

THE FINANCIAL SERVICES TRIBUNAL

Case numbers: JSE1/2022

In the matter between:

TRUSTCO GROUP HOLDINGS LIMITED

Applicant

and

JSE LIMITED

Respondent

RESPONDENT’S HEADS OF ARGUMENT

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INTRODUCTION AND OVERVIEW

- 1 In December 2019, the applicant's ("**Trustco**") financial statements were selected for review under the respondent's ("**JSE**") proactive monitoring review process.
 - 2 Under this process, the JSE reviews the financial statements of every listed company once every five years. The Trustco financials reviewed were its group annual financial statements for the year ending 31 March 2019, and its interim results for the six months ending 31 August 2018 (collectively, "**the financial statements**").¹
 - 3 On 11 November 2020, after investigation and recommendation of the JSE's Financial Reporting Investigation Panel ("**FRIP**"),² the JSE decided to direct Trustco to restate the financial statements, in relation to:
 - 3.1 loans by Trustco's CEO and majority shareholder, Dr van Rooyen, to Huso Investments (Pty) Ltd ("**Huso**"), a company in which Dr Van Rooyen was sole shareholder and which Trustco later acquired ("**the Loan Issue**");³ and
 - 3.2 the reclassification by Trustco of properties in Elisenheim, Windhoek, from inventory to investment ("**the Property Issue**").⁴
- ("the JSE decision").**⁵
- 4 Following a reconsideration application by Trustco, the Tribunal on 22 November 2021 upheld the JSE decision ("**the Tribunal decision**").⁶

¹ Record: Part A item 3 pp 217-8 para 14.

² Record: Part A item 3 p 218 paras 15-17.

³ Record: Part B p 5 para 1 and Record: Part A item 3.1 pp 242-243 paras 35-37 and pp 249-250 pars 64-65.

⁴ Record: Part B p 5 para 1 and Record: Part A item 3.1 pp 254-255 paras 78-81.

⁵ Record: Part B p 5.

⁶ Record: Part A item 3.1 p 231.

5 An exchange of correspondence took place between the JSE and Trustco⁷ and on 13 December 2021, the JSE informed Trustco that it had decided:

5.1 that Trustco had not complied with the Tribunal decision as it had not restated the financial statements ("**the non-compliance decision**"); and

5.2 to suspend Trustco's listing on the JSE ("**the suspension decision**").

6 After the non-compliance decision and the suspension decision the JSE and Trustco again exchanged correspondence.⁸

7 On 18 February 2022, Trustco lodged two applications with the Tribunal. This matter concerns the first of these applications.⁹ Trustco seeks reconsideration, in terms of section 230 of the FSR Act, of the non-compliance decision and suspension decision ("**the suspension reconsideration application**").¹⁰

8 In Trustco's application papers, it says the non-compliance and suspension decisions fall to be set aside for the following reasons:

8.1 Mr Visser lacked authority to make either decision;¹¹

8.2 the suspension decision is premature;¹²

8.3 the suspension decision is not in the public interest and does not promote the objectives of the Financial Markets Act, 2012 ("**the FM Act**");¹³

⁷ We deal with this more fully in paragraphs 17 to 21 hereunder.

⁸ We deal with this more fully in paragraphs 17 to 21 hereunder

⁹ The second application was under section 231 of the FSR Act (Record: Part A item 2 pp 188-198), in which Trustco asked the Tribunal to suspend the suspension decision pending the determination of the suspension reconsideration application. Justice Mokgoro dismissed the application (Record: Part A item 9 pp 380-383).

¹⁰ Record: Part A p. 2 para 1.2.2, read with Record: Part A item 1.2 p 10.

¹¹ Record: Part A item 1.2 pp 13-14 para 21 and Record: Part A item 8 p 371 para 5.

¹² Record: Part A item 1.2 pp 14-17 para 22.

¹³ Record: Part A item 1.2 pp 17-18 para 23 and Record: Part A item 8 p 371 para 6.

8.4 the JSE has failed to comply with the FM Act and Mr Visser was biased;¹⁴

8.5 Trustco complied with the Tribunal decision;¹⁵ and

8.6 the JSE decision was wrongly decided, and Trustco is judicially reviewing the Tribunal decision.¹⁶

9 In these submissions, we explain that none of these grounds, only some of which are canvassed in Trustco's written submissions,¹⁷ are sustainable.

10 The rest of these submissions are structured as follows:

10.1 First, we outline the relevant factual background.

10.2 Second, we address the merits of this application.

10.3 Third, we conclude.

FACTS

11 In December 2019, Trustco's financial statements were selected for review under the JSE's proactive monitoring review process.

12 This review revealed three issues that warranted additional investigation by the FRIP, an advisory body that is constituted by a panel of IFRS experts which advises the JSE on technical issues pertaining to compliance with the IFRS.

¹⁴ Record: Part A item 1.2 pp 18-19 para 24.

¹⁵ Record: Part A item 8 pp 369-370 para 3.

¹⁶ Record: Part A item 8 pp 371-374 para 7.

¹⁷ For the sake of completeness, we address all the grounds advanced in Trustco's application. In part, we do this since it is not always clear in Trustco's submissions on which grounds it means to rely.

13 Of the issues tagged by the FRIP, two are relevant to this application, namely, the Loan Issue and the Property Issue.¹⁸

14 The review and FRIP investigation revealed the following:

14.1 Regarding the Loan issue:

14.1.1 Between 2015 and 2018, Dr van Rooyen advanced ND 546 million in loans to Huso.¹⁹

14.1.2 In 2018, Trustco acquired all the issued shares of Huso. When the Trustco shareholders approved this acquisition, it was on the basis that Dr van Rooyen's loan was classified as equity (meaning it was recorded as money that Dr van Rooyen had invested in Huso as a shareholder).²⁰

14.1.3 By the time that Trustco acquired Huso, though, the equity loan had been reclassified as a liability (or as money that Huso owed Dr van Rooyen).²¹ A few weeks after Trustco acquired Huso's shares, Dr van Rooyen forgave the loan, which was then reflected in Trustco's financial as profit.²²

14.1.4 Thereafter Dr van Rooyen loaned Trustco ND 1 billion with the express proviso that if he were to waive repayment of the loan the financial gain had to be recognised in a manner that would benefit

¹⁸ Record: Part A item 3 pp 217-8 paras 14-17.

¹⁹ Record: Part A item 3.1 pp 244-245 para 42.

²⁰ Record: Part A item 3.1 p 245 para 44.

²¹ Record: Part A item 3.1 pp 245-246 paras 47 and 49 and p 251 para 73.

²² Record: Part A item 3.1 p 246 para 51 and p 250 para 66.

him on the earn-out-mechanism under the Huso sale agreement. Dr van Rooyen thereafter waived repayment of the ND 1 billion loan.²³

14.1.5 Since there was an earn-out mechanism in the Huso sale of shares agreement, Dr van Rooyen benefitted handsomely.²⁴

14.2 Regarding the Property Issue:

14.2.1 Trustco owns properties north of Windhoek.

14.2.2 It reclassified some of these properties from inventory to investment property, on the basis that a decline in demand meant that it did not anticipate selling them in the foreseeable future.²⁵

14.2.3 This resulted in them being revalued upwards, increasing Trustco's profitability. Thus, it reported a ND 693 million gain in the profit and loss account in its financial statements.²⁶

15 In July 2020, the FRIP sent a report to the JSE, advising it that Trustco's reporting of the Loan and Property Issues did not comply with the IFRS. In October 2020, the JSE informed Trustco that it agreed with the FRIP's findings.²⁷

16 After the JSE dismissed Trustco's objection, i.e., the JSE decision,²⁸ Trustco applied for the reconsideration of that decision and the Tribunal dismissed its reconsideration

²³ Record: Part A item 3.1 p 250 para 66.

²⁴ Record: Part A item 3.1 p 246 para 52 and p 250 para 66.

²⁵ Record: Part A item 3.1 p 254 para 81.

²⁶ Record: Part A item 3.1 p 254 para 79.

²⁷ Record: Part B p 5 para 1 and Record: Part A item 3.1 pp 242-244 paras 35 and 41.

²⁸ Record: Part B p 8 para 9.

application, i.e., the Tribunal decision.²⁹ Trustco was therefore required to restate its financial statements in accordance with the JSE decision.³⁰

- 17 On 3 December 2021, the JSE wrote to Trustco, informing it that it was “*considering the suspension of the listing of Trustco’s securities*”, as Trustco had not complied with the Tribunal decision, i.e., had not restated its financial statements. Per paragraph 1.7 of the Listing Requirements, it invited Trustco to “*make written representations to the JSE as to why such a suspension should not be affected*”.³¹
- 18 On 13 December 2021, after receipt and consideration of Trustco’s representations,³² the JSE informed Trustco of the suspension decision, i.e., that Trustco had not complied with the Tribunal decision, as it had not restated its financial statements, and that the JSE as a result had decided to suspend Trustco’s JSE listing.³³
- 19 Trustco objected to the suspension decision on 17 December 2021.³⁴ The JSE agreed to hold off deciding Trustco’s objection until Trustco published its 2021 annual financial statements, on the assurance by Trustco’s attorneys that Trustco would in fact restate the financial statements in accordance with the Tribunal decision.
- 20 When Trustco published its annual financial statements on 31 January 2022, however, they did not restate them as required or as undertaken.³⁵
- 21 Therefore, on 14 February 2022, the JSE dismissed Trustco’s objection.³⁶ As Trustco

²⁹ Record: Part A item 3.1 p 258.

³⁰ Record: Part A item 3.1 pp 249 and 252 paras 63 and 75.

³¹ Record: Part A item 1.3 p 22 paras 5-6.

³² Record: Part A item 1.4 pp 23-27.

³³ Record: Part A item 1.1 p 7 para 5.

³⁴ Record: Part A item 1.8 p 36.

³⁵ Record: Part A item 3 pp 215-216 para 4.

³⁶ Record: Part A item 1.1 pp 8-9 para 3.

indicated that it would seek to suspend the suspension decision, however, the JSE did not implement it immediately.³⁷

22 On 18 February 2022, Trustco lodged this suspension reconsideration application, in which it seeks to have the non-compliance and the suspension decisions reconsidered by this Tribunal.³⁸

GROUNDINGS FOR RECONSIDERATION

23 In this section, we explain that none of Trustco's grounds for reconsidering the non-compliance and suspension decisions, which we have already summarised above, are sustainable.

Mr Visser's authority

24 In a recent review application against the Tribunal decision Trustco had initially raised Visser's authority but did not persist with that point in argument. It is not clear why Trustco persists with the lack of authority argument in this reconsideration application when it has previously recognised that the argument is unsustainable.³⁹

25 Trustco argues that Mr Visser lacked the authority to make either the non-compliance decision or the suspension decision. In the judicial review proceedings Trustco advanced the same argument, which goes as follows:

25.1 Mr Visser purports to have authority by virtue of a delegation of authority by the JSE's board, in terms of section 68 of the FM Act.⁴⁰

³⁷ Record: Part A item 1.1 p 9 para 4.

³⁸ Record: Part A item 1 p 2 para 1.2.2, read with Record: Part A, item 1.2 p 10. Trustco's application to suspend the implementation of the suspension decision pending determination of the suspension reconsideration application was dismissed by Justice Mokgoro (Record: Part A item 9 pp 380-83).

³⁹ Judgment on the review application is still outstanding and will be made available to the Panel once it is received.

⁴⁰ Record: Part A item 1.2 p 13 paras 21.1-21.3.

25.2 This delegation is unlawful, however, because:

25.2.1 Section 72 of the Companies Act, 2008, authorises delegation to a committee of a board of directors. As a committee cannot consist of one person, the delegation to Mr Visser is unlawful.

25.2.2 Clause 12.11.1 of the JSE's memorandum of incorporation ("**MOI**") provides that members of committees must be directors. Since Mr Visser is not a director, the delegation is unlawful.⁴¹

25.3 Therefore, the non-compliance and suspension decisions are unlawful.⁴²

26 This argument is bad for the following reasons:

26.1 Section 68 of the FM Act allows the JSE to delegate to "*a person or group of persons, or a committee . . .*"

26.2 The presumption against redundancy means each word in the section means something different.⁴³ Said differently, section 68 allows the JSE to delegate to a person or a group or persons or a committee.

26.3 Paragraph 12.11.1 of the JSE's MOI regulates delegations to "*committees*". It does not apply to delegations to "*a person*", and so the proviso in paragraph 12.11.1 does not apply. But more fundamentally the JSE's MOI cannot restrict the legislative entitlement of the JSE.

26.4 Taken to its logical conclusion what Trustco suggests is that the JSE cannot act in respect of listed companies other than through committees composed

⁴¹ Record: Part A item 1.2 p 14 paras 21.5-21.6.

⁴² Record: Part A item 1.2 p 14 para 21.7.

⁴³ *Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC) para 153.

of JSE directors. This would render JSE unworkable, for it would:

26.4.1 require directors to deal, in committee, with the day-to-day issues of listed companies;

26.4.2 require that directors be experts who are skilled and have specialist knowledge of the JSE's Listings Requirements; and

26.4.3 effectively deprive the JSE of a board of directors that functions to guide its own affairs.

26.5 Given the rule against interpretations that produce practical absurdities,⁴⁴ Trustco's argument is unsustainable.

26.6 Plainly, therefore, the JSE is entitled and empowered to delegate powers to persons such as Mr Visser.

27 This first ground for reconsideration, therefore, falls to be dismissed.

Suspension is not premature

28 Trustco's second reconsideration ground is that the non-compliance and suspension decisions are premature, for two reasons:

28.1 First, the validity of the decisions is dependent on the validity of the JSE and Tribunal decisions, which are the subject of judicial review proceedings, and in terms of section 236 of the FSR Act it was therefore not open to the JSE to seek enforcement, through suspension, of those decisions.⁴⁵

⁴⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 17.

⁴⁵ Record: Part A item 1.2 pp 14-16 para 22.2.

28.2 Second, it was impossible for Trustco to restate its financial statements in accordance with the Tribunal decision, delivered on 22 November 2021, by the time the suspension decision was made on 13 December 2021.⁴⁶

29 Neither argument is sustainable:

29.1 Trustco has misread section 236 of the FSR Act:

29.1.1 Section 236 provides as follows:

- (a) “A party to proceedings on an application for reconsideration of a decision”, i.e., an application in terms of section 234 of the FSR Act not review proceedings under section 235 as argued by Trustco,⁴⁷ may file with a court registrar a copy of an order that made in terms of section 234 of the FSR.
- (b) After doing so, this order will have the effect of a civil judgment and may be enforced as if lawfully given in that court.
- (c) But this may only be done if no legal proceedings in relation to that order have commenced, or if they have, the proceedings must first be finally determined.

29.1.2 Section 236 of the FSR Act finds no application here:

- (a) Neither the JSE nor Trustco have sought to file an order under section 234 with the registrar of any court.

⁴⁶ Record: Part A item 1.2 pp 16-17 para 22.3.

⁴⁷ Trustco HOA paras 6, 13 and 17.1.

(b) Nor is the JSE seeking to enforce the Tribunal decision as if it were an order granted in court.

29.1.3 Since section 236 of the FSR Act is not applicable, the suspension decision cannot be premature by virtue of it.

29.2 Trustco's second argument, which is that it was not practically possible for it to comply with the Tribunal decision by the time that the non-compliance and suspension decisions were made, is advanced in bad faith:

29.2.1 The relevant timeline is as follows:

(a) 3 and 13⁴⁸ December 2021: non-compliance and suspension decisions are made.

(b) 17 December 2021: Trustco lodges objection.

(c) 22 December 2021: JSE states will not implement suspension decision until objection finalised.⁴⁹

(d) 13 January 2022: Trustco says that its 2021 annual financial statements will be published by 31 January 2022, and that they will constitute a restatement in accordance with the Tribunal decision.⁵⁰

(e) 20 January 2022: JSE says it will await publication of Trustco's 2021 annual financial statements by 31 January 2022, for the

⁴⁸ This is date of the suspension decision, not 3 December 2021, as claimed is by Trustco HOA para 1. On 3 December 2021, the JSE informed Trustco that it was "*considering*" suspending it (Record: Part A item 1.3 p 22 para 5), in the light of the non-compliance decision (Record: Part A item 1.3 p 21 para 1).

⁴⁹ Record: Part A item 1.8 p 43 para 4.

⁵⁰ Record: Part A item 1.8 p 48 para 11.

sake of determining whether it constitutes compliance with the Tribunal decision.⁵¹

- (f) 31 January 2021: Trustco publishes 2021 financial statements, but still fails to comply with the Tribunal decision.

29.2.2 Now 18 months later, Trustco has still not complied with the Tribunal decision. The lament, therefore, that it did not have time to comply with the restatement ordered in the Tribunal decision, cannot be taken seriously as an argument made in good faith.

29.2.3 Likewise, the argument that because the suspension decision was taken in December 2021, the JSE ought to have upheld its objection and “*commenced the process afresh*”,⁵² ignores both:

- (a) the fact that Trustco agreed to the procedure in terms of which the JSE delayed its decision on the objection on the basis that it would decide the objection after its receipt of the 2021 annual financial statements; and
- (b) the internal structure of the Listing Requirements and the FSR Act, in terms of which the decision being reconsidered is the “*final*” decision of the JSE on 14 February 2022 not to uphold Trustco’s objection, not the JSE’s initial decision which it made on 13 December 2022.

30 This second ground for reconsideration, therefore, falls to be dismissed.

⁵¹ Record: Part A item 1.8 p 50 para 6.

⁵² Record: Part A item 1.2 p 17 para 22.3(8).

Challenging the JSE and Tribunal decisions

31 The third and fourth grounds for reconsideration are related. Essentially, they complain that the JSE decision, as confirmed by the Tribunal, to order restatement is incorrect and/or is the subject of judicial review.⁵³

32 Both grounds can be disposed of quickly, for there is Constitutional Court authority that renders each unsustainable:

32.1 First, in *Kirland*, it was explained that until it is set aside, even an unlawful administrative decision is valid and effectual.⁵⁴ As the JSE and the Tribunal decisions have not been set aside, this Tribunal must proceed on the basis that they are valid. So, it is not open to Trustco to attack them on the indirect basis it purports to do.

32.2 Second, in *City of Tshwane*, the Court had these strong words to say about an argument essentially identical to Trustco's:

*"It needs to be stated categorically, that no aspect of our law requires of any entity or person to desist from implementing an apparently lawful decision simply because an application, that might even be dismissed, has been launched to hopefully stall that implementation. Any decision to that effect lacks a sound jurisprudential basis and is not part of our law. It is a restraining order itself, as opposed to the sheer hope or fear of one being granted, that can in law restrain. To suggest otherwise, reduces the actual grant of an interdict to a superfluity."*⁵⁵

32.3 Trustco sought an order from this Tribunal suspending implementation of the

⁵³ Record: Part A item 8 pp 371-374 para 7.

⁵⁴ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) para 101.

⁵⁵ *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC) para 74.

suspension decision. Justice Mokgoro dismissed the application.⁵⁶ Thus, it is not open to Trustco to rely on the pending review of the JSE and Tribunal decisions to argue that either the non-compliance or suspension decisions ought to be reconsidered.

32.4 Trustco recognised that the review did not suspend the implementation of the suspension decision because after Justice Mokgoro dismissed Trustco's application Trustco rushed to the urgent court in Pretoria and was able to obtain an order interdicting the implementation of the suspension decision pending the judgment in the review of the Tribunal's decision.⁵⁷ As we have already mentioned the judgment in the review is awaited and will be provided to the Panel when it is received.

32.5 The suspension reconsideration application now falls to be judged on its own merits. As Trustco provides no good reasons to overturn the non-compliance decision or suspension decision, the third and fourth reconsideration grounds fall to be dismissed.

Non-compliance with the Tribunal decision

33 Trustco's fifth ground for reconsideration is that it has in fact complied with the Tribunal decision,⁵⁸ arguing that through its publication of the 2021 annual financial statements and "*various SENS announcements . . . the market at large is well aware of the [JSE and Tribunal decisions]*".⁵⁹

⁵⁶ Record: Part A item 9 pp 380-383.

⁵⁷ This does not appear from the record as these events occurred after the record had been filed. These events are not contentious and Trustco will separately be invited to agree to these facts.

⁵⁸ Record: Part A item 8 pp 369-370 para 3.

⁵⁹ Record: Part A item 8 p 369 paras 3.2-3.3.

34 This astonishing argument is advanced by Trustco for the first time in its augmented grounds of reconsideration:

34.1 Trustco explains that it is only raising the argument now after the JSE filed the record to the non-compliance and suspension decision,⁶⁰ as the record does not include the 2021 financial statements.

34.2 As explained above, it is common cause that after provision of the statements to the JSE on 31 January 2022, it dismissed Trustco's objection to the initial decision made on 13 December 2021.

34.3 Therefore, there is no basis for Trustco to argue that the statements were not considered by the JSE when it made the suspension decision, and through it the non-compliance decision.

34.4 Again, Trustco is making an argument it knows does not have support in the underlying facts.

34.5 This argument is especially egregious in this particular instance since Trustco has admitted, in its application for suspension of the suspension decision in terms of section 231 of the FSR Act, which it lodged on 18 February 2022,⁶¹ i.e., after it filed its 2021 annual financial statements, that it "*has not restated its financial statements to date and contends that there is no law, ruling, standard or listing requirement that precludes the presentation of its financial as they currently stand*".⁶²

⁶⁰ Record: Part A item 8 p 369 para 3.1.

⁶¹ Record: Part A item 2 p 190.

⁶² Record: Part A item 2 p 191 para 5.

35 Moreover, as a matter of fact, Trustco's 2021 financial statements plainly do not comply with the Tribunal decision:

35.1 The required corrective action is clear: Trustco must reverse the ND 546 million gain recognised in profit and loss, it must reverse the ND 1 billion gain recognised in profit and loss, and it must reverse the ND 693 million gain in respect of the Windhoek properties.

35.2 Instead of reversing the gains and restating the financial statements, Trustco buried some commentary about the JSE and Tribunal decisions in the small print to its financial statements.

35.3 That is not enough. And Trustco knows it is not enough, which is why even it cannot bring itself to say in its augmented grounds that it has restated the financial statements. Instead, it offers the following weasel words:

35.3.1 *"the market at large is well aware of the Restatement Decision and the Award",⁶³ i.e., the JSE and Tribunal decisions;*

35.3.2 *"All information in relation to how the JSE requires Trustco to restate its financial statements is public information and the market has been informed of this through various SENS announcements in the 2021 AFS";⁶⁴*

35.3.3 *"The difference in interpretation between the JSE and Trustco is made clear in a comprehensive note contained in the financial*

⁶³ Record: Part A item 8 p 369 para 3.2.

⁶⁴ Record: Part A item 8 p 369 para 3.3.

*statements . . . The JSE’s discord is stated in exactly the same terms as the JSE communicated it to Trustco.”*⁶⁵

35.3.4 *“The 2021 AFS thus fully informs the market” of the “JSE’s views, the views of Trustco, the opinions of expert accredited JSE auditors and expert accredited JSE advisors.”*⁶⁶

35.4 It was not open to Trustco to simply ignore the express order of the Tribunal, because it preferred its method of disclosing *“all of the available information into the public domain”*,⁶⁷ for the purpose of letting the public decide for itself what the financial statements should say.

35.5 Trustco was not ordered to *“inform”* the market of everybody’s views. It was ordered to restate its financial statements. It did not do so. It left the numbers unchanged. It did not comply with the Tribunal decision.

36 Trustco knows that its approach to the restatement issue in this application is wrong. This issue arose in the review and Trustco was faced with the unreported judgment in the Huge Group case⁶⁸ which dealt with the requirement of a restatement and explained what is required, albeit in the context of whether the JSE has the authority to order a restatement.

37 Therefore, the fifth ground for reconsideration falls to be dismissed.

⁶⁵ Record: Part A item 8 p 369 para 3.4.

⁶⁶ Record: Part A item 8 pp 369-370 para 3.5.

⁶⁷ Record: Part A item 8 p 370 para 3.7.

⁶⁸ Huge Group Limited v JSE and others, case number 15380/2015, Gauteng Local Division, Johannesburg.

Public interest, the FM Act and bias

38 The JSE's answer to Trustco's sixth to eighth reconsideration grounds, which relate to the suspension decision, is the same, so we address these grounds together.

39 Trustco says that:

39.1 suspension is not in the public interest and does not promote the objectives of the FM Act;⁶⁹

39.2 the JSE did not identify which Listing Requirement was breached and which forms the basis for suspension decision;⁷⁰ and

39.3 the above two grounds demonstrate that Mr Visser was biased in making the suspension decision.⁷¹

40 Each argument is unsustainable for the same reasons:

40.1 Above, we explained that:

40.1.1 on the binding authority of *Kirland* and *City of Tshwane*, it must be presumed by this Tribunal that the JSE and Tribunal decisions are valid and effective; and

40.1.2 Trustco's argument that it complied with the Tribunal decision is demonstrably false.

40.2 Once these two propositions of fact and law are accepted, the suspension decision is straightforward:

⁶⁹ Record: Part A item 1.2 pp 17-18 para 23.

⁷⁰ Record: Part A item 1.2 p 18-19 paras 24.1-24.4.

⁷¹ Record: Part A item 1.2 p 19 para 24.5.

40.2.1 Paragraph 1.6 of the Listings Requirements empowers the JSE to suspend a listing on either of two grounds:

- (a) suspension will further one or more of the objects contained in section 2 of the FM Act, which may include if it is in the public interest to do so; or
- (b) if the issuer failed to comply with the Listings Requirements and it is in the public interest to do so.

40.2.2 Section 2 of the FM Act lists five statutory objects, with paragraph 1.6 of the Listing Requirements empowering the JSE to suspend a listing if this would further any of those objects.

40.2.3 The suspension decision furthers at least three objects.

- (a) First, suspension ensures that “*South African financial markets are fair, efficient and transparent*”.⁷² Trustco’s statements are inaccurate and do not reflect a fair picture of Trustco’s financial performance. It is unfair for Trustco’s shareholders to benefit from Trustco’s inaccurate and wrong accounting. The only way for Trustco to be transparent with the market was to restate its financial statements. It refused to do. And an efficient market requires accurate information, so allowing Trustco to trade on the back of inaccurate, misleading statements is an inefficiency that regulators like the JSE and the Tribunal are there to police and stamp out.

⁷² Section 2(a) of the FM Act.

- (b) Second, Trustco's suspension will "[increase] confidence in the South African financial markets".⁷³ Suspension of its listing will facilitate this objective as enforcement is the only effective way to protect the market and investors. The JSE decided that the financial statements did not comply with the IFRS. The Tribunal agreed. For Trustco's shares to trade as normal, in contempt of these decisions, erodes market confidence and undermines the regulatory ecosystem's authority.
- (c) Third, the suspension decision "*promote[s] the protection of regulated persons, clients and investors*",⁷⁴ since it functions to prevent unsuspecting investors from buying Trustco shares on the strength of misleading financial statements.

40.2.4 Non-compliance with the JSE and Tribunal's decisions profoundly threatens the JSE's regulatory ecosystem:

- (a) Trustco's duties are not voluntary, and they must be complied with timeously.
- (b) Where there is non-compliance, the JSE is obliged to act, in terms of section 10 of the FM Act. The JSE's failure to ensure timeous compliance has the potential to cause profound harm to market participants.
- (c) Enforcing compliance with the Listings Requirements is the JSE's primary mechanism for regulating its market in the public

⁷³ Section 2(b) of the FM Act.

⁷⁴ Section 2(c) of the FM Act.

interest, with compliance with its orders promoting the market's integrity and preventing listed companies simply following their own views to the prejudice of the investing public.

- (d) Non-compliance was a breach of the highest order.
- (e) Trustco's flouting of the JSE's rules, the JSE's various decision and the Tribunal's decision implicates issues of rule of law. It has become fashionable for parties to adopt an approach that they are entitled to reconsider, and review, any decision on any ground. This has been unceremoniously christened the Stalingrad approach to litigation. This approach should not be condoned. If parties are listed on the JSE they must rigorously adhere to those rules and vigorously assess if there is a real and sustainable basis to challenge a decision. A role of the dice or a simple possibility of success is not enough. The argument that Trustco has the right to challenge decisions made by regulators misses the point. The point is not about being entitled to exercise rights of review and reconsideration; it is about the functioning of financial markets. The proper functioning of financial markets requires all participants to abide reasonable decisions of regulators, even if those decisions are not what the market participant would have preferred.

40.2.5 As such, suspending Trustco's listing is plainly in the public interest: not only does the public interest favour market transparency, but it also requires effective and authoritative regulators acting in the

public's interest, when there is a breach of its rules — nowhere more so than when this breach takes the form of non-compliance with an order of the Tribunal, following a finding of breach.

40.2.6 Not suspending Trustco's listing, therefore, undermines the public interest. It would send a message that listed companies can freely trade with inaccurate financial statements, and if they are found out, continue to do so by just ignoring the orders of the JSE and Tribunal to remedy their breaches.

40.2.7 Trustco admits it has not restated its financials: there was no option for the JSE but to suspend its listing.

40.3 Once all of this is grasped, Trustco's sixth to eighth reconsideration grounds fall to be dismissed:

40.3.1 suspension was in the public interest, and it promotes the objectives of the FM Act;

40.3.2 the JSE has identified the Listing Requirements that were breached, and which form the basis for the suspension decision; and

40.3.3 with the above two facts demonstrated, the case for Mr Visser's bias necessarily cannot be sustained.

41 Therefore, the sixth to eighth reconsideration grounds fall to be dismissed, and with it the suspension reconsideration application as a whole.

CONCLUSION

- 42 In the circumstances, we submit that this suspension reconsideration application falls to dismissed, with the costs of two counsel.
- 43 We ask for costs because of the exceptional circumstances of this matter. The Tribunal has already previously ruled that, at that stage, the JSE was entitled to 50% of its costs. These costs were awarded as a mark of displeasure at Trustco's conduct. This application is an escalated repeat of Trustco's previous behaviour, which is characterised by a "delay at all costs" approach, and a "raise any argument approach". In our submission Trustco's conduct cannot be condoned and a cost order is warranted.

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