

THE FINANCIAL SERVICES TRIBUNAL

Case No. PFA45/2023

In the matter between:

MARTIN STEYN

APPLICANT

and

TSHWANE MUNICIPAL PROVIDENT FUND

FIRST RESPONDENT

THE PENSION FUNDS ADJUDICATOR

SECOND RESPONDENT

Summary: Reconsideration of a decision of the Pension Funds Adjudicator (30M) in terms of Section 230 of the Financial Sector Regulation Act 9 of 2017 ("the FSRA").

Appearances:

Applicant *in personam*

Second Respondent: Adv Sandile Khumalo S.C.

Date of Hearing: 16 February 2024

DECISION

A. INTRODUCTION

1. The Applicant is Martin Steyn, an erstwhile board member of the First Respondent.
2. The First Respondent is the Tshwane Municipal Provident Fund ("the Fund").
3. The Fund is registered and approved and is subject to the provisions of the Pension Funds Act 24 of 1956 ("the PFA").

4. The Second Respondent is the Pension Funds Adjudicator ("the Adjudicator"), the statutory ombud as defined in section 1(1) of the FSRA and is established in terms of the PFA.
5. This is an application in terms of Section 230 of the Financial Sector Regulation Act 9 of 2017 against the decision taken by the Adjudicator in terms of Section 30M of the PFA.
6. The matter was heard virtually before Judge Dennis Davis, PJ Veldhuizen and Zama Nkubungu-Shangisa on 16 February 2024.

B. FACTS

7. On 17 November 2022, the Fund charged the Applicant with five contraventions of its Code of Conduct, namely:

7.1 "Charge one: communicated directly with a service provider on fund matters without authorisation to do so on 17/10/2022 through an email that you sent.

7.2 Charge two: intimidated or used intimidatory language towards a service provider in your attempt to get information from them, on 17/10/2022.

7.3 Charge three: divulged confidential discussions that took place at the investment committee (IC) meeting held on 17/10/2022 in an email that you sent to a service provider without authorisation.

7.4 Charge four: divulged the same information again to the chief investment

officer (CIO) of the service provider during the board of trustees (BoT) meeting held on 19/10/2022.

7.5 Charge five: you brought the BoT into disrepute with your conduct in that you failed to act with due care, diligence and good faith."

8. The Applicant was requested to reply to the charges within five working days, but no meaningful reply was received.
9. On 22 February 2023, the BoT elected to immediately release the Applicant from his duties as a trustee of the board. The BoT communicated its decision and reasons to the Applicant on 7 March 2023. In light of the Tribunal's conclusion, it is unnecessary to delve any further into the charges, outcome, and reasons for the release of the Applicant.
10. The Applicant filed a complaint with the Adjudicator on 23 February 2023 concerning his release as an elected board member of the Fund.
11. The Adjudicator dismissed the complaint for want of jurisdiction.

C. THE LEGISLATION

12. Section 7A(4) of the PFA provides that:

(4) A board member must—

- (a) within 21 days of removal as board member for reasons other than the expiration of that board member's term of appointment or voluntary resignation, submit a written report to the registrar detailing the board member's perceived reasons for the termination;
- (b) on becoming aware of any material matter relating to the affairs of the pension fund which, in the opinion of the board member, may seriously prejudice the financial viability of the fund or its members, inform the registrar thereof in writing.

[S. 7A inserted by s. 2 of Act No. 22 of 1996. Sub-s. (4) added by s. 8 (b) of Act No. 45 of 2013.]

13. Section 9B of the PFA provides that:

9B. Protection of disclosures.—(1) The registrar must provide a process for the submission of disclosures by a board member, principal officer, deputy principal officer, valuator or other officer or employee of a fund or an administrator, which ensures appropriate confidentiality and provides appropriate measures for the protection of disclosures.

(2) In addition to what is provided in sections 8 and 9 of the Protected Disclosures Act, a disclosure by a board member, principal officer, deputy principal officer, valuator or other officer or employee of a fund or administrator to the registrar constitutes a protected disclosure.

(3) (a) A board member, principal officer, deputy principal officer, valuator or other officer or employee of a fund or an administrator who makes a protected disclosure in accordance with this section, may not suffer any occupational or other detriment.

(b) Any person referred to in paragraph (a) who suffers any detriment, including occupational detriment as defined in the Protected Disclosures Act, may—

- (i) seek the remedies provided for in section 4 of the Protected Disclosures Act, where occupational detriment has been suffered;
- (ii) approach any court having jurisdiction for appropriate relief; or
- (iii) pursue any other process and seek any remedy provided for in law.

[S. 9B inserted by s. 15 of Act No. 45 of 2013.]

14. Section 26 (1) and (2) of the PFA provide that:

26. Registrar may intervene in management of fund.—(1) Without limiting what a directive of a financial sector regulator may include, the Authority may, through a directive, direct that the rules of a fund, including rules relating to the appointment, powers, remuneration (if any) and removal of the board, be amended if the fund—

- (a) is not in a sound financial condition or does not comply with the provisions of this Act or the regulations affecting the financial soundness of the fund;
- (b) has failed to act in accordance with the provisions of section 18; or
- (c) is not being managed in accordance with this Act or the rules of the fund.

[Sub-s. (1) substituted by s. 36 (a) of Act No. 45 of 2013 and by s. 290 read with Sch. 4 of Act No. 9 of 2017 with effect from a date determined by the Minister by notice in the Gazette: 1 April, 2018 (General Notice No. 169 in Government Gazette 41549 of 29 March, 2018.).]

Wording of Sections

(2) 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

[Para. (a) substituted by s. 36 (c) of Act No. 45 of 2013.]

Wording of Sections

- (b) assign to such board such specific duties as the registrar deems expedient.

[Sub-s. (2) amended by s. 36 (b) of Act No. 45 of 2013.]

D. APPLICATION OF THE LAW TO THE FACTS

15. The Applicant's referral to the Adjudicator was misplaced. Section 7A(4) of the PFA provides the remedy for the Applicant's complaint. Put differently, the Applicant's remedy was to refer his complaint to the the Financial Sector Conduct Authority and not the Adjudicator.
16. In the circumstances, the Adjudicator has correctly held that she has no jurisdiction to entertain a complaint of this nature.
17. In the circumstances, the Tribunal cannot interfere with the Adjudicator's determination.

E. THE ORDER

The application is dismissed.

Signed on behalf of the Tribunal on 21 February 2024.



PJ Veldhuizen

(Member)

Judge Dennis Davis

(Member)

Zama Nkubungu-Shangisa

(Member)