

Our reference: FSCA001/LAW/18

06 December 2018

TO: Mr. Abel Sithole
Commissioner of the Financial Sector Conduct Authority

CC: Ms. Catherine Gibson
Member of Financial Sector Conduct Authority Transitional Management Committee

CC: Mr. Radesh Maharaj
Senior Legal Manager, Retirement Funds - FSCA
Email: Radesh.Maharaj@fsc.co.za

Dear Mr. Sithole,

1. Open Secrets is a non-profit organisation dedicated to investigating and pursuing accountability for economic crimes and related human rights violations. We write this letter to you in your capacity as Commissioner of the Financial Sector Conduct Authority (FSCA). This letter requests that the FSCA urgently ensures that all pension funds erroneously deregistered during the FSB's 'cancellations project' are lawfully reinstated, and that beneficiaries are paid without delay.
2. Between 2007 and 2013 the Financial Services Board (FSB) undertook the 'cancellations project' to deregister 'dormant' pension funds. During this period, 6757 pension funds had their registrations cancelled on the basis that the funds no longer had any assets, liabilities or members. However, it is common cause that the process was beset by irregularities, and that errors were made by both fund administrators and the FSB. This resulted in a significant number of funds being cancelled when they still had assets, liabilities, and members. This in turn meant that the beneficiaries to whom these cancelled funds were liable were left unable to claim their pensions. This needs to be rectified urgently.
3. Liberty Corporate administered around 80% of funds in question, and it is appropriate to look at their conduct in this regard. Despite being very slow to react to the problem, Liberty eventually approached the High Court in Pretoria in 2017 to bring a review application in terms

of the Promotion of Administrative Justice Act (PAJA)¹ to have the cancellations of 25 funds set aside and their registrations reinstated. Their reasons, inter alia, were that Liberty had provided incorrect information to the Registrar of Pension funds on which basis they were cancelled. In their application, Liberty conceded that reinstatement was a necessary step to ensure that they were compliant with both their common law and statutory duties to administer funds in a responsible manner and with the utmost good faith and due diligence. It further conceded that many beneficiaries may have been materially prejudiced by the deregistration of the funds. The FSB did not oppose the application and conceded that it was *functus officio* on the matter of cancelled funds, and that the appropriate remedy for reinstatement was the review brought by Liberty in terms of PAJA. The 25 funds that owed beneficiaries nearly R90 million were duly reinstated.

4. In August 2018, Liberty indicated that it had identified a further 105 erroneously-cancelled pension funds, and was in the process of gathering final information before a further application to the High Court to have the funds reinstated so that they could pay members forthwith. In November 2018, concerned with the urgency of reinstating these funds, Open Secrets wrote to Liberty to confirm when this application would be launched. Liberty's response indicates that it no longer intends to pursue judicial review in terms of PAJA, despite all parties previously accepting this as the only lawful manner of reinstating funds unlawfully cancelled during the cancellation project. Instead, Liberty claims to be pursuing internal consultations with the FSCA on the matter.
5. This is a deeply concerning state of affairs. When a fund is cancelled, it no longer exists in terms of the law, and its beneficiaries are unable to claim the money they are rightfully owed. Some funds in question may have been deregistered for over 10 years. This is a long time for a pensioner to have to wait to receive their pension. Despite this urgency, Liberty is backtracking on its stated intention to reinstate funds through a transparent court process. At the same time, other fund administrators such as Alexander Forbes have indicated that they never intend to approach the court to reinstate funds and will find 'alternative' ways of paying beneficiaries. None of the administrators have communicated a clear lawful basis for their strategies.
6. Open Secrets maintains that the clear lawful and transparent process for reinstating the affected funds is by means of judicial review in terms of PAJA. Such applications should be

¹ Promotion of Administration of Justice Act 3 of 2000.

launched urgently to limit any further prejudice to the beneficiaries who are owed their pensions.

7. The Financial Sector Regulation Act² (FSR Act) established the Financial Sector Conduct Authority (FSCA) with the objective of, amongst others, enhancing the efficiency and integrity of financial markets and protecting financial customers by promoting their fair treatment by financial markets.³ It has the express mandate to regulate and supervise the conduct of the financial institutions in accordance with financial sector laws.⁴ In so doing, it must take into account the need for a primarily pre-emptive, risk-based approach that prioritises its resources in accordance with the significance of risks to the achievement of its objectives.⁵ This mandate makes it clear that the FSCA has the duty to regulate the cancellation and reinstatement of pension funds in a manner that protects the interests of pension-fund beneficiaries and the integrity of the financial sector.
8. Further, to fulfil this mandate the FSCA is granted a range of powers. This includes the power to issue directives in terms of s144 of the FSR so as to direct financial institutions to take any action required to, *inter alia*, ensure that it is fulfilling its lawful duties relating to the fair treatment of its customers.
9. Cognisant of this, and with due regard to the concern outlined above that pension fund administrators are not doing enough to urgently reinstate erroneously cancelled funds, we ask you to respond to the following questions:
 - 9.1 What steps are the FSCA taking to ensure that pension fund administrators reinstate the funds in question as a matter of urgency so that payments to beneficiaries can be made without delay?
 - 9.2 Will the FSCA be issuing a directive in terms of s144 of the FSR to Liberty and other relevant administrators, directing them to immediately approach the courts to review past cancellations and reinstate any unlawfully cancelled funds that still have assets and liabilities?
10. We respectfully ask that you provide a written response to this correspondence within 10 working days, by 19th of December 2018.

² Financial Sector Regulation Act 9 of 2017.

³ Section 57(1) & (2) FSR Act.

⁴ Section 58(1)(a) FSR Act.

⁵ Section 58(5)(b) FSR Act.

Yours sincerely,



Michael Marchant

Researcher: Investigations

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