

THE FINANCIAL SERVICES TRIBUNAL

Case No: **PFA30/2019**

In the matter between:

KEY MOVES (PTY) LTD

Applicant

and

PENSION FUNDS ADJUDICATOR

First Respondent

MR MOKOENA

Second Respondent

TRANSPORT SECTOR RETIREMENT FUND

Third Respondent

THE SALT EMPLOYMENT BENEFITS (PTY) LTD

Fourth Respondent

Tribunal: H Kooverjie (chair), G Madlanga, W Ndinisa

Hearing: 7 August 2019

Decision: 15 August 2019

Summary: Reconsideration of the Pension Fund Adjudicator's determination on failure by the Employer to comply with Section 13A of the Pension Funds Act 24 of 1956 and the Fund's Rules.

DECISION

1. This Tribunal was required to reconsider the decision of the Pension Funds Adjudicator (“**PFA**”) (the first respondent) in this matter. The PFA in its determination essentially found that the applicant failed to comply with section 13A of the Pension Fund Act in that it *inter alia* failed to submit schedules as well as make contributions on behalf of Mr Mokoena (second respondent), during the period that he was employed with the applicant.
2. The applicant based this application on essentially two main issues namely that:
 - 2.1 Mr Mokoena’s claim had prescribed and therefore the PFA was wrong in determining that the applicant was required to pay the outstanding contributions.
 - 2.2 The PFA was incorrect in finding that the applicant had an obligation in terms of the main collective agreement to report the applicant to the Bargaining Council, and register him with the Fund.
3. The Transport Sector Retirement Fund (“**The Fund**”), being the third respondent, opposed this application.
4. The Fund had however not timeously filed its response. A substantive application for condonation was filed by the Fund which considered by this Tribunal and we were satisfied that good cause had been shown. The applicant further did not oppose the said application. In light thereof, condonation is granted by this Tribunal for the late filing of its response to the application.
5. It is necessary to summarize the salient facts in order to contextualise whether

the PFA's determination was justified. Mr Mokoena's period of employment with Key Moves, ("**the applicant**") was from 1 December 2011 until 2 January 2018. Mr Mokoena was entitled to a withdrawal benefit upon the termination of his employment. It is common cause that the withdrawal benefit was paid to him on 14 June 2018, in the amount of R59,920.76.

6. Mr Mokoena's complaint with the office of the PFA was that he was not registered timeously as a member of the Fund and that he had not received his full benefits.
7. It appears that Mr Mokoena's total benefit amounted to R65,001.11. From the calculations, an amount of R5,080.35 thereof was taxed, leaving him with an amount of R59,920.76.
8. It was not disputed that between December 2011 to June 2014, Mr Mokoena was not registered with the Fund. The applicant however proffered an explanation as to why it did not timeously register the applicant with the Fund.
9. The applicant in its papers submitted that due to various uncertainties, particularly on the issue whether the National Bargaining Council for Road Freight and Logistics Industry ("**NBCRFLI**") had the capacity to handle provident fund contributions or not. It was on this basis that the applicant did not deduct any provident fund contributions from the second respondent's salary during the 2011 to 2014 and consequently not making contributions to the Fund.
10. We also note from the record that Mr Mokoena failed to provide proof to the PFA that deductions were made from his salary prior to July 2014 in respect of the

Fund contributions.

A REGISTRATION AND CONTRIBUTION TO THE FUND

11. The PFA's determination was that Key Moves should have registered Mr Mokoena timeously as a member of the Fund and was required to pay all the contributions on his behalf since the inception of his employment in 2011.

12. The order in the determination is set out as follows:

“6.1.1 The first respondent is ordered to register the complainant as its member from 1 December 2011 to 2 January 2018, within two weeks of this determination;

6.1.2 The third respondent is ordered to submit all outstanding contribution schedules for the period December 2011 to October 2013, and December 2013 to June 2014, to the first respondent in order to facilitate the computation of the complainant's outstanding contributions, within three weeks of this determination;

6.1.3 Should the third respondent fail to comply with paragraph 6.1.2, the first respondent is order to reconstruct the complainant's contribution schedules based on the information already in its possession within two weeks of the third respondent's favour to submit the schedules;

6.1.4 The first respondent ordered to compute the arrear

contributions due by the third respondent, together with late payment interest owed by the third respondent in terms of section 13A(7) of the Act, within one week of receiving the contribution schedules in terms of either paragraph 6.1.2 or 6.1.3 (whichever is applicable);

6.1.5 The first respondent is ordered to transmit to the third respondent its computations in paragraph 6.1.4, within three days of completing them;

6.1.6 The third respondent is ordered to pay to the first respondent the arrear contributions together with late payment interest as computed in accordance with paragraph 6.1.4, within one week of receiving the computations from the first respondent;

6.1.7 The first respondent is ordered to pay the complainant his outstanding withdrawal benefit as computed in paragraph 6.1.4 above, less any deductions permitted in terms of the Act, within one week of receiving payment from the third respondent; and

6.1.8 The first respondent is ordered to provide the complainant with a breakdown of his withdrawal benefit within one week of effecting payment in paragraph 6.1.7 above.”

13. In considering the explanation by Key Moves for not registering timeously, the PFA found the Bargaining Council's Funds which were previously exempted from registration, were in fact obliged to register with effect from 1 January 2008.

Cognisance was taken of the fact that the Fund in issue was provisionally registered as a pension fund on 25 April 2008, and finally registered on 27 November 2008.

14. Prior to February 2014, the main collective agreement of the Provident Fund and the main collective agreement of the NBCRFLI, required that all employers within the industry contribute to the Fund. The applicant did not provide any evidence that it was exempted by the NBCRFLI from participating in the Fund during December 2011 to June 2014. During this period therefore, it was by law obliged to have registered Mr Mokoena as a member of the Fund.

15. From February 2014, the main collective agreement expired and was not renewed. The main collective agreement of NBCRFLI was amended and required employers to contribute to a fund and not only to the third respondent. Therefore, it could not be gainsaid that the applicant should have registered Mr Mokoena as a member of the Fund on the commencement of his employment. It was compulsory for employers like Key Moves, operating in the road freight and logistics industry to register with the Fund and pay contributions to the Fund in line with the main collective agreement and the rules of the Fund. The only exception applied to those who were exempted. The applicant was not exempted from participating in the Fund. The fact that Mr Mokoena did not approach the applicant or failed to report the applicant to the NBCRFLI for his timeous registration does not absolve the applicant from its duty to register Mr Mokoena.

16. The relevant legislative provision is section 13A of the Pension Funds Act (“**PFA**”) which places certain obligations on the “employer”. It is trite that the

applicant has a duty by virtue of the provisions of section 13A(1)(a) and (b) of the Pension Fund Act, and the rules to pay contributions and submit schedules to the Fund indicating on whose behalf payment is being made. Key Moves as the employer had a statutory duty to pay out the benefits to the members.

17. We note from rule 2.3 of the Fund's Rules that the Fund is compulsory for employees or members of the National Bargaining Council for Road Freight and Logistics Industry ("**NBCRFLI**").
18. By virtue of rule 5 of the Fund Rules, a member is required to make a contribution to the Fund, and the employer is required to contribute to the Fund.
19. Section 13A(3)(a)(i) states that:

"such contributions must be made directly into the fund's account."

Section 13A(3)(a)(ii) states that:

"the contributions must be paid directly to the fund in such a manner as to have the fund receive the contributions no later than seven days after the date of that month for which contributions are payable."

20. It is common cause that the applicant commenced with payment of the contributions in respect of Mr Mokoena from 30 November 2013. Having considered the submissions from both parties we find that the aforesaid prescribed legislative requirements should have been adhered to by the employer. As far back as 2008, the Fund was registered by virtue of Section 13A

and the Rules. The applicant had a statutory responsibility to deduct contributions from the employee's salary, pay such contributions to the Fund and moreover keep proper records therefor.

21. This Tribunal is mindful that it does not have unfettered discretion to interfere with decisions of the PFA. It can however intervene if such decisions are premised on legally or factually incorrect findings. In this instance we have no basis to interfere with the determination of the PFA and its findings.

B PRESCRIPTION

22. The second ground upon which this application for reconsideration is based is on the fact that Mr Mokoena's claim in respect of the outstanding amount had prescribed.
23. It was argued that Mr Mokoena had an obligation to report the contravention on the part of his employer to the Bargaining Council within 26 weeks of such contravention having occurred. He failed to do so.
24. The applicant submitted that Mr Mokoena's outstanding contributions for the period December 2011 to June 2014 had prescribed. A period of three years had lapsed since the complainant only lodged his complaint on 8 June 2018.
25. In this regard we were referred to section 30I of the PFA, which imposed a certain time limit with regard to lodgement of complaints before the Pension Fund Adjudicator, which states that:

“(1) the Adjudicator shall not investigate a complaint with 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 68 of 1969) relating to a debt apply in respect of the calculation of the three-year period refer to in sub-section 1(1).”

26. In applying the aforesaid provision, the PFA is precluded from investigating and adjudicating any complaint if the act or omission to which it relates occurred more than three years prior to receipt of a written complaint in that regard.

27. Moreover, the applicant argued that Mr Mokoena was aware of the debt since no deductions were made for his salary by Key Moves during 2011 to 2013. Section 12 of the Prescription Act, stipulates that:

“Prescription only commences to run as soon as the debt is due.”

28. Section 12(3) of the Prescription Act further stipulates that a debt shall not be deemed to be due (and recoverable) until the creditor has knowledge of the facts from which the debt arose.

29. It is trite that a debt would become due when Mr Mokoena became aware of the debt due to him by the applicant. The difficulty raised, and which we took cognisance of, by counsel representing the Fund was that Mr Mokoena should have been given an opportunity to advance his submissions setting out the circumstances and in particular when he became aware of the debt.

30. Since the issue of prescription was not raised with the office of the PFA it would be premature for this Tribunal to adjudicate on this issue. The issue of prescription was raised for the first time in this application. In fairness Mr Mokoena's response should have been placed before the PFA in order for that office to make a determination on this issue of prescription. We therefore find that the issue of prescription must be properly ventilated before the decision maker if the applicant wishes to persist therewith.
31. In the premises this application for reconsideration is dismissed.

SIGNED at **PRETORIA** on this **15th** day of **AUGUST 2019** on behalf of the Panel.



ADV H KOOVERJIE SC

With the Panel consisting also of:

G Madlanga

W Ndinisa