

IN THE FINANCIAL SERVICES TRIBUNAL OF SOUTH AFRICA

Case No.: **A1/2023**

In the matter between:

TEXTILE OPEN PROVIDENT FUND

Applicant

and

FINANCIAL SECTOR CONDUCT AUTHORITY

Respondent

TRIBUNAL PANEL:

**TJ GOLDEN SC (CHAIRPERSON)
W NDINISA
KD MAGANO**

APPEARANCE FOR THE APPLICANT:

MS Z BADSHA

APPEARANCE FOR THE RESPONDENT:

MR SR ROSSOUW

DATE OF HEARING:

13 SEPTEMBER 2023

DATE OF DECISION:

9 NOVEMBER 2023

SUMMARY:

**APPLICATION FOR RECONSIDERATION OF A DECISION OF
THE FSCA WHERE THE FSCA DECLINED TO REGISTER THE
RULES OF THE FUND; RULES OF THE FUND MUST PROVIDE
FOR THE NUMBER OF TRUSTEES ON THE BOARD**

DECISION

A. INTRODUCTION

1. This is an application for reconsideration of the decision taken by the Financial Sector Conduct Authority ("the FSCA") on 16 November 2022 where it decided not to approve and register a proposed rule amendment of the applicant's Fund Rules. The applicant is an umbrella fund with different employees and employers contributing in the textile industry. The Fund seeks an order that the initial decision of the FSCA be overturned, and that an order is granted for the FSCA to register the Rules of the Fund.
2. Ms Badsha appeared on behalf of the applicant ('the Fund'), and Mr Rossouw appeared on behalf of the FSCA.
3. The decision which the Fund seeks to overturn is set out in its reconsideration application and refers to the FSCA's letter where it declined to register the rule amendment of the Fund. The letter records that FSCA required the exact number of trustees to reflect in the rules of the fund, and that this requirement is implied in Section 7A(1A) of the PFA. The FSCA informed the Fund that if the actual composition of the Board is not stipulated, it will never be possible to determine

whether the Board is properly constituted at any given time and there can be no vacant seat on the Board where the actual number of seats is not known.

4. The relevant facts are summarised below.
5. The Fund submitted for approval and registration by the FSCA an amendment to its Rules. The proposed amendment was the following:

"12.1.1 Subject to the provisions of the Act and of these Rules, the sole responsibility for the management of the Fund shall be vested in the Trustees. The board of trustees shall comprise at least 4 trustees, appointed and elected to office in accordance with the provisions of Rule 12.2.1 and Rule 12.3.2. The board of trustees are responsible to perform that obligation and duties as set out in the Act and in these Rules.

12.2.1 The employers may appoint the same number of trustees as are elected by the members in terms of Rule 12.3.2 or may appoint fewer trustees than are elected by the members in terms of that Rule and may also appoint alternate employers' trustees. Any alternate employers' trustee may replace an employer's trustee who is temporarily unable to act in that capacity.

12.3.1 The members shall elect a minimum of two trustees and may also elect alternate members' trustees. Any alternate members'

trustee may replace a member's trustee who is temporarily unable to act in that capacity.

12.3.2 *The term of office of the members' trustees is 4 years and at the end of this period they shall cease to hold office but shall be eligible for re-election. An election shall take place in accordance with the following procedures:*

- (a) *The members shall be asked to nominate candidates for election to the board of trustees as members' trustees;*
- (b) *Each nominee must accept his nomination in writing;*
- (c) *If the number of nominations equals the number of vacancies, no voting shall take place and the candidates so nominated shall be the members' trustees;*
- (d) *If the number of nominations exceeds the number of vacancies, the members will then elect, by secret ballot, the members' trustees from among the nominees who have accepted the nomination;*
- (e) *The nominees who receive the highest number of votes will become the members' trustees, and the nominees receiving the next highest number of votes (if any) shall become the alternate members' trustees."*

6. The FSCA did not approve the proposed Rule amendment on the basis that it required the Board of the Fund to always be properly constituted and that all

vacancies must be filled within the specified period which implied that an actual number of Board members (trustees) must be provided for in the Rules.

7. The FSCA was of the view that the proposed Rule amendment was inconsistent with Section 7A of the Pension Funds Act, 1956 ("the PFA").
8. The PFA was amended in 1996 to insert Section 7A into the Act. In terms of this section, every fund is required to have a board of trustees with a minimum of four members, and the members of the fund have the right to appoint at least 50% of the members of the board. The purpose of Section 7A is to give members of the fund an equal say in the affairs of a fund, and it gives them the right to elect their number of trustees. The principle underlying section 7A was confirmed by the then Appeal Board of the Financial Services Board in Gumede & Another v PEP Limited Provident Fund & Others (case number: A7/2016).
9. Section 7A of the PFA provides as follows:

"7A. Board of fund.-

- 1. Notwithstanding the rules of a fund, every fund shall have a board consisting of at least four board members, at least 50% of whom the members of the fund shall have the right to elect.*

(1A) The composition of the board shall at all times comply with the requirements of the rules of the

fund and any vacancy on such board shall be filled within such period as prescribed.

- (2) *subject to subsection (1), the constitution of a board, the election procedure of the members mentioned in that subsection, the appointment and terms of office of the members, the procedures at meetings, the voting rights of members, the quorum for a meeting, the breaking of deadlocks and the powers of the board shall be set out in the rules of the fund: Provided that if a board consists of four members or less, all the members shall constitute a quorum at a meeting."*

10. Section 7B relates to exemptions and provides as follows:

"7B. Exemptions.-

- (1) *The registrar may on written application of a fund and subject to site conditions as may be determined by the registrar may-*
- (a) *authorise a fund to have a board consisting of less than four board members if such number is impractical or unreasonably expensive: Provided that the members of the fund shall have the right to elect at least 50% of the board members.*
- (b) *exempt a fund ...*

- (2) *The registrar may withdraw an exemption granted under subsection (1)(a) or (1)(b) if a fund no longer qualifies for such exemption.”*

11. Section 12 of the PFA deals with the amendment of rules. The relevant sections, for purposes of the present decision, are the following:

“12. *Amendment of rules.-*

- (1) *A registered fund may, in the manner directed by its rules, alter or rescind any rule or make any additional rule, but no such alteration, rescission or addition shall be valid-*

- (a) *if it purports to effect any right of a creditor of the fund, other than as a member or shareholder thereof; or*

- (b) *unless it has been approved by the registrar and registered as provided in subsection (4).*

- (2) *...*

- (3) *...*

- (4) *If the registrar finds that any such alteration, rescission or addition is not inconsistent with this Act, and is satisfied that it is financially sound, he shall register the alteration, rescission or addition and return a copy of the resolution to the principal officer with the date of*

registration endorsed thereon, and such alteration, rescission or addition, as the case may be, shall take effect as from the date determined by the fund concerned or, if no date has been so determined, as from the said date of registration.

(5) ...

(6) ...

(a) *The registrar may request such additional information in respect of any alteration, rescission, addition or consolidation of the rules of a registered fund transmitted or forwarded to the registrar for approval as the registrar may deem necessary.*

(b) *If a registered fund fails to furnish the information requested by the registrar within 180 days from the date of that request, any submission for approval of an alteration, rescission, addition or consolidation of the rules of that fund lapses."*

12. The Fund contends that the Fund rule is not inconsistent with Section 7A(1) of the PFA. Ms Badsha contended that since the Rules provide for a minimum of four trustees, the proposed amendment complied with Section 7A(1) and (2). Accordingly, so she argued, the FSCA *must* register the Fund Rules, and it has no discretion to refuse. She contended that the Act stipulates that the Registrar *shall* register the alteration.

13. Ms Badsha however conceded that there was no maximum number of trustees provided for in the Rules and argued rather that this was not a requirement and that the Act only stipulates that there should be a minimum of four trustees. Accordingly, there could be any number of trustees, but the minimum must always be four.
14. We have difficulty with this argument.
15. The Fund's argument is not supported by the construction and interpretation of Section 7A(2) which requires that the rules of the fund make provision for the *constitution* of the board. Thus, the specific number of board members must be provided for in the rules as the number of board members plainly *constitute* the board. The rationale which underpins this provision also serves to support the FSCA's oversight duties over a fund. This is illustrated by Section 26(2) of the PFA which permits the Registrar to appoint so many persons as may be appropriate to the Board of the fund as may be necessary to make up the full complement or *quorum* of the board. This reasoning is supported by the approach to statutory interpretation where *inter alia*, the statutory provisions should always be interpreted purposefully and the provision must be properly contextualised in order to give it its true and proper meaning (see Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) and Cool Ideas 1186 CC v Hubbard 2014 (4) SA 474 (CC)).

16. The second difficulty with the Fund's argument is that the number and/or formula of additional trustees for appointment to the Board is decided outside of the Fund Rules, is determined by extrinsic factors and an external decision-making process which, in our view, violates the Section 7A(2), in particular, the requirement that the fund make provision for the *constitution* of the Board. Put differently, the fund rules must make provision for the full composition of the Board. This must mean on a proper construction of the provision that a determined number of trustees must be provided for.
17. Third - and this is really a consequence of the second difficulty - is that absent the total number of trustees, it will be difficult to determine the vacancies on the Board which will then, in turn, impact the *quorum* requirement. Overall, this will also result in a lack of certainty and transparency in the Rules of the Fund.
18. Whilst we do not take issue with the Fund's discretion to determine the number of trustees on its Board, the Board's discretion is ultimately subject to and constrained by the provisions of the PFA.
19. On a proper construction of Section 7A, it is implicit that a fund must stipulate the number of trustees on the Board. Absent this, there can be no proper determination of the vacancies on the Board, full complement of the Board, as well as the *quorum* of the Board. It will be difficult to determine – and indeed may be fertile grounds for a dispute – as to the voting rights of members and the breaking of deadlocks, as provided for in Rule 7A(2).

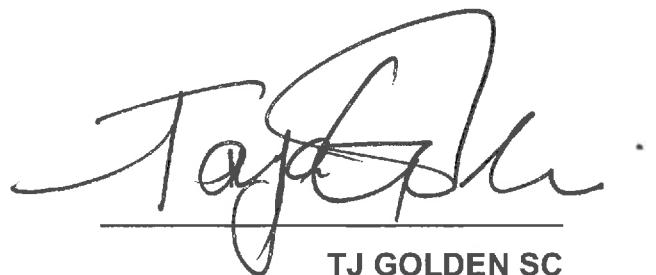
20. We are therefore unable to uphold the application for reconsideration on the basis that the proposed Rule amendment is inconsistent with Section 7A (1) and (2) of the PFA as the proposed Rule amendment does not specify the number of trustee board members who would make up the composition of the Board.
21. The FSCA's decision not to approve and register the Rule amendment was sound, and there is no basis to interfere with this decision.

B. ORDER

22. Accordingly, the following Order is made:

- (a) The application for reconsideration is dismissed.

SIGNED at CAPE TOWN on this the 9th DAY of NOVEMBER 2023.

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

TJ GOLDEN SC

Chairperson of the Panel

Signed on behalf of the Tribunal Panel

9 November 2023