

THE FINANCIAL SERVICES TRIBUNAL

Case No: PFA24/2023

In the matter between:

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| X-SPAN LOGISTICS CC | Applicant |
| and | |
| M A LUKHAIMANE – PENSION FUNDS ADJUDICATOR | 1 st Respondent |
| PENSION FUND ADJUDICATOR | 2 nd Respondent |
| TRANSPORT SECTOR RETIREMENT FUND | 3 rd Respondent |

Tribunal: Adv W Ndinisa (Chair), Adv N K Nxumalo and Adv P Long

For Applicant: Mr Zehir Omar of Zehir Omar Attorneys

For Third Respondent: Mr Lennon of Lennon Moleele and Partners

Date of hearing: 29 November 2023

Date of decision: 30 January 2024

Summary: Section 13A(2) of the Pension Funds Act 24 of 1956 – minimum information to be furnished to the fund by the employer with regards to payment of contributions made by the employer.

DECISION

1. The applicant applies for reconsideration of a determination by the Pension Funds Adjudicator (“the Adjudicator”) dated 30 March 2023. The Adjudicator is cited as the second respondent and purportedly the decision-maker as the first respondent. We will refer to both the first and

second respondent as the “Adjudicator”.

2. The third respondent (“the Fund”) is a registered pension fund in terms of the Pension Funds Act 24 of 1956. (“the Act”). The applicant, as an employer, participates in the Fund by virtue of the fact that its employees are members of the Fund.
3. The Fund approached the Adjudicator with a complaint on or about 11 August 2022. Further submissions relating to the complaint were submitted by the Fund on 16 September 2022 and 24 March 2023.
4. The complaint concerns the failure of the applicant to pay contributions and submit contribution schedules to the Fund.
5. The Fund invoked the provisions of section 13A(8)(a) of the Act and sought that the director of the applicant be held personally liable for the payment of contributions to the Fund. This aspect of the matter is not before this Tribunal.
6. The applicant made its submissions to the Adjudicator on 16 November 2022 and on 15 November 2022, in response to the Fund’s complaints.
7. After having considered the submissions of the parties, the Adjudicator ordered, amongst other things:
 - 7.1 That the applicant and its director pay to the Fund the outstanding contributions of R794 129.24 for the period July 2020 to June 2022 within four weeks of the determination; and

- 7.2 that the Fund recalculate the late payment interest (“the LPI”) on the R794 129.24 at the rate prescribed in terms of section 13A(7) of the Act from the date set out in the said section until the date of final payment and to provide the recalculated LPI to the applicant and its director for payment.
8. The impugned determination is challenged by the applicant on, amongst other things, the following basis: that *(i)* there is no rational explanation setting out the reason how the amount of R769 612.12 is arrived at; *(ii)* no reasons in the determination for rejecting the defence of prescription; and *(iii)* there are no reasons substantiating the order in the determination.
9. The Fund submitted written responses to this Tribunal, resisting the application for reconsideration. When the Fund made its initial submissions to the Adjudicator, it stated that the applicant is liable for arrear provident fund contributions in the estimated amount of R769 612.12. It transpired during the hearing of the matter that the applicant took issue with the fact that the initial amount is an estimated amount. This aspect of estimation of the amount will be addressed later in this decision.
10. Further, the Fund submitted that the reason for estimation of the arrear provident contribution is the failure of the applicant to comply with section 13A(2) of the Act, which requires minimum information to be submitted to regarding payment contributions made by each employer in terms of

section 13A(1) of the Act.

11. Furthermore, it is the submission of the Fund that after it lodged its complaint with the Adjudicator, the applicant thereafter complied with its statutory obligations in terms of section 13A(2) of the Act by submitting the outstanding contribution schedules. During the subsequent submission by the applicant, the Fund had access to payroll schedules which enabled the Fund to calculate the actual arrear provident fund contributions and the LPI for the relevant period.
12. Further, the Fund submitted to the Tribunal that the Adjudicator made her determination based on the actual, not estimated, arrear contributions, being the amount of R794 129.24. This is in line with the recount of the Adjudicator's determination.
13. The contention of the applicant regarding the estimated amount of R769 612.12 does not assist or advance its case for the reasons that :*(i)* the order and the determination refer to an actual amount, being R794 129.12, not the estimated amount; and *(ii)* the calculation of the actual amount is based on payroll schedules received by the Fund from the applicant. For these reasons, the contention of the applicant is not sustainable.
14. The applicant contends that no reasons appear in the determination for rejecting the defence of prescription. The applicant is referring to the LPI (late payment of interests) for March 2018 to August 2019.

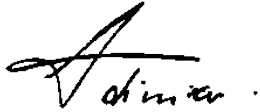
15. In response to the defence of prescription raised by the applicant, the Fund submitted that the Adjudicator examined the facts of the complaint relating to prescription. The Adjudicator referred to the submissions of the Fund that the dates of deposits of the arrear contributions for the period of March 2018 to June 2020 occurred on various dates from 12 February 2020 to June 2021.
16. Further, the Adjudicator referred to the submission of the Fund that since the contributions for the period of March 2018 to June 2020 were paid on various dates, the cause of action for the payment of LPI arose on the date of receipt of contribution. It is not clear, in our view, how the contention of prescription can be sustainable in light of the Fund's submissions and also in light of the order in the impugned determination.
17. The Adjudicator ordered the Fund to recalculate the LPI on the amount of R794 129.24 (for the period of July 2020 to June 2022). Therefore, the contention of prescription is not, in our view, sustainable as it does not deal with this period.
18. The legal representative of the applicant submitted during the hearing of the matter that it is not the contention of the applicant that it is not obliged to pay its contributions to the Fund. However, it is contesting the extent of the amount to be paid to the Fund. The Fund's contention is that the amount to be paid is based on the payroll schedules received from the applicant. We are of the view that the contention of the applicant is not sustainable based on the record before the Tribunal.

19. For the above stated reasons, there is no sound basis to interfere with the determination and the order of the Adjudicator. Therefore, we hold that the application for reconsideration should be dismissed.
20. It is the Fund's contention that this Tribunal should show its utmost displeasure by awarding costs against the applicant for the reasons, amongst other things, that the applicant cannot deny that it failed to pay the contribution of its employees and the prejudice suffered by the non-payment of the of the contribution of the employees continues. The Fund contends that the application constitutes an abuse of the Tribunal process.
21. Section 234(2) of the Financial Sector Regulation Act 9 of 2017 provides that this Tribunal may, in exceptional circumstances, make an order that a party to the proceedings on an application for reconsideration of a decision pay some or all costs reasonably and properly incurred by the other party in connection with the said proceedings.
22. We find no exceptional circumstances for an order that the applicant pay the costs incurred in this matter. Lack of merits in the matter, without more being submitted, should not, in our view, be the basis for the award of costs.

ORDER:

(a) The application for reconsideration is dismissed.

Signed on the 30th day of January 2024

A handwritten signature in black ink, appearing to read 'Adv W Ndinisa', written over a horizontal line.

Adv W Ndinisa (Chair of the panel)