

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: A41/2022

In the matter between:

MZIWANDILE PETER ZIBI Applicant

and

FINANCIAL SECTOR CONDUCT AUTHORITY First Respondent

OLANO MAKHUBELA N.O. Second Respondent

Tribunal Panel: LTC Harms (Chair), SM Maritz and C Woodrow SC

For Applicant: Motswasele Mogotsi instructed by Motswasele Mogotsi Attorneys

For Respondents: Lerato Maite and Michael Mbikiwa instructed by R & W Attorneys

Hearing: 13 April 2023

Summary: Application for Reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 ("FSR Act") of a direction by the Financial Sector Conduct Authority ("the FSCA") objecting to the continued appointment of the Principal Officer of a Pension Fund – termination of appointment as Principal Officer - sections 8(5)(a) and (c) and 8(6) of the Pension Funds Act 24 of 1956 ("the PFA") – test of fit and proper.

DECISION

A. INTRODUCTION

1. The Applicant, Mr Zibi, applied for reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 ("the FSR Act") of a decision taken by the Financial Sector

Conduct Authority (“the FSCA”), dated 5 August 2022¹, in which it objected to his continued appointment as the Principal Officer and directed the termination of his appointment as Principal Officer as he was found not to be fit and proper to hold office as such of the Private Security Sector Provident Fund (“the Fund”) as contemplated in section 8(5)(a) and (c) of the Pension Funds Act, 24 of 1956 (“the PFA”).

2. At the outset it is necessary to state that this decision should be read in conjunction with the decisions delivered by this tribunal in the matters of *Zulu and 6 Others v The Financial Sector Conduct Authority (Case No: A46/2022)* and *Mqadi v The Financial Sector Conduct Authority (Case No: A40/2022)*. The legal principles and factual matrix stated in these decisions apply *mutatis mutandis* to this decision insofar as it is applicable.

B. RELEVANT BACKGROUND FACTS AND CHRONOLOGY OF EVENTS

3. The Applicant held the position as Principal Officer of the Fund on a full-time basis from 2010. His full-time appointment was subsequently changed in 2014 to that of a contract Principal Officer. From 1 March 2019 the Applicant was again appointed on a full-time basis as the Principal Officer of the Fund², which appointment was until December 2022 when the FSCA took its decision (dated 5 August 2022).
4. The Fund has been under scrutiny by the FSCA for several years. Subsequent to investigations, which commenced in 2017 by the then Registrar of the Fund, it was determined by the investigators of the FSCA that there were legitimate concerns regarding the management of the Fund and essentially that the members of the board (sometimes referred to as the board of trustees) (“the board”) were incapable of managing the affairs of the Fund. This resulted in a memorandum, dated 8 May 2018, requesting urgent regulatory intervention.³
5. The request for urgent regulatory intervention was made pursuant to on-site visits conducted to assess the legislative compliance of the Fund.⁴ Serious concerns were noted during the on-site visits, which warranted further investigations.

¹ Annexure “A1” to Part A of the Record, pp 35 - 38

² Record: Part A, p 10

³ Record: Part B, pp 1 - 22, para 4 (p 22)

⁴ Record: Part B, p 23

6. As a result of the findings in the 8 May 2018 memorandum statutory managers for the Fund were duly appointed on 13 September 2018.
7. The appointed statutory managers called for a forensic investigation to be conducted into the various allegations of improprieties at the Fund. Ngidi Business Advisory (“Ngidi”) were appointed as investigators. A forensic report, dated 10 January 2020 (“the Ngidi report”), was produced, which contained findings, conclusions and recommendations regarding the allegations investigated. The Ngidi report made various findings against the Applicant⁵, which form the basis for the FSCA’s objection against his continued appointment as Principal Officer of the Fund and its finding that the Applicant is no longer fit and proper to hold office as Principal Officer. These findings relate to the periods 2011, 2013, 2016 and 2017. We will address these findings hereinunder.
8. On 6 July 2020 the FSCA addressed a detailed letter to the Applicant regarding the above findings and advised him that because of such findings, it (FSCA) had reason to believe that he is no longer fit and proper to hold office as Principal Officer. The Applicant was accordingly afforded the opportunity to respond to such preliminary findings.⁶
9. On 5 August 2020 the Applicant comprehensively replied to the above letter.⁷ Further correspondence, dated 26 May 2021⁸ (from FSCA) and 13 June 2021⁹ (response from Applicant) was exchanged between the Applicant and the FSCA relating to the Ngidi report’s findings, and the documents needed to finalise the matter.
10. After considering the Applicant’s responses, and on 5 August 2022, the FSCA concluded that the Applicant is no longer fit and proper to hold the office as Principal Officer as contemplated in section 8(5)(a) and (c) of the PFA and therefore it (FSCA) objected to his continued appointment as the Principal Officer of the Fund and directed that it is not in the public interest that he continues to hold office as such as he has failed to act diligently, competently or with sound judgment, which was prejudicial to the Fund and its members.¹⁰ This decision forms the subject of the present reconsideration application.

⁵ Record: Part B, p 30-221

⁶ Record: Part B, pp 222-231

⁷ Record: Part B, pp232-260

⁸ Record: Part B, pp 261-263

⁹ Record: Part B, pp 264-265

¹⁰ Record: Part A, para 6, p 38

C. APPLICANT'S GROUNDS FOR RECONSIDERATION

11. The grounds relied on by the Applicant in his Application for Reconsideration can be briefly summarised as follow:

11.1 The Applicant asserts that, as the Principal Officer, he does not owe any fiduciary duties, including to the Fund, and that he was duty bound at all times to follow the dictates of the board. This narrative that he lacked any decision-making powers, and can accordingly attract no blame or liability, is the golden thread that runs through his grounds of application and augmented grounds of application.¹¹

11.2 It is the case of the Applicant that he made various recommendations/proposals to the board, which were ferociously rebuffed.¹² Any such recommendations would be for the board to consider and implement. It is the assertion of the Applicant that section 8(2) of the PFA merely requires that a Principal Officer must be residing in South Africa.¹³

11.3 Applicant asserts that he requested the FSCA to invite him to make oral submissions before it reached its final decision and that it did not adhere to such a request.¹⁴

11.4 The Applicant further submitted that the FSCA's decision contravened various sections of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), as the decision was, *inter alia*, biased or reasonably suspected of being biased, alternatively materially influenced by error of law, the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered, the action was taken arbitrarily or capriciously, the exercise of power or the performance of the function authorised by the empowering provision in pursuance of which the administrative action was purportedly taken, is so

¹¹ Record: Part A, pp 10 -11

¹² Record: Part A, p 13-14

¹³ Record: Part A, para 34, p 14

¹⁴ Record: Part A, para 8, p7

unreasonable that no reasonable person could have so exercised the power or performed the function.¹⁵

11.5 It is the case of the Applicant that the provisions of section 8(6)(a) and (b) of the PFA have been incorrectly interpreted by the FSCA, as the duty to report arises only upon termination of the appointment of the Principal Officer.¹⁶

11.6 The Applicant further asserts that at all relevant times the FSCA was aware of the operations of the Fund as it had insight in its operations and that it (FSCA) was in effective control of the Fund by virtue of the information availed to it.¹⁷

D. TRIBUNAL'S DECISION

12. Against this background, before us is Mr Zibi's application for the reconsideration of the decision of the FSCA, dated 5 August 2022.

13. The central question in this application is whether the Applicant is a fit and proper person to occupy the position as Principal Officer.

14. In addressing the above, it is necessary to have regard to the interpretation and application of section 8(5)(c) of the PFA.

15. The relevant part of Section 8(5)(c) of the PFA provides as follows:

"The registrar may for purposes of assessing if a principal officer is not, or is no longer, a fit and proper person in accordance with paragraph (a) have regard to-

- (i) the competence and soundness of judgment of the person for the fulfilment of the responsibilities of the particular office and type of fund;*
- (ii) the diligence with which the person concerned is likely to fulfil those responsibilities;*
- (iii) previous conduct and activities of the person in business or financial matters; and*
- (iv) ..."*

¹⁵ Record: Part A, para 66, p 32

¹⁶ Record: Part A, pp 31-32

¹⁷ Record: Part A, para 36 - 41, pp 15 - 19

16. Article 18 of the Pension Fund Circular 130 ("Circular PF 130")¹⁸ states that the role of the Principal Officer is vital for the proper performance of the board and that his/her duty to the Fund overrides any responsibilities or obligations arising from being in the employment of or remunerated by the employer, the sponsor, or any service provider. It further places a duty on the Principal Officer to ensure that the decisions of the board are executed, to ensure that the Fund complies with the formal requirements of the law, including directives from the Registrar, SARS, and any other relevant regulatory authority, to liaise with service providers to the Fund and to contribute at board meetings.
17. Article 19 of Circular PF 130 provides that the fiduciary duty owed by the board and the Principal Officer requires that they avoid conflicts of interest.
18. In our view, the Applicant has failed to demonstrate competency and sound judgment in the fulfilment of his role as Principal Officer. We deal with our reasons in this regard below.
19. On the Applicant's own version, he deems himself not only subservient to the board, but duty bound to follow its decisions blindly, without the exercise of his own judgment. This is evident from the Applicant's initial response to the section 8(5) enquiry, which is quoted *verbatim*:

*"I in the outset significantly mention and emphasise as Ngidi and the FSCA ought to be aware, that the board of trustees handles the day to day administration of the fund in terms of s 7D of the PFA and the trustees direct , control and oversee the operations of the fund in terms of s 7C of the Act and which powers derive from the PFA and which the PO who is appointed by the fund cannot overrule in terms of the operation of the law."*¹⁹
20. The Applicant's construct of his duties is flawed (See: *South African Local Authorities Pension Fund v Registrar of Pension Funds (FSB Appeal Board) at para 7*). Having regard to Circular PF 130 it is clear that the Applicant's duties as the Principal Officer are not limited to the execution of the decisions of the board, but include the duty to act with utmost good faith towards the Fund and in the best interest of all members, to ensure that the board gives full and proper effect to the rules of the Fund and to deal with all matters relating to the Fund and its members in accordance with his fiduciary duties. It is the duty of the Principal Officer to

¹⁸ Financial Service Board, Circular PF No. 130, dated 11 June 2007

¹⁹ Record, Part B, para 7, p 234

oversee the general workings of the Fund, which includes the duty to oversee service providers and ensure that they are performing their tasks. In terms of article 17.5 of Circular PF 130 the Applicant as the Principal Officer should have met with the board to monitor the operations of the Fund. If this was done the Applicant would have been aware of the improprieties at the Fund.

21. The Applicant did not only fail in his fiduciary duties, but could not be considered as a person who is fit and proper to be entrusted as the Principal Officer of the Fund for the following reasons:

Service Level Agreement entered into between the Fund and Salt Employee Benefits (Pty) Ltd

21.1 The Applicant has been directly involved in the disregard of legislative prescripts. Service Level Agreements ("SLA") were concluded with various entities in breach of the Fund's procurement policies, which agreements and procurement processes were irregular.

21.2 When Salt Employee Benefits (Pty) Ltd ("Salt") was appointed to provide administrative services to the Fund in terms of Section 13B of the PFA the Applicant signed an SLA binding the Fund and Salt which agreement was inconsistent with procurement processes and policy as Salt was appointed after a closed bid process, which required written substantiation that was to be submitted and approved by the board. The required process was not followed and this much was conceded to by the Applicant.²⁰ Salt further failed to comply with the provisions of the Procurement Policy of the Fund, specifically paragraph 11 of such Policy.²¹

21.3 The Applicant was a member of the Self Admin Task Team ("SATT"), whose responsibility it was to procure the services of a Section 13B administrator.²²

²⁰ Record: Part B, para 20, p 102

²¹ Record: Part B, para 85, pp 199-206

²² Record: Part B, para 14, pp 99-100

- 21.4 In failing to ensure compliance with the provisions of the relevant legislative prescripts relating to procurement, the Applicant also failed to comply with the Circular PF 130²³, which is binding on him.
- 21.5 Four SLA were entered into between the Fund and Salt. The Applicant, together with other authorised people on behalf of the Fund, signed all four of the agreements.
- 21.6 Three of the SLA were signed post the effective date of the agreement, which was irregular.²⁴

Appointment of Vendicure (Pty) Ltd

- 21.7 It is common cause that the Applicant is the director and owner of Vendicure (Pty) Ltd (“Vendicure”). It is also not in dispute that payment was effected by the Fund into the account of Vendicure.²⁵
- 21.8 Payments were purportedly for section 14 services, as well as secretarial services, that the Applicant was providing to the Fund. Such services were plainly outside the scope of the Applicant’s role as Principal Officer.
- 21.9 The Applicant’s oral submissions at the hearing of this application that the payments to Vendicure were not irregular as it was standard practice by members of the board to have their remuneration paid to legal entities identified by them, does not assist him as it is firstly not substantiated by any evidence and secondly it does not negate a clear conflict of interest.
- 21.10 The Applicant does not deny that Vendicure provided the mentioned services and that he was remunerated therefore by the Fund, despite there being no SLA in place between the Fund and Vendicure. This was in contravention of the Procurement Policy of the Fund and amounted to irregular conduct on the part of the Applicant.²⁶

²³ Record: Part C, p 13 (Issued June 2007)

²⁴ Record: Part B, para 48, p 113

²⁵ Record: Part B, para 1, p 169

²⁶ Record: Part B, para 10, p 173

21.11 Although the Applicant asserts that he merely executed the decisions of the board and that he did not have any decision-making powers he clearly had the power to promote his own interests, for instance, by promoting the interests of the service provider of which he is a director. The Fund is in these circumstances particularly vulnerable because its Principal Officer, who is meant to be the guardian of its interests, subverted them to promote the interests of a particular service provider.

21.12 The Applicant's conduct, in procuring his own company, Vendicure, to provide services to the Fund, and receiving remuneration for such services flagrantly disregarded the Fund's Procurement Policy and the duties that he owed to the Fund and gave rise to a palpable conflict of interest.

Appointment of Ms Kele Zibi

21.13 Ms Kele Zibi is the daughter of the Applicant. She was appointed as a junior secretary by the Fund.

21.14 Ms Zibi's offer of employment was co-signed by the Applicant, in his capacity as Principal Officer.²⁷ This was a direct breach of the Fund's Recruitment and Selection Policy.²⁸

21.15 The Applicant further contravened the provisions of Circular PF 130 (paragraph 19 thereof) which expressly states that as part of the fiduciary duties owed to the Fund, conflicts of interest ought to be avoided by the board as well as by the Applicant. The appointment of his daughter was a clear conflict of interest, which could be viewed as nepotism.

Increase in the number of board meetings

21.16 The Applicant conceded that he was aware of the increase in the number of board meetings (493 meetings for the period 9 January 2017 to 1 February 2018), and accordingly an increase in the Fund's liability regarding such attendance of board

²⁷ Record: Part B, para 14.8, p 198

²⁸ Record: Part B, para 14.5, p 197

meetings.²⁹ However, he was unable to provide any evidence that he ever objected to such excessive meetings, or even raised a concern in this regard.

22. The Applicant's submission that he does not bear fiduciary duties is at odds (to use the words of Counsel for the Respondents) with the nature of his function as Principal Officer of the Fund. He fulfils a role comparable to that of the Chief Executive Officer of any other organisation. He enjoys wide discretionary powers. (See: *Phillips v Fieldstone Africa 2004 (3) SA 465 (SCA)* in respect of the characteristics relating to a relationship in which a fiduciary obligation has been imposed).
23. In addition to the above, the Applicant has failed to provide any evidence indicating that he ever objected to the way legal prescripts were flouted, or to the fact that excessive meetings were held to the detriment of the Fund or that he has reported these contraventions to the FSCA, as he was mandated to do.
24. Thus, it cannot be said that the Applicant has exhibited sound judgment or that he executed his duties as Principal Officer diligently.³⁰ While the Applicant was at the helm (to use the words of Counsel for the Respondents), the Fund was exposed to both reputational and financial damage.

Interpretation of section 8(6)(a) and (b) of the PFA

25. The Applicant has sought to absolve himself of any duty to report any misconduct to the Registrar.³¹
26. The Applicant's argument that the provisions of section 8(6)(a) and (b) of the PFA have been incorrectly interpreted by the FSCA, as the duty to report arises only upon termination of the appointment of the Principal Officer is baseless for the following reasons:

26.1 Section 8(6)(a) and (b) provides as follows:

"A principal officer of a fund must-

²⁹ Record: Part A, para 30, p 13

³⁰ *Moropa and Others v Chemical Industries National Provident Fund and Others, 2022 JDR 1875 (GJ) at para 82*

³¹ Applicant's Head of Argument and submission, para E, p 7

- (a) *within 21 days of his or her appointment being terminated, other than in accordance with the condition referred to in subsection 5(b), submit a written report to the registrar detailing the principal officer's perceived reasons for the termination; and*
- (b) *on becoming aware of any matter relating to the affairs of the pension fund which, in the opinion of the principal officer, may prejudice the fund or its members inform the registrar thereof in writing."*

- 26.2 On a proper reading of section 8(6)(a) the Principal Officer has a duty to submit a report to the Registrar within 21 days of his/her appointment being terminated regarding his perceived reasons for termination. That duty can only arise after his appointment has been terminated.
- 26.3 Section 8(6)(b) entails a separate requirement namely that the Principal Officer of a Fund must inform the Registrar in writing of any matter relating to the affairs of the Pension Fund which in his/her opinion may prejudice the Fund or its members. That duty exists while the Principal Officer is in office, and not upon the termination of his/her appointment. Further, the word "and" between section 8(6)(a) and (b) clearly indicates that a Principal Officer must comply with both (a) and (b).
- 26.4 In addition to the above, Directive PF No 5 issued on 10 December 2010 and published on 14 February 2011³² sets out in unequivocal terms the responsibilities of a Principal Officer (duty to report) in terms of section 8(6)(b) of the PFA.
- 26.5 The Applicant has a duty to report the irregularities regarding irregular procurement, excessive board meetings, conflicts of interest, and any other matter that he deemed prejudicial to the Fund and its members. There is no evidence that the Applicant has adhered to his duty to report these irregularities to the FSCA. Although the Applicant attached correspondence between the Fund and the FSCA to his application for reconsideration, none of this correspondence relates to the above irregularities. Having regard to the above it is clear that the Applicant has failed to ensure that the

³² Record: Part C, p 31 (Government Gazette No 34024)

principles of sound corporate governance were maintained at all times, as he was mandated to do in terms of his SLA with the Fund.³³

- 26.6 In addition to the above, the Applicant in terms of the SLA between himself and the Fund was responsible for the monitoring and reporting of payment of contributions in terms of section 13A and Regulation 33 of the PFA.³⁴ The FSCA's records reflect that no reporting was received during 2015 and 2016. The FSCA only received a report of non-compliance for the month August 2016. The annual financial statements for the period ended 29 February 2016 reflected non-compliance with section 13A and Regulation 33 of the PFA. The Applicant has failed in his duty to report instances of non-compliance with section 13A and Regulation 33 of the PFA to the FSCA, as he was mandated to do.
27. While the Applicant was entrusted as the Principal Officer of the Fund, the Fund's annual financial statements as of 28 February 2017 reflected the Board of Fund Expenses as R25 212 683 for the 2017 financial period and R21 058 032 for the 2016 financial period. The FSCA conducted a comparison of these expenses to various other funds in the retirement funds industry for the 2017 financial period. It appeared the board expenses for the PSSPF were excessive and disproportioned. No explanation was given for this.
28. The Applicant's failure to comply with his duty to report is a clear indication of his disregard of legal prescripts and thus this tribunal agrees with the FSCA that he is no longer fit and proper to act as the Principal Officer of the Fund.
29. To determine what is expected from the Applicant section 2 of the Financial Institutions (Protection of Funds) Act, 28 of 2001 ("FI Act") should also be considered. In terms section 2 it is required of the Principal Officer of the Fund, that he/she must observe the "*utmost good faith*" and exercise "*proper care and diligence*" with regards to such funds.
30. From the above it is clear that the Applicant has failed to show the utmost good faith and has failed to exercise proper care and diligence in his dealings with the Fund.

³³ Para 3.3 of the Service Level Agreement between the PSSPF and Mr Zibi, dated 1 December 2013

³⁴ Para 3.4(k) of the Service Level Agreement between the PSSPF and Mr Zibi, dated 1 December 2013

31. Insofar as the Applicant relies on the provisions of PAJA we point out that the Tribunal is not a review “court” or “tribunal” as envisaged in PAJA, and accordingly does not have review jurisdiction. (Erasmus v Financial Sector Conduct Authority and Another (A1/2022) [2022] ZAFST 13 (16 March 2022: “*We have held repeatedly that although the FSCA must comply with PAJA, this Tribunal does not have review jurisdiction because the Tribunal is not a review “court” or “tribunal” as defined in PAJA. Reviews are concerned with the process, reconsideration applications with the result. But that does not necessarily mean that review grounds may not overlap with reconsideration grounds. This is especially the position where a flawed process impacts on the result.*”) Insofar as the review grounds may overlap with the reconsideration grounds, it is incumbent on the Applicant to set out the factual allegations necessary to support such a challenge. The Applicant has failed to substantiate any of these grounds.
32. The Applicant’s submission that he was not invited to an interview prior to the final decision being taken by the FSCA as a ground for reconsideration is without merit for the following reasons: Firstly, in terms of sections 134 to 139 of the FSR Act the FSCA has a wide range of investigative powers, which include, *inter alia*, to conduct interviews, to do on-site inspections, to subpoena documents, etc. However, there is no prescript relating to the manner of the investigations. Secondly, the Applicant does not *per se* have a right to be interviewed prior to a decision being taken. The Applicant is only entitled to be invited to make submissions prior to a decision been taken. As stated above, the Applicant was on various occasions invited to make submissions, which he did. Thirdly, the Applicant was afforded a further opportunity in his application for reconsideration to make submissions. Thus, this tribunal does not uphold this ground for reconsideration.
33. For reasons stated above, this tribunal finds no reason to deviate from the decision taken by the FSCA and the application for reconsideration is accordingly dismissed.

E. ORDER

1. The Applicant’s application for reconsideration is dismissed.

SIGNED on behalf of the Tribunal on this 9th day of MAY 2023.

A handwritten signature in black ink, appearing to read "ADV Salmé Maritz". The signature is written in a cursive, flowing style.

ADV SALMÉ MARITZ

With the panel also consisting of:

LTC Harms (Chair)

C Woodrow SC