



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

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Trustco Group Holdings Limited v Financial Services Tribunal and Another (471/2023) [2024] ZASCA 100 (19 June 2024)

Today the Supreme Court of Appeal (SCA) dismissed an appeal against the order of the Gauteng Division of the High Court, Pretoria (the high court), with costs on the attorney and client scale, including the costs of two counsel, where so employed.

The appellant is Trustco Group Holdings Limited (Trustco), a company listed on the second respondent, the Johannesburg Stock Exchange (the JSE), and the Namibian Stock Exchange. The first respondent is the Financial Services Tribunal (the Tribunal), established in terms of s 219 of the Financial Sector Regulation Act 9 of 2017 (the FSR Act). The Tribunal did not participate in the proceedings before the high court nor in the appeal before the SCA.

The appeal related to a directive issued by the JSE, which compelled Trustco to restate their financial statements in respect of certain transactions; and the composition of the Tribunal panel established in terms of s 224 of the FSR Act. The Tribunal had dismissed Trustco's application for reconsideration of the JSE's decision on 22 November 2022 and Trustco thereafter filed an application in the high court, seeking to review the Tribunal's decision. It did so on three grounds, namely that: (a) on a proper interpretation of ss 220(2), 224(2) and 225(2)(a) of the FSR Act, the Tribunal panel was improperly constituted; (b) the JSE does not have the power to direct listed companies to restate their financial statements; and (c) the Tribunal accorded undue deference to the views of the JSE's and its expert witness. The high court delivered its judgment on 7 November 2022, dismissing the application with costs. Trustco appealed that decision with the leave of the SCA.

Between 2015 and 2018, Trustco's Chief Executive Officer and majority shareholder, Dr Quinton van Rooyen, advanced to Huso Investments Pty Limited (Huso) and other subsidiaries loans amounting to approximately N\$ 546 million. In 2018, Trustco acquired all Huso's issued shares. The loans were initially reflected in Huso's financial statements as equity, however, by the time Trustco had acquired Huso's shares, the loan amount had been reclassified as a liability, namely a debt owed to Dr van Rooyen.

The sale of shares agreement in respect of Trustco's purchase of Dr van Rooyen's shares in Huso included an 'earn-out' mechanism in terms of which the latter would be allocated shares in Trustco if it meets certain profit thresholds. A few weeks after the conclusion of the sale of shares agreement, Dr van Rooyen 'forgave' the loans, resulting in a N\$ 546 million profit in Trustco and triggering the 'earn-out' mechanism, which allowed Dr van Rooyen to acquire the Trustco shares. In October 2018, Dr van Rooyen advanced a second loan of N\$ 1 billion to Trustco, which he also 'forgave' during 2019. That amount was then also reflected in Trustco's financial statements as profits, again allowing Dr van Rooyen to acquire more shares in terms of the contractual 'earn-out' mechanism

The other entry which the JSE took issue with was the reclassification of properties owned by Trustco in Elisenheim, Windhoek, Namibia, from inventory to investment property. Trustco explained that the reclassification was done because a decline in demand meant that it did not anticipate selling the properties in the foreseeable future. It thereafter revalued the properties and, as result, reported a profit of N\$ 693 million.

On 5 December 2019, the JSE advised Trustco that its financial statements had been selected for review under its 'pro-active review process' and subsequently referred three issues to its Financial Reporting Investigation Panel (the FRIP). Two related to entries in respect of the loans by Dr van Rooyen, and the other to the entries reflecting the reclassification of the immovable properties from inventory to investments properties.

On the FRIP's advice, the JSE informed Trustco, on 16 October 2020, that the entries did not comply with the prescripts of the International Financial Reporting Standards (the IFRS). Trustco objected to that decision in terms of clause 1.4 of the JSE Listings Requirements. On 11 November 2020, the JSE dismissed the objection and directed Trustco to restate its annual financial statements for the year ending 31 March 2019 to correctly reflect the nature of the transactions.

Trustco's reconsideration application was heard by a panel appointed and chaired by the Tribunal chairman, retired Judge Harms. In addition to the latter, the panel also comprised a practicing advocate and attorney. The Tribunal dismissed Trustco's application for the reconsideration of the JSE's decision on 22 November 2021. Trustco then launched its review application challenging the Tribunal's decision in February 2022.

The issues before the SCA thus related to: (a) the power of the JSE to direct listed entities to restate financial statements; and (b) the legal principles governing the appointment of Tribunal panels to hear applications for the reconsideration of the JSE's decisions in terms of s 230 of the FSR Act.

The SCA found that the relevant sections of the FSR Act, in relation to the composition of a panel, do not contain any express or implied requirement for a panel constituted under s 220 of the FSR Act to include a person with knowledge of accounting practises or international financial reporting standards, as was contended for by Trustco. The SCA, on this issue, held that the construction contended for by Trustco simply does not find any support in the express and unequivocal language of those sections. With regards to the issue of the JSE's powers to direct listed entities to restate financial statements, the SCA held the view that paragraph 8.65 of the JSE Listing Requirements grants wide permissive powers to the JSE to instruct listed entities, in its sole discretion, to 'publish or reissue any information it deems appropriate'. The SCA reasoned that these wide powers are underpinned by ss 10(2)(m) and 11(1)(g)(v) of the Financial Markets Act, which, respectively, empower the JSE to do 'all other things that are necessary for, or incidental or conducive to the proper operation of an exchange and that are not inconsistent with this Act' and to impose any penalty that is 'appropriate in the circumstances'. In the circumstances, the SCA concluded that both grounds (a) and (b) of the review application can therefore not succeed.

In addressing the new arguments advanced in oral arguments before the SCA, namely, that in appointing the Tribunal panel Judge Harms failed to exercise the discretion vested in him in terms of s224 of the FSR Act, and that the Tribunal accorded undue deference to the JSE's views, the SCA held that this review ground was not raised in the high court, neither was it raised in Trustco's written argument on appeal to the SCA. The SCA reasoned that Trustco's failure to challenge Judge Harms' decision to appoint the panel and to draw his attention to the allegation that he failed to exercise a discretion, precluded Trustco from construing the reasons he provided for a different purpose in support of this newly contrived review ground.

Lastly, regarding the undue deference review ground, the SCA found that this criticism was unsustainable and unfounded and was belied by the Tribunal's extensive analysis of the opinion submitted by Trustco's expert and the reason it gave for preferring the opinion of the JSE's expert.

In the result, the SCA made an order dismissing the appeal with costs on attorney and client scale, including the costs of two counsel, where so employed.

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