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Please quote our ref: PFA/WE/3467/05/SG(CN)

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): SOLOMONS M v SECURITY EMPLOYEES NATIONAL PROVIDENT FUND & TRUST LOSS CONTROL SERVICES CC

INTRODUCTION

- [1] This matter relates to the delay in the payment of a withdrawal benefit to a member of a fund upon the termination of the member's membership of the fund.
- [2] The complaint was received by this office on 10 May 2005, and a letter acknowledging receipt thereof sent to you on 26 May 2005. On 27 May 2005 a letter was dispatched to the respondents requesting them to submit a response to the complaint by no later than 17 June 2005. The employer's response, dated 8 June 2005, was received by this office on 9 June 2005. A copy thereof was sent to you for a reply on 18 July 2005. The fund's response, dated 17 October 2005 was received by this office on 17 October 2005. No reply has been received from you.
- [3] After considering all the written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and the reasons therefor appear below.

THE COMPLAINT

- [4] The crux of your complaint is that although you left employment during April 2005, as a consequence of which your membership of the Security

V Ngalwana (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (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), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

Employees National Provident Fund (“the fund”) terminated, you have not received payment of your withdrawal benefit from the fund. You further state that the employer made deductions from your wages throughout your period of membership of the fund.

- [5] Your requested relief is that I investigate why Trust Loss Control Services CC (“the employer”) failed to pay contributions to the fund from December 2003 up to the date of your withdrawal, and also order the fund to pay out your accumulated credit.

THE RESPONSES

- [6] The employer states that its contributions to the fund “were up to date...until a number of employees...made enquiries with regard to their contributions”. It further states that it is in the process of terminating its participation in the fund with effect from 1 November 2003, and moving to the provident fund that is administered by NBC Holdings Limited.
- [7] The fund states that the employer’s participation commenced in February 2003 and that it made contributions to the fund until the end of October 2003. The fund further submits that your name appears on the contribution schedules for the months of November and December 2003, but states that no payments have been received from the employer for those two months. It confirms the employer’s assertion regarding the section 14 transfer to the Private Security Sector Provident Fund, but states that it cannot initiate the transfer process until the arrear contributions have been paid.
- [8] According to the fund your fund credit as at October 2003 is R1 337.57 before tax, and the arrear contributions due from the employer on your behalf for the months November and December 2003 is R458.28. The fund concludes that it is prepared to pay you a benefit representing your accumulated share and is actually processing the payment thereof, but states that you will have to look to the employer for the balance that would have been part of your accumulated share had the employer paid contributions in full up to the date on which it notified its intention to terminate its participation in the fund.

DETERMINATION AND REASONS THEREFOR

- [9] This matter is yet another one of the numerous complaints that this office receives on a regular basis against employers participating in provident funds falling within the private security sector. It has become a habit for such employers to make deductions from their employees’ emoluments in lieu of provident fund contributions but not pay the same over to the relevant provident funds. This results in the funds’ being unable to pay

- out benefits to the members and/or their beneficiaries when they fall due.
- [10] Not only is such conduct deplorable and unfair to the members as it deprives them of their hard-earned retirement savings, but it also amounts to a contravention of section 13A(1) of the Act and is a punishable offence in terms of section 37(1).
- [11] Main rule 5.5 provides as follows:
- “Withdrawal benefits**
If a MEMBER leaves SERVICE prior to his NORMAL RETIREMENT DATE or early retirement age specified in the SPECIAL RULES applicable to him for any reason including but not limited to resignation, dismissal, illness, retrenchment and redundancy, the MEMBER’S ACCUMULATED SHARE shall be:
- 5.5.1 paid to such MEMBER in cash; or
- 5.5.2 transferred to an APPROVED FUND or PRESERVATION FUND of the MEMBER’S choice for preservation until his retirement; or
- 5.5.3 partly paid in cash and/or partly transferred,
- in accordance with the MEMBER’S instructions which must be conveyed to the FUND in writing at its registered office prior to the date on which he leaves SERVICE, or if that is not possible, within 30 days thereafter.”
- [12] The “member’s accumulated share” is defined as follows:
- “MEMBER’S ACCUMULATED SHARE means, in respect of a MEMBER, an amount equal to the aggregate contributions and transfer values paid to the FUND by or in respect of him, possible allocations from the MEMBER SURPLUS ACCOUNT or EMPLOYER SURPLUS ACCOUNT and the investment returns accrued to date on the underlying investment portfolio(s), less any expenses deducted by the TRUSTEES in terms of these RULES (my underlining).”
- [13] When your membership of the fund terminated you became entitled to a withdrawal benefit representing your accumulated share. Due to the lack of co-operation between the employer and the fund, the former did not submit a withdrawal notification form to the latter on your behalf. It is only in the course of the investigation of this matter that the fund decided to send you a copy of that form for completion by you. You completed and returned the form to the fund on 29 September 2006.
- [14] The fund is in the process of arranging payment of an amount of R1 337.57, which represents your accumulated share as at October 2003. Needless to say, you have suffered loss as a result of the employer’s

failure to fulfill the duties placed on it by the rules, namely that of paying your contributions to the fund timeously. However, that loss can only be recovered from the employer because the fund cannot be held liable to pay a benefit if it has not received contributions to fund the payment of that benefit: *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator & Others* [2002] 9 BPLR 3830 (C) at page 3839F.

- [15] The fund's liability is thus restricted to the amount of your accumulated share calculated with reference to the contributions actually received by it.
- [16] According to the fund, the employer still owes it an amount of R458.28 in lieu of contributions for the months November and December 2003. You have indicated that from December 2003 until the end of 20 April 2005 the employer continued to make deductions from your wages in lieu of provident fund contributions, and have adduced proof in the form of salary advice slips for the period January 2004 to 20 April 2005 in support of that contention. It appears from the salary advice slips that amounts totaling R1 942.04 were deducted from your wages in lieu of provident fund contributions. Those amounts were not paid over to any retirement fund organization, as it appears that at that stage the employer had discontinued its participation in the fund with effect from 1 November 2003. Despite the employer's professed termination of its participation in the fund, no section 14 transfer of the fund's assets and liabilities to another fund has to date been effected. Thus, up to the date of termination of your employment you were still a member of the fund, and the employer still owed you, as a member, the obligations placed on it by the fund's rules.
- [17] Having failed to pay the amount of R1 942.02 to any retirement fund organization, the employer is liable to refund the same to you.
- [18] The order of this tribunal is the following:
- [18.1] The Security Employees National Provident Fund ("the fund") is ordered to pay to the complainant, within fourteen days of the date of this determination, the amount of R1 337. 57, less any deductions allowed in terms of the provisions of the Act.
- [18.2] Trust Loss Control Services CC ("the employer") is ordered to pay to the complainant, within fourteen days of the date of this ruling, the amounts of R458.28 and R1 942.02, respectively, together with interest thereon calculated at the rate of 15.5% per annum and

reckoned from 1 November 2003 until the date of final payment thereof to you.

SIGNED IN CAPE TOWN ON THIS DAY OF 2006

Yours faithfully

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VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR