

# OBLIGED to pay?

The interests of the members of a retirement fund are significantly compromised when the participating employer fails to pay contributions owing to the fund in which they participate.

Not only does this constitute a breach of the employment contract, where contribution payments are late, the member forfeits the interest that could be earned on that money. The employee's risk cover could lapse due to non-payment.

Timeous payment is a constant struggle for many funds and administrators. Section 13A of the Pension Funds Act (PFA) requires that: employers pay contributions for a particular month within seven days after month-end, that they provide member schedules in respect of contribution payments to the fund and that compound interest is paid on late contributions.

There appears to be a misperception that section 13A does not apply to a company that has been placed under business rescue in terms of Chapter 6 of the new Companies Act, 2008 (Companies Act). Quite contrary to this misperception, section 136 of the Companies Act expressly prohibits the unilateral cancellation or alteration of employees' terms and conditions of employment during business rescue proceedings. An employer's contributions to its employees' retirement funding vehicle are made pursuant to the employee's terms and conditions of employment, and the same is true of the deduction of employees' contributions and remittal. Section 144(5) of the Companies Act

further states that additional protections specifically awarded to employees during business rescue proceedings shall be in addition to any rights arising or accruing in terms of any law, contract, collective agreement, shareholding, security or court order. So it seems clear that section 13A of the PFA continues to bind companies during business rescue proceedings. Section 133 of the Companies Act does, however, impose a general moratorium on legal proceedings against a company in business rescue, with limited exceptions, including:

- the consent of the business rescue practitioner to bring legal proceedings against the company; and
- criminal proceedings being instituted against the company and any of its directors or officers.

The continued obligation to pay contributions raises the question of whether interested parties will have a concomitant right to enforce contribution payments through legal process while business rescue proceedings are ongoing.

The Pension Funds Adjudicator considered this question in her 2013 determination, YN Landman vs Wilenri Appliance Service Provident Fund and others. Specifically, the adjudicator confirmed that "the fact that the (employer) has been placed under business rescue did not absolve it from its statutory duty to pay outstanding contributions". As adjudicator determinations are deemed to be civil judgments of a court of law, the adjudicator's ability to continue to hear complaints in respect of non-payment of contributions against companies placed

in business rescue is crucial to protect members' benefits.

While the adjudicator's conclusion is agreeable, it is regrettable that she reached it without the benefit of substantive engagement around at least some of the following areas of contention:

- No reference was made to the provisions of Chapter 6 of the Companies Act (the business rescue regime).
- No reference was made to whether fund rules are contractual by nature and, if so, the implications thereof in business rescue proceedings.
- No reference was made to whether the general moratorium on legal proceedings against a fund extends to the adjudicator's office.

It is hoped that jurisprudence in this area will continue to develop, confirming the adjudicator's decision, and providing further clarification regarding the technicalities surrounding the enforcement of the employer's continued obligation to pay pension fund contributions to retirement funds during business rescue proceedings.

Despite the uncertainty regarding whether the moratorium would prevent an application enforcing the payment of contributions, recent amendments to the PFA have introduced provisions that allow for the directors of a company to be held personally as well as criminally liable for the company's non-payment of contributions where the company is in default. It is suggested that companies strictly adhere to section 13A, even when undergoing business rescue proceedings. ■

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