IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: **11121/2022**

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
	DATE: 8 Augustus 2022
	SIGNATURE: *JANSE VAN NIEUWENHUIZEN J*

In the matter between:

TRUSTCO GROUP HOLDINGS LIMITED Applicant

and

JSE LIMITED First Respondent

THE FINANACIAL SERVICES TRIBUNAL Second Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] This is an urgent application for an interim interdict interdicting and restraining the first respondent from:

1.1 suspending the applicant's listing on the Johannesburg Stock Exchange ("the JSE");

1.2 implementing the second respondent's decision under case number JSE1/2021 dated 22 November 2021; and

1.3 implementing, or attempting to implement, the decision that Trustco restate its annual financial statements for the year ending 31 March 2019 and in the interim results for the six months ending September 2018;

pending the outcome of the review application instituted under case number 5640/2022.

[2] I pause to mention, that the review application is set down for hearing on 5 September 2022.

Background

[3] In view of the urgency of the matter, the relevant background facts will be succinctly summarised.

[4] On 11 November 2020, the JSE took a decision that the applicant's ("Trustco's") financial statements do not comply with International Financial Reporting Standards ("IFRS") and had to be restated ("restatement decision").

[5] On 10 February 2021 Trustco lodged an application with the second respondent, the Financial Services Tribunal ("the Tribunal") for a reconsideration of the JSE's restatement decision.

[6] On 22 November 2021 the Tribunal dismissed Trustco's reconsideration application.

[7] On 31 January 2022 Trustco issued the review application for the review and setting aside of the Tribunal's decision.

[8] Trustco did not comply with the JSE's restatement decision and on 14 February 2022, the JSE informed Trustco that it intended to implement the suspension of Trustco's Listing on 11 March 2022, unless Trustco took some preventative measure which measure must be finally decided before 15:00 on 11 March 2022.

[9] In response to the aforesaid and on 18 February 2022 Trustco made two applications to the Tribunal, to wit an application to reconsider the JSE's decision to suspend Trustco's listing and an interim application to prevent the JSE from suspending Trustco's listing pending the reconsideration application.

[10] It was uncertain whether or not the Tribunal would hear the interim application and render an award before the deadline of 15:00, 11 March expires and Trustco elected to, as a precaution, launch the present application, which application was issued on 23 February 2022 for hearing on 8 March 2022.

[11] Upon receipt of the application, the JSE agreed not to suspend Trustco's listing until such time as the Chairperson of the Tribunal has issued a ruling in Trustco's interim application.

[12] On 13 July 2022 the Chairperson of the Tribunal dismissed the interim application and as a result, the JSE stated its intention to suspend Trustco's listing on 29 July 2022.

[13] This, in turn, prompted Trustco to set the matter down in the urgent court.

[14] I held that the matter was urgent.

Oppostion

[14] The JSE opposes the interim relief claimed herein on several grounds, namely:

14.1 the matter is *res judicata*;

14.2 the interim relief is incompetent, because the proverbial *"the horse has bolted"* and Trustco remains in contempt of the Tribunal;

14.3 Trustco does not meet the *OUTA* clearest- of- cases test;

14.4 Trustco does not have a *prima facie* right to an interim interdict;

14.5 Trustco does not show that it will suffer irreparable harm;

14.6 the balance of convenience weights against interim relief;

14.7 Trustco already exhausted its alternative remedy in the proper forum.

Discussion

Res Judicata

[15] The JSE submits that the ruling in the interim application that served before the Chairperson of the Tribunal, prohibits Trustco from applying for the interim relief herein. In other words, the application for interim relief is *res judicata.*

[16] In support of its aforesaid submission, the JSE submits that the requirements for a *res judicata* order have been met; to wit:

16.1 *a previous judgment by a competent court:* The Tribunal is a competent tribunal for interim relief, and its interim relief order is a judgment on interim relief;

16.2 *between the same parties:* the JSE and Trustco;

16.3 *based on the same cause of action:* Trustco asked for interim relief in the Tribunal, and the requirements for interim relief in the Tribunal overlap with the requirements for interim relief in this court;

16.4 *with respect to the same subject-matter:* Trustco asked the Tribunal for interim relief to keep its shares trading on the JSE, which is the same outcome that Trustco hopes to achieve in this application

[17] Mr Luderitz SC, counsel for Trustco, pointed out that the interim application that served before the Chairperson of the Tribunal is an internal remedy in terms of section 231 of the Financial Section Regulator Act, 9 of 2017. Furthermore, the interim application in *casu* is pending the review of the JSE' restatement decision, whereas the interim application in terms of section 231 was pending the reconsideration of the suspension decision.

[18] The *res judicata* point is in my view, ill-conceived. It is patently clear the two interim applications differ substantially on cause of action and subject matter. This court is, furthermore, clothed with the necessary authority to determine interim interdicts pending a review. This much is clear from para [108] of the Constitutional Court judgment in *Economic Freedom Fighters v Gordhan and Others* 2020 (6) SA 325 CC (*the Gordhan matter"*), to wit

"[108] When the High Court determined the first part of the application, it was exercising powers conferred on it by s 172(1) of the Constitution. On the authority of Hoërskool Ermelo, 93 the power to make a just and equitable order does not depend on first declaring law or conduct invalid. Considerations of justice and equity permeate every order made in a constitutional matter."

[19] I pause to mention that the *"first part of the application"* referred to *supra* was an application for an interim interdict pending the hearing of the review application.

[20] In the result, the *res judicata* point is dismissed.

The interim relief is incompetent, because the proverbial *"horse has bolted"* and Trustco remains in contempt of the Tribunal

[21] According to the JSE, Trustco had to restate its financial statements on 31 January 2022. It has failed to do so and is as a result, in *"contempt"* of the restatement decision of the JSE.

[22] Furthermore, Trustco has lost its chance to restate its financial statements and there is nothing left to interdict. The proverbial *"horse has bolted"*.

[23] The validity of the JSE's restatement decision is, however, the subject matter of the pending review. Should Trustco be successful, there will be no need to restate its financial statements.

[24] In the result, the horse has not bolted until the finalisation of the review application and as stated in the *Gordhan* matter *supra,* a party is at liberty to bring an application to protect its rights pending the finalisation of a review application. [See: para [117] and further]

Trustco does not meet the *OUTA* clearest- of- cases test;

[25] The JSE contents that it derives its power to suspend listings from the Listing Requirements, the Financial Markets Act and the Financial Sector Regulation Act. A decision to suspend a listing is a polycentric, statutory power that is entrusted to the JSE as the expert regulator of a financial market.

[26] In requesting the interim relief, Trustco must therefore show that the relief will not cause harm to the separation of powers. In support of the aforesaid submission the JSE relies on the Constitutional Court decision in *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 CC and more specifically para [63] to [66]:

"[63] There is yet another and very important consideration when the balance of convenience is struck. It relates to separation of powers. In ITAC we followed earlier statements in Doctors for Life38 and warned that —

'(w)here the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.'39

[64] In a dispute as the present one, this does not mean that an organ of state is immunised from judicial review only on account of separation of powers. The exercise of all public power is subject to constitutional control.40 In an appropriate case an interdict may be granted against it. For instance, if the review court in due course were to find that SANRAL acted outside the law then it is entitled to grant effective interdictory relief. That would be so because the decisions of SANRAL would in effect be contrary to the law and thus void.

[65] When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the executive or legislative branches of government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. While a court has the power to grant a restraining order of that kind, it does not readily do so, except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.

[66] A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.41"

[27] The Constitutional Court held that the granting of interim relief in *OUTA* will *"invade the heartland of* (a) *national treasury function and* (will) *force the hand of parliament's budgetary role."* In *OUTA* an interim interdict was sought to prohibit the implementation of an e-tolling system to fund a highway up-grade. The impact and import of such an interdict differ materially from the facts in *casu.*

[28] The interim interdict will not impose on the JSE's statutory power to regulate the financial market. It retains such powers in toto. It is only one of its decisions that will be temporary suspended for a period of less than a month.

Trustco does not have a *prima facie* right to an interim interdict;

[29] In determining whether Trustco has a *prima facie* right to an interim interdict, the court needs to *"peek´* at the grounds for review.

[30] In respect of the JSE 's restatement decision, Trustco raised the lack of authority of the decision maker as a ground of review. Trustco asserts that a

certain Mr AF Visser who is not a director of the JSE made the decision, whereas the JSE's memorandum of incorporation expressly states that persons to whom authority is delegated must be directors. In the result, so Trustco contends, Mr Visser's decision is illegal and invalid.

[31] Insofar as the JSE's power to order restatement is concerned, Trustco with reference to paragraph 8.65 of the Listings Requirements, contends that the JSE does not have the power to require that "corrections" or "restatements" be made, but may only direct that information be "published or "re-issued".

[32] The main ground of review against the decision of the Tribunal is the composition of the Tribunal's panel. With reference to section 220 and section 224 of the Financial Sector Regulation Act, 9 of 2017 ("FSR Act"), Trustco contends that the panel should at least have had one financial expert.

[33] The panel, however, consisted of a retired judge, a senior counsel and an attorney.

[34] The composition of the panel resulted in an inability of the panel to give effect to the purpose of the FSR Act and is a reviewable irregularity. Trustco, furthermore lists pertinent considerations the Tribunal overlooked and irrelevant factors it considered.

[35] The grounds of review are all deserving of a proper hearing in due cause and I am satisfied that Trustco has asserted a *prima facie* right to fair and just administrative action.

Trustco does not show that it will suffer irreparable harm

[36] Trustco contends that it will suffer irreparable reputational harm and in turn a share price dip given the market sensitivity should the delisting of its shares not be suspended.

[37] It further points out that its ability to raise capital will be impaired and three of its pending transactions will be jeopardised.

[38] The harm is, in my view, self- evident. This much was stated by Corbett JA in *JSE V Witwatersrand Nigel* 1988 (3) SA 132 (A) at p152:

"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 ..."

The balance of convenience weights against interim relief

[39] The JSE contends that unsuspecting third parties who invest in Trustco shares if Trustco obtains interim relief but is ultimately unsuccessful in its review, will suffer irreparable harm. Furthermore, and due to the fact that an interim interdict will allow Trustco to defy the restatement decision of the JSE, market regulation and the rule of law will also suffer irreparable harm.

[40] In the premises, the balance of convenance strongly favours the refusal of the interim interdict.

[41] Trustco has, however, pointed out that, although the JSE has threatened since March 2019 to suspend Trustco's listing, it has been content for Trustco's shares to trade until 29 July 2022.

[42] The proclaimed concern for unsuspecting third parties, market regulation and the rule of law appears, in the circumstances to be somewhat contrived.

[43] The review application will be heard in less than a month and the harm Trustco will suffer if its shares are delisted now far outweighs the harm that could possibly befall traders until the review application is heard.

Trustco already exhausted its alternative remedy in the proper forum

[44] The reasoning in respect of this ground of opposition has been dealt with under the *res judicata* point.

[45] It is abundantly clear that Trustco has no other remedy to protect its interests until the finalisation of the review.

COSTS

[46] Costs should follow the result.

ORDER

The following order is issued:

1. Pending the outcome of the review application instituted in this court under case number 5640/2020, the first respondent is interdicted and restrained from;

1.1 suspending the applicant's listing on the Johannesburg Stock Exchange;

1.2 implementing the second respondent's decision under case number JSE1/2021 dated 22 November 2021; and

1.3 implementing, or attempting to implement, the decision that Trustco restate its annual financial statements for the year ending 31 March 2019 and in the interim results for the six months ending 30 September 2018.

2. The first respondent is ordered to pay the costs of this application, including the costs of two counsel.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

28 July 2022

DATE DELIVERED PER COVID19 DIRECTIVES:

8 August 2022

APPEARANCES

For the Applicant:	Advocate Werner Luderitz SC
	Advocate Marc Cooke
Instructed by:	Norton Rose Fulbright South Africa Inc

For the First Respondent:	Advocate Green SC
	Advocate Mitchell
Instructed by:	Webber Wentzel