

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED:

DATE

SIGNATURE

CASE NO: 9102/2022

In the matter between:

BRINANT SECURITY SERVICES (PTY) LTD

Applicant

and

THE PRIVATE SECURITY SECTOR PROVIDENT FUND

First Respondent

JZ FANKOMO

Second Respondent

L J PHIRI

Third Respondent

THE PENSION FUND ADJUDICATOR

Fourth Respondent

JUDGMENT

(The matter was heard in open court but judgment is handed down electronically by circulation to the parties/their legal representatives and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be the day of uploading thereof).

BEFORE: HOLLAND-MUTER J:

[1] The applicant launched this application in terms of section 30 P of the Pension Fund Act, Act 24 of 1956 (“the Act”) as amended for an order to set aside the determination by the fourth respondent of a complaint lodged by the second respondent.

[2] The second respondent was out of time filing his notice of intention to oppose and later his answering affidavit but the applicant had no objection that the court grants the necessary condonation to the second respondent. The necessary condonation was granted.

[3] The applicant seeks the that determination by the fourth respondent dated 30 June 2022 relating to the second respondent’s complaint be set aside in terms of section 30 P of the Act and that the second respondent pay the costs of the application. The second opposed the application and requested the dismissal of the application with costs.

[4] There are two issues to decide: namely (1) whether the determination by the fourth respondent has prescribed or is time barred and (2) whether the complaint procedurally complied with section 30A (3) of the act.

FACTUAL POSITION:

[5] It is common cause that the applicant is a registered security provider.

[6] The applicant prior to 2016 faced serious opposition from some of its employees against the deduction of pension fund contributions from their

salaries resulting that some employees were not registered with the first respondent and that no pension deductions were made and paid over to the first respondent.

[7] After obtaining legal advice, the applicant registered all its employees with the first respondent since February 2016. The applicant thereafter proceeded to deduct the pension fund contributions from the salaries of all employees and paid over to the first respondent. The applicant contends that it made all payments required to the fourth respondent and that there were no outstanding contributions due.

[8] The third respondent, one L J Phiri, did not file any notice to oppose or opposing papers. Although not partaking in this application, the determination made by the fourth respondent with regard to the third respondent remains a bone of contention for the applicant. The applicant however did not request the court to deal with this aspect in similar way to the second respondent's matter and only moved for prayers 1 & 4 of the Notice of Motion.

[9] The second respondent was employed by the applicant for the period of 1 September 2004 to November 2021 before he was dismissed.

[10] The fourth respondent indicated in its determination that the second respondent received three (3) withdrawals from the pension fund in the amounts of R 5 367-79; R 33 811-76 and R 9 325-15. It is however not clear from the determination by the fourth respondent when these withdrawals were done towards the second respondent. These withdrawals can only take place at the request of the employee.

SECOND RESPONDENT'S CASE:

[11] The second respondent's version is to a great extent in line with that of the applicant save for the following:

11.1 The second respondent denies that he ever requested to be excluded from being a contributor to the pension fund before 2016. His version is that he was under the belief that he was a contributing member of the pension fund since becoming an employee of the applicant. He denies that he withdrew from the fund at any stage.

11.2 He tried to create the impression that the applicant's administration was poor in that at some stage employees no longer received printed salary slips and that it was not possible for him to access the electronic supplied salary slips.

11.3 He admits receiving three withdrawals from the pension fund. Although no specific dates were given, it remains that he received these withdrawals. The annexed determination by the fourth respondent is clear in this regard.

[12] The applicant alleged that the second respondent, like other employees, prior to 2016, opted to exit from the pension fund for reason of not wanting deductions made from their salaries. The second respondent denies this. If the greater picture is taken into account, the version of the applicant ought to be accepted. This is a clear example where the **Plascon-Evans rule** finds application where two conflicting versions are before court and the court, in applying the Rule, accept one and reject the second. The version of the applicant is accepted as indicated below.

[13]The applicant annexed examples of other employees' exit requests and although it could not produce one for the second respondent, the circumstances favours the version of the applicant. Firstly it proves that employees

had the option; secondly although the dates are not clear, the second respondent made

[14] In view of receiving the withdrawals from the pension fund on at least three occasions, it is more in line with the version of the applicant that the second respondent opted out from the fund at some stage but that since 2016 all employees became participants in the pension scheme. Receiving withdrawals can only mean two things namely that the second respondent voluntarily withdrew pension monies or that this happened when the employee decided to opt out of the scheme. In view of any contrary evidence I am satisfied that the latter is the position in view of the circumstantial evidence by the applicant. The second respondent failed to give any version of his own in this regard.

[15] The allegation by the legal representative of the second respondent in the heads of arguments that employees should be guarded against maladministration of kind by the applicant and suggesting the applicant is not bona fide before court is without any substance and is rejected. In my view the opposite is more on par that the second respondent is not fully candid with the court. He failed to set out when and for what purpose the withdrawals were received.

LEGAL POSITION:

[16] Chapter VA of the Act deals with considerations and adjudications of complaints with regard to administration of a fund, the investment of its funds or the interpretation of its Rules.

[17] It is clear from section 30A(1) that the Adjudicator is not divested from dealing with a complainant in the absence of it first being dealt with by the

Fund, The Supreme Court of Appeal in **Municipal Gratuity Fund vs Pension Fund Adjudicator {364/2022 at para 14-17}** reasoned that the provisions of section 30A (1) gave rise to an election for a complainant when submitting a complaint in terms of section 30 to either lodge the complaint with the Fund or the Adjudicator. This means that the Adjudicator is not divested from dealing first with a complaint in the absence of it being dealt with by the Fund. I am satisfied that the second respondent's lodging of the complaint direct to the fourth respondent does not invalidate the process. This was confirmed in **Brinant Security Services (Pty) Ltd v The Private Security Sector Provident Fund and Four Others Case No A 113/2022 GDP** on 6 September 2023.

[18] The High Court can set aside a determination in terms of section 30P of the act. Section 30 provides that a party aggrieved by a determination may, within six weeks after date of the determination, apply to the High Court for relief. The application was lodged timeously and the only remaining issue is whether the fourth respondent erred when making its determination taking into account the whole period of employment and not limiting the determination to three years before lodging of the complaint.

[19] It is common cause that in this matter the applicant is aggrieved by the determination and applies to the court to set aside the determination and refer it back to the fourth respondent to reconsider its determination.

[20] Section 30P empowers an aggrieved person to apply to the High Court to consider the merits of the complaint regarding the determination made by the fourth respondent and to make any order it deems fit. This is the relief sought by the applicant to set aside the determination under consideration.

[21] Section 30I (2) of the Act makes the provisions of the Prescription Act 68 of 1969 applicable in respect of the calculation of the time barred three year period referred to in section 30I (1). Of significance is that the fourth

respondent does not possess the discretion to condone nor extend the time bar provided for. Section 30I is simply a time bar and that the Prescription Act's three year period when calculating a determination has to be accounted for. Section 30I is clear that the Adjudicator (fourth respondent) shall not investigate a complaint of the act or omission to which it relates occurred more than three years before the date on which the complaint was received. This was confirmed in **Investic Employee Benefit Ltd v Marais and Others [2012] 3 All SA 622 (SCA)**. There is no room for any argument that the three year period was interrupted as in normal prescription matters. It is a time bar and not a prescription period. The fourth respondent erred in this regard.

[22] The complaint by the applicant is that the fourth respondent failed to calculate the determination taking into account that it was restricted to the years prior the complaint received. It is clear that the fourth respondent could not include any period from **March 2005 to December 2008** and from **August 2010 to February 2016** in its determination.

[23] It is on this basis that the applicant seeks an order in terms of prayers 1& 4 of the Notice of Motion. It has to be remembered that the third respondent did not oppose the application and that similar reasoning is applicable to this determination. In terms of section 30P of the Act the court may make any order it deems fit. Under the circumstances it would be just and fair that the determination regarding the third respondent be dealt with similar to that of the second respondent.

[24] I make the following order:

ORDER:

1. The determinations in respect of the second and third respondents are set aside in terms of section n 30P of the Pension Fund Act, 24 of 1956.
2. The second respondent is ordered to pay the costs of the application on a party and party scale.

HOLLAND-MUTER J
Judge of the Pretoria High Court

Appearances:

For the Applicant: Adv T Ellerbeck

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Attorney: Arthur Channon Inc
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For Second Respondent: Me I L Snyman

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Heard on: 3 August 2023

Delivered on: 13 November 2023