IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 11121/2022

In the matter between:

TRUSTCO GROUP HOLDINGS LIMITED	Applicant
and	
JSE LIMITED	First Respondent
THE FINANCIAL SERVICES TRIBUNAL	Second Respondent

APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1. Trustco approaches this court for urgent interim relief to prevent the JSE from enforcing a decision to suspend its listing thereby in effect suspending, not only Trustco's right to trade its shares on the JSE, but also the right of the public at large to buy and sell their shares.

2. This decision was taken by Mr AG Visser ("**Visser**") within the JSE's rank who had no authority to take such a decision. The enforcement of such an illegal decision will, no doubt, cause irreparable harm to Trustco.

3. Despite having no answer to the illegality of Visser's actions, the JSE forged ahead and relies on the decision made by the Financial Services Tribunal ("**the**

Tribunal") in support of its persistence to implement the illegal decision. But, it is that very decision of the Tribunal, which forms the subject matter of a pending review before this court ("**the Review Application**"). And, as we make plain below, the Tribunal 's decision is marred with illegality and vitiating irregularity as well – it is bound to be set aside on clear an indisputable grounds being:

3.1. Visser's lack of authority to have made the JSE's decision;

3.2. the JSE's lack of power to order a restatement of the Financials;

3.3. the Tribunal itself was improperly constituted, and lacked desperately needed expertise. As a natural consequence of lacking expertise, the Tribunal, perhaps understandably yet not permissibly, could not consider the wide appeal which served before it. It was simply unable to deal with the intricate financial and accounting issues at hand; and

3.4. due to the lack of expertise the Tribunal overlooked pertinent considerations and took into account irrelevant factors including reaching for the "due deference principle" that is applicable in review proceedings, but has no role to play in the appeal proceedings which served before the Tribunal.

4. Accordingly, this is an application to interdict the JSE from suspending Trustco's listing on the Johannesburg Stock Exchange.[1] The interdict is not sought indefinitely, but only until a Review Application is finally determined.[2] The papers

[1] NoM p 001-1 and FA p 001-9, par 8
[2] FA p 001-9, par 9

and the parties heads of argument in the Review Application have been filed[3] and the matter is now ripe for hearing.[4]

5. The circumstances that necessitate this application are as follows:

5.1. Trustco issued its unqualified audited financial statements for the 2018 and 2019 financial years ("**the Financials**"). The Financials accord with the specialist advice of a plethora of IFRS and IAS experts – each of whom are accredited and approved by the JSE;

5.2. the Financials were approved by Trustco's shareholders;

5.3. 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. The FRIP investigation was in respect of three transactions ("**the Transactions**");[5]

5.4. the FRIP disagreed with Trustco's accounting treatment of the Transactions;[6]

5.5. 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;[7]

5.6. Trustco objected to the JSE's finding and the JSE issued an amended decision in November 2020 which, for all intents and purposes, is the

[3] Review Application p 008-1
[4] SFA p 010-3, par 11
Although not on the papers, the JSE's heads of argument in the review were duly filed on 18 July 2022
[5] Review Application FA p 008-28, par 60
[6] Review Application FA p 008-29, par 62
[7] ibid

same as the initial decision. In sum, the JSE ordered Trustco to restate the Financials ("**the JSE Decision**");[8]

5.7. the decision of the FRIP was appealed to the Tribunal (the second respondent) during 2021;

5.8. on 21 November 2021, the Tribunal dismissed Trustco's appeal and upheld the FRIP's decision ("**the Tribunal Decision**");[9]

5.9. 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**");[10]

5.10. on 14 February 2022, the JSE informed Trustco that it intended to suspend Trustco's listing unless some action was taken on or before 11 March 2022;[11]

5.11. on 18 February 2022, Trustco applied to the Chairperson of the Tribunal for a suspension and reconsideration of the JSE's decision to suspend Trustco's listing in terms of section 230 and 231 of the Financial Sector Regulation Act 9 of 2017 ("**the FSR Act**");[12]

[8] Review Application FA p 008-30, par 63
[9] FA p 001-11, par 18 and Annexure FA1 p 001-21
[10] Review p 008-1
[11] FA p 001-9, par 10
[12] FA p 001-9, par 11

5.12. given the possibility that the Tribunal would not have made a decision before the 11 March 2022 deadline, Trustco also launched this application on an urgent basis on 23 February 2022;[13]

5.13. the JSE then agreed not to suspend Trustco's listing until a week after the Chair of the Tribunal had made a ruling of Trustco's application;[14]

5.14. as the JSE's undertaking had negated any immediate urgency, the matter was removed from the urgent court roll in the week of 9 March 2022;[15]

5.15. on 13 July 2022, the Chairperson of the Tribunal made a ruling refusing Trustco's application;[16]

5.16. the JSE then informed Trustco that it would suspend Trustco's listing on 29 July 2022.[17] This extended period was agreed between the parties in order to permit the filing of heads of argument.[18]

6. Having outlined the history of the matter, we now turn to consider:

6.1. the preliminary issues of urgency and *lis pendens* raised by the JSE;

6.2. Trustco's Review Application and the basis on which the Tribunal Decision is sought to be set aside;

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[13] FA p 001-9, par 12 read with SFA p 010-1, par 3
[14] SFA p 010-2, par 4 and 7 read with Annexure RB1 p 010-6
[15] SFA p 010-3, par 9
[16] SFA p 010-2, par 5 and p 010-3, par 12 read with Annexure RB2 p 010-10
[17] SFA p 010-2, par 6
[18] SFA p 010-4, par 13 and 14 read with Annexure RB3 p 010-14

6.3. the regulatory framework under which the JSE may impose a suspension of an entity's listing; and

6.4. finally, we deal with the merits of the interdict sought and whether a case has been made out for it.

PRELIMINARY ISSUES

7. The consequence of the recent developments in this matter render the *in limine* points raised in the answering affidavit irrelevant. In particular the matter of urgency and the defence of *lis pendens*.

Urgency

8. The question of urgency, which was contested in the answering affidavit on the basis of Trustco having the ability to obtain substantial redress before the Tribunal,[19] is now beyond doubt.

9. The purpose of this application is to temporarily prevent Trustco's listing from being suspended pending the final determination of the pending review. In light of the Tribunal's refusal of Trustco's application, after 29 July 2022, and absent the relief sought from this Court, Trustco's listing will be suspended. Trustco cannot thereafter obtain the substantial relief that it seeks in this application.

10. Any assertion by the JSE that Trustco may seek alternate kinds of relief in due course misses the point of this application: Trustco seeks to prevent its listing from being suspended at all. Once a suspension is effected, the proverbial horse

[19] AA p 003-20, par 63 to 68

will have bolted, and the very relief which Trustco seeks will be impossible, and in any event of no significance.

11. The harm that Trustco seeks to guard against cannot be obtained in due course. This application is urgent as a result.

Lis pendens

12. The JSE points to the applications in terms of section 230 and 231 of the FSR Act in support of its contention that *lis pendens*,[20] this application cannot be entertained.

13. While that may have been true when this application was initially brought, there are currently no applications pending before the Tribunal. That the Tribunal's Decision is in force and effect is evident from:

    13.1. the Tribunal Chairperson's refusal to suspend it;[21] and

    13.2. the JSE's stated intention to suspend Trustco's listing after 29 July 2022.[22]

14. Accordingly, the JSE's *lis pendens* defence no longer holds true and is without merit or implication as a result.

THE REVIEW APPLICATION

[20] AA p 003-22, par 72
[21] SFA Annexure RB2 p 010-13, par 24
[22] SFA Annexure RB3 p 010-15

15. At the very heart of the dispute between the parties is the JSE's assertion that the Financials did not comply with IFRS.[23]

16. The JSE has never alleged fraud, *mala fides* or any nefarious dealing whatsoever in Trustco's accounting treatment of the Transactions.[24] The JSE has also been unable to assert precisely which, if any, of the IFRS principles it alleges Trustco has breached.[25] Instead, what is in dispute between the parties concerns a difference of opinion in respect of the proper interpretation and application of IFRS principles.[26]

17. The opinion of the JSE is shared by the FRIP. Both conflict with the opinion of Trustco and its specialist accredited advisors. It is for this reason that Trustco sought to refer the dispute to the Tribunal – as an expert panel in matters of accounting, accounting standards and IFRS principles – for final determination.

18. The hearing that Trustco received, and the Tribunal Decision that followed it, infringed Trustco's right to just administrative action for a number of reasons. When considered, it is clear that these reasons negate the Tribunal Decision and render it liable to be reviewed and set aside. The Review Application has strong prospects of success as a result. We briefly set out Trustco's grounds of review.

The authority of the maker of the JSE's decision[27]

[23] See FA Annexure FA1 p 001-22, par 3 (recorded in the Tribunal Decision)
[24] FA p 001-19, par 50
[25] Ibid
[26] RA p 004-6, par 9.5 and p 004-12, par 29
[27] Review Application p 008-38

19. The JSE's Decision was made by a Mr AF Visser. Mr Visser is not a director of the JSE. The JSE's memorandum of incorporation states expressly states that persons to whom authority is delegated must be directors of the JSE.[28]

20. In making the JSE Decision without being properly authorised, Mr Visser and in turn the JSE, acted unlawfully. The exercise of a power in unlawful circumstances carries with it the consequence dictated by the Constitutional Court in New Clicks:[29]

> *There were two overarching principles which formed the basis of judicial review. First, that the functionaries or bodies exercising delegated powers are confined to the powers vested in them by the empowering legislation. Should they exceed such powers, their actions are illegal, and invalid.*

The JSE's power to order a restatement[30]

21. The JSE contends that its power emanates from paragraph 8.65 of the Listings Requirements.[31] It states that:

> *"The JSE and SAICA have formed a panel to be known as the Financial Reporting Investigations Panel to consider complaints and to advise the JSE in relation to compliance by issuers with IFRS and the JSE's required accounting practices (in terms of the Listings Requirements). If, after receiving advice from the FRIP, the JSE finds that an issuer has not complied with any of the above, the JSE will be able, in its sole discretion:*
>
> *(a) to censure such issuer in accordance with the provisions contained in Section 1 of the Listings Requirements; and*

[28] Review Application p 008-38, par 88.3
[29] Minister of Health NO v New Clicks SA (Pty) Ltd (TAC as Amici Curiae) 2006 (2) SA 311 (CC) at par 101
[30] Review Application p 008-38
[31] Ibid, par 90

(b) ***instruct such issuer to publish or re-issue any information the JSE deems appropriate****."*

22. The JSE Decision orders Trustco to restate the Financials, however, the JSE does not have the power to require that "corrections" or restatements be made. It may direct only that information be "published" or "re-issued'.

23. Pursuant to the JSE Decision:

23.1. the JSE published a SENS announcement informing the market that the JSE took issue with its financial treatment of the Transactions and the consequence thereof;[32]

23.2. Trustco issued a SENS announcement informing the market that the JSE took issue with its financial treatment of the Transactions;[33]

23.3. Trustco recorded the JSE's concerns in its Financials for the period ended 31 January 2022.[34]

24. Any "information" pertinent to the JSE Decision has plainly been "published" or "re-issued", not once, not twice, but three times. This accords with the express powers conferred on the JSE. To the extent that the JSE seeks to force Trustco to restate the Financials – that power simply does not exist.

25. The judgment of Chaskalson CJ in New Clicks is instructive here too:

"There were two overarching principles which formed the basis of judicial review. First, that the functionaries or bodies exercising delegated powers are confined to the

[32] FA p 001-12, par 23 and Annexure FA5 p 001-60
[33] FA p 001-18, par 46.1 and Annexure FA8 p 001-72
[34] Annexure FA9 p 001-75

powers vested in them by the empowering legislation. Should they exceed such powers, their actions are illegal, and invalid."

26. In seeking to enforce a power that has never vested in the JSE under any "empowering legislation", be it primary, subordinate, delegated or otherwise, the JSE's Decision defies the legality standard. The JSE Decision stands to be set aside as a result.

27. By upholding the JSE's Decision in circumstances where it is illegal, the Tribunal merely perpetuated the illegality. Accordingly, the Tribunal Decision stands to be set aside on the same basis.

Composition of the Tribunal's panel[35]

28. It is apparent from a reading of the Tribunal Decision that the panel that heard Trustco's reconsideration was comprised of three lawyers:[36] a retired judge,[37] a senior counsel of the Pretoria Bar[38] and an attorney[39] ("**the Panel**").

29. Section 220 of the FSR Act mandates that the members of the Tribunal must consist, at a minimum, of:

    29.1. two legal experts;[40] and

    29.2. two financial experts.[41]

[35] Review Application p 008-42
[36] See Annexure FA1 (Tribunal Decision) p 001-21
[37] Review Application FA p 008-32, par 68.1
[38] Review Application FA p 008-33, par 68.3
[39] Review Application FA p 008-33, par 68.3
[40] s 220(2)(a)
[41] s 220(2)(b)

30. Section 224 of the FSR Act then stipulates that a panel arranged to hear a given matter must consist of:

30.1. at least one legal expert;[42] and

30.2. two other panel members.[43]

31. Even at its most basic composition, the FSR Act envisages that at least one financial expert will hear a given matter. That basic composition is evidently designed to ensure that the panel as a whole is equipped to deal with both matters legal and financial in any matter before it. This accords with the essential function of the Tribunal: to reconsider, as an appellate body, decisions made by financial regulators.[44] It follows ineluctably that the purpose of the FSR Act is to ensure expertise in the reconsideration of financial decisions.

32. The inability of the Panel to give effect to the purpose of the FSR Act is a reviewable irregularity. This was recognised by the Constitutional Court in DA v President of the RSA:[45]

> *"The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred."*

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[42] s 224(4)(a)
[43] s 220(4)(b)
[44] FSR Act preamble and s 219(1)
[45] 2013 (1) SA 248 (CC) at par 36

33. While the legal acuity of each of the Panel members is beyond reproach, its accounting expertise, knowledge and familiarity with IFRS and other important financial standards was lacking. At the outset of the hearing, the chairperson admitted a lack of audit related knowledge and recognised the difficulty that the Panel had in navigating the applicable accounting standards.[46] Plainly the Panel's inexperience and lack of familiarity with IFRS and other accounting standards makes its determination of Trustco's reconsideration irrational.

34. The importance of a properly qualified panel bringing its expertise and judgment to bear in making a decision is well established. In Bato Star,[47] Justice O'Regan held:

> *"What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the* ***identity and expertise of the decision-maker****, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected."*

35. The primacy of a qualified decision maker was reiterated by Rogers J (as he then was) JH v HPCSA,[48] where the learned judge held that a medical tribunal was:[49]

> *"… obliged to bring its own expertise and professional judgment to bear on the case."*

[46] Review Application FA p 008-42, par 105
[47] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism 2004 (4) SA 490 (CC) at 45; See also Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service 2020 (2) SA 19 (SCA)
[48] JH v Health Professions Council of SA 2016 (2) SA 93 (WCC)
[49] At par 58

36. Absent a decision maker entirely *au fait* with IFRS principles and accounting standards, a competent decision was an impossibility. Given the evident lack of accounting experience in the Panel – as acknowledged by the Panel itself – Trustco's right to procedural fairness has unquestionably been infringed.

37. In light of the intricacy of the relevant accounting standards and the interplay between them, a firm grasp of the relevant account principles was (and remains) imperative to the proper determination of this matter. Without that expertise, the hearing was bound to be procedurally unfair and the Tribunal Decision was bound to be arbitrary and unreasonable.[50]

Pertinent considerations overlooked by the Tribunal[51]

38. Trustco's founding affidavit highlights a number of vitiating irregularities made by the Panel which evince unreasonableness and arbitrariness. In particular:

    38.1. it conflated the requirement of disclosure and the financial treatment of a transaction;[52] and

    38.2. it misinterpreted the Listings Requirements and misapplied IFRS.[53]

39. Trustco's affidavit details how the Panel arbitrarily neglected relevant considerations in respect of each transaction. The failure to consider these grounds is, in and of itself, a reviewable irregularity. The failure to take account

[50] Review Application p 008-43, par 108
[51] Review Application p 008-42
[52] Review Application FA p 008-44, par 111 to 113
[53] Review Application FA p 008-45, par 114 to 115

of pertinent considerations was recognised as irrational by Yacoob ADCJ in the Constitutional Court in DA v President of the RSA:[54]

> *"If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole."*

40. As we have said above, the Tribunal's purpose is to determine the correctness of decisions made by financial regulators. The Tribunal's statutory mandate is prescribed by the FSR Act and requires that it "reconsider decisions by financial regulators".[55] In this capacity, the Tribunal sits as a body of appeal and is required to reconsider the decision in question. Accordingly, it must reconsider the matter afresh in light of all of the facts and circumstance and come to a reasoned decision.

41. The failure to take account of considerations that have a material bearing on the correct outcome of a matter undermines the Tribunal's very purpose. This failure is directly linked to the power conferred on the Tribunal and its essential function to reconsider decisions by financial regulators.

Irrelevant factors considered by the Tribunal[56]

42. In coming to the Tribunal Decision, the Panel gave 'due deference' to the expert report of Prof Maroun while rejecting the expert report of Mr Njikazana.[57] Having

[54] DA v President of the RSA 2013 (1) SA 248 (CC) at par 39
[55] See s 230 read with preamble to the Act
[56] Review Application p 008-42
[57] Review Application FA p 008-46, par 118

done so, the Panel accepted (again on the strength of ‘due deference’) the report and findings of the FRIP.

43. The reliance on the FRIP investigation, and indeed the ‘due deference’ afforded to it by the Panel, highlights the Panel’s lack of expertise. Without a reasoned and cogent explanation why it relied on the FRIP decision unchallenged, the reliance is arbitrary.

44. In any event, the principle of ‘due deference’ is not one that plays any role in an appeal. To apply ‘due deference’ in an appeal is destructive of the notion of an appeal itself. We consider this example:

    44.1. a court of first instance makes a finding;

    44.2. the unsuccessful party appeals to the full bench;

    44.3. the full bench gives ‘due deference’ to the court a quo and, without itself interrogating the merits, dismisses the appeal;

    44.4. the unsuccessful litigant petitions the SCA;

    44.5. the SCA gives ‘due deference’ to the full bench and, without itself interrogating the merits, dismisses the petition.

45. This example illustrates how the application of the ‘due deference’ principle in appeals would negate the purpose of an appeal court entirely. A court of appeal would, in each and every instance, merely rubber stamp the decision of the lower court.

46. It need hardly be said that this untenable situation is not the purpose of an appeal. It is well established that the purpose of an appeal – be it in the wide or narrow sense – is to conduct a rehearing on the merits.[58]

47. The Tribunal, which is the replacement of the FSB Appeals Board, certainly ought to have fulfilled the function of an appellate body and not relied on the 'due deference' principle. This principle belongs to a body of review – as the Constitutional Court grappled with in Bato Star.[59]

48. The 'due deference' principle had no place in the Tribunal's determination of this matter. In applying it without cogent reason, the Tribunal gave credence to a principle that was (and remains) irrelevant to the determination before it. The unjustified application of the principle is unreasonable in the circumstances, and particularly so in light of the Tribunal's essential function to *reconsider the decisions of financial regulators.*

49. While the JSE did not dispute the bona fides of the transactions under scrutiny in the Financials its entire argument as to why a different accounting treatment should have been employed is one of "substance over form". In doing so it ignored:

    49.1. what the Appellate Division of the Supreme Court said in Duke of Westminister v IR Commissioner[60] (1936) A.C. 1;29 TC 490 said about "substance over form". The Appellate Division embraced the cautionary

[58] See Tikly v Johannes 1963 (2) SA 588 (T); National Union of Textile Workers v Textile Workers' Industrial Union (SA) 1988 1 SA 925 (A); Committee of the Johannesburg Stock Exchange v Chairman, Stock Exchanges Appeal Board, and Another 1992 (2) SA 30 (W)
[59] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism 2004 (4) SA 490 (CC) at 46 – 48
[60] 1936 AC 1,29 TC 490

approach applicable when the doctrine is sought to be employed, by reminding the reader that the doctrine of substance over form was no more than substituting "*the uncertain and crocked cord of discretion for the golden and straight mete wand of the law*."

49.2. Section 76(4) of the Companies Act, 2008 and the Listing Requirements that underpin the business judgment rule. The JSE's own Listing Requirements stipulate that:

> *2.10* *Before the application for a new listing is made, or in the event of a sponsor accepting appointment to act as such to an issuer, the sponsor must report to the JSE in writing that it has obtained written confirmation from the applicant issuer that the directors have established suitable information communication procedures, providing for a flow of information that provides a reasonable basis for the directors to make proper judgements as to the financial position and prospects of the issuer and its group.*
>
> *3.4(b)* *All issuers, other than those who publish quarterly results, must comply with the detailed requirements of paragraph 3.4(b)(i) to (viii). Issuers with a policy of publishing quarterly results must comply with the general principles contained in paragraph 3.4(b)(ix), but may also elect to comply with paragraph 3.4(b)(i) to (viii) on a voluntary basis*
>
> *(i) …*
>
> *(ii) The determination of a reasonable degree of certainty in terms of 3.4(b)(i) is a judgmental decision which has to be taken by the issuer and its directors and is one in which the JSE does not involve itself. This determination may differ from issuer to*

issuer depending on the nature of business and the factors to which they are exposed."

50. Thus, not only was the JSE's decision vitiated by irregularity, but that irregularity was embraced by the Tribunal when it lacked the necessary expertise to recognise and eradicate the irregularity but showed due defence to the irregularity.

SUSPENSION: THE REGULATORY FRAMEWORK

51. The Financial Markets Act 19 of 2012 ("**the FMA**") requires that an exchange must create listing requirements that, inter alia, prescribe when the trading in listed securities may be suspended.[61] The JSE Listing Requirements duly make provision for the suspension of a listing as follows:[62]

> ***Suspension initiated by the JSE***
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> *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 Listing 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…*

52. In a similar manner, section 12 of the FMA provides that:

> ***12 Removal of listing and suspension of trading***

[61] FMA s 11(1)(*a*) and s 17(1)(*m*)
[62] Listings Requirements par 1.6. See also par 1.1(a) and (f)

*(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**.*

...

53. In summary, the JSE is entitled to suspend Trustco's listing only where it establishes that:

53.1. the suspension will further one or more of the objects of section 2 of the FMA; or

53.2. the suspension is in the public interest; or

53.3. Trustco has failed to comply with the Listings Requirements and a suspension is in the public interest as a result.

54. Section 2 of the FMA provides that:

2 Objects of Act

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.

55. The JSE has not established that a suspension of Trustco's listing:

55.1. would further any of the objects in section 2 of the FMA;

55.2. is in the public interest; or

55.3. is as a result of the failure to comply with the Listings Requirements.

56. Having failed to establish any of the mandatory pre-requisites before it could impose a suspension, the JSE has no basis to resist the interdict sought. However, in addition, there is a critical fact that militates against a suspension.

57. That fact is that the public has already been made well aware of the JSE's position and its discontent with the accounting treatment of the Transactions. This because that information is the subject of two SENS announcements[63] and was expressly set out again in Trustco's January 2022 Financials, which were also published on the SENS.[64]

THE INTERDICT

Trustco's right

58. Trustco has an unassailable right to fair and just administrative action. It is this right that Trustco seeks to vindicate in the Review Application.

59. Closely allied to the protection of that right is the protection of Trustco's interests pending the outcome of the Review Application. This right is recognised explicitly in section 236 of the FSR Act, which provides that:

[63] FA p 001-12, par 23 and Annexure FA5 p 001-60 and FA p 001-18, par 46.1 and Annexure FA8 p 001-72
[64] FA p 001-18, par 46 and 47 and Annexure FA9 p 001-75

(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.

60. The FSR Act thus expressly recognises the interim protection of a party's rights after a determination by the Tribunal. Section 236(1)(*b*) of the FSR Act applies squarely in this case. The Review Application has been instituted. Until it is finalised, the JSE is not entitled to have the Tribunal Decision filed or treat it as an order of Court. Until such time as the Tribunal Decision has the force of law, Trustco has the right to protect its interest pending the Review Application.

Harm to Trustco

61. Trustco's primary listing is on the JSE.[65] It is also listed on the Namibian Stock Exchange (NSX) and the OTCQX in New York.[66] It is not denied by the JSE that if Trustco's listing on the JSE is suspended, its listing in both Namibia and New York will be suspended too.[67] A suspension of Trustco's listing will evidently lead to every one of Trustco's listings being suspended.

62. There is no evidence at all to establish under what circumstances this consequence can or would be undone.

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[65] FA p 011-10, par 13
[66] Ibid
[67] AA p 003-36, par 118 to 123

63. In JSE v Witwatersrand Nigel,[68] the Appellate Division considered the power of the JSE to suspend the listing of a company in terms of section 17(3) of the Securities Exchange Control Act. Although there concerned with a temporary suspension, Corbett JA considered the effect of the suspension on the company as follows:[69]

> ***The suspension of the listing of a company's shares, even for a limited period of 30 days or less, can have very serious consequences for the parties concerned*** *and it seems obvious that the Legislature did not intend the president to have carte blanche in this regard.*

64. Trustco's founding affidavit also lists a plethora of categories of people whose interest is certainly not served by a suspension, they include:

    64.1. Trustco's employees – who will be prevented from receiving Trustco shares as part of their compensation or incentive schemes;[70]

    64.2. Trustco's shareholders – who will be unable to trade their shares while those shares face significant devaluation by the suspension;[71]

    64.3. Trustco's international stakeholders – who face an event of default if the shares are suspended.[72]

65. In addition to these classes of people, Trustco itself will be negatively affected:

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[68] 1988 (3) SA 132 (A)
[69] See p 152
[70] FA p 001-15, par 38.1
[71] FA p 001-16, par 38.3
[72] FA p 001-16, par 38.5

65.1. it will suffer irreparable reputational harm and, in turn a share price dip given the market sensitivity;[73]

65.2. its ability to raise capital will be impaired;[74] and

65.3. three pending transactions will be jeopardised.[75]

66. The JSE's glib answer to these allegations is that "there is reputational harm to the entire market, and the knock-on consequences are on a larger scale than any market sentiment against Trustco."[76] However, in light of the fact that the market is well aware of the discord between the parties, this theoretical harm loses all cogency.

Balance of convenience

67. The JSE has threatened to suspend Trustco's listing since March 2019. To date, no suspension has been effected. To the contrary, the JSE has been content for Trustco's shares to be traded while the slew of litigation between it continued. This undermines the JSE's contentions that the market must be protected against buying and selling Trustco's shares.

68. Evidently the JSE realises, as Trustco correctly asserts: that the market is sufficiently well informed of the status of Trustco's business and the JSE's issue with the Financials. If the JSE was actually concerned for 'non-institutional

[73] FA p 001-15, par 38.2
[74] FA p 001-16, par 38.4
[75] FA p 001-16, par 38.6 and 38.7
[76] AA p 003-40, par 142

investors', as it suggests in its affidavit,[77] surely it would not have permitted Trustco's shares to be traded freely in the market.

69. Until Trustco's rights have been finally determined by a court, it serves no purpose to suspend its listing. Should the Review Application succeed and a properly constituted Tribunal agree with Trustco, the JSE Decision will be undone. In that circumstance, there will be no reason for the JSE to have quibbled with the Financials at all, and the JSE's persecution of Trustco will be seen for what it really is: a storm in a teacup.

CONCLUSION

70. In summary of what we have said above:

    70.1. the matter is urgent and requires a determination before 29 July 2022;

    70.2. the lis pendens defence does not require consideration in light of the matters before the Tribunal having been disposed of;

    70.3. Trustco has a pending Review Application which has strong prospects of success and is ripe for hearing as soon as a date can be obtained;

    70.4. The JSE has not complied with the FMA or its own Listings Requirements and has made out no case for a suspension of Trustco's listing; and

    70.5. Trustco has met the requirements for an interim interdict;

[77] AA p 003-42, par 146

71. In the circumstances, Trustco seeks that the interdict be granted as prayed in the notice of motion.

J P DANIELS SC

M J COOKE

20 July 2022