

NOTARIAL CERTIFICATE

I, the undersigned

JOSIAS ANDRIES AGENBACH

NOTARY PUBLIC

of the Republic of Namibia

admitted in terms of section 86(2)

of the Legal Practitioners Act, Act 15 of 1995

a practicing legal practitioner and notary public of Second Floor, 37 On Schanzen Building, 37 Schanzen Road, Windhoek, Republic of Namibia, P O Box 86435, Windhoek, Telephone Number + 264 85 127 2525 and electronic mail address joos@agenbach.com

do hereby certify:

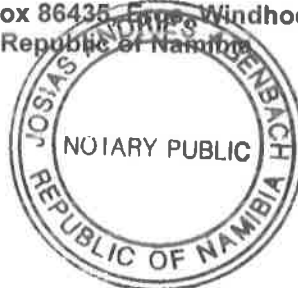
the genuineness of the signature of **RIAAN TOBIAS BRUYNS**, **NAMIBIAN IDENTITY NUMBER 76033010337** subscribed to the documents hereunto annexed, such signature being in his own handwriting and signed in my presence today, **31 January 2022** at **Windhoek, Republic of Namibia**, in testimony of which I have subscribed my name and affixed my seal of office on this day.

Documents attached:

- Founding Affidavit of Riaan Bruyns with Annexures



Josias Andries Agenbach
Legal Practitioner and Notary Public
Second Floor, 37 On Schanzen Building
37 Schanzen Road,
P O Box 86435, Windhoek
Republic of Namibia



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

Case No: _____

In the matter between:

TRUSTCO GROUP HOLDINGS LIMITED

Applicant

and

THE FINANCIAL SERVICES TRIBUNAL

First Respondent

THE JSE LIMITED

Second Respondent

FOUNDING AFFIDAVIT

I, the undersigned:

RIAAN BRUYNS

do hereby state under oath that:

1. I am the internal legal adviser and general counsel of the applicant at its principal place of business at Trustco House, 2 Keller Street, Windhoek, Namibia.



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2. I am duly authorised to depose to this affidavit and to lodge this application on behalf of the applicant.
3. The contents of this affidavit fall within my personal knowledge, save where otherwise stated or the context indicate the contrary, and are to the best of my belief, both true and correct.

PARTIES

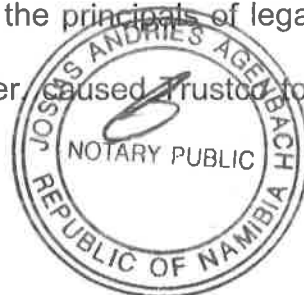
4. The applicant is **TRUSTCO GROUP HOLDINGS LIMITED**, a Namibian company with Namibian registration number 2003/058 which is registered as an external company in South Africa and listed on the second respondent's exchange, with registration number 2009/002634/10 and its registered address in South Africa at Unit 304 Oakmont Building, Somerset Links Office Park, De Beers Avenue Somerset West, Western Cape (**Trustco**).
5. The first respondent is **THE FINANCIAL SERVICES TRIBUNAL**, a tribunal established in terms of section 219(1) of the Financial Sector Regulation Act, 2017 (**the FSR Act**) to reconsider certain decisions as described in the FSR Act and to perform other functions set out in the FSR Act. The first respondent operates from Kasteel Office Park, Orange Building (2nd Floor), 546 Jochemus Street, Erasmuskloof, Pretoria (**the Tribunal**).
6. The second respondent is **JSE LIMITED**, a public company registered in accordance with the laws of the Republic of South Africa with registration number 2005/022939/0 and with its registered address at One Exchange Square, 2 Gwen Lane, Sandown (**the JSE**). The second respondent is:



- 6.1. a licensed exchange in terms of the Financial Markets Act, 2012 (the **FM Act**);
 - 6.2. a “market infrastructure” in terms of the FSR Act; and
 - 6.3. thus a ‘decision-maker’ whose decisions fall under the definition of ‘decision’ in section 281(c) of the FSR Act.
7. As an issuer listed as defined in the FM Act, and subject to the principals of legality and enforceability, Trustco is bound by the JSE’s Listing Requirements, a set of rules and procedures issued by the JSE in terms of the FM Act which govern applications, corporate actions and the continuing obligations applicable to issuers on the JSE (the **Listing Requirements**).

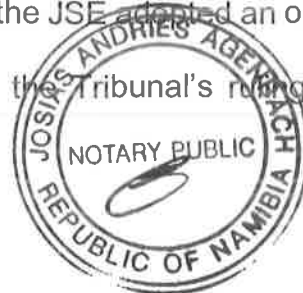
INTRODUCTION

8. In December 2019, a certain Mr AF Visser (**Mr Visser**), who is employed by the JSE and held out that he was duly authorised to act on behalf of the JSE, reviewed Trustco’s group annual financial statements for the year ending 31 March 2019 (the **2019 AFS**) and the interim results for the six months ending 30 September 2018 (**2019 Interim Financials**) (collectively referred to as **the Group Financial Statements**).
9. Three of the issues raised by him were referred to, what was said to be the Reporting Investigations Panel (the **FRIP**). Trustco assumed that the FRIP was a duly authorised and duly constituted body who had full powers to act and make binding rulings which comply with the principals of legality and enforceability. Recent developments, however, caused Trustco to realise



that its *bona fide* assumption could turn out to be entirely wrong. I turn to this aspect in more detail below. I am advised that the JSE is obliged to make a full record available, of at least, the documents which will give answers to the questions posed below. Once Trustco realised that Mr Visser had no authority to act as he did, Trustco investigated the issue more thoroughly. Despite Trustco's best endeavours to understand how the FRIP operates in conjunction with the JSE, and in terms of which powers, Trustco became increasingly troubled by the following issues;

- 9.1. While the existence of the FRIP could readily be assumed, when and how was it constituted?
- 9.2. Exactly when and how did the JSE and the FRIP come to be a governing body which could, separately or in conjunction with each other, order Trustco to change its Group Financial Statements in circumstance where Trustco's Board of Directors, (incidentally on advice from an FRIP expert) made a judgment decision to reflect the financial transactions referred to below, to the best of their ability and in a *bona fide* manner. This aspect became even more troubling to Trustco when it was coerced by Mr Visser (still professing to be the JSE or to be duly authorised to act on behalf of the JSE) to comply with the "ruling" discussed in detail below, failing which Trustco will be suspended from trading its shares on the JSE. What was not only troubling, but ultimately disconcerting to Trustco's Board of Directors was that Mr Visser of the JSE adopted an openly hostile approach towards Trustco after the Tribunal's ruling was



handed down, and while Mr Visser well knows that, at no stage during the any proceedings leading up to and before the Tribunal, did anyone make oath to accuse Trustco's Board of Directors of not having acted in accordance with the business judgment rule, while doing so to the best of their ability and in a *bona fide* manner.

- 9.3. Did the JSE and the FRIP enter into an agreement?
 - 9.4. Who represented the JSE when such an agreement was entered into?
 - 9.5. Was that person duly authorised to do so?
 - 9.6. Does the FRIP (acting separately or in conjunction with the JSE) have coercive powers over Trustco to enforce a "ruling", against Trustco in the circumstances described immediately below, and if so, where do they originate from?
 - 9.7. Is it permissible in law, and does it comply with the legality principal for the JSE to simply order Trustco to change its Group Financial Statements in circumstances where it is not in dispute between the JSE and Trustco that Trustco's Board of Directors acted in a *bona fide* manner, after having taken expert advice, and then exercised a judgment decision?
10. Nevertheless, and while the legality issues referred to above will play a pivotal role in this application, I return to the narrative. Henceforth, I use the acronym "JSE" while not conceding that anyone acting on its behalf was



duly authorised to do so. Trustco and the JSE have resolved one of the referred issues. Accordingly, the remaining issues relevant in this application resolve into two parts, namely:

10.1. **the Loan Issue** – concerning loans granted by Trustco's majority shareholder to:

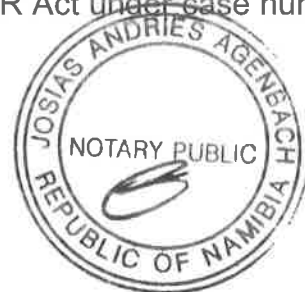
10.1.1. Trustco (**the Related Party Loan**); and

10.1.2. Huso Investments (Pty) Ltd (**Huso**) (**the Huso Loan**).

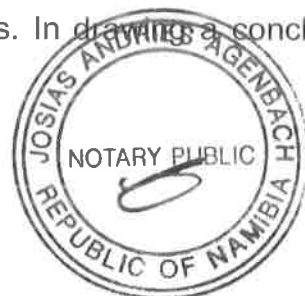
10.2. **the Property Issue** – concerning the reclassification of a portion of the property owned by Trustco, known as the Elisenheim development.

11. In October 2020, the JSE ruled that Trustco restate its accounting treatment of the transactions. Trustco objected to the restatement, however on 11 November 2020, the JSE issued an amended decision reiterating that a restatement was required.

12. Trustco maintains that the JSE is incorrect in its determination and that its determination is without accounting foundation. By contrast, the accounting methodology employed by Trustco in recording the transactions was taken pursuant to extensive engagement with the JSE accredited expert IFRS advisors as well as independent external advisors. Accordingly, in response to the measures ordered by the JSE, Trustco brought an application for reconsideration in terms of section 230 of the FSR Act under case number JSE1/2021 (**the Reconsideration Application**).



13. On 22 November 2021, the Tribunal dismissed the Reconsideration Application (**the Tribunal Decision**). A copy of the Tribunal Decision is annexed hereto marked **FA1**.
14. Trustco remains confident that its accounting treatment of the transactions was correct and so brings this application to review the Tribunal Decision in terms of:
- 14.1. the Promotion of Administrative Justice Act, 2000 (**PAJA**), as provided for in section 235 of the FSR Act; alternatively
- 14.2. the principle of legality.
15. The grounds on which the Tribunal Decision stands to be reviewed and set aside are the following:
- 15.1. the sanction imposed by the JSE is not authorised by the empowering legislation (i.e. the Listings Requirements and the FM Act). The Tribunal Decision does not take account of this and its decision is unlawful as a result;
- 15.2. the JSE's decision to impose sanctions on Trustco was not taken by a properly authorised representative. The Tribunal Decision does not take account of this and its decision is unlawful as a result;
- 15.3. the Tribunal failed to take account of relevant considerations. Instead, it dealt superficially with Trustco's contentions and gave undue deference to the FRIP's findings. In drawing a conclusion



based on this information, the Tribunal Decision is incongruent with the pertinent facts before it and is arbitrary as a result;

15.4. the Tribunal was comprised of three experienced legal practitioners. However, this matter is less about law and almost entirely accounting based. A proper understanding and appreciation of the accounting implications requires input from a trained accounting professional experience in the application of International Financial Reporting Standards (**IFRS**). Without that experience and expertise, the Tribunal Decision mis-appreciates the requirements of the relevant standards and, as a result, an improper application of the standards and principles that underpin them.

16. Each of the above grounds, which are dealt with in more detail below, undermine Trustco's right to administrative action that is lawful, reasonable and procedurally fair.

17. This affidavit is accordingly structured as follows;

17.1. First, I outline the necessary facts in respect of each of the Huso Loan, Related Party Loan and the Property Issue;

17.2. second, I deal with the JSE's decision;

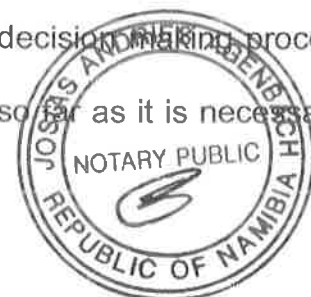
17.3. thirdly, I deal with the proceedings before the Tribunal;

17.4. fourth, I amplify the grounds of review highlighted above and detail Trustco's contentions in respect of each; and



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- 17.5. finally, I deal with the question of appropriate relief.
18. To avoid unduly burdening this affidavit, I have annexed only documents that are essential to the allegations made herein. Trustco is advised that the Tribunal will, in terms of Uniform Rule 53, file a complete record in respect the JSE and the FRIP's powers discussed above, as well as the complete record of the Tribunal Decision which will include all the underlying documentation filed in the Reconsideration Application.
19. I attach hereto the papers filed by Trustco and the JSE in the Reconsideration Application which comprise:
- 19.1. the JSE's reasons for its decision – **FA2**;
- 19.2. the grounds on which Trustco sought a reconsideration of the JSE's decision (**the Augmented Grounds**) – **FA3**;
- 19.3. the JSE's further reasons for its decision and expert report of Professor W Maroun (**Prof Maroun**) – **FA4**; and
- 19.4. the expert report of Mr Tapiwa Njikizana (**Mr Njikizana**) filed together with Trustco's Augmented Grounds – **FA5**.
20. I do not intend to unnecessarily burden this affidavit by simply repeating what is set out in the Augmented Grounds or the expert report of Mr Njikizana. I confirm that these documents should be read as if specifically incorporated herein. Trustco stands by these documents and confirms that their content correctly reflects both Trustco's decision-making process as well as its objection to the JSE's decision. In so far as it is necessary, Mr



Njikizana has deposed to an affidavit confirming the content of his expert report, which affidavit will be filed together with this affidavit. What is of crucial importance, however, is that Trustco's Board of Director's obtained the advice of Mr Njikizana before it made its judgment on how to reflect the three transactions - discussed in detail below - in Trustco's Group Financial Statements.

21. Without again traversing the detail of the above documents, I will highlight below, certain important aspects detailed in the Augmented Grounds which underpin the grounds on which this review is sought. I do so in respect of each of the three judgment decisions, namely: the Huso Loan, the Related Party Loan and the Property Issue **(the Transactions)**

22. But, before I proceed to discuss the Transactions, I must give the background circumstances.

22.1 Firstly, it is crucial to understand that the actual existence of the Transactions was never questioned - under oath - by Mr Visser, the FRIP, the JSE or anyone before the Tribunal. Indeed, it was common cause in the statements filed of record before the Tribunal that the Transactions did indeed take place.

22.2 Secondly, the issue for determination was also not that Trustco did not reflect the transactions in the Group Financial Statements. Rather, it was common cause that each and every Transaction was indeed reflected in Trustco's Group Financial Statements. Thus, the Transactions were not withheld from the Group Financial



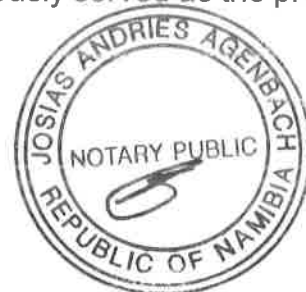
Statements. They were indeed pertinently reflected in the Group Financial Statements and properly expanded and disclosed in the notes thereto.

22.3 It was also not the JSE's case on the statements filed before the Tribunal, that Trustco's Board of Directors acted fraudulently, recklessly, dishonestly, or in a *mala fide* manner.

22.4 In short, the only issue before the Tribunal was whether or not the JSE's ruling to order Trustco to reflect the transactions in a manner the JSE would have preferred, should be set aside by the Tribunal.

22.5 When the Trustco Board of Directors made its unanimous business judgment decision how to reflect the Huso Loan, the Related Party Loan, and the Property Issue in the Group Financial Statements, the Board of Directors consisted of:

22.5.1 Advocate Raymond Heathcote SC - with BA LLB qualification who is an admitted advocate of the High Court of Namibia and was an acting judge of the High Court of Namibia in 2005, 2007, 2009 and 2011. He is also an admitted advocate in South Africa and several of his judgement has been reported in both the Namibian and South African Law Reports. Advocate Heathcote is a member of the society of Advocates and was honoured by being appointed as senior counsel in 2009. Advocate Heathcote previously served as the president



of the Society of Advocates and president of the Law Society of Namibia (**Adv Heathcote SC**).

22.5.2 Mr Winton Geyser - has BCompt, BCompt (Hons) and CA (SA) qualifications. Mr Geyser is a member of the South African Institute of Chartered Accountants. He completed his articles with the audit firm Deloitte Haskins & Sells (now Deloitte) and later joined their financial management services division. Since then he has performed accounting, taxation and consultancy work and has held various senior positions, such as the general manager finance at Agra (Co-op) Ltd and the financial director of M Pupkewitz & Sons. Mr Geyser holds the position of group managing director of Epic Holdings (Pty) Ltd and various other directorships of Namibian companies (**Geyser**).

22.5.3 Mr Renier Taljaard - obtained a BEcon, FCII, and FII (SA) qualification and has vast experience, of more than 32 years, in both the short- and long-term insurance industries. After completing his FCII studies, Mr Taljaard was admitted as a fellow member of the Insurance Institute of South Africa and Namibia. He held various senior positions within the industry including managing director at Swabou Insurance, Nasria, Harvest Reinsurance Company, Trustco Insurance Ltd and Trustco Life Ltd. He served on the board of Trustco Insurance Ltd from 2000 to 2006, was appointed to the board of Trustco



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Group Holdings Ltd in 2012 and to the board of Trustco Insurance Ltd and Trustco Life Ltd as an independent non-executive director in 2013 (**Taljaard**).

22.5.4 Professor Lana Weldon held a B Comm Accounting (Rhodes), a B Compt Hons (Unisa), a MBA (Edinburgh Business School) and was at the time employed as an associate professor and head of subject for Governance and Auditing at the University of Fort Hare. Professor Weldon was reading for a PhD at Nelson Mandela University. Professor Weldon is a South African Chartered Accountant, has completed the Alternative Exchange Directors Induction Programme and was completing the chartered director (IODSA) qualification and is a registered assessor (SAICA) (**Prof Weldon**).

22.5.5 Ms Kristin van Niekerk had a BA LLB from the University of Natal, Durban and a Masters in International Relations from the School of Oriental and African Studies (University of London). At the time, she was employed as Head of Legal and Compliance at AGCS SA. She is a qualified lawyer admitted in South Africa, England, Wales and New York including the Southern District of New York (**Van Niekerk**).

22.5.6 Dr Quinton van Rooyen - has a BJuris LLB, DBL (Honoris Causa) and Business Leadership and Entrepreneurship (IUM). Dr van Rooyen is the founding member of Trustco and acts as Group Managing Director/CEO of the company. Dr



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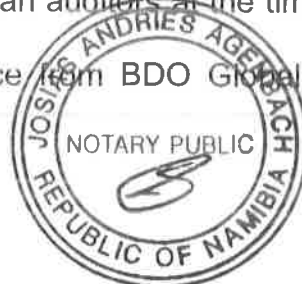
van Rooyen and his associates are also the majority shareholder of Trustco (collectively referred to as **Dr Van Rooyen**).

22.5.7 Mr Floors Abrahams - has a BCom qualification and is the Group Financial Director. Mr Abrahams completed his articles in 1999. During this period, he accumulated experience in the financial sector and serviced various audit clients. Mr Abrahams was appointed as group financial manager of Trustco in 2000 and subsequently group financial director in 2006. Mr Abrahams assumed the role of group treasurer in 2013. He was re-appointed as group financial director on a full-time basis in 2017, a position he holds to date (**Mr Abrahams**).

22.5.8 Adv Heathcote SC, Geyser, Taljaard, Prof Weldon and Van Niekerk were appointed as independent non-executive directors, whilst Dr van Rooyen and Mr Abrahams were executive directors.

22.6 Before the Trustco Board made its business judgment decisions on Transactions, it obtained the expert advice of Mr Nijikizana. Mr Nijikizana has a B.Compt (Hons), CTA, CA (SA) (Mr Nijikizana's CV appears at the end of his report (FA5)).

22.7 It is important to note that the Namibian auditors at the time, BDO Namibia had also obtained clearance from BDO Global on the



accounting treatment of the Transactions. Thereafter, Trustco's JSE accredited auditors at the time Moore Jhb also obtained advise from their independent JSE accredited IFRS expert. All these experts and their advisors agreed and advised the board on the accounting treatment of the Related Party Loan, the Huso Loan, and the Property Issue. The Trustco Board then carefully considered the issues, and while taking the expert advice into consideration, made their business judgment decisions.

22.8 It is important to note that neither the JSE nor the FRIP ever audited or expressed an audit opinion on the accounting treatment or financial information of the Group Financial Statements.

22.9 After the Trustco Board made its business judgment decision, the three actual Transactions were reflected in Trustco's Group Financial Statements. The actual Transactions as reflected in the March 2019 AFS were also approved by the shareholders on 12 September 2019.

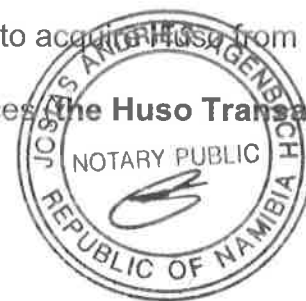
22.10 Lastly, the Tribunal was not required, and did not say, that the manner in which JSE contended the Transactions should have been reflected, was wrong or right. It simply refused to set aside the JSE's ruling. It is that refusal of the Tribunal which is impugned in this application. That refusal, Trustco respectfully contends, should be set aside on the grounds set out below. I now return to the Transactions.



THE LOAN ISSUE

The Huso Loan

23. As stated above, Dr Van Rooyen is the majority shareholder and CEO of Trustco and currently holds 63.97% in Trustco. Dr Van Rooyen was also the sole shareholder of Huso up to 31 August 2018, where after the Huso Transaction was perfected.
24. In order to fund Huso's operations from the date of the Huso Transaction in 2015 to the date that the Huso Loan was waived, Dr Van Rooyen advanced the Huso Loan as follows:
- 24.1. NAD 121 million to Trustco Resources (a subsidiary of Trustco);
 - 24.2. NAD 204 million to Huso;
 - 24.3. NAD 42 million to Morse Investments (a subsidiary of Huso); and
 - 24.4. NAD 179 million to Northern Namibia Development Company (Pty) Ltd (**NNDC**) (a subsidiary of Huso).
25. While Dr Van Rooyen was the sole shareholder of Huso, the direct loan to Huso (NAD 204 million) and the loan to NNDC (NAD 179 million) were structured so that their repayment was entirely within the discretion of Huso and NNDC respectively. Given these repayment terms, the loans were recorded as equity loans in the books of Huso and NNDC.
26. During 2015, Trustco engaged in a transaction to acquire Huso from Dr Van Rooyen through its subsidiary Trustco Resources (**The Huso Transaction**).



The terms of the Huso Transaction were recorded in a sale of shares agreement (which excluded the sale of any loans or loan accounts). The details are set out in paragraphs 19 to 23 of the Augmented Grounds.

27. The shareholders of Trustco approved the Huso Transaction and voted in favour of it at a meeting held on 5 October 2015. As the Huso Transaction constituted a 'related party transaction' under the JSE Listing Requirements, Dr Van Rooyen did not and could not vote in respect of it.
28. Due to a delay in fulfilment of the Huso Transaction suspensive conditions a change in the structure of the Huso Transaction was proposed. The details are set out in paragraphs 24 to 25 of the Augmented Grounds.
29. These changes were approved by Trustco's shareholders on 13 June 2017. Again, as a 'related party transaction' under the JSE Listing Requirements, Dr Van Rooyen did not vote in respect of the addendum approval.
30. During March 2018, the terms of the Huso Loan were changed by a resolution of directors of Huso and NNDC. Notably, repayment was no longer at the discretion of Huso, but was due within the following twelve-month period.
31. As this change made the loans repayable, where previously they had not been, the nature of the loans themselves changed. Now, as a repayable debt, the loans are a liability in the books of Huso and NDCC respectively. They were accordingly reflected as such as it would be improper to reflect it as anything else.



32. The Huso Transaction subsequently became effective on 31 August 2018 and Van Rooyen's shares in Huso were acquired by Trustco Resources. The acquisition was accordingly reflected in Trustco's 2019 AFS.
33. On 30 September 2018, Van Rooyen elected to waive repayment of the Huso Loan, made up, at that date, by the NNDC loan of NAD 174 million and the Morse loan of NAD 42 million. The waiver relieved NNDC and Morse of the financial liability on their books. In consequence, there was a NAD 216 reduction in liability in the financials of the following entities:
- 33.1. Huso (as the holding company of NNDC and Morse); and
 - 33.2. Trustco Resources (as the holding company of Huso); and
 - 33.3. Trustco (as the holding company of Trustco Resources).
34. The effect of the waiver by Dr Van Rooyen is that NNDC and Morse were relieved of the respective repayment obligations owed by them. The applicable accounting standards dictate that this change be reflected as a gain in profit and loss.
35. The gain in profit and loss, as with the reduction of the liability, operated up the group structure to:
- 35.1. Huso (as shareholder of NNDC and Morse);
 - 35.2. Trustco Resources (as shareholder of Huso); and
 - 35.3. in turn, to the group's parent: Trustco.



Accounting Treatment

36. The accounting treatment employed by Trustco in respect of the above Huso Transaction and loan waiver is reflected in paragraphs 29 to 39 of the Augmented Grounds.

37. Of importance is that:

37.1. the Huso Transaction falls within the express 'combination of business or businesses under common control' exclusion created by paragraphs 2(c) and B1 of IFRS3. IFRS3 does not apply as a result;

37.2. Trustco was unable to find an IFRS standard that applied directly to the situation, as there is no such specific IFRS standard;

37.3. acting on advice from W Consulting (Trustco's independent JSE accredited expert IFRS advisor) Trustco had been advised in 2015 to formulate and implement its own accounting policy in accordance with IAS8, and, in particular, paragraphs 10 to 12 thereof. Reason being Trustco's Life Insurance subsidiary acquired 100% (one hundred percent) of the equity of Trustco's Property Companies.

37.4. The applicable portions of IAS8 dictate that, in formulating an appropriate policy, Trustco ought to:

37.4.1. consider accounting standards similar in substance to the transaction in question;



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37.4.2. if no similar accounting standard exists or could be found, consider the Accounting Conceptual Framework (**the Conceptual Framework**); and

37.4.3. if there is no appropriate guidance in the Conceptual Framework, consider how similar transactions are treated by other Accounting Standard setters.

38. As neither similar standards nor any relevant guidance in the Conceptual Framework exist, Trustco considered an array of local and international accounting standard setters in search for an appropriate accounting treatment for business combination transactions. The most appropriate standard was found in the United Kingdom's Financial Reporting Standard 6, which pertains to amalgamations.
39. Applying FRS6, the Huso Transactions was accounted for as detailed in paragraph 37 to the Augmented Grounds.
40. In accounting for the loan waiver, Trustco applied IFRS9 and reflected the waiver as a gain of NAD 546 million in profit and loss (this is explained in paragraph 38 of the Augmented Grounds).
41. The above transactions were audited by two independent audit firms: BDO (Namibia) and Moore Stephens MWM Inc in South Africa. Both firms issued an unmodified audit report. This confirms that they agreed with Trustco's application of IFRS.



42. Subsequently, Trustco appointed new JSE accredited auditors (Nexia SAB&T) to conduct an independent audit of each transaction. In the same manner as BDO and Moore Stephens, Nexia SAB&T concluded that Trustco's application of IFRS was appropriate and correct.

The Related Party Loan

43. On 8 October 2018, Dr Van Rooyen, through Next Investments (Pty) Ltd (**Next Investments**) concluded an agreement to loan up to NAD 1 billion to Trustco (the Related Party Loan) for the purposes of funding the acquisition of a mining entity. The details of the Related Party Loan and its purpose are set out in paragraphs 45 to 57 of the Augmented Grounds.
44. It was a term of the Related Party Loan Agreement that any monies advanced would be repayable. As a result, any advance was a financial liability and was reflected as such in Trustco's Group Financial Statements.
45. On 1 October 2019, Dr Van Rooyen waived repayment of the Related Party Loan. As with the Huso Loan, this waiver was approved by Trustco's shareholders with the exclusion of Dr Van Rooyen who, as a related party, could not and did not vote in respect of the Related Party Loan or the loan waiver.
46. In accounting for the Related Party Loan, Trustco applied IFRS9 as it had in respect of the Huso Loan. This is detailed in paragraphs 58 and 59 of the Augmented Grounds. IFRS9, obliges Trustco to:

- 46.1. remove the financial liability as at the date it was extinguished; and



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46.2. recognise the difference between the carrying amount of the financial liability and the consideration paid for it in profit and loss.

47. On the advice of its independent JSE accredited IFRS advisors, Trustco applied IFRS9 and applied it to the letter.

The Property Issue

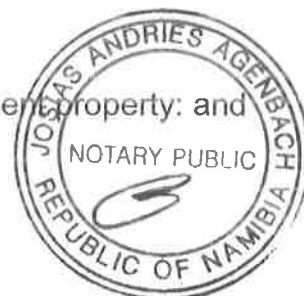
48. This issue pertains to the reclassification of certain immovable property owned by Trustco (**the Elisenheim Property**). As a result of the change in use of the property, a portion of the property was reclassified from inventory to investment property. This change is detailed in paragraphs 70 to 81 of the Augmented Grounds.

49. The Elisenheim Property consists of 1186,2387 hectares of land in the Windhoek municipal area, on which Trustco had intended to develop serviced stands for sale to the public.

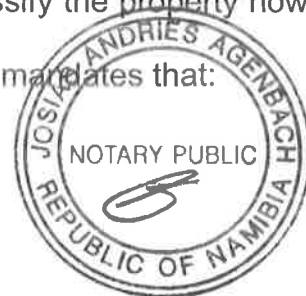
50. Given its intended development, Trustco classified the Elisenheim Property as 'inventory' and held it as its cost price. When Trustco developed and sold a portion of the land, the proceeds were recorded as revenue. This accounting treatment is precisely that which IAS2 requires in the circumstances.

51. When the property market in Namibia slowed and Trustco was unable to fully exploit this development opportunity, Trustco's Board of Directors resolved to:

51.1. transfer 356,3603 hectares as investment property; and



- 51.2. cease development of the remainder of the property.
52. IAS40 prescribes the circumstances under which property can be reclassified as investment property. At its essence, the reclassification is permitted when there is an actual change of use as well as evidence thereof (apart from management's intention).
53. Despite its ancillary weight under IAS40, Trustco's intention to change the intended use of the Elisenheim Property is evinced by minutes of a meeting of directors held on 13 March 2019, as well as the actions taken by Trustco pursuant thereto.
54. In addition to Trustco's stated intention, the objective factors that give credence to the change in use include that Trustco:
- 54.1. stopped development of the property and related activities;
- 54.2. decommissioned further development plans; and
- 54.3. ceased all steps to obtain regulatory approval for further development.
55. Factually, there was a clear change in use of the property: Development activities ceased, construction staff were retrenched, and equipment was sold off.
56. In light of the change in use of the identified portion of the Elisenheim Property, Trustco was bound by IAS40 to reclassify the property now held for investment purposes. In particular, IAS40.63 mandates that:



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"For a transfer from inventories to investment property that will be carried at fair value, any difference between the fair value of the property at that date and its previous carrying amount shall be recognised in profit or loss."

57. In addition to its own assessment of the required accounting treatment, the Board sought the advice of its external independent advisors, BDO Namibia and Moore Jhb, whose assessment was eventually also confirmed to be correct by Nexia SAB&T when they were appointed. Pursuant to that advice, the Trustco board resolved to do exactly as IAS 40.63 requires:

57.1. derecognise the inventory value in cost of sales; and

57.2. recognise the fair value of the investment property in revenue.

THE JSE'S DECISIONS

58. On 5 December 2019, the JSE informed Trustco that it had been selected for review under the JSE's proactive monitoring review process and that certain of Trustco's financials would be reviewed.

59. The JSE initially raised fifteen concerns which was subsequently reduced to five. Of the five issues, three were referred to the FRIP for investigation, namely: the Huso Loan Issue, the Related Party Loan Issue and the Property Reclassification Issue. The background and history is set out in paragraphs 4 to 17 of the Augmented Grounds.

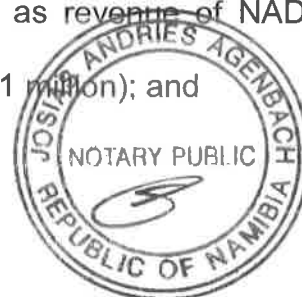
60. The JSE notified Trustco that it had referred the three issues to the FRIP.

According to the JSE's Listing Requirements:



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- 60.1. the FRIP is a panel established in terms of paragraph 8.65 of the JSE's Listings Requirements;
- 60.2. the FRIP is tasked and appointed by the JSE to consider and advise on issues referred to it by the JSE itself; and
- 60.3. the FRIP acts on the instruction of the JSE and in accordance with the FRIP Charter; and
- 60.4. the FRIP makes recommendations to the JSE pursuant to any referral it receives.
61. The outcome of the FRIP investigation was, in sum, that it disagreed with Trustco's accounting treatment in respect of each of the three issues referred to it. The FRIP report detailing its reasons is attached as **FA6**.
62. On 16 October 2020, the JSE wrote to Trustco informing it that the JSE had determined that Trustco had not complied with IFRS, as required by the Listing Requirements in the following respects:
- 62.1. the 2019 AFS when Trustco:
- 62.1.1. recognised a NAD 545.6 million gain in profit and loss as a result of the waiver of the Huso Loan;
- 62.1.2. reclassified certain of the Elisenheim Property from inventory to investment property, thereby recognising a NAD 693 million gain in profit and loss (presented as revenue of NAD 984 million and cost of sales of NAD 291 million); and



62.1.3. recognised revenue on the sale of unserviced land, at the time that the purchaser signs the purchase agreement.

62.2. Trustco's 2019 Interim Financials by recognising a NAD 1 billion gain in profit and loss, as a result of the waiver of the Related Party Loan.

(the JSE's Initial Decision)

63. Following an objection by Trustco on 11 November 2020, the JSE issued an amended decision. Although the same in effect as the JSE's Initial Decision, in the amended decision the JSE:

63.1. found that the 2019 AFS were not compliant with IFRS because they:

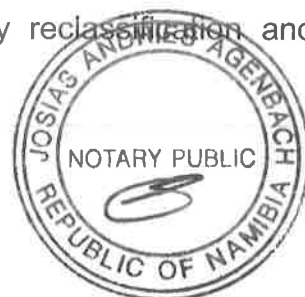
63.1.1. classified the Huso Loan as a financial liability, the waiver of which was recognised as a gain in profit and loss; and

63.1.2. reclassified certain properties in the Elisenheim development from inventory to investment property, which resulted in a gain in profit and loss;

63.2. required Trustco to restate the March 2019 AFS by:

63.2.1. reversing the gain in respect of the Huso Loan and instead recognising the amount directly in equity; and

63.2.2. reversing the Elisenheim property reclassification and the resultant gain in profit and loss;



- 63.3. found that the 2019 Interim Financials were not compliant with IFRS because they classified the Related Party Loan by Dr Van Rooyen as a financial liability, the waiver of which was recognised as a gain in profit and loss;
- 63.4. required Trustco to restate the 2019 Interim Results by reversing the gain in respect of the Related Party Loan and instead recognising the amount directly in equity; and
- 63.5. required that the restatement of the Trustco Group Financial Statements be effected in accordance with paragraphs 42 and 49 of IAS 8.

(the JSE's Final Decision).

64. As indicated above, the reasons for the JSE's Final Decision which were provided in terms of section 229 of the FSR Act are attached as FA2 and its further reasons in terms of the Tribunal rules are attached as FA4.
65. The flaws in the JSE's Final Decision, which form the basis of the Reconsideration Application, are detailed:
- 65.1. in paragraphs 40 to 44 of the Augmented Grounds and Njikizana's report in respect of the Huso Loan issue;
- 65.2. in paragraphs 60 to 69 of the Augmented Grounds and Mr Njikizana's report in respect of the Related Party Loan issue;



65.3. in paragraphs 82 to 96 of the Augmented Grounds and 75 and Njikizana's report in respect of the Property Reclassification Issue.

65.4. Paragraphs 6 to 21 of Mr Njikizana's report deals with what Trustco perceives as the general flaws in the JSE's Final Decision and its reasons.

PROCEEDINGS BEFORE THE TRIBUNAL

66. In addition to the Augmented Grounds, the respective expert reports and the JSE's reasons and further reasons the Tribunal:

66.1. received heads of argument filed by both the JSE and Trustco (which are attached as **FA7** and **FA8** hereto respectively); and

66.2. the oral submissions made by counsel for the JSE and Trustco at the hearing.

67. The hearing took place virtually on 2 November 2021. A transcript of the hearing of 2 November 2021 is annexed hereto marked **FA9 (the Transcript)**.

68. The Tribunal panel consisted only of members experienced in the field of law, none of whom expressed during the hearing to have had any experience in the application of International Financial Reporting Standards ("**IFRS**"), being:

68.1. Retired Justice Louis Harms, the chair of the panel and former Deputy President of the Supreme Court of Appeal,



68.2. Ms Soraya Hassim SC, a senior counsel practising at the Pretoria Bar; and

68.3. Ms Zama Nkubungu-Shangisa, an attorney with experience in commercial law.

69. The Tribunal Decision was handed down on 22 November 2021.

TRIBUNAL'S DECISION AND GROUNDS OF REVIEW

70. A detailed review and reading of the Tribunal Decision, the papers filed by the parties and the Transcript demonstrate that the Tribunal's process and reasoning was flawed and reviewable under PAJA, alternatively, the principle of legality.

71. I deal with each ground of review below.

Authority of the decision maker

72. The power to make the JSE's Final Decision is derived from the FM Act and the Listings Requirements which comply with the legality principle and are enforceable.

73. Section 11(1)(f) and (g) of the FM Act provide that:

"11. Listing of securities.—(1) An exchange must, to the extent applicable to the exchange in question, make listing requirements which prescribe:



- (f) *the steps that must be taken by the exchange, or a person to whom the exchange has delegated its disciplinary functions, for the investigation and discipline of an issuer, or director, officer or employee of an issuer, that contravenes or fails to comply with the listing requirements;*
- (g) *for any contravention of or failure to comply with the listing requirements, any one or more of the following penalties that may be imposed by the exchange or by a person to whom the exchange has delegated its disciplinary functions:*
 - (i) *A reprimand;*
 - (ii) *a fine not exceeding R7.5 million, to be adjusted by the Authority annually to reflect the Consumer Price Index, as published by Statistics South Africa;*
 - (iii) *disqualification, in the case of a natural person, from holding the office of director or officer of a listed company for any period of time;*
 - (iv) *suspension or termination of listing; or*
 - (v) *any other penalty that is appropriate in the circumstances.”*

74. Section 68(1) of the FM Act provides that:

“68. Delegation of functions.—(1) *A market infrastructure may delegate or assign any function entrusted to it by this Act or its rules to a person or group of persons, or a committee approved by the controlling body of the market infrastructure, or a division or department of the market infrastructure, subject to the conditions that the market infrastructure may determine.”*



75. Section 3 of the Listings Requirements imposes continuing obligations, including those relating to their financial statements, on listed companies. Paragraphs 8.65 and 8.66 of the Listings Requirement as such provide that:

"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.*

8.66 In addition, the JSE will refer any such non-compliance to SAICA, the IRBA or any other relevant professional body."

76. Trustco assumed, and fairly so, that the JSE's representative had the necessary authority to make the JSE's Final Decision; and that the Listing Requirements were properly amendment from time to time while the JSE Board of Directors complied with their powers. However, this appears not to have been the case.
77. On 9 December 2021, following a decision by the JSE to suspend Trustco's listing for a purported failure to implement the Tribunal's Decision, Trustco's attorneys requested that the JSE clarify the source of its power to *inter alia* order that Trustco amend or restate its Group Financial Statements (the JSE's Final Decision). A copy of the letter is attached hereto as FA101



78. This request was further repeated in a letter dated 14 December 2021 (attached hereto as **FA11**).

79. On 15 December 2021, the JSE's attorneys responded (which response is attached hereto marked **FA12**) that:

"the decisions referred to in your letter were taken by Mr Andre Visser in his capacity as Director of the JSE's Issuer Regulation division, acting in accordance with authority delegated to him by the JSE's board in terms of section 68 of the Financial Markets Act 19 of 2012."

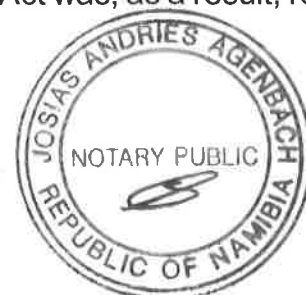
80. On 17 December 2021, Trustco's attorneys contested Mr Visser's authority to make the JSE's Final Decision as no valid delegation ever took place. A copy of the letter is attached hereto as **FA13**.

81. On 22 December 2021, the JSE's attorneys furnished a resolution by the JSE's board of directors (**the Resolution**), on which Mr Visser's authority is purportedly premised. A copy of the letter including the Resolution is attached hereto as **FA14**.

82. Paragraph 1 of the Resolution states that:

"In terms of section 58 of the Securities Services Act 36 of 2004 and section 72 of the Companies Act 71 of 2008 (the Acts), the Board hereby delegates to the persons or entities set out below the following powers:"

83. The Securities Services Act, 2004 (**the SS Act**) has been repealed and replaced with the FM Act. Section 58 of the SS Act was, as a result, replaced with section 68 of the FM Act.



84. Paragraph 2 of the Resolution reads as follows:

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

*2.1. the head of the **Issuer Regulation Division** or the General Manager: Issuer Regulation, or other appropriate person or persons as identified by the Executive Committee; and*

2.2. the Listings Appeal Committee, provided that the Listings Appeal Committee may only exercise any of the powers or duties so delegated after it receives a request for appeal."

85. First, the Resolution confers no authority on Mr Visser to make the JSE's Final Decision. To the contrary, it delegates the powers vested in the JSE under section 13 and 15 of the SS Act.

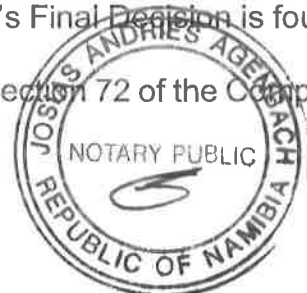
86. These sections have, as part of the repeal of the SS Act, been replaced by sections 12 and 14 of the FM Act, which deal with the JSE's powers to:

86.1. remove and suspend trading of listed securities (ss 12 and 13); and

86.2. disclosure of information by issuers of listed securities (s 14).

87. The JSE's Final Decision does not related to any of the powers or functions prescribed by sections 12, 13 or 14 of the FM Act.

88. Second, and even if the power to make the JSE's Final Decision is found to be encapsulated by the above provisions, then section 72 of the Companies



Act, 2008 (**the Companies Act**) authorises the delegation of authority by a board of directors to a committee of the board of directors. In this regard:

88.1. it is not apparent that Mr Visser is the head of the Issuer Division as contemplated by the Resolution;

88.2. inherently, a committee cannot comprise of only one person, unless perhaps if a statute takes the bold step and defines a committee to also consist of one person; and

88.3. clause 12.11.1 of the JSE's Memorandum of Incorporation (attached hereto as **FA15**) requires that "all members of these committees must be directors". Mr Visser is not a listed director of the JSE.

89. Neither Trustco nor the Tribunal was aware at the time of this issue. That notwithstanding, I am advised that it is an issue which undoubtedly would have resulted in a different outcome before the Tribunal and one which would have resulted in the Tribunal granting the Reconsideration Application.

Authority of the JSE to make its decision

Jurisdictional requirement: non-compliance with IFRS

90. The JSE's Final Decision is, from the empowering provisions quoted above and paragraph 8.65 of the Listings Requirements in particular, based on Trustco's purported non-compliance with IFRS.



91. Despite its foundation in an alleged non-compliance with IFRS, neither the JSE nor the Tribunal (in its decision) could point to a single instance of non-compliance with IFRS by Trustco.
92. To the contrary, the JSE confirmed that its complaint was that Trustco's application of IFRS produced a result that does not reflect "the economic substance" of the transaction.¹ This stated complaint differs markedly from a non-compliance with IFRS. The Tribunal Decision does not even consider this.
93. Trustco's Augmented Grounds, the report by Dr Njikizana and its heads of argument all set out clearly that the essence of this matter was compliance with IFRS. This foundational premise was reiterated by Trustco's counsel in argument before the Tribunal, in particular at the outset of the hearing:²

"The heart of the dispute between the parties is really whether or not the financial statement of the applicant (Trustco) and those are the brief annual financial statement for the period ending March 2019 as well as the interim financial statement for the six month's period ending the 30th September 2019, comply with IFRS. And that we would submit is the heart of the dispute."

94. The essence of the matter was ignored in the Tribunal Decision.
95. The impact of the heart of this matter having been ignored is most apparent in the context of the Huso Loan. There the JSE asserts that IFRS3 ought to

¹ Page 74 of the Transcript

² Page 6, Line 6 to 12 of the Transcript. See also p 87 and 88



have been applied in circumstances where it was expressly excluded. The JSE then criticised Trustco for applying an accounting policy which it was permitted to apply under IFRS.

96. A further instance of the impact of the Tribunal's approach is by accepting the JSE's contention that the accounting treatment ought to reflect 'substance over form' as prescribed by the Conceptual Framework. This, so the JSE contended and the Tribunal accepted, ought to apply instead of the precise provision of IFRS which Trustco applied.

97. Realising that there has been no non-compliance with IFRS, the JSE's shifted its complaint. This shift is summed up in paragraphs 4 and 5 of its reasons where it states that:

4 ... *What Trustco ignores is that IFRS requires financial statement to be a faithful representation of the underlying economic substance and events.*

5 *'This means that financial statement must consider the economic substance and financial reality of the underlying transaction and not merely their legal form.'*³

98. The JSE contends that this broad approach ought to have been applied. It does so to suit what it subjectively considers a fair representation of the

³ Page 7, Line 11 to 22 of the Transcript



transactions. The JSE's subjective consideration has no bearing to the objective requirements of any relevant or applicable accounting standard.

99. At best for the JSE, this amounts to a difference in opinion between the JSE and Trustco as to the proper application of IFRS. It does not amount to a non-compliance with any IFRS in respect of the Huso Loan Issue, the Related Party Issue and the Property Issue. The fact that the JSE could not, has not and cannot point to a single instance of non-compliance is telling.
100. As the JSE could not establish non-compliance with IFRS, it has not overcome a jurisdictional element of the Listing Requirements. Its failure to do so renders the JSE's Final Decision one that was taken without any authorisation for it under the relevant empowering provisions. In accepting the JSE's version unabated, the Tribunal has seemingly failed to determine the nub of the matter:

Whether or not there was a breach of IFRS or any other accounting standard.

Sanction

101. In addition to the JSE's Decision lacking foundation in the Listing Requirements, the sanction ordered by it is similarly improper and without substantive foundation.
102. Paragraph 8.65(b) allows for the JSE to instruct an issuer "to publish or re-issue any information the JSE deems appropriate". There is no mention of a restatement of an entity's financial statements.

103. The JSE had no authority to impose the sanction that it did



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Tribunal's lack of expertise and failure to take into account relevant considerations

104. Even from the simplified exposition of the Huso Loan Issue, the Related Party Loan Issue and the Property Reclassification Issues set out above, it is evident that the issues underpinning the JSE's Final Decision are extremely complex and require in depth financial accounting expertise to determine.

105. The Tribunal did not have the benefit of any expert auditors and/or accountants and/or IFRS experts on its panel when it heard the Reconsideration Application. Instead, the panel consisted only of individuals with legal background and expertise. The Tribunal itself recognised its lack of relevant and necessary expertise in that the chairman, Justice Harms stated that:

105.1. *"We have never had such a case"*⁴; and

105.2. *"My colleagues may have auditing background, I don't have an auditing background as you know. So I tried over the weekend to read through all these standards, and to – and I gave up, because I just didn't know where I was going"*⁵;

106. Section 220(2) of the FSR Act mandates that the Tribunal comprise at least two persons with experience in "financial products, financial services,

⁴ Page 2, Line 17 to 18 of the Transcript

⁵ Page 5, Line 11 to 15 of the Transcript

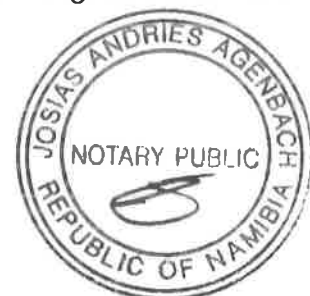


financial instruments, market infrastructures or the financial system". It is apparent that the Tribunal, comprised of three lawyers, does not meet the qualifications or experience requirement mandated by s 220.

107. I respectfully submit that the record will demonstrate that none of the members of the Tribunal had the requisite expertise as required by the FSR Act. I also respectfully submit that the record will show that no prior enquiry was held before the Tribunal was constituted. I believe that the record, or perhaps rather the lack of documents which will be made available, will show that no prior enquiry with reference to the nature of the issues involved took place before the Tribunal was appointed for this particular hearing. I say so based on the statements made by a member of the Tribunal during the hearing that they have received the record shortly before the hearing, and obviously after they were already appointed

108. As will be demonstrated, the lack of expertise of the Tribunal and inability to deal with the highly technical nature of the issues in question resulted in not only an arbitrary and unreasonable outcome, but also a hearing which was procedurally unfair.

109. In consequence of the panel members' lack of experience in matters involving complicated accounting standards, the Tribunal could not, and did not, engage with the merits of the dispute in this case. In order to constitute a procedurally fair hearing, it is a basic requirement that the decision maker engage with and interrogate the relevant accounting standard and the parties' contentions in respect thereof.



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110. By contrast, the Tribunal's Decision ignored the bulk of the relevant contentions and conducted only a superficial analysis of the remainder.

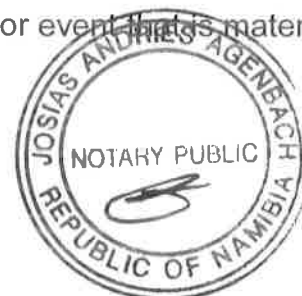
111. For example, in considering Trustco's contention that the 'substance over form' requirement is "baked" into IFRS:

111.1. paragraphs 24 to 27 of the Tribunal's Decision criticised Mr Njikizana's reference and reliance on paragraph 15 of IAS1. It is worth quoting paragraph 26 and 27 of the Tribunal's Decision which forms the basis of its conclusion on this aspect:

"26 The underlined sentence does not state what he says. The presumption only arises when the necessary disclosure has been made and then it is only a presumption of fair presentation. Presumptions remain presumptions and the decision whether additional disclosure was required is not something that cannot be re-assessed by the JSE.

27 In addition, the opinion did not take account of the Listing Requirement 8.62 referred to earlier. It regards fair representation as a requirement separate and additional to IFRS rules."

112. The Tribunal's lack of accounting knowledge and expertise is clear from the evident conflation. The Tribunal failed to appreciate the difference between the accounting treatment of a transaction and a disclosure. This is an elementary mistake: disclosures are matters of fact detailed in the notes to the annual financial statements for purposes of providing the reader with a clearer understanding of a particular transaction or event that is material to the company's financial position.



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113. The matter is entirely unconcerned with an insufficient disclosure having been made by Trustco, the issue is whether or not Trustco's accounting treatment of the three issues in question complied with IFRS.
114. The Tribunal also misapplied and misinterpreted paragraph 8.62 of the Listing Requirements. In paragraph 27 of the Tribunal Decision, the requirement that the annual financial statements "must fairly present the financial position, changes in equity, results of operations and cash flows of the group" was elevated above the express requirements of IFRS.
115. This approach ignores that the fundamental purpose of IFRS is to achieve a fair presentation of financials (which position the JSE coincidentally agrees with and is therefore not in dispute)⁶. Moreover, as highlighted in the ground of review above, the Listing Requirements do not empower the JSE to impose an accounting treatment that is not prescribed by IFRS.
116. If the JSE was permitted to impose its own standards and requirements – above and in addition to those prescribed by IFRS – it would leave the market at large in darkness. Entities and market participants would be unable to predict how the JSE would subjectively view a company's accounting treatment of similar transactions; a board would be unable to prepare financials. The uncertainty would lead to arbitrariness, which is precisely what has occurred in this case. In order to ensure against such an impermissible occurrence, listed entities are bound by the enforceable

⁶ Page 69 Line 15 and 16 of the Transcript.



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provisions of IFRS alone. That is the standard which is internationally known, accepted and applied in the accounting profession and to which the JSE must hold them.

117. The Tribunal's misunderstanding was then carried into paragraph 30 of the Tribunal Decision and tainted the conclusion that it reached.

118. As such, the apparent dismissal of Mr Njikazana's opinion and acceptance of that of Prof Maroun, of whom the Trustco board of directors did not even know when it made its judgment decision nor did the JSE sought to place his views before Trustco at the time that the JSE made its decision, is premised on a complete misunderstanding and misapplication of the relevant and applicable accounting principles, as well as the application of IFRS. Again, this renders the decision unreasonable and arbitrary.

119. In respect of the Huso Loan issue:

119.1. there is simply no application of IFRS to the relevant facts of the matter, no interrogation of Trustco's accounting treatment or why such a treatment is purportedly incorrect and non-compliant with IFRS and no suggestion which other relevant IFRS Trustco should have applied.

119.2. despite quoting IAS8.10, 8.11 and 8.12, the Tribunal does not deal on any appropriate level with the fundamental disputes between the parties in relation to the application of the relevant IFRS. Mention is merely made, in passing, of IAS 8 and IFRS3 without regard to Trustco's submissions and explanations including those of its



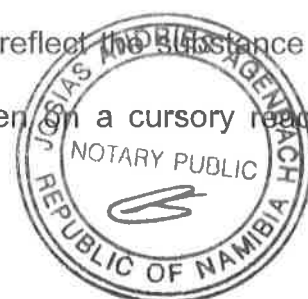
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expert. The Tribunal has not engaged with these fundamental disputes and specifically the issue as to the importance of the timing of the loan waiver in relation to the finalisation of the financial statements and what information was before the Trustco board of directors at the time of approval of Group Financial Statements. From commencement of the various transaction until finalisation of the transactions, a period of approximately three years passed.

120. This particular matter is a complex one in circumstances where there is no applicable IFRS – it would have been prudent for the Tribunal to therefore deal in detail with the information before it. It did not do so at all.

121. In paragraph 60, the Tribunal infers that Trustco's position seeks to avoid the Conceptual Framework. The Tribunal simply ignores and fails to deal with all submissions and arguments made by Trustco on this issue and comes to this conclusion without any factual basis. Trustco's position, and indeed its case, was not to avoid the Conceptual Framework – it was that the JSE impermissibly seeks to elevate the provisions of the Conceptual Framework (which is a document used to assist in the development of accounting standards) over express provisions of IFRS. This mirrors the JSE's approach of imposing subjective requirements in order to suit what it considered to be the appropriate result.

122. In paragraph 62 the Tribunal states that "Trustco did not allege, nor did it argue (as mentioned) that the transaction was, as a matter of substance not a composite transaction or that the financials reflected the substance of the transaction". This is completely incorrect. Even on a cursory reading of



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Trustco's Augmented Grounds, the expert report of Mr Njikizana and the heads of argument Trustco, in fact, contended for the contrary position.

123. Relying on a purported concession that Trustco never made, the Tribunal concludes (in paragraph 63) that “the loan reclassification, waiver and acquisition transaction should not have been treated as separate and distinct transactions in order to reflect their economic substance and not merely legal form.”

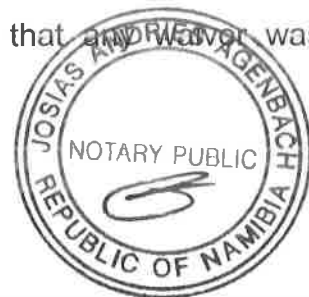
124. The conclusion is derived from an incorrect premise. Had Trustco's submissions been properly interrogated, this would not have been the case.

125. In respect of the Related Party Loan Issue, the Tribunal states:

125.1. (in paragraph 75 of the Tribunal Decision) that: “*The Findings of the JSE that the result of the waiver was pre-determined by the terms of the loan and that the loan was in substance an equity contribution rather than a debt/liability are not it dispute*”;

125.2. (in paragraph 77 of the Tribunal Decision) that: “*Trustco does not dispute that the waiver was pre-determined and the application in respect of the second loan is consequently dismissed*”.

126. This is an entirely inaccurate reflection of the position contended for by Trustco or any purported admission which the Tribunal has ostensibly elevated it to. It is also not based on any pertinent allegation made against the Trustco Board members in statements or documents filed before the Tribunal. In fact, Trustco stridently disputes that any waiver was pre-



determined at all. In short, Trustco's Board was condemned in respect of a serious allegation which was never directly put to them under oath, and in respect of which they did not receive the basic courtesy of a hearing.

127. The principle of waiver/deferral is a standard clause in agreements that Dr van Rooyen and his associates enters with Trustco as majority shareholders. As for example in Dr van Rooyen's investment vehicle Next who concluded a management agreement with Trustco (effective since 1 April 2011) contains a similar clause that determines that Next Investments may in its sole discretion, elect not to receive the management fee, or elect to receive partial payment of its management fee or elect to defer payment of a portion of its management fee or repay any management fee already received. Next Investments may elect to exercise any such receipt, deferral, or repayment at its sole discretion. This clause also finds its way, and has been captured in the new Next Investments Management Agreement, currently in the circular process with the JSE, for which shareholder irrevocable undertakings has been received to date.

128. Next Investments' management agreement with Trustco contains a clause that permits Next, in its sole discretion to elect:

128.1. not to receive the management fee; or

128.2. to receive partial payment of its management fee; or

128.3. to defer payment of a portion of its management fee; or

128.4. repay any management fee already received



129. This raises serious concerns about whether the Tribunal in fact applied its mind to the parties' respective positions and submissions. It evidences that the Tribunal Decision is not rationally connected to the information that was before the Tribunal which, in and of itself, is an appropriate ground of review.
130. It is unfortunate that the Tribunal apparently ignored and failed to deal with any of Trustco and its expert's submissions in this regard. Instead, it patently ignored the relevant considerations. Its entire conclusion and ultimate finding was therefore based on an issue with which Trustco was not pertinently confronted with, and which is in any event a wholly incorrect understanding of Trustco's position.
131. In respect of the Property Reclassification issue, paragraph 87 of the Tribunal Decision states that "[a]lthough the examples given are, as submitted, nothing more than examples they are all instance of a change in use. There is no evidence of a change in use in relation to the property. One would have at least expected something approximating items (c) and (d). The properties are undeveloped and vacant and continue to be vacant and undeveloped."
132. In coming to this conclusion, the Tribunal failed to deal with each of the examples provided by Trustco. Each of them demonstrates a change in intention.⁷ It simply refers to the examples listed in IAS40.57 and, although admitting that they are examples, apparently requires that these examples

⁷ See paragraph 44.1 to 44.3 of TrustCo's heads of argument and Page 20 of the Transcript.



be present before accepting that a change in use occurred. What is more, is that not a single person on behalf of the JSE disputed Trustco's factual version. The majority of Trustco's Board members live, breath and operate in the Namibian economy. They, and only they, had the experience to rely on, when this decision was taken. Truth is, the property market in Namibia took a considerable blow by the time the Board exercised their business judgment on this issue. No one could or did dispute that.

133. The Tribunal therefore again unfortunately misunderstood IFRS and failed to take into account relevant considerations which are present in this case.

134. The Tribunal's lack of expertise resulted in it being unable to grapple with the technical nature of the matter at hand on any level. This has resulted in the Tribunal, apparently ignoring the vast majority of Trustco's submissions, incorrectly summarising Trustco's position, making an arbitrary decision and failing to take into account relevant considerations while taking account of irrelevant considerations pertaining to the merits of the matter.

Van Rooyen's Evidence

135. The Tribunal Decision criticises Trustco and Dr Van Rooyen for not explaining the rationale for the waiver of the loans. If regard is had to paragraph 93 of the Tribunal Decision, this also appears to form the basis of the costs order against Trustco.



136. What is disconcerting is that it can be seen from the transcript of the hearing⁸ that the Tribunal briefly considered whether it would be appropriate to allow for Dr Van Rooyen to give oral evidence and explain the rationale.

137. This oral evidence was tendered as Dr Van Rooyen was prepared to give a full explanation, however this tender was refused by the Tribunal.⁹ The Tribunal therefore refused the opportunity to be presented with Dr Van Rooyen's evidence, being a relevant consideration which should have been taken into account if it was going to attribute criticism to Trustco for a lack of such evidence.

138. The Tribunal cannot have it both ways. It cannot refuse to hear the evidence and then criticise Trustco and Dr van Rooyen for not adducing it. Given that the Decision, at least in part, is premised on the failure to explain the rationale behind the loans and their waivers, the Tribunal ought to have allowed itself the opportunity to hear Dr van Rooyen's oral evidence to explain the rationale behind the loan waivers to see the full picture.

139. The Tribunal's manner in dealing with this was unreasonable and leads to a situation where Trustco's right to a just and fair administrative process was undermined.

Failure to consider the consequences of the decision

⁸ Page 32 of the Transcript

⁹ Page 34 and 35 of the Transcript.



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140. In what Trustco considers to be an unreasonable decision, the Tribunal Decision fails to account at all for the unreasonable and highly prejudicial consequences it will cause if not set aside – particularly as it relates to:

140.1. the impracticality (if not impossibility) and prejudicial effect of trying to unwind the underlying transactions which comprise complex transactions already approved by shareholders;

140.2. Trustco's auditors potentially having to qualify the audited financial statements due to these now having to reflect a position that they do not agree with (assuming the auditors even can qualify their statements in such circumstances) which would result in confusion amongst the public, financial analysts, potential investors, financiers, creditors and the company's shareholders; and

140.3. the impact and effect of this judgment on the auditing profession. If the Tribunal Decision is allowed to stand, the JSE will be empowered, without any element of fraud or deception, to force a board of directors and auditors to sign-off on financial statements that neither the board of directors, nor its auditors agree with without assuming any responsibility for such action. As such, the JSE would be able to regulate the auditing profession through the FRIP.

Tribunal Process and due deference

141. There was some confusion during the hearing and in the Tribunal Decision regarding the Reconsideration Application's form and handling



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142. For example, paragraph 12 of the Tribunal Decision states that reconsiderations are “not appeals” but paragraph 13 states that the Tribunal exercises “an appeal jurisdiction”. On page 91 of the Transcript of the hearing the chairman states that “[w]e are sitting as a panel of first instance. Whether they were misinformed is hardly neither here nor there. We have to look at the facts under the Act as afresh and not sitting on appeal.”

143. In addition, the Chairman of the panel mentioned that the Supreme Court of Appeal Rules must be followed.¹⁰ The Tribunal Rules simply do not mention anything along these lines and there thus appears to be complete confusion on the part of the Tribunal which rules apply to its procedures as well as what authority and status it has.

144. These contradictions and the confusion points to the fact that in reaching the Tribunal Decision, the Tribunal conducted a hearing where it was unclear as to the nature of its own process. This vagueness as to the process renders the hearing procedurally unfair.

145. The Tribunal then goes on to rely on the dictum in **Staufen Investments (Pty) Ltd v The Minister of Public Works, Eskom Holdings OSC Ltd & Registrar of Deeds, Cape Town**. It placed particular reliance on the following passage:

¹⁰ Page 83 of the Transcript



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“Although not immune from judicial review it was a decision to which the principle of ‘deference’ which requires that the decision should be ‘shown respect by the courts’, applied.”

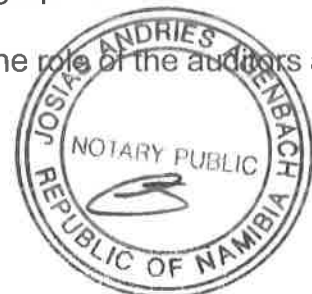
146. The Tribunal applied the due deference principle to the decisions made by the JSE pursuant to the FRIP report (the FRIP being a panel that receives its instructions from the JSE). However, the very same deference principle was not even considered in respect of the decisions taken by the board of directors of Trustco, or its many advisors, in applying the accounting treatment to each of the transactions in question.

147. This double standard application of the due deference rule is untenable. A correct application of the due deference principle requires that it be applied in respect of Trustco and its board of directors. In this regard:

147.1. the board of directors is the body legally responsible for the preparation, approval and signing of the annual financial statements. It bears ultimate responsibility and importantly carry liability for compliance of the financial statements with the provisions of the Companies Act and IFRS;

147.2. in fulfilling this statutory function, reliance is placed by the board of directors, in terms of the well-known business judgment rule, on the input and guidance by the company’s management and its external advisors such as auditors and IFRS advisors;

147.3. in this regard, and with reference to paragraph 21 of the Tribunal’s Decision, the Tribunal fails to appreciate the role of the auditors and



the independent JSE accredited expert IFRS advisors. As part of the business judgment rule, Trustco and its board can place reliance on the opinion of its expert advisors and the decision taken upon such advice should be respected;

147.4. the Tribunal's generalised and veiled criticism of the auditors is both without foundation and non-sensical. The auditors will clearly review transactions of this magnitude and materiality for purposes of ensuring that the annual financial statements accord with IFRS.

148. Moreover, in the present circumstances, in respect of:

148.1. the Huso Loan issue – IFRS affords the board of directors the discretion to formulate and apply an appropriate policy as to the accounting treatment of the transaction as there is no IFRS principle dealing with the matter. This is a discretion that the JSE cannot interfere with unless it leads to non-compliance with IFRS, which the JSE was unable to establish and that the Tribunal also could not establish;

148.2. the Related Party Loan issue – IFRS was correctly applied in every single aspect and in circumstances where it could not be expected to know that Van Rooyen will waive the loan;

148.3. the Property Reclassification issue – the accounting treatment turns on a change of use informed by the directions, intention and



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decisions of the board of directors.¹¹ Interference by the JSE, in the absence of any contrary facts to those presented by Trustco, is an impermissible interference in the business operations of the Company.

149. In addition to taking responsibility for the annual financial statements through its reliance on the business judgment rule, Trustco's board retained a discretion as to how it deals with the particular issues in dispute. This was ignored by the JSE and by the Tribunal.

150. Therefore, to apply the due deference principle in favour of the JSE is clearly an error and not legally sound or authorised as the JSE is not the authority tasked with taking responsibility for the annual financial statements. To do so:

150.1. undermines the authority of the board of directors;

150.2. undermines the directors discretion;

150.3. ignores the business judgment rule; and

150.4. ignores the expert advice taken by the board from the independent JSE accredited IFRS advisors and confirmed by the independent auditors by expressing an unqualified audit opinion; and

¹¹ See Page 22 of the Transcript



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150.5. will result in the board of directors being placed at the mercy of the JSE when it comes to financial statements with there being no liability attached to the JSE for its decisions.

151. I respectfully submit that the Tribunal decision must be set aside as an irregularity occurred. That is because the Tribunal was clearly not aware and therefore, also did not apply the business judgment rule. The net prejudicial effect on Trustco is then demonstrated as follows:

151.1. The business judgment rule exists and Trustco's Board of Director's is owed due deference by the JSE, in circumstances where it is not alleged that Trustco's Board acted fraudulently, recklessly or with *mala fides*.

151.2. The JSE does not refer to the business judgment rule in any of its decisions or ruling.

151.3. As a result, the JSE does not show Trustco the required deference in terms of the business judgment rule.

151.4. Then, the Tribunal shows due deference to the JSE. This is an irregularity in itself as the Tribunal must be a body with specialised financial knowledge, to such an extent that it should be able to realise that the JSE did not apply the business judgment rule in deference to Trustco.

151.5. So, and with respect, Trustco suffers "double jeopardy", so to speak. Instead of being accorded deference by the JSE in terms of



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the business judgment rule, the JSE does not do so. Then the Tribunal - also not referring to or applying the business judgment rule - gives deference to the JSE. The end result is that the business judgment rule plays no part in any enquiry whatsoever. Trustco's Board of Directors is treated - while no allegation of fraud, recklessness or mala fides is made against it – as if they do not exist, and never made a decision. The nett effect is that the entire existence and purpose of a board of directors of a company, as known and respected in our law since time immemorial, becomes meaningless.

RELIEF SOUGHT

152. For these reasons, the Tribunal Decision stands to be reviewed and set aside as it adversely effects Trustco's right to administrative action that is just, reasonable and fair, in that in terms of:

152.1. section 6(2)(c) of PAJA, the Tribunal Decision was procedurally unfair; and/or

152.2. section 6(2)(d) of PAJA the Tribunal Decision was materially influenced by an error of law; and/or

152.3. section 6(2)(e)(i) the Tribunal Decision was taken for a reason not authorised by the empowering provision; and/or



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152.4. section 6(2)(e)(ii) of PAJA, the Tribunal Decision was taken because irrelevant considerations were taken into account and relevant considerations were not taken into account; and/or

152.5. section 6(2)(e)(vi) of PAJA, the Tribunal Decision was taken arbitrarily or capriciously; and/or

152.6. section 6(2)(f)(i) of PAJA, as the Tribunal Decision is not authorised by the empowering provision; and/or

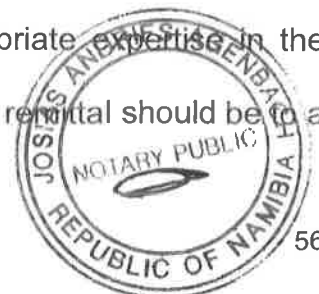
152.7. section 6(2)(f)(ii) of PAJA, the Tribunal Decision is not rationally connected to the information before the Tribunal; and/or

152.8. section 6(2)(h) of PAJA, the Tribunal Decision is so unreasonable that no reasonable person could have so exercised the power or performed the function; and/or

152.9. section 6(2)(i) of PAJA, the Tribunal Decision is otherwise unconstitutional or unlawful.

153. Insofar as it is found that the JSE lacked the requisite authority to make the JSE's Final Decision, an appropriate remedy would be for this court to replace the Tribunal's Decision with a decision that the Reconsideration Application is upheld with costs including the costs of two counsel.

154. Should it be found that the Tribunal's Decision is reviewable on any other ground, Trustco would seek that the matter be remitted to the Tribunal for hearing afresh. However, given the lack of appropriate expertise in the composition of the panel, Trustco contends that any remittal should be to a



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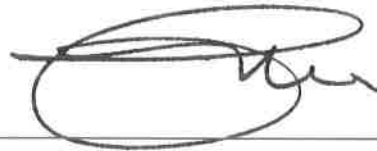
newly constituted panel comprised of persons appropriately qualified and with sufficient relevant experience in matters of accounting and financial reporting according under IFRS to grapple with the complex issues relating to accounting and financial reporting that arise in this matter.

WHEREFORE the applicant prays for an order in terms of the notice of motion to which this affidavit is annexed.



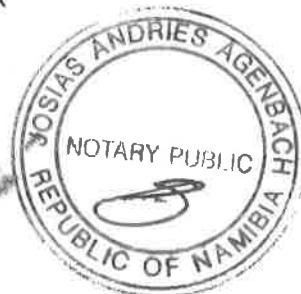
DEPONENT

SIGNED and **SWORN** to before me at Windhoek on this the 31st day of January 2022, by the deponent who has acknowledged that he knows and understands the contents of this affidavit; that he has no objection to taking the prescribed oath and that he considers the prescribed oath to be binding on his conscience.



JOOS AGENBACH
Attorney and Notary of the High Court
of Namibia
37 Schanzen Road, Windhoek
P.O. Box 86435, Eros, 10009, Windhoek
Republic of Namibia

COMMISSIONER OF OATHS



THE FINANCIAL SERVICES

TRIBUNAL

CASE NO.: JSE1/2021

TRUSTCO GROUP HOLDINGS LIMITED

APPLICANT

and

JSE LIMITED

RESPONDENT

Tribunal: LTC Harms (chair), Adv Soraya Hassim SC and Attorney Zama Nkubungu-Shangisa

For the applicant: Advv KW Lüderitz SC and MJ Cooke instructed by Norton Rose Fulbright
South Africa Inc

For the respondent: Advv Ian Green SC and Jason Mitchell instructed by Webber Wentzel

Virtual hearing: 2 November 2021

Date of decision: 22 November 2021

Summary: JSE listing requirements – financial statements – reconsideration of non-compliance with IFRS – form and substance – change of use of land



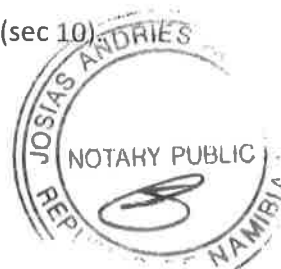
DECISION

INTRODUCTION

- 1 The applicant, Trustco Group Holdings Ltd, is a Namibian company which is registered as an external company and is listed as an issuer on a local stock exchange, the JSE Ltd ('the JSE'), the respondent.
- 2 TrustCo applies for the reconsideration of a decision, which is in the form of a directive, by the JSE. The application is in terms of sec 230 of the Financial Sector Regulation Act 7 of 2019 (the 'FSR Act').
- 3 The JSE found that the group annual financial statements for the year ending 31 March 2019 and the interim results for the six months ending 30 September 2019 did not, in material respects, comply with the International Financial Reporting Standards ('IFRS'), and it instructed TrustCo to restate the statements and results by correcting them. TrustCo is aggrieved by the decision, insisting that its accounting complied with the IFRS.

THE LISTING REQUIREMENTS

- 4 The JSE is a 'licensed exchange' as defined in the Financial Markets Act 19 of 2012. It must, inter alia, issue exchange rules; supervise compliance by its authorised users with the exchange rules and exchange directives; and enforce the exchange rules, listing requirements and exchange directives (sec 10).



5 Section 3 of its Listing Requirements imposes continuing obligations, including those relating to their financial statements, on listed companies.

6 The annual financial statements in terms of para 8.62 (inter alia):

- *must be prepared in accordance with (a) IFRS and the SAICA [the SA Institute of Chartered Accountants] Financial Reporting Guides as issued by the Accounting Practices Committee and (b) Financial Pronouncements as issued by Financial Reporting Standards Council;*
- *must be audited;*
- *must be in consolidated form if the listed company has subsidiaries; and*
- *must fairly present the financial position, changes in equity, results of operations and cash flows of the group.*

7 Paragraphs 8.66 and 8.67 deal with FRIP (the Financial Reporting Investigations Panel):

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.



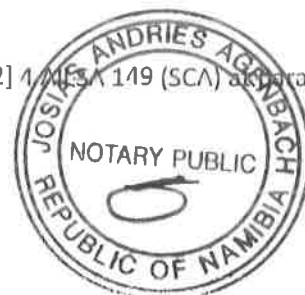
In addition, the JSE will refer any such non-compliance to SAICA, the IRBA or any other relevant professional body.

- 8 This should be read in with the charter of the FRIP Panel. The Panel consists of the Chairman, and fifteen members representing preparers, auditors, academics and users of listed entities' financial statements.
- 9 The function of the Panel is to advise the Issuer Regulation Division of the JSE in relation to alleged cases of non-compliance with the financial reporting requirements which have been referred to the Panel by the Division. The Division considers the advice of the Panel and takes such action that it deems appropriate.
- 10 The JSE, before issuing the instruction under consideration, complied with the procedure prescribed.

THE CONTEXT OF THE RECONSIDERATION APPLICATION

- 11 The JSE is a 'market infrastructure' as defined in the FSR Act. It is a 'decision-maker' and its decisions fall under the definition of 'decision' in sec 281(c). They are subject to reconsideration by this Tribunal under sec 230(1). Apart from dismissing the application or setting the order aside and refer the matter back to the JSE, the Tribunal may substitute the decision with its own decision (sec 234(1)(b)).
- 12 There was some confusion during argument about the nature of reconsideration proceedings. They are not motion proceedings subject to Uniform rule 6 and the notorious *Plascon-Evans* rule; they are not appeals; and they are concerned with result more than reasons.¹

¹ Cf *Tecmed Africa (Pty) Ltd v Minister of Health and another* [2012] 4 All SA 149 (SCA) at para 17.



13 We said this before and quote it again for convenience:²

Although we have before stated our position clearly, it appears that we have to do it again. Our position is, as it was with the then Appeal Board of the Financial Services Board, when the judgment in *Nichol and Another v Registrar of Pension Funds and Others* [2006] 1 All SA 589 (SCA), 2008 (1) SA 383 (SCA) was delivered. The Court pointed out that the Appeal Board was a specialist and independent tribunal as contemplated in sec 34 of the Constitution:

It has very wide powers on appeal, including the power to confirm, set aside or vary the decision of the Registrar against which the appeal is brought; to refer the matter back for consideration or reconsideration by the Registrar in accordance with such directions as the Board may lay down; or to order that its own decisions be given effect to. In addition, it is empowered under section 26(2A) to grant interim relief by suspending the operation or execution of the decision appealed against and, under section 26(14), it can make an appropriate order as to costs. The Appeal Board therefore conducts an appeal in the fullest sense – it is not restricted at all by the Registrar’s decision and has the power to conduct a complete rehearing, reconsideration and fresh determination of the entire matter that was before the Registrar, with or without new evidence or information.

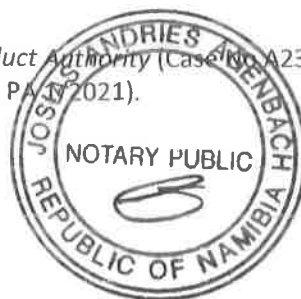
In short, this Tribunal is not much different, and it exercises an appeal jurisdiction of the first category referred to in *Tikly v Johannes* NO 1963 (2) SA 588 (T) 590.

14 We also explained in another context (omitting inapplicable considerations):³

Although the Tribunal is an ‘expert’ tribunal, it obviously is less qualified than the PA [read: the JSE] to make multi-faceted and polycentric decisions . . . The following

² *MET Collective Investments (RF) (Pty) Ltd v Financial Sector Conduct Authority* (Case No A23/2019).

³ *Niemiec and others v Constantia Insurance Co Ltd and Ano* (Case PA 1/2021).



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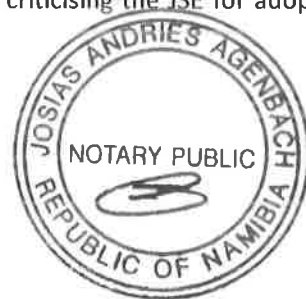
dictum in *Staufen Investments (Pty) Ltd v The Minister of Public Works, Eskom Holdings SOC Ltd & Registrar of Deeds, Cape Town* (200/2019) [2020] ZASCA 18; [2020] 2 All SA 738 (SCA); 2020 (4) SA 78 (SCA) . . . appears to be apposite:

‘it is important to note that the first respondent’s decision was a multi-faceted and polycentric decision requiring ‘. . . an equilibrium to be struck between a range of competing interests and considerations and which is to be taken by a person or institution with specific expertise in that area . . .’ An evaluation as to whether an expropriation was expedient would necessarily lie within the domain of the expropriating authority. Although not immune from judicial review it was a decision to which the principle of ‘deference’, which required that the decision should be ‘shown respect by the courts’, applied.’

THE SUBSTANCE VERSUS FORM ISSUE

- 15 Mr Lüderitz, for TrustCo, submitted that the essence of the loan issues lies in the JSE’s insistence on substance over form.
- 16 We shall assume that, by defining the case in these terms, counsel did not concede by implication that if substance trumps form, the decision of the JSE in respect of the loan issues was correct.
- 17 Counsel and his expert take issue with the following statement by the JSE in its further reasons:

Trustco's approach in the application is to focus on the form of the relevant transactions and decisions that underly the matter. It carefully dissects each transaction into its component steps, and then justifies its accounting treatment with reference to these individual components, while criticising the JSE for adopting the broader approach that it did.



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What Trustco ignores is that IFRS requires financial statements to be a faithful representation of the underlying economic substance 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.

- 18 The substance/form issue was formulated in both the FRIP report and the reasons for decision of the JSE. TrustCo dealt with the matter generally, alleging that

it is apparent that the FRIP / JSE took an overarching theoretical and not case specific view to support a type of substance over form argument without taking into account the actual facts which supported Trustco and its JSE accredited IFRS advisors' decision in relation to the specific accounting treatment of the Van Rooyen Loans.

- 19 It was raised in detail in its augmented grounds by means of an expert report of Mr Tapiwa Njikizana, who is a director of a firm accredited by the JSE to act as IFRS advisor.

- 20 Since Mr Njikizana acted as advisor of TrustCo in relation to the accounting the entries that form the basis of the JSE's decision under attack, he cannot be said to be entirely objective. The main problem is that his report contains a mix of allegation of fact, interpretation and adjudication and therefore transgresses the limits of 'expert evidence'.

- 21 Counsel submitted that the erstwhile auditors (according to FRIP, there were two firms) of TrustCo, who had signed off the financials, shared his view. The problem with the submission is that one does not know what they considered because they did not, in these proceedings, seek to justify their audit. In any event, one of the purposes of a FRIP report is to enable the JSE to decide whether to report an auditor to the professional body.



22 Against Mr Njikizana's opinion we have the opinion of the JSE, the opinion of Professor Maroun, and the opinion of the FRIP panel (constituted as explained above).

23 Numbers do not count, reasons do.

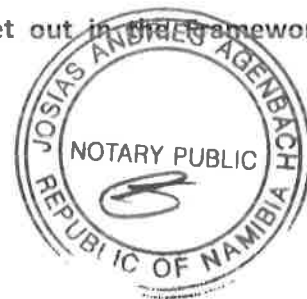
24 If Mr Njikizana's conclusion were that form trumps substance, accounting would be the only discipline we know of with that approach. Not even Picasso would have agreed. Fortunately, that is not what he says. The essence of his argument is that substance is 'baked into' the IFRS standards and once one complies with the standards, the form determines substance:

There is therefore a built-in presumption within IFRS that by applying the requirements of the standards, an entity will achieve a fair representation, meaning that the financial statements will faithfully represent the financial effects of transactions. Put differently, where an entity has referred to no information other than the requirements set out in the IFRS applicable to it, it shall be able to present financial statements that fairly represent its affairs (para 15).

25 Mr Njikizana relies chiefly in support of this conclusion on IAS1, which he says is an important paragraph because it is in bold in the original. It reads (with his emphasis here indicated by means of underlining):

"Fair presentation and compliance with IFRSs

15 Financial statements shall present fairly the financial position, financial performance and cash flows of an entity. Fair presentation requires the faithful representation of the effects of transactions, other events and conditions in accordance with the definitions and recognition criteria for assets, liabilities, income and expenses set out in the framework. The



application of IFRSs, with additional disclosure when necessary, is presumed to result in financial statements that achieve a fair presentation.”

- 26 The underlined sentence does not state what he says. The presumption only arises when the necessary disclosure has been made and then it is only a presumption of fair presentation. Presumptions remain presumptions, and the decision whether additional disclosure was required is not something that cannot be reassessed by the JSE.
- 27 In addition, the opinion did not take account of the Listing Requirement 8.62 referred to earlier. It regards fair presentation as a requirement separate and additional to IFRS rules.
- 28 The JSE, in emphasising substance over form, referred to the Conceptual Framework.⁴ Its status and purpose are as follows:

SP 1.1: The Conceptual Framework for Financial Reporting (Conceptual Framework) describes the objective of, and the concepts for, general purpose financial reporting. The purpose of the Conceptual Framework is to:

(a) . . .;

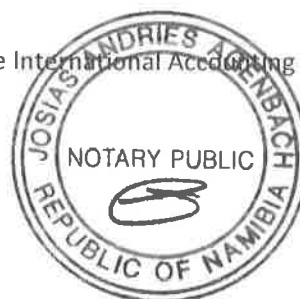
(b) . . .; and

(c) assist all parties to understand and interpret the Standards.

SP 1.2: The Conceptual Framework is not a Standard.

SP 1.3: Nothing in the Conceptual Framework overrides any Standard or any requirement in a Standard.

⁴ Conceptual Framework for Financial Reporting Issued by the International Accounting Standards Board.



- 29 It is unnecessary to refer to the detail of the Framework and it suffices to quote para 2.12:

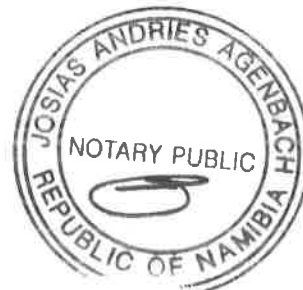
Financial reports represent economic phenomena in words and numbers. To be useful, financial information must not only represent relevant phenomena, but it must also faithfully represent the substance of the phenomena that it purports to represent. In many circumstances, the substance of an economic phenomenon and its legal form are the same. If they are not the same, providing information only about the legal form would not faithfully represent the economic phenomenon (see paragraphs 4.59–4.62).

- 30 TrustCo submitted that the JSE, in requiring that financials must be a faithful representation of the underlying economic substance and events, elevated the Framework to a standard and overrode the requirements of IFRS. (It is unclear whether TrustCo thereby suggests that financials may provide an inaccurate representation of the underlying substance and events by, for instance, ignoring simulation.)

- 31 We disagree and hold that the JSE used the Framework to understand and interpret the IFRS. As Prof Maroun explained:

The CFW [the Framework] is not itself an IFRS and does not override a requirement of the IFRS (CFW, SP1.2). It does, however, underpin the development of IFRS and inform how the standard-setter, which prepared IFRS, developed and interpreted the provisions of specific IFRSs (CFW, SP1.5). In addition, the use of the CFW to inform any analysis is supported by the following:

The CFW provides details on what is meant by "substance over form" which is referred to in certain of the individual IFRSs.



The CFW must be referred to when IAS 8 is used to develop an accounting policy, because a specific IFRS does not deal with a transaction (see IAS 8, para 10-11).

More generally, IAS 1 (which is part of IFRS) requires financial statements to achieve 'fair presentation' and provide a 'faithful representation of the effects of transactions, other events and conditions' (IAS 1, para 15).

- 32 We find the opinion of Prof Maroun expressed as a chartered accountant convincing and logical for us as lawyers. We quote in redacted form:

The accounting standards are used by accountants to prepare financial statements which faithfully represent the economic substance of a transaction, or group of transactions.

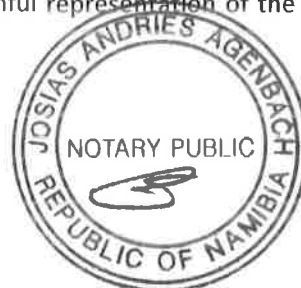
The economic substance, as assessed by an accountant or auditor, may differ from the legal conclusions reached by a lawyer when interpreting a transaction, or group of transactions.

Differentiating between economic substance and form would capture a transaction which is a simulation or sham, but it can also inform the accounting for entirely honest transactions.

For the purpose of applying IFRS, "substance over form" is an accounting concept which is specific to financial accounting. It is not a legal concept that is dictated by the assessment of whether a contract is a sham or not.

"Substance over form" 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, the Conceptual Framework for Financial Reporting ("CFW") which underpins the IFRS at paragraphs 2.6- 2.19; IAS 16, para 25, IFRS 9, para 3.3.2 & IFRS 16 para B2).

IFRS requires financial statements to be a faithful representation of the underlying economic phenomena and events.



- 33 Once one accepts that, the detail of the Framework, relied on by Prof Maroun (para 12), follows as a matter of logic, and one would have reached the same conclusion without reference to it relying on the underlying universal principle of transparency and the purpose of financial statements of companies. This is confirmed by sec 29(1) of the Companies Act 71 of 2008:

If a company provides any financial statements, including any annual financial statements, to any person for any reason, those statements must—

(a) satisfy the financial reporting standards as to form and content, if any such standards are prescribed;

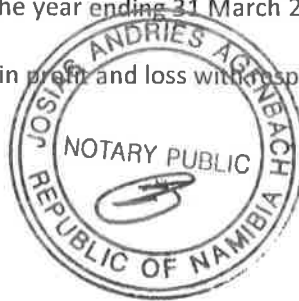
(b) present fairly the state of affairs and business of the company, and explain the transactions and financial position of the business of the company.

- 34 Mr Lüderitz, accordingly, mischaracterised the JSE's analysis and reasons by submitting that the JSE 'merely dislikes TrustCo's accounting treatment' of the transactions, and that the JSE without finding any material breach or irregularity 'merely asserts that it would have done it differently' or 'from a different perspective'. Whether the JSE was correct in its conclusion is the issue to which we now turn.

THE FIRST LOAN ISSUE

- 35 The decision of the JSE was as follows:

Trustco has not complied with the International Financial Reporting Standards in that: Trustco's annual group financial statements for the year ending 31 March 2019 ("the Group AFS") recognised a NAD545.6 million gain in profit and loss with respect to the



waiver by Dr Quinton van Rooyen of an initial loan by Dr van Rooyen to Huso Investments (Pty) Ltd ("Huso") as a financial liability.

36 The consequent direction was that –

Trustco must restate the Group AFS making the following correction: reversing the NAD545.6 million gain previously recognised in profit and loss and recognising this 'credit amount' to reduce the common control reserve initially recognised in equity as a result of the Huso acquisition.

37 The underlying transaction is the acquisition by TrustCo of another company, Huso Investment (Pty) Ltd. Dr Quinton van Rooyen was and is the majority shareholder of TrustCo and was the sole shareholder of Huso Investment.

38 The JSE accepted that the acquisition was a common control transaction, for which there is no current IFRS, which brings one to IAS 8 paragraph 10, which reads:

In the absence of an IFRS that specifically applies to a transaction, other event or condition, management shall use its judgement in developing and applying an accounting policy that results in information that is:

(a) relevant to the economic decision-making needs of users; and

(b) reliable, in that the financial statements:

(i) represent faithfully the financial position, financial performance and cash flows of the entity;

(ii) reflect the economic substance of transactions, other events and conditions, and not merely the legal form;

(iii) are neutral, ie free from bias;

(iv) are prudent; and

(v) are complete in all material respects.



39 Paragraph 11 states:

In making the judgement described in paragraph 10, management shall refer to, and consider the applicability of, the following sources in descending order:

(a) the requirements in IFRSs dealing with similar and related issues; and

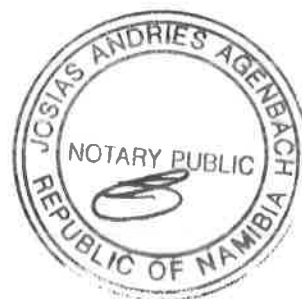
(b) the definitions, recognition criteria and measurement concepts for assets, liabilities, income and expenses in the Conceptual Framework for Financial Reporting (Conceptual Framework).

40 And para 12 provides:

In making the judgement described in paragraph 10, management may also consider the most recent pronouncements of other standard-setting bodies that use a similar conceptual framework to develop accounting standards, other accounting literature and accepted industry practices, to the extent that these do not conflict with the sources in paragraph 11.

41 It is consequently necessary to consider the facts to establish, inter alia, whether the financials (i) represent faithfully the financial position, financial performance and cash flows of the entity and (ii) reflect the economic substance of transactions, other events and conditions, and not merely the legal form. We therefore set out the facts substantially as recorded by TrustCo in its reconsideration application.

42 As mentioned, Dr van Rooyen is the majority shareholder of TrustCo and was also the sole shareholder of Huso Investments. To fund Huso Investments' operations, he advanced NAD 546 million to TrustCo Resources and Huso Investments and its



subsidiaries. The loans were structured so that their repayment was entirely within the discretion of the borrowers.⁵

43 Given the repayment terms, the loans were recorded as equity loans in the books of the borrowers.

44 During 2015, TrustCo agreed to acquire Huso Investments in terms of a sale of shares agreement. The structure of the acquisition was that TrustCo, through TrustCo Resources, would acquire the entire shareholding in Huso Investments from Dr van Rooyen. The effective date was 30 September 2015, and the agreement was subject to conditions precedent. The purchase consideration was 'payable' by an issue of TrustCo shares at NAD 4.69 per share, the major portion over nine years mainly determined with reference to agreed annual EBITDAASA targets in each year.

45 The Huso Loan was not affected by the sale and the initial accounting treatment of the Huso Loan, as an equity loan, was not altered.

46 The conditions precedent could not be fulfilled, and the parties concluded an addendum to the Share Purchase Agreement on 17 December 2016 (A506), which provided inter alia that the purchase consideration would be determined by new specific financial performance targets (i.e., EBITDAASA).

47 During March 2018 (A572), the terms of the Huso Loan were changed: repayment was no longer at the discretion of the borrowers but was due within the following twelve-month period.

⁵ References to Huso and the loan include the subsidiaries and the loans to them.



48 It was not suggested that Huso had the ability to pay in terms of the new
arrangement, and the change was not motivated.

49 As a result of this change, the accounting treatment of the Huso Loan changed in
the books of Huso Investments from equity to a liability.

50 The Huso Transaction became effective on 4 September 2018, and the shares of
Huso Investments were acquired by TrustCo Resources and, in turn, by TrustCo.

51 Dr van Rooyen elected to waive repayment of the Huso Loan of some NAD 546 on
30 September 2018 – 26 days after the effective date.

52 The waived loan amount affected the EBITDAASA and made the ‘purchase price’ by
means of shares payable. In other words, through the waiver of the loan, Dr van
Rooyen’s shareholding in TrustCo increased.

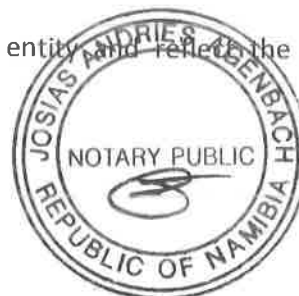
53 TrustCo, as ultimate holding company, had to account for the acquisition in the
group financials for the year ending 31 March 2018.

54 In so doing, TrustCo “merely” recorded the Huso Loan as it had been reflected in
the books of Huso Investments as at the acquisition date, namely as a financial
liability and not as an equity loan; and the effect of the waiver was reflected as a
gain in profit and loss.

55 It is this representation that gave rise to the JSE’s directive stated earlier.

56 TrustCo, in its reconsideration application (para 36), describes the transaction as
‘peculiar and novel’, which it is doubtlessly.

57 The JSE queried the financial rationality of the transaction, but TrustCo chose to
ignore the question, as did counsel during the hearing. This pertinently raises
doubts as to whether the financials represent faithfully the financial position,
financial performance and cash flows of the entity and reflect the economic



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substance of transactions, other events and conditions, and not merely the legal form.

58 The question, accordingly, is whether the loan reclassification, waiver and acquisition transaction (the application par 41 uses the singular) should be treated as separate and distinct transactions. TrustCo says yes, relying principally on the dates of the transactions.

59 The JSE's assessment, in brief, was the following:

Your assertion that the Trustco Group and QvR should be viewed independent of one another is contrary to the accounting policy that was adopted by the Group when it acquired control of the Huso Group - namely a business combination under common control. To claim that the Huso acquisition was a common control transaction takes the view that Trustco is part of a larger reporting entity under the control of QvR. That being the viewpoint, the waiver of a "financial liability" a mere 26 days after the acquisition date by the common shareholder should be viewed in its holistic sense. The additional information that came to light (in the form of the loan waiver) was relevant to the entire transaction and should have been considered as part of the "acquisition date" accounting.

This is further demonstrated by the fact that the "loan" (by QvR to Huso) was not classified as a financial liability at the time that the transaction was voted on by Trustco shareholders (in October 2015 and June 2017).

Furthermore, it is not clear why (in the absence of definitive guidance regarding business combinations under common control) an accounting policy based on UK GAAP was developed rather than an accounting policy based on IFRS 3. The Huso acquisition led to a debit of N\$3.9bn being recognised in equity at the acquisition date.



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Subsequently a gain/ credit of N\$546m was recognised in profit and loss when the 'financial liability' was waived 26 days later. It is not clear how the above accounting outcome leads to more relevant and reliable information being presented (IAS 8.10) than if an accounting policy aligned to IFRS 3 had been applied?

60 Reverting to IAS 8, quoted earlier, TrustCo had to develop an accounting policy based primarily on the requirements in IFRSs dealing with similar and related issues. Although IFRS 3 does not apply, it deals with 'similar and related issues.' The next step is the Framework, which (as discussed) the applicant seeks to avoid. The third stop (IAS 8.12) does not include repealed UK GAAP provisions.

61 To summarise (relying on Mr Green's argument),

- in Huso's financial statements, the loan was initially classified as equity.
- By the time Trustco acquired Huso, though, the first loan had been reclassified as a liability.
- This was not disclosed to the Trustco shareholders.
- The sale of shares agreement for the purchase of the Huso shares included an EBITDAASA-based earn-out mechanism in favour of Dr van Rooyen (or his investment vehicle, Next Investments (Pty) Ltd), in terms of which Trustco shares were to be allotted if profit thresholds were met.
- 26 days after Trustco acquired the Huso shares, Dr van Rooyen forgave the first Huso loan and released Huso from all its obligations in relation to the first loan.
- Consequent on the first loan being forgiven Trustco then recognised a substantial gain of N\$546 million in its 2019 annual financial statements.



- The conversion of the first loan from equity to liability and its subsequent forgiveness converted what was otherwise a loss-making resources segment to a profit, which also triggered the earn-out mechanism in Dr van Rooyen's favour.
- Despite several opportunities, neither Dr van Rooyen nor Trustco has offered a commercial rationale for forgiving the first loan.

62 TrustCo did not allege, nor did it argue (as mentioned), that the transaction was, as a matter of substance not a composite transaction or that the financials reflect the substance of the transaction.

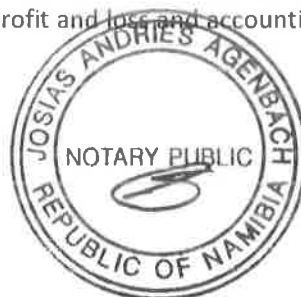
63 The answer to the question put is that, on balance, the loan reclassification, waiver and acquisition transaction(s) should not have been treated as separate and distinct transactions in order to reflect their economic substance and not merely their legal form. This means that the reconsideration application relating to the first loan is dismissed.

THE SECOND LOAN

64 Much of what was said about the first loan is applicable. The JSE determined that TrustCo has not complied with the International Financial Reporting Standards in that the interim results for the six months ended 30 September 2019 ("the Interim Results") recognised a NAD 1 billion gain in profit and loss with respect to the waiver by Dr van Rooyen of a subsequent loan of NAD1 billion by Dr van Rooyen to Trustco as a financial liability.

65 The JSE accordingly issued the instruction that

TrustCo must restate the Interim Results making the following corrections: Reversing the NAD1 billion gain previously recognised in profit and loss and accounting for this



as a transaction with an equity participant, i.e., recognising the credit directly in equity.

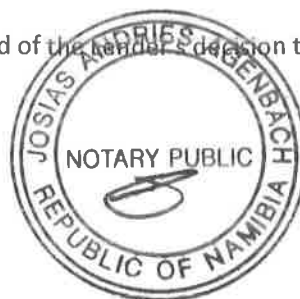
66 In summary, as Mr Green pointed out, Dr van Rooyen advanced a second loan of up to NAD1 billion to Trustco during 2017. After eight months he waived/forgave this loan too, resulting in a NAD1 billion gain which was recognised by TrustCo in its September 2019 interim results and September 2020 financial statements. Here too, neither Dr van Rooyen nor Trustco offered a commercial rationale for forgiving the second loan. As with the first loan, this waiver/forgiveness triggered the earn out provisions in terms of the Huso sale of shares agreement and Dr van Rooyen or his investment vehicle, benefited handsomely from the allocation of Trustco shares.

67 The loan agreement (A 576) of October 2018 is, on its face, what the title states. It provided for a loan, payable in cash, in (or up to – clause 3.3) an amount of NAD 1 billion before 30 June 2019. It was to be an unsecured sub-ordinated shareholder's loan to TrustCo. Its effective date was to be the date on which the first payment is received by the borrower. It bore interest on any outstanding amount at the prime interest rate compounded monthly. Interest was monthly payable as from the effective date. The due date for repayment was 31 March 2024.

68 The lender had a conversion option, namely, to receive repayment of the capital amount in tranches, the first of being for the the first quarter of 2020.

69 Clause 7.3 is significant and also 'peculiar and novel'. It reads:

During the term of the Loan, the Lender, in its sole discretion, have the right and may elect to postpone or write-off any portion of the Capital Amount. The Lender would give 30 (thirty) days' notice to the TrustCo board of the lender's decision to postpone



or write-off the Capital Amount or any portion thereof which was on lend to the Borrowers subsidiaries or operating segments. The Borrower would be obligated to align the Capital Amount accordingly to reflect the Lender's decision in the Borrower's subsidiaries or operating segments.

- 70 The object of the last sentence of the clause was that the resources segment of Trustco would make a profit due to a waiver (without which it would have made a loss) the EBITDASA targets would be triggered and Trustco shares would be issued to Dr van Rooyen under the Huso share sale agreement.
- 71 The effective date of the loan was 29 March 2019, two days before the end of the financial year, when Dr van Rooyen settled a TrustCo obligation. The balance of the 1 billion was advanced during the period 1 April and 30 September.
- 72 The waiver was, apparently on 30 September 2019, and was notified by a SENS announcement early in October.
- 73 The effect of the waiver on the interims was that the carrying amount of the financial liability (the loan amount) was derecognised and the amount was recognised in profit and loss as a gain.
- 74 TrustCo relied in this regard on IFRS 9 para 3.3:

1.3.1 An entity shall remove a financial liability (or a part of a financial liability) from its statement of financial position when, and only when, it is extinguished—ie when the obligation specified in the contract is discharged or cancelled or expires.

1.3.2 An exchange between an existing borrower and lender of debt instruments with substantially different terms shall be accounted for as an extinguishment of the original financial



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liability and the recognition of a new financial liability. Similarly, a substantial modification of the terms of an existing financial liability or a part of it (whether or not attributable to the financial difficulty of the debtor) shall be accounted for as an extinguishment of the original financial liability and the recognition of a new financial liability.

1.3.3 The difference between the carrying amount of a financial liability (or part of a financial liability) extinguished or transferred to another party and the consideration paid, including any non-cash assets transferred or liabilities assumed, shall be recognised in profit or loss.

75 The findings of the JSE that the result of the waiver was pre-determined by the terms of the loan and that the loan was in substance an equity contribution rather than a debt/liability instrument are not in dispute. In other words, although its treatment of the waiver was formally in order, the presentation was in substance untrue.

76 The JSE's reasoning is relied on and for the sake of completion quoted in redacted form (A360 et seq):

- QvR [Van Rooyen] appears to have been acting as a shareholder (as opposed to a lender) when waiving the second loan.
- The waiver led to the issue of TrustCo shares to QvR because of triggering the EBITDAASA earn-out clause.



- The ability to relieve a counterparty of the obligation to repay a loan is a common right in any debt agreement and the explicit inclusion of this right is unusual.
- The loan was always designed to cause a benefit in Trustco's resources sector, which is where the contingent share obligation for the benefit of QvR was located.
- The reference to the right to waive in the SENS announcement of 8 October 2018 and how any waiver was to be recognised by the TrustCo Group 'suggests' [indicates that it is likely] that the future waiver was predetermined.
- The SENS announcement was specific as to how any 'waiver benefit' would be required to be passed down to operating segments of the TrustCo Group. This also suggests [indicates that it is likely] that the future waiver was predetermined.
- The timing of the loan: The market was informed about the loan approximately one month after the Huso acquisition was effected. The first loan from QvR was waived by 30 September 2018. Considering the explicit inclusion of a right to waive the loan, this suggests [indicates that it is likely] that QvR [always] intended to waive the loan as he had with the first loan.
- There is no reasonable commercial rationale for why Dr van Rooyen (in his capacity as lender) would forgo the receipt of capital and interest payments related to a 5-year loan a mere 9 months after the loan had been initiated without some form of compensation.

77 TrusCo does not dispute that the waiver was predetermined and the application in respect of the second loan is consequently dismissed.



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THE PROPERTY ISSUE

78 The JSE found that

TrustCo had not complied with the International Financial Reporting Standards in that its annual group financial statements for the year ending 31 March 2019 reclassified certain properties in the Elisenheim development from inventory to investment property and thereby recognising a NAD693 million gain (presented as revenue of NAD984 million and cost of sales of NAD 91 million in profit and loss).

79 It consequently instructed

TrustCo to restate the Group AFS by reversing the reclassification of the Elisenheim properties (incorrectly reclassified to investment properties) and consequently reversing the NAD693 million gain (presented as revenue of NAD984 million and cost of sales of NAD91 million from profit and loss).

80 TrustCo explained that the issue concerns 1,186.2387⁶ hectares of land acquired for development as residential property. The land was held as inventory in accordance with IAS 2:

Inventories are assets:

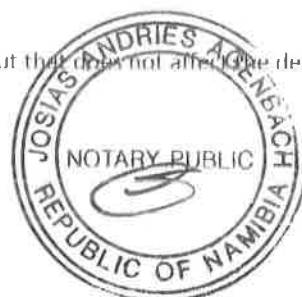
(a) held for sale in the ordinary course of business;

(b) in the process of production for such sale; or

(c) in the form of materials or supplies to be consumed in the production process or in the rendering of services.

81 A portion of the land was developed for residential purposes. However, in 2018 TrustCo experienced a slow-down in demand and most of the land stood vacant

⁶ There may be typos in the record about the placing of the commas but that does not affect the decision.



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and undeveloped. Reflecting on this wasted use of the land, the directors of TrustCo resolved during March 2019 to effectively: retain 356.3603 hectares, which would no longer be held for purposes of development and sale in the ordinary course of business; cease all works in relation to the development of the identified portion of the property for the purposes of a sale in the ordinary course of business; and the identified portion of land was to be held as a long term investment for capital appreciation.

82 'Given the board's decision to change the purpose of the land', TrustCo said, it applied IAS 40 to reclassify the land for accounting purposes.

83 IAS 40.57 stipulates that:

'An entity shall transfer a property to, or from, investment property when, and only when, there is a change in use. A change in use occurs when the property meets, or ceases to meet, the definition of investment property and there is evidence of the change in use. In isolation, a change in management's intentions for the use of a property does not provide evidence of a change in use. Examples of evidence of a change in use include:

- (a) commencement of owner-occupation, or of development with a view to owner-occupation, for a transfer from investment property to owner-occupied property;*
- (b) commencement of development with a view to sale, for a transfer from investment property to inventories;*
- (c) end of owner-occupation, for a transfer from owner-occupied property to investment property; and*



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(d) inception of an operating lease to another party, for a transfer from inventories to investment property".

84 The accounting consequences of a change in use are set out in IAS 40.63:

For a transfer from inventories to investment property that will be carried at fair value, any difference between the fair value of the property at that date and its previous carrying amount shall be recognised in profit or loss.

The factual consequences of the application of IAS 40.63 have been set out in the decision of the JSE quoted earlier.

85 TrustCo's submits that

The examples in IAS 40.57 are not exhaustive. The critical factor influencing the appropriate accounting treatment and valuation is the intention for which the property is held. IAS 40 then prescribes that land held at cost and then reclassified as investment property must be valued at fair value.

86 Its second submission is that objective factors (the outward manifestation of the board's decision) evince TrustCo's change in intention. These include cessation of all development activity related; decommissioning of the development plans; and cessation of associated activities such as planning, contracting and obtaining regulatory approval. The details and underlying documents were supplied.

87 Although the examples given are, as submitted, nothing more than examples, they are all instances of 'a change in use'. There is no evidence of a change in use in relation to the property. One would at least have expected something approximating items (c) and (d). The properties are undeveloped and vacant and continue to be vacant and undeveloped.



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88 Concerning the submission that 'the critical factor is the intention for which the property is held', one is here concerned with a change in use and not the original intention. The submission ignores the express statement that *in isolation, a change in management's intentions for the use of a property does not provide evidence of a change in use.*

89 In any event, the expressed intention (apart from the intention to change the accounting), reflected in the minutes of the Board, was the following and belies the submission:

The current economic slowdown in the property market has forced the Group to reconsider its development timetable in order to optimally allocate resources and maximise its return on its investments. Based on this review a decision was taken to defer various development projects.

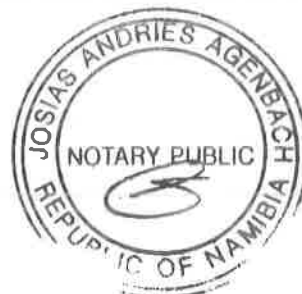
90 A different timetable and a deferment of projects do not amount to a change in use. That leaves the objective factors. As the JSE held, these facts are neutral and are equally consistent with a delayed implementation of the use of the property as per its initial classification (A365).

CONCLUSION

91 It is, in view of our conclusion, unnecessary to deal with all the issues raised, and the application stands to be dismissed.

92 Both parties have asked for costs, which means that both parties consider that exceptional circumstances, as required by sec 234(2) of the FSR Act, are present.

93 The JSE is the successful party. We agree with its counsel that TrustCo's repeated failure to take the FRIP, the JSE, and the Tribunal into its confidence by explaining



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the economic rationale for Dr van Rooyen's waivers of the loans amounts to exceptional circumstances.

94 A fair assessment would be to order TrustCo to pay half the costs of the JSE.

ORDER:

- A. The application for reconsideration is dismissed.
- B. The applicant is ordered to pay 50% of the respondent's costs, such costs to include the costs of two counsel on the High court scale and which is to be taxed by the Taxing Master or a taxing practitioner agreed to by the parties.

Signed on behalf of the Tribunal on 22 November 2021.



LTC Harms



11 January 2021

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REASONS FOR DECISION IN TERMS OF SECTION 229 OF THE FINANCIAL SECTOR REGULATION ACT 9 OF 2017

- 1 On 16 October 2020, the JSE decided that Trustco Group Holdings Limited ("Trustco") has not complied with International Financial Reporting Standards ("IFRS") relating to Trustco's annual financial statements for the year ended 31 March 2019 and its interim results for the six months ended 31 September 2019 ("the Decision"). A copy of the Decision is attached as "A".
- 2 Trustco has noted its intention to apply to the Financial Services Tribunal for reconsideration of the Decision. To that end, on 11 December 2020, Trustco requested that the JSE furnish reasons for the Decision in terms of section 229 of the Financial Sector Regulation Act 9 of 2017.

Introduction and factual background

- 3 On 5 December 2019, the JSE wrote to Trustco after Trustco was selected in terms of the JSE's proactive monitoring process. The proactive monitoring review was on Trustco's annual financial statements for the year ended 31 March 2019 ("Trustco's 2019 AFS") and its interim results for the six months ended 31 August 2018. The JSE's letter to Trustco in this regard is attached as "B".
- 4 In accordance with the well-established and universally applied proactive monitoring process, the financial statements of every listed company are reviewed at least once every five years. This process gives shareholders and the investing public the benefits of a better-regulated market, as the integrity

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

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

Group Company Secretary: GA Brookes

JSE Limited Reg No: 2005/022939/06

Member of the World Federation of Exchanges



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of financial information is a critical element of a well-functioning market. Any errors, omissions or manipulation of published financial information and results of an issuer listed on the JSE have a direct impact on the pricing information of a company and may influence the investment decisions of shareholders and/or the general public.

5 The JSE initially raised queries with Trustco about five items. Each was described in detail in the appendices to the JSE's letter dated 5 December 2019.

6 The first item related to related party loans.

6.1 In recent years, Dr Quinton van Rooyen and/or Next Investments (Pty) Limited ("Next") advanced loans to Huso Investments (Pty) Limited ("Huso"), Northern Namibia Development Company (Pty) Limited ("NNDC"), and Trustco.

6.2 After an initial review of Trustco's financial statements, the JSE was unable to identify the terms of the loan between Next and Huso.

6.3 Note 26 to Trustco's 2019 AFS recorded that the loan that Next (not Dr Quinton van Rooyen ("QvR")) advanced to Huso had been waived. However, circulars that Trustco published on 11 September 2015 ("the 2015 circular") and 11 May 2017 ("the 2017 circular") indicated that QvR had advanced loans to Huso.

6.4 In its letter dated 5 December 2019, the JSE sought clarification from Trustco on a number of issues relating to these transactions and their reporting under the applicable IFRS standard. Trustco clarified (in its letter dated 5 February 2020) that the loan advanced to Huso by QvR are of the same loans to Huso that were waived by Next. QvR is the 100%



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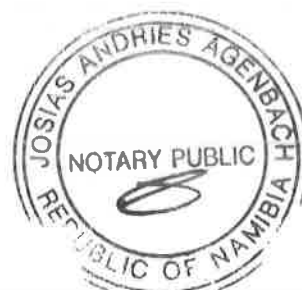
shareholder of Next and therefore (in terms of nomination rights) QvR and Next are considered to be (and are, in fact and substance) the same counterparty.

6.5 In addition, a Trustco SENS announcement dated 8 October 2018 described a N\$1 billion loan that Next and/or QvR advanced to Trustco. After an initial review of Trustco's financial statements, the JSE formed an initial view, based on the information before it at the time, that it was incorrect and misleading to classify the transaction as a financial liability under IFRS because the transaction was in substance, more akin, to an equity transaction (i.e. a shareholder injecting additional capital into the business). In its letter dated 5 December 2019, the JSE sought clarifications and explanations from Trustco to address its concerns about this issue.

7 The second item related to the effect of Trustco's acquisition of Huso from QvR, referred to as the Huso transaction (QvR was Huso's sole shareholder).

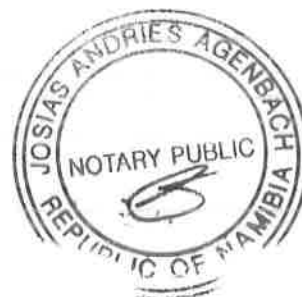
7.1 Trustco's 2019 AFS reflected the consideration for Huso as N\$2.9 billion, while a circular that Huso issued reflected the consideration as N\$3.6 billion. The JSE asked Trustco to explain this discrepancy.

7.2 The JSE also asked Trustco to explain various other issues relating to the Huso transaction and the consideration payable to QvR. This included loan forgiveness (and, in particular, a loan waiver by Next which QvR controlled) being reported as earnings for Huso (which, in turn, assisted in the achievement of certain EBITDA targets by Huso for purposes of contingent consideration due to QvR). Plainly put, QvR would receive large and material amount of financial consideration if Huso met the prescribed EBITDA targets.



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- 8 The third item related to Trustco's 2019 AFS reflecting a transfer of a property (known as Ellsenheim) from inventory to investment property. As a result of this transfer, Trustco recognised "deemed revenue" of N\$948 million and a net gain of N\$693 million in profit and loss. After an initial review of Trustco's financial statements, the JSE was not convinced that Trustco's reporting of this transfer was justified in terms of IFRS. The JSE asked Trustco a number of clarification questions in this regard.
- 9 The fourth item related to other property sales unrelated to the Elisenheim property and the manner in which Trustco reported these transactions. In particular, the JSE queried why Trustco recognised revenue attributable to the sale of land as at the date of the customer signing the contract of sale and how Trustco is able to demonstrate that it has transferred control of the asset to the customer on this date as required by IFRS. The JSE noted that payment of the purchase price would only be effected after the registration of transfer of ownership in the Deeds Office.
- 10 The fifth item related to various miscellaneous issues itemised in Appendix E of the JSE's letter dated 5 December 2019.
- 11 Between December 2019 and July 2020, the JSE and Trustco exchanged correspondence relating to the JSE's queries and the five items described above. Copies of this correspondence are attached as "C" and comprise the following:
 - 11.1 JSE letter dated 5 December 2019 (already annexed marked "B");
 - 11.2 Trustco response dated 5 February 2020;
 - 11.3 email from Sonja Carshagen (JSE) dated 28 February 2020;
 - 11.4 Trustco response dated 5 March 2020;



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- 11.5 JSE letter dated 17 March 2020;
 - 11.6 Trustco response dated 20 April 2020;
 - 11.7 JSE letter dated 15 May 2020; and
 - 11.8 Trustco response dated 12 June 2020.
- 12 In addition to the above, there was a meeting between representatives of the JSE and Trustco's representatives (including Trustco's IFRS advisor) on 29 January 2020.
- 13 The JSE considered Trustco's responses to the JSE's initial queries, and Trustco's subsequent responses included in the correspondence attached as "C", during its decision-making process. As is evident from the timeline of correspondence set out above, the JSE gave Trustco ample opportunities to make representations before the JSE made its referral to the FRIP.
- 14 On 7 July 2020, the JSE notified Trustco that, after carefully considering Trustco's responses, the JSE had decided to refer three issues to the Financial Reporting Investigations Panel ("FRIP"). The three issues were:
- 14.1 The first item in the JSE's letter dated 5 December 2019, known as Appendix A: related party loans.
 - 14.2 The third item in the JSE's letter dated 5 December 2019, known as Appendix C: transfer from inventory to investment property.
 - 14.3 The fourth item in the JSE's letter dated 5 December 2019, known as Appendix D: revenue recognition and related matters for property sales.

(collectively, "the Referred Issues").



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- 15 These three items are explained in more detail in the JSE's letter dated 15 May 2020.
- 16 The JSE's referral to the FRIP is attached as "D" (excluding appendices referred to therein).
- 17 The FRIP is an advisory body to the JSE that provides it with technical advice on IFRS. Paragraph 8.65 of the JSE Listings Requirements deals with the mandate of the FRIP:

"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."

- 18 The FRIP does not, and is not empowered to, make any form of decision, nor is the JSE bound by the views of the FRIP. The JSE does, however, carefully consider the views and recommendations of the FRIP as well as all other facts and information at its disposal in its assessment as to whether an issuer listed on the JSE has complied with the JSE's Listings Requirements (including the important provisions prescribed in the IFRS).

- 19 On 31 July 2020, the FRIP issued its report on the Referred Issues ("the FRIP Report"). A copy of the report is attached as "E".

- 19.1 In respect of the first item outlined in paragraph 14.1 above, which the FRIP Report labels "Referral 1 – substance of initial and subsequent loans from QvR to Trustco", the FRIP's



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conclusions are in paragraph 4 of the Report and its recommendations at paragraph 5 of the Report. The Report notes that the FRIP was unanimous in respect of those conclusions and recommendations.

19.2 In respect of the second item outlined in paragraph 14.2 above, which the FRIP Report labels **"Referral 2 – appropriateness of reclassifying inventory to investment property and presenting the fair value gain as revenue/cost of sales"**, the FRIP's conclusions are in paragraph 8 of the Report and its recommendations at paragraph 9 of the Report. The Report notes that the FRIP was unanimous in respect of those conclusions and recommendations.

19.3 In respect of the third item outlined in paragraph 14.3 above, which the FRIP Report labels **"Referral 3 – appropriateness of the point at which revenue on land sales is recognised"**, the FRIP's conclusions are in paragraph 12 of the Report and its recommendations at paragraph 13 of the Report. The Report notes that the FRIP was unanimous in respect of those conclusions and recommendations.

20 On 7 August 2020, the JSE sent excerpts from the FRIP Report to Trustco for its response (a copy of the JSE's letter is attached as "F"). In the intervening period between the 7 August 2020 letter and Trustco's response thereto, the JSE and Trustco engaged in a series of letters and meetings (detailed in paragraphs 21 and 2222 below) with respect to the IFRS arguments considered by the FRIP. Trustco formally responded to the JSE on 9 September 2020 (attached as "G").

The Decision

21 The JSE considered Trustco's responses as set out in its letter dated 9 September 2020 and all other relevant information, including the correspondence exchanged between the parties to date. In



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THE FINANCIAL SERVICES TRIBUNAL

FA3

REF: JSE1/2021

In the matter of:

TRUSTCO GROUP HOLDINGS LIMITED

Applicant

and

JSE LIMITED

Respondent

**NOTICE IN TERMS OF RULE 14 OF THE FINANCIAL SERVICES TRIBUNAL
RULES**

PLEASE TAKE NOTICE THAT in terms of Rule 14 of the Financial Services Tribunal Rules, the Applicant submits herewith:

1. its augmented grounds for the application for reconsideration in terms of section 230 of the Financial Sector Regulation Act, 2017; and
2. the expert report of Tapiwa Njikizana, in response to the expert report of Professor Maroun, to be read in conjunction with the Applicant's augmented grounds for the application for reconsideration.

DATED at SANDTON on this the 8TH day of **APRIL 2021**


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(it is calculated as revenue less cost of sales). Gross profit, together with revenue, is a critical line item that is considered by investors. Classifying the transaction as "revenue" misrepresents the nature of the transaction (it is a remeasurement and not part of revenue / gross profit) and is inappropriate under IFRS.

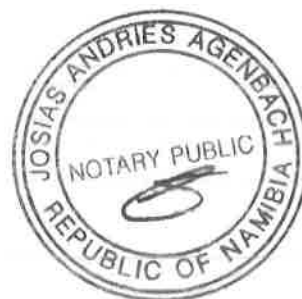
Conclusion

74 Based on these reasons, and the further reasons set out in the FRIP report, the JSE made the Decision set out in its letter dated 16 October 2020 and attached as "A".

Yours faithfully



**A F VISSER: DIRECTOR
ISSUER REGULATION**



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inappropriate to split the single figure and reflect the gain on a gross basis as both revenue and cost of sales.

73 The correspondence and the FRIP report clearly articulates the JSE's reasons in this regard, explaining that:

73.2 IAS 40.59 explains that the subsequent paragraphs (60 – 65 of IAS 40) apply to recognition and measurement issues that arise when an entity uses the fair value model. No reference is made to presentation (as revenue).

73.3 IAS 40.63 states that *"any difference between the fair value....and its previous carrying amount shall be recognised in profit and loss"*. The reference to 'difference' is a single amount.

73.4 IAS 40.63 is a bold paragraph – meaning it sets out the main principle of the standard (Paragraph 14 to Preface to IFRS).

73.5 Lastly, revenue arises in the course of an entity's ordinary activities (conceptual Framework 4.29 and the Appendix A to IFRS 15). Revenue is typically recognised under IFRS 15, arising from a contract with a customer. In this case the reclassification is not in the ordinary course of Trustco's activities nor does it involve any interaction with a customer (it is an internal reclassification). Revenue is the 'top line' of the income statement and a critical line item that investors consider. It is for this reason that IAS 1.82 requires revenue to be presented separately and in addition to the total profit or 'bottom line' of the income statement. Whilst Trustco has not changed its bottom line profit figure, it has inflated the revenue as well as its 'gross profit' figure. Gross profit is not an IFRS mandated line item but is commonly used by issuers to reflect their trading profits



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The definition of inventory does not include a time limit in which the asset is expected to be sold. Rather, it is based on the business model or purpose for which the asset is held. The JSE understands that Trustco continues to hold these properties with the view to develop and sell these in the future. Only the timing thereof appears to have been pushed out.

- 70 As to the 'KPMG example' from KPMG's publication "Insights to IFRS" (referred to by Trustco on page 5 of the 11 December 2020 letter and Trustco's letter of 5 February 2020) as a matter of principle the JSE does not consider literature issued by any organisation other than the IASB to be authoritative IFRS text. Consequently, the JSE does not believe it is appropriate to place reliance on such publications as being 'evidence' of what the IASB had intended when they wrote the standards. KPMG also states (on the second page of the opening pages to volume 1 of "Insights to IFRS") that the interpretive guidance is based on specific facts and circumstances and that in many instances, further interpretation will be needed in order for an entity to apply IFRS to its own facts, circumstances and individual transactions.
- 71 KPMG further states that the information contained in the publication is based on KPMG's interpretation of IFRS, which may change as practice and implementation guidance continue to develop. Lastly, KPMG cautions users to read the publication in conjunction with the actual text of the standards and to consult their professional advisors before concluding on accounting treatments for their own transitions. Without knowing the facts and circumstances upon which the KPMG example was based, it is not possible to analogize how these would/would not be different to the facts at hand.

Referral 2: presenting the resultant gain as revenue and cost of sales

- 72 Even if the JSE's conclusion that the reclassification was inappropriate, were such a gain to be recognised, the JSE is of the view that the gain must be accounted as a single amount. It is



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68.3 A letter provided by the consulting engineers (WCE consulting engineers; dated 29 September 2020, i.e. after the reclassification) was submitted by Trustco as an annexure to the 9 October 2020 letter in support of evidence in change in use. The JSE noted that:

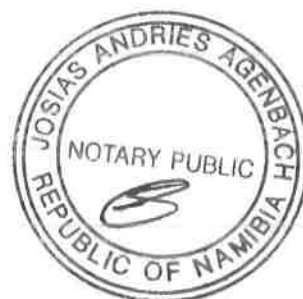
68.3.1 the letter referred to 'postponement' of activities, not cancellation (see point (68.1) above); and

68.3.2 the letter referred to phases 2 and 4 of Elisenheim development being postponed. These do not correspond with the phases that were reclassified to investment properties (being phases 10–21 per the schedule provided in Trustco's 5 March 2020 letter).

The letter from the engineer does not establish "observable action" as is required, and instead establishes a simple delay or postponement of the initial intended use.

68.4 Trustco also asserts (in its letter of 20 April 2020) that the 'evidence' of a change in use is its decision to decommission any development plans and activities associated with the reclassified erven. However, development activities are generally limited to installing/providing bulk services once sufficient erven in a phase are subject to a contract of sale. The suspension of development activities is therefore equally consistent with a decline in the number of sales, as opposed to a clear case of "evidence of the change in use". This would then be nothing more than a simple delay or postponement of the initial intended use.

69 In addition, the definition of investment property (IAS 40.5(b)) specifically excludes those properties that are held for sale in the ordinary course of business (i.e. those that are classified as inventory).



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- 66 An amendment to IAS 40.57 (effective for periods ended on or after 1 January 2018) states that, *"in isolation a change in management's intentions for the use of a property does not provide evidence of a change in use"*. IAS 40.BC27 further explains that *"an entity must have taken observable actions to support such a change"* (emphasis added). The test for transfer therefore requires more stringent requirements than the initial classification as investment property.
- 67 Trustco did not present sufficient evidence of observable actions to support a change in use, and thereby satisfy the requirements of IAS 40.57. Consequently, the reclassification from inventory to investment property and the resulting gain recognised in profit and loss (N\$ 693m) is inappropriate.
- 68 The JSE noted the following in its reasoning on the absence of insufficient evidence observable actions to support a change in use:
- 68.1 The properties are undeveloped and vacant. While Trustco indicate that the business model for the properties has changed this is no more than an expression of managements intention of use which does not justify a reclassification. Trustco did not present evidence, or sufficient evidence of "observable action" that demonstrates a change in use as required for reclassification from inventory to investment property. The properties continue to be vacant and undeveloped after their reclassification.
- 68.2 The nature of evidence provided by Trustco (annexures to the 9 October 2020 letter) in support of the change in use was mostly in the form of emails confirming cancellation of internal site meetings. The JSE does not consider these to demonstrate "observable action" to support IAS 40.57. Further the e-mails are equally consistent with a delayed implementation of the use of the property as per its initial classification.



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have recognised a loss before tax and QvR would not have received the shares under the earn out targets. Whilst EBITDAASA targets may eventually have been earned some time in the future, the waiver of both initial and subsequent loans leads to QvR 'earning' shares sooner than he might otherwise have. The JSE also noted that the Addendum to the Huso share purchase agreement in which the EBITDAASA targets to be met in order for Trustco shares to be issued were changed:

- 63.1 from EBITDAASA targets to be earned in specific financial periods;
- 63.2 to EBITDAASA targets earned only on a cumulative basis anywhere within the 9 year payment term.

This change further facilitated QvR earning the shares sooner than he might otherwise have.

- 64 The amendment referred to in paragraph 63 above made it possible for the EBITDAASA targets to be triggered by the loan waivers alone and immediately without reference to operating profits earned by the resources segment. Whilst circumstantial, when viewed together with the quantum of the loans waived in the March 2019 and September 2019 periods and the tranches of shares that were issued in those periods, these factors suggest that the advancement of funds with the view to subsequent waiver was preconceived to secure issuing the contingently issuable shares.

Referral 2: appropriateness of reclassifying inventory as investment property

- 65 The prerequisites for reclassifying items to investment property in IAS 40.57 are clear. A change in use occurs when:

- 65.1 The property meets the definition of an investment property; and
- 65.2 There is evidence of a change in use.



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