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Please quote our ref: PFA/GA/15669/2007/LM

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 ("the Act"): THE BOARD OF MANAGEMENT OF THE PRIVATE SECURITY SECTOR PROVIDENT FUND ("the complainant") v BAGALE SECURITY SERVICES CC ("the respondent")

1. Introduction

1.1 This complaint, received by this office on 4 July 2007, concerns the 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 the respondent be prohibited from applying for the liquidation of the business.

1.2 On 16 July 2007, a copy of the complaint was sent to the respondent, with a request for a response by close of business on 16 August 2007. No response was received. On 1 April 2008, at my request, a member of my staff telephoned the respondent, spoke to a certain Edwin at 012 323 7737 to request a response. No response was received.

1.3 Having considered the written submissions filed before this tribunal, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

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

1.4 As the background facts are well-known to all parties, these shall be repeated only to the extent that they are pertinent to the issues raised herein.

2 Complaint

The complainant, a provident fund established in terms of Sectoral Determination 6: Private Security Sector, South Africa ("the Sectoral Determination") 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, asked for an order that

2.1 the respondent be prohibited from applying for liquidation of the business;

2.2 the respondent is compelled within 7 working days to make the payment of contributions from 31 July 2005 to date, to the complainant's banking account;

2.3 the respondent be compelled within 7 working days to submit schedules from 31 May 2005 to date of determination to the complainant;

2.4 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;

2.5 the respondent to pay late payment interest within 7 working days of receipt of the calculations;

2.6 the administrator 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

2.7 the respondent to pay the Repudiated Amounts within 7 working days of receipt of the information from the administrator.

3 Respondent's Response

3.1 The respondent failed to submit a response to the complaint.

3.2 On 8 April 2008, a member of my staff, at my request tried to contact the respondent telephonically, spoke to a certain Edwin at 012 323 7737 and requested a response.

3.3 No response has been received.

4. Determination and reasons therefor

Prohibition against applying for liquidation

4.1 The complainant requests an order that the respondent be prohibited from applying for liquidation of the business.

4.2 This application would apply to an application to court. It would not include the passing of a resolution for voluntary winding-up, be it for a members' or creditors' voluntary winding-up.

4.3 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 346(1) of the Companies Act, 61 of 1973).

4.4 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 108 of 1996. An order denying a person the right to approach a court for relief would be unconstitutional.

4.5 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. I am not willing to consider granting an order that could so easily be circumvented.

Late transmission of contributions and submission of schedules

4.6 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.

4.7 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

4.7.1 not later than 30 days after the end of the month about the receipt and reconciliation of data; and

4.7.2 not later than 22 days after the end of the month about the receipt of contributions.

4.8 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.

4.9 In the present matter, the complainant contends that the respondent did not pay the contributions from 31 July 2005 and that the schedules were not received from the complainant from 31 May 2005.

4.10 The respondent was on two occasions invited to submit a response, but no response was received. If the respondent was not in arrears with the lodging of schedules, it was the respondent's duty to bring this to the attention of this Tribunal. As the respondent failed to make any submission, the complainant is entitled to relief.

Calculation of late payment interest

4.11 The fourth prayer is that the administrator be ordered to calculate late payment interest. 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, it is up to the complainant to give an instruction to the administrator to do the necessary calculations.

Payment of late payment interest

4.12 The fifth prayer is that the respondent be ordered to pay late payment interest. 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. At the same time, the respondent should be afforded the opportunity to respond to any letter of demand.

Repudiated Death and Disability Claims

4.13 Prayers 6 and 7 relate to the calculation and payment of the repudiated amounts for death and disability claims plus late payment Interest in terms of the complainant's policy.

4.14 If the complainant repudiated any claims, it did not suffer any loss. It would only suffer loss if it had to pay out claims without receiving the necessary contributions. The complaint before this Tribunal is not based on claims paid; it is based on claims repudiated. Any claim based on the repudiated claims would have to be instituted by the members or their beneficiaries who actually suffered loss. In the result, prayers 6 and 7 cannot succeed.

5. Relief

5.1 In the result, I make the following order:

5.1.1 The prayer that the respondent be prohibited from applying for liquidation of the business is dismissed;

5.1.2 The respondent is ordered to pay the amount of all arrear contributions from date of 31 July 2005 to date of this determination, to the complainant;

5.1.3 The respondent is ordered to submit schedules to the complainant from 31 May 2005 to date of this determination, within seven days from the date of this determination;

5.1.4 The complainant shall ensure the calculation of late payment interest from date of registration to the date of this determination 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;

5.1.5 The respondent is ordered to pay late payment interest calculated in accordance with paragraph 5.1.4 within 7 working days of receipt of the calculations from the complainant;

5.1.6 Complaints 6 and 7 are dismissed.

DATED at JOHANNESBURG on this day of 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR