



HEAD OFFICE
Johannesburg

2nd Floor, Sandton House
Sandton Close 2, Sandton, 2196
PO Box 651826, Benmore, 21010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town

2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 □ Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: PFA/WE/8075/2006/SM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act") – VG VAN NIEKERK ("the complainant") v MAXI STRATEGIC ALLIANCE (PTY) LTD ("the first respondent") AND NBC HOLDINGS (PTY) LTD ("the second respondent")

1. Introduction

- [1.1] The complaint concerns the failure of the first respondent to pay all contributions in respect of the complainant despite deducting a certain amount from his salary for purposes of pension contributions.
- [1.2] The complaint was received by this office on 12 April 2006. A letter acknowledging receipt thereof was sent to the complainant on 1 November 2006. On 8 October 2007 a letter was dispatched to the first respondent giving it until 26 October 2007 to file a response to the complaint. Another letter was dispatched to the second respondent on 17 June 2008 giving it until 24 June 2008 to file its response to the complaint.
- [1.3] Responses were received from the second respondent on 7 February 2007 and from the first respondent on 22 May 2008. These responses were forwarded to the complainant on 8 October 2007 and 17 June 2008 respectively. The complainant omitted to file any further submissions.
- [1.4] 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

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

and reasons therefor appear below.

2.Factual Background

- [2.1] The complainant is employed by the first respondent and is a member of the Private Security Sector Provident Fund ("the fund") by virtue of his employment. The complainant was initially employed by Court Security from 1 January 2004 until 31 October 2005 when the company was purchased by the first respondent in November 2005.
- [2.2] The first respondent took over employees of Court Security and continued with the payment of contributions on their behalf.

3.Complaint

- [3.1] The complainant submitted that he received a letter from Court Security on 26 October 2005 advising him about a joint venture between the company and the first respondent with effect from 1 November 2005. However, the complainant stated that he was later advised that Court Security was purchased by the first respondent. He contended that prior to the purchase of Court Security by the first respondent a certain portion of his salary was deducted and paid over to the fund.
- [3.2] However, the complainant submitted that the first respondent failed to pay contributions on his behalf despite deducting a certain amount from his salary since it purchased Court Security on 1 November 2005. Further, the complainant indicated that he wishes to remain a member of the fund.

4.Responses

First respondent's response

- [4.1] Mr J Kunene, the human resources manager of the first respondent, filed a response on behalf of the first respondent. He confirmed that the complainant was employed by Court Security, which was purchased by the first respondent in November 2005. He indicated that the first respondent purchased Court Security and that there was no joint venture between the two companies.
- [4.2] Further, he argued that the first respondent continued to pay contributions on behalf of all members of the fund in its employ from November 2005.

Second respondent's response

- [4.3] The second respondent submitted that contributions in respect of the complainant were received from May 2004 until October 2004. Further, it indicated that no claim form was received in respect of the complainant.

- [4.4] In its second response dated 3 July 2008, the second respondent indicated that the complainant is still a member of the fund. Further, it pointed out that contributions in respect of the complainant were received from the first respondent from April 2004 until April 2008. It further averred that no contribution schedule was received in respect of the complainant for May 2008.

5.Determination and reasons therefor

- [5.1] The issue that falls to be determined is whether the first respondent failed to comply with its duties in terms of the fund's rules and the Act with regard to the payment of contributions in respect of the complainant.
- [5.2] Rule 4.2 of the fund's rules regulates the payment of contributions by an employer who employs people who are its members. It reads as follows:
- “4.2.1 The Employer shall make a monthly contribution in respect of each Member in its Service at the rate of 5.00 per cent of the Member's Fund Salary.
4.2.4 Contributions by the Employer must be paid to the Fund within seven (7) days after the end of the month to which they relate.”
- [5.3] The complainant submitted that the first respondent failed to pay contributions on his behalf since it purchased Court Security in November 2005. The second respondent submitted that contributions in respect of the complainant were received from May 2004 until October 2004. It is common cause that the complainant acknowledged that this is correct as these contributions relate to the period he was employed by Court Security. Thus, the issue of the complainant's contributions prior to the purchase of Court Security by the first respondent is not in dispute.
- [5.4] There is a dispute of fact as to whether the first respondent continued to pay all contributions in respect of the complainant after it purchased Court Security in November 2005. The first respondent submitted that it continued to pay contributions on behalf of all members who are in its employ from November 2005. However, the second respondent indicated that contributions in respect of the complainant were received from the first respondent from April 2004 until April 2008. It further argued that no contribution schedule was received in respect of the complainant for May 2008.
- [5.5] It is clear that the first respondent did not submit any evidence which

indicates that it paid contributions in respect of the complainant from November 2005 to date. The second respondent's records indicate that the first respondent only paid contributions on behalf of the complainant from April 2004 until April 2008. Thus, the probabilities favour the complainant's version that the first respondent failed to comply with its duties regarding payment of contributions.

- [5.6] The first respondent's conduct is in contravention of Rule 4.2 of the fund's rules as set out above. Further, the first respondent's conduct is in contravention of section 13A of the Act and is a punishable offence in terms of section 37 of the Act. Section 13A of the Act provides that the employer of any member of a registered fund shall pay the following to the fund in full, namely:
- (a) any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration; and
- (b) any contribution for which the employer is liable in terms of those rules."
- [5.7] Section 13A(3)(a)(i) also states that such contribution must be paid directly into the fund's account and section 13A(3)(a)(ii) states that the contributions must be paid directly to the fund in such a manner as to have the fund receive the contribution not later than seven days after the end of that month for which such a contribution is payable.
- [5.8] Further, the second respondent indicated that the first respondent did not submit a contribution schedule in respect of the complainant for the month of May 2008. It is clear that the second respondent will not be able to allocate correct contributions to the complainant's fund credit until contribution schedules are submitted to it. Further, the benefit that is payable to the complainant when he withdraws from the fund might not be correct unless contributions were submitted as required.
- [5.9] Thus, I find that the first respondent failed to comply with its fiduciary duties in respect of the complainant. The second respondent also stated that no withdrawal claim form was received in respect of the complainant. However, it appears that the complainant is still employed by the first respondent and is a member of the fund. Moreover, the complainant indicated in his complaint that he wishes to remain a member of the fund. It follows that there is no need for a withdrawal claim form to be submitted to the second respondent as the complainant did not withdraw from the fund or terminated his employment.

[5.10] Therefore, the appropriate relief is that which has the effect of placing the complainant in the position he would have been had the first respondent regularly and timeously paid all contributions due. To that end, the second respondent must compile a schedule of all outstanding contributions due by the first respondent in respect of the complainant with the respective dates that it failed to pay contributions since November 2005. The first respondent must then be ordered to pay the outstanding contributions together with interest calculated from the date that it failed to pay contribution until the date of payment.

6. Relief

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

- [6.1.1] The first respondent is ordered to submit contribution schedules for the months of May 2008 and June 2008 in respect of the complainant to the second respondent within two weeks of the date of this determination and furnish this tribunal, the second respondent and the complainant with copies of the schedules within 7 days of compiling them.
- [6.1.2] The second respondent is ordered to compile a schedule of all outstanding contributions due by the first respondent in respect of the complainant and furnish this tribunal, the complainant and first respondent with a copy of such document within two weeks of the date of this determination.
- [6.1.3] The second respondent is ordered to compute the value of the complainant's fund credit had the first respondent paid all the outstanding contributions timeously in terms of the fund's rules, less amounts presently credited to the complainant's fund credit, and to inform the complainant, this tribunal and the first respondent of such amount within three weeks of the date of this determination.
- [6.1.4] The first respondent is directed to pay to the complainant's fund credit the amount computed in paragraph 6.1.2 within one week of the second respondent forwarding the calculation to it, together with interest thereon calculated at 15.5% per annum from the date that it failed to pay contributions until the date of payment.

DATED AT JOHANNESBURG ON THIS

DAY OF

2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR