IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 13568/2020

In the matter between: REPORTABLE

ENGINEERING INDUSTRIES PENSION FUND First Applicant

METAL INDUSTRIES PROVIDENT FUND Second Applicant

and

PIONEER MECHANICAL CC (In Liquidation) First Respondent

JOHN EDWARD NICKEL Second Respondent

Date of hearing: 24 May 2022

Judgment delivered: 3 June 2022

JUDGMENT

CARTER, AJ

INTRODUCTION

[1] As will be gleaned from the parties cited in this matter, the first respondent is currently under voluntary liquidation.[1] The second respondent is its sole member and always has been. The first and second applicants are pension and provident funds, in the engineering and metal industries respectively, who seek a money judgment, in the amount of R5 030 437.11, against the second respondent for outstanding fund contribution payments which should have been made by the first respondent.

[2] In its notice of motion the applicants sought further relief directing the second respondent to provide the applicants with fund contribution schedules, which have ostensibly been received, so I shall therefore concentrate my judgment on the relief sought in paragraph 1 above.

[3] The central issue therefore revolves around the application and interpretation of section 13A(1), read with sections 13A(7) and 13A(8) and (9) of the Pension Funds Act ("the Act").[2] For ease of reference I shall quote the sections in this judgment, starting with 13A(1):

'**Payment of contributions and certain benefits to pension funds**

(1) Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely-

(a) any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration; and

(b) any contribution for which the employer is liable in terms of those rules.'

It is acutely and unambiguously clear that an employer has a statutory obligation to pay such deductions from a members' remuneration to the pension fund that the employer is a member of. This is customary practice and subject to certain statutory time limits within which payment needs to be made, failing which appropriate criminal sanction may be imposed for failure to comply with the

[1] Since May 2020 – record page 213.
[2] 24 of 1956 as amended.

aforementioned statutory provisions.[3] There is little doubt regarding the duties of the employer, and in most cases these duties are complied with in the pension funds industry, of course with the odd exception to this general rule. An employee's pension interest is a critical nest egg, accumulated over years of service, in anticipation of the employee's eventual retirement. This is the consequence of living in a capitalist society, as opposed to a socialism society where the government to a large extent provides comforts and income upon retirement.

[4] The landscape of accountability and responsibility, regarding liability for the payment of an employee's pension fund contributions to a fund, was changed with the Legislative intervention of the Financial Services Laws General Amendment Act[4] by re-introducing criminal sanctions which will be imposed on all those who fail to comply with certain provisions of the Act including section 13A of the Act. More relevant to this matter was the introduction of sections 13A(8) and (9), as follows:

'(8) For the purposes of this section, the following persons shall be personally liable for compliance with this section and for the payment of any contributions referred to in subsection (1):

(a) If an employee is a company, every director who is regularly involved in the management of the company's overall financial affairs:

(b) If an employer is a close corporation registered under the Close Corporations Act, 1984 (Act No. 69 of 1984), every member who controls or is regularly involved in the management of the close corporation's overall financial affairs; and

(c) In respect of any other employer of any legal status or description that has not already been referred to in paragraphs (*a*) and (*b*), every person in accordance with whose directions or instructions the governing body or structure of the employer acts or who controls or who is regularly involved in the management of the employer's overall financial affairs.

---

[3] The penalty provision was set aside by Section 14 of the Financial Services Laws General Amendment Act 22 of 2008 ("FSLGA"), however the criminal sanction was reintroduced by an amendment of Section 37 of the Act.

[4] Act No 45 of 2013.

(9)(*a*) A fund to which the provisions of subsection (8) apply, must request the employer in writing to notify it of the identity of any such person so personally liable in terms of subsection (8).

(*b*) In the event that an employer fails to comply with the requirements of this provision, all the directors (in respect of a company), all the members regularly involved in the management of the closed corporation (in respect of a closed corporation), or all the persons comprising the governing body of the employer, as the case may be, shall be personally liable in terms of subsection (8).'

In my view, the new statutory requirements are unambiguous and specific in intent and application, without any additional or ancillary due processes or obligations being bestowed upon the directors, members, or governing bodies respectively.

[5] In applying the abovementioned statutory principles to the present case, the second respondent, in his answering affidavit,[5] ostensibly relies upon the procedures provided for in section 359 of the Companies Act No 61 of 1973, read with section 66 of the Close Corporation Act 69 of 1984, as a defence to this application, and the relevance of section 13A(8) of the Act, and therefore contends that any proceedings brought against either of the respondents are effectively null and void.

[6] Notwithstanding the above, the second respondent makes significant admissions which, in my view, underscores the rationale for the implementation and application of section 13A(8), and thereby weakens his argument that this section only imposes accessory, not primary, obligations upon him to comply therewith. In my view, the *raison d'être* of this section is to ensure that, in circumstances where a failure to comply with section 13A(1) occurs, someone must and should, via compulsion, be responsible to 'step into the shoes' of the employer, in this case of the first respondent. If this were not the intention of the Legislature, it would call into question why this section was enacted and is interpreted strictly. In *Fundstrust (Pty) Ltd (In Liquidation) v Van Deventer* the Court held:

"*The Legislature has not unambiguously expressed its intention and here it becomes of prime importance to have regard to the context, and thus including the*

[5] Record page 196.

often more important matter of the statute it's apparent scope and purpose and within limits, its background."[6]

I therefore disagree with the second respondent's rationale and practical application of subsection (8)[7] .

[7] The second respondent admits[8] that the first respondent is in breach of the statutory provisions of section 13A(1), and does not dispute the binding nature of the applicant's rules.[9] The second respondent even goes as far as to accept that the amount of R5 030 437.11 is outstanding, which is due and payable to the applicants, in respect of its respective employee contributions.[10]

[8] However, counsel for the second respondent argued that, notwithstanding the admissions and/or acknowledgments made by the second respondent, he is protected from any course of action and/or personal liability, for two principal reasons:

8.1 that '. . . members of a corporation shall not merely by reason of their membership be liable for the liabilities or obligations of the corporation';[11] and

8.2 to preserve the sanctity of not piercing the corporate veil, as held in the *Fundstrust* case.[12]

Inasmuch as these submissions might have sought to convince me to apply same to this matter, they did not. In *Fundstrust* the appellate division states that the regime of the corporate veil 'remained firmly intact . . . except for rare and exceptional cases of "piercing" by the Legislature or the Courts.' I agree with this approach and am of the view that this matter is precisely such an instance as the Legislature foresaw in enacting the provisions of section 13A(8), and this court should apply its discretion in invoking its powers to prevent the second respondent from hiding behind the corporate veil and escaping liability, discarding any onus

---

[6] 1997 (1) SA 710 (A)
[7] Record page 200 at para 15.4
[8] Even via an acknowledgement of debt.
[9] Record page 204 at para 28.1.
[10] Record page 207 at para 34.1.3.
[11] Section 2(3) of the Close Corporations Act 69 of 1984.
[12] Ibid fn 6. See also *Salomon v A Salomon & Co Ltd* [1897] AC 22 and *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530.

which rests upon him, leaving unsuspecting and disadvantaged employees rudderless and up the creek without a paddle. The three amendments of subsections (8), (9) and (10):

"...aim to pierce the corporate veil and mandates employers to identify a person who can be held personally liable for non-payment of contributions to the fund."[13]

[9] Counsel for the second respondent argued that the personal liability that the applicants assert is imposed by section 13A(8) is far-reaching and untenable for reasons set out in the *De Bruyn v Steinhoff International Holdings NV and Others*[14] and therefore this subsection requires restrictive interpretation. Notionally it may be not clear from the amendments, if once subsection (9) has been complied with, then if a company experiences financial difficulties which lead to the identified person to fail to make contributions to the applicants, then would such identified person still be held liable for the non-payment. This places a heavy onus and burden upon such an identified person if non payment is due to circumstances beyond such person's control. In the *Steinhoff* case Unterhalter J was of the view that:

"*the fiduciary duties of directors are owed to the company. A fiduciary duty is predicated upon a duty of loyalty ad that requires the director to act in the interests of the company. A fiduciary duty owed by directors to shareholders as been recognised in certain cases where the directors have persuaded outside shareholders to sell their shares in a company. In family companies where shareholders reposed trust and confidence in a family member and sought advice and information, a fiduciary duty was recognised.*"

[10] The above encapsulates the present matter in that the second respondent is the sole member[15] of the first respondent, and is therefore, in my view, the member who controlled or was regularly involved in the management of the first respondent's overall financial affairs.[16] On the second respondent's own version

---

[13] Speculum Juris, Volume 29 Part 1, 2015 by Motseotsile Marumoagae, Senior Lecturer in the Community Law Centre North-West University (Mafikeng Campus)
[14] 2022 (1) SA 442 (GJ)
[15] A 100% member's interest.
[16] Record page 203 at para 27.1.

there is therefore no need to pierce the corporate veil, further also as he placed the first respondent into voluntary liquidation. The second respondent distinctly had a fiduciary duty of care, loyalty and to act in the best interests of the first respondent, but failed to. There was a special relationship between the second and first respondent and in these unique personal circumstances, quite distinct from the *Steinhoff* circumstances, the applicants by way on invoking the provisions of subsection (8), have the right to enforce the provisions thereof by seeking redress as pleaded against the second respondent, because of a breach committed by the first respondent for which the second respondent is statutorily liable for.

[10] I agree further on the second respondent's own version that section 13A(1) does not create a primary obligation on the second respondent, but rather the obligation to pay contributions falls squarely on the first respondent, and it is thus the employer who bears the primary obligation and who must first be claimed against before looking to the individuals who control or controlled the first respondent.[17] This might very well be functionally true, but for the saving provisions of section 13A(8), which cannot simply be ignored. If that were the case, it would make a mockery of the re-enactment of this section and serve no purpose. I find this implausible, and illogical to decide otherwise.

[11] Based on my understanding of section 13A(8) there are two remaining aspects I wish to deal with:

11.1 Firstly, there is no mention by any stretch of the imagination, nor is it suggested in the interpretation thereof, that some form of 'other process', for instance an enquiry, must first be undertaken under section 13A(1) before the provisions of section 13A(8) may be invoked. This simply does not exist.

11.2 Secondly, section 13A(8)(b) states: '. . . the following persons shall be personally liable for compliance with this section **and** for the payment of any contributions referred to in subsection (1)'. (My emphasis.) This is self-explanatory and, in my view, any interpretation to the contrary can only be

[17] Record page 207 at para 34.2.

considered as being otherwise hopeful and therefore wrong. This is well summarised as follows:

"Section 13A(8) of the of the Act imposes personal liability on certain parties within the employer's organization. These persons will be held personally responsible for ensuring that contributions are deducted and paid to the fund within the prescribed period. This section allows for determining the person who will be held personally liable for the corporation's failure to make contributions. In the event that an employer fails to comply with the requirements of this provision, all the directors (in respect of a company), all the members regularly involved in the management of the closed corporation (in respect of a closed corporation), or all the persons comprising the governing body of the employer, as the case may be, shall be personally liable in terms of subsection (8)"[18]

[12] I am satisfied that the applicants did comply with the provisions of section 13A(9) of the Act, proof of which is to be found in Annexure "OG10" to the applicants' replying affidavit.[19] The underlying rationale for doing so is, firstly, to comply with the provisions of the Act, and, secondly, for the purposes of the applicants' election to commence with proceedings against the second respondent, unconstrained by the principle of excussion, as this would undermine the statutory provisions of section 13A(8). This in my view was surely not the intention of the Legislature.

[13] Accordingly the following order is therefore made:

1. Within one (1) calendar month of the applicants having determined any additional outstanding Provident Fund contributions other than the amount referred to in point 2 below payable by the first and second respondents, based on the schedules submitted by the liquidators of the first respondent to date, the second respondent (in his personal capacity in terms of s 13A(8)(*a*) of the Pension Funds Act 24 of 1956 ('the PFA')) shall pay any additional outstanding Provident Fund contributions, together with interest and late payment interest thereon at the rate prescribed in terms of the PFA, to the applicants.

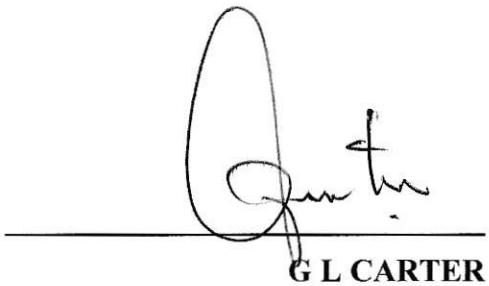
---

[18] Momentum Corporate Compliance Alert
[19] Record page 235 read with page 223 at para 17.

2. The second respondent (in his personal capacity in terms of s 13A(8)(*a*) of the PFA) shall pay to the applicants the monies admitted and owing, as determined based on contribution schedules already submitted by the respondents, in the total sum of **R5,030,437.11**, within 60 (sixty) calendar days of the date of service of this order on him.

3. In the event of the second respondent failing to comply with paragraph 1 above, the applicants are granted leave to approach this Court on the same papers, duly supplemented, on notice to the second respondent, for judgment on the amounts quantified by the applicants in terms of paragraph 1 above.

4. The second respondent shall pay the costs of this application on the scale as between attorney and own client.



G L CARTER

ACTING JUDGE OF THE HIGH COURT

For applicant:	Adv. P Coston
Instructed by:	Soonder Inc. c/o Vezi De Beer Inc.
For Respondents:	Adv. L Crow
Instructed by:	Anneke Wheelan Attorneys