

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: JSE1/2022

TRUSTCO GROUP HOLDINGS LIMITED

Applicant

and

JSE LIMITED

Respondent

RULING BY THE CHAIRPERSON

APPLICATION FOR SUSPENSION IN TERMS OF SECTION 231 OF THE FINANCIAL SECTOR REGULATION

ACT 9 OF 2017

Background

- [1] This application is not for the reconsideration and suspension of the decision of any of the decisions of the decision-maker who, in this matter, is the Johannesburg Stock Exchange Limited (the JSE) as it initially seemed. The JSE decisions which suspended Trustco's share listing, (the Suspension Decision) and the decision which required Trustco to restate its annual financial statements (Restatement Decision) have already been determined on reconsideration by the Financial Services Tribunal (the Tribunal) on 22 November 2021 in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 (the Act).
- [2] The application comes before the Chairperson of the Tribunal (the Chairperson) and is for the suspension of the order of the Tribunal, where the order simply dismisses Trustco's application for reconsideration, of the decision of the Restatement Decision of the JSE, including a cost order.
- [3] The application to the Chairperson was initially made pending the outcome of an application before the Gauteng High Court for the judicial review of the Tribunal order (case number 5640/2022) and a subsequent urgent application before the Gauteng High Court (case number 11121/2022) which was due to be heard on 11 March, 2022. However, the urgent application was not heard on that day and is now said to be held in abeyance, pending the completion of the Tribunal processes or the outcome of the application before the Chairperson.
- [4] The JSE had found that Trustco had failed to comply with the share listing requirements, having failed to meet the objective International Financial Reporting Standards, (IFRS) in their annual financial statements for the year ending 31 March 2019 and the interim results for the six months ending 30 September 2019 and for that reason had been materially non-compliant. In the result, the JSE instructed Trustco to restate the corrected financial statements and financial results, (the Restatement Decision), failing which, the JSE would suspend Trustco's share listing (the Suspension Decision). Trustco failed to comply with the Restatement Decision, resulting in the imposition of the Suspension Decision.

- [5] Following the Restatement Decision and the Suspension Decision, Trustco applied to the Tribunal for the reconsideration of the directive, containing the Restatement Decision of the JSE. The Tribunal, deciding the matter only on the directive based on the Restatement Decision, finding it unnecessary to deal with the rest of the issues raised, dismissed the application for reconsideration, ordering Trustco to pay 50% of the costs of the JSE, including the costs of two counsel on the scale of the High Court and to be taxed by the taxing Master or any taxing practitioner the parties agree to.
- [6] Aggrieved by the order of the Tribunal and insisting that the accounting in their financial statements was compliant with the IFRS, Trustco applied on 31 January 2022 to the Gauteng High Court for a judicial review of the Tribunal's order. On 18 February 2022, Trustco applied to the Chairperson of the Tribunal for the reconsideration and the suspension of the Tribunal order pending the outcome of the application for the judicial review, an application duly opposed by the JSE. On 23 February 2022, Trustco launched the urgent application to the Gauteng High Court.
- [7] The Chairperson requested that the parties submit heads of arguments first, dealing with the basis for the application for suspension by the Chairperson of the Tribunal's award issued on 22 November, 2021, The parties were also requested to make submissions as to whether the Tribunal has jurisdiction to set aside its own decision, in view of the applicant's initial approach to the issues, seemingly applying to the Chairperson to set aside the Suspension Decision of the JSE which, as indicated above had already been reconsidered and decided by the Tribunal in terms of section 230 of the Act.
- [8] As alluded above, on 4 March 2022, counsel for the JSE wrote to the Tribunal Secretariat as follows: *"The applicant has requested an indulgence from our client - that it delay the decision to suspend its listing by a week. The applicant, as we understand it, wishes to have the FST process concluded first, before the High Court Proceedings. Given the Chairperson's recent involvement in the matter and the voluminous record and in deference to Mokgoro J, our client will (without prejudice to its rights) in fact not suspend the listing of the applicant until such time as the Chairperson has decided the application to suspend the Suspension Decision. Additionally, our client will then afford the applicant an additional week from that date, to take whatever additional steps it is advised to take (in the event that the suspension application is unsuccessful)."*
- [9] That communication brought clarity to the nature and purpose of Trustco's application which was already before the Chairperson. First, notwithstanding that the Tribunal had already dealt with Trustco's application for reconsideration of the decision of the JSE, albeit on a limited basis, the application before the Chairperson was now clearly for the suspension of the order of the Tribunal.
- [10] The indulgence requested and granted to Trustco by the JSE, including the consideration of the JSE to delay whatever steps it might need to take in relation to Trustco, depending on the outcome of the application before the Chairperson does not go unnoticed. It is reflective of the spirit of mutual consideration and good faith with which it is preferred that processes in terms of the Act are to be conducted.
- [11] The Tribunal having dealt with and dismissed Trustco's application to reconsider the Restatement Decision of the JSE, in terms of section 230 of the Act and the applicable Tribunal rules, important to note is that neither Trustco's application for reconsideration nor the process of reconsideration automatically suspended the JSE's Restatement Decision, nor did the Tribunal suspend it.

- [12] Thus, the Restatement Decision remains executable (see in *MEC for Health Eastern Cape v Kirkland Investments (Pty) Ltd 2014 (3) SA 481* at para 101 and in *Tshwane City v Afriforum 2016 (6) SA 279 CC* at para. 73 to 74). The application of the administrative law principle that invalid administrative actions may not be regarded as invalid based merely on the basis that their underlying decision is challenged at law, but may continue to have legal effect until set aside by due legal process.
- [13] Further, it must be noted that the indulgence extended to Trustco by the JSE, informally undertaking to delay the execution of the Restatement decision in the terms indicated above, is not part of the Tribunal's order. For that reason, the reported agreement by the parties to delay the execution of the JSE's Restatement Decision does not constitute a suspension of the order of the Tribunal.
- [14] The reconsideration of the decision-maker's decision by the Tribunal is a remedy internal to the Tribunal, contemplated in section 7(2) of the Promotion of Administrative Justice Act, 3 of 2000. Once the order of the Tribunal is made, flowing from the reconsideration of the decision of the decision-maker, the resultant order is implementable in terms of section 236 of the Act.
- [15] Thus, notwithstanding the agreement between the JSE and Trustco regarding the delay of the execution of the Tribunal's order, subject to the outcome of the application for suspension of the Tribunal's order, the Restatement Decision of the JSE remains binding on the parties. The agreement may therefore delay the execution of the order of the Tribunal as agreed. However, it shall not prevent its execution.
- [16] Although an order of the Tribunal is immediately executable, it may however be taken on judicial review before the High Court in terms of section 235 of the Act, section 7(2) of PAJA and or any applicable law. However, such an application or the process of judicial review itself does not automatically suspend the order of the Tribunal.
- [17] This matter initially came before the Chairperson as applications for reconsideration and suspension pending the outcome of an application for the review of the order of the Tribunal. The High Court urgent application was filed subsequently and as indicated above, and as matters stand, Trustco has held in abeyance that urgent application pending the finalisation or completion of the application for suspension before the Chairperson.
- [18] Important to note is that in this matter, the Chairperson is not confronted with the reconsideration of the decision of the Tribunal. The question or issue here is limited to the determination whether or not the Chairperson may suspend the order of the Tribunal which dismissed the application for reconsideration of the Restatement Decision, requiring Trustco to correct and restate its group annual financial statements as indicated above, failing which, the Suspension Decision will kick in.
- [19] In determining the suspension of the Tribunal order, it is important to determine the implications of the suspension of the order which merely dismissed Trustco's application for reconsideration of the JSE Restatement Decision and second, what the implications are, if any, for the Chairperson proceeding to suspend the Tribunal order considering that Trustco's application for the judicial review of the order of the Tribunal is still pending before the High Court and it has held in abeyance its urgent High Court application pending the outcome of the application for suspension before the Chairperson of the Tribunal.

- [20] In this matter, the Tribunal having declined to reconsider the Restatement Decision implies that the decision is still in place and valid. With the Restatement Decision still valid, Trustco is bound by that decision, requiring the company to comply with the JSE directive to restate its group annual financial statements as indicated above. With the Tribunal order dismissing the application to reconsider the directive constituting the Restatement Decision, a suspension of the Tribunal order will have the effect of suspending the Restatement Decision.
- [21] In turn, suspending the Restatement Decision will place Trustco in a position where it could proceed with the listing of its shares notwithstanding its non-compliance with the Restatement Decision containing the directive to first correct and then restate the group annual financials as determined above, in line with the objective IFRS standards, a directive which the Tribunal supports and therefore declined to reconsider it. Besides, Trustco does not dispute not complying with the Restatement Decision, insisting that it's own accounting approach is in order, notwithstanding.
- [22] In my view it would not be in the interests of justice for Trustco to remain non-compliant with a valid Restatement Decision which aims to protect the objective IFRS, but proceed with its share listing, contrary to the said international standards. Following the dismissal of Trustco's application for the reconsideration of the Restatement Decision, that decision remains in place, is valid and binding on Trustco.
- [23] Having decided that the Restatement Decision remains valid and binding until Trustco complies with the Restatement Decision, there is no need to proceed to address any of the further contentions raised in Trustco's application for the suspension of the order of the Tribunal.

THE RULING

- [24] The application to suspend the order of the Tribunal is declined.



Yvonne Mokgoro: Chairperson
Financial Services Tribunal
13 July 2022