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Please quote our ref: PFA/GA/21292/2007/EMD

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 ("the Act"): THE BOARD OF MANAGEMENT OF THE PRIVATE SECURITY SECTOR PROVIDENT FUND ("the complainant") v PHUMULANI GENERAL SERVICES CC ("the respondent")

1. Introduction

1.1 This complaint, received by this office on 27 July 2007, concerns the registration of an employer with a pension fund established in terms of a sectoral determination. The complainant also claims as ancillary relief an order that the respondent be prohibited from applying for the liquidation of the business.

1.2 On 13 December 2007, a copy of the complaint was sent to the respondent, but no response was received. On 15 May 2008, a member of my staff spoke to a certain T R Nkosi at 011 463 5699 and requested a response. No response has been received.

1.3 Having considered the written submissions filed before this tribunal, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

1.4 As the background facts are well-known to all parties, these shall be repeated only to the extent that they are pertinent to the issues raised herein.

2. Complaint

The complainant, a provident fund established in terms of a sectoral determination, asked for an order that

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator)

Office Manager: L Manuel, Financial Manager: F Mantsho, Accountant: R Soldaat

2.1 the respondent be prohibited from applying for liquidation of the business;

2.2 the respondent be compelled within 7 working days to register with the Fund by completing an application form, a copy of which is attached to the complaint, or by applying for an exemption.

3 Respondent's Response

3.1 The respondent failed to submit a response to the complaint.

3.2 On 15 May 2008, a member of my staff spoke to a certain T R Nkosi at 011 463 5699 and requested a response.

3.3 No response has been received.

4. Determination and reasons therefor

Prohibition against applying for liquidation

4.1 The complainant requests an order that the respondent be prohibited from applying for liquidation of the business.

4.2 This application would apply to an application to court. It would not include the passing of a resolution for voluntary winding-up, be it for a members' or creditors' voluntary winding-up.

4.3 The respondent is only one of a number of entities that may apply to court for winding-up. Other possible applicants would include one or more creditors, as well as one or more members (section 66(1) of the Close Corporations Act, 69 of 1984, read with section 36(1) of the Companies Act, 61 of 1973.)

4.4 A blanket prohibition against applying to court for relief would be inappropriate. Access to the courts, albeit to have disputes settled, is one of the fundamentals set out in Chapter 2, the Bill of Rights, of the Constitution of the Republic of South Africa, Act 108 of 1996. An order denying a person the right to approach a court for relief would be unconstitutional.

4.5 Such an order would under the circumstances also be inappropriate. The order, if granted, could readily be circumvented and rendered ineffective, as it would not restrain any other party, including one or more members of the respondent itself, from applying to court for relief in their individual capacity. I am not willing to consider granting an order that could so easily be circumvented.

Order to compel respondent to join

4.6 The second prayer is for an order compelling the respondent to register with the Fund or to apply for an exemption.

4.7 The complainant is a fund established in terms of Sectoral Determination 6: Private Security Sector, South Africa issued by the Minister of Labour under the Basic Conditions of Employment Act, 75 of 1997, and registered as a pension fund with the Registrar of Pension Funds.

4.8 Clause 24.1 (1) provides for the membership of each employee falling within the scope of the Determination of the complainant.

4.9 An employer cannot *join* the complainant or become a member thereof. It can participate in the complainant by deducting contributions from the remuneration due to an *eligible employee*, as defined, and transmitting this amount, together with its own contribution and a prescribed schedule, to the complainant.

4.10 *Eligible employee* is in the definition in the Rules of the complainant defined to limit participation to

- persons performing certain classes of work as defined in sub clauses (41) to (46) of Sectoral Determination 3 of 2000;

- who do not fall under the jurisdiction of any other wage determination, sectoral determination or bargaining council agreement; and

- who have completed 6 months continuous permanent employment with any of the employers within the Private Security Sector immediately prior to joining the complainant;

- but excludes an employee employed by an employer who has been granted exemption to participate in the complainant in terms of Rule 3.1.2.

4.11 There is no direct requirement in the Sectoral Determination or the Rules of the complainant for employers to register with the complainant. Certain duties are placed on employers by the Sectoral Determination and the Rules, such as to deduct and transmit contributions, and to submit schedules. It follows that before an employer can be ordered to deduct and transmit contributions to the complainant, and in the process be *registered* with the complainant, it must be clear it the employer employs at

least one person who qualifies as an *eligible employee* as defined in the Rules.

4.12 Clause 1(3)(a) of the Sectoral Determination excludes a manager, as defined, from the determination. The members of the close corporation are managers of the corporation. It follows that managers are not *eligible employees*, as defined.

4.13 A member of my staff spoke to a certain T R Nkosi to request a response. A certificate issued electronically by the Registrar of Companies and Close Corporations on 23 June 2008 reflects Tuga Robert Nkosi as the only member of the respondent.

4.14 The respondent was on two occasions invited to submit a response, but no response was received. If the respondent does not employ any *eligible employees* as explained above, it was the respondent's duty to bring this to the attention of this Tribunal. As the respondent failed to make any submission, the complainant is entitled to relief.

5. Relief

5.1 In the result, the following relief is granted:

5.1.1 The prayer that the respondent be prohibited from applying for liquidation of the business is dismissed;

5.1.2 The respondent is hereby ordered to register with the Fund or apply for an exemption, within 15 business days from the date of this determination.

DATED at JOHANNESBURG on this day of 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR