

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: PFA09/2024

In the matter between:

CROSSMOOR TRANSPORT (PTY) LTD

APPLICANT

AND

MRS D MOODLEY

FIRST RESPONDENT

PENSION FUNDS ADJUDICATOR

SECOND RESPONDENT

TRANSPORT SECTOR RETIREMENT FUND

THIRD RESPONDENT

Summary: Application for reconsideration of decision of the Pension Fund Adjudicator in terms of section 230 of the Financial Sector Regulation Act 9 of 2017; and jurisdiction of the Adjudicator in terms Section 30I of the Pension Funds Act 24 of 1956.

DECISION

INTRODUCTION

- 1 This application is in terms of Section 230(1) of the Financial Sector Regulation Act 9 of 2017, against a determination of the Pension Funds Adjudicator (“the Adjudicator”). The determination was made under sec 30M of the Pension Funds Act 24 of 1956 (“the PFAct”).
- 2 The parties waived their right to a formal hearing, and this is, accordingly, the decision of the Tribunal.

THE COMPLAINT

- 3 The First Respondent (Complainant”) submitted her complaint against the Applicant to the Adjudicator on 20 February 2023 in which she stated that she is the widow of Kelvin Moodley, an employee of the Applicant who died in a car accident on 22 February 2022. The essence of her complaint was that the Applicant as the deceased’s employer had failed to provide any assistance, she required for her to claim funeral and death benefits from the Provident Fund the Applicant was contracted to and the deceased was a member of.

- 3.1 The complainant submitted proof of deceased's employment with Applicant through payslips which reflected employment by Satloblok Bulk from 04 October 2013 to 27 February 2022 and employment with Crossmoor Transport from 13 March 2020 to 24 February 2022.
- 3.2 The Tribunal notes that the complainant was not able to furnish payslips for several months. However, the Applicant well aware of the information gaps, didn't volunteer any information to close the gaps as part of its case.
- 4 On 06 April 2023, the Adjudicator addressed a letter to the Fund in terms of Section 30 E(1) of the PFAAct requesting details of the Applicant as a member of the Fund. In response on behalf of the Fund, Salt (the administrator of the Fund) in a letter dated 20 June 2023 stated that:
 - 4.1 The Applicant started participation in the Fund on 1 August 2008, but has not been compliant in terms of section 13A of the Act, and as a result it reported the Applicant to the Financial Sector Conduct Authority ("FSCA") for non-compliance.
 - 4.2 Although the Applicant had registered the deceased as a member the only contribution it paid on his behalf to the Fund was for June 2020.
 - 4.3 The arrear amounts for which the Application ought to have submitted payment on behalf of the deceased are October 2013 to May 2020; and July 2020 to February 2022. Accordingly, the Applicant owed an amount of R123 895.00 in respect of outstanding contributions.
- 5 After the Adjudicator granted the Applicant opportunities to comment on the allegations made against it by the Complainant as required in terms of section 30F of the Act, but failed to respond, the Adjudicator disposed of the matter on available submissions.

DETERMINATION

- 6 A preliminary determination was made on 27 October 2023 and final determination was made by the Adjudicator on 14th November 2023. For purposes of this decision only the aspects relevant to the reconsideration application are listed. The Applicant was ordered to pay to the Fund
 - 6.1.1 *R 123 895.00 in respect of arrear contributions.*
 - 6.1.2 *Late payment interest on the amount referred to;*
 - 6.1.3 *The insured portion of the death benefit in the amount R 365 630.40;*
 - 6.1.4 *Late payment interest on the amount referred to 6.1.3 ;*

6.1.6 In addition, the Applicant was ordered to pay *the Complainant the amount of R 65 000.000 in respect of the lapsed funeral benefit.*

The Adjudicator had intended to send the Determination dated 14th November 2023 to the Applicant's email address, but by its own admission sent it to an incorrect email address error. Consequently, the Applicant could not respond to the determination in time.

THE APPLICANTS CASE FOR RECONSIDERATION

Application for Condonation

- 7 The Applicant, aggrieved by the Determination of the Adjudicator lodged the application for condonation for the late submission of its application on 25 March 2024, which was granted by the Financial Services Tribunal on 10 April 2024.
- 8 Subsequently, the Applicant filed its application for reconsideration dated 24 April 2024. The problem with the application itself is that it is fatally flawed. It raised issues of fact that were not raised before the Adjudicator and these new allegations are simply stated by an attorney and are not under oath and do not comply with the Rules of the Tribunal relating to the filing of new evidence. See Rules 23 to 29. We nevertheless assess the probabilities of the new allegations with reference to the record as a whole.

Merits of Application for Reconsideration

- 9 The Tribunal notes that the Applicant does not deny that he was obliged to register the deceased with the Provident Fund from date of employment and to submit its contribute and deductions to the deceased's Provident Fund to the Fund.
- 10 The Applicant's challenge is limited to the date on which it became liable to comply with Section 13 and 13A of the PFAAct.
- 11 The Applicant contends that the Adjudicator's decision was based on a misconception and was without merit, on the following basis:
 - 11.1 Prior to March 2020, the deceased was employed by a Labour Broker Satloblox Bulk from 2013, and no deductions were made from the employee as is evident from the payslips. The employee would have reasonably known from his payslips that he was not contributing to a provident fund. By implication, the liability for Applicant to contribute to the deceased's provident fund will coincide with the date from which if employed the deceased.

11.2 However, when the Tribunal examined the 2013 -2019 payslips, and compared them to those issued by Crossmoor Transport, the following similarities in the payslips were noted:

11.2.1 They were all issued by Sage. The employer in 2013-2019 is listed as ta Satloblok Bulk. If we assume ta means trading as, then the payslip does not state the name of the entity Satloblock Bulk is trading as.

11.2.2 The account number of Satloblock Bulk with Sage of 332077004, is identical to that Crossmoor Transport; they all provide the Department as Julian and Paypoint as Keegan and the company address is the same and the date of employment of the deceased 04 October 2013. The similarities are too numerous and have been repeated over a long period of time to be a mistake or coincidence.

11.2.3 Additionally, the Applicant prepared and issued to the Complainant a Department of Labour Salary Schedule and Confirmation of employment documents forming part of the Tribunal Record.¹ The documents state that the deceased started working for the Applicants Applicant from 2013 contradicting all by the Applicant that deceased started working for the Applicant in 2020, such allegation cannot be true and were intended to mislead this Tribunal.

11.2.4 It was accordingly not unreasonable for the Adjudicator to conclude that ta Satloblock Bulk and Crossmoor Transport referred to the same entity, and that the provisions of section 13 and Section 13A of the PFAct place an obligation on the Applicant to contribute to a pension fund from 2013.

11.3 The Applicant's assertion that it only learnt in 2018 that it had to register with the bargaining council and make certain deductions for levies and provident fund is irrelevant but is also contradicted by:

11.3.1 The uncontested statement of K Masekela of the Salt Employees Benefit who stated that the Applicant became a participant of the fund from 1 August 2008 and is non-compliant in terms of section 13A of the Act; and

11.3.2 Although the payslips indicate that the first deduction made from the employee's payslip for provident fund was on the 07th May 2020, the last and only contribution payments made by Applicant was for June 2020. The deceased had no way of knowing that the deduction of May 2020 had not been paid to the Fund.

11.3.3 On its own version, the Provident Fund deductions collected by the Applicant from 02 July 2020 to 24 February 2022 were not paid over to the Fund.² The non-payment was only known to the Applicant and had never been brought to the attention of the deceased.

12 The Adjudicator in her determination dealt with the question of time barring, and pointed out that she received the complaint with claims arising from 2013 on 20 February 2023. She referred to provisions Section 30I of the PFAct which states that:

"(1) 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 by him or her in writing.

(2) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1)."

12.1 The implications are that section 30I precludes the Adjudicator from investigating and adjudicating any complaint if the act or omission it relates to occurred more than three years prior to receipt of a written complaint in that regard. Furthermore, in terms of section 12(1) of the Prescription Act No 68 of 1969, prescription commences to run as soon as the debt is due.

12.2 However, the Adjudicator relied on Section 12(3) to establish or found her jurisdiction.

12.2.1 The section provides that a debt shall not be deemed to be due until the creditor has acknowledged the identity of the debtor and of the facts from which the debt arises, provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

12.2.2 She cited Applicant's failure to include a provident fund deduction in the amount of R302.50 reflected on the deceased's payslips of 9 September 2021 in the contribution schedule as proof that the Applicant wilfully prevented the deceased from coming to know about the arrears.

12.2.3 In opposition, the Applicant's contended that the running of the period of prescription had not been suspended by its wilful conduct of preventing the deceased from knowing about the arrears. The Applicant rejected the finding of the Adjudicator as baseless.

12.2.4 However, the Applicant didn't provide a reasonable explanation why the deduction was not included in the contribution schedule.

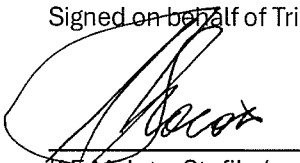
CONCLUSION

- 13 The Tribunal noted that the Applicant has not challenged any of the assertions set out in Salt's Response set out in paragraph 2(2.1-2.7) in respect to its legal obligations to pay pension fund contributions to the Fund and consequences for non-compliance.³ Instead it submitted that it does not intend to evade any of its responsibility and will make payments of the amount for the period as calculated, provided such calculations are correct.
- 14 The Applicant sought to reduce the amount of its indebtedness by excluding contributions due for the period before February 2020, by reason of prescription.
- 14.1 However, there is ample evidence of the Tribunal Record that the Applicant version that the deceased commence employment with it in February 2020, should be rejected and the Adjudicator's finding that the deceased commenced employment with the deceased in 2013 should be accepted. Consequently, the date on which the Applicant became liable to make contributions on behalf of the deceased to the Pension Fund in terms of Section 13 and 13A is 04 April 2014.
- 14.2 Furthermore, the Applicant's contended it didn't engage in wilful conduct which prevented the deceased from discovering its non-compliance with PFact is rejected. Again, there is ample evidence in the Tribunal Record that the Applicant version that the Applicant concealed its non-compliance from the deceased and even tried to conceal if from the Tribunal. Consequently, the finding of the Adjudicator that she had jurisdiction on matters that arose from 2013 is upheld.
- 14.3 Therefore, this Tribunal finds the Applicant failed make out a case for interference with the adjudicator's determination

ORDER

The application is dismissed.

Signed on behalf of Tribunal on 01 August 2024



K E Moloto-Stofile (member of the Tribunal) obo self; and
LTC Harms (deputy chair)

³ See paragraph 4 above.