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Please quote our ref: PFA/KZN/6089/2005/MD/SGM

Ms M I Gumede
B45 Umqhele Road
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BY REGISTERED MAIL

Dear Ms Gumede

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 25 OF 1965 (“the Act”): M I GUMEDE (“the complainant”) v UKUTHULA/SHALOM IMPACT SECURITY (“the first respondent”), and PRIVATE SECURITY SECTOR PROVIDENT FUND (“the second respondent”)

Introduction

1. This complaint concerns failure by an employer to pay regular contributions on behalf of a member of a fund.
2. The complaint was received by this office on 27 October 2005, but since this office was, at the time, not vested with the jurisdiction to investigate and adjudicate upon complaints relating to bargaining council fund, subsequently had to be withdrawn. The complaint was then re-submitted during September 2006. The complaint was forwarded to the respondents and NBC Holdings (Pty) Ltd (“NBC Holdings”) which was the previous administrator of the second respondent on 18 September 2006. This office received two responses

Dr. EM de la Rey (Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), S Mothupi (Snr Assistant Adjudicator), T Dooka (Snr Assistant Adjudicator), M Ramabulana (Snr Assistant Adjudicator), C Seabela (Snr Assistant Adjudicator), P Mphephu (Snr Assistant Adjudicator), T Nawane (Snr Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator), S Mokgara (Assistant Adjudicator), L Molete (Assistant Adjudicator), A Mnqinya (Assistant Adjudicator), B Mahlalela (Assistant Adjudicator), G Mothibe (Assistant Adjudicator), P Mogashoa (Assistant Adjudicator), T Mbhansa (Assistant Adjudicator), T Tlooko (Assistant Adjudicator), R Kikine (Assistant Adjudicator)

Financial Manager: F Mantsho, Accountant: R Soldaat, HR Manager: P Mhlambi

from NBC Holdings on 28 November 2006 and 27 June 2007. The responses were subsequently forwarded to the complainant to make further submissions if she wished to do so. This office has not received any further submissions.

3. After considering the written submissions that have been received, it is considered unnecessary to hold a hearing in this matter. The determination and the reasons therefor are set out below.

Factual Background

4. The complainant was employed by the first respondent. She was a member of the second respondent by virtue of her employment with the first respondent, from 07 January 2004 until 28 February 2005 when she withdrew from the second respondent.

Complaint

5. The complainant is a former employee of the first respondent which is a participating employer in the second respondent. She is aggrieved by the minimal amount of a withdrawal benefit that she received from the second respondent when her employment with the first respondent terminated.
6. She submitted that had the first respondent paid all the due contributions on her behalf to the second respondent, she would have been entitled to a benefit equivalent to her full fund credit. She has requested this tribunal to order the first respondent to compensate her for her loss.

Response

7. NBC Holdings filed a response on behalf of both itself and the second respondent. It confirmed that the complainant was a member of the second respondent from 7 January 2004 until 28 February 2005. It further states that upon her withdrawal she became entitled to a benefit calculated in terms rule 7.1.
8. According to NBC Holdings, the first respondent has been in arrears with some of the contributions, which resulted in the second respondent paying the complainant only an amount of R734.33 as a withdrawal benefit.

Determination and reasons therefor

9. The issue to be determined is whether the first respondent paid regular contributions to the second respondent on behalf of the complainant in accordance with the Act and the second respondent's rules.
10. In an endeavour to deal with this issue, it is imperative to invoke the rules to establish what they entail. In this regard, section 7 reads as follows:

"7 Termination of service

7.1. Resignation or Dismissal

(a) "If a member who is not qualified to retire in terms of Rule 5 leaves service of his own free will or is dismissed by his Employer for reasons other than those provided for in Rule 7.2, he shall become entitled to a lump sum benefit equal to his Fund Credit at the date of leaving service.

(b)"

11. Further, a Fund Credit is defined in section 2 as follows:

"Fund Credit shall mean for each member at any particular date the sum of:

(a) his Member's Portion; and

(b) his Employer's Portion."

12. In *Tek Corporation Provident Fund And Others v Lorentz [2000] 3 BPLR 227* at paragraph 28, the court stated that:

"What the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it."

13. This position is confirmed by section 13 of the Act which provides:

"Binding force of rules-subject to the provisions of the Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming."

14. The first respondent did not submit anything to dispute the complainant's submission in this regard as set out above. It follows that the first respondent failed to pay contributions as required in terms of

the Act. The first 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”

15. 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.
16. In terms of sections 7C and 7D of the Act, in compliance with its fiduciary duties, the second respondent should compel the first 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 the above mentioned sections. However, it appears that the second respondent has lodged a complaint with this office in order to compel the first respondent to pay the outstanding contributions. Therefore, in doing so it is clear that the second respondent have complied with section 7C and 7D of the Act.
17. As a result of the first respondent's conduct the complainant has suffered prejudice in that she has been denied access to a portion of her withdrawal benefit which is due to her. The complainant should be placed in the position she would have been had the first respondent regularly and timeously paid the contributions due. To that end, the second respondent must compile a schedule of the outstanding contributions due by the first respondent in respect of the complainant from the date that it failed to pay contributions. The first respondent must then pay the outstanding contributions together with interest thereon.

Relief

18. In the result, the order of this tribunal is the following:
 - 18.1 The second respondent is directed to compile a schedule of all outstanding contributions due by the first respondent in respect of the complainant and furnish the complainant and the first respondent with a copy thereof within four weeks of the date of this determination.
 - 18.2 The first respondent is ordered to pay the second respondent the amounts computed in paragraph 18.1 within one week of the second

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.

18.3 The second respondent is ordered to pay the complainant the balance of the withdrawal benefit due to her within 14 days from receipt of the arrear payments from the first respondent.

SIGNED AT JOHANNESBURG ON THIS DAY OF 2010

Yours faithfully

DR E.M. DE LA REY
PENSION FUND ADJUDICATOR

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