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**Our Ref: PFA/GA/17653/07/MN**

**RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956("the Act): PSSPF("the complainant")v STANDBY SECURITY("the first respondent ") and (SENPF("the second respondent"))**

1. Introduction

- [1.1] The complaint concerns the alleged refusal of the first respondent STANDBY SECURITY to join the Private Security Sector Provident Fund. The complaint was received by this office on 27 July 2007. A letter acknowledging receipt thereof was sent to the complainant on 6 September 2007. On the same date a letter was dispatched to the first respondent giving them 4 October 2008 to file their response to the complaint. The responses was received from the respondent on 16 October 2007 .
- [1.2] After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons thereof appear below.

2. Factual Background

- [2.1] The complainant was established in terms of the Sectoral Determination for the private security sector industry as contained in a Government Notice number R306 of 30 March 2001 (" the government notice") as amended by Government Gazette number R331 of 25 October 2002.
- [2.2] According to the Sectoral Determination, employers who participated in a registered fund prior to the publication of the government notice or had

prior to 30 March 2001, consulted with employees about establishment of a pension or provident fund were exempted from participating with the applicant.

- [2.3] The Sectoral Determination states that the Management Committee will consider all applications for exemptions and provides for the modalities upon which such applications are to be considered. It provides that, if an exemption is granted, an exemption certificate will be issued, and if it is refused, reasons will be given to the applicant for not granting the exemption.
- [2.4] The Sectoral Determination does not provide for the dispute resolution mechanism in the event of the refusal to grant an exemption.

### 3. The complaint

- [3.1] The complainant requested an order that:
- [3.1.1] STANDBY SECURITY be prohibited from applying for liquidation of business.
- [3.1.2] STANDBY SECURITY be compelled to register within 7 days and join PSSPF.

### 4. The respondent's response

- [4.1] SENPF responded on the 16 October 2007 and indicated that indeed the first respondent joined the SENPF post the March 2001 deadline.
- [4.2] Their submission was however that, PSSPF has got no locus standi to refer the matter to this tribunal because the first respondent was not a participating employer in their fund and thus not bound by their rules. They submitted that, the oversight about compliance with a sectoral determination rests with the Department of Labour and not the PSSPF.

### 5. Determinations and reason thereof

- [5.1] At face value it is clear that the first respondent does not qualify to be considered for an exemption in terms of the Sectoral Determination, which provides that the employers who participated in a registered fund prior to the publication of the government notice or had prior to 30 March 2001, consulted with employees about establishment of a pension or provident fund were exempted from participating with the applicant. From the evidence submitted in this tribunal, it is common cause that the first respondent would not qualify to apply for an exemption.

- [5.2] The crucial factor is however to ascertain whether the non compliance of the first respondent to join PSSPF can be enforced by this tribunal. Indeed, there is a plethora of case and statutory law which dictate that, the answer cannot be on the affirmative. Compliance enforcement with Sectoral Determinations rests squarely with the Department of Labour. The fund was established in terms of Sectoral Determination Three: Private Security Sector, South Africa, published under the government gazette Notice R.196 of 25 February 2000 and amended by Government Notice R306 on the 30 March 2001. The law that governs sectoral determinations in South Africa is the Basic Conditions of Employment Act of 1997. The framework of the Basic Conditions of Employment Act of 1997 provides for an appeal against a decision that emanates from the auspices of the Act .At the same time it provides for an enforcement of obligations emanating from the auspices of the Act. It is important to note that, unlike the 1983 Basic Conditions of Employment Act which made use of the criminal justice system to enforce compliance with the Act, the new act has got an extensive internal dispute resolution framework;

*“One of the most significant departures from the previous system is that the monitoring and enforcement of conditions of employment are transferred from the criminal justice system to the administrative system and the Labour Court...the Basic Conditions of Employment Act of 1997 promotes administrative enforcement by investing labour inspectors with wide powers of entry and investigation and empowering them to issue compliance orders against employers who fail to comply with the provisions of the Act...labour inspectors and accredited bargaining council agents may promote , monitor and enforce compliance with employment laws by advising employers and employees of their rights and obligations in terms of employment law. They may further conduct inspections, investigate complaints and endeavor to secure written undertakings from employers or issue compliance orders.”*[Employment, Law 3, Service Issue 4, February 2006]

- [5.3] The finding of this tribunal is therefore that, the Sectoral Determination under discussion is a product of the Basic Conditions of Employment Act of 1997.The Basic Conditions of Employment Act does provide for an internal enforcement mechanism for all acts that are contrary to the Act and its subordinate legislation including but not limited to sectoral determinations. Therefore, if an employer refuses to abide by the provisions of the Sectoral Determination, and upon receipt of a particular complaint, it is imperative upon the administrative body to issue a compliance order. In terms of Section 69 of the Basic Conditions of Employment Act of 1997;

1) A labour inspector who has reasonable grounds to believe that an employer has not complied with a provision of this Act may issue a compliance order.

2) A compliance order must set out--

- a) the name of the employer, and the location of every workplace, to which it applies;
  - b) any provision of this Act that the employer has not complied with, and details of the conduct constituting non-compliance;
  - c) any amount that the employer is required to pay to an employee;
  - d) any written undertaking by the employer in terms of section 68(1) and any failure by the employer to comply with a written undertaking;
  - e) any steps that the employer is required to take including, if necessary, the cessation of the contravention in question and the period within which those steps must be taken; and
  - f) the maximum fine that may be imposed upon the employer in accordance with Schedule Two for a failure to comply with a provision of this Act.
- 3) a) A labour inspector must serve a copy of the compliance order on the employer named in it, and on each employee affected by it unless this is impractical, and on a representative of the employees.
- b) The failure to serve a copy of a compliance order on any employee or any representative of employees in terms of paragraph (a) does not invalidate the order.
- 4) The employer must display a copy of the compliance order prominently at a place accessible to the affected employees at each workplace named in it.
- 5) An employer must comply with the compliance order within the time period stated in the order unless the employer objects in terms of section 71.

[5.4] It is therefore clear from the discussion above that , this matter should be in the domain of the Department of Labour .A Sectoral Determination was made by the Minister of Labour in terms of Section 51 of the Basic Conditions of Employment Act of 1997;

- 1) The Minister may make a sectoral determination establishing basic conditions of employment for employees in a sector and area.

It is alleged that, the complainant has failed to honour the spirit of the letter of the Sectoral Determination and in so doing he has triggered the activation of Section 69 of the Basic Conditions of Employment Act of 1997. This means in a nutshell that Labour Inspectors should do the necessary in terms of activating the compliance enforcement mechanisms that the BCEA framework has provided for in situations where there is non compliance.

[5.5] Unfortunately, this tribunal can only advise the complainant to take the matter up with the Department of Labour and enforce the compliance with the Sectoral Determination. This tribunal cannot force the respondent to abide by a Sectoral Determination as such powers are vested with Labour Inspectors who should issue Compliance Certificates.

