

**THE FINANCIAL SERVICES TRIBUNAL**

**CASE NO.: PFA5/2024**

In the matter between:

**DURR AFRICA (PTY) LTD**

Applicant

and

**NATALIE GOOSEN**

First Respondent

**OLD MUTUAL SUPERFUND PROVIDENT FUND:**

**SUB FUND**

Second Respondent

**PENSION FUNDS ADJUDICATOR**

Third Respondent

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**DECISION**

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[1] This is an application filed with the Tribunal on 19 February 2024 for reconsideration in terms of section 230 of the Financial Sector Regulations Act 9 of 2017. The applicant waived its right to a formal hearing.

[2] The application for reconsideration is brought by Durr Africa (Pty) Ltd (“the applicant”). The reconsideration relates to a decision made by the Pension Funds Adjudicator (“the Adjudicator”) which was handed down on 31 January

2024 (the determination by the Adjudicator) in favour of the Employee (the first respondent), an erstwhile Employee of the applicant.

[3] The basis of the complaint before the Adjudicator was whether the applicant had failed to timeously register the Employee with the second respondent, Old Mutual Superfund Provident Fund: Sub Fund (“the Fund”) and pay all contributions to the Fund at the correct rate.

[4] The Adjudicator decided the matter based on the written submissions of the parties without the need to hold a formal hearing in the matter.

## **RELEVANT BACKGROUND**

[5] The Employee commenced employment with the applicant from 17 May 2021 until 30 November 2022. She was employed as a Design Engineer with the applicant. She was registered with the Fund under the participation of the applicant from July 2021.

[6] In June 2022, the Employee discovered that her contributions to the Fund were less than her fellow colleagues. Upon reconsidering her employment contract with the applicant, she discovered that there was an error as her contributions were less than her fellow colleagues.

[7] The Employee discovered according to her employment contract with the applicant, that she would contribute 50% and the applicant 50% of a total 14.8% contribution to the Fund. According to the Employee, the numeric value in the contract was only 4%. She raised this discrepancy with her manager and director at the time and a decision was made that the applicant would receive a portion of her annual increase towards the Fund and the contributions would increase to 7% from the applicant.

[8] Although according to the Employee the contributions were rectified, she complained that the deficit was not paid to her. She contends that for the period 30 June 2021- 31 May 2022, a total of 8.5% was paid towards the Fund on her behalf. Because the contributions were rectified from 31 May 2022, she maintained that she was owed R 8051-40 from the applicant. As part of the documents filed by the Employee in her complaint, she provided the Adjudicator with her salary slips for the periods December 2021, June 2021, May 2022 and April 2022, which according to her showed clear discrepancies in the contributions made to the Fund by her and the applicant on her behalf.

[9] In a letter by the applicant's attorney dated 20 October 2023, the applicant contended that the Employees pay slips will reflect a contribution of R 905.25 as the applicant's contribution towards the Fund, and that the Employee had not enquired about the contribution amount. The applicant's attorneys further stated that the Employees contract of employment had a clear typographical error as it made reference to 14.8% instead of 8.5% and if one considers the

amount paid each month to the Employer, it has a nominal value of 8.5%. The applicant's attorney also stated that the salary earned by the Employee was under category 2 and therefore the Fund deductions and contributions were correct at 8.5%.

[10] In reply thereto, the Employee clarified that she was well aware that the applicant had placed her on member category 2 from July 2021 until April 2022 and therefore the contributions by the applicant to the Fund were 8.5%. However, she noted that the contributions from the applicant increased from R905.25 to R 1677.38 from 31 May 2022, and this is when it was brought to the applicant's attention about the discrepancies and that the contractual value was incorrect. She contended that the contributions from 31 May 2022- 30 November 2022 were correct, but the applicant owed her backpay for the period July 2021-April 2022.

[11] In response to the Employee's complaint, the Fund submitted that the Employee had erroneously used the gross percentage instead of the net percentage when calculating the values she claimed were owed to her by the applicant. In terms of the rules of the Fund, as detailed on the benefit statement, the costs are to be deducted from the gross percentage in order to reach the correct net value. The Fund submitted that the net contributions made by the applicant for the period July 2021 to April 2022 based on 8.5% pensionable salary are R 6654.10.

[12] The Fund further submitted that the net contributions made by the applicant for the period July 2021 to April 2021 based on 14.8% pensionable salary are R13 363.60. The Fund provided a contribution schedule reflecting the contributions made from July 2021 to November 2022. On 30 November 2022, the Employer terminated her employment with the applicant, and she selected to preserve her funds in the Old Mutual Superfund Preserver Provident Fund.

### **ADJUDICATOR'S DETERMINATION**

[13] In its determination, the Adjudicator found in relation to whether the Employee was timeously registered with the Fund:

- a. That the Employee had commenced employment with the applicant on 17 May 2021 and she was only registered with the Fund on 1 July 2021.
- b. In terms of rule 5.2 of Membership Fund Rules, membership of the Fund throughout the period of employment shall be a condition of employment for all persons or classes specified who enter the employment of the participating employer on or after the participation date.
- c. As the Employee commenced employment after the applicant's participation date, it was a condition of her employment that she is registered with the Fund in June 2021 as she commenced employment in May 2021. Accordingly, the applicant failed to timeously register the Employee in terms of Rule 5.2 of the Fund.

[14] In its determination, the Adjudicator found in relation to the payment of contributions *inter alia*:

- a. That contributions made by the applicant were made at the correct rate of 8.5% for July 2021 to April 2022.
- b. The error in terms of placing the Employee in the incorrect category did not affect the contribution rate made to the Fund on her behalf. However, there are outstanding contributions for June 2021 as contributions were only received for July 2021 to November 2022.
- c. The Adjudicator accordingly found that the applicant did not pay all contributions to the Employee and rendered its order accordingly.

## **ISSUES FOR RECONSIDERATION**

[15] The issues before this Tribunal are two-fold:

- a. Whether the applicant has failed to timeously register the Employee as a member of the Fund. The Adjudicator found that the Employee should have been registered in June 2021 as she commenced employment on 17 May 2021. The applicant contends otherwise as it produced an email where the Employee herself only elects to join the Fund on 08 July 2021, which election was immediately actioned upon by the applicant.

b. Whether the contributions made by the applicant for the period of the Employees employment were correct and at the correct rate. The Adjudicator found that the contributions were not made by the applicant for June 2021. The applicant contends that the Employee already received the contribution as income and that Fund contributions were allocated for May 2021 and June 2021.

## **ANALYSIS AND DISCUSSION**

[16] There is no dispute that the Employee was employed for the period 17 May 2021 to November 2022.

[17] In its determination, the Adjudicator correctly referred to the Fund Rules and the manner provided for when an employer must register an employee with the fund. The applicant however made the submission with reference to an email addressed by the Employee herself that she had only on 08 July 2021, elected to join the Fund.

[18] This Tribunal is of the view that the applicant would not have been obliged to register the Employee with the Fund upon her commencement of employment on 17 May 2021 as she clearly was already registered with another fund at the time.

[19] If one has regard to the words of the email from the Employee, she only elected on 08 July 2021 to become a member of the Fund. Her email states:

*"I have decided to join the provident fund as per the company option.*

*I do have a fund with MIBFA that I still need to cancel. Would this affect starting a new fund?"*

[20] This Tribunal is of the view that it is clear from the contents of the Employees email that she was well aware of her options to join the Fund and only chose to do so on 08 July 2021.

[21] The Tribunal accordingly finds that the applicant was not obligated to register the Employee with the Fund prior to 8 July 2021. Accordingly, the order of the Adjudicator at paragraphs 6.1.1 falls to be set aside.

[22] Insofar as the second issue is concerned and the contributions made by the applicant are concerned, it is clear that the applicant did make contributions towards the Employee at the correct rate of 8.5%. The Fund correctly validated the Employee's payslip for the incorrect period.



[23] This Tribunal agrees with the submissions made by the Fund in its correspondence to the Employee, that she erroneously used the gross percentage to value her claim as opposed to the net percentage.

[24] In terms of Funds Special Rules:

*“PLEASE NOTE: The gross percentage quoted above must be reduced by the premiums required for the unapproved risk benefits (not FUND benefits but benefits which are promised to each MEMBER by the PARTICIPATING EMPLOYER), to determine the **net** PARTICIPATING EMPLOYER contribution in terms of the MASTER RULES which must be credited to the MEMBER ACCOUNTS of this SUB-FUND.”*

[25] Based on the above rules of the Fund, this Tribunal cannot align itself with the calculations made by the Employee where she claims she is owed an amount of R 6709.50. Her calculations are incorrect and based on gross percentage instead of net percentage figures.

[26] Furthermore, this Tribunal cannot agree with the findings of the Adjudicator that the applicant was required to reimburse the Employee for contributions which it failed to make for June 2021, as the Employee was clearly not a part of the Fund during this time as she elected to only join the Fund in July 2021.

[27] We accordingly find that the contributions made by the applicant to the employee were made at the correct rate of 8.5% pensionable salary based on Category 2 for July 2021 to April 2022. The error in placing the Employee on the incorrect Category did not affect the contributions made.

[28] Furthermore, if one has regard to the Employee's salary slips for the period May 2021 and June 2021, when she was not a member of the Fund, the applicant compensated the Employee for the Retirement Contribution in the amount of R459.52 for May 2021 and R 905.25 for June 2021.

## **FINDINGS**

[29] The Tribunal is therefore of the view that the Adjudicator erred in its determination that the Employee was entitled to be placed on the Fund from 17 May 2021 and that the applicant was required to submit the outstanding contribution schedule in respect of the Employee for June 2021 to the Fund to reimburse the Employee for June 2021.

## **ORDER**

1. The determination and order of the Adjudicator dated 31 January 2024 is set aside and the matter is remitted to the Adjudicator for reconsideration.

SIGNED ON BEHALF OF THE TRIBUNAL ON THIS THE 13<sup>th</sup> DAY OF AUGUST 2024.

*A Saldulker*

Adv A Saldulker

For self and on behalf of LTC Harms (Chair)