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Our ref: PFA/WE/5383/05/VIA

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 (“the Act”) – T E MGAIMBIYIYANA (“the complainant”) v SECURITY EMPLOYEES NATIONAL PROVIDENT FUND (“the first respondent”) & AZA DAY AND NIGHT SECURITY CC t/a AZANIA SECURITY (“the second respondent”)

1. Introduction

- 1.1 This matter concerns the first respondent’s failure to pay a withdrawal benefit because the second respondent failed to pay contributions to it.
- 1.2 The complaint was received by this office on 12 September 2005. On 16 September 2005 a letter was dispatched to the first respondent giving it until 7 October 2005 to file its response. A response was received on 19 October 2005.
- 1.3 On 8 February 2007 a letter was dispatched to the second respondent, the complainant’s former employer, giving it until 15 February 2007 to file its response to the complaint. A response was not received from the second respondent.
- 1.4 Subsequent to considering the written submissions before this tribunal, it is found to be unnecessary to hold a hearing in this matter.

2. The factual background

- 2.1 The complainant was employed by the second respondent from September 2003 until 28 February 2005. During the course of the complainant’s employment the second respondent, on a monthly basis the

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second respondent, deducted pension contributions from the complainant's salary. When the complainant left the service of the second respondent, the first respondent refused to pay him a withdrawal benefit.

3. Complaint

- 3.1 The complaint is that the complainant has sustained damages, in particular due to the fact, that the first respondent failed to pay him a withdrawal benefit when he left the services of the second respondent because the second respondent failed to register the complainant as a member of the fund, first respondent, despite deducting pension fund contributions from his salary on a monthly basis.

4. The response

- 4.1 Ms Nazlee Kyriakidis, principal officer for the first respondent, states that the complainant was not a member of the first respondent while he was employed by the second respondent. According to her the complainant only became a member of the first respondent when he commenced working at Chuma Security.

5. Determination and reasons therefor

5.1 *Fund membership*

- 5.1.1 The first respondent is a registered fund in terms of the provisions of the Act, it is bound by its rules in the same way as its members, officials, shareholders and persons claiming under the rules (see section 13 of the Act). By virtue of the binding effect of the rules, the board of trustees of the first respondent and any service provider such as the administrator may only do with the first respondent's assets what is set forth in the rules (see *Tek Corporation Provident Fund & Another v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E).

- 5.1.2 Member eligibility and admission to the first respondent is dealt with in rule 4 of the master rules. Rule 4.2.1 provides that membership of the first respondent shall be a condition of service for every person who becomes an "ELIGIBLE EMPLOYEE" on or after the "COMMENCEMENT DATE". Furthermore that each "ELIGIBLE EMPLOYEE" shall become a member of the first respondent on the first day of the month following that in which he became an "ELIGIBLE EMPLOYEE".

- 5.1.3 "Commencement Date" in respect of the first respondent means 1 August 1996, and in respect of a participating employer, such as the second respondent, the effective date as from which that participating employer was admitted to the first respondent as such.

- 5.1.4 In terms of rule 1.3 of the special rules the second respondent was admitted as a participating employer on 1 February 2003. Thus, that is the commencement date insofar as it is applicable to the second respondent.
- 5.1.5 “Eligible Employee” in turn is defined as an employee of a participating employer.
- 5.1.6 Rule 2.1 of the special rules states further, that all employees who are in the employ of a participating employer and who have not attained “Normal Retirement Date” are eligible for membership of the fund. Furthermore a member must remain a member of the first respondent for as long as he is employed by a participating employer. Special rule 2.3 further provides that contributions to the first respondent shall commence with immediate effect and continues until such time that the member leaves the service of the participating employer.
- 5.1.7 “Normal Retirement Date” in terms of rule 1.4 of the special rules shall mean:
- “[T]he last day of the month in which a Member attains the age of sixty five (65) years, provided that a Member, with the consent of the Employer, shall have the option to defer retirement from Service to a later date not exceeding the last day of the month in which the Member’s seventieth (70th) birthday occurs.”
- 5.1.8 The second respondent has not provided this tribunal with reasons why it failed to register the complainant as a member of the first respondent. I cannot see any impediment which would have prevented the second respondent from registering the complainant as a member of the first respondent or which would have disqualified the complainant from becoming a member of the first respondent. The fact that the complainant would have qualified for membership of the first respondent is confirmed by his current membership.
- 5.1.9 It therefore follows that the complainant was entitled to become a member of the first respondent on the first day of the month following that in which he became an “ELIGIBLE EMPLOYEE”. The complainant was employed by the second respondent from September 2003. Furthermore, the complainant had not at that stage attained the normal retirement age. The complainant was 22 years old at the time. I am satisfied that the second respondent failed to comply with its duties in terms of the rules in that it failed to register the complainant as a member of the first respondent. I am also satisfied that the complainant met the criteria for membership as stated in rule 4.2.1 of the master rules and rule 2.1 of the special rules.
- 5.2 *Deductions of contributions and the second respondent’s failure to pay it*

to the first respondent

- 5.2.1 In terms of rule 3 of the Special Rules both the member and the employer have to contribute at the rate of 5% of salary, and a portion of the employer's contribution is payable towards risk benefits and administration costs.
- 5.2.2 According to the payslip attached to the complaint, the second respondent deducted certain amounts from the complainant's salary for "provident fund" purposes. However, the second respondent failed to pay it over to the first respondent as prescribed by the rules and the Act. In terms of rule 5.8.2 of the first respondent's rules, contributions in respect of any month shall be paid directly to the first respondent not later than 7 days after the end of the month for which such contribution is due. The second respondent's conduct is also in contravention of section 13A of the Act which provides that the employer of any member of a registered fund shall pay any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration; and any contribution for which the employer is liable in terms of those rules. Section 13A(3)(a)(i) and (ii) also states that such contributions must be paid to the fund by no later than seven days after the end of the month for which such a contribution is payable.
- 5.2.3 Despite deducting contributions from the complainant's salary the second respondent failed to transfer same timeously to the first respondent. As a result thereof, the first respondent refused to pay the complainant a withdrawal benefit when he left the service of the second respondent. The first respondent cannot reasonably be held liable to pay the complainant a withdrawal benefit if it has not received the requisite contributions from the second respondent. That liability is for the second respondent (see: *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator & Others* [2002] 9 BPLR 3830 (C) at 3839F) ("the *Orion* case).
- 5.2.4 Thus, the appropriate relief is that which has the effect of placing the complainant in the position he would have occupied had the second respondent regularly and timeously paid the contributions due to the first respondent. In other words, the second respondent is liable to pay the amount that would have been the complainant's accumulated share of the fund had the contributions been timeously received and invested by the first respondent (see the *Orion* case at 3839 F-G).
- 5.2.5 A member of a pension fund organization is entitled to have his fund benefit calculated on the date of his withdrawal from the fund. It is also on this date that the benefit becomes due and payable to the member (see *Sanlam Retirement Fund A (Office Staff) and another v Pension Funds Adjudicator and Another* [2004] 6 BPLR 5790 (C) at 5795D-J). This is

