THE NEED TO ADDRESS THE CHALLENGE OF NON-PAYMENT OF RETIREMENT FUND CONTRIBUTIONS: A CASE FOR NECESSARY LEGISLATIVE AMENDMENTS

By

MOKHECHE STEPHEN MARAKA

400695

Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

Supervisor: Professor MC Marumoagae

Date: 31 October 2023

TABLE OF CONTENTS

(a) Declaration

I, declare that this Research Report, which is hereby submitted for the award of Legumes Magister (LLM), is my original work. It has not been previously submitted for the award of a degree at this or any other tertiary institution. Where works of other people are used, references have been provided.

Signed: M. Maraka

400695

31 October 2023

Johannesburg, South Africa

(b) Acknowledgements

I would like to thank the Almighty God for giving me the strength to complete this research report. I wish to thank my supervisor, Professor MC Marumoagae for all the guidance he provided during the course of the writing of this report. I also extend my gratitude to all my family members for all their support.

Abstract

The challenge of the employers' failure to pay retirement funds contributions to the retirement funds to which their employees are members is prevalent in South Africa. With the current legislative framework, it does not seem like this conduct is subsiding. The Pension Fund Act 24 of 1956 has criminalized the non-payment of contributions, however, the problem persists. In this regard, this research report evaluates the effectiveness of the current legislative framework and criminal sanctions in addressing this challenge, with the aim of making recommendations on how this challenge can be legislatively addressed.

I INTRODUCTION

Some employees when exiting their employment discover that their employers deducted but failed to pay their contributions to their retirement funds.[1] There are times when non-payment could be attributed to the inefficiency of some retirement funds in the collection of contributions from employers.[2] Irrespective of the circumstances that led to the non-payment of contributions to the associated retirement funds, at the time they exit their employment, these employees or their beneficiaries would be unable to claim benefits that are due to them.[3] To understand the detrimental effect of the non-payment of retirement contributions, it is important to discuss the current legislative framework to assess its efficacy.

This research report discusses the legislative framework that regulates the payment of members' contributions to their retirement funds. It seeks to evaluate whether legislative measures relating to the payment and collection of retirement funds contributions are effective. In particular, this report assesses the effectiveness of the remedies at the disposal of retirement fund members who find themselves in this conundrum. This report also assesses whether the introduction of criminal sanctions led to a change in behaviour and better payment and collection of retirement fund contributions in South Africa. This report critically reflects on whether criminal sanctions are an effective deterrent to prevent employers from defaulting on their payments of retirement contributions.

The second part of this report provides a contextual background on the concerning culture of non-payment of retirement funds' members' contributions in South Africa. The third part critically evaluates the effectiveness of the legislative framework that regulates the collection and payment of retirement funds

[1] Thulani Nkosi 'The Rules of an Occupational Retirement Fund and the Problem of Defaulting Employers: A Reconsideration of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator'* (2016) 19 *PER/PELJ* 1.
[2] Ibid at 3.
[3] *Tembe v Security Employees National Provident Fund & Aza Day & Night Security* Case No. PFA/WE/3197/05/SG para 9.

contributions in South Africa. Herein the weaknesses in the current legislative framework will be highlighted. The way the Financial Sector Conduct Authority (hereafter FSCA) responded to the challenges of non-payment of retirement fund contributions by employers will also be discussed. The fourth section examines the impact of the introduction of criminal sanctions for non-payment of retirement funds contributions in South Africa. The fifth section concludes the discussion. Throughout the report, necessary recommendations for law reform will be advanced.

II RETIREMENT FUND CATEGORIES

(a) Categories of contributions

There are two broad categories of retirement funds, defined benefit funds and defined contribution funds. A defined benefit fund has been described as:

> *'a retirement fund scheme that is created by the employer or its sponsor wherein employees are promised a determinable monthly benefit when they retire, which benefit is somewhat guaranteed or predetermined by a formula based on the employee's period of service, his or her salary history and his or her age, rather than depending directly on individual employee's investment returns.'*[4]

There appear to be three elements to the above description. The first is that the employer plays an important role in the establishment of the fund. The employer provides financial backing to the fund and 'makes regular and consistent contributions' to the fund.[5] Secondly, the employer bears the risk of investment[6] and has an obligation to make up for any shortfall that may be experienced in the

[4] Clement Marumoagae 'Liability to Pay Retirement Benefits when Contributions were not paid to the Retirement Fund' (2017) 20 *PER / PELJ* 1 at 7.
[5] Hieu V Phan and Shantaram P Hedge 'Contributions and Firm Performance: Evidence from Frozen Defined Benefit Plans' (2013) 42 *Financial Management* 373.
[6] Simphiwe M Mdluli 'The Role of the Board of a South African Defined Contribution Pension Fund that Offers Investment Choice' (2011) 23 *SA Merc LJ* 247 at 249.

fund. The employer is thus, under an obligation to 'ensure' that the benefits are given to its employees who are the fund members and/or their beneficiaries when they become due.[7] In the event that the assets of the fund are insufficient to cover the employees' claims, the employer is 'responsible for making up the difference.[8]

Thirdly, the benefit is 'determinable' based on a prescribed formula.[9] The effect of the last element is that, even 'if the investments made by such a fund performs well, the members do not benefit proportionately.'[10] Notwithstanding employers playing a major role in ensuring the liquidity of the funds to which they are associated, they are still expected to deduct contributions from their employees' salaries and pay them over to the fund, which is a separate entity from the employer. These contributions will be invested for the benefit of employees in accordance with the rules of these retirement funds.

Defined Contribution funds are pension plans wherein

> '… benefits are not underwritten by the employer but the members have the advantage that if the fund performs well, it would reflect in their pension benefits. If the fund performs poorly, the members' pension benefits are reduced accordingly. In short, the members carry the risk of the investments, both good and bad, and their benefits are not guaranteed by the employer.'[11]

In defined contributions funds, members bear the risk of investment in their contributions. If the investments perform well, the benefits will be increased.[12] However, in the event that the investments underperform, there would be little or no benefits.[13] To keep these retirement funds sustainable, there is usually a

---

[7] William G. Gale 'Public Policies and Private Contributions' (1994) 26 *Journal of Money, Credit and Banking* 710 at 712.
[8] Natascha van der Zwan 'Financialisation and the Pension System' (2017) 15 *Journal of Modern European History* 554 at 559.
[9] *ICS Pension Fund v Sithole* [2009] ZAGPHC 6 (13 January 2009) para 3.
[10] Ibid.
[11] Ibid para 4.
[12] Ibid.
[13] Ibid.

'determined' amount from the employer as well as an amount from the employee contributed to the fund.[14] These contributions and their investment returns constitute the members' fund credits,[15] which 'operate like savings accounts.'[16] If contributions are not provided to these funds, there will be nothing that can be given to members when they exit these funds. To be sustainable, retirement funds rely on monthly contributions from their members, which can be invested over a period of time with a view to assisting such members to avoid poverty when they reach old age. These contributions are also used to cover retirement fund expenses'.[17] Irrespective of whether a retirement fund is established on a defined, or contribution basis, members' contributions play a major role in ensuring that members can retire comfortably. As such, failure to pay these contributions to the associated funds can be devastating for members of these retirement funds.

(b) Culture of non-payment of contributions

Section 13A of the Pension Funds Act[18] deals with the payment of contributions. It provides that contributions shall be paid in terms of the provisions of this Act and the Rules of the fund.[19] It also provides information that must accompany contributions,[20] time periods, mode and/or manner of payment,[21] interest on late payments,[22] and liability in cases of default.[23] Regulation 33 which was aimed at operationalising section 13A of the PFA by ensuring that contributions were paid effectively was repealed. This regulation was repealed because the 'FSCA

[14] Gale op cit note 7 at 712.
[15] Ibid.
[16] Motseotsile Clement Marumoagae 'Pension Law' (2021/2022) *Yearbook of South African Law* 1084 at 1100.
[17] Ibid.
[18] 24 of 1956 (hereafter 'PFA').
[19] Section 13A(1) (a) (b).
[20] Section 13A(2).
[21] Section 13A(3).
[22] Section 13A(7)
[23] Section 13A(8)&(9).

recognised various shortcomings in respect of [it].'[24] Some of the shortcomings related to the lack of standard 'format and manner' of reporting issues relating to section 13A compliance[25]; minimum information from employers regarding contribution payment; standard format to inform employers of its duties and obligations under section 13A; format for requesting information on persons that are liable for non-compliance with section 13A; regulating the use of attorneys for arrear contribution collection, and, the rate of interest calculation.'[26]

On 27 January 2023, Regulation 33 was replaced by Conduct Standard 1 of 2022, with the aim of addressing the above-discussed shortcomings.[27] The Conduct Standard seem to be putting the requirements for payment into practice. It achieves this by clearly defining the role to be played by the retirement fund in ensuring that employers pay contributions.[28] It also defines the duties and obligations of employers to ensure that correct contributions are paid timeously.[29] Lastly, it provides schedules, formats, and specimens for reporting and furnishing information. The Conduct Standard is a vital tool to protect members of retirement funds by holding employers, retirement funds' boards of management, 'authorised persons, and contractors accountable.'[30]

In South Africa, the non-payment of contributions by employers is a concerning practice. The practice of deducting contributions and failing to pay them to the associated retirement funds persists.[31] There are several reasons why employers

---

[24] Imraan Mahomed & Tshepiso Rasetlola 'Proposed repeal of Regulation 33: Tightening the grip on employers who fail to make contributions to an employees' pension fund' available at https://www.cliffedekkerhofmeyer.com/expot/sites/cdh, accessed on 13 September 2013.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Paragraph 2, 4,5 & 6.
[29] Paragraph 3
[30] FSCA 'Statement supporting the Conduct Standard – Requirements related to payment of pension fund contributions' (19 August 2022) https://jutacomplinews.co.za/media/filestore/2022 para 5.1.
[31] The Office of the Pension Fund Adjudicator Integrated Report of 2021/2022 accessed on https://www.pfa.org.za/publications/pasges/annual-report s.aspx/ indicates that during 2021/2022 year of review, about 40% of complaints were related to section 13A of the Pension Fund Act's non-compliance. This was largely attributed to employers who fail to pay their employees'

seem to default in paying retirement fund contributions. Because of this recalcitrant nature of employers, the FSCA decided to name and shame defaulting employers on a quarterly basis.[32]

In *Moloantoa v The Private Security Sector Provident Fund and Others,*[33] it was found that the employer failed to register its employee on the contribution schedules submitted to the fund. As a result, no contributions were paid to the fund on his behalf in violation of the Act.[34] In *Mthimkhulu MB v NCB Holdings and Another,* it was found that the employer failed to register the employee as a member of the fund despite making monthly deductions for pension on his salary which the employer failed to pay to the fund.[35] There are instances where employers fail to register their employees with the pension fund timeously, and, also fail to deduct contributions from their employees' remuneration.[36] The Financial Services Tribunal determined that failure to deduct contributions from employees is a breach of the PFA because '[s]ection 13A of the Act is peremptory and places a statutory duty on employers to deduct contributions from employees'.[37] At times, employers and employees enter into agreements to avoid making pension contributions. This situation occurred in *JA Vorster Vervoer v Transport Sector Retirement Fund and others*[38]*.* In this matter, the employer agreed with an employee that he would not register him as a member of a retirement fund but instead pay him R 500.00 per month. The employer also did not pay part of his contributions. The Tribunal found that agreement to be *null and void* and determined that the employer cannot 'compromise or waive' its statutory

contributions to the retirement funds to which they are associated. Secondly due to the inefficiency of retirement funds to collect contributions from employers, at 6.

[32]FSCA Communication 21 of 2023 last accessed on 17 September 2013 on https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20Communication%2021%20of%202023%20(RF).zip para 4.

[33] Case No. PFA/GP/00001982/2013/TKM.

[34] Ibid para 5.8 – 5.9.

[35] Case No. PFA/GA/8180/2006/SM para 13.

[36] *PC Van Niekerk Plant Hire CC t/a PC'S Transport v AF Nhleko and others* Case No. PFA44/2019.

[37] Ibid para 17.

[38] Case No. PFA55/2021.

duty to pay contributions.[39] This kind of arrangement therefore goes against social security considerations that were in the minds of the legislature when they made payment of contributions mandatory under section 13A of the PFA. The Constitution of the Republic of South Africa, 1996 provides that everyone has a right to have access to social security. Section 13A of the PFA is one of the legislative means that ensures that the right to social security is realised.

There are cases where employers claim that they were labouring under an honest mistake that they are making correct contributions, such as in *Municipal Workers Retirement Fund v Ndlambe Local Municipality*.[40] The court in this matter concluded that there is a statutory obligation placed on employers to ensure that the correct amount is paid to the fund.[41] Further, a mistaken belief of paying the correct amount cannot be used as a defense.[42] In *Post Office Retirement Fund v South African Post Office SOC Ltd and others*[43]*,* the employer relied amongst others, on financial hardships brought by Covid-19 pandemic as a basis for its failure to pay employees' contributions.[44] It argued that due to its financial challenges, it elected to prioritise certain expenses such as 'transport costs, national linehaul expenses, property costs including rental expenses, information technology expenses and the cost of security.'[45] In choosing the said expenses, the employer's justification was that these services were essential 'in order to continue to meet its primary statutory duties'[46] The employer suggested that on the conspectus of the challenges, it was faced with an intervening impossibility to meet its pension obligations hence it required a six months 'contribution holiday'.[47]

---

[39] Ibid para 14.
[40] [2018] ZAECGHC 139 (22 November 2018).
[41] 'A mistaken belief cannot be a defence in the circumstances of this case. The Municipality is the entity which has the obligation to pay the contributions, in terms of s13A (1) of the PFA. No other entity has that obligation. If the Municipality was able to rely on a mistake, it would be to the detriment of the employees who are entitled to their full pension benefits in terms of the PFA and the rules of the fund.' At para 9.
[42] *Ndlambe* supra note 40 paras 8 – 9.
[43] [2022] 2 All SA 71 (SCA).
[44] Ibid para 15.
[45] Ibid para 25.
[46] Ibid.
[47] Ibid para 16.

Alternatively, a ‘once-off capped withdrawal by retirement fund members who are still employees to cushion them’ from any adverse decisions on their earnings that the employer might make.[48] The fund objected to the first proposal on the basis that for that to happen the statute and rules of the fund have to be amended to accommodate that situation.[49] With regard to the second proposal, it informed the employer that it had to urgently pay contributions for ‘risk benefits’ such as death and disability, and, also pay contributions that have already been deducted from members for May and June 2020.[50]

Even though the court accepted that Covid-19 worsened the employer’s financial situation, it came to the conclusion that they were ‘self-created’ hence it objected to a plea of impossibility to perform.[51] It found that the employer can only do what the law entitles it to do, it had no choice to select which creditors it could prioritise as it was under a legal duty to pay contributions to the fund.[52] Further, the obligation of the employer to pay contributions stems from principles of fair labour practice, and, the constitutional right to social security.[53]

The approach adopted by the Supreme Court of Appeal is different from that taken by the High Court regarding SAPO’s Constitutional obligations. The High Court accepted that to interpret the rules of the fund and its statutory obligations in a manner that requires SAPO to pay contributions in circumstances where it cannot fulfill its main statutory mandate would be against constitutional values.[54] The High Court held that both the member’s contributions and the employer’s contribution come from the employer’s funds and no monies are actually deducted from

[48] Ibid.
[49] Ibid para 17.
[50] Ibid.
[51] Ibid paras 81 – 82.
[52] Ibid para 56.
[53] Ibid para 59.
[54] *Post Office Retirement Fund v South African Post Office SOC Ltd and Others* [2020] ZAGPPHC 519 (14 September 2020) para 53.

employees' remuneration.[55] That while the member's right to pension is not undermined, it must be balanced with the plight brought by Covid-19, SAPO's main obligation of delivering postal services and social grants to the most vulnerable.[56] Mhango is of the view that the High Court decision is 'pragmatic', in that it balances constitutional imperatives with the statutory obligations to pay contributions and the effects of Covid-19 on employers to meet these obligations.[57] He argues that the principle laid by the High Court allows the state as employer to justifiably not pay contributions on the basis of financial hardships brought by the pandemic, and, the requirement to perform its constitutional obligations.[58] He argued that public sector funds governed by the PFA can 'successfully rely on this case to justify their failure to pay contributions in appropriate circumstances.'[59] With respect, Mhango's analysis is problematic and would open the floodgates of employers who have financial challenges to default on paying contributions. Whether such hardships are because of a pandemic or any other factor, it would mean, as long as they can prove such hardships coupled with other constitutional obligations, such employers will be allowed to compromise their members pension savings. This will place employees in a very gloomy situation should employers be allowed to rely on financial hardships as a basis for non-payment of contributions, except where the rules specifically allow that.

The Supreme Court of Appeal's approach was different to that of the High Court. Significantly, the SCA found that the employees 'contribute a defined proportion of their salaries to the Fund on a monthly basis.'[60] The SCA held that SAPO had a legal obligation to pay contributions to the Fund, in the absence of any exemption to do so from the Rules.[61] The SCA's findings cannot be faulted. The High Court's findings therefore that the employees' contributions are only 'notional deductions'

---

[55] Ibid para 62.
[56] Ibid paras 64 – 70.
[57] Mtendeweka Mhango 'A strange thing happened on the way to the Post Office: Post Office Retirement Fund v S.A. Post Office SOCLtd and Others' (2021) 36.2 *ITJ* at 3.
[58] Ibid.
[59] Ibid.
[60] *SA Post Office* supra note 43 para 55.
[61] Ibid para 56.

for accounting purposes is clearly wrong, and ignores the actual loss that the members are suffering. Secondly, the supremacy of the rules of the fund cannot be ignored based on a pandemic. This would open a leeway for other breaches of the rules based on financial hardships as it has been argued above. In any event, at the heart of COVID-19 challenges is financial hardships, which are being used as a basis for non-payment of contributions.

It has been suggested that the court's findings superficially considered the employer's genuine ability to pay contributions 'at the time it was supposed to.'[62] That had it delved deeper into this aspect, it would have appreciated the employer's explanation of preferential treatment of its creditors.[63] However, this argument ignores the fact that part of the contributions comes from the employees' remuneration, which makes that portion of contributions their property and not that of the employer. Therefore, it does not seem a deeper probe of the employer's financial situation at the time it failed to pay contributions would have changed the findings the court ultimately arrived at. This is because, it is clear from the employer's reasoning that the non-payment of contributions was an election based on its priorities.[64] It considered its service delivery mandate more important than its statutory obligation to pay deducted contributions to the fund as mandated by the Rules.

This is an incorrect balancing of priorities because when the fund resisted the proposal for a contribution holiday[65] on the basis that it had to change its rules,[66] the employer was supposed to advise the fund of FSCA Communication 11 of 2020. This communication allowed employers and funds to agree to an expedited amendment of the rules to relieve financially distressed employers who could not pay contributions.[67] Instead, the employer allowed the fund to device its own

[62] Marumoagae op cit note 16 at 1104 – 1105.
[63] Ibid at 1105.
[64] *SA Post Office* supra note 43 para 25.
[65] Ibid para 16.
[66] Ibid para 17.
[67] FSCA Communication 11 of 2020.

means of 'possible actions to offer relief',[68] and, in that process the employer wrongfully elected not to pay contributions.

Alternatively, the South African Post Office while faced with unsurmountable financial problems should have opted for business rescue in terms of Chapter 6 of the Companies Act 71 of 2008. In *Municipal Workers Retirement Fund v Kopanong Local Municipality*[69], the court stated the following regarding a Municipality who have alternative options other than withholding contributions:

> *'The MFMA provided alternative mandatory remedies which could and should have been utilized if the Municipality was in such dire financial straits as it wanted the court to believe.'*[70]

SAPO can therefore not elect to breach the fund rules and a statutory obligation under the Telecommunication-Related Matters Act 44 of 1958, based on financial challenges when, as a state-owned enterprise, it had an option of applying for business rescue.

Whether failure to pay contributions is by default or by design as demonstrated in the above-discussed cases, it is evident that this culture is worrying.[71] It has been argued that retirement funds are also to blame because they seem to be failing 'to be proactive and take steps to collect contributions from all employers'.[72] However, according to Marumoagae, the PFA does not place a duty on retirement funds to take steps and collect contributions, but rather places a duty on retirement funds to report instances of non-compliance by employers including failure to pay contributions.[73] In light of the two different arguments, the FSCA Conduct Standard

[68] *SA Post Office* supra note 43 para 19.
[69] [2019] ZAFSHC 159 (19 September 2019).
[70] Ibid para 37.
[71] *M Mbundu v Security Employees National Provident Fund and other* Case No. PFA/WE/2314/05/KM at para 1.
[72] Nkosi op cit note 1 at 5-6.
[73] Marumoagae op cit note 4 at 10 – 11.

1 of 2022 laid this debate to rest, by placing a positive duty on retirement funds to collect contributions even through outsourcing such services to attorneys, albeit with caution on fees and conflict of interest.[74] Moreover, in *Joint Municipal Pension Fund v Ehlanzeni District Municipality*[75] the court held that

> 'The fund is therefore statutorily obliged to collect the contributions and distribute the benefits payable to its members as appears from Section 7[D(d)] of the Pension Act'.[76]

It is evident that there is an obligation placed on retirement funds to ensure that contributions are paid.[77] It is this obligation that gives retirement funds *locus standi* to bring legal action against employers that default.[78] The dominant impression in the South African context is that some defaulting employers are simply 'unscrupulous.'[79] They tend to make deductions on their employees' remuneration and fail to submit them to the pension funds.[80] It is in this context that the discussion that follows seeks to evaluate the effectiveness of the current legislative framework.

III LEGISLATIVE FRAMEWORK

(a) Duty to pay contributions

In terms of section 13A of the PFA, the employer must pay employees' contributions and employer's contributions 'in full' to the employee's retirement fund.[81] The duty to pay contributions and the amount of contributions payable is

[74] At para 6.
[75] [2018] ZAGPPHC 594 (14 June 2018).
[76] Ibid para 40.
[77] Marumoagae op cit note 4 at 11.
[78] *Ehlanzeni District Municipality* supra note 76 para 35.
[79] Marumoagae op cit note 16 at 1101.
[80] Ibid at 1101.
[81] Section 13A (1) (a) (b).

also stated in the retirement funds rules.[82] The section further provides that in making payments, the employer must furnish the fund with ‘minimum information’ regarding such contributions.[83] Alternatively, the said information should be furnished within 15 days of the month when payment was due.[84] The employer must ‘ensure that it was making the right payments and to keep up to date with relevant schedules.’[85] In *Wentzel Long Hall CC t/a Lezmin 1862* CC v *Transport Sector Retirement Fund and* Another,[86] it was held that ‘the statutory obligation to supply information and to pay does not depend on letters of demand and liability does not depend on wilfulness.’[87] This duty is therefore created by statute and failure to comply with it does not depend on the defaulter’s intention.

(b) Information that must accompany contributions

The phrase ‘minimum requirements’ seems vague in so far as the content and extent of the information required is concerned. In an attempt to cure this, the Conduct Standard provides that the minimum information in the first contribution statement must include among others, details of the fund, employer, and responsible persons for contributions.[88] The statement must also provide the members’ details and contribution details.[89] The Conduct Standard further provides what minimum information entails ‘subsequent contribution statements’, which essentially includes changes, alterations, and additions that may have occurred during the time between the two statements.[90] Lastly, it provides for a requirement that employers must furnish a declaration that information furnished is accurate.[91]

---

[82] *Van der Riet Family Trust t/a Cathedral Peak Hotel v Hospitality Industry Pension Provident Fund* [2009] 2 ALL SA 196 (SCA) at 197.
[83] Section 13A (2).
[84] Section 13A (2) (b).
[85] *Ndlambe Local Municipality* op cit note 40 para 9.
[86] PFA5/2022.
[87] Ibid para 38.
[88] Item 3(1)(2)(a) to (g).
[89] Item 3(h)(i) to (xiv).
[90] Item 3(3).
[91] Item 3(4).

The above should be viewed as a positive development because, detailed information would enable retirement funds to pick up and report to their members any employers' failures to pay contributions timeously. Secondly, by declaring the accuracy of the information they provide, employers cannot later rely on technical problems or typographical errors for wrong entries on member's contributions information. It is therefore a form of a guarantee on the accuracy of the information given to the retirement fund, which is binding on the employer.

(c) Mode of payment

Section 13A(3) of the PFA provides that contributions must be paid into the fund's bank account not later than seven days after the end of the month they were due.[92] Alternatively, they can be paid directly to the fund, and the fund shall deposit those contributions in its bank account the following day of business.[93] In *Private Sector Security Provident Fund v Quaka Security Services CC,*[94] the Adjudicator determined that, in the event that the 7 days lapse without receiving contributions, the monitoring person must launch a written complaint to the board about the failure to pay contributions.[95] In terms of the current Conduct Standard, the person responsible for receiving contributions and reconciling them with information received from the employer must report '… not later than a further fifteen days after the end of the period set out in section 13A(2)(b)' if the information was not received.[96] These time periods are important to ensure that there is no inaction between the period the contributions were supposed to have been received and when it ultimately becomes evident that there has been non-payment for that month.

[92] Section 13A (3) (a) (i).
[93] Section 13A (3) (ii) (b).
[94] PFA/GA/15097/2007/LCM.
[95] Ibid para 5.12.
[96] Item 4(1)(ii).

Secondly, where the data received does not reconcile with contributions payment received and the discrepancies are more than 2.5% such a person must report to the principal officer.[97] In terms of this provision, any discrepancy less than 2.5% is 'deemed not to constitute a contravention for purposes of the conduct standard.'[98] It is not clear how the 2.5% is going to be measured and what standard is going to be used. In this regard, it is proposed that once there is a discrepancy in the amount of the contributions received, such should be reported to the principal officer. The Principal Officer would exercise his/her discretion to determine whether any action needs to be taken with regard to those discrepancies. The board can also get expert advice on the impact the said discrepancies would have on the members' investment and/or benefits, to assist it in making an informed decision.[99]

(d) Duties and Obligations of Principal Officer

Section 13A(6) of the PFA provides that the principal officer or any authorised person shall monitor and ensure compliance with the provisions of section 13A. The principal office is required to exercise good faith in line with the fiduciary duties he or she owes to both the fund and its members.[100] The Tribunal held that it is the duty of the principal officer to monitor and report payment of contributions, and, where there is non-compliance with section 13A he/she must report such to the FSCA.[101] The role of the principal officer is very important in ensuring that there is compliance with section 13A. If the principal officer fails to comply with his duties and obligations under 13A(6), he/she can be removed in terms of section 8(5)(*c*) of the PFA. Such removal would be on the basis that he/she is no more a fit and proper person.[102] It would seem therefore that the retirement funds through their principal officers cannot just be folding their hands when employers default in either

[97] Item 4(1)(iii).
[98] Item 4(1)(iii).
[99] Section 7D (e) of the PFA.
[100] *Zibi v Financial Sector Conduct Authority and Another* [2023] ZAFST 59 (9 May 2023) para 20.
[101] Ibidpara 26.6.
[102] Ibid para 28.

furnishing contributions information or failing to pay contributions. They are under a legal obligation to report such contraventions of the Act to the FSCA. Item 4 (3) of the Conduct Standard obliges the board to report any material breach of section 13A to the members, the FSCA, and ultimately to the police.[103]

(e) Interest Payable for non-payment of contributions

In terms of section 13A(7) of the PFA, if the employer fails to pay contributions within the prescribed periods, interest 'shall be payable from the first day following the expiry of the period.' Such interest is payable on late payments as well as contributions not received.[104] In *Municipality Gratuity Fund v West Rand District Municipality and Another*[105], it was found that the Adjudicator's equitable jurisdiction cannot 'override' the legal obligation to pay interest at the rate set by the statute.[106] This was subsequent to the Adjudicator making a determination that the Municipality should pay the fund at a lower agreed rate that is not provided for in the statute.[107] In *Municipal Workers Retirement Fund v Ndlambe Local Municipality*[108]*,* the High Court found that interest is payable in accordance with the applicable rate and 'the court has no discretion regarding the rate of interest.'[109] The Conduct Standard provides that interest on late payment or non-payments shall be calculated from the first day after expiry of the applicable payment period at the 'prime rate plus 2 percent.'[110] Further that such interest shall become 'investment income for the fund'.[111] The failure to pay contributions would therefore be met with a punishment of payment of interest once discovered. The high rates of interest are aimed at dissuading employers from non-payment of contributions, in this regard, it is an important punishment tool the legislature has put in place.

[103] Item 4 (4).
[104] Section 13A(7).
[105] PFA 97/2019.
[106] Ibid para 21.
[107] Ibid para 15.
[108] *Ndlambe Local Municipality* op cit note 40.
[109] Ibid para10.
[110] Item 5(1)(a)&(b).
[111] Item 5(2).

(f) Personal Liability for Defaulting Employers

Section 13A(8) of the PFA provides for personal liability for non-payment of contributions for companies, close corporations, and employers of any legal status. In *Municipality Gratuity Fund v West Rand District Municipality and Another*[112], it was found that personal liability does not absolve the employer from making interest payments and/or contributions.[113] For purposes of identifying the person who should be held personally liable, the fund must request the employer to identify such a person.[114] If the employer fails to comply with such a request, 'all directors', managers, or 'the governing body' shall be held personally liable.[115] In *National Fund for Municipal Workers v Tswaing Local Municipality and Another*[116], it was found that in the event that the fund is unable to find the person to be held personally liable, it is the duty of the Adjudicator to investigate and determine the identity of such a person.[117] In *Engineering Industries Pension Fund and Another v Pioneer Mechanical CC and Another,*[118] the High Court found a sole director of a close corporation to be personally liable for payment of outstanding contributions.[119] The imposition of personal liability plays two important roles. First, it ensures that directors and/or employers don't hide behind the corporate veil of their companies. Secondly, it ensures that compensation is afforded to 'employee members' who lost their retirement savings due to their employer's failure to pay contributions.[120]

[112] *West Rand District Municipality* supra note 105.
[113] Ibid para 12.
[114] Section 13A (9).
[115] Section 13A (9) (b).
[116] PFA 25/2020.
[117] Ibid paras 28 – 29.
[118] [2022] ZAWCHC 215 (3 June 2022).
[119] Ibid paras 10 – 13.
[120] Motseotsile Clement Marumoagae 'Section 13A of the PFA: Employer's failure to pay employee's contribution to the employee's pension fund' (2015) *Speculum Juris* 68 at 83.

(g) Fiduciary Duties of the Board

In terms of section 13A(10) of the PFA the board is under a legal obligation to report non-compliance with provisions of section 13A. This section read with the provisions of section 7C and 7D of the PFA provide for the fiduciary duties of the board of trustees. Section 7C of the PFA provides that in exercising control and overseeing the fund, the board 'must take reasonable steps to ensure the interest of members.' Such interests include amongst others a duty to ensure that employers pay contributions timeously. Where the employer fails to do so, the fund must take steps to ensure compliance which may include litigation. Section 7C of the PFA further provides that the board owes fiduciary duties to the fund and the members. In terms of section 7D(*d*), it is the duty of the board to take reasonable steps to ensure that contributions are paid timeously. In *Joint Municipal Pension Fund v Ehlanzeni District Municipality*[121], the court found that the institution of legal proceedings to recover unpaid benefits 'falls squarely into the concept of reasonable steps.'[122] The High Court in *Private Sector Security Provident Fund v Naphtronics (Pty) Limited*[123], relied on the provision of section 7D and section 13A to find that the employer is liable to pay outstanding contributions together with penalty interest.[124] Section 7D(*c*) of the PFA makes it a requirement that members be furnished with information regarding *inter alia* their rights, benefits, and duties.

It has been argued that if benefit statements were provided to members at proper intervals, they might become aware that their employers are not paying contributions and action can be taken while they are still employed.[125] Ideally, if employees become aware of employer's default whilst still employed they can file a complaint with the Adjudicator for retirement funds that fall under its jurisdiction, or institute a civil claim for those without such adjudicating bodies.

[121] *Ehlanzeni District Municipality* supra note 75.
[122] Ibid para 40.]
[123] (2008) *ILJ* 29 (B).
[124] Ibid paras 32-33 and para 55.
[125] Marumoagae op cit note 120 at 71.

IV LEGISLATIVE SANCTIONS

(a) Overview

Section 37(1)(a) of the PFA provides that any person who violates or fails to comply with section 13A is guilty of a criminal offence, and, if convicted might be liable to a fine of R10 million or to imprisonment not exceeding 10 years or both. This section criminalises non-compliance with section 13A of the PFA. In other words, failure to pay contributions and/or failure to collect contributions will lead to conviction and imprisonment. It has been argued that while it cannot be proven for certainty that the imposition of criminal sanction encourages employers to comply with their obligation in terms of the PFA, absence of such also create a 'fertile environment' for defaulters'.[126] It has also been argued that to enhance compliance mechanisms, section 167 of the Financial Sector Regulation Act of 2017 may be used.[127] This provision empowers the FSCA to issue administrative penalties for violations of 'financial sector law – which includes the PFA.'[128] The criminalisation of violating section 13A of the PFA and the imposition of penalties is indeed a step in the right direction to ensure compliance. The fear of imprisonment would have a deterring effect on defaulters, and the heavy penalties would also discourage non-compliance. It is essential that these sanctions should be seen to be applied on offenders as opposed to being only good on paper and not practical. Section 37(2) of the PFA also bestows powers on the FSCA to impose administrative fines for failure to submit any document or information required in terms of the Act. It can be argued that failure to submit contribution schedules and information relating to contributions may render a party in default to such administrative fine.

---

[126] Ibid at 75 – 76.

[127] Deirdre Phillips 'South Africa: Employers take note – A new Conduct Standard on the requirements related to the payment of retirement fund contributions and submission of prescribed information' at 2 accessed from https://bowmanslaw.com/lawyer/Deirdre-Phillips/ on 24 July 2023.

[128] Ibid.

There is some legislative intervention that has been put into place to ensure that retirement fund contributions are paid timeously, including section 13A and the Conduct Standard. The Adjudicator, the Financial Service Tribunal and the courts have interpreted section 13A of the PFA in a manner that ensures compliance but there are still employers who are defaulting. In its 2021 communication, the Adjudicator expressed concern over a huge number of complaints relating to non-payment of contributions by employers that her office received.[129] She noted that about 40% of overall complaints her office received related to failure to pay contributions.[130] It is recommended that the Act be amended to require boards of trustees to appoint responsible persons who will ensure that contributions are received by the fund and report employers who failed to pay as required. There should also be personal liability should the appointed persons fail to perform their tasks. The fund should not be burdened with liability because of a failure by the board and the relevant officials to perform what they are legislatively obliged to do. In any event, such liability on the fund will only prejudice the members, as it would be their monies that would be used to pay such penalties and/or fines.

It would seem currently the power to report and/or institute criminal proceedings with police is only vested with the board, which will determine whether such violation is material or not.[131] The members can only take action regarding such material breaches once they are informed by the board. [132] One wonders whether the board would bring a contravention of section 13A to the attention of the members if they are the culprits. It is also not clear which breaches would be considered material, but perhaps the legislature used the word material with the maxim *de minimis non curat lex*[133] at the back of their minds. It is submitted that

[129] Office of Pension Fund Adjudicator Communication 1 of 2021, dated 14 October 2021, last accessed from http://www.pfa.org.za/Notices Docs/20Communication%2021/pdf. On 24 July 2013.
[130] Integrated Report op cit note 31.
[131] Item 4(4)(a) of the Conduct Standard.
[132] Item 4(4)(b).
[133] This phrase means that 'the law does not concern itself with trifles' as defined in *Freedom of Religion South Africa v Minister of Justice and Correctional Services and Others* 2020 (1) SA (CC) para 35. See also *Diageo SA (Pty) Ltd v Commissioner of the South African Revenue Services* [2023] ZAGPPHC 508 (5 July 2023) para 56, where it was stated that '[t]he maxim *de minimis non curat lex* encapsulates that the law does not concern itself with a fact or thing that is so insignificant

members need not have to wait for the board to inform them of contraventions before they take action. Secondly, it is not clear why a period of 90 days should first lapse before the non-payment of contributions can be reported to the police. It is recommended that a shorter period of at least a month be applicable. This is to avoid cancellation of those members' policies that may be underwritten by insurance companies.

(b) The impact of criminal sanctions

In *SAMWU National Provident Fund v Ntabankulu Local Municipality and Others*[134]*,* the court expressed a view that non-compliance with section 13A of the PFA is 'so serious ... the legislature [proscribed]...a prohibitive fine or a lengthy term of imprisonment.'[135] However, it is concerning that law enforcement agencies appears to not view non-compliance in a serious note as intended by the legislature.

---

that a court may overlook it in deciding an issue or case. The maxim signifies that "mere trifles and technicalities must yield to practical common sense and substantial justice". The maxim has been applied, in South Africa in a variety of cases, but predominantly in criminal matters. The policy reasons behind invoking the maxim are, however, similar, and the principles flowing from the case law provide guidance in this matter. It was further held that ' '[i]t seems to me that, wherever the defence of *de minimis non curat lex* is raised, the court has to consider all the circumstances under which the blow which is said to be trivial was delivered. In some circumstances a blow may be considered so trivial as to justify the court ignoring it altogether; in different circumstances, a similar blow might be a relatively serious assault; for example, slaps delivered by fishwives to each other during a drunken brawl might well be ignored on the principle of *de minimis non curat lex* whereas an unprovoked slap delivered to the face of a lady, say at a garden party, could not be similarly ignored' (para 58). In the context of pension law, *de minimis* maxim has been referred to in the Revenue Laws Amendment Act No. 2 of 2016, wherein it entails pension fund members' entitlement to cash withdrawal or purchasing an annuity with their benefits. 'If the member's total retirement interest in any of these funds is less than R247 500 at retirement, the member can take his whole retirement benefit in a lump sum. If it is R247 500 or more, the one-third restriction will apply, which means that the member will have to buy an annuity with the remaining two-thirds' by Hettie Joubert 'Momentum Legal Updates- Revenue Laws Amendment Act' accessed from https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2016/Revenue_Laws_Amendment / on 28 October 2023.

[134] [2018] ZAECMHC 93 (14 August 2018).

[135] Ibid para 30.

In *S v BTC Construction (Pty) Ltd and Another,*[136] the director of the company was accused of contravening section 37(1)(a) read with section 13A(1) of the PFA in that he deducted contributions from the remuneration of employees but failed to pay the said amounts to the relevant provident fund.[137] Alternatively, he was charged with vicarious liability for the actions of the company which was charged as the second accused, with the same offence, under section 332 of the Criminal Procedure Act 51 of 1977.[138] In terms of the schedule attached to the charge sheet, the deductions that were not paid were for several months from 2012 until 2017, the total amount was R 152 738.82.[139] The director entered into a plea bargain with the state in terms of section 112 (2) of CPA.[140] On the other hand, the company was found guilty on all counts and a fine of R5000.00 was imposed against it.[141]

The facts, and the ultimate sanction in the above discussed case leaves a lot to be desired, for the following reasons. First, it is not clear why the state allowed the director to enter into a plea bargain on behalf of the company yet still sentenced the company to a fine of R 5 000.00. While the director, who is actually the controlling mind of the company was not fined anything. Secondly, it is not clear why the court awarded a small fine as compared to what the company failed to pay as contributions, and, in light of the high bar of 'not exceeding 10 million' set by section 37 of the PFA. It is therefore argued that the whole sentence seems to be the proverbial 'slap on the wrist' and has little or no effect of deterring would be offenders. In *S v Scott-Crossley*[142], the court stated the following regarding appropriate sanction and the theory of deterrence:

[136] SCCC257/2017 (Johannesburg Magistrate Court Archives).
[137] Ibid at 1-3 of the charge sheet.
[138] Ibid at 1-3 of the charge sheet.
[139] Ibid at 4 - 14 of the charge sheet
[140] Ibid at 6 of J175.
[141] Ibid at 6 of J175.
[142] 2008 (1) SACR 223 (SCA).

Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones... It is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.'[143]

While it is true that an accused person should not be sacrificed at the expense of deterrence, a small fine imposed for non-payment of contributions worth thousands of Rand over a long period was indeed disproportionate in this instance.

It would seem that while some offences are reported and ultimately prosecuted in the courts of law as demonstrated above, the statistics provided by Adjudicator do not show improvement.[144] The FSCA press release of 1 September 2023 indicates that it received a total of 5430 cases of section 13A contraventions 'as at 30 April 2023'.[145] Amongst these 28% is for one month outstanding contributions.[146] While 24% are for contributions outstanding from two months to a year, and, another 25% for 5 or more years.[147] The purpose of the press release was to inform 'members of retirement funds and relevant stakeholders' of the contraventions of the provisions of section 13A (3) (a) of the PFA.[148] The FSCA also advised members on the basis of a compromise placed on their benefits as a result of the default.[149] Secondly, it seeks to alert them of the possible repudiation of insurance policies after three months of non-payment of contributions by the employers, which may lead to forfeiture of death benefits by dependants.[150]

---

[143] Ibid para 35.
[144] Integrated Report op cit note 31.
[145]Financial Sector Conduct Authority press release of 1 September 2023 last accessed on 17 September 2023 at https:www.fsca.co.za/news%20 Documents/FSCA%20Press%20-%The%20FSCA at 1.
[146] Ibid.
[147] Ibid.
[148] FSCA Communication 21 of 2023 op cit note 32 para 1.
[149] Press release of 1 September 2023 op cit note 145.
[150] Ibid.

While these are commendable initiatives by the FSCA, nothing is said about the reporting of these acts of criminality to the South African Police Service (SAPS) and other law enforcement agencies.[151] The FSCA only states that it is 'continuing to engage with the relevant authorities to ensure that the criminal element of this contravention is effective.'[152] One would think that the first step in ensuring effectiveness would be to report these contraventions to law enforcement agencies. However, the precise meaning of engaging with relevant authorities is not clear as to what it entails, in the absence of statistics showing how many cases have been reported to SAPS.

The Financial Sector Regulation Act 9 of 2017 provides that, the FSCA in compliance with its obligation must 'deter, prevent, detect, report and remedy fraud or other criminal activity in relation to financial products or financial services.'[153] The FSCA is therefore under a clear legal obligation to report non-payment of contributions to SAPS in terms of the regulations. It is surprising that out of 5430 cases of section 13A(1)(a) violations, there is no clear indication of those reported to the SAPS. All that the FSCA states is that it is 'continuing to engage with relevant authorities'. It appears that nothing or very little is being done by the FSCA to ensure that perpetrators of section 13A violations are brought before law enforcement agencies.

While naming and shaming may alert members and affected stakeholders to take action on their own, this initiative remains insufficient. This is because many of the employees might not even have access to these press releases and communications issued by the FSCA, while others may not understand the contents of these press releases. Many might not be aware that non-payment of contributions constitutes a criminal offence. It is therefore recommended that other than placing a reporting obligation to the SAPS on only the boards,[154] Conduct

[151] Like Directorate for Priority Crime Investigation (Hawks).
[152]Press release of 1 September 2023 op cit note 145 at 2.
[153] Section 251(2)(a)(vii).
[154] Item 4 (4) (a) FSCA Conduct Standard 1 of 2022.

Standard must also place an obligation on the FSCA to report non-payment of contributions offences to police. As it has been argued above, it is very unlikely that the board of trustees would report their own non-compliance with section 13A to the SAPS. It is therefore the duty and obligation of the FSCA to take positive action by reporting such violations and work together with the SAPS to ensure their prosecution. In any event, the FSCA is better placed in terms of resources and knowledge to assist and guide SAPS other than ordinary members. It is therefore recommended that the FSCA should play an active role in reporting section 13A violations that are brought to their attention for better enforcement and deterrence. In this regard the following remarks by the FSCA Commissioner are true:

> *'However, the effectiveness of laws is determined not only by their articulation or existence, but also by their proper enforcement. It is through enforcement that wrongdoers are deterred, and unlawful activities are curtailed, forming a shield that safeguards the harmony and stability of society. Without robust and effective enforcement, laws become mere words on paper, lacking the power to protect the rights and interests of individuals and society as a whole. This powerlessness breeds a culture of impunity and risks the erosion of public trust in legal institutions. Conversely, it is the diligent and vigilant enforcement efforts that ensure the credibility and efficacy of legal frameworks.'*[155]

Criminal sanctions in line with the above statement can only be effective if they are enforced. Enforcement not only entails reporting violations to the SAPS, it also means successful prosecution. For criminal sanctions to be effective they must have the effect of instilling regret on the part of the offender and fear on the part of would-be offenders. It has been argued that special deterrence involves punishing the offender for him or her to 'stay away from criminal activities.[156] On the other

[155] Unathi Kamlana 'Successful enforcement of financial sector laws as a credible deterrent in the context of the South Africa FATF grey-listing' (Address by FSCA Commissioner at Unisa on 24 August 2023) at 2 last accessed from https://www.fsca.co.za/news%20Downloads/FSCA% on 17 September 2023.
[156] Nicolien du Preez and Phumudzo Muthaphuli 'The deterrent value of punishment on crime prevention using judicial approaches' (2019) 1 *Just Africa* 34 at 36.

hand, general deterrence entails instilling fear in others by setting an example with the apprehended offender of what would happen to them should they commit the crime.[157]

If the sanction or punishment is not severe, the employers will forever fail to pay contributions as demonstrated by the FSCA statistics above. Secondly, if other employers realise that what defaulting employees are getting as punishment for non-payment of contributions is negligible, they would not be deterred from doing like-wise. It is therefore recommended that the legislature must set minimum imprisonment years for first offenders, as well as maximum imprisonment years for repeated offenders. Secondly, with regards to fines, a minimum amount should be proscribed as opposed to giving a range that permits magistrates to issue very little fines such as R 5 000.00 like it was awarded in *BTC Construction*[158] . In this, the law will have a 'biting effect' as opposed to only 'barking', and, it would therefore be an effective deterrent.

Despite the above criticism, it cannot be argued that criminal sanctions are wholly ineffective and useless. It has been correctly argued that in their absence a conducive environment is created for employers to default in paying contributions.[159] It has been argued further that in practice, once a criminal case has been opened with the SAPS employers are quick to approach retirement funds with settlement proposals.[160] Further, challenges with criminal sanctions sometimes arise as a result of SAPS' categorisation of the non-payment of contributions as a civil matter between employers, employees and retirement funds.[161] This leads to some members of SAPS to be reluctant to open criminal cases or investigate them with vigour.[162]

[157] Ibid.
[158] Supra note 136.
[159] Marumoagae op cit note 121 at 76.
[160] Anesh Soonder (Wits University Lecture) delivered online on 09 March 2023.
[161] Ibid.
[162] Ibid.

In order to overcome such challenges, it is proposed that the FSCA should develop a training programme that can be offered to the South African Police Service that can assist them to understand and effectively respond to claims of non-payment of retirement fund contributions.[163] This programme can also be made available to the National Prosecuting Authority and the Magistracy.

The other challenge relates to the boards and/or authorised administrators' failure to report section 13A violations to the SAPS.[164]Perhaps the FSCA as the governing authority should robustly deal with such board members by awarding personal fines against them or removing them as board members. Sanctions are a very effective tool to ensure compliance. Should SAPS approach defaulting employers, such employers are likely to pay outstanding retirement funds contributions.[165]

It is advisable that criminal sanctions should be used together with civil remedies because the latter has the effect of compensating members.[166] It is further recommended that the Adjudicator and the Tribunal be vested with powers to issue compensation and/or damages orders. In the United Kingdom case of *N v Town Wall Tavern Ltd*[167], The Pension Ombudsman ordered an employer who had been deducting contributions from an employee but failing to pay it to the latter's retirement fund to pay the 'missing contributions' and 'any shortfall in units'.[168] It was further determined that the employer must pay £1,000 for 'distress and inconvenience in respect of the serious ongoing non-financial injustice.'[169] In another Ombudsman determination[170], an award for distress and inconvenience was also issued.[171] The Employment Tribunal in *Eamonn Daly v First Magazine*

[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] Ibid.
[167] Cas-82123-F4Y1.
[168] Ibid para 1.
[169] Ibid para 18.
[170] *N v Alchemilla* Cas-46218-Y6Y3.
[171] Ibid para 16.(i).

Limited,[172] found that the failure to pay contributions by the employer is a breach of contract in the following words:

> *'The Respondent is ordered to pay damages in the sum of £20,000 to the Claimant in respect of the Respondent's breach of contract by failing to pay £10.000 pension contributions at the end of 2016 and 2017.'*[173]

Considering the above decisions, it is recommended that we follow the United Kingdom approach.[174]

It is submitted that failure to pay deducted contributions constitutes a legal wrong and as such, a *solatium* should be paid by defaulting employers to the employees. The payment of such damages should be accompanied by payment of arrear contributions with interest, which should be paid to the retirement fund.

V LIMITATIONS

One major limitation to the collection of relevant data for the research is the non-reporting of criminal cases at the level of Magistrate Courts. This has hindered an extensive interrogation of how non-compliance cases have been handled by the Magistrate Courts. How many have led to successful convictions, and how many led to acquittals, and, the reasons thereof. The lack of data from the National Prosecuting Authority on criminal cases relating to non-payment of contributions

[172] Case No. 2201881/2018.
[173] Ibid 80.13.
[174] See *Johnson and Johnson (Pty) Ltd v CWIU,* where the court stated the that: '[t]he compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a *solatium* for the loss of the right and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in some way or another.'

also meant it was difficult to identify such cases and trace their dockets. As a result, only one docket was successfully located in the archives of the Johannesburg Magistrate Court. The analysis on the impact of criminal sanctions was however aided by statistics issued by the FSCA, even though they only indicate cases of non-compliance, and not how the criminal justice system has dealt with such cases. It is in this regard that it is proposed that Magistrate Court decisions should be reported. Alternatively, NPA should have a means of categorising all criminal cases in terms of their nature, and, make data relating to such cases available for purposes of research. This would assist researchers to identify cases relevant to their scope of study by the names of the parties or case numbers. In this way they may be able to locate dockets and/or case files relating to their particular research field.

VI CONCLUSION

The issue of non-payment of contributions by employers is a real pandemic affecting the pension law industry in South Africa. Statistics from the Adjudicator's office and the FSCA proves that this misconduct continues unabated.[175] The adverse effects of non-payment of contributions are mostly felt by retirement fund members who may not have saved enough when they retire. Retirement funds are also affected because the non-payment of contributions ultimately affects the amount and nature of investments they should be making on behalf of their members as these investments depend on contribution monies. While there are a range of factors for non-payment such as, outright recalcitrant employers, ineffective boards, ineffective enforcement authorities, and collusion between employers and employees. The current legal framework allows defaulting employers to continue not paying contributions. It is in this regard that the report made the following proposals for reforms:

[175] Press release of 1 September 2023 op cit note 145.

That item 4 (1) (i) (iii) of the Conduct Standard, which requires a certain percentage of discrepancies regarding data received from the employer and the contributions should be reported to the Principal Officer, needs to be amended. It is proposed that any discrepancy should be reported to the Principal Officer as it can be difficult to determine the required percentage by retirement fund employees responsible for receiving data and contributions. In any event the Conduct Standard does not provide a criteria for determining such a percentage. It is also proposed that item 4 (4) (b) of the Conduct Standard which seem to suggest that members can report non-payment of contributions to police once informed by the board about it should also be amended. It is proposed that the Conduct Standard should be amended in such a way that it clearly gives rights to members to report instances of non-payment once they become aware of them, irrespective of the source of such knowledge. In this regard, the argument is that it is impractical that the board would report such instances to the members if it is the one that failed to collect. Lastly, it is proposed that the requirement that a period of 90 days before non-payment can be reported as per the Conduct Standard be amended. It is proposed that a shorter period of perhaps a month should be imposed as further delays can have irreversible consequences.

With regard to the PFA, it is proposed that it should be amended to hold board members and/or principal officers that are found to have breached their legal obligation to ensure collection and payment of contributions personally liable. Further that the PFA be amended to make provision for the payment of civil damages and/or compensation to pension fund members for breach of the legal obligation to pay contributions by employers.

In so far as criminal sanctions are concerned, it is proposed that harsh and/or severe criminal sanctions must be imposed on convicted offenders which would have a deterrent effect. That in order to achieve successful convictions, law enforcement agencies such as the South African Police and the Prosecuting

Authority should be made aware of the severity of non-payment of pension contributions through awareness and/or training programmes.

It is being proposed further that the FSCA should be seen to be robustly dealing with issues of non-payment of contributions such as removing board members that fail to ensure collection and payment of contributions. Secondly the FSCA should issue communications advising qualifying employers that are in financial distress to seek business rescue in terms of the Companies Act. The FSCA's financial sanctions should also be imposed on employers not with the view of bankrupting them, but as a means of effectively punishing them financially in order to deter non-compliance. It is for this reason that while awarding financial sanctions the 10 million bar set in section 37 of the PFA, the amount of unpaid contributions, and, period of default should be guiding principles. No employer would feel the pinch of financial sanction if they are so little that they amount to the proverbial 'drop in the ocean' when compared to the employer's financial muscle. It is through the above proposed suggestions for reform that effective and efficient law enforcement mechanisms can be achieved. This would in turn ensure that the alarming statistics of non-compliance would diminish, lest citizens view our laws as a 'toothless bulldogs' that can only bark without a bite

BIBLIOGRAPHY

Journal Articles

Du Preez N and Muthaphuli P 'The deterrent value of punishment on crime prevention using judicial approaches' (2019) 1 *Just Africa* 34 - 46

Gale W 'Public Policies and Private Contributions' (1994) 26 *Journal of Money, Credit and Banking* 710 - 732

Marumoagae C 'Liability to Pay Retirement Benefits when Contributions were not paid to the Retirement Fund' (2017) 20 *PER / PELJ* 1 - 39

Marumoagae C 'Pension Law' (2021/2022) *Yearbook of South African Law* 1084 – 1118

Marumoagae C 'Section 13A of the PFA: Employer's failure to pay employee's contribution to the employee's pension fund' (2015) *Speculum Juris* 68 – 85

Mhango M 'A strange thing happened on the way to the Post Office: Post Office Retirement Fund v S.A. Post Office SOCLtd and Others' (2021) 36.2 *ITJ* 1

Mdluli S 'The Role of the Board of a South African Defined Contribution Pension Fund that Offers Investment Choice' (2011) 23 *SA Merc LJ* 247 - 268

Nkosi T 'The Rules of an Occupational Retirement Fund and the Problem of Defaulting Employers: A Reconsideration of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator'* (2016) 19 *PER/PELJ* 1 - 24

Phan H and Hedge S 'Contributions and Firm Performance: Evidence from Frozen Defined Benefit Plans' (2013) 42 *Financial Management* 373 - 411

Van der Zwan N ‘Financialisation and the Pension System’ (2017) 15 *Journal of Modern European History* 554 – 578

Cases

Diageo SA (Pty) Ltd v Commissioner of the South African Revenue Services [2023] ZAGPPHC 508 (5 July 2023)

Eamonn Daly v First Magazine Limited Case No. 2201881/2018

Engineering Industries Pension Fund and Another v Pioneer Mechanical CC and Another [2022] ZAWCHC 215 (3 June 2022)

Freedom of Religion South Africa v Minister of Justice and Correctional Services and Others 2020 (1) SA (CC)

ICS Pension Fund v Sithole [2009] ZAGPHC 6 (13 January 2009)*JA Vorster Vervoer v Transport Sector Retirement Fund and others* Case No. PFA55/2021

Johnson and Johnson (Pty) Ltd v CWIU [1998] BLLR 1209 (LAC)

Joint Municipal Pension Fund v Ehlanzeni District Municipality Joint Municipal Pension Fund v Ehlanzeni District Municipality [2018] ZAGPPHC 594 (14 June 2018)

Municipality Gratuity Fund v West Rand District Municipality and Another Case No. PFA 97/2019

Municipal Workers Retirement Fund v Kopanong Local Municipality [2019] ZAFSHC 159 (19 September 2019)

M Mbundu v Security Employees National Provident Fund and other Case No. PFA/WE/2314/05/KM

Moloantoa v The Private Security Sector Provident Fund and Others Case No. PFA/GP/00001982/2013/TKM

Mthimkhulu MB v NCB Holdings and Another Case No. PFA/GA/8180/2006/SM

Municipal Workers Retirement Fund v Ndlambe Local Municipality [2018] ZAECGHC 139 (22 November 2018)

Municipality Gratuity Fund v West Rand District Municipality and Another Case No. PFA 97/2019

National Fund for Municipal Workers v Tswaing Local Municipality and Another Case No. PFA 25/2020\

N v Town Wall Tavern Ltd Cas-82123-F4Y1

N v Alchemilla Cas-46218-Y6Y3

PC Van Niekerk Plant Hire CC t/a PC'S Transport v AF Nhleko and others Case No. PFA44/2019

Private Sector Security Provident Fund v Quaka Security Services CC Case No. PFA/GA/15097/2007/LCM

Private Sector Security Provident Fund v Naphtronics (Pty) Limited (2008) *ILJ* 29 (B).

Post Office Retirement Fund v South African Post Office SOC Ltd and others [2022] 2 All SA 71 (SCA)

Post Office Retirement Fund v South African Post Office SOC Ltd and Others [2020] ZAGPPHC 519 (14 September 2020).

SAMWU National Provident Fund v Ntabankulu Local Municipality and Others [2018] ZAECMHC 93 (14 August 2018).

S v BTC Construction (Pty) Ltd and Another Case No. SCCC257/2017

S v Scott-Crossley 2008 (1) SACR 223 (SCA)

Tembe v Security Employees National Provident Fund & Aza Day & Night Security Case No. PFA/WE/3197/05/SG

Wentzel Long Hall CC t/a Lezmin 1862 CC v *Transport Sector Retirement Fund and* Another Case No. PFA5/2022

Zibi v Financial Sector Conduct Authority and Another [2023] ZAFST 59 (9 May 2023)

Internet Sources

FSCA 'Statement supporting the Conduct Standard – Requirements related to payment of pension fund contributions' (19 August 2022) https://jutacomplinews.co.za/media/filestore/2022 accessed on 23 September 2023

FSCA Communication 21 of 2023 last accessed on 17 September 2023 on https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20Communication%2021%20of%202023%20(RF).zip accessed on 17 September 2023.

Financial Sector Conduct Authority press release of 1 September 2023 last accessed on 17 September 2023 at https:www.fsca.co.za/news%20 Documents/FSCA%20Press%20-%The%20FSCA accessed on 23 September 2023

Joubert H ‘Momentum Legal Updates- Revenue Laws Amendment Act’ accessedfromhttps://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2016/Revenue_Laws_Amendment / on 28 October 2023

Kamlana U ‘Successful enforcement of financial sector laws as a credible deterrent in the context of the South Africa FATF grey-listing’ (Address by FSCA Commissioner at Unisa on 24 August 2023) https://www.fsca.co.za/news%20Downloads/FSCA% accessed on 17 September 2023

Mahomed I & Rasetlola T ‘Proposed repeal of Regulation 33: Tightening the grip on employers who fail to make contributions to an employees’ pension fund’ available at https://www.cliffedekkerhofmeyer.com/expot/sites/cdh accessed on 13 September 2013

Office of Pension Fund Adjudicator Communication 1 of 2021, dated 14 October 2021, last accessed from http://www.pfa.org.za/Notices Docs/20Communication%2021/pdf accessed on 24 July 2013

Phillips D ‘South Africa: Employers take note – A new Conduct Standard on the requirements related to the payment of retirement fund contributions and submission of prescribed information' https://bowmanslaw.com/lawyer/Deirdre-Phillips/ accessed on 24 July 2023

The Office of the Pension Fund Adjudicator Integrated Report of 2021/2022 accessed on https://www.pfa.org.za/publications/pasges/annual-report s.aspx/ accessed on 17 September 2023