IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 5640/2022

In the matter between:

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

SECOND RESPONDENT'S HEADS OF ARGUMENT
(LEAVE TO APPEAL)

INTRODUCTION

1 The applicant ("**Trustco**") is seeking leave to appeal against the judgment and order of Potterill J, delivered on 7 November 2022 ("**the Order**").

2 In the Order, Potterill J dismissed an application by Trustco reviewing the decision of the second respondent ("**the JSE**") directing Trustco to restate its financial statements ("**the JSE decision**") and the first respondent's ("**the Tribunal**") decision to uphold the JSE decision ("**the Tribunal decision**").

3 JSE opposes Trustco's application for leave to appeal, on the ground that there are no reasonable prospects of success, nor other compelling reasons why the matter should go on appeal.

4 The rest of these submissions are structured as follows:

4.1 First, we outline the law applicable to applications for leave to appeal.

4.2 Second, we summarise the findings of the Order.

4.3 Third, we demonstrate that there are no reasonable prospects of success and that no other compelling reasons exist to hear the appeal.

4.4 Finally, we conclude.

APPLICABLE LEGAL PRINCIPLES

5 In terms of section 17(1)(a) of the Superior Court Act, 2013, leave to appeal may only be granted where the judge or judges concerned are of the opinion that:

5.1 the appeal would have a reasonable prospect of success;[1] or

5.2 there is some other compelling reason why the appeal must be heard, including conflicting judgments on the matter under consideration.[2]

6 On the first basis on which leave to appeal may be granted:

6.1 Prior to the Superior Courts Act, the test for whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion.[3] Pursuant to the introduction of section 17(1)(a)(i) of the Superior Courts Act, the test is now that the appeal would have a reasonable prospect of success. The word "*would*", the Full Court has held, "*indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.*"[4]

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[1] Section 17(1)(a)(i) of the Superior Courts Act.

[2] Section 17(1)(a)(ii) of the Superior Courts Act.

[3] *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) 343H.

[4] *Acting National Director of Public Prosecutions and Others v Democratic Alliance in Re: Democratic Alliance v Acting Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016) para 25, quoting with approval *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*.

6.2 As for "*reasonable prospects of success*", the Supreme Court of Appeal has stressed that the test for leave to be granted is exacting in nature:

> "*. . . the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.*"[5]

6.3 Thus, Trustco must demonstrate with a measure of certainty, as opposed to a hypothetical possibility, that an appeal court will come to a different conclusion, i.e., the Order should not have been granted.

6.4 An appeal lies only against a court's order, not its reasons.[6] So, it is not enough for Trustco to argue that another court would disagree with some aspect of this Court's reasoning. It must demonstrate that a measure of certainty exists that another court would alter the "*substantive order*" of this Court.[7] The reason for this is that an appellate court must reject an appeal if <u>any</u> ground is established to support the order.[8]

7 On the second basis on which leave to appeal may be granted:

7.1 Save for conflicting judgments, not claimed here by Trustco, section 17(1)(a)(ii) does not prescribe what constitutes compelling reasons. Therefore, this Court has a discretion, which it must exercise judiciously, after having regard to the interests of justice.

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[5] *Smith v S* (475/10) [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

[6] *SA Reserve Bank v Khumalo* 2010 (5) SA 449 (SCA) at para 4.

[7] *ABSA Bank Ltd v Mkhize and two similar cases* 2014 (5) SA 16 (SCA) para 64.

[8] *Khumalo* at para 4.

7.2 In exercising the discretion, a court should be mindful that resource constraints exist in respect of the judiciary. Absent reasonable prospects that another court will make a different decision, therefore, we submit that a court must only grant leave if the reasons are truly compelling.

7.3 This interpretation is supported by section 16(2)(a) of the Superior Courts Act, which provides: "*[w]hen at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone*".

7.4 This approach accords with the settled principle that courts ought not exercise their discretion in favour of deciding merely abstract, academic or hypothetical issues, no matter how novel or interesting they are.[9]

8 Trustco meets neither threshold for leave to be granted.

THE ORDER

9 In dismissing the application, Potterill J made *inter alia* the following orders:

9.1 The composition of the Tribunal panel complied with sections 220, 224 and 225 of the Financial Sector Regulation Act 2017 ("**FSR Act**"),[10] and the appointment process was procedurally fair.[11]

9.2 Listing requirement 8.65 empowers the JSE to order a company listed on the JSE to restate its financial statements.[12]

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[9] See *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC) para 14, in the context of the discretion to issue declaratory orders. The logic of the principle extends to the discretion to grant leave to appeal in terms of section 17(1)(a)(ii) of the Superior Courts Act.

[10] Order paras 30-33 (K12 to K14)

[11] Order paras 27-29 (K11 to K12).

[12] Order para 39 (K15 to K16).

9.3 The business judgment rule does not govern duties but rather protects directors from liability for breaches thereof, so the Tribunal did not err by not deferring to the Trustco board's decision on how best to reflect the contested entries in the statements.[13]

9.4 The Tribunal did not "*sit back and defer to the JSE*", so the Tribunal decision is not reviewable on this ground.[14]

GROUNDS OF APPEAL

10 Trustco argues that leave to appeal should be granted either because it has reasonable prospects of success on appeal, or because there are other compelling reasons why the appeal ought to be heard.

No reasonable prospects of success

11 Trustco advances the following reasons for why the appeal has reasonable prospects of success:

11.1 According to Trustco, sections 220, 224 and 225 of the FSR Act, properly interpreted, require that members of a panel be appointed on the basis of the particular expertise required in a matter.[15] Given the nature of the matter, the panel was improperly constituted, for it consisted only of legal experts. This fact, it concludes, rendered the Tribunal's process irrational,[16] procedurally unfair,[17] and unreasonable.[18]

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13 Order paras 42-43 (K16 to K17).

14 Order para 46 (K18).

15 Trustco notice paras 8-9.

16 Trustco notice para 11.1.

17 Trustco notice para 11.2.

18 Trustco notice para 11.3.

11.2 Trustco argues that because the term "*re-issue*" not "*restatement*" is used in listing requirement 8.65, and because these two terms contemplate distinct actions, it follows that the JSE lacks the power to order to restate.[19] In finding otherwise, this Court made an error of law.[20]

11.3 As for the business judgment rule, Trustco argues that this Court erred in its finding that that this principle only applies to director's liability, not also to the question whether there is a breach of duty.[21] Had it applied the rule correctly, it should have taken into account the fact that the board of Trustco exercised its discretion about how best to record the transactions in the statements in a *bona fide* manner.[22]

11.4 Regarding the principle of deference, Trustco argues that this Court erred in law and/or fact in finding that it applies to the Tribunal,[23] and it erred in finding that the Tribunal did not sit back and defer to the JSE.[24]

12 None of Trustco's reasons meet the high threshold that is set by section 17(1)(a)(i) of the Superior Courts Act.

<u>Panel composition</u>

13 Starting with the Tribunal panel's composition, for two reasons Trustco's challenge to this component of the Order has no reasonable prospect of success:

13.1 <u>First</u>, in *Kirland*, the Constitutional Court held that until it is set aside even an

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[19] Trustco notice paras 17.2-17.6.

[20] Trustco notice para 12.

[21] Trustco notice para 18.

[22] Trustco notice paras 21-22.

[23] Trustco notice para 23.

[24] Trustco notice paras 25-26.

unlawful administrative decision is valid and effectual.[25] As Trustco has not challenged the decision taken by retired Justice Harms as to the composition of the panel, this decision is valid and effectual. As it is valid and effectual, it is not open to Trustco to say that the panel was improperly constituted. Once this logical consequence of the legal principle clearly formulated in *Kirland* is articulated, it follows that Trustco cannot coherently argue that the Tribunal's process was irrational, procedurally unfair or unreasonable, on the basis that the panel was improperly constituted.

13.2 Second, even if Trustco overcame this fundamental constitutional hurdle, its interpretation of the sections of the FSR Act that regulate the appointment of panels is plainly incorrect. The FSR Act distinguishes between membership of the Tribunal[26] and panels of the Tribunal.[27]

13.2.1 As regards membership of the Tribunal, the Tribunal must include at least two persons who are retired judges, or persons who have suitable expertise and experience in law;[28] and at least two persons with experience or expert knowledge of financial products, financial services, etc.[29]

13.2.2 As regards panels, they have to consist of "*a person to preside over the panel, who must be a person referred to in section 220 (2) (a) or 225 (2) (a) (i)*",[30] i.e., retired judge or person with legal experience

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[25] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) para 101.

[26] Section 220 of the FSR Act.

[27] Section 224 of the FSR Act.

[28] Section 220(2)(a) of the FSR Act.

[29] Section 220(2)(b) of the FSR Act.

[30] Section 224(4)(a) of the FSR Act.

or expertise, and "*two or more persons who are Tribunal members or persons on the panel list.*"[31]

13.2.3 Not only do the sections not expressly require the appointment of a person with financial expertise; they indicate the opposite, by virtue of the fact that they expressly require appointment of a person with legal experience or expertise. If Parliament had intended Trustco's interpretation of section 224 of the FSR Act, it would similarly have stated that someone with the relevant financial expertise has to be appointed to each panel.

13.2.4 We submit that there is no overcoming these textual indicators—no matter how much Trustco stamps its feet asserting that the purpose of the Tribunal would be better served if the FSR Act did require that a financial expert be appointed. That judgment is not for it, or indeed a Court,[32] to make, but rather it is Parliament's.

14 Therefore, for either or both of these reasons, Trustco's first ground of appeal has no reasonable prospect of success.

<u>JSE's power to direct a restatement</u>

15 Trustco's second ground of appeal, that this Court erred in its interpretation of listing requirement 8.65, is without any prospect of success. This is for two reasons:

15.1 <u>First</u>, this issue was considered in *Huge*,[33] where it was held that the JSE is empowered by listing requirement 8.65 to direct a listed company to restate

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31 Section 224(4)(a) of the FSR Act.

32 As this Court recognised in Order para 33 (K13 to K14).

33 *Huge Group Ltd v Executive Officer: Financial Services Board* 15380/2015 GLD (21 July 2017).

its financials.[34] Trustco is incorrect that *Huge* was not about restatement as such, but rather about whether the JSE is empowered to order restatement of financial statements in particular.[35]

15.2 Trustco's argument is not borne out by the *Huge* Court's reasoning:

15.2.1 Whilst the Court did consider if the word "*information*" in paragraph 8.65 includes financial statements,[36] it independently dealt with and rejected the argument that the JSE cannot "*overrule*" and "*second-guess*" the opinion of the company's auditor.[37]

15.2.2 What the applicant had argued, and what was expressly rejected by the Court, is that the JSE "*lack[s]*" the "*power to direct a restatement of any financial statements, and to overrule the auditor's opinion*".[38] That was the "*question*" before the Court.[39]

15.2.3 The applicant there made exactly the same argument that Trustco[40] is making now:

> "*All that the JSE was permitted to do, on a proper construction of Listing Requirement 8.65, was to require Huge to publish some sort of statement (such as through SENS) stating that the JSE was of the view that the SSFs ought to have been reflected as equity and not as liabilities.*"[41]

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[34] *Huge* at para 65.

[35] Trustco notice para 17.1

[36] *Huge* at para 55.6.

[37] *Huge* at para 59, quoting para 40 of the applicant's replying affidavit, and para 60, quoting para 48 of the applicant's replying affidavit.

[38] *Huge* at para 59, quoting para 41 of the applicant's replying affidavit.

[39] *Huge* at para 60, quoting para 48 of the applicant's replying affidavit.

[40] Trustco notice para 15.

[41] *Huge* at para 63.

15.2.4 It was in rejecting this argument, i.e., that restatement in general is not permissible, that the Court held that the JSE is empowered to order the restatement of financials.[42]

15.3 Second, this Court was plainly right that one purpose of listing requirement 8.65, i.e., to ensure that the financial statements of listed entities are correct, would be undermined if the JSE had no power to order restatement.[43] There is no reasonable alternative to this Court's purposive interpretation—certainly not Trustco's, according to which the purpose of listing requirement 8.65 is adequately served by publishing the fact that the JSE considers the financial statements to be incorrect.[44]

16 Therefore, there is also no reasonable prospect that Trustco's second ground of appeal would succeed.

Business judgment rule

17 Trustco's third ground for appealing the Order, namely, that the business judgment rule is relevant not only to liability protection, as this Court held, but also to the delimitation of duties, is entirely without merit.

18 Trustco conflates two distinct concepts—discretion and duty—properly drawn by this Court in paragraph 42 of its Order:

> "*This ground again reflects a tug-a-war between regulation and judgment of the Board of a business. The IFRS sets the standards that has to be adhered to. Within those boundaries a Board can exercise its discretion, but a Board cannot sidestep the standards of the IFRS.*"

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42 *Huge* at para 65.

43 Order para 39 (K15 to K16).

44 Trustco notice para 15.

19 As for the board's discretion, its nature can take two forms:

19.1 Sometimes, it has a strong discretion, where it "*has a wide range of equally permissible options available to it*".[45] In such cases, no matter which option it chooses, it cannot be wrong, for each is permissible.

19.2 Other times, it will have a weak discretion, which "*means no more than that [it] is entitled to have regard to a number of disparate and incommensurable features in coming to a decision*".[46] It must evaluate different considerations, but its decision will objectively-speaking be either right or wrong.

20 It is to strong or weak discretions that Trustco refers in its notice of application for leave to appeal, where it lists "*various examples*" of "*business judgments*" that a company's board has under the IFRS.[47] That a discretion exists, however, is compatible with this discretion being internally limited or subject to external duties:

20.1 With strong discretions, the board may be limited by the fact that the options available to the board are limited. If the board does something falling outside the range of these permissible options, it cannot raise in its defence the fact that it has a discretion.

20.2 With weak discretions, its authority is limited by the fact that it must make the objectively correct decision. When it fails to do so, it cannot defend its action by pointing to its discretion.

21 In this matter, the JSE found that the financial statements of Trustco were not a faithful representation of the underlying economic phenomena and events, and therefore that

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[45] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd* 2015 (5) SA 245 (CC) para 85.

[46] *Trencon* at para 86.

[47] Trustco notice para 20.

they incorrectly recorded the transactions. This is a finding of fact, which was informed by the expert advice of the Financial Reporting Investigation Panel.[48]

22 Because of this finding of fact, it follows that Trustco breached the IFRS, which in turn meant it breached the listing requirements. These are findings of law:

22.1 In responding to these findings of fact and law, i.e., that Trustco breached its duties under the listing requirements owing to their non-compliance with the IFRS, it is not now open to Trustco to point to the fact that it had a discretion, either strong or weak.

22.2 For whatever the nature of the board's discretion, it plainly did not extend to recording the nature of the transactions incorrectly:

22.2.1 Either its recordal of the transactions in the financial statements will have fallen outside of the permissible range of options available to it when it was exercising its discretionary power, or it will have been objectively speaking wrong.[49]

22.2.2 So, no matter how Trustco now seeks to characterise the discretion that it claims to have, such a discretion is not relevant to whether it has breached its duties to correctly record the true character of the economic transactions in question.

22.2.3 This in turn means that the business judgment rule is irrelevant to

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[48] Answering affidavit para 14 (E4 to E5), admitted by Trustco in its replying affidavit para 31 (F8).

[49] Since the JSE, informed by FRIP's advice, is an expert body, it does not stand in an asymmetrical information relation to Trustco's board (SM Bainbridge, 'The Business Judgment Rule as Abstention Doctrine', 57 Vanderbilt Law Review 83 (2019) 106), on questions of the accuracy of the financial statements. Thus, there is no ground on which it should "*defer*" to the board's judgment (Trustco notice para 32.1.2). This is unlike courts, who in judicial reviews, might lack expertise and so might, at least plausibly, be required to abstain from interfering in the board's factual judgments. It is to situations of the latter kind, i.e., those concerned with reviews by non-expert judges, that the article relied upon by Trustco pays especial attention (Bainbridge at pp 117-24). Nor do the other grounds justifying the rule considered, i.e., encourage risk-taking (110-7) and impact on the board's internal dynamics (124-7), apply here.

the issue before the JSE and then the Tribunal, which was whether Trustco's board, in exercising its discretion, did so within the (weak or strong) boundaries set by the IFRS's standards.

23 Therefore, this Court was right to find that the ambit of the business judgment rule did not extend to whether Trustco's financial statements breached the IFRS:

23.1 The rule does not concern questions about whether directors have breached particular duties, e.g., to accurately record transactions in financials. As the academic article that is cited by Trustco puts it, "*the business judgment rule's function is to preclude courts from deciding whether the directors violated their duty of care.*"[50]

23.2 It is in this sense that the rule concerns director's liability, for it can be relied upon if the directors, subject to the jurisdictional requirements sect by section 76(4) of the Companies Act, are alleged to have breached their duties of care under the Companies Act. But as the issue before the JSE and Tribunal was not whether the directors breached their duties of care the business judgment rule was not applicable.

24 For these reasons, there is also no reasonable prospect that Trustco's third ground of appeal would succeed.

Due deference principle

25 The final ground on which Trustco seeks leave to appeal on the grounds that there are reasonable prospects of success, namely, that this Court erred in its treatment of the due deference principle, is equally without merit:

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50 Bainbridge at p 101.

25.1 Firstly, Trustco misidentifies this Court's *ratio*, which was that "*the Panel did not sit back and defer to the JSE*".[51] Therefore, whether the principle applies to reconsideration applications is not essential to the Order. Thus, Trustco's arguments about this issue can be ignored, because, as explained, an appeal lies against a court's substantive order not its reasons.

25.2 Second, despite asserting that this Court erred in finding that the Tribunal did not sit back and defer to the JSE, Trustco offers no reasons for this assertion. Rather it targets the correctness of the Tribunal's decision,[52] and again raises the Tribunal's alleged lack of expertise.[53] But even if Trustco is right that the Tribunal made these errors and lacked expertise, this would not show that it sat back and deferred to the JSE. The allegations are unrelated to this final ground of appeal. Which means that Trustco provides no reason to think that an appeal court would find otherwise.

26 Therefore, this final ground of appeal also has no prospect of success.

No compelling reasons

27 Trustco says that even if there are no reasonable prospects this matter raises important and novel legal issues, which novelty and importance provide a compelling reason for why the appeal should still be heard.

28 By themselves, however, considerations of novelty and importance cannot constitute compelling reasons:

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51 Order para 45.

52 Trustco notice para 26.1 ("*The Court ought to have found that the Panel incorrectly rejected Mr Njikizana's report on the basis that he lacked partiality.*"); and para 26.3 ("*The Court ought to have found that the Panel erred in not realising that Professor Maroun, himself, did not say that Trustco's Board made an unreasonable decision when they followed expert advice.*")

53 Trustco notice para 26.2.

28.1 Courts do not exist to decide upon merely abstract, academic or hypothetical issues, no matter how novel or interesting they are.

28.2 Further, new questions of law arise in the High Court every day. These often concern issues of great importance, to the parties and public. If bare novelty or importance were to function as a standard for section 17(1)(a)(ii), then the appeal courts would inevitably be swamped.

28.3 If a decision overturned settled practices and rules, or introduced uncertainty to the application of existing rules, this might provide a compelling reason for an appeal to be heard, despite there being no reasonable prospect of success.

28.4 But the Order did nothing of that sort:

28.4.1 Insofar as section 220(2) read with sections 224(4) and 225(2)(a) of the FSR Act, and listing requirement 8.65, are concerned, it entails only the application of settled rules of interpretation to unique facts. Nothing was upset by this aspect of the Order.

28.4.2 As regards the business judgment rule, we showed above that there are no reasonable prospects that an appeal court will find differently to this Court, insofar as its nature or application are concerned. So, it is not open to Trustco, when relying on section 17(1)(a)(ii) of the Superior Courts Act, to say that this Court erred in its understanding of the rule.[54]

28.5 Lastly, Trustco cites no conflicting judgments pertaining to the section 220(2)

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[54] Trustco notice paras 32-33.

read with sections 224(4) and 225(2)(a) of the FSR Act, listing requirement 8.65, or business judgment rule. So, there is no compelling reason to send the matter to an appeal court for adjudication. In fact, in these circumstances, it is best for appellate courts to gather different views from high courts before being called on to make a final decision on the issue. The limited resources of appellate courts must not be wasted on a premature exercise of the kind advocated by Trustco.

29 A further fact of some moment is that after the Order had been given:

29.1 Trustco's application to the FST to reconsider the JSE's decision to suspend Trustco's shares because it had not restated its annual financial statements was dismissed by the FST;

29.2 the JSE suspended Trustco's shares pending a restatement of its annual financial statements; and

29.3 Trustco has agreed to restate its annual financial statements and has engaged the JSE on what the form and nature of the restated annual financial statements will be and, in this process, has indicated that the shares issued to Dr van Rooyen will be returned to Trustco, the loans that Dr van Rooyen will be reinstated as liabilities in Trustco's accounts, and the profits that it recognised from the waiver of the loans will be reversed.

30 What is set out in paragraph 29 is not contentious.

31 The facts which we have set out point strongly to this appeal having no practical effect which implicates section 16(2)(a) of the Superior Courts Act as a self-standing reason why leave to appeal should not be granted.

32 Therefore, this Court should not grant leave to appeal on the basis that there are other compelling reasons to do so.

CONCLUSION

33 We submit that Trustco's application for leave to appeal should be dismissed with costs of two counsel.

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27 January 2023