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Please quote our ref: PFA/GA/4105/2005/FM

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”): S J MSIMANGA v CANINE SECURITY (PTY) LTD / SECURITY EMPLOYEES NATIONAL PROVIDENT FUND

Introduction

[1] This complaint arises out of the alleged failure by the Security Employees National Provident Fund (“the fund”) and/or Canine Security (Pty) Ltd (“the employer”) to effect payment of your withdrawal benefit on leaving service of the employer.

[2] The complaint was received by this office on 22 June 2005 and a letter acknowledging receipt thereof was sent to the complainant on 9 July 2005. A letter of the same date was sent to the respective respondents giving each until 1 August 2005 to file a response to the complaint. A response dated 26 July 2005 was received from the employer on the same date. On 14 October 2005 a response of the same date was received from the fund on the same day. A letter was on 29 July 2005 dispatched to the complainant giving him until 12 August 2005 to file a reply to the respondents’ respective responses. A reply dated 12 August 2005 was received from the complainant on the same date. After considering the written submissions before me, I consider it unnecessary to hold a hearing.

Complaint

[3] On 17 May 2003 you commenced employment with the employer and

V Ngalwana (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), N van Coller (Assistant Adjudicator), L Mballo (Assistant Adjudicator), R Maharaj (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), Solomzi Gcelu (Assistant Adjudicator)

Office Manager: L Manuel

consequently became a member of the fund, which is an umbrella fund in which the employer participated until the termination of your employment on 6 May 2004. You aver that during the period of your employment, you contributed to the fund by way of deductions effected from your salary by the employer and in light of that you contend that you are entitled to a withdrawal benefit on leaving the fund and the service of the employer.

[4] You accordingly seek me, in your words, to order that:

“(i) I be furnished with a statement reflecting all the contributions made to the fund and the interest accumulated until to date an, [sic]

(ii) Payment of all my benefits accrued”.

Response

[4] The employer filed a response on its behalf and on behalf of the fund. It avers that you are, in terms of the special rules of the fund, not entitled to any benefit on your withdrawal from the fund because you did not complete a period of twelve months service with the employer. The employer further contends that in terms of the fund’s special rules, during an employee’s first twelve months of employment, no retirement cover is provided and the employee is only accorded risk cover for which the employer carries the liability. It is only from the thirteenth month, so argues the employer, that the employees commence with contributions to the fund. Therefore, the employer denies that it ever deducted from your salary any monies in lieu of fund contributions.

Determination and reasons therefor

[5] There are two issues, which, in my view, appear to be inextricably linked, which fall for determination; whether you, on leaving the fund, are entitled to payment of a withdrawal benefit and whether the fund rules made provision for contributions by employees with your length of service with the employer. It is common cause that your duration of service with the employer was less than twelve months (11months and 11 days to be exact).

[6] Rule 2 of the special rules governs the eligibility requirements for fund membership. In this regard rule 2.3 provides as follows:

“Waiting Periods

Employees shall work for the duration of twelve months before contributions are made towards the Fund. However, during the course of this twelve month waiting period, risk cover will be paid for by the participating Employer. Upon completion of the twelve month period, contributions will commence and continue until such time as the Member leaves the employ of the Participating Employer...”

- [6] It is patently clear from the provisions of the above rule that an employee who has not yet completed twelve months' service with the employer does not qualify for retirement cover although he/she enjoys risk cover provided at the expense of the employer and is furthermore not required to make contributions to the fund. In the ordinary course of events, this would be the end of the matter.
- [7] However, in this case you allege and have tendered documentary proof in the form of a salary advice that the employer did deduct amounts from your salary in lieu of contributions to the provident fund. The employer has not responded to this pointed allegation. It is clear that the fund rules give no authority to the employer to deduct contributions from your remuneration prior to your completing twelve months' service with the employer. It is also common cause that no contributions were received from the employer by the fund in respect of your retirement cover. The fund is consequently holding no cash benefits on your behalf. The deductions by the employer clearly constitute a breach of the fund's rules. It would therefore be appropriate to order the employer to refund such deductions made during the duration of your employment.
- [8] Rule 3 of the special rules regulates the fund contribution rates and provides for six percent of the fund salary to be deducted from the member and the employer. From the employer portion is deducted the cost of risk benefits and administration costs.
- [9] To repeat, rule 2.3 of the special rules clearly preclude fund members with less than twelve months of service with the employer from making fund contributions and that the deductions of 6% of your fund salary by the employer was in breach of the fund rules and therefore unlawful.
- [10] It goes without saying that the fund cannot be held liable to pay you a withdrawal benefit for the reason that not only was the employer acting unlawfully when it deducted from your salary monies in lieu of fund contributions, such monies were not remitted to the fund and the fund consequently does not hold cash benefits on your behalf.
- [11] This issue has been canvassed by the Cape High Court in *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others* [2000] 2 BPLR 3830 (C) at 3839 F-G, where the employer failed to pay the members' contributions on their behalf and as a result thereof the members lost their pension benefits. The court held in that case that the members were entitled to claim the loss of such benefits from the employer and the employer was ordered to effect payment thereof. In casu, the appropriate remedy is to order the employer to pay to you the

