

IN THE FINANCIAL SERVICES TRIBUNAL

Case No.: A26/2024

In the matter between:

BOKAMOSO RETIREMENT FUND

Applicant

and

FINANCIAL SECTOR CONDUCT AUTHORITY

Respondent

Panel: LTC Harms (chairperson), Ms Zama Nkubungu Shangisa and Adv Sesi Baloyi SC

For the Applicant: JPV McNally SC instructed by Webber Wentzel

For the Respondent: AM Breitenbach SC instructed by Norton Rose Fulbright

Hearing: 7 May 2025

Decision: 19 May 2025

Subject: Sec 7B(1)(b)(i) of the Pension Funds Act 24 of 1956 – exemption - time limit/condition imposed by Authority divisible and void ex tunc.

DECISION

1. The applicant, the Fund, is an umbrella fund and obtained an exemption in terms of sec 7B(1)(b)(i) of the Pension Funds Act 24 of 1956 from the Registrar of Pension Funds on 7 August 2017 for a period of three years. The exemption allowed the Fund to bypass member elections for board members.

2. The Financial Sector Regulation Act 9 of 2017 came into effect on 1 April 2019 and it replaced the Registrar with the respondent, the FSCA (the Authority).
3. Acting on the assumption that the exemption had lapsed on 31 August 2020, and during the Covid lockdown of varying degrees when it was not possible to hold board elections, the Fund applied for a further exemption in January 2022, which the Authority did not process due to concerns about the Board's composition. The Authority informed the Fund that the new exemption application was not processed because the board was not properly constituted because the Fund's exemption already expired on 31 August 2020 and that the election of the present Board during November 2021 was irregular.
4. The Fund further applied for the registration of special rules for individual employers Level Seven Restaurant (Pty) Ltd, Austere Group (Pty) Ltd and African Shipping Training (Pty) Ltd which the Authority also refused to process for the same reason.
5. The powers of the Authority under sec 7B(1)(b)(i) was addressed in the judgment of the Full Court in *Financial Sector Conduct Authority v Municipal Workers' Retirement Fund* [2022] ZAGPPHC 977, [2023] 2 All SA 131 (GP) ("MWRF).
6. The Tribunal considered the effect of the judgment in *Municipal Employees' Pension Fund v Financial Sector Conduct Authority* A33/2023; A43/2023 ("MEPF")¹ and said the following:

¹ <https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20MEPF%20v%20FSCA%20%26%20Others.pdf>.

"A few months later the Full Court of the High Court in *Financial Sector Conduct Authority v Municipal Worker's Retirement Fund* . . . in the majority decision (par 16) held as follows (the minority judgment appears to be to the same effect):

There is no express provision in s7B that the exemption is to be for a limited duration. There is no reason to read in such implied provision. The Authority had no right to impose a time limit and should not do so. A policy, as correctly argued by the Fund, can be amended, and a Court is required to pronounce on this issue. A time-limit is not a condition, it is limiting the life of the exemption. The Conduct Authority it is not imposing a time limit by way of condition [sic].

The FSCA is bound by this decision which it did not appeal. So is the Tribunal. This interpretation of the Act is a decision *in rem* since it does not depend on the facts or identity of any particular fund. What this means is that the time limit in the last exemption is to be deemed *pro non scripto*. This is not an instance covered by the *Oudekraal* principle² because the exemption was validly granted and only the time limit condition was void."

7. The underlined sentences form the bone of contention. The Authority submits that the finding was wrong while the Fund relies on it.
8. The Authority correctly submitted that the Tribunal is not a court of law and is not bound by its own decisions because *stare decisis* does not apply to administrative tribunals. This does not mean that administrative tribunals should not strive to be

² [Oudekraal Estates \(Pty\) Ltd v City of Cape Town and Others \(41/2003\) \[2004\] ZASCA 48; \[2004\] 3 All SA 1 \(SCA\); 2004 \(6\) SA 222 \(SCA\).](#)

consistent for the public good and that of the public administration. If the Authority is dissatisfied with a decision of the Tribunal, it is free to review it - something that did not happen with MEPF.

9. The Authority submitted that one should read the quoted dicta of the Full Court with reference to the order, which was made under PAJA, because it supposedly qualified the dicta. There may be undisclosed reasons for the form of the order but that does not affect the matter. The ratio is clear and does not require a vivisection or microscopic examination.

10. The decision of the Full Court is a decision *in rem*:³ the Court interpreted the statutory provision and determined its objective status, and that interpretation binds all. The meaning of the provision did not change because of the decision – the decision stated what its meaning always was. It is not *in rem* in the limited sense as submitted by the Authority, namely that it determined the objective status of the exemption in that case only.

11. We consequently reject the submission that the effect of the judgment is that only going forward from the date of the judgment (as one would find in constitutional challenges of legislation) the Authority should not impose time limits when granting exemptions including when doing so pursuant applications by funds whose exemptions had lapsed or are due to lapse because of the time limits imposed by the Authority.

³ [Airports Company South Africa v Big Five Duty Free \(Pty\) Limited and Others \(CCT257/17\) \[2018\] ZACC 33; 2019 \(2\) BCLR 165 \(CC\); 2019 \(5\) SA 1 \(CC\)](#) par [2].

12. The Authority submitted that the *Oudekraal* principle was misunderstood and misapplied by the Tribunal. On reconsideration we do not believe that it is correct. The principle is explicable with reference to its facts. The administrative decision, which had been taken many years ago, was bad because the administrator had not taken material facts into account. It was not *ultra vires* as such. That administrative decision, the Court held, stood until it had been set aside on review.

13. Here the situation is quite different. The exemption was *intra vires* and good; the time limit was *ultra vires*. The good and the bad are divisible. The time limit lapsed after three years, but not the exemption. The condition did not survive the three-year period and existed in fact for that period, but it exists no longer. To submit that a review is unnecessary in each case because funds with lapsed exemptions may apply for evergreen exemptions which, inevitably, will lead to delay and the imposition of other conditions is to elevate form over substance. It was unnecessary to throw the baby out with the bathwater. If the Authority wishes to amend the other conditions it may do so following the prescribed procedure.

14. As *Oudekraal* explained, the purpose of the rule is to prevent persons to give effect to or ignore an administrative act depending upon the view taken on the validity of the act in question. That is not the case here. A decision *in rem* has stated what the status of the condition is. The Fund did not prior to the Full Court decision adopt a subjective attitude about the validity of the administrative act – it assumed that it was valid but later learnt that the condition was not. What it now requires of the Authority is to accept the status of its decision.

15. We do not understand the necessity for following the convoluted process in dealing with something that is straightforward. The 'convoluted process' stems from the primary submission made by the Authority, namely that it is prepared to 'settle' the matter by agreeing to a remittal of the applications which would then be dealt with by the Authority in a proposed non-binding manner. Counsel disputed (somewhat unconvincingly) that this, his main argument, amounts to a concession that the MEPF decision was correct and the attitude of the Authority incorrect, but nevertheless, since we do not base our decisions on (non-) concessions we proceed to consider the effect of the tender on the present proceedings.

16. The function of the Tribunal is to 'reconsider' matters. If the Tribunal finds that its conclusion differs from that of the Authority, it sets the decision aside and remits it for reconsideration. If it reaches the same conclusion, it dismisses the application. A remittal places the Authority in a position to reconsider its approach, particularly in light of the legal principles clarified.

17. Although the Tribunal may make an order in terms of a settlement or concession, it is necessary that the order is within the competence of the Tribunal. If there are grounds for remittal, the Tribunal may agree but if there are no grounds for remittal, except a desire of the Authority to change its *modus operandi*, it would be inappropriate to remit on that ground, especially since the Tribunal cannot prescribe the further administrative process and result. Here, the applicant does not accept the offer.

18. We do not issue structural orders or, as the Fund asked, issue ‘clear directions’ as to what the Authority is permitted to do and is prohibited from doing.

19. There are some subsidiary points that must be mentioned. The heads of the Authority listed in footnote 7 the other reasons why the Authority pended the applications of the Fund, but these were not highlighted during argument.

20. Although the term of office of the previous Board expired during the Covid epidemic in 2020, it was not possible to hold an election before November 2021.⁴ If the Authority held the view that the Fund had no board, it was supposed to act in terms of sec 26(2) to ensure that a board is properly constituted. Instead, it allowed the Board to function and did not even suggest that the Board had no locus standi in the present matter.⁵

21. The Authority’s complaint that indirect elections were held assumes that the exemption had lapsed and that direct elections were feasible, both incorrectly. The other grounds were dealt with by this Tribunal in the MEPF decision, and that part of the decision was not said to be incorrect.

22. The Authority also argued that since the exemption was granted under the old dispensation the applicant had to follow the appeal process, which applied at the

⁴ *Mtokonya v Minister of Police* [2017] ZACC 33; 2018 (5) SA 22 (CC); 2017 (11) BCLR 1443 (CC) at para 137; *Montsisi v Min van Polisie*, [1984] 1 All SA 478 (A), 1984 (1) SA 619 (AD) deal with the application of *lex non cogit ad impossibilia impossibilium nulla obligatio est*. See also *Electoral Commission of South Africa v Minister of Co-operative Governance and Traditional Affairs and others* 2022 (5) BCLR 571 (CC), 2022 (5) BCLR 571 (CC); [2021] ZACC 29 (CC) at paras 72 -75 dealing with elections.

⁵ Whether *Ex Parte United Party Club* 1930 WLD 277 and *Medupe and Others v African National Congress and Others* (003/2024) [2025] ZASCA 22 (20 March 2025), paras [33] and [35] are limited to voluntary associations or can be extended to pension fund boards need not be decided.

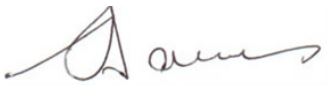
time and to a body that no longer exists. But, as thus far held, that misconceives the case.

23. We therefore conclude that the Authority erred in not considering the Fund's application mentioned because of the lapse of the exemption. Although the application relating to the Fund's application for a new exemption is moot, the non-decision is probably not. For clarity's sake we consequently set aside all the decisions or non-decisions by the Authority based on the supposition that the exemption had lapsed.

ORDER:

The different decisions or non-decisions of the Authority to pend or reject applications filed by the Applicant Fund on the ground that the exemption granted on 7 August 2017 under sec 7B(1)(b)(i) of the Pension Funds Act 24 of 1956 lapsed after three years are set aside and the matters are remitted to the Authority for reconsideration.

Signed on behalf of the Panel on 19 May 2025.

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

Chairperson