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Please quote our reference: PFA/FS/3408/05/CN

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956: MP NTEPE v WELMIN PROPERTIES (PTY) LTD (In liquidation)& CORPORATE SELECTION RETIREMENT FUND (Participating Employer: Welmin Properties)

INTRODUCTION

1. Having considered the reformulated complaint that was received by this office on 21 June 2005, as well as further written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.
2. The background facts are well known to all the parties, thus I shall not burden this ruling by repeating them here.

THE COMPLAINT

3. Your complaint concerns the non-payment of your withdrawal benefit by the Corporate Selection Retirement Fund ("the fund") of which you were a member up to April 2004 when the business of Welmin Properties (Pty) Ltd ("the employer") was placed in liquidation in April 2004. As against the employer, you are contending that its failure to pay contributions to the fund from August 2003 up to April 2004 has caused you to suffer financial prejudice. As against the fund, you are contending that when the employer started defaulting in paying the contributions to the fund, the fund should have taken steps to rectify the situation, and that the fund should have paid your benefit within 3 months from the date of liquidation of the employer's business.

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), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), R Maharaj (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator)

Office Manager: L Manuel

THE RESPONSES

4. No response has been received from the employer, nor has it been possible to establish the names and contact details of its liquidator.
5. The fund's administrator states that the employer started participating in the fund on 1 June 2002, it having previously participated in the Welmin Properties Provident Fund, and that the section 14 transfer of assets from the provident fund into the fund is still outstanding. It further states that the employer only made contributions up to August 2003, but the breakdown of contributions which has been furnished with the response reflects that contributions were received up to January 2004. According to the administrator, your benefit has not been paid out because the employer (despite several demands from the administrator) has not submitted a signed withdrawal notification form to enable the administrator to process the withdrawal.

DETERMINATION AND REASONS THEREFOR

6. The rules of the fund govern, among other things, the operation of the fund and the payment of benefits by the fund. Of particular relevance is general rule 12.1, which provides as follows:

"PAYMENT OF BENEFITS

12.1.1 On the happening of an event giving rise to a claim for benefits under these RULES, the FUND will be liable to provide only the benefit applicable to that event. Such benefit shall be paid to a BENEFICIARY.

12.1.2 The benefit will be calculated on the later of the occurrence giving rise to the event and the date that Liberty is notified of such occurrence."

7. It is common cause that you became entitled to a benefit upon the termination of your membership of the fund in April 2004. Your membership terminated as a result of the employer's being liquidated and thus discontinuing its participation in the fund. Thus, the applicable rule in your case is rule 11.1, the relevant portions of which provide as follows:

"DISCONTINUANCE OF A PARTICIPATING EMPLOYER

11.1.1 An EMPLOYER may subject to the terms and conditions of the POLICY discontinue paying contributions to the FUND at any time. Discontinuance shall in no way prejudice benefits already being paid in accordance with the RULES at the date of discontinuance or any claims already submitted prior to the date of discontinuance...

11.1.2 Discontinuance shall take place when the EMPLOYER discontinues payment of contributions to the FUND, or is being liquidated or placed under judicial management, or, on the occurrence of any other event as provided for in the

POLICY...

11.1.4 On discontinuance, the MANAGEMENT COMMITTEE, in consultation with the EMPLOYER, where appropriate, may decide to:

11.1.4.1 retain the benefits as paid-up benefits within the FUND, in which case the benefits shall become payable on the earlier of the MEMBER leaving the service of the EMPLOYER, the NORMAL RETIREMENT DATE or the MEMBER'S death (emphasis added)."

8. The rules do not specify exactly what benefit is payable in the event of the discontinuance of the participating employer's participation where the management committee has decided to retain the benefits in the fund as paid-up instead of transferring the members to another approved fund. However, it can be reasonably inferred from rule 11.1.4.1 that the benefit payable is the one which would ordinarily have become payable upon the member's leaving service, or reaching normal retirement age or dying, as the case may be. In your case, the benefit that would have become payable is a withdrawal benefit, which, according to special rule 7, is an amount equal to your share of the fund. "Share of the fund" is defined as:

"...the amount attributable to that MEMEBR in terms of SECTION 11 Clause 11.1.3 or in terms of the scheme or arrangement of the liquidator envisaged in SECTION 11 Clauses 11.1.4 and 11.2.2".

9. The benefit became due and payable on the later of your leaving service and the administrator being notified thereof. Although the employer has not submitted a withdrawal notification, the administrator should have become aware that something was amiss and should have made enquiries from the employer regarding the members' employment status, at the earliest within two months from January 2004, the date on which the last contributions were received from the employer. Had the administrator acted as aforesaid, it would have established that your services had been terminated with effect from April 2004, and it would accordingly have requested the employer to submit a withdrawal notification form. As a result of the administrator's sitting idly for over eighteen months, you have been deprived of both your withdrawal benefit and whatever investment growth has accrued thereon.

10. The employer's failure and/or refusal to submit a withdrawal notification should not affect your right to payment. Because the rules do not make the submission of a withdrawal notification form a condition precedent to the payment of a benefit, it is not good enough for the fund to claim that it could not pay out your benefit until it had been furnished with a withdrawal notification by the employer. In any event, even if such a requirement was a condition precedent, the fund and/or the administrator should have made all possible endeavours to compel the employer to submit the withdrawal notification form. Upon the employer's refusal to do so, the administrator

- and/or the fund could have approached this Tribunal for an order compelling the employer to complete the form so as to enable the fund to effect payment: (see *Rwexwana v Idaho Spur Provident Fund and Others* [2005] 7 BPLR 640 (PFA) at paragraph [12]).
11. The appropriate relief to compensate you for the loss that you have suffered as a result of the delay would be an award of interest on the amount of the withdrawal benefit: (*Gcali v MEC for the Department of Health Eastern Cape and Others* [2001] 5 BPLR 1945 (Tk) at 1950A-B).
 12. Insofar as your complaint regarding the employer's failure to pay contributions to the fund between January and April 2004 is concerned, please note that rule 11.1.1 entitles the employer to discontinue paying contributions to the fund at any time, subject, of course, to the conditions of the policy. In light of the fact that the benefit payable to you is an amount representing your share of the fund (nett employer and member contributions, plus investment returns), you cannot be prejudiced by the employer's failure to pay contributions to the fund unless the same have been deducted from your salary but have not been paid over to the fund. You have, however, not made that specific allegation that the employer made deductions from your salary in lieu of pension fund contributions, but failed to pay them over to the fund.
 13. In the result, the order of this Tribunal is as follows:
 - 13.1. It is declared that the complainant is entitled to a benefit in terms of special rule 7, read together with general rule 11.1.4 of the rules of the Corporate Selection Retirement Fund ("the fund").
 - 13.2. The fund is ordered to, within 7 days of the date of this ruling, obtain the requisite withdrawal notification form from the employer or its liquidator.
 - 13.3. In the event of the employer not furnishing the same, the fund is directed to, within 14 days of the date of this ruling, calculate the complainant's share of the fund together with interest thereon at the rate of 15.5% *per annum* calculated from 1 June 2004 to the date of payment of the benefit, and to pay the amount thereof, less any deductions permitted by section 37A read with 37D of the Act, to the complainant within 6 weeks of the date of this ruling.

SIGNED IN CAPE TOWN ON THIS

DAY OF

2006

Yours faithfully

.....
VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR