

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: A33/2023

MUNICIPAL EMPLOYEES' PENSION FUND

APPLICANT

and

FINANCIAL SECTOR CONDUCT AUTHORITY

RESPONDENT

and

SIBOSISO GODFREY SITIBA & OTHERS

JOINDER APPLICANTS

CASE NO.: A43/2023

In the matter between:

MUNICIPAL EMPLOYEES' PENSION FUND

FIRST APPLICANT

PETER MODIKE AND NINE OTHERS

2nd to 11th TRUSTEE APPLICANTS

and

FINANCIAL SECTOR CONDUCT AUTHORITY

RESPONDENT

And

SIBOSISO GODFREY SITIBA & OTHERS

JOINDER APPLICANTS

Tribunal panel: LTC Harms (chairperson), MF Legodi (deputy chairperson) and C Pretorius JJ

For the applicants: AE Franklin SC, JPV McNally SC and T Mafukidze instructed by Webber Wentzel

For the respondent: EL Theron SC instructed by Norton Rose Fulbright

For the joinder member applicants: AC Botha SC and SJ Martin instructed by Ndou Inc

Hearing: 25 September 2024

Date of decision: 10 October 2024

Subject: Pension Funds Act 24 of 1956 secs 7, 12 and 26. Reconsideration of failure to make decisions on amendment and exemption applications under the Pension Funds Act; and of decision to disband Board and appoint interim Board. Joinder application.

DECISION

- 1 This decision deals with the consolidated hearing of the matters mentioned in the heading. It concerns the reconsideration of decisions or non-decisions by the FSCA in relation to, in case A33/2023, applications made by the Municipal Employees' Pension Fund ('MERPF' or 'the Fund') in terms of sec 12 the Pension Funds Act 24 of 1956 ('the PFA') and, in case A43/2023, a decision under sec 26 of the PFA.

- 2 The relationship between the Fund (probably rather its former Principal Officer and/or its Administrator) and the FSCA as regulator is strained and we were informed of pending High Court proceedings between the parties. Those do not concern us. Some members of the Fund have axes to grind with the Fund and this led to applications by them to join

the proceedings (the Members' application), something vehemently opposed by the Fund while the FSCA adopted a qualified neutral stance.

- 3 The decision of the FSCA in A43/2023 affects the trustees of the Fund and they, accordingly, have joined in that case.
- 4 The applications are under sec 230(1) of the Financial Sector Regulation Act 9 of 2017 which entitles an aggrieved person to apply for the reconsideration of a 'decision' by a financial services regulator such as the FSCA (sec 218(a)).
- 5 The term 'decision' includes an omission to take a decision within a reasonable period if a period for decision-making has not been prescribed.
- 6 The only powers the Tribunal has in matters such as these is to either dismiss the application or set the impugned decision of the FSCA aside and remit the matter to the decision-maker (the FSCA) for reconsideration (sec 234(1)(a)). How one sets a non-decision aside is somewhat of a mystery unless one assumes that a non-decision is an implicit decision not to decide within a reasonable time.
- 7 It must again be emphasised that the Tribunal is not an appeal body in the ordinary sense of the word nor is it a review court under PAJA. Although counsel are fully aware of this, the argument often tended to move into those spheres of the law. We have no intention of restating what was said in *Jooste v Financial Sector Conduct Authority (A3/2023) [2023] ZAFST 126 (28 September 2023)*.
- 8 To revert to detail, the A33 reconsideration concerns the FSCA's decisions to refuse to consider and approve (or 'pend') the Fund's applications under sec 12 for amendments to the Rules of the Fund and a change of name, and an exemption from compliance with sec 7A(1) of the PFA, made in terms of sec 7B(1)(b)(i).

9 The A43 reconsideration concerns the FSCA's decision, pursuant to a notice issued in terms of sec 26, to remove the Board and appoint an interim board under section 26(2)(a) of the PFA. The Fund dissected the decision, but it is indivisible. The implementation of the decision has been suspended by agreement between the parties.

10 Central to all the decisions and non-decisions is the contention of the FSCA that the Board of the Fund is not properly constituted and although the FSCA and the Members approach the matters from that perspective the Fund adopts another angle, arguing mainly that the composition of the Board is irrelevant and that the decisions and non-decisions are otherwise contrary to administrative law.

EXEMPTION APPLICATION

11 It is convenient to begin with the exemption application. Pension funds must have a board of 'trustees' to direct, control and oversee the operations of a fund in accordance with the PFA and the fund rules (sec 7C(1)). Usually, a board consists of employer and employee nominated trustees and the intention of sec 7A(1) is to ensure that employees are represented by at least half of the trustees and that the members must have the right to elect their trustees.¹ In the case of this Fund, all trustees are member trustees and although the employer municipalities are bound by the rules, they are not represented on the Board.

12 Section 7B(1)(b) allows for an exemption subject to the conditions as determined by the registrar (now the FSCA) from the requirement that the members of the fund have the right to elect members of the board if the fund has been established for the benefit of different employers, in this case the 100 plus municipalities with employees that chose to be members of the Fund.

¹ A Gumede A7/2016 [KMBT_654-20160831093224 \(fsca.co.za\)](http://KMBT_654-20160831093224 (fsca.co.za))

13 The Fund has been exempted at least since 2015, each time for a period of three years, and the Rules have been drafted and approved by the registrar/FSCA accordingly. The last extension was for the period 1 June 2019 to 31 May 2022. The Fund applied for a new exemption on 26 May. On 7 July the FSCA responded as follows:

The exemption application was considered, and the following was noted; on the 30 May 2022, the Authority has issued a letter to the Fund The Authority has requested the Fund to provide information and evidence that the Board is properly constituted in terms of the Rules of the Fund and the Pension Funds Act. This application will be put on hold pending the outcome and or a satisfactory response or submission of evidence and the provided information as requested.

14 A few months later the Full Court of the High Court in Financial Sector Conduct Authority v Municipal Worker's Retirement Fund (A50/21) [2022] ZAGPPHC 977; [2023] 2 All SA 131 (GP) in the majority decision (par 16) held as follows (the minority judgment appears to be to the same effect):

There is no express provision in s7B that the exemption is to be for a limited duration. There is no reason to read in such implied provision. The Authority had no right to impose a time limit and should not do so. A policy, as correctly argued by the Fund, can be amended, and a Court is required to pronounce on this issue. A time-limit is not a condition, it is limiting the life of the exemption. The Conduct Authority it is not imposing a time limit by way of condition [sic].

15 The FSCA is bound by this decision which it did not appeal. So is the Tribunal. This interpretation of the Act is a decision *in rem* since it does not depend on the facts or identity of any particular fund. What this means is that the time limit in the last exemption is to be deemed *pro non scripto*. This is not an instance covered by the

Oudekraal principle² because the exemption was validly granted and only the time limit condition was void. Once this is the case the argument for the Members that the present application does not comply with an administrative Guidance Note 4 of 2018 (something never raised by the FSCA) or that the quoted judgment is distinguishable fall away. The suggestion that direct elections are feasible (something never suggested by the FSCA) is rejected.

- 16 Relying on the judgment, the Fund requested the FSCA to confirm its understanding that the exemption remained in place, alternatively, to extend the exemption. The FSCA did neither, giving a non-committal answer stating that it is reconsidering a new set of conditions. But as the judgment implies, that is beside the point.
- 17 The Fund submitted that it is entitled to certainty that the FSCA either recognises the exemption granted and that the exemption endures indefinitely (according to the High Court judgment), *alternatively* that, should this not be the case, the FSCA has granted the Exemption Application.
- 18 It is fair to assume that the Fund wishes the Tribunal to hold that the FSCA failed to render a decision within a reasonable time, set aside the non-decision and remit the matter for the FSCA to decide. For the sake of common courtesy and legal certainty one would have expected that the FSCA would answer the request and re-issue or affirm the present exemption without the time limit. In the meantime, knowing what the law is one would not have expected the FSCA to act as if the judgment had not been given but that is what happened as will appear from the next section of this decision.

SECTION 26 REMOVAL OF THE BOARD

² *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [\[2014\] ZACC 6; 2014 \(5\) BCLR 547](#) (CC); [2014 \(3\) SA 481](#) (CC); *Public Protector of South Africa v Chairperson of the Section 194(1) Committee and Others* (627/2023) [2024] ZASCA 131 par 34

19 Section 26 deals with the powers of intervention of the FSCA in the management of a pension fund. It is in three parts. The first (ss (1)) permits the FSCA to direct a board to amend its rules if, for example, the fund is not being managed in accordance with the Act or rules. Then, the FSCA may direct a trustee to vacate office if the trustee is no longer fit and proper to act as trustee (ss (4)).

20 The part, which was applied in this case, permits the FSCA to replace a board and appoint an interim board. Sub-section (2) reads thus:

Where a fund has no properly constituted board contemplated in section 7A and has failed to constitute a board after 90 days written notice by the registrar, or where a fund cannot constitute a board properly or where a board fails to comply with any requirements prescribed by the registrar in terms of section 7A (3), the registrar may, notwithstanding the rules of the fund, at the cost of the fund—

- (a) appoint so many persons as may be appropriate to the board of the fund or appoint so many persons as may be necessary to make up the full complement or quorum of the board; and
- (b) assign to such board such specific duties as the registrar deems expedient.

21 What ss (2) therefore contemplates is that an interim board may be appointed under the following two relevant circumstances:

- Where a fund has no properly constituted board contemplated in section 7A and has failed to constitute a board after 90 days written notice by the registrar, or
- where a fund cannot constitute a board properly.

22 On 30 May 2022, the FSCA issued a notification in terms of sec 26(2). The letter dealt in detail with problems the FSCA had noted during a review of the board's election

process. The main purpose of the letter was to determine whether the application for amendment of the Rules had been properly adopted by a properly elected Board of Trustees. There had been two resolutions on the same issue. The first was adopted by a board on 11 December 2020. Thereafter, a new board was elected, and this board ratified the first resolution on 20 December 2021.

23 The relevance of the first resolution escapes us and the FSCA's insistence to return to that stage for purposes of the amendment application is inexplicable. The exemption application was by the new board.

24 In any event, the FSCA listed many defects in the election process of the Board and stated that it 'does not find that there is sufficient evidence to conclude that the board of the fund is properly constituted in terms of the rules of the fund and section 7A(1A) of the PF Act.' The FSCA invited the Fund to file affidavits within 30 days to prove otherwise.

25 Then followed two paragraphs, one relying on the first bullet point and the other on the second. The first stated that

'if it is conceded that [emphasis added] the board of the fund is not properly constituted in terms of section 7A and/or 7A(1A) of the PF Act, the fund is hereby notified that it is required on or at any time prior to the expiry of a period of 90 days from the date of this letter to - ensure that a board for the fund is properly constituted in terms of section 7A and/or 7A(1A) of the PF Act and the rules of the fund'

26 The second stated that if the Fund is unable to constitute a proper board, the FSCA will exercise its powers in terms of section 26(2) to appoint an interim board.

27 The Fund responded on 20 July. One thing it did not do was to concede that the Board was not properly constituted. For the rest, it did not satisfy the FSCA that the Board was

properly constituted, and the FSCA proceeded to give notice on 4 October 2023 of its intention to appoint an interim board because ‘the Fund is unable to constitute a proper board’. This decision is the subject of the reconsideration application A43/2023.

28 It is unfortunately necessary to quote at length from the decision letter. The FSCA summarised its findings as follows:

- the fund has failed to ensure compliance with the rules of the fund, as there was no oversight that the election for employee representatives was conducted at each local authority;
- the fund did not ensure that pensioners, who are members in the fund, were given a right in terms of the rules of the fund nor by practice of the fund to participate in the election of office-bearers; and
- the appointment of three office-bearers was not in accordance with the rules of the fund.

29 The reason the FSCA chose to use the second option and not the 90-days option is to be found in the following statement:

The exemption granted to the fund in terms of section 7B(1)(b)(i) of the PF Act expired on 31 May 2022. In the absence of a valid exemption the fund is required to comply with the provisions of section 7A(1) of the PFA. The rules of the fund need to be amended to provide for a procedure that will be followed by the fund to include pensioners in the election of office-bearers. The amendment(s) of the rules and an application for an exemption from the provisions of section 7A(1) of the PF Act cannot be actioned by an improperly constituted board.

30 This statement relates to the finding that pensioner-members were not, under the Rules, given the right to elect trustees. The reason for this is that elections are run by each municipality for its employee members. There is no process whereby ex-employees who remained members could take part in those elections. That is what the

Rules stated when the Board was elected in November 2021.

31 Those Rules were the governing rules and had been approved and registered by the registrar/FSCA. Unless set aside by a court the rules bind not only members and the Fund but also the FSCA. That much is trite.³ The FSCA cannot because of an *ex post* dissatisfaction with the rules ignore them. Its remedy in those circumstances lies in sec 26(1) or an application to Court for a declaratory order.

32 The Constitutional Court reiterated the principles underlying rationality when it said:⁴ The question whether s 6(1)(a) of the Act is irrational involves an objective enquiry. As was stated in *Levenstein and Others*:

‘The constitutional requirement of rationality is an incident of the rule of law, which in turn is a founding value of our Constitution. The rule of law requires that all public power must be sourced in law. This means that (s)tate actors exercise public power within the formal bounds of the law. Thus, when making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose.’

In *Pharmaceuticals Manufacturers*, the Constitutional Court, however, made it clear that the fact that rationality is a minimum requirement for exercise of public power

‘does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary’s decision, viewed

³ *Abrahamse v Connock’s Pension Fund*, [1963] 1 All SA 159 (1963 (2) SA 76) (W); *TEK Corporation Provident Fund and others v Lorentz* 1999 (4) SA 884 (A) at 894B–C

⁴ *Democratic Alliance v Minister of Home Affairs and Another* (67/2022) [2023] ZASCA 97; 2023 (6) SA 156 (SCA) paras 23 and 24. Citations omitted.

objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or consider that the power was exercised inappropriately.'

33 To remove a board because it acted under binding rules is irrational. The FSCA knew that the cut-off date of the exemption was invalid and then to act as if the Court had not spoken is not acceptable.

AMENDMENT APPLICATION

34 The Fund applied to the FSCA for the registration of an amendment of its rules. The amendment is in essence a consolidation of existing rules. The applicant also applied for a name change. In what follows we do not express any opinion about the merits of these applications.

35 The applicable provision is sec 12 which reads to the extent relevant as follows:

(1) A registered fund may, in the manner directed by its rules, alter or rescind any rule or make any additional rule, but no such alteration, rescission or addition shall be valid— unless it has been approved by the registrar [FSCA] and registered as provided in subsection (4).

(4) If the registrar [FSCA] finds that any such alteration, rescission or addition is not inconsistent with this Act, and is satisfied that it is financially sound, he shall register the alteration, rescission or addition and return a copy of the resolution to the principal officer with the date of registration endorsed thereon, and such alteration, rescission or addition, as the case may be, shall take effect as from the date determined by the fund concerned or, if no date has been so determined, as from the said date of registration.

36 The FSCA has not, to date, determined whether the amendments are inconsistent with the Act or are financially unsound. It is indisputable that a reasonable time has elapsed since the applications were made and that in the case of the rule consolidation application many if not all concerns have been addressed. Counsel stated correctly

that

It is effectively common cause between the parties that the FSCA refused to decide and grant the Amendment and Exemption Applications because of concerns regarding the current MEPF Board composition. Indeed, the A33 decision, as communicated in the FSCA's letter of June 2023, simply indicated that the Applications "*remain active*", "*queries have been raised pertaining to composition issues in the management board*", and that the Applications "*will be considered once both cases have been finalised*". The FSCA has raised nothing adverse about the substance of the Applications themselves.

37 The essence of the Fund's argument is that

Nothing in the prevailing relevant legislation (ie the PFA and FSRA) empowers the FSCA, as regulator and registrar, to adopt the position it did in failing to consider and grant the Amendment and Exemption Applications on their merits. There is also no discretion afforded to the FSCA in terms of the FSRA or PFA (whether in the loose or true sense) which permits it not to consider applications from a pension fund, due to alleged issues concerning the management of the fund (irrespective of the merits of such allegations). The FSCA has other, self-standing remedies and powers in this regard.

38 Formulated differently, the complaint is that the FSCA's failure to act in terms of section 12(4) is ultra vires. The problem though with the submission lies in the premise that the FSCA exercised a kind of discretion. It did not. It sought to determine whether the application before it was a valid application by the Fund. It could only be one if the application was made in the name of the Fund by a properly constituted Board. If it had reason to believe that the Board was not properly constituted, it could not grant the applications.

39 In other words, since only a properly constituted board could apply, the fact that the application had been filed by such a body was a jurisdictional fact which the FSCA was

obliged to consider before it could grant the applications. It is thus not the question of an implied power.⁵ Section 12(6) entitled it to request additional information, which it did.

40 The argument that the FSCA was obliged to accept an application by a *de facto* board for the sake of legal certainty is rejected. It assumes that the election of the board was an administrative act and that one could reverse engineer the *Oudekraal* principles to legitimise the actions of a putative board,⁶ something we do not accept without some authority or logic.

THE COMPOSITION OF THE BOARD

41 The FSCA's argument was not very helpful because it was not much more than a copy and paste of the FSCA's reasons and did not engage the Fund's argument and, especially, not the Fund's augmented grounds.

42 It is also based on the assumption that any error or omission during an election vitiates the whole election, something for which we could not find any authority.

43 Before dealing with the facts, it is necessary to consider some general propositions as to the approach to non-compliance with the strict wording of the Rules in the election of the trustees to the Board. We are aware that sec 7A, 7C and 7D are couched in peremptory terms but taken literally it would be impossible to comply with the letter of words. Employee representatives and trustees are usually lay persons who depend on administrative personnel to guide them. There is much to be commended in the

⁵ The applicant's counsel quoted *Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd and others* [2007] 1 All SA 154 (SCA) par 28 out of context. The judgment merely confirmed that a power cannot be implied which is not compatible with an express power.

⁶ *Judicial Service Commission and Another v Cape Bar Council and Another 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA)* par 13.

approach taken in *Garment Workers' Union v De Vries and Others* 1949 (1) SA 1110 (W):

In considering questions concerning the administration of a lay society governed by rules, it seems to me that a court must look at the matter broadly and benevolently and not in a carping, critical and narrow way. A court should not lay down a standard of observance that would make it always unnecessarily difficult - and sometimes impossible to carry out the constitution. I think that one should approach such enquiries as the present in a reasonable common-sense way, and not in the fault-finding spirit that would seek to exact the uttermost farthing of meticulous compliance with every trifling detail, however unimportant and unnecessary, of the constitution. If such a narrow and close attention to the rules of the constitution [is] demanded, a very large number of administrative acts done by lay bodies could be upset by the Courts. Such a state of affairs would be in the highest degree calamitous - for every disappointed member would be encouraged to drag his society into Court for every trifling failure to observe the exact letter of every regulation.

- 44 Examples of excessive fault-finding spirit are the following: the insistence on a secret ballot when someone is nominated, and the meeting unanimously accepts the nomination; the presence of some members who had not been nominated by their branches; the documents (such as ballot papers) underlying the nomination and election of representatives at municipal level.
- 45 The one question the FSCA did not consider is whether the contravention of the Rules was material to the result of the election.
- 46 Without conducting a detailed autopsy, we revert to the summary of the findings that the Board was not properly constituted, the first ground being that the fund has failed to ensure compliance with the rules of the fund, as there was no oversight that the election for employee representatives was conducted at each local authority. The

answer of the Fund is compelling:

As explained in the reconsideration application, to the extent that the FSCA wished to ascertain how each municipality conducted its own election process and which individual would represent it as the elected representative, that is in the domain of the municipality, not the MEPF. In terms of the Rules, the MEPF is not itself involved in the internal election process undertaken by municipalities and administered by municipal managers, but simply receives a return, addressed to the Principal Officer, indicating the result of the election (Rules S(S)(a) and (b)).

- 47 The Fund, in its augmented grounds, set out the facts in detail (par 11) and supplied a sample of returns and stated in its application for reconsideration that the meeting was attended by the elected employee representatives based on returns provided to the Fund by the municipal managers. The FSCA argued that the allegation is inconsistent with a confirmation by the attorneys of the Fund that the Fund was unable to furnish the returns to the FSCA. The problem though is that the record references relied on by counsel do not support him (A 231 and A237). The further problem is that counsel ignored the exposition in the said par 11 which casts light on the 'new' evidence obtained by the FSCA from (only?) two municipalities.
- 48 The second, which has already been dealt with in some detail, relates to the fact that the Fund did not ensure that pensioners, who are members in the fund, were given a right in terms of the rules of the fund nor by practice of the fund to participate in the election of office-bearers.
- 49 One may add to the earlier comment that the FSCA's approach is inconsistent. We have already alerted to the fact that the Rules do not provide for a process for pensioners to take part in the election, and this may have been because of logistical issues that were considered when the Rules were drawn under the exemption. The

FSCA took umbrage because pensioners were not represented on the Board. But when a former employee-trustee who has since retired was appointed to the Board for the sake of continuity, the FSCA's attitude is that she could not have been so nominated or appointed because she no longer was an employee.

50 The third ground is that the appointment of three office-bearers was not in accordance with the rules of the fund. That may be so but that does not nullify the election of a quorum of the Board. The problem, if any, may be rectified through the application of sec 26(4).

51 We consequently conclude that the FSCA misconceived its powers and that it should instead have considered the application of sec 26(1) and (4) instead of 26(2). We may add this: the FSCA did not consider the effect of its decision to invalidate all the decisions and workings of the Board retrospectively to an undefined date. In addition, if this decision that there was no valid Board were correct the FSCA logically had to dismiss the amendment and exemption applications and not pend them. This adds to the irrationality of the decision.

JOINDER APPLICATIONS

52 Members of the Fund applied for leave to join the proceedings to support the FSCA in opposing the reconsideration applications. The FSR Act does not provide for this, and the application is not covered by the Rules of the Tribunal. On the other hand, sec 232(1) of the FSR Act states that that the chairperson of a panel may determine the procedure and that proceedings before the Tribunal are to be informal and without technicalities. That did not deter the Fund from raising many technical issues.

53 The main problem with the applications is that much that was said is irrelevant and even vexatious. Their counsel was more circumspect and limited himself to the merits

of the applications in context of the interests of the members in the application. His argument was helpful and was considered and the Fund replied to it.

54 We do not believe that the Fund was, except for additional costs (which were not claimed), prejudiced by the attempted joinder of the Members and that the applications should, on that count, be dismissed. Since stare decisis does not apply to our decisions, any discretionary decision would also not affect future cases.

55 On the other hand, granting the applications will have no value to the Members. Their voices have been heard (read). If they wish to review our decision, they will in any event have to convince the High Court of their legal standing.

56 Accordingly, we do not consider that it is in the interest of justice to grant an order that will have no practical effect, and we make no orders on the joinder applications.

CONCLUSION

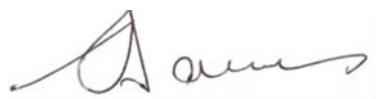
57 The time has arrived for the end of antagonistic stances and the beginning of constructive engagement between the Board and the FSCA. Conscious of the administrative burden on the FSCA, many delays between steps remain inexplicable. The approach of the Fund was also not very helpful, shrugging off bona fide queries. The Principal Officer is duty bound to ensure that the lay Board members understand their duties under the Act and the Rules of the Fund, not seek to act as quasi board member, and must ensure that to the extent possible elections at municipality level are properly conducted and proper records kept and provided to the Board and its chair. Last, the Administrator is an administrator and not the Board.

ORDER

A. No order is made in connection with the joinder applications of the members.

- B. In case A33/2023, the decisions to pend and/or dismiss the amendment and exemption applications are set aside and remitted for reconsideration.
- C. In case A43/2023, the decision under sec 26(2) is set aside and remitted for reconsideration.

Signed on behalf of the Tribunal panel.

A handwritten signature in black ink, appearing to read "LTC Harms".

LTC Harms