



MEDIA STATEMENT

CONSTITUTIONAL COURT CASE (MS ROSEMARY HUNTER VS FSB)

The National Treasury welcomes the judgement by the Constitutional Court dismissing the appeal by former Financial Services Board (FSB) Deputy-Executive Officer (DEO) Rosemary Hunter to procure yet another investigation into the cancellations project implemented by the FSB between 2007 and 2013. Under the project, over 4 600 pension funds without properly constituted boards were cancelled by the Registrar in terms of section 271 of the Pension Funds Act (PFA).

The National Treasury and FSB have refrained from commenting on the merits of the case until its final conclusion, to avoid creating confusion amongst members of retirement funds regarding the safety of their funds.

In a split judgement, 7 of the 10 judges dismissed the application because three such investigations had already been conducted. The majority judgement noted that "... not one, not two but at least three investigations with a view to determine whether irregularities that are potentially prejudicial to pensioners were committed in the cancellations process" (paragraph 42). The majority judgement concluded that "The danger with the approach adopted by Ms Hunter is that it is very likely to yield a never-ending investigation. Investigations would be difficult to bring to finality as long as, in her view, something might just be uncovered. This observation must be understood within the context of the several credible investigations already conducted by people whose capacity to address actual or perceived irregularities is beyond doubt". (par 46).

Given the legal complexity of this case, and contrary to a media campaign supporting the applicant, it is important to note that this case was not about issues of corruption, malfeasance, whistle-blowing or unclaimed benefits (further details on the case are explained below in this statement).

All members of retirement funds, and the public in general, should note that the Treasury and FSB have championed the Treat Customers Fairly Initiative in recent years, and hold the strong policy view that the primary objective of a regulator is to ensure that it always acts in the interests of the customer, including members of retirement funds. This is one of the underlying factors behind the significant Twin Peaks regulatory reforms initiated by the Treasury in 2011, to regulate the financial sector more intrusively, intensively and effectively, following the 2008 global financial crisis, and the Fidentia/ Ghavalas fraud schemes which had severe negative impacts on members of retirement funds.

Two key initiatives under the reforms were the launch of the Retirement Reform initiative to deal with poor industry practices and abuses, and the establishment of the market conduct regulator, the Financial Sector Conduct Authority (FSCA), which replaced the FSB from 1 April 2018.

Continuing with Retirement Reforms to better serve members

The conclusion of this case enables the National Treasury and FSCA to proceed with the Retirement Reform programme, ensuring that the retirement fund industry better serves members of retirement funds, and that the industry and funds are regulated more effectively and intensively, in the best interests of members. This includes accelerating fund consolidation, which aims to deregister genuinely inactive funds and further consolidate small active funds to achieve better economies of scale and reduce costs and charges, thereby contributing to the maximization of benefits to members rather than industry. The reforms also prioritised improving transparency and disclosure by funds, improving governance and addressing abusive and opaque charging practices which can reduce the final savings of members by up to 40% and possibly more.

While Treasury is committed to proceeding with further consolidation and the lowering of costs and charges, Treasury will also engage with the FSCA to study the judgement in further detail, and engage with key stakeholders (including NGOs like the Casual Workers Advice Office and RIGHT2KNOW Campaign) to address concerns raised. In particular, Treasury believes that the majority and both minority judgements offer valuable insights and observations to inform improvements in the consolidation process in the future, and to strengthen the regulatory system and better protect members of retirement funds.

A regulator should solve and fix problems related to the financial soundness of any fund, its conduct in relation to members and other stakeholders, and its governance. A regulator is more than a lawyer, auditor or compliance officer, and while needing to always act on any past transgressions, must be forward-looking and pro-active, identifying risks that may emerge in future and that may prevent a fund from delivering on its promise to its members. It has always been the view of Treasury that the issues raised in this case are best addressed in the first instance through a well-managed regulatory process, rather than a litigation or court-driven process.

The integrity and reputation of financial sector regulators is critical in ensuring that financial customers have confidence that the financial sector is serving their best interests and delivering proper outcomes. In the retirement fund industry, members must be confident that their funds are safe at all times as long as the boards of trustees, principal officers, and auditors, are performing their functions in line with regulatory expectations.

Issues raised (and not raised) in the case

Treasury and the FSB (now FSCA) have always been and remain committed to fighting all forms of corruption, and will continue to investigate and act without fear or favour when evidence of any wrongdoing is found. It is equally important that regulators continue meeting their regulatory objectives, and not engage in fruitless investigations. Members of the

cancelled funds should note that the very first investigation conducted by Justice O'Regan "...stated that no evidence was placed before her that suggested that there were improper, dishonest or corrupt actions in administering and dealing with dormant pension funds".

The minority judgement more favourable to Ms Hunter also noted that "There is no real evidence here that the FSCA, or any of its employees, have been corrupt. While this is not a case about corruption and malfeasance, it is about whether the FSCA's apparently good faith attempts to investigate the cancellations project pass muster. The issue is whether they were diligent enough" (p89 Froneman). All three judgements therefore note that there was no evidence of any corruption and malfeasance by the FSB Board or employees, and make no reference to whistle-blowing. Indeed, a regulator as part of its supervisory role must ensure that problems are resolved in the best interests of members of retirement funds and take appropriate corrective and/or punitive steps against those not complying with the law.

This case was primarily about whether there should be a further fourth investigation into the cancellations project undertaken by the FSB, after three independent investigations has been concluded. The majority of judges (7 of the 10) dismissed the need for a further investigation, with the majority judgement finding that the FSB (now FSCA) "...has self-evidently always recognised that it was duty-bound to investigate any alleged or potential irregularity and acted in line with its recognition of this responsibility, whenever circumstances so required" (p42) and that it "was intent on getting to the bottom of the problem" (p45).

The judgement concluded that: "...For these reasons, the FSCA has not only recognised and discharged its duty to investigate whatever is worthy of an investigation, but administrators have also embarked on the responsible exercise of ensuring that the interests of the admittedly vulnerable pensioners are not compromised" (p 4).

The Court also dismissed allegations related to any transgressions of the PFMA and allegations of financial misconduct by the FSCA, and did not entertain the request for intervention by the Minister of Finance. Neither has the Auditor-General agreed with Ms Hunter's allegation, after receiving such request from her. The National Treasury is pleased that the court outcome reflects positively on the integrity of the FSB Board, its chair Mr Abel Sithole and its executives (Mr Tshidi and Mr Boyd). The Treasury also does not doubt the integrity of Ms Hunter, even as it differs on how she has approached her regulatory duties. It is regrettable that in doing so, as noted by Judge Cachalia in his judgement in p182, Ms Hunter has "also made unsubstantiated allegations and unjustifiably impugned the integrity of various officials in the course of her employment-related complaints".

In exercising its duties as regulator, the FSB accepted that there were some errors in the cancellations project, given the scope and nature of such project. This was noted even before Ms Hunter was appointed as the regulator responsible for retirement funds. The FSB Board therefore commissioned the first investigation conducted by the former Constitutional Court Justice Kate O'Regan. All parties (FSB and Ms Hunter) accepted the recommendations made by Judge O'Regan, and hence commissioned the second investigation by KPMG. However, the FSB was not satisfied with the investigation by KPMG, which as noted by Judge Cachalia in his minority judgement "...misunderstood its mandate" and "did not investigate the issue that Justice O'Regan had considered necessary".

The FSB sought further guidance from Justice O'Regan on the KPMG report. As noted by Judge Cachalia, the FSB "acceded exactly to what Judge O'Regan had recommended" (p177), by appointing Mr Jonathan Mort, an experienced attorney and pension fund specialist, who reviewed the KPMG report, and produced three reports, assisted by Mr Jeremy Andrew, a well-known pension fund actuary. The Treasury is pleased to note that all three judgements took into account the reports of Mr Mort and Mr Andrew, despite Ms Hunter's "groundless attack on Mr Mort" (p182).

WHAT IS THE FSCA DOING ABOUT UNCLAIMED FUNDS?

The issue of tracing beneficiaries affects most retirement funds, but some more than others. Unclaimed funds come about as a result of various factors, including fund members were not required to supply their retirement funds with the necessary information to facilitate pay-outs after they left job, funds not making sufficient effort to trace beneficiaries, employers not providing correct and updated information to the fund, and poor data management systems on the part of administrators. It also particularly affects the mining sector and black workers who first won the right to be members of provident and pension funds as they won the right to be unionised in the 1970s and 1980s.

Funds and their members have a responsibility to ensure that the fund has all the details it requires during contribution and at retirement such as ID numbers, beneficiary details, and bank details at retirement, etc. Fund members should also inform their families or a trusted person about their retirement benefits.

It should be noted that unclaimed funds do not reside under the FSCA, but with each and every pension or provident fund, under the control of the board of trustees of such funds.

The FSCA has established a tracing function on its website and through the SMS system to assist claimants. As at the end of June 45 000 enquiries had been received of which 8 000 possible matches were identified with a value of R1.8 billion rand traced for beneficiaries. A further update is due in October. Some retirement funds have themselves also established tracing and tracking vehicles in an effort to reduce unclaimed benefits. Monies in unclaimed funds, whether under active or unclaimed benefit funds, belong to beneficiaries unless depleted by various fees.

The implementation of further retirement reforms could assist in accelerating this process, if proposals on the creation of a central database and creation of one fund are implemented.

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