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Please quote our reference: PFA/MP/14461/2007/SM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 of 1956 (“the Act”): DD MASALES AND ANOTHER (“the complainants”) v CLOTHING INDUSTRY PROVIDENT FUND (“the first respondent”) AND MULTISHIRT MANUFACTURER CC (“the second respondent”)

1. Introduction

- [1.1] The complaint concerns the delay in the payment of withdrawal benefits to the complainants following the termination of their employment in February 2006 and the alleged failure of the second respondent to pay all contributions on their behalf.
- [1.2] The complaint was received by this office on 19 June 2007. A letter acknowledging receipt thereof was sent to the complainants on 19 November 2007. On the same date a letter was dispatched to the first respondent giving it until 19 December 2007 to file its response to the complaint. This office also dispatched a letter to the second respondent on 13 May 2008 giving it until 26 May 2008 to file its response to the complaint. However, the respondents omitted to file any response despite being invited to do so on several occasions.
- [1.3] After considering the complainants’ complaint, 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.

2. Factual Background

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

- [2.1] The complainant lodged this complaint on her behalf and on behalf of one Stephina Pinky Marumo. The complainants were employed by the second respondent until they were retrenched on 27 February 2006. The complainants were members of the first respondent by virtue of their employment until their employment was terminated.
- [2.2] Upon the termination of their employment, the complainants became entitled to receive withdrawal benefits from the first respondent.

3.Complaint

- [3.1] The complainants submitted that the second respondent failed to assist them to obtain payment of their withdrawal benefits following the termination of their employment. Further, the complainants stated that the first respondent advised them that the second respondent did not pay contributions on a regular basis on their behalf as required. The complainants further argued that the first respondent cannot pay their withdrawal benefits as a result of the failure of the second respondent to pay contributions.
- [3.2] Therefore, the complainants request that the second respondent should be ordered to pay the outstanding contributions together with interests from February 2006 to date of payment. Moreover, the complainants request that the first respondent should be directed to release their withdrawal benefits.

4.Determination and reasons therefor

- [4.1] The issue that falls for determination is whether the respondents failed to comply with their duties in terms of the Act and the first respondent's rules with regard to the payment of withdrawal benefits to the complainants.
- [4.2] As stated above the respondents failed to file any responses to the complaint despite been invited to do so. In this regard I set out the following record of attempts to procure responses from the respondents. A letter was dispatched to the first respondent on 19 November 2007 requiring a response to the complaint by 19 December 2007. A further letter was sent to the first respondent on 18 June 2008, as no response was received by 19 December 2007, setting a further deadline of 2 July 2008. Further, letters were sent to the second respondent on 13 May 2008 and 18 June 2008 requiring a response by 26 May 2008 and 26 June 2008 respectively. However, the respondents omitted to file any responses in this regard.

[4.3] In terms of section 300 of the Act determinations issued by the Adjudicator have the same status as civil judgments of any court of law (see *Fischer v Henderson & Dreyer Pension Fund and Another* [2003] 1 BPLR 4240 (PFA) at 4247I-J). Thus, the Adjudicator performs the same function which a court of law would perform had such court been seized with the matter (see *Shell & BP SA Petroleum Refineries v Murphy NO 2001 (3) SA 683 (D) at 690E-F*). It follows that the relevant Rules of the High Court relating to default judgments should be applied in this matter. The apposite portion of Rule 19 of the Uniform Rules of the High Courts reads as follows:

“Notice of Intention to Defend

(1) Subject to the provisions of section 27 of the Act, the defendant in every civil action shall be allowed ten days after service of summons on him within which to deliver a notice of intention to defend, either personally or through his attorney. ...”

[4.4] Rule 31(2)(a) and 31(5)(a) of the Uniform Rules reads as follows:

“31(2)(a) Whenever in an action or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.

31(5)(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant. ...”

[4.5] It has been held that there is nothing which precludes the court from dealing with applications in terms of Rule 31(5)(a) where the claim involves a liquidated demand (see *Standard Bank of SA Ltd v Snyders and Eight Similar Cases* 2005 (5) SA 610 at paragraph 13). Similarly, there is nothing which precludes this tribunal from issuing a default determination if the circumstances meet. Therefore, this tribunal has the power to issue a default determination in cases where it has attempted to procure a response from the respondents to no avail. This is due to the fact that the failure by the respondents to file responses delays the resolution of the complaint and protracts the dispute unnecessarily. Further, it causes prejudice to the complainant in respect of his/her right to the benefit in the fund and also delays access to justice.

[4.6] In this regard the following passage in *Van Winsen et al Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa* (1997) at 33 has often been cited by the courts (see *Standard Bank of SA Ltd v*

Snyders and Eight Similar Cases-supra at 615H-J). It reflects an eminently reasonable approach:

“The rules of court, which constitute the procedural machinery of the courts, are intended to expedite the business of the courts. Consequently, they will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible.”

[4.7] Therefore, the main purpose of requesting responses to a complaint is to ensure that the respondents are afforded an opportunity to answer the complainant’s allegations as set out in the complaint. Any delay or failure to respond thereto is not in the interest of justice and does not help in resolving the dispute speedily.

[4.8] It is further important to quote a passage from the decision of the Supreme Court of Appeal in *Lodhi 2 Properties v Bondev Development (Pty) Ltd* [2007] SCA 85 (RSA) at paragraph 27), which reads as follows:

“A court which grants a judgment by default like the judgment we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grant the judgment on the basis that the defendant has been notified of the plaintiff’s claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought.”

[4.9] *In casu*, the complainants submitted that the second respondent failed to pay contributions on their behalf and also failed to assist them to obtain payment of their withdrawal benefits. The complainants contend that the first respondent cannot pay out their benefits as a result of the second respondent’s conduct.

[4.10] The second respondent did not submit anything to dispute the complainants’ submission in this regard as set out above. It follows that the second respondent failed to pay contributions as required in terms of the Act. The second 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.”

[4.11] Section 13A(3)(a)(ii) also 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.

- [4.12] Further, it appears that the second respondent did not submit a withdrawal notification form to the first respondent following the retrenchment of the complainants. It has been held that it is the duty of an employer to complete a withdrawal notification form indicating the cause of the termination of the complainant's employment within a reasonable time (see *Rwexwana v Idaho Spur Provident Fund and Others* [2005] BPLR 640 (PFA) at paragraph 11). According to the evidence before this tribunal it appears that the second respondent failed to comply with its fiduciary duties in this regard.
- [4.13] However, the conduct of the first respondent in this regard is to be severely deprecated. In compliance with its fiduciary duties, the first respondent should have compelled the second respondent to pay the outstanding contributions. This is in compliance with its duty to act with care, diligence, good faith and in the best interest of members as set out in sections 7C and 7D of the Act. According to the complainant's version, the first respondent was aware of the problem but it failed to make some enquiries regarding the outstanding contributions.
- [4.14] As a result of the second respondent's conduct, the complainants have suffered prejudice in that they have potentially been denied access to benefits which is due to them. Thus, I am of the view that a default determination should be issued in terms of which the complainants are placed in the position they would have been had the second respondent regularly and timeously paid the contributions due. To that end, the first respondent must compile a schedule of all outstanding contributions due by the second respondent in respect of the complainants from the date that it failed to pay contributions. The second respondent must then be ordered to pay the outstanding contributions together with interest.

5. Relief

- [5.1] In the result, the order of this tribunal is as follows:
- [5.1.1] The second respondent is ordered to complete withdrawal claim forms on behalf of the complainants and submit them to the first respondent within 7 days of the date of this determination.
- [5.1.2] In the event that the second respondent fails to submit withdrawal claim forms within the period set out in paragraph [5.1.1], the first respondent is directed to deal with the matter as if withdrawal claim forms have been submitted and must compile a schedule of all outstanding contributions due by the second respondent in respect of the complainants and furnish this tribunal, the complainant and the second respondent with a copy thereof within two weeks of the date of this determination.

[5.2.3] The first respondent is further directed to compute the value of the credit that would be reflected against the complainants' shares had the second respondent paid all the outstanding contributions timously, less amounts presently credited to the complainant's fund credit, and to inform the complainant, this tribunal and the second respondent of such amount within three weeks of the date of this determination.

[5.2.4] The second respondent is ordered to pay the complainants the amounts computed in paragraph [5.2.3] within one week of the first 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.

[5.2.5] The complainants may approach a court with jurisdiction to obtain a writ of execution against the second respondent should it fail to comply with this order.

Dated at Johannesburg on this the day of 2008

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR