



HEAD OFFICE
Johannesburg
1st Floor, Norfolk House
Cnr 5th Street & Norwich Close
Sandton, 2196
P O Box 651826, Benmore, 2010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: 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
Website: www.pfa.org.za

Please quote our reference: PFA/GA/14828/2007

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – PRIVATE SECTOR SECURITY PROVIDENT FUND (“the complainant”) v COASTAL SECURITY AND MONITORING SERVICES (“the respondent”)

1. Introduction

- [1.1] The complaint concerns the late 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, inter alia, be prohibited from applying for the liquidation of its business.
- [1.2] The complaint was received by this office on 4 July 2007. A letter acknowledging receipt thereof was sent to the complainant on 16 July 2007. On the same date a letter was dispatched to the respondent giving it until 16 August 2007 to file its response to the complaint. A response was received from the respondent on 30 August 2007.
- [1.3] After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

2. Factual Background

- [2.1] The complainant was established in terms of the sectoral determination for the private security sector industry as contained in a Government

M Mohlala (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shroobree (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

Notice number R306 of 30 March 2001 (“ the government notice”) as amended by Government Gazette number R331 of 25 October 2002.

- [2.2] According to the sectoral determination, the employers who participated in a registered fund prior to the publication of the government notice or had prior to 30 March 2001, consulted with employees about establishment of a pension or provident fund were exempted from participating in the applicant.

33. Complaint

- [3.1] The complainant, requested an order as that:
- [3.1.1] the respondent be prohibited from applying for liquidation of its business;
 - [3.1.2] the respondent be compelled within 7 working days to make the payment of contributions from 31 December 2004 to date, to the complainant’s banking account;
 - [3.1.3] the respondent be compelled within 7 working days to submit schedules from 31 October 2007 to date of determination to the complainant;
 - [3.1.4] 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;
 - [3.1.5] the respondent is to pay late payment interest within 7 working days of receipt of the calculations;
 - [3.1.6] the administrator of the complainant 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
 - [3.1.7] the respondent is to pay the Repudiated Amounts within 7 working days upon receipt of the information from the administrator.

4 Response

- [4.1] This office received a response from the E P Sharman, the previous owner of the respondent.
- [4.2] E P Sharman submitted that the he sold the business of the respondent to

Merrs Fordfonics in October 2005 and that he is not responsible for any activities that might have occurred after that date.

- [4.3] He contended that he submitted all the contributions and schedules to the complainant for the period when he was the owner of the respondent.
- [4.4] E P Sharman also attached the schedules and deposit slips as proof that contributions were made to the complainant.

5. Determination and reasons therefor

Jurisdiction

- [5.1] Prior to the determination in **Mandla Mali v Nabelah Trading CC t/a Security Wise; Private Security Sector Provident Fund PFA/WE/7723/2006**, this office historically made a decision that these matters do not fall within its jurisdiction. This was reassessed and the decision is that this office 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.
- [5.2] Since the decision in **Mandla Mali** (*supra*) the 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 states 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.
- [5.3] It follows that this office does have the necessary jurisdiction to determine this matter.

Prohibition against applying for liquidation

- [5.4] The complainant requests an order that the respondent be prohibited from applying for liquidation of its business.
- [5.5] An application to court for the liquidation of the company or close corporation may be made by any person who is entitled to apply to court for an order winding up the company or close corporation or it may be done by a shareholder or director or creditors of the company or close corporation.
- [5.6] 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.)

- [5.7] 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 106 of 1996. An order denying a person the right to approach a court for relief would be unconstitutional.
- [5.8] 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, including one or more members of the respondent itself, from applying to court for relief in their individual capacity. This office is not willing to consider granting an order that could so easily be circumvented.

Transmission of contributions and submission of schedules

- [5.9] 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.
- [5.10] 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
- [5.10.1] not later than 30 days after the end of the month about the receipt and reconciliation of data; and
- [5.10.2] not later than 22 days after the end of the month about the receipt of contributions.
- [5.11] 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.
- [5.12] In the present matter, the complainant alleged that it did not receive payments since 31 December 2004 and the schedules since 31 October 2006. The respondent has denied this and submitted schedules which indicated the details of all the members, their pensionable salaries and contributions. The respondent has proved that it had acted properly in terms of section 13A and regulation 33. A part of this complaint that

remains unresolved is the one for outstanding schedules in from October 2006. On this date [31 October 2006] the respondent was under management of Ferdfonics. It follows that this unresolved part should be directed to the latter owner.

- [5.13] The responsible person referred to in regulation 33 (*supra*) should have been aware of the payment and the schedules before the complaint was lodged.

Calculation of late payment interest

- [5.14] 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 (if any) due by the respondent.

Payment of late payment interest

- [5.15] 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 office 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

- [5.16] 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.

[6] Relief

- [6.1] The complaint is dismissed

DATED AT JOHANNESBURG ON THIS DAY OF 2007.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR