IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 5640/2022

In the matter between

TRUSTCO GROUP HOLDINGS LIMITED Applicant

and

FINANCIAL SERVICES TRIBUNAL First Respondent
JSE LIMITED Second Respondent

JSE'S HEADS OF ARGUMENT

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INTRODUCTION

1. Trustco is a public company. Its shares are offered for sale on the JSE—offered to large institutional investors, to private- and public-pension funds, to ordinary people investing their hard-earned money.[1] And because Trustco is a public company, the investing public is entitled to accurate and reliable information about its finances. The fallout from corporate collapses like Steinhoff show what can happen if a listed company's financial statements do not tell the whole story.

2. Despite the promise of its name, the investing public cannot trust Trustco's financial statements. In October 2020, the JSE decided that two sets of Trustco's financial statements—its annual financial statements for the year ending 31 March 2019 and its interim results for the six months ending 31 August 2018—do not tell the whole story. The JSE decided that Trustco's financial statements do not comply with the International Financial Reporting Standards, or IFRS for short, a set of global accounting standards.[2] The JSE directed Trustco to correct (or restate, in accounting parlance) its financial statements.

[1] See, for example, the list of Trustco's large shareholders on page 212 of its 2021 integrated annual report and audited financial statements, including Protea Asset Management and the Government Employees Pension Fund (through the Public Investment Corporation); available at: https://tinyurl.com/Trustco2021.

[2] Answering affidavit; p E6, para 18.

3. After losing an internal objection, Trustco asked the Financial Services Tribunal to reconsider the JSE's decision. After careful and diligent consideration, the Tribunal dismissed Trustco's reconsideration application in November 2021.[3]

4. Nearly two years have passed since the JSE's decision, and almost a year since the Tribunal dismissed Trustco's reconsideration application. Yet Trustco has still not restated its financial statements.[4] The investing public still does not know the whole story.

5. Trustco instead rolls out a Stalingrad strategy to stymie the JSE and avoid playing open cards with the market.[5] Trustco now reviews the JSE's decision and the Tribunal's decision. All this filibustering has worked thus far: it remains business as usual at Trustco.

6. Trustco's grounds of review are a grab bag: some are roughly repackaged arguments about why the JSE and the Tribunal got it wrong; others are impermissibly raised late and without having been made to the Tribunal. None has merit, and Trustco's review should be dismissed with costs.

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[3] Founding affidavit; annexure "FA1", p A62.

[4] Replying affidavit; p F10, para 45.

[5] 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

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

8. Between 2015 and 2018, Dr van Rooyen loaned Huso N$546 million.[6] In 2018, Trustco bought all of Dr van Rooyen's Huso shares. Dr van Rooyen was on both sides of the deal: he was Trustco's CEO and majority shareholder, and he was Huso's sole shareholder.[7]

9. In Huso's financial statements, Dr van Rooyen's loan was initially classified as equity (meaning it was recorded as money Dr van Rooyen invested in Huso as a shareholder).[8] This was the position when Trustco agreed to buy the Huso shares. By the time Trustco acquired Huso, though, the loan had been reclassified as a liability (or money that Huso owed Dr van Rooyen).[9]

10. The sale of shares agreement between Trustco and Dr van Rooyen has an earn-out mechanism for Dr van Rooyen.[10] The mechanism boils down to this: Dr van Rooyen gets shares in Trustco if Trustco meets stipulated profit thresholds.

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[6] Answering affidavit; p E2, para 6. Trustco admits this: replying affidavit; p F5, para 18.

[7] Answering affidavit; p E3, para 6. Trustco admits this: replying affidavit; p F5, para 18.

[8] Answering affidavit; p E3, para 7. Trustco does not deny this: replying affidavit; pp F5 to F6, paras 20 to 21.

[9] Answering affidavit; p E3, para 7. Trustco does not deny this: replying affidavit; pp F5 to F6, paras 20 to 21.

[10] Answering affidavit; p E3, para 8. Trustco admits this: replying affidavit; p F6, para 22.

11. A few weeks after Trustco acquired Dr van Rooyen's Huso shares, Dr van Rooyen forgave the N$546 million loan. [11] Because Trustco had recognised the loan as a liability, it reflected Dr van Rooyen's generosity in its financial statements as a *gain* of N$546 million.[12] And so after this quick stroke of Dr van Rooyen's forgiving pen, Trustco's financial statements were made to look like Trustco gained almost half-a-billion dollars. Dr van Rooyen's good deed did not go unrewarded: Trustco's gain triggered his earn-out mechanism in the sale of shares agreement.[13]

12. Meanwhile, in 2019, Dr van Rooyen advanced a second loan of up to N$1 billion to Trustco.[14] A few months later, Dr van Rooyen's generosity struck again, and he 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).[15]

13. Why would Dr van Rooyen forgive loans worth more than N$1.5 billion? While Trustco criticises the JSE for daring to ask about this billion-dollar elephant in the room,[16] neither Trustco nor Dr van Rooyen has ever offered an explanation.

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[11] Answering affidavit; p E3, para 9. Trustco admits this: replying affidavit; p F6, para 22.

[12] Answering affidavit; p E3, para 9. Trustco admits this: replying affidavit; p F6, para 22.

[13] Answering affidavit; p E3, para 9. Trustco admits this: replying affidavit; p F6, para 22.

[14] Answering affidavit; p E3, para 11. Trustco admits this: replying affidavit; p F8, para 31.

[15] Answering affidavit; p E3, para 11. Trustco admits this: replying affidavit; p F8, para 31.

[16] Replying affidavit; p F6, para 24.

14. Then there are the properties that Trustco owns in a development in Elisenheim, north of Windhoek. Trustco reclassified them from inventory to investment property.[17] It justified the reclassification on the basis that a decline in demand meant that it did not anticipate selling the properties for the foreseeable future. The reclassification resulted in the properties being revalued upwards, which increased Trustco's profitability. Trustco reported a N$693 million gain in the profit and loss account in its financial statements (or revenue of N$984 million against a cost of sales of N$291 million).[18]

15. At the beginning of December 2019, Trustco's financial statements were selected for review under the JSE's proactive monitoring review process. Under this 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 (which we refer to as "Trustco's financial statements" for short).

16. The JSE referred three issues to the Financial Reporting Investigation Panel, or the FRIP. The FRIP is an advisory body to the JSE. It advises the JSE on, amongst other things, technical issues about listed companies' compliance with IFRS, a global set of accounting standards. The FRIP is, in short, a panel of IFRS experts.[19]

[17] Answering affidavit; p E4, para 12. Trustco admits this: replying affidavit; p F8, para 31.

[18] Answering affidavit; p E4, para 12. Trustco admits this: replying affidavit; p F8, para 31.

[19] Answering affidavit; pp E4 to E5, para 14. Trustco admits this: replying affidavit; p F8, para 31.

17. The JSE referred three issues to FRIP. Two are relevant to this review:[20]

- The loan issue: Dr van Rooyen's two loans and Trustco classifying their forgiveness as gains in profit and loss (a N$546 million gain in Trustco's 2019 annual financial statements, and a N$1 billion gain in its 2019 interim results).

- The property issue: Trustco's reclassification of the Elisenheim properties from inventory to investment property in its financial statements.

18. The FRIP sent a report to the JSE in July 2020.[21] 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.

19. A few months later, in October 2020, and after giving Trustco an opportunity to comment on the FRIP's report, the JSE decided that Trustco had not complied with IFRS in respect of the loan issue and the property issue.[22]

[20] Answering affidavit; p E5, para 16.

[21] Founding affidavit; annexure "FA6", p A263.

[22] Rule 53 record; B301.

20. Trustco objected to the JSE's decision in terms of paragraph 1.4 of the JSE Listings Requirements.[23] In November 2020, the JSE dismissed Trustco's objection.[24] The JSE directed Trustco to take corrective action by restating its financial statements. Said differently, the JSE directed Trustco to reverse the gains it reflected in its financial statements after Dr van Rooyen waived the loans and after it reclassified the Elisenheim properties.

21. Trustco then applied to the Financial Services Tribunal under section 230 of the Financial Sector Regulation Act to reconsider the JSE's decision.[25]

22. In November 2021, and after carefully considering detailed arguments by both sides, including each party's experts,[26] the Tribunal dismissed Trustco's reconsideration application.[27]

23. Describing the JSE's process as "unwarranted interference" that "undermine[d] the independence, accountability, and integrity" of Trustco's board, Trustco still refuses to implement the JSE's decision.[28] Trustco launched this review at the end of January 2022.

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

[24] Rule 53 record; B15.

[25] Act 9 of 2017.

[26] Professor Maroun for the JSE (at A199) and Tapiwa Njikizana for Trustco (at A217).

[27] Founding affidavit; annexure "FA1", p A62.

[28] Answering affidavit; annexure "AA1", p E37.

24. Trustco's legal maneuvering has done the trick: almost two years after the JSE's spot check on Trustco revealed non-compliance with IFRS, the numbers in Trustco's financial statements remain unchanged. Trustco admits that it has not restated its financial statements.[29] Trustco's shares are still available to buy and sell, and Trustco's financial statements are still built on a misstated picture of the loan issue and the property issue.

THE GROUNDS OF REVIEW AGAINST THE JSE'S DECISION HAVE NO MERIT

25. Trustco raises three grounds of review against the JSE's decision.[30]

- First, Trustco argues that the JSE's director for issuer regulation, Andries Visser, lacked authority to make the decision.
- Second, Trustco argues that the JSE does not have the power to order Trustco to restate its financial statements.
- Third, Trustco argues that the JSE did not find non-compliance with IFRS, which, so the argument goes, is a jurisdictional requirement for the JSE's decision.

26. There is no dispute that Trustco did not think to raise its first two grounds of review during its internal remedy (the reconsideration application in the Tribunal).[31] It is impermissible for Trustco to skip over its internal remedy like this, and these grounds of review should be disregarded for that reason alone.

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[29] Replying affidavit; p F10, para 45.

[30] Supplementary founding affidavit; p D17, para 50.

[31] Answering affidavit; p E23, para 79; p E31, para 101. See replying affidavit; pp F17 to F18, paras 81 to 83; p F21, para 98.

27. There is no reason why Trustco could not have raised these arguments in the Tribunal.

27.1 Trustco's excuse for not raising the first argument until now is that it did not think to question Mr Visser's authority until after the Tribunal's decision.[32]

27.2 If anything, that answer makes things worse for Trustco. If Trustco and its lawyers[33] were genuinely concerned about Mr Visser's authority, they would have insisted on proof from the outset. They would not have simply "assumed"[34] that Mr Visser was authorised. They would have asked for proof of Mr Visser's authority when the JSE's first decision arrived in October 2020 with his signature.[35] Or when Mr Visser signed the final decision in November 2020, dismissing Trustco's objection.[36] Or when Mr Visser signed the JSE's reasons in January 2021.[37]

27.3 Trustco waited until December 2021 to challenge Mr Visser's authority—more than a year after the JSE's decision, and several weeks after the Tribunal's decision.[38] Trustco claims that it "assumed,

[32] Founding affidavit; p A35, para 76.

[33] Founding affidavit; p A35, para 77.

[34] Founding affidavit; p A35, para 76.

[35] Rule 53 record; B301.

[36] Rule 53 record; B15.

[37] Founding affidavit; annexure "FA2", p A90.

[38] Founding affidavit; p A35, para 77.

and fairly so" that Mr Visser was authorised.[39] But from the get-go, Trustco knew all the facts it needed to timeously challenge Mr Visser's authority.

27.4 The Constitutional Court has spoken richly about the "value and importance" of internal remedies to the administrative and judicial processes.[40] Trustco should not be allowed to leapfrog the Tribunal by raising this argument for the first time in this review.

27.5 Nor does it matter that now is "the first time that the JSE's Decision can in fact be judicially reviewed by a court".[41] If that were a basis to excuse a failure to exhaust an internal remedy, then there would be no rule requiring parties to exhaust their internal remedies before coming to court. The very reason for the obligation to exhaust internal remedies is so that challenges to administrative decisions can be ventilated *before* "the first time" the decision "can in fact be judicially reviewed by a court".[42] It makes sense, then, that this Court has applied the duty to exhaust internal remedies to review grounds like procedural unfairness.[43] Said another way, labelling the argument

[39] Founding affidavit; p A35, para 77.

[40] *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC) at para 54. See also *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) at paras 49 to 50.

[41] Replying affidavit; p F17, para 82.

[42] Replying affidavit; p F17, para 82.

[43] See, for example, *Genesis Medical Scheme v Ngalwana NO* 2014 JDR 0032 (GNP).

about Mr Visser's authority as a ground of review does not excuse Trustco's failure to raise the point in the Tribunal.

28. That hurdle aside, the afterthought challenge to Mr Visser's authority is wrong.

28.1 The JSE's board delegated power as follows:[44]

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

28.2 The first part— "the powers and duties under sections 13 and 15 of the Securities Services Act"—is met. Trustco accepts that this must be read as a reference to sections 12 and 14 of the Financial Markets Act[45], which repealed the Securities Services Act.[46] The JSE's decision that Trustco's financial statements do not comply with IFRS and should be restated is an exercise of power under sections 12 and 14 of the Financial Markets Act and under the Listings Requirements.

28.2.1 Sections 12 of the Financial Markets Act gives the JSE power to remove a listing and suspend trading. The JSE's decision that Trustco's financial statements do not comply

[44] Founding affidavit; annexure "FA14", p A427 at A432.

[45] Act 19 of 2012. Replying affidavit; p F15, para 69.

[46] Act 36 of 2004.

with IFRS and should be restated is part and parcel of the delisting and suspension process. Section 14 of the Financial Markets Act is a broad conferral of power on the JSE to require an issuer to disclose information to the public. A restatement of financial information is just another form of disclosure, and so the JSE's decision falls well within section 14 of the Financial Markets Act.

28.2.2 The delegation to Mr Visser includes the JSE's powers under the Listings Requirements. The Listings Requirements themselves confirm that the JSE "delegated its authority in relation to the Listings Requirements… to the management of the Issuer Regulation Division."

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

> "**FRIP**
>
> 8.65 The JSE and SAICA have formed a panel to be known as the Financial Reporting Investigations Panel to consider complaints and to advise the JSE in relation to compliance by issuers with IFRS and the JSE's required accounting practices (in terms of the Listings Requirements). If, after

receiving advice from the FRIP, the JSE finds that an issuer has not complied with any of the above, the JSE will be able, in its sole discretion:

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

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

28.2.4 The JSE delegated its "powers and duties under … the Listings Requirements". The decision that Trustco's financial statements do not comply with IFRS and should be restated is just that: an exercise of the JSE's "powers and duties under … the Listings Requirements".

28.3 As for the second part of the delegation, Mr Visser fits the bill: his job title is "Director: Issuer Regulation".[47]

29. Trustco's complicated response[48] starts at section 68 of the Financial Markets Act, which allows the JSE to delegate "to a person or group of persons, or a committee approved by the controlling body of the market infrastructure, or a

[47] Answering affidavit; p E1, para 1.

[48] Trustco's heads of argument; p G11, paras 24 to 26.

division or department of the market infrastructure, subject to the conditions that the market infrastructure may determine." Holding one finger on the last phrase of section 68—"subject to the conditions that the market infrastructure may determine"—Trustco turns to the JSE's memorandum of incorporation.[49] There, it goes to paragraph 12.11.1 on page 62, which allows the board to "appoint any number of committees of Directors and delegate to any such committee any of the authority of the Board, provided that all members of these committees must be Directors."[50] Trustco argues that the proviso "provided that all members of these committees must be Directors" at the end of paragraph 12.11.1 of the memorandum of incorporation is a "conditio[n] that the market infrastructure may determine" as envisaged in section 68. Mr Visser is not a director, and so the JSE's delegation to him, so the argument goes, is invalid.

30. This argument is not the "fatal blow" Trustco hopes.[51]

30.1 Section 68 of the Financial Markets Act allows the JSE to delegate to "a person or group of persons, or a committee…".

30.2 The presumption against redundancy means each of those words mean something different.[52] Said differently, section 68 allows the JSE to delegate to a *person*, to a *group* or persons, or to a *committee*.

[49] Trustco's heads of argument; p G11, para 25.

[50] Trustco's heads of argument; p G11, para 25. See founding affidavit; annexure "FA15", p A433 at A493.

[51] Trustco's heads of argument; p G11, para 26.

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

30.3 Paragraph 12.11.1 of the JSE's memorandum of incorporation is about delegations to "committees".[53] Paragraph 12.11.1 does not apply to delegations to "a person", and so the proviso in paragraph 12.11.1 does not apply.

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

31. To sum up, Trustco's first ground of review should be dismissed either because it was not raised in the Tribunal, or because the JSE delegated its powers under the Financial Markets Act and under the Listings Requirements to Mr Visser.

32. Trustco's second ground of review is that the JSE does not have the power to order Trustco to restate its financial statements. In Trustco's world of market regulation, the market regulator has no power to require a public company to restate its non-compliant financial statements, and the regulator would simply

[53] Founding affidavit; annexure "FA15", p A433 at A493.

have to watch as inaccurate financial information is peddled by listed companies.

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

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

35. Trustco argues, in effect, that the Listings Requirements and the Financial Markets Act could not *really* have meant to give the JSE such broad powers.[54] The text of the Listings Requirements and the Financial Markets Act is a surer guide, and the text is clear: the JSE may instruct an issuer to "re-issue any information" and the JSE has the power to "do all things that are necessary for, or incidental or conducive to the proper operation of an exchange". Trustco's

[54] Replying affidavit; p F21, para 96.

shrinking interpretation does not rhyme with the expanding statutory language. To the contrary, at every turn, the Listings Requirements and the Financial Markets Act use broad language to confer broad powers on the JSE.

36. Trustco tries a different approach in its heads of argument. There, it argues that it has already "published" or "re-issued" the relevant "information".[55] Trustco seems to accept that the JSE has the power to direct a listed company to "re-issu[e]" words, but it argues that the JSE has no power to direct a listed company to "re-issu[e]" numbers. There is no basis in the text of the Listings Requirements and the Financial Markets Act for an ultra-fine line between words and numbers.

37. And in any event, Trustco did not restate its financial statements as the JSE directed. Trustco admits as much: it admits that it "has not restated its financial statements".[56] 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.

38. Said simply, the JSE told Trustco to correct ("re-issu[e]") *numbers*. Trustco, by its own admission, corrected no numbers. Instead of correcting numbers, Trustco added words: it buried some commentary about the JSE's decision in the notes to its financial statements. But this is a regulated stock exchange, not a secondhand car dealership, and *buyer beware* is not enough. Those diligent

[55] Trustco's heads of argument; p G14, paras 34 to 35.

[56] Replying affidavit; p F10, para 45.

enough to reach the fine print of Trustco's financial statements may learn about court cases and lawyers' letters. Look at the numbers, though, and you would be none the wiser.

39. This is not accountants nitpicking for the sake of it. Financial statements are there to give the market reliable financial information to inform investment decisions. Trustco's financial statements do not do that. Even if an intrepid investor were to pore over the commentary to Trustco's financial statements, that would still not help. The commentary does not identify the specific line items that would increase or decrease as a result of the restatements; the commentary does not specify any tax or deferred tax consequences of the 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.[57]

40. For these reasons, Trustco's second ground of review has no merit.

41. Trustco's third ground of review is that the JSE did not find non-compliance with IFRS, which, so the argument goes, is a jurisdictional requirement for the JSE's decision. Though this comes framed in the language of review, it is, in truth, a challenge to the merits of the JSE's decision. Trustco's true gripe is that the

[57] JSE's response; para 45.

JSE (and the Tribunal) got it wrong—to borrow the SCA's words, Trustco's "original grounds of appeal have now been dressed up as grounds of review."[58]

42. A review is not about the correctness of the decision being reviewed. The SCA recently made this point clear, in this passage that could be written about Trustco's third ground of review:[59]

> "The principal basis of the appellant's review is that the recommendation of the Commission and the decision of the Premier based on that recommendation, were factually wrong. In general terms, review is concerned with whether a decision was regular or irregular, not with whether it was 'right' or 'wrong'. That is the province of appeals – and no provision is made in the legislation in this case for an appeal. In other words, whether the decision is a correct decision is not open for determination on review. The appellant's counsel properly conceded that his attack on the decision was based on it being wrong. He conceded too that in a review, a party may not revisit the correctness of the factual findings of the administrative decision-maker.
>
> Except in a narrow band of cases, of which this case is not one, error of fact is not a ground of review. The result is that even if it could be said that the Commission's factual conclusions were wrong, that is not a ground of review."

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[58] *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government* 2020 (4) SA 453 (SCA) at para 13.

[59] *Mgijima v The Premier of the Eastern Cape Province* 2020 JDR 2249 (SCA) at paras 29 to 30.

43. This line between reviews and appeals holds good even for grounds of review that tend to blur it, like a review for mistake of fact (or, to use Trustco's dress-up, the "jurisdictional element of the Listings Requirement" [60] and its "jurisdictional complaint"[61]).

44. A court may interfere with an administrator's factual determination if the facts are "material, were established, and meet a threshold of objective verifiability."[62] That standard is not met here; indeed, the very reason for the JSE's decision is that Trustco's treatment of the loan issue and the property issue were not "objective[ly] verifiabl[e]" according to IFRS. This means that the JSE's decision on this point is "not reviewable", as this extract "set[ting] out" the "present state of the law" makes clear:[63]

> "In sum, a court may interfere where a functionary exercises a competence to decide facts but in doing so fails to get the facts right in rendering a decision, provided the facts are material, were established, and meet a threshold of objective verifiability. That is to say, an error as to material facts that are not objectively contestable is a reviewable error. The exercise of judgment by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would

[60] Founding affidavit; p A41, para 100.

[61] Replying affidabit; p F18, para 85.

[62] *South Durban Community Environmental Alliance* (note 58) at para 23 (citing *Airports Company South Africa v Tswelokgotso Trading Enterprises* CC 2019 (1) SA 204 (GJ) at para 12).

[63] *Tswelokgotso Trading* (note 62) at para 12.

have reached a different view on these matters were it vested with original competence to find the facts."

45. The JSE's decision falls firmly in the second category. Trustco's compliance with IFRS is far from "not objectively contestable". Instead, the JSE "exercise[d]" its judgment and "assess[ed]" and "weigh[ed]" the "contested evidence" (and, later, so did the Tribunal).

46. None of this means Trustco was without a chance to argue that the JSE got its decision wrong. It just means that Trustco already had its chance. Trustco had several—exhaustive even—opportunities to engage with the JSE on the merits during the JSE's decision-making process. Trustco even had an opportunity to persuade the JSE to change its mind during an internal objection process. Trustco then had an opportunity to (re-)argue the merits before Tribunal in a "complete rehearing, reconsideration and fresh determination of the entire matter".[64] The time for Trustco to argue that the JSE and the Tribunal got it wrong is over.

[64] Founding affidavit; annexure "FA1", pp A65 to A66.

47. Trustco's main point is that the JSE "cannot point to any instance where Trustco has not complied with any specific IFRS."[65] Not so. The FRIP's report points to non-compliance with IFRS.[66] So does the JSE's initial decision.[67] And its final decision.[68] Plus, in the Tribunal, its two sets of reasons and its expert report.[69]

48. Trustco quibbles about the issue of substance over form, claiming that this "does not demonstrate a contravention or breach of any specific IFRS".[70] This misses the point that the substance over form doctrine *is part and parcel of IFRS*, as the JSE's expert explained in detail.[71] 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)".[72]

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[65] Replying affidavit; p F18, para 86.

[66] Founding affidavit; annexure "FA6", p A263.

[67] Rule 53 record; B301.

[68] Rule 53 record; B15.

[69] Founding affidavit; annexure "FA2", p A90; annexure "FA4", p A162; p A199.

[70] Replying affidavit; p F19, para 87.

[71] See pp A200 to A203.

[72] See p A200.

49. The JSE summarises in its answering affidavit why Trustco's financial statements do not comply with IFRS in respect of the loan issue and the property issue.[73] Trustco failed—and continues to fail—to 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.

50. For these reasons, the third ground of review—in truth, a rinse-and-repeat of Trustco's arguments to the JSE and to the Tribunal—has no merit.

THE GROUNDS OF REVIEW AGAINST THE TRIBUNAL'S DECISION HAVE NO MERIT

51. Trustco raises four grounds of review against the Tribunal's decision.

- First, the Tribunal failed to consider Trustco's arguments about why the JSE's decision is wrong (the same ground covered in the previous section).
- Second, the Tribunal failed to adequately deal with Trustco's arguments;
- Third, the Tribunal was not properly qualified and lacked adequate expertise.
- Fourth, the Tribunal did not apply the business judgment rule.

[73] Answering affidavit; pp E26 to E29, paras 92 to 93.

52. The first two grounds of review can be dispensed with quickly. The previous section showed that these arguments have no merit. More importantly, though, the Tribunal properly considered these arguments and rejected them. Trustco's first and second grounds of review boil down to Trustco contending that the Tribunal's decision is wrong. But since this is a review, not an(other) appeal, this Court should decline to second-guess the correctness of the Tribunal's decision.

53. As for the third ground of review, Trustco never thought to challenge the composition and expertise of the Tribunal until now. In analogous contexts, courts have deprecated this wait-and-see approach.[74]

54. Trustco's objections are, in any event, misplaced. Its argument about the composition of the Tribunal mixes up the composition *of the Tribunal* and the composition *of panels* of the Tribunal.

    54.1 The Tribunal is the broader concept. Section 220(1) states that the Tribunal comprises "as many members, appointed by the Minister, as the Minister may determine." Section 220(2) requires there to be at least two retired judges and at least two people with, broadly speaking, finance experience in the pool of Tribunal members. So if, for example, the Minister decides that there are 10 members of the Tribunal, there must be at least 2 retired judges and at least 2 people with a background in finance.

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

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

54.3 Another way to think about the difference between the Tribunal and panels of the Tribunal is like this: there are 20-odd judges *on the SCA*, but usually only 5 of them sit on a *panel* of the SCA that hears an appeal.

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

54.5 In this way, Trustco's main argument supporting its third ground of review confuses members *of the Tribunal* and members of a *panel* of the Tribunal.

55. Trustco's complaint about the composition of the Tribunal calls into question the skill and competence of the panel members. There is no basis for this given that the panel consisted of the retired Deputy Judge President of the SCA, an experienced practicing senior counsel, and an experienced practicing attorney. But they were not left to their own devices but were instead assisted by experts from both sides.

56. Still further because the panel members are selected from a list prepared by the Minister, Trustco's complaint about the skill and competence of the panel members brings in its wake the imputation that the Minister did not consider whether those who he placed on the list of panel members had the required skill and competence.

57. 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.

    57.1 Trustco mischaracterises how this issue arose. The possibility of Dr van Rooyen giving evidence was raised *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".[75]

[75] Answering affidavit; p E33, para 112. See also Tribunal's Rule 53 reasons; p B2176, para 33.

57.2 And besides, section 232(5)(a) of the Financial Sector Regulation Act provides that the chairperson of a panel may, *on good cause shown*, direct someone to appear before the panel to give evidence. Trustco never applied for an order along those lines.

57.3 Worse for Trustco, its counsel explained that Trustco need only demonstrate that "the transactions in question have been reflected in the financial statements of the company in a manner that fairly reflects the particular transaction".[76] 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".[77] 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".[78] And so Trustco itself did not deem it material to apply to lead Dr van Rooyen's evidence.

58. In the end, the Tribunal carefully considered the evidence, including the evidence of the two experts (though Trustco's expert is hardly independent given that he advised Trustco in relation to the very accounting entries that formed the basis of the JSE's decision). The Tribunal rejected Trustco's

[76] Answering affidavit; p E34, para 115.

[77] Answering affidavit; p E34, para 115.

[78] Answering affidavit; p E34, para 115.

arguments for reconsideration, and there is no basis to review the Tribunal's considered decision.

59. Trustco's fourth ground of review is that the Tribunal failed to consider the business judgment rule.

59.1 The main problem with this argument is that the business judgment rule precludes liability; it does not set standards.

59.2 Trustco argues that the business judgment rule is "entrenched into South African law by virtue of section 76(4) of the Companies Act".[79] Maybe. But section 76(4) of the Companies Act is about directors' conduct and their fiduciary duties. For policy reasons, the business judgment rule is a shield against liability if a director is found to have breached his or her fiduciary duties. But the rule does not do the work of defining those duties in the first place. A leading commentary on the Companies Act puts the point like this:[80]

> "This provision, generally known as the 'business judgment' rule, provides a significant shield (which some commentators have called a 'safe haven') against liability for a director whose conduct has failed to satisfy the duty of care imposed by the Act.
>
> …

[79] Trustco's heads of argument; p G23, para 62.

[80] JL Yeats et al *Commentary on the Companies Act of 2008* at p 2-1323 to 2-1324.

> The structure of the inter-relationship between s 76(3)(c) (which imposes a duty of care, skill and diligence) and of s 76(4) (which lays down a business judgment rule) seems to be that the statutory criteria applicable to the duty of care, skill and diligence in s 76(3)(c) will first be applied, and only if the director in question is found to have failed to satisfy those criteria will the secondary question arise as to whether the director in question has avoided liability on the basis that his conduct has satisfied the statutory business judgment rule in s 76(4)."

59.3 So while the business judgment rule may be a "shield" available to Trustco's directors against liability for Trustco's failure to comply with IFRS, the rule does not give them a licence to interpret and apply IFRS as they please.

59.4 After all, the point of IFRS—International Financial Reporting *Standards*—is, as its name suggests, to set the standards. There would be nothing standard about IFRS if each board could apply it as they please. Paragraphs 2.10 and 3.4 of the Listings Requirements, which Trustco claim show the business judgment rule is a "feature" of the Listings Requirement, do not suggest otherwise, at least not as far as compliance with IFRS is concerned.[81]

[81] Trustco's heads of argument; p G22, para 61.

60. The Tribunal was not asked to decide whether Trustco's directors should be held liable for some management decision that did not work out. The Tribunal was asked whether Trustco's financial statements complied with IFRS. The business judgment rule is no answer to that question, and Trustco's Cook's tour of English and Australian cases does not suggest otherwise.[82]

CONCLUSION

61. The market works only if financial statements are accurate. The JSE, with input from the IFRS experts on the FRIP, determined that Trustco's financial statements do not comply with IFRS. The Tribunal agreed.

62. Trustco's grounds of review against the decisions of the JSE and the Tribunal—most raised for the first time in these proceedings—fail to show any reviewable irregularities in either decision. Trustco's review should be dismissed with costs, including the costs of two counsel.

IAN GREEN SC
JASON MITCHELL

Counsel for the JSE
18 July 2022

[82] Trustco's heads of argument; pp G23 to G24, paras 63 to 65.