

SECTION 13A STATUTORY OBLIGATIONS

- It is trite that s13A imposes obligations on participating employers to pay contributions on time and in the manner stipulated in 13A
- *Van der Riet Family Trust t/a Cathedral Peak Hotel v Hospitality Industry Pension and Provident Fund [2009] 1 BPLR 7 (SCA); Agricultural Reserach Council v Bredel and others [2005] 1 BPLR 1 (SCA)*

WHAT ARE MEMBERS OBLIGATIONS ITO s13A

- PFA imposes no obligations on the members in relation to contributions
- A member can thus not breach the provisions of s13A (or related sections of the PFA)
- No duty on member to ensure that contributions are paid as stipulated in the Act
- No duty on member to enforce compliance with s13A

SECTION 13A RIGHTS

- Fund has a right to receive contributions referred to (member has no such right to PFA)
- In the event of default, Fund has a right to receive the s13A(7) interest (This is not a member's right)
- Members only have interest in compliance with s13A (s13A(6))
- This right is enforceable against employer

PFA OBLIGATIONS OF TRUSTEES RE CONTRIBUTIONS

- Trustees' reporting obligations in Reg 33(3) for non payment of contributions
 - Ensure that members notified
 - Ensure that Registrar is notified of action taken
- Other obligations in reg 33 are obligations of the Reporting Person/monitoring person

ARE REPORTING OBLIGATIONS THE ONLY TRUSTEE OBLIGATIONS?

- Take reasonable steps to protect the interests of members at all times (s7C(2))
- Care, diligence and good faith (s7C(2))
- Take reasonable steps to ensure that contributions are paid timeously and in accordance with the Act (s7D(d))
- *Martin v The Printing Industry Pension Fund for SATU Members [2003] 4 BPLR 4562*;

TRUSTEES DUTY TO COLLECT

- *Emma & others v Orion Money Purchase Provident Fund (SA) (1) [2004] 2 BPLR 5443 (PFA) par 17*

“section 7D(d) of the Act places a duty on the board of management of the fund to collect contributions due.”

- Board breaches its duties by failing to collect contributions. Failure to execute debt due to the fund is breach (par 21)

EMMA DETERMINATION (Continued)

- “In my view, had the board instituted legal proceedings in January 1999 against the employer for the outstanding contributions, or had the Registrar been informed of the breach, the matter may have been resolved in that the employer either would have paid the outstanding contributions or indicated to the fund that it was not in a position to pay any contributions on behalf of the members. The effect of the second answer would have meant that the board would have been in a position to terminate the fund and pay discontinuance values to the respective complainants”

EMMA DETERMINATION (continued)

- Fund and employer were declared jointly and severally liable (one paying the other to be absolved)
- Rule nisi
- This case in my opinion represents a better approach to be followed in these cases
- Consistent with the decision in *Mes v Liquidator of Art Medical Equipment Pension Fund and another (1)* [2005] BPLR 326 (PFA)

DECISION OF CAPE HIGH COURT

- *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and others [2002] 9 BPLR 3830 (C)*
- This decision is not authority for the proposition that fund cannot be held liable
- In this case the Fund was unaware of the existence of the employees and the duty to claim contributions
- To the extent that the Adjudicator relied on this case in *Mali v Nabelah Trading CC t/a Securitywise and Another [2007] 2 BPLR 222*, I believe that decision is incorrect

WHAT FUNDS MUST DO WHERE THERE IS FAILURE TO PAY CONTRIBUTIONS

- Reporting is not enough
- Reporting is not reasonable steps to collect contributions
- Funds must take legal action, they must not make this a member or union issue

LEGAL OPTIONS AVAILABLE

- Adjudicator
- Enforcement Committee
- Court
 - Action/summons
 - Application

LEGAL OPTIONS: CHALLENGES

- Adjudicator:
 - Backlog, could take months
 - Must first inform the other side and wait for submissions
 - No finality
- Enforcement Committee:
 - Registrar refers
 - No guarantee that Registrar will refer
 - Could take months

LEGAL OPTIONS

- Court
 - More effective but the cost of litigation and amount of contributions outstanding may not justify approaching court

LEGAL OPTIONS

- We recently approached Pretoria High Court in a case where amount outstanding was R 1 Million
- We used application proceedings and sought a mandatory interdict
- Application was not opposed and court granted the order

MANDATORY INTERDICTS

- Type of interdict used to enforce statutory obligations
- Payment of contributions is a statutory obligation
- Must prove requirements of interdict (clear right, breach, no other remedy) see Zokufa v Compuscan (Credit bureau) 2011 (1) SA 272 (ECM)

CONCLUSION

- In my view, funds should not pass responsibility to members, they must enforce compliance with s13A
- Fund Boards should be held liable for failure to take reasonable steps to enforce compliance
- Reasonable steps should depend on circumstances of each case
- Adjudicator complaint by the Fund is a reasonable step
- Reporting, and doing nothing thereafter, is not reasonable step

CONCLUSION

- In appropriate cases, funds should approach court
- Appropriate case can be where costs can be justified
- Where matter is urgent



THANK YOU