

THE FINANCIAL SERVICES TRIBUNAL

Case No. A58/2022

In the matter between:

TEXTILE OPEN PROVIDENT FUND

Applicant

and

FINANCIAL SECTOR CONDUCT AUTHORITY

Respondent

Tribunal Panel: T Golden SC (Chairperson)

W Ndinisa

KD Magano

Appearance for the applicant: Z Badshah

Appearance for the respondent: S.R Rossouw

Date of hearing: 13 September 2023

Date of decision: 27 October 2023

Summary: Application for reconsideration of a decision of the FSCA-section 2(5) of the Pension Funds Act 24 of 1956 read with Board Notice 59; confers a discretion to grant or refuse valuation exemption; FSCA exercised the discretion judicially- No valid grounds for interference

DECISION

INTRODUCTION

1. This is an application for reconsideration of the decision of the Financial Sector Conduct Authority (“FSCA”).
2. This application is made in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 (“the FSR Act”).

FACTUAL BACKGROUND AND CHRONOLOGY OF EVENTS

3. On 19 October 2022, the applicant, Textile Provident Fund (“the Fund”) applied to be exempted from the requirement to submit tri-annual statutory valuation reports as required by section 9A¹ and 16² of the Pension Funds

¹ 1) Every registered fund which in terms of section 16 is required to have its financial condition investigated and reported upon by a valuator, shall appoint a valuator.

(2) The provisions of section 8, excluding the provisions of subsections (1) and (2), apply with the necessary changes to the appointment of a valuator under this section.

(3) The valuator of a registered fund must be a natural person who is resident in the Republic, and if the valuator resigns the appointment or is unable for any reason to discharge any duty imposed upon a valuator by any provision of this Act, the fund shall appoint another person to be its valuator within such period as prescribed.

² “(1) A registered fund shall, once at least in every three years, cause its financial condition to be investigated and reported upon by a valuator, and shall deposit a copy of such a report with the registrar, and shall send a copy of such report or a summary thereof, prepared by the valuator in a form prescribed and signed by the valuator, to every employer participating in the fund.”

Act, 24 of 1956 (*“the Pension Funds Act”*).

4. In its application for exemption, the board stated the following:

“We, duly authorised by a resolution of the board of the fund, hereby apply for valuation exemption on behalf of the above-mentioned fund in terms of the Pension Funds Act, 1956.

The board has satisfied itself that the fund is properly administered in terms of its rules and that there is no need for contingency reserve accounts to allow for contingencies resulting from the fund not being administered properly in terms of its rules.”

5. On 1 December 2022, the FSCA rejected the Fund's application for exemption on the basis that the Fund's annual financial statements revealed that it had significant reserves, which made it unclear whether members were receiving their benefits (*“the impugned decision”*).

6. Aggrieved by the outcome of the exemption application, the Fund applied for reconsideration of the decision based on the following grounds:

- 6.1. In terms of section 2(5)(a) of the Pension Funds Act, the FSCA must exempt the fund from compliance with sections 9A and 16 of the Pension Funds Act because it complied with the requirements for valuation exemption specified in Board Notice 59 (*“BN59”*).

- 6.2. Section 3 of the BN59 is silent on the amount that may be held in the contingency reserves of the fund and a significant amount of assets in contingency reserves is not specified as a factor which would preclude valuation exemption for the fund.

- 6.3. Past applications have been approved despite the Fund having significant amounts in reserve.
 - 6.4. A full statutory valuation for a fund of this size will be a significant cost to members, and loss of valuation exempt status will also complicate and delay future section 14 transfers.
7. The FSCA opposes the application for reconsideration on the following grounds:
- 7.1. The Fund's annual financial statements for the 2022 year of assessment showed that the Fund had significant reserves, making it unclear whether members are receiving their minimum benefits.
 - 7.2. From the Fund's AFS, it is apparent that the Fund's reserve accounts represent 8.1% of the net assets of the Fund and unallocated surplus represents 2% of the net assets, totalling 10.1% of the assets of the Fund. This, according to the FSCA, is a significant proportion of assets and represents assets that were not allocated towards the retirement savings of the members of the Fund.

ISSUES FOR RECONSIDERATION

8. The issues for reconsideration are the following:
- 8.1. Whether the provisions of 2(5) of the Pension Funds Act read with section 3 of BN59 confer a discretion on the FSCA to grant or refuse a valuation exemption;
 - 8.2. If those provisions confer a discretion on the FSCA, we are required to

decide whether in this case, the FSCA exercised its discretion correctly; and

- 8.3. Whether there is any legal basis for this Tribunal to interfere with the discretion exercised by the FSCA.

ANALYSIS AND DISCUSSION

Do the provisions of 2(5) of the Pension Funds Act read with section 3 of BN59 confer a discretion on the FSCA to grant or refuse a valuation exemption?

9. At the hearing of this matter, the Fund argued that the provisions of section 2(5) of the Pension Funds Act are peremptory and that the FSCA does not have any real discretion if the Fund has met the conditions set out in BN59. In other words, once it is established that the fund has complied with the conditions set out in BN59, the FSCA must exempt the Fund from compliance with the provisions of sections 9A and 16 of the Pension Funds Act.
10. The FSCA submitted that the provision is not peremptory. The use of the word “*may*” in section 2(5) demonstrates that the Pension Fund Act confers a discretion on the FSCA when considering an application for valuation exemption. According to the FSCA, the exercise of the discretion is also echoed in the wording of BN59 which states that “*the registrar may grant a valuation exemption*”.
11. The requirement for exemption under section 2(5)(a) is that the registrar may exempt the Fund from compliance with a provision of the Pension Funds Act where practicalities impede the strict application of a specific provision of this Act.

12. The above provisions confer on the Registrar the power to exempt the Fund from compliance with the provisions of sections 9A and 16 of the Pension Funds Act in circumstances where practicalities impede the strict application of those provisions. However, it must be noted that even though there may be practicalities which impede the strict application of those provisions, FSCA is not obliged to exercise its discretion in favour of the Fund by granting a valuation exemption. We say this because the language of section 2(5) and the use of the word “may” in this provision is permissive and not peremptory. Taken in isolation, the word “*may*” has several meanings, including, “*might*”, “*maybe*”, “*might be*”, “*admit of*”, “*allow*”, “*permit*”, and “*offer an opportunity for or be a possibility*”.³ It is a settled principle of our law that the use of permissive language signifies conferral of a discretion to do or not to do that which is stipulated in the provision.⁴
13. As has been repeatedly affirmed by our Courts, words used in a statutory provision must be given their ordinary meaning.⁵ These words must be read in their proper context and in a manner that enables the provision to achieve its purpose. In Cool Ideas 1186 CC v Hubbard⁶ the Constitutional Court said:

“[A] fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do

³ S v Bergman 1984 (1) SA 182 (C) at 185

⁴ Smit v Minister of Justice and Correctional Services and Others [2020] ZACC 2

⁵ Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA)

⁶ [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC)

so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;*
- (b) the relevant statutory provision must be properly contextualised; and*
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."*

14. The use of the word "may" in section 2(5) must be interpreted as conferring a discretion on the Registrar to exempt the Fund from complying with sections 9A and 16 of the Pension Fund Act. However, such discretion may only be exercised where practicalities impede the strict application of sections 9A and 16 of the Pension Fund Act. The Fund carries the onus to show that practicalities impede the strict application of sections 9A and 16 of the Pension Funds Act. Where the Fund fails to discharge this onus, the FSCA does not have any discretion to grant or refuse a valuation exemption.
15. The Fund did not present a case on the practicalities that impede the strict application of sections 9A and 16 of the Pension Fund Act. The Fund's case was simply that it was entitled to the exemption because it complied with all the requirements of BN59.
16. FSCA correctly argued that the power to exempt the Fund from complying with sections 9A and 16 of the Pension Fund Act is derived from the Act itself and that the use of the word "may" cannot be interpreted to mean that the registrar "must" exempt the Fund from compliance with that section. We

agree with this interpretation.

17. The FSCA clearly has a discretion to grant or refuse a valuation exemption.
18. We now move to address the Fund's argument that the provisions of BN59 oblige the FSCA to grant an exemption once it has been established that it met all the conditions set out in section 3 of BN59.
19. The Registrar of Pension Funds published BN59 which prescribes the conditions for exemption from the provisions of sections 9A and 16 of the Pension Fund Act. The conditions for valuation exemption are set out in section 3 of BN59 which provides that the registrar ***may*** grant valuation exemption provided it complies with the requirements set out in section 3 of BN54.
20. An interpretation of section 3 of BN59 confirms that:
 - 20.1. The Registrar has a discretion to exempt the Fund from complying with sections 9A and 16 of the Pension Fund Act.
 - 20.2. The exercise of the discretion involves a two-stage enquiry. The first stage is a factual enquiry whether the Fund complied with all the conditions set out in section 3 of BN59. The exercise of the Registrar's discretion to exempt the Fund from valuation requirements must be preceded by compliance with ***all*** the conditions set out in BN59. In other words, the exercise of discretion is only triggered once the Fund complies with the conditions set out in section 3 of BN59.
 - 20.3. The second stage involves the exercise of the discretion. The Registrar

may, having found that the Fund has complied with all the conditions set out in section 3 of BN59, consider whether to exempt the fund from complying with sections 9A and 16 of the Pension Fund Act. If it is found that the Fund does not comply with any of the requirements set out in section 3 of BN59, the exercise of discretion will not be triggered. In such circumstances, the FSCA will not be vested with any discretion.

21. We are therefore unable to agree with the Fund's argument that an exemption would be automatic if the conditions in BN59 are met.
22. The source of the FSCA's power to grant a valuation exemption is section 2(5) of the Pension Funds Act read with BN59 and section 281 of the FSR Act. It is clear from the language used that the provisions of section 2(5) read with BN59 are not peremptory. Although the FSCA is authorised to grant valuation exemption in circumstances set out in BN59, it is not obliged to do so even in circumstances where the Fund has complied with the conditions of section 3 of BN59. Again, the use of the word 'may' in the context of BN59 does not mean "must." Therefore, the word "may" in the context of section 2(5) of the Pension Funds Act read with BN59 must be given its ordinary meaning, which implies a discretionary power.

Did the FSCA correctly exercise its discretionary powers conferred by section 2(5) of the Pension Funds Act read with section 3 of BN59?

23. In terms of section 9A, the Fund must have its financial condition investigated and reported on by a valuator in terms of section 16 of the Pension Funds Act. The obligation is essential to ensure that the Fund has sufficient assets to meet its obligations to members when they retire or make claims. It also

mandates the valuation of pension fund liabilities, including the expected future payments to members. This helps in determining the fund's financial health and whether it can meet its obligations.

24. Regular valuation, as contemplated in the Pension Funds Act, is crucial for identifying any shortfalls or surpluses in the fund, which in turn allows for appropriate risk management and investment strategies to be put in place. By requiring valuations, Section 9A promotes transparency, as it ensures that pension funds' financial conditions are regularly reviewed and reported to both members and regulatory authorities.
25. Section 16 on the other hand requires the Fund to, at least once every three years, cause its financial condition to be investigated and reported upon by a valuator, and to deposit a copy of such a report with the FSCA. In addition to the above and in terms of section 16, the Fund is obliged to send a copy of such report or a summary prepared by the valuator in a form prescribed and signed by the valuator, to every employer participating in the Fund. For this purpose, the Fund must appoint a valuator.
26. The purpose of section 16 is to enhance transparency and accountability. It also allows the FSCA to monitor the financial health and compliance of the Fund. This oversight is essential for preventing mismanagement and ensuring that funds are adequately funded.
27. The financial reporting imposed by section 16 is also important for members, FSCA, and other stakeholders to understand the financial health and performance of the Fund. It ensures that members of the Fund and beneficiaries can access critical financial information about the Fund. This

transparency also helps members make informed decisions and safeguards their interests.

28. The above provisions are peremptory and the Fund has a statutory duty to comply with these sections unless it has been granted an exemption from such a compliance. The grant of an exemption is an exception to the general rule. The key mandate of the FSCA which is to ensure the financial stability, transparency, and accountability of pension funds, which is crucial for the protection of the retirement savings of fund members in terms of the FSR Act. Therefore, when considering the application for exemption and to ensure that the public interest is preserved, the FSCA has to take into account the underlying purpose of the relevant provisions and its mandate in terms of the FSR Act.
29. Exemptions are granted in terms of section 218 of the FSR Act which also echoes the principle that an exemption should be granted only if it is not contrary to the public interest and it will not prejudice the achievement of the objects of any financial sector law. Section 281(4) of the Act requires that where the Authority grants an exemption in terms of a financial sector law, the requirements of section 281(3) must be met and such exemption must be published. In this regard, the exercise of the discretion conferred by the Pension Funds Act and BN59 must always be guided by what the interests of justice would require in the particular circumstances of a case. The overall interests of justice are, therefore, the decisive factor for the exercise of

discretion.⁷

30. The FSCA's reasons for rejecting the valuation exemption application are that the annual financial statements of the Fund had significant reserves held in its reserve accounts representing 8.1% of the assets of the Fund. Together with an allocated 2% of the assets, this is a total of 10.1% of the Fund.
31. In response to the concerns raised by the FSCA, the Fund argued that it implemented internal controls such as the annual financial reviews which look at the position of the Fund. If a problem is ascertained, it will be attended to immediately without waiting for three years to do a valuation.
32. The Fund further submitted that the breakdown of what happened to the reserves fund accounts is included in the annual financial statements and to the extent that the FSCA required clarity, it should have engaged the Fund. According to the Fund, the current Annual Financial Statements address FSCA's concerns.
33. According to the FSCA, it cannot determine the financial condition of the Fund from the annual financial statements, and the appropriate way to determine the financial condition of the reserve account of the Fund is through an investigation and reporting by a valuator.
34. The FSCA argued that the AFS do not serve the same purpose as the valuation report. The AFS report on the financial *position* of the Fund, whereas

⁷ See *Joka v the Registrar of Financial Service Providers*⁷ Case No. A412014 at paragraphs 38-39.

the purpose of the valuation report is to report on the financial *condition* of the Fund. We agree with this position.

35. It is common cause that the Fund submitted AFS in terms of section 15 of the Pension Fund Act.
36. Section 16, on the other hand, focuses on the “*financial condition*” of the pension fund. The term “*financial condition*” typically encompasses a broader assessment of the fund's overall financial health, performance, and compliance with regulatory requirements.
37. It is clear from the above that the submission of annual financial statements alone does not fulfil the intended purpose of section 16. The Fund is still obliged to submit valuation reports even in circumstances where it has submitted its AFSs. The valuation report will explain and address the concerns that the FSCA raised when it took the impugned decision.
38. The fact that the Fund was previously exempted from compliance with sections 9A and 16 does not automatically entitle the Fund to another exemption. The FSCA is required to make a new decision and as such, it has to exercise a discretion. We note that if FSCA exercises its discretion in favour of the Fund, the Fund would be exempted from valuation for a period of six years. This would mean that there would be no financial oversight of the Fund for a period of six years. This is a long time.
39. The submission by the representative of the Fund that the Fund has a history of funds that went missing due to underhanded means, is concerning. This of itself would warrant a valuation by an independent valuator in the interests of

the members of the Fund.

40. The Fund submitted that it is prepared to engage the FSCA to address any concerns that the FSCA may have regarding the reserve fund. We understand that FSCA is not opposed to engaging with the Fund in this regard, however, the decision to refuse the valuation exemption was based on the information that was before the FSCA at the time when it considered the exemption application. It is *functus officio*. It will not assist the Fund at this stage to engage the FSCA in order to achieve a different outcome.
41. The last ground for reconsideration is that the appointment of a valuator is expensive and will result in members having to unnecessarily incur the costs of appointing a valuator.
42. We align ourselves with the argument presented on behalf of the FSCA that Sections 16 read with 9A of the Pension Funds Act places a default obligation on the Fund to appoint a valuator. Therefore, the Fund must make provision for the cost of having its financial condition investigated. This expense is incurred on a tri-annual basis and the Fund has ample time to make provision for costs relating to the valuation. The expense of appointing a valuator cannot override the public interest and the purpose of the valuation.
43. The Fund failed to establish the practicalities which would possibly override the strict application of sections 9A and 16 of the Pension Funds Act.
44. To the extent that the Fund relies on BN59 alone, we find that the FSCA was not obliged to grant a valuation exemption notwithstanding that the Fund may have complied with all the conditions of BN59.

Is there any basis for this Tribunal to interfere with the FSCA's decision?

45. It is trite that the Tribunal is not entitled to interfere with the exercise by the FSCA 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.⁸
46. We find that the impugned decision was justified, and the reasons which underpin the FSCA's decision are rational and sound.
47. There is no basis to interfere with the exercise of the FSCA's discretion when it refused the valuation exemption. The FSCA exercised its discretion properly.

ORDER

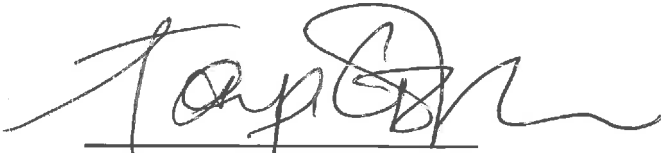
48. The following Order is made:

48.1. The application for reconsideration is dismissed.

SIGNED at CAPE TOWN on this the 27th Day of OCTOBER 2023.

⁸ *Fern Finance v FSCA FST* Case No. A19/2019; see also *Jooste v Financial Sector Conduct Authority* (A3/2023) [2023] ZAFST 126 (28 September 2023)

Signed on behalf of the Tribunal Panel.

A handwritten signature in black ink, appearing to read 'TJ Golden', written over a horizontal line.

TJ Golden SC
Chairperson of the Panel