

57 By contrast, IAS40.64 recognises that, despite the effect on revenue, customer involvement is not required in the circumstance. It provides that:⁷⁹

The treatment of transfers from inventories to investment property that will be carried at fair value is consistent with the treatment of sales of inventories.

- 58 As TrustCo has highlighted in its application, it appears that the JSE's quarrel lies not with TrustCo, but with the standard itself.⁸⁰ The fact that the JSE disagrees with the presentation of TrustCo's financial statements is of no moment. The only consideration is whether or not there is a material misstatement, error or noncompliance with an accounting standard. There is not.
- 59 Absent any actual irregularity, there is no basis for the JSE to order that TrustCo amend its financials. This as the current financials provide a fair picture to investors, creditors and shareholders of TrustCo's financial affairs and future prospects.

THE EXPERT REPORTS

- 60 Although the findings of the parties' experts inform their contentions as set out above, there are a number of aspects which warrant separate consideration of the expert reports.
- 61 The JSE enlist the aid of Prof Maroun. His report, like the JSE's reasoning, is singularly focussed on a substance over form approach. Like the JSE, the Maroun report relentlessly bangs the very same drum without regard to the facts

⁷⁹ Part A p 46, par 79

⁸⁰ Part A p 50, par 92



RB

of the matter. In this regard, the TrustCo expert records no disagreement with the theoretical approach adopted in the Maroun report, and says this:⁸¹

Prof. Maroun's statements, generically applied, are not contentious. What is however important is how these concepts are applied to the specific facts and circumstances under discussion.

- 62 The TrustCo expert then highlights how 'substance over form' is a foundational principle of all accounting standards that is incorporated into each of them by the IASB.⁸² The fact that the Conceptual Framework is not an independent standard to be applied is expressly provided for therein. As we have iterated above, it provides that:⁸³

"The Conceptual Framework is not a Standard. Nothing in the Conceptual Framework overrides any Standard or any requirement in that Standard."

- 63 The TrustCo expert then provides examples which show that 'substance over form' is an inherent part of IFRS,⁸⁴ before reiterating the presumption that compliance with IFRS achieves fair presentation of the financials.⁸⁵

- 64 The TrustCo expert then makes reference to that 'catch all' provision in IAS1, which provides:⁸⁶

In the extremely rare circumstances in which management concludes that compliance with a requirement in an IFRS would be so misleading that it would conflict with the objective of financial statements set out in the Framework, the entity shall depart from that requirement in the manner set out in paragraph

⁸¹ Part A p 653, par 6

⁸² Part A p 654, par 8

⁸³ Part A p 654, par 9

⁸⁴ Part A p 656, par 14 quoting IFRS15 *Fair presentation and compliance with IFRS*

⁸⁵ Part A p 656, par 15

⁸⁶ Part A p 657, par 16 quoting IAS1.19



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20 if the relevant regulatory framework requires or otherwise does not prohibit, such a departure.

- 65 That the conclusion of the company's management is determinative is important. TrustCo's management did not conclude that, by applying the direct requirements of applicable IFRS standards, its presentation of any of the transactions in question would be either misleading or conflict with the objectives of its financial statements. The expert agrees,⁸⁷ and concludes that IFRS has been properly applied and fairly presents TrustCo's state of affairs.⁸⁸

CONCLUSION

- 66 That the JSE may present the same transactions differently does not detract from the fact that TrustCo has complied with and adhered to the letter of every applicable accounting standard. Its financial presentation of each of the above transactions cannot be faulted from an accounting perspective. Certainly, it does not infringe any IFRS or other recognised accounting standard. The JSE is unable to point to any such infringement, because there is no infringement. There is just compliance.

- 67 As IFRS makes plain, the fact that there is proper compliance with IFRS gives rise to the presumption that the financial statements are fairly presented.⁸⁹ Accordingly, the point of departure in determining this application must be that TrustCo's financials are accurate and fair. It is for the JSE to show an actual

⁸⁷ Part A p 658, par 18

⁸⁸ *ibid*

⁸⁹ Part A p 656, par 14. In this regard, IAS1 provides that:

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



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deviation that gives rise to an irregularity. Absent the JSE proving a deviation from IFRS, the presumption of fair presentation is not disturbed at all.

- 68 In order to support its contentions, the JSE instead relies on a contorted application of frameworks which, by their own express terms, exclude applicability in the circumstances.⁹⁰ TrustCo's expert had this to say about the result that would arise if the JSE's accounting treatment was applied:⁹¹

In my view, the effect of the JSE decision is to instruct Trustco not to comply with IFRS in order to achieve what the JSE considers to be a fair presentation of its financial statements.

- 69 Although there is scant judicial consideration of accounting standards, in CSARS v Volkswagen SA,⁹² the SCA expressed the purpose of adhering to accounting standards as follows:

Annual financial statements prepared in accordance with IFRS, as embodied in GAAP in South Africa, serve a valuable purpose in providing a fair picture to investors, shareholders and creditors of companies about their financial affairs. In doing so, it is important that the picture be fair, both in regard to the past trading activities of the company and as to its future prospects.

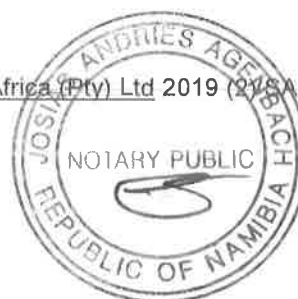
- 70 If TrustCo were to change its financials in the manner directed by the JSE, it would:

70.1 flout the direct and express provisions of IFRS and IAS;

⁹⁰ Part A p 659, par 23 and p 665, par 37

⁹¹ Part A p 659, par

⁹² Commissioner, South African Revenue Service v Volkswagen South Africa (Pty) Ltd 2019 (2) SA 362 (SCA) at par 31



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70.2 misstate its true financial position; and

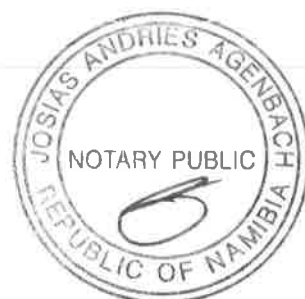
70.3 misinform the market.

71 In the circumstances, TrustCo seeks that its application for reconsideration be upheld with costs, including the costs of two counsel.

K W LÜDERITZ SC

M J COOKE

Applicant's Counsel



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ARGUMENT

FA9

IN THE MATTER

BETWEEN

TRUSTCO GROUP HOLDINGS

AND

JSE

TRANSCRIPT

HELD ON

12 NOVEMBER 2021

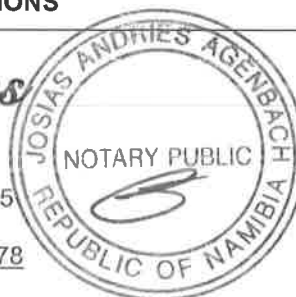
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Trustco Group Holdings // JSE

[PROCEEDINGS ON 2 NOVEMBER 2021]

MS HOST: Good morning, Judge Harms.

CHAIRPERSON: Good morning.

MS HASSIM: Hi Miss Kim, hi Zama.

CHAIRPERSON: Hello.

MS NKUBUNGU-SHANGISA: Hi, good morning,
Judge.

CHAIRPERSON: Good morning.

MS HOST: Thank you, Judge, everything is
recording now, if you want to start.

CHAIRPERSON: Yes. I think we can. Good
morning, everyone. Mr Luderitz, are you ready?

MR LUDERITZ SC: Good morning, Judge. We
are ready, thank you.

CHAIRPERSON: Mr Green?

MR GREEN SC: Yes, Judge. Sorry, just
fiddling with the buttons here. We are ready as well.

CHAIRPERSON: Okay, thank you.

Appearances for the applicant please?

MR LUDERITZ SC: May it please you, Mr
Chair, I'm here with my learned friend, Mr Cook, on the
instructions of Mr John Bell, formerly of Baker, McKenzie,
now Norton Rose.

CHAIRPERSON: Thank you.

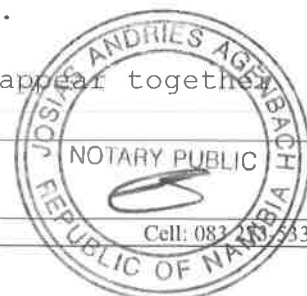
MR GREEN SC: Chair, I appear together

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1 with Mr Mitchell for the JSE, and we are instructed by
2 Webber Wentzel.

3 CHAIRPERSON: Thank you. Yes, Mr
4 Luderitz?

5 MR LUDERITZ SC: Thank you, Mr Chair. We
6 have filed our heads of argument; we don't intend
7 traversing on every aspect of the heads of argument. The
8 fundamental point of departure between the applicant, and
9 the JSE-

10 CHAIRPERSON: Mr Luderitz, please.

11 Before you jump in, in the middle of the lake, I asked that

12 we be provided with a context of the decision. We have

13 been - 1 600 pages was dumped on us on Friday, after 12,

14 which doesn't give us the context of the decision. I don't

15 know whether the attorney expects me to wade through 1 600

16 pages to find the references to which you refer in your

17 heads. We have never had such a case, you don't tell us

18 what the context is, neither does Mr Green. And I find

19 this very unfortunate, and very difficult.

20 You don't tell us what is relevant, or irrelevant
21 in the thousands of pages that are part of the record. We
22 just get everything dumped on us, and we have to sort out
23 where we go. Is that the new way matters are dealt with?

24 MR LUDERITZ SC: Mr Chair, I'm not aware

25 - was not made aware of the enquiry that you had raised.



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1 And I'm not aware of any response thereto. May I -

2 CHAIRPERSON: What I got is two bundles,
3 each of them 800 plus pages. Now, to wade through 800
4 pages through your computer to find one, or other of these
5 auditing standards that is applicable, one, or other
6 paragraph, is rather difficult.

7 MR LUDERITZ SC: No, I accept that, of
8 course, having undertaken the exercise myself.

9 CHAIRPERSON: So, we don't have any
10 cross-references? And unless you're going to give us
11 cross-references now to say where we find this, that's my
12 first problem.

13 My second problem is; our rules require that the
14 grounds of reconsideration must be succinctly stated. Now
15 where are they succinctly stated in your application?

16 MR LUDERITZ SC: Mr Chair, they are
17 stated, well-

18 CHAIRPERSON: I know where they are
19 stated, I've asked where they are succinctly stated?

20 MR LUDERITZ SC: Chair, I don't think
21 that that necessarily meets the criteria of succinctness.

22 CHAIRPERSON: You - 52 pages. Whatever.
23 That's not quite in the statement of succinctness. Unless
24 we take what is said on page 51, and 52, of what is your
25 case. Or do we have to wade through everything to know

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1 what it is, succinctly?

2 MR LUDERITZ SC: The-

3 CHAIRPERSON: And then the - and related
4 to that is your - the further document that you filed under
5 Rule 14, which appears to me to be a re-statement. Unless
6 I analyse it word for word, or sentence by sentence,
7 basically, a re-statement of the grounds, of the initial
8 application, which is quite not how these things are done.
9 I think you must carry on as you wish, I will just have to
10 sort it out afterwards.

11 MR LUDERITZ SC: Mr Chairman, the two
12 differences between the Rule 14 statement, and the initial
13 grounds are recorded in paragraphs 28, at page 623. And
14 paragraph 37, at page 627. For the rest it is indeed the
15 same.

16 CHAIRPERSON: Oh no, that's - thank you
17 for telling us now.

18 MR LUDERITZ SC: Insofar as the
19 (inaudible) grounds of reconsideration are concerned, Mr
20 Chairman, paragraph 52, on page - or paragraphs 52, on page
21 16 - sorry, paragraph 97, on page 52, the conclusion-

22 CHAIRPERSON: Hm.

23 MR LUDERITZ SC: Would be the succinct
24 grounds relied upon by the applicant.

25 CHAIRPERSON: Hm.

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1 MR LUDERITZ SC: Insofar as your first
2 concern is, the cross-references, as I say I was not aware
3 of the request. We have referenced in our heads of
4 arguments, as did our learned friends have the references
5 to specific paragraphs, and page numbers in Part A, in Part
6 B of the bundles.

7 CHAIRPERSON: I appreciate that, but
8 where - you know, if you quote a section, or a paragraph
9 from a document, and we don't know where the document is,
10 what it looks like, what the context is, it doesn't help
11 us. It doesn't help me at least. My colleagues may have
12 auditing background, I don't have an auditing background,
13 as you know. So, I tried over the weekend to read through
14 all these standards, and to - and I gave up, because I just
15 didn't know where I was going.

16 But I mean, or what I'm saying to you applies to
17 Mr Green as well. I'm not picking on you as such, so to
18 speak. So, but I think let's carry on, and see where we
19 get. I think I've more or less, I would have thought what
20 one - how one approaches this, especially if you deal with
21 a panel such as, speaking from myself, who does not work
22 with the JSE on a daily basis, and never had such a case.
23 To tell us what the JSE's hours are, where they come from,
24 and then to say; well, as you say there is this rule that
25 you complied with, they say you didn't comply with the

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1 rule, you did comply with the rule. That is how I think
2 what the case is about, if I understand it correctly.

3 But we'll have to figure it out, you carry on
4 now. Thank you.

5 MR LUDERITZ SC: Okay, thank you, Mr
6 Chairman. The heart of the dispute between the parties is
7 really whether or not the financial statements of the
8 applicant, and those are the brief annual financial
9 statements for the period ending March 2019, as well as the
10 interim financial statements for the six month's period
11 ending the 30th September 2019, comply with IFRS. And that
12 we would submit is the heart of the dispute.

13 And the dispute is apparent by way of summary in
14 Part B, page 1, the document containing the JSEs further
15 reasons. And what you would see is that what the JSE
16 contends, is that the transactions in question are not
17 reflected in the manner that is compliant with IFRS. On
18 reflection that is, in fact, not the position adopted by
19 the JSE, there is no debate about the question whether or
20 not, having regard to the different components of each
21 conception, the applicant has complied with IFRS. The main
22 thrust of the dispute raised by the JSE is that the
23 financial statements are overly simplistic, and that they
24 interrogate the component steps of what the JSE contends
25 is, in fact, one transaction.

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1 If you have regard to paragraph 4, under the
2 heading; summary of the approach of the JSE, at page 3, in
3 bundle B, the JSE contends the following. They say that:
4 "Trustco's approach in the application is to focus on the
5 form of the relevant transactions, and decisions that
6 underlie the matter. It carefully dissects each
7 transaction into its component steps, and then justifies
8 its accounting treatment with reference to these individual
9 components, while criticising the JSE for adopting the
10 broader approach that it did."

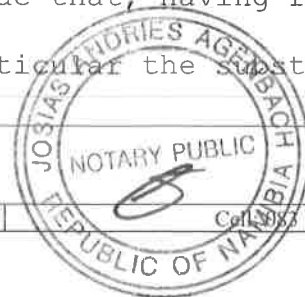
11 So, the heart of the dispute is, in fact, not
12 whether or not the applicant has complied with the
13 requirements of IFRS in accounting for what the JSE terms,
14 the component steps. The heart of the dispute is to be
15 found in the following sentence on page 4, where the JSE
16 says: "What Trustco ignores is that IFRS requires financial
17 statements to be a faithful representation of the
18 underlying economic substance, and events." And then
19 paragraph 5, "This means that financial statements must
20 consider the economic substance, and financial reality of
21 the underlying transactions, and not merely their legal
22 form." It then concludes in paragraph 6, "Both with
23 reference to the waiver of the loans, and as you will
24 ultimately see, also the property issue that, having regard
25 to the provisions of IFRS, and in particular the substance

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1 over form requirement." And this is really the heart of
2 the dispute; "The substance over form requirement be
3 accounted by Trustco for waivers of loans to Trustco by the
4 controlling shareholder is going to be profit, or loss, is
5 not in compliance with IFRS."

6 Now IFRS is the manifestation of the application
7 of various principles that are to be found in the - if you
8 will just bear with me. Which are to be found in the
9 conceptional framework for financial reporting. And the
10 whole concept of substance over form is dealt with at
11 length in the expert's report of Mr Tapiwe Njikizana, which
12 you will find at page 652.

13 CHAIRPERSON: Now, can you tell me how is
14 that document in front of us if you have regard to our
15 rules?

16 MR LUDERITZ SC: Mr Chairman, that
17 document is part of the submissions that were made-

18 CHAIRPERSON: Is it evidence, or is it
19 submissions? Or is it argument?

20 MR LUDERITZ SC: Well, the document
21 itself, the expert report, does not contain facts as such.
22 It really opines on accounting concepts, and the
23 application of IFRS, as well as the conceptual framework,
24 and interrogates the facts that are largely common cause.
25 And applies the accounting standards, and expresses certain

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1 views on whether or not there has been compliance with
2 IFRS. And also expresses views in relation to the
3 applicability of the conceptual framework for financial
4 reporting.

5 CHAIRPERSON: Ja. Now, where - I have
6 here a document which I've received on Friday, running to
7 86 pages, which says it's the conceptual framework. Now, I
8 prefer to work from that, but just tell us where I have to
9 look?

10 MR LUDERITZ SC: You will find all of the
11 relevant parts, for purposes of our argument, of the
12 conceptual framework quoted in the expert's report, of -

13 CHAIRPERSON: Mr Luderitz, as I said to
14 you, I - you know, I've never decided a case on extracts.
15 I have to read the whole section to understand it. So,
16 which section, which chapter is it?

17 MR LUDERITZ SC: Of the conceptual
18 framework?

19 CHAIRPERSON: Yes. Which paragraph?

20 MR LUDERITZ SC: Well, the first
21 reference in the report of Mr Njikizana, in paragraph 7, on
22 page 653, well, it's a reference to SP1.1.

23 CHAIRPERSON: Okay.

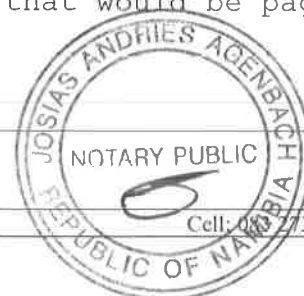
24 MR LUDERITZ SC: And that would be page 5
25 of the bundle.

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1 CHAIRPERSON: Thank you. I have it.

2 MR LUDERITZ SC: If I may ask you to turn
3 to the expert report, at page 653, paragraph 7, where the
4 expert deals with the concept of substance over form, as it
5 is reflected in the conceptual framework.

6 CHAIRPERSON: Yes.

7 MR LUDERITZ SC: The first point to be
8 made is to understand properly the purpose, and function of
9 the conceptual framework. And that is recorded in
10 paragraph SP1.1, under the heading; status and purpose of
11 the conceptual framework. And it reads as follows:
12 "The conceptual framework for financial reporting describes
13 the objective of, and the concepts for general purpose
14 financial reporting."

15 The purpose of the conceptual framework is to
16 assist the International Accounting Standards Board- or the
17 IASB as it's referred to later in the document "To develop
18 IFRS standards that are based on consistent concepts." So,
19 that is the purpose of the conceptual framework. It is
20 there to assist the IASB to develop IFRS standards.

21 The so called substance over form concept, we
22 submit, is in fact bade into all standards developed by the
23 IASB, and it is not a concept which should be considered as
24 residing outside the individual standards, and therefore
25 has to be applied, as the JSE seeks to do, over and above

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1 the specific requirements of the standards, or, and even
2 worse instead of the specific requirements of the
3 standards. And if there is a particular standard that
4 regulates the accounting of a transaction, then that
5 standard must be supplied, must be applied. And as is
6 pointed out in paragraph 9, the conceptual framework itself
7 states expressly that the framework is not a standard, and
8 that nothing in the framework overrides any standard, or
9 any requirement in a standard.

10 Deviations from the standards are provided for in

11 SP1.3. I will provide the-

12 CHAIRPERSON: It's on the same page.

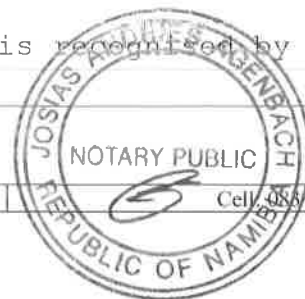
13 MR LUDERITZ SC: In a moment, the same
14 page. But it is quoted in full by the expert at page 654,
15 going over to page 655. Which provides that: "To
16 meet the objective of (inaudible) purpose financial
17 reporting the Board my sometimes specify requirements that
18 depart from aspects of the conceptual framework." As I've
19 already submitted, the expert in paragraph 11 points out
20 that: "Where a standard deals with a particular
21 matter, as it does in this particular instance, an argument
22 that the standard is incorrect, is incomplete, or lacks a
23 substance over form perspective would be baseless, given
24 the fact that the substance over form concept is already
25 bade into the IFRS Standards." That is recognised by way

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1 of example in IAS16, on paragraph 12 of the expert's
2 report. And you will see at paragraph 13, paragraph 12,
3 and 13 a clear example of where substance over form is
4 indeed expressly bade into this standard.

5 In paragraph 14 of the expert's report, you will
6 see that the expert states that the view of the
7 International Accounting Standards Board is that the
8 application of IFRS would result in fair presentation of
9 financial statements, and as is confirmed by IAS1. And
10 again, the point is simply that if a specific standard is
11 to be applied, or caters for a specific factual scenario,
12 then the standard is to be applied, and inherent in the
13 application of a standard, and compliance with the standard
14 is the notion that the financials then would reflect fairly
15 the factual position to which the standard speaks.

16 On IAS1, which is quoted at the foot of page 656,
17 provides the following: "And compliance with IFRS,
18 financial statements shall present fairly the financial
19 position, financial performance, and cash flows of an
20 entity. Fair presentation requires the faithful
21 representation of the effects of the transaction, other
22 events, and conditions in accordance with the definitions,
23 and recognition criteria of assets, liabilities, income and
24 expenses" and then importantly "Set out in the framework.
25 The application of IFRS with additional disclosures where

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1 necessary, is presumed to result in financial statements
2 that achieve a fair representation."

3 So, the point is simply that compliance with
4 IFRS, and the standards set by IFRS, as we will demonstrate
5 the applicant has done, implies a presumption that the
6 results in the financial statements would achieve a fair
7 representation of a particular transaction. There are
8 exemptions, and those are dealt with in paragraph 16 of the
9 expert's report, at page 657, where management may deviate
10 from compliance with IFRS. In paragraph 16, you will see
11 that the requirement is that - well, first of all, these
12 deviations occur in extremely rare circumstances. And that
13 is where management concludes that compliance with the
14 requirement in an IFRS would be so misleading as, that it
15 would conflict with the objective of financial statements.
16 Set out in the framework, "The entity shall depart from the
17 requirement in the manner set out in paragraph 20, that the
18 relevant regulatory framework requires, or otherwise does
19 not prohibit such a departure." So, in any departure from
20 IFRS, and would first of all only occur as is recorded in
21 paragraph 19 in extremely rare circumstances. And it would
22 only be permissible in circumstances where compliance with
23 IFRS would be so misleading that it would conflict with the
24 objective of financial statements.

25 CHAIRPERSON:

Now, that is a factual

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1 question, is it?

2 MR LUDERITZ SC: That would indeed be a
3 factual question.

4 CHAIRPERSON: And in this case?

5 MR LUDERITZ SC: Well, we say that it is
6 not misleading, and is in fact not in conflict with the
7 objective of-

8 CHAIRPERSON: Mr Luderitz, why doesn't
9 your client wish to disclose these facts?

10 MR LUDERITZ SC: Mr Chairman, there are
11 no facts that are in fact not to disclose. The various
12 steps of the transaction are accurately disclosed in the
13 financial statements, as different component steps. And
14 every component step is reflected in compliance with the
15 applicable IFRS standard. The fundamental difference in
16 approach between the applicant, and the JSE, is not at the
17 level of compliance, or not with a particular IFRS
18 standard. The fundamental point of departure between the
19 parties is whether the transactions, or the different
20 components of the transactions should be accounted for, in
21 our submission, correctly, as different, and discreet
22 components, each one of them attracting compliance with an
23 IFRS standard. Or whether, as the JSE suggests, those
24 individual components should be ignored, and the
25 transaction should be reflected as a composite transaction,

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1 even though a particular event, namely, the waiver of the
2 loan, occurred after the acquisition date. When in fact,
3 even applying IFRS 3, as the JSE submits it should be
4 applied, the requirement is to account for the transaction
5 with reference to the facts as they were known as at the
6 acquisition date. But that's the fundamental point of
7 departure between the parties.

8 So, what the applicant says is that there are
9 different components. The first component, if we take the
10 Huso transaction, is first of all the initial recognition
11 of the Huso loan as an equity loan. The second component
12 part is the conclusion of the Huso transaction in 2015,
13 albeit subject to a number of conditions precedent, which
14 were only fulfilled in 2018.

15 Prior to the fulfilment of those conditions'
16 precedent, the Huso loan, which previously was repayable in
17 the exclusive discretion of the borrower, Huso, the terms
18 were then amended to make the loan repayable within a
19 period of 12 months. And consistent with the applicable
20 IFRS standard, what was previously reflected as an equity
21 contribution was then reflected as a liability. And there
22 is no criticism at that level raised by the JSE, and the
23 transaction, or the change in the nature of the loan is
24 then actively reflected as a liability.

25 And the next step in the transaction, which is

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1 again properly recorded in the financials, consistent with
2 the applicable IFRS standard, is the actual acquisition of
3 the shareholding formerly held by Dr Van Rooyen in Huso.
4 And that, those are the facts as they were up to the date
5 of the acquisition, and are accurately reflected as at the
6 acquisition date.

7 What the JSE contends is that facts that were not
8 on any basis known to the company at the time, namely the
9 waiver of the loan after the acquisition date, is not
10 reflected as part of the (inaudible), and accounting for
11 what the JSE contends to be a composite transaction. And
12 as I say, that is the fundamental point of distinction
13 between the applicant, and the JSE. And that is the
14 question, whether or not the waiver of the loan was a
15 fundamental part of the transaction, or whether that is an
16 event that occurred after the acquisition date, and should
17 be accounted for separately, and not on the basis of
18 forming part of the - of what the JSE refers to as a
19 composite transaction?

20 So, on the Huso transaction, Mr Chairman, that
21 would be the fundamental difference between the parties,
22 and the applicant says - and there is no real dispute about
23 this issue - is that it has accounted for every component
24 part, consistent with the requirements laid down by IFRS.
25 And that it is not obliged, with reference to the

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1 particular transaction, and there I refer to the Huso
2 transaction, to account as part, and parcel of the
3 transaction for an event that occurs after the acquisition
4 date, and that is the waiver of the loan.

5 CHAIRPERSON: Yes.

6 MR LUDERITZ SC: The same applies to the
7 second transaction, the "so called" Meya acquisition. In
8 relation to the Meya acquisition, you will recall that Dr
9 Van Rooyen advanced loan funding in order to facilitate the
10 Meya acquisition. The Meya acquisition was completed, and
11 accounted for. The loan was correctly reflected as a
12 financial liability. The loan, in accordance with its
13 terms, and had specific repayment terms, attracted an
14 obligation to pay interest. And after the completion of
15 the Meya transaction, the loan was waived by Dr Van Rooyen.
16 Again, that transaction was accounted for in the financial
17 records, in due compliance with the applicable IFRS
18 standard.

19 Once again, the fundamental point of distinction
20 between the applicant, and the JSE, is the JSEs contention
21 that the waiver of the loan formed part, and parcel of the
22 Meya transaction, and that it should be reflected as such,
23 even though it is again an event that occurs subsequently.

24 Mr Chairman, we then get to the third dispute
25 between the parties. And that you will see

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1 MS HASSIM: May I ask a question of Mr
2 Luderitz please? Mr Luderitz, my understanding of the Meya
3 transaction is that the money was paid directly, and not
4 through the company. So, if there had been a loan to the
5 company, if there had been a loan to - yes. If there had
6 been a loan, then one wouldn't have expected the payment to
7 go directly from Dr Van Rooyen, would one? And I think the
8 point is made by the JSE somewhere.

9 MR LUDERITZ SC: That, with respect, Ms
10 Hassim, should not inform the question whether or not the
11 funding was made available on loan, or not. The fact that
12 the payment was made directly to the third party for, and
13 on behalf of the company does not detract from the fact
14 that there is, in fact, a loan agreement in place that
15 provides for the payment of the monies for, and on behalf
16 of the company, and that contemplates the repayment of that
17 amount - of that loan advance by the company to Dr Van
18 Rooyen on the terms that are expressly recorded in the loan
19 agreement. So, I would submit that the fact that the
20 payment is made directly does not detract from the
21 fundamental nature of the transaction as it is recorded
22 between the parties. Namely that of a loan that attracts
23 interest, and that was repayable on the terms recorded in
24 the loan.

25 MS HASSIM: Thank you so much. Thank

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1 you, Mr Chair.

2 MR LUDERITZ SC: Mr Chair, the third
3 issue in dispute between the parties concerns the so called
4 Elisenheim development. A development that was undertaken
5 by the applicant, and which, given a slowdown in the
6 property market, was since terminated-

7 CHAIRPERSON: Mr Luderitz, I think it's
8 probably - since this is Namibia - that is probably
9 Elisenheim.

10 MR LUDERITZ SC: Thank you, Mr Chairman.
11 I should-

12 CHAIRPERSON: You should - you ought to
13 know that, having a town now named after you.

14 MR LUDERITZ SC: The issue concerning the
15 development lies at two levels. The development was
16 properly initially reflected as inventory, given that the
17 intention was to develop the property, and to sell the
18 property into the market. What then occurs is that there
19 is a change in the use of the property. The change in use
20 is evidenced both by the express intention, as it is
21 recorded in the minutes of the Board on the 13th of March
22 2019. As well as the actual concrete evidence that then
23 supports the implementation of the intention as it is - was
24 expressed by the Board.

25 The applicable standard, you will see from our

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1 heads of argument, paragraph 42, is IAS40, which deals with
2 the circumstances under which a property can be
3 reclassified as investment property. In other words, where
4 it had previously been reflected in the financial records
5 as inventory, IAS40 then prescribes the circumstances under
6 which the property can be reclassified as investment
7 property. And that requires - as I've already submitted -
8 an intention of an actual change of use, as well as
9 evidence thereof.

10 The objective factors that support the
11 conclusion, we say that there has in fact been a change in
12 the use, and are recorded in our heads of argument, in
13 paragraph 44.1 to 44.3, as well as in the email
14 communication dated the 29th of September 2020, referenced
15 in paragraph 45 of our heads of argument. And those are
16 the facts that the development had stopped, that the
17 development plans had been decommissioned. That the
18 process of seeking regulatory approval had ceased. That
19 the construction staff had been retrenched. And that the
20 equipment that had previously been used, had in fact been
21 sold off.

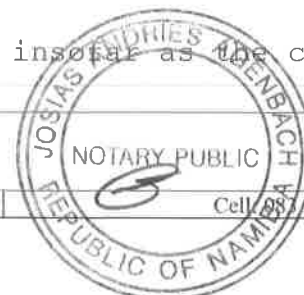
22 So, what you would see from the objective facts
23 is clear evidence that the intention was in fact carried
24 through, and that the development has in fact ceased. And
25 that we submit is sufficient evidence insofar as the change

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1 in control - ag, the change in use is concerned. This
2 issue is dealt with at some length by both experts on
3 behalf of the parties, and what is important is that it
4 appears - and that both the JSEs expert, and the JSE itself
5 - appears to be under a misapprehension as regards the
6 evidence, and that is required to be adduced in order to
7 meet the threshold.

8 In paragraph 75, on page 684 of the expert's
9 report of Mr Njikizana, he deals with the approach adopted
10 by Professor Mauron, as well as the JSE. And he quotes
11 from the report of Professor Mauron, and you will also see
12 the same approach adopted by the JSE. That was is required
13 in order to meet the threshold set in IAS40, is clear
14 evidence of a change in use. But if one considers the
15 express wording of IAS40, paragraph 57, and as it quoted in
16 paragraph 75 of the expert's report, the requirement is not
17 clear evidence, but in fact, simply evidence. You will see
18 from paragraph 57: "An entity shall transfer a property to,
19 or from investment property when, and only when there is a
20 change in use. A change in use occurs when the property
21 meets, or ceases to meet the definition of investment
22 property, and there is evidence of the change in use."

23 This is an important point of distinction, and
24 approach between the parties. The one contending for clear
25 evidence, and the other one for evidence. And as the

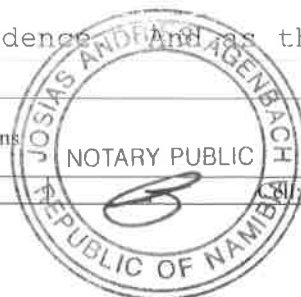
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1 expert for the applicant explains, the absence of the word,
2 clear, in the description in paragraph 57 is not
3 insignificant. It's not insignificant because throughout
4 the accounting standard there are express instances where
5 clear evidence, as opposed to evidence, is required. In
6 this particular instance the requirement is simply
7 evidence, and not clear evidence. And that, we submit,
8 would be understandable given that one seeks to interrogate
9 is the intention of the Board as it is expressed, and
10 reflected in the minutes of the Board to cease the
11 development. Which is then, we submit, corroborated by the
12 objective facts as we have placed it before the tribunal.

13 So, the first point of difference between the
14 parties is whether or not the change of use has occurred.
15 That is referenced, and defined in our heads of argument as
16 the "so called" reclassification issue. And the second
17 issue that also arises between the parties is the manner in
18 which Trustco has presented this reclassification, which we
19 then define as the presentation issue. And that you will
20 find in our heads of argument, at paragraph 49.

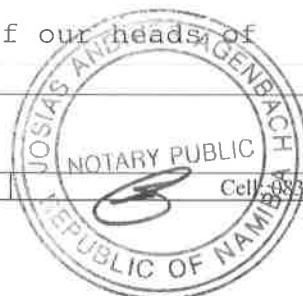
21 We then deal extensively with the "so called"
22 reclassification issue. And we indicate that this is
23 certainly not a mere postponement of a development, but
24 indeed a cessation of the development. The presentation
25 issue, we deal with in paragraph 54 of our heads of

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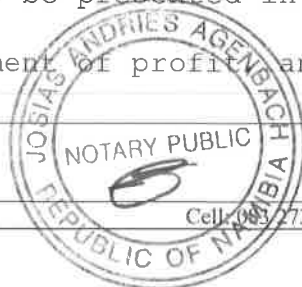
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1 argument. And the applicable standard is again dealt with
2 at length in the expert report of the applicant's expert.
3 And if I can refer you, again in this regard, to paragraph
4 98 of the expert report, at page 690.

5 Before I do that, I'll ask you to turn to page
6 685, where IAS1, paragraph 82, is cited by the expert. And
7 the debate between the two experts here concern the
8 concepts of profit, and loss, and - on the one hand, and
9 that of revenue, on the other hand. In paragraph 78, at
10 page 685, the JSE expert records that Professor Mauron
11 states that: "Profit, or loss is entirely different to
12 revenue. Revenue arises from the sale of goods, or
13 services, and has nothing to do with fair value gain." But
14 points out the expert for the applicant: "That
15 revenue, in paragraph 79, is an aggregation of certain
16 types of transactions where this profit, and loss is a sub-
17 total presented in the statement of comprehensive income.
18 Which being a sub-total comprises many items of income, and
19 expense, including revenue. There can therefore not be any
20 confusion that profit, or loss is unlike any other
21 individual item reported under IFRS, as it is a sub-total
22 of many items."

23 When reflecting on IAS1, paragraph 82, it records
24 the following: "Information to be presented in the
25 profit, and loss section, or the statement of profit, and



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1 loss." And then paragraph 82, sub (a): "Contains
2 a reference to interest revenue. And the point is that
3 revenue, in contradiction to what is contended for by the
4 expert for the JSE, is not limited to amounts that arise
5 from the sale of goods, and services, but in this instance
6 indeed also includes interest income."

7 Then if I can ask you to turn to page 692, the
8 application of IAS40, paragraph 64? The expert, in
9 paragraph 103, references IAS16. Which in turn deals with
10 IFRS 15, the concept of revenue, and IAS2, the concept of
11 cost of sales. And points out in paragraph 104 that the
12 cross-reference to IFRS 15, and IAS2, and the analogy to
13 the sale of inventories is made by the IASB,
14 notwithstanding that factually there has been no sale of
15 inventory. The point made by Professor Mauron is that
16 there has in fact been no sale, but that - with respect -
17 is not the point. The analogy of a sale of inventory is
18 the concept that is being applied by the standard itself.

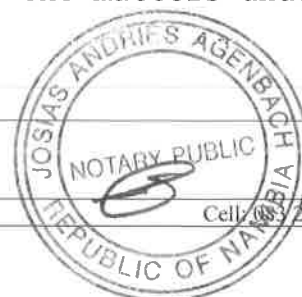
19 Then in paragraph 106, page 693, with reference
20 to Professor Mauron's reliance on IAS40, paragraph 75.1,
21 and read with IAS1, paragraph 85, the expert provides the
22 full text of the particular standard, from which it appears
23 that there is in fact nothing in what is relied upon by
24 Professor Mauron that is applicable to the matters under
25 consideration.

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1 And then again in paragraph 110, at page 695, in
2 the third line. The expert for the applicant points out
3 that the difficulty with the approach of Professor Mauron
4 is that the argument fails to address the reality that the
5 application of IFRS 15, and IAS2 is by analogy to a sale of
6 inventory, not because it is a sale of inventory.

7 So, the case for the applicant insofar as the
8 development is concerned is that there has in fact been a
9 change of use. That the change of use is evidenced by the
10 express intention of the Board, as it is reflected in the
11 minutes of the Board, as well as the objective facts that
12 are not in dispute between the parties. The JSE challenges
13 these objective facts based on nothing but speculation, in
14 circumstances where those facts are not, and cannot be
15 contested. The real dispute between the parties insofar as
16 this issue is concerned is the weight to be placed on that
17 evidence, the JSEs approach being informed by the
18 requirement, or the perceived requirement that clear
19 evidence is required. When in fact the standard requires
20 no more than evidence.

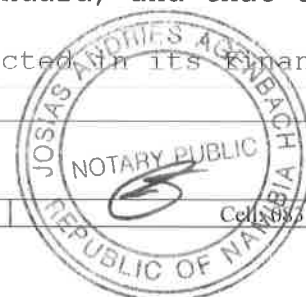
21 The second dispute between the parties concern
22 the accounting for the transaction. And we submit that on
23 that level the applicant has demonstrated that it has in
24 fact complied with the applicable standard, and that that
25 transaction has accurately been reflected in its financial

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1 statements.

2 Chair, those are the submissions for the
3 applicant. If I may just have one moment to confer with my
4 team?

5 CHAIRPERSON: Pleasure.

6 MR LUDERITZ SC: Thank you, Chair.

7 Perhaps if I can just return to a question that you posed
8 earlier, and that is the status of the expert report. I
9 had made the point that the expert report does not offer
10 factual evidence, but simply expresses views as regards
11 compliance with IFRS, or not. And also expresses views as
12 regards to applicability of the conceptual framework. It
13 is indeed so that the expert report has not been placed
14 before the tribunal on oath, but similarly the report of
15 Professor Mauron, which appears in Part B of the bundle,
16 and which is relied on by the JSE, has simply been placed
17 before the tribunal as an expert report where Professor
18 Mauron expresses the views that he holds. And once again,
19 does not seek to place, and at least on our reading of his
20 report, any factual evidence before the tribunal.

21 CHAIRPERSON: No, but what he does is,
22 what he may not do, and that is interpret.

23 MR LUDERITZ SC: In-

24 CHAIRPERSON: He interprets this,
25 interprets this, he doesn't say they've got special

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1 meanings in the arc. So, much of his is he argues your
2 case. And it is quite obvious, because you read - that's
3 how you argue the case, repeat what he says.

4 MR LUDERITZ SC: Yes, we rely heavily on
5 the views expressed by the expert. You would know from the
6 document before you, and also from the expert report, that
7 the views expressed by the applicant's expert is entirely
8 consistent with the views that were held, and expressed by
9 at least two independent auditing firms, as well as
10 external parties that were requested to consider, and
11 advise on the applicant's compliance with the applicable
12 IFRS Standards. And to that end the expert report does in
13 fact deal extensively with the views, the contrary views
14 expressed by Professor Mauron, and interrogates those views
15 in significant detail. The expert for the applicant places
16 before you the conceptual framework in its correct context.
17 And he explains to the tribunal what in fact the purpose of
18 the framework is, namely to assist the Board in developing
19 its own standard. And he points out, correctly in our
20 view, that the framework is not a standard, and that
21 nothing in the framework overrides, or can permissibly
22 contradict this standard.

23 So, yes, it is correct that we rely extensively
24 on the expert, that supports the contentions advanced by
25 the applicant. And that deals expressly, and contradicts,

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1 and by way of a reasoned approach the views expressed by
2 Professor Mauron, and the JSE.

3 CHAIRPERSON: Yes, you see the
4 (inaudible) panel is a panel of experts.

5 MR LUDERITZ SC: Indeed so.

6 CHAIRPERSON: And they honestly came to
7 a different conclusion. Now, they are as expert as your
8 witness is expert. How do we deal with it then?

9 MR LUDERITZ SC: Well, there are experts
10 that express contradictory views, and what you are left
11 with is - Chair, I see that one of the panel members have
12 disappeared off the screen. I don't know whether the link-

13 CHAIRPERSON: Zama, are you there?
14 There she is.

15 MR LUDERITZ SC: Oh.

16 CHAIRPERSON: Carry on. Ja, the only
17 point I'm trying to make here is; we have two experts, they
18 differ. You say there are other auditors also agreed with
19 your expert, and the JSE says FRIP members agree with ours.
20 So, at this level which we now are, what do we do?

21 MR LUDERITZ SC: Well, the question that
22 you need to interrogate, we would submit, is firstly - and
23 we say that that is not a contentious issue, it's whether
24 or not the applicant has in fact in accounting for every
25 transaction, whether the applicant has complied with the

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1 applicable IFRS Standard.

2 CHAIRPERSON: Hm.

3 MR LUDERITZ SC: And the JSE concedes,
4 and in fact criticises the applicant for the fact that it
5 has accounted for every component, as the JSE would have
6 it, of the transaction consistent with IFRS. The case
7 advanced by the JSE is that in so accounting, and
8 notwithstanding compliance with the applicable IFRS
9 Standard, the accounting does not amount to a fair
10 reflection of what it considers to be a composite
11 transaction. And the composite transaction on the JSEs
12 version includes the post-acquisition event of the waiver
13 of the loan in both instances. And it then seeks
14 effectively to advance a case on the basis that IFRS – that
15 compliance with IFRS is not, does not amount to a fair
16 reflection, and then seeks to apply the conceptual
17 framework notion of substance over form in order to advance
18 a case. That notwithstanding compliance with the
19 applicable IFRS standards, the transaction is not fairly
20 presented in the financials of the company.

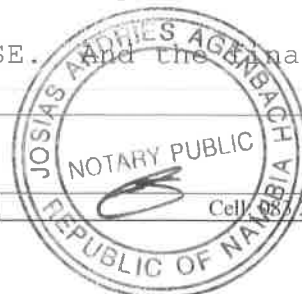
21 It is indeed so that there are some differing
22 expert opinions insofar as the question is concerned.
23 There are a number of experts that support the views
24 expressed by the applicant, and there are experts that
25 support a contrary view held by the JSE. And the General

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1 word is in fact the words that are spoken by the
2 applicant's expert, who comments on the views expressed by
3 the JSE, and Professor Mauron. And I've already given you
4 - by way of example - his criticism on the approach by the
5 JSE, and the Board, supported by Professor Mauron that
6 insofar as the property development is concerned, that
7 clear evidence is required, which appears to be - with
8 respect - a fundamental misdirection of both the JSE, and
9 Professor Mauron.

10 But the report of Mr Njikizana, we submit, is of
11 particular relevance given that it interrogates the views
12 expressed by Professor Mauron. And we submit, with
13 reference to objective facts, and the references provided
14 by him show that the views expressed by Professor Mauron
15 are not supported by the applicable standards. Nor are
16 they supported by the framework.

17 The question that you raised with me is where
18 does it leave you? Or, where does it leave the tribunal?
19 Well, the answer is that unless you can find that the
20 applicant's accounting for the transaction, in fact, does
21 not meet, or do not meet the IFRS requirements, there would
22 be no basis to compel the applicant to re-state its
23 financials. The fact that there are differing views in
24 relation to how these transactions should be accounted for
25 is not sufficient to warrant a direction by the JSE to

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1 compel the applicant to re-state its financials.

2 CHAIRPERSON: You see, yes. Could I
3 just interrupt? Sorry, I always interrupt, you know that.
4 The whole issue of substance and form arose before you were
5 - the need arose to augment your grounds. That was an
6 issue that should have been addressed in your founding
7 application, it wasn't. And now you introduce it "so
8 called" as an augmented ground, but as it was the issue
9 right from the beginning, which you didn't address right
10 from the beginning. Or did you? I mean in your founding
11 application.

12 MR LUDERITZ SC: No, the founding
13 application - if I can just make sure? Are you referring
14 to the notice in terms of Rule 14?

15 CHAIRPERSON: No, no.

16 MR LUDERITZ SC: There at page 612?

17 CHAIRPERSON: No, I'm talking about your
18 application as filed. Which is at that page 16, Annex 2.
19 And you took me to the summary there. It says:
20 Conjecture. Does not align. Does not support. Was done
21 after this. Should not have accepted the recommendations
22 of FRIP. And so, the point is, or the point I am trying to
23 make is, the old rule, that is you knew right from the
24 beginning that the issue us substance and form. That was
25 what the JSE told you in advance. And now you introduce it

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1 by way of augmentation, and make it your main ground, and
2 that was wrong.

3 But I understand that, this is now not - our
4 rules are fairly flexible, and our process also. But what
5 I would like to know is this; if we believe that, or come
6 to the conclusion that there is - or let's say there is
7 reason to believe that what is presented as discreet steps,
8 was not discreet steps, but the single transaction. Would
9 that not be a reason to apply section 3, 232, sub 5 of the
10 FSCR Act, for me to direct Dr Van Rooyen to appear before
11 the panel, and to give evidence so ta he can explain these
12 waivers, which are not explained on the papers?

13 MR LUDERITZ SC: Mr Chair, what the
14 applicant needs to demonstrate is that the transactions in
15 question have been reflected in the financial statements of
16 the company in a manner that fairly reflects the particular
17 transaction. That in turn is dependent on the question
18 whether - to use the phraseology of the JSE - the different
19 components, or the transactions as we - the transaction as
20 we say it is, was reflected in a manner consistent with the
21 applicable accounting standard. To that end we submit that
22 we have demonstrated that every leg of the transaction has,
23 in fact, been accounted for in compliance with the
24 applicable Standard.

25 It is indeed so that the fundamental difference

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1 between the parties is the concept of what includes, and
2 what excludes the transaction. On the applicant's approach
3 it is obliged, even relying, or even applying IFRS 3 - as
4 Mr Mauron, or Professor Mauron suggests one should do by
5 way of analogy, as he calls it - even though IFRS 3 is
6 expressly not applicable. The transaction has to be
7 accounted with reference to the facts as they were known on
8 the acquisition date. And those facts are properly
9 accounted for in the financial statements. The waiver of
10 the loan is a - it's an event that occurs after the
11 conclusion of the transaction. And the question that you
12 need to concern yourself with is whether the waiver of the
13 loan was accounted for in accordance with the applicable
14 IFRS standard.

15 The effect of the waiver of the loan is that the
16 liability that existed at the time was extinguished, and
17 had to be de-recognised in terms of the applicable standard
18 as it was. And that, with respect, is the sum total of the
19 facts that are relevant to the question whether or not the
20 applicable standard has been met. The intention is
21 certainly not relevant from the perspective of whether or
22 not the transaction, or the waiver has been accurately
23 reflected in the financials. The standard does not
24 interrogate the intention with which a party waives a
25 liability. The waiver is a unilateral act that occurs, and

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1 does not require consensus on the part of the company. And
2 the standard recognises the fact that the liability has
3 effectively been discharged, and as a consequence of the
4 waiver that is a factual enquiry that is undertaken. And
5 that fact is then accurately reflected, and recorded in the
6 financial statements consistent with the applicable
7 standard.

8 So, in our submission, Mr Chair, the intention of
9 Mr - or Dr Van Rooyen is not relevant to the consideration
10 whether or not the transaction has been accounted for in
11 accordance with the applicable standard, or not. That does
12 not mean to say, and I've been given an express instruction
13 by my attorney, that Dr Van Rooyen is not willing to
14 explain himself if he is called upon to do so. And I'm
15 instructed that indeed he would be willing, and perfectly
16 comfortable to explain what motivated him to waive the loan
17 liability, if, and to the extent that you consider that to
18 be a relevant consideration.

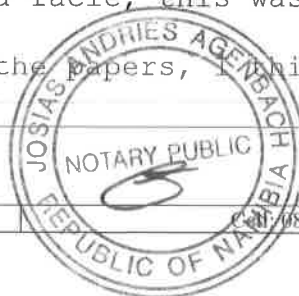
19 CHAIRPERSON: I'm not interested in his
20 intention. I'm interested in understanding - and I'm
21 speaking for myself - whether this is prima facie a
22 composite transaction, or as you say, a discreet
23 transaction, or discreet transactions. That is the issue.
24 And if - so if we conclude that prima facie, this was a, is
25 probably a composite transaction on the papers, I think the

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1 result would be that the application is dismissed. If we
2 find, as you submit, that these were discreet transactions
3 which were disclosed in the financials as discreet
4 transactions, then the application must succeed. Am I
5 correct?

6 MR LUDERITZ SC: That would be correct.

7 I - the response that I offered was in response to your

8 enquiry as regards to the powers under Section 232 (5) (a)

9 of the Act, which permits the tribunal to direct a person

0 to appear before the panel-

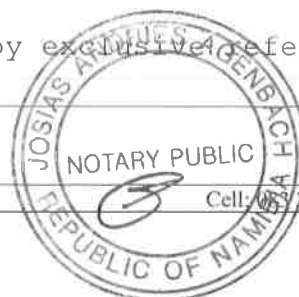
11 CHAIRPERSON: Ja.

12 MR LUDERITZ SC: And give evidence, and
13 be questioned. And at that level it may be relevant to you
14 to understand what the intention of Dr Van Rooyen was, and
15 to what extent the waiver of the loan was in fact part, and
16 parcel of a composite transaction. On the evidence-

17 CHAIRPERSON: Now, but he doesn't deal
18 with it, and he had the opportunity. So, I was just
19 raising the possibility, which I haven't considered, and
20 just mentioned to you. Because it's not something that I
21 intend to use, a power that I intend to use. In general,
22 my approach is to decide these re-application matters on
23 paper, and leave it at that.

24 MR LUDERITZ SC: Well, the question that

25 you would interrogate, whether it be by ~~exclusive~~ reference



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1 to what is currently before you, or after having invoked
2 Section 232 of the Act, is whether or not the transaction,
3 as the JSE would have it, was a composite transaction,
4 which in fact included as a component part of the
5 transaction, the subsequent waiver of the loan by Professor
6 - by Dr Van Rooyen. Now, it's important at that level to
7 understand what the version is of the applicant, and a
8 version which is not contradicted at a factual level by the
9 JSE. The JSE offers no more than speculation, and seeks to
10 draw inferences.

11 But at a factual level of a version that's placed
12 before you by the applicant, is that the unilateral waiver
13 by Dr Van Rooyen, after the acquisition did not form part
14 of the conception. The undisputed evidence is that the
15 intention, if there was an intention at the time by Dr Van
16 Rooyen to waive the loan, was not known to the Board of
17 Trustco.

18 CHAIRPERSON: Once again, I think you
19 use the word, evidence, fairly loosely. These are all
20 allegations.

21 MR LUDERITZ SC: Well-

22 CHAIRPERSON: I don't know who drew
23 them, they are allegations, there is no evidence before us.
24 It's not even signed, the document.

25 MR LUDERITZ SC: But the factual version

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1 as it is presented to the tribunal is not disputed by the
2 JSE. The JSE doesn't know-

3 CHAIRPERSON: I say it is not evidence,
4 it's - these are all allegations. On the JSEs side, and on
5 your side, all allegations. So, it's not as if - we're not
6 applying, we as the Authority, we are not applying the
7 Plascon Evidence Rule here. It's not that kind of hearing
8 that we have.

9 MR LUDERITZ SC: No, that I understand.
10 All I'm submitting is that the version that is placed on
11 record by the applicant as regards the Huso transaction,
12 and the component parts of the Huso transaction is not in
13 dispute between the parties. We can-

14 CHAIRPERSON: Oh, I think - my
15 understanding is that the JSE says there is an inherent
16 improbability in that version.

17 MR LUDERITZ SC: Well, that is-

18 CHAIRPERSON: That is why I say let's go
19 to substance, and not to form. Otherwise, they couldn't
20 say that.

21 MR LUDERITZ SC: Well, that's the high-
22 water mark of the case advanced by the JSE.

23 CHAIRPERSON: Yes, ja.

24 MR LUDERITZ SC: And one needs to
25 obviously interrogate that assertion.

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1 CHAIRPERSON: Whether we agree that, or
2 disagree.

3 MR LUDERITZ SC: Yes. Well, the point-

4 CHAIRPERSON: That's a reasonable
5 conclusion.

6 MR LUDERITZ SC: Yes. But the point of
7 departure, of course, would be the Huso transaction, which
8 is a written agreement itself.

9 CHAIRPERSON: Hm.

10 MR LUDERITZ SC: And what is significant
11 is that that transaction was already concluded in July
12 2015, some three years before the suspensive conditions
13 were fulfilled, and before - after the acquisition had
14 occurred the loan was waived. Mr Chair, I see that Ms
15 Hassim has raised her hand.

16 MS HASSIM: Hello, Mr Luderitz. I was
17 just going to ask the timelines. Because I understand that
18 the loan was waived on the 30th of September 2019.

19 MR LUDERITZ SC: Yes.

20 MS HASSIM: And I thought that the loan
21 was advanced, you know, shortly then before that. What do
22 we make of the reclassification of the liability on the 4th
23 of September? There was, initially it was classified as
24 equity, then it was reclassified on the 4th of September as
25 a liability in Trustco. And the loan gets then waived some

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1 25 days later.

2 MR LUDERITZ SC: So, the - that is
3 correct. If I can assist the tribunal insofar as the
4 chronology is concerned. We provide that chronology in our
5 heads of argument in paragraph 11. And you will see in
6 paragraph 11.4 that the (inaudible) purchase agreement, the
7 "so called" Huso transaction, was concluded in 2015. The
8 actual document appears at page 480. It is annexure H2.

9 MS HASSIM: Hm.

10 MR LUDERITZ SC: And that is the signed
11 agreement between the parties. So, when we talk about the
12 Huso transaction, we're in fact talking about a transaction
13 that is recorded in writing, in a document which
14 constitutes the sole memorial of the agreement between the
15 parties. And that-

16 CHAIRPERSON: Yes. But it doesn't bind
17 third parties. So, the third parties are not bound by what
18 you say, (inaudible) doesn't bind a third party. What was
19 the date of that agreement? Footnote 18.

20 MR LUDERITZ SC: The agreement was signed
21 on the 14th of July 2015, and the page reference is page
22 503.

23 CHAIRPERSON: 2015, yes.

24 MR LUDERITZ SC: Mr Chair, the suggestion
25 is not that the agreement binds third parties.

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1 agreement as it was concluded at the time, in July 2015,
2 was presented to the shareholders of the company. Dr Van
3 Rooyen, who was the majority shareholder, and he was also
4 the controlling shareholder at the time of Huso, of course,
5 abstained from voting in relation to the approval of that
6 transaction. And the transaction was approved by the
7 minority shareholders at the time, in accordance with its
8 terms.

9 CHAIRPERSON: Hm.

10 MR LUDERITZ SC: When one talks about a
11 transaction, and the component parts of the transaction,
12 the first point that we make, and in fact that should be
13 the end of the debate, is to have regard to the express
14 terms of the Huso transaction, which does not contemplate,
15 or foreshadow the waiver of a loan by Dr Van Rooyen some
16 three years later. That, and we've made the point, is a
17 unilateral act that occurs by Dr Van Rooyen, and does not
18 involve the consent of the Board. So, at the level of a
19 transaction one needs to draw a clear distinction between
20 the Huso transaction as it is recorded in the written
21 agreement between the parties, and the subsequent
22 unilateral waiver, some three years later by Dr Van Rooyen
23 of the loan.

24 If I may return to the issue that was raised with
25 me by Ms Hassim, and that concerns - if I understand the

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1 point correctly - the reclassification of the loan from
2 equity to a financial liability. We deal with that aspect
3 in paragraph 11.7 of our heads of argument. It is correct
4 that initially the loans were reflected as equity loans, we
5 deal with that in paragraph 11.3, and the reason why these
6 loans were reflected as equity loans was because their
7 repayment at the time was entirely within the discretion of
8 Huso Investments.

9 Now, important is the fact that the Huso loans
10 did not form part of the Huso transaction. What was
11 disposed of, in terms of the Huso transaction, was Dr Van
12 Rooyen's shareholding in Huso, and not the loans that were
13 held, and that were reflected at the time. The
14 reclassification of the loans occurred in the circumstances
15 described in paragraph 11.7 of our heads of argument. And
16 what in fact occurred is, whether the loan was repayable in
17 the absolute discretion of Huso, being the debtor, and the
18 terms of the loan was then amended so that the loan would
19 become repayable within 12 months. And that change
20 occurred in March 2018, which of course is before the
21 acquisition date. And at the time when Dr Van Rooyen is
22 still the sole shareholder of Huso Investments, and NNBC.

23 So, that is an event that occurs prior to the
24 actual acquisition of the shares. And that event is, in
25 fact, correctly and consistently consistent with the

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1 applicable standard reflected in the financial statements.
2 Where the repayment of the Huso loan is reflected in the
3 financial statements as a liability. And as at the
4 effective date of the acquisition, it is reflected as such
5 in the financial statements. The waiver then occurs after
6 the actual acquisition of the shares, and at the time when
7 the liability, or the loan is in fact a liability
8 consistent with the applicable standard.

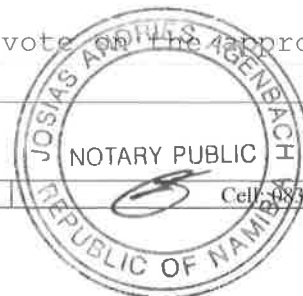
9 But to get back to the issue raised by the
10 Chairman, the Huso transaction is the transaction as it is
11 recorded in the written memorial between the parties, and
12 as it was approved by the shareholders at the relevant
13 time. And that is the Huso transaction, that transaction
14 was in fact accurately recorded in the financial statements
15 on any score consistent with the applicable standard. What
16 the JSE seeks to do is to say that the Huso transaction in
17 fact entailed something more. The Huso transaction also
18 entailed an agreement between the parties that after the
19 acquisition of the shares, the Huso loan would be waived by
20 Dr Van Rooyen. And there is simply no evidence to support
21 that inference that the JSE seeks to draw. And in fact,
22 that inference is entirely inconsistent with the express
23 terms of the agreement approved by the minority
24 shareholders of the company, with Dr Van Rooyen at the time
25 abstaining from participating in any vote on the approval,

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1 or not of the Huso transaction.

2 And, so we say that on the evidence - well, let's
3 not use the word, evidence. On the facts, the undisputed
4 facts as they are before the tribunal, the waiver of the
5 loan did not form part of the Huso transaction, even
6 (inaudible) IFRS 3, as Professor Mauron suggests one
7 should. Notwithstanding the fact that IFRS 3 is in fact
8 not applicable. The accounting requires an accounting of
9 the transaction as at the acquisition date. There is no
10 dispute that at that level the transaction was in fact
11 properly, and fully accounted for, and consistent with the
12 applicable accounting standards. And so, returning to the
13 question whether or not the tribunal should invoke the
14 powers in terms of section 232, on the undisputed facts,
15 the Huso transaction did not involve, or include a waiver
16 of the loan by Dr Van Rooyen. And on that basis, there
17 would be no reason to direct the applicant to re-state its
18 financials. Its financials fairly reflect the transaction,
19 and every component part of the transaction, and we say
20 that there is no basis to criticise the manner in which the
21 transaction has in fact been accounted for.

22 CHAIRPERSON: Thank you.

23 MS HASSIM: I beg your pardon. Mr Chair,
24 I just have one more question, perhaps two. The substance
25 over form argument, the JSE argues that this entire

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1 transaction was contrived, and I think they use that word,
2 they use the word specifically, contrived, to create a more
3 favourable financial picture. That was the first thing.

4 The second thing is, they - this edge out
5 mechanism, it seems that, by waiving the loan it presents
6 the opportunity to Dr Van Rooyen. So, there were two, it
7 was contrived in two ways as I understand it. The one was
8 the favourable result for Dr Van Rooyen. And the other
9 result was presenting a very favourable position, putting
10 the company into a profit-making position, which otherwise
11 wouldn't have occurred, but for the waiver. And it really
12 made no difference insofar as the financial position of the
13 company is relative to. That's my understanding of that
14 portion of the form over substance argument that the JSE
15 advances. Would it - can I hear you on that?

16 MR LUDERITZ SC: Yes. The words,
17 contrived, of course are words that appear in heads of
18 argument. What you would know is that there was an
19 exchange of correspondence between the JSE, and the
20 applicant preceding these proceedings. The exchange of
21 correspondence forms part of the record before the
22 tribunal. And you will search in vain for any allegation,
23 or suggestion in that exchange between the parties that
24 what the Huso transaction was, was in fact a contrivance.
25 It's not an allegation that was made on the record, and on

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1 that basis it's not an allegation that was responded to.

2 What you do have are the facts as they are
3 recorded by the applicant, and which are not disputed by
4 the JSE. The JSE seeks to attribute based on no more than
5 speculation on their part, on some or other contrivance
6 involving the Board of Trustco, and Dr Van Rooyen. And
7 involving an element of a transaction not recorded in their
8 written agreement that was concluded some three years prior
9 to the waiver of the loan agreement. So, what you would
10 have to find is that the actual Huso transaction, as it is
11 recorded, and reflected in annexure H2, was in fact a
12 contrivance. And that even at the time the parties - and I
13 say, parties, I'm referring of course to them in the plural
14 - because a contrivance would involve at least two parties,
15 the Board of Trustco at the time, and Dr Van Rooyen. That
16 there was, at the time, an intention to offer this
17 additional benefit to Dr Van Rooyen, and that it was at the
18 time contemplated that he would ultimately waive a loan in
19 favour of the company so as to, on the one hand, increase
20 the profitability of the company. And on the other hand,
21 to benefit himself in the form of compensation for the
22 shares that were required.

23 And there is simply no evidence to support that
24 inference, and the inference has not been placed on record.
25 And the applicant was never challenged, or invited to deal

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1 with a proposition that the Huso transaction was in truth,
2 and in fact nothing other than a contrivance that was
3 designed to benefit Dr Van Rooyen. And applying the
4 authorities that would normally apply to High Court
5 proceedings, if that is the case that the JSE sought to
6 advance, then it was duty bound to place that position on
7 record, and to allow Dr Van Rooyen, and the Board of
8 Trustco to deal with an assertion that this transaction was
9 nothing other than a contrivance.

10 But as I've already pointed out to you, you will
11 search in vain in the correspondence for any suggestion on
12 the part of the JSE that the entire Huso transaction was
13 nothing other than a contrivance.

14 MS HASSIM: Sorry, Mr Luderitz, I see the
15 contrivance was referred to in the context of the R1
16 billion loan, that's the other transaction. So, I stand to
17 be corrected. Thank you.

18 MR LUDERITZ SC: Yes. But I don't
19 believe that that was raised in the correspondence either.

20 MS HASSIM: No, absolutely. If I could --
21 sorry, I had it just a moment ago. If you look at page
22 241. And if you wish, the top of page 241 is dealing with
23 the (inaudible) loan waiver. Yes.

24 MR LUDERITZ SC: Well, that assertion was
25 answered. That assertion was answered by Trustees and it



18

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1 was shown in the response that there is just no basis for
2 this inference that the JSE seeks to draw.

3 MS HASSIM: Thank you, Mr Luderitz.

4 MR LUDERITZ SC: Thanks.

5 MS HASSIM: Thanks, Chair.

6 CHAIRPERSON: Any other questions? Are
7 you finished, Mr Luderitz?

8 MR LUDERITZ SC: Thank you, Mr Chairman.

9 CHAIRPERSON: Okay. We'll take a
10 quarter of an hour adjournment, until ten to. Ten to.

11 [INQUIRY ADJOURNS INQUIRY RESUMES]

12 CHAIRPERSON: Are we ready? Mr Green?

13 MR GREEN SC: Yes, thank you. Sorry.

14 CHAIRPERSON: (Inaudible).

15 MR GREEN SC: Yes, thank you, Mr
16 Chairman, there we go. Sorry, on mute again.

17 CHAIRPERSON: Thank you.

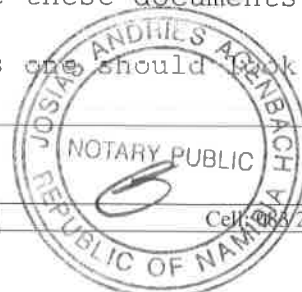
18 MR GREEN SC: Thank you. Mr Chairman, if
19 I may, my submissions will take the following form. I'll
20 deal with some introductory remarks, and I'll deal with the
21 question of the record, and the manner in which this matter
22 is placed before yourself, and the tribunal members there.
23 I'll then move onto a section which I call, the approach to
24 the matter, and how one should analyse these documents that
25 are before you, and through which lens one should look at

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1 it. And then I'll deal with the loans issue. And then
2 I'll deal with the evaluation issue.

3 If I may then start with the introductory points,
4 and deal with the record. Mr Chairman, we agree that this
5 record is, it is impenetrable, and takes an enormous amount
6 of time to try and understand. We have, on a separate, but
7 related issue in regard to the rules that the tribunal uses
8 in respect of JSE matters, engaged the Secretariat to see
9 whether there could be an amendment to the rules.

10 In discussion with my team, Mr Chair, it seems
11 that it would be sensible for the JSE to extend those
12 discussions to include perhaps a different way of putting
13 the JSE related documents before the tribunal. It works
14 the rules in a more simple matter, but where one is left
15 with a complicated matter like this, it does just result in
16 lots, and lots of paper that is unhelpful. I offer that
17 not as an excuse, but just by way of explanation of what
18 the JSE will do in future. I will, in my argument, try to
19 give you the references, the page references to the
20 relevant parts.

21 Still in the introduction part, you have asked my
22 learned friend about the experts. There are, as we have
23 it, three experts which have said something which is before
24 the tribunal. That is the FRIP, Mr Njikizana, and
25 Professor Mauron. Mr Njikizana comes, as it were, late,

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1 and out of turn, but it is before you, and one can make of
2 it what one will. We would suggest that Mr Njikizana's
3 document should be viewed with a degree of circumspection.
4 And we say that because of what is to be found in his
5 report. And that is at page A652. And, Mr Chairman, I
6 will differentiate the parts of the record between A, and
7 B, it is divided into two parts.

8 So, A, at page 652, paragraph 4.1. There you
9 will see Mr Njikizana says that he has advised Trustco in
10 relation to the accounting treatment of accounting entries
11 forming the basis of the decision, and the application for
12 reconsideration. So, he is - by his own admission it seems
13 - propping up his own advice in this document. By
14 contrast, FRIP, and Professor Mauron have no interest in
15 the matter, and are independent.

16 The question of the auditors who looked at these
17 various statements. We think that Trustco may have gotten
18 its wires crossed, and when I come to that part in the
19 argument, I'll take you to the pages where we think that
20 Trustco is wrong when it says there were multiple auditors
21 that looked at these particular statements. There was only
22 one set of auditors as we understand it, and that is Moore
23 Stephens.

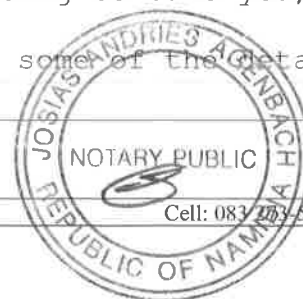
24 As part of my argument, I am going to take you,
25 Mr Chairman, and the tribunal members to some of the detail

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1 of the loans. And I'm going to do that, because that is a
2 fact which is noticeable by its absence in Trustco's
3 submissions, both the oral, and in the heads of argument.
4 And we think that there is something to be made of the
5 detail of the loans, and I'll take you to that. And the
6 point that will come out of looking at the loans is that
7 the Huso Save-It Shares Agreement, as amended, then extends
8 its tentacles into both loan waivers. And I'll explain how
9 that works.

10 Mr Chairman, you asked my learned friend whether
11 you should direct Dr Van Rooyen to appear before you. We
12 would say you should not. And we say that for this reason;
13 is Dr Van Rooyen is the CEO of Trustco. He has, through
14 Trustco, been given every opportunity to explain himself in
15 this matter. And he has studiously - we would say - not
16 done so. Having not done so, he shouldn't be given a
17 second chance, as it were, by being summoned to appear
18 before you.

19 Can I just give you two references where we think
20 that the point is made that Dr Van Rooyen ignored matters?
21 And the first one is A198, at paragraph 2 (c), it's at the
22 foot of the page. And there the JSE says; "The subsequent
23 loan was interest bearing. The economic rationale for
24 waiving the right to a steady income receipt after expiry
25 of only 10 months of a five-year loan is not clear." So,

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1 he's pointedly said it's not clear why he did this. The
2 response you will then find at A216, and this is simply
3 ignored. It's just not dealt with. It's an example that
4 we give to you.

5 Then, Mr Chairman, you asked my learned friend a
6 question which related to the single, and the composite
7 nature of the transaction. And as I understood it you said
8 that, the finding is that if it's a single transaction, and
9 then the application for reconsideration should succeed.
10 And if it's composite, it should fail. Mr Chairman, we
11 agree that if you find this as a composite transaction, the
12 reconsideration will fail. But we do not think that it
13 follows, as a matter of course, that if find that there are
14 separate transactions the application should succeed.

15 And we say that for this reason. The separate
16 single - the separate transactions viewed collectively may
17 nonetheless require an accounting treatment that reflects a
18 particular economic reality. And that must be done,
19 notwithstanding the separateness of the individual
20 transactions.

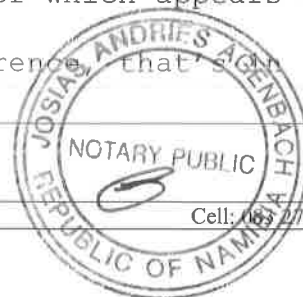
21 Then, Mr Chairman, Ms Hassim raised the issue of
22 contrivance. And I understood my learned friend to say
23 that it can't be found in the correspondence. Ms Hassim
24 did take my learned friend to the letter which appears at
25 A241. Could I give you a further reference that's in the

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1 FRIP report at A258, it uses the description of
2 contrivance. And in respect of the letter that Ms Hassim
3 referred my learned friend to at A241, the Trustco answer
4 is at A280, and there is no explanation offered, there is
5 no attempt to engage with the suggestion of contrivance.

6 Could I then, Mr Chairman, move into the next
7 part of my argument, and that I was I call the approach
8 section. And can I start by making this point; the FRIP
9 process is a random process. There is no design to target
10 Trustco, its name - as it were - came out of the hat
11 (inaudible). That's how it finds itself being subject to,
12 or its financials being subject to scrutiny by the JSE, and
13 thereafter by the FRIP.

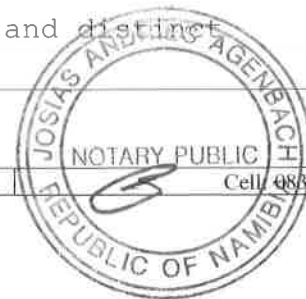
14 We say that the approach that one adopts when
15 considering accounting matters is important. You should
16 not, we say, as Trustco does, adopt a lawyer's approach of
17 looking at separate individual agreements. And we will see
18 that approach articulated by Trustco at A31, paragraph 41.
19 And what Trustco says there at the second sentence is:
20 "The JSEs misplaced view falls to - fails to distinguish
21 the loan transaction," - in other words the
22 reclassification waiver - "on the acquisition of the Huso
23 Investment shares. The correct position, as submitted, is
24 to treat the Huso loan classification waiver, and
25 acquisition transaction as separate, and distinct."

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1 transactions." That's Trustco's approach. And you will
2 find that same approach articulated in my learned friend's
3 heads of argument, at paragraph 23 to 26.

4 The JSE, by contrast, adopts a different approach
5 to the matter. And the best place I can show you the
6 approach that the JSE adopts is to ask you to turn up
7 Professor Mauron's report. And Mr Chairman, and tribunal
8 members, on page 2, the last sentence of what would be
9 paragraph 4, Professor Mauron says: "The economic
10 substance, as assessed by an accountant, or auditor, may
11 differ from the legal conclusions reached by a lawyer when
12 interpreting a transaction, or group of transactions." Mr
13 Chairman, could I ask you to make a note of the reference
14 to group of transactions, because that feeds back to the
15 point I made to you about - even if you find that there are
16 several single transactions, together as a group they may
17 have a particular meaning to an accountant.

18 He goes on in paragraph 5, and I read from the
19 second sentence in the third line: "On
20 differentiating between economic substance and form would
21 capture a transaction which is a simulation, or sham, but
22 it can also inform the accounting for entirely honest
23 transactions." And he then refers to the lease. The point
24 there is it is not necessary in order to find a sham, in
25 order to say that something does not reflect the substance

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1 when it is accounted for in a particular manner.

2 In paragraph 6 he makes the point that you have
3 heard lots about already, the substance over form. And
4 then at seven, he explains in the second sentence what
5 substance over form means. He says: "It requires
6 the underlying economics of a transaction to be considered.
7 Including how the facts, and circumstances affect the
8 amount, time, and uncertainty of the resulting cash flows,
9 and entity specific values." He, in support of that,
10 refers to the conceptual framework. Which you, and
11 particularly paragraph 2.12 – and, Mr Chairman, the
12 reference for that is in the accounting bundle, at page 17.
13 And I needn't take you to that.

14 But what it says is that the conceptual framework
15 underpins all of the IFRS standards. So, whilst a
16 conceptual framework does not trump a standard, it is the
17 guiding document that informs the creation of standards.
18 And that is consistent with what is said in the MEC for
19 economic development case, which we've quoted in our heads.
20 There is an Acting Judge in the Cape, that is the only
21 reference we could find in all reports to that, and it is
22 consistent with what Professor Mauron said.

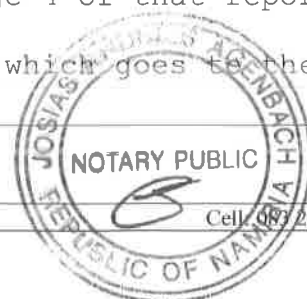
23 Whilst you have Professor Mauron's report open,
24 could I ask you then to turn up on page 4 of that report,
25 paragraph 11? And particularly 11.3, which goes to the

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1 rights, and obligations arising from a group of contracts,
2 mainly to be accounted for as a single entity. That is
3 again to the point I made about a single transaction, or
4 multiple single transactions. And the same point is then
5 made in 11.4.

6 Then, still on the introduction, could I ask you
7 to turn up the JSEs heads of argument at paragraph 22? Mr
8 Chairman, and panel members, in paragraph 22 we have set
9 out why the JSE plays the role that it does in respect of
10 the accounts of Trustco. It is not being a nosey,
11 busybody. It is discharging its obligations to ensure that
12 there is a sound presentation of financial information,
13 which we say is one of the cornerstones of an efficient
14 functioning market.

15 Then finally in the introduction. What the
16 position of the JSE is, is that the manner in which Trustco
17 has implemented the IFRS standards is incorrect, and leads
18 to a misrepresenting of the financial results. That arises
19 because Trustco breaks things up into separate
20 transactions, and doesn't consider the effect of the group
21 of transactions, and doesn't consider the abilities of
22 composite transactions.

23 Could I then move to the loans? Trustco says in
24 its argument, as we understand it, that all that the JSEs
25 position (inaudible), is that it would have done things

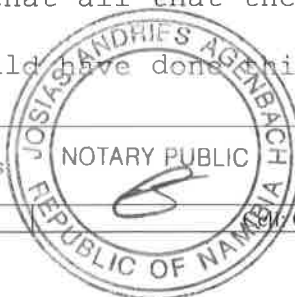
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1 differently. That is not a correct statement of the JSEs
2 position. The JSE says that Trustco's treatment of the
3 loan waivers is incorrect. And it says that because the
4 way in which they are treated results in a gain in profit,
5 which would not otherwise have been recognised. And I'm
6 going to - with reference to the loan agreements - then
7 take you, if I may to why the profit is such an important
8 issue.

9 Can I start that point by asking you to turn up
10 the Sale of Shares Agreement, which you will find at A480?
11 Now, my computer is faulty. Mr Chairman, I'm sorry, I've
12 picked up a computer glitch here, I was using the documents
13 electronically, and they have frozen. I'm just asking for
14 somebody else to bring another set of the papers. Mr
15 Chairman, while I'm waiting, what I wish to refer you, and
16 the tribunal members to is page 487 of the document, and
17 particularly clause 4, which is the purchase price. So,
18 the Huso Sale of Share Agreement has a purchase price of
19 3.6 billion. And then at clauses 4.1.1, and 4.1.2, it sets
20 out how it's going to be paid.

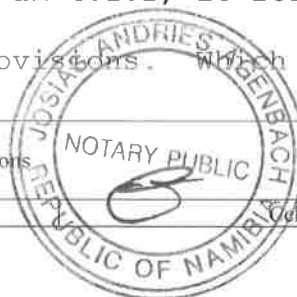
21 And you will see that 4.1.1 is the initial
22 purchase price of some 672 million, which is to be payable
23 in shares. And that is recorded as representing the value
24 of the mineral resource. And then in 4.1.2, it refers to -
25 what I have called the earn out provisions. Which says

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1 that; if certain profit targets are met in the year's
2 listed, then the amount of shares which are given there
3 will be provided to Mr, or Dr Van Rooyen.

4 That is changed though, and the amended Sale of
5 Shares Agreement, the relevant clause is at page 510. And
6 at clause (inaudible) 5 on that page, it changes the
7 initial purchase price, just by a small amount, some
8 \$77 000 million. And then over the page is the important
9 change. It's in clause 6 of the amendment. What it does
10 is delete the existing 4.1.2 of the Sale of Shares, and
11 replace it with what appears at the foot of the page, and
12 over the page. And the difference is, is that the earn out
13 provision is no longer time limited. So, it's not that Dr
14 Van Rooyen can get a certain number of shares in each
15 particular year, instead it is a cumulative profit number.
16 And the profit number is the 1.3 billion Namibian Dollars,
17 which appears at the foot of the table. And in exchange
18 for that, Dr Van Rooyen would then get 628 million shares.
19 628 million shares is - round numbers - about 2.95 billion
20 Namibian Dollars.

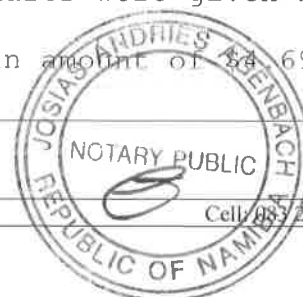
21 And I do that to ways. One is, is I subtract the
22 600 odd million initial purchase from the balance, the 3.6.
23 Also, I did it by working out how much each share was
24 worth. And if you look at how many shares were given for
25 the initial purchase, and you get to an amount of \$4.69 for

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1 each share. But it's around about \$2.9 odd billion. And
2 the point that I want to underscore there is that what Dr
3 Van Rooyen needs is for a profit of 1.3 billion to be
4 earned, and he will then get R2.9 billion worth of shares.

5 We say this is the context within which the loans
6 have to be considered, and the way that the loans has to be
7 considered. We say one cannot ignore the enormous benefit,
8 Dr Van Rooyen gets more, it's sort of a doubling of your
9 money almost that Dr Van Rooyen will enjoy if Trustco -
10 particularly the mining division - can make \$1.3 billion in
11 profit.

12 That then brings one to the Huso transaction.
13 And what happened there is Dr Van Rooyen, through his
14 mining interests in Huso, said to Trustco; let me sell you
15 the shares in Huso. And that was then presented to the
16 shareholders, and it was presented to the shareholders on a
17 particular basis. And one of the things that the
18 shareholders, Trustco shareholders were told, is that the
19 loan that Dr Van Rooyen has into Huso is an equity loan.
20 And could I give you the reference there, it's at A563,
21 that's part of the circular that went to the shareholders.

22 Mr Chairman, and panel members, the third entry
23 in the table you will see equity loan, and if you run your
24 finger across it's \$295 million. You will recall that the
25 loan changed, and increased quite a lot before the closing

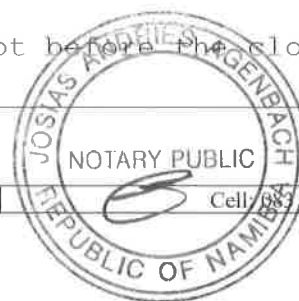
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1 date on the transaction. But the point here is that this
2 is the Dr Van Rooyen loan, and the shareholders are told
3 that it's an equity loan. Now, the importance of that at a
4 simple level is, if you were a shareholder and you were
5 saying; what's the net asset value of Huso, you would
6 ignore that equity loan, because it's an equity loan, it's
7 not repayable. If, however, it is a liability, when you as
8 a potential shareholder say; what's the NAB, you have to
9 bring to account that rather large liability, which
10 ultimately ends up at 590 odd million Namibian Dollars.
11 It's a significant amount.

12 What Dr Van Rooyen, and Huso do - remember Dr Van
13 Rooyen's a sole shareholder of Huso. He's the lender of
14 the money. After this transaction has been approved by the
15 Trustco shareholders, he enters into an addendum to the
16 loan agreement to convert the equity loan to a liability
17 loan. Suddenly Huso now owes \$590 odd million to Dr Van
18 Rooyen. But the shareholders of Trustco are never told
19 about this. We have not seen that loan agreement, nor have
20 we seen the addendum, because seemingly Trustco has quite
21 studiously not put that document up. We would have thought
22 it's an obvious document that Trustco should have provided.

23 Now, we'll probably hear an answer that says; oh,
24 but the loan is between Dr Van Rooyen, and Huso, not
25 between Trustco. We think that is a paper-thin answer,

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1 because Dr Van Rooyen is the CEO, and Huso is now a
2 subsidiary of Trustco, so it has access to those documents.

3 What then happens, and I'm just rolling forward.
4 Is on the 4th of September 2018 the Huso transaction closes,
5 that's when the CPs are completed. On the 30th of September
6 2018, which is the last day for Trustco's interim results -
7 so that's the six month period from financial year end. On
8 that day Dr Van Rooyen waives his loan in Huso. So,
9 suddenly there is - the way Trustco deals with it - \$590
10 odd million benefit to the mining sector of Huso - of
11 Trustco. Dr Van Rooyen gets nothing, he gives it away.

12 We say that raises a question; why would an
13 astute businessman, who owns 55% of Trustco, so he knows
14 how to deal with money, why would that type of person give
15 away 590 odd million Namibian Dollars? It's never been
16 explained, and we think that it should have been explained.
17 But there is, we say, an apparent answer. And that is in
18 the Huso Sale of Shares Agreement. Because \$590 million of
19 profit to Trustco activates the earn out provision, and so
20 Dr Van Rooyen can recover shares. Just on rough numbers
21 what happens is Dr Van Rooyen would double-up, just over
22 double-up his \$590 million in getting shares in the earn
23 out. A bit over a billion dollars' worth of shares, that's
24 what would happen.

25 The JSE considered the matter that way, and

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1 looked at it and its reasons in that manner. And could I
2 just give you the references to the JSEs reasons? They're
3 at page A338, that's where they start. And the first loan
4 issue you will find at A350, at paragraph 37.

5 And what the JSE says in its reasons is that the
6 substance of this transaction is an equity transaction.
7 It's Trustco taking money in exchange for shares. And
8 because it's an equity transaction, it should have been
9 accounted as such. The points that the JSE has made in its
10 decision, we have summarised in our heads of argument at
11 paragraph 29, and I needn't take you there specifically.

12 And then just on how the JSE suggests this ought
13 to have been accounted for, if I give you the reference,
14 it's at A358, paragraph 49. There the JSE has given the
15 proforma version of how it should be accounted for.

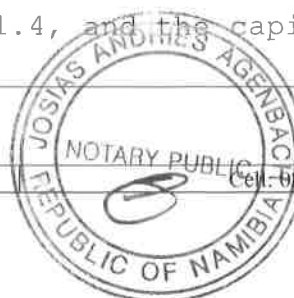
16 Could I then move to the second loan, and the
17 second loan agreement you will find at A576?

18 CHAIRPERSON: Sorry, just a moment. AA
19 where?

20 MR GREEN SC: A576.

21 CHAIRPERSON: Yes.

22 MR GREEN SC: Chairman, could I then just
23 direct you, and the tribunal members to a couple of the
24 definitions which I would submit are relevant? On page
25 578, total amount, it's at clause 2.1.4, and the capital



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1 amount is a billion dollars. And due date, when the
2 repayment has to be made - at 216 - that's the 31st of March
3 2024. And then over the page one sees the definitions for
4 interest, and interest rate. The interest rate is prime.
5 And then at page 582, point 5 deals with interest, and says
6 that the capital amount is interest bearing. And the
7 reason I point these things out, Mr Chairman, is that this,
8 on the face of it, has all the hallmarks of a normal
9 interest free loan. Then the payment is dealt with in 6.
10 At 7 we then see another clause, which is repayment of the
11 loan amount in equity. And it provides in there that Dr
12 Van Rooyen can elect to take shares at certain points in
13 time, at certain prices, instead of taking cash as
14 repayment. But then at 584 there's a term at clause 7.3.
15 And can I ask you to turn that one up? 7.3 is an odd term,
16 its language is poor, and we did wonder whether it was
17 inserted later because of the difference, and the style of
18 language. But I have nothing to support that.

19 But what it says is that it stipulates that Dr
20 Van Rooyen can, in his sole discretion, elect to write off
21 any portion of the capital amount. And it goes on and it
22 says in the last sentence: "The borrower would be
23 obligated to align the capital amount accordingly to
24 reflect the lender's decision in the borrower's
25 subsidiaries, or operating segments." So it's a clause

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1 that gives to Dr Van Rooyen the entitlement to waive, we
2 would have thought he always had that, without stipulating
3 for it. But the last sentence seems unusual. It's been
4 read, it is that Dr Van Rooyen can direct Trustco where to
5 reflect the benefits of the waiver. We say why that's
6 important is because it feeds back into the Sale of Shares
7 Agreement, and the earn out provision that Dr Van Rooyen
8 enjoys.

9 You will know that about eight months after this
10 loan was concluded, Dr Van Rooyen waived it. And what
11 Trustco did, in its mining division, took a billion
12 Namibian Dollars profit, which then saturated the earn out
13 provision. So, as a result of the waiver of these two
14 loans, Dr Van Rooyen has - in terms of the Sale of Shares
15 Agreement - received just over 2.9 billion Namibian
16 Dollars' worth of shares. It is a little bit of a big bang
17 approach to making money, we would say. One takes 1.5
18 billion Namibian Dollars, and changes it into \$2.9 billion
19 of shares. That's the context in which the JSE says these
20 two loans should be considered. It says that, in
21 particular in respect of the second loan, because the
22 source of the billion Namibian Dollars that Dr Van Rooyen
23 lends to Trustco, is to come from him selling shares, and
24 we need to find the clause there. Sorry, because mine has
25 frozen, I don't have access to my marked-up versions. The

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1 sale of - the second loan agreement provides that Dr Van
2 Rooyen is to source his billion Namibian Dollars by selling
3 shares that he already owns.

4 So, again, back to my thesis of doubling of
5 money. Dr Van Rooyen is, on this loan, if there is to be a
6 waiver in future, sell a billion dollars of Namibian
7 shares, lend the money to Trustco, waive the billion-dollar
8 loan, and get \$2 billion worth of shares back. We think
9 that is too good to be true. And that's why the JSE says
10 one must look at the loan waivers as part of the group of
11 contracts that starts with the Sale of Shares Agreement,
12 proceeds with the first loan agreement, and into the second
13 loan agreement. And that when one looks at those three
14 contracts as a group of contracts, then one includes that
15 you are either dealing with a single composite contract, or
16 structure perhaps, rather than contract. And one would be
17 tempted to say that it was by design (inaudible), but it
18 doesn't have to be by design if the result is that one is -
19 from an economic perspective - dealing with an equity
20 transaction, then one must account for it as such. So,
21 that's what the JSE says.

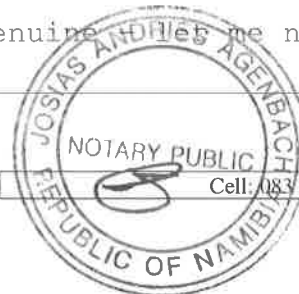
22 Our learned friends in Trustco pin their entire
23 argument in respect of the second loan, certainly as we
24 understand it, on a reference to IFRS 9. We say that is
25 too blinkered a view. If you had a genuine

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1 say, let me take that back. If you had a normal, typical,
2 commercial loan from an independent third party lender to
3 an independent borrower, then IFRS 9 may apply in the
4 application. But where one has this close related party
5 structure that one finds here, and particularly where one
6 has a group of contracts, and a pattern of waiving, we say
7 that IFRS 9 cannot be blindly applied, and one must adopt a
8 (inaudible) different approach in order to ensure a proper
9 (inaudible).

10 Can I then just stop about, and pause? I said I
11 would deal with the Trustco auditor's point. Our learned
12 friends refer to this in their oral argument, and the deal
13 with it in paragraph 14 of their heads of argument. They
14 don't give a reference, or say that there are multiple
15 accountants that look at this. And what we think our
16 Trustco, and our learned friends may have done is have
17 confused the position that Trustco found itself in during
18 2020, with what happened in respect of these accounts. And
19 you may recall, Mr Chairman, that in the correspondence it
20 is buried deep, that Trustco was late with putting out its
21 statements, it couldn't meet the March deadline. It had to
22 then change its financial year end, and swapped auditors.

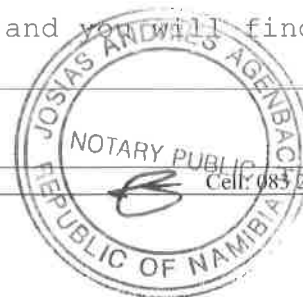
23 If I could just give you the references to those,
24 and they all come from letters which Trustco's attorneys
25 have sent. The first one is at B334, and you will find a

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1 reference there to Moore Stephens resigning on the 23rd of
2 March 2020. Then at B - same page - B334, in the same
3 letter you will find the reference to Trustco changing its
4 financial year end. And Mr Chairman, I'm told that one of
5 the panel members may have dropped off the call. I think
6 it's Ms Shangisa that has - is missing.

7 CHAIRPERSON: Right, Kim, will you
8 please check what's going on?

9 MS HOST: Yes, Judge, I am actually
10 trying to call now. I'll let you know.

11 CHAIRPERSON: Thank you.

12 MS HOST: Sorry, Judge, I don't seem to
13 be getting through, the phone is just going to voicemail.
14 I'll continue to try on a landline, I don't know if that
15 will work because I don't know if she's at the office.
16 I'll let you know now.

17 CHAIRPERSON: Ja, but also try an email.

18 MS HOST: Ja, I've sent one. I've sent
19 an email as well. Oh, there she is, oh good. Thank you.

20 CHAIRPERSON: Okay. Thank you.

21 MS NKUBUNGU-SHANGISA: Apologies, Chair,
22 I'm back on.

23 CHAIRPERSON: Thank you.

24 MS NKUBUNGU-SHANGISA: I lost connection,
25 so I was reconnected, thank you.

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1 CHAIRPERSON: Thank you. Yes, Mr Green?

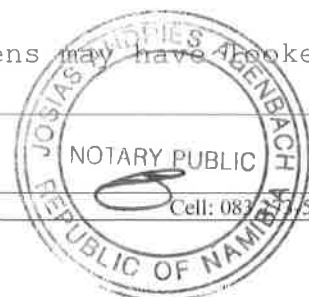
2 MR GREEN SC: Yes, thank you. Mr
3 Chairman, I will, with your leave, just recount those
4 dates, with those pages again. B334 was the first one, the
5 23rd of March 2020, that's when Moore Stephens resigns. The
6 same page, B334, there is a recordal from Trustco's
7 attorneys that it changed its financial year end to 2020.
8 Over the page, B335, you will find the reference to Trustco
9 requesting the JSE to approve BDO Namibia, that's on the 7th
10 of May 2020. And the JSE declined to approve BDO. And
11 then over the page, at 336, in paragraph E, you will find
12 the reference to the Trustco appointing Nexia on the 7th of
13 July 2020. And then, just as a reference as well, at B983.
14 Again, a letter from Trustco's attorneys in October of last
15 year, recording in paragraph 2.1 that Nexia indicated that
16 certain of these statements had to be implemented by
17 Trustco before it would sign off.

18 So, as we have it, Moore Stephens resigns in
19 March of 2020. There was then an attempt to get BDO on
20 Board, and the JSE said they're not an appropriate auditor
21 for a listed company. And Nexia then came on Board in July
22 2020, but they required some changes to be made. So,
23 that's just then whether there are multiple auditors which
24 have looked at these statements. We don't think that's
25 correct; we think that only Moore Stephens may have looked

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1 at it.

2 CHAIRPERSON: But at any event, if one
3 has to work on the assumption that auditors are always
4 correct, Arthur Anderson would still have been in business.

5 MR GREEN SC: Mm.

6 CHAIRPERSON: So, I'm not quite sure
7 that is of much help. Mr Green, let me try and get back to
8 basics. What are the listing requirements that the JSE is
9 trying to enforce?

10 MR GREEN SC: It is - let me get it.
11 It's in the Statutory Bundle.

12 CHAIRPERSON: Yes.

13 MR GREEN SC: You will find it at page
14 287, sorry 285, I beg your pardon. And that there's
15 requirements-

16 CHAIRPERSON: Just a moment. Let us
17 just look at it. "And it's for the panel to consider
18 compliance, and advise the JSE that compliance, because of
19 the issues with IFRS, and the JSEs required accounting
20 practices. In terms of listing required." So, as I
21 understand it, the legal context is whether the applicant
22 complied with IFRS?

23 MR GREEN SC: Yes.

24 CHAIRPERSON: Is that right?

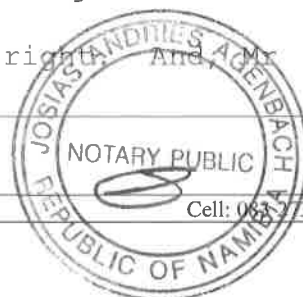
25 MR GREEN SC: That's right. And, Mr

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1 Chair, it may also go into the JSEs accounting practices.

2 And let me just get the reference.

3 CHAIRPERSON: What do they say?

4 MR GREEN SC: It's at - if you go to page
5 283, it's listings requirement 8.62. Which says; "The
6 financial statements." And it says; A, B, C, and E. It
7 probably is captured in IFRS, but there is said, stated
8 separately. "Fairly present the financial position,
9 changes in equity, results of operations, and cash flows
10 from - of the group." So, there one has it very simply
11 what the accounting practices are.

12 CHAIRPERSON: Well, this is - so, is it
13 your case - your case is not as much of compliance with
14 IFRS, but also fairly represent under 8.62?

15 MR GREEN SC: Yes. Mr Chairman, that bit
16 I would - I'd make the submission that if one complies with
17 IFRS correctly, then the result is one which fairly
18 represents.

19 CHAIRPERSON: Yes, but now you see that
20 is where you, and Mr Luderitz part ways.

21 MR GREEN SC: Yes. What-

22 CHAIRPERSON: Now, he says you can't
23 rely on that other document, because it does not - the
24 conceptual framework does not oust the wording of IFRS.

25 MR GREEN SC: The conceptual framework

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1 does not trump any particular-

2 CHAIRPERSON: Does not trump, ja.

3 MR GREEN SC: Any particular standard.

4 CHAIRPERSON: Ja.

5 MR GREEN SC: But it informs the creation
6 of each standard. And Mr Luderitz has referred you to -
7 there is a provision - and I'm sorry I don't have the
8 numbers in front of me - which obliges a user of IFRS to
9 depart from the standard if the result is not one of fair
10 presentation. And we-

11 CHAIRPERSON: Yes, is that the one about
12 exceptional circumstances?

13 MR GREEN SC: Yes. Sorry I'm not-

14 CHAIRPERSON: Okay, but I'm not quite
15 sure. You see, this is why I asked that I be - that we be
16 provided with the statutory context of this case, which
17 hasn't been done. And as I understand it, the statutory
18 context of this case goes back to the Financial Markets
19 Act.

20 MR GREEN SC: Yes.

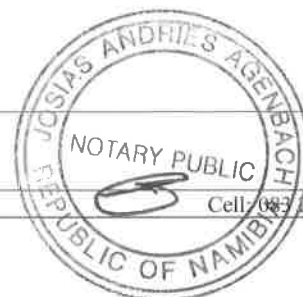
21 CHAIRPERSON: And from there to the fact
22 that the JSE is licensed. And from there that the JSE has
23 the authority to issue a listing requirement. And from
24 there we have to ask, do these accounts comply with the
25 listing requirements?

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1 MR GREEN SC: Hm.

2 CHAIRPERSON: And that is where I am
3 now.

4 MR GREEN SC: Hm.

5 CHAIRPERSON: I mean, you all skipped
6 that essential - as far as I am concerned - to understand
7 what our jurisdiction is, etc. And it appears to me you're
8 still uncertain what - about on what basis? Is it on a -
9 let's put it this way, the constructional way of reading
10 the IFRS Rules, or is it literal, or is it embedded, or
11 what is the - where are we for it? And there's this other
12 rule that you referred to, 8.62, is - E - is that separate?
13 Is that a separate requirement?

14 MR GREEN SC: Ja, Mr Chairman, the 865
15 requires an assessment of the - of compliance with IFRS,
16 and the JSE required accounting practices. The only
17 required accounting practices I could identify was 862.

18 CHAIRPERSON: No, but now go back to -
19 go to A8847. That is at the earlier stage. He says; "The
20 (inaudible) are conducting, engaging in accordance with the
21 relevant standards issued by the national auditing relevant
22 guidance, and/or IRBA." So, where is the basic obligation
23 to comply with the IRBA?

24 MR GREEN SC: It's in 862. Sorry, let me
25 just turn it up, and I'm sorry I skipped that when I took

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1 you there, Mr Chairman.

2 CHAIRPERSON: No, no, I think it's
3 somewhere earlier. There it is, here I have it (inaudible)
4 already, 810. Non-compliance with the IFRS. And this
5 applies to the applicant. Unless this - was this maybe
6 not, but not directly.

7 MR GREEN SC: Mm.

8 CHAIRPERSON: So, there - so, that's why
9 I asked that you tell me - there you take me up to 8.4.
10 Already have there, 8.7. So, somewhere along the line the
11 requirement is compliance with that standard. So, now, how
12 are we - how do we reach your conclusion?

13 MR GREEN SC: Mr Chairman, can I explain
14 - not as an excuse, but to explain why the matter was
15 approached on this manner. It is because both the JSE, and
16 Trustco have accepted that IFRS is to be complied with. I
17 understand, and accept the point that you raise, that it is
18 an essential aspect of your jurisdiction. I can't, as I
19 sit here, answer that to you, I can't walk you through the
20 different listings' requirements, and statutes. If you -
21 as you do, Mr-

22 CHAIRPERSON: Well, I tried to. And I
23 said you start off at the Financial Markets Act.

24 MR GREEN SC: Mm.

25 CHAIRPERSON: And from there you go to

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1 the FRCA Act, and from there you go to the listing
2 requirements.

3 MR GREEN SC: Mm, yes.

4 CHAIRPERSON: And then you go back to
5 the FSCA Act for R8, to - which lays down what happens if
6 you make a decision, and the applicant is dissatisfied with
7 the decision. Then we get here, and then we have certain
8 powers, which both of you have not addressed. I'm not
9 talking about the end result; I'm talking about how we
10 approach the matter. Which is a reconsideration, and not
11 an appeal. So, it, you know, you know more than I know at
12 least. And, but this is how I understand where the case
13 comes from, and where it goes. So, tell me if I'm right,
14 or wrong?

15 MR GREEN SC: Mr Chairman, broad outline
16 is what you have described, I agree with. I cannot provide
17 you with the finer, granular detail of that roadmap to it,
18 as I sit here now. I can offer-

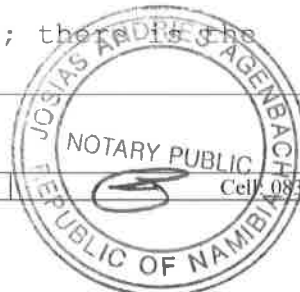
19 CHAIRPERSON: Is that - yes. So, as I
20 say, eventually - as you said - we have a jurisdictional,
21 we have underlying everything that we do is jurisdictional.
22 And what the JSE does is jurisdictional. And is the
23 finding of the JSE that the applicant did not comply with
24 this laid down international standard? And that is what
25 puts - Mr Luderitz's argues. He says; there is the

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1 standard, word for word we comply. And what the JSE does,
2 whether morally, or otherwise correct, is to impose on us
3 another standard. And that standard, that he says is the
4 dividing line. Now, what is your answer to that?

5 MR GREEN SC: Yes. We say that they have
6 not applied IFRS correctly. And we say that because the
7 result that is produced does not reflect the economic
8 substance of the transaction.

9 CHAIRPERSON: Now, on what Rule do you
10 rely for that conclusion? Just to get that-

11 MR GREEN SC: We start with the
12 conceptual framework, which informs everything.

13 CHAIRPERSON: So-

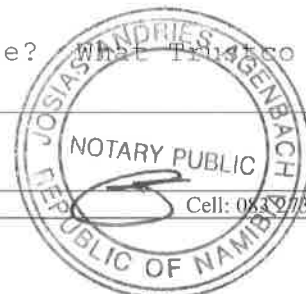
14 MR GREEN SC: - 2.12.

15 CHAIRPERSON: Yes, I appreciate that.
16 But, it is - is it not correct that the conceptual
17 framework is not a Standard?

18 MR GREEN SC: Yes.

19 CHAIRPERSON: Okay. So, it underlies
20 it, or it informs it, whatever the present word is. Is
21 that - if that is your case, then I understand that is your
22 case.

23 MR GREEN SC: That's the case. And what
24 we say has happened here, and could I use the reliance on
25 IFRS 9 in the second loan as the example? What Trustco



18

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1 does is it says there's a loan, a liability loan. And that
2 Standard says that when the loan is waived there's a
3 benefit that accrues. And that's why I made the submission
4 to you, I said if that were a normal third party arm's
5 length loan, Trustco would be correct. But one cannot - we
6 say - look at IFRS 9 in isolation, and ignore all of the
7 other transactions that are around it.

8 And that's why we say you can't blindly apply
9 accounting standards. You start with the facts, you look
10 at them, you say; what is the proper result? And you then
11 account for them using the standards. But you can't use
12 the standard to pervert the result, and that's what has
13 happened we're saying. And it comes from the salami
14 slicing approach that Trustco adopts to matters.

15 CHAIRPERSON: Yes. And so?

16 MR GREEN SC: So, our complaint, Mr
17 Chairman, is a principled one. We don't go to a specific
18 Standard, or Rule. We start and say; as a principle the
19 accounts must fairly represent. And you can't then pervert
20 a standard to produce a result which does not result in
21 fair representation.

22 CHAIRPERSON: Yes.

23 MR GREEN SC: Mr Chairman, may I then
24 move on to the final issue, that's the property, the
25 evaluation issue. There's two points here. The first is

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1 whether there is enough evidence to justify the
2 reclassification? And the second one is, if there has been
3 a reclassification, if there is sufficient evidence, should
4 that have been recognised as revenue, or should it have
5 been recognised as a separate accrual arising from the
6 evaluation?

7 Can I just explain simply what the point is as we
8 see it? As we see it, Trustco says; it had certain stock
9 on its shelf, and there was a "for sale" sign outside. It
10 says; it's no longer going to sell that stock now, it's
11 going to put it into a storeroom. Because it puts it into
12 its storeroom, it now re-values the property. It goes from
13 cost price to fair value, and that results in a benefit of
14 690 (inaudible) million Namibian Dollars. So, moving the
15 same property from the "for sale" shelf, to the storeroom
16 produces this result.

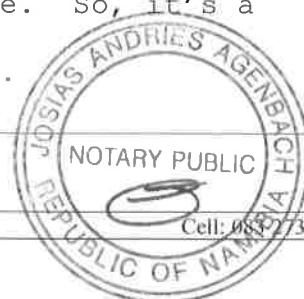
17 On the first point, whether there is sufficient
18 evidence. Mr Luderitz has said that there is a fundamental
19 misdirection on whether there's clear evidence, or
20 evidence. But let's have a look at what evidence there is,
21 to see what's there. Could I ask, when I take you to the
22 document to bear this in mind, because this is what we say
23 the point is. Trustco has not changed its use of the
24 property, it has merely delayed the sale. So, it's a
25 timing issue, not a change of use issue.

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1 And the first document that I'd refer you to
2 there is at A601. Sorry, 602. It's the Board minutes of
3 Trustco from the 13th of March 2019. And the relevant part
4 is at 604, underneath 9.1. And it starts, it says:
5 "Background. The current economic slowdown in the property
6 market has forced the group to reconsider its development
7 timetable." And we say, timetable, is a time issue. "In
8 order to optimally allocate resources to maximise its
9 return. Based on this review, a decision was taken to
10 defer various development projects." Again, we think that
11 defer is simply a timing issue. We're not going to sell it
12 now, we're going to sell it later, but we're still going to
13 sell it.

14 It then says: "Following from this
15 decision to defer the various developments, a guideline was
16 established that land assets would only be classified as
17 inventory when it has been identified for sale, or if
18 servicing with the intention to sell has commenced. All
19 other land assets would be treated as investment property."
20 We say that properly read, this minute is demonstrative of
21 Trustco saying; I can't sell my property now, so I'm not
22 going to carry on trying to sell it, I'll sell it later.
23 That's all that it says.

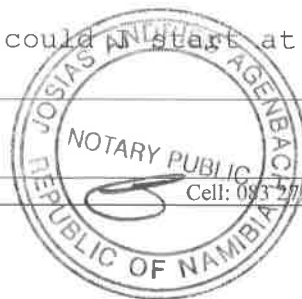
24 There are then a couple of other documents that
25 we were given by Trustco as well. And could ~~we start~~ at

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1 page B596? 596 is an email that Trustco gave to the JSE.
2 It's from Mr Nico Van Westhuizen, who is the engineer for
3 the development. And he says there: "Dear All,
4 unfortunately we must postpone the meeting again for two
5 weeks. The overall development plan is delayed, and I've
6 requested the engineers, and contractors to re-evaluate the
7 timeframes, and programme on the development progress."

8 And he goes on: "The delay is created by the
9 takeover process, and the inability of stakeholders to
10 contribute to bulk infrastructure." At this point he's
11 putting additional obligations on EPDC, that's the
12 development company. Again, the theme there is one of
13 delay, rather than change.

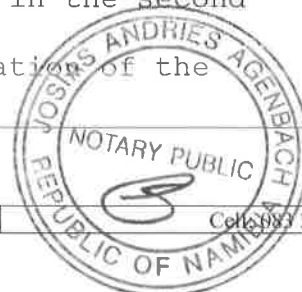
14 At 598, I must refer you to that for completion.
15 There is Mr Van Westhuizen - a little later - sending out
16 another email to the development team to say:
17 "Kindly note all site progress meetings is cancelled until
18 further notice." But he then sends a letter, quite a lot
19 later, which is at B610. And this letter is dated the 29th
20 of September 2020. So, it's quite late. And what he says
21 there is, he refers in the first paragraph to a Elisenheim
22 Phase 4 Waste Treatment, and Phase 2 Temporary Works. You
23 will recall that this, the re-evaluation relates to phases
24 5 to 21, not to phase 4. But he says in the second
25 paragraph: "Provided notification of the

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1 postponement of the progress meetings." And then in bullet
2 point: "The overall delay on all construction
3 works." Then at the foot of the page he says this. He
4 says: "The fact that the contractor, and the
5 employer falls under the same company head structure, it
6 was possible to accommodate the delay in the contract.
7 However, with the extended delay, the vacated site, and the
8 continuing difficulties, we are of the opinion that the
9 contract should be normalised by possibly giving extensions
10 of time to some point in future, or any other contractual
11 remedy. We propose that we have a planning meeting to
12 discuss the matter." Mr Chairman, this is not the language
13 of somebody who is saying; this development has been put in
14 a box, and on the shelf to see whether it increases in
15 value. This is the language of an engineer who was saying;
16 there is still a live, and (inaudible) construction
17 contract, and we need to normalise it by granting an
18 extension. And he proposes that a meeting be held. Or a
19 meeting take place.

20 So, when it comes to evidence, we say we cannot
21 find - because it has not been produced - any evidence to
22 say that there has been a change in use. If this
23 development had been stopped, we would have thought that it
24 would have been the easiest thing for Trustco to produce to
25 the JSE the letters of cancellation given to contractors.

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1 The letters of termination that were given to the
2 professionals. The retrenchment notices issued to the
3 staff. Something to show that equipment that was used has
4 been sold. None of that has been put up. So, we say that
5 there is simply not enough that Trustco has done to produce
6 a \$690 million benefit, gain, without putting up evidence.
7 The say-so of Trustco is not enough. It is - and Mr
8 Luderitz recognises that - it's not an issue. That one
9 needs to look for other facts.

10 So, we say as a first point that there is not
11 sufficient evidence to demonstrate a change in use. The
12 second point, which is an alternative point, is this. It
13 says: "If there is evidence to demonstrate a
14 change in use, then Trustco ought not to have accounted for
15 the benefit in the manner that it did." And you would have
16 seen that what Trustco did is, it took the increased value
17 - or the revalued number, their market value, as a revenue
18 item, and then took the carrying cost, the line item, as
19 cost of sales. So, it results in larger sales, larger
20 costs of revenue, and an increased gross profit. It's that
21 that the JSE takes issue with.

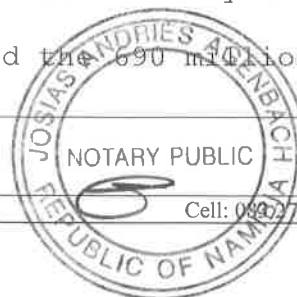
22 It says; you can't tell the world out there that
23 you have earned revenue to include the 690 million. That's
24 not right, that's not a fair representation. What you
25 ought to have done is to have recognised the 690 million as

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1 a separate item arising from a (inaudible) on the
2 evaluation. So, it's a (inaudible). It's when one looks
3 at the account, you don't think; this company has earned
4 revenue of an additional 690 million. Or a gross profit of
5 690 million. So, that's the second point.

6 Mr Chairman, and panel members, could I - as a
7 ready reference to how to navigate the quite complex issues
8 in this matter - could I urge on you the JSEs reasons
9 letter. Which is at page A338, and it is a long
10 (inaudible), it is a comprehensive document which
11 articulates the points that were made by Trustco, and the
12 JSEs reasons for not accepting them. It is a convenient
13 roadmap due to navigating this matter. It summarises both
14 party's arguments, it does not, Mr Chairman, go to the
15 jurisdiction question which you have raised. But it does
16 identify, I think, the other detail which is relevant to
17 this matter.

18 CHAIRPERSON: Yes.

19 MR GREEN SC: Mr Chairman, panel members,
20 those are the submissions for the JSE, and we would ask
21 that the application be dismissed, and that the costs of
22 the two counsels should be included in the dismissal.

23 CHAIRPERSON: Hold on, you know, what is
24 exceptional about the case?

25 MR GREEN SC: Mr Chairman perhaps the

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1 volume of the case, and the complexity of the issues at
2 stake. I-

3 CHAIRPERSON: That would (inaudible)
4 exceptional.

5 MR GREEN SC: Yes, I think-

6 CHAIRPERSON: If it's - well, we don't
7 easily grant exceptional circumstances. I mean here are
8 true issues, valid issues I think, and it's not as if we
9 have a vexatious applicant, or whatever. So, I see nothing
10 exceptional about this case. You know, it's - if you win,
11 you win, but it doesn't make your win exceptional. Not as
12 far as I can see.

13 MR GREEN SC: No, my win doesn't have to
14 be exceptional, Mr Chairman. But the matter is a difficult
15 one. The debates that you have had with my learned friend,
16 and I, I think demonstrate that. To try and marshal the
17 accounting aspects of this, to make the submissions to you
18 that I have today, has taken - I can tell you - it has
19 taken a lot of work, and a lot of time, and consideration.
20 Could I have done it without a junior? One always makes a
21 plan. Was a junior necessary, if somebody had asked me
22 earlier on, I would have said, absolutely, a matter of this
23 nature I would want a junior in it. Mr Chairman, I - all I
24 can-

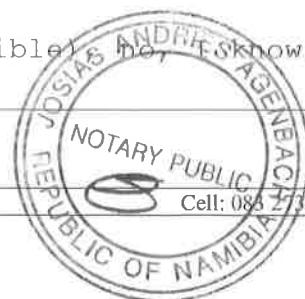
25 CHAIRPERSON: (Inaudible) I don't know.

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1 I know those arguments; I've heard them all.

2 MR GREEN SC: Yes.

3 CHAIRPERSON: And we'll consider that
4 aspect. Just to come back to your complaint, or problems
5 with our rules. The - what I would have expected in a case
6 like this is for the counsel to tell us which documents are
7 relevant for purposes of their application. I think that's
8 a requirement in the SCA, and our rules say you must follow
9 the SCA Rules. But, in any event, that at least would have
10 made our task much easier. And, but there's always a
11 problem, or a complaint about; is the record of the
12 Authority a proper record, and so on? And the result is
13 that the Authorities inundate us with records. I have here
14 a matter next week, which is a few thousand pages. And I -
15 or many thousand pages. And I can assure you, not - I
16 don't think 200 will become relevant in the hearing.

17 MR GREEN SC: Mr Chairman, I agree with
18 everything that you have said. And I had suggested to my
19 team one of the issues we may wish to consider proposing is
20 that in a matter such as this, is that the parties are
21 obliged to prepare the core bundle. Which I think is to
22 your point about what documents are relevant. And-

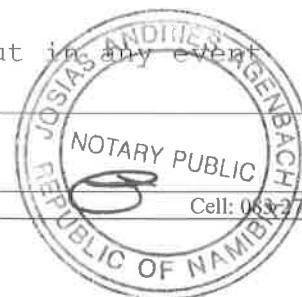
23 CHAIRPERSON: The core bundle is just
24 another lot of paper. So, if we have a list of pages you
25 consider relevant, we can use that. But in any event

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1 that's a side issue. Thank you, we'll look at the rules
2 again.

3 MR GREEN SC: Yes.

4 CHAIRPERSON: Thank you.

5 MR GREEN SC: Thank you, Mr Chairman.

6 Thank you, panel members.

7 CHAIRPERSON: Mr Luderitz?

8 MR LUDERITZ SC: Thank you, Mr Chair.

9 You raised with our learned friend your powers, and the
10 powers of the JSE. And you referred our learned friend to
11 paragraph 8.10 of the listing requirements dealing with
12 non-compliance with IFRS. And our learned friend referred
13 you to paragraph 8.65, on page 285, where there is a
14 reference to compliance with IFRS, and the JSEs required
15 accounting practices. The accounting practices of the JSE,
16 says our learned friend, is to be found in 8.62, and he
17 referred you specifically to sub-paragraph E, requiring
18 that the annual financial statements must fairly present
19 the financial position, changes in equity, results of
20 operations, and cash flows of the Group.

21 And the question is; on what is the case that the
22 applicant was called upon to meet? And what is, in fact,
23 the case advanced by the JSE? The best indication of the
24 exact case that the applicant was called upon to meet is to
25 be found in B1, where there are several places where we can

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1 give the same reference. But in B1, the further reasons,
2 you will see that what the complaint is, and this is the
3 complaint that the applicant met. It's consistently on the
4 basis that the annual financial statements were non-
5 compliant with IFRS.

6 So, in paragraph 1.1, dealing with the group
7 annual financial statements for March 2019, which reflects
8 two transactions. The first one is the classification of
9 the loan. And the second one is the reclassification of
10 the property. The complaint is that the annual financial
11 statements were non-compliant with IFRS.

12 Particularly in paragraph 1.3, the complaint is
13 non-compliance with IFRS. And dealing with the properties,
14 the same complaint is raised in paragraph 14, on page 5 of
15 the further reasons, non-compliance with IFRS. Nowhere to
16 be found is a reference to the accounting practices of the
17 JSE. Nor is there any particularity provided as regards to
18 the particular accounting practice that was not complied
19 with. But the complaint has always fairly been non-
20 compliance with IFRS.

21 Now, the case advanced by the JSE is, in fact,
22 not non-compliance with IFRS, it appears - both from my
23 learned friend's oral address, and from the documentation
24 relied upon - that the entire complaint is premised on the
25 conceptual framework. And in particular, paragraph 4.62 of

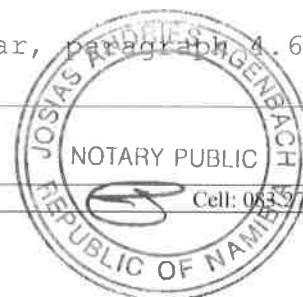
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1 the conceptual framework.

2 Now, we have dealt at length with the status of
3 the conceptual framework. The expert for the applicant
4 explains - without contradiction - and our learned friend
5 has conceded as much, that the conceptual framework is
6 simply a guidance to the International Accounting Standards
7 Board to develop IFRS standards that are based on-

8 CHAIRPERSON: No, that's an
9 understatement, I think. It's also just to understand, and
10 interpret, so. So, don't say - don't rely on one sub-
11 paragraph. It's not correct.

12 MR LUDERITZ SC: Well, SP1.1 deals with
13 the status, and purpose of the conceptual framework. SP1.1
14 records that the conceptual framework for financial
15 reporting describes the objective as, and the context of
16 concepts for general purpose financial reporting. "The
17 purpose of the conceptual framework is to assist the
18 International Accounting Standards Board to develop IFRS
19 standards that are based on consistent concepts."

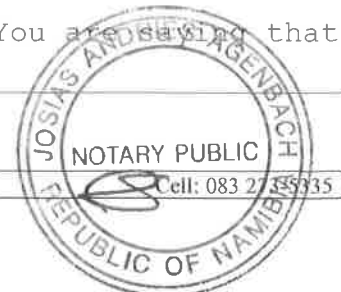
20 And then records SP1.2: "The conceptual
21 framework is not a standard. Nothing in the conceptual
22 framework overrides any standard, or any requirement in a
23 standard."

24 CHAIRPERSON: That's right. But the
25 point I'm trying to make, Mr Luderitz. You are saying that

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1 in reading here, the standards, one should only have regard
2 to form, and not anything else?

3 MR LUDERITZ SC: No. No, with respect-

4 CHAIRPERSON: You (inaudible). Is that
5 your argument?

6 MR LUDERITZ SC: No, not at all. What
7 we're saying is that the concept of substance over form,
8 and the concept of fair representation is - to use the
9 words of the expert - baked into the-

10 CHAIRPERSON: Yes.

11 MR LUDERITZ SC: Into the IFRS standards.

12 And-

13 CHAIRPERSON: No, but to see - but to
14 see on the fact of the case, that what has been reported is
15 not substantially correct, although it is formally correct.
16 Is that your argument?

17 MR LUDERITZ SC: No. We say that what
18 has been reported is substantially correct. Because-

19 CHAIRPERSON: Yes. So, that is no
20 debate. If you say that's substantially correct, then
21 there is no debate. Then it is a factual issue, whether
22 you are right, or wrong.

23 MR LUDERITZ SC: Yes, well it - well, the
24 factual issue is whether - well, the factual issue is
25 whether the correct IFRS standard was identified, whether

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1 the correct IFRS standard was applied, and was correctly
2 applied.

3 CHAIRPERSON: Yes.

4 MR LUDERITZ SC: And there appears to be
5 no debate at that level. The debate is really at the level
6 of almost a criticism of the content of the IFRS standards.
7 On the basis that those IFRS standards - as they are
8 applied - does not accurately reflect the transaction.

9 MR GREEN SC: Ja.

10 MR LUDERITZ SC: And that argument is
11 advanced on the basis of 4.62 of the conceptual framework.

12 CHAIRPERSON: Mm.

13 MR LUDERITZ SC: I mean, significantly
14 what is not suggested, and this is not the case, and has
15 never been the case of the JSE, up to the oral address of
16 our learned friend this morning. Is that it is now
17 suggested in oral argument, and for the first time, that
18 this is in fact one of those exceptions where the
19 management of Trustco should have deviated from the
20 standards. And where this is one of those very rare
21 instances where the - where compliance with IFRS would be
22 so misleading that it would conflict with the objective of
23 the financial statements.

24 Now, that case you will also not find advanced by
25 the JSE anywhere. And either in the preceding

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1 correspondence, or in any of the formal submissions made by
2 the JSE. I'm yet to hear, in oral argument this morning,
3 that indeed this is one of those rare cases, where it is so
4 misleading, and what Trustco actually failed to do is not a
5 failure to comply with the IFRS standards, as it did. But
6 the failure on the part of the management to deviate from
7 the IFRS standard.

8 So, the point that we're making is that we were
9 called upon to meet an allegation that the financial
10 statements do not comply with IFRS. There is no debate
11 that the correct IFRS standards were applied. And that
12 having applied the correct IFRS standards, the financial
13 statements substantively fairly reflect the transaction.

14 The case that we were not called upon to meet is
15 a case based on an application of the conceptual framework,
16 which has no legal standing. Which does not trump the
17 standard. And the case that we were most certainly not
18 called upon to meet is the case where we stand accused of
19 having failed to deviate, consistent with IAS1, paragraph
20 19, from the accounting standards, on the basis that these
21 are extremely rare circumstances, and the financial
22 statements that we have produced are misleading to the
23 extent that it would conflict with the objective financial
24 statements.

25 So, and that is most certainly not the case that

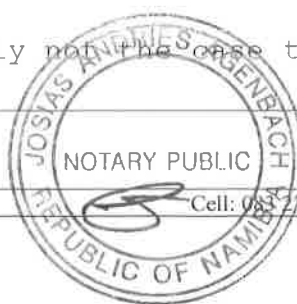
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1 we are called upon to meet. That is not the criticism that
2 has been levelled against Trustco insofar as the
3 preparation of the financial statements are concerned.

4 Chair, if I can then deal with the property
5 transaction. My learned friend referred you to the
6 document appearing at page B610. You would have noted, or
7 the tribunal would have noted from our heads of argument
8 that the point is squarely made that a really small portion
9 of the development is continued with, portions two, and
10 four. But that all of the other parts of what was
11 initially contemplated to constitute the development has
12 ceased in every material respect. And we cite that as
13 proof of the fact that the distinction has been drawn in
14 relation to different parts of the development, and that
15 the one is continued with, albeit at a slower pace. And
16 that the development of the remainder of the property has
17 been abandoned.

18 In the very letter referenced by our learned
19 friend, at page 610, it is recorded - at the foot of the
20 page, in the second last paragraph - "In addition to the
21 above, a complete project standstill was communicated to
22 the project team upon notification, dated 21 November 2018
23 by the project engineer, that all site progress meetings
24 have been cancelled until further notice." Then it
25 continues to say that: "Trustco" "We

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1 further understand that the main contractor, Trustco
2 Contracting Services, has downscaled, and the key
3 personnel, and equipment is no longer available for the
4 project. TCS has for all practical purposes vacated the
5 site." That is just one example of objective facts, which
6 demonstrate that the development of the remainder of the
7 property has ceased. People have been retrenched.
8 Contracts have been terminated. Plant and equipment have
9 been sold off.

10 Says our learned friend, but this is not
11 sufficient proof. This is not sufficient proof, and
12 presumably it's not sufficient proof because the view of
13 the JSE, FRIP, and the expert of the JSE is informed by a
14 misreading of the requirement under the standard. The
15 standard does not require, as is suggested by the JSE-

16 CHAIRPERSON: Mr Luderitz, may I
17 interrupt you? We are sitting as a panel of first
18 instance. Whether they were misinformed is hardly neither
19 here, nor there. We have to look at the facts under the
20 Act, as afresh, and not sitting on appeal.

21 MR LUDERITZ SC: The facts, with respect,
22 are not contradicted-

23 CHAIRPERSON: Now, that's a different
24 point. But it's no use carrying on about how wrong they
25 were, because we're not sitting on appeal against their

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1 reasons. We are reconsidering the conclusion.

2 MR LUDERITZ SC: Yes. So, with respect,
3 what you will consider is, first of all, what is the
4 applicable test? Is it as the JSE suggests, a requirement
5 of clear evidence, or is it simply evidence? The word,
6 clear, in the context of the IFRS Standards having a
7 particular meaning, because it differentiates in various
8 instances, as pointed out by the applicant's expert,
9 between evidence, and clear evidence.

10 And then you will consider what the undisputed
11 facts are. The undisputed facts are those facts that were
12 placed before the tribunal by the applicant, and to which
13 there is no counter factual version. What our learned
14 friend says is that that is not enough. What one would
15 have expected to see is not simply a statement corroborated
16 by contemporaneous correspondence that all development
17 activities have ceased. Says our learned friend that what
18 one would have expected is, in fact, copies of notices of
19 retrenchment, and copies of notices of cancellation. And
20 that again goes to the weight of evidence that is required
21 to establish as a fact, an intention on the part of the
22 applicant to cease the development.

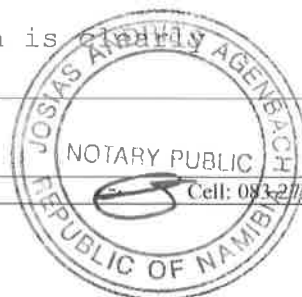
23 So, the process to be followed, if one considers
24 the application of IFRS40, is that you first of all have
25 regard to the intention. The intention is clearly

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1 formulated in the minutes of the Board. And you then
2 secondly look at corroborating evidence. And that evidence
3 has been placed before the JSE, and is now before the
4 tribunal. And that evidence on a proper application of the
5 requirement under section 14, to produce evidence shows
6 demonstrably that the development has, in fact, ceased.
7 And, so we submit that there is sufficient evidence.

8 In response to the criticism raised by my learned
9 friend insofar as the weight of the evidence is concerned,
10 you would, of course, know that these financial statements
11 have been signed off by qualified auditors, who have
12 interrogated the content of the financial statements, and
13 who accept, and have signed off those financials on the
14 basis that they fairly reflect the change in the use of the
15 property. And in doing so they would have, of necessity,
16 interrogated, first of all, the intention as it is
17 reflected in the minutes, as well as the objective facts.
18 So, there is in fact-

19 CHAIRPERSON: Mr Luderitz, I'm sorry. I
20 don't - that argument doesn't cut ice with me. We've had
21 enough experience of auditors, and without their evidence,
22 what they did - so we can't simply say; because they did
23 this, therefore it's fine. If that had been the position,
24 we wouldn't have been here at all today.

25 MR LUDERITZ SC: Well, Mr Arbitrator-

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1 CHAIRPERSON: So, just so the fact that
2 an auditor - who is no longer your auditor - signed it off,
3 doesn't prove anything.

4 MR LUDERITZ SC: Well, Mr Arbitrator-

5 CHAIRPERSON: We don't know whether they
6 - what they did. What the auditing clerk did. How do we
7 know that? We know nothing.

8 MR LUDERITZ SC: Well, what you do know,
9 Mr Chairman, is that the financials were audited by a firm
10 of auditors who were properly appointed at the time. That
11 they have issued a statement wherein they record that as
12 far as they are concerned, and having undertaken the tasks
13 normally undertaken by auditors to verify the accuracy of
14 financial statements, they are happy to sign off on the
15 audited financial statements-

16 CHAIRPERSON: But look, clearly you
17 don't understand what I'm putting. So, carry on.

18 MR LUDERITZ SC: No, no, I understand
19 what you're putting to me.

20 CHAIRPERSON: Oh.

21 MR LUDERITZ SC: I understand that there
22 are-

23 CHAIRPERSON: You're not, because you're
24 not responding to what I'm putting to you.

25 MR LUDERITZ SC: Well, I understand that

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