



HEAD OFFICE

Johannesburg

2nd Floor, Sandown House  
Sandton Close 2, Sandton, 2196  
PO Box 651826, Benmore, 2010  
Tel (011) 884-8454 □ Fax (011) 884-1144  
E-Mail: [enquiries-jhb@pfa.org.za](mailto:enquiries-jhb@pfa.org.za)

Cape Town

2nd Floor, Oakdale House, The Oval  
Oakdale Road, Newlands, 7700  
P O Box 23005, Claremont, 7735  
Tel (021) 674-0209 □ Fax (021) 674-0185  
E-mail: [enquiries@pfa.org.za](mailto:enquiries@pfa.org.za)  
Website: [www.pfa.org.za](http://www.pfa.org.za)

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Please quote our ref: PFA/GA/15475/2007/EMD

**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 ADVANTAGE TRANSPORT SECURITY SERVICES (“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 A copy of the complaint was sent to the respondent on 16 July 2007. Mr JP Motsamai responded on 14 August 2007. On 31 January 2008 a copy of the response as forwarded to the complainant for a reply, but no reply 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.

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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 a sectoral determination, asked for an order that

- 2.1 the respondent be prohibited from applying for liquidation of the business;
- 2.2 the respondent be compelled within 7 working days to make the payment of contributions from 30 April 2007 to date, to the complainant's banking account;
- 2.3 the respondent be compelled within 7 working days to submit schedules from 31 March 2007 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 In his response, Mr JS Motsamai states that Advantage Security and Cleaning Services CC trades under two names, as Advantage Transport, Security and Cleaning Services (PSIRA Registration number 877912) and as Advantage Security and Cleaning Services CC (PSIRA Registration number 1468889.) He then states that Advantage Transport, Security and Cleaning Services trades as a sole proprietorship with Mr JP Motsami as the main member.

- 3.2 Copies of two registration certificates issued by the Private Security Industry Regulatory Authority (PSIRA) are attached to the response, showing that Advantage Transport & Security and Cleaning Services was registered as a security service provider on 13 February 2002, and Advantage Security and Cleaning Services CC was registered on 28 May 2007.
- 3.3 Mr Motsamai further states that all active members (presumably employees) are registered with the complainant under the name of Advantage Transport, Security and Cleaning Services
- 3.4 Details of the members are given on a sheet marked Advantage Security & Cleaning CC.

#### 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 cited as being Advantage Transport Security Services trading under the same name, which would be an indication of a sole proprietorship or a partnership. The response was received from both a sole proprietorship, JP Motsamai trading as Advantage Transport & Security and Cleaning Services, as well as a close corporation, Advantage Security and Cleaning Services CC.
- 4.4 JP Motsamai (trading as Advantage Transport & Security and Cleaning Services) is a natural person. It follows that his estate could at best be sequestered upon application to a court. An order restraining him from applying for the liquidation of the business could be described as an attempt at restraining him from doing the impossible. Such an order would therefore be inappropriate.
- 4.5 The respondent is not cited as being a close corporation, but if it were a close corporation, such corporation would 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.)

- 4.6 Under those circumstances 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.
- 4.7 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 would not be willing to consider granting an order that could so easily be circumvented.

*Late transmission of contributions and submission of schedules*

- 4.8 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.
- 4.9 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
- 4.9.1 not later than 30 days after the end of the month about the receipt and reconciliation of data; and
- 4.9.2 not later than 22 days after the end of the month about the receipt of contributions.
- 4.10 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.
- 4.11 In the present matter, the complaint states that the last payment received was for the month ending 30 April 2007. This means that payment by the respondent was one month in arrears when the complaint was lodged.
- 4.12 The complaint states that the last schedule submitted was for the month ending 31 March 2007. Schedules for April 2007 and May 2007 were therefore overdue.

- 4.13 The respondent does not deny that contributions or schedules were in arrear, but offers the explanation that the members (probably meaning employees who are members of the complainant) are registered with the complainant under the name Advantage Transport Security and Cleaning Services, the name under which the complaint was lodged. He then explains that the close corporation, Advantage Security and Cleaning Services CC, is newly established and has no members (presumably a reference to members of the complainant).
- 4.14 Advantage Security and Cleaning Services CC was, according to the records of the Registrar of Companies and Close Corporations, registered as a close corporation on 14 April 1997. This corporation was according to the PSIRA certificate attached to the response, registered with PSIRA on 28 May 2007.
- 4.15 The complaint can therefore only relate to JP Motsamai trading as Advantage Transport & Security and Cleaning Services.
- 4.16 The list for December 2007 under the heading Advantage Security and Cleaning Services CC, could accordingly not be accurate, as employees are reflected as having commenced duty prior to the date on which that close corporation was registered with PSIRA.
- 4.17 The respondent does not respond directly to the allegations that the last payment submitted was for 30 April 2007 and the last schedule for 31 March 2007. It must therefore be assumed that he does not deny that payment for May 2007 was outstanding when the complaint was lodged, as well as schedules for April and May 2007.

#### *Calculation of late payment interest*

- 4.18 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, the complainant should give an instruction to its administrator to calculate the late payment interest due by the respondent.

#### *Payment of late payment interest*

- 4.19 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. When such demand is made, the respondent should be afforded the opportunity to respond to any letter of demand.

*Repudiation and payment of death and disability claims*

4.20 The sixth and seventh prayers: The complainant should instruct the administrator 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.

5. Relief

5.1 In the result, I make the following order:

- 5.1.1 Complaint 1 is dismissed;
- 5.1.2 The respondent is ordered to pay the amount of contributions outstanding from 30 April 2007 to date, to the complainant;
- 5.1.3 The respondent is ordered to submit schedules to the complainant from 31 March 2007 to date, within seven days from the date of this determination;
- 5.1.4 The complainant shall ensure the calculation of late payment interest from 1 May 2007 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;

