

Legal update

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An employer's legal obligation to pay contributions continues even if the employer is experiencing financial difficulties

In Legal updates 2 / 2010, 15 / 2011 and 7 / 2012, we discussed the responsibility of the employer to pay contributions to the fund in terms of section 13A of the Pension Funds Act ("the Act"). In a recent determination, the deputy Pension Funds Adjudicator ("the Adjudicator") stated that companies experiencing financial difficulties had a legal obligation to continue to pay contributions to a retirement fund for their employees.

Facts of the case

- Ms Landman started working for Master Care (Pty) Ltd on 1 August 2005.
- The company made deductions from her salary for the contributions to the provident fund.
- In May 2012, Ms Landman left employment and her withdrawal benefit was made up of contributions up to August 2010 plus investment returns. A further payment was to be made to her once the outstanding contributions had been received from the company.
- The company was then placed under business rescue from May 2012.
- The fund administrator told the Adjudicator's office that the company had made a number of undertakings to pay the outstanding contributions and had requested that contributions be suspended from 1 June 2011.
- A rule amendment was drafted to suspend contributions from June 2011 onwards but the company would still need to pay contributions for the period 1 September 2010 to 31 May 2011.

Adjudicator's determination

- The company had breached the fund's rules by not paying the contributions over to the fund.
- The rule change to suspend contributions from 1 June 2011 onwards had not been registered by the Financial Services Board and was not valid. Therefore the company had defaulted with the payment from 1 September 2010 to 31 May 2012.
- Being placed under business rescue did not release the company from paying the outstanding contributions as it still existed as a legal entity and was bound by the fund's rules.
- The company was ordered to pay the fund the outstanding contributions for the period mentioned above plus late payment interest.

How the non-payment of contributions affects employees

- Where premiums for insurance benefits are included in the contributions, non-payment means that employees may not be covered in the event of death or disability. In most instances, the employee is unaware that his insurance cover has stopped.

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- Sometimes employees may only find out years later when they withdraw from the fund that contributions were not paid and that they have no or very little money in their retirement savings account.

The employer could then be held liable to pay the insurance benefits and outstanding contributions if they did not fulfil their legal obligation to pay the contributions.

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