Dear clients, below an article in today`s EBNet by J.P Reineck, Director – Reineck Capital (Pty) Ltd for noting.

The repealing of regulation 33 of the Pension Funds Act 24 of 1956 ("PFA"), in favour of the new Financial Sector Conduct Authority ("FSCA") Conduct Standard 1 of 2022 (RF) ("Conduct Standard"), is set to bring harsh consequences for employers, and particularly directors, who fail to pay over their employees' retirement fund contributions.

Briefly, Regulation 33 aimed to regulate the requirements and processes involved in the collection and payment of retirement fund contributions from the employer to the retirement fund. The FSCA identified various shortcomings in Regulation 33 and has replaced Regulation 33 with the Conduct Standard to address the shortcomings.

The Conduct Standard regulating the payment of contributions to a retirement fund became effective on 19 February 2023 and will have severe consequences for employers, and their directors, who fail to pay over their employees' retirement fund contributions.

Section 13A of PFA requires that the employer deduct, from an employee's remuneration, any retirement fund contributions due, and then pay such contributions over to the relevant retirement fund not later than 7 days after the end of the month for which such a contribution is payable.

In addition, every employer needs to furnish the retirement fund with the prescribed minimum information regarding payments of contributions made by the employer. If the information does not accompany the payment of a contribution, the information needs to be provided to the retirement fund not later than 15 days after the end of the month in which the payment was made.

The PFA is prescriptive and provides that the following persons shall be personally liable for compliance with this section and for the payment of any contributions:

(a) if an employer is a company, every director who is regularly involved in the management of the company's overall financial affairs;
(b) if an employer is a close corporation, every member who controls or is regularly involved in the management of the close corporation's overall financial affairs; and
(c) any other employer, every person who is regularly involved in the management of the employer's overall financial affairs.

Section 13A also requires that a retirement fund must request the participating employer in writing to notify it of the identity of any such person so personally liable in terms of the subsection. If an employer fails to comply with the requirements of this provision, all the persons mentioned above, shall be personally liable in terms of the subsection.

Section 37 of the PFA stipulates that "any person" who fails to comply with Section 13A of the PFA is guilty of an offence and liable on conviction to a fine not exceeding R10 million and/or imprisonment for a period not exceeding 10 years.

In terms of the Conduct Standard, the Board of Trustees of a retirement fund are required to report any non-payment of contributions to the South African Police Service (SAPS) if the employer fails to pay over the retirement fund contributions within 90 days after being required to do so. More specifically, the FSCA has indicated that the fund must request "further investigation and/or criminal prosecution in the matter".

In respect of the person who could be found guilty of an offence in terms of Section 37 of the PFA, recall that Section 13A(8) states, "every director who is regularly involved in the management of the company's overall financial affairs" will be personally liable for the company's payment of contributions and related compliance of section 13A.

A further consequence for directors of companies found criminally guilty of non-compliance with Section 13A of the PFA, can be found in the Companies Act 71 of 2008 ("Companies Act"). Section 69(4) of the Companies Act states a person who becomes ineligible or disqualified while serving as a director of a company ceases to be entitled to continue to act as a director immediately. Section 69(8)(b)(iv) of the Companies Act stipulates that a person is disqualified to be a director of a company if the person has been convicted and imprisoned, or fined more than R1000, for theft, fraud, forgery, perjury, or an offence involving fraud, misrepresentation, or dishonesty. Further to this, Section 69(11A) of the Companies Act stipulates that the Registrar of the Court must, upon a conviction for an offence referred to in Section 69(8)(b)(iv), send a copy of the relevant order or particulars of the conviction, to the Commission (i.e. the Companies and Intellectual Property Commission "CIPC").

With regards to an offence involving dishonesty, the comments made in Nedcor Bank Ltd v Frank & others [2002] 7 BLLR 600 (LAC), are relevant. It was held that: "*Dishonesty entails a lack of integrity or straightforwardness and in particular, a willingness to steal, cheat, lie or act fraudulently* … and it is normally used to describe an act where there has been some intent to deceive or cheat.". Where an employer deducts an employees' retirement fund contribution from his/her remuneration, and then fails to pay their employees' retirement fund contribution to the relevant retirement fund, this can clearly be stated to be acting in a dishonest manner.

In summary, the Conduct Standard, coupled with the provisions of the Companies Act, could result in severe consequences for employers and directors. For instance, where a company deducts an employees' retirement fund contribution from his/her remuneration, and then fails to pay their employees' retirement fund contribution to the relevant retirement fund, this could result in not only a conviction which could entail a fine not exceeding R10 million and/or imprisonment for a period not exceeding 10 years, but also directors could be disqualified and removed as directors of the said company. As such, employers are advised to take the Conduct Standard seriously and pay their employees' deducted retirement fund contributions to the relevant retirement fund to avoid the severe consequences that would flow from such a breach.

ENDS

Kind regards

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