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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO.: 1633/2023

In the matter between:

ENGINEERING INDUSTRIES PENSION FUND

First Applicant

METAL INDUSTRIES PROVIDENT FUND

Second Applicant

And

INSTALLAIR (PTY) LTD (IN LIQUIDATION)

First Respondent

PAOLO RINALDA ORSO

Second Respondent

SANDRA MARTHA ORSO

Third Respondent

JUDGMENT

PARKER, AJ:

Introduction

'Pension money forms the cornerstone of most people's retirement security. When a person retires from active employment, he or she still

*wants to maintain more or less the same standard of living that existed during his or her working life*¹.

[1] The recent two-pot system introduced in South Africa has highlighted the dilemma employees find themselves in. A few years ago the issue of pension benefits were highlighted thus:

'The non-payment of retirement fund contributions is an ongoing problem faced by thousands of retirement fund members'.²

[2] In more recent news it has been reported that about 7 770 employers have defaulted on paying their pension fund contributions as of December 2023. It was said this failure had a negative impact on the implementation of the two-pot retirement system which came into effect on 1 September 2024.³

[3] I heard this opposed application on 17 October 2024 pertaining to outstanding pension and provident fund contributions for the period of May 2020 to July 2020. Applicant was seeking payment in the amount of R93 715.53 which is calculated based on contribution schedules duly received but for which payment remains outstanding for the period January 2020 to April 2020. On the date of the hearing there was no appearance by the Respondents and at the conclusion of the hearing I requested Applicant to file a further note on argument, which was received on the 25 October 2024.

The Applicants

[4] The Applicants (at times I will refer to them as the "Fund or "Funds") both of whom are pension funds registered in terms of section 4 of the Pension Funds Act, 24 of 1956 ("the PFA"), rely on the provisions of s13A(1), s13A(7), s13A (8), s13A (9)

¹ Manamela "Deductions from Pension Benefits for Purposes of Section 37D of the Pension Funds Act 24 of 1956: Employers Forced to Tow the Line" 2007 (19) SA Merc LJ 189 – 204 at 198.

² Cameron "Troubled Firms must still Contribute to Pension Funds" (14 April 2013) Personal Finance available at <http://www.iol.co.za/business/personal-finance> (accessed 15 October 2013)

³ Abongwe Kobokana "Over 7 700 employers default on pension contributions: Godongwana" (11 December 2024) SABC News available at <https://www.sabcnews.com/sabcnews/over-7-700-employers-default-on-pension-contributions-godongwana/>

of the PFA read with Regulation 33 (promulgated in terms of the PFA but now repealed).

[5] Section 13A(1) of the PFA places an obligation on the employer of any member (or members) of a fund to pay the member's contribution deducted from the member's remuneration and any contribution for which the employer is liable in terms of the Rules to the fund *'in full'*. This subsection reads as follows:

'13A Payment of contributions and certain benefits to pension funds

(1) Notwithstanding any provision in the rules of a registration fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely-

(a) any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration; and

(b) any contribution for which the employer is liable in terms of those rules.'

[6] Any contribution to a fund in terms of the rules, must be paid to the fund not later than seven days after the end of the month for which the contribution is payable.⁴

[7] Section 31A (7) requires that *'interest at a rate as prescribed shall be payable from the first day following the expiration of the [seven day] period in respect of which such amounts were payable on'* and not paid.⁵

⁴ Section 13A(3)(a):

'Any contribution to a fund in terms of its rules, whether it be a contribution contemplated in subsection (1), a contribution for the payment of which a member of the fund is responsible personally, or a contribution to be paid on a member's behalf-

*(i) Shall be transmitted directly into the fund's account with a bank finally registered as such under the Banks Act, 1990 (Act 94 of 1990), **not later than seven days after the end of the month for which such a contribution is payable.**' [own emphasis]*

⁵ Section 13A (7):

'Interest at a rate as prescribed shall be payable from the first day following the expiration of the period in respect of which such amounts were payable on-

(a) the amount of any contribution not transmitted into a fund's bank account before the expiration of the period prescribed therefor by subsection (3)(a)(i);

(b) the amount of any contribution not received-

(i) by a fund before the expiration of the period prescribed therefor by subsection (3)(a)(ii); or

[8] The Fund/s are statutorily obliged to collect the contributions and distribute the benefit payable to its members as provided for in s 7D(1)(d), s13 and s13A of the PFA.⁶ The binding nature of the applicants' rules is statutorily confirmed in s13 of the PFA.⁷

[9] The Financial Services General Laws Amendment Act 22 of 2008 amended the PFA by deleting ss(1) from s37 of the PFA and thereby decriminalized an employer's non-payment of employees' contribution to the pension fund as required by s13A of the PFA. There were thus, no clear and direct enforcement mechanisms which could induce employers to make payments of contributions as required by s13A of the PFA.⁸

[10] If the applicants do not receive contributions from the employers as required by the rules of the Funds and s13A of the PFA, the employees will not receive their benefits when they either retire or are retrenched by the employer. In this case the First Respondent was wound up. Aside from members being prejudiced, there are also prejudice to other members of the Funds.

[11] Following legislative intervention in 2014 with the Financial Services Laws General Amendment Act No. 45 of 2013 ("the FSLGA"), the provisions of the FSLGA, with effect from 28 February 2014, *inter alia*:

11.1 Amended s37⁹ of the PFA by re-introducing criminal sanctions which will be imposed on all those who fail to comply with certain provisions of the PFA including s13A of the PFA.¹⁰

(ii) in the circumstances contemplated in subsection (3)(a)(iii), by the insurer concerned before the expiration of the period prescribed therefor by that subsection;

(c) the value of any benefit, or right to any benefit, not transferred by the first fund to the other fund before the expiration of the period prescribed therefor by subsection (5)."

⁶ *Joint Municipal Pension Fund v Ehlanzeni District Municipality* 2018 (6) SA 197 (GP) at 210 C-D

⁷ *supra* at 213 A-D

⁸ Motseotsile Clement Marumoagae – Section 13A of the PFA: Employer's Failure to Pay Employee's Contribution to the Employee's Pension Fund, *Speculum Juris* Volume 29, Part 1, 2015

⁹ By section 49(b)

¹⁰ 37 penalties

(1) Any person who-

a. Contravenes or fail to comply with section 4, 10, 13A, 13B or 31

b., or

c.,

11.2 Introduced as ss(8) & (9) to s13A¹¹, to enable the fund to identify and hold certain persons who are in control of or regularly involved in the management of the employer's overall financial affairs, accountable and personally liable for any non-compliance with s13A and for the non-payment (or short payment) of pension fund contributions.¹²

[12] The First and Second Respondents do not dispute that the employer (i.e the First Respondent) was a participating member of the Applicants.

[13] With regard to the personal liability provisions s13A(8) & (9) of the PFA read as follows:

'For the purposes of this section, the following persons shall be personally liable for compliance with this section and for the payment of any contribution referred to in subsection (1);

(a) If an employer is a company, every director who is regularly involved in the management of the company's overall financial affairs;

(b) If an employer is a close corporation registered under the Close Corporation Act, 1984 (Act 69 of 1984), every member who controls or is regularly in the management of the close corporation's overall financial affairs; and

(c)...

(9)(a) A fund to which the provisions of subsection (8) apply, must request the employer in writing to notify it of the identity of any such person so personally liable in terms of subsection (8).

Is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.'

¹¹ By section 17 of the FSLGA

¹² R176, annexure "OG7" – Financial Service Board: Circular PF No. 110

(b) In the event that an employer fails to comply with the requirements of this provision, all the directors (in respect of a company), all the members regularly involved in the management of the closed corporation (in respect of a closed corporation), or all the persons comprising the governing body of the employer, as the case may be, shall be personally liable in terms of subsection (8).’(on emphasis)

[14] This application is about the personal liability provisions of s13A(8) & (9) of the PFA.

Second and Third Respondents

[15] Before I elaborate on the Second and Third Respondents, I must record that the First Respondent (“the employer”) was at the time of the application, under liquidation and as such, no order was sought against First Respondent¹³. The Second and Third Respondents who are the directors of First Respondent, says that the employees ‘*were paid a sum which reflected their net salaries less their fund contributions. This way the employer's income was [allegedly] distributed such that all employees would receive a salary*’. The employees thus received their net salaries [presumably reduced] and their contributions towards their pension and provident were deducted from their salaries. But on the Second Respondent's version, the deducted pension and provident portions were utilised to subsidise employee salaries. On this version the fund deductions were clearly deducted from the salaries and not paid over to the Applicants. Put differently the employee members did not receive any pension and provident fund benefits despite receiving a net salary which excludes their pension and provident fund contributions. The Second Respondent calls this an adjustment of payment of employee compensation which the Applicants do not accept; nor do they agree as the actual deductions were not made from the employees' salaries. The Second Respondent has demonstrably failed to substantiate this allegation with relevant and objective evidence.

[16] Second, they contend that the personal liability provisions of section 13A(8) of the PFA do not apply to the Third Respondent, although listed as a director, as she

¹³ This is in accordance with the moratorium on legal proceedings in terms of s133 of the Companies Act

was not involved in the affairs of the employer and an order should not be granted against her.

[17] Third, in instances where the employer and the directors are unable to comply with their statutory obligations due to reasons beyond their control and have not been either reckless or negligent in their actions, the applicability of the personal liability provisions of section 13(8) of the PFA is dependent on two considerations, namely:

17.1 The circumstances which lead to the breach of the statutory provisions by the employer and its individual directors;

17.2 The extent to which the directors were responsible for those circumstances.

Evaluation

[18] The Second Respondent cannot unilaterally decide not to submit contribution schedules. This runs contrary to the purpose, spirit and import of the PFA and, to allow this type of conduct would undermine the provisions of the PFA.

[19] Given the nature of the relief sought and the serious prejudicial consequences of the failure to comply with the provisions of the PFA to the employees and other members of the Applicants, the Second and Third Respondents are not entitled to excuse themselves from these very serious statutory obligations. Their explanations are not plausible. Personal liability is statutorily regulated by the PFA and under the circumstances, as demonstrated above, applies.

[20] The Applicants therefore requires the schedules and returns for the period May 2020 – July 2020 to finally do the outstanding calculations. However, the Employer had generated sales in excess of R 232 000.00 for the period April 2021 – March 2023, notwithstanding it being in liquidation in May 2022.

The period January 2020- April 2020

[21] Second Respondent contends that no actual deductions were made from employees in this period. In terms of s13A(1) read with ss(3), it is peremptory to pay over the contributions deducted from salaries. Section 13(8)(a) imposes personal liability on those directors of the employer who are regularly involved in the management of the employer's overall financial affairs. Unilateral conduct is precluded on a plain interpretation of the PFA. The employer must submit contribution schedules (and make payment accordingly) as it is a statutory obligation imposed on it by the relevant provisions of the PFA, Regulation 33 to the PFA and Circular PF No. 110 form: Financial Services Board.

[22] Moreover, the period January 2020 to almost the end of March 2020 was manifestly prior to the Covid-19 pandemic. The National Lockdown was only imposed on 26 March 2020. The pandemic and its general effects are not an excuse for the non-compliance with payment of contributions for January, February and March 2020, during which time the employer was operational. Fund contribution exposure for this period (and for which no defence on the merits have been advanced) amounts to R74, 046.80 which the directors are liable to pay.

[23] The amount of R 93 715.53 is calculated on contributions already received; therefore, payment is due. The Second Respondent persists and ignores the statutory obligation (and other obligations in terms of the rules) to pay over the employer's portion of the contributions to the Funds. Here the answering affidavit demonstrates a fundamental misconception: it is not a bonus for the employees if the employer matches their monthly contributions. The employer is statutorily obliged to pay over contributions for which it is liable. The Second Respondent should have ensured that the employer's portion towards the employees' pension and provident funds were made. He has not done so, despite on his version having used personal resources to fund other expenses of the employer.

The period May 2020 – July 2020

[24] The Applicants require the submission of the contribution schedules for this period to calculate the pension and provident fund contributions and ancillary payments such as interest which is due.

Personal liability

[25] The Second Respondent contends that the Third respondent, although listed as a director, was not involved in the affairs of the employer and an order should not be granted against her. This assertion cannot stand. She was a director of First Respondent and has to accept the responsibilities that come it, as she is listed as a director on the Second Respondent's own CIPRO search, reflected she had a loan account with the employer in the amount of R285, 672.37 as at 21 November 2021, on the version advanced in the answering affidavit. The Second Respondent further denies that the directors breached the provisions of the PFA and that they are personally liable (i.e the personal liability provisions of section 13(8) of the PFA is dependent on the circumstances which lead to the breach of the statutory provisions by the employer and its individual directors and the extent to which the directors were responsible for those circumstances). This too, cannot stand.

[26] The Second Respondent accepts that the PFA prescribes personal liability. At common law, the Applicants have no redress against anyone other than the employer; however, s13A(8)(a) now permits them to hold not only the employer, but also the employer's directors personally liable for the employer's debts '*without the need to pierce the corporate veil*'. In other words, there is no need to give s 13A(8)(a) an interpretation unsupported by the text to achieve its purpose; the text-based interpretation achieves its purpose. The Second Respondent is confusing his fiduciary duties as a director of the employer with his statutory duties in terms of the PFA.

[27] Furthermore, the Second Respondent has not demonstrated as a fact, that for the periods January 2020 to April 2020 and May 2020 to July 2020, no factual deductions were made. In any event there remains the issue of the employer's portion of the contributions which the second respondent has not addressed. The Second Respondent has similarly not demonstrated, as a fact, that the employer was not trading between May 2020 until its final liquidation.

[28] In all the circumstances it is submitted that the Second and Third Respondents have fallen short of advancing a bona fide defence. The purported defences are far-fetched and untenable and falls to be rejected on the papers. Given

the high interest in withdrawal claims from the two-pot retirement system which has exposed the failure of employers to pay pension contributions, this is but just another example of how retirees and those who thought they could readily access their benefits, suffer.

[29] I would be failing in my constitutional duty if an order is not granted to the vulnerable groups. I reiterate, my attention is drawn to an article in the media and to the high interest in withdrawal claims from the two-pot retirement system which has exposed the failure of employers to pay pension contributions/s to funds who administer these contributions as envisaged under these unfortunate circumstances.¹⁴

Costs

[29] The Applicants seek a punitive costs order on the scale as between attorney and own client as it is prejudicial to the Applicants members' that the costs have to be borne by the members of the Funds who have to fight to access benefits and face unwarranted reduced benefits. The Directors (and the employer) have neglected their statutory responsibilities in terms of the PFA towards their employees which justifies a punitive costs order.

The Second and Third Respondents withdrawal

[30] Before I conclude I deem it prudent to address the following. On 11th July 2024 the Registrar issued a Notice of Set Down for the opposed hearing of this application to take place on 17th October 2024. Therein the Second and Third Respondent's address was recorded as 0[...] B[...] Drive, Platteklouf Glen, 7460. On 3rd October 2024 their attorney withdrew as attorney of record. In terms of the withdrawal notice the Second and Third respondents' last known address is recorded as 0[...] B[...] Drive, Platteklouf Glen, 7460 ("0[...] B[...] Drive"). The Applicants cited B[...] Drive under oath in the Founding Affidavit as the Second and Third Respondents' residential address, confirmed in the Answering Affidavit to by the

¹⁴ Two-pot: While claims spike, many employers never paid pensions
<https://www.msn.com/en-za/news/other/two-pot-while-claims-spike-many-employers-never-paid-pensions/ar-AA1vgblb?ocid=BingNewsVerp>

Second Respondent on 27th September 2023 wherein he confirmed under oath that 0[...] B[...] Drive is his residential address. The same applies to the Third Respondent in respect of her confirmatory affidavit. On 16th October 2024 the Sheriff provided returns of non-service of the Notice of Set Down [for 17th October 2024] on the Second and Third Respondents at 0[...] B[...] Drive.

[31] On the date of the hearing, 17th October 2024, anticipating new counsel or appearances in person by the Second and Third Respondents, who however were not present at court. Given the nature of the claims and the importance of the matter, the Respondents names were called out in the passages. I further stood down the matter till after 10:00am to cater for possible late arrivals whereafter I heard argument conducted by the Applicants. Despite no appearance by the Respondents, I nevertheless evaluated their versions placed before Court under oath which versions I took cognisance of.

Order

[32] Having heard counsel for the Applicants it is ordered:

- a) Directing the Second and Third Respondents to provide the Applicant with the documents set out below within 30 calendar days of the date of this Court Order:
 - (i) Outstanding pension fund contribution schedules, in respect of pension fund contributions for its employees which is payable to the First Applicant, as contemplated in Regulation 33 of the Pension Funds Act, Act 24 of 1956 for the periods May 2020 to July 2020.
 - (ii) Outstanding provident fund contribution schedules, in respect of provident fund contributions for its employees which is payable to the Second Applicant, as contemplated in Regulation 33 of the Pension Funds Act, Act 24 of 1956 for the period May 2020 to July 2020.

- b) Directing the Second and Third Respondents to pay over the monies owing to the Applicants, as determined based on contribution schedules already submitted by the Respondents but not paid over, which amount has accrued to R 93 715,53 (Ninety-Three Thousand, Seven Hundred and Fifteen Rand, Fifty-Three Cents).

- c) Within one calendar month of the Applicants having determined the outstanding pension and provident fund contributions, payable by the Respondents based on the schedules, provided by the Respondents in terms of paragraph (a) above, directing the Second and Third Respondents to pay:
 - (i) All outstanding pension fund contributions, together with prescribed interest thereon, to the First Applicant.

 - (ii) All outstanding provident fund contributions, together with prescribed interest thereon, to the Second Applicant.

- d) The Applicants are granted leave to approach this Court on the same papers, as supplemented, to seek relief once the amounts payable by the Respondents have been quantified based on the returns, schedules and forms are provided by the Second and Third Respondents.

- e) The Second and Third Respondents, jointly and severally are to pay Applicants' legal costs in respect of this application on an attorney and own client scale.

PARKER AJ
Acting Judge of the High Court,
Western Cape Division

APPEARANCES

For the First & Second Applicants: Adv Peter Coston
Instructed by: Soonder Inc c/o Vezi & De Beer Inc.
Cape Town

For the First, Second & : Not Represented
Third Respondents

Date of Hearing: 17 October 2024
Date of Judgment: 16 January 2025

This judgment was handed down electronically by circulation to the parties' representatives by email.