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Please quote our reference: PFA/GA/12797/2007/LN

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act") – R J SETHUNYA ("the complainant") v MORPHEUS UMBRELLA PROVIDENT FUND ("the first respondent"), SPEKTROFIN ADMINISTRATORS (PTY) LTD & LUCENTIA BROKERS ("the third respondent")

1. Introduction

1.1 The complaint concerns the respondents' failure to pay out the complainant's withdrawal benefits on his withdrawal from the fund.

1.2 The complaint was received by this office on 15 February 2007. A letter acknowledging receipt thereof was sent to the complainant on 26 March 2007. On the same date a letter was dispatched to the third respondent giving them until 26 April 2007 to file their response to the complaint. Another letter was dispatched to the third respondent on 27 September 2007 giving them until 30 September 2007 to file their response to the complaint. This office received a response from the second respondent on 1 October 2007 and 17 October 2007 respectively.

1.3 Having considered the submissions before this office, it is considered unnecessary to hold a hearing in this matter. As the background and the facts are well known to the parties, only those facts that are pertinent to the issues raised herein will be repeated. The determination and reasons therefor appear below.

2. Factual Background

M Mohlala (Adjudicator), C Nkuhlu (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), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator), AP Lehana (Assistant Adjudicator), S Mokgara (Assistant adjudicator), L Molete (Assistant Adjudicator), T Nawane (Assistant Adjudicator)

Financial Manager: F Mantsho, Accountant: R Soldaat

2.1. The complainant was a member of the first respondent by virtue of his employment with Nkukuleko Guarding Services ("the employer") from March 2003 until June 2006. During his time as a member of the first respondent, the employer used to deduct an amount of R75.00 and thereafter increased to R114.00 on a monthly basis until June 2006 from the complainant monthly salary.

3. Complaint

3.1 The complainant's complains about a withdrawal benefit due to him which has not yet been paid by the first respondent.

4. Responses

4.1 Mr. De beer C M filed a response on behalf of the first respondent. He submitted that the third respondent approached the second respondent via Rentmeester in 2004 to take over the administration of Nkukuleko Security (Pty) Ltd's Provident Fund due to the fact that Rentmeester were in the process of being taken over by Capital Alliance/ Liberty Life.

4.1 He confirmed that premiums were received from the third respondent for some of the members without complete contribution schedules or any application forms in place. These contributions were made from March 2004 to June 2004 and then again from September 2004 to January 2005 approximately nine months. These premiums were paid over to Rentmeester for the underwriting and investments. The second respondent did enter into an administration agreement with the employer Nkukuleko. After numerous meetings held with both employer and the third respondent to follow the correct rules and procedures in accordance with the Act and supply complete distribution schedules and member application forms. Such were not found and the second respondent terminated its agreement and involvement with both the employer and the third respondent.

4.2 He further submitted that since then they did not receive further correspondence for an Article 14 transfer. The funds are still being administered by Rentmeester/Capital Alliance. No further premiums were received. They have received certain termination forms under the name of the third respondent after three years.

4.4 He confirmed that premiums were received for the said members including the complainant. Funds were requested and will be paid out

according to the rules. He indicated that the fact that no Article 14 transfer was done is of great concern to them seeing that the third respondent received premiums which was paid over to the first respondent and not coming from the employer, that being the main reason why second respondent cancelled this potential agreement. It was finally submitted that no agreement was ever entered into with the third respondent although they probably still received premiums and handled Nkukuleko's Fund as an administrator

5. Determination and reasons therefor

5.1. None of the parties dispute the fact that the complainant is entitled to his withdrawal benefit and ought to have received payment since June 2006 when he exited the fund. However, from the complaint, the second respondent confirmed that they received premiums and members appearing in their list will be considered for payment including the complainant. Funds were requested for those members that are on the list and will be paid out according to the rules. The complainant has not yet received payment for the contributions that were made to the first respondent of his benefit to date and no reasons have been furnished by the second respondent why payments are delayed.

5.2. The delay in effecting further payment to the complainant is inexcusable. We do not understand the reason why the complainant was not paid within the first six months from the date of his exit from the fund. This behavior is not in accordance with the law.

5.3 The conduct of the third respondent in this matter is to be severely deprecated. It is now trite law that the third respondent in a pension fund at the very least owes a duty of good faith to its employees (see *Rwexwana v Idaho Spur Provident Fund and Others (*2005) 7 BPLR 640 (PFA) and *Tek Corporation Provident Fund and others v Lorentz* (2000) 3 BPLR 227 (SCA) at 235C). It is essential for the third respondent to make contributions to the first respondent since they were deducting monies from the complainant salary. It is their duty to make contributions to the first respondent in terms of the Act. This, in turn, allows the first respondent to make payments to the complainant which is due to her. In this matter there is no reasons provided by the third respondent's for not making contributions.

5.4 There has also been no sufficient response from the administrators of the first respondent. The administrators of the first respondent are also partially to blame in this matter. In terms of sections 7C and 7D of the Act the second respondent is required to, *inter alia*, act with due

care, diligence, good faith and impartiality in respect of all members and beneficiaries. The administrators should have compelled the third respondent to make contributions. After it had refused to do so, it should have approached this office for an order obliging the third respondent to make contributions

6 Relief

In the result, this office makes the following order:

6.1. The third respondent is ordered to make outstanding contributions to the first respondent, within seven days of the date of this determination.

6.2. The first respondent is ordered to calculate and pay the complainant outstanding withdrawal benefit due to him less any permissible deductions in terms of the Act, together with interest thereon of 15,5 percent from 1 July 2006 to date of final payment, within six weeks of the date of this determination.

6.3. The third respondent is ordered to refund the interest paid by the first respondent in terms of paragraph 6.2 above to the first respondent within seven days of the date of this determination

DATED AT JOHANNESBURG ON THIS DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR