



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 471/2023

In the matter between:

TRUSTCO GROUP HOLDINGS LIMITED

APPELLANT

and

FINANCIAL SERVICES TRIBUNAL
JSE LIMITED

FIRST RESPONDENT
SECOND RESPONDENT

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

Coram: DAMBUZA, SCHIPPERS and WEINER JJA, SMITH and MBHELE AJJA

Heard: 14 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 19 June 2024.

Summary: Statutory interpretation – Financial Markets Act 19 of 2012 (Financial Markets Act) – powers of Johannesburg Stock Exchange – has wide powers in terms of its Listing Requirements and Financial Markets Act to direct restatement of financial statements – appointment of a panel of Financial Services Tribunal in terms of s 224 of the Financial Sector Regulation Act 9 of 2017 – does not require a person with experience or expert knowledge of financial services or the financial system.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Potterill J, sitting as court of first instance):

The appeal is dismissed with costs on the attorney and client scale, including the costs of two counsel, where so employed.

JUDGMENT

Smith AJA (Dambuza, Schippers and Weiner JJA and Mbhele AJ concurring):

Introduction

[1] This appeal concerns: (a) the power of the second respondent, the Johannesburg Stock Exchange (the JSE), to direct listed entities to restate financial statements; and (b) whether a panel of the Financial Services Tribunal (the Tribunal) to hear an application for the reconsideration of a decision in terms of s 230 of the Financial Sector Regulation Act 9 of 2017 (the FSR Act), was properly constituted. The appeal is with the leave of this Court.

[2] The JSE is a securities exchange, licensed in terms of the Financial Markets Act 19 of 2012 (the Financial Markets Act). The appellant, Trustco Group Holdings Limited (Trustco), is listed on the JSE and the Namibian Stock Exchange. The first respondent is the Tribunal, established in terms of s 219 of the FSR Act. Apart from filing reasons in terms of rule 53 of the Uniform Rules of Court, the Tribunal did not participate in the proceedings before the Gauteng Division of the High Court, Pretoria (the high court), nor in this Court.

[3] On 22 November 2020, the JSE directed Trustco to restate its financial statements for the year ending 31 March 2019 to correct certain entries relating to loans by its Chief Executive Officer and major shareholder, Dr Quinton van Rooyen,

and reclassification of immovable properties from inventory to investment property.¹ The JSE also directed Trustco to reverse the profits declared in pursuance of those transactions.

[4] After the JSE dismissed Trustco's objection filed in terms of its Listings Requirements, on 10 February 2021, Trustco filed an application with the Tribunal for the reconsideration of the JSE's decision in terms of s 230 of the FSR Act. The Tribunal dismissed that application on 22 November 2021.

[5] On 31 January 2022, Trustco launched an application in the high court seeking to review and set aside the Tribunal's determination, inter alia, on the grounds that the JSE lacks the power to direct listed companies to restate their financial statements and that a panel of the Tribunal had not been properly constituted in terms of s 224 of the FSR Act. The high court (Potterill J) dismissed the application with costs.

The facts

[6] The following material facts are common cause. Between 2015 and 2018, Dr Van Rooyen advanced to Huso Investments (Pty) Limited (Huso) and other subsidiaries of Trustco loans amounting to approximately N\$ 546 million. Huso was a related company in which Dr Van Rooyen owned all the shares. In 2018, Trustco acquired all Huso's issued shares.

[7] The loans were initially reflected in Huso's financial statements as equity, in other words, they were reflected as investments by Dr Van Rooyen. 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.

[8] 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 former would be allocated shares in Trustco if it met certain profit thresholds. A few weeks after the conclusion of the sale of shares agreement, Dr Van Rooyen 'forgave'

¹ Inventory property is an asset held for sale in the ordinary course of business. Investment property (land or buildings) is held to earn rental or for capital appreciation. Property can only be reclassified for accounting purposes if there is a change in use.

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.

[9] 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 profit, again allowing Dr Van Rooyen to acquire more shares in terms of the contractual 'earn-out' mechanism.

[10] The next entry in Trustco's financial statements with which the JSE took issue, 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 a result, reported a profit of N\$ 693 million.

[11] On 5 December 2019, the JSE advised Trustco that its financial statements had been selected for review under its 'pro-active review process', in terms of which listed companies' financial statements are reviewed at least once every five years. The JSE referred three issues to its Financial Reporting Investigation Panel (FRIP).² 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 investment property.

[12] On the FRIP's advice, the JSE informed Trustco, on 16 October 2020, that the entries did not comply with the International Financial Reporting Standards (the IFRS).³

² The FRIP is an advisory panel of financial reporting experts whose function is to investigate and advise the JSE on alleged cases of non-compliance with financial reporting standards in annual and interim reports and any other company publications. It is established in terms of para 8.65 of the JSE Listing Requirements.

³ The IFRS are a set of accounting rules for the financial statements of public companies that are intended to make them consistent, transparent, and easily comparable. They are issued by the International Accounting Standards Board and are intended to foster greater corporate transparency regardless of the company or the country.

[13] 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.

[14] Trustco's reconsideration application was heard by a panel appointed and chaired by the Tribunal's chairperson, retired Judge Harms. A practising advocate and an attorney served with Judge Harms on the panel. Both parties submitted opinions by their respective accounting experts. Trustco relied on a report filed by an accountant, Mr Tapiwa Njikizana, and the JSE relied on the FRIP report and the opinion of Professor Maroun, a chartered accountant.

[15] As mentioned earlier, the Tribunal dismissed Trustco's application for the reconsideration of the JSE's decision on 22 November 2021. Trustco launched its review application challenging the Tribunal's decision in February 2022.

[16] In February 2023, Trustco agreed to restate its financial statements and undertook to:

- (a) arrange for the shares issued to Dr Van Rooyen to be returned to Trustco;
- (b) reinstate the loans waived by the former; and
- (c) reverse the profits declared pursuant to the waiver of the loans.

It is common cause, however, that it did so without prejudice to its rights and solely to ensure the lifting of the suspension of the trading of its shares on the JSE. The issue of mootness accordingly does not arise.

Proceedings in the high court

[17] In the high court, Trustco challenged the Tribunal's decision on three main grounds, namely:

- (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 and its expert witness.

[18] Regarding (a), Trustco argued that the panel constituted to decide the reconsideration application violated the provisions of the FSR Act because it comprised only lawyers who lacked the necessary financial expertise and experience. The decision to constitute the panel was therefore irrational and unreasonable, and rendered the procedure adopted by the Tribunal unfair.

[19] As regards (b), Trustco argued that the JSE does not have the power under para 8.65 of its Listings Requirements to direct companies to restate their financial statements. That provision, according to Trustco, envisages a more drastic procedure, namely the 'reissue' of financial statements. Restatements, on the other hand, are voluntary acts which may be undertaken by listed entities under para 3.14 of the Listing Requirements. In the event, publication on the JSE's real time Stock Exchange News Service would have more effectively informed the public that the JSE had taken issue with Trustco's financial statements, so Trustco argued.

[20] Trustco's contentions in respect of the undue deference review ground were based mainly on the Tribunal's statement in the reasons it provided under rule 53 that '[a]lthough the Tribunal is an "expert" tribunal, it is obviously less qualified than the JSE to make multi-faceted and polycentric decisions. . .' This statement, Trustco contended, was a critical concession by the Tribunal that, because the panel comprised only persons with legal expertise, it lacked the expertise properly to adjudicate issues involving complicated financial and accounting principles.

[21] The JSE took issue with those contentions and argued that Trustco's failure to challenge the decision of the Tribunal chairman, Judge Harms, to appoint the panel was fatal to its application. That decision, the JSE contended, constituted administrative action as defined in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and it thus remained valid and effectual until set aside by a competent court.⁴ Not having challenged the decision to appoint the panel, Trustco was precluded from arguing that because the panel was not properly constituted, its process was procedurally unfair or unreasonable.

⁴ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) para 26; *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC).

[22] As to the restatement issue, the JSE argued that para 8.65 of the Listing Requirements grants it wide permissive powers ‘in its sole discretion’ to instruct a listed entity to publish or reissue any information it deems appropriate. In addition, in terms of the Financial Markets Act, the JSE is obliged to supervise compliance with its Listings Requirements,⁵ and grants it wide permissive powers to impose sanctions and to do ‘all other things that are necessary for, incidental or conducive to the proper operation of an exchange and that are not inconsistent with this Act’.⁶ Relying on the judgment in *Huge Group Ltd v Executive Officer: Financial Services Board*,⁷ the JSE contended that the power in terms of para 8.65 of the Listing Requirements to instruct companies to reissue or publish any information that the JSE deems appropriate, contextually and purposely interpreted, includes the power to direct restatement of financial statements.

[23] In respect of the undue deference argument, the JSE contended that the Tribunal properly evaluated and analysed the expert evidence submitted by the parties and gave comprehensive reasons for preferring the testimony of the JSE’s experts. The Tribunal’s decision was thus underpinned by an objective consideration of the evidence.

[24] The high court found that since Trustco did not assail Justice Harms’ decision to appoint the panel, the court could not find ‘that the constitution of the Panel by retired Judge Harms was procedurally unfair or that the constitution of the Panel was a decision of the Panel and is reviewable’. The high court found, furthermore, that on a reasonable construction of ss 220, 224 and 225 of the FSR Act, it is not a legal requirement that a panel constituted in terms of s 224 should include a person with financial experience and expertise. The court observed that, even though the contended requirement of having financial expertise on the panel is not unreasonable, ‘a Panel consisting of lawyers is eminently suited to adjudicate a reconsideration in evaluating facts and evidence’.

⁵ Section 10(2).

⁶ Section 10(2)(m).

⁷ *Huge Group Limited v JSE Limited and Another* 15380/2015 GLD (21 July 2017), para 55 where the court held that the JSE’s power under Listing Requirement 8.65 to direct companies to reissue financial statements does not ‘exclude from the ambit of that provision an instruction to restate annual financial statements’.

[25] Regarding the restatement issue, the high court upheld the JSE's contention that para 8.65 of the Listing Requirements, properly interpreted, includes the power to direct listed entities to restate their financial statements. The court was of the view that without that power, 'the JSE has in fact no teeth to correct the position to protect the public with the financial statements setting out the full picture'.

[26] The high court also made short shrift of the undue deference argument, finding that 'the Panel did not just sit back and defer to the JSE'. It was also satisfied that the Tribunal had properly analysed the experts' views.

The contentions on appeal

[27] In its written argument, Trustco persisted only with two appeal grounds, namely that:

- (a) the FSR Act, properly interpreted, requires that in cases involving only accounting issues, the panel must include persons with financial expertise and experience; and
- (b) para 8.65 of the Listing Requirements does not empower the JSE to issue directives for listed companies to restate financial statements. The JSE is consequently only empowered to direct a 're-issue' of financial statements, which is a more invasive procedure that requires of the JSE to take other ancillary steps.

[28] However, in oral argument before us, Trustco all but abandoned those points. It instead resuscitated the undue deference argument and, in addition, raised a new argument, namely that in appointing the panel in terms of s 224 of the FSR Act, Judge Harms had a discretion to include a person with financial expertise. According to Trustco, Judge Harms, on his own admission, failed to exercise that discretion thereby rendering the appointment of the panel fundamentally flawed.

[29] Because Trustco did not unequivocally abandon the arguments relating to the composition of the panel and the power of the JSE to direct restatements of financial statements, I am constrained to deal with them before I consider the new arguments advanced on appeal.

Discussion

[30] First, regarding the composition of the panel, s 220 of the FSR Act provides that the Tribunal members must include, ‘at least two persons who are retired judges, or are persons who have suitable expertise and experience in law’ and, ‘at least two other persons with experience or expert knowledge of financial products, financial services, financial instruments, market infrastructures or the financial system’. In terms of s 224(4),⁸ panels must consist of ‘a person to preside over the panel, who must be a person referred to in s 220(2)(a)⁹ or 225(2)(a)(i),¹⁰ namely a retired judge or person with legal experience or expertise, and ‘two or more persons who are Tribunal members or persons on the panel list’.

[31] These sections do not contain any express or implied requirement for a panel constituted under s 220 to include a person with knowledge of accounting practices or international financial reporting standards. The interpretation contended for by Trustco simply does not find any support in the express and unequivocal language of these provisions.

[32] Second, the argument that the JSE does not have the power to direct listed entities to restate financial statements is, in my view, equally unsustainable. It was thus no surprise that it was not pursued in oral argument before us. Counsel for the JSE correctly submitted that para 8.65 of the Listing Requirements confers on the JSE wide permissive powers to instruct listed entities, in its sole discretion, to ‘publish or reissue any information it deems appropriate’. These wide powers are underpinned by ss 10(2)(m) and 11(1)(g)(v) of the Financial Markets Act which, respectively, empowers the JSE to do ‘all other things that are necessary for, or incidental or

⁸ Section 224(2) reads as follows: ‘(2) The panel constituted to consider an application for the reconsideration of a decision is the decision-making body of the Tribunal, and the panel exercises any of the powers of the Tribunal relating to the reconsideration of the decision.’

⁹ Section 220(2) reads as follows: ‘(2) The Tribunal members must include—

(a) at least two persons who are retired judges, or are persons with suitable expertise and experience in law; and (b) at least two other persons with experience or expert knowledge of financial products, financial services, financial instruments, market infrastructures or the financial system.’

¹⁰ Section 225 provides that: ‘(1) The Minister must establish and maintain a list of persons who are willing to serve as members of panels of the Tribunal.

(2) The persons included in the panel list must— (a) have relevant experience in or expert knowledge— (i) of law; or (ii) of financial products, financial services, financial instruments, market infrastructures or the financial system; and (b) be a fit and proper person to be included in the panel list.’

conducive to the proper operation of an exchange and that are not inconsistent with this Act' and empowers the JSE to impose any penalty that is 'appropriate in the circumstances'.

[33] Construed in terms of established canons of interpretation, that is, regard being had to the text, context and purpose of the JSE Listing Requirements, this construction also makes business sense.¹¹ It is manifestly essential that investors on the JSE are able to rely on accurate financial statements that comply with international accounting standards. It is also self-evident that a market cannot properly operate without them. It is the JSE's statutory obligation, in terms of its Listing Requirements under the Financial Markets Act, to hold listed entities to this imperative. And, where financial statements do not accurately reflect the nature of financial transactions in accordance with international accounting standards, the JSE must be entitled to direct restatement of the financial statements to ensure that the full and correct position is stated. Both these grounds of review can therefore not succeed.

[34] I now consider the new submissions advanced in oral argument before us. The argument that Judge Harms failed to exercise his discretion to appoint a person with financial expertise as a member of the panel, is premised on the following statements contained in his 'REASONS IN TERMS OF UNIFORM RULE 52(1)(b)'. He said the following in respect of his decision to appoint the panel:

(a) 'I consider the general nature of the case (e.g., is it about the Pension Funds Adjudicator, the FAIS Ombud, a debarment, an administrative penalty, emanates from a body such as the JSE, etc.), ask about the size of the record (in this matter eventually [it] was extensive), the workload of panellists and their availability and the equal spread of the workload. I have regard to potentiality of conflict, representativity, seniority and general experience as well as the duty to induct younger (new) members into potentially challenging cases. I am conscious of the judicial anathema to choosing horses for courses.'

(b) 'I did not receive or read the record before settling the panel and only read it in preparation for the hearing after receiving the heads of argument. I knew, from experience, that matters relating to the JSE before the (former) Financial Services Appeal Board and this Tribunal can

¹¹ *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC); *Natal Pension Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA).

be difficult and because of the many kinds of decisions the JSE may make are of different kinds. (I was also the chairman of the former JSE Appeal Board until my appointment as a judge in 1986.); and

(c) 'Past JSE matters raised no accounting issues, and I was unaware that there were issues, that according to the applicant, could only be decided by someone with the "necessary and statutory required knowledge and expertise of the application of International Financial Reporting Standards ("IFRS") to be so appointed for the matter under consideration", which, by definition, excludes all the potential chairs.'

[35] Counsel for Trustco submitted that these statements indicate that Judge Harms, on his own admission, was unaware of the nature and complexity of the issues that the Tribunal would be required to consider before appointing the panel. He was consequently oblivious of the need to appoint someone with the requisite financial expertise and experience. His failure to exercise his discretion in respect of that issue not only taints the appointment of the panel but also renders the entire process pursuant thereto procedurally unfair and reviewable, so the argument went.

[36] In my view, there are several insurmountable difficulties with this argument. The first problem relates to the timing and the manner in which the point was raised. It is common cause that this review ground was not raised in the high court, neither was it raised in Trustco's written argument on appeal to this Court. As mentioned earlier, it was raised for the first time during oral argument before us. This has important consequences for the context in which Judge Harms' reasons should be construed. When he prepared those reasons, Judge Harms was obviously unaware of the allegation that he did not exercise a discretion and consequently did not address that issue at all. He explained that '[t]hese "reasons" are submitted because of the applicant's displeasure with the record of the proceedings'. Having failed to challenge Judge Harms' decision to appoint the panel and to draw his attention to the allegation that he failed to exercise a discretion, it can hardly lie in Trustco's mouth to construe the reasons he provided for a different purpose in support of this new review ground.

[37] Moreover, the manner in which the point was raised creates a more fundamental problem for Trustco. The decision to constitute a panel of the Tribunal

in terms of s 224(1) of the FSR Act is a self-standing administrative act. In taking this decision, Judge Harms was exercising a public power which – at least according to Trustco – adversely affected its rights and accordingly had ‘a direct, external effect’.¹² In terms of the legal principle enunciated in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹³ and *MEC for Health, Eastern Cape v Kirland Investments*,¹⁴ that administrative decision remained valid and effectual until set aside by a competent court.

[38] Trustco’s answer to this assertion was that as *dominus litis*, it was entitled to challenge either (a) the decision of the Tribunal chairman to constitute the panel; or (b) the decision of the Tribunal, on the basis that the process was procedurally and substantively irrational because the panel had been improperly constituted and lacked the necessary expertise. It had chosen the latter option and was accordingly not required to amend its notice of motion to assail the decision of the Tribunal chairman.

[39] In my view, this argument does not bear scrutiny. It is a direct attack on Judge Harms’ decision to constitute the panel in the manner that he did. This was not an issue to which the respondents were required to address their minds. Had the challenge been raised in the founding papers, the Judge would have been able to answer it. A party is required to make out its case in the founding affidavit;¹⁵ even less is it permitted to mount a challenge to a decision in heads of argument. The new challenge advanced during oral argument, namely that Judge Harms failed to exercise a discretion in terms of s 224 of the FSR Act when appointing the panel, is ‘a full-frontal attack’ on an administrative act, which could only be undone by virtue of judicial review in terms of PAJA. In my view, Trustco’s failure to adopt that course is fatal to its case.

[40] In any event, the statements cited by Trustco in support of its submission that Judge Harms failed to exercise a discretion were quoted selectively and out of

¹² Section 1 of PAJA.

¹³ *Oudekraal* fn 4.

¹⁴ *Kirland* fn 4.

¹⁵ *Director of Hospital Services v Mistry* (272/77) [1978] ZASCA 126 (9 November 1978).

context. The Judge explained the procedure he followed in appointing the panel and stated that he accepted ‘that the Minister appointed all by following the statutory prescripts and that all members of the Tribunal and on the panel list are equal and independent and competent to decide any of the many and varied issues under the many Acts listed in Schedule 1 of the Act that fall under the jurisdiction of the Tribunal’. He explained furthermore that ‘[t]he composition of a panel is a matter that is settled after a request from the Secretary of the Tribunal, considering the statutory requirement, before a hearing date is determined. *She proposes a panel, and we then discuss it before I make my decision.*’ (Emphasis added.)

[41] Those reasons, having been provided in the absence of a specific allegation regarding the exercise of a discretion by Judge Harms, establish that he considered the panel proposed by the Secretary and that he exercised a discretion in deciding on the panel members, having regard to ‘the general nature of the case’. This review ground is therefore also unsustainable and falls to be dismissed on any of the foregoing bases.

[42] Regarding the undue deference review ground, Trustco submitted that the Tribunal’s reasoning shows that the panel members were under the erroneous impression that they were required to defer to the JSE’s views. Because they lacked the necessary financial expertise to understand and objectively analyse the merits and demerits of the financial experts’ opinions, they impermissibly abdicated their statutory responsibility to render a decision based on their own assessment of the evidence. In support of this assertion Trustco pointed to the following aspects of the Tribunal decision:

- (a) The Tribunal acknowledges that it is not an ‘expert tribunal’ and that it is obviously less qualified than the JSE to make ‘multi-faceted and polycentric decisions’;
- (b) The Tribunal was under the erroneous impression that the Administrative Law principle of ‘deference’ was applicable and that they were therefore constrained to show respect to the JSE’s decision.¹⁶ That rule is peculiar to judicial reviews,¹⁷ and

¹⁶ *Staufen Investments (Pty) Ltd v The Minister of Public Works, Eskom Holdings SOC Ltd & Registrar of Deeds, Cape Town* [2020] ZASCA 18; [2020] 2 All SA 738 (SCA); 2020 (4) SA 78 (SCA).

¹⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) paras 46-48.

was not relevant to an application for the reconsideration of the JSE's decision in terms of s 230 of the FSR Act; and

(c) While dealing with the opinion of Trustco's expert, Mr Njikizana, in a perfunctory manner, the Tribunal accorded disproportionate deference to the JSE's views and quoted extensively from its submissions. The panel members accepted the JSE's views indiscriminately and therefore failed to decide the disputed issues based on their own objective assessment of the evidence.

[43] In my view, this criticism is unjustified and is belied by the Tribunal's extensive analysis of Mr Njikizana's opinion, the JSE's submissions and the reasons it gave for preferring the opinion of the JSE's expert, Prof Maroun. The Tribunal explained that Mr Njikizana was not 'entirely objective' and that his report contained 'a mix of allegation of fact, interpretation and adjudication and therefore transgresses the limits of "expert evidence"'. The Tribunal then proceeded to juxtapose Mr Njikizana's opinion with that of the JSE, Prof Maroun and the FRIP. And, cautioning that '[n]umbers do not count, reasons do', the Tribunal then considered Mr Njikizana's conclusion that 'form trumps substance', and his opinion in respect of the presumption regarding fair representation of financial transactions. The Tribunal provided extensive reasons for its finding that the presumption did not avail Trustco and why it preferred the JSE's approach, which emphasises substance over form.

[44] The criticism that the Tribunal did not give due consideration to Mr Njikizana's opinion is also demonstrably unfounded. The Tribunal analysed his submissions and, thereafter, dealt with the JSE's views. It again considered Trustco's submission that the JSE's stance overrode the requirements of the IRFS. The Tribunal then carefully weighed up the conflicting opinions and gave comprehensive reasons why it preferred the JSE's views. I need not concern myself with the soundness of the Tribunal's reasoning since it is the propriety of the process that resulted in its decision and not the correctness of its findings that must be considered in review proceedings. I am therefore of the view that this review ground must also fail. Consequently, the appeal falls to be dismissed.

Costs

[45] Counsel for the JSE asked the Court to award costs on a punitive scale to show its disapproval of the unacceptable manner in which Trustco conducted the litigation. I agree. Trustco has vacillated regarding its review grounds throughout the proceedings both in the high court and in this Court and, in the end, it presented oral argument in respect of issues not foreshadowed in the pleadings or its heads of argument. The JSE has been put out of pocket because it was compelled to incur unnecessary costs to defend litigation that had no reasonable prospects of succeeding. It is thus only fair that the JSE should be indemnified in respect of those unnecessary expenses through a punitive costs order.

Order

[46] In the result I make the following order:

The appeal is dismissed with costs on the attorney and client scale, including the costs of two counsel, where so employed.

J E SMITH
ACTING JUDGE OF APPEAL

Appearances

For the appellant:	W Trengrove SC with S Scott
Instructed by	Norton Rose Fulbright South Africa Inc., Johannesburg Webbers, Bloemfontein
For the second respondent:	I Green SC with M Kruger
Instructed by:	Webber Wentzel, Johannesburg Honey Attorneys, Bloemfontein.
