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
JSE LIMITED	Second Respondent

APPLICANT'S NOTICE OF APPLICATION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE THAT the applicant hereby applies for leave to appeal against the whole of the judgment and order handed down by Her Ladyship the Honourable Justice Potteril on 7 November 2022 ("the Order").

TAKE NOTICE FURTHER THAT the applicant seeks leave to appeal to the Supreme Court of Appeal, *alternatively* to the Full Court of this Division and that the application will be made on a date to be arranged with the Registrar of this Court.

TAKE NOTICE FURTHER THAT the applicant contends that the appeal has reasonable prospects of success and that there are other compelling reasons why leave to appeal should

be granted, as provided for in sections 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013, on the basis of the grounds set out below.

PROSPECTS OF SUCCESS

1 Section 17(1)(a)(i) of the Superior Courts Act provides that leave to appeal may be granted where the judges concerned are of the opinion that "the appeal would have a reasonable prospect of success".

2 For the reasons that follow, it is respectfully submitted that the appeal would have a reasonable prospect of success.

(i) The Panel composition

3 The Court recognised that the applicant's reconsideration application before the Financial Services Tribunal ("FST") was heard and determined by a panel that consisted of a retired Judge, and two legal practitioners, and that the Panel excluded anyone with financial or accounting qualifications or experience ("the Panel").

4 The Court erred in law and/or fact in finding that the applicant's ground of review challenging the composition of the Panel was attempting to "*raise the merits of the decision and seek another outcome. Review is concerned with whether a decision was regular or irregular not whether it was right or wrong. On this ground alone this ground of review should be rejected*" (para 28 of the judgment).

4.1 The Court ought to have found that the applicant's argument, properly construed, was that the improper constitution of the Panel rendered the decision by the Panel irregular because the *process* was irregular – quite apart from whether the outcome ultimately reached by the Panel was correct or not. The applicant's founding affidavit raised various reviewable irregularities (see paragraphs 108 to 113, and 119 to 134 of the founding affidavit) challenging the *manner in which the decision was reached*, rather than the outcome of the decision: that is the hallmark of any review application;

4.2 The Court ought to have found that it is a central principle of administrative law that, when challenging a process as being unfair, the applicant need not show that if the correct process had been followed there would necessarily have been a different outcome. It is "*vital that the procedure and the merit should be kept strictly apart, since otherwise the merits may be prejudged unfairly*."[1]

5 The Court erred in law and/or fact in finding that the constitution of the Panel could not be attacked because the decision of retired Judge Harms to compose the Panel had not been expressly listed separately in the applicant's amended notice of motion.

6 The Court ought to have found that:

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[1] Wade *Administrative Law* 6 ed (Oxford University Press, New York 1988) at 533-4. Cited with approval by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at para 26 the Constitutional Court noted: "*The remarks are as applicable to our law as they are to English law*."

6.1 an applicant – as dominus litis – may elect to challenge the same irregularity by different means. The applicant was entitled *either* to challenge: (i) the decision taken by retired Justice Harms as to the composition of the Panel; or (ii) to challenge the decision delivered by the FST on the basis that the process was procedurally and substantively irrational because the Panel had been improperly constituted and lacked the relevant expertise. There was no need to challenge the appointment decision separately;

6.2 this is particularly so because the law discourages reviews *in medias res* of intermediate decisions, in a multi-layered decision-making process, before the administrative process has been completed. The applicant explained that it was not aware, until after the proceedings, that the Panel members lacked financial expertise. At that stage, there was nothing precluding the applicant from challenging the entire process and decision rendered by the Panel on the basis that the Panel was not properly constituted.

7 The Court acknowledged (at para 32 of the judgment) that the applicant's argument that "*in view of the nature of the reconsiderations brought before the Panel, the requirement of financial experience would be an apparent reason to at least have one Panellist to have such expertise is not unreasonable*".

8 The Court, however, erred in law and/or fact in finding that:

8.1 considering the language used in the light of the ordinary rules of grammar and syntax and the context in which the provisions appear there is no ambiguity or

uncertainty about the content of sections 220, 224 and 225 of the Financial Sector Regulation Act 9 of 2017 ("FSR Act") (para 31 of the judgment); and

8.2 the applicant's interpretation of the FSR Act amounted to substituting the words actually used for what is argued to be a business-like result (para 33 of the judgment).

9 The Court ought to have found that section 220(2) read with sections 224(4) and 225(2)(a) of the FSR Act – correctly interpreted in the light of the purpose of the provisions – means that the composition of the members of the Panel in each matter must be appointed on a case-by-case basis, based on whether the particular matter requires particular expertise.

9.1 Section 220(2)(b) of the FSR Act provides that the Tribunal members must include "at least two (other) persons with experience or expert knowledge of financial products, financial services, financial instruments, market infrastructures or the financial system";

9.2 Section 224(4) of the FSR Act provides that the Panel constituted to consider an application for reconsideration must consist of a person to preside over the panel, who must be a person referred to in section 220(2)(a) (i.e. a person having relevant experience in law) and two or more persons who are Tribunal members or persons on the panel list;

9.3 There would be no purpose in the express requirement in section 220(2) that the Tribunal is to include at least two persons of each of the two distinct

categories listed therein, if the composition of the Panels can be put together without any regard to the substance of the matter before the FST.

9.4 In respect of a decision that involves factual or legal issues, one or more persons of the category referred to in section 220(2)(a) must be included in the Panel, whilst in respect of a decision that involves issues of a financial nature, at least one person falling in the category referred to in section 220(2)(b) of the FST must be included in the Panel.

9.5 The applicant's reconsideration application to the FST involved complex financial issues in relation to the correct interpretation and application of specific paragraphs of IFRS and the appropriate accounting treatment of the transactions in accordance with such interpretation. These issues required detailed financial and accounting expertise for their resolution.

9.6 The Tribunal is intended to be a specialist body assigned to determine matters of a specialist nature, and not a parallel court. That function is undermined if a reconsideration application in respect of a decision based on financial matters is assigned to retired judges and/or a legally experienced person only – such an application ought then rather to be submitted to and determined by the High Court. The fact that a court of law may also decide financial matters with the assistance of experts – a fact which is submitted was erroneously taken into consideration by the court – is an irrelevant consideration. The legislator was well aware that a court with general jurisdiction is entitled to determine expert

issues. Yet, in respect of, *inter alia,* the subject matter of the applicant's reconsideration application, the legislator opted for an expert Tribunal.

10 The Court erred in law and/or fact (at para 29 of the judgment) in using the current, anecdotal practice followed by retired Justice Harms (of selecting the Panel members before the heads of argument in a matter are filed – and thus before the subject-matter of the dispute is known to retired Justice Harms) in order to interpret the provisions of the FSR Act and what the Act requires. It is well-established that it is impermissible to use subordinate legislation (i.e. Regulations) as an aid to interpret an Act of Parliament.[2] This principle applies with greater force to a practice followed by the current chairperson of the FST. If the applicant's construction of the Act is correct, then the FST would need to adapt its practices of when and how the Panels are appointed. It is not permissible to analyse the past practice of the Panel in order to interpret the words in the FSR Act.

11 The Court ought to have concluded that the composition of the Panel (consisting only of legally experienced persons) in this specific case:

11.1 was not rationally related to the achievement of the purpose for which the Panel was to be appointed. It is thus also liable to be set aside on review by virtue of being irrational in terms of section 6(2)(f)(ii)(aa) of PAJA and the principle of legality;

[2] *Rossouw and Another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) at paragraph 24.

11.2 did not constitute a fair procedure, as contemplated by section 6(2)(c) of PAJA, alternatively was procedurally irrational under the rubric of the principle of legality; and

11.3 was unreasonable in the circumstances of this case, as contemplated in section 6(2)(h) of PAJA, because the expertise of the ultimate decision-makers (i.e. the members of the appointed Panel to adjudicate on the applicant's reconsideration application, which related to financial matters) were not considered.[3]

(ii) The JSE has no power to direct a 'restatement'

12 The Court erred in law in finding that the reference to "re-issue" in Listing Requirement 8.65(b) empowered the JSE to direct an entity to "restate" aspect of the audited financial statements.

13 The Court ought to have found that:

13.1 the powers of the JSE to enforce its listing requirements are set out in paragraph 8.65 of the listing requirements. The power applicable to this case is that set out in paragraph 8.65(b), which reads: *"to instruct such issuer to publish or re-issue any information the JSE deems appropriate".*

[3] Reasons, vol 6, pB2172-3, paragraphs 10-12.

13.2 the JSE had no power to direct the applicant to restate its financial statements, in general, and particularly in this case. The terms have distinct meanings for financial practitioners.

13.2.1 Indeed, the JSE initially directed the applicant to "re-issue" the financial statements.[4]

13.2.2 It then changed its directive in its final decision – directing the applicant to "*restate*" its financial statement by making corrections therein in terms of International Accounting Standards ("IAS") 8.

13.2.3 If the terms were interchangeable then the JSE would not have changed the manner in which its directive was phrased.

13.3 The amended directive, being to restate the applicant's financial statements so as to incorporate a series of changes in accordance with IAS8 is not a power held by the JSE.

14 The Court erred in law and/or fact in finding that if the JSE did not have the power to direct a restatement then "*the JSE has in fact no teeth to correct the position to protect the public with the financial statements setting out the full picture*".

15 The Court ought to have found that the JSE has already directed the applicant to publish

[4] Annexure FA2 to the founding affidavit, pA99, paragraph 25.

information related to the transactions:

15.1 The JSE published a SENS announcement informing the market that the JSE took issue with the applicant's financial treatment of the transactions;

15.2 The applicant issues a SENS announcement informing the market that the JSE took issue with its financial treatment of the transactions;

15.3 The applicant recorded the JSE's concerns in its financials for the period ended 31 January 2022.

15.4 Accordingly, the purpose of providing the public with a full picture had already been achieved. In instances of serious non-compliance then the JSE is empowered to order a re-issue. It elected not to do so in the current matter.

16 The Court erred in fact and/or law in relying on the unreported decision in *Huge Group Ltd v Executive Officer: Financial Services Board* Case Number:15380/2015.

17 The Court ought to have found that, properly construed, the *Huge Group* decision is distinguishable from the present matter. The decision in *Huge Group* did not squarely deal with the distinction between a restatement and a re-issue.

17.1 What was argued in that case was that the JSE was not empowered under Listing Requirement 8.65 to make any directives whatsoever regarding an entity's annual financial statements because (according to the argument raised by Huge Group) the annual financial statements did not fall within the ambit of the term "information" under Listing Requirement 8.65.

17.2 In the present case, the applicant submitted that there is a critical distinction between restatement and re-issue and the Listing Requirements only authorise a re-issue. A re-issue is a complete withdrawal of the annual financial statements and a re-issuing thereof.

17.3 Re-issuing of the annual financial statements is a more invasive sanction than a restatement. It, therefore, achieves every concern the Court raised in paragraph 55. But the invasive power requires that the JSE take other concurrent steps. For instance, Listing Requirement 8.66 requires the referral of the auditor to IRBA (i.e. to investigate improper conduct on the part of the auditor).

17.4 The term "restatement" has a particular meaning in the Listing Requirements and Listing Requirement 3.14 expressly deals with restatements. It provides that:

> *"[i]n the instance where an applicant issuer restates previously published results, for whatever reason, they must submit a restatement notification to the JSE containing details of the restatement and the reasons therefor. Such notification must be submitted pursuant to the provisions of Practice Note 3/2017."*

17.5 It is clear from the words used in Listing Requirement 3.14 that a restatement is undertaken voluntarily by the entity, which is why the JSE must be notified of the details of the restatement. That provision is nonsensical if the JSE is the entity that has directed the restatement (notification would be superfluous).

17.6 Similarly, other Listing Requirements expressly state that non-compliance "may result in a restatement and consequent re-publication of the information

concerned" (Listing Requirement 12.12(b); 12.23(b) neither of which deal with anything like the circumstances of the present case).

(iii) The business judgment principle

18 The Court erred in fact and/or law in concluding that the business judgment rule only addresses the *liability* of a director, when a director has breached his or her fiduciary duties, and does not play any part in the determination of whether a Board complied with IFRS (para 43 of the judgment).

19 The Court correctly stated that the IFRS "*sets the standards that [have] to be adhered to*" and that *"[w]ithin those boundaries a Board can exercise its discretion, but a Board cannot sidestep the standards of the IFRS*" (para 42 of the judgment).

20 The Court ought to have found that IFRS itself requires the Board of a company to exercise business judgments in relation to the presentation of transactions in the company's financial statements. There are various examples.

20.1 IAS 36 dealing with impairment of assets affords a discretion as to the certain methods of determination of an appropriate impairment.

20.2 IAS 8 affords a discretion in relation to the formulation of an accounting policy where there is no applicable IFRS rule applicable to a given situation.

20.3 The management of a company is required to exercise judgments in the application of accounting policies of the company (see IAS 1.122 and IAS 1.125).

20.4 The management of a company is required to make estimations of the fair value of certain financial assets, land, buildings and investment property, in relation to goodwill impairment, the useful life of intangible assets, in relation to provision of warranty claims, estimations of the fair values of contingent liabilities, estimations in respect of recognition of revenue.

21 The Court ought to have found that:

21.1 The JSE and the FST are obliged to consider the business judgment principle when assessing whether there has been compliance with IFRS;

21.2 The applicant's board exercised its business judgment in relation to the manner in which the applicable transactions should be recorded in its financial statements, after taking advice from JSE accredited experts;

21.3 The JSE and the FST ought to have considered the business judgment rule – and the appropriate amount of deference owed to the applicant's Board in its recordal of bona fide transactions in its accounting records;

22 The Court should have found that JSE and FST's failure to do so constituted a failure to have regard to a relevant consideration that was, as contemplated by section 6(2)(e)(iii) of PAJA, required to be taken into account by the FST in making the impugned decision.

(iv) The FST's misplaced reliance on due deference

23 The Court erred in law and/or fact in finding that the principle of deference – which the FST afforded to the JSE's determination – is "*entrenched and by analogy applicable in these matters*" (para 45 of the judgment).

24 The Court ought to have found that:

24.1 the FST as a specialist and expert statutory tribunal – not a court has (or should have if the Panels are properly selected) the necessary experience to determine the specialist questions placed before it;

24.2 the FST's reliance on the decision in *Staufen Investments (Pty) Ltd v the Minister of Public Works, Eskom Holdings SOC Ltd and Registrar of Deeds, Cape Town*[5] was misplaced. The *Staufen* decision is authority for the proposition that a Court may show deference to a functionary to whom a specific discretion is entrusted, rather than to second-guess the functionary's evaluation;

24.3 Deference applies to review proceedings where Courts may defer to administrative decisions taken by expert bodies, especially where the Court are not specialist institutions in relation to the subject matter of the decision under review. However, a specialist body such as the FST should be appropriately qualified to deal with matters falling within its field of expertise;

[5] 2020 (4) SA 78 (SCA).

24.4 A reconsideration is a *de novo* procedure in which the Panel must consider the decision afresh – it is not an appeal or review in which deference is owed to the prior state decision-makers. However, due deference must still be afforded to the Board of directors in such an appeal.

25 The Court erred in law and/or fact in finding that the Panel did not sit back and defer to the JSE because the Panel:

25.1 "*analysed the experts' views and relied on the one view of the expert*";

25.2 recognised that the expert view from Mr Njikizana was not objective as he had advised the applicant on the transactions.

26 The Court ought to have found that the Panel:

26.1 incorrectly rejected Mr Njikizana's report on the basis that he lacked partiality. The fact that Mr Njikizana had advised the applicant in the position as an independent expert, did not compromise his evidence in explaining the rationale for the advice he had previously given to the applicant;

26.2 was forced to rely "*on the one view of the expert*" because the Panel itself lacked the necessary expertise properly to evaluate the proper accounting treatment.

26.3 erred in not realising that Professor Maroun, himself, did not say that Trustco's Board made an unreasonable decision when they followed expert advice.

27 The Court ought to have concluded that, in affording undue deference to the prior decision-makers, when what was required was a *de novo* reconsideration, the Panel took irrelevant considerations into account and failed properly to perform its statutory function.

COMPELLING REASONS FOR THE APPEAL TO BE HEARD

28 In addition to the grounds of appeal set out above, section 17(1)(a)(ii) of the Superior Courts Act provides that leave to appeal may be granted where the judges concerned are of the opinion that there is "*some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration*".

29 There are compelling reasons why leave to appeal should be granted. This matter raises important and novel legal issues in relation to three legal questions.

30 First, the proper interpretation of section 220(2) read with sections 224(4) and 225(2)(a) of the Financial Services Act, which is a matter of public interest.

31 Second, whether the JSE's power in Listing Requirement 8.65 to direct an entity to "re-issue" includes the power to "restate".

32 Third, the appeal concerns the proper scope of the business judgment principle. The Court, respectfully, erred in law in concluding that the business judgment rule *only*

governs the liability of a director and does not govern whether a board or company complied with the IFRS (para 43 of the judgment).

32.1 The Court ought to have found that the business judgment rule has two components. See, for example, Stephen M. Bainbridge, 'The Business Judgment Rule as Abstention Doctrine', 57 Vanderbilt Law Review 83 (2019) available at: https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1665&context=vlr.

32.1.1 First, as a standard of liability, the business judgment rule shields directors from liability as long as they act in good faith.

32.1.2 Second, the business judgment rule operates as a 'doctrine of abstention' pursuant to which courts (and regulatory authorities) should refrain from reviewing board decisions unless exacting preconditions for review are satisfied. The business judgment rule mandates that courts defer to the board of directors' judgment absent highly unusual exceptions.

32.2 As Cassim notes, the business judgment rule is "a rule of restraint that prevents a court from interfering, with the benefit of hindsight, in honest and reasonable business decisions of the directors of the company."[6]

[6] F Cassim (Ed.) *Contemporary Company Law* (2ed) Juta 2012 at p 563

33 These issues should be considered by an appellate court as the Court's judgment is – respectfully – at odds with the clear wording of the relevant statutory principles and narrows long-standing legal concepts, such as the business judgment rule, which have been incorporated into the Companies Act, the Financial Services Act and IFRS. The importance of these issues of principle being resolved has application far beyond the parties in this particular application.

TAKE NOTICE FURTHER THAT, for all of the reasons set out above, it is respectfully submitted that the Court ought to have granted prayers 1 to 5 of the applicant's amended notice of motion, dated 13 March 2022. Accordingly, the applicant seeks an order —

(a) granting leave to appeal to the Supreme Court of Appeal *alternatively* to a Full Court of this Division; and

(b) directing that the costs of the application for leave to appeal be costs in the appeal.

DATED at SANDTON on this 28th day of **NOVEMBER 2022**.

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