

**THE FINANCIAL SERVICES TRIBUNAL**

CASE NO: JSE2/2023

In the matter between:

**MURRAY HECTOR MUNRO**

Applicant

and

**JOHANNESBURG STOCK EXCHANGE  
LIMITED**

Respondent

**Tribunal Panel:**

Judge D Davis, Adv S Jikela SC, Adv G Goedhart

SC

Appearance for the applicant: Adv A Morrissey

Appearance for the respondent: Adv I Green SC

Adv M Kruger

Date of hearing: 3 July 2024

Date of decision: 31 July 2024

Summary: Reconsideration in terms of section 230 of the Financial Sector Regulation Act, 2017 – breach of JSE's Listing Requirements – financials not compliant with Listing Requirements and International Reporting Standards requiring restatement – responsibility of CFO - censure of CFO - whether JSE's sanction amounted to strict liability – whether sanction proportionate to nature of breaches

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## DECISION

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1. This is a reconsideration application which concerns the finding of respondent in respect of the conduct of the applicant in his role as former director and Chief Financial Officer of Tongaat Hullett Ltd ('Tongaat').
2. Respondent's adverse findings against applicant follows an investigation of the applicant's conduct relating to the publication of materially misstated consolidated financial statements of Tongaat between 2011 to 2018. Following this investigation, the respondent found that applicant had breached paragraphs 8.5.7 (a) and 8.6.2 (b) and General Principles (v) and (vii) of the JSE's Listing Requirements. It imposed a public censure together with a penalty of R 6 million and disqualified applicant from holding the office of a director or officer of a listed company for ten years.
3. On 24 February 2023 the applicant launched an application for reconsideration of the decision, contending in respect of the merits of the finding of the respondent that it had imposed a form of strict liability which rendered its conclusion unfair. He further contended that there was no basis for these findings which had misconstrued the facts, were legally unsubstantiated and hence based on errors of law. In respect of the sanction

imposed by respondent, the applicant contended that respondent had imposed a sanction which was not proportionate to the nature of the alleged breaches and did not take account of applicant's personal circumstances.

#### The background

4. On 29 November 2019 Tongaat published a report entitled 'Key Findings of PWC investigation' which identified that senior executives were responsible for various accounting regularities that resulted, inter alia, in the overstatement of profits as reflected in Tongaat's financial statements. Various processes had identified substantial errors which had to be corrected in the restatement of Tongaat's annual financial statements, affecting assets, income and liabilities in excess of R 10 billion.
5. Pursuant thereto, respondent considered that the fact that fifteen corrections of errors in the financial statements in the financial years 2011-2018 had been identified represented material evidence that the financial position of Tongaat for the years ending 31 March 2011 to 2018 had been significantly misstated. As a result of these findings and the fact that the applicant was the Chief Financial Officer during the relevant period, the censure and the fine were imposed on the basis that respondent had found that the applicant had breached paragraphs 8.5.7 (a), 8.6.2 (b) and General Principles (v) and (vii) of the Listing Requirements. In the view of the respondent, applicant's conduct resulted directly and/or contributed to the material restatements of Tongaat's 2018 Financial Statements and to the opening balance of retained earnings between the years 2011 and 2017. In summary, the financial statements had

failed to comply with the Listing Requirements and the International Financial Reporting Standards ('IFRS').

#### A summary of the listing requirements and the IFRS

6. Paragraph 8.5.7 (a) of the Listing Requirements obliges listed companies to prepare financial information in interim reports in accordance with, inter alia, IAS 34. It also required listed companies, in terms of paragraph 8.6.2 (b), to prepare annual financial statements in accordance with IFRS. General principle (v) requires that all parties involved in the dissemination of information into the market, whether directly to holders of relevant securities or to the public, observe the highest standards of care. General principle (v) (iii) requires that the Listing Requirements promote confidence in standards of disclosure and corporate governance in the conduct of issuers affairs and in the market as a whole.
  
7. To the extent relevant, IAS 18.1.4 regulates the conditions in terms which a company may recognise revenue in its financial statements. This is only permissible if five conditions are satisfied:
  - 7.1. the entity has transferred to the buyer, the significant risk and rewards of ownership of the goods;
  
  - 7.2. the entity retains neither continuing managerial involvement to the degree usually associated with ownership nor effective control over the sold goods;

- 7.3. the amount of revenue can be measured reliably;
  - 7.4. it is probable that economic benefits associated with the transaction will flow to the entity; and
  - 7.5. the costs incurred ought to be incurred in respect of the transaction can be measured reliably.
8. In addition, reference must be made to sections 29 and 30 of the Companies Act 71 of 2008 ('Companies Act') which provide that the Chief Financial Officer in particular must be held responsible for the preparation of the financial statements for the period in which there were financial statements. Thus, S29 of the Companies Act provides that if a company provides any financial statements including any annual financial statements to any person for any reason, those statements must, inter alia:
- 8.1. satisfy the financial reporting standards as to form and content, if any such standards are prescribed;
  - 8.2. present fairly the state of affairs and business of the company and explain the transactions and financial position of the business of the company; and
  - 8.3. show the company's assets, liabilities and equity as well as its income and expenses and any other prescribed information.

9. Section 29 (1) (e) of the Companies Act provides that on the first page of the statements there must be a prominent notice, inter alia, providing an indication as to whether the statements had been audited in compliance with any applicable requirements of the Act.
10. Pursuant to paragraph 3.60 of the Listing Requirements a submission must be made to respondent of a declaration in terms of schedule 13 to the JSE by which directors such as applicant agree to bind themselves to and comply with the Listing Requirements and note that the delegation of their duties to anyone else will not absolve them of their duties and responsibilities under the Listing Requirements. Similarly, paragraph 3.6.2 provides that 'all directors of issuers are bound by and must comply with the Listing Requirements ... in their capacities as directors and in their personal capacities'.
11. In a letter of 19 September 2021 respondent identified two land sale transactions for which applicant was requested to provide an explanation as to whether the revenue from those transactions was appropriately included in the respective financial periods in which they reported in accordance with IFRS. A further transaction was also raised by respondent, requiring a response from applicant.
12. In response, in a letter of 15 November 2021 applicant provided detailed submissions in respect of the two land transactions. In a further exchange of correspondence, the applicant through his attorneys, stated 'while our client accepts and agrees that as CFO of such a large group of operating companies

and divisions that made up Tongaat the financial reporting took place under his supervision – he did not actually personally process any entries or physically prepare the financial schedules and reports.’

13. Furthermore, insofar as the transaction upon which the respondent had focussed, applicant’s case was summarised thus:

*‘The three transactions you have identified would have been an indistinguishable fraction of the multiple transactions concluded in the conduct of the multiple businesses that Mr Munro was overseeing. Moreover, and given the oversight nature of his role, had any of the transactions been brought to his specific attention (he doubts that any were) Mr Munro would, in all likelihood, not have scrutinised the terms of the applicable agreements in the detail and in the context that an enquiry into alleged misconduct that the JSE has.’*

14. By contrast, the respondent concluded that, in particular in relation to the land transactions, to which reference has been made, these provided “indisputable evidence” that revenue had been recognised prematurely in clear contravention of IFRS. Furthermore, these transactions were but a sample which was representative of a population of similar transactions which caused Tongaat’s financial statements to be changed. The initial statement had been prepared under the direct supervision of applicant and had contained materially misstated revenue figures which required their material restatement.

### The applicant's case for reconsideration

15. In his argument before this Tribunal, Mr Morrissey, on behalf of the applicant submitted that, insofar as the so called *prima facie* case was concerned which the respondent had accepted that it was required to establish, it had to be supported by reliable evidential material capable of being tested by the applicant. In the absence thereof, he could not be called upon to explain and provide his views 'on this evidence and *prima facie* conclusions.'
16. Mr Morrissey further contended that other than the three transactions which were raised by the respondent, no factual details of proof of the suggested categories of errors were placed before applicant in order that he might respond thereto, specifically in relation to the bulk of the charges made against him. It was never suggested that the respondent was unable to provide such factual evidence to applicant so that he could investigate and respond accordingly.
17. Mr Morrissey further contended that the entire case of the respondent had proceeded upon the assumption that since the financial statements of Tongaat had to be materially restated it followed (without more) that the applicant was guilty of wrongdoing.
18. In summary, Mr Morrissey contended that there had been a failure to provide applicant with evidence to the effect that any or all of his conduct caused or contributed to the necessity to restate the accounts which had the financial consequences of reducing the revenue of Tongaat by R 10.3 billion. There



was no explanation of the manner in which the respondent had engaged in a sampling process nor tested its assumed reliability.

19. Mr Morrissey also submitted that the applicant's position was that the fact that there may have been misstatements in Tongaat's annual financial statements had to be distinguished from the question of whether applicant had breached the Listing Requirements. In his view, respondent's case had promoted the argument that the mere fact that there were restatements of the financial accounts was sufficient to establish a *prima facie* case against the applicant which he was then obliged to meet. In Mr Morrissey's view the fundamental problem in this argument was that this conclusion had been based on a construction of strict liability of the listing requirements which was legally unsustainable.
20. Relying on a *dictum* of the Constitutional Court in *Democratic Alliance v ANC* 2015 (2) SA 23 (CC) at para 154, it was contended that there is an interpretative presumption that a penal prohibition must include a requirement of fault; in contrast to the respondent's case which was based on the concept of strict liability. Furthermore, the concept of strict liability ran contrary to s 76 (5) of the Companies Act which made it clear that a director may in certain circumstances rely on work done by others without breaching his or her statutory obligations as a director. It therefore followed that it was untenable to conclude that a director in respect of the same conduct which complied with the statutory obligations under the Companies Act on the same facts had been in breach of obligations under the Listing Requirements.

21. A further contention was made that the applicant was entitled to rely on experts and accountants to ensure that Tongaat's annual financial statements were properly prepared. It would not be correct to conclude that applicant could not reasonably have accepted that the auditors' interpretation in respect of the preparation of the relevant financial statements were indeed correct.
22. A further set of arguments were placed before this Tribunal on the basis of the applicability of the IAS 18.1.4 relating to whether revenue could only be recognised when payment was made prior to occupation being afforded.

### Evaluation

23. In *Abdulla v JSE Ltd and Andre Visser* (Case Number JSE3/2023) this Tribunal had addressed a number of the arguments which had now been raised by applicant in the present case. In relation to the argument that insufficient documentation had been provided to the applicant, in *Abdulla* the Tribunal stated that, 'the facts and the views of the JSE were put to Mr Abdulla in a number of "audi" letters and he was invited and given a reasonable opportunity to respond.' (para 37)
24. To the argument that penal statutes must be strictly construed so as to require fault as an element of a statutory offence, the Tribunal accepted that as a general proposition of law in respect of penal statutes that submission was correct. It then went on to say:

*‘However in the present matter we are not dealing with ‘a penal statute’ and the cases cited do not assist the argument that fault is required in casu ... In our view, the sanction imposed by JSE serve regulatory rather than penal purposes ... Thus, the element of fault is not to be imported into or implied where the Listings Requirements do not require this.’ (para 44)*

25. Accordingly, ‘where the JSE finds that an issuer’s director has contravened or failed to adhere to the provisions of the Listing Requirements, the JSE may, inter alia, censure such director (privately or publicly) and impose a fine.’ (para 46)
26. These *dicta* are clearly applicable in this case. There is no plausible basis nor was one offered by which to eschew following the approach that the Tribunal adopted in the *Abdulla* case.
27. To the argument that this Tribunal is required to engage with the interpretation of the impugned transactions in order to determine the correctness of the initial financial statements, the decision of this Tribunal in *Jooste v JSE* (Case Number JSE4/2022) is of particular relevance. In that case the Tribunal was required to answer a question as to what was the cause of the demise of Steinhoff International Holdings NV (‘Steinhoff’). To this it stated ‘[T]he answer ... is accounting irregularities suspected by Deloitte and later confirmed by PwC and the Board and, one may add, the inability of the Applicant who alleged that audit proof was available to produce it when push came to shove.’ (para 36)

28. The next question considered by the Tribunal was why Steinhoff would restate the financial statements and publish disastrous financials 'if they were not, on the probabilities, more correct than incorrect.' (para 36) In support of this conclusion, the Tribunal registered its agreement with the argument of the JSE that 'there are therefore two sets of financial statements for the same periods that had been released to the market, i.e. the information that was published under Mr Jooste's direction and leadership versus the information which was subsequently restated. Both versions of the same set of financial statements cannot be correct.' (para 37)
29. Thus, the Tribunal concluded that 'it was not required of it (the JSE), as the Applicant suggested, to revisit and re-audit the financials. It was entitled to rely on probabilities as we do.' (para 39) The Tribunal further agreed with the following submission of the JSE:

*'Jooste was the Chief Executive Officer of Steinhoff throughout the period in question. Directors of issuers fulfil a critical role in ensuring that listed companies comply with the Listings Requirements. Issuers of securities listed on the JSE are only able to comply with the Listings Requirements if their directors take the appropriate action (or refrain from taking unlawful actions) to ensure that such issuers comply in all respects with its provisions and to ensure that the financial information of listed companies are, in all aspects, accurate and correct and that it represents a fair and accurate exposition of the company's financial information.'*  
(para 49)

30. This approach is directly applicable to the facts confronting this Tribunal. Further, although respondent was not able to locate a copy of applicant's schedule 13 declaration, it is relevant to note that every director of a listed company was required to complete a schedule 13 declaration which reads thus:

*'[I agree] ...to be bound by and to comply with the JSE's Listings Requirements, as amended from time to time, and, in my capacity as a director I undertake and agree to discharge my duties in ensuring such compliance whilst I am a director. The delegation of any my duties to any sub-committee or anyone else will not absolve me of my duties and responsibilities in terms of the Listings Requirements.'*

31. I should add that applicant's attention was drawn to his schedule 13 declaration in a letter of respondent of 3 August 2020. (para 26)

32. As the Tribunal noted in *Abdulla* the Schedule 13 undertaking points in an opposing direction in respect of the requirement of fault, whether in the form of intention or negligence. It held:

*'[w]e find that each relevant Listing Requirement is to be objectively interpreted to determine whether or not there has been a breach thereof, and that fault is not to be implied therein where the Listing Requirement objectively interpreted does not require fault.'* (para 48)

33. To the extent that this interpretation of the relevant law requires further support, in *Trustco Group Holdings Ltd v Financial Services Tribunal and*

another [2024] ZASCA 100 at para 33 Smith AJA (as he then was), on behalf of the unanimous court, said:

*‘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. 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.’*

34. This powerful statement of the imperative of accurate financial statements and their importance for prospective investors is manifestly applicable in this case. The applicant was the Chief Financial Officer of Tongaat. It is undisputed that the financial statements of Tongaat had to be materially restated to the cost of R 10.3 billion. In short, the initial financial statements did not reflect the accurate financial position of Tongaat; far from it. That the board was required to engage in so drastic a surgical operation as to restate the financial statements to the extreme detriment of the financial future of Tongaat, gainsays any argument that this Tribunal is required to engage in an interpretive exercise as to whether the initial financial statements are correct. The inference to the contrary is overwhelming.

35. That the applicant was a central figure in the manner in which the financial records of Tongaat were prepared and reflected, and that the financial statements were intended to accurately reflect the nature of the financial transactions of the company in accordance with international accounting standards cannot possibly be rebutted in this case.
36. In summary, there is no basis on the evidence which has been provided to the Tribunal to adopt a contrary approach to the decision taken by the respondent in this case. Save for a generalised argument about the justification for relying on a sample of incorrect financial reporting, the applicant placed no plausible argument before this Tribunal as to why, evaluated in terms of all the evidence, an irresistible inference adverse to applicant's conduct was not mandated.

### Sanction

37. That conclusion therefore leaves the question of sanction to be considered. Mr Morrissey contended that the large fine which the respondent imposed upon the applicant justifies the inference that it afforded wholly inadequate weight to the applicant's personal circumstances, including his ability to pay a fine of R 6 million. These circumstances were detailed in a letter of 13 January 2023.
38. Yet again emphasis was placed on respondent's merits decision which was predicated on three specific transactions, as opposed to the entire set of transactions which triggered the restatement by Tongaat's board. It was also emphasised that the applicant had no further capacity to earn an income. To

the extent that the reconsideration application on the merits was to be dismissed, he was a first time offender as a result of which the sanction induced a significant sense of shock in that it was unduly harsh.

39. In assessing these arguments, consideration must be given to a decision of this Tribunal in *Renault Otto Kay v The Financial Sector Conduct Authority* (Case Number A 19/2022):

*'The ordinary rule is that a higher body is not entitled to interfere with the exercise by a lower body of its discretion unless it: failed to bring an unbiased judgment to bear on the issue; did not act for substantial reasons; exercised its discretion capriciously; or exercised its discretion upon a wrong principle...'* (para 47)

See also *Jooste v FSCA* (Case A3/2023).

40. The fact is that the three transactions to which the respondent focussed its attention justified an inference that the applicant had clearly breached IFRS requirements in his capacity as the Chief Financial Officer of a listed entity, I might add, to the considerable detriment of innocent investors in Tongaat and other stakeholders of the company. The consequences of a breach of his responsibilities was egregious and had a most significant effect on members of the public who had chosen to invest their hard earned savings in Tongaat.
41. In the light of the jurisprudence to the effect that this Tribunal should tread cautiously in interfering with the sanction that has been imposed by the



respondent, there is no significant basis which was raised by applicant to interfere therewith.

42. In the result the application falls to be dismissed.



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Davis J