

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: PFA51/2023

In the matter between:

MAXI PHUMELELA SECURITY (PTY) LTD

APPLICANT

and

WINNIE NOTHEKO KALENI

FIRST RESPONDENT

PRIVATE SECURITY SECTOR PROVIDENT FUND

SECOND RESPONDENT

THE PENSION FUND ADJUDICATOR

THIRD RESPONDENT

Summary: The matter involves an employer's failure to timeously register as a participating employer with the fund, to timeously register a former employee as a member thereof and pay all her provident fund contributions to the fund.

DECISION

- 1 The applicant, Maxi Phumelela Security (Pty) Ltd, is an employer in the private security sector who applies for reconsideration in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act") against the Pension Funds Adjudicator's (PFA's)

determination in terms of section 30M of the Pensions Funds Act, 24 of 1956 (“the Pension Funds Act”) made on 20th May 2021.

2 The present application also included an affidavit where the employer purportedly applies for condonation, submission of further evidence and the suspension of the determination by the PFA. The latter application for suspension of the PFA determination was dismissed by this Tribunal in an order dated 7th of September 2023¹.

3 The first respondent, Ms Kaleni, a former employee of the applicant until 28 November 2019, submitted a complaint on 17 November 2020 with the third respondent, the Pension Funds Adjudicator (PFA) about the amount of her withdrawal benefit paid to her by the Fund.

4 In its comprehensive determination, the PFA identified the issues as largely concerning the failure of the employer to timeously register as a participating employer with the Fund, and to timeously register the complainant as a member thereof and pay provident fund contributions on her behalf.

5 Despite having been given the opportunity to make any submissions to the PFA, the employer, who is the applicant in this application for reconsideration, failed to do so.

6 The PFA in its determination states that the employer commenced business on 24 January 2001 and is still in business. The employer became a participating employer in the fund in

¹ Part A of the record at pages 23-33.

July 2007, in terms of the National Bargaining Council for the Private Security Sector (NBCPSS) Main Collective Agreement. The fund commenced on 1 November 2002. The PFA found that the employer ought to have registered as a participating employer in the fund on 1 November 2002 when it commenced business and its failure to do so rendered the employer non-compliant with the rules of the fund.

- 7 It is common cause that the complainant commenced her employment with the employer on 11 March 2003 and only became a member of the fund on 1 July 2007. The complainant exited in November 2019 and the last contribution she made was in December of that year. It is also worth mentioning that the complainant was paid a withdrawal benefit of R 46 845.08 representing provident fund contributions paid on her behalf by her employer for the period July 2007 to January 2008 and November 2011 to December 2019.
- 8 It is further common cause that the employer did not register the complainant (first respondent) as a member of the second respondent's fund for the periods September 2003 to June 2007 and February 2008 to October 2011. The PFA found that the employer owed contributions on behalf of the first respondent from the period identified above and that such a default constituted breach of the rules of the fund; as well as section 13A of the Pension Funds Act.
- 9 In its detailed determination, the PFA found that the employer underpaid contributions. That was so because the employer did not pay contributions at the required 7.5% rate to the fund in line with the rules of the fund. The PFA ordered the fund to reconcile the contribution payments made for the periods July 2007 to January 2008 and November 2011 to December 2019 and advise the employer of the outstanding amount in that regard.

- 10 Pursuant to the order of the PFA, the employer was ordered to submit all outstanding contribution schedules to the fund to facilitate the computation of the complainant's outstanding contributions, within five weeks of the determination.
- 11 On this score, it is important to also note that it has been three years since the PFA determination was made. The employer applies for reconsideration application on a determination made on 20 May 2021. The employer states that it only became aware of the determination on 23 May 2023 and filed its application before this Tribunal on 28 August 2023. The FSR Act provides that a reconsideration application must be filed within 60 days after the employer was notified of the decision. In the present case, that was not done and there are no submissions made by the applicant which deal with this delay. Although the reasons advanced by the employer for its late filing of the application for reconsideration are weak, the merits of the application are even weaker. Put differently, even if one were to condone the employer's late filing, there is no merit in the application for reconsideration. The employer could not explain its failure to timeously register the complainant. Worse still, the employer failed to make any submissions to the PFA despite having been invited to do so. In my view, the employer's failure to proffer any version to the PFA is fatal to its case.
- 12 The above being the case, the PFA properly assessed the merits of the complaint before it and reached a correct conclusion. On the objective consideration of the facts, the employer was obliged to register as a participating employer in the fund on 1 November 2002 when it commenced business and its failure to do so rendered it non-compliant with the rules of the fund. The employer owed contributions on behalf of the first respondent from the period identified by the PFA in paragraph 6 of the PFA determination and that such a default

constituted breach of the rules of the fund; as well as section 13A read with Regulation 33 (1) of the Pension Funds Act.

13 As a result, the application for reconsideration stands to fail.

14 The following Order is made:

ORDER: The reconsideration application is dismissed.

Signed on behalf of the Tribunal on 22 December 2023.

A handwritten signature in black ink, appearing to be 'Zama Nkubungu-Shangisa', is written over a light gray grid background.

Zama Nkubungu-Shangisa (with Judge Harms).