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Please quote our ref: PFA/GA/14944/2007/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 J D T W SECURITY 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. On 14 August 2007, the respondent advised that the matter was receiving attention. No further response was received. On 5 March 2008, a reminder was sent to the respondent. On 5 May 2008, a member of my staff spoke to an unidentified secretary at 039 682 5645 and requested a response. No response 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 May 2005** to date, to the complainant's banking account;
- 2.3 The respondent be compelled within 7 working days to submit schedules from **31 January 2006** 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 On 16 July 2007, a copy of the complaint was sent to the respondent. On 14 August 2007, the respondent advised that the matter was receiving attention. No further response was received.
- 3.2 On 5 March 2008, a reminder was sent to the respondent.
- 3.3 On 5 May 2008, a member of my staff spoke to an unidentified secretary at 039 682 5645 and requested a response. No response has been received.

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, 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 30 April 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 The respondent was on three occasions invited to submit a response, but no response was received. If the respondent has made the necessary payment of contributions to the complainant and submitted the statutory schedules, it was the respondent's duty to bring this to the attention of this Tribunal. As the respondent failed to make any submission, the complainant is entitled to relief.
- 4.13 Participation by the respondent in the complainant is not voluntary. The converse of the obligation of the respondent to participate in the complainant is the complainant's duty to take the necessary steps to ensure that the respondent transmits contributions regularly and submits the necessary schedules on time.

Repudiated Death and Disability Claims

- 4.14 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.

**MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR**