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Please quote our reference: PFA/WE/13045/2007/SM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act") – A CLEGHORN AND OTHERS ("the complainants") v NEW DAWN HOLDINGS (PTY) LTD ("the first respondent") AND GG UMBRELLA PROVIDENT FUND ("the second respondent")

1. Introduction

[1.1] The complaint concerns the failure of the first respondent to pay all contributions in respect of the complainant and other members of the second respondent on a regular basis as required in terms of the rules and the Act.

[1.2] The complaint was received by this office on 19 December 2006. A letter acknowledging receipt thereof was sent to the complainants on 3 August 2007. On 3 December 2007 a letter was dispatched to the first respondent giving it until 7 December 2007 to file its response to the complaint.

[1.3] Responses which were copied to the complainants, were received from the first respondent on 21 January 2008 and 18 February 2008. This office also received a response from the second respondent on 29 January 2008.

[1.4] Having considered the written submissions before this tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are well known to all the parties, only those facts that are pertinent to the issues raised herein shall be repeated. 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

2.Factual Background

[2.1] This complaint was lodged on behalf of the complainant and other members of the second respondent. The other members involved are, Belinda Combrink, Sinead Baker, Mark Brouwer and Susan Mackinlay. Two of the complainants are currently employed by the first respondent and the others are former employees of the first respondent. The complainants are/were all members of the second respondent by virtue of their employment.

[2.2] During November 2006, it came to the attention of the complainants that the first respondent failed to pay all contributions on their behalf to the second respondent despite deducting monies from their salaries.

3.Complaint

[3.1] The complainants submitted that the first respondent failed to pay their full contributions to the second respondent during November 2004 until July 2006. The complainants indicated that they received letters from the principal officer of the second respondent in November 2006, which contained a schedule of the contributions the first respondent made to the second respondent on their behalf. However, the complainants contend that there was a shortfall in the amount deducted from their salaries and the amount that was paid to the second respondent in respect of their contributions.

[3.2] Further, the complainants indicated that benefit statements could be issued to them as the administrator of the second respondent advised that they still need to reconcile their records due to outstanding payments to the fund in the sum of R3 million. The complainant submitted that the amounts owing to them are as follows: A Cleghorn (R2 355.89), Belinda Conbrink (R3 409.56), Sinead Baker (R33 277.81), Mark Brouwer (R16 740.21) and Susan Mackinlay (R5 322.59).

[3.3] Therefore, the complainants request that the first respondent should be ordered to pay all outstanding contributions to the second respondent and that it should further be directed to compensate them for the loss in investment returns as a result of its failure to comply with its duties.

4.Responses

First respondent's response

[4.1] Mr C Mogoboya, of the Human Resources Unit of the first respondent, filed a response on behalf of the first respondent. He submitted a copy of

an agreement, which he argued, was entered into between the first respondent and the second respondent regarding the payment of the outstanding contributions in respect of the complainants. Attached to the agreement is a table which shows the calculation of the outstanding contributions plus interest in respect of employees and former employees of the first respondent. He indicated that the first respondent agreed with the second respondent that a scheme in terms of section 18 of the Act should be submitted to the Registrar of Pension Funds ("the Registrar") for approval.

[4.2] Further, he submitted that the complainants were provided with a schedule reflecting the shortfall and interest. He further stated that the calculations and a comprehensive reconciliation of payroll were signed by the auditors. Moreover, he indicated that no one will be unduly prejudiced as the calculations were done in terms of a prescribed formula.

Second respondent's response

[4.3] Mr M Levitas, the principal officer of the second respondent, filed a response on behalf of the second respondent. He submitted that the second respondent became aware of the non-payment of contributions by the first respondent on 11 May 2006. He indicated that a meeting was held at the Financial Services Board ("FSB") with the respondents, trustees and himself regarding this issue on 27 July 2006. He submitted that one Ms Buitendag of the FSB advised that the second respondent must work with the administrator of the second respondent in supplying all necessary information regarding the outstanding contributions. He argued that the first respondent subsequently provided contribution information to the administrator of the second respondent which did not correspond with deductions that were made from the members' salaries. He indicated that an amount of R3 316 619.11 was still outstanding after a reconciliation was done.

[4.4] Further, he pointed out that contribution statements were sent to all employees of the first respondent after it agreed with the reconciliation. He stated that arrangements were made for the auditing of the outstanding contributions after the FSB advised the second respondent that it is underfunded and that a scheme in terms of section 18 of the Act is required to bring it to a sound financial position. He argued that the auditors verified the original reconciliation figures and added interest to the outstanding balance, which brought the outstanding amount to R4,656,359.57 as at 31 October 2007.

[4.5] He further noted that the first respondent and second respondent signed an agreement which constitutes section 18 scheme. He averred that the agreement is with the auditors of the second respondent and will be

submitted to the FSB for approval. Further, he submitted that the first respondent has already paid the following amounts to the second respondent: R400,000.00, R320,000.00, R300,000.00 and R300,000.00.

[4.6] Moreover, he pointed out that the delay in implementing section 13A of the Act was due to the dispute regarding the quantum of the outstanding contributions by the first respondent.

5.Determination and reasons therefor

[5.1] It is common cause that the first respondent acknowledged that it failed to comply with its duties regarding the payment of contributions in respect of the complainants. This is evidenced by clause 3.1 of the agreement that it entered into with the second respondent.

[5.2] Thus, the first respondent's conduct is in contravention of Rule 4.3.1 of the second respondent's rules, which reads:

> "4.3.1 Each EMPLOYER shall pay in full to the FUND all contributions to be made by it and by the MEMBERS employed by it within 7 (seven) days of the expiry of the month in respect of which the contributions in question are payable."

[5.3] Further, the first respondent's conduct is in contravention of section 13A of the Act and is a punishable offence in terms of section 37 of the Act. Section 13A of the Act provides that the employer of any member of a registered fund shall pay the following to the fund in full, namely:

> "(a) any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration; and
> (b) any contribution for which the employer is liable in terms of those rules."

[5.4] Section 13A(3)(a)(i) also 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.

[5.5] The complainants submitted that the first respondent failed to pay contributions on their behalf despite deducting monies from their salaries from November 2004 until July 2006. However, it is clear that the first respondent subsequently entered into an agreement with the second

respondent regarding the payment of the outstanding contributions and the amount to be paid. Further, the principal officer of the second respondent indicated that a scheme in terms of section 18 of the Act has been submitted to the Registrar for approval. The principal officer further submitted that the first respondent has already paid amounts of: R400,000.00, R320,000.00, R320,000.00, R300,000.00 and a further R300,000.00.

[5.6] However, the complainants argued that the respondents failed to provide a specific breakdown of how the amounts that were paid to the fund relate to them individually. The complainants stated that they have no idea as to whether the outstanding amounts have been settled, whether correct amounts together with interests have been recorded to each of them. Further, the complainants argued that they have not been provided with benefit statements. Moreover, they contended that they cannot make a withdrawal from the second respondent as a result of the failure of the underpayment/non-payment of contributions by the first respondent.

[5.7] As regards the failure of the respondents to provide the complainants with benefit statements, it is clear that in order for members of pension funds to make informed choices and protect their rights they need to be furnished with adequate information by the fund. The complainants' entitlement in this regard is based essentially on the duties of the trustees in terms of section 7D(c) of the Act. Section 7D(c) requires the board to ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund. The failure by a fund to comply with its duties in this regard amounts to a breach of the duty to act in good faith and constitutes maladministration of the fund (see *Lediga v Bosal Afrika Group Provident Fund and Another* [2001] 7 BPLR 2211 (PFA) at 2216G-H).

[5.8] The second respondent indicated that contribution statements were sent to the complainants as it was felt that they would not understand benefit statements. It is clear that a contribution statement is not the same as a benefit statement as it does not reflect the member's contributions together with his/her benefits plus interest. Further, the second respondent failed to submit any cogent reasons for its failure to provide the complainants with benefit statements as requested. Thus, I find that the second respondent failed to comply with its duty to provide the complainants with adequate information regarding their benefits.

[5.9] The second issue is whether the complainants have been prejudiced in respect of payment of their benefits or the investment thereof as a result of

the delay by the first respondent in paying the outstanding contributions.

[5.10] It is clear that the first respondent was complying with its duties regarding the payment of the outstanding as set out in the agreement it entered into with the second respondent. However, it has come to the attention of this office that the second respondent received payment of the outstanding from the first respondent only until end of February 2008. A representative of the complainants (Mr G Dunn) indicated in an electronic mail dated 19 June 2008 that the first respondent is three months in arrears on the agreed repayment schedule. The first respondent failed to dispute the complainant's submission in this regard despite being provided with a copy thereof.

[5.11] Further, it is evident that the Registrar has not approved the section 18 scheme as yet. In any event, the section 18 scheme relates to a proposal by the board of the second respondent regarding the steps they have taken to bring it to a sound financial position and does not affect the duty of the first respondent to pay contributions in terms of the rules and the Act. It is further clear that the complainants are being prejudiced by the delay in the payment of the outstanding contributions by the first respondent. This is due to the fact that they cannot receive withdrawal benefits until such time that the outstanding contributions have been paid. Moreover, the complainants cannot transfer or invest their benefits to another fund of their choice.

[5.12] Therefore, the appropriate relief is that which has the effect of placing the complainants in the position they would have been had the first respondent regularly and timeously paid the contributions due in terms of Rule 4.3.1. To that end, the second respondent must compile a schedule of all outstanding contributions due by the first respondent in respect of the complainants from the date that it failed to pay contributions. The first respondent must then be ordered to pay the outstanding contributions together with interest calculated from the date that it failed to pay contribution until the date of payment.

6. <u>Relief</u>

[6.1] In the result, the order of this tribunal is as follows:

[6.1.1] The second respondent is ordered to compile a schedule of all outstanding contributions due by the first respondent in respect of the complainants and furnish this tribunal, the complainant and first respondent with a copy of such document within two weeks of

the date of this determination.

[6.1.2] The second respondent is ordered to compute the value of the credit that would be reflected against the complainants' share had the first respondent paid all the outstanding contributions timeously in terms of the fund's rules, less amounts presently credited to the complainants' fund credit, and to inform the complainants, this tribunal and the first respondent of such amount within three weeks of the date of this determination.

[6.1.3] The first respondent is directed to pay the complainants the amount computed in paragraph 6.1.2 within one week of the second respondent forwarding the calculation to it, together with interest thereon calculated at 15.5% per annum from the date that it failed to pay contributions until the date of payment.

[6.1.4] In respect of complainants who are still employed by the first respondent, the first respondent is directed to credit their share of the fund with the amount computed in paragraph 6.1.2, together with interest calculated at 15.5% per annum from the date that it failed to pay contributions until the date of payment.

DATED AT JOHANNESBURG ON THIS DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR