

Our reference: CP001/LAW/19

19 March 2019

TO: Tian Kotze, Chief Executive Officer, Liberty Corporate

Email: atusaye.mughogho@liberty.co.za

CC: Atusaye Mughogho, Head of External Communications, Liberty Group

Email: atusaye.mughogho@liberty.co.za

Dear Tian Kotze,

1. Open Secrets is a non-profit organisation dedicated to investigating and pursuing accountability for economic crimes and related human rights violations. This letter is in response to PFA Information Circular No. 1 OF 2019 (“the Circular”; see Annexure A), issued on 4 March 2019 by the Financial Sector Conduct Authority (“the FSCA”).
2. Open Secrets writes this letter to determine when Liberty will be approaching a competent court to reinstate pension funds erroneously cancelled before 1 April 2018, as required by the FSCA directives contained in the Circular on 4 March.
3. Between 2007 and 2013 the Financial Services Board (“the FSB”, now the FSCA) undertook the ‘Cancellations Project’ to deregister ‘dormant’ pension funds (“the Cancellations Project”). 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 unlawfulness, 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 meant that the beneficiaries to whom these cancelled funds were liable were left unable to claim their pensions. It should be noted that many beneficiaries are persons from vulnerable groups such as the elderly and orphans.
4. This is a deeply concerning state of affairs. When a fund is cancelled, it cannot lawfully carry out any activities to fulfil its functions, and its beneficiaries are unable to claim the money they are rightfully owed, resulting in possible financial harm suffered by the beneficiaries of these funds. Some funds in question may have been deregistered for over 10 years, and consequently resulting in substantial financial harm and prejudice.

5. Open Secrets maintains that the clear lawful and transparent process for reinstating the affected funds is by means of judicial review in terms of the Promotion of Administrative Justice Act (“PAJA”). Such applications should be launched urgently to limit any further prejudice to the beneficiaries who are owed their pensions. As discussed below, this has now been confirmed by the FSCA.
6. In 2018, the Financial Sector Regulation Act¹ (“the FSR Act”) established the FSCA with the objective of, amongst others, protecting financial customers by promoting their fair treatment by financial service companies.² It has the express mandate to regulate and supervise the conduct of the financial institutions in accordance with financial sector laws.³ 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.
7. Further, to fulfil this mandate the FSCA is granted a range of powers. This includes the power to issue directives in terms of section 144 of the FSR Act 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. As such, the FSCA issued the Circular on the 4th of March 2019. The circular states that funds and administrators must implement appropriate processes to establish whether there are remaining assets, liabilities or members in the terminating funds. It states that the funds and administrators must put in place reporting mechanisms to ensure the necessary reporting to the FSCA.
8. Importantly, it also states that administrators must approach a competent court to set aside the cancellation of funds incorrectly deregistered before 1 April 2018. Given evidence of systemic errors in the cancellations process, this in turn will require the administrators to investigate which funds were incorrectly deregistered.
9. Once administrators become aware of an incorrectly deregistered fund (before 1 April 2018), they must:

9.1 Inform the FSCA;

¹ Financial Sector Regulation Act 9 of 2017.

² Section 57(1) & (2) FSR Act.

³ Section 58(1)(a) FSR Act.

- 9.2 Disclose all relevant information and full particularity of the error and provide an explanation for why the error occurred; and
 - 9.3 Make application to a competent Court with jurisdiction in order for the cancellation of the registration of the fund to be reviewed and set aside, and that these applications be launched without delay and be served on the FSCA.
10. In light of these directives, the fact that the FSCA is a regulatory body that acts in the public interest, and the public nature of these requirements, we request your response to the following questions with regards to the implementation of the Circular:
- 10.1 How many funds administered by Liberty have to date been identified as having been deregistered in error? Please provide the names of those funds and the total value of assets that they currently hold.
 - 10.2 What mechanisms are you putting in place to establish which of the funds cancelled during the Cancellation Project were incorrectly deregistered (i.e. they still had assets, liabilities or members at the time when they were cancelled)?
 - 10.3 By when will these mechanisms be put in place?
 - 10.4 By when will the process of identifying incorrectly deregistered funds be completed?
 - 10.5 How soon after identifying incorrectly deregistered funds will Liberty approach a competent court for a PAJA review to set aside the cancellation of the fund?
 - 10.6 What steps will Liberty take to ensure that the members of incorrectly deregistered funds are notified of their entitlements as beneficiaries of those funds, and ensure that their benefits are paid without delay following reinstatement of the fund?
11. Kindly provide us with a substantive written response to the above by **16 April 2019**.

Please acknowledge receipt of this letter.

Yours sincerely,



Michael Marchant

Researcher: Investigations

Open Secrets

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