

Take heed of the consequences of not complying with section 13A

An employer participating in a retirement fund must adhere to the obligations imposed on it in terms of section 13A of the Pension Funds Act (the Act), namely, ensuring that the correct amount of contributions is paid into the fund's bank account and that certain minimum information relating to its employees is provided to the fund's administrator within the periods prescribed in the Act.

In a recent ruling of the Financial Services Tribunal, *PC van Niekerk Plant Hire CC t/a PC's Transport versus AF Nhleko, the Transport Sector Retirement Fund and the Pension Funds Adjudicator*, the employer had failed to make contributions on behalf of a member for a certain period of time. The Pension Funds Adjudicator held that the employer owes a duty of good faith to its employees and by failing to pay all the contributions, the employer had breached this duty. The employer took the ruling on review to the Financial Services Tribunal based on the argument that it should only be ordered to pay the employer's portion of the contributions and not also the employee's portion of the contributions as it did not deduct contributions from the employee's salary for the period in question. The employer submitted that it would be to its detriment if an order was made that it also had to pay a contribution which was never deducted from the employee's salary. The Tribunal held that section 13A is pre-emptory and places a statutory duty on the employer to deduct contributions from employees' salaries, pay such contributions to the fund and keep proper records thereof. The employer was accordingly ordered to pay the full amount of contributions to the fund.

What is also important to note is that the Act does not impose an obligation on a fund to notify an employer of any underpayment of contributions. The Act only provides that the fund's administrator must report instances of underpayment to the fund's monitoring person, who in turn must report it to the board, to the members and to the National Prosecuting Authority (NPA). This principle was confirmed by the high court in 2018 in the case of *Municipal Workers Retirement Fund v Ndlambe Local Municipality*, where it was held that the obligation and duty to ensure that it was making the correct payments and to keep up to date with the relevant contribution schedules was *only* that of the employer. It therefore remains the duty of the employer to ensure that the contributions it is paying to the fund are indeed the correct amounts in terms of the fund's rules and that they are paid within the prescribed period.

Non-compliance with the obligations set-out in section 13A, even if it is not intentional but caused by a mistaken belief on the part of the employer that the amount of contributions paid is the correct amount, or is due to unforeseen circumstances (such as an employer's cash-flow problems caused by a poor economic climate), could have the following consequences for such non-compliant employer:

Payment of penalty interest in respect of any unpaid or underpaid contributions - compound interest at a rate of interest prescribed by the Minister of Finance from time to time will become payable by the employer in respect of the full amount of contributions or any underpaid balance of the required contribution amount. The full amount of such late payment interest will constitute investment income for the fund. As the rate for the late payment interest (which is meant to be punitive in nature) is prescribed, a fund or a court has no discretion to alter that rate on request of an employer.

In the *Municipal Workers Retirement Fund*-high court ruling referred to above, the employer had paid contributions to the fund for a couple of years believing that the amounts of those contributions was correctly calculated when it was indeed not. When the fund decided to institute legal action against the employer, the total shortfall for the members' contributions amounted to R1 159 843.71 and the total shortfall for the employer's contribution was R2 783 588.27. The fund claimed payment of both the shortfall and late payment interest on the amounts of those shortfall which amounted to R13 649 186.21. The prescribed rate of interest for the amounts concerned in this matter was the repo rate plus one third thereof plus 8 % points with a finance charge rate cap of 20% per annum. The employer submitted that its underpayment had been an honest mistake on its part and that it should not have to pay late payment interest on amounts it had not been aware it was liable to pay, particularly as the fund had not alerted it to its mistake.

The high court found that a mistaken belief cannot be a defence in these circumstances - the employer was the only entity which had the obligation to pay the contributions and if the employer was able to rely on a mistake, it would be to the detriment of the employees who were entitled to their full pension benefits. The high court further held that although it was most unfortunate that the shortfall was not picked up much earlier, the payment of interest is as much part of the contributions as the contributions themselves, bearing in mind that contributions are invested by the fund in the best interests of its members and it is critical therefore that the correct amounts are paid. The court also held that it had no discretion regarding the rate of interest as section 13A provides that interest at the prescribed rate "shall" be payable. The employer was accordingly ordered to pay the fund the full amount of R13 649 186.21.

Criminal action instituted by the NPA and the South African Police Services (SAPS) - the infringement of section 13A must be reported to the NPA to take criminal action against the employer. The Financial Services Conduct Authority (FSCA) also recommends in its PF Circular 110 that the infringement be reported to the SAPS at the commercial branch nearest to the fund. A fine of up to R10 million and/or imprisonment of up to 10 years may be imposed.

Action instituted by the South African Revenue Services (SARS) - the board of a fund must instruct that the employer's non-compliance situation be reported to FSCA who may in turn inform SARS for whatever action SARS may deem necessary to take against the employer.

Legal proceedings instituted by the members - the board of a fund must also instruct that the employer's failure to pay contributions be brought to the attention of the members. A member can then lodge a complaint with the Office of the Pension Funds Adjudicator who can order the employer to pay such arrear contributions (plus interest) to the fund. The rulings of the Adjudicator have the same effect as a civil court judgment and may lead to attachment of the employer's property or other assets.

According to the 2019 annual report of the Adjudicator, the bulk of the complaints she received for the period under review had to do with delays in the payment of benefits and non-compliance with section 13A. One such Adjudicator case was *Ebenol Boudienste CC versus Pension Funds Adjudicator, B Marero, North and West Boland Building Pension Scheme and GTC (Pty) Ltd* which went on review to the Financial Services Tribunal. In this case, the employer failed to pay over all of the member's contributions to the fund which resulted in the member's claim for a disability benefit being repudiated by the fund on grounds that the full contributions were not received. The member then submitted a complaint to the Adjudicator who held that the non-payment of contributions not only affected the member's fund credit but also affected his risk cover (for disability) and the employer accordingly had to pay all the outstanding contributions to the fund, as well as the disability benefit to the member (if the member indeed qualified for it). The Tribunal concurred with the ruling made by the Adjudicator and the employer thus had to fund the cost of the member's disability benefit.

Legal proceedings instituted by the fund - it is not only the member that has a right to institute proceedings against a non-complaint employer for recovery of arrear contributions - a fund to which arrear contributions are owed is legally obliged to sue such employer for the recovery of such contributions. This was confirmed in the 2018 high court decision of *Joint Municipal Pension Fund v Ehlanzeni District Municipality*. In this case, the fund declined to pay the retrenched member his monthly retirement benefits because his employer only

paid the monthly contributions in respect of the member until 2005 and then stopped, whereas it should have been paid until 31 October 2015 when the member went on early retirement. The high court referred to section 7D of the Act which provides that one of the duties of a board is to take all *reasonable steps* to ensure that contributions are paid timeously to a fund. The high court held that the right to institute legal proceedings against an employer to pay arrear contributions fell squarely into the concept of such reasonable steps and a fund thus have a statutory duty to institute such action.

Personal liability - the non - or late payment of contributions could also result in certain individuals within an employer incurring personal liability which could constitute a criminal offence if convicted. In terms of section 13A, all employers must identify a “responsible person” that will be personally liable in the event of non-compliance with section 13A and must then provide the fund with the name(s) of the applicable individual(s) and this confirmation must be annually reviewed. Please note, if an employer fails to notify the fund of the name of the responsible person, all the directors, all the closed corporation members regularly involved in the management of the close corporation, or all the persons comprising the governing body of the employer, whatever is applicable, will be held personally liable for the non-compliance with section 13A. Put differently, if the employer no longer has any assets to satisfy a claim of the members or fund for payment of the arrear contributions, then a claim can be brought against the aforementioned persons in their personal capacities.