

THE FINANCIAL SERVICES TRIBUNAL

Case No.: JSE1/2022

In the matter of:

TRUSTCO GROUP HOLDINGS LIMITED

Applicant

and

JSE LIMITED

Respondent

APPLICANT'S HEADS OF ARGUMENT

1. This matter concerns the suspension of the listing of Trustco, and the trade of its shares on the JSE's main board ("**the Suspension Decision**").¹ The JSE Suspension Decision was taken on 3 December 2021.²
2. Trustco's many objections to the suspension are detailed in its grounds for reconsideration.³ On 14 February 2022, the JSE confirmed that all of Trustco's objections had been dismissed and the Suspension Decision stood.⁴
3. The events that led to the Suspension Decision are these:
 - 3.1. Trustco issued financial statements for the 2018 and 2019 financial years. It did so in accordance with the specialist advice of a plethora of

¹ Part A p 10, par 3

² Part A p 10, par 6

³ Part A p 10, par 5 to p 11, par 13 read with annexures A1 to A11

⁴ Part A p 11, par 14 read with Annexure A12

IFRS and IAS experts – each of whom are accredited and approved by the JSE;

- 3.2. at the end of 2019, the JSE informed Trustco that it had been selected for review and that the Financials had been referred to the FRIP.⁵ The FRIP investigation was in respect of three transactions (“**the Transactions**”);⁶
- 3.3. the FRIP disagreed with Trustco’s accounting treatment of the Transactions, and concluded a breach of IFRS;⁷
- 3.4. in October 2020, more than two years after the first of the Financials had been issued, the JSE informed Trustco that the Financials did not comply with IFRS and must be restated;⁸
- 3.5. Trustco objected to the JSE’s finding⁹ and the JSE issued an amended decision in November 2020 which, for all intents and purposes, is the same as the initial decision. In sum, the JSE ordered Trustco to restate the Financials (“**the JSE Decision**”);¹⁰
- 3.6. the decision of the FRIP was appealed to the Tribunal during 2021;¹¹
- 3.7. on 22 November 2021, the Tribunal dismissed Trustco’s appeal and upheld the FRIP’s decision (“**the Tribunal Decision**”).¹²

⁵ Part A p 217, par 14

⁶ Part A p 218, par 16

⁷ Part A p 217, par 17

⁸ Part A p 218, par 18

⁹ Part A p 218, par 19

¹⁰ Part A p 219, par 20

¹¹ Part A p 219, par 21

¹² Part A p 219, par 22

4. In light of that concise history, Trustco seeks to have the Suspension Decision set aside. The grounds on which Trustco seeks that relief are because:
 - 4.1. the decision to suspend is premature;¹³
 - 4.2. the Suspension Decision is being implemented for an ulterior purpose;¹⁴
 - 4.3. a suspension does not comply with the empowering legislation.¹⁵
5. Each of these grounds is considered in turn below.

A SUSPENSION IS PREMATURE¹⁶

6. Section 235 of the Financial Sector Regulation Act 9 of 2017 (“**the FSRA**”) provides that:

Any party to proceedings on an application for reconsideration of a decision who is dissatisfied with an order of the Tribunal may institute proceedings for a judicial review of the order in terms of the Promotion of Administrative Justice Act or any applicable law.

7. During January 2022, Trustco launched an application to review and set aside the JSE Decision and the Tribunal Decision. That application is pending before the Pretoria High Court under case number: 5640/2022 (“**the Review Application**”).¹⁷ The Review Application was argued on 7 September 2022 and a decision is imminent.

¹³ Part A p 14, par 22

¹⁴ Part A p 17, par 23

¹⁵ Part A p 18, par 24

¹⁶ Part A p 14, par 22

¹⁷

8. In light of the Review Application, section 236 of the FSRA is relevant. It concerns the enforcement of Tribunal Orders and provides that:

(1) A party to proceedings on an application for reconsideration of a decision may file with the registrar of a competent court a certified copy of an order made in terms of section 234 if-

(a) no proceedings in relation to the making of the order have been commenced in a court by the end of the period for commencing such proceedings; or

(b) if such proceedings have been commenced, the proceedings have been finally disposed of.

(2) The order, on being filed, has the effect of a civil judgment, and may be enforced as if lawfully given in that court.

9. From a reading of s 236(2), it is evident that, until the Tribunal Decision (as an order made in terms of section 234) is filed in court, it:

9.1. does not have the effect of a civil judgment; and

9.2. cannot be enforced as an order given by a court.

10. Plainly then, the JSE's assertions of 'contempt' are manifestly incorrect.

11. Far from contemptuous, Trustco has merely asserted and exercised the rights afforded to it by the FSRA. There can be nothing contemptuous about complying with a statute.

12. What is objectionable is seeking to impose a punitive measure while a person attempts to exercise its statutorily conferred rights. This is precisely what the JSE seeks to do. It will have the Tribunal flout the provisions of the FSRA and order that Trustco be sanctioned before its right to a fair hearing has been exhausted.

13. There is good reason why the FSRA mandates that an order of the Tribunal not be enforced until proceedings surrounding it are finalised. This matter is a prime example. If the Review Application succeeds, then both the Tribunal Decision and the JSE's Decision will be set aside. In that event, there is no basis at all for Trustco to be punished.
14. In an attempt to avoid the express intention of sections 235 and 236 of the FSRA, the JSE contends that:
 - 14.1. it does not intend to enforce the Tribunal Decision in the form of a civil judgment;¹⁸ and
 - 14.2. remarkably:¹⁹

The Review Application does not suspend the operation of the JSE's and the Tribunal's decisions. Trustco knows this because it was told that by the JSE

15. As though the JSE is the mind of both the legislature and the judiciary, it seeks to denude Trustco of its rights under the FSRA merely because the JSE says so.
16. Perhaps the JSE knows something about the fate of the Review Application that Trustco does not. Perhaps the JSE is desperate to impose the harshest possible sanction on Trustco. Perhaps the JSE's say so is the best reason it has to avoid the FSRA. Indeed, despite it bemoaning Trustco exercising its statutory rights, there is no better reason offered in its response.²⁰

¹⁸ Part A p 226, par 50

¹⁹ Part A p 226, par 52

²⁰ See Part A p 226, par 49 to 227, par 56

17. Regardless of the JSE's motive, its end is impermissible. The FSRA is clear:

17.1. section 235 permits a party to review a decision of the Tribunal in court;

17.2. 236, prevents enforcement of the impugned decision until the court proceedings connected to the impugned decision have been finalised.

18. In the circumstances, until the Review Application has been finalised, the Tribunal Order cannot be enforced.

ULTERIOR PURPOSE²¹

19. Section 12 of the Financial Markets Act 19 of 2012 ("the FMA") states that:²²

*(1) An exchange may, subject to this section, the exchange rules and the listing requirements, remove securities from the list, even to the extent that a removal may have the effect that an entire board or substantial portion of the board on the exchange is closed, or suspend the trading in listed securities, **if it will further one or more of the objects of this Act referred to in section 2.***

20. Section 2 of the FMA sets out its objectives:

This Act aims to-

(a) ensure that the South African financial markets are fair, efficient and transparent;

(b) increase confidence in the South African financial markets by-

(i) requiring that securities services be provided in a fair, efficient and transparent manner; and

(ii) contributing to the maintenance of a stable financial market environment;

(c) promote the protection of regulated persons, clients and investors;

(d) reduce systemic risk; and

²¹ Part A p 17, par 23

²² Part A p 12, par 17

(e) promote the international and domestic competitiveness of the South African financial markets and of securities services in the Republic.

21. In a similar vein, the JSE's Listing Requirements permits a suspension:²³

(a) if it will further one or more of the objects contained in Section 2 of the FMA, which may also include if it is in the public interest to do so; or

(b) if the applicant issuer has failed to comply with the Listings Requirements and it is in the public interest to do so...

22. The JSE does not, and has not, meaningfully assert that any of the objectives in section 2 of the FMA will be fulfilled by a suspension of Trustco's listing. It also does not meaningfully contend that a suspension is in the public interest.

23. Trustco gives a number of cogent undisputed reasons why none of these imperatives could be fulfilled by a suspension:²⁴

23.1. the market knows about the JSE Decision and the Tribunal Decision as they have been widely published on SENS, Trustco's website and in Trustco's subsequent financial statements;

23.2. a suspension does not provide the market, or its participants with any additional information;

23.3. the financial statements published by Trustco on 31 January 2022 make specific reference to the JSE's requirement to restate and the potential effect of a restatement;

²³ Paragraph 1.6

²⁴ Part A p 17, par 23.2

- 23.4. there is no suggestion of malfeasance in Trustco's actions at all. It is merely a difference of opinion on the accounting treatment of certain financial transactions;
- 23.5. Trustco's shareholders voted to and did confirm the financial treatment of the Transactions; and
- 23.6. there is an unresolved dispute as to whether Trustco has breached any of the Listings Requirements at all.
24. Trustco asserts that, in view of the market's thorough knowledge of the dispute between Trustco and the JSE, there is no legitimate purpose to be served by suspending Trustco's listing other than a punitive one.
25. Unfortunately for the JSE, enforcing the harshest possible remedy just because the JSE wants to, and based solely on the JSE's say so, is not an objective of the FMA, the Listings Requirements or the FSRA.

COMPLIANCE WITH THE EMPOWERING LEGISLATION²⁵

26. It is only in its response that the JSE for the first time divulge which provision of the Listings Requirements Trustco infringed. The JSE says that its complaint is that:²⁶

... Trustco, by failing to implement the restatements, has failed to comply with IFRS. Compliance with IFRS is a requirement of paragraph 8.62 of the Listings Requirements.

²⁵ Part A p 18, par 24

²⁶ Part A p 229, par 64

27. Paragraph 8.62 of the JSE Listings Requirements states:

The annual financial statements must:

- (a) be drawn up in accordance with the national law applicable to a listed company;*
- (b) be prepared in accordance with International Financial Reporting Standards and the SAICA Financial Reporting Guides as issued by the Accounting Practices Committee and Financial Pronouncements as issued by Financial Reporting Standards Council (but see Section 18 in respect of dual listings and listings by overseas companies);*
- (c) be audited in accordance with International Standards on Auditing or, in the case of overseas companies, in accordance with national auditing standards acceptable to the JSE or International Standards on Auditing;*
- (d) be in consolidated form if the listed company has subsidiaries, unless the JSE otherwise agrees, but the listed company's own financial statements must also be published if they contain significant additional information; and*
- (e) fairly present the financial position, changes in equity, results of operations and cash flows of the group.*

28. It is peculiar that the JSE, despite referring specifically to paragraph 8.62, confines its grievance to paragraph (b) – that Trustco's financials did not comply with IFRS.

29. The JSE does not base its challenge on Trustco's financials:

29.1. failing to comply with any law (apparently including the FMA and the FSRA) (para 8.62(a);

29.2. being properly audited. Peculiarly, if the audit did not comply with IFRS, it too would be a ground on which the JSE would have relied (para 8.62(c); or

- 29.3. not fairly representing the financial position of the Trustco group (para 8.62(e).
30. If there was, in fact, an established non-compliance with IFRS (as the JSE alleges as the basis of its Suspension Decision), each of the other considerations would inevitably be infringed too. However, the JSE makes no mention of any of them. Certainly, if there was a material consequence as a result of Trustco's non-compliance with IFRS, the JSE would have made much of it. The JSE's strident avoidance of any of these considerations is telling.
31. In any event, and of particular relevance to the only ground on which the JSE does mount a challenge, Trustco disputes that its financial statements do not comply with IFRS. That dispute is what Trustco seeks to ventilate by exercising its rights under the FSRA as detailed above.
32. In light of the dispute, it is for the JSE to establish that there is, in fact, a breach of IFRS in the manner that Trustco's financials are prepared. Only once it has established that breach of IFRS conclusively, is the JSE empowered to effect a suspension of Trustco's listing. Unless and until that breach has been properly established, it is certainly not "*in the public interest*" to suspend Trustco's listing – a consideration mandated by paragraph 1.6 of the Listings Requirements. In the absence of such a finding any suspension would be arbitrary and/or capricious.

CONCLUSION

33. Trustco contends that the Suspension Decision is premature and cannot, in earnest or in law, be enforced until the Review Application has been finally determined.
34. Moreover, the relentless pursuit of a suspension of Trustco's listing appears to be contrary to the stated objectives of the FSRA, the FMA and the Listings Requirements.
35. Absent a proper purpose, as recognised by the empowering legislation, and strict compliance with the mandatory prerequisites, the JSE is not permitted to enforce the most stringent remedy available to it.
36. In the circumstances, there is no basis for the Suspension Decision to be enforced until, at least, the Review Application has been disposed of. Accordingly, it is submitted that this application stands to be granted, with the costs of two counsel.

JP DANIELS SC

M J COOKE