred to in paragraph 40.2), which I attach as "AA11" and "AA12". The Tribunal's decision on the suspension application is pending.

#### TRUSTCO'S GROUNDS OF REVIEW HAVE NO MERIT

- 44. Trustco's founding affidavit claims that the "JSE is incorrect" (emphasis added).

  And Trustco asserts that it is "confident that its accounting treatment of the transactions was correct and so bring this application to review the Tribunal Decision" (emphasis added).
- This gives the game away: Trustco's true complaint is about the merits of the JSE's Decision and the Tribunal's Decision. I am advised that a review—under either PAJA or the principle of legality—is not about whether the impugned decision is right or wrong. Trustco's grounds of review are no more than that: arguments about why the JSE and the Tribunal got their decisions wrong. Trustco's attempt to reargue the merits of each decision is impermissible and this review should be dismissed for that basis alone.
- 46. In any event, the JSE and the Tribunal carefully considered Trustco's arguments and lawfully, rationally, and reasonably rejected them.
- 47. In respect of the JSE's Decision, Trustco alleges that:
  - 47.1 I had no authority to make the JSE's Decision;
  - 47.2 the JSE did not meet a jurisdictional requirement; and
  - 47.3 the JSE did not have authority to impose the sanction that it did.
- 48. In respect of the Tribunal's Decision, Trustco alleges that:

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- 48.1 the Tribunal failed to consider the issues listed in the previous paragraph;
- the Tribunal failed to adequately deal with Trustco's arguments; and
- 48.3 the Tribunal was not properly qualified and lacked adequate expertise.

# The legislative framework

- 49. Before dealing with each ground in turn, I set out the relevant legislative framework.
- The JSE is a licensed exchange under the Financial Markets Act 19 of 2012 ("the FM Act"). The purpose of the FM Act is to ensure that the South African financial markets are fair, efficient, and transparent. Accurate financial information is key to achieving those purposes.
- 51. As the Tribunal pointed out in its Decision, the JSE is obligated under section 10 the FM Act, *inter alia*, to issue exchange rules; supervise compliance by its authorised users with the exchange rules and exchange directives; and to enforce the exchange rules, listings requirements and exchange directives.
- 52. To carry out these functions, the JSE "may do all other things that are necessary for, incidental or conducive to the proper operation of an exchange" that are not inconsistent with the FM Act. In the event of an issuer failing to comply with the Listings Requirements, the FM Act provides that the JSE, or a person to whom the exchange has delegated its disciplinary functions may impose, *inter alia*, a reprimand or "any other penalty that is appropriate in the circumstances". This

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broad power afforded to the JSE is codified in paragraph 1.21 of the Listings Requirements.

- 53. The JSE adopted its Listings Requirements pursuant to the statutory scheme set out in the FM Act and enforcing compliance with the Listings Requirements is the JSE's primary mechanism to regulate its market in the public interest. The Listings Requirements are available on the JSE's website.
- 54. The objective of the Listing Requirements is to provide the JSE's users with an orderly marketplace for trading securities and to regulate the market accordingly. Given that it is impracticable for the JSE's requirements to attempt to govern all circumstances that may arise in commercial practice, it subscribed to a set of General Principles in order to guide the implementation of its duties under both the FM Act and the Listings Requirements. The General Principles may even be applied by the JSE in areas or circumstances not expressly covered in the Listings Requirements. The General Principles are, therefore, a safety net to ensure that all commercial practices are supervised and regulated in a manner befitting the responsibilities bestowed on the JSE in the FM Act.
- 55. The relevant General Principles are, among other things:
  - 55.1 to protect investors;
  - to ensure that full, equal and timeous public disclosure is made to all holders of securities and the general public at large regarding the activities of an issuer that are price sensitive;
  - 55.3 to ensure that holders of relevant securities are given full information; and

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- to promote investor confidence in standards of disclosure and corporate governance in the conduct of applicant issuers affairs and in the market as a whole.
- 56. Compliance with the Listings Requirements ensures the integrity of the market and prevents listed companies simply following their own views (or that of their auditors and/or their board of directors). These obligations are not voluntary or subjective. Where there is non-compliance, the JSE must act. It is statutorily obliged to do so under section 10 of the FM Act. A failure to ensure timeous compliance has the real potential to cause very serious harm to participants in the market. Any number of the recent large corporate accounting scandals demonstrates the scale of the potential harm. The recent collapse of the Steinhoff group is just one of example.
- 57. Section 8 of the Listings Requirements prescribes how listed companies must report their financial information. Paragraphs 8.62 and 8.65 require listed companies to comply with those expert accounting standards, known as the International Financial Reporting Standards, or IFRS. The preparation, publication, and dissemination of accurate financial statements is of critical importance in ensuring a fair, efficient, and transparent market.
- 58. Notwithstanding the specific sections of the Listings Requirements listed above, paragraph 1.3 of the Listing Requirements stipulates that nothing in this section shall limit the JSE, or its officers, to exercise any further powers granted to the JSE in terms of the FM Act.

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- 59. The FRIP was formed by the JSE and SAICA 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).
- 60. Paragraph 8.65 of the Listings Requirements stipulate that if, after receiving advice from the FRIP, the JSE finds that an issuer has not complied with IFRS or the Listings Requirements, the JSE "will be able, in its sole discretion" (my emphasis) to censure such issuer in accordance with the provisions contained in section 1 of the Listings Requirements (detailed above) and to instruct such issuer to publish or re-issue any information the JSE deems appropriate.
- 61. Paragraph 8.65 of the Listings Requirements must be read with the charter of the FRIP Panel, which governs the activities of the FRIP. The members of FRIP are jointly appointed by the JSE and SAICA, and consist of the Chairman, and fifteen members representing preparers, auditors, academics and users of listed entities' financial statements. It is a highly specialized body, and its members are subject to an annual review to ensure that:
  - 61.1 the FRIP as a whole has people with an appropriate mix of diversity, experience and expertise;
  - there is a level of continuity in the composition of the FRIP from year to year; and
  - 61.3 that a recognition is placed on certain individuals that bring a unique skill set to the FRIP.
- 62. The FRIP's sole function is to advise the Issuer Regulation Division of the JSE in relation to alleged cases of non-compliance with the financial reporting

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- requirements which have been referred to the FRIP by the Issuer Regulation Division.
- 63. The FRIP does not, and is not empowered to, make any form of decision, nor is the JSE bound by the views of the FRIP.
- 64. The JSE does, however, carefully consider the views and recommendations of the FRIP as well as all other facts and information at its disposal in its assessment as to whether an issuer listed on the JSE has complied with the Listings Requirements and IFRS.

## Trustco's grounds of review against the JSE's Decision

- 65. In respect of the JSE's Decision, Trustco alleges that:
  - 65.1 I had no authority to make the JSE's Decision;
  - 65.2 the JSE did not meet a jurisdictional requirement; and
  - 65.3 the JSE did not have authority to impose the sanction that it did.
- 66. The first ground of review goes nowhere. I was duly and properly authorised to make the JSE's Decision.
- 67. Trustco points to a resolution attached to the founding affidavit as "FA14" ("the Resolution"). Trustco argues that the Resolution confers no authority on myself but rather, "it delegates the powers vested in the JSE under section 13 and 15 of the Securities Act", which has since been repealed and replaced by sections 12 and 14 of the FM Act.
- 68. Sections 12 and 14 of the FM Act deal with the JSE's powers to:

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- remove and suspend trading of listed securities (ss 12 and 13); and
- disclosure of information by issuers of listed securities.
- 69. Section 12(2) of the Interpretation Act 33 of 1957 is clear:
  - "(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not
    - (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
    - (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or ...
- 70. I am advised that in terms of section 12(2) of the Interpretation Act, sections 12 and 14 of the FM Act is plainly a re-enactment of sections 13 and 15 of the Securities Services Act and, as such, section 12(2) of the Securities Services Act applies.
- 71. The Resolution confers authority on me to make the JSE's Decision. It is necessary to quote from the relevant portion of the Resolution:

"That, save for the power or duty to decide whether the listing of the securities of a company on the JSE should be terminated at the instance of the JSE, which power is delegated to the Executive Committee, the Board hereby delegates the powers and duties under sections 13 and 15 of the Securities Services Act, and the Listings Requirements to –

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- 2.1 the head of the **Issuer Regulation Division** or the General Manager: Issuer Regulation, or other appropriate person or persons as identified by the Executive Committee ..." (my emphasis).
- 72. The Resolution clearly and plainly provides for a delegation of the powers under the Listings Requirements to the head of the Issuer Regulation Division. I am the director of Issuer Regulation.
- 73. In its founding affidavit, Trustco provides an extract of paragraph 8.65(b) of the Listings Requirements. Paragraph 8.65(b) of the Listings Requirements empowers the JSE, in its sole discretion, to instruct an issuer to "publish or reissue any information the JSE deems appropriate" upon receiving advice by the FRIP regarding the compliance (or lack thereof) of issuers with IFRS and the Listings Requirements. The JSE also has broad power to impose any penalty that it deems appropriate in the circumstances.
- 74. Furthermore, under the section titled "Competent Authority" in the Listings Requirements, it is clearly recorded that "the Board of the JSE has delegated its authority in relation to the Listings Requirements... to the management of the Issuer Regulation Division".
- 75. In the circumstances, I was properly authorised.
- 76. Trustco points to section 72(1)(b) of the Companies Act, which provides that the board of a company may delegate to any committee. Trustco then argues that the term "committee" means more than one person.
- 77. This argument is misplaced because the Resolution provides for the delegation of a variety of powers, some of which fall under the scope of section 72 of the

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Companies Act, and others which fall under section 58 of the Securities Services Act (now section 68 of the FM Act). Indeed, paragraph 1 of the Resolution provides for the delegation of certain powers to the Executive Committee and the delegation of these powers ostensibly falls under section 72 of the Companies Act. However, paragraph 2 of the Resolution provides for the delegation of certain powers to the head of the Issuer Regulation Division. This delegation clearly falls under section 68 of the FM Act, which provides, *inter alia*, for a delegation from a market infrastructure to a single person.

- 78. The absurd implication of Trustco's interpretation is that no market infrastructure would be able to delegate anything to a single person. In any event, it is irrelevant. Section 68 of the FMA provides for the delegation of functions for a market infrastructure. It states:
  - "(1) A market infrastructure may delegate or assign any function entrusted to it by this Act or its rules 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."
- 79. Significantly Trustco's complaint about my authority has only been raised after the Tribunal ruled against Trustco. Trustco has not explained why it did not raise my alleged absence of authority at the outset when the JSE first made its decision, or prior to the hearing before the Tribunal. It is clear that the "absence of authority point" is a make weight, and after thought, and not something that Trustco genuinely believes is correct.

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- 80. Trustco's next grounds of review against the JSE's Decision are the absence of a jurisdictional requirement and that the JSE did not have authority to impose the sanction that it did.
- 81. Trustco's arguments in this regard amount to a rehearing of the merits of the JSE's Decision, which is impermissible. For that reason alone, these grounds of review should be rejected.
- 82. The JSE's Decision was based on Trustco's non-compliance with IFRS and the Listings Requirements.
- 83. An issuer contravenes IFRS if its financial statements do not reflect the economic substance of a transaction.
- 84. The JSE explained Trustco's failure to comply with IFRS in its reasons submitted during the reconsideration application before the Tribunal, which are attached to the founding affidavit as "FA2" and "FA4" (the latter includes Prof. Maroun's report). I ask the contents of all three documents be incorporated by reference into this affidavit as if specifically traversed.
- 85. For the convenience of the Court, I have provided a summary of Trustco's noncompliance with IFRS below. I do so in order to show that the JSE's Decision is lawful, rational, and reasonable. I am advised that, for purposes of this review, the JSE does not need to show that Trustco did not comply with IFRS. The JSE does not need to make that showing because this is not an appeal, but a review. All that the JSE needs to show is that it rationally and reasonably considered all relevant information to arrive at a rational and reasonable decision.



- 86. In the reconsideration application before the Tribunal, Trustco adopted a narrow and overly legalistic approach. It failed to appreciate that the issues are accounting matters and must be viewed through an accountant's lens and not a lawyer's lens.
- 87. The issue of substance over form was of central importance in the Trustco failed—and continues to fail—to reconsideration application. appreciate that IFRS requires financial statements to be a faithful representation of the underlying economic substances and events. This means that financial statements must consider the economic substance and financial reality of the underlying transactions, and not merely their legal form. Economic substance, as assessed by an accountant or auditor, may differ from the legal conclusions reached by a lawyer when interpreting a transaction, or group of transactions.
- 88. The principle of "substance over form" is an accounting concept that is specific to financial accounting. As Professor Maroun explained in his expert report, "it requires the underlying economics of a transaction to be considered, including how the facts and circumstances affect the amount, timing and certainty of the resulting cash flows and entity-specific values (see, for example, CFW, 2.6-2.19; IAS 16, para 25, IFRS9, para 3.3.2 & IFRS para B2)".
- The Tribunal found this approach to be "convincing and logical" based on, inter 89. alia, an interpretation of the relevant standards, and the universal principle of transparency and the purposes of financial statements of companies, as confirmed by section 29 of the Companies Act. In coming to its decision, the

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Tribunal considered IFRS 3, IFRS 9, IAS 2, IAS 8, IAS 32, IAS 40, and the Conceptual Framework.

- I point out that for accounting purposes, an element of deceit (which may be 90. required for a legal conclusion) is not necessary to conclude that the economic substance of a transaction is different to its form. Differentiating between economic substance and form would capture a transaction which is a simulation or sham, but it can also inform the accounting for entirely honest transactions.
- It is simply not true, contrary to what Trustco assets in its founding affidavit, that 91. its financial statements pertinently reflected the loan issue and the property issue. Trustco's financial statements reflected both issues incorrectly.
- In respect of the loan issue: 92.
  - In the JSE's view, the waiver of the two loans by Dr van Rooyen is, 92.1 in economic substance, part of his equity contribution to Trustco. As a result, under IFRS no gain is recognised in profit or loss when the loans are waived. The waivers are accounted for directly in equity. This conclusion is supported from three perspectives:
    - The timing of the first loan being waived relative to the 92.1.1 business combination, and its close link to the number of shares which are issued or issuable to Dr van Rooyen (or a related person), means that the Huso acquisition and the waiver of the first loan should be understood as a single unit of account. The result is that the waiver is accounted for in equity and not in profit or loss.

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- The cash flow profiles resemble an equity contribution 92.1.2 rather than a repayment of borrowed amounts with compensation for the time value of money. As a result, when the loans are forgiven, the waivers are treated as an integral part of Trustco's equity.
- Even if the two loans are financial liabilities, the waiver should be 92.2 seen as an equity contribution which settles the liabilities. substance, a lender would not ordinarily forgo the right to unpaid capital and interest for no consideration. The JSE also considered the definition of income in terms of paragraph 4.68 of the Conceptual Framework, which excludes contributions from holders of equity claims.
- 92.3 The fact that Dr van Rooyen is also the controlling shareholder means that, by releasing Trustco from its obligations, it is adding to the Trustco group's financial resources and allowing the funds which would have been used to service the liabilities to be redeployed. In the same way as an equity participant, the "lender" is compensated by improved financial performance and the associated benefits of capital appreciation and dividends on his existing shareholdings. In support of this view, Trustco would be in the same position if the shareholder had advanced the funds as a direct equity contribution and these funds were then used to repay a third-party debt of the same amount.

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- 93. As for the property issue:
  - 93.1 Trustco, allegedly as a result of a change in use of the property, reclassified a portion of the property from inventory to investment property.
  - 93.2 Trustco contends that it was bound by IAS 40 to reclassify the property as an investment property. As such, it accounted for the transactions in terms of IAS 40.63, which requires that Trustco derecognise the inventory value in costs of sales and recognise the fair value of the investment property in revenue.
  - 93.3 The JSE considered and rejected Trustco's arguments.
  - Management's intention, by itself, is insufficient to determine if there has been a change in the intended use of an asset. There must also be evidence of a change in use (IAS 40.57 and BC 27). The JSE found that Trustco had not furnished sufficient evidence of a change in the expected use of certain properties from inventory to investment property.
  - 93.5 A resolution of Trustco's board dated 13 March 2019 referred to the development of properties to be deferred rather than discontinued.

    The financial and non-financial impact of the decision to stop development could also not be determined. As a result, there was insufficient information to conclude that a change in use from investment property to inventory was appropriate.

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- 93.6 Moreover, Trustco's reporting was inappropriate. The change in use should and ought to have been appropriately accounted for as a fair value adjustment in profit or loss. Based on the amount and the non-recurring nature of the reclassification adjustment, presenting it as a separate line item in the statement of profit or loss is the only appropriate presentation. There is no basis under IFRS for accounting for the fair value adjustment in revenue and cost of sales (which should be entirely unaffected) as there is no customer and no sale that gives rise to the gain. The gain arises solely from an accounting construct requiring the asset to be fair valued when reclassified.
- 93.7 Presenting the adjustment as part of revenue creates the impression that goods and services have been transferred to a customer when this is clearly not the case. Treating the fair value adjustment as part of revenue also distorts the assessment of how the primary operating activities of the entity are realised in cash; the computation of the gross profit and margin percentages; and the determination of maintainable earnings.
- 94. The JSE carefully considered Trustco's arguments. The JSE decided that Trustco's financial statements did not comply with IFRS. Trustco's contention that the JSE did not determine whether there was a breach of IFRS or any other accounting standard is plainly without merit.
- 95. Next, Trustco alleges that the JSE lacked authority to order Trustco to restate its financial statements.

- 96. This argument rests on paragraph 8.65 of the Listings Requirements, which allows the JSE, *inter alia*, to instruct an issuer "to publish or re-issue any information the JSE deems appropriate". Trustco argues that there is no mention of a sanction of restatement of an entity's financial statements and, on that basis, the JSE had no authority to impose the sanction that it did.
- 97. Trustco misinterprets paragraph 8.65 of the Listings Requirements. A sensible reading of the paragraph provides for no ambiguity: the JSE is entitled to instruct an issuer to publish any information the JSE deems appropriate. That broad power includes a power to direct an issuer to publish restated financial statements.
- 98. In addition, section 10 of the FM Act empowers the JSE to "do all other things that are necessary for, incidental or conducive to the proper operation of an exchange" that are not inconsistent with the FM Act. In the event of an issuer failing to comply with the Listings Requirements, section 11 of the FM Act provides that the JSE, or a person to whom the exchange has delegated its disciplinary functions may, *inter alia*, impose a reprimand or "any other penalty that is appropriate in the circumstances". This broad power afforded to the JSE is also codified in paragraph 1.21 of the Listings Requirements, and paragraph 8.65(a) permits the use of such a penalty <u>in its sole discretion</u>.
- 99. This is also supported by the General Principles of the Listings Requirements.

  Indeed, the "main body" of the Listings Requirements, which include paragraph 1.21, are "derived from the application and interpretation of the General Principles by the JSE". The General Principles are not optional but couched in peremptory language which stipulates that the General Principles

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- "must be observed in all corporate actions and also in all submissions pertaining to securities listed".
- 100. Trustco imperils the JSE's ability to protect investors, to promote investor confidence, to ensure the integrity of the market, to ensure that holders of relevant securities are given full information, and to ensure that full and timeous public disclosure is made to all holders of securities and the general public.
- 101. As with its challenge against my authority, Trustco's challenge to the JSE's authority to order a re-statement is a point that was not raised before. Instead Trustco accepted the JSE's authority but contested the merits of the JSE's Decision. This point is another make weight.
- 102. For these reasons, Trustco's grounds of review against the JSE's Decision are unsustainable.

# Trustco's grounds of review against the Tribunal's Decision

- 103. Trustco unfairly and incorrectly maligns the Tribunal's expertise. The complaint goes nowhere because each party was permitted to submit expert reports in order to crystallize and simplify the issues in dispute.
- 104. The Tribunal, having had the benefit of receiving evidence from each expert, was tasked as a decision-maker to factor into its adjudication the expert reports and the submissions contained therein. The Tribunal is not, however, mandated to afford the evidence of each expert equal weight.
- 105. In any event, Trustco's expert, Mr Njikizana, could not be considered to be an independent expert. This was because Mr Njikizana himself acted as an advisor to Trustco in relation to the very accounting entries that formed the basis

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of the JSE's Decision. The Tribunal accepted this submission. Nonetheless, the Tribunal still addressed the substance of Mr Njikizana's report. After addressing the contentions of Mr Njikizana, and having regard to the contents of the report, the Tribunal summarised that "it contains a mix of allegation of fact, interpretation and adjudication and therefore transgresses the limits of 'expert evidence'". Trustco's expert report, in other words, left much to be desired. This does not, however, mean that the Tribunal ignored Trustco's expert evidence.

- 106. In contrast to Trustco's expert, the Tribunal described the JSE's expert, Professor Warren Maroun, as "convincing and logical" in his interpretation of IFRS and the Conceptual Framework.
- 107. Trustco argues that the Tribunal was not properly constituted in terms of section 220 of the FSR Act.
- 108. Trustco confuses members of the Tribunal and members of the Tribunal who make up a particular panel that is assigned to hear a particular application.

  Trustco bases its argument on section 220 of the FSR Act when the correct provision is section 224.
- 109. A panel of the Tribunal is constituted "for each application for reconsideration of a decision". A panel consists of members of the Tribunal who have been appointed by the Chairperson of the Tribunal to hear a particular application. The panel of the Tribunal "is the decision-making body of the Tribunal... relating to the reconsideration of the decision", as section 224 makes clear.



- 110. Section 224(4) of the FSR Act deals with the composition and constitution of the panel. It prescribes that a panel consists of a person to preside over the panel, such person to meet the requirements of section 220(2)(a) (such as a retired judge), and two or more other persons "who are Tribunal members or persons on the panel list". It does not stipulate that these persons must meet the requirements listed in section 220(2)(b) (which, to repeat, applies to members of the Tribunal, not members of a panel).
- 111. Trustco also alleges that the Tribunal failed to allow Dr van Rooyen to give oral evidence to explain the rationale of the transactions, which, according to Trustco, was unreasonable and infringed its right to a just and fair administrative process.
- 112. Trustco mischaracterises how this issue arose. The Chairperson of the Tribunal stated (at page 32 of the transcript, with my emphasis added):

"But what I would like to know is this; if we believe that, or come to the conclusion that there is - let's say there is reason to believe that what is presented as discreet steps, was not discreet steps, but the single transaction. Would that not be reason to apply to section 3, 232, sub 5 of the FSCR Act, for me to direct Dr Van Rooyen to appear before the panel, and to give evidence so ta [sic.] he can explain these waivers, which are not explained on the papers?"

113. The possibility of Dr van Rooyen giving evidence was raised *mero motu* by the Tribunal. It was, at best for Trustco, and to use the Chairperson's words, "a tentative issue raised during argument" that "does not amount to a decision".

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- 114. In any event, section 232(5)(a) of the FSR Act provides that the person presiding over a panel may, on good cause shown, by order, direct a specified person to appear before the panel to give evidence. Trustco did not apply to the Tribunal in terms of section 232(5)(a) of the FSR Act to lead Dr van Rooyen's evidence.
- "the transactions in question have been reflected in the financial statements of the company in a manner that fairly reflects the particular transaction". After elaborating on the statement, counsel for Trustco summarised that the "question that" the Tribunal "need to concern" itself with was "whether the waiver of the loan was accounted for in accordance with the applicable IFRS standard". Trustco's counsel went on to submit that the "intention" of Dr van Rooyen in waiving the loans was "certainly not relevant from the perspective of whether or not the transaction, or the waiver has been accurately reflected in the financials". Trustco's counsel then said:

"So, in our submission, Mr Chair, the intention of Mr- or Dr Van Rooyen is not relevant to the consideration whether or not the transaction has been accounted for in accordance with the applicable standard. That does not mean to say, and I've been given an express instruction by my attorney, that Dr Van Rooyen is not willing to explain himself if he is called upon to do so."

116. Trustco itself did not deem it material to apply to lead Dr van Rooyen's evidence (nor, for even stronger reasons, did Trustco show good cause to do so).



- 117. In any event, Dr van Rooyen was, as CEO of Trustco, given every opportunity to explain himself throughout the decision-making process. For example, after the FRIP released its report, the JSE met with representatives of Trustco and its advisors (at Trustco's request) between 30 September 2020 and 2 October 2020, where Trusco was given an opportunity to make representations. Whilst Dr van Rooyen was not present at the meetings, the meetings were called at Trustco's request. Dr van Rooyen had every chance to explain himself, either in person or in later written representations.
- 118. Ultimately, the Tribunal rightly found that "Trustco's repeated failure to take the FRIP, the JSE, and the Tribunal into its confidence by explaining the economic rationale for Dr van Rooyen's waivers of the loans amounts to exceptional circumstances" which warranted an order that Trustco is to pay half the JSE's costs. Importantly, Dr van Rooyen's explanation (or lack thereof) featured only in the Tribunal's reasoning as to costs. It had no bearing on the Tribunal's Decision on the merits, as is apparent from its absence in the Tribunal's reasoning in its Decision on the merits.
- 119. Next, Trustco argues that the Tribunal failed to consider the consequences of its Decision. Trustco never made this point in its reconsideration application before the Tribunal. The first time Trustco raised this point was in a letter dated 9 December 2021, over a month <u>after</u> the Tribunal's Decision.
- 120. Finally, Trustco misplaces reliance on the business judgment rule. This will be dealt with in argument. It suffices for now to say that the business judgement rule does not excuse a company from failing to comply with IFRS, the Listings Requirements, or any other peremptory rule, standard or provision.

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## CONCLUSION

121. The review should be dismissed with costs.

ANDRIES FRANCOIS VISSER

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at <u>SANDTON</u> on this the <u>II</u> day of May 2022, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

**COMMISSIONER OF OATHS** 

Full names:

KGABELE MDLALOSE

COMMISSIONER OF OATHS PRACTISING ATTORNEY R.S.A. 20th Floor, Office Tower, Sandton City

Fifth Street, Sandton, 2196

Capacity:

Address:



TRUSTCO GROUP HOLDINGS LIMITED

Incorporated in the Republic of Namibia

(Registration number 2003/058)

Registered as an external company in South Africa

(External registration number 2009/002634/10)

JSE share code: TTO

NSX share code: TUC

OTCQX share code: TSCHY

....

ISIN Number: NA000A0RF067

("Trustco" or "the Group")

**NON-BINDING ADVISORY VOTE** 

Trustco Shareholders (Shareholders) are referred to the announcements released on SENS on 23 November 2021 in terms whereof Shareholders were advised of the dismissal of Trustco's application for reconsideration by the Financial Services Tribunal in South Africa.

Shareholders are reminded that, as per the Companies Act of Namibia, Act 28 of 2004 and the principles of the King IV Report, the Trustco Board of Directors (the Board) is responsible and accountable to Shareholders for the preparation and presentation of financial statements and to ensure that the financial statement are prepared in compliance with International Financial Reporting Standards (IFRS). The Board cannot abdicate this responsibility, especially when the outcome would contradict the Group's appointed professional advisors.

Trustco's professional advisors confirmed that the dismissal of its application for reconsideration puts the Board in an untenable position whereby the Board is instructed by the JSE, which is only one of the three stock exchanges Trustco is listed on, to report in a manner that would not be in compliance with IFRS. The JSE directive contradicts both the Board's considered opinion and the advice of its professional advisors. Trustco reserves its rights herein.

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Shareholders should further note that the unwarranted interference of the JSE is an attempt to usurp the responsibilities and fiduciary duties of the Board without any accountability towards Shareholders. This undermines the independence, accountability and integrity of the Board.

Trustco's Board is engaging stakeholders and requests Shareholders to participate in non-binding advisory votes on key matters as set out below. All Shareholders, excluding the majority shareholder and his associates, are hereby invited to cast their vote. Although Shareholders have previously approved the affected transactions, as well as the audited annual financial statements and disclosures, the Board requests current Shareholders to reaffirm their position on these transactions.

This non-binding advisory vote enables Shareholders to express their views and will not have any legal consequences for those Shareholders that now cast their vote. The Board will however consider the outcome of the votes to assess Trustco's future options.

### The process will be as follows:

- Shareholders are invited to attend an interactive online session with the independent nonexecutive chairman of the Board, the Audit and Risk Committee Chairman and the Group Financial Director to discuss the key matters set out below.
- Shareholders who want to attend the online session must provide the company secretary with their details (Full name, name under which shares are registered, number of shares and email address) by sending an email to <a href="mailto-komada@tgh.na">komada@tgh.na</a> before 10h00 Central African Time (08h00 UTC) on the 6<sup>th</sup> of December 2021.
- 3. The online session will be held on the 6<sup>th</sup> of December 2021 at 12h00 Central African Time (10h00 UTC).
- 4. Shareholders are requested to return the voting tabulation by no later than Wednesday the 8<sup>th</sup> of December 2021 at 12h00 Central African Time (10h00 UTC) to <a href="komada@tgh.na">komada@tgh.na</a>. The form can also be downloaded from or completed online at Trustco's website at <a href="www.tgh.na">www.tgh.na</a>



Name of shareholder	:	
Number of shares held	:	
Email and contact details	•	

No	Key matter	For	Against	Abstain
		Include	Include	Include
		number of	number of	number of
		shares	shares	shares
1.1	To endorse and confirm the accounting treatment of the			<u></u>
	NAD 546 million loan forgiveness transaction by the			
	majority shareholder, Next Capital Limited, as set out in			
	the audited financial statements (Note 26, Page 65 of			
	the March 2019 Annual Financial Statements).			
1.2	To endorse and confirm the accounting treatment of the			
	NAD 1 billion loan forgiveness transaction by the			
	majority shareholder, Next Capital Limited, as set out in			
	the audited financial statements (Note 27, Page 153 of			
	the September 2020 Financial Statements).			
1.3	To endorse the accounting treatment of the property			
	reclassification as set out in the audited financial			
	statements (Note 8, Page 49 of the March 2019 Annual			
	Financial Statements)			
2.1	To confirm and endorse the auditors' opinions as			
	contained in the audited financial statements for the			
	financial year ending March 2019.			
2.2	To confirm and endorse the auditors' opinions as			···
	contained in the audited financial statements for the			
	financial period ending September 2020.			
3	To confirm and agree that the Board followed due			
	process and remains best placed to do so in the future,			
	in recommending the financial statements to the		!	
	shareholders for approval.			
4.1	To endorse that the loan write-offs set out in 1.1 and 1.2			
	above triggered a contractual earn-out clause in terms		-	
	of the amended Huso Transaction as approved by			ļ
	Shareholders on 13 June 2017.			



4.2	To endorse that the share issue at NAD 4.69 was in line			
1.2	with the amended Huso Transaction as previously			
	approved by Shareholders on 13 June 2017.			
4.2				
4.3	To endorse the amended Huso Transaction as approved			
	by Shareholders on 13 June 2017.			
4.4	To endorse the Related Party Loan Transaction (One			
	Billion Namibia Dollar Loan) as approved by			
	Shareholders on 22 January 2019.			
4.5	To confirm that the Board acted in the best interest of			
	minority Shareholders by accepting the total of			
	NAD1.546 billion loan write-offs by the majority			
	shareholder to Trustco.			
5	To confirm that the information and disclosures			
	(including pro forma financial information) presented to			
	Shareholders in the Huso circular, the amended Huso			
	circular and the audited financial statements were			
	adequate to approve the Huso Transaction, the		:	
	amended Huso Transaction and the Related Party Loan			
	Transaction.			
6.1	The Board is considering its options regarding the			
	benefits of Trustco's current listings. To move a listing to			
	a more beneficial exchange, a majority vote from			
	minority Shareholders is required. Should Trustco delist			
	from the JSE, Trustco would also automatically delist			
	from the NSX in Namibia and the OTCQX in the United			
	States of America.			
	To support the Board's position that Trustco's current			
	listings are not in the best interest of all Shareholders.			
6.2	To support the Board's position for Trustco to list on a			
	business-friendly international exchange as soon as			
	practical.			
7.1	To elect to remain as a Shareholder in an unlisted			
	environment until Trustco relists on an international			
	stock exchange within a period of not more than 36			
	(thirty-six) months from the date of delisting from the			
	JSE ("Delisting Date")			
	,			
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	Should Trustco fail to relist on an international exchange			
	within 36 (thirty-six) months from the Delisting Date,			
	Shareholders may give notice of their intention to sell			
	their shares to Trustco at a price of 10% above the			
	average VWAP price of the TTO Share between the 1st			
	of January 2021 to the 30 <sup>th</sup> of November 2021 plus 8.5%			
	compound interest from the Delisting Date to the end			,
	of the 36 (thirty-six) month period.			
7.2	To elect not to remain a Shareholder after delisting, with			
	Trustco acquiring the Shareholder's Trustco shares			
	("TTO Shares") within 36 (thirty-six) months from the			
	Delisting Date at a price of 10% above the average			
	VWAP price of the TTO Share between the 1st of January			
	2021 to the 30 <sup>th</sup> of November 2021.			
8	As a minority Shareholder, to consent to a reduced	<u></u>		
	timeframe for the above delisting transactions when a			
	formal vote is required.			
9	To agree that any announced transactions currently in			
	process be implemented subsequent to the potential			
	delisting.			
10	To hold the responsible parties, jointly and severally,			
	accountable for shareholder value destruction during			
	the process.			
11	Shareholders are invited to provide any relevant comme	nts or informat	ion for the at	tention of the
	board:			



The outcome of the non-binding advisory votes will be announced on SENS.

Windhoek, Namibia,

1 December 2021

### Komada Holdings (Pty) Ltd

Company Secretary and Investor Relations Services to Trustco Group Holdings Limited

### **JSE Sponsor**

Vunani Corporate Finance – Johannesburg

### **NSX Sponsor**

Simonis Storm Securities Proprietary Limited – Windhoek

### **OTCQX Sponsor**

J.P Galda & Co – New York

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3 December 2021 111246/19-4/SC

Mr W Geyser
The Audit Committee Chairperson
Trustco Group Holdings Limited

Johannesburg Stock Exchange

One Exchange Square Gwen Lane Sandown, South Africa Private Bag X991174 Sandton 2146

Tel: +27 11 520 7000 Fax:+27 11 520 8584

www.jse.co.za

Email: gmd@epic-holdings.com

Dear Sir

### PROACTIVE MONITORING OF ANNUAL FINANCIAL STATEMENTS ("AFS")

- 1. We refer to our letter dated 26 November 2021. Trustco has failed to comply with important provisions of the JSE's Listings Requirements and the JSE's decision in this regard has been confirmed by the Financial Service Tribunal. It is of obvious and serious concern that Trustco's published financial information was incorrect, misleading and did not comply with important provisions of the Listings Requirements and IFRS and that this untenable state situation has been continuing for a period of more than two years.
- 2. The serious concerns set out above are further exacerbated by Trustco's failure and refusal to take the necessary and appropriate steps to ensure that it complies with the Listings Requirements and the decisions of the JSE and the Financial Services Tribunal. It is readily apparent from the contents of Trustco's announcement of the 1<sup>st</sup> of December 2021 that it has no intention of complying with the Listings Requirements and the decisions of the JSE and the Financial Services Tribunal. It is indeed startling that Trustco has attempted to somehow make compliance with the Listings Requirements and the JSE and the Financial Services Tribunal's decisions dependent on, or subject to shareholders' approval.
- Neither Trustco, its directors, its shareholders and/or its advisors are empowered to endorse or approve a course of action that is contrary to and in conflict with the provisions of the Listings Requirements and the decisions of the JSE and the Financial Services Tribunal.

Executive Directors: Dr L Fourie (Group CEO), A Takoordeen (CFO)

Non-Executive Directors: N Nyembezi (Chairman), ZBM Bassa, MS Cleary, VN Fakude, Dr SP Kana, FN Khanyile, IM Kirk, BJ Kruger, Dr MA Matooane, P Nhleko

Group Company Secretary: GA Brookes

JSE Limited Reg No: 2005/022939/06 Member of the World Federation of Exchanges



4. The JSE's licensed duties and functions are set out in peremptory terms in section 10 of the Financial

Markets Act. The JSE is obliged to enforce its Listings Requirements and to ensure that issuers and

their directors comply, in all aspects with these Requirements. Conversely, issuers listed on the JSE

and their directors are obliged to provide the JSE with an unequivocal undertaking that they will

comply with the Listings Requirements (see 1.1 of Schedule 1).

5. In these circumstances, the JSE is considering the suspension of the listing of Trustco's securities due

to its failure to comply with important provisions of the Listings Requirements and its refusal to take

the necessary steps to ensure that it complies, in all aspects with the Listings Requirements and the

decisions of the JSE and the Financial Services Tribunal. The JSE is also of the view that the proposed

suspension would be in the public interest and will further the objects of the Financial Markets Act.

Trustco's failure to comply with important provisions of the Listings Requirements and its refusal to

take the necessary and appropriate corrective action are contrary to the objectives of the Financial

Markets Act, destructive of their very purpose and can never said to be in the public interest.

6. In terms of paragraph 1.7 of the Listings Requirements, we hereby give Trustco the opportunity to

make written representations to the JSE as to why such a suspension should not be affected.

7. We await your response on or before 10 December 2021.

Yours faithfully

A F VISSER: DIRECTOR

ISSUER REGULATION

Page 2 of 2

KW Y



13 December 2021

Ref: 111246/19-4/SC

The Company Secretary

Trustco Group Holdings Limited

Johannesburg Stock Exchange

One Exchange Square Gwen Lane Sandown, South Africa Private Bag X991174 Sandton 2146

Tel: +27 11 520 7000 Fax: +27 11 520 8584

www.jse.co.za

Via Email: C/O dsteinbuch@vunanicapital.co.za

Dear Sir/ Madam

### TRUSTCO GROUP HOLDINGS LIMITED ("TRUSTCO"): SUSPENSION OF LISTING OF SECURITIES

- 1. We refer to the following:
- our letter of 3 December 2021, in which Trustco was informed that due to its non-compliance with the Listings Requirements, the decision of the JSE in its letter of 11 November 2020 (which was confirmed by Financial Services Tribunal) ("the JSE Decision") and the decision of the Financial Services Tribunal itself, upholding the JSE Decision, dated 22 November 2021 ("the FST Decision"), the JSE was considering suspending the listing of Trustco's securities ("the proposed suspension"); and
- 1.2 the letter from Norton Rose Fulbright to the JSE, on Trustco's behalf, dated 7 December 2021 in response to the JSE's above letter ("the NRF letter").
- 2. It is necessary to record at the outset that the NRF letter is incorrect in contending that the JSE has already decided to suspend the listing of Trustco's shares. It is plain that the JSE expressly invited Trustco in its letter to "make written representations to the JSE as to why such a suspension should not be affected." The JSE therefore sought in express terms Trustco's views in relation to why the proposed suspension should not be confirmed, and the NRF letter unfortunately proceeds from the wrong premise insofar as it assumed that the JSE already decided to suspend the listing of Trustco's securities.

Executive Directors: Dr L Fourie (Group CEO), A Takoordeen (CFO)

Non-Executive Directors: N Nyembezi (Chairman), ZBM Bassa, MS Cleary, VN Fakude, Dr SP Kana, FN Khanyle, IM Kirk, BJ Kruger, Dr MA Matooane, P Nhleko

Group Company Secretary: GA Brookes

JSE Limited Reg No: 2005/022939/06 Member of the World Federation of Exchanges



- 3. In the circumstances, we consider the "objections" raised in paragraph 14 and 15 of the NRF letter (which are clearly intended to be Trustco's objections to the proposed suspension) to be Trustco's representations as to why the proposed suspension should not be confirmed. We deal with these representations on this basis below.
- 3.1 Firstly, considerable emphasis has been placed on the alleged difficulties that Trustco has with the FST Decision and its intended review thereof. Trustco seeks to rely on this as a basis to contend that the proposed suspension will be premature, as the JSE ought in Trustco's view to await the outcome of its intended review proceedings before considering the proposed suspension. The JSE does not agree with this contention for, inter alia, the following reasons:
- 3.1.1 The FST Decision is final, binding and immediately enforceable unless and until it is set aside; and its enforceability is not affected or automatically suspended by the institution of any proceedings to have it reviewed and set aside.
- 3.1.2 In any event, the effect of the FST Decision is that the JSE Decision is restored, as the Tribunal refused to interfere with the JSE Decision and dismissed Trustco's application for reconsideration.
- 3.1.3 The JSE does not intend to enforce the FST Decision (save in respect of the cost order if that is required, which will be done later) in the form of a civil judgment as contemplated in section 236 of the Financial Sector Regulation Act, 2017 ("FSRA"). Instead, the JSE seeks to enforce the JSE Decision as it would have had there been no application for reconsideration at all. Section 236 of the FSRA accordingly does not find application.
- 3.2 Secondly, Trustco contends that it requires more time to consider the effect of the FST Decision and how to implement the FST Decision. The JSE does not agree with this for the following reasons:
- 3.2.1 As noted above, it is not the FST Decision that needs to be implemented but instead, the JSE Decision which was effectively confirmed by the FST Decision to dismiss Trustco's application for reconsideration. Importantly, the JSE Decision directs Trustco as to how the relevant financial statements need to be restated.

KW

- 3.2.2 The JSE Decision was taken over a year ago and Trustco accordingly had a year to consider and take advice on it, in the knowledge that its challenges to the JSE Decision may prove to be unsuccessful.
- 3.2.3 In any event, the confirmation that Trustco will review the FST Decision confirms that it has already formed a view on such decision and accordingly does not require any further time to consider it.
- 3.2.4 As regards the alleged concerns regarding the potential liability of Trustco's directors, it is not clear why this has been raised in the NRF letter, as this has nothing to with Trustco and its obligation to comply with its legal obligations.
- 3.3 Trustco's contention that the FST Decision did not confirm the reconsidered decision or find that it was correct is plainly incorrect. The FST Decision clearly aligns with the submissions advanced by the JSE in all material respects and moreover, as stated above, by dismissing Trustco's application for reconsideration, the JSE Decision was effectively upheld.
- Thirdly, Trustco contends that the proposed suspension should not be confirmed because it would cause harm to Trustco itself and to its shareholders. In considering whether to suspend the listing of Trustco's shares, the JSE is required to consider whether it would promote the objectives of the Financial Markets Act, 2012 ("FMA") which, inter alia, includes whether or not it is in the public interest to do so. In the JSE's view, Trustco's concerns as aforesaid are outweighed by the need to hold Trustco accountable for its refusal to comply with the Listing Requirements and the JSE Decision, and its consequent disregard of the FST Decision. The JSE is of the view that the proposed suspension is necessary to satisfy the objectives of the FMA and it is manifestly in the public interest. What Trustco is required to do involves restating its financial statements in an amount in excess of N\$ 2 billion. The JSE considers that this is important information which the public must be told.
- 4. Lastly, in regard to Trustco's requests for information, the JSE is of the view that Trustco already has all of the information that it requires to respond to the JSE's request for written representations regarding the proposed suspension. The JSE accordingly declines to provide same.



### Decision by the JSE

5. Having carefully considered all relevant facts and information, including those contained in the NRF letter, the JSE has decided that Trustco has failed to comply with the Listings Requirements and the JSE decision and in so doing, has disregarded the FST Decision. The JSE has also decided that the appropriate recourse for Trustco's aforementioned failures is to suspend the listing of its securities, as this would further the objectives of the FMA and would manifestly be in the public interest.

The JSE notes Trustco's requests for undertakings and its threat of urgent court proceedings if such 6. undertakings are not provided. In light of the fact that Trustco misconstrued the proposed suspension as being a decision already made by the JSE, this threat is clearly premature. In any event the JSE declines to provide the undertaking sought.

7. Now that the JSE has confirmed its decision, should Trustco be dissatisfied with the decision, its remedy is to object to the decision in accordance with paragraph 1.4 of the Listings Requirements.

Should Trustco wish to object to the JSE's decision to suspend the listing of Trustco's shares, the JSE 8. must be notified and written reasons for such objection must be furnished to the JSE by no later than close of business on Friday, 17 December 2021.

Yours Faithfully

AM DE BRUYN: GENERAL MANAGER

**ISSUER REGULATION** 



13 January 2022

NORTON ROSE FULBRIGHT

Norton Rose Fulbright South Africa Inc 15 Alice Lane Sandton 2196 South Africa

By Email: michael.straeuli@webberwentzel.com

Tel +27 11 685 8500 Fax +27 11 301 3200 PO Box 784903 Sandton 2146 Docex 215 Johannesburg nortonrosefulbright.com

Michael Straeuli Webber Wentzel

**Direct line** 

Dear Michael

+27 11 685 8501

**Email** 

john.bell@nortonrosefulbright.com

Your reference Our reference PTGH1/J Bell Straeuli Mohanlall / D Harris /3043858

### TRUSTCO GROUP HOLDINGS (PTY) LTD / JSE LIMITED

- 1 We refer to your letter of 22 December 2021.
- 2 In respect of paragraph 31 of your letter:
- 2.1 Firstly, the resolution now attached gainsays the instruction you received previously, as conveyed to us;
- 2.2 Secondly, the resolution is not numbered; and
- 2.3 Thirdly, the resolution itself, even if valid, confirms that the decisions under discussion and forming the purported basis of all action taken in respect of Trustco were taken in an ultra vires manner;
- 2.4 Fourthly, given the contradictions between the various JSE documentation relating to the purported authority of Mr Visser, and in order to get a proper understanding of the context within which the decision reflected in the resolution was taken, we require a copy of the minute of the meeting where this decision was taken.
- 3 We call again on the JSE to inform the market of these defects. Trustco's prejudice and damages are escalating every day the incorrect information in the market is not withdrawn. Our client's rights are reserved to deal with the further issues resulting from the ultra vires action, the JSE's refusal to set the record straight, and remainder of the letter at the appropriate time.
- 4 Turning to paragraphs 3.2 to 3.4 of your letter:
- 5 We note the JSE's agreement that the restatements it require would need to be audited as part of our client's audited financial statements for the year ending 31 August 2021 ("the 2021 AFS"). This in itself supports our client's submission that, mindful of the date of the Tribunal's decision, the suspension decision is premature and that no such decision could have taken prior to the publishing of our client's 2021 AFS.
- As to the oral submissions, we have indicated in our client's objections the complex and intergrade 6 nature of the restatements that your client requires coupled with the knock on effect it has on the underlying transactions. Neither your client nor the decisions maker(s) are, to our client's knowledge,

Norion Rose Fulbright South Africa Inc (Rog No 1984/003385/21) Directors: APM Robinson (Chairman); M van der Westhuizen (Chief Executive Officer) K Almaile MH Alexander MS Ash SH Barneti JW Bell HI Bisset BE Boths GG Bouwer N Bowan PA Bracher DR
AJ Chappel M Chavoos SJ. Chemaly MG Cossile C Costas MO Dais V David BM Donny O Diretie MC Hartwell R Hendrichs CR Hofnes DS Rappel AV Nationalisis SJ Kennedy-Good SS Khoza JM Kron SJ Latin REF1 Lake PE Lank D S Makara EJ McGau CJ Ment
EJ Middane GA Nation Nodayay B Persis RP Peters and C Polisy DR Plays (2) Peterbrus GM Redemyer (L Roch D Reddy V Rody AK Starknan) Swart DS Tathbarn HJ van Granburg C van Vourser AV Vous M Wellman LE Williams C Wooling

Consultant, N Botha AE Buckley PM Chronia AGS Dixon MJ Hart RJ Holwill GCB Kahle WP Ie Roux E Lamprecht P Naude L Oberho

Nation Rose Full-high South Africa Ins. Nation Rose Full-high I (I.P.) Nation Rose Full-high





accounting experts and it is prudent that the aforesaid accounting complexities and time it will take to duly consider all aspects and implications of the restatements be explained to these decision maker(s), especially because neither our client nor its advisors (or its minority shareholders for that matter) agree with the restatements.

- Moreover, a suspension is, barring a termination of a listing, the most severe sanction that the JSE 7 can impose. Given the immense prejudice and damaging consequences this entails, particularly where it cannot be undone, and in circumstances where the underlying decision is the subject of a review and the possibility exists that the Tribunal's decision is set aside, it would be prudent for the decisionmaking body to be provided with as much information as possible and be able to engage with our client face to face in respect of our client's objections and any queries they have in respect thereof.
- To try and deal with these types of issues based solely on the papers will not only be to our client's 8 prejudice but also place the decision-making body in a precarious and uninformed position as they will undoubtedly need to have a clear understanding of the issues in order to properly consider our client's objections. This can only be achieved through oral submissions and engagement.
- Our client therefore proposes to make submissions on each of the matters raised in its objections with 9 a particular focus on the time this will take and the time it will take to come to a determination on how to practically implement the restatements pending the outcome of a review application. Our client would also propose to make submissions on why a suspension at this stage is, in addition to being premature, a wholly inappropriate remedy.
- Oral submissions will be made by Dr Quinton van Rooyen (CEO), Mr Floors Abrahams (CFO) and Mr 10 Tapiwa Njikizanas, our client's independent IFRS advisor. Our client further proposes for these submissions to be made on either 27 or 28 January 2022 via Zoom or MS Teams. Our client's representatives are also prepared to travel to Johannesburg for an in-person meeting if so required by the JSE.
- Until our client has, in conjunction with its and external advisors, come to a determination as to how to 11 practically implement the restatements pending a review, our client is not at this juncture able to give the undertaking sought in paragraph 3.4 of your letter under reply. As communicated to the JSE, our client does however undertake to publish its 2021 AFS by no later than 31 January 2022.
- We await your response and in the interim all our client's rights remain reserved. 12

Yours faithfully

John Bell Director

Norton Rose Fulbright South Africa Inc

### WEBBER WENTZEL

in alliance with > Linklaters

Norton Rose Fulbright

John Bell 15 Alice Lane, Sandton, 2196 Johannesburg

By email: john.bell@nortonrosefulbright.com

90 Rivonia Road, Sandton Johannesburg, 2196

PO Box 61771, Marshalltown Johannesburg, 2107, South Africa

Docex 26 Johannesburg

**T** +27 (0) 11 530 5000 **F** +27 (0) 11 530 5111

www.webberwentzel.com

Your reference

Our reference

Date

J Bell

M Straeuli / P Mohanlall / D Harris

20 January 2021

TM/117526 3043858

**CONFIDENTIALITY:** This letter contains confidential information intended only for the person/s to whom it is addressed. No other recipient is entitled to read the rest of this letter or disclose its contents to any person, or take copies. If you have received this in error please notify us immediately by fax, e-mail or telephone at the numbers listed above.

Dear Sir

### TRUSTCO GROUP HOLDINGS LIMITED ("TRUSTCO"): SUSPENSION OF LISTING OF SECURITIES

- 1. We refer to the above matter, and to the various correspondences exchanged between the parties to date, including the following:
- 1.1 the JSE's letter to Trustco, dated 13 December 2021 ("the Suspension Decision"); and
- 1.2 your letters to the JSE, dated 14 and 17 December 2021;
- 1.3 our letter to you, dated 22 December 2021; and
- 1.4 your letter to us, dated 13 January 2022 ("your letter").
- We note from your letter that Trustco persists in taking issue with Mr Visser's authority. The JSE denies that Mr Visser lacked authority, and maintains that all its decisions were lawfully made. The JSE is also satisfied that it has provided Trustco with sufficient information to address its concerns.
- 3. As regards Trustco's request for an opportunity to make oral submissions, we are instructed that the JSE has carefully considered the request made in your letter as to why your client considers oral submissions are appropriate and necessary.

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: BW Abraham RB Africa NG Alp RL Appelbaum DC Bayman KL Beilings AE Bennett AP Blair AR Bowley J Braum MS Burger M Bux RI Carrim T Cassim SJ Chong ME Claassens C Collett KL Collier KM Colman KE Coster K Couzyn DB Cron PA Crosland R Cruywagen JH Davies PM Daya L de Bruyn PU Dela M Denenga DW de Villiers BEC Dickinson MA Diemont DA Dingley MS Dladla G Driver W Drue GP Duncan HJ du Preez CP du Toit SK Edmundson LF Egypt KH Eiser AE Esterhuizen MJR Evans K Fazel AA Felekis G Fitzmaurice JB Forman L Franca KL Gawith OH Geldenhuys MM Gibson CI Gouws PD Grealy S Haroun JM Harvey JS Henning KR Hillis Z Hlophe CM Holfeld PM Holloway AV Ismail ME Jarvis CA Jennings JC Jones CM Jonese S Jooste LA Kahn ACR Katzke M Kennedy KE Kilner A Keyser MD Kota JC Kraamwinkel J Lamb KJ Lebea E Louw M Mahlangu V Mannar L Marais G Masina T Masingi N Mbere MC McIntosh SJ McKenzie CS Meyer AJ Millis D Milo NP Mngomezulu P Mohanlall M Moloi N Moodley LE Mostert VM Movshovich C Murphy RA Nelson G Niven ZN Ntshona M Nxumalo AN Nyatsumba A October L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel N Pather GR Penfold SE Phajane M Phillippides BA Phillips MA Phillips DJ Rafferty D Ramjettan GI Rapson K Rew SA Ritchie J Roberts G Sader M Sader H Samsodlen JW Scholtz KE Shepherd AJ Simpson N Singh N Singh-Nogueira P Singh S Sithole J Smit RS Smith MP Spalding PS Stein MW Straeuli LJ Swalne Z Swanepoel A Thakor T Theessen TK Thekiso C Theodosiou T Theunissen R Tlhavani G Truter PZ Vanda SE van der Meulen JP van der Poel CS Vanmali JE Veeran B Versfeld MG Versfeld TA Versfeld DM Visagle EME Warmington J Watson AWR Westwood RH Wilson KD Wolmarans DJ Wright M Yudaken

Chief Operating Officer: SA Boyd

sen feld

### WEBBER WENTZEL

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Page 2

- 4. Trustco has no automatic right to an opportunity to make oral submissions. The JSE has afforded Trustco an opportunity to make written submissions which is sufficient to ensure that Trustco is able to present whatever arguments it believes are necessary.
- 5. In the circumstances, Trustco is requested to deliver any written submissions it wishes to make by close of business on **Wednesday**, **26 January 2022**. If the written submissions are not received by 26 January 2022 the JSE will accept that Trustco has elected not to provide written submissions.
- 6. Following receipt of Trustco's written submissions, the JSE will await the publication of Trustco's annual financial statements for 2021 by 31 January 2022 in order to consider its contents and whether this impacts upon the Suspension Decision. The JSE will then deliver its decision on whether or not to uphold Trustco's objection to the Suspension Decision as soon as reasonably possible thereafter.
- 7. The JSE looks forward to receiving Trustco's written submissions in due course.

8. Our client's rights are reserved.

Yours faithfully

WEBBER WENTZEL

Michael Straeuli

Partner

Direct tel: +27 11 530 5488 Direct fax: +27115306488

Email: michael.straeuli@webberwentzel.com

Kw Y

26 January 2022

By Email: michael.straeuli@webberwentzel.com

Michael Straeuli Webber Wentzel

### NORTON ROSE FULBRIGHT

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Direct line +27 11 685 8501

Email john.bell@nortonrosefulbright.com

Your reference M Straeuli / P TGH1/J Bell Mohanlall / D Harris /3043858

Dear Michael

### TRUSTCO GROUP HOLDINGS LIMITED / JSE LIMITED: SUSPENSION OF LISTING OF SECURITIES

- 1 We refer to your letter of 20 January 2021.
- It's disappointing and unfortunate to note your client's refusal to allow our client the opportunity to make oral representations simply on the basis that our client has no express right thereto. One would have thought that your client would be amenable and in fact deem it prudent to discuss and interrogate our client's objections on a matter of this magnitude in a fair, open and transparent forum.
- Our client accordingly persists in the grounds of objection as set out in our letters of 17 December 2021 and 13 January 2022.
- That said, it would appear from your letter that your client is in fact intent on dismissing our client's objection simply based on how it presents its annual financial statements (**AFS**) on 31 January 2022 rather than with regard to any of the grounds of objection raised.
- We are accordingly instructed that the AFS will, whilst noting that the JSE is in fact not in terms of paragraph 8.65 of Listing Requirement authorised to order a restatement and as an interim measure pending the determination of our client's application to review the Tribunal's decision (Review), address the restatements.
- Once the JSE has considered the AFS, and in the event that it disagrees with how the AFS are presented as an interim measure, then we request that our clients' respective representatives meet as soon as possible in order to discuss the matter at hand in an effort to resolve it in an expedient and amicable manner.
- If the JSE is not agreeable to the above approach and if it will seek to uphold the initial suspension decision, then we request an undertaking that we be provided with 96 hours' notice before such a suspension would take effect in order to afford our client the opportunity to seek the necessary urgent injunctive relief to stay implementation of such a decision.
- 9 Lastly, we anticipate to issue the Review during the course of next week. Please advise whether your offices are authorised to accept service of the application on behalf of the JSE.
- 10 Our client's rights remain fully reserved.

Letter WW (220126)v2

Notion Rose Fulbright South Africa Inc (Reg No 198400338571) Directors APM Robinson (Chairman) M van der Westhuizen (Chief Executive Officer) K Almäse MH Alexander MS Ash SH Barnett AN Bell Hil Bisset BE Boths GG Bouwer N Bowan PA Bracher DR Broler PA Cartwright M Chavoos SL Chemisty MD Cossie C Costas MD Dale V David BM Denny D Dinnie MC Hartwell R Hendricks CR Hothers DS Kapelas AV Kardsmilakis SJ Kennady-Good SS Khozz JM Kvon S Lehr REF Lake PE Lemb S Makars EJ McCaul CJ Mertington JE Midlane T Moodley GA Not BP O Cornor UN Odayar B Perrett RP Petersen CC Pday DR Pillay CJ Pretorius GM Rademeyer L Rech D Reddy V Reddy AK Strachan 1 Swart DS Tatham HJ van Rereburg C van Vuxren AP Vos M Wagener JJ Whyte AP Williams LE Williams EL Webley

Consultant: N Bolha AE Buckley AJ Chappel PM Chronis AGS Dixon MJ Hart RJ Holwill GCB Kalle WP le Roux E Lamprechi P Naude L Oberholzer

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Yours faithfully

John Bell

Director

Norton Rose Fulbright South Africa Inc

V 10



14 February 2022

The Company Secretary
Trustco Group Holdings Limited

Johannesburg Stock Exchange
One Exchange Square Gwen Lane Sandown South Africa
Private Bag X991174 Sandton 2146
T+27 11 520 7000 | F+27 11 520 8584
jse.co.za

Via email: C/O dsteinbuch@vunanicapital.co.za

**Dear Sirs** 

### JSE LIMITED ("THE JSE") // TRUSTCO GROUP HOLDINGS LIMITED ("TRUSTCO"): SUSPENSION OF LISTING OF SECURITIES

- 1. We refer to the JSE's decision to suspend the listing of Trustco's securities ("the Suspension Decision") and following:
- the correspondence exchanged between the JSE, Trustco and the parties' respective legal representatives between 3 December 2021 to date, with particular reference to:
- 1.1.1 the JSE's letter to Trustco, dated 11 November 2020 ("the JSE's Decision");
- the JSE's letter to Trustco confirming the Suspension Decision, dated 13 December 2021;
- 1.1.3 the letter from Norton Rose Fulbright to the JSE setting out its objections to the Suspension Decision, dated 17 December 2021 ("the Objection Letter");
- 1.1.4 the letter from Webber Wentzel to Norton Rose Fulbright, dated 20 January 2022 and Norton Rose Fulbright's response thereto, dated 26 January 2022;
- 1.2 Trustco's audited financial statements for the year ending 31 August 2021, published on 1 February 2022 ("Trustco's AFS").
- 2. As you are aware, following receipt of the Objection Letter, in which it was contended that the implementation of the Suspension Decision would be premature prior to the publication of Trustco's AFS, the JSE confirmed, through Webber Wentzel's 20 January 2022 letter, that it would await sight of Trustco's AFS before making its decision on whether to uphold Trustco's objection to the Suspension Decision.
- 3. Having considered Trustco's AFS, as well as all other relevant facts and information contained in the Objection Letter, the JSE has decided to dismiss Trustco's objection to the Suspension Decision. In doing so, and having regard

Executive Directors: Dr L Fourie (Group CEO), A Takoordeen (CFO)

Non-Executive Directors: N Nyembezi (Chairman), ZBM Bassa, MS Cleary, VN Fakude, Dr SP Kana, FN Khanyile, IM Kirk, BJ Kruger, Dr MA Matooane, P Nhleko

Group Company Secretary: GA Brookes

JSE Limited Reg No: 2005/022939/06 Member of the World Federation of Exchanges



to the significance of the Suspension Decision, the JSE will simultaneously with the sending of this letter, publish a SENS announcement confirming its decision, a copy of which is annexed to this letter marked "A".

- 4. As Trustco has made clear its intention to seek a suspension of the Suspension Decision, the JSE confirms that it will not immediately implement the Suspension Decision. In this regard, we are instructed to record that:
- should Trustco wish to initiate any legal proceedings, and obtain the relief it deems necessary to obtain, on 4.1 an urgent basis, in the form of an order from a competent tribunal directing that the implementation of the Suspension Decision is suspended pending the outcome of an application for reconsideration of such decision, such process must be initiated and delivered by 15h00 on Friday, 18 February 2022;
- 4.2 upon receipt of such process, the JSE will suspend the implementation of the Suspension Decision until 15h00 on 11 March 2022, to allow for these proceedings of first instance to run their course;
- if Trustco does not initiate and deliver any legal process by 15h00 on 18 February 2022, or if it does so, but 4.3 in any event fails to obtain the appropriate relief by 15h00 on 11 March 2022, the JSE will immediately implement the Suspension Decision without further notice to Trustco.
- We confirm that Webber Wentzel is authorised to accept service of any process in this regard on behalf of the JSE. 5.

Yours faithfully

A F VISSER: DIRECTOR

**ISSUER REGULATION** 

### GEN - General - Trustco Group Holdings Limited

Update in the JSE's decision on its proactive monitoring review for Trustco Group Holdings Limited ("Company" or "Trustco") financial results.

#### We refer to:

- the JSE's SENS announcement of 11 November 2020 which informed stakeholders of the process followed and the decisions made by the JSE in respect of the Company as it relates to their Annual Financial Statements for the year ended 31 March 2019 and interim results for the 6 months ended 30 September 2019 and the JSE's views and decision that Trustco's financial information does not comply with the JSE's Listings Requirements ("the JSE's Decision");
- 2. the JSE's SENS announcement of 22 November 2021 which informed stakeholders that the Company's application to the Financial Services Tribunal ("the Tribunal") for a reconsideration of the JSE's decisions in terms of the Financial Sector Regulation Act was dismissed by the Tribunal on 22 November 2021 ("the Tribunal's Ruling").

Following the dismissal of the Company's application to the Tribunal, the Company was required to implement the JSE's Decision by implementing the following corrective action:

- A. Restating the Company's Annual Financial Statements for the year ended 31 March 2019 to account for the following prior period errors:
- 1. Reversing the N\$546m gain previously recognised in profit and loss and recognising this 'credit amount' to reduce the common control reserve initially recognised in equity as a result of the Huso acquisition (referral 1);
- Reversing the reclassification of the Elisenheim properties (incorrectly reclassified
  to investment properties) and consequently reversing the N\$693m gain (presented
  as revenue of N\$984m and cost of sales of N\$291m) from profit and loss (referral
  2); and
- B. Restating the Company's interim results for the 6 months ended 31 September 2019 to account for the following prior period error:
- 3. Reversing the N\$1bn gain previously recognised in profit and loss and accounting for this as a transaction with an equity participant i.e. recognising the credit directly in equity (referral 1).

The restatement of both the Annual Financial Statements and interim results was required to be effected in accordance with IAS 8, and in particular paragraphs 42 and 49 thereof.

On 1 December 2021, the Company published a SENS in which, *inter alia*, it criticised the JSE's Decision and requested shareholders to participate in non-binding advisory votes on various key issues which were the subject of and had already been determined by the JSE's Decision.

Following correspondence exchanged between the JSE and the Company in relation failure, and/or refusal to comply with the JSE's Decision, the Listing Requirements

Tribunal's Ruling, the JSE notified the Company of its decision to suspend the listing of its securities on 13 December 2021 ("the Suspension Decision").

On 17 December 2021, the Company provided its written objections to the Suspension Decision. One of the Company's objections was that it would be premature to implement the Suspension Decision prior to it publishing its audited financial statements for the year ended 31 August 2021, which was the earliest it would be able to give effect to the JSE's Decision. The Company indicated that it anticipated it would be able to publish its audited financial statements by 31 January 2022.

On 1 February 2022, the Company published its audited financial statements but did not implement the JSE's Decision and instead, confirmed its intention to apply to the High Court to review the Tribunal's Ruling in terms of the Promotion of Administrative Justice Act No. 3 of 2000. On the same date, the Company published a SENS announcement indicating that it had filed its review application against the against the Tribunal's Ruling.

Although the Tribunal's Ruling is now subject of a review application, it remains valid, binding and enforceable until it is set aside or suspended by a court. In the circumstances, Trustco remains in breach of the JSE's Decision, the Listing Requirements and the Tribunal's Ruling. In the circumstances, having considered Trustco's objections to the Suspension Decision, including the reasons for its refusal to comply with its obligations as aforesaid, and the contents of the annual financial statements that it published on 31 January 2022, the JSE has decided to dismiss Trustco's objection and confirm the Suspension Decision.

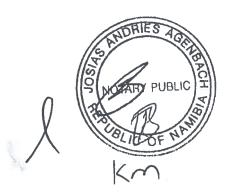
Trustco has a right to seek a suspension of the Suspension Decision, and has requested from the JSE a notice period between confirmation of the Suspension Decision and its implementation, in order to enable it to seek urgent injunctive relief to stay the implementation of such decision (if so advised). The JSE has considered Trustco's request and has agreed to suspend the implementation of the Suspension Decision on the following terms:

- should Trustco wish to initiate any legal proceedings, and obtain the relief it deems
  necessary to obtain, on an urgent basis, in the form of an order from a competent tribunal
  directing that the implementation of the Suspension Decision is suspended pending the
  outcome of an application for reconsideration of such decision, such process must be
  initiated and delivered by 15h00 on Friday, 18 February 2022;
- upon receipt of such process, the JSE will suspend the implementation of the Suspension Decision until 15h00 on 11 March 2022, to allow for these proceedings of first instance to run their course;
- 3. if Trustco does not initiate and deliver any legal process by 15h00 on 18 February 2022, or if it does so, but in any event fails to obtain the appropriate relief by 15h00 on 11 March 2022, the JSE will immediately implement the Suspension Decision without further notice to Trustco.

This announcement has been placed by the JSE in the interests of existing and potential shareholders of Trustco. The accuracy and reliability of financial information published by companies is of critical importance in ensuring a fair, efficient and transparent market, and it is therefore imperative that the market is notified of the JSE's decision.

KM

14 February 2022





MACINTOSH, CROSS & FARQUHARSON PH 50 TEL: 012 342 4855

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

Case No: 11121/2022

In the matter between:

TRUSTCO GROUP HOLDINGS LIMITED

and

JSE LIMITED

THE FINANCIAL SERVICES TRIBUNAL

Applicant

. First Respondent

nd Respondent

### \_\_\_\_\_

### NOTICE OF MOTION

TAKE NOTICE THAT application will be made on behalf of the applicant to this Court on 8 March 2022 at 10h00 or so soon thereafter as Counsel may be heard for an order in the following terms —

- The matter be dealt with as urgent and that the applicant's non-compliance with the prescribed form, manner of service and time periods be condoned in accordance with the provisions of Rule 6(12) of the Uniform Rules of Court, and that the matter be heard as one of urgency;
- Pending the outcome of the review application instituted in this court under case number 5640/2022, including any appeal, the first respondent is interdicted and restrained from:



- 2.1. suspending the applicant's listing on the Johannesburg Stock Exchange;
- 2.2. implementing the second respondent's decision under case number JSE1/2021 dated 22 November 2021; and
- 2.3. implementing, or attempting to implement, the decision that Trustco restate its annual financial statements for the year ending 31 March 2019 and in the interim results for the six months ending 30 September 2018.
- The first respondent be ordered to pay the costs of this application, including the costs of two counsel, in the event of opposition;
- 4. Further and/or alternate relief.

TAKE NOTICE FURTHER THAT the founding affidavit of RIAAN BRUYNS will be used in support of this application.

**TAKE NOTICE FURTHER THAT** should you intend opposing this application, you are required to:

- a) file and serve your notice of intention to oppose on the applicant's attorneys
   on or before 24 February 2022 at 17:00;
- b) elect an address in terms of Uniform Rule 6(5)(b) at which you will accept service of all notice and process in this application; and
- c) file and serve your answering affidavit, if any, on or before 1 March 2022 at 17:00.



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TAKE NOTICE FURTHER THAT the applicant will accept all service of notice and

process

via

email

john.bell@nortonrosefulbright.com

Candice.grieve@nortonrosefulbright.com

KINDLY place the matter on the roll for hearing.

DATED at PRETORIA on this the 23rd day of February 2022.

Norton Rose Fulbright South Africa

Attorneys for applicant 15 Alice Lane

Sandton

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Email:

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Ref TGH1/J Bell

c/o Macintosh Cross And

Farquharson

**Embassy Law Chambers** 834 Pretoria Street Arcadia, Pretoria

Tel: 012 342 4855

Fax: 086 518 3799

Ref: C ERASMUS/CN/B18/2022

To:

The Registrar of the High Court

And to:

**JSE Limited** 

First respondent

c/o Webber Wentzel

Attorneys for the first respondent

90 Rivonia Road

Sandton

Tel:

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Michael.straeuli@webberwentzel.com

Prathik.Mohanlall@webberwentzel.com

Dominic.Harris@webberwentzel.com

SERVICE BY EMAIL

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Ref M Straeuli/P Mohanlall/D Harris/3043858

And to
Financial Services Tribunal
Second respondent
Kasteel Office Park
Orange Building (2nd Floor)
546 Jochemus Street
Erasmuskloof
Pretoria
Email: applications@fstribunal.co.za

SERVICE BY EMAIL



- 47. I attach copies of the relevant pages of these financial statements as FA9.
- 48. To implement the Suspension Decision thus does not create equilibrium in the market or share any new information with market participants. This information is already freely available in the market and has been distributed widely.
- 49. Moreover, although there has not been a restatement of the Financials in the technical sense of the word, all readers of the Financials will note the effect that these restatements will have if they were to be implemented following the outcome of the Review Application. The market is thus well aware of the potential in either event.
- 50. The difference between Trustco and the JSE's respective positions is an interpretation of IFRS accounting standards. Despite the wealth of documents filed in various fora, the JSE has not ever pointed to a concrete standard or rule that Trustco has contravened. Indeed, Trustco has not importantly, the JSE does not assert or suggest an element of fraud, deceit or manipulation of financial statements.
- 51. In the circumstances, the balance of convenience overwhelmingly favours Trustco. If the Suspension Decision is implemented, the consequences are dire. On the other hand, the JSE will suffer no prejudice at all. This particularly as the market is already fully informed of Trustco's financial position regardless of the outcome of the Review Application.

No alternate remedy



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### THE FINANCIAL SERVICES TRIBUNAL

Case Number: JSE1/2022

In the matter of:

TRUSTCO GROUP HOLDINGS LIMITED

**Applicant** 

and

**JSE LIMITED** 

Respondent

### APPLICANT'S HEADS OF ARGUMENT

### INTRODUCTION

- 1. On 10 March 2022, the parties were invited to file heads of argument in respect of the application for suspension of the Tribunal's decision. The invitation requested that the parties deal, in particular, with the following matters:
  - the basis of the suspension of the Tribunal decision of 22 November
     2021;
  - 1.2. the Tribunal's jurisdiction to suspend its own order pending the outcome of a judicial review in the High Court in light of the provisions of section235 of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act").
- Before we deal with these two grounds, and in order to give context to them, we provide some important background and make Trustco's submissions for why



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the Suspension Decision should itself be suspended. Thereafter we answer the questions posed.

### THE ESSENCE OF THIS CASE

- 3. This matter concerns a company called Trustco. Like any company, Trustco's affairs are run by its board of directors. By all accounts, and certainly those filed in the slew of litigation between the parties, the Trustco board is a good board. It is independent and compliant with the duties imposed on it by law. It acts in the best interests of Trustco and its stakeholders.
- 4. The JSE does not dispute the competence, independence or altruism of the Trustco board. There is not a single inkling, intimation or even whisper in any of the many affidavits filed by the JSE before the Tribunal or court that this is not the case.
- 5. One day, the benevolent Trustco board hard at work to advance the best interests of its stakeholders – was approached by its financier. The financier offers to waive the repayment obligation of a substantial loan that was previously granted to Trustco.
- 6. The Trustco board is ecstatic and welcomed the waiver. It has been given a gift: the opportunity to unburden itself of a heavy and oppressive liability. Its stakeholders will be delighted. Trustco will be flush with cash. Dividends will increase. This truly is a gift.
- 7. The Trustco board has a choice:

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<sup>&</sup>lt;sup>1</sup> Suspension Application, RA par 39

- 7.1. accept the gift; or
- 7.2. compel its financier to un-waive the loan so that Trustco can be returned to its place beneath a crushing liability (although this would not be possible as such a waiver would be a unilateral act which,<sup>2</sup> once exercised by the financier, would be binding on Trustco).
- 8. Which of these two options accords with the duties of the directors on Trustco's board? Which of these two options serves to best advance the interests of Trustco and its stakeholders? These questions answer themselves.
- 9. As any benevolent board would, the Trustco board took a decision in the best interests of the company and its stakeholders. There is no cogent allegation that this decision was tainted with a conflict on Trustco's board. That being the case, the principle of corporate deference is important. Although the principle has received little judicial attention in South Africa, the Harvard Law Review explains the principle as follows:<sup>3</sup>

Under the business judgment rule, courts accord great deference to board approval of an action as long as no corporate manager has a conflict of interest, but they review for 'fairness' any action involving such a conflict...

10. This principle has been overlooked by both the JSE and the Tribunal. In the absence of any contention of conflict in the Trustco board, the deference principle ought to have been rigidly applied in favour of Trustco.

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<sup>&</sup>lt;sup>2</sup> Suspension Application, RA, par 28.2

<sup>&</sup>lt;sup>3</sup> The Propriety of Judicial Deference to Corporate Boards of Directors Harvard Law Review, Vol 96, No. 8 (June 1983) p 1894

- 11. Having taken this corporate decision, and relieved the company of a massive debt, Trustco must account for the change in its fortunes. But how?
- 12. The benevolent board does not make it up as it goes, but, once again eager to do what it right, it seeks advice. The advice is sought from accounting experts and IFRS advisors who are accredited and approved by the JSE itself. Surely they, au fait with the relevant accounting standards and JSE listing requirements as they must be, will guide Trustco to act in terms of the relevant accounting standards. And so they do.
- 13. The benevolent board accounts for the loan waiver precisely in terms of the advice that it received from its experts and advisors. It applies IFRS9 which requires that Trustco:
  - 13.1. derecognise the financial liability as at the date it was extinguished; and
  - 13.2. recognise in profit and loss the difference between the carrying amount of the financial liability and the consideration paid to settle it.
- 14. In simple terms, the amount of the liability waived by its financier is reflected as a gain in profit and loss.
- 15. This conclusion is hardly surprising. If Assets = Equity + Liabilities, as anyone with a rudimentary understanding of accounting knows that it must, then a reduction of liabilities increases assets. Any increase of cash assets increases the money in the bank.
- 16. Given that this accounting treatment is both eminently logical and in line with international accounting practice, why does the JSE take issue with it?



- 17. If Trustco's financier was a bank, the JSE would not.
- 18. The source of the JSE's ire is that Trustco's financier is also a shareholder of Trustco. This fact, so says the JSE, changes everything. It magically morphs the nature of the loan from a financial liability (which was never contentious) to something else. The loan waiver is also something more dubious. The accounting treatment too must be bad. This is the JSE's rationale.
- 19. But why?, asks Trustco.
- 20. There is no cogent response from the JSE. It is unable to point to a single accounting standard that Trustco has breached. It is unable to fault the accounting treatment at all.
- 21. What the JSE dislikes is the result. The result is that Trustco's shareholders will receive a windfall as a result of Trustco's increased profitability. The JSE's discord is because Trustco's shareholder/financier will benefit from its legitimate, and expert backed, actions. The JSE says as much in its answering affidavit:<sup>4</sup>

Trustco's filibustering is designed to protect its majority shareholder, Dr van Rooyen. It is after all Dr van Rooyen who will lose out financially when the restatement is effected because he will have to return the nearly N\$ 3 billion shares he unlawfully received.

22. In this single paragraph, the JSE has played its hand. It's real qualm is with Dr van Rooyen. It must be, as this startling allegation against the Trustco board is devoid of any proof or substance. In a single sentence, for the first time ever, while clearly moving away from the facts on record, the JSE seemingly suggests the share transaction was "unlawful". What the JSE seems to ignore is that the

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<sup>&</sup>lt;sup>4</sup> Suspension Application AA par 68

JSE itself approved the transaction. Indeed it approved it twice. So, what the JSE now suddenly says is that it agreed and approved of a transaction which it now for the first time, without reason or ground previously advanced, says is somehow unlawful. Surely an entity tasked with regulating the market may not make such an allegation without any proof at all. This particularly where it approved the transaction itself. What the JSE is actually trying to do is to set aside its own approval of the transaction. That is a very unfortunate state of affairs.

- 23. The JSE's relentless pursuit, in light of its inability to point to an actual breach of any financial standard, leads ineluctably to the conclusion that its target is not Trustco, but Dr van Rooyen. Trustco, and its benevolent board, is little more than a tool in the skirmish with Dr van Rooyen.
- 24. The underlying rationale behind the JSE's desire for the restatement to be effected is made plain in its answering affidavit:5

Equally important is the knock-on effect of the restatement – the shares that were given to Dr van Rooyen must be returned.

- 25. In consequence, the JSE requires Trustco to restate its financial statements. Presumably Trustco must take back the entire loan of more than a billion Rand. But Trustco does not want to do so. When Trustco questions the JSE's say so, the JSE revolts and seeks to suspend Trustco's listing. This penalty is imposed despite the on-going litigation aimed at determining the very question that the JSE is unable to answer: what has Trustco done wrong?
- 26. It would appear that the JSE's inability to answer that question is by design.

Suspension Application AA par 66

- 27. Ironically, the JSE's concern, and its allegations of a R 3 billion windfall by Dr van Rooyen, are misplaced. The evidence in the suspension application is that the shares received by Dr van Rooyen are valued at R 728 million.<sup>6</sup> This is less than half of the R1,54 billion value of the loans that he waived to Trustco's benefit. The benevolence of the Trustco board is immediately apparent. Yet the JSE wants Trustco to take back the loan.
- 28. Importantly, and even if the JSE's concern is the accounting and not the result, the dispute between Trustco and the JSE concerns a difference of opinion. An opinion on how to correctly reflect what are novel and complex accounting transactions. As we have mentioned above, the JSE is unable to point to a concrete standard that Trustco has breached. It cannot do so because Trustco has not, in fact, breached any accounting standard at all. Its accounting treatment, influenced by JSE accredited experts, accords with every applicable accounting standard. The difference between the parties is one of opinion.
- 29. Given the lack of any proof that the Trustco board has acted improperly or failed to be impartial or anything of the sort, how can Trustco be punished for the windfall received by its shareholders? How can the JSE seek to suspend Trustco's listing when the dispute rages on, not yet finally determined? How can the JSE impose a sanction when the basis of its decision may well be its own uncontested approval?
- 30. And yet the JSE does. It seeks to sanction Trustco, and harshly, before the legal process is allowed to play out. All that Trustco seeks is for its dispute to be handled fairly. That it be afforded the remedies available to it under South African

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<sup>&</sup>lt;sup>6</sup> Suspension Application RA par 28.3

law and its dispute be resolved before it is sanctioned and its listing suspended.

This is the essence of Trustco's case.

#### BRIEF HISTORY OF THE LITIGATION

- 31. In October 2020, the JSE required that Trustco restate its financials in respect of two issues: the loan issue (referred to above) and a reclassification of certain property held by Trustco ("the Restatement Decision"). Trustco disputes the JSE's Restatement Decision. The dispute in respect of the Restatement Decision ultimately came before the Tribunal, which handed down its award on 22 November 2021 ("the Award").<sup>7</sup>
- 32. The Award upheld the JSE's Restatement Decision and, in effect, required that Trustco restate its financials as decided by the JSE. Trustco disputes the correctness of the Award and the Restatement Decision and has reviewed both in the High Court under case number: 5640/2022 ("the Review Application").
- 33. Despite the review, the JSE seeks to sanction Trustco. On 3 December 2021, the JSE informed Trustco that it was considering a suspension of Trustco's listing as a result of it not having restated its financials. Trustco made representations to the JSE under paragraph 1.7 of the JSE Listing Requirements in this regard. However Trustco's objection was summarily dismissed on 13 December 2021 when the JSE informed Trustco that it would be suspending Trustco's listing ("the Suspension Decision"). Suspension Decision").

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<sup>&</sup>lt;sup>7</sup> Suspension Application, FA par 6

<sup>&</sup>lt;sup>8</sup> Reconsideration Application, par 6 and Annexure A.1

<sup>&</sup>lt;sup>9</sup> Reconsideration Application, par 7 and Annexure A.2

<sup>&</sup>lt;sup>10</sup> Reconsideration Application, par 8 and Annexure A.3

- 34. Trustco objected to the Suspension Decision on 17 December 2021.<sup>11</sup> This objection was dismissed by the JSE on 14 February 2022.<sup>12</sup> At the same time, the JSE issued a SENS announcement informing the market that Trustco's shares would be suspended.<sup>13</sup>
- 35. In response, Trustco launched an application in terms of section 230 of the Financial Sector Regulation Act ("the FSR Act") for a reconsideration of the Suspension Decision ("the Reconsideration Application").<sup>14</sup>
- 36. Given the JSE's stated intention to suspend Trustco's shares, and the fact that such a decision is not automatically suspended under the FSR Act, Trustco has brought this application (in terms of section 231 of the FSR Act) seeking a suspension of the Suspension Decision pending the Reconsideration Application.

# THE BASIS ON WHICH A SUSPENSION IS SOUGHT

- 37. Trustco contends that the Suspension Decision is impermissible on the basis that:
  - 37.1. the JSE has not met the threshold imposed on it by the Financial Markets

    Act 19 of 2012 ("the FMA") or the JSE's Listing Requirements;<sup>15</sup>
  - 37.2. Mr AF Visser (who made the Suspension Decision on behalf of the JSE) was not authorised to make the decision; 16 and

<sup>11</sup> Suspension Application, FA par 9 and Annexure B

<sup>&</sup>lt;sup>12</sup> Suspension Application, FA par 10.1 and Annexure C

<sup>&</sup>lt;sup>13</sup> Suspension Application, FA par 10.2 and Annexure D

<sup>&</sup>lt;sup>14</sup> Suspension Application, FA par 11 and Reconsideration Application, Annexure X-3

<sup>&</sup>lt;sup>15</sup> Reconsideration Application, par 23 to 24.5

<sup>&</sup>lt;sup>16</sup> Reconsideration Application, par 21

- 37.3. it is premature until the Review Application has been heard and determined.<sup>17</sup>
- 38. Should the JSE implement a suspension of Trustco's shares, it is unarguable (despite the JSE's best intentions to do so) that Trustco will be prejudiced as a result. For one, its shares cannot be traded this impacts both Trustco and its shareholders. For another, the negative market sentiment associated with a suspension will undoubtedly impact Trustco's share price. These are just some of the host of negative consequences that will inevitably follow upon a suspension of Trustco's listing. It is this negative consequence that Trustco seeks to avoid.
- 39. Indeed, the Appellate Division has recognised the potential adverse consequence that can arise following the suspension of an entity's listing. In <u>JSE v Witwatersrand Nigel</u>, Corbett JA found that:<sup>21</sup>

... The suspension of the listing of a company's shares, even for a limited period of 30 days or less, can have very serious consequences for the parties concerned and it seems obvious that the Legislature did not intend the president to have carte blanche in this regard. The general tenor of the Act evinces a concern that a stock exchange licensed thereunder should conduct its business with due regard for the public interest (see eg s 8(1)(a) and s 12(1)(n) and cf the Dawnlaan Beleggings case supra at 361F - 362G). The public interest is served by the stock exchange, inter alia, controlling the securities which are bought and sold on the market which it conducts. This control is exercised by way of the listing system, which enables the committee to refuse a listing in respect of securities, if it so decides, and also to remove or suspend listed securities if it is of opinion that it is desirable to do so. Where s 17(1) speaks of 'desirable' it means, in my view, desirable in the public interest, which in practice means, for the most part, in the interests of the company

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<sup>&</sup>lt;sup>17</sup> Reconsideration Application, par 22

<sup>&</sup>lt;sup>18</sup> Suspension Application, FA par 17.3

<sup>&</sup>lt;sup>19</sup> Suspension Application, FA par 17.2

<sup>&</sup>lt;sup>20</sup> See Suspension Application, FA par 17

<sup>&</sup>lt;sup>21</sup> Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A) at 152E

concerned or its shareholders or persons who might wish to purchase the shares on the stock exchange. The president's power of suspension under s 17(3) is clearly a temporary measure designed to protect this public interest and it would no doubt be exercised in many instances where there was the prospect of an investigation by the committee which might lead to the shares being removed from the list or suspended. Obviously such an investigation, which entails hearing representations, could take time and s 17(3) provides a procedure whereby interim action can be taken.

40. There is no real attempt to establish why a suspension of Trustco's shares would be in the public interest, why it accords with the objectives of section 2 of the FMA or that the Suspension Decision is lawful at all. To the contrary, the JSE's answering affidavit in this application evidences that the Suspension Decision is used as a whip to punish Trustco for daring to disagree with it. The answering affidavit says this:

Trustco has disregarded the Tribunal's Order. It concedes in its affidavit that it has "not restated its financial statements".

- 41. This is a brazen falsity. Trustco has not merely "disregarded" the Award, but has sought to review it on numerous grounds. The fact that Trustco has embarked on the process of seeking a reconsideration and suspension of the consequence of the Award is proof of its engagement with it.
- 42. The JSE's own Listing Requirements permit it to suspend securities in the following instances:22

The JSE may, subject to the suspension provisions of the FMA, and if either of the following applies:

- (a) if it will further one or more of the objects contained in Section 2 of the FMA, which may also include if it is in the public interest to do so; or
- (b) if the applicant issuer has failed to comply with the Listings Requirements and it is in the public interest to do so, suspend the listing of securities of an applicant issuer

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<sup>&</sup>lt;sup>22</sup> JSE Listing Requirements, par 1.6

and impose such conditions as it may, in the circumstances, deem appropriate for the lifting of such suspension.

- 43. In its answering submissions, which is noteably not under oath, the JSE does not engage at all with how or why the Suspension Decision furthers the objects of section 2 of the FMA. It deals with some of the other issues raised by Trustco, but this fundamental aspect the basis of the Suspension Decision is strangely absent.
- 44. The high watermark of the JSE's attempt to squeeze itself into paragraph 1.6(b) of the Listing Requirements is this:<sup>23</sup>

In terms of the Listings Requirements, there is an obligation on the JSE to protect investors. The JSE is further obligated to ensure that full, equal and timeous public disclosure is made to all holders of securities and the general public at large regarding the activities of an issuer that are price sensitive. The JSE must promote investor confidence in standards of disclosure and corporate governance in the conduct of applicant issuers' affairs and in the market as a whole.

The Suspension Decision accords with the General Principles of the Listings Requirements.

45. The JSE's pity reliance on its decision according generally with the principles of the Listing Requirements lacks any meaningful substantiation.<sup>24</sup> Moreover, its reliance on these grounds is misplaced as its obligations to ensure public disclosure of sensitive information to the market as a whole have been fulfilled as:

<sup>&</sup>lt;sup>23</sup> Suspension Application, AA par 62 and 63

<sup>&</sup>lt;sup>24</sup> Suspension Application, RA par 13

- Trustco has recorded the fact of the dispute with the JSE in its 45.1. financials;25
- 45.2. 99% of Trustco's shareholders voted in favour of the accounting treatment employed in the financials;26 and
- 45.3. the JSE has issued a number of SENS announcements informing the market of its decisions in respect of Trustco.
- 46. In any event, even if the JSE could establish compliance with par 1.6(b) of the Listing Requirements (which it has not), the paragraph itself subjects any decision to "the suspension provision of the FMA". Section 12 of the FMA provides that:

An exchange may, subject to this section, the exchange rules and the listing requirements, remove securities from the list, even to the extent that a removal may have the effect that an entire board or substantial portion of the board on the exchange is closed, or suspend the trading in listed securities, if it will further one or more of the objects of this Act referred to in section 2.

- 47. As we have said, the JSE has not mentioned, much less set out any facts, which of the section 2 objectives its Suspension Decision seeks to achieve. In view of the JSE's discord with Dr van Rooyen, it appears that there is no legitimate objective sought to be furthered by suspending Trustco's listing.
- 48. It is for this reason that Trustco's challenge is to the very foundation of the chain of events which the JSE has erroneously put in motion to bring the parties to this point. While it is the JSE's Suspension Decision which is sought to be suspended

<sup>&</sup>lt;sup>25</sup> Suspension Application, RA par 26 and 27

<sup>&</sup>lt;sup>26</sup> Suspension Application, RA par 32

in the immediate term, Trustco seeks to impugn the foundation of the Suspension Decision, that is: the Award, and in turn, the Restatement Decision.

- 49. Should Trustco's Review succeed, with its strong prospects as set out in the Reconsideration Application,<sup>27</sup> then there is no basis for Trustco's listing to have been suspended to begin with. If the JSE is permitted to implement the Suspension Decision, and the Restatement Decision is later set aside, Trustco will have suffered the consequence above for no reason at all.
- 50. For these reasons, it is submitted that that Suspension Decision should be suspended in terms of section 231 of the FSR Act.
- 51. Having made these submissions, and in light of them, the questions posed to the parties can be answered crisply.

## THE QUESTIONS POSED TO THE PARTIES

- 52. We have set out above how the component parts of this matter are all interconnected:
  - 52.1. the genesis of the matter is the Restatement Decision;
  - 52.2. the Restatement Decision is the subject of the Award;
  - 52.3. the Award is the subject of the Review Application; and
  - 52.4. the Suspension Decision is a consequence of the Award.

<sup>&</sup>lt;sup>27</sup> Reconsideration Application pars 15 to 24

53. Regardless of the undeniable link between each of the component parts (which is dealt with in detail above), this application concerns the Suspension Decision.

In terms of section 105 of the FMA, Trustco has a right to approach the Tribunal for a reconsideration in respect of the decision of:<sup>28</sup>

... an exchange to defer, refuse or grant an application for the inclusion of securities in the list or to remove securities from the list or to suspend the trading in listed securities;

- 54. That is the remedy that Trustco seeks to invoke in the Reconsideration Application. By extension, this application seeks to protect its rights pending that application. The grant of that relief is a discretion conferred on the Tribunal in terms of section 231 of the FSR Act. It is one we submit should be granted for the reasons set out above.
- 55. The relief sought in respect of the Suspension Decision does not constitute a suspension of the Tribunal's Award dated 22 November 2021.
- 56. It follows, and in answer to the second question, that the Tribunal's jurisdiction to suspend its own orders pending a judicial review, is not in issue in this application.

Norton Rose Fulbright South Africa Inc

Applicant's Attorneys

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 $<sup>^{28}</sup>$  s 105(1)(d)

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## THE FINANCIAL SERVICES TRIBUNAL

Case number: JSE1/2022

In the matter between

TRUSTCO GROUP HOLDINGS LIMITED

**Applicant** 

and

**JSE LIMITED** 

Respondent

## JSE'S HEADS OF ARGUMENT

### INTRODUCTION

Trustco thumbs its nose at the JSE, its market regulator, and thumbs its nose at the Tribunal. In October 2020—almost 18 months ago—the JSE decided that Trustco's financial statements did not comply with IFRS and should be restated. After losing an internal objection, Trustco asked the Tribunal to reconsider the JSE's decision. After careful and diligent consideration, the Tribunal dismissed Trustco's reconsideration application in November 2021.2

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<sup>&</sup>lt;sup>1</sup> JSE response; para 18.

<sup>&</sup>lt;sup>2</sup> JSE response; para 23. See also annexure "RA1".

- 2. Five months later, Trustco has on its own version, "not restated its financial statements" and it has not interdicted the JSE's decision or the Tribunal's previous decision. It instead rolls out a Stalingrad strategy to stymie the JSE and the Tribunal and distort the market. Trustco's filibustering has worked: its shares remain free to buy or sell on the open market. It remains business as usual for Trustco even though the JSE directed it to restate its financial statements and even though the Tribunal agreed with the JSE's decision.
- 3. It should not be so easy to game the market, game the market regulator, and game the Tribunal. The Tribunal has already considered and already rejected Trustco's objections to restating its financial statements. Trustco all but ignores the Tribunal's decision and all but repudiates the Tribunal's authority.
- 4. The JSE decided to suspend Trustco's listing to protect the market and protect innocent third-party investors. Having disregarded the Tribunal's previous decision, Trustco now returns to the Tribunal asking for the discretionary remedy of suspension. There is no basis for the Tribunal to come to Trustco's aid particularly where its conduct is contemptuous of the Tribunal's previous decision. Its application for a suspension of the JSE's decision to suspend its listing should be dismissed. Trustco should be ordered to pay the costs of this application, but this time it should be ordered to pay all of the costs, and not only 50% as it was ordered to do in the Tribunal's previous decision.

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<sup>&</sup>lt;sup>3</sup> Trustco's founding affidavit; para 5.

<sup>&</sup>lt;sup>4</sup> See, for example, *C & M Fastners CC v Buffalo City Metropolitan Municipality* 2019 JDR 0498 (ECG) at para 49 ("Respondent seems intent on the subterfuge of a mixture of deep silence and then when forced out of hiding, a Stalingrad Strategy, taking all possible technical points and staying coy at best on the details of the merits and purported cancellation.").

#### THE FACTS

- 5. Trustco is a billion-Rand company incorporated in Namibia.<sup>5</sup> It's CEO and majority shareholder is Dr Quintin van Rooyen.<sup>6</sup>
- 6. Dr van Rooyen was also the sole shareholder of Huso Investments (Pty)
  Limited.<sup>7</sup> Between 2015 and 2018, Dr van Rooyen loaned Huso just over halfa-billion Namibian dollars (equal to the same amount in Rand).<sup>8</sup>
- 7. In 2018, Trustco bought out Huso.<sup>9</sup> Dr van Rooyen was on both sides of the transaction: he was Trustco's CEO and majority shareholder, and he was Huso's sole shareholder.<sup>10</sup>
- 8. In Huso's financial statements, Dr van Rooyen's loan was initially classified as equity (that is, it was recorded as money that Dr van Rooyen had invested in Huso as a shareholder).<sup>11</sup> By the time Trustco acquired Huso, though, the loan had been reclassified as a liability (that is, money that was owed to Dr van Rooyen).<sup>12</sup>

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<sup>&</sup>lt;sup>5</sup> JSE's response; para 6.

<sup>&</sup>lt;sup>6</sup> JSE's response; para 6.

<sup>&</sup>lt;sup>7</sup> JSE's response; para 6.

<sup>&</sup>lt;sup>8</sup> JSE's response; para 7.

<sup>&</sup>lt;sup>9</sup> JSE's response; para 7.

<sup>&</sup>lt;sup>10</sup> JSE's response; para 7.

<sup>&</sup>lt;sup>11</sup> JSE's response; para 8.

<sup>&</sup>lt;sup>12</sup> JSE's response; para 8.

- 9. A few weeks after Trustco acquired Huso, Dr van Rooyen forgave his half-a-billion Rand loan. As it happens, an earn-out mechanism in Dr van Rooyen's sale of shares agreement with Trustco rewards him with more Trustco shares if Trustco meets stipulated profit thresholds. The sale of shares agreement and the earn out mechanism had also been adjusted to maximise the benefit for Dr van Rooyen.
- 10. Because Trustco had recognised the loan as a liability, it reflected the forgiveness of the loan as a gain. 15 So, by the stroke of Dr van Rooyen's generous pen, Trustco reflected a gain of N\$546 million in its financial statements after Dr van Rooyen forgave the loan. 16 Trustco's gain, in turn, triggered Dr van Rooyen's earn-out mechanism.
- 11. Dr van Rooyen and Trustco have never explained why Dr van Rooyen would forgive a loan worth more than half-a-billion Rand. Try as Trustco might in these proceedings to paint a picture of a hapless board doing its best, 17 it still avoids explaining why Dr van Rooyen would waive the loan. Trustco's excuse for not explaining why the loan was forgiven is paper-thin: Dr van Rooyen is a member of Trustco's board and its CEO; it would be no hardship for Trustco to ask Dr van Rooyen to explain himself; or as the CEO Dr van Rooyen ought, in the discharge of his fiduciary duties, have explained himself. These obvious, and

<sup>&</sup>lt;sup>13</sup> JSE's response; para 10.

<sup>&</sup>lt;sup>14</sup> JSE's response; para 9.

<sup>&</sup>lt;sup>15</sup> JSE's response; para 10.

<sup>&</sup>lt;sup>16</sup> JSE's response; para 10.

<sup>&</sup>lt;sup>17</sup> Trustco's heads of argument; paras 5 to 9.

simple means to explain what went on are ignored by Trustco. The Tribunal criticised Trustco for its "repeated failure to take the FRIP, the JSE, and the Tribunal into its confidence" on this issue.<sup>18</sup>

- 12. Dr van Rooyen loaned another N\$1 billion to Trustco in 2019.<sup>19</sup> His generosity struck again: he forgave this loan too, and Trustco reported the "gift"<sup>20</sup> as a N\$1 billion gain in its financial statements. And for his generosity, Dr van Rooyen was rewarded once more through the earn-out mechanism.<sup>21</sup> In the end, forgiving the loans resulted in Dr van Rooyen receiving far more in Trustco shares than the Namibian Dollar amounts that he forgave. This simple point illustrates why Trustco and Dr van Rooyen had to explain themselves, which they have never done.
- 13. The way that Trustco accounted for Dr van Rooyen forgiving his loans, and its classifying gains in profit and loss, has become known as "the loan issue". 22
- 14. Trustco's "innocent-board" defence in its heads of argument misses the point about the loan issue: the JSE does not take issue with Dr van Rooyen's generous waivers in and of themselves. The JSE takes issue with how Trustco reported the waivers in its financial statements. The waivers should not have been reported as gains in profit and loss; they should have been reported as equity transactions, which would have extinguished the liabilities without

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<sup>&</sup>lt;sup>18</sup> JSE's response; annexure "RA1", para 93.

<sup>19</sup> JSE's response; para 12.

<sup>&</sup>lt;sup>20</sup> Trustco's heads of argument; para 6.

<sup>&</sup>lt;sup>21</sup> JSE's response; para 12.

<sup>&</sup>lt;sup>22</sup> JSE's response; para 16.

inflating profits (of course, that would have been less desirable for Dr van Rooyen's bottom line, because reporting the loans that way would not have triggered his earn-out mechanism).

On a separate issue, which has become known as "the property issue", Trustco owns properties in a development in Elisenheim, just north of Windhoek. Trustco reclassified properties in the development, by processing a book entry, from inventory to investment property.<sup>23</sup> After the reclassification, Trustco revalued the properties upwards which increased its profitability. Trustco then reported a gain in its profit and loss account of just under N\$700 million.<sup>24</sup>

- 16. At the end of 2019, Trustco's financial statements were selected for review under the JSE's proactive monitoring review process.<sup>25</sup> 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.<sup>26</sup>
- 17. On 16 October 2020, the JSE decided that Trustco had not complied with IFRS in respect of the loan issue and the property issue.<sup>27</sup> The JSE made this decision after considering the expert views of the FRIP, an advisory body to the JSE.<sup>28</sup>

<sup>24</sup> JSE's response; para 13.

<sup>&</sup>lt;sup>23</sup> JSE's response; para 13.

<sup>&</sup>lt;sup>25</sup> JSE's response; para 14.

<sup>&</sup>lt;sup>26</sup> JSE's response; para 14.

<sup>&</sup>lt;sup>27</sup> JSE's response; para 18.

<sup>&</sup>lt;sup>28</sup> JSE's response; para 15.

- 18. Trustco objected to the JSE's decision.<sup>29</sup> On 11 November 2020, the JSE dismissed Trustco's objection and directed Trustco to take corrective action.
  We refer to this decision as "the Restatement Decision".<sup>30</sup>
- The corrective action that the Restatement Decision required included the following:<sup>31</sup>
  - 19.1 The JSE directed Trustco to restate its annual financial statements for year ended 31 March 2019, with the following corrections:
    - in respect of the first loan, Trustco must reverse the N\$546million gain recognised in profit and loss; and
    - 19.1.2 in respect of the property issue, Trustco must reverse the reclassification of the properties and reverse the N\$693 million gain recognised in profit and loss.
  - 19.2 The JSE directed Trustco to restate its interim results for the 6 months ended 30 September 2019 in respect of the second loan by reversing the N\$1 billion gain recognised in profit and loss.

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<sup>&</sup>lt;sup>29</sup> 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: <a href="https://tinyurl.com/ListingsRequirements">https://tinyurl.com/ListingsRequirements</a>.

<sup>30</sup> JSE's response; para 20.

<sup>31</sup> JSE's response; para 20.

- 20. On 22 November 2021, the Tribunal dismissed Trustco's reconsideration application against the Restatement Decision. <sup>32</sup> We refer to this as "the Tribunal's Order".
- 21. By the beginning of December 2021, Trustco had still not complied with the JSE's Restatement Decision and its corrective action. The JSE informed Trustco that it was considering suspending Trustco's listing.<sup>33</sup>
- 22. On 13 December 2021, and after the parties exchanged correspondence, the JSE decided to suspend Trustco's listing, which we refer to as "the Suspension Decision". <sup>34</sup> Trustco objected. The JSE agreed to hold off on deciding Trustco's objection until Trustco published its 2021 annual financial statements.<sup>35</sup>
- Trustco published its 2021 annual financial statements on 31 January 2022.
   Trustco did not restate its financial statements as the JSE required.
- 24. The same day, Trustco launched a review of the Tribunal's Order in the High Court.<sup>36</sup> Trustco did <u>not</u> seek interim relief against the enforcement of the Restatement Decision or the Tribunal's Order.

<sup>&</sup>lt;sup>32</sup> JSE's response; para 22; annexure "RA1".

<sup>33</sup> JSE's response; para 24.

<sup>&</sup>lt;sup>34</sup> JSE's response; para 26.

<sup>35</sup> JSE's response; para 30.

<sup>&</sup>lt;sup>36</sup> JSE's response; para 37.

- 25. On 14 February 2022, the JSE dismissed Trustco's objection to the Suspension Decision, and the JSE published a SENS announcement to that effect.<sup>37</sup>
- 26. On 18 February 2022, Trustco lodged two applications in the Tribunal:
  - a reconsideration application asking the Tribunal to reconsider the Suspension Decision, which we refer to as "the Reconsideration Application"; and
  - 26.2 a suspension application, under section 231 of the Financial Sector Regulation Act, asking the Tribunal to suspend the Suspension Decision pending the Reconsideration Application.
- 27. On 23 February 2022, Trustco launched an urgent application in the High Court—adding another litigation front to its determined effort to avoid complying with the Restatement Decision and the Tribunal's Order. After the JSE agreed that it would not implement the Suspension Decision pending the Tribunal's decision on this application, Trustco did not persist with the urgent application which remains in abeyance and has not been withdrawn.

#### THERE IS NO REASON TO SUSPEND THE SUSPENSION DECISION

28. The Restatement Decision and its 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. Trustco admits that it "has not restated its financial

<sup>&</sup>lt;sup>37</sup> JSE's response; para 39.

statements". 38 There is no dispute, in other words, that Trustco has not complied with the Restatement Decision and has not complied with the Tribunal's Order.

- 29. Trustco points to its pending review of the Tribunal's Order to excuse its non-compliance. There, amongst other baseless arguments, Trustco accuses the Tribunal of not being qualified for the job and of not applying its mind to the matter. We surmise that it these types of baseless and very personal attacks that led Retired Justice Harms to recuse himself from this application.
- 30. The important point for now is that the Restatement Decision and the Tribunal's Order are extant decisions that are valid and binding. It does not matter that Trustco has instituted review proceedings against the Restatement Decision and the Tribunal's Order. It does not matter because the mere institution of a review does not affect the validity of an administrative decision. <sup>39</sup> Trustco elected not to apply for an interim interdict pending the review, and this

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<sup>38</sup> Trustco's founding affidavit; para 5.

see, for example, *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 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."). See also *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.").

suspension application targets the Suspension Decision, not the Restatement Decision or the Tribunal's Order. It follows that the Restatement Decision and the Tribunal's Order remain valid and binding decisions.

- 31. In turn, this means that this application to suspend the Suspension Decision must proceed from this premise: the Restatement Decision and the Tribunal's Order are "valid and effectual" and "continue to have legal consequences". 40 In other words, the starting point for these proceedings is that Trustco's financial statements do not comply with IFRS and Trustco has failed to restate them, despite the JSE's lawful and binding corrective action. Trustco still failed to restate its financial statements even after the Tribunal endorsed the JSE's corrective action when it dismissed Trustco's first reconsideration application.
- 32. Trustco's failure to restate its financial statements is contemptuous of the JSE's and the Tribunal's authority. In the absence of a court order interdicting the operation of the Tribunal's Order pending the review, or a court order reviewing and setting aside the Tribunal's Order, Trustco had to comply with the Restatement Decision. It instead consciously elected to ignore the Restatement Decision and the Tribunal's Order. And it now complains of a consequence that flows from the Restatement Decision and the Tribunal's Order, and its conscious failure to comply with the corrective action. It is in this way that Trustco is truly the master of its own misfortune: it is its own contemptuous conduct that has brought it to where it currently finds itself, and it is not entitled to the assistance of the Tribunal in those circumstances.

<sup>40</sup> Kirland (note 39) at para 101.

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- 33. Trustco does not, in any event, make out a case for a suspension of the Suspension Decision.
- 34. Under section 231 of the Financial Services Regulation Act, a reconsideration application does not suspend the decision in question "unless the Tribunal so orders." Though the Tribunal has the power to suspend the Suspension Decision, Trustco does not make out a case for suspension. Trustco trips at three hurdles:
  - Trustco does not show that its Reconsideration Application has prospects of success.
  - Trustco does not show irreparable harm if the Suspension Decision is not suspended.
  - Trustco does not discharge its onus to show that the JSE and the market will not suffer irreparable harm if the Suspension Decision is suspended.<sup>41</sup>

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<sup>&</sup>lt;sup>41</sup> See *Becker v The Financial Services Conduct Authority* 2022 JDR 0194 (GP) at para 86 "In terms of section 231 of the FSR Act read with the Financial Sector Tribunal Rule 15, the Chairperson of the Tribunal has the discretion to suspend the decision of the Conduct Authority, on application by the aggrieved party. I see no reason why, in appropriate case, the chairperson of the Tribunal should not invoke the same test developed and followed by the Supreme Court of Appeal [in *University of the Free State v AfriForum* 2018 (3) SA 428 (SCA)]". In *Afriforum*, the SCA held, in relation to the test to execute a judgment pending an appeal, that "the requirements introduced by s 18(1) and (3) [of the Superior Courts Act] are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 18(1), s 18(3) requires the applicant 'in addition' to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not made, and that the other party 'will not' suffer irreparable harm if the order is made."

## The Reconsideration Application does not have prospects of success

- 35. Trustco's first problem is that the Reconsideration Application does not affect the Restatement Decision and the Tribunal's Order. The Restatement Decision and the Tribunal's Order remain valid and binding. An interim interdict was the only way for Trustco to avoid their "binding consequences" pending its review.

  Trustco did not seek an interim interdict.
- 36. Once the validity of the Restatement Decision and the Tribunal's Order is accepted, the Suspension Decision is straightforward. The simple fact that follows from the Restatement Decision and the Tribunal's Order is that Trustco's financial statements are not accurate and do not give the market a fair picture of Trustco's financial position. Trustco's financial statements must be restated—and by a margin worth almost N\$2 billion.<sup>42</sup>
- 37. In these circumstances, the Reconsideration Application has no prospects of success.
- 38. Paragraph 1.6 of the Listings Requirements allows the JSE to suspend a listing on either of two grounds:
  - 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
  - if the issuer "failed to comply with the Listings Requirements and it is in the public interest to do so".

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<sup>&</sup>lt;sup>42</sup> JSE's response; para 36.

- 39. Section 2 of the Financial Markets Act lists five statutory objects. 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.
  - 39.1 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 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.
  - 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.
- 39.3 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.
- 40. Trustco also failed to comply with the Listings Requirements: it 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.
- 41. Enforcing compliance with the Listings Requirements is the JSE's primary mechanism to regulate its market in the public interest. Compliance with the Listings Requirements ensures the integrity of the market and prevents listed companies simply following their own views to the prejudice of the investing public. These obligations are not voluntary. They must be timeously complied with. Where there is non-compliance, the JSE must act. It is statutorily obliged to do so under section 10 of the Financial Markets Act. A failure to ensure timeous compliance has the real potential to cause very serious harm to participants in the market.
- 42. 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. The Restatement Decision and the Tribunal's Order mean that Trustco did not comply with IFRS. It has not restated its financial statements, and so its non-compliance continues unabated. The

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preparation, publication, and dissemination of accurate financial statements is of critical importance in ensuring a fair, efficient, and transparent market.

- 43. Suspending Trustco's listing is "in the public interest". 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.

  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.
- 44. Trustco is doing just that: it ignores the Restatement Decision and the Tribunal's Order. Trustco admits that it "has not restated its financial statements". 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. Instead of "revers[ing]" any gains and instead of restating any financial statements, Trustco buried some commentary about the Restatement Decision in the small print to its financial statements. That is not enough. The JSE directed Trustco to restate the numbers in its financial statements. Trustco left the numbers unchanged.

<sup>43</sup> Trustco's founding affidavit; para 5.

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- 45. At the heart of this matter is a fundamental rule of law issue, and Trustco wants to ignore and run rough shod over the rule of law. That is a very dangerous course, and should, we submit, be decisively stamped out.
- 46. Trustco makes two main arguments in the Reconsideration Application:
  - Suspension is somehow premature before Trustco's review of the Restatement Decision and the Tribunal's Order is finally determined.
  - The Suspension Decision was not properly authorised.
- 47. The prematurity argument gets the law backwards. The Restatement Decision and the Tribunal's Order are valid and binding unless and until they are reviewed and set aside. 44 The mere fact that Trustco has instituted a review does not change things, otherwise every Rule 53 notice of motion would automatically operate as an interim interdict. The Constitutional Court has already rejected the contrary suggestion as "reduc[ing] the actual grant of an interdict to a superfluity." 45 If Trustco wanted to 'suspend' the Restatement Decision and the Tribunal's Order, it should have applied for an interim interdict. It elected not to. And without an interim interdict, the Restatement Decision and the Tribunal's Order continue to have legal consequences. Suspension of Trustco's listing is one of those consequences, as the Listings Requirements envisage.
- 48. Trustco points to section 236 of the Financial Sector Regulation Act, which deals with "[e]nforcement of Tribunal orders". Trustco's reliance on section 236

<sup>&</sup>lt;sup>44</sup> See Kirland (note 39) at para 101 and Tshwane City (note 39) at paras 73 to 74).

<sup>45</sup> Tshwane City (note 39) at para 74.

is wrong because the JSE is not "[e]nforc[ing]" the Tribunal's Order. Instead, the Suspension Decision is based on Trustco's "fail[ure] to comply with the Listings Requirements and the [Restatement Decision]". 46 To be sure, the JSE also considered Trustco's "disregar[d]" for the Tribunal's Order. 47 But the Suspension Decision is not a means of "[e]nforc[ing]" the Tribunal's Order. In any event, it makes no sense to talk about the JSE "[e]nforc[ing]" the Tribunal's Order. The Tribunal dismissed Trustco's reconsideration application against the Restatement Decision. The dismissal of the reconsideration application had consequences for Trustco. But the consequences flow from the Restatement Decision, not from any "[e]nforcement" of the Tribunal's Order.

- 49. Trustco's quibble about Mr Visser's authority fares no better. The JSE's delegation of authority delegates the board's "powers and duties under ... the Listing Requirements" to "the head of the Issuer Regulations Division or the General Manager: Issuer Regulation". 48 Mr Visser is the Director of Issuer Regulation and the head of the division. The authority point is plainly one that has been raised as the shoe began to pinch and ought, we submit, to be placed into the bin of "desperate and last-ditch points".
- 50. For these reasons, Trustco's Reconsideration Application has no prospects of success.

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<sup>&</sup>lt;sup>46</sup> Trustco's founding affidavit; annexure "A".

<sup>&</sup>lt;sup>47</sup> Trustco's founding affidavit; annexure "A".

<sup>&</sup>lt;sup>48</sup> JSE's response; annexure "RA5".

# Trustco does not show that it needs relief to prevent irreparable harm

- 51. Trustco claims that it is "unarguable" that it "will be prejudiced" if the JSE suspends its listing. 49 Trustco is right that it is "unarguable": unarguable because Trustco pleads no facts to support the argument.
- 52. Trustco claims there will be a "host of negative consequences that will inevitably follow" from suspension.<sup>50</sup> But adjectives and adverbs are no substitutes for proper pleading of facts. Nor are the law reports, despite Trustco's attempt to outsource its duty to plead facts to the Appellate Division in 1988.<sup>51</sup> Trustco probably avoids pleading any facts because it knows who stands to lose out once everything is put right again: Dr van Rooyen, who authored his own misfortune.
- 53. The commercial harm that Trustco fears from suspension is, in any event, not irreparable. If Trustco's listing is suspended but it ultimately succeeds in the Reconsideration Application, its shareholders, including Dr van Rooyen, will then be able to freely trade their shares. Trustco's success in the Reconsideration Application will also cure any alleged reputational damage.

<sup>&</sup>lt;sup>49</sup> Trustco's heads of argument; para 38.

<sup>&</sup>lt;sup>50</sup> Trustco's heads of argument; para 38.

<sup>&</sup>lt;sup>51</sup> Trustco's heads of argument; para 39.

<u>Trustco does not show that suspending the Suspension Decision will not cause</u> irreparable harm to the market and innocent investors

- 54. Trustco has the onus to prove an absence of irreparable harm.<sup>52</sup>
- 55. There is irreparable harm to the market and to unsuspecting third parties who may buy Trustco shares unaware of the Restatement Decision and the Tribunal's Order.<sup>53</sup> There is also irreparable harm to the rule of law and the JSE's and the Tribunal's ability to act as an effective regulator.<sup>54</sup>
- 56. Trustco's only counter is that it has "recorded the fact of the dispute with the JSE in its financials" and it points to "a number of SENS announcements". <sup>55</sup> In other words, Trustco asks the JSE and the Tribunal to look the other way because, well, buyer beware.
- 57. The JSE is a regulated stock exchange, not a secondhand car dealership.

  Trustco's financial statements do not comply with IFRS. The JSE directed

  Trustco to restate them. Trustco admits it did not restate its latest financial
  statements, so even the most astute investor would be none the wiser by
  looking at the actual numbers in Trustco's latest financial statements.

  Unsuspecting investors would have no reason to look out for SENS
  announcements about Trustco.

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<sup>52</sup> Becker (note 41) at para 86.

<sup>&</sup>lt;sup>53</sup> JSE's response; paras 62 to 69.

<sup>&</sup>lt;sup>54</sup> JSE's response; para 70.

<sup>&</sup>lt;sup>55</sup> Trustco's heads of argument; para 45.

- 58. The small print to Trustco's financial statements is, in any event, inadequate and does not reasonably convey the nature and effect of Trustco's failure to comply with IFRS. Ironically, Trustco's reliance on the commentary to its financial statements is itself in contravention of 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".
- 59. This matter 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 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.<sup>56</sup>
- 60. Suspension is also necessary to prevent knock-on consequences that will be difficult, if not impossible, to reverse. For example, the necessary implication of the JSE's corrective action is that the issuing of some of Dr van Rooyen's shares must be reversed.<sup>57</sup> If Trustco's listing is not suspended, those shares,

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<sup>&</sup>lt;sup>56</sup> JSE's response; para 45.

<sup>&</sup>lt;sup>57</sup> JSE's response; para 66.

which were never validly issued, may be sold on the market to unsuspecting investors.

61. 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 its conduct sends to the market is that listed companies can, through brute litigation trench-warfare, thwart their regulator and thwart the Tribunal, and continue offering their shares to the market despite not complying with IFRS.

## CONCLUSION

- 62. The market works only if financial statements are accurate. The JSE determined that Trustco's financial statements do not comply with IFRS. The Tribunal agreed. Having ignored the Restatement Decision and the Tribunal's Order, Trustco now invites the Tribunal to exercise its discretion and suspend the Suspension Decision.
- 63. The Tribunal should decline the invitation and dismiss the suspension application. Trustco has not made out a case for a discretionary suspension.

  Granting a suspension will tie the JSE's hands, leaving it powerless to exercise its statutory powers to regulate the market and protect the investing public and will make a mockery of the Tribunal's Order.

IAN GREEN SC JASON MITCHELL

Counsel for the JSE 1 April 2022

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