



moment OF TRUTH

Legal update 16 of 2020: Case law on the PFA's equity jurisdiction and the liability for unpaid retirement fund contributions

Introduction

There are two cases, heard by the Financial Services Tribunal, relating to the application of equity jurisdiction (ability to make a ruling based on fairness and not solely based on positive law) by the Pension Funds Adjudicator (PFA). Below are summaries of these cases and insight into how we deal with these matters should they come across on the Momentum Retirement Annuity Fund, the Momentum Pension Preservation Fund and the Momentum Provident Preservation Fund. We have also included more detail on the cases in the document.

Summaries

Case 1: Municipal Gratuity Fund vs West Rand District Municipality & Another [PFA97/2019] (18 May 2020)

Does the application of equity jurisdiction by the PFA mean that she can ignore legislation when making a decision?

- **The finding:** Applying equity should not override the law. Where the law is clear on a matter, equity cannot be applied to ignore or contradict the law.
- **How we deal with this:** We always assess the fairness of an outcome of a matter on any party that complains as a result of being aggrieved by a decision. This assessment is done before we proceed to defend the decision in question. Where fairness requires that a decision be made in favour of the complainant, without contravening the law, a different decision will be made to avoid prejudice for the complainant.

Case 2: National Fund for Municipal Workers vs Tswaing Local Municipality & Another [PFA25/2020] (19 August 2020)

Is the employer participating in a retirement fund absolved of liability for unpaid contributions on account of the personal liability created by section 13A of the Pension Funds Act (the Act) for specific individuals such as directors regularly involved in the company's financial affairs?

- **The finding:** Even though section 13A of the Act creates personal liability for certain persons where contributions are not paid to a fund, that liability is not primary, and the employer remains liable for the unpaid contributions.
- **How we deal with this:** The Momentum Retirement Annuity Fund, Momentum Pension Preservation Fund and the Momentum Provident Preservation Fund are not occupational funds with employers participating in them. Therefore, we do not have incidents of failure to pay contributions by the employer participating in the fund. For occupational funds, the effect of this decision

is that they may lodge a complaint with the PFA where the employer has failed to pay contributions and/or late payment interest.

More detail of the cases

Case 1: Municipal Gratuity Fund vs West Rand District Municipality & Another [PFA97/2019] (18 May 2020)

Does the application of equity jurisdiction by the PFA mean that she can ignore legislation when making a decision?

The matter concerned the non-payment of late payment interest on contributions due to the Municipal Gratuity Fund (the Fund) by the West Rand District Municipality (the Employer) which participates in the Fund. The Employer had failed to comply with section 13A of the Pension Funds Act (the Act) which requires that all retirement fund contributions be paid to a fund within seven days after the end of the month for which the contributions are payable. The section, read with Regulation 33 of the Pension Funds Regulations, also requires that an employer submits contribution schedules in respect of the amount payable to a fund within 15 days of the end of the month for which the contributions are payable. Section 13A(7) of the Act provides that late payment interest, as prescribed, is payable where contributions are paid late, i.e. after expiry of the seven day period after the end of the month for which the contributions are payable. The Employer failed to pay contributions to the Fund within the prescribed period and that led to late payment interest in the amount of about R103 894 accruing on the unpaid contributions at 31 December 2018. The Employer's failure to pay the late payment interest led to the Fund lodging a complaint with the PFA to seek an order for the Employer to pay the late payment interest plus interest thereon.

It is important to mention that late payment interest in terms of section 13A(7) of the Act is mandatory in terms of the Act. However, interest thereon is at the discretion of the Adjudicator who is empowered by section 30N of the Act to apply her discretion. The Employer had been struggling to pay its debts since around May 2018 and it was placed under administration in 2019.

The Employer's reason for late payment of contributions and failure to pay late payment interest was its financial condition. The PFA used its equity jurisdiction and ordered the Fund to enter into a settlement agreement with the

Employer for payment of a reduced or lower amount of late payment interest. In terms of the PFA determination, once the parties have concluded the settlement agreement, the Fund would recalculate the late payment interest and the Employer would pay the reduced amount within one week of having been furnished with the new amount.

The Fund was dissatisfied with the determination issued by the PFA and applied for the matter to be reconsidered by the Financial Services Tribunal (FST) under the Financial Sector Regulation Act.

The FST found the following:

- The equity jurisdiction of the PFA is derived from section 30A of the Act.
- Any determination of the PFA has the force of a judgment by a civil Court and a warrant of execution may be issued to enforce the determination.
- A question that occupied the mind of the PFA was what is meant by 'equitable jurisdiction', referring to some English textbook on English law of equity and trusts.
- In English law, equity jurisdiction refers to a system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law.
- In civil law, such as Roman-Dutch law, equity jurisdiction is the method of deciding cases where the positive law is absent or ambiguous.
- The PFA may only use equity jurisdiction in an appropriate case and the PFA must have regard to the provisions of the Act. Equity jurisdiction cannot override statute. The statute (i.e. section 13A(7) of the Act) sets the obligation to pay interest and the rate thereof, and the PFA must have regard to that.
- In addition to the above, the FST found applying equity jurisdiction to this matter to be problematic and raised the following rhetorical questions:

- Is the principle that local authorities in financial distress are not bound by the Act, or does it apply to all other bodies in distress such as State-owned Enterprises?
- Does the principle apply to late payment interest (in terms of section 13A(7)) only or does it also apply to the unpaid contributions (in terms of section 13A(1))?
- Is non-compliance with the provisions of the Act, which are criminalised, on an administrative level negotiable and capable of settlement between the parties?
- The other reason why the PFA determination could not stand was that it was not capable of enforcement. The Fund was ordered to settle with the Employer. If they reached a deadlock, there would be no mechanism in the determination to break it.

For the above reasons, the FST set aside the PFA's decision and referred the matter back to the PFA for reconsideration.

Case 2: National Fund for Municipal Workers vs Tswaing Local Municipality & Another [PFA25/2020] (19 August 2020)

Is the employer participating in a retirement fund absolved of liability for unpaid contributions on account of the personal liability created by section 13A of the Pension Funds Act (the Act) for specific individuals?

This matter is similar in many respects to that of *Municipal Gratuity Fund v West Rand District Municipality & Another* discussed above. The National Fund for Municipal Workers (the Fund) lodged a complaint against the Tswaing Local Municipality (the Employer) and sought an order for the municipal manager and/or the Employer to pay the unpaid contributions from June 2018 to date of the PFA determination. The PFA made no order in respect of the liability of the municipal manager or the Employer to pay the unpaid contributions and late payment interest but applied equity jurisdiction to order the Fund to enter into a settlement arrangement with the Employer in terms of which the late payment interest should be reduced. The determination was made on 4 February 2020 and when the Fund brought it to the attention of the PFA that no order was made in respect of the Employer's liability for the

unpaid contributions and late payment interest, the PFA dismissed the complaint. That led to the application for reconsideration of the decision in the Financial Services Tribunal (FST).

The FST found the following:

- The PFA omitted to deal with the complaint in her first adjudication. In the PFA's second adjudication, the PFA dismissed the complaint on the grounds that the Fund should have taken other reasonable steps to recover the unpaid contributions. The reasonable steps referred to were linked (by the PFA) to the object and duties of a board as set out in sections 7C(2)(a) and 7D(1)(d) of the Act. However, the PFA did not make a finding that the board of the Fund had failed to discharge their duties.
- The senior assistant adjudicator took it upon himself to review and rectify the determination without regard for the principle of *functus officio* which stipulates that a decision-maker cannot review its own decision once the decision is made and its decision-making duties are discharged. His reason for doing this was that the issues were not dealt with entirely in the first adjudication, which was not true. It is inexplicable that the PFA and the senior assistant adjudicator would seek to justify a determination on a ground that they knew or ought to have known to be untrue.
- The PFA's main point was that the Fund should have identified the person(s) with personal liability for unpaid contributions as envisaged in section 13A(8) of the Act and instituted legal action against such person(s) for the unpaid contributions. However, it was clear in the complaint that the Fund could not ascertain the identity of any such person(s) as the Employer did not respond to the Fund's request.
- The senior assistant adjudicator, in his further reasons, argued among other things, that the Fund ought to have exhausted not only civil remedies but criminal legal remedies too before lodging a complaint with the PFA. That is by instituting civil legal proceedings and criminal charges with a view to obtain a compensation order under section 300 of the Criminal Procedure Act. The FST found it difficult to accept that this submission was made in good conscience.

- The senior assistant adjudicator also submitted that the Employer is an organ of state. Therefore, in terms of the Institution of Legal Proceedings against Certain Organs of State Act, no legal proceedings for recovery of a debt against an organ of state may proceed without compliance with certain procedures set out in section 3 of that Act. The FST rejected this reasoning on the grounds that the said Act defines debt to mean any debt arising from delict, contract or any other liability for which an organ of state is liable for payment of damages. In this matter, as it was also the case in the high court matter of *Municipal Workers Retirement Fund v Ndlambe Local Municipality [2018] ZAECGHC 139 (22 November 2018)*, the claim was not for damages and therefore the said Act does not apply.
- The senior assistant adjudicator further argued that although the Fund's claim for unpaid contributions was quantified until the date of the lodging of the complaint on 24 April 2019, there was no proof of the debt between that date and the date of the determination. Therefore, the PFA saw it fit to dismiss the complaint. The FST rejected this submission as the PFA could have ordered the Employer to pay the amount which was unknown at the time of making the determination. Alternatively, the PFA could have

asked the Fund to provide an updated calculation at the time of making the determination.

- The senior assistant adjudicator found that section 13A(9) of the Act, in as far as it creates personal liability for a municipal manager, is unconstitutional. The FST found that the potential liability of a municipal manager was founded in subsection (8), not (9), and that the senior assistant adjudicator had usurped powers reserved for the Constitutional Court in pronouncing on the constitutionality of a provision in legislation.
- The FST expressed great disapproval and concern around how the Fund's complaint was dealt with by the senior assistant adjudicator and the PFA.
- The PFA determination was set aside and the matter was referred back to the PFA for reconsideration. The FST also made an order in terms of which the secretariat was requested to bring the decision to the attention of the Commissioner of the Financial Sector Conduct Authority.

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