THE ENFORCEMENT OF SECTION 13A OF THE PENSION FUNDS ACT BY THE OFFI1CE OF THE PENSION FUNDS ADJUDICATOR

PRESENTED BY

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INTRODUCTION

- The Pension Funds Act, is 55 years old this year. a lot has changed since its promulgation, in particular, the nature of the fund, the labour laws, the duration of employment and to no lesser extent the economic circumstances.

- Regardless, the single most important factor has remained constant, in that, it is still not compulsory (per legislation) for employers to provide a pension fund for their employees.

- It is from this perspective that I intend to approach the topic by giving the legislature the benefit of doubt in that some of the current problems could not have foreseeable and that even with the benefit of amendments over the years some of the challenges remains unresolved.

SECTION 13A

- The basic principle for the creation of pension funds in this country is still that, it is the prerogative of the employer to decide whether or not it should create a pension fund for its employees and on what terms. If it does so it is bound by the legislation and the rules of the fund. The employer's most important duties are contained in section 13A of the Act, which are to contribute and provide schedules in relation to the contributions to the fund.

- Should an employer fails to make contributions or provide schedules as is required, steps are provided in the Act read with the rules to remedy the defect. If these steps fail section 26 provides that the fund or the portion of the fund relating to that employer can be placed under liquidation or deregistration.

- The question is, what if the latter option is not available to the fund.

HOW THE OPFA HAS GRAPPLED WITH THIS PROBLEM

- Two complaints shall be used to demonstrate the different approaches used by the OPFA to address this problem. We shall then look at the pros and cons of each approach.

- Firstly, we shall look at the case of *Mali v Nabiela Trading CC t/a security wise and Another (needless to say another was the Private Security Sector Provident Fund(PSSPF)), [2007] 2 BPLR 222 (PFA)*. This matter was decided on 7 January 2007 by the then pension funds Adjudicator, Vuyani Ngalwana.

- Secondly, we shall look at *Mofokeng v PSSPF and Another, [2011] 2 BPLR 207 (PFA).* This matter was determined on 8 September 2010 by the then pension funds Adjudicator, the late Charles Pillai.

MALI

- Employer in default with contributions.
- At the time the legislation provided for both civil and criminal sanction.
- The employer was found to be directly liable to the member for the outstanding contributions.
- Member entitled to fund value plus investment returns he would have earned had contributions been made timeously.

MOFOKENG

- Employer in default with contributions.
- At the time the legislation had no criminal sanction (although the common law crimes are still applicable).
- The employer was liable to the fund for outstanding contributions.
- Member entitled to fund value plus interest at the prescribed rate of interest from date of last contribution.

Mali in perspective

- Mali was the beginning of the problem.
- The complainant treated as an individual.
- Criminal sanction not seen as viable alternative to solving civil problems.
- Option preferable from an enforceability perspective.
- Option preferred by errant employers.

Mofokeng in perspective

- Mofokeng had the advantage of hindsight.
- the complainant treated as one of many affected by the non-contribution
- The legislated criminal sanction no longer viable
- Option difficult to enforce
- Option a better deterrent to errant employers

Mali in perspective (cont)

- The computation method of current fund value, preferable.
- This payment method coupled with a claim by the fund may result in double payment.

Mofokeng in perspective (cont)

- Computation model may have punitive effects.
- This payment method is consistent even when run in conjunction with a claim by the fund.

- The question remains, what is the better approach?

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