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Please quote our ref: PFA/GA/15190/2007/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 SUPERSOUND SECURITY (PTY) LTD ("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, which responded by fax dated 20 July 2007. On 17 June 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.

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

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

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 **28 February 2007** to date, to the complainant's banking account;

2.3 the respondent be compelled within 7 working days to submit schedules from **31 May 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 its response, the respondent admits that it is in arrears with the payment of contributions. This is attributed to fraud being perpetrated by the former Human Resources Manager, who left the respondent on 12 February 2007.

3.2 In an attempt to sort out matters, a forensic investigation had to be conducted. It is possible that the respondent overpaid the complainant.

3.3 The respondent offered to rectify the situation with two payments of R15 905.81 each, on 16 August 2007 and on 16 September 2007.

4. Determination and reasons therefor

Jurisdiction

4.1 Prior to the determination in *Mandla Mali v Nabielah 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 346(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, 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

4.9 The complainant is a fund established in terms of Sectoral Determination 6: Private Security Sector, South Africa 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.

4.10 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.

4.11 The relief sought is that

4.11.1 the respondent be compelled within 7 working days to make the payment of contributions from 28 February 2007 to date, to the complainant's banking account;

4.11.2 the respondent be compelled within 7 working days to submit schedules from 31 May 2007 to date of determination to the complainant.

4.12 In its response, the respondent offered to rectify the situation with two payments of R15 905.81 each, on 16 August 2007 and on 16 September 2007.

4.13 The response was submitted to the complainants on 17 June 2008 for a reply, but no reply was forthcoming. If the facts stated on behalf of the respondent are not correct, the complainant had sufficient opportunity to place its view on record.

4.14 The complainant states that the last schedules received from the respondent are for the month ending 31May 2007. The next schedule, for the month ending 30 June 2007, was therefore due by no later than 15 July 2007. The complaint was lodged on 4 July 2007, was premature and cannot be upheld.

Repudiated Death and Disability Claims

4.15 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.

4.16 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 Complaint 1 is dismissed;

5.1.2 The respondent is ordered to pay the outstanding amount of contributions from 28 February 2007 to date to the complainant;

5.1.3 Complaint 3 is dismissed;

5.1.4 The complainant shall ensure the calculation of late payment interest 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 Notice166 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