

## IN THE FINANCIAL SERVICES TRIBUNAL

CASE NUMBER: JSE1/2022

In the matter between:

**TRUSTCO GROUP HOLDINGS LIMITED**

Applicant

and

**JSE LIMITED**

Respondent

Panel: C Woodrow SC (chair), Mr PJ Veldhuizen, Mr J Pema

For the applicant: JP Daniels SC with MJ Cooke instructed by Norton Rose Fulbright

For the respondent: I Green SC with M Kruger instructed by Webber Wentzel

Hearing: 21 October 2022

Summary: Reconsideration of decision of the JSE in terms of section 230 of FSR Act – decision of JSE to suspend listing of securities of issuer based on non-compliance – whether or not: the decision was premature, implemented for an ulterior purpose, in compliance with empowering legislation – whether person who took the decision had necessary authority.

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**DECISION**

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**INTRODUCTION:**

1. The applicant is Trustco Group Holdings Limited ("**Trustco**"). Trustco is a Namibian company, registered as an external company in South Africa, and listed as an issuer on the respondent, the JSE Limited (the "**JSE**").

2. Trustco brings this application for the reconsideration of certain decisions of the JSE in terms of section 230 of the Financial Sector Regulation Act, Act 9 of 2017 (the “**FSR Act**”).
  
3. Trustco states that the decisions which are the subject of the present reconsideration application are contained in a letter from the JSE dated 13 December 2021 read with a letter from the JSE dated 14 February 2022.<sup>1</sup> It states that the JSE’s decisions are as follows:
  - 3.1. *“that Trustco has failed to comply with the Listings Requirements and the JSE decision and in so doing, has disregarded the Financial Services Tribunal’ decision”*. (We shall refer to this decision as the “**non-compliance decision**”)
  
  - 3.2. *“that the appropriate recourse for Trustco’s aforementioned failures is to suspend the listing of its securities, as this would further the objectives of the Financial Markets Act and would manifestly be in the public interest”*. (We shall refer to this decision as the “**suspension decision**”)

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<sup>1</sup> We do not distinguish in this decision between letters directed directly by a party and letters directed for and on behalf of such party by a party’s attorney of record. We simply refer to the party.

**SYNOPSIS OF FACTS:**

4. The JSE conducts a review process of the financial statements of every listed company under its 'proactive monitoring review process'. In terms of the proactive monitoring review process, the JSE reviews the financial statements of every listed company at least once every five years.
5. On 5 December 2019, Trustco's financial statements (referred to below) were selected for review under the JSE's proactive monitoring review process.
6. The JSE review of Trustco's financial statements under the aforesaid process revealed certain issues that required further investigation by the FRIP (the 'Financial Reporting Investigations Panel' - 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). The FRIP investigated the issues and produced a report (the "**FRIP report**").
7. The JSE having considered the facts and information, including *inter alia* the submissions of Trustco and the advice of the review committee of FRIP (in the FRIP report), decided that Trustco had not complied with IFRS in that:
  - 7.1. In Trustco's group annual financial statements of 31 March 2019:

7.1.1. Trustco recognised a N\$ 545.6 million gain (in the profit and loss account) with respect to the waiver by Dr van Rooyen<sup>2</sup> of the initial loan (FRIP referral 1)<sup>3</sup>

7.1.2. Trustco reclassified certain properties in the Elisenhein development from inventory to investment property, thereby recognising a N\$ 693 million gain (in the profit and loss account) (FRIP referral 2)<sup>4</sup>

7.1.3. Trustco recognised revenue on the sale of underserviced land at the time that the purchaser signed the purchase agreement (FRIP referral 3)

7.2. In Trustco's unaudited interim results for the six month period ended [30] September 2019:

7.2.1. Trustco recognised a N\$ 1 billion gain (in the profit and loss account) with respect to the waiver by Dr van Rooyen of the subsequent loan (FRIP referral 1).

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<sup>2</sup> Dr van Rooyen is Trustco's CEO and majority shareholder. He was also the sole shareholder of a company that Trustco acquired, namely Huso Investments (Pty) Ltd ("**Huso**"). This is addressed further in the decision below.

<sup>3</sup> FRIP referral 1 relates to what has been described as the "**Loan Issue**".

<sup>4</sup> FRIP referral 2 relates to what has been described as the "**Property Issue**".

8. To place context to the FRIP referral 1 (the “**loan issue**”) and FRIP referral 2 (the “**property issue**”) we provide the following basic overview:<sup>5</sup>
9. FRIP referral 1 (the “**loan issue**”)
  - 9.1. As at 2018, Dr van Rooyen had advanced a total of N\$ 546 million in loans to Huso (see footnote 2 hereof). This loan was classified and recorded as an equity loan (money that Dr van Rooyen had invested in Huso as a shareholder).
  - 9.2. In 2018, Trustco acquired all of the issued shares of Huso. When the Trustco shareholders approved this acquisition, it was on the basis that the loan of Dr van Rooyen was classified and recorded as an equity loan.
  - 9.3. By the time that Trustco finally acquired Huso, though (there being certain delays in this process), the equity loan had been reclassified as a liability (money that Huso owed Dr van Rooyen).
  - 9.4. A few weeks after Trustco acquired Huso’s shares, Dr van Rooyen forgave the loan, which was then reflected in Trustco’s financials as profit.
  - 9.5. Thereafter, Dr van Rooyen loaned Trustco N\$ 1 billion with the express proviso that if he were to waive repayment of the loan the financial gain

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<sup>5</sup> As dealt with below, FRIP referral 3 became moot and we say no more about it.

had to be recognised in a manner that would benefit him on the earn-out-mechanism under the Huso sale agreement.

- 9.6. Dr van Rooyen thereafter waived repayment of the N\$ 1 billion loan.
- 9.7. Since there was an earn-out mechanism in the Huso sale of shares agreement, Dr van Rooyen benefitted.
- 9.8. Trustco presented the aforesaid waivers / forgiveness of loans in the relevant financials as gains in profit (totalling just over N\$ 1.5 billion), which they were not and which required restatement.

#### 10. FRIP referral 2 (the “**property issue**”)

- 10.1. Trustco owns properties outside of Windhoek (the Elisenheim properties).
- 10.2. Trustco 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.
- 10.3. After the reclassification, Trustco then revalued the properties upwards increasing Trustco’s profitability.
- 10.4. Based on the reclassification of the properties, Trustco reported and represented a N\$ 693 million gain (in the profit and loss account) in its

financial statements (presented as revenue of N\$ 984 million and cost of sales of N\$ 291 million).

11. The decisions of the JSE together with the corrective action required of Trustco by the JSE were communicated to Trustco on or about 16 October 2020. In essence, the corrective action required Trustco to reissue the group annual financial statements and the interim results referred to above and to restate them in certain terms, and to publish a SENS announcement containing such information.
12. Trustco objected, in terms of Listing Requirement 1.4, to all of the JSE's decisions and the corrective action required of Trustco. (Despite objecting to all of the decisions and corrective action, Trustco, in fact, effected a restatement that resolved FRIP referral 3, apparently rendering this aspect moot.)
13. The JSE dismissed the balance of the objections of Trustco (i.e. excluding the objection to FRIP referral 3 which had been rendered moot), upheld part of the objection to the corrective action, and amended the corrective action. This was conveyed in a letter from the JSE dated 11 November 2020 and Trustco was directed to take the following (amended) corrective action:

Trustco must take the following corrective action:

A. Restate the Group AFS for the year ended 31 March 2019 to account for the following prior period errors:

1. Reversing the N\$545.6m gain previously recognised in profit and loss and recognising this 'credit amount' to reduce the common control reserve initially recognised in equity as a result of the Huso acquisition (referral 1);

2. Reversing the reclassification of the Eisenheim properties (incorrectly reclassified to investment properties) and consequently reversing the N\$ 693m gain (presented as revenue of N\$984m and cost of sales of N\$291m) from profit and loss (referral 2); and

B. Restate the interim results for the 6 months ended 30 September 2019 to account for the following prior period errors:

1. Reversing the N\$1bn gain previously recognised in profit and loss and accounting for this as a transaction with an equity participant i.e. recognising the credit directly in equity (referral 1).

The restatement (in both the AFS and interims) must be effected in accordance with IAS 8, and in particular paragraphs 42 and 49 thereof.

(the “**amended corrective action**” decision or “**restatement decision**”)

14. The amended corrective action accordingly removed reference to FRIP referral 3, required a restatement (as opposed to a reissue of the financial statements), and no longer required Trustco to publish a SENS announcement (as the JSE would publish such SENS announcement).
15. Trustco was aggrieved by the decisions of the JSE, the decision / finding that Trustco had not complied with IFRS and by the amended corrective action directive / decision as directed by the JSE. Trustco contended that its accounting complied with the IFRS. Trustco accordingly applied in terms of section 230 of the FSR Act to this Tribunal for a reconsideration of the decisions of the JSE.
16. On 22 November 2021, the Tribunal (constituted of a panel different to the present panel), dismissed the aforesaid application for reconsideration and



directed Trustco to pay 50% of the costs of the JSE (as more fully set out in the tribunal decision **Trustco / JSE - JSE1/2021** of 22 November 2021 (the “**first Tribunal decision**”)).

17. On 3 December 2021, the JSE informed Trustco in writing that it was considering the suspension of the listing of Trustco’s securities due to its failure and refusal to comply with the JSE Listings Requirements, and with the decisions of the JSE and the Tribunal (in the first Tribunal decision). The JSE afforded Trustco an opportunity in terms of paragraph 1.7 of the JSE Listings Requirements to make written representations to the JSE why the suspension should not be effected.

18. After receipt and consideration of the representations made by Trustco, the JSE, in a letter dated 13 December 2021, conveyed its decision to Trustco in the following terms:

18.1. ... [The] JSE has decided that Trustco has failed to comply with the Listings Requirements and the JSE decision and in so doing, has disregarded the FST decision.

(the “**non-compliance decision**”)

18.2. The JSE has also decided that the appropriate recourse for Trustco’s aforementioned failures is to suspend the listing of its securities, as this would further the objectives of the FMA [Financial Markets Act, Act 19 of 2012] and would manifestly be in the public interest.

(the “**suspension decision**”)

19. Trustco was further informed that if it wanted to object to the decision of the JSE to suspend the listing of Trustco's shares it could do so in accordance with paragraph 1.4 of the JSE Listings Requirements.
  
20. On 14 December 2021, Trustco demanded in writing that the JSE provide the resolutions and minutes in terms of which the following decisions (*inter alia*) had been taken: the decision regarding the amended corrective action, the decision to consider the suspension of the listing of the Trustco securities, the suspension decision *et cetera*. Trustco stated *inter alia* that "... [Any] answer which has the effect that the JSE is not willing to provide the requested document will entitle Trustco to accept that no duly constituted meeting was held, and no lawful decision was ever made ...". In essence, the lawfulness of the decisions of the JSE were challenged (which later evolved into an argument regarding the authority of the person who took the decisions).
  
21. On 15 December 2021, the JSE confirmed that the relevant decisions had been taken by Mr Andre Visser ("**Mr Visser**") in his capacity as director of the Issuer Regulation Division of the JSE, acting in accordance with authority delegated to him by the board of the JSE in terms of section 68 of the Financial Markets Act, Act 19 of 2012 (the "**FMA**"). The JSE stated further that the decisions taken by the JSE "... stand and are operative until they are set aside or stayed ..." and that Trustco was "... required to comply with the decisions notwithstanding its views of the authority of the individual who took the decisions."

22. Trustco objected to the suspension decision on 17 December 2021, setting out its objections in a letter of that date which further incorporated objections / reasons from a letter dated 9 December 2021. In correspondence dated 26 January 2022, Trustco indicated that it further persisted with its grounds of objection set out in its letter of 17 December 2021 and 13 January 2022.
23. The JSE states that it understood Trustco to have given the assurance that it would in fact restate its financial statements, as had been directed, by 31 January 2022.<sup>6</sup> The JSE accordingly held off deciding Trustco's objections until Trustco published its 2021 annual financial statements.
24. When Trustco published its annual financial statements on 31 January 2022, Trustco did not restate them as had been required by the JSE and did not take the 'amended corrective action'.
25. On 31 January 2022, Trustco applied to the Gauteng Division of the High Court seeking a review and setting aside of the first Tribunal decision (the "**High Court review application**").
26. On 14 February 2022, the JSE dismissed Trustco's objections.
27. Trustco had previously indicated that it intended to seek a suspension of the 'suspension decision'. For this reason, the JSE indicated that it would not

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<sup>6</sup> Whilst there was argument presented at the hearing of the reconsideration application about whether Trustco had given this assurance or not, it is unnecessary for us to decide this for purposes of arriving at our decision in this matter.

immediately implement the suspension decision but would hold off such implementation until 11 March 2022 (to allow proceedings of first instance to run their course) subject to Trustco bringing certain legal proceedings within certain time frames.

28. On 18 February 2022, Trustco launched the present reconsideration application.
29. On the same day, 18 February 2022, Trustco brought an application in terms of section 231 of the FSR Act for the suspension of the decisions which form the subject matter of the present reconsideration application – namely the ‘non-compliance decision’ and the ‘suspension decision’. (the “**section 231 application**”) (Section 231 of the FSR Act provides as follows: “*Neither an application for reconsideration of a decision, nor the proceedings on the application, suspends the decision of the decision-maker unless the tribunal so orders.*”)
30. As it was uncertain whether the Tribunal would determine the ‘section 231 application’ by 11 March 2022, on 23 February 2022 Trustco launched an urgent application in the Gauteng Division of the High Court seeking an interim interdict (the “**High Court urgent application**”) in effect interdicting and restraining the JSE from implementing the suspension decision, the first Tribunal decision, and the ‘amended corrective action’ decision (restatement decision), pending the outcome of the High Court review application. The High Court urgent application was set down for 8 March 2022. On receipt of the High Court urgent application, the JSE agreed not to implement the suspension

decision (i.e. not to suspend Trustco's listing) until such time as the Chairperson of the Tribunal had issued a ruling in terms of the section 231 application.<sup>7</sup>

31. After the exchange of papers between the parties, the filing of heads of argument and authorities, on 13 July 2022 the Chairperson of the Tribunal, having found that the section 231 application was in truth and in fact an application for the suspension of the order made in the first Tribunal decision, ruled that the application to suspend the order made in the first Tribunal decision is declined.
32. Trustco set the High Court urgent application down for hearing and on 8 August 2022 and was granted an interim interdict as sought in the High Court urgent application pending the outcome of the High Court review application.
33. The present reconsideration application was heard virtually on 21 October 2022.
34. On 7 November 2022, Trustco's High Court review application was dismissed with costs, Her Ladyship Justice Potterill presiding.

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<sup>7</sup> The information in this paragraph is derived from the judgement of Her Ladyship Justice Jansen van Nieuwenhuizen dated 8 August 2022, which is included in a hyperlink in the 31 January 2022 financial statements of Trustco furnished to the tribunal panel electronically by the attorney of record for Trustco.

**GROUNDS ADVANCED BY TRUSTCO IN THE PRESENT APPLICATION:**

35. In its heads of argument, Trustco advances three grounds in support of its reconsideration application, namely:<sup>8</sup>

- 4.1. the decision to suspend is premature;
- 4.2. the Suspension Decision is being implemented for an ulterior purpose;
- 4.3. a suspension does not comply with the empowering legislation.

36. At the commencement of the hearing of the present application we enquired from counsel on behalf of Trustco whether Trustco relied on any further grounds. Counsel for Trustco submitted that in addition to the three grounds referred to above, the only further ground Trustco persisted with was the 'authority point'.<sup>9</sup>

**FIRST GROUND: "A suspension is premature"**

37. Trustco bases this argument predominantly on section 235 read with section 236 of the FSR Act.

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<sup>8</sup> Trustco heads of argument, paragraph 4.

<sup>9</sup> This ground is set out under the heading "The Decision Maker Lacks Authority" in Trustco's grounds for application for reconsideration.

38. Section 235 of the FSR Act reads:

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.

39. Section 236 of the FSR Act reads:

- (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.

40. Trustco places special emphasis on section 236(1)(a) read with section 236(2) of the FSR Act. Trustco's argument includes the following:

40.1. Trustco has in terms of section 235 of the FSR Act instituted review proceedings to review and set aside the first Tribunal decision and the decision of the JSE which was the subject of the first Tribunal decision

(namely the 'amended corrective action' decision / 'restatement decision' of the JSE) (in terms of the High Court review application).

40.2. The High Court review application is pending.

40.3. Section 236(1)(a) of the FSR Act prevents the JSE from filing the order in the first Tribunal decision with the registrar of the court (which would give it the effect of an enforceable civil judgment in terms of section 236(2) of the FSR Act) until the review proceedings are disposed of.

40.4. Accordingly, the first Tribunal decision does not have the effect of a civil judgment and cannot be enforced as an order given by a court.

40.5. In the circumstances, until the High Court review is finalised, the Tribunal Order cannot be enforced.

41. In our view, the first ground is without merit for the following reasons *inter alia*.

41.1. First, none of the provisions relied upon by Trustco prevent or prohibit the JSE from taking, making or implementing the decisions which are the subject matter of the present application, namely the 'non-compliance decision' and the 'suspension decision'. The provisions of the FSR Act do not render the aforesaid decisions premature.



- 41.2. Second, the JSE has to date not sought to file the order granted in the first Tribunal decision with the registrar (as contemplated in section 236 of the FSR Act). The relevant order in the first Tribunal decision reads the “*application for reconsideration is dismissed*”. The JSE does not seek to enforce the order in the first Tribunal decision as if it were an order of court. The fact that the JSE has not made the order in the first Tribunal decision enforceable in terms of the provisions of section 236 of the FSR Act is no bar to the JSE taking the decisions that are the subject of the present reconsideration application.
- 41.3. Third, the decisions that are the subject of both the first Tribunal decision and the present application stand until set aside. Trustco itself has demonstrated this point by first bringing the section 231 application and thereafter the High Court urgent application. The decisions of the JSE are valid and effectual. So too is the first Tribunal decision. (**MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd** 2014 (3) SA 481 (CC) at par [101]) The JSE is not in law required to desist from implementing the decisions because Trustco has brought the High Court review application. (**City of Tshwane Metropolitan Municipality v Afriforum and Another** 2016 (6) SA 279 (CC) at par [74])
- 41.4. Fourth, the decision which is the subject of the first Tribunal decision has been reconsidered by this Tribunal and the application of Trustco on reconsideration has been dismissed. The first Tribunal decision (as is the case with the present decision) is the result of a reconsideration application which involves a reconsideration of the matter exercising

'appeal jurisdiction'<sup>10</sup> in the fullest sense. (**MET Collective Investments (RF) (Pty) Ltd v Financial Sector Conduct Authority** (Case number 23/2019) at par [23]) The amended corrective action decision (restatement decision) has been reconsidered by this Tribunal in prior proceedings and such decision stands. Trustco brought the High Court review application seeking to review and set aside the first Tribunal decision and the decision of the JSE which was the subject of the first Tribunal decision. This too has been dismissed.

41.5. Fifth, the interpretation that Trustco seeks to place on section 236 of the FSR Act is not sustainable. Parties are not required to wait 180 days after a Tribunal decision to see whether the dissatisfied party wishes to bring a review application, nor does section 236 of the FSR Act in express terms prohibit the JSE from implementing its decision, as was suggested in argument on behalf of Trustco. This is not what section 236 of the FSR Act states, neither is it a sensible interpretation. (**Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at par 18)

42. The argument on behalf of Trustco that it was not possible to implement the amended corrective action in the period between the first Tribunal decision and the date that the JSE made the non-compliance decision loses sight of the

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<sup>10</sup> Inverted commas used as a reconsideration application is not an appeal, but a reconsideration by the Tribunal of the matter that was decided before the decision maker, and is concerned with the result more than the reasons.

relevant timeline in this matter. Without going into detail, we point out that Trustco was directed to take the amended corrective action (to restate its financials) on 11 November 2020 already. Further, the JSE had indicated that whilst practical difficulties were no excuse not to comply with the amended corrective action that if an unequivocal and irrevocable undertaking was given the JSE would “*reasonably accommodate [Trustco] in its timeline for the implementation of the JSE’s Decision.*” Trustco has not made out a case for impossibility. The fact of the matter is that the non-compliance persists.

43. The argument on behalf of Trustco that because the suspension decision was taken in December 2021, the JSE ought to have upheld its objection and commenced the process afresh loses sight of the fact that the final decision of the JSE was taken on 14 February 2022, that the JSE held off deciding Trustco’s objections until Trustco published its 2021 annual financial statements at the end of January 2022, and that, in truth and in fact, it is common cause that Trustco did not implement the amended corrective action and did not restate its financials.
44. We find that neither the suspension decision nor the non-compliance decision were premature.

**SECOND GROUND:** *“the Suspension Decision is being implemented for an ulterior purpose”* and **THIRD GROUND:** *“a suspension does not comply with the empowering legislation”*

45. We deal with the ‘second ground’ and ‘third ground’ together as there is an overlap between these grounds.
46. With reference to the ‘second ground’, counsel for Trustco submit that the JSE does not meaningfully assert that any of the objectives in section 2 of the FMA will be fulfilled by a suspension of Trustco’s listing, nor does the JSE meaningfully contend that a suspension is in the public interest. Further, 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 which is not an objective of the FMA, the JSE Listings Requirements or the FSR Act.
47. The argument of Trustco in respect of the ‘second ground’ is that the JSE could not take the suspension decision unless this was done in terms of the FMA read together with the JSE Listings Requirements. Trustco states that this is not the case but that the JSE seeks to implement the suspension decision for some other (undisclosed) ulterior purpose (and not for a legitimate purpose).
48. In respect of the third ground, Trustco contends that the suspension decision is not in compliance with the empowering legislation.

49. Section 12(1) of the FMA provides:

(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.

50. Section 2 of the FMA provides:

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

51. The FMA requires the JSE to make listing requirements that prescribe amongst others the manner in which trading in listed securities may be suspended. (FMA section 11(1)(a) and 17(2)(m))

52. Paragraph 1.1(a) and (f) of the JSE Listings Requirements, under the heading “*General powers of the JSE*” provide:

**General powers of the JSE**

- 1.1 Subject to the provisions of the FMA, the JSE has the power:
- (a) to grant, defer, refuse, suspend or remove a listing of securities in accordance with the Listings Requirements;
  - ...
  - (f) to prescribe the circumstances under which a listing of securities shall or may be suspended or removed;
  - ...

53. Paragraph 1.6 of the JSE Listings Requirements provides:

**“Suspension initiated by the JSE**

- 1.6 The JSE may, subject to the suspension provisions of the FMA, and if either of the following applies:
- (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,
- suspend the listing of securities of an applicant issuer and impose such conditions as it may, in the circumstances, deem appropriate for the lifting of such suspension.

54. The amended corrective action decision (restatement decision) and the first Tribunal decision are valid and effectual (as addressed above already). It is common cause that Trustco has failed to comply with the amended corrective action decision.
55. We find that the suspension decision does further a number of the objects (aims) referred to in section 2 of the FMA. It is further in the public interest. On either of the aforesaid bases, the JSE was entitled to take the suspension decision. We deal with certain of the reasons for this finding below.
56. Accurate financial statements of listed companies are essential to “*ensure that the South African financial markets are fair, efficient and transparent*” (FMA section 2(a)). The markets work only if financial statements are accurate. Trustco’s financial statements are not accurate and do not reflect a fair picture of Trustco’s financial performance. The references in the financial statements (published at the end of January 2022) to the JSE proactive monitoring process, the first Tribunal award, the property and loan issues *et cetera*, and the publication of SENS announcements made by Trustco do not comply with the restatement decision of the JSE which requires a restatement of the financial statements. Nor do such acts on behalf of Trustco render the decision made by the JSE one made for an ulterior purpose. We agree with the submission on behalf of the JSE that financial statements are ‘living documents’ in the sense that prior years reported results are referred to in subsequent years, and inaccuracies in financial statements perpetuate in subsequent years. The amended corrective action is aimed directly at ensuring the accuracy of the

financial statements of Trustco ensuring fairness, efficiency and transparency in the market. The amended corrective action advances the aforesaid objective of the FMA (section 2 (a) of the FMA) The JSE does not seek to implement the suspension decision for an ulterior purpose.

57. The suspension decision is the only effective way in which to protect the market and investors. The JSE decided that the financial statements did not comply with the IFRS. The Tribunal in the first Tribunal decision agreed. For Trustco's shares to trade as normal despite the aforesaid decisions erodes market confidence and undermines the regulatory ecosystem's authority. The JSE is not merely entitled to act, it must act. (FMA section 10) The JSE is obliged to protect investors.<sup>11</sup> The suspension decision achieves the aim of *increasing "confidence in the South African financial markets"* (section 2 (b) of the FMA) and also promotes *"the international and domestic competitiveness of the South African financial markets and of securities services in the Republic"*. (section 2 (e) of the FMA)
58. The suspension decision further promotes *"the protection of regulated persons, clients and investors"* (section 2 (c) of the FMA) as it prevents persons acting on the strength of misleading financial statements. Transparency and accountability are key to an effective market.

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<sup>11</sup> JSE Listings Requirements (i): *"to ensure the existence of a market for the raising of primary capital, an efficient mechanism for the trading of securities in the secondary market, and to protect investors ..."* (our emphasis) see also: further 'General Principles' (iii) and vi)



59. We agree with the submissions on behalf of the JSE that non-compliance with the relevant decisions profoundly threatens the regulatory system of the JSE (and we paraphrase the points made):

59.1. Trustco is required to comply with its duties and must do so timeously.

59.2. The JSE is obliged to act where there is non-compliance. (FMA section 10) Failure to ensure timeous compliance has the potential to cause profound harm to market participants.

59.3. Enforcing compliance with the JSE Listings Requirements is the JSE's primary mechanism for regulating its market in the public interest. Compliance with its orders promote the market's integrity and prevents listed companies simply following their own views to the prejudice of the investing public.

59.4. Non-compliance is a serious breach. 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.

60. As indicated above, we further find that the suspension decision is in the public interest: the public interest favours market transparency and accountability, which is what the suspension decision seeks to enforce; the public interest requires effective and authoritative regulators acting in the public's interest, when there is a breach of its rules; the suspension decision is in the public

interest, and an effective action to take - listed companies cannot be permitted to freely trade with inaccurate financial statements.

61. Trustco also failed to comply with the JSE Listings Requirements by *inter alia* not complying with IFRS in reporting its financial information. The JSE was entitled to take the amended corrective action decision / restatement decision (8.65 of the JSE Listings Requirements). Trustco has failed to comply with the aforesaid decision.
62. We find that neither the non-compliance decision nor the suspension decision have been implemented for an ulterior purpose. The suspension decision is in the public interest, and it promotes the objectives of the FMA Act. Further, the non-compliance decision and the suspension decision comply with the empowering legislation.

**FOURTH GROUND: “The decision maker lacks authority”**

63. Trustco contends that Mr Visser lacks authority to have made the relevant decisions. The argument is advanced based on the delegation of authority which references section 58 of the Securities Services Act, 2004, and section 72 of the Companies Act, 2008. Trustco contends that section 72 of the Companies Act, 2008, authorises the delegation of authority by a board of directors to a committee of the board. Trustco contends (a) is not apparent that Mr Visser is the head of the Issuer Division as contemplated by the resolution; (b) a committee cannot comprise of only one person; (c) clause 12.11.1 of the MOI of the JSE provides that “*all members of these committees must be*

*Directors ...*” and Mr Visser is not a director of the JSE. Trustco states further that insofar as the board of the JSE sought to resolve to delegate its authority and powers under section 68 of the FMA to Visser, such resolution is *ultra vires* the MOI of the JSE and the Companies Act, 2008.

64. We point out that on 15 December 2021 the JSE confirmed that Mr Visser took the relevant decisions acting in accordance with authority delegated to him by the board of the JSE in terms of section 68 of the FMA.
65. Section 68(1) of the FMA provides that: “*A market infrastructure may delegate or assign any function entrusted to it by this Act or its rules to a **person or group of persons, or a committee** approved by the controlling body of the market infrastructure ...*”. (our emphasis)
66. Paragraph 12.11.1 of the JSE’s MOI and section 72 of the Companies Act, 2008, regulate delegations to “*committees*”. They do not apply to a delegation to a person, and accordingly do not affect the authority of Visser. The JSE further has a statutory entitlement in terms of section 68(1) of the FMA. Further in terms of section 3(3) of the FMA: “*Despite any other law, if there is an inconsistency between any provision of this Act and a provision of any other national legislation, except the Financial Intelligence Centre Act and the Financial Sector Regulation Act, this Act prevails.*”
67. The JSE was entitled to and did delegate authority to Mr Visser. This ground is without merit.

**COSTS:**

68. Section 234(2) of the FSR Act provides that the Tribunal may in exceptional circumstances make an order of costs. Both parties initially sought costs, including costs of two counsel, although Trustco retracted such request in argument in reply. Both parties, at least until argument in reply, must have held the view that there were exceptional circumstances in this matter justifying a cost order.
69. We find that the following (*inter alia*) constitutes exceptional circumstances. Trustco alleged bias in its application both as a ground for reconsideration and in support of a cost order against the JSE. In our view the allegations of bias made by Trustco in support of a cost order do not favour the grant of a cost order in favour of Trustco but rather against it. These are serious allegations. An allegation of bias must be substantiated by a proper factual basis, must not be based on mere speculation and conjecture, and must be proved by the party alleging bias. There is no evidence of bias on the part of the JSE, and these allegations ought not to have been made. Trustco in fact withdrew this ground at the hearing of the matter, conceding that there was no evidence to support such argument. In addition, Trustco persisted with the ground of lack of authority of Mr Visser in these proceedings, having not persisted with such ground in the High Court review application, it having petered out. On a conspectus of the evidence, the conduct of Trustco warrants a finding of exceptional circumstances.

70. In our view it would be fair to direct Trustco to pay half of the costs of the JSE in connection with the present proceedings.

**ORDER:**

71. We accordingly grant the following order:

71.1. The reconsideration application is dismissed.

71.2. The applicant is directed to pay half of the costs of the respondent, such costs to include the costs of two counsel to be taxed by the Taxing Master or a taxing practitioner agreed to by the parties.

Signed on behalf of the Tribunal panel.



**C Woodrow SC**

**18 November 2022**