

THE FINANCIAL SERVICES TRIBUNAL

Case No. PFA8/2024

In the matter between:

BOOST PROPERTY MANAGEMENT CC

Applicant

and

PATIENCE NOMSA MHLANGA

First Respondent

**M A LUKHAIMANE
(THE PENSION FUNDS ADJUDICATOR)**

Second Respondent

**GAUTENG BUILDING INDUSTRY PROVIDENT FUND
(ADMINISTERED BY ALEXANDER FORBES FINANCIAL
SERVICES (PTY) LTD)**

Third Respondent

Tribunal Panel: Legodi JP, S Khumalo SC, GM Goedhart SC

Appearance for the applicant: Mr MT Nhlapo

Appearance for the first respondent: Mr DR du Toit

Date of hearing: 12 August 2024

Date of decision: 26 September 2024

Summary: *Application for reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 of the determination made by the second respondent in terms of section 30M of the Pension Funds Act, 24 of 1956.*

DECISION

Introduction

1. The first respondent lodged a complaint with the second respondent (the Adjudicator) on 9 March 2023. The first respondent's complaint was that the applicant, as employer, had failed to pay all contributions due to the third respondent (the Fund) as it was obliged to do in terms of section 13A(1) of the Pension Funds Act 24 of 1956 (the Act).
2. The Adjudicator notified the applicant and the Fund of the complaint. On 19 April 2023, the Fund filed its response to the complaint.
3. Despite notification to the applicant on 19 March 2023 requesting a response by 20 April 2023 and again on 21 April 2023, the applicant failed to respond to the Adjudicator.

4. On 31 October 2023, the Adjudicator determined the matter in terms of section 30M of the Act on the papers. The Adjudicator found that the first respondent only became aware of the applicant's failure to make payments in April 2022, and ordered the applicant to:¹

4.1. submit all outstanding contribution schedules in respect of the first respondent for July 2016, July 2018, August 2020 to September 2020, April 2021, June 2021 and February 2022 to the date of the determination, to the Fund in order to facilitate the computation of the outstanding contributions within three weeks of the determination;

4.2. pay the Fund the outstanding contribution together with late payment interest as computed by the Fund within two weeks of receiving the computation from the Fund.

Condonation

5. The applicant sought reasons for the determination on 28 November 2023 as contemplated by section 229 of the Financial Sector Regulation Act 9 of 2017 (the FSR Act). The applicant followed up the request on 8 January 2024 and sought the reasons by no later than 15 January 2024 failing which it would proceed with the reconsideration application. No further reasons were provided

¹ The Adjudicator also made orders against the Fund which are not replicated in this decision as these are not directly pertinent to the applicant's reconsideration application.

by the Adjudicator and the applicant then brought its reconsideration application on 4 March 2024.

6. To the extent that the Tribunal finds that the application is outside of the 60 day time period contemplated in section 230(2)(b) of the FSR Act, the applicant brings a condonation application on the basis that it proceeded with the reconsideration application within a reasonable time after the Adjudicator had failed to provide the reasons sought in terms of section 229 of the FSR Act. The first respondent opposed the application for condonation.
7. The test for condonation is well-established. In *Grootboom v National Prosecuting Authority and Another*² the Constitutional Court held, with reference to the decisions in *Brummer*³ and *Van Wyk*⁴, that:

“ . . . the standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation

² 2014 (2) SA 68 (CC); [2013] ZACC 37; 2014 (1) BCLR 65 (CC) (**Grootboom**); *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* 2017 (6) SA 90 (SCA); [2017] ZASCA 88; [2017] 3 All SA 520 (SCA) at paras 26, 33 and 34.

³ *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); [2000] ZACC 3; 2000 (5) BCLR 465 (CC) at para 3.

⁴ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC); [2007] ZACC 24; 2008 (4) BCLR 442 (CC) at para 20.

for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."⁵

8. The Adjudicator's determination of 23 October 2023 contained the reasons for the determination in terms of section 30M of the Act.⁶ There was thus a misconception on the part of the applicant in requesting reasons when the reasons appear from the determination.
9. Despite the misconception, the lateness of the application for reconsideration was however explained, the application for reconsideration was not unreasonably

⁵ Grootboom at paras 22 and 23.

⁶ Section 30M of the Act provides: "After the Adjudicator has completed an investigation, he or she shall send a statement containing his or her determination and the reasons therefor, signed by him or her, to all parties concerned as well as to the clerk or registrar of the court which would have had jurisdiction had the matter been heard by a court."

delayed after 15 January 2024, and the applicant has demonstrated prospects of success. The Tribunal is satisfied that condonation is to be granted.

The applicant's submissions

10. Turning to the merits, the applicant describes itself as a property management company, which overseas and manages a portfolio of buildings on behalf of the building owners. Its business includes the collection of rentals from tenants, maintenance of the buildings, cleaning of the buildings and security for certain buildings.
11. During July 2020, the applicant decided to outsource its cleaning division to two separate entities, being Pierre Chem (Pty) Ltd and Moon and Light (Pty) Ltd.
12. On 1 August 2020, the applicant transferred all its employees under its cleaning division, including the first respondent, to the abovementioned entities as contemplated by section 197 of the Labour Relations Act, 1995 (LRA) ("the section 197 transfer"). The first respondent was transferred to Pierre Chem (Pty) Ltd (Pierre Chem).
13. The applicant submits that the first respondent was only its employee until 1 August 2020, and that it contributed monthly towards the first respondent's pension fund from the date on which she joined as an employee until 1 August 2020. After the section 197 transfer, the first respondent was employed by Pierre

Chem and the applicant ceased to make contributions to the Fund, as it was no longer the first respondent's employer.

14. The first respondent only submitted a pay slip from the applicant, but did not submit her pay slips from Pierre Chem, which she ought to have done. The applicant submitted the first respondent's Pierre Chem payslips for March and April 2022.⁷ These payslips reflect that the first respondent was engaged by Pierre Chem as a cleaner with effect from 1 August 2020. The Pierre Chem payslips reflect provident fund deductions.
15. The applicant submits that the Adjudicator could not make any determination against the applicant as the obligation to make contributions in terms of section 13A of the Act and the Fund's Rules is that of the employer. Further, in so far as the Adjudicator ordered the applicant to make the contributions for July 2016 and July 2018, these were time barred in terms of section 30I of the Act⁸, given that the first respondent's complaint was made on 9 March 2023.

⁷ Record, Part A, p165-166.

⁸ Section 30I (1) provides that the Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received and section 30I (2) stipulates that the provisions of the Prescription Act, 68 of 1969 relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1).

16. The applicant sought an order that the Adjudicator's determination against it be dismissed.

The Fund's records

17. Alexander Forbes (Pty) Ltd (Alexander Forbes), the Fund's administrator, submitted the first respondent's benefit statement issued by the Fund as at 30 June 2022 to the Adjudicator.⁹ The benefit statement reflects "Pierre Chem Group (Pty) Ltd" as the Billgroup. It also reflects that the date the first respondent "joined the company" is 1 August 2015.
18. Alexander Forbes also submitted a transaction history of contributions made to the Fund.¹⁰ The transaction history reflects that contributions commenced in October 2015. *Ex facie* the transaction history, contributions were not made on July 2016, July 2018, August 2020, September 2020, April 2021, June 2021 and February 2022. It is these outstanding contributions which the Adjudicator ordered the applicant to make.

⁹ Record, Part B, p11.

¹⁰ Record, Part B, p9.

The respondent's submissions

19. The applicant's play slip¹¹ for the first respondent for the period 31 July 2019 reflects that the first respondent was engaged on 14 January 2009.
20. The first respondent submitted that she elected to join the Fund on 1 August 2015, and therefore the fact that the first respondent joined the Fund on this date is not in dispute.
21. The first respondent described the section 197 transfer as "bogus", opposed the reconsideration application and sought an order that the Adjudicator's determination be upheld.

Analysis

22. It is clear that there are longstanding labour disputes between the first respondent and the applicant concerning the true identity of the first respondent's employer and the lawfulness of the section 197 transfer, which resulted in referrals to the CCMA under the Labour Relations Act, 1995 (the LRA).
23. The applicant provided a referral to conciliation dated 26 March 2024 reflecting that the dispute under case number GAJB5499-24 regarding "section 198D(1) of the LRA – Interpretation or application of sections 198A, 198B or 198C" was so

¹¹ Record, Part B, p5.

referred. The determination of the CCMA dated 28 June 2024 under case number GAJB5499-24 was subsequently furnished to all the respondents and the Tribunal. The determination of 28 June 2024 reflects that the section 198 dispute (referred in March 2024) falls outside the jurisdiction of the CCMA. The dispute was dismissed.

24. The applicant and first respondent's labour disputes do not fall within the ambit of the Adjudicator's determination or within the remit of this Tribunal. However, there is no determination in the labour proceedings before the Tribunal which reflect that the applicant is to be regarded as the first respondent's employer after 1 August 2020, notwithstanding Mr Nhlapo's lengthy and persistent submissions to the contrary.
25. Following notification of the determination of the CCMA of 28 June 2024, the Adjudicator advised that there would be no objection on her part to a remission to the Adjudicator of the first respondent's complaint.
26. On the facts before the Tribunal, it would appear that the benefit statement of the Fund reflecting Pierre Chem as the "Billgroup" and the Withdrawal Quotation dated 20 March 2023 addressed to Pierre Chem by Alexander Forbes, were not taken into account by the Adjudicator when the determination of 23 October 2023 was made. Further, there is no indication that the Adjudicator sought information from Pierre Chem relating to the first respondent's complaint.

27. The applicant failed to respond to the Adjudicator's request for a response to the complaint in March and April 2023. The need for a reconsideration application may well have been averted if the applicant had timeously responded to the Adjudicator when it was called upon to do so. No proper explanation for the applicant's failure to respond to the Adjudicator was provided. The Tribunal finds this failure inexcusable. Employers who have been cited as respondents in complaints before the Adjudicator should take a request for information from the Adjudicator, who is statutorily empowered to investigate complaints, seriously.
28. However, given that it is the obligation of the employer to make contributions under section 13A of the Act¹² and the Fund's Rules,¹³ the Adjudicator's determination of 23 October 2023 pursuant to the first respondent's complaint of 9 March 2023 stands to be reconsidered having regard to all the information which served before the Tribunal.

Order

29. In the result the following order is made:


29.1. Condonation for the late filing of the reconsideration application is granted;

¹² See paragraph 5.11 of the determination at Record, Part A, p18.

¹³ Rule 4.1.1 and 4.2.1 quoted by the Adjudicator at Record, Part A, p17-18.

29.2. The Adjudicator's determination of 23 October 2023 is set aside and remitted to the Adjudicator for further consideration.

Signed on behalf of the Tribunal on 26 September 2024.



GM Goedhart SC