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Please quote our ref: PFA/WE/6858/06/CN

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): MP TUKUSHE (“the complainant”) v SECURITY EMPLOYEES NATIONAL PROVIDENT FUND (“first respondent”) & AZA DAY & NIGHT SECURITY (“second respondent”)

1. Introduction

- 1.1 This complaint relates to the non-payment of a withdrawal benefit to a withdrawing member of a fund due to the failure of the employer, second respondent to fully and timeously pay contributions to the fund, the first respondent.
- 1.2 The complaint was received by this office on 13 January 2006, and a letter acknowledging receipt thereof sent to the complainant on 31 January 2006. On the same date letters were sent to the respondents requesting them to submit their responses to the complaint by no later than 17 February 2006. No response was received from the second respondent, while the first respondent's response was received on 22 February 2006. The response was forwarded to the complainant for a reply on 24 February 2006. No reply has been received from him.
- 1.3 After considering all the written submissions it is considered unnecessary to hold a hearing in this matter. The determination and the reasons therefore appear below.

2. Factual background

- 2.1 The complainant was employed as a security guard by Aza Day & Night Security CC (“the employer”) from 31 July 2000 until 30 June 2005. He became a member of the Security Employees National Provident Fund

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

("the fund") from 31 July 2003, from which date the second respondent effected monthly deductions from his salary *in lieu* of your contributions to the first respondent.

2.3 When the complainant's services terminated, the first respondent did not pay him any benefit. According to the complainant he was informed that the reason therefore is that the second respondent had only paid contributions to the first respondent from February to May 2003.

3. The complaint

3.1 The complainant is aggrieved by the second respondent's failure to pay his contributions over to the first respondent, and is requesting that the second respondent be ordered to compensate him for the loss suffered.

4. The first respondents' response

4.1 The first respondent states that it received contributions on the complainant's behalf from the months February to July 2003. According to it, the total contributions received from the second respondent on the complainant's behalf were an amount of R456.48. The first respondent concludes that its board had resolved to pay the amount in question into the complainant's account.

5. Determination and reasons therefore

5.1 The second respondent has a duty placed on it by the rules of the first respondent and the provisions of section 13A (1) (a) of the Act to pay contributions to the first respondent, and the first respondent in turn has a duty to pay out benefits to the members. Section 13A (3) (a) (i) 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. If the employer fails to transmit contributions to the fund within the prescribed period, interest at the usury rate is payable thereon by the employer. Section 13A(7) provides that interest at the rate prescribed by the Minister of Finance shall be payable on the amount of any contribution not transmitted by the employer or received by the fund before the expiration period prescribed therefore in section 13A(3)(a)(i) and (ii).

5.2 Upon the failure to pay contributions to the fund or administrator, the employer will not only be liable to pay interest on the arrear contributions but will also be guilty of an offence in terms of the Act.

- 5.3 The extent of the fund's liability is limited to the amount by which the benefit in question has been funded. Thus, if no contributions have been paid to it, the fund cannot be held liable to pay any benefit to the members, and they will have to look to the employer for compensation for any loss suffered thereby: See *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator & Others* [2002] 9 BPLR 3830 (C).
- 5.4 When the complainant withdrew from the first respondent he became entitled to a benefit representing his member's accumulated share in terms of main rule 5.5, which is defined as follows:
- "MEMBER'S ACCUMULATED SHARE means, in respect of a MEMBER, an amount equal to the aggregate contributions and transfer values paid to the FUND by or in respect of him, possible allocations from the MEMBER SURPLUS ACCOUNT or EMPLOYER SURPLUS ACCOUNT and the investment returns accrued to date on the underlying investment portfolio(s), less any expenses deducted by the TRUSTEES in terms of these RULES".
- 5.5 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. At this stage, it is not clear what the value of your member's accumulated share would have been had the second respondent timeously and fully paid its contributions to the first respondent. The administrator of the first respondent is, however, in a position to calculate the said amount.
- 5.6 In the result, the order of this tribunal is as follows:
- 5.6.1 The first respondent is directed to calculate the benefit the complainant would have received in terms of rule 5.5 had the contributions been made timeously and the monies invested in the first respondent portfolios, less any deductions permitted by the Act, within **two weeks** of the date of this determination.
- 5.6.2 The first respondent is further directed to furnish the complainant, the second respondent and this Tribunal with the calculations in paragraph [5.6.1] above within **three weeks** of the date of this determination.
- 5.6.3 The second respondent is directed, within **1 week** of receiving the calculations, to pay the benefit calculated in paragraph 5.6.1 directly to the complainant together with additional *mora* interest at the rate of 15.5% per annum calculated from 30 June 2005 to date of payment.

SIGNED IN CAPE TOWN ON THIS

DAY OF

2007

Yours faithfully

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MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR