IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

14/12/2016 .....
DATE SIGNATURE

3725/16

Case No: ~~3275/2016~~

In the matter between:

14/12/2016

ROSEMARY THÈRÈSE HUNTER Applicant

and

FINANCIAL SERVICES BOARD 1st Respondent

ABEL MOFFAT SITHOLE N.O. 2nd Respondent

DUBE PHINEAS TSHIDI N.O. 3rd Respondent

JURGEN ARNOLD BOYD N.O. 4th Respondent

PRAVIN GORDHAN N.O. 5th Respondent

JUDGMENT

HF JACOBS, AJ:

INTRODUCTION AND STATUTORY SETTING:

[1] With the advent of the Financial Services Board Act ("FSB Act")[1] on 1 October 1990 there was established a board to supervise compliance with laws regulating financial institutions and the provision of financial services and for matters connected therewith. The board so established is a juristic person and is known as the Financial Services Board ("the FSB"), the first respondent in this application.[2] The FSB Act creates an executive for the FSB which consists of the Chairperson, the second respondent (Mr Sithole) and one or more Deputy Executive Officers and a Chief Actuary. Those officials are all appointed by the Minister of Finance ("the Minister").[3] More persons may be appointed to the executive by the Board itself. The appointed executives are all full-time officers of the Board and employees of the FSB and they oversee and perform functions imposed under regulatory acts. The Pension Funds Act, Act 24 of 1956 ("the Pension Funds Act") is one of the regulatory acts under the supervision of the FSB. The FSB Act itself is not regulatory at all. It only provides the statutory structure within which the regulatory acts are administered by the FSB.

[2] The Executive Officer of the FSB, the second respondent (Mr Tshidi) is the *"Registrar"* of pension funds in terms of the Pension Funds Act and the FSB Act.

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1 Act 97 of 1990. Only sections 1, 2, 4-11, 13(1)(a) (insofar as it pertains to the executive officer), 14, 15, 16(1)(a), (d) and 16(3)-(5), 17-19, 23-25 took effect on 1 October 1990. The other sections, namely sections 3, 12, 13 (insofar as it had not yet been put in operation on 1 October 1990), 16(1)(b), (c), 16(2) & (6), 20-22, 26-29 took effect on 1 April 1991. See Proclamation 175 in Government Gazette 12757 of 28 September 1990 and Proclamation 29 in Government Gazette 13094 of 28 March 1991.

2 Section 2 of the FSB Act.

3 The fifth respondent in this application. See section 13(1)(a) of the FSB Act.

[3] There are five Deputy Executive Officers appointed by the Minister to the FSB. The Deputy Executive Officers are each responsible for a specific division of the FSB under delegation of authority from the Executive Officer.[4] The functions of the FSB are –

[3.1] to supervise and enforce compliance with laws regulating *financial institutions*[5] and the provision of *financial services*[6];

[3.2] to advise the Minister[7] of matters concerning *financial institutions* and *financial services*, either of its own accord or at the request of the Minister; and

[3.3] to provide, promote or otherwise support financial education, awareness and confidence regarding financial products, *institutions* and *services*.[8]

[4] *Financial institutions* and *financial services* are defined by section 1 of the FSB Act to include any pension fund organisation registered in terms of the

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4 The structure of the FSB and its delegation of authority changed over the past years but those changes are of no moment in these proceedings. Until 28 February 2014 the Deputy Registrar of Pension Funds enjoyed equal status with that of the Registrar of Pension Funds. The Deputy Registrar of Pension Funds derived his powers (original powers) from the Pension Funds Act. From 1 March 2014 the Deputy Registrar of Pension Funds no longer enjoy the original powers, only delegated powers from the Registrar.

5 My own italics.

6 My own italics.

7 Fifth respondent in this application.

8 Section 3 of the FSB Act.

Pension Funds Act.[9] A *pension fund* (a fund which on retirement of a member either pays a lifelong annuity to its member or buys an annuity for its member from an insurer) and a *provident fund* (which is a fund that pays the full amount of a member's benefit in one cash lump sum on retirement) are regulated by the Pension Funds Act. I refer to a pension fund and a provident fund as a *"pension fund"* or a *"fund"* as the distinction between the two are of no relevance in the present context. A pension fund exists as a legal entity and is constituted in terms of its rules. It has members and the members' dependents, like the members themselves, have interest in the pension fund. The rights of the members and their dependents are determined by the rules of the fund. Rules of a fund may, therefore, provide for the payment of money to dependents or nominees of the members following the death of a member. The dependents or nominees are often referred to as beneficiaries. It, therefore, follows that as long as a benefit remains payable to a member (or his or her beneficiary) a pension fund will have a member.

[5] The directing mind and will of a pension fund, like other corporate entities, lies with its human agency, its board.[10] The board of a pension fund is responsible for the general superintendence of its affairs including compliance with the provisions of the Pension Funds Act and its regulations. The Pension Funds Act[11] provides that the members of a pension fund may elect and appoint 50% of the members of the board of trustees of a fund. The board's

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9 The FSB Act also deals with friendly societies, collective investment schemes and related industries but those are of no relevance in the present proceedings.

10 Introduced by Act 22 of 1996.

11 Section 7A.

responsibilities lie with the pension fund and with no one else (not with its members, beneficiaries or its creditors). The members of a pension fund's board owe the fund a duty of utmost good faith. The powers of the board must be exercised in terms of the rules of the fund and the applicable legislation.

[6] The applicant explains that as at the end of 1998 there were 15 825 registered pension funds under the Pension Funds Act. Her evidence in this context is based on the information contained in the annual reports of the FSB for the calendar year 1998. Of those funds 13 127 (83%) were exempt from the obligation to submit annual financial statements and statutory actuarial valuations to the Registrar of Pension Funds.[12] The exemptions existed by reason of the fact that the exempted funds were wholly underwritten funds - meaning that their total asset base comprise of insurance policies underwritten by insurance companies for all the liabilities of those funds. After 1998, so the applicant explains, there occurred a shift in employer preference from *"stand-alone funds"* (a fund for the employees of a single employer) to *"umbrella-funds"* (a number of funds to which more than one employer can direct its employees to belong). Many of these pension funds were *"occupational retirement funds"*. *Occupational retirement funds* are pension funds and provident funds to which employees of a specific employer are required to belong in terms of their contract of employment. Occupational retirement funds may be approved by the South African Revenue Service in terms of the Income Tax Act of 1962. Such approval can only take place if membership to the retirement fund is compulsory for all employees or for employees within a specified category of employees.

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12 Non-exempt pension funds submit three actuarial valuations per annum.

Funds with a few members were exposed to the risk of poor returns on their investments by reason of their inability to make diverse investments in categories such as equities, bonds, property and cash. The migration to umbrella funds caused many stand-alone funds to cease functioning. No liquidators were appointed to wind-up these remaining funds[13] and the registrations of those funds were not cancelled.[14] Mr Tshidi explains in his answering affidavit that those funds *"floated around aimlessly"*. These funds became known as *"orphan funds"* – that is, funds without boards of trustees.[15] Orphan funds comprise two categories, namely *"shell funds"* and *"dormant funds"*. A shell fund is, as the term suggests, only a husk. It has no assets and only exists in name. Dormant funds are funds with assets but without a board and, therefore, without a directing mind and will.[16]

[7] During 2005 the Registrar withdrew the exemption to wholly underwritten funds from compliance with the requirements of section 15 of the Pension Funds Act (the obligation to annually submit audited financial statements and actuarial valuations to the Registrar). After withdrawal of the exemption it appeared from the 2006 annual report of the Registrar of Pension Funds that there were 13 132 registered pension funds at the start of 2006, but

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13 A process specifically provided for by the provisions of section 28 of the Pension Funds Act.

14 Cancellation of pension funds is provided for by section 27 of the Pension Funds Act.

15 The term *"orphan fund"* is defined in the Financial Services Board's Circular PF126 to mean *"a fund which does not have a properly constituted board of management as required in terms of section 7A of the Pension Funds Act, Act 24 of 1956 ('the Act') and/or the Rules of the Fund ..."*.

16 In the voluminous papers filed of record some of the deponents referred to the terms *"shell fund"* and *"orphan fund"* and *"dormant fund"* in a different context. I have adopted the reference used by the applicant in this judgment.

only 4 384 complied with their duties in terms of section 15 of the Pension Funds Act by submitting their annual financial statements and actuarial valuations. This evidence, so the applicant inferred, indicated that most of the remainder of the registered pension funds (8 748) were shell or dormant funds. The fourth respondent, Mr Boyd, became Deputy Registrar of Pension Funds during 2006. From 2006 to 2013 Mr Boyd cancelled the registration of many dormant funds. Mr Boyd on 30 October 2014 explained in a memorandum addressed by him on the topic that cancellations of the aimlessly floating pension funds took place as a pragmatic step at the time. He explained the cancellations of the funds as follows:

> *"While bald and pragmatic steps are needed to deal with the on-going problem of orphan and dormant funds as a matter of urgency, in the process care should be taken not to apply the 'ideal situation' postulated for prospective regulatory measures to past actions, as was pointed out by the FSB's Legal Department and with which I fully agree. Maybe this is the ideal situation in which pragmatism and practical common-sense solution must prevail over a theoretical and legally sophisticated approach."* [17]

The applicant holds the view that the assets of the dormant funds of which the registrations had been cancelled between 2006 and 2013 had not been paid to those members who became entitled thereto, in other words, that there remained in those dormant funds, unpaid benefits. The applicant further holds the view that those cancellations which occurred between 2006 and 2013 had been done unlawfully. In this regard she relies on two opinions furnished to the FSB by

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17 Record: p 326 par 7.8.

Adv Breitenbach SC[18] to the effect that the only legitimate avenue to provide *"a directing mind and will"* to an orphan fund would be the appointment of a curator for it in terms of section 5A of the Financial Institutions (Protection of Funds) Act of 2001 (the ideal situation referred to by Mr Boyd in his memorandum of 30 October 2014).

[8] The applicant is an attorney of 23 years standing. She specialises in pension law. She was appointed by the Minister, as Deputy Executive Officer: Retirement Funds and Friendly Societies and Head of the FSB's Retirement Funds and Friendly Societies Division, a Deputy Registrar of Pension Funds and Deputy Registrar of Friendly Societies in terms of the Pensions Funds Act and the Friendly Societies Act, 1956. Her appointment was for a period of three years and took effect on 1 August 2013.

[9] Soon after her appointment the applicant made it her business to have the cancellations of orphan funds investigated. On 10 September 2013 the applicant suspended the cancellations of pension funds. She found that several of the orphan funds had been cancelled and held the view, mentioned above, namely that those cancellations had taken place unlawfully. Cancellation of the pension funds took place in terms of section 27(1)(a) of the Pension Funds Act which provides that:

> *"The registrar shall cancel the registration of a fund ... on proof to his satisfaction that the fund has ceased to exist."*

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[18] Dated 2 March 2014.

The FSB also used the provisions of section 26(2) of the Pension Funds Act by appointing a trustee on behalf of an orphan fund to hold office until the registration of the fund had been cancelled in terms of section 27(1)(a) of the Pension Funds Act. Her view was not shared by all members of the FSB. Mr Tshidi and Mr Boyd are two individuals who did not share the applicant's view on the issue. This difference of opinion gave rise to a war of words that waged in the offices of the FSB for years and throughout these proceedings. The applicant made it clear that she and those who share her view believe the unlawful cancellation of funds occurred during the watch of Mr Tshidi and Mr Boyd and heaped the scorn on them. It is not within my remit to consider the merits of the views of the factions within the FSB as can be seen from the issues of law distilled by counsel during argument and listed below. However, and in view of the cost orders sought by the parties, reference will be made to some of the events which preceded the present litigation. My summary of the facts gleaned from the 3 700 page record is not a summary of all the evidence presented by the parties. Much was stated in correspondence (mostly typed in single spacing) and attached to the affidavits relevant to the acrimonious dispute between the parties. Mindful of its general import I am of the view that, except for the costs issue, the dispute can be resolved on determination of the applicant's standing and her entitlement in law to the relief sought in the original notice of motion and that the application for the proposed amendment of her notice of motion can be adjudicated on the same premise. More about the amended notice of motion presently.

[10] On 25 February 2014 (7 (seven) months after she took office) the applicant informed Mr Tshidi of her intention to reveal the existence of the

cancellations of orphan funds and her reasons for stopping the cancellations and her view of the unlawfulness of the cancellations project as it became known by then, at a Pension Lawyers Association meeting. The meeting enjoyed media coverage. Such a revelation from a public podium obviously embarrassed Mr Tshidi and Mr Boyd (and the FSB). The wisdom of the applicant's conduct in that respect was questioned.

[11] During March 2014 meetings took place between the applicant and Mr Tshidi to resolve their differences on the cancellation of orphan funds. Those attempts failed. The applicant then asked the FSB's Retirement Fund Division's Legal Department to convene a legal team of staff to investigate the circumstances under which registration of pension funds had been cancelled during the period 1 January 2012 to 30 September 2013. Shortly thereafter another employee of the FSB, Ms Buitendag, submitted a complaint of grievance to Mr Tshidi against the applicant. Soon thereafter the FSB caused the applicant's office computer to be seized and a copy be made of her computer's hard drive. Thereafter the applicant received a call from the FSB's attorneys who offered her a golden handshake. She declined the offer. On 27 March 2014 the applicant proposed a mediation facilitated by the FSB's attorneys of the dispute between the applicant and Mr Tshidi. The FSB declined the applicant's proposal. On 3 April 2014 Mr Tshidi mandated and appointed Gobodo Forensic Investigators ("Gobodo") to investigate and report on the complaint of Ms Buitendag and to investigate *"other matters of concern"*. During June of 2014 Gobodo furnished a preliminary report to Mr Tshidi. On 1 July 2014 the

applicant submitted a notice of non-compliance[19] to the FSB. On 23 September 2014 the second respondent (Mr Sithole) sent an email to the applicant and Mr Tshidi informing them that Justice O'Regan, a retired Constitutional Court Justice, was appointed to conduct an investigation into the notices of non-compliance submitted to the FSB by the applicant. The applicant and some of the respondents submitted memoranda and other correspondence to Justice O'Regan following her appointment. On 22 October 2014 the applicant was informed that the Board of the FSB had formed the view that the applicant may be guilty of serious misconduct and that the Board had obtained the Minister's permission to institute disciplinary proceedings against her and would defer consideration of her notice of compliance until after the conclusion of the disciplinary proceedings that was imminent. On 23 October 2014 the Executive Committee of the FSB decided during a meeting that the cancellation issues of pension funds will be removed from the agenda of the FSB until the enquiry of Justice O'Regan had been finalised. The report of Justice O'Regan became available on 21 November 2014 or shortly before then. On 4 December 2014 the second respondent informed the applicant that the report of Justice O'Regan would be considered *in camera* at a board meeting of the FSB and that it had been resolved by the Board that publication of the report was premature at that stage. On 19 December 2014 the second respondent sent an email to the applicant, Mr Boyd and Mr Tshidi stating that the FSB Board had appointed KPMG to conduct an audit and an investigation following the report of Justice O'Regan.

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19 Annexure "NCN1" to the founding papers.

[12] On 9 February 2015 a disciplinary hearing commenced during which the applicant was charged as anticipated earlier. On the third day of the disciplinary proceedings a settlement was reached. That happened after cross-examination of the second respondent by the applicant's counsel. The settlement included consent by the parties to participate in mediation and resolution of their disputes. Adv Antrobus SC was appointed and nominated to facilitate the mediation. On 24 February 2015 the applicant sent an email to the FSB Board's sub-committee asking them to provide her with a copy of the final report of Justice O'Regan. The following day Mr Sithole responded to the applicant stating that the FSB is not authorised to release the final report of Justice O'Regan. On 4 March 2015 Adv Antrobus SC submitted his report to the FSB stating that the mediation exercise failed and recommended that the FSB convene a grievance enquiry to address the applicant's grievances without delay. The applicant was on 7 April 2015 informed by a member of the FSB Board that decisions on her notices of non-compliance will only be considered once the FSB has received the KPMG report. By that time the final report of Justice O'Regan was not made available to the applicant and on 10 April 2015 the second respondent sent an email to the applicant, Mr Boyd and Mr Tshidi stating that they would be allowed access to the final report of Justice O'Regan on signature of a confidentiality undertaking in that respect. The applicant was not prepared to sign the non-disclosure agreement or confidentiality undertaking. In June 2015 the applicant submitted her second notice of non-compliance[20] to the FSB and on 18 June 2015 she reported her suspicion of fraudulent or corrupt activities involving officials of the FSB to the Hawks. On 3 July 2015 the

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[20] Annexure "NCN2" to the founding papers.

applicant transmitted a letter to the Auditor-General bringing to his attention the allegations contained in her notices of non-compliance, annexures "NCN1" and "NCN2". The final KPMG report was later supplied to the FSB. The FSB refused to furnish the applicant with a copy of the final report of Justice O'Regan and the final report of KPMG.

[13] The purpose of the KPMG report was *"... to determine whether it is likely that material financial prejudice may have been suffered by any fund or any person with an interest in any fund as a result of the acts and/or omissions of the Registrar or any 'authorised representative' or 'section 26(2) trustee' in regard to the disposal of the fund's assets and/or liabilities before its registration was cancelled or the determination by the registrar whether the fund had assets and/or liabilities when deciding to cancel its registration in terms of section 27 [of the Pension Funds Act]".*

[14] KPMG concluded as follows in its report to the FSB:

> ***"Conclusions***
>
> *8.1 ...*
>
> *8.2 Reasonable person test – ceased to exist*
>
> *With reference to the specific factual questions posed by Justice O'Regan, namely to:*
>
> *"consider in particular whether on the information available to the registrar at the time of cancellation, it was clear that a reasonable person would have concluded that the fund had 'ceased to exist', in that it had no members, nor any assets or liabilities.'*
>
> *We conclude that in 500 of the 510 cancelled fund reviewed by us, we were unable to confirm that the information*

available to the Registrar was sufficient for a reasonable person to have concluded that these funds had ceased to exist at the time of cancellation thereof.

In reaching this conclusion, we have applied the subjective and objective test as set out in the report.

On a balance of probabilities we conclude that a reasonable person could not, based on the available information, have concluded that the funds identified had ceased to exist.

8.3 Reasonable steps taken

With reference to the specific factual questions posed by Justice O'Regan, namely to:

"consider whether, before the registration of the fund was cancelled, the manner in which its assets and/or liabilities were disposed of, (whether by the transfer of its assets and/or liabilities to another fund or otherwise) pursuant to decisions taken by 'authorised representative(s)' or 'section 26(2) trustee(s)' indicated that reasonable steps were taken to protect the interests of members and/or beneficiaries and/or other creditors.'

We conclude that we are unable to confirm with reference to 500 of the funds review, that the information available to the Registrar was sufficient for a reasonable person to have concluded that reasonable steps were taken, inter alia by the Authorised Persons or the Section 26(2) trustees, and/or the Registrar to protect the interest of members, beneficiaries and/or creditors.

On a balance of probabilities the opposite appears to be the case.

8.4 Likelihood of material financial prejudice

With reference to the further question posed by Justice O'Regan, namely:

to determine whether it is likely that material financial prejudice may have been suffered by any fund or any person with an interest in any fund as a result of the acts and/or omissions of the Registrar or any 'authorised representative' or 'section 26(2) trustee' in regard to the disposal of the fund's assets and/or liabilities before its registration was cancelled or the determination by the registrar whether the fund had assets and/or liabilities when deciding to cancel its registration in terms of section 27'.

We conclude that the documentation available to the Registrar at the time of the cancellation, and at least on the face of it suggests a high likelihood of the existence of assets, liabilities and/or members at cancellation for 500 of the 510 funds reviewed.

Although we were not mandated or requested to determine the extent and value of the asset, we have, based on the available documentation performed a high level calculation and an indicative quantification of the value of such assets.

The significant extent and value of the indicative quantification strongly supports a conclusion of the likelihood of material financial prejudice. We have quantified an indicative value of assets and approximately R2 500 000 000.

The detail of these indicative asset values are included in the amounts reflected in Volume 2 and the calculation underpinning the indicative values are contained in Volume 3.

We are further of the view that the significant lack of reliable documentation and information at the disposal of the Registrar, suggests that a structured and extensive documentation supplementation exercise may significantly reduce the possible prejudice calculated.

8.5 *Contributory role of the mechanisms utilised*

The shortcomings in the approach and processes followed, were in our view, a major contributory factor to the

conclusions that we made in the paragraphs above. The mechanisms deployed during the cancellation project established processes that resulted in the lack of objective information and documents at the disposal of the Registrar. This lack created a factual position in terms whereof the decisions taken could not be objectively supported and verified.

Specifically the perceived conflict of interest of the Section 26(2) trustees that was not considered at the time of appointment of the trustees and the lack of monitoring and oversight from the FSB."

[15] Following the KPGM report the FSB appointed Mr Mort as an inspector in terms of section 2(1) of the Inspection of Financial Institutions Act, 80 of 1998 ("the Inspection Act") and engaged his services as an expert advisor to, according to subparagraph 2.3 of his letter of appointment:

"2.3.1 Determine the history of any of those deregistered funds determined by you prior to deregistration;

2.3.2 In terms of section 3(1) of the Inspection Act, inspect the affairs of any fund or long-term insurer, and any associated institution, to which any asset of such deregistered funds were transferred prior to the deregistration;

2.3.3 In terms of section 3(1) of the Inspection Act, inspect the affairs of the administrators, set out in Annexure 'A', administered, as benefited administrators, any of these deregistered funds at any time prior to deregistration, and the associated institutions; and

2.3.4 In terms of section 3(2) of the Inspection Act, inspect the affairs of any deregistered funds and the associated

> *institutions, if there is reason to believe that such deregistered funds were conducting unregistered business after deregistration."*[21]

[16] Mr Mort reported to the FSB in writing on two occasions. His first inspection report was dated 7 June 2016. Mr Mort's latest report was handed up to me by Adv Loxton SC at the hearing after service thereof by the FSB a few earlier. The applicant challenged the appointment of Mr Mort to undertake the investigation. In her affidavits filed she expressed the view that Mr Mort as a single inspector cannot possibly complete the investigation within a reasonable time. The latest report of Mr Mort however shows that he has completed his investigation of approximately 63% of the orphan funds concerned and that his investigation (inspection) is still underway. As stated earlier it is not within my remit to consider or adjudicate upon the merits or demerits of the cancellation project, the findings of Justice O'Regan, the KPMG report or the report of Mr Mort. The applicant's notice of motion suggests that no investigation (inspection) is underway. The common cause facts show the opposite. The evidence show that an investigation took place and the report was presented by Justice O'Regan at the behest of the FSB that was followed by a report by KPMG. The applicant holds the view that the ambit of the mandate of KPMG was too narrow. It is further common cause that Mr Mort is at present in the process of completing his inspection. I will refer to these common cause facts in the context of the legal basis on which the applicant's claims have been formulated below.

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[21] Mr Mort's letter of appointment was dated 6 April 2016, approximately four months after the notice of motion was dated.

[17] On 19 January 2016, a little more than six months before the termination date of her 3 year appointment, the applicant launched this application against the FSB, Mr Sithole in his capacity as Chairperson of the FSB, Mr Tshidi in his capacity as Executive Officer of the FSB and its Accounting Officer in terms of the Public Finance Management Act, 1999 ("PFMA") and as Registrar of Pension Funds under the Pension Funds Act, and against Mr Boyd in his capacity as Deputy Registrar of Pension Funds and Deputy Registrar of Friendly Societies and the Deputy Executive Officer: Retirement Funds and Friendly Societies Division of the FSB during the period 1 May 2006 – 31 December 2012.

THE RELIEF SOUGHT IN THE ORIGINAL NOTICE OF MOTION:

[18] In her original notice of motion the applicant claimed the following relief:

[18.1] that a copy of the final report produced during or about December 2014 by Justice O'Regan in relation to the Pension Funds Cancellation Project conducted by the first respondent;

[18.2] that a copy of the report produced during or about July 2015 by the firm KPMG in relation to the Pension Funds Cancellation Project conducted by the first respondent;

[18.3] an order against the FSB to investigate the matters referred to in the applicant's notice of non-compliance dated 1 July 2014 and supplemented on 29 July 2014, a copy of which is attached

to the founding papers as annexure "NCN1" by an independent and suitably qualified individual or organisation and report to the applicant on the outcome of such investigations within three (3) months;

[18.4] that the FSB, *alternatively* the Minister procure an investigation into the matters referred to in the applicant's notice of non-compliance dated 1 July 2015 ("NCN2") by an independent and suitably qualified individual or organisation and to furnish the applicant with a copy of that report;

[18.5] leave to approach the Court on the same papers, supplement it if required, after receipt of the reports sought in terms of the notice of motion for further relief may be appropriate in the circumstances; and

[18.6] an order as to costs in the event of opposition of the application.

THE RELIEF SOUGHT IN TERMS OF THE PROPOSED AMENDED NOTICE OF MOTION:

[19] On 20 October 2016, six weeks before the hearing, the applicant served an application to amend her original notice of motion ("the amendment application"). The amendment application was served after the applicant had delivered her replying affidavit on 1 July 2016.

[20] In the proposed amended notice of motion the relief summarised in paragraphs [17.1] to [17.3] remain. To those paragraphs the following relief is added by the proposed amended notice of motion:

> *"3. declaring that:*
>
> *3.1 in the conduct of the pension funds cancellations project, the third respondent (Tshidi) has failed to comply with his obligations in terms of the Pension Funds Act, 1956, (the PFA) to properly exercise the powers given to him in terms of that Act for the purposes for which they were given;*
>
> *3.2 The FSB, including those persons appointed in terms of section 4 of the Financial Services Board Act, 1990 (the FSB Act) during the period 1 August 2013 to 31 July 2016 have failed to comply with its obligations in terms of the Constitution of the Republic of South Africa, 1996 (the Constitution) the FSB Act and the Public Finance Management Act, 1999 (the PFMA) (collectively 'the relevant legislation'), in that having been made aware of the irregular manner in which the cancellations project was executed, they failed to deal with such irregularities properly and failed to ensure compliance by Tshidi and the fourth respondent (Boyd) with the relevant provisions of such legislation;*
>
> *4. That within 30 days of this order the FSB procure the conduct of an investigation by a firm of independent and appropriately qualified forensic auditors (the investigator) chosen by it in consultation with the fifth respondent (the Minister) into:*
>
> *4.1 the circumstances under which Tshidi cancelled the registrations of certain funds (the 500 funds) in relation to which KPMG, in its report to the FSB of 20 October 2015, concluded that Tshidi was not possessed of information sufficient to be reasonably satisfied that such funds had no assets or liabilities and that their registrations should be cancelled in terms of section 27 of the PFA;*
>
> *4.2 whether Tshidi, Boyd or other employees of the FSB in employment during the period 1 August 2013 to 31 July 2016 and/or any other person(s) who provided services to the FSB during that period obstructed Hunter in her efforts to investigate and address irregularities in the cancellations project,*

inter alia in the manner described in Hunter's Notice of Non-Compliance and Statement of Grievance dated 1 July 2014 and supplemented on or about 29 July 2014 (together Hunter's 'NCN1") and whether such conduct which was unlawful and/or otherwise improper;

4.3 *whether the second respondent (Sithole) and other persons appointed in terms of section 4 of the FSB Act during the period 1 August to 31 July 2016 unlawfully failed to exercise their powers and fulfil their duties under the relevant legislation in the manner described or contemplated in Hunter's Notice of Non-Compliance and Statement of Grievance dated 9 June 2015 (under's 'NCN2');*

4.4 *whether Tshidi abused his position as executive officer of the FSB and the powers conferred upon him by the FSB Act by unlawfully obstructing the efforts of Hunter to investigate and address irregularities in the conduct of the cancellations project, inter alia in the manner described.*

5. *That the investigator shall be mandated by the FSB to determine, on the basis of information and records and any other past or present employee of the FSB) who, in the opinion of the investigator, may have information or records relevant to its investigation in relation to each of the 500 funds, whether –*

5.1 *the assets reflected in the most recent and properly completed financial statements or other statutory returns submitted to Tshidi on behalf of the fund before the cancellation of its registration were lawfully and properly disposed of in a manner which protected the rights and reasonable expectations of such fund, its members, beneficiaries and other persons with legitimate interests in such disposals ('interested persons');*

5.2 *the liabilities reflected in such statements or other statutory returns were lawfully and properly discharged, before the registration of the fund was cancelled;*

and if not, whether any fund and/or any of its interested persons have suffered material financial prejudice and, if so:

5.3 *whether such prejudice may reasonably be attributed to:*

5.3.1 the manner in which the cancellations project was conducted by Tshidi and/or Boyd and/or other employees of the FSB; and/or

5.3.2 the unlawful, negligent or otherwise improper conduct of any person(s)

5.3.2.1 appointed by or on behalf of Tshidi to act in the place of the board of the fund in the disposals of its assets and/or liabilities ('appointee's'); and/or

5.3.2.2 which or who provided information and/or made representations to Tshidi or employees of the FSB acting on his behalf on which he or such employees relied when deciding –

5.3.2.2.1 to appoint the person(s) referred to above;

5.3.2.2.2 whether the fund had complied with any statutory requirement;

5.3.2.2.3 whether to exempt the fund from compliance with any statutory requirement;

5.3.2.2.4 that the fund had no assets or liabilities and that its registration should in consequence be cancelled in terms of section 27(1)(a) of the PFA.

6. The FSB shall require the investigator –

6.1 to commence its investigation as soon as reasonably possible and not less than 30 days after appointment;

6.2 to produce interim written reports to the FSB, the Minister and all parties to these proceedings at intervals not exceeding three months on the results of the investigation, and its observations and findings on the basis of those results (the interim reports);

6.3 to make written recommendations in such interim reports in regard to –

6.3.1 the further conduct of the investigation and the resources and measures, if any, which, in its opinion, will be reasonably required for the successful and expeditious conduct and conclusion of the investigation; and

6.3.2 the actions, if any, that, in its opinion, should be taken by the Minister, the FSB, the registrar of pension funds and/or any appointees and/or service providers –

6.3.2.1 to ensure the proper disclosure and delivery to the investigator of information and/or documents relevant to the investigation; and/or

6.3.2.2 to remedy any material financial prejudice to funds, their members, beneficiaries and/or interested persons which may reasonably be attributed, in whole or in part, to any of the persons contemplated in paragraph 5.2.3;

6.3.2.3 to investigate whether any material prejudice has been sustained by any of the other funds the registrations of which were cancelled in the course of the cancellations project or by their members, beneficiaries and interested persons as a result of the manner in which the cancellations project was conducted and, if so, to remedy such prejudice;

6.3.2.4 to identify and/or address any other unlawful or improper conduct determined by the investigator in the course of its investigation.

7. To the extent that it may be necessary for the purposes of the investigation, the registrar of pension funds must appoint the investigator as an inspector in terms of the Inspection of Financial Institutions Act, 1998 and confer such powers and authorities in terms of that Act on the inspector as it may reasonably require.

8. The cost of the investigation shall be borne by the FSB and it must provide to the investigator all such facilities and access to its records and information and communication systems as it may reasonably require for the purposes of the investigation.

9. The FSB must instruct each of its office-bearers and employees, and request each of its ex-employees identified for this purpose by the investigator, on the request of the investigator –

9.1 to make him- or herself available to be interviewed by the investigator; and

9.2 *to provide to the investigator on request with all information, advice and documentation as the investigator or that person considers relevant for the purposes of its investigation.*

10. *For the purpose of taking such advice and obtaining such information from each of the persons referred to in paragraph 9, the FSB must in writing authorise the investigator to disclose to such person such information and documents, including any drafts of its report(s), as the investigator may consider appropriate but subject to the condition that that person agrees in writing not to disclose to third parties any of such information and/or documents as are not then in the public domain.*

11. *The FSB must ensure that the interim reports are filed in court immediately upon their production and, unless the court on application otherwise orders, simultaneously also serve copies of such interim reports on each of the parties to these proceedings and publish copies of them on its website.*

12. *The Minister and each such party may, if he or she so wishes, within 15 days of the filing of the investigator's final report, lodge an affidavit in which he or she comments on the report and makes submissions to the court on the findings and decisions, if any, it should make on the basis of the final report.*

13. *Within 15 days of the expiry of the 15-day period referred to in paragraph 12 above the FSB must file in this court, serve upon each party to this application and publish on its website-*

13.1 *the final report of the investigator, confirmed on affidavit;*

13.2 *such affidavits as may have been filed pursuant to paragraph 12 hereof; and*

13.3 *an affidavit in which the FSB reports on the steps that it has already taken, and proposes in the future to take, in relation to the cancellations project, and responds to the findings and recommendations made by the investigator in its final report and to the affidavits filed in terms of paragraph 12 above.*

14. *The FSB shall thereafter and without delay set the matter down for hearing on notice to each of the other parties to these proceedings.*

15. *The court shall make such findings and orders, and give such directions as it deems fit and in the interests of justice in order to address the issues before it.*

16. *The FSB, Sithole and Boyd are jointly and severally liable for the applicant's costs in this application, such costs to be on the attorney and own client scale, including the costs of two counsel.*

17. *Further or alternative relief."*

[21] At commencement of the hearing I enquired from Adv Loxton SC about the applicant's intentions should the application for amendment not be allowed. Adv Loxton SC informed me that in such an event the applicant will proceed with the application but only for the relief sought in her original notice of motion. The application, including the application for amendment, was argued on that basis. The relief sought in terms of the amended notice of motion, or part of it at least, is not aimed at compelling the FSB as regulatory or supervisory institution to perform in the furtherance of its objectives. It is aimed at compelling the FSB as employer of a category of employees to act against those employees. The relief sought is not for review of any decision under PAJA or on any other ground. No administrative action or other conduct performed are even mentioned in the notice of motion.

[22] The declaratory order sought in paragraph 3.1 of the amended notice of motion is final in nature and depends on resolution of numerous disputes of fact in motion proceedings. There are so many such disputes that it will serve no purpose to catalogue them here. Should the proposed amendment be allowed,

this Court (or if the matter is postponed, another Court) would be faced with the obligation to, on the rules of practice stated in *Wightman,*[22] *Lombaard,*[23] *Buffalo,*[24] *Mokala,*[25] and *National Scrap Metal*[26] to satisfy itself that the parties who purport to raise the disputes (something the respondents no doubt would do) have in their affidavits seriously and unambiguously addressed the facts said to be disputed and whether the dispute can be resolved in motion proceedings at all. I am of the view that the papers as they stand show several genuine disputes of fact. In my view this Court, should the amendment be allowed, would have to refer the entire matter to trial or dismiss the application by reason of the existence of disputes of fact that exist in these papers and have been in existence and foreseeable for years. The relief sought in the amended notice of motion is fresh and the respondents have not had the opportunity to answer thereto. I am bound to apply the *Plascon-Evans* rule[27] in considering the factual issues. I will return to the applicant's prospects of success to succeed with the relief sought in respect of the appointment of an investigator below when I discuss the legal basis of the applicant's claim as formulated in the original notice of motion and the proposed amended notice of motion.

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22 *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another* 2008 (3) SA 371 (SCA) at [13].

23 *Lombaard v Droprop CC & Others* 2010 (5) SA 1 (SCA) at [26].

24 *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd & Another* 2011 (1) SCA 8 at [19]-[20].

25 *Mokala Beleggings & Another v Minister of Rural Development and Land Reform & Others* 2012 (4) SA 22 (SCA) at [11].

26 *National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts Ltd & Others* 2012 (5) SA 300 (SCA) at [17].

27 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

THE LEGAL BASIS OF THE APPLICANT'S CLAIM:

[23] The applicant's standing and the basis of her claim in law is not readily discernible from the papers. Her cause of action has mutated during the proceedings. At my request Adv Loxton SC supplied during argument a note recording the references to legal duties the applicant relies on and detail of the *"applicable legislation"* and *"ethical duties"* she mentions in paragraph 3.3, 3.9, 3.2.2 and 4.3.1 of her founding affidavit. These include the following:

[23.1] The constitutional duties to act lawfully and in a manner that is effective, transparent, accountable and consistent with a high standard of professional ethics founded on the provisions of sections 1(c) and 195 of the Constitution;

[23.2] The incurring of *"irregular expenditure"* as contemplated by the Public Finance Management Act, 1999 ("PFMA") in an aggregate amount in excess of R1.5 million as *"fruitless and wasteful expenditure"*, *"irregular expenditure"* and/or *"unauthorised expenditure"* in the PFMA if read with sections 38(1)(b) and 63(2) of the PFMA;

[23.3] The occupational detriments as contemplated in the Protected Disclosures Act, 2000 ("the PDA") and the numerous measures to undermine the applicant's ability to effectively fulfil her duties as appointed official in terms of the FSB Act including the duties to consult with the National Treasury on matters relating to retirement savings, related policy issues

constituting *"occupational detriments"* as defined in section 1 of the PDA;

[23.4] That the conduct of the applicant was aimed at ensuring compliance by the Registrar and the FSB of its legal duties contained in the FSB Act which was met with considerable resistance by Mr Tshidi and other members of the FSB staff. This resistance took various forms including attempted premature termination of the applicant's employment without good cause and attempts to frustrate her investigations and refusal to disclose to her the O'Regan report and the KPMG report while she, as employee of the FSB, was entitled to their disclosure;

[23.5] By making disclosure of the O'Regan report conditional upon signing of a non-disclosure undertaking which would have prevented the applicant from complying with her legal duties imposed by the FSB Act and the law in general;

[23.6] That Mr Tshidi and other staff members of the FSB conducted themselves in a manner subversive to the execution of the applicant's duties in terms of the Pension Funds Act detailed in her founding affidavit.

[24] To the abovementioned list was added during reply, with objection from Adv Trengrove SC on behalf of the first and second respondents, the alleged obligation flowing from acceptance by the FSB of the O'Regan report's

recommendation to appoint an investigator which, so the submission went, on acceptance of the report created an obligation on the FSB to appoint the persons whose appointments are sought in the notice of motions.

[25] The respondents challenged the legal foundation of the applicant's claim in law and her *locus standi in iudicio* to claim the relief sought. The following points are distilled from the applicant's affidavits, initial heads of argument, concise heads of argument and submissions made on her behalf during oral argument:

[25.1] In her founding affidavit the applicant made it clear from the outset that she brought the application in the hope and under the belief that, should the relief claimed by her be granted, it would yield a result forcing compliance by the Minister and the FSB with their constitutional obligations *"to act lawfully and in a manner that is effective, transparent, accountable and consistent with a high standard of professional ethics, and to comply with the specific duties contemplated in applicable legislation and FSB policy documents"*. She particularised the aforementioned premise by stating that the conduct of the Minister and the FSB to *"act lawfully"* should include:

[3.1.1] the identification of, and, if necessary, the adoption by the Registrar of Pension Funds of measures to remedy, or if that is not possible, to mitigate, any substantial prejudice which may have been suffered by any pension funds subject to regulation

and supervision in terms of the Pension Funds Act and/or other persons with interests in those funds as a result of the conduct by the FSB and its staff in the course of the cancellations project which the applicant, as stated earlier, firmly believes to have been conducted unlawfully and negligently.

[26] The order sought (under the original and amended notices of motion) is aimed at prescribing to the FSB and the Minister (1) what to do to resolve the cancellation issue as the applicant perceives it; (2) how to do the investigation; and (3) to impose judicial control over its manner and time of execution. In her heads of argument the applicant makes it clear that she *"does not ask this Court to find as a fact that the FSB, Sithole or any of the other respondents are guilty of breaching the FSB's internal policies, Treasury Regulation 33 or Protected Disclosures Act. The relief sought is on the contrary directed at establishing, inter alia, whether that is so."*

[27] My general observation is that the applicant has failed to set out with the required measure of particularity, facts and conclusions of law to rely on any of the statutory provisions stated in her affidavits and those advanced during argument and summarised above. The provisions of Regulation 33 of the National Treasury Regulations, the Protected Disclosures Act or the Constitution apply to the facts deposed to have no legal and logical connection to the relief sought. The applicant relied on *Viking Pony*[28] in support of a finding that the facts deposed to by her justify an order to give effect to a general obligation to investigate a particular matter. A general obligation to investigate does not exist

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[28] *Viking Pony Africa Pumps v Hydro-tech Systems* 2011 (1) SA 327 (CC).

on authority of *Viking Pony*. *Viking Pony* was decided on facts peculiar to that case and in the context of a procurement-related dispute.

[28] The central issue in the application is the standing in law of the applicant to apply for the relief sought, put differently, the jurisdiction of a court to order the FSB and the Minister to perform a certain act in a specified manner and then to supervise compliance with the order. The FSB cancelled the registration of pension funds years ago (or over many years would be more accurate). It did so in terms of the Pension Funds Act referred to above. Before doing so it found *"proof to its satisfaction"* that the orphan funds no longer function. That (all those) decision(s) of the FSB are not challenged. Years later the FSB learnt of the applicant's views as deputy registrar. The administrator, the FSB, as summarised above, appointed Justice O'Regan, KPMG, Mr Mort and its decision or decisions to do so have not been challenged or set aside. In law they stand. Both the original decisions to cancel the orphan funds and the subsequent decisions must on authority of *Bato Star*[29] be respected. It must be considered rationally connected to a legitimate governmental and administrative end unless and until set aside by a court of law.[30]

[29] The decision-maker and statutory supervisory body is the FSB. Its functions are listed in paragraph [3] above. It is not for the applicant as a member of the FSB to dictate her views and preferences to the FSB by means of judicial intervention. The applicant contended that she is entitled to the relief

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29 *Bato Star Fishing v Minister of Environmental Affairs* 2004 (4) SA 490 (CC).

30 *Democratic Alliance v President of the Republic of South Africa & Others* 2013 (1) SA 248 (CC) at [29] – [30].

sought under section 1(c) of the Constitution. I do not agree with the proposition. She further relied on the provisions of section 195 of the Constitution. The law is trite that the values enunciated in section 1 of the Constitution and the considerations mentioned in section 195 have reference to government and the duties of government, *inter alia*, to be accountable and transparent but do not confer upon applicants any justifiable rights that they can exercise to protect by means of access to courts.[31] In my view the applicant does not have the necessary standing in law to claim the relief sought in the original notice of motion or the amended notice of motion.

[30] It was in reply submitted on behalf of the applicant that acceptance by the FSB of the O'Regan report obliged the FSB to appoint investigators, not as they did by appointing Mr Mort, but as claimed in the notices of motion. This submission cannot be accepted. A factual basis of the submission has not been laid in the founding papers. The respondents have not been informed of the point and have not attended any contradicting evidence. There is, also, nothing on the papers to suggest that the FSB, after considering the context of the O'Regan report and the KPMG report considered itself bound to do what the applicant suggests and there is in law no obligation on the FSB to have accepted the O'Regan report's recommendations or that of any other person who advised the FSB.

[31] The applicant states in the founding papers that she brought this application in the public interest. From the papers filed in the main application

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31 *Britannia Beach Estate (Pty) Ltd & Others v Saldanna Bay Municipality* [2013] ZACC 30 (5 September 2013).

and in the application for the proposed amendment of her notice of motion she seems to be concerned that nothing may come of her efforts to regularise the cancellation of orphan funds now that her term of office had expired (or was to expire when she launched the application). Our Constitution provides for a number of Chapter 9 institutions which supports the constitutional democracy. One of those institutions is that of the Public Protector.[32] The applicant's concerns in that regard do not merit the granting of the proposed amendment or the relief sought in paragraphs 3 and 4 of her original notice of motion. Those can be taken care of by the Public Protector.

[32] In view of the lateness of the proposed amendment of the notice of motion, the many genuine disputes of fact that appear from the papers on the issues germane to the declaratory orders sought, the lack of standing of the applicant to succeed with the relief sought in both the original notice of motion and the proposed amended notice of motion, the application for the amendment cannot succeed. Under the circumstances the application for the proposed amendment and the main application must fail.

JOINDER OF THE THIRD AND FOURTH RESPONDENTS:

[33] In our law parties may be joined in proceedings for reasons of convenience and equity and to avoid depression or multiplicity of actions.[33] In other instances joinder of parties may be essential because of the interest a

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32 Sections 182-183 of the Constitution; *Economic Freedom Fighters v Speaker, National Assembly & Others* 2016 (3) SA 580 (CC) at [48]-[56]; *Broadcasting Corporation v Democratic Alliance* 2016 (2) SA 522 (SCA); *The Public Protector v Mail & Guardian & Others* 2011 (4) SA 420 (SCA).

33 *BHT Water Treatment (Pty) Ltd v Leslie* 1993 (1) SA 47 (W) at 50G-H.

party has in the matter. Failure to join a party when his or her participation is essential may cause a Court to suspend proceedings pending joinder or decline to hear the matter at all. The third and fourth respondents objected to their joinder as respondents. Adv Maritz SC submitted that they could not have been joined for purposes of convenience, let alone on the basis that their participation in the litigation is essential. The test to determine whether there is a misjoinder is whether or not a party has a direct and substantial interest in the subject-matter of the litigation which might be affected prejudicially by the judgment of the Court.[34]

[34] The third and fourth respondents are, like the applicant, employees and officials of the FSB. There exists in law as far as I have been able to determine, no statutory provision or rule of common law or any factual basis gleaned from the papers to conclude that the judgment sought by the applicant in the original notice of motion might prejudicially affect the third and fourth respondents in their capacities as employees of the FSB. On the contrary, none of the relief sought by the applicant is directed against them. In my view the objection of the third and fourth respondents to their joinder in these proceedings before the introduction of the notice to amend is valid and I am of the opinion that the application against them should be dismissed on that ground alone. The proposed amendment changed the position and records declaratory relief affecting the third and fourth respondents. In view of my finding that the amendment should not be allowed, there is no need to dwell on that issue.

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[34] *University of Pretoria v South Africa for Abolition of the Vivisection & Another* 2007 (3) SA 395 (O) at 7.

COSTS:

[35] The applicant, relying on *Affordable Medicines' Trust*[35] and *Biowatch Trust,*[36] submitted that the established general principle that in litigation between a private individual seeking to assert constitutional rights and a public entity such as the FSB and the Minister should be applied in the present proceedings and invited me to conclude that, if she is unsuccessful in the application, that each party should bear its own costs of these proceedings.

[36] The purpose of a cost award to a successful litigant is *"to indemnify him for the expense to which he has been put through having been unjustly compelled to either initiate or defend litigation as the case may be".*[37] Our Courts have at regular intervals endorsed the longstanding principles applicable on cost awards in High Court litigation. The first principle underlying the general rule is that awards of costs are in the discretion of the judicial officer. The second is that the unsuccessful party must pay. The second principle is, however, not inflexible and also subject to the first, and, subject to a large number of exceptions where a successful litigant may be deprived of his or her costs. The circumstances depriving successful litigants of their costs depend on *"... circumstances such as, for example, the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of*

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35 *Affordable Medicines' Trust & Others v Minister of Health & Another* 2006 (3) SA 247 (CC) at [139].

36 *Biowatch Trust v Registrar of Genetic Resources & Another* [2009] ZACC 14 at [21]; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 CC.

37 *Texas Co (SA) Ltd v Cape Town Municipality* 1927 AD 467 at 488 quoted by the Constitutional Court in *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45 at [14].

litigants and the nature of proceedings".[38] In *Biowatch*[39] the Constitutional Court held that as a general rule costs should not be awarded against unsuccessful litigants when they are litigating against the State in matters of genuine constitutional import. The *Biowatch* principle does not only apply to costs orders on merits in constitutional cases. It also applies to disputes described as ancillary to the merits of constitutional disputes. The underlying ratio emphasised in *Biowatch* and *Helen Suzman Foudation*[40] was aimed at preventing litigants who endeavour to vindicate their constitutional rights to be discouraged by the risk of adverse cost orders if they lose on the merits. Those seeking to ventilate important constitutional principles, should not be discouraged by the risk of having to pay the costs of the State adversaries merely because the Court holds adversely to them.[41] Adv Gauntlett SC pointed out that in *Lawyers for Human Rights*[42] the Constitutional Court, referring to *Biowatch* and *Helen Suzman Foundation*, stated as follows:

> *"This, of course, does not mean risk-free constitutional litigation. The Court, in its discretion, might order costs, Biowatch said, if the constitutional grounds of attack are frivolous or vexatious – or if the litigant has acted from improper motives or there are other circumstances that make it in the interest of justice to order costs. The High Court controls its process. It does so with a measure of flexibility. So a Court must consider the*

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38 *Ferreira v Levin N.O.* 1996 (2) SA 621 (CC) quoted in *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45 at [13].

39 *Biowatch Trust v Registrar of Genetic Resources & Another* [2009] ZACC 14 at [??].

40 *Helen Suzman Foundation v President of the Republic of South Africa* [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) at paras 36-38.

41 *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45 at [17].

42 *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45 at [18].

'character of the litigation and [the litigant's] conduct in pursuit of it' even where the litigant seeks to assert constitutional rights."

[37] I have referred to the acrimonious nature of the litigation and the events that led thereto above. In my view all the parties to the litigation (except the Minister) are to blame for the state of affairs. Having regard to the nature of the employment issues summarised above, reasonable litigants would have terminated the litigation. The Minister held a similar view which he expressed through his tender to the applicant in of his answering affidavit offering her permission to withdraw her application with impugnity. In my opinion the application is not one of genuine constitutional import and the principle stated in *Biowatch* does not apply in the present case at all and that the costs issue should be resolved on the general principles referred to above.

[38] The applicant advanced her campaign to resolve the cancellation issue with considerable energy and with conviction. Her announcement of its existence at the Pension Lawyers' Association meeting from a public podium, despite previous communication of her intention to do so to Mr Tshidi, caused embarrassment to the FSB and those involved in it, especially Messrs Tshidi and Boyd. The announcement by those in search of sensation described it as *"a bomb shell"* and it led to much animosity that prevailed throughout the period under consideration. The FSB's endeavours to get rid of the applicant at all cost, first by way of a golden hand shake and later by way of a failed disciplinary process, fuelled the applicant's efforts to pursue what she perceives as a quest for justice from which the general public would benefit. She retaliated with a process of suspicion mongering against Mr Tshidi. The FSB chose to deny the applicant, who was in law an employee of it charged with performing a statutory

duty, access to the O'Regan report and the KPMG report which were both produced as a direct consequence of the applicant's concern. That conduct of the FSB gave rise to the litigation or at least to part of it. The applicant's conduct was also unreasonable by seeking, after her term of office had expired, to amend her papers to claim relief directly aimed at Messrs Tshidi and Boyd. The applicant was also out of place when she expressed her view that she considers Mr Mort so slight that another entity should be appointed to undertake the investigation of the cancellations issue. Adv Maritz SC sought a punitive costs order against the applicant on behalf of Mr Tshidi and Mr Boyd. I do not think that, considering the history of the matter and the facts summarised above, that such an order should be granted.

ORDER:

I make the following order:

1. The application for amendment of the applicant's notice of motion is refused.

2. The application is dismissed.

3. The first respondent is ordered to pay the applicant's costs up to and including 1 August 2016, which costs shall include the costs of two counsel where so employed;

4. The second, third, fourth and fifth respondents shall bear their own costs up to and including 1 August 2016;

5. The applicant shall pay the costs of the respondents incurred by them from 2 August 2016, which costs shall include the costs consequent upon the employment of two counsel.

H F JACOBS
ACTING JUDGE OF THE HIGH COURT
PRETORIA

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C D A Loxton SC
A Milovanovic

Counsel for 1st & 2nd Respondents:

W H Trengove SC
H Rajah

Counsel for 3rd & 4th Respondents:

M Maritz SC
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Counsel for 5th Respondent:

J J Gauntlett SC
F B Pelser