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Please quote our ref: PFA/GA/15615/2007/LCM

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 C P B SECURITY GAUTENG 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. On 3 April 2008, the respondent furnished a response. On 10 April 2008, this office forwarded the response to the complainant for a reply. No reply has been 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.
- 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

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

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 **31 January 2007**, to the complainant's banking account;
- 2.3 the respondent be compelled within 7 working days to submit schedules from **31 January 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 The respondent submits that it does not have employees and that it has independent contractors.

4. Determination and reasons therefor

Jurisdiction

- 4.1 Prior to the determination in *Mandla Mali v Nabelah Trading CC t/a Security Wise; Private Security Sector Provident Fund* PFA/WE/7723/2006, we historically made a decision these matters do not fall within our jurisdiction. This was reassessed and the decision is that we 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.
- 4.2 Since the decision in *Mandla Mali*, the Pension Funds 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 clarifies 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.
- 4.3 It follows that this Tribunal does have the necessary jurisdiction to determine this matter.

Prohibition against applying for liquidation

- 4.4 The complainant requests an order that the respondent be prohibited from applying for liquidation of the business.
- 4.5 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.
- 4.6 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.)
- 4.7 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 108 of 1996. An order denying a person the right to approach a court for relief would be unconstitutional.
- 4.8 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,

**MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR**