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

REPLYING 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 The facts contained herein are within my personal knowledge unless the context indicates otherwise and are both true and correct. I deposed to the founding affidavit on behalf of the applicant and I am duly authorised to depose to this replying affidavit on behalf of the applicant. The submissions of law that I make in this affidavit are made on the advice of the applicant's legal representatives.

INTRODUCTION

3 I first deal with the second respondent's ("the JSE") answering affidavit thematically and then deal, seriatim, with a few averments in the answering affidavit that are disputed. Anything in the answering affidavit that is inconsistent with what is stated in the founding affidavit or here, is denied and for the reasons set out in those affidavits.

4 The question before this Court, at this stage, is simply whether this Court should receive detailed

legal submissions and oral argument on two significant points of law: (i) the panel composition of the Financial Services Tribunal; (ii) whether the JSE has the power to order a listed company to restate its financial statements (without directing the entity to reissue the financial statements).

5 The JSE itself concedes in its application for condonation that: "We respectfully submit that is a minor delay when considered against the significant issues in dispute between the parties". The JSE accepts the significance of the matter.

6 Similarly, the High Court's judgment (at para 32) accepted that Trustco's account of the statutory regime was "not unreasonable". The High Court's judgment is the first reported judgment squarely dealing with these two legal issues. Those questions affect every company listed on the JSE and every ordinary member of the public who holds shares in those entities. Plainly, with respect, those debates should be resolved by this Court.

7 Trustco submits that it has reasonable prospects of success in the appeal.

8 As regards the panel issue, the JSE's construction of the FSR Act is untenable. The logic of the JSE's position is that even though 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 would be lawful if those members:

8.1 were never utilised by the Chairperson of the Tribunal in assembling the panels;

8.2 were allocated in matters on an entirely random basis.

9 The panel for each matter must be determined based on what the matter requires – not simply randomly. There will be instances where the issue is purely a legal one, and the Panel need not have a person with financial expertise. But when there is a clear need for financial expertise within the meaning of the FSR Act – then it cannot be lawful for a matter to proceed before three lawyers. It reduces a specialised tribunal to a court process without the procedural benefits of oral evidence

or the opportunity to appeal against the merits.

10 As regards the issue of the powers of the JSE, there is no statutory wording whatsoever (which the JSE accepts) that gives the JSE the power to direct a restatement. The high watermark of the JSE's case is that without the power to restate, the JSE would be toothless. But that contention is unsustainable. The JSE's powers, in fact, have very sharp teeth. The JSE does not deny in its answering affidavit that the JSE has the power to direct an entity to reissue its financial statements. The JSE also does not deny that directing Trustco to reissue its financial statements would have adequately served the desired purpose in this instance. Directing that a company reissue its financial statements is a far more intrusive sanction. It is designed to cater for the most significant accounting irregularities. That is ably demonstrated by the fact that the JSE must report the relevant auditors to the IRBA (in terms of Listing Requirement 8.65).

11 It is common cause that the JSE did not report the auditors responsible for Trustco's financials in this case. Trustco received independent expert advice from respected accounting professionals. The board applied its mind to that advice. It is common cause that Trustco's advisors, its board and its directors acted in good faith when the transactions were recorded.

THE ISSUES TO BE DETERMINED ARE NOT MOOT (Ad paragraphs 46 to 52 of the AA)

12 On the one hand, the JSE correctly concedes that Trustco restated the financial statements on a without prejudice basis (i.e. without prejudice to Trustco's rights if its appeal before this Court were to be successful). On the other hand, the JSE takes the position that:

> "[because Trustco] 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" (para 47 of the JSE's AA).
>
> "[i]f Trustco had felt strongly about its position in this application, it ought to have persisted with its view that a restatement was not required, and it ought to have maintained its previous financial statements."

13 The JSE's position is cynical and without merit. After the High Court judgment was handed down,

the JSE suspended Trustco from trading on the JSE because Trustco had not restated its financial statements. In that context, Trustco could not simply "persist with its view that a restatement was not required". Trustco agreed to comply on a without prejudice basis (reserving its right to reverse the restatements if Trustco were successful in this appeal).

14 If Trustco had refused to restate its financials, it would have further prejudiced the market and holders of its securities who were rendered unable to trade whilst the suspension remained in place. I confirm that on the very first day that the suspension was lifted, Trustco's share price on the JSE went up by 30%. The JSE cannot, with respect, contend for mootness when it placed its counterparty in a commercially untenable situation if Trustco decided not to adhere to the JSE's instruction.

15 In any event, the matter is plainly not moot for three reasons. First, the subject matter of the appeal remains a live issue for determination and has a clear practical effect. If Trustco were successful in the appeal before this Court, it is Trustco's prerogative to revert back to the position it was in before the restatements.

16 Second, even assuming that the practical result would be the same (which is denied because Trustco could reverse the transactions again), it is of critical importance to Trustco's reputation that this Court pronounces on the JSE's and Tribunal's powers. For instance, in Buthelezi,[1] this Court was asked to determine the legality of the conduct of the Minister of Home Affairs in failing to take a decision on whether or not to grant an application for a visa by the Dalai Lama. The purpose and scheduled date for the Dalai Lama's visit had long passed by the time the case was heard. Nugent JA held: "*Whether the authorities had acted lawfully was and remains a live issue.*"[2]

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[1] Buthelezi and Another v Minister of Home Affairs and Others 2013 (3) SA 325 (SCA).
[2] Ibid at para 4. Similarly, in Pheko and Others v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC) at para 32 the Court held that "*unlawful conduct is inimical to the rule of law and to the development of a society based on dignity, equality and freedom. Needless to say, the applicants have an interest in the adjudication of the constitutional issue at stake. The matter cannot therefore be said to be moot*." Properly speaking, the JSE conflates the critical distinction between this Court determining the merits of the review application and the particular just and equitable remedy that this Court may decide to impose. The JSE's points would be points to be debated at the level of what remedy is appropriate. They do not show that the dispute is moot.

17 The very same rationale applies here. Indeed, Trustco submits that the proposition applies with equal force in relation to listed companies. The reputation of an entity has an influence on its share price. Where members of the public own a company's shares, then a finding that Trustco acted lawfully (and the JSE unlawfully) will undoubtedly have a real financial effect on members of the public who own Trustco's securities.

18 Third, the issues in this matter have an extremely wide impact. They determine whether every single panel arranged before the Tribunal may simply be done at random (which Judge Harms expressly conceded is the current position). If Trustco is correct – either about the panel composition or that the JSE has no power to direct an entity to 'restate' their financial statements – then it is critical that this Court say so in order to make that position clear to the JSE and the Financial Services Tribunal. Otherwise, they will continue to repeat their unlawful conduct in the future.

THE JSE INTRODUCES NEW EVIDENCE ON APPEAL – WITHOUT ANY APPLICATION

19 It is trite that an appeal is decided on the basis of the record that served before the High Court. The JSE seeks to introduce new evidence in its answering affidavit before this Court (without even flagging that the evidence is new).

20 First, in relation to the importance of financial statements versus announcements in the SENS system. In the JSE's answering affidavit before the High Court, the JSE stated that the problem with Trustco's conduct is that timeous public disclosure needed to be made to all holders of securities and the general public.[3] Trustco demonstrated that this was incorrect because the public and investors were fully aware based on the various public announcements on the SENS system.

21 The JSE's new version is that the SENS system is not sufficient. The JSE never made the point in its answering affidavit before the High Court. It was the JSE's counsel team who first made the point

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[3] Answering affidavit at para 100.

in heads of argument. The deponent, Mr Andries Visser, is an employee of the JSE described as the Director: Issuer Regulation. He cannot belatedly seek to introduce new evidence on appeal without an application. In any event, Mr Visser has no expertise, and there is no evidence (whether a market survey or other research) to support the claims about the financial statements.

22 Second, in relation to new evidence regarding Mr Van Rooyen's and Trustco's intention in relation to performing the transactions. Trustco does not want to be misunderstood – Trustco welcomes this Court considering Trustco's appeal together with any and all relevant facts before it. But the correct process should be followed. If this Court is minded to set the matter down, there could be timeframes built into the process for the JSE to apply to admit new evidence and Trustco will have a proper opportunity to respond to the application for new evidence.

23 For the purpose of completeness, at this stage, Trustco emphasises that there is nothing unlawful about what Mr van Rooyen did or the transactions that he entered into with Trustco. Mr van Rooyen is a businessman and – like every single person and every single entity on the JSE – seeks to make a profit within the lawful principles and rules that apply. The JSE has not stated that anything done was unlawful or unethical. The JSE concedes that its actual version (at para 17 of its AA before this Court) – was only based on recommendations by its expert advisers FRIP was that "*Trustco's reporting on the Loan Issue and Property Issue did not comply with IFRS*". It follows that much of the JSE's affidavit which attempts to engage in insinuation and innuendo falls to be disregarded. In any event, the JSE does not deny that – irrespective of whether one agrees or disagrees with the transactions – the legal questions involved will have a significant impact in future cases.

SERIATIM RESPONSES

24 **Ad paras 4 to 17**: the allegations and insinuation of something untoward in the transactions are denied. The transactions all had a commercial rationale (both for Mr Van Rooyen and for Trustco). The JSE has never squarely suggested otherwise. The JSE's approach is regrettable and has been

firmly rejected by our courts. This Court made it clear in *AllPay*[4] that:

> "[4] Whatever place mere suspicion of malfeasance or moral turpitude might have in other discourse it has no place in the courts – neither in the evidence nor in the atmosphere in which cases are conducted. It is unfair if not improper to impute malfeasance or moral turpitude by innuendo and suggestion. A litigant who alleges such conduct must do so openly and forthrightly so as to allow the person accused a fair opportunity to respond. It is also prejudicial to the judicial process if cases are adjudicated with innuendo and suggestion hovering in the air without the allegations being clearly articulated. Confidence in the process is built on transparency and that calls for the grounds upon which cases are argued and decided to be openly ventilated.
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> [5] The affidavits of AllPay evoke suspicion of corruption and dishonesty by innuendo and suggestion but without ever making the accusation directly and to a degree that has carried over to the heads of argument filed on its behalf. To clarify the position AllPay's counsel was asked at the outset of the hearing whether corruption or dishonesty was any part of its case, and that was unequivocally disavowed. It confined its case to what were said to have been fatal irregularities and it was on that basis that the appeal proceeded."

25 Paragraph 7 is incorrect. Trustco denies that "the switch from equity to liability, however, was not disclosed to Trustco's shareholders." This was made clear in the circulars to shareholders at the time, and this was not a complaint that the JSE had.

Litigation history (Ad paragraphs 18 to 28 of the JSE's AA)

26 The salient background facts are recorded in the judgment of Potterill J that is attached to the application for special leave to appeal. The JSE's account is self-serving and incomplete. The JSE fails to mention that: (i) Trustco was successful in the urgent application to interdict the suspension of trading in its securities pending the outcome of the review hearing before Potterill J; and (ii) the JSE, immediately after handing down of the judgment, effected the suspension of the trading in Trustco's shares – even before Trustco's time periods for noting an appeal had lapsed.

The panel issue

27 **Ad para 33**: it is correct that Trustco was aware of the identity of the panel members before the reconsideration application was heard. But Trustco was not aware at that point that none of those

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[4] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* 2013 (4) SA 557 (SCA) at paras 4 – 5.

members had any accounting or financial experience. It was only after the hearing (taking cognisance of the comments made by Judge Harms during the hearing) that this specific issue was interrogated further, and it could with certainty be said that they all lacked the necessary accounting / financial expertise. Judge Harms, himself, conceded (remarkably, with respect) that even he has no idea about the panel members specific skills and accounting knowledge.

28 Even if Trustco had been aware of the panel's lack of knowledge and expertise prior to the hearing, it does not preclude a subsequent review on that basis, mindful that one then has the benefit of the reasoning of the panel, which bore out their lack of knowledge and expertise and that clearly contributed to the reviewable irregularities committed.

29 **Ad para 34**: the failure to challenge Harms' decision to appoint the panel does not preclude Trustco from reviewing the decision of the Tribunal based on grounds that the entire process was rendered unfair and irregular due to the fact that the panel did not have the requisite knowledge (as contemplated and in fact required by section 220(2) read with sections 224(4) and 225(2(a) of the FSR Act) to properly determine the matter. It is noteworthy that in a currently pending reconsideration application before the Tribunal (between Trustco and the JSE) that the panel includes a person with accounting knowledge.

30 **Ad para 35**: There would be no need for a specialised tribunal, which is specifically tasked with dealing with matters relating to the JSE and those disputes arising from Listing Requirement 8.65, if the matter could be resolved by a court using expert evidence. As set out above and in the founding affidavit, Trustco's rights are in fact, restricted by virtue of the Tribunal process as it is unable to appeal any order by the Tribunal on the merits. In contrast, if it were a court it would have had the ability to appeal the matter on the merits.

31 **Ad para 36**: Trustco made it clear in argument before the High Court that – notwithstanding the language in the notice of motion – what was required was that a person referred to in section

220(2)(b) of the FSR Act must be appointed if the matter calls for it.[5] There is, thus, no conflation of the distinction between the Panel and Tribunal. Trustco's argument is that the sections stand to be read together in order for it to achieve its proper purpose, i.e. to have a panel with the necessary knowledge to determine the issues that serve before a specialised tribunal on a case-by-case basis.

32 The JSE's construction makes no commercial sense. According to the JSE's construction of the Act, the Act requires at least two people as members of the Tribunal with specific skills to form part of the list of panel members, but then those members need not ever be utilised in complex financial cases. Trustco's construction of the statute does not require Parliament to amend the wording of the sections – it is a matter of proper legislative interpretation in light of the purpose of the statute.

33 **Ad paras 39 to 41**: the JSE concedes that this is a matter for argument which leaves it beyond doubt that leave to appeal should be granted so that the parties can make proper legal submissions to this Court on the issue. If this Court did not set down the matter, the current position is that an unreported decision by an acting Judge would (in effect) govern the legal position in relation to all listed companies in future. That is particularly undesirable when a proper reading of the judgment in Huge Group Ltd v Executive Officer: Financial Services Board makes it clear that Bham AJ did not consider the discreet argument that Trustco is raising, i.e. the distinction between "restatement" and "re-issue" and the fact that the Listing Requirements expressly provides for the latter. Bham AJ, quite understandably given the question before him, used loose language.

34 Although he might have held that the JSE can order a restatement, it was not in the context of the argument that Trustco is raising.

35 Paragraph 40 is incorrect. Listing Requirement 8.65 gives the JSE the necessary powers to deal with findings made by the FRIP. Those powers are per the JSE's own rules (and which are the rules

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[5] In other words, a person with experience or expert knowledge of "financial products, financial services, financial instruments, market infrastructures or the financial system." (with financial expertise).

that issuers on the JSE bind themselves to) restricted to order an issuer to publish or re-issue. The JSE cannot, if it is not satisfied by the restriction placed on its powers pursuant to its own rules, ignore these and revert back to the broad statutory powers afforded to them to overcome the restriction. Doing so infringes on the established principle of subsidiarity.

36 **Ad para 44.1**: in Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit [2023] ZACC 8, the Constitutional Court explained that a matter that deals with the status, powers and functions of a public entity raises arguable points of law of general public importance because "[t]hese are questions that have greater implications, not just for the litigants before this Court, but also for other parties who may find themselves before the Special Tribunal in similar cases. Therefore, it is in the interests of justice that leave to appeal should be granted." Like the Ledla case this matter deals with the status, powers and functions of both the FST and the JSE and is therefore of general public importance.

CONCLUSION

37 In the circumstances, Trustco persists in seeking the order in the notice of motion, which accompanied the founding affidavit.

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 Vanderbijlpark on 13 APRIL 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

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