

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)



CASE NO: 62575/2013

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED.
.....	.....
DATE	SIGNATURE

4/2/2014

In the matter between:

GHANDI SQUARE

PROPERTY HOLDINGS (Pty) Ltd

APPLICANT

and

THE PENSION FUND ADJUDICATOR

1<sup>ST</sup> RESPONDENT

T J MOKOENA

2<sup>ND</sup> RESPONDENT

THE PRIVATE SECURITY SECTOR

PROVIDENT FUND

3<sup>RD</sup> RESPONDENT

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**J U D G M E N T**

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TWALA, AJ

1. This is an application for review and to set aside the decision of the first respondent, The Pension Fund Adjudicator, handed down on the 22 August 2013 in the complaint brought against the applicant and the third respondent by the second respondent.
2. The applicant brought this application in terms of Section 30P of the Pension Funds Act 24 of 1956 against the following award or order of the first respondent:
  - “6.1.1 the Second Respondent is ordered to register with the First Respondent as a participating employer from 1<sup>st</sup> September 2002 within two weeks of this determination;
  - 6.1.2 the Second Respondent is ordered to register the Applicant as a member of the First Respondent with effect from 1<sup>st</sup> September 2004 within three weeks of this determination;
  - 6.1.3 the Second Respondent is ordered to submit all outstanding contributing schedules to the First Respondent for the period September 2004 to March 2011, in order to facilitate the

computation of the complainant's withdrawal benefit, within four weeks of this determination;

- 6.1.4 should the Second Respondent fail to comply with paragraph 6.1.3, the First Respondent is ordered to reconstruct the complainant's contribution schedule based on the information already in its possession, within four weeks of the Second Respondent's failure to submit the schedules;
- 6.1.5 the First Respondent is ordered to compute the complainant's outstanding withdrawal benefit, together with late payment interest owed by the Second Respondent in terms of Section 13A(7) of the Act, within one week of receiving the contribution schedules in terms of either paragraph 6.1.3 or 6.1.4 (whichever is applicable);
- 6.1.6 the First Respondent is ordered to transmit to the Second Respondent its computations in paragraph 6.1.5 within three days from completing them;
- 6.1.7 the Second Respondent is ordered to pay the complainant's outstanding withdrawal benefit, together with late payment interest as computed in accordance with paragraph 6.1.5 supra, to the First Respondent within one week of receiving the computations from the First Respondent; and
- 6.1.8 the First Respondent is ordered to pay the complainant his outstanding withdrawal benefit, less any deductions permitted in terms of the Act within one week of receiving payment from the Second Respondent."

3. The First Respondent filed its papers of record but did not oppose the application. The second and third respondents did not file any opposing papers.
4. It appears from the record that the second respondent, Mr TJ Mokoena, lodged a complaint with the first respondent that he commenced his employment with the applicant from the 1<sup>st</sup> March 2004 until his service was terminated on the 30<sup>th</sup> June 2012. He was a member of the Private Security Sector Provident Fund, the third respondent, by virtue of his employment. Following the termination of his employment, a withdrawal benefit became payable to him, but when he claimed his withdrawal benefit from the third respondent, he was advised that his employer, the applicant, only registered as a participating employer with the third respondent in April 2011. He wanted the first respondent to assist him to recover his money from the date of his engagement by the applicant until the date of termination of his employment.
5. In its response to the complaint of the second respondent, the applicant admitted that it only registered as a participating employer with the third respondent on the 1<sup>st</sup> April 2011 due to the fact that it was unaware of the regulations of the Private Security Industry Regulatory Authority (PSIRA). It was charged with "improper conduct" by PSIRA and a settlement agreement was entered into between the applicant and PSIRA whereby the applicant paid some penalties for its breach of the

rules of PSIRA. From the 1<sup>st</sup> April 2011 to the 7<sup>th</sup> June 2012 all its contributions were paid to the fund and were up to date in June 2012. A letter dated 26 September 2013 from the third respondent confirms that the second respondent was paid in full and final a sum of R4 450,26 which covers the period April 2011 to June 2012.

6. On the 21 August 2013 counsel for the Applicant argued this matter before this Court and because the Court needed clarification of certain issues the following order was made:
  - I. Judgement is reserved;
  - II. Applicant to file its heads of argument within 10 days of this order;  
and
  - III. The first respondent furnish reasons why her award should not be set aside within 10 days after receiving the Applicants heads of argument;
7. The first respondent responded by saying that it was *functus officio* and may not defend its determination, oppose a Section 30P application in terms of The Pension Fund Act or participate in subsequent court proceedings between the parties. It referred to several authorities in this regard.  
  
Schutz JA said the following in the case of Pretoria Portland Cement Co Ltd and Another vs Competition Commission and Others 2003 (2) SA 385 (SCA):

"It is not for judges to participate in any stage subsequent to their judgments in order to defend their decision. The place to explain a decision is in the judgment".

8. I accept the argument of the First Respondent that it is not a party to these proceedings and therefore it cannot participate in any way. Whatever reasons or clarification that may be required can be found in the reasons of her award or judgment.
9. The applicant filed a supplementary affidavit accompanying its heads of argument in compliance with the order of the 21 November 2013. The supplementary affidavit introduces a settlement agreement entered into between the applicant and the second respondent on the 15 November 2013. The material terms of the settlement agreement are as follows:

"I Tebelo Josiah Mokwena,

In the matter that I have instituted with the Pension Fund Adjudicator against Ghandi Square Property Holdings (PTY) LTD, I have accepted an ex gratia and without prejudice cash settlement of R8 000.00 (eight thousand rand).

In terms of the settlement, I hereby undertake not to enter an appearance to defend in the matter between the Pension Fund Adjudicator and Ghandi Square Property Holdings (PTY) LTD. I further undertake to advise Bianca Vaskow of Pro Bono that the matter is settled and that she is not to proceed with the intention to defend.

The cash payment will only be paid on confirmation that Pro Bono acknowledge that they will not enter an appearance to defend following a settlement between TJ Mokwena and Ghandi Square Property Holdings (PTY) LTD.

Signed at Johannesburg this the 15th day of November 2013.

10. This information only surfaced after hearing argument of this application on the 21 November 2013. It is surprising that both parties having legal representation would take it upon themselves to draft such an agreement without involving their legal representatives.
11. Because of the settlement agreement entered into between the applicant and the second respondent, applicant argues that the litigation between them has become settled and this court need not make any determination with regard thereto. Applicant argues that the remaining issues to be determined by this court are threefold:
  - I. there was non – compliance with the provisions of Section 30A (1)-(3) of the Pension Fund Act;
  - II. the Adjudicator was not empowered to consider and rule on the question whether the applicant should be held accountable for failing to timeously register as a member of the third respondent; and

III. In terms of Section 30I of the PFA the Adjudicator is barred from investigating and ruling on any such omission that took place prior to 15 April 2010 because of the time limit for the lodging of the complaints.

12. At this stage, I deem it appropriate and necessary to set out some of the provisions of the PFA which are relevant to this case:

"Section 30A provides as follow:

**Submission and consideration of complaints:**

1. Notwithstanding the provisions of the rules of any fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participates in a fund.
2. A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.
3. If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint, the complainant may lodge the complaint with the Adjudicator.

13. The literal interpretation of Section 30A above is that it creates a right to the complainant to lodge a complaint in writing with the fund or the participating employer but does not create an obligation on the part of the complainant to do so. This section is peremptory on the part of the fund or the participating employer to receive, properly consider and reply



in writing to the complaint within the specified period. It does not provide that the complainant shall lodge a complaint with the fund or participating employer but that the complainant shall have the right to lodge the complaint with the fund or the participating employer.

Therefore, the argument of the applicant that there was no compliance with section 30A of the PFA falls to be dismissed.

14. On the other hand, in the circumstances of this case, it is common cause that the complainant, the second respondent, lodged his claim for the withdrawal benefit with the third respondent and was paid based on the contributions for only three months. On enquiring as to why he was paid such a small amount as his withdrawal benefit having been in the employ of the applicant from 1 March 2002 until termination of his employment on 30 June 2012, he was advised by the third respondent that his employer, the applicant herein, only registered as a participating employer on the 1 April 2011 and contributed for only three months from that date.

15. Therefore, the complainant did lodge a complaint with the fund, though not in writing, and was given an unsatisfactory answer in that he was told his employer only registered as a participating employer in April 2011 and contributed for three months only from that date – hence he approached the Pension Fund Adjudicator for assistance. How else could he have known that his employer registered as a participating

employer in April 2011 and that the employer contributed for three months only after registering if he did not engage the fund on receipt of his withdrawal benefit.

I am of the view that in this case, there was sufficient compliance with section 30A of the PFA to found the jurisdiction required for the first respondent to entertain the complaint of the second respondent.

16. It is further argued by the applicant that for the first respondent to validly exercise its power over a complaint, the complaint must be a complaint as defined in the PFA and must be a complaint in respect of which all the jurisdictional pre-requisites to the exercise of its power as set out in the PFA must have been met.

17. The PFA defines the complaint as follows:

“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:

- (a) That a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) That the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;

- (c) That a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) That an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;  
but shall not include a complaint which does not relate to a specific complainant."

18. The rules of the Private Security Sector Provident Fund provides as follows:

1. Rule 1.5 Registration

If the registration of these rules in terms of the Act is effected later than 1 September 2002, the Rules shall nevertheless take effect from 1 September 2002.

2. Rule 3 Membership

3.1 EMPLOYER PARTICAPATION

3.1.1 Subject to Rule 3.2.7 below, all Employers in the Private Security Sector shall participate in the Fund with effect from the commencement of the fund or the commencement of the Employer's business in the Private Security Sector, whichever is the later.

3.2 MEMBER PARTICIPATION

3.2.1 Subject to Rule 3.2.7 below, each Eligible Employer shall, as a condition of employment, become a Member of the Fund with effect from the commencement of the Fund or the

commencement of the Employer's business in the Private Security Sector, whichever is the later.

19. The complaint by the second respondent is that the third respondent should assist him to get his withdrawal benefit retrospectively to the date of his employment by the applicant. He was told that his employer only registered as a participating employer on 30 April 2011 and paid for three months, i.e 30 April 2011 to 30 June 2011. This is apparent from the details in the complaint form completed by the complainant. He says "I would also like to know if the PFA can help with the remaining years".
20. It is common cause that the applicant started its business on the 24 March 2000 and only registered with the third respondent in April 2011. The second respondent was employed by the applicant from 1 March 2004 until he was dismissed from his employment in 30 June 2012.

This confirms that this is a complaint as defined in paragraph (d) of the definition of "complaint" in the PFA in that the applicant did not fulfil its duties in terms of the rules of the fund in relation to the second respondent.

The further argument tendered by the applicant herein is that it entered into a settlement agreement with PSIRA and paid the penalties for not

complying with its rules and therefore the Adjudicator was not competent to order it to register retrospectively to 1 September 2002.

This court was not privy to the contents of settlement agreement between the applicant and PSIRA nor did the applicant find it necessary to attach a copy thereof to its papers. However, it appears as follows on page 79 of the record and on paragraph 5.6 of the first respondent's award:

"the record of the misconduct proceedings against the second respondent by PSIRA and the settlement agreement connected thereto do not show that there was an agreement that the second respondent was to be allowed to register as a participating employer with the first respondent and enrol its employees as its members at a later date".

21. As indicated above, rule 1.5 of the PSSPF states that these rules shall take effect from 1 September 2002. Rule 3.1.1 states that all employers in the private security sector shall participate in the Fund with effect from the commencement of the fund or commencement of the employer's business in the private security sector, whichever is the later.

The applicant started its business in March 2000 and did not register with the fund when it came into being on 1 September 2002. The second respondent was employed by the applicant from 1 March 2004 and was not registered with the fund at the time but only in April 2011. The rules of the fund are peremptory on the part of the employer to register with the fund as a participating employer and the applicant has failed to fulfil

its duty to register as such on the 1<sup>st</sup> September 2002 and to register the second respondent in particular on the 1<sup>st</sup> March 2004 when the second respondent was employed by the applicant.

22. The excuse by the applicant that it was unaware of the regulations is not reasonable and cannot be accepted. There is a maxim in our law that "ignorance of the law is no excuse". This maxim was discussed at length by the Appellate Division, now known as the SCA in the case of *State v De Blom* 1977(3) SA 513 (A) as captured in the head note at 514E-F:

"At this stage of our legal development it must be accepted that the cliché that "every person is presumed to know the law" has no ground for its existence and that the view that "ignorance of the law is no excuse" is not legally applicable in the light of the present day concept of mens rea in our law. But the approach that it can be expected of a person who, in a modern State, wherein many facets of the acts and omissions of the legal subject are controlled by legal provisions, involves himself in a particular sphere, that he should keep himself informed of the legal provisions which are applicable to that particular sphere, can be approved."

23. It is my view therefore that there was a valid complaint before the first respondent and the first respondent was accordingly empowered to adjudicate upon the complaint.

24. I now turn to deal with the argument in relation to the provisions of Section 30I of the PFA which provides as follows:

30I Time Limit for lodging of complaints:

30I. (1) The Adjudicator shall not investigate a complaint if 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) If the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.

(3) .....

25. The second respondent was employed by the applicant from the 1<sup>st</sup> March 2004 until he was dismissed from his employment on the 30 June 2012.

Rule 7 of the PSSRA provides that:

7. Termination of Membership

7.1 Termination of Service

If a member who is not qualified to retire in terms of Rule 5 leaves service, whether of his or her own accord or dismissal or retrenchment, such a member may elect:

(a) .....

(b) .....

- (c) As a lump sum, provided that if the member fails to make such an election within such period as the trustees may from time to time decide, and if his or her employer has certified that he or she is no longer in employment with that employer, the member is deemed to have elected to receive a lump sum benefit;

26. *Section 12 of the Prescription Act, 68 of 1969 provides as follows:*

12. When prescription begins to run:

12 (1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

27. Having regard to the provisions of rule 7 of the PSSRA quoted above, in this particular case, the withdrawal benefit arose on the 30 June 2012 when the employment of the second respondent was terminated by the applicant. I am not persuaded by the argument that the second respondent should have known from the date of his employment that the



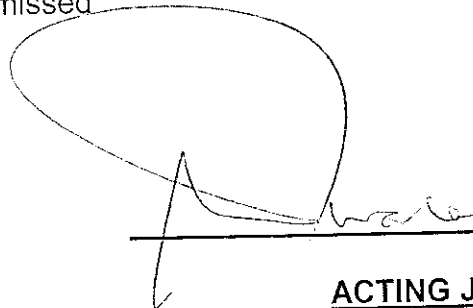
applicant did not deduct any pension money from his salary to pay over to the fund since he was not employed for the first time in the industry. The rules of the PSSRA clearly place a duty on the employer to register with the fund immediately it commences business or on the 1 September 2002, whichever is the later. Rule 4 of the PSSRA provides that the employer shall deduct the member's contribution from the salary or wages of the employee and together with the employer's contribution shall be paid, by the employer, to the Fund within 7 days of the calendar month in respect of which the contributions are payable.

In my view the claim for the withdrawal benefits of the second respondent arose when his employment was terminated on the 30 June 2012 and this is in line with rule 7 of the rules of the PSSRA.

Therefore the first respondent was correct in entertaining the complaint of the second respondent.

28. Having regard to the facts and factors relevant in this case, I therefore make the following order:

"The application is dismissed"

A handwritten signature in black ink, appearing to read 'Twala', is written over a horizontal line. The signature is stylized with a large loop at the end.

**TWALA, AJ**  
**ACTING JUDGE OF THE**  
**NORTH GAUTENG HIGH COURT**

**Representation for the Applicant:**

Counsel

Adv:

Adv

Instructed by

**Representation for respondent**

Counsel

Adv:

Instructed by: