IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A50/21

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

DATE SIGNATURE

15 December 2022

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THE FINANCIAL SECTOR CONDUCT AUTHORITY APPELLANT

and

MUNICIPAL WORKER'S RETIREMENT FUND RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 15 December 2022.

The Court: Potterill J, Khumalo J and Molefe J

JUDGMENT

N V KHUMALO J

Introduction

[1] This is an appeal by the Financial Sector Conduct Authority ("Conduct Authority"), against the judgment of Basson J delivered in this

court on 3 March 2020, granting the Municipal Worker's Retirement Fund ("the Fund") a declaratory order that the Fund's board of trustees as presently constituted complies with the provisions of s 7 A (1) of the Pensions Fund Act 24 of 1956 ("the Act"). The appeal is with leave of Basson J.

[2] The Fund, which is established and duly registered in terms of the Act is responsible for the management of collective retirement savings of municipal employees employed by various Municipalities located in every part of the country.

[3] The Conduct Authority was established in terms of s 56 of the Financial Sector Regulatory Act 9 of 2017 ("the FSRA") that came into effect on March 2017[1]and is in terms of s 30 (3) thereof the regulatory body of the Fund. It came into existence on 1 April 2018 and took over the regulatory and supervisory functions previously performed by the FSB and in the previous context, the Registrar of Pension Funds.

[4] The issue between the parties on appeal is whether the *court a quo* was correct in finding that the Fund's board of trustees is constituted in compliance with the provisions of s 7A (1) of the Act. The Conduct Authority sought a finding that the rules of the Fund in relation to the election of the members constituting the Fund's board of trustees do not comply with s 7 A (1) of the Act, and accordingly to be granted an order dismissing the Fund's application with costs.

[5] The contention in essence turns mainly on the interpretation of s 7A (1), which is to be read with the rules of the Fund in relation to the conformation of the Fund's board of trustees.

[6] In addition, the Fund persisted with its alternative relief raised in the court a quo for a declaratory order in the event the court finds that its board did not meet the requirements of s 7A (1), that "the Conduct Authority is required to grant the Fund an exemption from the requirement to comply with s 7A (1) for an indefinite period," plus an order reviewing and setting aside the decision of the Registrar granting the Fund an exemption for a definite period and replacing it with a decision granting an exemption for an indefinite period." The Fund initially sought an alternative order only declaring that "the Registrar, in granting the Fund the required exemption in terms of s 7B (1) (b) for a definite or determined period, acted *ultra vires* the provisions of the section." The court a quo did not decide on the issues raised in the alternative order, following its finding on the primary relief.

[1] See GN 169 in GG 41549 of 29-03-2018; and the Regulations published in GN R405 in GG 41550 of 29-03-2018

[7] Notwithstanding the Conduct Authority's initial view that the issues are limited to the court a quo's findings, it conceded to the Fund's alternative relief, the contention of which is also mainly on the interpretation of s 7B (2). The issue being whether the exemption granted under s 7B (1) was to remain extant unless withdrawn in accordance with s 7B (2) or for a definite period as per condition determined by the Registrar. The powers of the Registrar also scrutinized.

Legislative framework

[8] The requirement for the Board of fund's compliance are set out in s 7 A of the Act that reads:

> (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.
>
> (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. [S. 7A inserted by s. 2 of Act No. 22 of 1996]

[9] Two requirements are therefore imposed by s 7A (1) which are that:

[9.1] The board must be composed of at least 4 members;

[9.2] 50% of whom the fund members have a right to elect.

[10] *In casu*, the contention is with regard to the second requirement, the right of the Fund members to elect 50% of the board members. A Fund may however in terms of s 7B apply for an exemption from compliance with the requirements as imposed by s 7 A (1).

[11] Section 7B on exemption from compliance reads:

> (1) The registrar may on written application of a fund and subject to such conditions as may be determined by the Registrar:

(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 from the requirement that the members of the fund have the right to elect members of the board, if the fund

(i) has been established for the benefit of employees of different employers referred to in the definition of “pension fund" and "provident fund” as defined in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962);

(ii) is a retirement annuity fund;
(iii) is a beneficiary fund; or
(iv) is a pension preservation fund or a provident preservation fund as defined in section 1 of the Income Tax Act, 1962.
[subsection (1) substituted by section 3 of Act 22 of 2008]

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

[12] The relevant rules of the Fund which must give effect to the provision of s 7A (1) of the Act on the constitution and election of the trustees to the board, provides as follows, that:

10.1.3 The TRUSTEES shall be elected as follows:

(a) TRUSTEES shall be elected from amongst member representatives and TRUSTEE at a Provincial Annual General Meeting. Two TRUSTEES shall be elected from each province, namely KwaZulu Natal, Eastern Cape, Northern Cape, Western Cape, Gauteng, Mpumalanga, Limpopo, North West Province and Free State Provinces. TRUSTEES shall be elected by secret ballot or by show of hands,

as determined by the MEMBER representatives and/or presiding officer present at the meeting.

(b) The Union shall be entitled to nominate two representatives of the Union as the Trustee, who shall be members of the Fund (now amended) (This clause has since been removed by Rule Amendment 8)

(c) If an employer has more than 5 000 employees who are members of the Fund, the Members who are employees of such an employer, shall be entitled to nominate an additional TRUSTEE.

10.1.8

Each PARTICIPATING EMPLOYER shall be entitled to elect two MEMBER representatives or each unit or division of PARTICIPATING EMPLOYER shall be entitled to elect one-MEMBER representative up to a maximum of four MEMBER representatives, provided no member representative shall be elected where there is less than 20 MEMBERS in a participating EMPLOYER, employer or unit or division.

Background facts

[13] The Fund, as it is established for the benefit of employees of different employers envisaged in s 7 B (1) (b) (i), had previously applied and was exempted from compliance with s 7 A (1), that is the requirement that the members of the fund have the right to elect members of the board, on the premise that the constitution of the Fund's board of trustees was not compliant with such requirement.

[14] The exemption was granted for stipulated or definite periods. The first exemption was granted on 6 July 2016 for a period of one year ("first exemption") and on expiry thereof, a further exemption was granted on 6 July 2017 on the same basis. On its application for a second exemption, the Fund was informed that not only was its application out of time, its board was not properly constituted in accordance with the provisions of s 7A (1) which requires each member to elect members of the board and consequently required to appoint a new board.

[15] The Fund lodged an appeal and an urgent application in the above honourable court for the review and the setting aside of the decision by the Registrar to grant the Fund an exemption for a period of one year. On 31 July 2017 before the application was heard, the Fund was granted a second exemption ("the current exemption") for an extended period of three (3) years, which was to expire on 30 June 2020 and consequently withdrew its urgent application.

[16] However the Fund subsequently obtained a legal opinion that it actually did not require an exemption granted in terms of s 7B (1) (b) (i), as its board of trustees was constituted in compliance with the provisions of s 7 A (1) of the Act. Based on that opinion it proceeded with the application in the court a quo for the declaratory order that it does comply, alleging that:

> [16.1] The Fund's board of trustees took a decision on 26 July 2017, to amend the Fund's rules and get the proposal to Rule Amendment 8 approved, which proposed to delete Clause 10.1.3 (b) of the Fund's rules that allows the South African Municipal Workers Union to nominate two (2) representatives to the Board of Trustees. The approval of the amendment meant clause 10.1.3 (b) was to be deleted, then the exemption no longer required, in other words the Fund automatically became compliant in that the majority of the Board is therefore elected directly and indirectly by the members of the Fund. Also suggesting the amendment to mean all board members will be elected directly or indirectly by the members of the Fund. Although at the time their Application was launched, Rule Amendment 8 had not been approved and there was no response from the Registrar. That is borne out by the current composition of the board whose list demonstrates that there are two trustees representing each of the nine (9) Provinces and two trustees representing the South African Municipal Workers Union, giving a total of 20 trustees. There are no trustees directly elected by the members of the Fund, where there are more than 5 000 members who are employees of a single employer.
>
> [16.2] The Fund's Rules do make provision for its members to elect the Board members. The majority of the members of the Fund's Board are directly or indirectly elected by members of the Fund and notably none of the Trustees is elected by any of the Municipal employers, in that Rule 10.1.9 deals with the election of member representatives and according to the Fund the way the clause is applied is that 'within each participating employer (that is every municipality throughout South Africa) around which has at

least 20 members of the Fund "two provincial member representatives are elected at a provincial meeting. They are elected by members of the Fund itself and not by the employers. These member representatives then attend the Provincial Annual General meetings, at which each Province elect two trustees to the Board in terms of clause 10.1.3 (a). The elected Provincial representatives, therefore acting collectively appoint two Board members to make up a Board of trustees that constitutes 18 Board members.

[16.3] The trustees are elected from a list of nominees nominated by members of the Fund from each Province. This means that after electing the member representatives, all of the members of the Fund may nominate a short list of nominee drawn from the member representatives, to be elected onto the Board of Trustees. The member representatives will then vote on the short list to elect the two Provincial Trustees. The board of trustees as a result consists of at least 18 trustees who are directly elected by the member representative at the various Provincial Annual General Meetings, who are themselves elected directly by members. The members themselves therefore elect the Trustees indirectly.

[16.4] Two trustees are elected by the South African Union Municipal Workers Union members (where the Union itself is representative of employees not employers and if Rule Amendment 8 is approved, then this clause will be deleted and there will be no Union representative); and Trustees directly elected by the members of the Fund, where there are more than 5 000 members who are employees of a single employer.

[17] The Conduct Authority on the other hand contended that the right contemplated is one that allows members a direct say in the election of the Trustees of the Fund. An indirect right which provides for members to elect some other representative who may appoint or elect a Trustee does not afford the members an opportunity or a right to elect the Trustees of the Fund, where the vast majority of the members of the Fund have no say either directly or indirectly in the composition of "the majority of the members of the Board" of the Fund.

[18] Fundamentally it argued that Section s 7A (1) affords a right to the members of the Fund to elect at least 50% of the Trustees of that Fund's board, which confers on each and every member a direct say in the election of 50% of the Trustees. Such an interpretation accordingly reinforces the right of the members to elect their quota of trustees, when

regard is had to the purpose of s 7 A (1) as described by Harmse in *Gumede & Others vs Pep Provident Fund,*[2] which is to give the Fund members equal say in the affairs of the Fund not others on their behalf which is to have a direct right to elect the trustees. It found the Fund's contentment of indirect election untenable.

[19] The mentioned position is, according to the Conduct Authority reinforced by the fact that the Fund has not cited the rules of the Fund it relies upon properly, especially the provisions of 10.1.3. (a) which was amended by Rule Amendment 2 that was registered on 27 January 2014 and further amendment on its first sentence by Rule Amendment 5 with effect from 1 March 2018 and at present reads:

> "Trustees shall be elected amongst member representatives and Trustees at the Provincial Annual General Meetings. Two trustees shall be elected from each Province, namely KwaZulu Natal, Eastern Cape, Northern Cape, Western Cape, Gauteng, Mpumalanga, Limpopo, North West Province and Free State Provinces. Trustees shall be elected by secret or show of hands as determined by the member representatives and or presiding officer present at that meeting."

[20] Accordingly Rule 10.1.3 (b) has been deleted by Rule Amendment 8 which was registered on 13 November 2017 but had an effective date of 1 September 2017. Whilst Rule 10.1.9, 10.1.12, 10.1.13 were amended by Rule Amendment 5 which was registered on 22 July 2016 and had an effective date of 1 March 2016. They now read as follows:

> 10.1.9 Each participating employer shall be entitled to elect two member representatives or each unit or division of participating employer shall be entitled to elect one-member representative up to a maximum of four member representatives, provided no member representative shall be elected where there is less than 20 members in a participating employer or unit or division.
>
> 10.1.12 The Fund shall organise Provincial Annual General meetings for member representatives and Trustees at any time between August and October.

[2] Case no A7/2016, 29 August 2016 (2017) JOL 37949 FSAB.

10.1.13 The provisions of 10.1.3 to 10.1.7 shall apply mutatis mutandis to member representatives.

[21] In respect of those changes the Conduct Authority argued that the Fund's Rules are not a model of clarity as far as the process of election of Trustees by members is concerned, which compelled the Fund to interpret Rule 10.1.9 by referring to the manner in which the rule is both understood and applied. However, still pertinently clear from the rules and the manner in which they are implemented as explained by the Fund that they do not comply with s 7 A (1) because the members do not have a right to elect at least 50% of the Board of management of the Fund. What the Fund's rules contemplate is a tier process where the members in any given participating employer comprising more than 20 members have the right to elect one- member representative to be sent as a delegate to the Provincial Annual General Meeting of the Fund where the elected delegates then elect two trustees amongst their ranks, to the Board of the Fund. In that process members of the Fund have no opportunity, let alone a right to elect trustees to the Board but at best have a right to elect a delegate which is not the same as a right to elect a Trustee. When making a choice to elect a delegate to the provincial meeting the members of the Fund would not know whether or not the delegates for who they vote may be nominated for election to the Board.

[22] The contention by the Conduct Authority is therefore that the Fund's rules only provide for Provincial Annual General Meetings from which two trustees are appointed from each of the nine provinces of South Africa by provincial representatives of each Province and the Fund's trustees. There is no reason given for the presence of the incumbent trustees of the Fund at this meeting nor which Fund members they represent. Whilst s 7 A (1) does not allow for members' provincial representatives and incumbent trustees to exercise an election vicariously on the members' behalf.

[23] The Conduct Authority further argued that the Fund's own interpretation and illustration of its election process for the members in any given province, or their representatives in terms of the Rules at best participate indirectly in the appointment of two trustees to the full Board complement of 18 trustees. The members in one province therefore have no opportunity to determine who the remaining 6 trustees will be and not afforded any opportunity to do so which is again contrary to s 7 A (1) of the PFA Act which requires that the members elect at least 50% of the Trustees. In that case the situation is compounded by the Fund's Rule 10.1.9 that provides that if there are less than 20 members in a participating employer unit or divisions those members cannot elect a

representative to the Provincial Annual General Meeting and are effectively disfranchised, such members will have no representative at the Provincial Annual General Meeting which on the Fund's own argument these members do not have the right to elect any Trustees whether directly or indirectly which is once again clearly contrary to s 7A (1).

[24] The situation was further pointed by the Conduct Authority to be compounded by the fact that Rule Amendment 3, amended the schedule of benefits to the Rule and extended the membership requirement for eligibility to allow membership of all local Government, Municipality, and or State Owned Enterprise employees. However, the Fund in its Founding Affidavit stated that in practice the employees participating in the Fund are various South African Municipalities and Municipalities entities but silent about the position and fate of employees in state owned enterprises who would generally not have access to processes and structures available within the local Government spheres.

[25] The Conduct Authority regarded the Fund's argument on the indirect election to be a contention that members have waived their right to elect trustees to the board, receding this right to representatives at a Provincial level, who amongst themselves appoint two trustees from the Provincial representatives and the Fund trustees present at the Annual General Meeting, which is not permissible in terms of section 7A (1), because the member's right to elect is a direct right which is not capable of being waived or exercised in an indirect manner as the Fund contends. The Conduct Authority made reference to *Gumede supra* at [41], where it is stated that:

> "Not every right can be waived. The leading case remain Richt and Bhyat vs Union of Justice vs 1912 AD 719 734-735 where the following principles were stated. The maxim everyone is able to renounce a right conferred by the law for his own benefit is subject to certain exceptions of which one was that no one can renounce a right contrary to law, or a right introduced not only for his own benefit but in the interest of the Public as well. No one can renounce a right which is duty to the public which the claims of society forbid the renunciation of. An individual cannot waive a matter in which the public have an interest. Waiver is not possible, the result of a renunciation by an individual would be to abrogate the terms of a statute which in their nature are mandatory and not merely directory. Because otherwise the result would be not merely to destroy private rights, but to defeat the provisions of an enactment intended on public or general grounds to be peremptory and binding on all concerned."

[26] The submission being that if the Legislature intended to permit the delegation of the member's right to elect trustees or to allow members to elect provincial representatives or to provide that members had a right to

elect only a minor component of a Fund's board of management, it would have said so expressly.

[27] The Fund's Rule 10.1.3 (c) that is now numbered 10.1.3 (b) following the registration of Amendment 8 was also pointed out by the Conduct Authority as not providing for the direct election by members of an employer of an additional trustee, where such an employer has more than 5 000 employees who are members of the Fund. The Rule allows members of such an employer to nominate an additional trustee, however the Conduct Authority argues that even if such nomination was to be regarded as an election of that trustee, not all of the members of the Fund had this right to elect such additional trustees, only some and no such trustees have ever been elected as in accordance with the Fund's founding affidavit. In that instance it argued that the registration of Amendment 8 had not assisted the Fund in terms of its compliance with s 7A (1), it remained non-compliant.

[28] Based on the stated grounds, the Conduct Authority submitted that the Fund's Rules do not comply with s 7A (1) stipulation that the Fund members shall have a right to elect at least 50% of the trustees to the Fund's board. It therefore noted that the Fund as the multi- employer may therefore make an application for exemption from s 7A (1) in terms of s 7B (1) (b) which is what the Fund had done in the past and currently operates and may now, in terms of the Conduct Authority's newly adopted regulatory strategy, be granted for an indefinite period.

[29] In addressing the Conduct Authority' contentions, the Fund refuted that the proper interpretation of s 7A (1) provisions that "the members of the Fund shall have the right to elect at least 50% of the Board of the Fund" is that every member must elect each of the member elected board members or that the member elected board members be elected directly, but alleged the provision instead to be silent on the means through which members can exercise their right, whether direct or indirect election of member trustees permissible and that to confirm that the answer is a matter of statutory interpretation which according to the Fund, s 7A (1) does allow for the indirect election of trustees.

[30] The Fund admitted that the rules of the Fund do not override the Pension Fund Act but in terms of s 13 of the Act, to be subject to the Act. However, still disputed that the section confers on every member of a Fund a right to directly elect each Trustee, and argued that the Conduct Authority's interpretation of s 7A (1) is not workable but contrary to a proper interpretation of the PFA, denying that the matter of *Gumede supra*

supports the contentions of the Conduct Authority submitting that at best it is neutral.

[31] Furthermore the Fund admitted that the only limitation occurring is where there are less than 20 member employees in a participating employer, unit or division. The purpose of the limitation being to ensure that a small number of members within a participating employer, unit or division are not given a disproportionate voice in the election of a member representative, in circumstances where another participating employer or unit or division has thousands of members. Being apparent that clause 10.1.9 of the Fund's Rules provides that members within each participating employer are able to elect two member representatives, alternatively the members within each unit or division, as long as there are not more than four-member representative altogether for each participating employer.

[32] The Fund further pointed out that the Appellant failed to mention that the election of trustees by a member representative takes place from a short list of nominees who are elected directly by the members within the various participating employers within each province. Agrees that every member will not know whether the person they nominated to the shortlist will be elected as trustee arguing that which is always the case with elections. A member does however know that the member representative who was directly elected will vote for a trustee from a shortlist of nominee who were directly elected.

[33] Accordingly, the Fund argued that s 7A (1) should be read purposively not mechanically, its purpose being to ensure that the board is not dominated by employer nominated representatives but is balanced by the inclusion of member elected representatives. The individual profile of a Fund may dictate that an election of a member elected Trustee is done on a Regional basis or indirectly via an Electoral College system. Either of these will still serve the purpose for which s 7A (1) is intended to achieve and may do so more effectively than a system in which every member has a right to elect all member elected trustees**.** Also where the membership is geographically fragmented, it is difficult to know which of the candidates from the other regions to support. In such a case a constituency based election process would be more effective in achieving the objects of the section.

[34] The Fund also pointed out that only provincial delegates vote for trustees. Sitting trustees do not take part in the election in their capacities as trustees, however may be nominated for a further term in which case they may be re-elected by the delegates at the Provincial Annual General

Meeting. The Fund members only vote to elect the two trustees from their Province which it argued is not inconsistent with s 7A (1), as there is no right in s 7 A (1) for every member to vote for every trustee. It refuted any suggestion that any members have waived their rights to elect trustees, accepting that members cannot waive their statutory right set out in s 7A. Also that there is also no delegation of rights, but the Fund rules provide for a form of indirect election. However, emphasised that in its view the process of indirect election of trustees meets the requirements of s 7A.

Analysis

Compliance with s 7A (1)

[35] It is correct that the answer to the contention whether or not the Fund complies with s 7A (1) lies in the interpretation of the provisions of the subsection and mainly the purpose for which it was created. The subsection specifically provides that "Notwithstanding the rules of a Fund, every Fund shall have a Board, consisting of at least of 4 Board members, at least 50% of whom the members of the Fund shall have the right to elect."

[36] Wallis JA in *Natal Municipal Pension Fund v Endumeni Municipality*[3] summarised the principles of statutory interpretation as follows:-

> [36.1] The process of interpretation is objective, not subjective.
>
> [36.2] A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or that undermines the apparent purpose of the document.
>
> [36.3] Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.
>
> [36.4] From the outset it is necessary to consider the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and which frequently reflect an approach to interpretation that is no longer appropriate.

[3] 2012 (4) SA 593 (SCA)

> [36.5] Accordingly, to characterise the task of interpretation as a search for such an ephemeral and possibly chimerical meaning is unrealistic and misleading.
>
> [36.6] In resolving these problems, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, un-businesslike or oppressive consequences, or that will stultify the broader operation of the legislation or contract under consideration. (my emphasis)

[37] The interpretation is therefore with an understanding that every word within a statute is, as a result, there for a purpose and should be given its due significance. If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary grammatical sense, even though it does lead, in our view of the case, to an absurdity or manifest injustice.

[38] The Constitutional Court had in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[4] previous to *Endumeni* affirmed these principles stating, albeit in *dictum* that:

> "the emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous".

[39] A clearly outlined Constitutional perspective consistent with the principles for statutory interpretation were laid down by the Constitutional Court in *Cool Ideas 1186 CC v Hubbard*[5] as follows:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
>
> (b) the relevant statutory provision must be properly contextualised; and
>
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional

[4] 2004 (4) SA 490 (CC)

[5] [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC)

> validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).” (my emphasis)

[40] The golden rule being that the words of a statute must *prima facie* be given their ordinary (plain) meaning wherever possible and when they are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. The yet important, and interrelated to the general principle of statutory construction that cannot be compromised are the requirement that all statutory provisions are to be purposively interpreted, in the right context and construed consistently with the Constitution and where reasonably possible to preserve their Constitutional validity.

[41] In finding that the constitution of the Board of Trustees was compliant with the requirements of s 7A (1) and the purpose for which s 7A (1) was enacted, the *court a quo* referred to the statement by Harmse in the matter of *Gumede supra* (referenced by both parties), at para 31, explaining and emphasising the purpose of the provision, that:

> “The purpose of the provision is to give members of the Fund (at least) equal say in the affairs of the Fund. It democratises the management of Funds by creating minimum of requirements relating to the representation of members. They, and not others on their behalf have a right to elect the quota of trustees.”

[42] The clear purpose being that members of the Fund shall have the right to elect, the quota of the trustees, giving each member a right not an opportunity, to equally participate in the election of the trustees. That is a straight forward analysis by Harmse on the significance of the purpose of s 7A (1). The Fund members are bestowed with an equal right to express their personal choice, which is a public interest right that carries a special and important significance in the context of enforcing a democratic management of Funds as a Constitutional imperative.

[43] The election procedures as prescribed by the rules of the Fund do not enable the members to exercise their right as it was intended, but lets them elect provincial representative who will exercise that right on their behalf, resulting in a deference of their right to these representatives or delegates. The prescribed deference being not an individual choice therefore undemocratic. The parties have agreed that the process rather creates an indirect participation of the members in the election of the trustees, unfortunately involuntarily and contrary to democratic management intended by the provision. Again for the reason that it is not a choice exercised voluntarily but enforced through prescripts of the Fund,

it cannot be regarded to be “a waiver of a right” as argued by the Conduct Authority with reference to *Richt and Bhyat v Union Government* (Minister of Justice,) as quoted in *Gumede supra*. I would therefore not even consider the issue on the basis of a waiver.

[44] The Fund in arguing its point put further emphasis on the number of the trustees elected through the structures that has also increased as a result of the Rule Amendments effected to Rules 10.1.3 and 10.1.4 meeting the quota or increasing the number of member elected trustees on the board. That is compliance with only one aspect of the requirements of s 7A (1) which however becomes nugatory if there is non- compliance with the second requirement of the subsection, due to members not fully participating in the election of these trustees as prescribed by the law. It would not matter that the number elected by the structures is more than the quota, which is what Rule Amendment 5 and 8 would have achieved. The process of their election is still inconsistent with the Constitutionally protected value of equal participation by all members in the election of the trustees.

[45] The third point that has been raised by the Conduct Authority that the requirements of Rule 10.1.9 render the Fund non-compliant has merit. The Rule provides that:-

> “Each participating employer shall be entitled to elect two representatives or each unit or division of participating employer shall be entitled to elect one member representative up to a maximum of four member representatives provided no member representative shall be elected where there is less than 20 members in a participating employer or unit or division.”

[46] The members that fall under a participating employer with less than 20 member employees are disenfranchised as they are totally excluded from the process when the purpose of the provision is to democratise the way the Funds are managed which would be through giving the Fund members an equal say, in exercising the right to participate in the election of the board of trustees as bestowed by s 7A (1) (a). The procedural exclusion is a perfect example also of a Fund rule that is directly contradictory to the purpose of s 7A (1) (a). The argument by the Fund that the purpose of excluding these Fund members is to ensure that a small number of members within a participating employer, unit or division is not given a disproportionate voice is astounding, as the effect thereof is actually the denial of a voice, discriminatory and inconsistent with the

constitutional values propounded in *Gumede* and clearly intended by the section.

[47] The Appeal will have to be upheld on that contention, that as long as the Rules do not provide for the direct participation of the Fund members in the election of the trustees, and continue to exclude the Fund members whose employer does not employ more than 20 of their members, its Board's constitution will not comply with the requirements of s 7A (1) (a). The costs order is also to be set aside.

[48] Having come to that conclusion the issue that arises is whether a case has been made by the Fund for the alternative relief it seeks to be adjudicated for the first time on appeal, notwithstanding that the issue was not considered by the *court a quo* and there being no cross appeal.

[49] The Fund argued for such adjudication reliant on the matter of *Cole v Government of the Union of SA*[6] wherein Sheil J stated that:

> "The duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset."

[50] The parties have indeed in the *court a quo* dealt with the issue extensively, even though the court a quo decided, understandably so, against making any decision in relation thereto. As an alternative relief, it was to be adjudicated upon only in the instance of the primary issue decided against the Fund.

[51] According to the alternative relief as amended the Fund seeks:

> [51.1]a declaratory order that "the Conduct Authority is required to grant the Fund an exemption from the requirement to comply with Section 7A (1) for an indefinite period", and

[6] 1910 AD 263 at 272

[51.2] an order reviewing and setting aside the decision of the Registrar to grant the exemption for a definite period and replacing it with a decision granting an exemption for an indefinite period."

[52] The Conduct Authority's argument against the Court's adjudication of the alternative relief for the declaration sought by the Fund is that the issue has become moot since the Conduct Authority's in principle decision to extend the exemptions of the one contemplated in s 7B (1) to an indefinite period which is in terms of its newly adopted regulatory strategy and whilst awaiting finalisation had to that end issued a Draft Guidance Notice for comment.

[53] Certainly as pointed out by the Fund there is no certainty or a decision that can be regarded as binding as the matter is still being explored for future consideration and finalisation. The issue has therefore not become moot and its adjudication justified.

[54] The Conduct Authority has also in any case admitted that Pension Fund circulars or guidance notices are not law but there for information purposes therefore not binding and the previously issued circulars did no more than indicate the Registrar's opinion at the time of issue, therefore nothing preventing the incumbent Conduct Authority from changing his or her own opinion on the subject matter which is what has happened with regard to the granting of exemptions in terms of s 7B (1).

[55] As a result, not making a decision on the issue the court will be leaving it to the whims of the Conduct Authority with no certainty of the outcome of the investigation.

[56] For the sake of clarity it is important to revisit the provisions of Section 7 B (1) of the Act which read:

> (1) The registrar may on written application of a fund and subject to such conditions as may be determined by the registrar—
>
> > (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 from the requirement that the members of the fund have the right to elect members of the board, if the fund

(i) has been established for the benefit of employees of different employers referred to in the definition of “pension fund" and "provident fund” as defined in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962);

……

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

[57] It is therefore on a written application by the Fund that the Conduct Authority would, subject to such conditions as he may determine, grant the Fund an exemption from a requirement that members have a right to elect members of the board on condition the Fund qualifies for the exemption (The issue therefore being whether the granting of an exemption by the Conduct Authority for a definite period is in accordance with the terms of s 7B (1) (b) (i), the definite period being the condition envisaged by the section as argued by the Conduct Authority.

Contentions on the Conduct Authority’s power to limit duration of exemption

[58] On the alternative declaratory order that ‘the granting of an exemption for a limited period by the Registrar is *ultra vires* the Act” therefore should be reviewed and set aside and the Fund be granted an exemption for an indefinite period, the Fund contended that:

[58.1] Section 7B (1)(b) does not provide for an exemption that may be subject to a time limitation, as nowhere in the provisions of s 7B does it indicate that the exemption must be granted subject to a time period. However, recognise that the section does provide that the exemption may be subject to such conditions as may be determined by the Registrar. Still properly interpreted, it is not open to the Registrar to impose a time limitation by way of a condition.

[58.2] The 1 year and 3 year periods time limitations imposed by the Registrar for the exemptions were not framed as a condition in circumstances where conditions were expressly imposed, and that being clear from the wording of the exemption which reads:

> "*Accordingly the Fund's application for exemption is extended for a further period of three years ending on 30 June 2020 was granted subject to the same conditions to which its exemption from compliance with s 17 was granted."*

[58.3] Accordingly, it is not open to the Conduct Authority to impose a time limitation by way of a condition on the granting of the exemption because s 7B (2) already allows the Conduct Authority to withdraw an exemption in circumstances where a Fund no longer qualifies for an exemption. In these circumstances any decision to do so would amount to an administrative decision as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The Conduct Authority would be required to comply with the requirements of procedural fairness set out in PAJA by seeking representation from the Fund on the proposed decision and required to take into consideration those representations.

[58.4] Given that s 7B (2) of the Act envisages a procedure where the Registrar may withdraw an exemption affording procedural protection to the Fund under such circumstances, properly interpreted, the Act does not permit the Registrar to render these rights nugatory through a process of granting an exemption for a limited period and allowing that period to expire.

[58.5] It is clear that the Registrar adopted the practice of imposing a three (3) year period on all exemptions articulated on PF96 therefore arbitrary, because such a blanket policy pays no heed to the necessity for a time limitation in the case of any specific Fund and pays no heed to the appropriate period if any. The practice by the Registrar amount to a fettering of a discretion, itself a basis for the review of the Registrar's conduct.

[58.6] If in principle the Registrar could validly impose a time period as a condition, s 7B (1) cannot in light of the above considerations be interpreted to empower the Registrar to impose an arbitrary condition in the form of an automatic expiry of an exemption which is unconnected to the specific circumstances in which any particular application is made. It is plain that the Registrar pays no heed to the

specific applications for exemption but simply applies a set time period for all exemptions.

[59] For all the aforementioned reasons the Fund alleged to have been advised that the Registrar's imposition of a time limitations on the granting of exemptions is *ultra vires* the PFA as a result sought a declaratory order that it is so or that the decision be reviewed and set aside.

[60] Besides the Conduct Authority's standpoint at the outset that the issue was moot since it is the principle decision that the exemptions of the kind contemplated in s 7B (1) would in terms of the newly adopted regulatory strategy be of an indefinite duration for which it had issued a Draft Guidance Notice for comment and awaiting finalisation, it further contended that the granting of an exemption in terms of s 7B (1) of the Act is at its discretion as the Conduct Authority and the exemption provision must with effect from 1 April 2018, be read together with the provisions in s 281 of the FSR Act which provides as follows:

> (1) The responsible authority for a financial sector law may, in writing or with the concurrence of the other financial sector regulator exempt any person or class of persons from a specified provision of the financial sector law, unless it considers that granting the exemption:
>
> (i) will be contrary to the public interest;
>
> (ii) may prejudice the achievement of the project;
>
> (2) Subsection (1) applies to the granting of exemptions if a final sector law does not provide the power to grant exemptions;
>
> (3) If a financial sector law provides a power to grant exemptions, the responsible authority must:
>
> (a) grant the exemption in terms of the relevant provisions of the financial sector law; and
>
> (b) when deciding whether to grant an exemption, comply with the requirement of subsection (1) in addition to any requirements specified in the financial sector law.
>
> (4) The granting of exemptions by the Conduct Authority must not be contrary to public policy or prejudice, the achievement of the objects of the relevant financial sectoral law as public interest lies at the heart of all regulation.

[61] Pointing to the plain reading of the provisions of s 7B (1) (b), the Conduct Authority indicated that it is clear that, it:

> [61.1] will consider a Fund's written application for an exemption from a requirement in s 7A (1) of the Act that the Fund must afford its members the right to elect at least 50% of the Fund's Trustees and may determine the conditions to be attached to any exemption granted in terms of s 7B (1) of the Act.
>
> [61.2] may in terms of s 7B (2) further withdraw an exemption if a Fund no longer qualifies for an exemption. Inherent in that provision is the fact that where an exemption is granted subject to conditions, the failure to comply with a condition would be a trigger for the withdrawal of that exemption by the Conduct Authority, that being so because the exemption does not stand in isolation from any condition attached to it. So If the exemption was to be withdrawn the Fund will revert to the default position, namely that it has to comply with s 7A (1) of the Act and the Fund's members shall have the right to elect at least 50% of the Trustees to the Board of Management.

[62] According to the Conduct Authority the quoted section from the Pension Fund Circular 96 is irrelevant to this matter because the Registrar granted an exemption to the Fund subject only to the conditions relating to the time period. It also has in addition, in principle adopted a new regulatory strategy that provides for exemptions in terms of s 7B (1) (b) to be of indefinite duration. It agreed that the Pension Fund circulars are indeed not law as pointed out by the Fund, now spelled out in s 141 of the FSR Act that stipulates that, guidance notices are for information purposes and are not binding. The previously issued circulars did no more than indicate the Registrar's opinion at the time of issue, nothing preventing the incumbent Registrar from changing his or her own opinion on the subject matter which is what has happened with regard to the granting of exemptions in terms of s 7B (1).

[63] Persisting on its reliance on the mootness of the issue on the indefinite exemption the Conduct Authority insisted that the Fund was aware of and informed of the Draft Guidance Notice on s 7B exemptions issued for comment on 24 April 2018. The Draft conveyed the Conduct Authority's in principle position that s 7B (1) exemptions will in future be granted for indefinite period when the Fund applies for exemption. It however pointed out that where it is contended that the Conduct Authority had no authority to impose a time period as a condition to an exemption, that is not borne out by the wording of s 7B(1) which permits the Conduct Authority to impose conditions as it deems appropriate and there is no

restriction in this section to the effect that the Conduct Authority cannot impose a condition as to the duration of an exemption.

[64] The Conduct Authority further pointed out that it had been advised that the Fund's current exemption, having been issued as an administrative action on the part of the Registrar, will stand until set aside by a Court Order, which is not what is sort by the Fund, to set aside the current exemption but a declaratory order on a future dispensation that has become academic.

[65] The Conduct Authority reiterated that the Fund does not comply with the requirements of s 7 A (1) and agree that it will be necessary for the Fund to apply for a further exemption upon the expiry of its current exemption.

[66] According to the Fund, the Draft Guidance Notice espousing the Conduct Authority's regulative strategy is an implied admission that the Conduct Authority may not grant an exemption for the limited period of time and the exemption granted u*ltra vires*. Only if the Conduct Authority had admitted that to be its legal position than it may be contended that the declaratory relief sought is moot. The strategic policy Draft Notice that has been circulated for the purposes of comments is not indicative of any final position of the Conduct Authority, seeing that the Conduct Authority does acknowledge that guidance notices only reflect the opinion of the incumbent and may be changed at will at any time. Furthermore, the Draft Guidance Notes may not be used to interpret the Act and are irrelevant to the declaratory order it is seeking in the alternative, that involves the interpretation of s 7 B (1) (b) of the Act. The Conduct Authority had also said that the decision that exemptions should be of indefinite period is a decision in principle and not a decision in law.

[67] The Fund finally contended that if the issue on the alternative relief is to be regarded as moot then the Conduct Authority's answering affidavit should be interpreted as a tacit concession to the relief sought in Prayer 2 that the granting of an exemption for a limited period of time is *ultra vires* the Act. If there is no such admission, then the order sought on prayer 2 is not moot, moreover the Conduct Authority made it clear that there is no express or implied admission that it has no power in law to grant a time bound exemption.

[68] The Fund pointed out that an ambiguity arises from the Conduct Authority's position that the relief sought on Prayer 2 is moot and its consistent refusal to concede that it is *ultra vires* s 7B for the Conduct Authority to grant an exemption to the Fund for a limited duration. On the

fact that it is the Fund that requested an exemption "for such period as the Registrar may deem appropriate in terms of s 7B," it argued that if it is *ultra vires* s 7B for the Conduct Authority to grant an exemption for any limited period, then it would not be appropriate for the Conduct Authority to do so. The Fund's request is not determinative of the question of law regarding the competence of an exemption limited by the authority to predetermined period. The exemption granted is either in its terms *ultra vires* or it is not. The three- year term is not found in a legislative context.

[69] With regard to the reading of s 7 B (1) as proposed by the Conduct Authority that it enables the Conduct Authority to determine the criteria for the granting of an exemption, the Fund argued that if that was so, it would mean that the Conduct Authority could arrogate to itself powers which are not conferred to it by the Act, which interpretation is contrary to the rule of law. It would in essence mean that the Conduct Authority could legislate additional or different criteria to those stipulated in s 7 B (1) (b) (i) to (iv).

[70] On the Conduct Authority's discretion to grant the exemption, the Fund admitted to such, but argued that it is not an open ended discretion therefore has got to be exercised judiciously and consistently with the Promotion of Administrative Justice Act 3 of 2000. Further that the additional obligations imposed on the Conduct Authority in terms of s 281 (3) (b) read with s 281 (3) (a) of the FSR Act are applicable to the declaratory relief sought in prayers 1 and 2, however denied that they are applicable to the order for review and setting aside of administrative action sought in prayer 3.

[71] It according to the Fund follows that where a Fund no longer qualifies for an exemption in terms of s 7B (1) (b) (i) to (iv), the Conduct Authority may withdraw an exemption in terms of s 7B (2). She or he may not do so for lack of compliance with the Conduct Authority's condition, which it argues to be clear from the wording of s 7B (2) that reads:

> "*The conduct authority may withdraw an exemption granted under subsection (1) (a) and (b) if a Fund no longer qualifies for such exemption*"

[72] The Fund denies that PF96 dealing with Board Management is irrelevant and argue that it is relevant to the relief sought in Prayers 2 and 3 of the Notice of Motion and as far as it is concerned PF 96 has not been withdrawn.

[73] The Fund therefore argued that there is no prejudice to the additional consequential relief and that the Conduct Authority's attempt to rely on a time bar serves none of the parties' interest.

Analysis

[74] Following the simple reading of s 7B (1) text of the section, it clearly stipulates what the requirement is, for a Fund to qualify for an exemption, also to remain exempted and the condition for the withdrawal of the exemption, which is when the Fund no longer qualifies in terms of the purpose of its formation and or definition as highlighted in s 7B (1) (b). There is no mention of a withdrawal of exemption that would be due to a Fund's failure to adhere to a condition imposed by the Conduct Authority or as a result of a coming to an end of a period decided by the Conduct Authority, more so arbitrarily.

[75] The duration or endurance of the exemption has already been predetermined by s 7B (2) in providing that such exemption would be withdrawn when the Fund no longer qualifies for the exemption. As a result, a condition imposed by the Conduct Authority purporting to determine the period or condition of endurance of the exemption would be contrary to the Act, and the Conduct Authority would be acting outside his powers and in contradiction of the provisions of s 7B (1) (b) (i) if he is to restrict the exemption to any period of time.

[76] The argument therefore that the Fund's allegation that the Registrar's granting of an exemption for a definite period is *ultra vires* s 7B (1) is not borne out by the wording of s 7B (1) and that the section actually permits the Conduct Authority to impose conditions as it deems appropriate is not sustainable. As it would be unlawful to withdraw an exemption of a qualifying Fund on the basis that the condition imposed by the Conduct Authority has lapsed which was never intended by the provisions of the section. The power for the Conduct Authority to impose a time limit is not to be found in subsection (1) (a) or (b). On express statutory provisions of power, the court in *Private Security Industry Regulatory Authority vs Anglo Platinum Management Services Ltd and others*[7] significantly stated the following:

> [28] I agree with the respondents that the power contended for by the Authority should have been expressly conferred and cannot be implied. As stated in *Principal Immigration Officer v Medh* 1928 AD 451 at 458.:[22]

[7] [2007] 1 All SA 154 (SCA)

> 'The powers of the Minister must be found within the section creating them, and according to that section the Minister only has power either to exempt or not: there is no third course. In the absence of specific provisions to that effect, such power cannot be construed as embracing the wider power of attaching conditions. If it had been the intention of the Legislature to confer upon the Minister the additional power of attaching conditions to the exemption, it should have said so, as it has done in the case of temporary permits …'

[77] Furthermore, the argument that the definite time period is imposed as a condition by the Conduct Authority is devoid of any sense when there is a blanket application of that condition irrespective of the different circumstances of each Applicant. In that case it is correct that due to the decision's arbitrary nature it would potentially be prejudicial to some of the Applicants as it amounts to an administrative action, which requires to be exercised judicially and consistently in line with the Promotion of Justice Act 3 of 2000.

[78] There is also no contention regarding the application of the additional obligations imposed on the Conduct Authority in terms of s 281 (3) (a) read with s 281 (3) (b) to the declaratory relief sought in prayers 1 and 2. However, it is apparent that the reading of s 7 B (1) as suggested by the Conduct Authority would actually result in a conundrum considering what is stipulated in s 7B (1) and (2) and the Conduct Authority's powers in terms thereof in relation to the granting of the exemption.

[79] As it is clearly stated in s 7B (2) that the Conduct Authority may withdraw an exemption granted if a Fund no longer qualifies for such exemption as per provisions of s 7 B (1) (a) and (b), a Conduct Authority has no power to decide contrary to the stipulation in the Act by putting time frames on when the exemption will effectively be withdrawn. As a result, the declaration sought by the Fund is legally defensible and the review and the setting aside of the Conduct Authority's decision justifiable.

[80] Furthermore there is no dispute that the Fund duly qualifies for the exemption properly granted in terms of s 7B (1(a). The Conduct Authority therefore obliged to grant the infinite exemption. Considering the delays, the incontrovertible decision and the fact that it is just a matter of procedure that the matter should be referred back to the Conduct Authority for reconsideration, an order by the court substituting the incorrect decision by granting the Fund an infinite exemption would be just and equitable; see s 8 (1) (c) of PAJA. The costs should follow the event,

in this instance both parties having partially succeeded, each party is to pay its own costs.

[81] Under the circumstances, it is therefore ordered that:

1. The Appeal is upheld with the costs order also set aside;

2. The order and the Judgment of the *court a quo* delivered on 3 March 2020 is set aside and replaced with the following order:

   2.1 The Application for a declaratory order that the Respondent's board of trustees as presently constituted complies with the provisions of s 7 A (1) of the Pensions Fund Act 24 of 1956 ("the Act"), is dismissed.

   2.2 The decision of the Conduct Authority to grant the Respondent an exemption for a period of three (3) years is reviewed and set aside.

   2.3 The Respondent is granted an exemption from the requirement to comply with s 7A (1) for an indefinite period;

3. Each party to pay its own costs.

N V KHUMALO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Potterill J (Molefe J concurring)

I have read the judgment of my sister Khumalo J and I agree with the result. I feel constrained to add to the judgment. I do so without repeating the background facts and only concentrate on the reasons for the order.

Does the procedure employed by the Fund comply with Section 7A of the PFA?

[1] Section 7A has two requirements, but it is only the requirement that Fund members have the right to elect 50 % of the Board members that is in issue. It is in issue because the Fund, due to practical reasons, utilise a procedure provided for in Rules 10.13(a) and 10.17. This entails that each municipality that has more than 20 employees, elects two Fund members as provincial representatives. At a provincial meeting the provincial representatives from each province then appoint two Board members to make up the Board of Trustees of 18 members. The Fund contended, and the court *a quo* found, that s7A(1) catered for this indirect election of Board members by Fund members. On the other hand, the Conduct Authority argued that this procedure does not give Fund members the right to elect trustees; only provincial representatives.

[2] The Conduct Authority is correct; the Fund members can only elect representatives and do not have the right to elect the trustees. As practical as the Fund's Rules in regulating election of the trustees to the Board are, it does not adhere to s7A(1).

[3] The argument on behalf of the Fund went that a common sense meaning or business-like interpretation would allow for such workable, practical method of indirectly electing Trustees. Reliance was placed on *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para [18] in support of this submission. Such interpretation of s7A (1) was required because the Fund represents hundreds of municipalities geographically and organisationally disparate. The process to use a provincial basis is practically necessary and allows for closer scrutiny and a better understanding of the candidates in that province. The Fund rubbished the Conduct Authority's contention that the practical solution is to conduct an election process which gives members the right to vote from a nominated list of Fund members. It did so on the basis that such procedure is impossible and by no means a fairer process.

[4] I heed the warning of Wallis JA in the *Endumeni*-matter: *"A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation."* Although the practical difficulties with direct voting speaks for itself, the words of s7A are clear and interpreting it otherwise would result in the court acting as the Legislature; not mere interpretation. But, more importantly, the PFA provides the Fund with an alternative; special provision in s7B(1) for

exemption from the requirement that the members of the Fund have the right to elect members of the Board.

[5] It was also argued that s7A (2) of the PFA provides that the Fund's Rules must include the election procedures and the voting rights of members; by doing so the subsection draws a distinction between the conferral of a voting right and the process by which such voting right is exercised; thus as long as more than 50 % of Board members are elected by Fund members and one can track how the election took place there was compliance with s7A (1)'s *"right to elect."* This argument is contrived; the election process as exercised by the members does not grant the members a right to elect the trustees; they elect provincial representatives that elect the members of the Board. Tracking the process does not provide the members with a right to elect.

[6] The Conduct Authority relied for support that no indirect voting may take place on the decision of *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC). It argued that the court *a quo* erred in drawing an analogy with *"the manner in which South African parliamentarians are voted in, where the ordinary voter does not always vote for the candidate that then assumes a seat in Parliament: voters vote for participants which parties then nominate parliamentarians."* The argument went that the analogy was inapposite because in the *New Nation Movement*-matter the Constitutional Court declared that adult citizens may not be elected to the National Assembly and

Provincial legislatures only through their membership of political parties.

[7] Counsel for the Conduct Authority relied on s19(3) of the Constitution which reads as follows:

> *"Every adult citizen has the right-*
>
> *(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and*
> *(b) to stand for public office and, if elected, to hold public office."*

It argued that although in the *New Nation Movement* decision no reliance was placed on s19(3)(a) it was a useful way of testing the viability of the Fund's argument. Because the Court found that the right to stand for public office in section 19(3)(b) of the Constitution was infringed through a requirement that a person must do so a political party, it followed that section 19(3) of the Constitution would also be violated by legislation that prohibits a person from voting directly.

[8] The reliance on s19(3) and the New Nation Movement matter is novel, but not helpful. The interpretation of s19(3)(b) to include that an individual can stand without the backing of a political party is a far cry from a right to elect or vote for a person; two completely different self-standing rights. But, in any event, the right in s19(3)(a) is exercised with citizens voting for a political party and not for the

candidate of the voter's choice. This voting process does not support the Conduct Authority's argument for direct voting.

[9] I do not find the analogy apposite; two different acts that regulate different processes, different context and purpose. In *Gumede and Others v Pep Provident Fund and Others*[8] {Footnote (2017) JOL 37949 (PSAB)] the purpose of s7A was formulated as follows:

> *"The purpose of the provision is to give members of a fund (at least) equal say in the affairs of a fund. It democratises the management of the fund by creating minimum requirements relating to the representation of members. They and not the other on their behalf, have the right to elect their quota of trustees."*

Voting for a party to represent one in parliament does not give one equal say in the running of the country.

<u>The alternative relief sought in prayer 2 of the amended notice of motion</u>

[10] If the court found that the Fund did not comply with s7(A) then a declaration was sought that the Conduct Authority was required to grant an exemption from the requirement to comply with s7(A)(1) for an indefinite period and to review and set aside the current exemption for a period of three years that expired on 30 June 2020

[8] (2017) JOL 37949 (PSAB)

and substituting it with a decision to grant an exemption of indefinite duration.

[11] The court *a quo* did not decide this alternative relief due to its finding that there was compliance with s7A. This court can decide this issue as it was pleaded and argued before the court *a quo*. It can also do so in the interests of justice.

[12] Section 7B(1)(b) provides that the Conduct Authority may on written application grant an exemption from the requirement that members of the Fund have the right to elect members of the Board. The Conduct Authority can in terms of the subsection impose conditions as may be determined by the Authority. This exemption section was inserted by the Amendment Act purposefully to extend the powers of the Conduct Authority to exempt, for practical reasons, types of funds from certain provisions, s7A being one. This amendment thus supports the argument of the Fund that s7A is not practical for their type of Fund and exemption is required.

[13] The Fund has been granted exemptions when applying for same. However, exemptions have been granted always with a time limit. The Fund argued that s7B(1)(b) does not expressly or impliedly confer a power on the Conduct Authority to impose a time limit. Furthermore, a time limit is not a condition as argued by the Conduct Authority.

[14] I find the opposition to the fact that the Conduct Authority has no authority to impose a time limit perplexing. Especially so in light of their argument that this point is moot because this issue is academic. It is academic because in the answering affidavit the Authority explained that in principle it had decided that exemptions in terms of s7(B)(1)(b) would, in line with a newly adopted regulatory strategy, be of indefinite duration.

[15] Such regulatory strategy is sensible and fits the purpose of s7(B); to accommodate Funds for who it is not practical to comply with s7(A). If they cannot comply with s7(A), then they should simply be exempted in terms of s7(B) and it should not be attached to a time limit. Granting an exemption without a time limit does not prevent the Conduct Authority from still imposing other conditions that may be needed for regulatory control. It also does not prevent the Authority from withdrawing the exemption in terms of s7B.

[16] 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.

Can the court review and set aside the exemption granted on 31 July 2017 and replace it with the exemption being granted with effect from 1 July 2017 remaining extant until and unless withdrawn in terms of s7B (2)?

[17] On behalf of the Conduct Authority it was argued the court cannot review and set aside that exemption. The reasons are the Fund was outside the 180-day period provided in PAJA[9] for the launching of a review. The Fund did not exhaust the internal remedy and there are no exceptional circumstances to excuse them from exhausting this remedy. The Fund would acquire a windfall; from an exemption for three years to an indefinite one.

[18] Extension of the 180-day period in terms of s9(2) of PAJA is granted. It is in the interests of justice to grant the extension. The three-year period attached to the exemption has been in issue since the inception of the proceedings; it is not a second bite at the cherry. The nature of the relief claimed on this issue was amended from a declaratory order to a review and setting aside in terms of PAJA. The Fund explained that this became necessary after the Conduct Authority submitted the argument that the declaratory order sought was moot due to the principle decision that it took to in future grant exemptions for an indefinite duration. This decision was taken after this application was launched. The Fund required a Court to put this

[9] Promotion of Administrative Justice Act 3 of 2000

issue to bed and had to ensure that an argument of mootness would not do so.

[19] In view of the finding above that no time limit is to be attached to an exemption the review and setting aside should follow. The exemption that is under review must be set aside, because the Conduct Authority did not impose the time limit by way of condition and it is not by stature expressly or impliedly authorised to do so. I also agree with the submission that the three-year period is arbitrary; no explanation for this period is provided, let alone sufficient reason for such decision. There is accordingly no reasonable explanation or rational for this time limit.

[20] The Fund is excused from exhausting its internal remedies on the basis that exceptional circumstances do exist. There is no dispute between the Conduct Authority and the Fund that the Fund qualifies for an exemption. The Court is thus not usurping the powers of the Conduct Authority and taking a decision that only the Conduct Authority is authorised to take. With the finding that the time limit is unauthorised the granting of the exemption, subject to the same conditions as imposed by the Authority is not usurping the powers of the Conduct Authority.

[21] It must be remembered that the relief sought is in terms of s8(1)(c) of PAJA to vary the order granted by the Conduct Authority. The variation lies only therein that the three-year period is varied to an

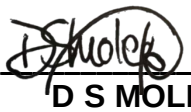
indefinite period. The granting of the exemption and the conditions attached thereto remains the decisions taken by the Conduct Authority. The court is not replacing its decision with the decision of the Conduct Authority. Under these exceptional circumstances the court can vary the exception granted. It would be just and equitable to do so. The Conduct Authority is not without a remedy, if the exemption needs new conditions it can withdraw the exemption in terms of the Act.

S. POTTERILL

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree



D S MOLEFE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

On behalf of Appellant:	Cockrell SC and Luyanda S Mbatha
Instructed by:	**MOTHLE JOOMA SABDIA INC ATTORNEYS** Tel: 012 771 6836 Ref: E Jooma/FIN4.0061/ Email: ebrahimj@mjs-inc.co.za
On behalf of Respondent:	C E Watt- Pringle SC and K Mclean
Instructed by:	**SHEPSTONE AND WYLIE ATTORNEYS**

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