IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 5640/2022

In the matter between:

TRUSTCO GROUP HOLDINGS LIMITED	Applicant
and	
THE FINANCIAL SERVICES TRIBUNAL	First Respondent
THE JSE LIMITED	Second Respondent

APPLICANT'S HEADS OF ARGUMENT

NATURE & PURPOSE OF THIS APPLICATION

1. This matter concerns a decision taken by a JSE employee who had no authority to make it. That decision imposed a sanction that the JSE had no power to impose. That remedy was upheld and enforced by a tribunal – sitting as a body of appeal – that lacked the expertise necessary to make a proper determination of the matter.

2. This is an application to review and set aside:

2.1. a decision of the second respondent ("**the JSE**") on 11 December 2020 requiring the applicant ("**Trustco**") to restate certain of its financial statements ("**the JSE Decision**");[1] and

2.2. a decision of the first respondent ("**the Tribunal**") taken on 22 November 2021 under case number JSE1/2021[2] ("**the Tribunal's Decision**") – upholding the JSE's Decision.[3]

3. Should the JSE Decision and the Tribunal Decision be set aside, Trustco seeks an order either:

3.1. upholding its reconsideration under case number JSE1/2021;[4] or

3.2. remitting the matter back to the Tribunal for reconsideration before a properly constituted panel.[5]

INTRODUCTION

4. The genesis of the dispute in this matter lies in Trustco's financial treatment of three transactions, namely:

4.1. the Huso Loan – concerning the waiver of R 546 million in loans which Trustco reflected as a gain in profit and loss;[6]

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[1] Amended NoM p D2, par 4
[2] Ibid, par 1
[3] Annexure FA1 p A62
[4] Amended NoM p D2, par 2
[5] Ibid, par 3
[6] See FA p A20, par 23 to p A25, par 42

4.2. the Related Party Loan – concerning the waiver of a R 1 billion loan which Trustco reflected as a gain in profit and loss;[7] and

4.3. the Property Issue – concerning the reclassification of property from ‘inventory’ to ‘investment’ property, which Trustco recognised as a gain in profit and loss.[8]

(“**the Transactions**”).

5. The Transactions were reflected in Trustco’s annual financial statements for the interim results for the six months ending 30 September 2018 and/or the year ended 31 March 2019 (“**the Financial Statements**”).

6. The decision regarding the appropriate accounting treatment of each of the Transactions was made by Trustco’s board of directors. At the relevant time, the board consisted of:

6.1. independent non-executive directors, including: a senior counsel;[9] a chartered accountant;[10] an insurance expert;[11] a professor who is a chartered director;[12] a lawyer qualified in South Africa, England, Wales and New York;[13] and

[7] See FA p A25, par 43 to p A26, par 47
[8] See FA p A26, par 48 to p A28, par 57
[9] FA p A15, par 22.5.1
[10] FA p A16, par 22.5.2
[11] Ibid, par 22.5.3
[12] FA p A17, par 22.5.4
[13] Ibid par 22.5.5

6.2. executive committee members, including: Trustco's financial manager;[14] and Doctor Quinton van Rooyen ("**Dr van Rooyen**") – Trustco's founder and majority shareholder,

("**the Board**").

7. The JSE has never so much as alleged, and it is not in dispute, that the Board acted benevolently at all times.[15] Indeed, the Board's *bona fides* cannot be impugned or even questioned in light of the fact that:

   7.1. the Board took advice from JSE accredited IFRS advisors, accounting experts and independently audited by Trustco's auditors in both Namibia and South Africa;[16]

   7.2. each of the Transactions was accounted for precisely in accordance with the relevant IFRS and IAS standards;[17]

   7.3. having received extensive accounting advice, the Board carefully considered the issues at play and made a determination by exercising its business judgment;[18] and

   7.4. the Transactions were reflected in Trustco's Financial Statements – which Financial Statements were approved by Trustco's shareholders.[19]

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[14] FA p A18, par 22.5.6
[15] FA p A15, par 22.3
[16] FA p A18, par 22.6 and 22.7; p A24, par 41; A25, par 42
[17] See FA p A23, par 36 to 42 in respect of the Huso Loan accounting, p A25, par 46 and 47 in respect of the Related Party Loan accounting treatment and p A27, par 52 to 57 in respect of the Property Issue accounting treatment
[18] FA p A19, par 22.7
[19] FA p A19, par 22.9

8. In addition, it is not in dispute that the financial treatment of the Transactions accord with generally accepted accounting principles. It is not in dispute that these accounting principles require the effect of the Transactions to be reflected as a gain in profit and loss. Instead, the JSE merely disagreed with Trustco's accounting treatment of the Transactions and so referred the Transactions for investigation by the FRIP.[20] The JSE Decision and its referral to the FRIP comes years after the Trustco Board took advice from JSE accredited experts and then exercised its business judgment in light of that advice.

9. The FRIP, a body created, appointed and instructed by the JSE,[21] disagreed with Trustco's accounting treatment of the Transactions.[22] The FRIP's conclusion was premised on the notion of 'substance over form'. It had to be grounded in some nebulous concept as the FRIP could not point to a single accounting standard that has been breached by Trustco. In this regard, it is notable that the FRIP did not – as the JSE Listings Requirements mandate where there is a non-compliance with IFRS[23] – refer the matter to SAICA, IRBA or any other relevant professional body. Had there been any non-compliance at all, the FRIP certainly would not have ignored its mandate. The only conclusion to be drawn is one that Trustco has maintained all along: there is no non-compliance with IFRS.

10. Despite this, pursuant to the FRIP's report, the JSE wrote to Trustco informing it that it:[24]

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[20] FA p A28, par 59 and 60
[21] FA p A29, par 60
[22] FA p A29, par 61 read with Annexure FA6 p A 263
[23] JSE Listings Requirements, par 8.66
[24] FA Annexure FA2 p A90

"… has not complied with International Financial Reporting Standards (IFRS)…"

11. In consequence of this finding by the JSE, it required that Trustco restate the Financial Statements.

12. The basis on which Trustco disputes the JSE's reasoning is set out in the documents detailed in paragraph 65 of the founding affidavit.[25] Given that this is a review, the merit of the dispute is not directly pertinent, but is relevant in respect of the 'reasonableness' enquiry. However, what is of primary importance is that Trustco has always disputed that it "has not complied with International Financial Reporting Standards (IFRS)…", as the JSE so asserts. It has been a feature of each and every step in this matter that:

    12.1. Trustco asks the JSE exactly which IFRS it has breached; and

    12.2. the JSE is unable to give a cogent answer or point to a single paragraph in IFRS that Trustco has not complied with in reporting the Transactions.

13. In light of the dispute between the JSE and Trustco, the matter was eventually referred to the Tribunal in terms of section 230 of the Financial Sector Regulation Act, 2017 ("**the FSR Act**"). The question that the Tribunal was called to consider was whether or not the JSE had any basis to require that Trustco restate the Financial Statements.[26]

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[25] FA p A31, par 65
[26] FA p A15, par 22.4

14. The matter was set down before the Tribunal on 2 November 2021.[27] The Tribunal Decision was handed down on 22 November 2022.

GROUNDS OF REVIEW

15. In its answering affidavit, the JSE latches onto the fact that Trustco is aggrieved with the outcome of the Tribunal Decision. On the basis of Trustco's dissatisfaction, the JSE repeatedly asserts that Trustco actually seeks not a review, but an appeal of the Tribunal Decision.[28]

16. The JSE is correct that Trustco is aggrieved at both the JSE's Decision and the Tribunal Decision.[29] It is uncontentious that Trustco is of the view that both Decisions are incorrect and are unsupported by a proper application of IFRS. However, contrary to the JSE's view, the fact of Trustco's dissatisfaction does nothing to detract from the reviewability of both Decisions.[30]

17. The JSE's Decision was made by a person not authorised to make it and imposes a sanction that the JSE is not empowered to make. Similarly, the Tribunal Decision stands to be impugned as it was made by lawyers who were (given the accounting and IFRS complexities of this matter) inexperienced and unqualified to make an appropriate determination. As a consequence of this lack of accounting/IFRS experience, the panel overlooked certain material

[27] FA p A32, par 67
[28] AA p E5, par 44 and 45
[29] RA p F2, par 8
[30] RA p F3, par 9

considerations that an appropriately qualified accountant/IFRS specialist would have considered.

18. In both instances, Trustco's right to procedural fairness and a fair hearing were infringed. The reasons for this conclusion are dealt with further below.

Decision Maker's Authority

19. Mr A F Visser, an employee of the JSE and the deponent to the answering affidavit, reviewed certain of Trustco's financial statements.[31] It was as a result of Mr Visser's review that the Transactions were referred to the FRIP.[32]

20. Pursuant to the FRIP report, on 11 November 2020, Mr Visser sent a letter to Trustco setting out the JSE's Final Decision.[33] The Final Decision asserts, inter alia, that "[Trustco] had not complied with the IFRS, as required in terms of the Listings Requirements…" in accounting for the Transactions as it did.[34]

21. Mr Visser's lack of authority only became known to Trustco in late December 2021, when the JSE's attorneys requested confirmation of authority in respect of a subsequent decision by the JSE.[35]

22. Following an exchange of correspondence, on 22 December 2022, the JSE furnished Trustco with the resolution which purports to empower Mr Visser to have made, inter alia, the JSE's Final Decision ("**the JSE Resolution**").[36] The JSE Resolution empowers "the head of the Issuer Regulation Division"[37] to

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[31] FA p A7, par 8
[32] Ibid, par 9
[33] FA p A30, par 63
[34] See FA p A30, par 63.1
[35] FA p A35, par 77 to A36, par 81
[36] FA p A36, par 81
[37] FA p A37, par 84 and Annexure FA14 p A432

exercise certain powers under sections 13 and 15 of the Securities Services Act (now s 12 to 14 of the Financial Markets Act) as well as in terms of the Listings Requirements.

23. The JSE relies on the Resolution as the basis for Mr Visser's authority to have made the JSE's Final Decision. In paragraph 74 of the answering affidavit, the JSE refers to the "Competent Authority" section of the Listings Requirements which confirms that:[38]

> *"… the Board of the JSE has delegated its authority in relation to the Listings Requirements… to the management of the Issuer Regulation Division."*

24. It also confirms that the delegation to Mr Visser was made and is permitted in terms of section 68 of the Financial Markets Act.[39] The section provides that:

> *"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."*

25. The JSE's memorandum of incorporation imposes this condition on any delegation of its board's powers:[40]

> *"… the Board may appoint any number of committees of Directors and delegate to any such committee any of the authority of the Board, **provided that all members of these committees must be Directors**."*

[38] AA p E22, par 74
[39] AA p E23, par 77
[40] FA p A38, par 88.3 read with Annexure FA15 p A493, par 12.11.1

26. The JSE does not dispute that Mr Visser is not a director of the JSE.[41] This is a fatal blow to the legality of the JSE's Decision.

27. It is the very essence of the doctrine of legality that an entity exercising a public power, such as the JSE in this case, does so in a lawful manner.[42] In view of the restrictive interpretation of the authority to delegate power generally,[43] it is uncontentious that a proper and lawful delegation must accord with the conditions imposed by the body making the delegation.

28. Failing compliance with the conditions imposed by the JSE's exercise of the power to delegation – set out expressly in clause 12 of the JSE's MoI – the purported delegation by the JSE is unlawful. In consequence, the power purportedly exercised by Mr Visser – in making and issuing the JSE's Final Decision – was not one that he was authorised to wield.

29. Absent a compliant authorisation and delegation, Mr Visser had no authority to make the JSE's Final Decision and he acted unlawfully in doing so.

30. The consequence of Mr Visser having purportedly exercised a power of the JSE in unlawful circumstances was spelled out by Chaskalson CJ in **New Clicks**:[44]

> *There were two overarching principles which formed the basis of judicial review. First, that the functionaries or bodies exercising delegated powers are*

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[41] FA p A38, par 88.3

[42] **Gees v Provincial Minister of Cultural Affairs and Sport, Western Cape and Others** 2017 (1) SA 1 (SCA) at par 7 and the cases referred to therein; **Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and Another** 2008 (3) SA 160 (SCA) at par 9

[43] See **Kasiyamhuru v Minister of Home Affairs and Others** 1999 (1) SA 643 (W) and **SA Airways Pilots Association and Others v Minister of Transport Affairs and Another** 1988 (1) SA 362 (W)

[44] **Minister of Health NO v New Clicks SA (Pty) Ltd (TAC as Amici Curiae)** 2006 (2) SA 311 (CC) at par 101

confined to the powers vested in them by the empowering legislation. Should they exceed such powers, their actions are illegal, and invalid.

Improper Sanction Imposed

31. At the very heart of this dispute is whether or not the JSE is empowered to force a listed entity to restate its financial statements. The JSE contends that its power emanates from paragraph 8.65 of the Listings Requirements which states that:

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

(a) to censure such issuer in accordance with the provisions contained in Section 1 of the Listings Requirements; and

(b) ***instruct such issuer to publish or re-issue any information the JSE deems appropriate****."*

32. In the Final Decision letter, the JSE instructed Trustco to restate the Financial Statements after making the following "corrections":[45]

32.1. reverse the R 546 million gain in profit and loss in respect of the Huso Transaction and reflect the credit as a reduction in the common control reserve in equity;[46]

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[45] See FA p A30, par 63.2 read with the JSE's Final Decision par 2.A

[46] See FA p A30, par 63.2.1 read with the JSE's Final Decision par 2.A.1

32.2. reverse the R 1 billion gain in profit and loss in respect of the Related Party Loan and reflect the credit as a reduction in the common control reserve in equity;[47] and

32.3. in respect of the Property Issue, reverse the property reclassification and, as a result, reverse the R693 million gain in profit and loss.[48]

33. The JSE does not have the power to require that "corrections" or restatements be made. It may direct only that information be "published" or "re-issued'.

34. Pursuant to the JSE's Decision, Trustco issued a SENS announcement informing the market that the JSE took issue with its financial treatment of the Transactions.[49] Trustco also expressly recorded the JSE's concerns in its financial statements for the period ended 31 January 2022.[50]

35. Any "information" pertinent to the JSE's Final Decision has plainly been "published" or "re-issued", not once, but twice. This accords with the express powers conferred on the JSE in this instance. To the extent that the JSE seeks to force Trustco to restate the Financial Statements – that power simply does not exist.

36. The judgment of Chaskalson CJ in **New Clicks** is instructive here too:

"There were two overarching principles which formed the basis of judicial review. First, that the functionaries or bodies exercising delegated powers are confined to the powers vested in them by the empowering legislation. Should they exceed such powers, their actions are illegal, and invalid."

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[47] See FA p A31, par 63.4 read with the JSE's Final Decision par 2.B.1
[48] See FA p A30, par 63.2.2 read with the JSE's Final Decision par 2.A.2 and 2.A.3
[49] AA p E7, par 24 and Annexure AA1 p E37
[50] AA p E13, par 37

37. In seeking to enforce a power that has never vested in the JSE under any "empowering legislation", be it primary, subordinate, delegated or otherwise, the JSE's Decision defies the legality standard. The JSE Decision stands to be set aside as a result.

38. By upholding the JSE's Decision in circumstances where it is illegal, the Tribunal merely perpetuated the illegality. Accordingly, the Tribunal Decision to stands to be set aside on the same basis.

Composition of the Tribunal

39. A reading of the record in this matter makes it clear that the dispute between Trustco and the JSE centres around pure accounting issues. Those accounting issues are novel and of untold complexity.[51]

40. Section 220 of the FSR Act mandates that the members of the Tribunal must consist, at a minimum, of:

    40.1. two legal experts;[52] and

    40.2. two financial experts.[53]

41. Section 224 of the FSR Act then stipulates that a panel arranged to hear a given matter must consist of:

    41.1. at least one legal expert;[54] and

[51] FA p A42, par 104
[52] s 220(2)(a)
[53] s 220(2)(b)
[54] s 224(4)(a)

41.2. two other panel members.[55]

42. Even at its most basic composition, the FSR Act envisages that at least one financial expert will hear a given matter. That basic composition is evidently designed to ensure that the panel as a whole is equipped to deal with both matters legal and financial in any matter before it.[56] This accords with the essential function of the Tribunal: to reconsider, as an appellate body, decisions made by financial regulators.[57] It follows ineluctably that the purpose of the FSR Act is to ensure expertise in the reconsideration of financial decisions.

43. In this matter, the Tribunal panel was comprised of three lawyers: a retired judge,[58] a senior counsel of the Pretoria Bar[59] and an attorney[60] ("**the Panel**").

44. While the legal acuity of each of the Panel members is beyond reproach,[61] its accounting knowledge and familiarity with IFRS and other important financial standards was lacking.[62] At the outset of the hearing, the chairperson admitted a lack of audit related knowledge and recognised the difficulty that the Panel had in navigating the applicable accounting standards.[63]

45. It is apparent from the Rule 53 Record filed by the Tribunal that there was no thought or prior consideration put into the Panel's composition.[64] There was similarly no consideration of or engagement with the nature of the matter before

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[55] s 220(4)(b)
[56] SFA p D12, par 32
[57] FSR Act preamble and s 219(1)
[58] FA p A32, par 68.1
[59] FA p A33, par 68.3
[60] FA p A33, par 68.3
[61] SFA p D8, par 14
[62] SFA p D8, par 15
[63] FA p A42, par 105; SFA p D9, par 19
[64] RA p D11, par 27 to 30 and D19, par 54.2.

it.[65] The failure to give any consideration to the composition of the Panel undermines the process of the proceedings before the Tribunal. This is recognised in a number of decisions of the Constitutional Court, for instance:[66]

> *"The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred."*

46. In light of the provisions of the FSR Act – which are designed to ensure at least a degree of matter specific expertise – Trustco legitimately expected that the Panel would have an appropriate degree of financial experience to engage with the issues in question.[67]

47. The failure to ensure an appropriately constituted and experienced Panel is, in and of itself, a procedural unfairness. The Panel's lack of experience is also evident from the errors highlighted in the Tribunal Decision – which errors bring into question the reasonableness of the process.[68]

48. The importance of a properly qualified panel bringing its expertise and judgment to bear in making a decision is well established. Perhaps the seminal judicial

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[65] SFA p D12, par 31 and D19, par 54.2.1
[66] **DA v President of the RSA** 2013 (1) SA 248 (CC) at par 36
[67] SFA p D13, par 33 and 34 and D19, par 54.4
[68] SFA p D13, par 35

exposition of this principle is that of Justice O'Regan in **Bato Star**.[69] There the learned judge found:

> *"What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, **the identity and expertise of the decision-maker**, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected."*

49. The primacy of a qualified decision maker was reiterated by Rogers J (as he then was) **JH v HPCSA**,[70] where the learned judge held that a medical tribunal was "… obliged to bring its own expertise and professional judgment to bear on the case."[71]

50. Absent a decision maker entirely *au fait* with IFRS principles and accounting standards, a competent decision was an impossibility. Given the evident lack of accounting experience in the Panel – as acknowledged by the Panel itself – Trustco's right to procedural fairness has unquestionably been infringed.

51. Moreover, the Rule 53 Record filed by the Tribunal in these proceedings does not include the 'Statutory Authorities Bundle' provided by the parties to the Panel.[72] This bundle included: the FSR Act, the FRIP Charter, the JSE Listings Requirements as well as IFRS and other applicable accounting standards.[73] The deduction drawn by Trustco, and reasonably so, is that the Panel did not take

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[69] **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism** 2004 (4) SA 490 (CC) at 45; See also **Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service** 2020 (2) SA 19 (SCA)
[70] **JH v Health Professions Council of SA** 2016 (2) SA 93 (WCC)
[71] At par 58
[72] SFA p D10, par 21
[73] SFA p D9, par 20

account of any of these documents in deciding the matter and coming to the Tribunal Decision.[74]

52. In light of the intricacy of the relevant accounting standards and the interplay between them, a firm grasp of the relevant accounting principles was (and remains) imperative to the proper determination of this matter. Without that expertise, the hearing was bound to be procedurally unfair and the Tribunal Decision was bound to be arbitrary and unreasonable.[75]

Pertinent considerations overlooked by the Tribunal

53. Trustco's founding affidavit highlights a number of vitiating irregularities made by the Panel which evince unreasonableness and arbitrariness that resulted, in particular:

    53.1. it conflated the requirement of disclosure and the financial treatment of a transaction;[76] and

    53.2. it misinterpreted the Listings Requirements and misapplied IFRS.[77]

54. Trustco's affidavit then details how the Panel arbitrarily neglected relevant considerations in respect of each transaction:

    54.1. in respect of the Huso Transaction the Panel: did not apply IFRS,[78] did not engage with the dispute between the parties concerning the correct accounting standard to apply,[79] did not consider the relevant information

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[74] FA p A44, par 110
[75] FA p A43, par 108
[76] FA p A44, par 111 to 113
[77] FA p A45, par 114 to 115
[78] FA p A46, par 119.1
[79] FA p A46, par 119.2

before it,[80] did not engage with Trustco's submissions in respect of the Conceptual Framework and sought to impermissibly elevate it above the relevant accounting standards;[81] and misunderstood the submissions made by Trustco.[82]

54.2. in respect of the Related Party Loan Issue the Panel accepted that the loan waiver was predetermined. This has never been the JSE's case, was not an issue on the papers before the Panel and Trustco has never been afforded a hearing in respect of it – this itself is a fundamental irregularity.[83] As Trustco's affidavits show, the ability to waive a loan is a standard provision in a plethora of agreements that Dr van Rooyen (or entities controlled by him) has entered into.[84] The loan waivers and agreements were approved by Trustco's shareholders and the JSE. These shortcomings bring into question whether or not the Panel applied its collective mind to the issues in question and the parties respective contentions in respect thereof.[85]

54.3. in respect of the Property Issue, the Panel: failed to deal with the examples offered by Trustco which evidence a change of intention;[86] refused to accept that any conduct could infer a change of intention

[80] FA p A47, par 120
[81] FA p A47, par 121
[82] FA p A48, par 123 and 124
[83] FA p A48, par 125 and 126
[84] FA p A49, par 127 to 129
[85] FA p A50, par 129
[86] FA p A50, par 131 and 132

besides the factors listed in IAS40.57;[87] misunderstood IFRS and failed to take account of the relevant considerations.[88]

55. The failure to take account of these relevant and pertinent considerations likely stems from the Panel's lack of accounting expertise. This compounds the reviewability of the decision as arbitrary and unreasonable as highlighted in the ground of review above.

56. However, in any event, the failure to consider these grounds is, in and of itself, a reviewable irregularity. The failure to take account of pertinent considerations was recognised as irrational by the Constitutional Court in **Simelane**:[89]

> *"If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole."*

57. As we have said above, the Tribunal's purpose is to determine the correctness of decisions made by financial regulators. The Tribunal's statutory mandate is prescribed by the FSR Act and requires that it "reconsider decisions by financial regulators".[90] In this capacity, the Tribunal sits as a body of appeal and is required to reconsider the decision in question. Accordingly, it must reconsider the matter afresh in light of all of the facts and circumstance and come to a reasoned decision.

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[87] FA p A50, par 132
[88] FA p A51, par 133
[89] **DA v President of the RSA** 2013 (1) SA 248 (CC) at par 39
[90] See s 230 read with preamble to the Act

58. The failure to take account of considerations that have a material bearing on the correct outcome of a matter undermines the Tribunal's very purpose. This failure is directly linked to the power conferred on the Tribunal and its essential function to reconsider decisions by financial regulators.

59. The Tribunal's failure to consider the relevant facts set out above renders the process, and in turn the Tribunal Decision, irrational and invalid.

The business judgment rule

60. Apart from the individual errors in respect of each Transaction, the Panel also failed to consider an overarching principle that is central to the proper determination of the matter: the business judgment rule.

61. The business judgment rule is a feature of the JSE's Listings Requirements.[91]

> "*2.10* *Before the application for a new listing is made, or in the event of a sponsor accepting appointment to act as such to an issuer, the sponsor must report to the JSE in writing that it has obtained written confirmation from the applicant issuer that the directors have established suitable information communication procedures, providing for a flow of information that provides a reasonable basis for the directors to make proper judgements as to the financial position and prospects of the issuer and its group.*
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> *3.4(b)* *All issuers, other than those who publish quarterly results, must comply with the detailed requirements of paragraph 3.4(b)(i) to (viii). Issuers with a policy of publishing quarterly results must comply with the general principles contained in paragraph 3.4(b)(ix), but may also elect to comply with paragraph 3.4(b)(i) to (viii) on a voluntary basis*
>
> *(i)* *…*
>
> *(ii)* *The determination of a reasonable degree of certainty in terms of 3.4(b)(i) is a judgmental decision which has to be taken by the issuer and its directors and is one in which the JSE does not*

[91] See par 2.10 and 3.4(b)(ii)

involve itself. This determination may differ from issuer to issuer depending on the nature of business and the factors to which they are exposed."

62. The rule is also now entrenched into South African law by virtue of section 76(4) of the Companies Act, 2008. Its purpose in the Act has been aptly described by Davis et al[92] as:

"Read as a whole, the 2008 Act promotes the objective that there should not be an over-regulation of company business. The Act grants directors the legal authority to run companies as they deem fit, provided that they act within the legislative framework. In other words, the Act tries to ensure that it is the board of directors, duly appointed, who run the business rather than regulators and judges, who are never best placed to balance the interests of shareholders, the firm and the larger society within the context of running a business."

63. Although our law has yet to consider the ambit and import of the rule, it has received much judicial treatment in jurisdictions where the rule is well established. In **Howard Smit Ltd v Ampol Petroleum Ltd & Others**,[93] the Privy Council, per Lord Wilberforce, found that:

… it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision, on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law; nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.

64. In **Harlowe's Nominees**,[94] the Australian High Court found that:

"Directors in whom are vested the right and the duty of deciding where the company's interests are and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised

[92] Companies and other Business Structures in South Africa (2011) 16
[93] 1974 1 All ER 1126 (PC) at 1131 - 1132
[94] **Harlowe's Nominee's Pty Ltd v Woodside (Lakes Entrance) Oil Co NL** 1968 121 CLR 482 at 493

in good faith and nor for irrelevant purpose, is not open to review by the courts…"

65. Again, in Australia, the Supreme Court of New South Wales in **Darvall v North Sydney Brick & Tile Co**[95] found that:

"Courts properly refrain from assuming the management of corporations and substituting their decisions and assessments for those of the directors. They do so, inter alia because the directors can be expected to have much greater knowledge and more time and expertise at their proposal to evaluate the interest of the corporation than judges…"

66. Neither the JSE nor the Tribunal found (or even alleged) that the Board acted improperly. To the contrary, for the reasons set out above, the only inference is that the Board acted in good faith, for a proper purpose, in the best interests of Trustco. After having taken expert advice, so as to become informed about how best to account for the Transactions, the Board believed that such an accounting treatment was in the best interests of Trustco and fully complied with IFRS.

67. Having applied its mind to the decision and come to a rational conclusion after taking expert advice, the Board's decision is justified by the business judgment rule. The foreign decisions quoted above are manifestly applicable in this case. The result of their application is that, unless and until the JSE or the Tribunal find (which they have not) that the Board acted in some manner contrary to section 76(4) of the Companies Act, or for some other improper purpose, there is no basis for reversing the Board's decision taken in good faith.

Irrelevant factors considered by the Tribunal

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[95] 1989 15 ACLR 230 (CA NSW) at 247

68. In coming to the Tribunal Decision, the Panel gave 'due deference' to the expert report of Prof Maroun while rejecting the expert report of Mr Njikazana.[96] Having done so, the Panel accepted (again on the strength of 'due deference') the report and findings of the FRIP.

69. The reliance on the FRIP investigation, and indeed the 'due deference' afforded to it by the Panel, highlights the Panel's lack of expertise. Without a reasoned and cogent explanation why it relied on the FRIP decision unchallenged, the reliance is arbitrary.

70. In any event, the principle of 'due deference' is not one that plays any role in an appeal. To apply 'due deference' in an appeal is destructive of the notion of an appeal itself. We consider this example:

    70.1. a court of first instance makes a finding;

    70.2. the unsuccessful party appeals to the full bench;

    70.3. the full bench gives 'due deference' to the court a quo and, without itself interrogating the merits, dismisses the appeal;

    70.4. the unsuccessful litigant petitions the SCA;

    70.5. the SCA gives 'due deference' to the full bench and, without itself interrogating the merits, dismisses the petition.

71. This example illustrates how the application of the 'due deference' principle in appeals would negate the purpose of an appeal court entirely. A court of appeal

[96] FA p A46, par 118

would, in each and every instance, merely rubber stamp the decision of the lower court.

72. It need hardly be said that this ridiculous situation is not the purpose of an appeal. It is well established that the purpose of an appeal – be it in the wide or narrow sense – is to conduct a rehearing on the merits.[97]

73. The Tribunal, which is the replacement of the FSB Appeals Board, certainly ought to have fulfilled the function of an appellate body and not relied on the 'due deference' principle. This principle belongs to a body of review – as the Constitutional Court grappled with in **Bato Star**.[98]

74. The 'due deference' principle had no place in the Tribunal's determination of this matter. In applying it without cogent reason, the Tribunal gave credence to a principle that was (and remains) irrelevant to the determination before it. The unjustified application of the principle is unreasonable in the circumstances, and particularly so in light of the Tribunal's essential function to *reconsider the decisions of financial regulators*.

CONCLUSION

75. The JSE's Decision was made by Mr Visser in circumstances where he had no authority to make it. The JSE's constitutional documents are clear on this. The JSE then imposed a sanction that is absent from the Listing Requirements. On

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[97] See **Tikly v Johannes 1963 (2) SA 588 (T); National Union of Textile Workers v Textile Workers' Industrial Union (SA)** 1988 1 SA 925 (A); **Committee of the Johannesburg Stock Exchange v Chairman, Stock Exchanges Appeal Board, and Another** 1992 (2) SA 30 (W)

[98] **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism** 2004 (4) SA 490 (CC) at 46 – 48

the strength of the Constitutional Court's decision in New Clicks above, the JSE Decision stands to be reviewed and set aside.

76. The Tribunal was comprised of an unqualified Panel. Their legal expertise was inept to consider – to any meaningful extent – the complex financial and accounting treatment that the Transactions required. This lack of subject related experience and expertise gave rise to a number of irregularities:

76.1. first, the Panel overlooked pertinent considerations that an accounting specialist would have taken into account in the determination;

76.2. second, the Panel did not even consider the business judgment rule;

76.3. third, the Panel applied the 'due deference' principle in placing exclusive reliance on the report of the FRIP. That principle had no place in the mind of the Panel. It ought to have considered the matter afresh.

77. In making these errors, the Tribunal Decision was unreasonable, irrational and procedurally flawed. In the circumstances, Trustco's right to just administrative action has been thoroughly trammelled. The Tribunal Decision stands to be reviewed and set aside as a result.

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