IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case No:
High Court Case No: 5640/2022

In the matter between:

TRUSTCO GROUP HOLDINGS LIMITED Applicant

And

THE FINANCIAL SERVICES TRIBUNAL First Respondent

JSE LIMITED Second Respondent

FOUNDING AFFIDAVIT

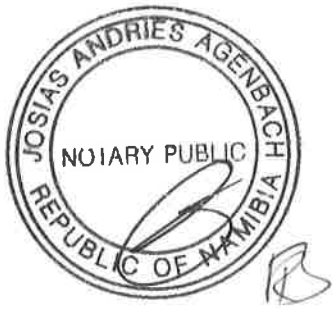
I, the undersigned,

RIAAN BRUYNS

state the following under oath:

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

2 I am duly authorised to make this application on behalf of the applicant. The facts contained herein are within my personal knowledge unless the context indicates otherwise and are both true and correct.



3 The submissions of law that I make in this affidavit are made on the advice of the applicant's legal representatives.

PARTIES

4 The applicant is **TRUSTCO GROUP HOLDINGS LIMITED**, a Namibian company with Namibian registration number 2003/058, which is registered as an external company in South Africa and listed on the second respondent's exchange with registration number 2009/002634/10, and its registered address in South Africa at Unit 304 Oakmont Building, Somerset Links Office Park, De Beers Avenue Somerset West, Western Cape ('the applicant' or 'Trustco').

5 The first respondent is **THE FINANCIAL SERVICES TRIBUNAL**, a tribunal established in terms of section 219(1) of the Financial Sector Regulation Act, 2017 ('the FSR Act') to reconsider certain decisions as described in the Act and to perform other functions set out in the Act. The first respondent operates from Kasteel Office Park, Orange Building (2nd Floor), 546 Jochemus Street, Erasmuskloof, Pretoria ('the Tribunal').

6 The second respondent is **JSE LIMITED**, a public company registered in accordance with the laws of the Republic of South Africa with registration number 2005/022939/0 and with its registered address at JSE Exchange Square, 2 Gwen Lane, Sandown, Johannesburg ('the JSE'). The second respondent is: a licensed exchange in terms of the Financial Markets Act 19 of 2012 ('the FM Act'); a 'market infrastructure' in terms of the FSR Act; and thus a 'decision-maker' whose decisions fall under the definition of 'decision' in section 281(c) of the FSR Act.

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INTRODUCTION AND BACKGROUND TO THE APPLICATION

7 This is an application for special leave to appeal against the whole of the judgment and order handed down by Her Ladyship the Honourable Justice Potterill on 7 November 2022 in the Gauteng, Pretoria High Court, as set out in the accompanying notice of motion ("the Order"). A copy of the judgment is attached as '**FA1**'.

8 The order which is the subject of this petition is annexure '**FA2**'. The learned judge refused leave to appeal on 30 January 2023. A copy of the order refusing leave is annexure '**FA3**' and a copy of the reasons for judgment, handed down on 6 February 2023, is attached as '**FA4**'.

9 The review application that served before Potterill J ultimately concerned the manner in which certain transactions were recorded in Trustco's (a public company listed on the JSE) 2019 audited financial statements and in its September 2018 interim financial statements ('the financial statements'), taking into account the applicable accounting principles known as IFRS (International Financial Reporting Standards).

10 There was no dispute between the parties before the High Court regarding:

10.1 whether the underlying transactions occurred; or

10.2 whether they were recorded in the applicable financial statements.

11 The transactions did occur, and they were recorded in Trustco's financial statements. The JSE did <u>not</u> state that the transactions themselves were unlawful or improper.

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12 The narrow dispute between Trustco and the JSE concerned the question of whether the applicable accounting principles forming part of IFRS were correctly applied in the recordal of the underlying transactions in the financial statements.

13 The JSE disagreed with the accounting treatment, in relation to three specific topics, by Trustco's accountants, its external auditors and its expert advisors.

13.1 **The Loan issue**: the correct accounting treatment of loans granted by Trustco's majority shareholder (which were subsequently forgiven) to:

13.1.1 Trustco; and

13.1.2 Huso Investments (Pty) Ltd.

13.2 **The Property issue**: Trustco reclassified properties in a development in Elisenheim, Windhoek, Namibia, from inventory to investment property. Trustco explained that the reclassification was done because a decline in demand meant that it did not anticipate selling the properties for the foreseeable future.

13.3 A **third issue** was resolved amicably by the parties prior to the proceedings described below. The JSE recognised in its answering affidavit that the third issue "also related to the sale of properties, but Trustco subsequently rectified this matter to the JSE's satisfaction."[1]

14 The JSE directed Trustco to restate the financial statements for the relevant period, by making specific corrections therein ('the JSE's directive'). Trustco objected to the ruling

[1] Answering affidavit at para 16.3.

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made by the JSE, inter alia, on the basis that the JSE has no power to direct a listed company to restate its financial statements. Trustco's objection was subsequently overruled by the JSE.

15 Thereafter:

15.1 Trustco took the matter in relation to its accounting treatment of the transactions to the Financial Services Tribunal ('FST') for reconsideration in terms of section 230 of the Financial Sector Regulation Act, 2017 ('the FSR Act');

15.2 Trustco's reconsideration was unsuccessful, and Trustco subsequently launched a review application before the High Court;

15.3 The High Court, per Potteril J, dismissed Trustco's application for review with costs, including the costs of two counsel and, as has been pointed out, subsequently refused Trustco's application for leave to appeal.

CORE ISSUES TO BE DETERMINED ON APPEAL

16 The review application before the High Court, and this application for special leave to appeal, raise – inter alia – the following important and novel legal issues:

16.1 First, the proper interpretation of section 220(2) read with sections 224(4) and 225(2)(a) of the FSR Act;

16.2 Second, whether the JSE's power in Listing Requirement 8.65 to direct an entity to "re-issue" includes the power to "restate", which in turn compels the entity to cancel an agreement in terms of which the entity was released of a loan

obligation of N$ 1.5 billion, with the end result being that, the entity is forced to take back a loan of N$1.5 billion against its will and better business judgment.

17 The first main issue is whether the FST Panel was correctly constituted when it heard and determined Trustco's reconsideration, because the panel lacked any person with financial or accounting qualifications and experience (or as it is put in section 220(2)(b) of the FSR Act, a person or persons "*with experience or expert knowledge of financial products, financial services, financial instruments, market infrastructures or the financial system*").

18 Importantly, the FSR Act entitles a party in Trustco's position to a *reconsideration* before the FST. A reconsideration is a *de novo* procedure in which the Panel must consider the decision afresh – it is not an appeal or review in which deference is owed to the prior state decision-makers.

19 For that very reason, the members of a specialist body such as the FST should be appropriately qualified to deal with matters falling within its field of expertise. A reading of the FSR Act reveals that "decisions" of a variety of officials or bodies are susceptible to possible reconsideration by a Panel of the FST.

20 Critically, for the purpose of the present application:

20.1 The underlying accounting subject matter of the JSE's directive and Trustco's reconsideration application to the FST involved complex financial issues in relation to the correct interpretation and application of specific paragraphs of

IFRS and the appropriate accounting treatment of the transactions in accordance with such interpretation.

20.2 These issues required detailed financial accounting expertise for their resolution. Each side submitted its own accounting expert's report to the FST, in which the interpretation and application of specific provisions of IFRS relied upon by that side were addressed.

20.3 But Trustco's reconsideration application before the FST was heard and determined by a panel that consisted of the Chairperson, a highly respected and prominent retired member[2] of the Supreme Court of Appeal,[3] a member of the Pretoria Bar[4] and an attorney,[5] thus all legally experienced persons, but no person experienced in financial matters, as contemplated by section 220(2)(b) ('the Panel'). There was no dispute in this regard.

21 The Panel simply delivered a decision similar to a judgment of the High Court ('the Panel decision'). Adopting "a lawyer's approach",[6] it preferred the expert opinion of the JSE's expert on the basis, *inter alia,* that since Trustco's expert accountant had acted as its advisor in relation to the accounting entries under consideration, he could not be

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[2] The former Deputy President.
[3] Justice LTC Harms.
[4] Adv S Hassim SC.
[5] Z Nkubungu-Shangisa.
[6] Decision of the FST Panel, paragraph 32.

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said to be entirely objective.[7] As against that finding, the Panel said that the expert opinion of the JSE's expert was convincing and logical "for us as lawyers".[8]

22 Trustco submits that the FSR Act, correctly and properly interpreted, renders it clear that the Panel must include financial expertise in an appropriate case, such as Trustco's reconsideration, which only dealt with accounting questions.

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

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

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

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[7] Decision of the FST Panel, paragraph 20.

[8] Decision of the FST Panel, paragraph 32.

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22.4 There would be no purpose in the express requirement in section 220(2) that the Tribunal is to include at least two persons of each of the two distinct categories listed therein, if the composition of the Panels can be put together without any regard to the substance of the matter before the FST.

23 The second main question is whether the JSE had the necessary power to issue the directive that it did, when it directed Trustco to restate its said financial statements by making corrections to the manner in which the transactions were recorded.

23.1 There was no dispute between the parties that the JSE does not have the express power to order a "restatement". The debate concerned whether the JSE's power in Listing Requirement 8.65 – to direct an entity to "re-issue" – also includes the power to "restate".

23.2 As I explain below, the term "re-issue" has a distinct accounting and legal meaning. It is a far more invasive power. In recognition of the invasive nature of that power, the JSE needs to comply with other steps when the power is invoked (for instance, reporting the accountants and/or auditors who prepared the statements to the appropriate professional body).

24 In the remainder of this affidavit, I deal with the following topics in turn:

24.1 Compelling reasons why the appeal should be heard;

24.2 The appeal has reasonable prospects of success;

24.2.1 The Panel composition;

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24.2.2 The JSE has no power to direct a 'restatement'

24.3 The legal dispute between the parties is not moot;

24.4 Conclusion and costs.

COMPELLING REASONS WHY THE APPEAL SHOULD BE HEARD

25 For the reasons set out in detail below, Trustco contends that the appeal has reasonable prospects of success as provided for in section 17(1)(a)(i) of the Superior Courts Act 10 of 2013.

26 Indeed, in relation to the question about the Panel composition, the High Court expressly acknowledged (at para 32 of the judgment) that Trustco's argument that "in view of the nature of the reconsiderations brought before the Panel, the requirement of financial experience would be an apparent reason to have at least one Panellist to have such expertise is not unreasonable" (emphasis added).

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

28 Trustco respectfully submits that there are compelling reasons why leave to appeal should be granted in the current matter.

28.1 Unless the High Court's decision is revisited, all panels of the FST will be constituted on an entirely random basis – without any regard for the specific

nature of the issues that need to be determined in the particular matter before the FST.

28.2 The High Court's decision has been marked reportable and will plainly inform the manner in which both the JSE and FST conduct themselves going forward. The JSE may – in accordance with the High Court's judgment and order – continue to direct listed companies to 'restate' their financial statements even though (if the applicant is correct) the JSE has no power to do so.

28.3 The High Court's judgment not only affects the parties before this Court, but all listed companies and every legal and natural person in South Africa who holds shares in those companies. In doing so, as explained below, the JSE has conflated 'restatement' with the more-invasive power the JSE does have: to direct a company to 'reissue' the financial statements. Where the JSE directs that a listed company's financial statements are reissued, the JSE simultaneously reports the accountants and auditors involved to the relevant professional bodies – because it is a step that is taken where there has been some form of gross negligence or fraud on the part of the financial advisors. There was no suggestion of anything of the sort in the current case.

28.4 A material component of the High Court arriving at its conclusion (as regards the JSE's power to restate) was relying on the unreported decision in *Huge Group Ltd v Executive Officer*: Financial Services Board Case Number:15380/2015. That decision is plainly distinguishable.

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29 Trustco respectfully submits that this Court should consider these issues as the interpretations advanced by the High Court's judgment are – respectfully – at odds with the clear wording of the relevant statutory provisions when properly construed in the light of their purpose and context.

THE APPEAL HAS REASONABLE PROSPECTS OF SUCCESS

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

31 It is trite that an appeal lies against the order of the Court, not simply the reasons. The High Court dismissed Trustco's review application with costs (the order) and did so because it rejected Trustco's grounds of review. If Trustco is correct that the High Court erred in relation to the two main issues raised in this appeal, then the High Court's order would fall to be set aside on appeal.

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

(i) The Panel composition

33 The High Court recognised that Trustco's reconsideration application before the FST was heard and determined by a panel that consisted of a retired Judge, and two legal practitioners. The Panel excluded anyone with financial or accounting qualifications or experience within the meaning of section 220(2)(b) of the FSR Act.

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

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

34.2 The High Court ought to have found that it is a central principle of administrative law that, when challenging a process as unfair, Trustco need not show that if the correct process had been followed, there would necessarily have been a different outcome. It is "vital that the procedure and the merit should be kept strictly apart, since otherwise the merits may be prejudged unfairly."[9]

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

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

36 The High Court ought to have found that:

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

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

37 As noted above, the High Court expressly acknowledged (at para 32 of the judgment) that Trustco's argument that "in view of the nature of the reconsiderations brought before the Panel, the requirement of financial experience would be an apparent reason

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to have at least one Panellist to have such expertise is not unreasonable" (emphasis added).

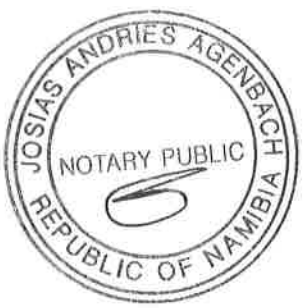
38 The High Court, however, erred in law and/or fact in finding that:

38.1 considering the language used in the light of the ordinary rules of grammar and syntax and the context in which the provisions appear, there is no ambiguity or uncertainty about the content of sections 220, 224 and 225 of the FSR Act (para 31 of the judgment); and

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

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

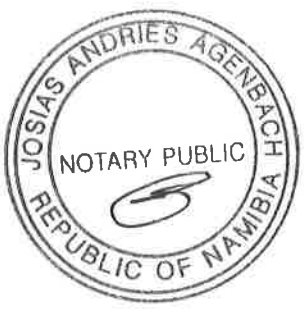
39.1 Section 220(2)(b) of the FSR Act provides that the Tribunal members must include "at least two (other) persons with experience or expert knowledge of financial products, financial services, financial instruments, market infrastructures or the financial system". It is from that Tribunal that the Chairman is to select members to serve on a Panel in a given case.



39.2 It is plain, it is respectfully submitted, that subsection 220(2)(b), read with sections 224(4) and 225(2)(a) of the FSR Act, fall to be afforded a purposive approach, which requires that in deciding on the composition of a Panel, the Chairperson is to have regard to the nature of the reconsideration matter to be heard and determined. It is for that purpose, it is submitted, that the Tribunal is required to have available for a given Panel, at least two persons with experience or expert knowledge of financial products, financial services, financial instruments, market infrastructures or the financial system. It is obvious, it is submitted, that a person with that knowledge and expertise will have knowledge of and expertise in accounting and the presentation of financial statements.

39.3 Put differently, there would be no purpose in the express requirement in section 220(2) that the Tribunal is to include at least two persons of each of the two distinct categories listed therein, if the composition of the Panels can be put together without any regard to the substance of the matter before the FST.

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



39.5 Trustco's reconsideration application to the FST only involved complex financial issues. These issues required detailed financial and accounting expertise for their resolution, which is the very reason section 220(2)(b) of the FSR Act mandates that there must be at least two people on the list of panel members with financial expertise.

39.6 The Panel is intended to be a specialist body assigned to determine matters of a specialist nature, and not a parallel court. That function is undermined if a reconsideration application in respect of a decision involving financial matters is assigned to retired judges and/or legally experienced persons only – such an application ought then rather be submitted to and determined by the High Court.

40 The High Court erred in law and/or fact (at para 29 of the judgment) in using the current, anecdotal practice followed by retired Justice Harms of selecting the Panel members before the nature of a particular reconsideration matter is considered by him, thus before the heads of argument in a matter are filed – and thus before the subject-matter of the dispute is known to retired Justice Harms, in order to interpret the provisions of the FSR Act and what the Act requires. It is well-established that it is impermissible to use subordinate legislation (i.e. Regulations) as an aid to interpret an Act of Parliament.[10] This principle applies with greater force to a practice followed by the current chairperson of the FST. If Trustco's construction of the Act is correct, then the FST would need to adapt its practices of when and how the Panels are appointed. It is

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

not permissible to analyse the past practice of the Panel in order to interpret the words in the FSR Act.

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

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

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

41.3 was unreasonable in the circumstances of this case, as contemplated in section 6(2)(h) of PAJA, because the expertise of the ultimate decision-makers (i.e. the members of the appointed Panel to adjudicate on Trustco's reconsideration application, which related to financial matters) was not considered.[11]

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

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

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[11] Reasons at paragraphs 10-12.

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43 The High Court ought to have found that:

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

43.2 the JSE had no power to direct Trustco to restate its financial statements. The terms have distinct meanings for financial practitioners.

43.2.1 Indeed, the JSE initially directed Trustco to "re-issue" the financial statements.[12]

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

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

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

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

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Investors and the public were fully apprised of the position

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

45 The High Court ought to have found that the JSE had already directed Trustco to publish information related to the transactions and Trustco had already complied:

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

45.2 Trustco issues a SENS announcement informing the market that the JSE took issue with its financial treatment of the transactions;

45.3 The applicant recorded the JSE's concerns in its financials for the period ended 31 January 2022, published on 31 January 2022.

45.4 Accordingly, the purpose of providing the public with a full picture had already been achieved.

45.5 The JSE also had other enforcement mechanisms at its disposal. For example, in instances of serious non-compliance, then the JSE is empowered to order a re-issue. It elected not to do so in the current matter.

46 The JSE's stance before the High Court was that Trustco was not presenting its shareholders and the general public with the full story. That is why the restatement was necessary (according to the JSE).

47 In the JSE's answering affidavit before the High Court, the JSE stated:

> *"Trustco imperils the JSE's ability to protect investors, to promote investor confidence, to ensure the integrity of the market, to ensure that holders of relevant securities are given full information, and to ensure that full and timeous public disclosure is made to all holders of securities and the general public".*[13]

48 But that is incorrect. Trustco at no stage imperilled the JSE's ability to ensure that "full and timeous public disclosure is made to all holders of [Trustco] securities and the general public".

49 Quite the opposite, pursuant to the JSE's decision, Trustco:

49.1 issued the SENS announcement informing the market that the JSE took issue with its financial treatment of the transactions;[14]

49.2 expressly recorded the JSE's concerns in its financial statements for the period ended 31 January 2022.

50 Trustco also pointed out in its replying affidavit that the proceedings instituted by Trustco before the Tribunal and before the High Court "are a matter of public record and it is indeed perplexing to note the reckless statements by the JSE that Trustco is attempting to avoid accountability and market transparency".[15]

51 The JSE's answering affidavit never explained or set out any facts alleging why these steps were insufficient to inform shareholders and the public. It could hardly claim that

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[13] Answering affidavit at para 100.

[14] This was attached to the JSE's answering affidavit before the High Court as annexure 'AA1'.

[15] Replying affidavit at para 10.3.

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Trustco's shareholders were not informed, as the JSE stated in its answering affidavit that Trustco's SENS announcement did not only inform its shareholders, it "asked shareholders to participate in a non-binding advisory vote on several issues" pertaining to the JSE's decisions.[16]

52 The argument that only a restatement would achieve this purpose arose, impermissibly, for the very first time in the JSE's heads of argument. But that argument plainly influenced the High Court. For instance, in paragraph 41 of the judgment, the Court found that:

> *"The financial statements of a listed company communicate with the public and it must tell a full story. The JSE and the FST found that the 'accounting' was not telling the whole story and did not comply with the IFRS."*[17]

53 The full story was derived from the cautionary notes recorded in Trustco's financial statements and the SENS announcement.

54 Trustco's SENS announcement also explained Trustco's predicament: Trustco only has one set of financial statements – it has an obligation to comply with IFRS in those financial statements – its expert accountant advisors and auditors took a view regarding how that should properly be done. Trustco is listed on three different stock exchanges. It was placed in the invidious position that two regulators did not raise any issue regarding the treatment of the recordal of the particular transactions – but the JSE did. Those other regulators could conceivably take a different view to the JSE regarding how best to record the transactions in question.

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[16] Answering affidavit at para 24.

[17] High Court Judgment at para 41.

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55 The key information pertinent to the JSE's final decision has plainly been published, not once, but twice. The JSE's approach was that the ordinary member of the public – who may potentially purchase Trustco's shares – was not properly informed by the words used in the SENS announcement or the cautionary notes recorded in Trustco's later financial statements. The JSE stated (albeit belatedly in legal argument) that the ordinary member of the public needed to see the actual figures in the financial statements after they were changed.

56 That position is untenable. The potential buyer/shareholder who may not be well versed in complex accounting principles would plainly derive better information from the SENS announcement and the cautionary notes recorded in Trustco's financial statements – merely than seeing adjusted figures.

The High Court's erroneous reliance on the *Huge* decision

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

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

58.1 What was argued in that case was that the JSE was not empowered under Listing Requirement 8.65 to make any directives whatsoever regarding an entity's annual financial statements because (according to the argument raised

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by Huge Group) the annual financial statements did not fall within the ambit of the term "information" under Listing Requirement 8.65.

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

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

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

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

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

58.6 Similarly, other Listing Requirements expressly state that non-compliance "may result in a restatement and consequent re-publication of the information concerned" (Listing Requirement 12.12(b); 12.23(b) neither of which deal with anything like the circumstances of the present case).

THE LEGAL DISPUTE BETWEEN THE PARTIES IS NOT MOOT

59 Section 16(2)(a)(i) of the Superior Courts Act provides:

> *"When 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".*

60 The section does not find application in the present matter.

61 The JSE, impermissibly in its heads of argument and in argument from the bar, in the application for leave to appeal, raised the fact that Trustco has, since handing down of the order of the court, a quo –

> *"agreed to restate its annual financial statements and has engaged the JSE on what the form and nature of the restated annual financial statement will be and, in this process, has indicated that the shares issued to Dr Van Rooyen will be returned to Trustco, the loans that were waived by 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."*

62 This statement is only partly correct. It is true that the 31 August 2022 annual financial statements published on 28 February 2023 duly reflect the restatements.

63 Critically, however, the restatements and the engagements with the JSE in respect thereof were done under protest and without prejudice to Trustco's position and right to

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pursue the appeal. After handing down of the court a quo's order in November 2022, Trustco decided to comply with the JSE's directive to restate to ensure the lifting of the suspension of trading in its shares on the JSE. The without-prejudice nature of this decision and the engagement with the JSE was clearly communicated to them.

64 Trustco decided on the above approach to protect shareholders and mitigate the prejudice they are suffering due to the suspension. Furthermore, the restatements could only be properly effected in compliance with IFRS if the underlying loan and share issuing transactions were reversed.

65 Trustco reserved its right to revert to the accounting treatment that it initially adopted (through the same exercise that it has gone through in effecting the restatements) if it is successful on appeal. This is by no means a simple exercise, but it is possible. And Trustco was left with no alternative choice, since the JSE would not have agreed to lift Trustco's suspension from the JSE pending the determination of this appeal, unless Trustco agreed (on a without-prejudice basis) to the restatements.

66 Trustco respectfully submits that the JSE's attempt to raise mootness during the application for leave to appeal was incorrect because the restatements were expressly done on a without-prejudice basis. But it is also telling, it demonstrates that the JSE seeks to avoid having this Court reconsider the merits of the High Court's construction of the FSR Act and the Listing Requirements – which are important issues not merely for Trustco, but all companies listed on the JSE.

67 The JSE was alerted numerous times to the prejudice that stakeholders will suffer if a suspension is put in place whilst this bona fide dispute is ongoing.

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68 The subject matter of the appeal, therefore, remains a live issue for determination and has a clear practical effect.

CONCLUSION

69 In the circumstances, Trustco asks for an order in terms of the accompanying notice of motion.

DEPONENT

I certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn to before me at Windhoek on 28 **FEBRUARY 2023**, the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended by Government Notice No. 1648 of 17 August 1977, as amended having been complied with.

COMMISSIONER OF OATHS

JOSIAS ANDRIES AGENBACH
NOTARY PUBLIC
REPUBLIC OF NAMIBIA

JOOS AGENBACH
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Republic of Namibia

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES.
(2) OF INTEREST TO OTHER JUDGES: YES.
(3) REVISED.
2022-11-07
DATE **SIGNATURE**

Case Number: 5640/2022

In the matter between:

TRUSTCO GROUP HOLDINGS LIMITED Applicant

and

THE FINANCIAL SERVICES TRIBUNAL First Respondent

JSE LIMITED Second Respondent

JUDGMENT

POTTERILL J

[1] The Applicant, Trustco Group Holdings Limited [Trustco] is seeking a review and setting aside of the reconsideration decision taken by the First Respondent, the Financial Services Tribunal [the FST] dated 22 November 2021 [the decision]. The decision is to be replaced with an order that Trustco's reconsideration application of the First Respondent, the JSE Limited [JSE] decision be upheld with costs including the costs of two counsel. In the alternative, the FST decision must be remitted to the chairman of the FST with directions that the chairman of the FST is to appoint a Panel in accordance with

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s224(4) of the Financial Sector Regulation Act 2017 [the FSR-Act] with such Panel to include at least one person suitably qualified in, and having suitable working knowledge of accounting, accounting practices and the international financial reporting standards. Trustco is also seeking the review and setting aside of the JSE decision requiring that Trustco restate its group annual financial statement for the year ending 31 March 2019 and the interim results for the six months ending 30 September 2018.

Factual background

[2] Trustco is a public Namibian company listed on the JSE with its shares offered for sale on the JSE. Dr van Rooyen is Trustco's CEO and majority shareholder and also the sole shareholder of Huso Investments Pty Limited. The crux of the dispute lies in Trustco's annual financial statements portrayal of three transactions for the year ending 31 March 2018 and its interim results for the six months ending 31 August 2018 [the financial statements].

[3] The first transaction has as background that Dr van Rooyen loaned to Huso N$ 546 million. In Huso's financial statements this loan was classified as equity in that Dr van Rooyen invested in Huso as a shareholder. In 2018 Trustco bought all the shares of Huso and then this loan was reclassified as a liability; Huso owed that money to Dr van Rooyen. Shortly after Trustco acquired Dr van Rooyen's Huso shares Dr van Rooyen forgave this N$546 million loan. This resulted in Trustco reflecting this as a gain of N$546 million in the financial statements and an earn-out mechanism in Dr van Rooyen's sale of shares agreement to his benefit [the first loan].

[4] A second loan of up to N$1 billion was advanced by Dr van Rooyen to Trustco. This loan was also within a few months forgave and reflected as a N$1 billion gain for Trustco [the second loan] with also an earn out mechanism for Dr van Rooyen.

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[5] Trustco owns properties in Elisenheim development. These properties were reclassified from inventory to investment properties. The reason for this was that a decline in demand led it to believe that it would not sell the properties quickly. Trustco then revalued the properties upwards which increased its profitability. It was reflected as a N$693 million gain in the profit and loss account in its financial statements [the property issue].

The JSE decision

[6] The JSE reviews the financial statements of every listed company at least once in every five years and Trustco's financial statements were in this process audited. The JSE referred the two loans and the property issue to the Financial Reporting Investigation Panel [FRIP], the advisory body to the JSE. A further issue relating to the sale of properties was also in issue, but Trustco rectified this issue to the satisfaction of the JSE.

[7] FRIP had consulted and obtained submissions from Trustco. On the information obtained it advised the JSE that Trustco's financial statements did not comply with the International Financial Reporting Standards [IFRS.] Trustco had an opportunity to comment on the FRIP report.

[8] On 16 October 2020 the JSE decided that Trustco did not on the first and second loans and the property issue comply with the IFRS. Trustco objected to this decision, but on 11 November 2020 the JSE dismissed Trustco's objection and directed it to restate the financial statements by reversing the first and second loans as gains recognised in profit and loss. Trustco was on the property issues instructed to reverse the reclassification of the properties and reverse the gains recognised in the profit and loss.

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[9] I do not dwell on the pending suspension application and the Non-binding advisory vote published by Trustco's excepting to note that regrettably there is no love lost between Trustco and the JSE.

The reconsideration application before the FST

[10] The FST's panel consisted of retired Judge Harms, and an advocate and an attorney. In its decision it restated that a reconsideration application is in *"the fullest sense - it is not restricted at all by the Registrar's decision and has the power to conduct a complete rehearing, reconsideration and fresh determination of the entire matter that was before the Registrar, with or without new evidence or information."* The decision also referred to the principle of deference which requires a court to show respect to bodies like the JSE.

[11] Before the FST were the opinions of experts, Prof Maroun on behalf of the JSE and Mr T Njikizana on behalf of Trustco. FRIP's report was also before it.

[12] The decision of the FST on the first loans was that "on balance, the loan reclassification, waiver and acquisition transaction(s) should not have been treated as separate and distinct transactions in order to reflect their economic substance and not merely their legal form.

[13] Pertaining to the second loan much of what was said about the first loan the FST also found to apply to this loan. Here once again the legal form did not reflect the economic substance.

[14] As for the property issue the FST found that the there was no evidence of a change in use in relation to the property; the properties were underdeveloped and vacant and continued to be vacant and undeveloped. The expressed

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intention for which the property was held was a different timetable and a deferment of projects not amounting to a change in use.

The review grounds to the re-consideration application

[15] One of the review grounds initially raised have petered out; the lack of authority of the JSE's director Mr Visser. A ground of review still alive is whether the JSE had the power to issue a directive that Trustco had to restate its financial statements by making the corrections prescribed by the JSE Listing Requirements. Further grounds of review were raised that the JSE and the Panel did not give any consideration to the relevant business judgment rule; the employment by the Panel of the *"due deference principle"* was an irrelevant consideration and the failure to call Dr van Rooyen as a witness to explain certain inferences drawn by the panel rendered the process procedurally unfair. The issue addressed below was seen as the nub of the matter before me.

Was the Panel incorrectly constituted?

[16] In oral argument this was argued as the crux of the matter. At the outset it must be noted that this ground was not raised with the Panel during the reconsideration hearing. The reason proffered why it is only raised before me is that Trustco only later realised that no member of the Panel had accounting experience.

[17] The review has now been framed as that the Panel of the FST was incorrectly constituted because it lacked any person with financial or accounting qualifications and experience. The argument goes that it rendered the decision reviewable because the reconsideration application involved complex financial issues in relation to the correct interpretation and application of specific paragraphs of the IFRS and the appropriate accounting treatment of the transactions in accordance with such interpretation.

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[18] In the supplementary affidavit it is submitted that Trustco had a legitimate expectation that the Panel members had the necessary qualifications and expertise and it is to be accepted that the Panel members had no personal benefit of expert financial knowledge Without this expertise the fundamental flaw in the constitution and appointment process of the Panel led to an unreasonable and unfair process.

[19] It was argued that the Panel delivered a decision akin to a High Court judgment, adopting a lawyer's approach. In preferring the opinion of the JSE's expert they did so as lawyers. Therefore, the appointment of the Panel was both procedurally and substantively irrational in not complying with the provisions of s220(2) read with sections 224(4) and 22592) of the FSR-Act.

The legislative framework

[20] Sections 220, 224 and 225 of the FSR-act provide as follows:

> *"220. Members of Tribunal –*
>
> *(1) The Tribunal consists of as many members, appointed by the Minister, as the Minister may determine.*
>
> *(2) The Tribunal members must include –*
>
> *(a) at least two persons who are retired judges, or are persons with suitable expertise and experience in law; and*
>
> *(b) at least two other persons with experience or expert knowledge of financial products, financial services, financial instruments, market infrastructures or the financial system.*
>
> *(3) A person may not be appointed to, or hold office as, a Tribunal member if the person –*

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(a) *is a disqualified person; or*

(b) *is not a citizen of the Republic or is not ordinarily resident in the Republic.*

(4) The Minister must appoint a Tribunal member referred to in subsection (2)(a) as the Chairperson and may appoint another Tribunal member as Deputy Chairperson.

(5) The Chairperson –

(a) *must preside at meetings of the Tribunal; and*

(b) *is responsible for managing the work of the Tribunal effectively.*

(6) The Deputy Chairperson performs the functions of the Chairperson on delegation by the Chairperson, or in the absence of the Chairperson, or if for any reason the office of the Chairperson is vacant.

224. Panels of Tribunal –

(1) The Chairperson must constitute a panel of the Tribunal for each application for reconsideration of a decision.

(2) The panel constituted to consider an application for the reconsideration of a decision is the decision-making body of the Tribunal, and the panel exercises any of the powers of the Tribunal relating to the reconsideration of the decision.

(3) The decision of the panel is the decision of the Tribunal as referred to in sections 234, 235 and 236 in respect of an application for the reconsideration of a decision.

(4) A panel consists of –

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(a) *a person to preside over the panel, who must be a person referred to in section 220(2)(a) or 225(2)(a)(i); and*

(b) *two or more persons who are Tribunal members or persons on the panel list.*

(5) *If, for any reason, a panel member is unable to complete proceedings for a reconsideration of a decision, the Chairperson may –*

(a) *replace that member with a person referred to in subsection (4);*

(b) *direct that the proceedings continue before the remaining panel members; or*

(c) *constitute a new panel and direct the new panel to either continue the proceedings, or start new proceedings.*

225. Panel list –

(1) *The Minister must establish and maintain a list of persons who are willing to serve as members of the Tribunal.*

(2) *The persons included in the panel list must –*

(a) *have relevant experience in or expert knowledge –*

(i) *of law; or"*

(ii) *of financial products, financial services, financial instruments, market infrastructures or the financial system; and*

(b) *be a fit and proper person to be included in the panel list."*

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Argument of behalf of Trustco on the legislative framework

[21] On behalf of Trustco it was argued that s220(2)(b) provides that the Tribunal members must include "*at least two (other) persons with experience or expert knowledge of financial products, financial services, financial instruments, market infrastructures or the financial system.*" S224(4) regulates the constitution of a Panel to consider an application for reconsideration. It requires a person with suitable expertise and experience in law and two more persons who are Tribunal members or persons on the panel list. S225(2)(a)(ii) provides that as an alternative to two members who have relevant experience in law, the two Panel members can be persons who have relevant experience or expert knowledge of financial products, financial services, financial instruments, market infrastructures of the financial system. The conclusion submitted was that a Panel must in each case be appointed on a case-by-case basis and this matter required a member with accounting experience.

[22] Because a reconsideration application involves decisions of financial sector regulators and a Panel can consider all relevant issues and facts before it afresh, it is necessary that the Panel be equipped of legally and financial experienced members.

[23] Put another way, a Panel for reconsideration must be constituted with specific regard to the subject- matter before it from one or more persons of the one, and of the other two categories referred to in subsections 220(2)(a) or 220(2) (b) of the FSR-Act. The argument went that if a legal matter a legal persons or financial matters persons with financial expertise. This would be a sensible interpretation of s224(4). The JSE's argument boiled down to interpreting s224 in isolation. This would lead to a Panel being appointed without considering the subject matter of a reconsideration. Due to the nature of the issues before the Panel, decisions made by financial sector regulators, a sensible interpretation of s224 was required. This would accord with the apparent purpose of sections

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218 to 225 resulting in the purpose of s222(2) specifically requiring that two persons of each of the two distinct categories be appointed to the Tribunal.

The argument on behalf of the JSE

[24] The argument went that the amended notice was aiming at the wrong target, because the relief sought does not seek to attack the decision on how to appoint the Panel. But, importantly it was never raised before the Panel and it is only raised now to avoid a defence of delay that would hit Trustco, be the review in terms of Promotion of Administrative Justice Act 3 of 2000 [PAJA] or legality. Trustco at the very least already in May, before the hearing, knew who the Panel members were and Trustco should not be allowed to raise this issue now.

[25] It was not understood what in the process was unfair since retired Judge Harms in the Rule 53 *"reasons"* set out that he complied with the only statutory requirement that the persons on the Panel list must have an equal opportunity to be appointed to serve on the Panel of the Tribunal. He had no reason to exclude the two Panel members that sat with him on this Panel. He considered where the matter emanated from; the JSE. He did not have the record and cannot read through records before members of the Panel are appointed simply because it would be an unworkable situation.

[26] S220(1) refers to the Tribunal as the broader concept. When the Minister appoints the Tribunal there must be at least two retired judges and at least two people with, in a nutshell, finance experience. Not all of these appointed members of the Tribunal hears an application. S224(4) requires that a Panel for reconsideration must have a presiding member who is a retired judge and at least two other members. These two members must either be members of the Tribunal or come from the panel list. S224(4) of the FSR Act does not require members of a Panel to have financial expertise. In any event not

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"accounting, accounting practices" as prayer 3 of the amended notice seeks. Trustco thus confuses members of the Tribunal and a Panel of the Tribunal.

The Panel was constituted in terms of the legislative framework and was appointed procedurally fairly

[27] It is palpable that this ground of review flows from this paragraph in the decision of the Panel:

> *"32 We find the opinion of Prof Maroun expressed as a chartered accountant convincing and logical for us as lawyers"*

This ground of review was thus not raised earlier because the composition of the Panel was not problematic to Trustco despite it having knowledge of who sat on the Panel prior to the hearing and during the hearing. This ground is now raised because as *"lawyers"* the Panel did not have financial expertise and their decision is thus wrong and a new Panel with a member with *"accounting"* experience would have come to another decision. Review is not the vehicle to raise the merits of the decision and seek another outcome. Review is concerned with whether a decision was regular or irregular not whether it was right or wrong. On this ground alone this ground of review should be rejected.

[28] But, in any event, I agree that the decision of retired Judge Harms to compose the Panel as he did in conjunction with the secretary cannot be attacked as a decision of the Panel. In the amended notice there is no attack against this decision. The rule 53- *"decision"* furnished by the deputy chair of the FSB and the chair of the reconsideration Panel, retired Judge Harms, set out that in fulfilling the administrative function of constituting the Panel for reconsideration he would not have a record and no Panel member would read the record before heads of argument are filed. Availability of a member plays a role in who is appointed to the Panel. He fulfilled the only statutory requirement that the persons in the Panel list must have an equal opportunity to be appointed to serve on the panel of the Tribunal. He had no reason to exclude the two panel

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members that sat with him on this Panel. He considered that the matter emanated from the JSE. There was no procedural irregularity when the Pane was appointed.

[29] It was not gainsaid that this *"procedure"* followed is the protocol to constitute a Panel to hear a reconsideration, whether it is a Full Court constituted for the High Court or any other Tribunal hearing a re-consideration. The subject-matter cannot practically be before the person constituting the Panel before the heads are filed. I cannot find that the constitution of the Panel by retired Judge Harms was procedurally unfair or that the constitution of the Panel was a decision of the Panel and is reviewable. But, there is nothing preventing a party seeking reconsideration that is of the opinion that the subject matter would require a Panel member to have financial expertise, to on referral motivate and request that there should be a *"financial"* member on the Panel.

[30] If the review is based not on the decision to constitute the Panel as it was, but that it's composition did not comply with the legislative requirements, this argument is rejected. In oral argument Counsel for Trustco conceded that s224 does not expressly require that on a Panel there must be a member with *"experience or expert knowledge of financial products, financial services, market infrastructures or the financial system."*

[31] Considering the language used in the light of the ordinary rules of grammar and syntax and the context in which the provision appears there is no ambiguity or uncertainty about the content of sections 220,224 and 225. The Tribunal, as the broader concept, is appointed by the Minister with s220(2) requiring that in the Tribunal a pool of Tribunal members must include at least 2 retired judges and 2 people with broadly speaking financial experience. If for example the Minister appoints 5 or 10 Tribunal members only 2 need to have experience in finance. Similarly, on the Panel list there also need only be two persons with financial experience.

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[32] The argument that in view of the nature of the reconsiderations brought before the Panel, the requirement of financial experience would be an apparent reason to at least have one Panellist to have such expertise is not unreasonable. But, a Panel consisting of lawyers is imminently suited to adjudicate a reconsideration in evaluating facts and evidence. If financial expertise to analyse is required, the *"lawyers"* rely on the experts' opinions brought before it. This is not a foreign concept or practise and is done regularly by *"lawyers."* If the Legislature intended to sidestep this established practise it could easily have expressed it in the FRS Act with a requirement that dependant on the subject matter each Panel had to have one member with financial background. A further problem however is that a person who has *"experience or expert knowledge of financial products, financial services, market infrastructures or the financial system"* may not have *"accounting"* experience as Trustco pleads for. Even if a person with such experience is appointed to the Panel the Panel would still be reliant on competing expert evidence. Put differently, having a person with financial knowledge as a Panel member will still require accepting the opinion of one expert on good grounds; as many experts as many opinions. However, this argument highlights the problem with this ground of review; the argument is in fact that the constitution of the Panel of *"lawyers"* rendered the decision of the Panel wrong. This is not a ground for review. The irony is not lost on the Court that in the amended notice of motion this Court, as a lawyer with no financial expertise, is asked to assess the merits of the JSE and Panel's finding, set it aside and replace it.

[33] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at par [18] Wallis J found as follows:

> *"A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.* ***Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a***

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statute or statutory instrument is to cross the divide between interpretation and legislation." [my emphasis]

In this matter to substitute the words actually used for, what is argued a businesslike result, would lead to a cross between interpretation and legislation

Does the JSE have the power to direct a restatement of the financial statements and make corrections thereto?

[34] Initially the JSE directed Trustco to *"re-issue"* the financial statements. In its final directive it directed Trustco to *"restate"* the financial statements. On behalf of Trustco it was argued that to re-issue financial information is a permissible remedy in terms of par 8.65(b) of the Listing requirements, but that a restatement making corrections in terms of International Accounting Standards [IAS] is not.

[35] The result of a restatement would have a ripple effect because errors must be retrospectively corrected and will also require the statutory external auditors to reconsider their audit opinion in the financial statements.

[36] The exercise of the JSE of a power it does not have infringes the principle of legality as it can only exercise powers conferred upon it by law. The JSE derives its powers from s10(2)(b) of the Financial Markets Act 19 of 2012 and exercising its discretion is an administrative function also for purposes of PAJA.

[37] In answer to this the JSE argued that par 8.65 of the Listing Requirements is broad enough to include restatement. It provides as follows:

"to instruct such issuer to publish or re-issue any information the JSE deems appropriate."

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But, in any event, s10(2)(b) of the Financial Markets Act 19 of 2012 is even broader giving the JSE the power to *"do all things that are necessary for, or incidental to the proper operation of an exchange."* S11 prescribes that *"any other penalty that is appropriate in the circumstances."*

[38] I was also referred to the unreported matter of *Huge Group Ltd v Executive Officer: Financial Services Board* 15380/2015 delivered in the Gauteng Local Division on 21 July 2017:

> *"[62] This then was the case made out by Huge in its affidavits. In essence, Huge contended that the JSE, on a proper construction of Listing Requirement 8.65, was not permitted to direct Huge to any restatement of its financial statements ..."*

The court therein found as follows:

> *"[69] This then takes me back to the case made out by Huge in its affidavits. I am unable to agree with the case advanced by Huge that Listing Requirement 8.65 does not, on its proper construction, empower the JSE to require Huge to restate its AFSs, In my view, there is no basis to restrict the interpretation of Listing Requirement 8.65 in such a manner and consequently, the JSE did not, in its decision of 27 October 2014, act outside of the powers granted to it by Listing Requirement 8.65."*

[39] I agree that Listing requirement 8.65 is wide enough to include *"restate."* The purpose of the directive of the JSE to Trustco is corrective action pertaining to its financial statements. Pertinently it directed Trustco to reverse the gains reflected in its financial statements after Dr van Rooyen waived the loans and reclassified the Elisenheim properties. If it is not restated, it is not corrected and the JSE has in fact no teeth to correct the position to protect the public with the

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financial statements setting out the full picture.

[40] I understand the underlying reason for this ground of review as that Trustco acted *bona fide* in using the methodology it did when recording the financial transactions. The recording was done pursuant to engagement with expert IFRS advisors as well as independent external advisors. The Board of Directors of Trustco consist of imminent persons. This imminent Board made its business judgment decisions on the advice of Mr Nijikizana. The JSE is interfering with the business judgment decisions of Trusto and it has no authority to do so.

[41] The FRIP report and the JSE both concluded pertaining to the N$ 1 billion gain as follows: *"... suggests that the structure has been contrived to increase QvR's equity shareholding."* I find it puzzling that Mr van Rooyen has to date not put his version to anybody. It may have enlightened all and have cleared the air. Having said this, I need not decide the bona fides, or lack thereof, and it has not influenced me in any way. The aspect is addressed because I can understand that would-be-interference in bona fide actions result in frustration and anger. But, the reality is, we live in a necessary controlled world. A company listed on the JSE has to comply with the JSE regulatory framework. The JSE provides a safe market for buying and selling securities and prevents fraud and protects investors by applying strict rules regarding trading. The financial statements of a listed company communicate with the public and it must tell a full story. The JSE and the FST found that the *"accounting"* was not telling the whole story and did not comply with the IFRS. Trustco must adhere to these decisions and restate accordingly.

<u>Should the FST have applied the business judgment rule and given deference to the Board's decision to reflect the three contested entries in the statements as they did?</u>

[42] This ground again reflects a tug-a-war between regulation and judgment of the

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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. Section 76(4) of the Companies Act has entrenched the business judgment rule in our Companies law, but to what end? It serves as a barrier against liability when a director has breached his or her fiduciary duties. *"There is always a link between good governance and compliance with law. Good governance is not something that exists separately from the law and it is entirely inappropriate to unhinge governance from the law."*[1] The business judgment rule therefore becomes a protective measure for directors against liability imputations. It protects honest directors from liability where a decision turns out to have been an unsound one and at the same time prevents the stifling of innovation and venturesome business activity. It is also doubtful that Dr van Rooyen concedes that he had breached his fiduciary duty and must thus rely on this principle.

[43] I am satisfied that the business judgment rule only addresses the liability of a director, it does not govern non-compliance with the IFRS.

Did the FST correctly refer to the due deference principle?

[44] The FST referred to this principle under the heading of the" context" of the reconsideration application. This was seemingly done because there was *"some confusion during argument about the nature of reconsideration proceeding."* The wide powers, appeal jurisdiction is then set out as well as the fact that *"Although the Tribunal is an 'expert' tribunal, it is obviously less qualified than the JSE to make multi-faceted and polycentric decisions …"* and reference is then made to the dictum in *Staufen Investments (Pty) Ltd v The Minister of Public works, Eskom Holdings SOC Ltd & Registrar of Deeds, Cape Town* 2020 (4) SA 78 (SCA).

[1] Muswaka, L – *"Shielding Directors against Liability Imputations: The Business Judgment Rule and Good Corporate Governance"* [2013] SPECJU 2

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[45] This principle is entrenched and by analogy applicable in these matters. The argument that the reference to this principle supports the argument that the Panel is incompetent to hear this matter is again an argument on the merits and not a ground for review. The concept of *"Sufficient expertise"* raised could then never suffice with one member of the Panel having financial expertise as defined. At least two panel members will then have to have specific expertise as defined, which will not necessarily include auditors with knowledge of the IRPS and the workings of the JSE, to be able to override the *"lawyer"* on the Panel, that supposing that those two members do not have different views. This is simply untenable.

[46] However, more importantly, the Panel did not sit back and defer to the JSE. They analysed the experts' views and relied on the one view of the expert. Also recognising that Mr Nijikizana was not objective as he advised Trustco and was thus not independent; an important consideration. The FST did not take irrelevant considerations into consideration.

Must Dr van Rooyen have been called?

[47] This ground needs little address. At any time in terms of the rules Trustco could have called Dr van Rooyen. Even if it is true that during the hearing goalposts shifted, retired Judge Harms specifically asked whether Dr van Rooyen should not be called to testify:

> *"But what I would like to know is this; if we believe that, or come to the conclusion that there is reason to believe that what is presented as discreet steps, was not discreet steps, but the single transaction. Would that not be a reason to apply section3,235, sub 5 of the FSRC Act, for me to direct Dr van Rooyen to appear before the panel, and to give evidence so that he can explain these waivers, which are not explained*

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on the papers?" This invitation was no accepted."

This ground of review is dismissed.

[48] I accordingly make the following order:

The application is dismissed with costs. Costs to include the cost of two counsel.

S. POTTERILL

JUDGE OF THE HIGH COURT

JOSIAS ANDRIES AGENBACH NOTARY PUBLIC REPUBLIC OF NAMIBIA

K19

K20

CASE NO: 5640/2022

HEARD ON: 7 September 2022

FOR THE APPLICANT: ADV. C.M. ELOFF SC
ADV. S. SCOTT

INSTRUCTED BY: Norton Rose Fulbright South Africa Inc.

FOR THE 2nd RESPONDENT: ADV. I. GREEN SC
ADV. M. KRUGER

INSTRUCTED BY: Webber Wentzel Attorneys

DATE OF JUDGMENT: 7 November 2022

JOSIAS ANDRIES AGENBACH NOTARY PUBLIC REPUBLIC OF NAMIBIA

K20

FA2

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 5640/2022

PRETORIA 7 NOVEMBER 2022

BEFORE THE HONOURABLE MADAM JUSTICE POTTERILL

In the matter between:

TRUSTCO GROUP HOLDINGS LIMITED		APPLICANT
AND		
THE FINANCIAL SERVICES TRIBUNAL	1ST	RESPONDENT
JSE LIMITED	2ND	RESPONDENT

HAVING HEARD counsel(s) for the parties and having read the documents filed the court reserved its judgment.

THEREAFTER ON THIS DAY THE COURT ORDERS

JUDGMENT

The application is dismissed with costs. Costs to include the cost of two counsel.

BY THE COURT

Private Bag X67, Pretoria 0001

2023 -02- 24

REGISTRAR

GD-PRET-018

HH
Attorney: NORTON ROSE FULBRIGHT SOUTH AFRICA INC

JOSIAS ANDRIES AGENBACH NOTARY PUBLIC REPUBLIC OF NAMIBIA

000-2

FA3

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 5640/2022

PRETORIA 30 JANUARY 2023

BEFORE THE HONOURABLE MADAM JUSTICE POTTERILL

In the matter between:

TRUSTCO GROUP HOLDINGS LIMITED		APPLICANT
AND		
THE FINANCIAL SERVICES TRIBUNAL	1ST	RESPONDENT
JSE LIMITED	2ND	RESPONDENT

HAVING HEARD counsel for the parties and having read the application for leave to appeal against the judgment of the Honourable Justice **POTTERILL** delivered on **7 NOVEMBER 2022**

IT IS ORDERED THAT

The application for leave to appeal is dismissed with costs, such costs to include the costs of two counsel.

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
Private Bag X67, Pretoria 0001
2023 -01- 30
GD-PRET-017
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

BY THE COURT

REGISTRAR

HH
ATT: NORTON ROSE FULBRIGHT SOUTH AFRICA INC

JOSIAS ANDRIES AGENBACH
NOTARY PUBLIC
REPUBLIC OF NAMIBIA

000-2

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
2023-02-06
DATE **SIGNATURE**

Case Number: 5640/2022

In the matter between:

TRUSTCO GROUP HOLDINGS LIMITED Applicant

and

THE FINANCIAL SERVICES TRIBUNAL First Respondent

JSE LIMITED Second Respondent

REASONS FOR JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

POTTERILL J

[1] I have considered the application and grounds thereto. I have listened to the argument and I am satisfied that there are no reasonable prospects that another court would come to another conclusion.

[2] The following order is made:

JOSIAS ANDRIES AGENBACH NOTARY PUBLIC REPUBLIC OF NAMIBIA

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The application for leave to appeal is dismissed with costs, such costs to include the costs of two counsel.

S. POTTERILL

JUDGE OF THE HIGH COURT

JOSIAS ANDRIES AGENBACH
NOTARY PUBLIC
REPUBLIC OF NAMIBIA

M2

M3

CASE NO: 5640/2022

HEARD ON: 30 January 2023

FOR THE APPLICANT: ADV. C.M. ELOFF SC
ADV. S. SCOTT

INSTRUCTED BY: Norton Rose Fulbright South Africa Inc.

FOR THE 2nd RESPONDENT: ADV. I. GREEN SC
ADV. M. KRUGER

INSTRUCTED BY: Webber Wentzel Attorneys

DATE OF REASONS FOR JUDGMENT: 6 February 2023

JOSIAS ANDRIES AGENBACH NOTARY PUBLIC REPUBLIC OF NAMIBIA

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