

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: PFA97/2019

In the matter between

THE MUNICIPALITY GRATUITY FUND

Applicant

And

THE WEST RAND DISTRICT MUNICIPALITY

1st Respondent

PENSION FUNDS ADJUDICATOR

2nd Respondent

SUMMARY: Reconsideration of determination by PFA – equitable jurisdiction – limits

DECISION

1. This is an application under sec 230 of the Financial Sector Regulation Act 9 of 2017 for the reconsideration of a determination made by the Pension Funds Adjudicator (the PFA) pursuant to a complaint by the applicant, the Municipality Gratuity Fund, against the West Rand District Municipality, the employer of members of the Fund.
2. The complaint is dated 11 February 2019, and the determination of the PFA was made on 26 September. The Fund applied for reconsideration on 25 November,

the PFA filed an explanatory note to which the Fund responded during February 2020.

3. The Municipality is in default and the Fund waived its right to a public hearing, something to which the PFA consented, and it was agreed that the application would be decided on the papers as filed.
4. The complaint was made under sec 30A(3) of the Pension Funds Act, 1956 (the PFA), and the complaint itself is one which is covered by the definition of “complaint” in sec 1 of the PFA:

“‘complaint’ means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging - (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund”.

5. The complaint is about the non-payment of interest on late payment of pension fund contributions. The complaint in specific terms relies on the provision of sec 13A(7), the terms of which are reflected in the Fund rules.
6. For context, fuller reference to the terms of sec 13A ought to be made. The provision applies “notwithstanding any provision in the rules of a registered fund to the contrary.” In this case the rules conform to the provisions of the PFA.
7. Sub-section (1) places an obligation on the employer of any member of a fund to pay to the “fund in full” the member’s contribution deducted from the member’s remuneration and any contribution for which the employer is liable in terms of those rules.

8. Any contribution to a fund in terms of its rules, including the one referred to, must be paid to the fund not later than seven days after the end of the month for which the contribution is payable.
9. As said, the complaint relates to ss (7), which requires that “interest at a rate as prescribed shall be payable from the first day following the expiration of the [seven day] period in respect of which such amounts were payable on and not paid.”
10. This is not on the face of it a penalty provision, which is contained in sec 37¹ – it defines the date from which the employer is deemed to be in mora – although the regulations may give another impression.² (The Authority might reconsider the rationality and proportionality of the prescribed rates.)
11. The common cause facts are that the Municipality failed to pay pension contributions within the prescribed period, and that interest accrued in terms of ss (7) amounting to R103 894.79 as at 31 December 2018. The failure to pay the arrears interest led to the complaint in which the Fund requested a determination for payment of that amount together with interest thereon, presumably, under sec 30N of the PFA. (Interest under sec 30N is a matter of discretion for the PFA but interest under ss (7) keeps running.)
12. Although ss (8) and (9) create personal liability for certain categories of persons in the event of non-compliance with the payment duty, this liability is not primary and does not displace the liability of the employer to pay the contributions and

¹ Any person who - (a) contravenes or fails to comply with [section 4, 10, 13A, 13B](#) or [31](#) - . . . is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

² GN 397 of 12 May 2010: Rate of interest payable on amounts and values in terms of section 13A (7) (*Government Gazette* No. 33182).

interest. The PFA directed the attention of the Fund to these provisions and said that the Fund should use its available legislative tools to ensure compliance on the part of the Municipality. However, there is no explanation as to how this should be done, it does not form part of the order issued and is incompatible with the order which, as will be shown, requires an agreement to reduce the interest due. In the circumstances of this case it would be inappropriate to rely on the personal liability provisions.

13. The circumstances are these. The Municipality has been unable to pay its debts since May 2018. It was placed under administration sometime during 2019 as per sec 139(5)(a) of the Constitution. One can guess who or what is responsible for the insolvency of the Municipality: non-payers, the Council, the management team, the employees, the economy, the social conditions?
14. In any event, the only “excuse” or defence the Municipality has for late payment of its contributions in terms of ss (1) and subsequent failure to pay the legal interest in terms of ss (7) is its financial condition and the consequent provincial government administration. These are not, as the PFA accepted, grounds for not paying.
15. The PFA then decided to have use her “equitable jurisdiction” to order the Fund – not the Municipality – to conclude a settlement agreement with the Municipality in terms of which the parties should agree on, apparently, another lower (non-statutory) rate or amount of the interest, in respect of the Municipality’s contribution (apparently overlooking the fact that the Municipality kept the members’ contribution illegally and interest-free for its own purpose). Thereafter

the Fund has to recalculate the interest and the Municipality must within one week of the computation pay the reduced amount.

16. The equitable jurisdiction of the PFA is derived from sec 30A of the PFA. It states that the main object of the PFA is to dispose of complaints, inter alia, lodged in terms of section 30A(3) of the Act. In disposing of such complaints the PFA “must”
 - (a) apply, where appropriate, principles of equity; (b) have regard to the contractual arrangement or other legal relationship between the complainant and any financial institution; (c) have regard to the provisions of this Act; and (d) act in a procedurally fair, economical and expeditious manner. (Items (b) and (d) do not arise.)
17. It must be borne in mind that any determination of the PFA has the force of a civil judgment of the appropriate court and that a warrant of execution may be issued to enforce the determination.
18. A question that occupied the mind of the PFA is what is meant by “principles of equity”, referring to some English textbook on English law of equity and trusts. As Bryan A Garner *A Dictionary of Modern Legal Usage* 2 ed states, “**equity** is a CHAMELEON-HUED WORD whose senses have never before been adequately broken down.” He identifies 13.
19. In English law, it refers to a system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law.³ In civil law, such as Roman Dutch law, it is the method of deciding cases where the

³ But, as was said INNES, CJ in *Kent v Transvaalsche Bank* 1907 TS 774); *Weinerlein & Goch Buildings* 1925 AD 295 our courts do not administer a system of *equity* as distinct from a system of law but sing the word *equity* in its broad sense, courts are always desirous to administer *equity*; but can only do so in accordance with the principles of Roman-Dutch law.

positive law is absent or ambiguous by natural law or the inferred intention of the legislature. And in ordinary language it means the quality of being equal or fair; fairness or impartiality; even-handed dealing etc.

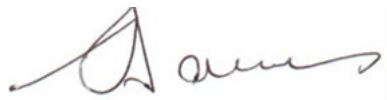
20. It is not necessary – and it would be presumptuous – to try and define what is or what is not equitable in any particular case because that is not, in the view of this Tribunal, the pertinent issue.
21. There is this primary problem with the exercise of an equitable jurisdiction in this case. The PFA may only use it in “an appropriate case” but the PFA, nevertheless, “must have regard to the provisions of the Act”. An equitable jurisdiction cannot override statute. The statute sets the obligation to pay interest and the rate – a provision to which the PFA “must have regard”.
22. Using an equitable jurisdiction to overrule a statutory provision cannot be appropriate and it is inconceivable that a tribunal may disregard the mandatory terms of the PFA. Reference may be made for an analogy to *Minister of Home Affairs v Eisenberg & Associates: In Re Eisenberg & Associates v Minister of Home Affairs & Others* 2003 5 SA 281 (CC) paras 68-70. In sum, the PFA is bound by statute law in the exercise of her equitable jurisdiction.
23. There is another reason why the determination cannot stand and that relates to the “principle” of equity which the PFA sought to apply. Is the principle that local authorities in distress are not bound by the PFA, or does it apply to all other bodies in distress such as SOEs and, say, companies under business administration? Does it only apply to the interest provision (7) or could it extend to the contribution provision in ss (1)? Is non-compliance with provisions of the PFA, which are

criminalised, on an administrative level negotiable and capable of settlement *inter partes*? Whatever the answer is, principle was not articulated.

24. The third reason why the determination cannot stand is because it is not capable of enforcement. The Fund is instructed to settle with the Municipality. Even if one assumes that this order applies to the Municipality, the question is how should or could any deadlock be broken. Obviously not by execution of the order as intended by the PFA. In this respect the determination differs from the order in *Makate v Vodacom (Pty) Ltd* 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) para 107 – it is public knowledge that the matter has not been solved to date.
25. This does not mean that the PFA is powerless in circumstances such as these. She could, for instance, have requested the Municipality for a payment plan and, having considered it, make a suitable payment order. It is, however, not the function of the Tribunal to be prescriptive.

ORDER: The determination is set aside and referred back to the PFA for reconsideration.

Signed at Pretoria on 18 May 2020

A handwritten signature in black ink, appearing to read 'LTC Harms', enclosed in a thin black rectangular border.

LTC Harms (deputy chair)

