THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: A46/2022

ZAZI ZULU	FIRST APPLICANT
COBUS BODENSTEIN	SECOND APPLICANT
~~ZITHULISE MQADI~~	~~THIRD APPLICANT~~[1]
MARCEL COETZEE	FOURTH APPLICANT
ANNA MAOKA	FIFTH APPLICANT
JONNES HLATSWAYO	SIXTH APPLICANT
BONGINKOSI QWABE	SEVENTH APPLICANT
SIPHO MIYA	EIGHTH APPLICANT

and

THE FINANCIAL SECTOR CONDUCT AUTHORITY	RESPONDENT

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

For the applicants: Pieter van den Berg SC instructed by Shepstone & Wylie (Dr J Esterhuizen).

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" – reconsideration of administrative penalty – "retrospectivity" of sec 167 of the FSR Act.

[1] Withdrawn from this joint application and filed a separate one under Case A40/2022 which was heard on the same day.

DECISION

1 This is an application for the reconsideration of decisions in terms of the Pension Funds Act 24 of 1956 ("the PFA") and the imposition of administrative penalties under the Financial Sector Regulation Act 9 of 2017 ("the FSR Act") by the respondent Authority. Formerly, under the PFA, decisions were taken by the Registrar of Pensions but since the introduction of the FSR Act it is the Authority that has jurisdiction to deal with these matters.

2 The latter Act allows for reconsiderations of decisions of the Authority by this Tribunal in terms of sec 230. The reconsideration is in the nature of an appeal of the first kind as described in ***Nichol and Another v Registrar of Pension Funds and Others*** **2008 (1) SA 383 (SCA)** par 22, and the orders the Tribunal may issue are set out in sec 234(1).

3 Fund rules and board members tend to refer to board members of pension funds as 'trustees', but the PFA does not call them that. They could as well be compared to directors of a company and although all these positions of trust impose similar obligations on office bearers it might, in a given instance, be misleading to refer to board members as trustees.

4 The applicants all were (and one still is) board members of the Private Security Sector Pension Fund ("the FUND").

5 The decisions relating to the applicants differ from board member to board member. Essentially the decisions entail the following:

- A direction to vacate the position as trustee of the FUND in terms of section 26(4) of the the PFA;
- A direction to vacate the position as board member of another pension fund in terms of section 26(4) of the PFA;
- The imposition of administrative penalties in terms of section 167 of the FSR Act; and

- In one instance, a direction to vacate the position as board member of another fund and an administrative penalty.

6 The detail appears from this useful table prepared by the applicants (as corrected):

Name	Start date as Board member of The FUND[2]	End date as Board Member of The FUND	Other Funds of which Board Member	Sanction
1. Zazi Zulu	2017	13/11/2018		Penalty: R81 500.00
2. Cobus Bodenstein	24/8/2011	20/11/2018	Unclaimed Benefit Fund[3]	s 26(4): Removed from Unclaimed Benefit Fund Penalty: R230 000.00
3. Zithulise Mqadi[4]	1/9/2016	Current		s 26(4): Removed from FUND
4. Marchel Coetzee	24/8/2011	17/2/2019	Unclaimed Benefit Fund	s 26(4): Removed from Unclaimed Benefit Fund
5.Anna Maoko	24/08/2011	31/08/2016	Umbrella Beneficiary Fund[5]	S 26(4): Removed from Unclaimed Benefit Fund
6.Jonnes Hlatswayo	24/8/2011	Current		26(4): Removed from FUND
7.Bonginkosi Qwabe	01/09/2016	30/11/2018		Penalty: R120 000.00
8. Sipho Miya	01/09/2016	30/11/2018		Penalty: R81 700.00

7 The submissions that are dealt with below were not made on behalf of Mr Mqadi whose reconsideration application under A40/2022 is dealt with in a separate Decision.

SECTION 26(4) and (5) OF THE PFA: VACATING OFFICE

8 These provisions state as follows:

[2] Abbreviation used for: Private Security Sector Pension Fund.

[3] Abbreviation used for: Private Security Sector Unclaimed Benefit Provident Fund.

[4] Withdrew this application and filed a separate application.

[5] Abbreviation used for: Private Security Sector Umbrella Beneficiary Fund. This is a disputed fact to which we revert.

"(4) If the registrar has reason to believe that a board member is not or is no longer fit and proper to hold office, the registrar may, after giving the board member a reasonable opportunity to be heard-

(a) direct the board member to vacate office; and

(b) replace that board member with another person for the period and subject to the conditions that the registrar may prescribe.

(5) In the circumstances described in subsection (4), the fund shall cause the vacancy to be filled in accordance with the provisions of section 7A and the rules of the fund, failing which the registrar may adopt the course set out in subsection (2)."

9 The jurisdictional fact is that the Authority must have reason to believe that the board member is not or is no longer a person "fit and proper" to hold office [as a board member]. In general, the criteria for being fit and proper may vary depending on the specific context and requirements of the role or profession. *Hewetson v Law Society of the Free State* [2020] 3 All SA 15 (SCA); 2020 (5) SA 86 (SCA). However, the general principle is that a fit and proper person is someone who can be trusted to act in the best interests of the fund, its members, regulators and the public.

10 Counsel for the applicants argued that the test is the same that applies at common law for the removal of a trustee or liquidator. He relied in this regard on a dictum of Bertelsmann J in another though related context in *Ex Parte Application Executive Officer of The Financial Services Board v Joint Municipal Pension Fund* 2004 JDR 0266 (T) at para 37. The case dealt with section 5 of the Financial Institutions (Protection of Funds) Act 28 of 2001, which provides for the appointment of a curator of a financial institution which, apparently, would mean that if a curator is appointed the trustees are removed in terms of common-law

principles from their positions and not that their powers are suspended during the curatorship.

11 Be that as it may, the Protection of Funds Act does not contain a test of “fit and proper”, something that has become a standard test in other financial sector statutes. The related Trust Property Control Act 57 of 1988 even has its own list of disqualifications and grounds and methods for removal of trustees. See in general *Gowar v Gowar*, [2016] 3 All SA 382, 2016 (5) SA 225 (SCA).

12 As the learned Judge recognised, the common-law test for removal of trustees was laid down in *Sackville West v Nourse and Another* 1925 AD 516 and I will redact the relevant dictum:

> The matter was, however, carefully considered in the case of *Letterstedt v Broers* (9 AC 371), which came before the Privy Council on appeal from the Cape Supreme Court, and which has laid down the broad principles by which, on this subject, Courts administering the Roman-Dutch law should be guided.
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> > 'But in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust: it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity'.
>
> He then proceeds to lay down the broad principle that the court 'if satisfied that the continuance of the trustee would prevent the trusts being properly executed', might remove the trustee. The same idea is expressed in different language in a later passage, where he says:

'In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated that their main guide must be the welfare of the beneficiaries'."

13 It is difficult to reconcile this authoritative exposition with the statement of Bertelsmann J that "at common law, a trustee or liquidator can only be removed if his actions are such that they create a very real risk that the funds entrusted to him or her would be dissipated, or that investments would be lost." He omitted (probably because it did not arise in his case) the qualification stated by the Appellate Division, namely that removal would be justified in the case of "want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity". And in the subsequent case of *Gowar v Gowar* it was stated that the overriding question is always whether the conduct of the trustee imperils the trust property or its proper administration.

14 Here we are not concerned with "every mistake or neglect of duty or inaccuracy of conduct of trustees" but, as the facts will show, with "positive misconduct [by trustees] who have abused their trust" and dissipated the assets of the FUND. Cf *Haitas v Froneman and Others* [2021] ZASCA 1 par 34.

15 Five of the eight board members on the list ceased to be board members during the period November 2018 to January 2019, i.e., before the date of the orders under reconsideration. The context is this, as explained by counsel:

On 24 May 2018 the FSCA issued an application out of the Gauteng Division, Pretoria against the FUND under case number 36090/18 in terms of section 5(1) of the Financial Institutions (Protection of Funds) Act, 2001 for the appointment of curators of the FUND. The court application was opposed and a settlement was reached, in terms of which two statutory managers were appointed in terms of section 5A of the FI Act, and an allowance was made for the appointment (or re-appointment) of other board members.

16 This explains why these five were not ordered to vacate their positions as board members of the FUND. One may add that in terms of the settlement the number of board members was reduced and those who left did so under the settlement and the board was effectively under control of the statutory managers who commissioned a forensic investigation into the affairs of the FUND which played an important part in the decision of the Authority.

17 Mr Hlatswayo (one of the applicants) relies on the fact that he was not required under the settlement to vacate and "was appointed (or re-appointed) as a board member of the FUND with the full knowledge and consent of the FSCA" as evidence as to his fulfilment of the fit and proper requirement. The submission is not understood unless it means that the Authority was estopped from proceeding with its investigation into the affairs of the FUND or that the settlement amounted to a decision by the Authority on the issue of his fitness, which it was not.

18 The next issue raised by counsel applies to three of the applicants, namely Mr Bodenstein, Ms Coetzee and Ms Maoko, who were also board members of another fund (the Private Security Sector Unclaimed Benefit Provident Fund) and in respect of whom the Authority issued an order removing them as board member of that fund.

19 When we said that Ms Maoko was a board member of the Private Security Sector Unclaimed Benefit Provident Fund, that is what the records filed by that fund with the Authority show. Ms Maoko's attorney, however, had submitted on her behalf that it was wrong and that she had been a board member of the Private Security Sector Umbrella Beneficiary Fund and that the order purported to remove her from a fund with which she had no relations.

20 There is no evidence that the Authority had erred, only a submission. Counsel was asked to file an affidavit by Ms Maoko about her membership (she was not present at

the hearing to be called). None was filed and there is accordingly no reason to find that an order in relation to an incorrect fund was made. There is some irony in the fact that she is confused about which master she is supposed to serve.

21 The legal submission was that the Authority does not have the power to issue a blanket directive that a person is not fit and proper "to be a board member of *any fund* indefinitely or even for a period of time". The short answer is that the Authority did not issue such directives. The relevant applicants were merely ordered to vacate their positions as board members of the Private Security Sector Unclaimed Benefit Provident Fund.

22 The next submission was that an order cannot be made that a person who misbehaved in respect of one fund can be held not to be fit and proper to be a board member of another fund.

23 As mentioned before, the jurisdictional fact for an order is the Authority's belief that a board member is not or is no longer fit and proper to hold office. The fitness to hold office is not related to the business of any particular fund. It is an objective question and of general application. To use an example: a board member who robs a bank is not a person who is fit and proper to hold office of any fund. And the way a board member acts in relation to the affairs of one fund quite clearly reflects on that member's fitness in relation to another fund: one cannot defraud fund A and be a person fit and proper to be a board member of fund B. In this regard the dicta (in a related context) in ***Financial Services Board v Barthram and Another*** **[2015] 3 All SA 665 (SCA); 2018 (1) SA 139 (SCA)** par 16 apply mutatis mutandis:

> The debarment of the representative by a FSP is evidence that it no longer regards the representative as having either the fitness and propriety or competency requirements. A representative who does not meet those requirements lacks the character qualities of honesty

and integrity or lacks competence and thereby poses a risk to the investing public generally. Such a person ought not to be unleashed on an unsuspecting public and it must therefore follow that any representative debarred in terms of s 14(1), must perforce be debarred on an industry-wide basis from rendering financial services to the investing public.

ADMINISTRATIVE PENALTY: SECTION 167 OF THE FSR ACT

24 The section allows for the imposition of an administrative financial penalty by the Authority if a person has contravened any financial sector law. The main argument of the applicants relates to retrospectivity: the alleged wrongdoings (namely contraventions of sec 7C of the PFA and sec 2 of the Protection of Funds Act – both financial sector laws – were committed before sec 167 came into operation (which was 1 April 2018) and, it was submitted, sec 167 creates an offence but does not do so retrospectively and there is a presumption against retrospectivity.

25 Section 7C states (inter alia) that board members have a fiduciary duty to members of the fund and beneficiaries, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and the Act.

26 Section 2 of the Financial Institutions (Protection of Funds) Act overlaps and states (in simplified form) that a board member of a pension fund (a) must, with regard to such funds, observe the utmost good faith and exercise proper care and diligence; and (b) must, with regard to the trust property and the terms of the instrument or agreement by which the fund has been created, observe the utmost good faith and exercise the care and diligence required of a trustee in the exercise or discharge of his or her powers and duties.

27 Section 167 did not create an offence. It created jurisdiction for the imposition of administrative penalties for “contraventions” of financial sector laws, i.e., failure to comply

with a positive obligation thereby breaking, transgressing, or contravening the law, irrespective of whether the law imposes criminal sanctions – an issue dealt with in *Kay v FSCA* A19/2022 of 7 February 2023.[6]

28 The presumption against retrospectivity does not arise, because a breach of the PFA and sec 2 have always been subject to an administrative penalty, albeit by the then existing Enforcement Committee, which was a committee of the Financial Services Board, the predecessor of the Authority. Cf ***Pather and Another v Financial Services Board and Others*** **[2017] 4 All SA 666 (SCA); 2018 (1) SA 161 (SCA)** . The procedure was different, but the substance remains the same. This is not a case of increased or different penalties. ***Veldman v Director of Public Prosecutions (Witwatersrand Local Division)*** **2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC)** . An applicant has in addition to the traditional right of review the right of reconsideration.

PROCUREMENT AND TENDERS

29 It may appear to be strange that it is only at this late stage that the facts that led to the decisions are addressed but that is because counsel for the applicants could not argue the facts with any level of confidence. The bare facts are not in issue and the lame excuses hardly worthy of serious debate.

30 Under the present heading we will deal with one set of facts only and we will quote liberally from the undisputed exposition set out in the Authority's counsels' argument.

31 It is common cause that the Board of the FUND, of which the applicants were members, over a lengthy period ignored the FUND's procurement policy. The excuse was that the policy did not bind the Board – in other words, the FUND had a policy which the Board could

[6] Decision - Renault Otto Kay v FSCA

freely ignore. How ignoring a fund policy wholescale can be equated with a unanimous consent[7] (in company law) is not understood.[8] Even if one assumes that any procurement policy established by a board can be "amended, overruled or withdrawn" by a board, the fact is that the board never sought or purported to amend, overrule, or withdraw the policy. It simply ignored it under suspicious circumstances.

32 In any case, the premise of the argument is flawed. One must assume that the policy was drafted in accordance with the rules of the FUND and, consequently, bound the board as it stated in express terms that it is

> "binding on the Private Security Sector Provident Fund ("the Fund"), Board of Trustees, employees, including all temporary staff, contractors, service providers and consultants".

33 If one assumes that the policy is not binding, the process followed in relation to the Salt tender on its own illustrates that the applicants failed in their fiduciary duties and are incompetent and could not be considered persons who are fit and proper to be entrusted with fiduciary duties. These are the facts:

- SALT was appointed as the FUND's sec 13B administrator. The FUND followed a closed bid process, without justification, and without the prerequisites being fulfilled. And it did so in the face of legal advice to the contrary.
- It shortlisted SALT as a service provider despite it failing to meet the requirements in the Tender Specification Document (which document in any event lacked the selection criteria prescribed in the procurement policy).

[7] Whilst we find that the argument regarding 'unanimous assent' is misplaced in law, it is also relevant that this version is directly contradicted by the version of Mr Mqadi on whose behalf it is submitted *inter alia* that: "… the PSSPF board was run like a spaza shop. There was no joint decision making …".

[8] ***Blue Grass Estates (Pty) Ltd. en Andere v Minister van Landbou en Andere* 1992 (4) SA 406 (AD); [1991] 1 All SA 319 (A); [1992] 1 All SA 215 (A)** is not authority for counsel's submission.

- It then proceeded to conclude a service level agreement with SALT in terms of which costs ballooned. The upshot was that the fees ultimately charged exceeded the quoted amount by more than R2.7 million per year.

- The FUND also agreed to pay SALT R17 100 000 as a "take-on fee" (because it did not have the existing capacity to take on the fund) – something not mentioned in the tender proposal, and without the amount being interrogated or quantified.

- The FUND also agreed to pay SALT nearly R33 million to load historical information, with 50% payable immediately, before any work had been done.

- Shortly after it was appointed, SALT made various unexplained donations to organisations closely associated with board members who had supported its appointment. It even purchased business class plane tickets for Mr Bodenstein and his wife to attend the Sevens Rugby Tournament in Hong Kong the following year, none of which was disclosed.

34 The "good value for money" argument is not an answer to egregious (to use counsel's adjective) breaches of fiduciary duties and incompetence and the approach best stated in *South African Container Stevedores (Pty) Ltd v Transnet Port Elizabeth Terminals and Others* 2011 JDR 0357 (KZD) at paragraph [72], that "the concept of post-tender negotiations is not uncommon in public tender dealings and has been found to be a legally acceptable practice as long as, it seems to me, it is included in the tender document as a requirement in the tender process" does not assist the applicant on the facts of the case. As counsel for the Authority pointed out,

> the absurdity of the present situation is that after awarding tenders, the FUND proceeded to negotiate higher prices, and to agree to pay fees and costs never contemplated in the bidding

process. It in other words negotiated to achieve less favourable terms than those contemplated in the tender documentation, thereby subverting the very purpose of the tender process.

REMUNERATION AND SELF-ENRICHMENT

35 The cost of board meetings including fees, travel and accommodation for 2016 was R21 million and for 2017 more than R25 million. The comparable cost of a similar fund (membership and funds under control) was, at the time in the vicinity of R1.2 million, which is the same as the FUND's costs were for the financial year after the reconstitution of the board under the settlement (and before Covid-19).

36 Counsel for the Authority summarized some of the facts: The rates paid to board members during 2017 exceeded the Remuneration Policy; chairpersons of sub-committees received a fixed monthly fee in addition to a fee for attending meetings; and the board held 493 meetings in a year, including 8 in a single month for purposes of organising a golf day (attendance at which was remunerated), 55 meetings in the month of March 2017 at a total remuneration of more than R2 million, and 66 meetings in June 2017 at a total remuneration of more than R3 million.

37 The average allowance (including travel reimbursements) for the period August 2016 to September 2017 equates to R74,518.91 per member (not employed on a full-time basis) per month. The following members charged over R2 million each for the 14-month period: Mr Bodenstein (Chairperson), Mr Mdineka, Mr Hlatswayo, Ms Coetzee and Mr Dube.

38 Seventeen members attended a Batseta Conference from 29 to 31 May 2017 at Sun City, North-West. The FUND incurred expenses of R540,295.03 in respect of remuneration for attendance of this conference in addition to other travel, accommodation, and conference costs. Various meetings were held prior to, during, and after the conference which resulted in a further cost of R379,039.83.

39 The applicants in their joint response sought to justify their costs and meetings but counsel limited himself to the fact that the gross remuneration had been disclosed in the AFS and that neither the auditors nor the FSB or the Authority had raised any queries before the May 2018 court application. The AFS for year end 28 February 2018 were not yet due and it is not alleged that the 28 February 2017 AFS had been accepted by that date. Counsel for the Authority rightly submitted that the FSCA reviews financial statements with a view to ensuring compliance with prudential standards; and financial statements do not go into granular detail as to how trustees' remuneration is made up – how many meetings were attended, the fee per meeting, the fact that basic salaries were earned in addition to per-meeting fees, and the like.

40 We deem it unnecessary to deal with the further facts because enough has been said. No one could honestly believe that these meetings and fees could have been justified. The members abused their fiduciary position for self-enrichment and the Authority correctly found that they are not fit and proper to occupy the position of trust of a board member and that they had contravened the financial laws mentioned.

THE ADMINISTRATIVE PENALTY

41 The consistent approach of the Tribunal about the imposition and quantum of administrative penalties is the ordinary rule that a higher body is not entitled to interfere with the exercise by a lower body 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.

42 For the sake of clarity: the removal of someone as a board member is not a penalty – it is a disqualification based on a value judgment and is not discretionary.

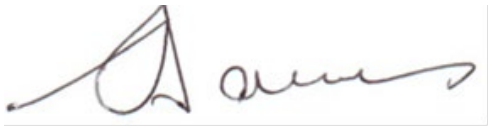
43 From the earlier table it would have been noticed that administrative penalties were imposed on four of the applicants. The amounts were calculated at 10% of the fees received by each of these members. Although the method of calculation may not have given rise to mathematical equal results (impossible to calculate), the penalties are, objectively, appropriate – if not too low because they were determined with reference to the "one" breach and without regard to, for instance, the impropriety relating to the tender processes.

44 There is no explanation why the others were not financially penalised and that bases the complaint of the penalised four of unequal treatment. However, the fact that the Authority erred in failing to penalise the others does not mean that, as said, the penalties imposed on the four were not appropriate. Had the issue been raised with prior notice, we might have considered imposing penalties on the others in the exercise of our discretion.

ORDER

The consolidated application for reconsideration of the applicants is dismissed.

Signed on behalf of the Tribunal panel.



LTC Harms (chair)