THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: A2/2021

GREENMAN INVESTMENTS S.C.A., SICAV-FIS APPLICANT

and

FINANCIAL SECTOR CONDUCT AUTHORITY RESPONDENT

For the applicant: Adv Paul Farlam SC instructed by ENSafrica.

For the respondent: Mr Barend Bredenkamp.

Application for reconsideration of decision in terms of section 230 of the FSR Act 9 of 2017, dated 4 January 2021, dismissing application for approval to market a foreign collective investment scheme

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DECISION

INTRODUCTION

[1] The applicant is Greenman Investments SCA, SICAV-FIC, incorporated in the Duchy of Luxemburg.

[2] By way of introduction: (a) the applicant is a foreign body corporate; (b) it "runs" a foreign collective investment scheme with sub-funds, each being a body corporate referred to as a portfolio company; (c) it is a qualified investor (QI) hedge fund (meaning that investors must comply with certain qualifications to be

able to invest in the scheme); (d) it wishes to market shares in one of the sub-funds in South Africa; and (e) its application for approval was dismissed by the FSCA.

[3] Dealing with the particular: Greenman applied on 2 September 2019 for the approval of the FSCA to market to interested investors in the Republic of South Africa a share class (SA Share Class) of Greenman OPEN (Fund) as a foreign collective investment scheme, namely a Qualified Investor Hedge Fund. OPEN is a sub-fund of of the applicant.

THE STATUTORY CONTEXT

[4] The application was in terms of section 65(1) of the Collective Investment Schemes Control Act 45 of 2002 ("the Act") and Board Notice 257 of 2013: Conditions for Foreign Collective Investment Schemes, 2013.

[5] Collective investment schemes are controlled by the Act. A collective scheme is a scheme in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio, and in terms of which— (a) investors contribute money or other assets to and hold a participatory interest in the portfolio; and (b) the investors share the risk and the benefit of investment in proportion to their participatory interest in the portfolio.

[6] Anyone who solicits investments in a foreign collective investment scheme which is not approved in terms of sec 65 (1) is guilty of an offence (ss (3)).

[7] Section 65(1) states that the [FSCA] may approve an application by the manager or operator of a foreign collective investment scheme to solicit investments in such scheme from members of the public in the Republic if—

(a) the application is in the form determined by the [FSCA];

(b) a copy of the approval or registration by the relevant foreign jurisdiction authorising the foreign collective investment scheme to act as such is submitted;

(c) the foreign collective investment scheme can comply with the conditions determined by the [FSCA];

and

(d) the fee determined by the registrar has been paid.

[8] Applications for permission under sec 65 for foreign collective investment schemes to solicit investments from members of the public in the Republic must be made under the said BN 257/2013.

[9] Hedge funds have been declared to be collective investment schemes by Government Notice 141/2015. A hedge fund is, for its purposes, defined as

> **an arrangement in pursuance of which members of the public are invited or permitted to invest money or other assets and which uses any strategy or takes any position which could result in the arrangement incurring losses greater than its aggregate market value at any point in time, and which strategies or positions include but are not limited to - (a) leverage; or (b) net short positions.**

[11] Board Notice 52 of 6 March 2015 contains the requirements for hedge funds.

THE DECISION OF THE FSCA

[12] The FSCA dismissed the application on 5 November 2020. It gave two reasons; one only, relating to sec 95, remains relevant.

[13] The applicant applied for reconsideration of the decision in terms of sec 230 of the Financial Sector Regulation Act 9 of 2017 (“the FSR Act”) read with sec 1A(9) of the forementioned Act. The parties waived their rights to a formal hearing.

[14] During the consideration of the application, the FSCA asked the applicant whether the portfolio issues loans and debt instruments. The applicant gave the following answer:

> “In your email, you requested that further particulars be provided in respect of the debt instruments provided to portfolio companies. In this regard we refer to the "Portfolio Debt Instrument Guidelines" set out on page 72 of the Offering Document as well as the organogram enclosed herewith marked "Annexure E", and confirm that the position is as follows:
>
> - Greenman OPEN holds ordinary shares in various portfolio companies which, in turn, own property investments;
> - Greenman OPEN invests funds by way of shareholders loan to portfolio companies which utilize such funding to invest in immovable property; and
> - no more than 20% of the Greenman OPEN compartment's NAV may be issued as a debt instrument or loan to a single portfolio company.”

[15] The FSCA refused the application because the scheme, according to its assessment, does not comply with sec 95(1)(b) of the Act:

> **(1) A manager may not—**
>
> . . .
>
> **(b) lend or advance any money.**

[16] The full decision on this aspect reads as follows:

> "In terms of section 95 (1) of CISCA [THE Act], a manager may not sell or offer for sale any participatory interests and may not lend or advance any money from the fund.
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> Referring to the response made to the Authority on 17 August 2020, point 17 of the response letter, the fund indicates that it issues loans to portfolio companies in the form of shareholder loans [quoted above]. Furthermore, this is stated in the Offering Document section 2.25:
>
> > 'The Compartment has the firm intention to provide loans and other debt instruments to any Portfolio Company or Intermediary Vehicle in which it participates, either as a Co-Investment or as a majority shareholder where the issuance of such an instrument would, in the opinion of the Management Company, supported if necessary by an independent third party report prepared by a recognised expert, benefit the Compartment from a fiscal, legal, operational, financing or accounting perspective (the Portfolio Debt Instrument).'

This is not in accordance with the prohibitions noted in section 95 (1) of CISCA."

[17] The applicant raised the following questions relating to the application of sec 95(1) to it. These are: Does the reference to the "manager" apply to the manager of a foreign scheme? And does the prohibition of lending and advancing money apply to inter-company loans? The second question does not arise because of the conclusion below on the first.

DOES THE REFERENCE TO THE "MANAGER" IN SEC 95 APPLY TO THE MANAGER OF A FOREIGN SCHEME?

[18] The starting point is to consider the structure of the Act because, as is sometimes said, context is everything.

[19] The Act is divided into "parts". Part I (sections 1 to 6) entitled "Collective Investment Schemes" is a general introductory part with definitions and governs all that follows.

[20] A scheme requires a manager, and the manager is a person who is authorised in terms of the Act to administer a collective investment scheme. No person may perform any act or enter into any agreement or transaction for the purpose of administering a collective investment scheme unless such person—(a) is registered as a manager by the registrar or is an authorised agent; or (b) is exempted from the provisions of the Act by the [FSCA] (sec 5(1)). It is not suggested that the applicant is exempted, and it cannot, by definition, be an authorised agent (see the definition is sec 1).

[21] The administration of the scheme relates to any function performed in connection with a collective investment scheme including—(a) the management or control; (b) the receipt, payment or investment of money or other assets; (c) the sale, repurchase, issue or cancellation of a participatory interest ; and (d) the buying and selling of assets or the handing over thereof to a trustee or custodian for safe custody (see the definition in sec 1).

[22] A manager must maintain adequate financial resources to meet its commitments and to manage the risks to which its collective investment scheme is exposed, and must, inter alia, (a) organise and control the collective investment scheme in a responsible manner; (b) keep proper records; and (c) have well defined compliance procedures (sec 4(4)).

[23] Parts II and III, and Parts IX, X and XI are not of immediate importance.

[24] Part IV contains special provisions relating collective schemes in securities; Part V those relating to property; Part VI those relating to participation bonds; Part VII those concerning declared collective investment schemes (one being hedge funds so declared by BN 52); and Par VIII those concerning foreign collective investments schemes.

[25] Then follows Part XII, General. Of special interest is sec 85:

> **(1) A manager may not sell or offer for sale any participatory interest in a portfolio of a collective investment scheme unless at the time of such offer the portfolio included assets in the manner, within the limits or on the conditions determined by the registrar.**

> **(2) A manager may, subject to section 95, lend or offer to lend assets included in a portfolio in the manner, within the limits or on the conditions determined in the deed.**

And, obviously, the quoted sec 95(1)(b) of the Act, that a manager "may not lend or advance any money".

[26] The applicant does not dispute that it is the manager of the scheme or hedge fund. The documents submitted show that clearly: the applicant performs the functions allocated to a manager as summarised above with reference to Part I.

[27] The applicant states, however, that it is not a manager appointed "under this Act". The submission is the following:

> "A manager of a foreign fund is not authorised in terms of CISCA to administer that scheme, or any other scheme. A manager of such a scheme would instead be authorised to manage that scheme in terms of the applicable offshore legislation."

[28] The applicant is, for purposes of its application, not the manager of a fund but its operator. That much is clear from BN 257, which distinguished, as sec 65(1) does, between a manager and an operator of a foreign fund.

[29] In any event, the applicant did not, as proposed "manager" of a scheme, apply under sec 5 for permission to administer a collective investment scheme; it applied under sec 65(1) to solicit investments in a foreign scheme from members of the public in the Republic. And if permission is granted, it does not become a

person authorised in terms of the Act to administer a scheme – it may only solicit investments. The foreign scheme is regulated by the laws of its domicile.

[30] That the terms "manager" does not have the extensive meaning which the respondent wishes to attach to is is best illustrated with reference to sec 101, which requires of a manager to maintain a principal office in the Republic, something that could not apply to a manager of a foreign scheme. This is recognised by BN 257, which does not even require a representative office in the Republic.

[31] I consequently conclude that the prohibition contained in sec 95 does not apply by virtue of the Act and that the basis of the decision of the FSCA cannot stand.

GN 141 of 2015: DECLARATION OF HEDGE FUND BUSINESS AS A COLLECTIVE INVESTMENT SCHEME

[32] Part VII of the Act deals with collective investment schemes that are not collective investment schemes in securities, property, or participation bonds (dealt with in Parts IV, V and VI respectively), and have been declared to be a collective investment scheme under sec 63.

[33] The Authority may by notice in the Gazette declare a specific type of business to be a collective investment scheme to which this Act or any part or provision thereof applies.

[34] As mentioned, this notice declared the business of a hedge fund to be a collective investment scheme.

[35] According to GN 141, the Act as a whole, save for listed sections, applies to hedge funds. Sections 65 to 67 (relating to foreign schemes) and sections 85 and 95 are not excluded. Because the foreign scheme is a hedge fund, and these sections by proclamation apply to hedge funds, the FSCA submits that the prohibition relating to loans applies.

[36] Collective investment scheme in securities, property or participation bonds were dealt with in earlier Parts of the Act. The provisions relating to schemes relating to property and participation bonds do not apply to hedge funds, but hedge funds based on securities must comply with secs 40 to 46 (save for sec 44(2) and (3)).

[37] It is of some significance that the Part dealing with declared schemes follows on schemes in securities, property or participation bonds and precedes the Part dealing with foreign schemes, which provides a prima facie indication that it was intended to apply to the preceding parts and not the subsequent one.

[38] The fact that sec 65 applies to hedge funds means no more and no less than that a foreign hedge fund that wishes to solicit investments in South Africa must comply with its provisions. It does not mean that the operator must apply for a licence to act as a manger in terms of sec 5 or that the principal office must be in South Africa. Since I have found that sec 95 does not under the Act apply to foreign schemes, it must follow that the same applies in respect of foreign hedge funds.

[39] I accordingly conclude that the FSCA's reliance on GN 141 for the application of sec 95 is also misplaced.

BN 257 OF 13 DECEMBER 2013: FINANCIAL SERVICES BOARD: CONDITIONS IN TERMS OF WHICH FOREIGN COLLECTIVE INVESTMENT SCHEMES MAY SOLICIT INVESTMENTS IN THE REPUBLIC

[40] The present application is under this Board Notice, which prescribes the procedure for the application by a foreign scheme and hence a hedge fund for approval to market the scheme/fund to persons in the Republic. Paragraph 5(2) is the kingpin of the FSCA's argument:

> **(2) The registrar may categorise any scheme for purpose of identifying provisions of the Act applicable to such category of collective investment scheme.**

[41] It is best to quote the argument in full:

> "Although paragraph 2 of BN 257 sets out specific conditions for approval in terms of section 65, the Board Notice also determines in paragraph 5(2) of BN 257 states that "[t]he registrar [Authority] may categorise any scheme for purpose of identifying provisions of the Act applicable to such category of collective investment scheme".
>
> The Authority's discretion in paragraph 5(2) of BN 257, to apply provisions of CISCA to a foreign CIS, is not limited to applying provisions of CISCA determining whether, and under what conditions, those funds can be marketed in South Africa, as Greenman seem to contend. The application of paragraph 5(b)(i) of BN 52 dealing with redemption requirements, which Greenman has not taken issue with, is an example.

> The Fund is a hedge fund. Greenman applied for authorisation to market the Fund in South Africa as a QI fund (foreign CIS in hedge funds). For purposes of its application, the Fund was categorised in line with its application. The Authority, in declining Greenman's application, applied section 95(1) of CISCA to the Fund, and categorised it as a QI fund (foreign CIS in hedge funds). As a section of general application, section 95(1) of CISCA also applies to a CIS in hedge funds, and through the exercise of the discretion afforded to the Authority in terms of paragraph 5(2) of BN 257, the Authority applied section 95(1) of CISCA to the Fund being a foreign CIS in hedge funds."

[42] The short answer to this is that the FSCA did not purport to exercise a discretion. It relied on the direct application of sec 95, which I have found is incorrect. As found earlier, sec 95 is not a section of general application.

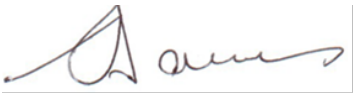
[43] The longer answer is that the FSCA's argument assumes that its regulations may be interpreted on the basis that they override the provisions of the Act. I accept the argument of the applicant, namely that paragraph 5(2) of BN 257 does not contemplate the respondent categorising a scheme, and then selecting sections of CISCA which it thinks should apply to that category:

> "Nor could any such power have lawfully been conferred on the [FSCA]; for the [FSCA] has not been given the power under CISCA to vary the legislative regime and make sections of that statute applicable to schemes which would not be subject to them."

[45] This does not mean that the Tribunal is assuming the power to declare regulations and board notices invalid, only that they must be interpreted consistently with the provisions of the Act.

ORDER: The application succeeds and the decision of the FSCA is set aside and the matter is referred back to the FSCA for reconsideration.

Signed on behalf of the Tribunal on 28 May 2021



LTC Harms (deputy chair)