

**THE FINANCIAL SERVICES TRIBUNAL**

**CASE NO: PA2/23**

In the matter between:

**MORUO LIFE LIMITED**

Applicant

and

**THE PRUDENTIAL AUTHORITY**

Respondent

Tribunal panel: LTC Harms (chairperson), T Golden SC and C Woodrow SC

For the applicant: S Khumalo SC instructed by Malatji & Co Attorneys

For the respondent: N Maenetje SC and N Luthuli instructed by MacRobert Attorneys

Hearing: 1 March 2024

Date of decision: 8 March 2024

Summary: Reconsideration application of dismissal of application for a life insurance business licence - sec 22(1)(c) of the Insurance Act 18 of 2017 - prescribed fit and proper requirements in the Joint Standard 1 of 2020 – direct and indirect significant owners

**DECISION**

1. The applicant, Moruo Life Ltd, applies in terms of sec 230(1) of the Financial Sector Regulation Act 9 of 2017 ('the FSR Act') for the reconsideration of a

decision by the Prudential Authority, the respondent, a regulatory body established by sec 32.

2. Moruo Life had applied on 31 August 2021 under sec 23(1) of the Insurance Act 18 of 2017 to the Authority for a licence to conduct life insurance business in certain classes. Although the Act requires that the application should be finalised within 120 days, the decision, which was to dismiss the application, was only made on 11 July 2023. (There may have been agreed extensions and the delay does not feature further in this matter.)
3. In terms of sec 22(1)(c) of the Insurance Act, to qualify for licensing as an insurer, an applicant must, inter alia, demonstrate that
  - (a) its significant owners meet the prescribed fit and proper requirements and
  - (b) it will be able to comply with the governance framework requirements and financial soundness requirements of the [Insurance] Act.

(The other requirements are not listed because they do not arise.)<sup>1</sup>
4. The Authority, in dismissing the application, found that Moruo Life had failed to demonstrate that it qualified for licensing as an insurer because it did not comply with those requirements.<sup>2</sup>
5. The Authority did not file additional reasons for purposes of the present application and the reasons are to be gathered from the laconic decision letter read in the light of the preceding report of the Frontline Team that made recommendations to the Licensing Panel of the Authority.

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<sup>1</sup> We do not quote the statutory provisions in full but only those parts that are pertinent to the issues in this matter.

<sup>2</sup> The Authority used the word 'includes' implying that there might be further reasons, but they have not been disclosed.

## THE SIGNIFICANT OWNER REQUIREMENTS

6. We begin to deal with the requirement that the applicant's significant owners had to meet 'the prescribed fit and proper requirements'.
7. The term 'significant owner' is defined in sec 157 of the FSR Act and for present purposes we are concerned with sec 157(2)(c) read with sec 157(1). Cut to the bone, a 'person' who, directly or indirectly, holds a 'qualifying stake' in the insurer is a significant owner.
8. A person may be a juristic person, and a juristic person, according to the definition, includes a trust or trust fund (FSR Act sec 1 sv 'person' and 'juristic person').
9. To hold a qualifying stake in the applicant insurance company, a person must, directly or indirectly, hold at least 15% of the issued shares of the applicant (FSR Act sec 1 sv 'qualifying stake').<sup>3</sup>
10. The prescribed fit and proper requirements (referred to in sec 22(1)(c) of the Insurance Act) are to be found in the Joint Standard 1 of 2020 (the 'Joint Standard').<sup>4</sup> Section 6.1 of the Joint Standard states that a significant owner must have the necessary financial standing required to support the business of the insurer/applicant.
11. The decision of the Authority on the fit and proper requirements is limited to the lack of financial standing of significant owners.
12. Section 6.4 of the Joint Standard provides as follows:

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<sup>3</sup> Once again, the other provisions do not arise.

<sup>4</sup> <https://www.resbank.co.za/content/dam/sarb/publications/prudential-authority/pa-financial/sector-regulation-joint-standards/2020/9970/1.-Joint-Standard-1-of-2020---Significant-Owner---1-June-2020---signed.pdf>

Subject to section 7 below,<sup>5</sup> the existence of any of the following constitutes prima facie evidence that a significant owner may not have the necessary financial standing to support the business of the financial institution:

(a) the significant owner does not have access to adequate funding or future access to capital enabling it to support the business of the financial institution when required;

(b) the significant owner is not able or not likely to be able to meet any of its financial obligations (including debts) as they fall due; or . . .

13. The direct significant owners of Moruo are Moja Sagagwe Oa Iphihla Trust ('the Trust') and Sampada Private Equity Fund II (RF) (Pty) Ltd ("the Equity Fund Company") because the Trust owns (or will own) 'directly' 30% and the latter 70% of the issued shares of Moruo.

#### THE EQUITY FUND COMPANY

14. We first consider whether the Equity Fund Company is fit and proper by complying with the requirement of financial standing as defined. The Frontline Team that made recommendations to the Licensing Panel found that the Equity Fund Company is 'fit and proper', and the Authority did not hold otherwise.

15. The Equity Fund Company has two shareholders: Mr Bafedile Mafologele who owns 90% of its issued share capital and Ms Laurett Jardim with 10%. That means that Mr Bafedile Mafologele is by definition an indirect significant owner

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<sup>5</sup> Section 7.1: When assessing the fitness and propriety of a significant owner, the responsible authority must consider the existence of any of the factors specified in section 6, in addition to any other reasonable considerations that the responsible authority deems relevant, having due regard to the: (a) nature and scope of the significant owner's business; and (b) structure of any group of companies of which the significant owner is part.

of Moruo because he holds indirectly more than 15% of the issued shares of Moruo.

16. Neither the frontline team or the Licensing Panel held that Mr Bafedile Mafologele was not a fit and proper person because he did not comply with the financial standing requirements as set out above.

## THE PENSION FUNDS

17. In holding that Moruo Life did not comply with the financial standing requirements the Authority instead considered the question whether two 'stakeholders' in Moruo Life were indirect significant owners with an interest of more than 15% in Moruo Life. These 'stakeholders' are pension funds (the South African Local Authorities Pension Fund – SALA – and the Chemical Industries Notional Provident Fund – CINPF) who are members of an *en commandite* partnership (Sampada Private Equity Fund II) consisting of several pension funds, constituting the Limited Partners, and a General Partner, the Equity Fund Company. The Authority found that they (SALA and CINPF), as indirect significant owners, did not have the required financial standing.

18. The involvement of pension funds was explained in the application for the insurance licence in these terms:

As an asset manager and having successfully managed the wealth of its clients over the past five years SAMPADA (the significant owner) took a decision to expand on its business to meet the needs of its clients (which are mostly Funds). SAMPADA's clients (the funds) have many beneficiaries and the beneficiaries also require insurance products such as life cover, disability cover and funeral

cover. Due to ongoing successful relationship between SAMPADA and its clients, the clients requested SAMPADA to register an insurance company [Moruo] that will take care of the insurance needs of the funds beneficiaries hence the application for a life insurance license.

The life insurance license will be in the best interest of the public because the needs of the clients and beneficiaries will be taken care of and the license will ensure that the needs of the clients and beneficiaries are all taken care of by one group of companies which will make things easier when it comes to communication between the clients, asset manager as well the insurance underwriter. The license will also consist of mostly black people when it comes to Board of Directors, Head of Control functions and senior management, this will therefore allow for transformation and inclusion in the financial services space especially the insurance space.

19. According to Joubert *Law of South Africa* 'Partnership' para 436 a partnership *en commandite* is one that is to be carried on in the name of a disclosed partner and to which every undisclosed partner contributes a fixed contribution on condition that the undisclosed partner receives a share of the profit but that in the event of loss is liable to the co-partners to the extent of the fixed amount of the agreed capital contribution only.

20. The requirements are that (a) the *en commandite* partners are undisclosed, which means that they are not held out to the world as partners; (b) they are not liable for partnership debts to creditors of the partnership, but only to their co-partners; (c) they may not participate actively in the business of the partnership; and (d) they cannot claim repayment of their contributions or payment of their

share of the partnership profits in competition with the creditors of the partnership, nor may they claim possession of assets while the partnership remains in existence.

21. The fact that the identities of the pension funds have been disclosed for purposes of these proceedings is of no consequence because

‘such disclosure does not infringe upon the reason for anonymity, namely that third parties should not be induced to deal with the managing partner in reliance on the credit of the other members of the partnership as members of the partnership’.

See *Van Oudtshoorn v Investec Bank Ltd* (588/10) [2011] ZASCA 205 para 22.

22. We shall assume for purposes of this decision that the pension funds do not have the required financial standing as indirect significant owners, and we accordingly consider only the question whether they are indeed indirect significant owners as defined.

23. To understand the Authority’s approach, we quote in redacted form from the argument of its counsel:

When a private equity fund uses an *en commandite* partnership, the private equity investor (the pension funds in casu) participates by contributing capital to the partnership in return for a share in the profit or loss of the partnership. The *en commandite* partnership structure enables investors to be limited partners and the appointment of the private equity firm as the general partner with the legal power to act on behalf of the private equity investment fund. A partnership agreement regulates the *en commandite* partnership, with the general partner, unlike limited partners, having unlimited liability for the debts and liabilities of the partnership. The general partner is usually also the fund manager, although

in this case it is Umthombo Investment (Pty) Ltd, a company in which Mr Bafedile Mafologele holds a significant interest.

24. Counsel referred to some provisions of the partnership agreement:

- The partnership is an *en commandite* partnership between the general Partner and the Investors (the pension funds).
- The liability of the pension funds is limited to the amount of their undrawn commitments.
- The partnership carries on business as a long-term investor and acquires and holds investments. The partnership (i.e. the Fund) does so “acting through the General Partner or persons authorised to act on behalf of the Partnership pursuant to this Agreement”.
- The Investors take no part in the management or control of the business and affairs of the Fund beyond what is stipulated in the partnership agreement or is provided under common law.
- The power to manage the business and affairs of the Fund, including to identify and make Investments is delegated to the General Partner. The General Partner does so on behalf of the partnership, and it is not at large to do as it pleases. The Investments it chooses must comply with the Investment Guidelines.
- The liabilities of the Investors are limited in terms of the partnership agreement and the common law, while that of the General Partner is not. However, the General Partner is indemnified in respect of any liabilities of the Fund which cannot be satisfied from the cash funds of the Fund, and



if the General Partner settles those liabilities, it will be repaid in priority to any distributions to the Investors.

- The Partners (i.e. the Investors and the General Partner) are entitled to distributions in terms of and according to the priority set out in clause 13 of the partnership agreement.

25. From this followed the Authority's decision and counsel's submission that as a matter of fact and law the pension funds are indirect significant owners of Moruo because they indirectly hold qualifying stakes in Moruo.

26. We disagree. One might in ordinary parlance state that each of the pension funds indirectly hold more than 15% stake in Moruo, but that is not what the FSR Act requires. As mentioned, the question is whether any of these pension funds indirectly 'hold at least 15% of the issued shares' of Moruo. In company law context, the requirement of holding issued shares indirectly refers to shareholding via holding companies or nominees.

27. The connection between the pension funds' interest in the partnership and the issued shares held directly and indirectly by others is tenuous. They have no legitimate legal interest, directly or indirectly, in the issued shares.

28. There is another approach and that relates to the purposive interpretation of these provisions. What legitimate or statutory purpose is served if the direct significant owner complies with the fit and proper requirements (and in this case, too, the 90% indirect significant owner, Mr Bafedile Mafologele) to require compliance by parties further down the line? We cannot conceive of any.

29. We accordingly find that the pension funds are not indirect significant owners of Moruo Life and if this were the only issue in the application, we would have upheld the application.

## THE TRUST

30. The Trust, as said, owns 30% of the issued shares of Moruo Life and is accordingly a significant owner of more than 15% of the issued shares of Moruo Life. The Authority found that the Trust did not have the necessary financial standing because it failed to manage its financial affairs satisfactorily as its total liabilities exceed its total assets.

31. In reconsidering the decision of the Authority, we are concerned with the correctness of its decision and not necessarily the reasons for its decision. In our view there are more profound reasons for the finding that the Trust does not have the necessary financial standing to make it a person fit and proper to be a direct significant owner of the issued shares of Moruo.

32. The Trust appears to be what is generally known as a family investment trust. Mr Bafedile Mafologele is the founder of the Trust with a capital contribution of R100.00. He is a co-trustee and one of the beneficiaries. In addition, he lent the Trust some R1.3 million in terms of an interest-bearing loan which was used in part to finance 'property, plant and equipment'. The Trust does not trade and, as the Authority said, its liabilities exceed its assets. In addition, it incurred a net deficit in each financial year disclosed.

33. The question then is whether the Trust has, in the words of section 6.4(a) of the Joint Standard, access to adequate funding or future access to capital enabling it to support the business of the financial institution when required. There is no evidence that it has.

34. Relying on p1059, counsel nevertheless submitted that the Equity Fund Company undertook to supply all the funding required by Moruo Life, and that (we suppose) it was unnecessary for the Trust to have access to capital. If this means that the Equity Fund Company intends to fund Moruo Life fully, allowing the Trust to reap 30% of the declared dividends through its shareholding, something must be wrong somewhere. One would have expected that the Equity Fund Company would, in those circumstances, hold 100% of the equity in Moruo Life. Whether such a structure is in the public interest, especially the interests of members of the contributing pension funds, is something touched on tangentially by the frontline team (p. 407-408) and may require future consideration.

35. We accordingly agree that the Trust is not a fit and proper significant owner of its shareholding in Moruo Life.

#### GOVERNANCE FRAMEWORK REQUIREMENTS

36. The Authority found that composition of the proposed board of directors including the proposed risk, remuneration and audit committees do not comply with the requirements of Governance and Operational Standards for Insurers (GOI) 2 and section 94(4) of the Companies Act and that Moruo Life had failed to

demonstrate that it will be able to comply with the governance framework requirements as required in terms of section 22(1)(c)(vii) of the Act.

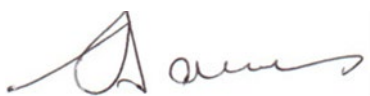
37. Although much was made of a lack of detail and the failure to consider other options, the detail is set out in the frontline team's report (p. 416-417): the concern is the shortage of independent directors. Moruo explained that it is difficult to recruit such persons while the licence application is pending.

38. The frontline team did not consider this to be an insurmountable hurdle and counsel, quite fairly, appeared to agree with the proposition that once the licence is granted, suitable candidates will become available. That means that the Authority should have considered the possibility of granting a licence subject to the condition that before business is commenced the appropriate key persons must be appointed – something always subject to the approval of the Authority.

## ORDER

39. The reconsideration application is dismissed.

Signed on 8 March 2024 on behalf of the Tribunal panel.

A handwritten signature in black ink, appearing to read 'LTC Harms', is enclosed in a thin black rectangular border.

LTC Harms (chairperson)