

**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR  
HELD IN CAPE TOWN**

CASE NO: PFA/WE/2314/05/KM

In the complaint between:

**M. MBUNDU**

**Complainant**

and

**SECURITY EMPLOYEES NATIONAL PROVIDENT FUND**

(“the fund”)

**1<sup>st</sup> Respondent**

**AZA DAY & NIGHT SECURITY (PTY) LTD**

t/a AZANIA SECURITY (“the employer”)

**2<sup>nd</sup> Respondent**

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**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24  
OF 1956 (“the Act”)**

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**Introduction**

[1] This complaint, lodged on 8 February 2005, is yet another example of the many cases received by this Office which reflect the worrying and endemic habit of certain participating employers in the private security sector of not paying over contributions to the pension/provident funds in which they are participating, despite having made deductions from their employees’ wages for that purpose (see for instance *Sakhwe v Security Employees National Provident Fund and Another*; *Mpondombini v Security Employees National Provident Fund and Another* [2005] 6

BPLR 527 (PFA)). This results in the fund's being unable to pay out benefits to the members and/or their beneficiaries when they fall due.

- [2] Not only is such conduct deplorable and unfair to the members as it deprives them of their hard-earned retirement savings, but it also amounts to a contravention of section 13A(1) of the Act and is a punishable offence in terms of section 37(1).

### **The facts**

- [3] The complainant commenced service with the employer on 16 February 2001. Pension contributions were only deducted from his salary from January 2003 and then continued to be deducted until August 2004. It is unclear why contributions ceased being deducted from that date. According to a notice of retrenchment attached to the complaint, the complainant's services were to be terminated with effect from 28 February 2005. This is confirmed in a letter received from the complainant on 26 May 2005 in response to a query from this office.

- [4] In support of his contention that he was a member of the fund and had also contributed to it, the complainant has submitted four salary advice slips dated 20 February 2003, 20 March 2003, 10 July 2004, and 10 August 2004. The first two

reflect a deduction of R60,84 each in favour of Penpro, the Administrators of the fund. The last two reflect deductions of R69,36 and R21,92 respectively.

### **The complaint**

[5] The complainant contends that although he withdrew from the fund at the end of February 2004, he still has not received payment of his withdrawal benefit. He also makes the allegation that his contributions were never paid over by the employer to the fund. This is supported by a letter from Legal Expenses Insurance Southern Africa Ltd (LegalWise) dated 3 December 2004, addressed to the complainant and annexed to his complaint, which states

“We advise that upon investigating your query we discovered the following:

- 1) That your company stopped paying over contributions to the fund in August 2003;
- 2) They made one payment again in April 2004;
- 3) They did not inform their current investors of a change in provident funds and are misinforming you;
- 4) There are a number of your co-employees who have lodged a complaint with the Pension Funds Adjudicator in town. “

### **The response**

- [6] Although the respondents were called upon to respond as early as 28 February 2005, neither the employer nor the fund has bothered to answer the complaint.
- [7] This is particularly vexatious on the part of the fund, or rather its administrator, Penpro, as it was put to terms on several occasions to file a response in the matter. In this regard, I set out the following record of attempts to procure an answer to the complaint.
- [8] I am advised that a letter was sent on 28 February 2005 requiring a response to the complaint by Tuesday 29 March 2005. A further request was sent on 12 May 2005, as nothing had been received by that date, setting a further deadline of 19 May 2005, and advising of the risk of a default judgment. Urgent telephone messages, not one of which were returned, were also left by members of my staff. Messages were left on the following dates: 5 May 2005 (Ms Higgs), 12 August 2005 (Ms MacKenzie), and 23 August 2005 (Ms Higgs). A further fax was also sent on 18 August 2005, requesting a response.

**Determination and reasons therefor**

- [9] By virtue of the lack of response I have not been placed in possession of the rules of the fund by the respondents in this matter, but, due to the filing of similar

complaints against the same fund and participating employer, the rules are filed at my office and thus available for examination.

[10] Main rule 5.5 provides as follows:

**“Withdrawal benefits**

If a MEMBER leaves SERVICE prior to his NORMAL RETIREMENT DATE or early retirement age specified in the SPECIAL RULES applicable to him for any reason including but not limited to resignation, dismissal, illness, retrenchment and redundancy, the MEMBER’S ACCUMULATED SHARE shall be:

5.5.1 paid to such MEMBER in cash; or

5.5.2 transferred to an APPROVED FUND or PRESERVATION FUND of the MEMBER’S choice for preservation until his retirement; or

5.5.3 partly paid in cash and/or partly transferred,

in accordance with the MEMBER’S instructions which must be conveyed to the FUND in writing at its registered office prior to the date on which he leaves SERVICE, or if that is not possible, within 30 days thereafter.”

[11] The “member’s accumulated share” is defined as follows:

“MEMBER’S ACCUMULATED SHARE means, in respect of a MEMBER, an amount equal to the aggregate contributions and transfer values paid to the FUND by or in respect of him, possible allocations from the MEMBER SURPLUS ACCOUNT or EMPLOYER SURPLUS ACCOUNT and the investment returns accrued to date on the underlying investment portfolio(s), less any expenses deducted by the TRUSTEES in terms of these RULES (my underlining).”

[12] The special rules are on all fours with the main rules with regard to the calculation of the withdrawal benefit. The latter go on to provide, in Clause 2.3, that no waiting period is implemented regarding the payout of a member’s fund credit.

[13] Upon termination of the complainant’s employment he became entitled to receive his accumulated share. As no waiting period applies with regard to the payment of

withdrawal benefits, the same became due and payable as soon as was reasonably possible after the date of the complainant's withdrawal.

[14] At this stage it is not possible to quantify the complainant's loss because of lack of co-operation from the employer and the fund. This obstacle is not insurmountable, though, as the fund can calculate the amounts that would have been payable to the complainant as a withdrawal benefit had the employer contributed fully and timeously. The employer can be called upon to lend assistance in reconstructing and reconciling the relevant membership and contributions date. Failing that, the fund can approach the complainant and request him to give an indication, on affidavit, of his fund salary over the relevant period. The lack of response from the fund and employer make it impossible to determine which of those parties is liable to the complainant. I shall therefore order that both parties, jointly and severally, pay the complainant the benefit to which he is entitled.

### **Relief**

[15] The final ruling of this Tribunal is therefore as follows:

[15.1] The fund is hereby ordered to calculate, as if the employer had made regular and timeous contributions over the period from January 2003 to 28 February 2004, the amount of the complainant's withdrawal benefit, and to furnish the complainant, the employer and this tribunal with a detailed

breakdown of those calculations by no later than **Monday 28 October 2005**.

[15.2] The fund is further directed to calculate the amount of interest that would be payable on the amount referred to in paragraph [15.1] above, at the rate of 15.5% per annum, calculated from 28 February 2004 to the date of payment thereof, and to furnish the complainant, the employer and this tribunal with that calculation by **28 October 2005**.

[15.3] The fund and the employer, jointly and severally, the one paying, the other to be absolved, are ordered to pay to the complainant the amount calculated in paragraphs [15.1] and [15.2] above, **within fourteen days** of the calculations from the fund.

[15.4] The complainant may approach a court with jurisdiction to obtain a writ of execution against both the fund and employer should they fail to pay the amount ordered in paragraph [15.3] above.

DATED AT CAPE TOWN THIS                      DAY OF                      2005.

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**VUYANI NGALWANA**  
**PENSION FUNDS ADJUDICATOR**

**Appearances**

**All parties not represented.**

cc:    Ms N van Staden  
      Legal Wise  
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      Mr MX Bam  
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**Registered address of fund**

Azania Security Pension Fund  
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Ottery  
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**Section 30M filing: Magistrate's Court**