IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case No: _____
HC Case number: 5640/22

In the matter between

TRUSTCO GROUP HOLDINGS LIMITED Applicant

and

FINANCIAL SERVICES TRIBUNAL First Respondent

JSE LIMITED Second Respondent

SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

ANDRIES FRANCOIS VISSER

state under oath that:

1. I am an adult male, employed by the second respondent ("**the JSE**") as the Director: Issuer Regulation.

2. I am authorised to depose to this affidavit on the JSE's behalf. The facts contained herein fall within my personal knowledge, save where otherwise indicated or where the contrary appears from the context, and are, to the best of my knowledge and belief, both true and correct.

3. I adopt the terminology employed by Trustco in its founding affidavit to identify parties and events.

INTRODUCTION AND THE FACTS

4. Trustco has not set out the facts which sparked its journey through the JSE's Financial Reporting Investigation Panel ("**FRIP**") process, the FST hearing, and the review. These facts are important to contextualise Trustco's application and I set them out briefly in the paragraphs below.

The relevant transactions

5. Trustco is a Namibian company that is listed on the JSE. At all relevant times, its CEO and majority shareholder was Dr Quintin van Rooyen, who was also sole shareholder of Huso Investments Pty Limited ("**Huso**").

6. Between 2015 and 2018, Dr van Rooyen advanced loans totalling approximately N$546 million (about R546 million) to Huso and its subsidiaries. In 2018, Trustco acquired all the issued shares of Huso. Dr van Rooyen was on both sides of the transaction: he was Trustco's CEO and majority shareholder, and he was Huso's sole shareholder.

7. In Huso's financial statements, Dr van Rooyen's loan was initially classified as equity, i.e., it was recorded as money that he invested in Huso as a shareholder. But by the time Trustco acquired Huso, it had been reclassified as a liability, i.e., money owed to Dr van Rooyen. The switch from equity to liability, however, was not disclosed to Trustco's shareholders.

8. The sale of shares agreement for Trustco's purchase of Dr van Rooyen's shares

in Huso included an earn-out mechanism, through which Dr van Rooyen would earn shares in Trustco if Trustco met stipulated profit thresholds.

9. A few weeks after Trustco acquired Dr van Rooyen's Huso shares he forgave his N$546 million loan. As Trustco had recognised the loan as a liability, it reflected the forgiveness of the loan in its financial statements as a gain (profit) of N$546 million. This, in turn, triggered the earn-out mechanism in Dr van Rooyen's sale of shares agreement to his benefit.

10. Trustco's board have only recently - now in 2023 when its financial statements were finally restated - explained why Dr van Rooyen would forgive a loan of more than half-a-billion Rand, and confirmed that Dr van Rooyen wanted to trigger the earn out mechanism for his own benefit.

11. Meanwhile, in 2019, Dr van Rooyen advanced a second loan of up to N$1 billion (R1 billion) to Trustco. A few months later, he forgave this loan too. This resulted in a N$1 billion gain (profit) that Trustco recognised in its financial statements, which in turn resulted in another reward for Dr van Rooyen through the earn-out mechanism.

12. On a separate issue, Trustco owns properties in a development in Elisenheim. It reclassified these properties from inventory to investment property. It justified the reclassification on the basis that a decline in demand meant that it did not anticipate selling the properties for the foreseeable future. After reclassification, Trustco revalued the properties upwards, which increased its profitability. It then reported a N$693 million gain in the profit and loss account in its financial statements (or revenue of N$984 million against a cost of sales of N$291 million). This all occurred without the properties changing in any way.

13. On 5 December 2019, Trustco was advised that its financial statements were selected for review under the JSE's proactive monitoring review process. Under this process, the JSE reviews the financial statements of every listed company at least once every five years.

14. As part of the proactive monitoring review process, the JSE referred three issues to the FRIP. The FRIP is an advisory body to the JSE. It advises the JSE on, *inter alia*, technical issues about compliance with IFRS by listed companies. It comprises a panel of IFRS experts. Individuals are appointed to FRIP because they have in-depth technical knowledge of IFRS, technical accounting work experience, and recognition from their peers that they are IFRS experts.

15. Trustco's financial statements reviewed by FRIP were its group annual financial statements for the year ending 31 March 2019, and the interim results for the six months ending 31 August 2018 (collectively, "**Trustco's financial statements**", except when necessary to differentiate between them).

16. FRIP is an advisory body, it does not make binding decisions. Its role is to advise the JSE and to provide expert input to assist the JSE's decision-making process. Relevant here are two issues that the JSE referred to FRIP:

16.1 Dr van Rooyen's two loans and Trustco classifying a 'gain' in profit and loss after Dr van Rooyen forgave the loans. This became known as "**the Loan Issue**".

16.2 Second, the reclassification of the Elisenheim properties from inventory to investment property in its financial statements. This became known as "**the Property Issue**".

17. FRIP sent a report to the JSE in July 2020, in which it advised the JSE that, in its (expert) view, Trustco's reporting of the Loan Issue and Property Issue did not comply with IFRS.

Litigation history

18. In this section I briefly explain the extraordinary lengths that Trustco has gone to in an effort to avoid presenting financial statements that comply with IFRS. This application is, I verily believe yet another extension of Trustco's attempts to delay finality.

19. On 16 October 2020, after giving Trustco an opportunity to comment on the FRIP report, the JSE determined that Trustco had not complied with IFRS in respect of the Loan and Property Issues.

20. Trustco objected to this decision in terms of paragraph 1.4 of the JSE Listings Requirements. On 11 November 2020 the JSE dismissed the objection. The JSE directed Trustco, *inter alia*, to:

20.1 restate its annual financial statements for year ended 31 March 2019, with the following corrections:

20.1.1 in respect of the first loan, it must reverse the N$546 million gain that was recognised in profit and loss; and

20.1.2 in respect of the property issue, it must reverse the reclassification of the properties and reverse the N$693 million gain.

20.2 restate its interim results for the six months ended 30 September 2019 in respect of the second loan by reversing the N$1 billion gain.

21. On 10 February 2021, Trustco filed the Reconsideration Application in terms of section 230 of the Financial Sector Regulation Act, 2017 ("**FSR Act**"), which was dismissed on 22 November 2021, i.e., the Panel Order.

22. On 13 December 2021, when Trustco failed to restate its financial statements, the JSE wrote to Trustco. In the letter, the JSE conveyed to Trustco its decision to suspend Trustco's listing on the JSE. It also informed Trustco of its right to object to this decision under paragraph 1.4 of the Listings Requirements

23. On 31 January 2022, Trustco launched the review.

24. On 14 February 2022, after Trustco had filed its objection to the JSE's decision to suspend its listing, the JSE dismissed Trustco's objection and communicated its final decision to Trustco.

25. On 18 February 2022, Trustco lodged two applications with the Tribunal, namely, applications under:

25.1 section 230 of the FSR Act, for reconsideration of the decision to suspend Trustco's listing; and

25.2 section 231 of the FSR Act, to suspend implementation of the decision to suspend Trustco's listing pending the determination of the reconsideration application.

26. On 23 February 2022, Trustco launched an urgent application seeking, *inter alia*, an interdict against the JSE suspending Trustco's listing pending the review. A copy of the notice of motion can be made available to the Court upon request.

27. On 4 March 2022, the JSE agreed not to suspend Trustco's listing pending the

Tribunal's decision on the suspension application. By agreement between JSE and Trustco, the urgent application was removed from the roll. The suspension application has since been dismissed by the Tribunal.

28. On 7 November 2022, Potterill J dismissed Trustco's review application. On 30 January 2023, Potterill J refused leave to appeal.

GROUNDS OF APPEAL

29. Trustco's application for special leave to appeal is based on two issues:

29.1 interpretation of section 220(2) read with sections 224(4) and 225(2)(a) of the FSR Act.[1] This issue involves whether the Panel that dismissed the Reconsideration Application was properly constituted (**"the Panel Issue"**);[2] and

29.2 whether paragraph 8.65 of the Listings Requirements empowers the JSE to direct restatement (**"the Restatement Issue"**).[3]

30. Neither issue merits special leave being granted. Trustco's arguments plainly do not bear any prospects of success, nor do they point to any compelling reasons to grant leave notwithstanding the absence of such prospects.

The Panel Issue

31. Trustco's argument on the Panel issue is that:

31.1 The Panel constituted to decide the Reconsideration Application violated

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1 FA para 16.1.
2 FA para 17.
3 FA paras 16.2 and 23.

the FSR Act, since the Panel lacked necessary accounting expertise to deal adequately with the "*complex financial issues*" before it.[4]

31.2 This violation of the FSR Act renders the composition of the Panel irrational[5] and unreasonable,[6] and the procedure of the Tribunal unfair.[7]

32. This first ground of appeal does not have prospects of success for at least four reasons.

33. First, the argument is a contrived afterthought. Trustco did not allege, before or during the Reconsideration Application hearing, that the Panel was not correctly constituted:

33.1 In the review application, Trustco said that the reason why it never raised this issue was because it "*only later realised that no member of the Panel had accounting experience*".[8] In this application, it similarly asserts that "*it was not aware, until after [the Reconsideration Application] that the Panel members lacked financial expertise*"[9]

33.2 This explanation does not bear scrutiny.

33.3 Trustco was aware of the constitution of the Panel approximately 6 months before the hearing of the Reconsideration Application. In an email dated 5 May 2021, the Tribunal secretariate told the parties that, "*Judge Harms will chair the panel allocated to hear the matter. The other panel members*

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4 FA paras 20 and 39.5.
5 FA para 41.1.
6 FA para 41.3.
7 FA paras 34.1 and 41.2.
8 Order para 16.
9 FA para 36.2.

allocated to hear the matter are Adv. S Hassim SC and Ms Z Nkubungu-Shangisa".

33.4 Plainly, it was only when Trustco received an unfavorable order from the Panel that it thought to raise the issue of the Panel members' expertise as a ground for review.

34. Second, Trustco has never challenged the decision of Retired Justice Harms to constitute the Panel:

34.1 The Constitutional Court has held that until it is set aside, even an unlawful administrative decision is valid and effectual.[10]

34.2 Thus, the decision taken by retired Justice Harms as to the composition of the Panel is valid and effectual. Being valid and effectual, it is not now open to Trustco to say that the Panel was improperly constituted.

34.3 Once this logical consequence of established legal principle is articulated, it follows that Trustco cannot coherently argue, on the basis that the Panel was not properly constituted, that the Panel's process was not rational, not procedurally fair, or unreasonable.

34.4 Ultimately, what Trustco is seeking to do is challenge the correctness of the Panel's order through back door, which is to say, it objects to the merits of the order but because review proceedings do not permit a challenge on this basis, it tries to disguise itself by challenging the composition of the Panel.

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

It is no answer to point to *All Pay*,[11] which states that procedure and merits must be kept strictly apart,[12] for that is precisely what Trustco is failing to do by purporting to challenge process when it is actually challenging the merits of the Panel's order.[13]

35. Third, Trustco's argument regarding the alleged lack of financial or accounting expertise is a non-starter.

35.1 Trustco and the JSE submitted full expert reports to the Panel. The purpose of the reports was to provide the necessary information to the Panel to deal with the accounting concepts and standards that were in dispute.

35.2 The role of the Panel in this regard is not dissimilar to the task confronting any adjudicative body, nor indeed is it unlike disputes requiring evidence of a complex nature outside the field of law. As pointed out in by Potterill J, "*if financial expertise to analyse is required, the 'lawyers' rely on the experts' opinions brought before it. This is not a foreign concept or practice and is done regularly by 'lawyers*"'.[14]

35.3 If Trustco were right, every decision-maker across South Africa would either have to be armed with a panel of their own experts in relation to disputes that pertain to science, engineering, mathematics, etc., or these decision-makers would have to boast a whole range of qualifications across every field implicated in any given dispute.

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[11] *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) para 26.

[12] FA para 34.2.

[13] Order para 28.

[14] Order para 32.

35.4 This is an absurdity, which renders the prospects of success on appeal non-existent, even absent a consideration of the particular sections in the FSR Act cited by Trustco.

36. Fourth, and in any event, the FSR Act does not require the Panel of the Tribunal tasked to hear a reconsideration application to consist of a person with "*suitable working knowledge of, accounting, accounting practices and the international financial reporting standards.*"[15]

36.1 The FSR Act distinguishes between membership of the Tribunal,[16] and the members of the Panels.[17] Ultimately, Trustco's argument proceeds from its conflation of this distinction.[18]

36.2 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;[19] and at least two persons with experience or expert knowledge of "*financial products, financial services, financial instruments, market infrastructures or the financial system*".[20]

36.3 With Panels, they must 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)*",[21] i.e., retired judge or person with legal experience or expertise, and "*two or more persons who are Tribunal members or persons on the panel list.*"[22]

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15 Prayer three in the notice of the motion in the review.
16 Section 220 of the FSR Act.
17 Section 224 of the FSR Act.
18 FA paras 22 and 39.
19 Section 220(2)(a) of the FSR Act.
20 Section 220(2)(b) of the FSR Act.
21 Section 224(4)(a) of the FSR Act.
22 Section 224(4)(a) of the FSR Act.

36.4 Simply put, there is no requirement in the FSR Act for the members of either the Tribunal or a Panel to have "*suitable working knowledge of, accounting, accounting practices and the international financial reporting standards*", yet this is what Trustco suggests should have occurred. This simple fact is fatal to Trustco.

36.5 Not only does the FSR Act not expressly require appointment of a person with financial expertise to a Panel, it indicates the opposite, by virtue of the fact that it only refers to the appointment of a person with legal experience or expertise.

36.6 The other two members of a Panel are not identified with reference to their skills. If Parliament had intended Trustco's interpretation of the FSR Act, it would similarly have stated that someone with relevant financial expertise must be appointed to each Panel. But even that does not get Trustco to the point that Panels must consist of a person with "*suitable working knowledge of, accounting, accounting practices and the international financial reporting standards.*"

36.7 There is no overcoming these textual indicators, no matter how much it is insisted by Trustco that the purpose of the Panel would be served better if the FSR Act required that a financial expert be appointed.[23]

36.8 That judgment is not for Trustco, or indeed any Court,[24] to make, rather it is Parliament's.

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[23] FA para 39.

[24] As this Potterill J recognised in Order para 33.

Restatement Issue

37. Trustco says that the JSE does not have the power under paragraph 8.65 of the Listings Requirements to direct the restatement of financial statements.[25]

38. Like the Panel Issue, the Restatement Issue was raised by Trustco for the first time on review. For reasons canvassed above, this is not permissible by Trustco. It is an abuse of process. The Restatement Issue for this reason alone ought not to be entertained by this Court.

39. Moreover, the power of the JSE to direct restatement of financials has already been decided by the High Court:

39.1 In *Huge*,[26] Bham AJ held that the JSE is empowered by paragraph 8.65 to direct a listed company to restate its financials.[27]

39.2 Trustco is incorrect that *Huge* was not about restatement as such, but rather about whether the JSE is empowered to order the restatement of financial statements in particular.[28]

39.3 Whilst it is primarily a matter for argument, Trustco's reading of *Huge* is not borne out by the Court's reasoning:

39.3.1 Whilst the Court did consider if the word "*information*" in paragraph 8.65 includes financial statements,[29] it also independently dealt with and rejected the argument that the JSE cannot "*overrule*" or "*second-*

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25 FA para 42.

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

27 *Huge* at para 65.

28 FA para 58.1.

29 *Huge* at para 55.6.

guess" the opinion of the company's auditor.[30]

39.3.2 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*".[31] That was the "*question*" before the Court.[32]

39.3.3 The applicant in *Huge* made exactly the same argument that Trustco now makes:

> "*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.*"[33]

39.3.4 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.[34] Therefore, there is no basis on which to distinguish *Huge*.[35]

40. Lastly, and in any event, Trustco's argument that restatement is impermissible is unsustainable on the merits. Trustco fails to grapple meaningfully with the broad powers afforded to the JSE under the Listings Requirements and the Financial Markets Act, 2012 ("**FM Act**"):

40.1 Paragraph 8.65 of the Listings Requirements provides, in broad terms, that

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30 *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.

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

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

33 *Huge* at para 63.

34 *Huge* at para 65.

35 FA para 58.

the JSE is empowered "*in its sole discretion… to instruct such issuer to publish or re-issue any information the JSE deems appropriate*".[36] Section 10 of the FM Act is even broader, affording the JSE power to "*do all things that are necessary for, or incidental or conducive to the proper operation of an exchange*" that are not inconsistent with the FM Act.

40.2 A market cannot operate without accurate financial information, so it follows that accurate financial statements, and therefore the power to direct a party to restate, is what paragraph 8.65 of the Listing Requirements is aimed at, and is also "*necessary for, or incidental or conducive to the proper operation of*" the JSE.

41. Trustco argues for a narrow interpretation that would have the effect of stripping the JSE of its enforcement powers:

41.1 It says that the market already had a full picture of the financial treatment of the transactions and the JSE's concerns, by virtue of the cautionary notes recorded in Trustco's financial statements and the SENS announcement,[37] which it says provides market actors with better information than corrected financial statements.[38]

41.2 This is a startling submission, the logical effect of which would be that a listed company can say whatever it wants in its annual financial statements, provided that it also publishes accompanying cautionary notes and SENS announcements.

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[36] Emphasis added.

[37] FA para 53.

[38] FA para 56.

41.3 Plainly, Potterill J was correct that if the JSE were not empowered to direct restatement, it will have " *no teeth to correct the position to protect the public with the financial statements setting out the full picture*".[39]

42. Trustco's application for special leave cannot be sustained, in law or fact, for its grounds of appeal do not have reasonable prospects of success. The application should therefore be dismissed with costs.

NO COMPELLING REASONS

43. Trustco's case for why, even in the absence of reasonable prospects of success, there are compelling reasons for why leave to appeal should be granted, is that the Order of Potterill J will affect third parties,[40] and it is distinguishable from the judgment in *Huge*.[41]

44. Neither purported reason merits special leave being granted:

44.1 New legal issues arise in the High Court every day. These often concern issues of great importance, to the parties and public. So, if importance were to function as a standard for section 17(1)(a)(ii) of the Superior Courts Act, 2013, then the appeal courts would inevitably be swamped.

44.2 As explained above, *Huge* is not distinguishable on the facts. But even if it were, this would mean that the judgments do not conflict. Whereas conflict between two High Court judgments might constitute a reason to grant leave in the absence of prospects of success, the fact that there exist different

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39 Order para 39.

40 FA paras 28.2 and 28.3.

41 FA para 28.4.

judgments on different issues can hardly provide a basis for leave to be granted. So Trustco's argument to avoid the effect of *Huge* necessarily self-destructs its argument on compelling reasons.

45. Therefore, I submit that leave to appeal should also not be granted under section 17(1)(a)(ii) of the Superior Courts Act.

THE MOOTNESS POINT

46. Trustco has, following the JSE's decision and the decision of the Panel restated its financial statements and published the statements. This restatement accords with what the JSE decided that Trustco ought to do, and accords with the Panel's decision.

47. Having restated the financial statements, there is no point in seeking to review the Panel's decision because it is a matter of historical interest, which has been given effect to by Trustco.

48. Trustco suggests that the mootness point should fail since it restated the financial statements "*without prejudice*". It is not clear how Trustco suggests that its actions of restating the financial statements, and publishing them to the investing public, can be ignored even if it was done "*without prejudice*".

49. Additionally, and to further show the mootness of the appeal, Trustco has not only restated its financial statements. It has also unwound the issue of the shares to Dr van Rooyen, and, he has, in turn, "unforgiven" the loans. This is not simply a "fixing" of accounting entries - practical steps have been taken by Trustco and Dr van Rooyen to unscramble the egg.

50. If Trustco had felt strongly about its position in this application, it ought to have persisted in its view that a restatement was not required, and it ought to have maintained its previous financial statements. To suggest that Trustco can restate and publish its financial statements and then, if it is successful, somehow undo the restatement, is a fanciful argument and a weak attempt to avoid the mootness difficulty Trustco faces.

51. Trustco has seemingly suggested that the mootness point was raised late, and impermissibly, having only been raised by the JSE in its heads of argument and during the leave to appeal.

52. The mootness point was raised once Trustco had agreed to restate its financial statements. It could not be raised before this. But now Trustco has restated and published its restated financial statements. There is nothing in the suggestion of the point being raised impermissibly or late. On the contrary, the JSE would have been remiss not to raise the point and thereby waste the court's time in an appeal that would have no practical effect.

CONCLUSION

53. For the reasons given above, I submit that the application for special leave falls be dismissed with costs of two counsel.

ANDRIES FRANCOIS VISSER

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at Johannesburg on this the 29 day of March 2023, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

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