




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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
<u>20 July 2023</u> DATE	 SIGNATURE

CASE NUMBER: 25318/2017

In the matter between:

BRINANT SECURITY SERVICES (PTY) LTD

Applicant

And

**THE PRIVATE SECURITY SECTOR
PROVIDENT FUND**

First Respondent

SH VUNDLA	Second Respondent
LP MAKOBE	Third Respondent
DT KGOMO	Fourth Respondent
MF MADIBANA	Fifth Respondent
ME MOUKANGWE	Sixth Respondent
S MABENA	Seventh Respondent
EM MAEPA	Eighth Respondent
SN MNGUNI	Nineth Respondent
TJ MAPYA	Tenth Respondent
TE RATEBE	Eleventh Respondent
KS MAJOZI	Twelfth Respondent
J BAMBO	Thirteenth Respondent
RJ MAKGOBA	Fourteenth Respondent
MJ MODIPANE	Fifteenth Respondent
ME SETAOLE	Sixteenth Respondent
SF KGASAGO	Seventeenth Respondent
MD APHANE	Eighteenth Respondent
MF MASOGA	Nineteenth Respondent
TC NELUVHOLA	Twentieth Respondent
D BOKABA	Twenty First Respondent
ML RACHOSHI	Twenty Second Respondent
HF MODISHANE	Twenty Third Respondent

MS MASUKU	Twenty Fourth Respondent
P MACHETELE	Twenty Fifth Respondent
DM MNGUNI	Twenty Sixth Respondent
ML LEGODI	Twenty Seventh Respondent
JR MATLHAELA	Twenty Eighth Respondent
THE PENSION FUNDS ADJUDICATOR	Twenty Nineth Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 20 July 2023.

JUDGMENT

COLLIS J

1] This is an application by in terms of Section 30P of the Pension Fund Act, Act 24 of 1956 (“the Act”) for an order to review and set aside the PENSION FUNDS ADJUDICATOR’S Determination relating to the twenty-second Respondent (*‘Mr Rachoshi’*) dated the 24th of March 2017. The determination was made in respect of a complaint lodged by *inter alia* Mr Rachoshi during March 2016.

2] Initially, the issued Notice of Motion related to twenty-seven Respondents. The application before this Court however, is presently only opposed by Mr Rachoshi.

3] On the 19th of July 2021 the Honourable Strijdom AJ granted an order setting aside the relevant Determinations by the PENSION FUNDS ADJUDICATOR relating to 25 of the Respondents¹ (excluding the Twenty Second and Twenty Fourth Respondents).

4] On the same day, the application relating to the Twenty-Second Respondent and Twenty-Fourth Respondent was postponed *sine die*.²

5] Subsequently, and on the 4th of February 2022, this Court heard the application relating to the Twenty Fourth Respondent and granted an order in terms whereof the PENSION FUNDS ADJUDICATOR'S Determination relating to the Twenty-Fourth Respondent was reviewed and set aside.

Background

6] The Applicant (*Brinant*) is a private company registered as a security service provider with the Private Security Regulatory Authority in terms

¹ Caselines: p.000-1 to 4

² See para 4.1 of the Strydom order.

of the provisions of the Private Security Industry Regulation Act, Act 56 of 2001.

7] The Twenty-Second Respondent (*Mr Rachoshi*) was employed by Brinant as a security guard on the 26th of August 2008.³ His employment was terminated in September 2016.⁴

8] On the 15th of October 2009 Mr Rachoshi requested in writing that Brinant should stop deducting any contributions from his salary to the Provident Fund.⁵ The said request was acceded to by the Applicant.

9] On the 3rd of March 2016, some seven years later, the PENSION FUNDS ADJUDICATOR received a complaint relating to *inter alia* Mr Rachoshi. The gist of the complaint was formulated as follows in the Determination of the PENSION FUNDS ADJUDICATOR:

“This complaint concerns the failure by the Second Respondent [Brinant] to timeously register the complainants as members of the First Respondent [the Private Security Sector Provident Fund] and pay all provident fund contributions due on their behalf to

³ Caselines: p. 005-0bc (table 1)

⁴ Answering Affidavit: Caselines: p. 004-0u (par 42.10)

⁵ Replying Affidavit: Caselines: p. 017-7 (par 8.1)

the First Respondent, resulting in the understatement of their fund credits.”⁶

10] According to the PENSION FUNDS ADJUDICATOR the date on which Mr Rachoshi ought to have been registered was the 1st of March 2009.⁷

11] During the early part of 2016 apparently after the complaints were received, the PENSION FUNDS ADJUDICATOR referred the issue to the First Respondent (the Private Security Sector Provident Fund), as the Fund Manager, to deal with the issue.⁸

12] Settlement negotiations followed resulting in a formal settlement of the issues.⁹

13] Mr Rachoshi, was part of the group of employees who formed part of the relevant settlement.¹⁰

⁶ Pension Funds Adjudicators Determination: Caselines: p.005-0ba, para 1.1 and 1.2

⁷ Determination: Caselines: p.005-0bf, par 5.5 table

⁸ Founding Affidavit: Caselines: p.004-0p, par 38.1

⁹ Answering Affidavit: Caselines: p. 004-0p to 004-0qm, par 38.1 to 38.3 See in particular Annexures “ALN2” to “ALN4” Caselines: p. 005-0b, 005-0c and 005-0f

¹⁰ Founding Affidavit: Caselines: p. 004-0r, par 38.6

14] It is the Applicants' case, that Brinant complied with all its obligations in terms of the settlement,¹¹ and that Mr Rachoshi personally received two payments in terms of the settlement agreement emanating from the payments made by Brinant to the Provident Fund.¹² This much is common cause between the parties.

15] The present application relates to the review and setting aside of the PENSION FUNDS ADJUDICATOR'S Determination relating to inter alia, the complaint of Mr Rachoshi.

Legal Principles

16] Section 30P of the Act provides that any party who feels aggrieved by a Determination of the PENSION FUNDS ADJUDICATOR may apply to the High Court with jurisdiction, for relief. The relevant High Court is provided with a wide discretion to consider the complaint and to make any order that it deems fit - including the setting aside of the Determination.

¹¹ Founding Affidavit: Caselines: p. 004-0r, par 38.7

¹² Replying Affidavit: Caselines: p. 017-7, par 8.2 to 8.4

17] In this regard, the enabling legislation and relevant section provides as follows:¹³

“30P Access to court

(1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.

(2) The division of the High Court contemplated in subsection (1) may consider the merits of the complaint made to the Adjudicator under section 30A (3) and on which the Adjudicator’s determination was based, and may make any order in deems fit.

(3) Subsection (2) shall not affect the court’s power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced.”

¹³ Pension Funds Act 24 of 1956.

Absence of Jurisdiction

18] In relation to the jurisdiction on the part of the Pension Funds Adjudicator to have dealt with the complaint, the provisions of section 30I of the Act is of relevance. The section reads as follows:

“30 I Time limit for lodging of complaints:

- (1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.*
- (2) The provisions of the Prescription Act, 1969 (Act 68 of 19869), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1).”*

19] On behalf of the Applicant it was argued, that apparent from the wording of section 30I of the Act, that the Adjudicator only has the jurisdiction to investigate complaints laid within three years after the act or omission complained of has occurred. The section unambiguously states, that the Adjudicator shall not investigate

complaints relating to conduct (either an act or omission) which is older than three years.

20] In *casu*, the facts depict that the Determinations dealt with complaints laid more than three years after the date of the complaints.¹⁴ It is common cause that Mr Rachoshi requested Brinant as far back as on the 15th of October 2009 already, that it should stop deducting any contribution from his salary which request, Brinant acceded to.

21] Furthermore, according to the PENSION FUNDS ADJUDICATOR'S Determination, the date on which Mr Rachoshi ought to have been registered was the 1st of March 2009.¹⁵

22] It is therefore on this basis that counsel submitted that the PENSION FUNDS ADJUDICATOR clearly dealt with a complaint in which the act or omission to which it relates occurred more than three years before.

¹⁴ Caselines 004-0a: par 51.2 and 51.3

¹⁵ Determination: Caselines: p.005-0bf, par 5.5 table

23] In addition counsel had argued, that the principles relating to prescription also apply to matters of this nature and therefore the Determination dealt with an issue that had already prescribed.

24] In the Answering Affidavit, Mr Rachoshi alleges, that he only became aware of the conduct of Brinant, in relation to their non-compliance with the First Respondent's rules in 2015. As such he asserts that his claim against Brinant could not have prescribed as prescription only starts to run as from the date he became aware of the debt in terms of section 12(3) of the Prescription Act 68 of 1969,¹⁶ read together with Section 31(2) of the Pensions Funds Act 24 of 1956.

25] This assertion so made by Mr Rachoshi was merely denied by Brinant.¹⁷

26] Relying therefore, on the provisions of Section 30(2) counsel for Mr Rachoshi had argued, that if he was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became

¹⁶ Answering Affidavit para 8 Caselines p 016-7

¹⁷ Replying Affidavit para 6 Caselines 017-5

aware or ought reasonably to have become aware of such occurrence, whichever occurs first.

27] He therefore contended, that the claim against the Applicant could not have prescribed, as prescription runs from the date he became aware of the debt in terms of Section 12(3) of the Prescription Act 68 of 1969 read with Section 30I(2) of the Pension Funds Act 24 of 1956.

28] Having regard to the date when Mr Rachoshi, first became aware of the debt, Brinant was unable to place any rebuttal evidence before this Court, save for a mere denial. As such, I must accept that Mr Rachoshi only became aware of the debt in 2015 and as a result the provisions of section 12(3) of the Prescription Act could not successfully be invoked. Consequently, it must follow that the Pension Funds Adjudicator was entitled to receive and consider the complaint when made by Mr Rachoshi.

Procedural Requirements

29] As for the procedural requirements to have been met, section 30A (3) of the Act is of relevance and quoted hereunder:

“30A Submission and consideration of complaints

- (1) *Notwithstanding the rules of any fund, a complainant may lodge a written complaint with a fund for consideration by the board of the fund.*
- (2) *A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.*
- (3) *If a complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint the complainant may lodge the complaint with the Adjudicator.*
- (4) *Subject to section 30 I, the Adjudicator may on good cause shown by any affected party-*
 - (a) *extend a period specified in subsection (2) or (3) before or after expiry of that period; or*
 - (b) *condone non-compliance with any time limit specified in subsection (2) or (3)."*

30] Section 30A of the Act prescribes a specific procedure for dealing with complaints of this nature. What is required from a complainant is

to first approach the Provident Fund in writing for consideration of such complaint.

31] The Fund in turn will then approach the employer for a response and only after a complainant obtained a written finding by the Fund will a complainant be entitled to approach the PENSION FUNDS ADJUDICATOR in this regard.

32] Before, this Court it is common cause counsel for the Applicant had argued that the complainants did not follow the above procedure and never approached the Fund for consideration. The employer was further not provided with the opportunity to respond to the Fund or the complainants in respect of the complaint.¹⁸

33] Furthermore, that the PENSION FUNDS ADJUDICATOR is a creature of statute that will only have jurisdiction to make Determinations under circumstances where it complies with the requirements and procedural aspects of the Act.

¹⁸ Caselines 004-0aa: Par 52.2 to 52.4

34] It is on this basis that counsel had submitted that the PENSION FUNDS ADJUDICATOR failed to comply with the jurisdictional requirements prescribed by the Act.

35] In respect of the jurisdictional requirements, counsel for Mr Rachoshi relied on the provisions of Section 30A (3) which reads as follows:

“If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint the complainant may lodge the complaint with the Adjudicator.”

36] In response to whether Mr Rachoshi (and by extension the 29th Respondent) followed correct procedure as set out in section 30A, counsel had drawn the court’s attention to section 30H (2) of the Act. The section reads as follows:

“The Adjudicator shall not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in

any civil court in respect of a matter which would constitute the subject matter of the investigation.”

37] As such counsel had argued, that the legislature only provides one instance wherein the Pension Funds Adjudicators’ jurisdiction to investigate a matter is curtailed and that is contained in above-mentioned section.

38] Thus, the restriction on the jurisdiction of the 29th Respondent to investigate matters is in relation to instances only where civil court proceedings have been instituted, not where the complaint was lodged directly with the 29th Respondent.

39] It is on this basis that counsel had argued, that Brinant suffered no prejudice by the conduct of the Twenty-Second Respondent to first approach the Twenty-Nineth Respondent. Upon careful consideration of the conduct of the Twenty-Nineth Respondent, once it was faced with Mr Rachoshi’s complaint, it is clear, that the Twenty-Nineth Respondent attempted to comply with Section 30A in that it gave all parties an opportunity to be heard.

40] The determination reached by the latter was arrived at having considered all sides and all the evidence before it. The manner in which the determination was reached is akin to the process envisaged by the Act, albeit the complainant elected not to use his right as contemplated by section 30A(1).

41] The strict compliance with the provisions of section 30A, As I see it, is no basis for the Adjudicator not to have considered the complaint.

42] In *casu* the Adjudicator gave all parties an opportunity to make representations and considered what has been placed before it before a Determination was ultimately made. In addition, before this Court there is no evidence, that Brinant was in any way deprived and or prejudice to be heard by the Adjudicator.

43] For the above reasons, I therefore must conclude that the procedural requirements have been met.

Settlement agreement

44] It is the Applicants' case that the dispute between the parties, which included Mr Rachoshi was settled on the 18th of October 2016.

45] Pursuant to the settlement reached, Mr Rachoshi received two payments in terms of this settlement. These payments emanated from the payment that Brinant paid over to the Provident Fund in terms of the settlement agreement.

46] The payments so made, Mr Rachosi, readily concedes¹⁹, but he however asserts that the payments so made to him, he believed that the Applicant was attempting to comply with the determination made by the Twenty-Nineth Respondent.

47] He thus laboured under the impression that the Applicant was in the process of complying with the determination. It is further his assertion that the two payments he received were not in full and final settlement of the moneys due to him as a result of his pension fund contributions.

48] The Applicant, in its Replying Affidavit, merely denies that Mr Rachoshi has merit in his opposition to the application. It is noteworthy to mention that no explicit attempt was made to answer to the assertions made by Mr Rachoshi in relation to the two payments which he received.

¹⁹ Answering Affidavit at para 18.6 Caselines 016-11

49] In this regard, counsel for Mr Rachoshi had argued, that if regard is had to (Annexure ALN8 to founding affidavit) and more specifically the following mentioned paragraphs, quoted hereunder namely:

49.1 **Paragraph 6.1.3** of the order made by the Twenty-Ninth Respondent reads as follows: *the second respondent (Applicant in these proceedings) is ordered to submit all outstanding contribution schedules in respect of each complainant mentioned as per Table 6 above to the first respondent, in order to facilitate the computation of outstanding contributions, within three weeks of this determination;*

49.2 **Paragraph 6.1.5** reads as follows: *the first respondent is ordered to compute the complainants' contributions, together with late payment interest owed by the second respondent (Brinant) calculated in accordance with section 13A(7) of the Act.*

50] Counsel for Mr Rachoshi had argued that the manner in which the Applicant calculated and arrived at the amounts for the two payments it made was offensive to the provisions of section 13A(7)²⁰. The

²⁰ Section 13A(7) and Regulation 33(7) **deal with charging of late payment interest (LPI)**. If contributions are not paid within the seven-day period, or if the contributions are not confirmed, then LPI is charged from the first of that month up to the date that it was paid or confirmed

Applicant adopted an arbitrary formula and calculations which did not even include interest owing.

51] Based on the above, counsel had therefore argued, that having regard to the abovementioned orders, it is clear that the Applicant has not complied with the orders set out in the determination.

52] In respect of the settlement agreement reached, it is the Applicants case, that the PENSION FUNDS ADJUDICATOR was part of the settlement negotiations and agreement and that it has no basis to renege from such an agreement.

53] Not only has the PENSION FUNDS ADJUDICATOR throughout the negotiations insisted on being informed of the progress in the settlement negotiations and were indeed informed,²¹ but also if regard is had to correspondence received from the Pension Funds Adjudicator.²²

54] As Mr Rachoshi failed to tender restitution of the benefits that he received in terms of the settlement agreement which restitution

²¹ See in this regard Annexure "ALN2

²² Caselines: p. 005-0b

Brinant never accepted, the settlement agreement counsel had argued remains valid.

55] It is Mr Rachoshi's case, that he has no knowledge of who Messers Soonders Inc is and he further denies having given them a mandate to act on his behalf.

56] Before, this Court, the above attorneys have failed to file an affidavit confirming the averments made by the Applicant in relation to the Twenty-Second Respondent. As such no corroboration exists to support the averments made by the Applicant in this regard. In the absence thereof, I agree, that all such averments in respect of Messers Soonders Inc are hearsay.

57] As the settlement agreement which the Applicant places reliance on, was rejected by the Twenty-Nineth Respondent owing to the agreement's non-compliance with the Rules of the First Respondent and its further non-compliance with section 30M of the Act, it must follow, that no legal consequences can flow therefrom.

58] Consequently, I cannot find that the applicant has persuaded this Court to grant the relief it seeks in terms of Section 30P of the Pension Fund Act.

Order

59] As a result, the application is dismissed with costs.



C.J. COLLIS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

APPEARANCES

Counsel for Applicant: Adv. JG Cilliers (SC)

Instructed By: Arthur Channon Attorneys

Counsel for 22nd Respondent: Adv. F Tugwana

Instructed By : Raulinga, Netsianda and Khameli Inc
Attorneys

Date of Hearing: 20 July 2022

Date of Judgment: 20 July 2023