IN THE HIGH COURT OF SOUTH AFRICA
BOPHUTHATSWANA PROVINCIAL DIVISION

CASE NO.: 971/05

In the matter between:

THE PRIVATE SECTOR SECURITY PROVIDENT FUND
APPLICANT

and

NAPHTRONICS (PTY) LIMITED **FIRST RESPONDENT**
PRIVATE SECURITY INDUSTRY REGULATORY FUND
SECOND RESPONDENT

JUDGMENT

LANDMAN J:

[1] The Private Sector Security Provident Fund ("the Fund") applies for an order compelling the first respondent, Naphtronics (Pty) Ltd ("Naphtronics"), to pay its

contributions and to deliver a schedule of contributions to the Fund. The second respondent is the Private Security Industry Regulatory Fund. No relief is sought against the second respondent.

[2] Section 51(1) of the Basic Conditions of Employment Act 75 of 1997 ("the BCEA") enables the Minister of Labour ("the Minister") to establish a sectoral determination for any sector which is not covered by a bargaining council. The Minister established Sectoral Determination 3: Private Security Sector, South Africa ("Determination 3"). Determination 3: has been replaced by Sectoral Determination 6: Private Security Sector, South African ("Determination 6"). Clause 24 of Determination 6 provides for the compulsory membership of employers and employees of what is termed the Private Security Sector Provident Fund ("the Fund"). Determination 6 provides for compulsory contributions, the administration of the fund and the fund rules. The Fund is registered in terms of the Pension Fund Act 25 of 1956 ("the PFA").

[3.1] Section 7D of the PFA sets out the duties of the board of a fund. One of the duties of a board is to "take all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act"

(section 7D(d)) of the PFA.

[3.2] Section 13A of the PFA provides for the payment of contributions and benefits to pension funds. The section states:

> "(1) Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such fund shall pay the following to the fund in full, namely:-
>
> (a) Any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration.
> (b) Any contribution for which the employer is liable in terms of those rules.
>
> (2) (a) The minimum information to be furnished to the fund by every employer with regard to payments of contributions made by the employer in terms of sub-section (1) shall be as prescribed by regulation.
> (b) If that information does not accompany the payment of a contribution, the information shall be transmitted to the fund concerned not later than 15 days after the end of the month in respect of which payment was made."

[3.3] Any contribution to a fund must be transmitted directly into the fund's bank account or otherwise paid not later than seven days after the end of the month for which such a contribution is payable. See section 13A (3)(a) (i) and (ii) of the PFA.

[3.4] Section 18A of the PFA provides for interest to be paid on any contribution not transmitted into a fund's bank account timeously. The rate of interest charged is the same as the maximum annual finance charge rate which on the date on which the amounts become claimable applies in accordance with section 2(1) of the Usury Act 78 of 1968.

[3.5] Regulation 33(1), promulgated in terms of section 36 of the PFA, prescribes the minimum information to be furnished by every employer with regard to payment of contributions. It states:

> "(1) Minimum information to be furnished by every employer to the fund with regard to payments of contributions in terms of section 13A(2) of the Act, shall consist of at least the following:
>
> (a) Initial Contribution Statement:
>
> (i) Name of the fund; identification of the fund (e.g. registration number); period in respect of which the contribution is payable;
>
> (ii) Name and address of the employer or pay-point which made the deduction; responsible person to contact at the employer or pay-point;
>
> (iii) Full name, date of birth, ID number or employer pay number, or other means of identification, date of membership, pensionable emoluments or a member and percentage or amount of contributions, split between member and employer as well as an indication of any additional

voluntary contributions paid.

(b) Subsequent Contribution Statement:

In respect of each contribution period either:

(i) The information required in paragraph (a)(i) and (ii) above and part of all the information contained in paragraph (a) (ii) above; or

(ii) a reconciliation with the contribution statement for the previous period showing any differences in the data such as additions as a result of new members, reductions as a result of membership terminations, adjustments as a result of changes in pensionable emoluments or the payment of additional voluntary contributions or other information and corrections due to error."

[3.6] Regulation 33(7) provides that compound interest on late payments shall be calculated for the period from the first day of the month following the expiration of the period in respect of which the relevant amounts payable until receipt by the fund.

[4] The Rules of the Fund provides that:

(a) employers in the Private Security Sector shall participate in the Fund. See Rule 3.1;

(b) employees in the Private Security Sector shall participate in the Fund; and

(c) each member shall make a monthly contribution

to the Fund at a rate of 5% of his salary. The member's contribution must be deducted by his employer and paid to the Fund within seven days after the end of the month in respect of which the contributions were made. See Rule 4(1).

Jurisdiction

[5] During the argument of this matter on 21 May 2007, I raised the question whether this court has jurisdiction to entertain the Fund's claim given that:

(a) the Fund was established by a Sectoral Determination made by the Minister in terms of section 55(3) read with section 55(4)(m) of the BCEA;
(b) section 77(1) of the BCEA provides that ". . . the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act . . ."; and
(c) on the face of it, the applicant's claim may possibly involve a "matter in terms of the BCEA".

[6] The relevant subsections of section 77 of the BCEA read:

> "(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and

> except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92.
>
> (5) If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer that matter to the Labour Court."

[7] The application was postponed to 28 June 2007 for the hearing of oral argument on the jurisdictional point.

[8] The vexed question of the overlapping jurisdiction of the Labour Court and High Court, in the context of the Labour Relations Act 66 of 1995 ("the LRA"), has formed the subject of a series of judgments in the High Court, Supreme Court of Appeal and the Constitutional Court. See **Fedlife Assurance Ltd v Wolfarrdt** [2001] 12 BLLR 1301 (SCA) at paras 25-27; **Fredericks & Others v MEC for Education & Training**, **Eastern Cape & Others** (2002) 23 IJL 81 (CC) at para 32-33; **Denel (Pty) Ltd v Vorster** (2004) 25 IJL 659 (SCA) at para 16; **United National Public Servants Association of SA v Digomo NO** (2005) 26 IJL 1957 (SCA) at paras 4-5; **Media 24 Ltd & Another v Grobler** [2005] 7 BLLR 649 (SCA) at para 76 and **Transnet Ltd & Others v Chirwa** [2007] 1 BLLR 10 (SCA) at paras 30-44.

[9] The judgments concern the interpretation of section 157 (1) of the LRA, which reads:

> "Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court." (My emphasis.)

[10] Mr Myburgh, who appeared for the Fund, submitted that the predominant principle emerging from the judgments is that the resolution of a jurisdictional controversy like the one in questions lies in an assessment of the nature and formulation of the applicant's claim or cause of action. He contended that provided the applicant's claim, as formulated, does not purport to be one that falls within the exclusive jurisdiction of the Labour Court, the High Court has jurisdiction even if the applicant's claim could also have been formulated as a claim falling within the Labour Court's exclusive jurisdiction. See **United National Public Servants Association of SA v Digomo NO** (2005) 26 ILJ 1957 (SCA) at paras 4–5 and the unreported judgment **Boxer Superstores Mthatha v Mbenya** (2007) 79 (SCA) at para 5.

[11] Section 77 of the BCEA has been interpreted in **Molapo Technology (Pty) Ltd v Schreuder & Others** (2002) 23 ILJ 2031 (LAC); **University of the North v Franks & Others** [2002] 8 BLLR 701 (LAC) and **Molato & Others v DMG Construction CC** (2004) 25 ILJ 675 (T).

[12] In **DMG Construction**, Hartzenburg J, Botha J and Du Plessis J held that:

> "[9] Section 77(1) of the [BCEA] confers exclusive jurisdiction on the Labour Court 'in respect of all matter in terms of this Act'. In terms of s 77(1) of the [BCEA] the High Court does not have jurisdiction directly to enforce the provisions of s 37(4). The right not to be dismissed otherwise than writing is a right conferred on employees in terms of s 37(4) and its direct enforcement manifestly is a matter 'in terms of' the [BCEA]. Since that is so, it serves no purpose for this court to consider whether s 37(4) is peremptory or not.
>
> [10] The provisions of s 77(4), on which Mr Beaton fell back for his final stance, provide that the provisions of subsection (1) do not prevent a party to a civil action or an arbitration to establish that a basic condition of employment constitutes a terms of the subject contract in those particular proceedings. Literally interpreted it would mean that a litigant can sue on a contract of employment in, say, the High Court and by virtue of the provisions of s 77(4) the High Court has concurrent jurisdiction with the Labour Court. Interpreted like that it emasculates s 77(1). The exclusive jurisdiction provided for disappears. In our view that could never

have been the intention of the legislature.

[11] It follows that s 77 (4) must be interpreted more narrowly. In our view it provides that in those cases where proceedings may validly be instituted in the High Court or other forum that forum will not be disqualified from finding that a basic condition of employment is one of the terms of the contract in question. For example it means that in a matter like the Wolfaardt case anyone of the litigants can avail itself of the provisions of s 77(4). That would also be the case in matters specifically provided for in s 157(2) of the [LRA]. The establishing of the condition in the Act as a term of the contract is incidental to the real issue between the parties.

[12] Mr Beaton realized his predicament and conceded that this court does not have jurisdiction to enforce s 37(4). He argued however that it is not necessary for this court to enforce s 37(4). He says that he is before this court on contract and that the court must only enforce the contract. By virtue of the provisions of s 37(4), written notice to employees is essential. The fallacy of the argument is that in effect it is not a term of the contract. To make it a term of the contract a court must enforce s 37 and hold that because of the provisions thereof it must of necessity be such a term. The appellants came to this court on a contract which did not stipulate that written notice of termination was necessary. But for the provisions of s 37 they could not possibly succeed.

[13] The appellants' only purpose with the application was to have it declared that by virtue of s 37 written notice is essential. It was the essence of the application. It was not something incidental to the main action. Unfortunately for the appellants it was not a case where, but for s 37(4), this court in any

> event had jurisdiction. The appellants are trying to jack themselves up by their own bootstraps. In our view the argument invites this court to assume jurisdiction which it does not have. It is evident that this case is different from the Wolfaardt matter. In that matter it was recognized that an employee could enforce this common-law right to claim damages flowing from the breach of his contract of service in the High Court. In this matter the employees have no cause of action in this court until the Labour Court has pronounced that s 37(4) has amended the existing contract by making written notice of termination essential." (My emphasis.)

[13] Mr Myburgh submitted that the Fund's claim does not involve a matter in terms of the BCEA over which the Labour Court has exclusive jurisdiction as provided for in section 77(1) for the reasons that follow.

[14] Mr Myburgh reasoned that in the first instance, the Labour Court has no jurisdiction over the Fund (a registered provident fund). He made five points:

(a) It is trite law that in order for a court to have jurisdiction, four elements or jurisdictional facts must be in existence. The court must have jurisdiction relating to: (i) territory; (ii) the person of the applicant and the respondent; (iii) the cause of action or matter in dispute; and (iv) time.

(b) Regarding requirement (ii), under the LRA, it is generally accepted that the Labour Court only has

jurisdiction over parties to an employment relationship and/or their representatives, unions and employers' organisations, etc. so, for example, the Labour Court has no jurisdiction to entertain disputes between a union and its members, or to grant an interdict sought by an owner of a shopping mall against strikers employed by one of the owner's tenants. Similarly, the Labour Court (under the LRA) has no direct jurisdiction over a pension fund (more particularly in a case such as the present, where the employer concerned does not control the fund, where its employees are not in dispute with it over a pension fund issue, and where the pension fund is itself the applicant).

(c) The position is the same under the BCEA, where (as held in **University of the North**) the Labour Court has exclusive jurisdiction over all contracts of employment insofar as "basic conditions of employment" are being enforced, and concurrent jurisdiction with the High Court over all other matters concerning contracts of employment. The point is that the dispute must involve a contract of employment for the Labour Court to have jurisdiction. It follows that the Labour Court only has jurisdiction over the contracting parties, with

the result that it has no jurisdiction over a pension fund.

(d) Consistent with this is the fact that the purpose of the BCEA is principally to give effect to and regulate the "right to fair labour practices conferred by section 23(1) of the Constitution . . . by establishing basic conditions of employment" (section 2), and that, flowing from this, the BCEA applies to "employees and employers" (section 3).

(e) This, in turn, accords with the fact that the constitutional right to "fair labour practices" relates to practices that arise from the relationship between workers, employers and their respective organisations, and that the right ought not to be read as extending the class of persons beyond those classes envisaged by the section as a whole.

[15] I am in general agreement with these submissions. But I must point out that litigation regarding some matters listed in the BCEA or subordinate legislation, such as a Sectoral Determination, would not be instituted by an employee but by the Director-General: Labour. See section 73 of the BCEA.

[16] Mr Myburgh went on to submit that even if this court were to find that the Labour Court has jurisdiction over

a pension fund, here the Fund's claim is based on the PFA (together with its regulations) and the rules of the Fund, and not on the Determination, with the result that this court (and not the Labour Court) has jurisdiction.

[17] Mr Myburgh developed the argument this way:

(a) Although the amendment to the Determination 3 established the Fund, the Fund was incorporated under and is operated, governed and regulated in all respects by the PFA (and its regulations) and the Fund's rules emanating from that Act (and not by the Determination).

(b) The statutory obligation that the Fund's board of trustees seeks to fulfil, through this litigation, is its duty to take all reasonable steps to ensure that the interest of members is protected (especially in the light of Naphtronics's decision to cease making contributions), and that contributions are paid over timeously. These duties and obligations are prescribed by section 7C (a) and section 7D (d) of the PFA (and not by the Determination).

(c) Allied to this, the Fund's board of trustees is empowered by its rules and the provisions of the PFA to undertake this litigation (and not by the Determination).

(d) Different to **DMG Construction**, the applicant does not seek the "direct enforcement" of a basic condition of employment, such as to bring section 77(1) into operation. Instead it seeks to discharge its own obligations and enforce its own rights – separate and removed from the employment relationship between the first respondent and its employees – under the PFA, the regulations and the rules of the Fund.

(e) The legislative scheme set out above demonstrates that it is this court and the adjudicator (and not the Labour Court) that has jurisdiction over the claim/complainant in question.

[18] Mr Gedulsky SC, who appeared for Naphtronics submitted, as regards the jurisdiction of this court to hear this matter, that:

(a) Section 34A of the BCEA, which was inserted by section 6 of Act 11 of 2002, applies. This section reads as follows:

> "Payment of contributions to benefit funds–
> (1) For the purposes of this section, a benefit fund is a pension, provident, retirement, medical aid or similar fund.
> (2) An employer that deducts from an

employee's remuneration any amount for payment for a benefit fund must pay the amount to the fund within 7 days of the deduction being made.

(3) Any contributions that employer is required to make to a benefit fund on behalf of the employee that is not deducted from the employees remuneration, must be paid to the fund within 7 days of the end of the period in respect of which the payment was made. It must be paid to the fund within 7 days of the end of the period in respect of which the payment was made."

(b) Accordingly, as the BCEA specifically provides for the payment by an employer to a fund of any deductions from an employee's remuneration, it must be regarded "as a matter in terms of the BCEA."

(c) There is clearly an obligation on the employer in terms of section 34A to pay the deducted amount to the Fund and the corresponding right of the Fund to receive such payment within 7 days of the deduction being made.

(d) Naphtronics relies on the fact that the Fund is a fund registered in terms of the PFA and sections 13A(1) and 13A(3)(a)(ii). Section 13A of the PFA reads:

(1) "Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall

pay the following to the fund in full, namely–

(a) any contribution which in terms of the rules of the fund is to be deducted from the members remuneration."

[19] Sections 13A(3)(a) reads:

> "Any contribution to the fund in terms of its rules or a contribution to be paid on a member's behalf (ii) shall be forwarded directly to the fund in such a manner as to have the fund receive the contribution not later than 7 days after the end of that month."

[20] Mr Gedulsky pointed out that the provisions in the BCEA and PFA are similar as far as the duty on the employer to pay deductions from an employee's remuneration to the funds is concerned. The time period however differs. In the BCEA it must take place within 7 days of the deduction being made whereas in the PFA it must be paid to the fund not later than 7 days after the end of that month. Nothing much, he submitted, turns on that difference. The question is which Act is applicable in this instance? Section 13A of the PFA became operative on 2 April 2001, whereas section 34A of the BCEA became operative during 2002.

[21] Mr Gedulsky also contended that:

(a) In terms of section 69(1) of the BCEA “a labour inspector with reasonable grounds to believe that an employer has not complied with the provisions of this Act may issue a compliance order.” Failure to remit deductions from employees’ wages to a fund would constitute non-compliance with a provision of the BCEA. There is a procedure for a labour inspector to issue a compliance order and in terms of section 73(1) the Director General may apply to the Labour Court for a compliance order to be made an order of the Labour Court in terms of section 158(1)(c) of the LRA.

(b) It appears that these procedural provisions do not appear in the PFA although there is provision made for complainants to the office of an adjudicator whose function it is to dispose of complaints lodged. See section 30C. Nevertheless the advantage of a labour inspector lodging a complaint and a labour officer being able to investigate complaints and (through the Director-General) obtain judgment in a Labour Court is far more effective than under the PFA.

(c) Neither the PFA nor the BCEA relate to each other and the provisions of the BCEA must be considered to be overriding. The fact that an allegation by the Fund that the PFA “is the

overriding legislation relating to this matter" was not disputed. But, being a legal allegation, is not binding on Naphtronics nor this court.

[22] Mr Gedulsky also seeks to make the point that in effect the employer and employee are or should be involved in this case. All the employees of Naphtronics have an acute interest in the outcome of this case.

[23] The nub of this point is that employees would have been able to intervene in this case and a plea of non-joinder could have been entertained. Employees may be able to establish that they paid to the employer more than the employer has transferred to the Fund and more than the Fund sought from the employer. It would be correct and just for the employees to be able to intervene in the proceedings to protect their interests. Hence this case, being essentially one between employer and employee, is fully within the jurisdiction of the Labour Court.

[24] The rights or the needs of members of the Fund (i.e. the employees) are protected by provisions of the PFA. The trustees must take all reasonable steps to ensure the interest of members in terms of the rules of the Fund – especially in the event of termination or

reduction of contributions to the Fund by an employer are protected. What better way to protect the interest of members, he asked rhetorically, than by allowing them to be involved in litigation if they so wish?

[25] Next Mr Gedulsky contended that:

(a) the BCEA does not incorporate pension funds or regulate their operation, but as the name indicates the Fund was born as a pension fund to cater for the needs of the Security Sector under the Determination. The procedure for the operation of the Fund must therefore be in terms of the PFA and yet compliance with the transfer of employee deductions must be in terms of the BCEA under Rule 34A (and exclusively so).

(b) The Labour Court clearly has jurisdiction over the Fund, at least in terms of section 34A of the BCEA as a pension fund has a cause of action in terms of section 34A(2) and (3), against an employer. This jurisdiction based on section 34A would be in addition to the jurisdiction that a Labour Court would have over a pension fund as a representative of employees against the employer.

[26] Mr Myburgh submitted in reply that:

(a) Naphtronics's reliance on section 34A of the BCEA was of no avail. He submitted that the Minister has, by notice dated 24 December 2003, in terms of section 50(1)(a) of the BCEA, excluded the application of section 34A to employers and employees in respect of the payment of contributions to any benefit fund that is covered by the provisions of the PFA.

(b) Indeed, the very fact that s 34A is inapplicable in relation to funds regulated by the PFA is further support for the argument that the claim is one in terms of the PFA and not the BCEA. The result is that this court has jurisdiction. Quite clearly, it was the legislature's intention to leave intact the established system of dispute-resolution under the PFA, where the PFA is applicable (as in this case).

[27] Mr Gedulsky countered that the Minister was not empowered in terms of section 50 of the BCEA to exclude the application of section 34A. Section 50(1) limits the power of the Minister to making a determination to replace or exclude "any basic condition of employment". Section 34A does not contain any "basic conditions of employment" (which is

defined as a minimum term or condition of employment). The Minister therefore acted ultra vires and the notice of 24 December 2003, is invalid. In the alternative he submitted that there's been non-compliance with the procedural provisions of section 50(1). This renders the notice invalid. As an alternative argument he submitted the notice is void for vagueness.

Has this court jurisdiction?

[28] This question is troubled by the fact that the Fund has launched motion proceedings and not issued summons. A summons usually sets out the cause of action crisply. In motion proceedings the applicant is obliged to set out the facts and make submissions on the law that advances its case but may also refer to such matters as background, facts and make comparisons, etc.

[29] The essential question is to determine the cause of action and what law supports the claim. The Fund is the result of the unilateral exercise of a legislative administrative act by the Minister when he made the Determinations 3 and 6. If Naphtronics challenged the legality of validity of the Fund, the Fund would perforce rely on the Determinations 3 and 6 and the BCEA to

prove its lawful establishment (and the PFA to prove its registration as a provident fund).

[30] It is sufficient for the Fund to allege that it is registered as a fund in terms of the PFA. This is particularly so where the Fund had cause to believe that its jurisdiction would not be challenged. Naphtronics had been paying its contributions to the Fund before it defaulted.

[31] The Fund relies on its own rules and the PFA and the regulations promulgated under that Act. It is important to note that the rules of the Fund may differ from the provisions of the Determination. Clause 28(2) of the Determination provides for this.

[32] Mr Gedulsky is entirely correct in pointing out that an obligation rests on Naphtronics to pay over the deductions of its employees' provident fund contributions must be paid over to the Fund under section 34A of the BCEA. But section 13A of the PFA also regulates this obligation.

[33] The BCEA does not trump the PFA and vice versa. The result is that all depends upon the Funds choice as it is manifested in its papers. The Fund makes out its case in terms of the PFA and does not rely on the Determinations or the BCEA. It follows that this court

has jurisdiction to entertain the Fund's application.

Condonation

[34] The application for condonation is weak. The delay may partly be explained by Naphtronics acting through its then attorney of record in attempting to settle the matter. But this does not explain the whole 16 months delay. Naphtronics has declined to take this court into its confidence as regards this period. It deliberately omitted to deal with "the non-performance of its mandate by our former Attorneys of record but will do so if same becomes necessary". The explanation for the period commencing with the appointment of Naphtronics new attorneys is also patchy. It is of cause necessary for Naphtronics to show that it has good prospects of success. Accordingly I turn to consider the merits.

Application to strike out

[35] Naphtronics seek to strike out new matter in the Fund's replying affidavit. Mr Gedulsky submitted that:

(a) The new matter relates to "the information regarding Naphtronics Provident Fund provided by

Mr Govin Govender of the MBC". Mr Gedulsky submits that the information should have been contained in the founding affidavit as it would be necessary to establish that the PFA was applicable to Naphtronics.

(b) The Fund alleges in reply that the Sage Life Fund, alias the Naphtronics Provident Fund underwritten by Sage Life, was established by way of a collective agreement entered into between Naphtronics and its employees at plant level and not at a centralised bargaining council level.

(c) The Fund contends in reply that Naphtronics Provident Fund was only established on 1 September 2002. This is also a new matter and should have been included in the founding affidavit. It should be struck out.

(d) The provisions of the PFA are not applicable by virtue of the terms of section 2(1).

(e) Naphtronics and its employees have been members of the Sage Pension Fund since 1992.

(f) Naphtronics was accordingly exempted from the 2001 Determination as it was the member of an existing Pension Fund at the time of coming into operation of the new Pension Fund Act, not applied to existing members of Pension Funds.

(g) Mr Mamabolo, the National Coordinator of the

Security Industry corroborates this.

Should the matter be struck out?

[36] The fate of the application to strike out hinges on the fate of the application for condonation. For purposes of an evaluation of the merits I am prepared to approach the facts on the basis that the application to strike out this matter has been successful.

Dispute of facts

[37] Mr Gedulsky's last point was that subject to the outcome of the application to strike out the new matter raised by the Fund in its replying affidavit, Naphtronics nevertheless contends that there are material disputes of fact relating to whether the first respondent is exempted from the provisions of the PFA. In view of my approach to the application to strike out it is unnecessary to deal with this.

Evaluation

[38] Naphtronics takes the point in limine that the PFA is not applicable on the grounds that the PFA does not apply by virtue of s 2(1) and in the alternative that it had an

existing pension fund prior to 30 March 2001.

[39] It is necessary to quote the short paragraph in the answering affidavit where this point in limine is taken. Para reads:

> "It is respectfully submitted that the provisions of the Pension Funds Act Number 24 of 1956 are not applicable by virtue of the terms of Section 2(1) thereof. Prior to the Labour Relations Amendment Act of 1998 coming into operation, the First Respondent and its employees were contributors to the Sage Life Pension Fund, which fund had been established or continued in terms of a collective agreement in terms of Section 2(1)."

[40] The alternative point is that Naphtronics had an existing pension fund (Sage Life) prior to the 30 March 2001 and was exempted from being a contributor to the Fund.

[41] I turn to examine whether the PFA applies to Naphtronics.

Section 2(1) of PFA

[42] Section 2(1) of the PFA reads:

> "2 **Application of Act.**–(1) The

> provisions of this Act shall not apply in relation to any pension fund which has been established or continued in terms of a collective agreement concluded in a council in terms of the Labour Relations Act, 1995 (Act No. 66 of 1995), before the Labour Relations Amendment Act, 1998, has come into operation, nor in relation to a pension fund so established or continued and which, in terms of a collective agreement concluded in that council after the coming into operation of the Labour Relations Amendment Act, 1998, is continued or further continued (as the case may be). However, such a pension fund shall from time to time furnish the registrar with such substantial information as may be requested by the Minister."

[43] Naphtronics cannot rely upon this section. This section provides that certain pension funds are exempt from the PFA. That does not assist Naphtronics. It is strictly speaking unnecessary for me to determine whether the Sage Life Pension Fund to which Naphtronics and its employees belong is excluded from the PFA because even if it is, this will not prevent Naphtronics and its employees from also belonging to the Fund. But nevertheless I shall briefly examine the situation. The elements required for the exclusion are the following:

(a) There must be a pension fund;
(b) The pension fund must have been established or continued in terms of a collective agreement

concluded in a bargaining council (i.e one established in terms of the LRA);

(c) The establishment or continuation must have occurred before 30 March 1998 (when the Labour Relations Act 1998 came into operation); and

(d) In the alternative to (c) the establishment or continuation is established or continuing by a collective agreement concluded in a bargaining council after 30 March 1998.

[44] The fact that a Sectoral Determination 3: (promulgated on 25 February 2000) and subsequently Sectoral Determination 6: have been promulgated confirms that a bargaining council not has been registered for the Private Sector Security Industry. The affidavit by the national coordination of the Security Industry Association of South Africa ("SIASA") that Naphtronics is one of its members and that SAISA represents its members at a bargaining forum takes the matter no further. A bargaining forum may possibly duplicate the functions of a bargaining council but it is not a registered bargaining council. Naphtronics' obligation to the Fund are not excluded or exempted from the jurisdiction of the Fund by section 2(2) of the PFA.

[45] The next issue is whether Naphtronics is exempted

from membership of the Fund by the Fund's Rules. The criteria for exemption are dealt with exhaustively in clause 3.3 of the Rules of the Fund. This clause reads:

> "An employer may apply for an exemption from the Security Sector Provident Fund provided that:
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> a) An employer who prior to the publication of Government Notice No 306 of 30 March 2001, had an existing pension or provident fund registered with the Registrar of Pension Funds covering employees for whom minimum wages are prescribed in Sectoral Determination No 3, as amended or replaced.
> b) An employer who prior to the publication of Government Notice No 306 of 30 March 2001, did not have existing pension or provident fund registered with the Registrar covering employees for whom minimum wages are prescribed in Sectoral Determination No 3, as amended or replaced, but before 30 March 2001, the employer and its employees have consulted in writing to commence negotiations for the establishment of a pension or provident fund for such employees."
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> The Management Committee will consider all applications for exemption from the provisions of the Security Sector Provident Fund.
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> Applications will be in writing and addressed to the Management Committee of the Security Sector Provident Fund. Applications shall comply with the following requirements:
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> a) Be fully motivated.
> b) Be accompanies by relevant supporting data and financial information.
> c) Applications that affect employees' conditions of service will not be considered unless the employees or their

representatives have been properly consulted and their view fully recorded in an accompanying.

d) Indicate the period for which exemption is required.

In considering the application the Management Committee shall take into consideration all relevant factors, which may include, but shall not be limited to the following criteria:

a) Any special circumstances that exist.
b) Any precedent that may be set.
c) The interest of the industry as regards

(i) Unfair competition
(ii) Collective bargaining
(iii) Potential for labour unrest
(iv) Increased employment

d) The interest of employees as regards

(i) Exploitation
(ii) Job preservation
(iii) Sound condition of employment
(iv) Possible financial benefits
(v) Health and safety
(vi) Infringement of basic rights

e) The interest of the employer as regards:

(i) Financial Stability
(ii) Impact of productivity
(iii) Future relationships with employees' trade union
(iv) Operational requirements

If the application is granted, the Management Committee shall issue an exemption certificate, signed by the chairperson, containing the following particulars:

a) The full name of the applicant;
b) The trade name of the applicant;
c) The period for which the exemption shall

operate;

d) The date of issue;

e) The conditions of the exemption granted.

If the exemption is refused the Management Committee shall specify its reasons for not granting the application, and which will be communicated to the applicant.

The management Committee shall retain a copy of the certificate and number each certificate sequentially.

An employer to whom a certificate of exemption has been issued shall at all times have the certificate available for inspection at his establishment.

Any application by an Employer shall in no way whatsoever affect the Employer's obligations, nor his employees' rights, with regard to the payment of all contributions and benefits in terms of the rules of that employer's retirement fund and/or his employees' conditions of employment."

[46] The important point which Naphtronics has not appreciated is that it is for the Board of Trustees to grant an exemption from membership. Even if Naphtronics is able to show that it meets the requirements of clause 3.3.1, that does, not guarantee that the Board of Trustees will grant it exemption from membership for there are a number of other considerations which the Board of Trustees must take into account. The decision to grant an exemption is that of the Fund. A court of law may review the decision but it cannot take the decision itself.

[47] Naphtronics does not make the allegation that it sought exemption from the Fund. It follows that Naphtronics is obliged to be a member of the Fund and that it has not shown that it has been exempted from membership.

[48] I may mention that clause 23 of Determination 3: which established the Fund provides in clause 23(5) for exemptions:

> "**Exemptions:**
>
> (a) Any application by an employer for exemption hereunder shall in no way whatsoever affect the employer's obligations, nor his/her employees' rights, with regard to the payment of all contributions and benefits in terms of the rules of that employer's fund and/or his/her employees' conditions of employment.
>
> (b) An employer who, in respect of all his/her employees [other than as described in clause 1.(3)] at the date of publication of this amendment, already participates in a retirement fund that –
>
> (aa) complies with the requirements of the Retirement Funds Act;
>
> (ab) is approved by the Commissioner for the South African Revenue Service;
>
> (ac) provides benefits comparable to those provided by the fund;
>
> may, with the agreement of a majority of his employees as aforesaid, in writing apply to the board for exemption from contributing to the fund in accordance with the rules, provided that –

(i) the board may only grant such exemption if, after consultation with the actuary and due consideration of such documents and information in respect of that employer's fund as it requires, it is of the opinion that the benefits provided by that employer's fund are overall more favourable than those provided by the fund;

(ii) the board may grant exemption on such terms and conditions, and for such duration, as it may determine and, upon expiry of the period of exemption or, if sooner, non-compliance with any of the terms or conditions of exemption, the employer concerned shall forthwith commence contributing to the fund in respect of his employees subject to a new application for exemption as aforesaid."

[49] The essence of clause 23(5) is encapsulated in the Rules of the Fund upon which the Fund relies. But in any event a distinction is drawn between the preconditions required for an application for exemption from membership of the Fund and the decision of the Board to grant exemption. The Board of the Fund has not, on the material before me, granted such exemption. There are no material disputes of fact which require referral to oral evidence.

[50] I need not consider the allegation that Naphtronics joined the Fund under duress by its employees. Naphtronics was obliged by the PFA to be a member of the Fund.

[51] The result is that there is no prospect of Naphtronics's defence succeeding. The application for condonation is therefore refused.

[52] It follows that the Fund is entitled to the relief it seeks. This means that the application must be dismissed with costs.

[52] The costs of the appearance of Naphtronics legal representatives on 1 February 2007 was caused by Naphtronics representative's failure to appreciate the practice relating to setdowns in this court.

[53] The costs of the application to strike out certain material in the replying affidavit are to be paid by Naphtronics. The replying affidavit was a proper reply to facts set out in the answering affidavit and the application for condonation even though I have decided this matter without reference to them.

[54] The costs of the second notice of motion and affidavit are not recoverable from Naphtronics. Mr Myburgh submitted that as the costs of this application would in fact be paid from monies reserved for Naphtronics employee members of the Fund, that I should order

Naphtronics to pay the costs on an attorney and client scale. Mr Myburgh also buttressed his submissions by referring to the lack of defence. These are not insignificant considerations but most litigants are left out of the pocket by civil legal proceedings. I do not think there is any warrant to depart from the usual rule that costs are awarded on a party and party scale. I am concerned about Naphtronics lack of a substantive defence but I am unpersuaded that a special order for costs is required at this stage.

[55] In the result I make the following order:

1. The application for condonation by the first respondent is refused with costs.

2. The first respondent is ordered to pay:

   2.1 R372 683.56.
   2.2 R148 879.98

3. The first respondent is to deliver to the applicant all outstanding contribution schedules, detailing the information set out in regulation 33(1) of the regulations published in terms of the Pension Funds Act for the period 1 May 2004 until date hereof.

4. The contribution schedules referred to in 3 above must be delivered within 5 days of service hereof.

5. The applicant is granted leave to supplement these papers on receipt of the contribution schedules referred to in 3 above and to thereafter re-enrol this application to seek judgment against the first respondent for the amount owing in respect of the contribution schedules for the period 1 May 2005 until date hereof together with penalty interest thereon.

6. This application is postponed *sine die*.

7. The first respondent is to pay the costs of this application.

_____
A A LANDMAN
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPLICANT	:	ADV A T MYBURGH
FOR THE RESPONDENT	:	ADV GEDULSKY
ATTORNEYS:		
FOR THE APPLICANT	:	MINCHIN & KELLY
FOR THE 1ST RESPONDENT	:	HLAHLA MOTLHAMME ATT
DATE OF HEARING	:	21 MAY & 28 JUNE 2007
DATE OF JUDGMENT	:	10 AUGUST 2007