



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR
(HELD IN JOHANNESBURG)**

CASE NO: PFA/GA/8180/2006/SM

In the complaint between:

MB MTHIMKHULU

Complainant

and

NBC HOLDINGS (PTY) LTD

First Respondent

COMPRA CC/ORAC CC

Second Respondent

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

INTRODUCTION

- [1] The complaint concerns the failure of the second respondent to register the complainant as a member of the Contract Cleaning National Provident Fund (“the fund”) and to pay contributions on his behalf despite deducting a certain amount from his salary for purposes of pension contributions.
- [2] The complaint was received by this office on 19 April 2006. On 24 April 2006 we sought a reformulation of the complaint. The reformulated complaint was received by this office on 2 November 2006 and a letter acknowledging receipt thereof was sent to the complainant on 28 November 2006. On 7 February 2007 a letter was dispatched to the first respondent giving it until 7 March 2007 to file its response to the complaint. Another letter was dispatched to the second respondent on 14 April 2008 giving it until 30 April 2008 to file its response to the complaint.
- [3] Responses were received from the first respondent on 8 April 2007 and from the second respondent on 14 April 2008 and 9 June 2008. These responses were forwarded to the complainant on 20 May 2008 and 13 June 2008, in the event that he wished to make any further submissions. On 26 May 2008 this office received the complainant’s further submissions.
- [4] Having considered the written submissions before this tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are well

known to all the parties, only those facts that are pertinent to the issues raised herein shall be repeated. The determination and reasons therefor appear below.

FACTUAL BACKGROUND

[5] The complainant was employed by the second respondent as a cleaner from 9 September 2004 until his employment was terminated on 31 October 2005.

[6] Upon the termination of his employment, the complainant claimed payment of his withdrawal benefit from the first respondent. The first respondent advised the complainant that according to its records he is not registered as a member of the fund.

COMPLAINT

[7] The complaint is that the second respondent failed to comply with its duties regarding payment of contributions on behalf of the complainant. The complainant contends that the second respondent deducted an amount of R47.20 from his salary per month but failed to pay it over to the fund. The complainant stated that these deductions were made from September 2004 until his employment was terminated.

[8] Further, the complainant submitted that he discovered that he was not registered as a member of the fund by the second respondent. Thus, the complainant argued

that a withdrawal benefit could not be paid to him as a result of the second respondent's conduct.

RESPONSES

First respondent's response

[9] Mrs/Ms M Clarke, the consultant of the first respondent, filed a response on behalf of the fund and the first respondent. She submitted that the complainant was never registered as a member of the fund. She pointed out that according to the fund's records the complainant was never a member or a former member of the fund while he was employed by the second respondent. Further, she indicated that the complainant is employed by Hikumekile Business Enterprise and is currently a contributing member of the fund.

Second respondent's response

[10] The second respondent submitted that a former employee of the company made a mistake by deducting the amount of R47.20 from the complainant's salary without registering him with the fund. It indicated that this issue was explained to the complainant when he came to the company's offices to claim his benefit.

[11] In its second response, the second respondent submitted that it paid the complainant an amount of R317.25 for the contributions that were deducted from

his salary.

DETERMINATION AND REASONS THEREFOR

[12] The issue that falls to be determined is whether the second respondent failed to comply with its duties in terms of the Act with regard to the payment of contributions in respect of the complainant.

[13] It is common cause that the second respondent acknowledged that an amount of R47.20 was deducted from the complainant's salary as provident contributions until his employment was terminated. Further, it acknowledged that it failed to register the complainant as a member of the fund. However, it appears that the second respondent is shifting liability to its former employee who was responsible for the administration of provident contributions. The second respondent seems to forget that its former employee was acting as its agent in the execution of her duties. It follows that the second respondent failed to comply with its duties regarding the payment of contributions on behalf of the complainant.

[14] Although it is clear that this tribunal does not have jurisdiction to adjudicate this matter as the complainant was not a member of any fund, this tribunal cannot turn a blind eye to what appears to be a bad business practice by the second respondent. Section 31 of the Act provides as follows:

“Carrying on business of unregistered pension fund organization and the use of designation “pension fund”-

- (1) No person shall-
 - (a) carry on the business of a pension fund which is in existence at the commencement of this Act, for a period of more than six months after such commencement unless application has been duly made under section *four* for the registration of that fund; or
 - (b) carry on the business of a pension fund established after such commencement, unless that fund has been duly registered under section four; or
 - (c) carry on business of a pension fund for a period of more than twelve months after the date on which the person who applies for registration of the fund is advised by the registrar that the application for registration has been refused; or
 - (d) after the expiration of a period of twelve months from the commencement of this Act, apply to his business a name which includes the words “pension fund” or any other name which is calculated to indicate that he carries on the business of a pension fund, unless such business is registered as a pension fund under this Act, except with the consent of the registrar.”

[15] The conduct of the second respondent is contrary to section 31 as it deducted monies from the complainant’s salary in the name of a pension fund for which the complainant was not registered as a member. This conduct amounts to an unlawful use of the word “pension fund” as indicated above.

[16] According to the evidence before this tribunal it is clear that the second respondent is a participating employer in the fund. However, the second respondent failed to register the complainant as a member of the fund despite deducting a certain amount from his salary for purposes of pension contributions. It has been held that

an employer who participates in a pension owes a duty of good faith to all employees who are members of the fund (see *H v Otis (South Africa) Pension Funds and Another* [2002] 3 BPLR 3152 (PFA) at paragraph 32 and see also *SA Beje v Private Security Sector Provident Fund and Archer Security Services* PFA/WE/12591/2007/PGM-unreported). Further, the second respondent stands in a fiduciary relationship with all its employees, especially in matters relating to their pension benefits. According to the evidence before this tribunal the second respondent failed to comply with its fiduciary duties in this regard.

[17] Further, the second respondent indicated that an amount of R317.25 was paid to the complainant for the contributions that were deducted from his salary. However, the second respondent failed to explain how it arrived at this amount. It is common cause that the amount of R47.20 was deducted from the complainant's salary since September 2004 until his employment was terminated on 31 October 2005. Thus, the amount of R317.25 that was paid to the complainant cannot be regarded as the total amount that was deducted from his salary as provident contributions.

[18] It is clear that the complainant was under the impression that his contributions were paid over to the fund and that he was a member of the fund. Thus, he was under the impression that he would receive a withdrawal benefit after his withdrawal from the fund. However, as a result of the second respondent's conduct the first respondent could not pay the complainant a withdrawal benefit as he was not a member of the fund and contributions were not paid on his behalf.

[19] Therefore, the complainant is entitled to claim the loss of his withdrawal benefit from the second respondent (see *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others* [2002] 9 BPLR 3830 (C) at 3839F-G). The appropriate relief is that the second respondent should pay the complainant the amount he would have received from the fund had he been a member of the fund and contributions were paid accordingly from 9 September 2004 until 31 October 2005. To that end, the first respondent must compute the value of the withdrawal benefit that the complainant would have been entitled to had the second respondent registered the complainant as a member of the fund and paid all contributions accordingly.

RELIEF

[20] In the result, the order of this tribunal is as follows:

[20.1] The first respondent is ordered to compute the value of the withdrawal benefit that the complainant would have been entitled to had he been a member of the fund and the second respondent timeously made the pension contributions due in terms of the rules, less the amount paid and less deductions authorized in terms of the Act, and to inform the complainant, this office, and the second respondent of such amount, within three weeks of this determination.

[20.2] The second respondent is directed to pay to the complainant the amount of the benefit computed in paragraph [6.1.1] , within one week of the first respondent forwarding the calculation to it, together with interest thereon calculated at 15.5% per annum from 31 October 2005 until the date of payment.

DATED AT JOHANNESBURG ON THIS DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR