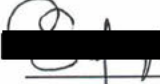




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2025-127578

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
22/08/25	
DATE	SIGNATURE

In the matter between: -

THE FINANCIAL SECTOR CONDUCT AUTHORITY

Applicant

and

**THE PRINCIPAL OFFICER OF THE MUNICIPAL
EMPLOYEES PENSION FUND**

1st Respondent

GIFT MOTSEPE

2nd Respondent

MUNICIPAL EMPLOYEES PENSION FUND

3rd Respondent

JUDGMENT

MFENYANA J

Background

[1] Before this court is an urgent application instituted by the applicant, the Financial Sector Conduct Authority (FSCA). The applicant seeks to compel the first respondent, the Principal Officer of the MEPF (the Fund) to convene a general meeting in accordance with its rules.

[2] Rule 6(1) of the rules of the MEPF mandates the Principal Officer to convene a meeting of the General Committee within six months after the financial year end. This rule also stipulates that such general meeting shall be convened by giving written notice of at least 21 days to each representative. The proviso to this rule stipulates that where no return is received by the Principal Officer 45 days prior to the meeting, such information must be conveyed to the persons concerned as soon as possible after the return has reached the Principal Officer.

[3] The applicant submits that the financial year ended on 28 February 2025, making the deadline for the meeting, as stipulated in rule 6(1), 31 August 2025.

[4] The Fund, however, avers that it cannot convene the meeting due to non-compliance with rule 5, which deals with the constitution of the General Committee and stipulates the process to be followed by the municipalities in nominating members as employee representatives. The Fund thus, argues that rule 5 is a prerequisite for compliance with rule 6 and given the low rate of returns received for the trustees' general meeting

scheduled to be held on 31 March 2025, it is *fait accompli* that the general meeting would not quorate if held on 31 August 2025 as the applicant suggests. This, the applicant dismisses out of hand, as devoid of any merit.

[5] The applicant further points out that the term of office of the current Board having lapsed, the failure by the Principal Officer to convene the meeting effectively leads to the current Board remaining in control of the Fund indefinitely, outside of its term of office, and in breach of the rules of the Fund. Relying on the judgment of the SCA in *Tek Corporation Provident Fund & Others v Lorentz*¹, the applicant submits that the rules of a pension fund are legally binding and must be adhered to by all parties involved. They govern what the trustees may do with the assets of the Fund, and if what “(the trustees) propose to do is not within the powers conferred upon them by the rules, they may not do it”, as they have no inherent and unlimited power as trustees to deal (with the affairs of the Fund) as they see fit. They have a fiduciary duty to act in the best interests of the members and beneficiaries.²

[6] Non-compliance with the rules renders the actions of the Board *ultra vires* and null and void. The applicant therefore, asserts that the Board or the Principal Officer of the MEPF has no discretion to avoid or relax compliance with the rules and can thus not deviate from compliance with rule 6(1), more so as rule 13(3)(b) provides a mechanism for dealing with a meeting which is inquorate.

¹ 1999 (4) SA 884 (SCA).

² at 898G.

[7] The Fund contends that a general meeting cannot be convened as stipulated in the rules, due to the absence of elected representatives as those elected in March 2025 were elected for the 2024 financial year. The FSCA however asserts that these representatives were elected following notification by the Fund's administrator on 27 November 2024 to municipal managers, advising of their rights to nominate representatives. In so saying the FSCA avers that due process was followed for the election of the current representatives, and that the Fund's assertion that the nominated representatives were only nominated for one meeting is not supported by the rules, particularly, section 5 or the Fund's own version. In its letter of 27 November 2024, the Fund complied with the provisions of section 5, resulting in responses from some municipalities and the election of member representatives.

[8] If the Fund deemed it necessary to deviate from the applicable rules, it should have invoked the provisions of section 7(B) of the Pension Funds Act³, for exemption, the FSCA further contends. This section permits exemption from certain requirements relating to trustee elections on written application by the Fund. Such exemption, further contends the FSCA, is an administrative act which on the strength of *Oudekraal*⁴ remains valid until it is set aside.

[9] In opposing the application, the Fund avers that the MEPF is a large Fund with a national footprint and has over 26 000 members in 111 municipalities, most of which are

³ Act 24 of 1956.

⁴ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (2004) (6) SA 222 (SCA).

local municipalities spread over eight provinces. It has approximately R29 billion worth of assets.

[10] The Fund contends that the relief sought by the applicant is unworkable, not *bona fide* and does not accord with a responsible regulator. Importantly, the Fund avers that were the relief to be granted, it would have to act contrary to the law and its rules as rule 5 has not been complied with. However, the regulator is insistent on the Fund's compliance with rule 6(1). In this regard, the Fund avers that the applicant cannot prefer one rule over the other, stating that rule 5 is a prerequisite for compliance with rule 6(1).

[11] The Fund contends that it would be destructive to member representation if it were to be compelled to comply with rule 6(1), as the process takes a substantial amount of time, given the large number of members and municipalities involved, including the requirement of affording municipalities a minimum of 75 days' notice of elections to enable them to conduct their internal processes. As there are no elected representatives to attend a general meeting, this would extinguish the rights of members to elect their leaders, and the quorum requirements would not be met, the Fund further contends.

[12] With reference to a meeting scheduled for 31 March 2025 in relation to the election of trustees, the Fund avers that only 24 of the 111 municipalities had submitted their returns, and as such the meeting could not proceed. It is on that basis that the Fund embarked on a drive to engage with municipalities about the process and the importance of meaningful participation. The Fund states that to date they have met with over 70

municipalities and would likely conduct elections in November or December 2025.

[13] The Fund vehemently denies that the representatives elected in the March 2025 meeting can be called up to attend the general meeting as they have no mandate beyond that meeting and do not constitute a quorum.

Urgency

[14] The applicant contends that the matter is urgent as it seeks to ensure compliance with the Fund's rules. The current management of the Fund is operating outside of these rules and in breach of its governance and timelines prescribed by the rules. The FSCA thus contends that it has no alternative remedy and would not be afforded substantial redress at a hearing in due course.

[15] On the other hand, the Fund denies that the matter is urgent, alternatively that the urgency is self-created as the applicant was informed as long ago as March 2025 that the election process would only be implemented later in the year. The applicant however delayed until 31 July 2025 to approach the court. Further, the Fund avers that no harm will crystallise on 31 August 2025. Regarding the term of office of the current trustees, the respondents aver that legal precedent and common sense suggest that the current trustees will remain in office until compliant elections are held to replace them.

[16] The Fund criticises the approach adopted by the FSCA, which it avers contributed to the delay. In this regard the Fund details various events dating back to 2023 regarding

the actions of the Fund towards the Fund, including a decision by the Financial Services Tribunal, inaction and silence for 16 months, instances which it contends that the FSCA did not act as a reasonable regulator should towards the Fund.

[17] The difficulty facing the Fund is that in the same vein it had always been aware of its legal obligations in terms of the law and the rules of the Fund. It was aware of time limit for compliance with section 6(1) of the rules was advancing. It was also aware of the requirements of section 5. Despite all this knowledge, it chose not to comply. There can therefore, be no doubt that enforcing the rules of the Fund and safeguarding the interests and benefits of members and beneficiaries is urgent. The truncated timeframes are justified in these circumstances.

Discussion

[18] It is clear that the history between the parties is quite a long one. That notwithstanding, it is necessary to discern what the present application is about, mindful of all that record.

[19] What the applicant seeks in this application is for the Fund to comply with its rules. The Fund states that it is not able to do so as that would force it to breach the very same rules and the law. The dispute is thus, in the main centred around rule 5 and rule 6(1).

[20] As already stated, rule 5 pertains to the constitution of the General Committee. Rule 6 deals with the process of convening a general meeting. There is no conflict

between these two rules, and as the Fund correctly points out, both rules need to be complied with. The question is whether it is open to the Fund to determine its own processes and timeframes outside of the rules and instruments that govern it and in so doing, create its own governance structure.

[21] By its own admission, the Fund elected to initiate its own process with no regard to what the rules stipulate, and in so doing breached the rules, including the very provision it now seeks to rely on. Having chosen this path, the respondents cannot be heard to be complaining about the applicant's decision to enforce the rules. They cannot benefit from their wrongdoing.

[22] There is no merit to the contention that the elected representatives were for the 2024 financial year and that their mandate was only valid for the meeting of 31 March 2025. The rules stipulate that the financial year of the Fund is from 1 March to 28 February. Similarly, a representative is a representative elected in terms of rule 5. That process was followed as far back as November 2024 culminating into the election of representatives by the various municipalities, as stipulated in rule 5.

[23] The FSCA relies on various decisions of the Supreme Court of Appeal (SCA) and this Division to advance its cause. In particular, in *Absa Bank Ltd v South African Commercial Catering and Allied Workers Union National Provident Fund*⁵, where the SCA noted that the rules of a Fund may not simply be ignored if there is no ambiguity. I do not

⁵ 2012(3) SA 585 (SCA).

understand the respondents' case to be that rule 6(1) is ambiguous. The capacity of the Fund to deviate from the provisions of the rules 'must be sought exclusively from the rules... and if it is not found there then (it) has exceeded its powers.⁶

[24] *Gerson v Mondi Pension Fund and Others*⁷ is equally relevant. In this case, the court took it a step further, stating that the rules of the fund amount to the fund's constitution.

[25] These decisions were appropriately referred to by the applicant and indeed echo the correct legal position.

[26] The Fund has appropriated to itself the power to vary the rules and act as it pleases. The applicant's contention is that this is to the detriment of the members and beneficiaries of the Fund, as the Fund is not governed according to its rules. On the contrary, the respondents aver that no harm crystallises on 31 August 2025. They, thus, aver that the current trustees can remain in office until compliant elections take place three to four months later and not on the date preferred by the FSCA. This contention misses the point of the application. It does not matter what the FSCA wants, as long as it is sanctioned by the rules. The convening of a general meeting is not an invention of the FSCA. It is indorsed by the rules. Anything outside of that would be *ultra vires*. This is the conduct the FSCA complains of.

⁶ Para 31; See also in this regard: *Abrahamse v Connack's Pension Fund* 1963 (2) SA 76 (W).

⁷ 2013 (6) SA 162 (GSJ).

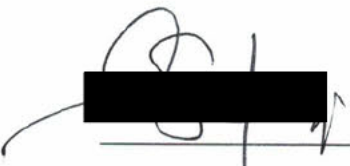
[27] What the Fund is effectively seeking is for this court to endorse conduct which is inconsistent with the law. That cannot be. In my view, the previous disputes between the parties that prompted the Fund to approach the Tribunal are irrelevant to the present application. Regardless, the Tribunal has already made a decision on that matter.

[28] While the respondents aver that the FSCA has continuously acted in a manner that is prejudicial to the Fund, this is not one such time. The relief sought by the FSCA is not sought on the applicant's whims but is prescribed by the rules of the Fund, which govern the conduct of the Fund, including the trustees, down to its very existence. To say the relief sought by the applicant, as the regulator, prejudices them, is equivalent to saying that the rules are prejudicial. I do not agree with Mr Franklin that the relief sought cannot be lawfully implemented. For the same reason that the Fund insists on convening the general meeting when it deems convenient, it is well able to convene it in accordance with the rules as it is obliged to. Whilst I am aware of the urgency of calling the envisaged general meeting, it is however a stark reality that the issuing of the notice therefor should be within the time limits prescribed by the rules. For that reason, any order granted by this court with regard to the convening of that meeting should be cognisant of the notice period stipulated in rule 6(1).

Order

In the result, I make the following order:

- a. The first respondent shall convene a meeting of the General Committee within 30 days of this order.
- b. The first respondent is directed to issue a notice of such meeting to each representative within 21 days of this order.
- c. The costs of this application shall be borne by the respondents on a party and party scale, jointly and severally, the one paying the other to be absolved, taxed on scale C, inclusive of the costs consequent upon the employment of two counsel.


S MFENYANA
JUDGE OF THE HIGH COURT
JOHANNESBURG

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Date of hearing : 06 August 2025

Date of judgment : 22 August 2025