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Please quote our reference: PFA/EC/6454/2005/NVC

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): N P Sifumba (“the complainant”) v Chitibunga Prepaid Funerals Pension Fund (“the first respondent”) and Chitibunga Funeral Services (“the second respondent”), Sanlam Life Insurance Limited (“third respondent”)

1. Introduction

1.1 Your complaint concerns the failure of the second respondent to pay contributions to the first respondent, and the first respondent's consequent inability to pay you a withdrawal benefit. The complaint was received on 22 November 2005 and a letter acknowledging receipt thereof was sent to you on 24 November 2005. On the same date letters were dispatched to the respondents requesting them to submit responses to your complaint by 15 December 2005. After requesting an extension on 13 December 2005, responses were received from the second respondent on 25 January 2006 and 8 March 2006. Responses from the administrators of the first respondent were received on 14 February 2006 and 12 February 2007. Both the the second respondent and the first respondent copied the complainant with their responses. No reply has been received from the complainant.

1.2 After considering the written submissions it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

2. Complaint

2.1 The complainant is dissatisfied that he has not received his withdrawal

M Mohlala (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator)

Office Manager: L Manuel

benefit from the first respondent subsequent to the termination of his employment on 14 June 2004, after four years' service with the second respondent. The complainant states that the second respondent made regular deductions from his salary for pension fund purposes, and he has submitted copies of his payslips to support this. The complainant wants this tribunal to investigate the matter.

3. The Second Respondent's response

- 3.1 The second respondent states that as a result of the mismanagement and misappropriation of company funds by former employees, the company has been left in a financial crisis. The fund was therefore terminated with effect from 1 January 2004 in terms of section 28 of the Act.
- 3.2 The second respondent contends that it has submitted the complainant's withdrawal form to the first respondent. However, there will be a delay in the payment of the benefit as the first respondent is to be liquidated, and the Registrar of Pension Funds ("the Registrar") needs to issue a section 28 liquidation certificate.
- 3.3 The second respondent further states that it last paid contributions to the first respondent in December 2005 and admits that it is in arrears with the payment of contributions.

4. The Third respondent's response

- 4.1 The fund administrator, the third respondent, confirms that the first respondent is a pension fund and not a funeral benefit scheme, states that the first respondent was terminated with effect from 1 January 2004, and is in the process of being liquidated. The liquidator's appointment has not been approved by the Registrar.
- 4.2 According to the third respondent contends that according to the first respondent's records it has not received notification of the complainant's withdrawal from the first respondent, but once it receives it, it will process the complainant's withdrawal application. However, the first respondent will only be able to pay the complainant a benefit based on the contributions in fact received on behalf of the complainant.
- 4.3 The third respondent states that the December 2003 contributions, paid in August 2004, were the last it received from the second respondent. The membership data is also only up to date up to December 2003. The third respondent alleges that the financial situation of the first respondent is a "complete mess".

5. Determination and reasons therefor

- 5.1 Following the termination of your service with the second respondent, the complainant became entitled to a withdrawal benefit. According to the payslips attached to the complaint, the second respondent deducted certain amounts from his salary for “pension fund” purposes. It is clear from the evidence that the second respondent failed to pay all the complainant’s contributions to the third respondent. It is also clear that the second respondent did not pay the contributions timeously to the third respondent. As a result of the second respondent’s conduct, the complainant’s fund share is much less than what it ought to be.
- 5.2 The second 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.”
- 5.3 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.
- 5.4 It is evident that the second respondent did not pay over all the complainants’ contributions to the first respondent. To the extent that the first respondent apparently does not hold sufficient cash reserves to pay the benefit, the complainant is entitled to recover the extent of the complainants loss of his benefits from the second respondent (see *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others* [2002] 9 BPLR 3830 (C) at 3839 F-G).
- 5.5 Thus, the appropriate relief is that which has the effect of placing the complainant in the position he would have been had the second respondent regularly and timeously paid the contributions due. To that end, the first respondent administrators, the third respondent must calculate the benefit to which the complainant would have been entitled had the second respondent made regular contributions less any deductions permitted by the Act. Taking into account the contributions the first respondent had received on behalf of the complainant, the second respondent must then be ordered to pay to the complainant the amount calculated by the third respondent.

6. Relief

6.1 in the result the order is as follows:

- 6.1.1 The first respondent is ordered to compute the value of the withdrawal benefit that the complainant would have been entitled to had the second respondent timeously made the pension contributions due in terms of the rules, and to inform the complainant, this office, and the second respondent of such amount, **within two weeks** of the date of this determination;
- 6.1.2 The first respondent is ordered to pay the complainant the amount it is presently holding on his behalf **within two weeks** of the date of this determination;
- 6.1.3 The second respondent is directed to pay the complainant the amount of the benefit computed in paragraph [6.1.1], less the amount paid by the first respondent in terms of paragraph [6.1.2] **within one week** of the first respondent forwarding the calculation referred to in 6.1.1 to it, together with interest thereon calculated at 15.5% per annum from 14 June 2005 until the date of payment.

Dated at Cape Town on this the day of 2007.

Yours faithfully

Mamodupi Mohlala
Pension Funds Adjudicator