IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO 5640/2022

In the matter between

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

REASONS IN TERMS OF UNIFORM RULE 53(1)(b)

1. The undersigned, Louis Theodor Christian Harms, is the deputy chair of the Financial Services Tribunal (the first respondent) and acts on delegation of and in the absence of the chairperson under sec 220 (6) of the Financial Sector Regulation Act 9 of 2017.
2. I was the chair of the panel that gave the decision in this matter.
3. The Tribunal, as a matter of principle, does not involve itself in review applications to defend itself and the Tribunal, and in this matter, too, it did not enter appearance. The record must show whether the decision of a panel is reviewable.
4. The fact that the Tribunal or its panels and members do not enter appearance does not mean that they agree with the allegations made by an applicant or even the respondent

that may follow. The dispute is one between the applicant and JSE, and the Tribunal has no legal interest in the outcome, and it will comply with any decision of the Honourable Court.

5. The notice of motion did not, as required by Rule 53, call upon me as chair to provide reasons. I did not *mero motu* file any reasons pursuant to the application because our decision states what we did and found. I had no reason to justify the decision.

6. These "reasons" are submitted because of the applicant's displeasure with the record of the proceedings. My reaction was that the request was presumptuous, and I provided a case reference (**Zamani Marketing and Management Consultants Proprietary Limited and Another v HCI Invest 15 Holdco Proprietary Limited and Others (32026/2019) [2020] ZAGPJHC 5; 2021 (5) SA 315 (GJ) (11 February 2020).** It is still my view particularly with reference to paras 3.2 to 3.4.[1] I am unable to determine the applicant's motive for the request unless it is to attack the integrity of the panel members or of the decision making or decision making process of the Tribunal.

7. The process followed was the standard: hearing – conference – appointment of scribe - scribe prepares a draft – draft is circulated for

[1] "3.2 the Tribunal members' deliberations and meetings following the hearing of the reconsideration
application and pursuant to which they reached their decision, particularly but not limited to the applicability, and if it was found to be applicable, its application of the business judgment rule;

3.3 the Tribunal members' deliberations and meetings following the hearing of the reconsideration application and pursuant to which they reached their decision, particularly but not limited to the applicability, and if it was found to be applicable, its application of any particular IFRS; and

3.4 the Tribunal members' deliberations and meetings following the hearing of the reconsideration application and pursuant to which they reached their decision, particularly but not limited to the consequences of JSE's directions to the applicant to restate its annual financial statements in circumstances where the applicant's JSE approved auditors and JSE approved IFRS advisors hold the view that there is no error or material inaccuracy in the audited annual financial statements."

agreement/disagreement/amendment/other decisions/ – comment received – discussion if required - further version(s) prepared – circulated – agreement – signing – publishing.

8. It may be that the applicant wishes to attack the rationality of my "decision" as to the composition of the panel (which is not a Tribunal decision), something different from the statutory requirement of a panel as set out in sec 224(4) of the Financial Sector Regulation Act 9 of 2017 as interpreted by the applicant, namely (in terms of the notice of motion) that a panel must "include at least one person suitably qualified in, and having suitable working knowledge of, accounting, accounting practices and the international financial reporting standards". Paragraph 154 of the Founding Affidavit appears to go further, namely requiring that the panel must be "comprised of" such persons.

9. The applicant knew before, during or after the hearing that the members of the panel do not comply with those requirements, and it did not raise the issue. It was first raised in the subsequent review application.

10. In para 5,[2] read with para 3.1,[3] I was asked to state whether I had applied my mind to whether "the members had the necessary and statutory required knowledge and expertise of the application of International Financial Reporting Standards ("IFRS") to be so appointed for the matter under consideration."

[2] "If there are no such documents in existence then in fairness to the Tribunal given the Tribunals decision to abide and the fact that it may not have an opportunity to respond, we invite you to deal with these issues."

[3] "an application of the mind by the Chairperson of the Tribunal in respect of the appointment of the panel members' qualifications and expertise to determine whether the members had the necessary and statutory required knowledge and expertise of the application of International Financial Reporting Standards ("IFRS") to be so appointed for the matter under consideration."

11. It is unlikely that I did for the reasons set out below.

12. Whether this administrative function (as the others under sec 225) is (if raised) reviewable is something for the Honourable Court to decide. It never crossed my mind that in nominating members of a panel I had to comply with sec 3 of the Promotion of Administrative Justice Act by giving notice of the intended nomination of the members of any given panel to the parties; giving a reasonable opportunity to make representations to the parties; making a clear statement of the intended listing; giving adequate notice of any right of review or internal appeal, where applicable; and giving adequate notice of the right to request reasons.

13. Having had 35 years of experience with how panel members are appointed, I try to follow the accepted protocol and the provisions of the Act. Whether I was right or wrong is for the Honourable Court to decide.

14. The only statutory obligation that I know of is that "the Chairperson must ensure that the persons included in the panel list have an equal opportunity to be appointed to serve on a panel of the Tribunal."

15. Tribunal members (sec 220) and panel members (sec 225) are appointed by the Minister. I do not know anything about the appointment process followed and I do not receive the CVs of tribunal (section 220) or panel members (section 225). I can gather from their addresses (and some names) who are lawyers and who are not.

16. I accept that the Minister appointed all by following the statutory prescript and that all members of the Tribunal and on the panel list are equal and independent and competent to decide any of the many and varied issues under the many Acts listed in Schedule 1 of the Act) that fall under the jurisdiction of the Tribunal.

17. The composition of a panel is a matter that is settled after a request from the Secretary of the Tribunal, considering the statutory requirement, before a hearing date is determined. She proposes a panel, and we then discuss it before I make my decision.

18. I consider the general nature of the case (e.g., is it about the Pension Funds Adjudicator, the FAIS Ombud, a debarment, an administrative penalty, emanates from a body such as the JSE, etc.), ask about the size of the record (in this matter eventually was extensive), the workload of panelists and their availability and the equal spread of the workload. I have regard to potentiality of conflict, representativity, seniority and general experience as well as the duty to induct younger (new) members into potentially challenging cases. I am conscious of the judicial anathema to choosing horses for courses.

19. The chair of a panel must be either Justice Mokgoro, myself or another appropriate lawyer and cannot be someone from the auditing profession. In the present instance and in the absence of Justice Mokgoro, I decided to chair the panel.

20. I had no reason to exclude Adv Soraya Hassim SC or Attorney Ms Zama Nkubungu-Shangisa from consideration.

21. The panel was formed by 5 May 2021, and the hearing date of 2 November settled soon thereafter by agreement with the parties and the parties soon knew from the Teams invite who the panel members would be.

22. I did not receive or read the record before settling the panel and only read it in preparation of the hearing after receiving the heads of argument. I knew, from experience, that matters relating to the JSE before the (former) Financial Services Appeal Board and this Tribunal can be difficult and because of the many kinds of

decisions the JSE may make are of different kinds. (I was also the chairman of the former JSE Appeal Board until my appointment as a judge in 1986.)

23. Past JSE matters raised no accounting issues, and I was unaware that there were issues that, according to the applicant, could only be decided by someone with the "necessary and statutory required knowledge and expertise of the application of International Financial Reporting Standards ("IFRS") to be so appointed for the matter under consideration", which, by definition, excludes all the potential chairs.

24. After rereading the application, I decided to deal with some other issues raised by the applicant, avoiding the "merit", "irrationality" and "incompetence" allegations and arguments.

25. AD PARA 9 OF THE FOUNDING AFFIDAVIT:

The "pivotal issues" dealt with in para 9 of the founding affidavit were not part of the reconsideration application.

26. AD PARAS 15.1 AND 15.2:

The grounds raised in paras 15.1 and 15.2 were not raised in the reconsideration application. The same applies to the expansion of these grounds in the later paragraphs 72 to 89.

27. AD PARA 15.3:

The decision of the Tribunal speaks for itself.

28. AD PARA 15.4:

This is an issue for the Honourable Court, and I have set out the facts above.

29. AD PARA 106:

The applicant fails to distinguish between the Tribunal and panel members and members of a particular panel.

30. AD PARA 107:

Members do not necessarily receive a record before they are appointed to a panel, and it is unrealistic to expect anyone to read the record before the heads of argument are available.

31. The purpose of oral argument is to explain and enlighten to the panel. Whether we eventually understood the issues and dealt with them fairly must appear from the decision. I respectfully invite the Honourable Court to consider the position of a judge who, for the first time, is confronted with a technical issue and who, when reading the papers initially does not understand them, and relies on argument to guide the judge.

32. The documents that I gave up reading before the hearing were the 1468 pages of regulatory instruments that were provided by the applicant to us after 11 am on Friday 29 October, with the hearing set at 9 am on 2 November, without any cross-references to the heads of argument or the record. I do not recall that any reference to them was made during argument but read them afterwards for context and found that all the relevant parts were quoted in the evidence filed.

33. AD PARA 135 – 139:

The decision to call a witness is the decision of the chair of the panel and not of the Tribunal or the hearing panel. It does not fall out of the air. “Good cause” must be shown (sec 232(5)(a)). Neither the applicant nor the respondent sought to show good cause why Dr van Rooyen should be called. A tentative issue raised during argument does not amount to a decision.

34. Dr van Rooyen chose not to file any evidence before the JSE or the Tribunal and chose to speak through others. He had many opportunities, as we held, to explain the rationale of the transactions and he did not. The applicant’s approach cast in stone was

that the rationale (which relates to substance) did not matter – only form does. Since he was represented by eminent counsel, who did not file an application for further evidence, and did not use him as witness, I felt that it would be inappropriate to call him. I respect counsel's decisions concerning the presentation of own witnesses.

35. AS PARA 140:

I do not recollect that this was an issue at the hearing.

36. AD PARA 141 AND 142:

The applicant takes issue with this statement in the decision.

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

Appeal jurisdiction of the first category referred to in *Tikly* is a reconsideration as the *Nichol* judgment stated.

36 AD PARA 143 AND 144:

This paragraph contains a gratuitous attack on my mental abilities or concentration, confusing the Tribunal rules with the Supreme Court of Appeal rules, and not knowing how to run a Tribunal case. The discussion with counsel arose in the context of curtailing the record. What I said at p 83 of the transcript of the proceedings) was:

> "Just to come back to your complaint, or problems with our rules. The - what I would have expected in a case like this is for the counsel to tell us which documents are relevant for purposes of their application. I think that's a requirement in the SCA, and our rules say you must follow the SCA Rules. But, in any event, that at least would have made our task much easier."

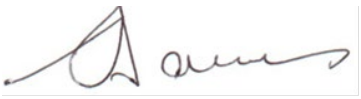
37 What I had in mind was Tribunal rule 63, namely

> "The heads of argument must generally comply with the rules for heads in the Constitutional Court or the Supreme Court of Appeal."

37 AD PARA 145 and following:

The applicant is not a decision-maker under the Act, and its decisions were not the subject of reconsideration by the Tribunal. The decisions the Tribunal had to reconsider were those of the JSE. The extent to which we "deferred" to and not only agreed with submissions made by the JSE will appear from the decision.

Signed on 28 February 2022 at Pretoria.



LTC Harms