

# PERSONAL FINANCE

## Employers renegeing on pension payments

March 17 2013 at 12:20pm

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<http://www.iol.co.za/business/personal-finance>



Illustration: Colin Daniel

Each year, hundreds of employers fail to pay over contributions to retirement funds, but the Financial Services Board (FSB) is reluctant to use its powers to act against errant employers because the responsibility for recovering arrear contributions rests with the funds and their trustees, the regulator told the recent Pension Lawyers Association conference in Muldersdrift.

If your employer does not pay contributions to your retirement fund, the fund may have to pay you a lower benefit when you withdraw or retire from the fund.

The Financial Services Laws General Amendment Bill, which is currently before Parliament, proposes that controlling shareholders, members of close corporations, company managing directors, trustees and partners be held personally liable for an employer's failure to pay contributions.

Radesh Maharaj, senior legal adviser to the Registrar of Pension Funds at the FSB, told the conference that the FSB has not yet had a watertight case of a defaulting employer which could be taken to its Enforcement Committee.

He says by the time defaults are reported to the FSB, many employers are no longer operating or the information provided by funds is insufficient to make a case.

The Enforcement Committee was introduced in 2009 to enable the FSB to act swiftly against individuals and entities that contravene the laws that the FSB regulates, including the Pension Funds Act.

At the same time, the Pension Funds Act was amended to decriminalise a contravention of the Act's provision that employers must pay over contributions due to a retirement fund within a set period.

But, despite amending the law and setting up the Enforcement Committee to avoid using the protracted and often less-than-successful criminal prosecution process, Maharaj says the FSB does not want to use the Enforcement Committee as a collecting agent when retirement funds should be using other ways to collect the contributions due to them.

The committee can impose administrative penalties, but this does not compensate funds that are owed contributions, he says.

Although it is no longer an offence under the Pension Funds Act not to pay over contributions, it is still a crime in terms of the common law, and the public prosecutor and the South African Police Service (SAPS) still have jurisdiction in these matters. However, Maharaj says, civil court proceedings remain the primary way for funds to collect debts from errant employers.

Zareena Camroodien, a senior assistant adjudicator at the Office of the Pension Funds Adjudicator (PFA), speaking in her personal capacity, told the conference that about one-third of the complaints to the adjudicator concern the non-payment of contributions, the underpayment of contributions, unregistered employers, and members in sectors with an agreement that all employers will register employees on a fund for the sector.

Last year, the PFA's office received more than 3 800 complaints, the office said recently.

Camroodien says the purpose of a proposed amendment to the Pension Funds Act contained in the bill that is before Parliament is to extend liability for the non-payment of retirement fund contributions by an employer to certain individuals within that employer.

She says "piercing the corporate veil" will widen the net of liability and "should go a long way to alleviating the problem with defaulting employers".

The pension lawyers' conference heard that employers sometimes liquidate a company and then set up the same business in a new company structure, and in this way avoid paying the contributions they should.

Camroodien suggested that legislation be amended to ensure that, when an employer is liquidated, fund members are made preferred creditors who can recoup their unpaid contributions ahead of other creditors.

If an employer fails to pay the contributions by the seventh day of the month following that for which they are due, the employer is charged late payment interest, and the fund is obliged to report the matter to the National Prosecuting Authority after 90 days. The Registrar of Pension Funds at the FSB must also be advised of the action the fund has taken to recover the unpaid contributions.

Maharaj pointed out that 90 days should be viewed as the maximum period, and funds should begin much sooner with remedial action to recover unpaid contributions.

Retirement funds reported at the conference that they have problems with employers that fail to provide the correct schedule of member data with the contributions they are obliged to pay. This can delay reconciliations and the detection of the underpayment of contributions.

Camroodien says that if a fund does not receive the full contributions from the employer, the PFA has consistently held that the fund cannot be held liable to pay benefits in full.

The extent of the fund's liability is limited to the amount by which the benefit in question has been funded, she says.

Therefore, if the employer did not pay all contributions to the fund, the fund cannot be held liable to pay the full withdrawal benefit to its members.

Camroodien said one avenue open to funds and members was to complain to the PFA .

Fund representatives reported to the conference that at times third- party payroll companies were to blame for not paying over the contributions on time, and one principal officer recommended that employers ensure that these companies are liable for the penalty interest if they fail to carry out this service and that this should be taken care of in a service-level agreement with the payroll company.

Another fund's legal representative suggested that fund trustees should have a clear policy on unpaid contributions and should lay charges against errant employers. He said this would result in employers paying up.

Camroodien suggested a practical step that can be taken by administrators and funds is to communicate directly to members that the employer has defaulted on its payments.

Trade unions, bargaining councils and employer organisations may also utilise their structures to get employers to comply, Camroodien says.

In addition, she suggested that businesses that fail to pay retirement fund contributions should be banned from being awarded government tenders.