IN THE FINANCIAL SERVICES TRIBUNAL

Case Number: A40/2022

ZITHUSILE DUGMOND MQADI **Applicant**

and

THE FINANCIAL SECTOR CONDUCT AUTHORITY **Respondent**

Tribunal panel: LTC Harms (chair), SM Maritz and C Woodrow SC.

For the applicant: Mr Sibisi instructed by Nkululeko Bambalele Ayanda Shazi and Associates Inc.

For the respondent: Lerato Maite and Michael Mbikiwa instructed by R&W Attorneys.

Hearing: 13 April 2023.

In re: Reconsideration of a direction to vacate board membership of a pension fund – sec 26(4) of the Pension Funds Act – test of "fit and proper" – opportunity to be heard during investigation process and sufficiency of notice regarding grounds.

DECISION

1. This is an application for reconsideration in terms of section 230 of the Financial Sector Regulation Act, Act 9 of 2017 (the "**FSR Act**") against the decision of the Financial Sector Conduct Authority (the "**Respondent authority**"), dated 5 August 2022 made in terms of section 26(4) of the Pension Funds Act, Act 24 of 1956 (the "**PFA**"), directing Mr Mqadi to vacate his position as board member of

the Private Security Sector Provident Fund (the "**PSSPF**") (the "**Impugned Decision**").

2. The present matter was heard together with the matter of **Zulu and 7 others v the FSCA**, FST A46/2022. We rendered a decision in the aforesaid matter (the "**Zulu Decision**") in which the legal principles were set out. Those principles should be incorporated in this decision as far as they are applicable..

3. The issues raised by and the submissions on behalf of Mr Mqadi differ from those raised in the Zulu decision. Accordingly, this separate decision is handed down.

THE RECONSIDERATION APPLICATION

4. At the hearing, counsel for Mr Mqadi abandoned the ground raised in the heads of argument (at par 18 and 19 thereof) that the Respondent authority had exceeded its powers / had no power to direct Mr Mqadi to vacate office. We agree that there is no merit in the said ground[1] and that the abandonment thereof was correct.

5. Mr Mqadi, whilst initially an applicant in the Zulu matter, has brought his own separate reconsideration application. Mr Mqadi does not make common cause with the applicants in the Zulu decision – he takes the position that the PSSPF was mismanaged by the board of trustees; and - in terms of the submissions in his counsel's heads of argument - that the PSSPF was "*run like a spaza shop*", and that there was a lack of transparency.

6. The crux of his case on the merits is that many of the transgressions occurred prior to his appointment as board member, and that when he "raised some objection" he was told that he was new and would understand in due course. It

[1] Sec 26(4) of the PFA expressly grants the Respondent authority such power.

was further submitted on behalf of Mr Mqadi that he was in need of training to acquire skills to comply with his fiduciary duties (as this was his first appointment as a board member / trustee).

7. Before dealing with the merits of the matter, it is necessary to first address certain procedural complaints raised by Mr Mqadi.

Audi alteram partem, and allegation that charges vague and embarrassing

8. Mr Mqadi submitted that he had a right to be heard during the investigation process, that he was not interviewed or provided with an opportunity to be heard at that stage, and that the decision to remove him as a board member (the Impugned Decision) was accordingly premature as the Respondent authority did not have the full facts. For the aforesaid reason, Mr Mqadi contends that the Impugned Decision ought to be reconsidered and set aside.

9. It was further submitted on behalf of Mr Mqadi that the ‘charges’ against him were “vague and embarrassing”.

10. The arguments are flawed for the following reasons:

    10.1. Ngidi Business Advisory (“**Ngidi**”) was instructed by the statutory managers of the PSSPF to conduct a forensic investigation into allegations of impropriety at the PSSPF. Ngidi was mandated by the PSSPF. Ngidi had no decision-making powers. The investigation process took place prior to the taking of the Impugned Decision, and over a period of time. The Ngidi report records that factual findings are based mainly on documentation reviewed, although certain consultations were held with various parties for corroboration purposes.

    10.2. On 3 July 2020, the Respondent authority addressed a letter to Mr Mqadi, attaching the Ngidi report (without annexures – which were available on

request), and setting out in detail the grounds upon which the Respondent authority stated that it had reason to believe Mr Mqadi was not fit and proper to hold office in terms of section 26(4) of the PFA. The letter concluded that "*you are afforded an opportunity to respond to the aforementioned allegations within 30 (thirty) days from date hereof.*"

10.3. It is apparent that Mr Mqadi was furnished with an opportunity to be heard – a *prima facie* view was presented to Mr Mqadi, and he was invited to respond. (**Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture** 1980 (3) SA 476 (T)) Not only were the detailed bases of the *prima facie* view set out in a letter consisting of 8 pages, but the entire Ngidi report was attached (*sans* annexures).

10.4. Further, Mr Mqadi did respond in a joint response via his previous attorney of record on 28 September 2020.

10.5. On 14 August 2021, the Respondent authority addressed a further letter in which Mr Mqadi (*inter alia*) was invited "*for purposes of due process … to comment on the findings contained in the Investigation Report*".

10.6. Further, Mr Mqadi did respond in a joint response via his previous attorney of record on 15 September 2021.

10.7. It is evident from the above that Mr Mqadi was given an opportunity to be heard. He used that opportunity, and he was heard. The 'audi principle' was complied with.

10.8. Further, the grounds upon which the Respondent authority was considering to take the impugned decision were set out in detail. There is no basis to allege that the 'charges' were "*vague and embarrassing*".

10.9. In addition to the aforesaid, in the reconsideration application, Mr Mqadi responded *ad seriatim* to the grounds (in support of the impugned decision set out by the Respondent authority in its decision letter) and thereby demonstrated himself that the 'charges' are not vague and embarrassing.

11. Even if one accepts the argument that Mr Mqadi had the right to be heard at the investigation stage and that the failure to hear him at that stage constitutes a procedural irregularity, or that the 'charges' levelled against him were unclear prior to the impugned decision, (neither of which we accept as having any merit), it is trite that procedural irregularities at first instance may, depending on the circumstances, be cured by a procedurally fair appeal. (**Amanda Dolores Laetitia Niemec and Others v Constantia Insurance Co Ltd and Others** (Case No PA1/2021) (the "**Niemec decision**") par 40, and the further cases there cited). We have considered all of the submissions that Mr Mqadi has made relevant to the impugned Decision afresh, as envisaged in the Niemec decision.

12. The procedural complaints raised by Mr Mqadi are without merit and are dismissed.

The merits

13. The version of Mr Mqadi that many of the transgressions occurred prior to his appointment as board member does not assist him.

14. We once again quote liberally from the undisputed exposition set out in the Respondent authority's counsels' argument.

15. Firstly, on the version of Mr Mqadi himself he has acted in breach of section 7A(4)(b) of the PFA which provides that "*A board member mus*t … *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." Mr Mqadi, on his own version, was aware of material matters falling under section 7A(4)(b) of the PFA but failed to inform the registrar thereof in writing or at all. These matters include the transgressions described in the Zulu decision under the headings "PROCUREMENT AND TENDERS" and "REMUNERATION AND SELF-ENRICHMENT".

16. Secondly, Mr Mqadi is directly implicated in various wrongdoings and transgressions:

16.1. Mr Mqadi was a member of the board that extended the services procured from Soonder Inc, such as payment verification and the appointment of a new administrator, without running a tender at all.

16.2. While the appointment of Salt Employee Benefits (Pty) Ltd ("**SALT**") as the PSSPF's section 13B administrator occurred prior to Mr Mqadi becoming a board member, various aspects of the implementation and extension of the contract with SALT occurred only once Mr Mqadi was on the board of trustees. Further, Mr Mqadi became aware of various irregularities in the earlier appointment of SALT, which have been addressed in the Zulu decision, but failed to do anything about them (in breach of *inter alia* section 7A(4)(b) of the PFA).

16.3. We do not intend to deal with all of the transgressions of Mr Mqadi as board member whilst serving on the board of the PSSPF but cite individual examples:

- In May 2017, the PSSPF amended the Legal Consultancy SLA with Soonder Inc without following a procurement process and in breach

of its procurement policy. This was done by the board at a time when Mr Mqadi was on the board.

- Mr Mqadi was a board member when the addendum to the Outsourced Benefit Administration SLA was entered into with SALT. He was also a board member when the Backlog Project SLA and the Unallocated Contribution backlog project SLA were signed with SALT. This was done in breach and in non-compliance with the PSSPF's procurement policy and processes and without any justifiable basis.

17. It is common cause that whilst Mr Mqadi was a member of the board of the PSSPF, the board ignored the procurement policy of the PSSPF.

18. The facts set out under the heading "REMUNERATION AND SELF-ENRICHMENT" in the Zulu decision apply equally to Mr Mqadi for the period post 1 September 2016.

19. Mr Mqadi charged the PSSPF R827,482.87 for the period September 2016 to September 2017, based on a fee of R7,945.63.00 per board meeting and R5,768.00 per sub-committee meeting, which was beyond the remuneration policy and without justification. The rates were unjustified. They amounted to self-enrichment and the diminishing of the retirement savings of the members of the PSSPF.

20. We agree with the submission on the part of counsel for the Respondent authority that the explanation of Mr Mqadi for being remunerated to attend the golf day does not withstand scrutiny – it is mandatory for security companies' employees

to belong to the PSSPF. There is no need for the PSSPF to arrange a remunerated golf day to secure their business.

21. Mr Mqadi could not honestly believe that the meetings and fees could have been justified. The members, including Mr Mqadi, abused their fiduciary position for self-enrichment and the Respondent authority correctly found that Mr Mqadi was not fit and proper to occupy the position of trust of a board member and that he had contravened the financial laws mentioned.

22. The vague and unsupported assertion on the part of Mr Mqadi that he "*raised some objection*" is without merit. We agree with the argument of the Respondent authority that this allegation is at the level of bare and vague assertion; that no detail is provided as to the specific objections he allegedly raised, who he raised them with, and what the outcome was. In any event, even on the vague version of Mr Mqadi, this does not comply with section 7A(4)(b) of the PFA as the 'objection' does not constitute the informing of the registrar. The single e-mail produced by Mr Mqadi, dated 30 May 2017, does not assist Mr Mqadi. It in fact shows that he was aware of the 'procurement policy'.

23. We agree with the submission on the part of counsel for the Respondent authority that the argument of Mr Mqadi that the failure on the part of the Respondent authority to train him constitutes "an own-goal" – a concession on the part of Mr Mqadi regarding his competence and capacity to hold office as a board member. The sections relied upon by Mr Mqadi in this regard, section 7A(3)(a) and (b) of

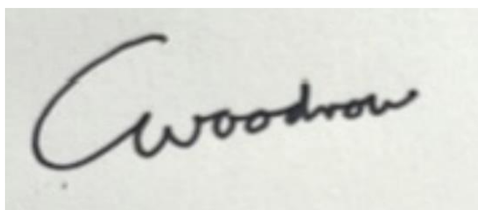
the PFA,[2] impose obligations on the "board member", not on the Respondent authority to ensure that Mr Mqadi is properly skilled. The ground is without merit.

24. The reconsideration application stands to be dismissed on the merits.

ORDER

25. The reconsideration application is dismissed.

Signed on behalf of the Tribunal panel.



C Woodrow SC

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[2] "(a) A board member appointed or elected in accordance with subsection (1), must attain such levels of skills and training as may be prescribed by the registrar by notice in the Gazette, within six months from the date of the board member's appointment.

(b) A board member must retain the prescribed levels of skills and training referred to in paragraph (a), throughout that board member's term of appointment."