IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/3865/2001/MR

In the complaint between:

NEVILLE BoHM Complainant

and

NATIONAL PRODUCTIVITY INSTITUTE 1ST Respondent
NATIONAL PRODUCTIVITY INSTITUTE PENSION FUND 2ND Respondent

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act")

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[1] This complaint concerns the employer's periodic failure to deduct and make contributions to the fund in terms of the fund's rules (as well as in terms of the Act) and the consequences attendant upon such failure. The employer does not dispute that it so failed.

[2] I shall not burden this determination with a description of the parties. They know who they are. The facts appear hereunder.

[3] In his initial complaint dated 15 November 2001 the complainant said he was "*wearing two different hats*", one as an employees' representative and another as an employee who felt "*short-changed*" by an employer who failed to make the requisite pension contributions to the fund in terms of Rule 4 of the fund's rules, taking into account the salary increases of September 2000 (backdated to April 2000) and June 2001 (backdated to April 2001). Since the specific complaints of

each of the employees he claims to represent are not before me, and he furnishes no authority from any of them as champion of their causes, I cannot deal directly with their cases in this determination. However, to the extent that they may be in a similar position, this determination must be taken as instructive on how their cases should be resolved.

[4] The complainant alleges that in September 2000 he received a salary increase backdated to 1 April 2000 and that this backdated increase was not taken into account by the employer, the National Productivity Institute, for purposes of making both employer and member pension contributions. He alleges further that the same process was repeated the following year when he received an increase in June 2001 which was backdated to 1 April 2001 but was not taken into account by the employer in making employer and member contributions.

[5] Rule 4 of the rules of the fund deals with contributions and provides:

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"**4.1. Contributions by Members**

4.1.1 Each Member will contribute to the Fund throughout his service at the rate of 8 per cent of his Pensionable Salary.

4.1.2 Each Member's contributions will be deducted by the Institute from his salary or wages and paid to the Fund.

4.1.3 …

4.1.4 …

4.2 Contributions by Institute

4.2.1 The Institute will contribute for each Member in its Service at the rate of 10 per cent of the Member's Pensionable Salary, less the premiums for the Disability Fund.

4.2.2 …

4.3 Contributions Paid to the Fund

Contributions must be paid to the Fund within seven days after the end of the month in respect of which the contributions were made."

[6] "Pensionable Salary" is defined as:

"the Member's basic monthly salary, or its equivalent if paid other than monthly, plus such other emoluments (if any) as the Institute may specify; provided that

(a) for the purposes of the Fund, Pensionable Salary will be determined on joining the Fund ***and a change in Pensionable Salary due to a change in the amount on which Pensionable Salary is based will take effect on the first day of the month which coincides with, or next follows, the date on which such change in amount occurs***;

(b) …. ” (emphasis supplied)

[7] There is no dispute that the employer failed to act in accordance with the rules of the fund in that during 2000 (and for the months of April, May, June, July, August and September), and again during 2001 for the months of April, May and June, it failed to:

[7.1] deduct and contribute to the fund 8% of the complainant's Pensionable Salary as required by rule 4.1.1; and

[7.2] contribute to the fund 10% of the complainant's Pensionable Salary as required by rule 4.2.1.

[8] **I should add that it is also a criminal offence not to deduct and pay contributions to the fund within seven days of the end of the month to which they relate (see *section 13A(3)(a) read together with section 37 of the Act*).**

[9] In a letter dated 10 November 2003 the employer makes the following suggestion with a view to resolving the issue:

> “At an extraordinary Pension Fund meeting held on the 29TH April 2003 (which was attended by Neville Bohm as well), it was decided that the outstanding members contributions be deducted from the employees' salary and be paid over to the pension fund administrator and that the company will be liable for the capital growth forfeited by the members during that period.”

[10] The view I take is that the employer must make good on those contributions (both in respect of the member's contributions [8% of pensionable salary as at 1 September 2000 for the six months in issue as required by rule 4.1.1], and in respect of its own contributions [10% of pensionable salary as at 1 June 2001 for the three months in issue as required by rule 4.2.1]). In addition, and in terms of section 13A(7) of the Act, the employer must pay interest on those outstanding contributions at the prescribed rate, reckoned from the latest date on which they should have been paid until the date of actual payment.

[11] Any order the adjudicator may make is subject to appeal (in the broad sense) in terms of section 30P of the Act within six weeks of the date of the determination. However, I do not believe that this precludes me from making an order to be complied with sooner than the six week period. In any event, especially since there is no dispute as regards the employer's failure to comply with the rules (and the mandatory provisions of the Act the breach of which constitutes a criminal offence), a shorter compliance period will be in the employer's advantage as it will thereby save on the interest that I shall order it to pay. As I consider the payment of these contributions rather urgent, the employer is similarly free (if so minded) to bring urgent proceedings to unravel everything if it should be aggrieved by the relief granted herein.

[12] In the result, I make the following order:

[12.1] The National Productivity Institute (the employer) is directed to deduct from the complainant's pensionable salary (as it was on 1 September 2000) 8% thereof in respect of the months of April, May, June, July, August and September 2000 and pay it into the National Productivity Institute Pension Fund's bank account within fourteen (14) days of this determination.

[12.2] The National Productivity Institute is further directed to pay interest, from its own funds, on the amount envisaged in paragraph [12.1] above, at the rate of 15,5% per annum, such interest to be reckoned from 7 April 2000 until 30 September 2000 or such later date as the amount may be (or may have been) actually paid.

[12.3] The National Productivity Institute is further directed to pay, from its own funds, 10% of the complaint's pensionable salary (as it was on 1 September 2000) in respect of the months of April, May, June, July, August and September 2000 into the National Productivity Institute Pension Fund's bank account within fourteen (14) days of the date of this determination.

[12.4] The National Productivity Institute is further directed to pay interest, from its own funds, on the amount envisaged in paragraph [12.3] above, at the rate of 15,5% per annum, such

interest to be reckoned from 7 April 2000 until 30 September 2000 or such later date as the amount may be (or may have been) actually paid.

[12.5] The National Productivity Institute is further directed to deduct from the complainant's pensionable salary (as it was on 1 June 2001) 8% thereof in respect of the months of April, May and June 2001 and pay it into the National Productivity Institute Pension Fund's bank account within fourteen (14) days of this determination.

[12.6] The National Productivity Institute is further directed to pay interest, from its own funds, on the amount envisaged in paragraph [12.5] above, at the rate of 15,5% per annum, such interest to be reckoned from 7 April 2001 until 30 June 2001 or such later date as the amount may be (or may have been) actually paid.

[12.7] The National Productivity Institute is further directed to pay, from its own funds, 10% of the complaint's pensionable salary (as it was on 1 June 2001) in respect of the months of April, May and June 2001 into the National Productivity Institute Pension Fund's bank account within fourteen (14) days of the date of this determination.

[12.8] The National Productivity Institute is further directed to pay interest, from its own funds, on the amount envisaged in paragraph [12.7] above, at the rate of 15,5% per annum, such interest to be reckoned from 7 April 2001 until 30 June 2001 or such later date as the amount may be (or may have been) actually paid.

Dated at JOHANNESBURG on this the 2nd day of FEBRUARY 2005.

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR

S30M filing: High Court