

# PERSONAL FINANCE

## Troubled firms 'must still contribute to pension funds'

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Illustration: Colin Daniel

The fact that a company is in financial trouble, even when it is subject to a business rescue plan, does not mean it can stop paying your and its contributions to your retirement fund.

So says Pension Funds Adjudicator Muvhango Lukhaimane in a recent determination where an employer tried to use financial difficulties as an excuse for non-payment.

The non-payment of retirement fund contributions is an ongoing problem faced by thousands of retirement fund members. There are currently almost 4 000 such complaints from members on Lukhaimane's desk. This comprises about one-third of all complaints.

Currently, about the only route open to fund members to get their money is the office of the adjudicator, despite procedures set out in the Pension Funds Act (see "How employees are affected", right). There are seldom prosecutions, one reason being that companies are placed in liquidation. Another reason is the weakness of the judicial system, retirement industry experts said at the recent Pension Lawyers Association annual meeting.

The Financial Services Board (FSB) was empowered in 2009 to take action through an administrative justice system that entitles it to take matters to its Enforcement Committee, appointed to uphold legislation for which the FSB is responsible.

However, the committee may only apply penalties for the non-payment of contributions – it cannot order the payment of outstanding contributions.

There has not been a single case involving the non-payment of retirement fund contributions brought before the FSB's Enforcement Committee.

But legislative steps are being taken to improve the situation.

Jurgen Boyd, FSB deputy executive in charge of pension funds, says the Financial Services Laws General Amendment Bill, which is before Parliament, proposes that controlling shareholders, members of close corporations, company managing directors, business partners, company executives and retirement fund trustees be held personally liable for an employer's failure to pay contributions.

"Aside from the deterrent effect of this provision, it is envisaged that it will make it easier for the authorities to prosecute defaulting employers," he says.

It will also mean that even if an employer is liquidated, retirement fund trustees can target those who owned and ran the defaulting business.

Boyd says that in terms of the Pension Funds Act, a fund's trustees are primarily responsible for ensuring that contributions are collected on time. The fund is required to take remedial action against a defaulting employer to recover unpaid contributions.

Apart from civil and criminal proceedings, the fund can lodge a complaint with the Pension Funds Adjudicator.

Boyd says the regulations require that the fund trustees advise the Registrar of Pension Funds of the action it has taken.

In her latest determination, Lukhaimane rejected arguments by a company called Master Care that it had not paid contributions to the Wilenri Appliance Services Provident Fund because of financial difficulties. These difficulties had resulted in the company being placed under business rescue in May 2012 in terms of the Companies Act.

Lukhaimane says the fact that Master Care has been placed under business rescue does not absolve it from its statutory duty to pay contributions. Master Care still exists as a legal entity and is bound by the fund rules and the Pension Funds Act regarding the payment of retirement fund contributions.

Master Care even tried to get the rules of the retirement fund changed to accept non-payment, but the rule changes have not been approved by the FSB, so they are not valid, says Lukhaimane.

Contributions are outstanding from September 2010 to May 2012.

The complainant, Ms L, has been employed by the company since 2005.

Lukhaimane ordered Master Care to submit within two weeks all outstanding schedules for the non-payment period to the fund, to give it a full record of Ms L's contributions.

Lukhaimane says if Master Care fails to comply, the fund must reconstruct the contribution schedules based on the information already in its possession and calculate Ms L's outstanding contributions plus late-payment interest owed by Master Care.

She says Master Care must pay over to the fund the contributions plus late payment interest within a week of receiving the calculations, and the fund must pay Ms L her withdrawal benefit, less amounts already paid to her and any deductions permissible in terms of the Act, within one week of receiving payment from Master Care.

## **HOW EMPLOYEES ARE AFFECTED**

The failure of employers to pay their and their employees' contributions to the employees' retirement fund can be to the severe detriment of the employees.

The non-payment of contributions affects employees in two ways:

- \* Premiums for the group life assurance attached to the retirement fund are not paid, so employees are not covered in the event of death or disability. This is a particular problem for employees in high-risk sectors who are in daily danger of being killed or severely injured.
- \* Employees may discover only years later, on retirement or withdrawal from the fund, that they have no money credited to their retirement savings.

In terms of the Pension Funds Act, employers are bound to pay over retirement fund contributions by the seventh day of the month.

The fund administrator must receive supporting schedules of the members and their contributions by the 15th of the month. The administrator must inform "the authorised person" – normally, the principal officer of the fund – if the contributions and member data have not been received by the 22nd of the month.

If the contributions remain outstanding for 90 days, the fund's trustees must advise the Financial Services Board and report the matter to the attorney-general to take criminal action.

A defaulting employer is liable to pay interest on contributions that have not been paid in time.