

## **Financial Services Tribunal provides context to Trustco's second reconsideration application**

In its decision handed down on 18 November, the Financial Services Tribunal (FST) set out the “factual synopsis” of the dispute between the Namibian investment company and the JSE.

According to this synopsis, the dispute can be traced back to December 2019, when the JSE selected Trustco's annual financial statements (AFS) for review as part of the exchange's “proactive monitoring review process”. In terms of this process, the JSE reviews the financial statements of every listed company at least once every five years. The review revealed “certain issues” that required further investigation by the Financial Reporting Investigations Panel (Frip), which advises the JSE on technical issues pertaining to compliance to the International Financial Reporting Standards (IFRS). The Frip investigated the issues and produced a report.

### **Trustco's non-compliance, according to the JSE**

The JSE decided that Trustco had not complied with the IFRS for the following reasons:

- In the group's AFS of 31 March 2019:
  - Trustco recognised a N\$545.6 million gain with respect to the waiver by Trustco chief executive and majority shareholder Quinton van Rooyen of an initial loan (Frip referral 1, or “the loan issue”).
  - Trustco reclassified certain properties from “inventory” to “investment property”, thereby recognising a N\$693m gain (Frip referral 2, or the “property issue”).
  - Trustco recognised revenue on the sale of underserviced land at the time that the purchaser signed the purchase agreement (Frip referral 3).
- In the group's unaudited interim results for the six months to 30 September 2019, Trustco recognised a N\$1 billion gain with respect to the waiver by Van Rooyen of a subsequent loan (Frip referral 1).

The FST provided the following context to Frip referrals 1 and 2: the “loan issue” and the “property issue”.

### **Loan issue**

By 2018, Van Rooyen had advanced a total of N\$546m in loans to Huso Investments, a company that Trustco acquired and of which he was the sole shareholder. The loan was classified and recorded as an equity loan (money that Van Rooyen had invested in Huso as a shareholder).

In 2018, Trustco acquired all the issued shares of Huso. When the Trustco shareholders approved this acquisition, it was on the basis that Van Rooyen's loan was classified and recorded as an equity loan.

By the time that Trustco finally acquired Huso, the equity loan had been reclassified as a liability (money that Huso owed Van Rooyen).

A few weeks after Trustco acquired Huso's shares, Van Rooyen forgave the loan, which was then reflected in Trustco's financials as profit.

Thereafter, Van Rooyen loaned Trustco N\$1bn with the express proviso that if he were to waive repayment of the loan, the gain had to be recognised in a manner that would benefit him on the earnout-mechanism under the Huso sale agreement.

Van Rooyen thereafter waived repayment of the N\$1bn loan. Since there was an earn-out mechanism in the Huso sale-of-shares agreement, Van Rooyen benefited.

Trustco presented the aforesaid waivers/forgiveness of loans in the relevant financials as gains in profit (totalling just over N\$1.5bn).

### **Property issue**

Trustco reclassified some of the properties it owned in the Elisenheim development outside Windhoek 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.

After the reclassification, Trustco revalued the properties upwards, increasing Trustco's profitability.

Based on the reclassification of the properties, Trustco reported and represented a N\$693m gain in its financial statements (presented as revenue of N\$984m and cost of sales of N\$291m).

### **JSE demands corrective action**

The JSE communicated the decisions mentioned above, together with the corrective action it required, to Trustco in October 2020.

In essence, the JSE required Trustco to reissue the AFS and the interim results referred to above and to restate them in certain terms, and to publish a SENS announcement containing such information.

Trustco objected to the JSE's decisions and the corrective action.

According to the FST, although Trustco objected to all the decisions and corrective action, Trustco effected a restatement that resolved Fripp referral 3, "apparently rendering this aspect moot".

The JSE dismissed the balance of Trustco's objections, 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.

Trustco was directed to take the following (amended) corrective action:

- Restate the AFS for the year ended 31 March 2019 to account for the following prior period errors:
  - 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; and
  - Reversing the reclassification of the Elisenheim properties and consequently reversing the N\$693m gain.
- Restate the interim results for the six months to 30 September 2019 to account for the following prior period errors:
  - Reversing the N\$1bn gain previously recognised in profit and loss and accounting for this as a transaction with an equity participant.

The amended corrective action accordingly removed the reference to Fripp referral 3, required a restatement (as opposed to a reissue) of the financial statements, and no longer required Trustco to publish a SENS announcement (because the JSE would publish such an announcement).

### **The first tribunal decision**

Trustco was aggrieved by the JSE's findings and the (amended) corrective action directive. It contended that its accounting complied with the IFRS.

Trustco applied to the FST for a reconsideration of the decisions of the JSE.

On 22 November 2021, the FST dismissed the application for reconsideration and directed Trustco to pay 50% of the costs of the JSE.

### **JSE's decision to suspend Trustco's shares**

On 3 December 2021, the JSE informed Trustco that it was considering suspending the listing of Trustco's securities because of its failure to comply with the JSE Listings Requirements and with the decisions of the JSE and the FST.

The JSE afforded Trustco an opportunity to make representations why the suspension should not be effected.

After considering Trustco's representations, the JSE, in a letter dated 13 December 2021, conveyed its decision to Trustco in the following terms:

- Trustco has failed to comply with the Listings Requirements and the JSE decision and, in so doing, has disregarded the FST's decision (the "non-compliance decision"); and
- The appropriate recourse for Trustco's aforementioned failures was to suspend the listing of its securities (the "suspension decision").

### **Trustco challenges the lawfulness of the JSE's decisions**

On 14 December 2021, Trustco demanded that the JSE provide the resolutions and minutes in terms of which its decisions had been taken.

"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)," the FST said.

On 15 December 2021, the JSE confirmed that the relevant decisions had been taken by Andre 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.

The JSE also stated that its decisions 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".

Trustco objected to the suspension decision on 17 December 2021, setting out its objections in a letter of that date that 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.

The JSE stated that it understood Trustco to have given the assurance that it would restate its financial statements, as had been directed, by 31 January 2022. The JSE accordingly held off deciding Trustco's objections until Trustco published its 2021 AFS.

When Trustco published its AFS on 31 January 2022, Trustco did not restate them and did not take the amended corrective action.

### **Trustco takes FST's decision to the High Court**

On 31 January 2022, Trustco applied to the Gauteng Division of the High Court seeking a review and setting aside of the FST's decision to dismiss its reconsideration application.

On 14 February 2022, the JSE dismissed Trustco's objections.

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 immediately implement the

suspension decision but would hold off until 11 March 2022, subject to Trustco bringing certain legal proceedings within certain time frames.

### **Second reconsideration application and section 231 application**

On 18 February 2022, Trustco launched a second reconsideration application to the FST. On the same day, Trustco brought an application in terms of section 231 of the Financial Sector Regulation Act for the suspension of the decisions that formed the subject matter of the reconsideration application: the non-compliance decision and the suspension decision.

### **Trustco applies for an interim interdict against the JSE**

As it was uncertain whether the FST 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 interdicting and restraining the JSE from implementing the suspension decision, the first tribunal decision, and the amended corrective action 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 suspend Trustco's listing until the chairperson of the FST had issued a ruling in terms of the section 231 application.

### **FST chairperson rejects section 231 application**

On 13 July 2022 the chairperson of the FST declined to suspend the order, finding 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.

### **High Court grants interim interdict**

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.