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Please quote our reference: PFA/GA/14614/2007/LCM

Re: **DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – PRIVATE SECTOR SECURITY PROVIDENT FUND (“the complainant”) v NYAMELELO SECURITY SERVICES AND GENERAL CC (“the respondent”)**

1. Introduction

- [1.1] The complaint concerns the late payment of contributions to a pension fund and the furnishing of information regarding the contributions. The complainant also claims as ancillary relief an order that, inter alia, the respondent be prohibited from applying for the liquidation of its business.
- [1.2] The complaint was received by this office on 4 July 2007. A letter acknowledging receipt thereof was sent to the complainant on 16 July 2007. On the same date a letter was dispatched to the respondent giving it until 16 August 2007 to file its response to the complaint. The respondent furnished a response dated 8 August 2007, to this office.
- [1.3] After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

2. Factual Background

- [2.1] The complainant was established in terms of the sectoral 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

for the private security sector industry as contained in a Government Notice number R306 of 30 March 2001 (“ the government notice”) as amended by Government Gazette number R331 of 25 October 2002.

- [2.2] According to the sectoral determination, the employers who participated in registered fund prior to the publication of the government notice or had prior to 30 March 2001, consulted with employees about establishment of a pension or provident fund were exempted from participating in the applicant.

3. Complaint

- [3.1] The complainant, requested an order that:

[3.1.1] the respondent be prohibited from applying for liquidation of its business;

[3.1.2] the respondent be compelled within 7 working days to make the payment of contributions from 31 May 2006 to date of lodging of the complaint into the complainant’s banking account;

[3.1.3] the respondent be compelled within 7 working days to submit contribution schedules from 31 May 2006.

[3.1.4] the administrator of the complainant, NBC Holdings (Pty) Limited, be compelled to calculate late payment interest and submit the calculations to the respondent for payment;

[3.1.5] the respondent is to pay late payment interest within 7 working days of receipt of the calculations;

[3.1.6] the administrator of the complainant to calculate repudiated amounts for death and disability claims (“Repudiated Amounts”) plus late payment interest in terms of the complainant’s policy and to revert to the respondent within 7 working days of receiving this determination; and

[3.1.7] the respondent is to pay the Repudiated Amounts within 7 working days upon receipt of the information from the administrator.

4 Response

- [4.1] The respondent admits that it failed to contribute to the respondent due to financial difficulties. However, the respondent submits that it has commenced paying contributions including additional contributions in respect of arrear contributions.

5. Determination and reasons therefor

Jurisdiction

- [5.1] Prior to the determination in **Mandla Mali v Nabelah Trading CC t/a Security Wise; Private Security Sector Provident Fund PFA/WE/7723/2006**, this office historically made a decision that these matters do not fall within its jurisdiction. This was reassessed and the decision is that this office shall now deal with these matters, as the complainant in this matter is not a bargaining council fund, but a fund established in terms of a sectoral determination for the private security sector issued by the Minister of Labour under the Basic Conditions of Employment Act, 75 of 1997 and registered as a pension fund with the Registrar of Pension Funds.
- [5.2] Since the decision in **Mandla Mali** (*supra*) the Act was amended by the Pension Funds Amendment Act, 11 of 2007, which came into operation on 13 September 2007. Section 2(1) as amended states that the Act applies to all registered pension funds and that bargaining council funds not yet registered, have to do so by no later than 1 January 2008.
- [5.3] It follows that this office does have the necessary jurisdiction to determine this matter.

Prohibition against applying for liquidation

- [5.4] The complainant requests an order that the respondent be prohibited from applying for liquidation of its business.
- [5.5] An application to court for the liquidation of the company or close corporation may be made by any person who is entitled to apply to court for an order winding up the company or close corporation or it may be done by a shareholder or director or creditors of the company or close corporation.
- [5.6] The respondent is only one of a number of entities that may apply to court for winding-up. Other possible applicants would include one or more creditors, as well as one or more members (section 66(1) of the Close Corporations Act, 69 of 1984, read with section 36(1) of the Companies Act, 61 of 1973.)
- [5.7] A blanket prohibition against applying to court for relief would be inappropriate. Access to the courts, albeit to have disputes settled, is one of the fundamentals set out in Chapter 2, the Bill of Rights, of the Constitution of the Republic of South Africa, Act 106 of 1996. An order

denying a person the right to approach a court for relief would be unconstitutional.

- [5.8] Such an order would under the circumstances also be inappropriate. The order, if granted, could readily be circumvented and rendered ineffective, as it would not restrain any other party, including one or more members of the respondent itself, from applying to court for relief in their individual capacity. This office is not willing to consider granting an order that could so easily be circumvented.

Repudiation and payment of death and disability claims

- [5.9] The complainant request that its administrator be instructed by this tribunal to establish whether or not there has been any repudiation of death and disability claims, quantify this amount and the respondent should pay the quantified amounts within 7 days of receipt of the information from the administrator. No determination can be made before it has been shown that there has indeed been any repudiation of death and disability claims.

Transmission of contributions and submission of schedules

- [5.10] Section 13A of the Act requires every employer to transmit member and employee contributions to a fund within seven days from the end of the month for which it was due.
- [5.11] In terms of regulation 33(2), the person responsible for checking the receipt of electronic transfers into the fund's bank account, or similar person, has to report to the principal officer or the monitoring person
- [5.10.1] not later than 30 days after the end of the month about the receipt and reconciliation of data; and
- [5.10.2] not later than 22 days after the end of the month about the receipt of contributions.
- [5.12] The monitoring person provided for in section 13A(6) has a duty to report to the board of the complainant in writing within seven days after receipt of the reports referred to above about the failure to transmit payments and submit data.
- [5.13] In the present matter, the complainant submits that the respondent failed to pay contributions since 31 May 2006 and to submit the necessary schedules since 31 December 2006. Since the complaint was lodged the respondent has failed to submit to this tribunal schedules and deposit slips as proof that direct deposits were paid to the complainant. it commenced membership in the complainant.

Calculation of late payment interest

[5.14] The method of calculation is explained in Circular PF 110. The maximum interest rate is prescribed by Government Notice 338 in *Government Gazette* 22210 of 6 April 2001. As the administrator is accountable to the complainant, the complainant should give an instruction to its administrator to calculate the late payment interest (if any) due by the respondent.

Payment of late payment interest

[5.15] The complainant should first instruct the administrator to quantify the amount. Once the amount has been quantified, the complainant should demand payment from the respondent and submit a copy of the detailed calculations to this tribunal before relief can be considered. When such demand is made, the respondent should be afforded the opportunity to respond to any letter of demand.

[6] Relief

[6.1] In the result, I make the following order:

[6.1.1] The respondent is ordered to make payments of all outstanding contributions from 31 May 2006 to 30 June 2007.

[6.1.2] The respondent is ordered to submit all outstanding contribution schedules from 31 December 2006 until the date of this determination.

[6.1.3] The complainant shall instruct its administrator to calculate late payment interest from 7 July 2007 to 1 May 2008 in accordance with Circular PF 110 and Government Notice 338 in *Government Gazette* 22210 of 6 April 2001, read with Government Notice 166 in *Government Gazette* 29661 of 26 February 2007 and clause 5 of Schedule 3 of the National Credit Act, 34 of 2005;

[6.1.4] The respondent is ordered to pay late payment interest calculated in accordance with paragraph [6.1.3] within 7 working days of receipt of the calculations from the complainant;

DATED AT JOHANNESBURG ON THIS DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR