Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): J P BURGER ("complainant") v WESKUS PELAGIESE VISSERS PENSIOENFONDS ("first respondent") AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD ("second respondent")

[1] INTRODUCTION

1.1 The complaint concerns the employer’s failure to pay contributions to the first respondent on behalf of the complainant.

1.2 The complaint was received by this office on 8 September 2011. A letter acknowledging receipt thereof was sent to the complainant on 20 September 2011. On the same date a letter was dispatched to the respondents giving them until 20 October 2011 to file their response to the complaint. A response to the complaint, which was forwarded to the complainant, was received from the second respondent on 2 December 2011. A reply was received from the complainant on 5 January 2012. No further submissions were received from the parties.
1.3 After reviewing the written submissions it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

2.1 The complainant was employed by Pioneer Fishing (West Coast) (Pty) Ltd ("the former employer") as a member of the crew of the fishing boat called Bella da Lunar ("first fishing boat"). He became a member of the first respondent by virtue of his employment. The second respondent is the consultant to the first respondent. The first fishing boat was withdrawn from service at the end of 2006 because it was old and unseaworthy. As a result of the withdrawal from service of the first fishing boat the employment contracts of the crewmen, including the complainant, were terminated by the former employer. However, the complainant did not submit a withdrawal claim to the first respondent for payment of his benefit. As a result, this benefit constitutes a portion of his fund credit in the first respondent.

2.2 In 2007 the former employer decided to enter into a joint business venture with other entities for the fishing business to be carried out by its new fishing boat, called the Viva ("second fishing boat"). The contract was awarded to the former skipper of the first fishing boat, Mr. P. Jacobs ("the current employer"), as both the contractor and skipper of the second fishing boat. As a result, a memorandum of agreement ("the agreement") between the former employer and the current employer was signed on 16 May 2007. The agreement provides that the former employer will not contribute to any pension fund scheme, the current employer will pay all employer and employee contributions on behalf of his employees to the first respondent, the current employer and the crewmen are not employees of the former employer and the crewmen are the employees of the current employer contractor.
3.1 The complainant's complaint is that the former employer failed or omitted to pay contributions on his behalf to the first respondent for a period spanning from July 2007 to December 2009. The complainant attached to his complaint a copy of a letter from his association to the former employer demanding payment of employer contributions on behalf of the crewmen of the second fishing boat for the period starting from July 2007 to December 2009 and a copy of a reply letter to the former employer's response.

3.2 Therefore, the complainant requests this tribunal to assist him in this regard.

[4] RESPONSE

4.1 The second respondent submitted a response on behalf of the respondents. The second respondent confirms the background facts as summarised above.

4.2 The second respondent submits that in terms of the registered rules of the first respondent a ‘member’ is defined as a person who is admitted to membership of the fund and does not cease to be a member. The Rule provides as follows:

“Lid” beteken ‘n person wat tot lidmaatskap van die Fonds toegelaat is en nie opgehou het om ‘n Lid te wees nie.”

4.3 The employers who participate in the first respondent are entities whose boats fish off the West Coast of the Republic of South Africa. In terms of the definition in the rules, an ‘employer’ is defined as an entity accepted as a participating employer in the fund by the trustees of the fund with or without any conditions. The Rule provides as follows:
“Werkgewer” beteken ‘n Kwotahouer, maatskappy en/of sodanige ander groep, liggaam of organisasie wat van tyd tot tyd tot die Fonds toegelaat mag word op voorwaardes waarop met die Trustees ooreengekoms is. Die Trustees mag, na hul goeddunke, toegang tot die Fonds weier aan enige moontlike werkgewer, sonder om enige voorwaardes neer te le of enige rede daarvoor te gee.”

4.4 The second respondent confirms that the complainant was admitted as a member of the first respondent in January 2010. It further confirms that the current employer was accepted as a participating employer in the first respondent in January 2010. The second respondent reiterates that the current employer is a participating employer in the fund and also a member of the fund. The current employer has a legal duty to pay contributions deducted in respect of himself and his crewmen as members of the fund to the fund’s bank account.

4.5 According to the second respondent for the period spanning from July 2007 through to December 2009 there was a dispute with respect to the nature of the contracts of employment of the crew of the second fishing boat and consequently the qualification of the crewmen for membership of the first respondent. The dispute was between the former employer and the current employer. The dispute was taken to adjudication and a settlement was reached whereby the crewmen, including the complainant and the current employer, would become members of the first respondent with effect from January 2010.

4.6 The second respondent advises that the current employer deducted money from his own and his crewmen’s salaries for retirement fund contributions in anticipation of a successful resolution of the dispute in his favour and hence with the participation from July 2007. It further states that since these monies could not be accepted by the first respondent during the period when the dispute subsisted, it is their understanding that he kept the monies in safekeeping until the issue of the crewmen’s membership was resolved. The second respondent confirms that on 2 November 2011 the current employer transferred the amounts he deducted from the crewmen’s
salaries and his own salary, for the period spanning from July 2007 to December 2009, to the first respondent. The first respondent accepted these contributions and the crewmen, including the current employer as a skipper of the boat, are members of the first respondent. The first respondent accepted these contributions and they are to be recorded as additional voluntary contributions in accordance with Rule 4.3 of the registered rules of the fund, and they are to be invested in respect of the members. Rule 4.3 provides as follows:

“Addisionele Vrywillige bydraes deur Lede en Werkgewers

4.3.1 ’n Lid mag addisionele bydraes tot die Fonds maak, ten einde groter voordele te verseker of ten opsigte van ’n tydperk van verstreke Diens, ooreenkomstig sodanige voorwaardes en prosedures soos wat die Trustees van tyd tot tyd mag voorskryf. Die betaling van addisionele bydraes tot die Fonds is onderworpe aan die beperkings en vereistes van die inkomstebelastingwet, 1962. Sodanige addisionele bydraes word in die Lid se Fondskrediet aangewend.

4.3.2 ’n Werkgewer mag addisionele bydraes tot die Fonds maak ten opsigte van ’n Lid se tydperk van verstreke Diens, ooreenkomstige voorwaardes en prosedures soos wat die Trustees van tyd tot tyd mag voorskryf. Die betaling van addisionele bydraes tot die Fonds is onderworpe aan die beperkings en vereistes van die inkomstebelastingwet, 1962. Sodanige addisionele bydraes word in die Lid se Fondskrediet aangewend.”

4.7 The second respondent submits that the complainant was not a member of the first respondent for the period from July 2007 to December 2009. The basis on which the complainant is now complaining is unclear because his complaint is rooted in a period when he was not a member of the first respondent. There has been no prejudice to the complainant as all monies deducted from his salary by the current employer are, with the resolution of the dispute, in the first respondent for the period from July 2007 to December 2009. The second respondent concludes by requesting that the complaint against the first respondent be dismissed on account of the above mentioned reasons.
The complainant's reply

4.8 The complainant confirms that he is indeed a member of the first respondent by virtue of his current employment. The crewmen of the first fishing boat, including the complainant, were members of the first respondent until the first fishing boat was withdrawn from active service in 2006. He further confirms that he never submitted withdrawal notification forms to the first respondent for payment of his benefit. The contractor deducted money from his salary for retirement fund contributions from July 2007 to December 2009 in anticipation of a successful resolution of the dispute in his favour.

4.9 The complainant states that the complaint is that the former employer, not the current employer, failed to pay ‘employer contributions’ on his behalf to the fund for the period starting from July 2007 to December 2009 as required by the rules.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

5.1 The complainant's complaint is that the former employer failed or omitted to pay ‘employer contributions’ on his behalf for the period starting from July 2007 to December 2009. The first respondent confirmed that the complainant was employed by the current employer during this period, in terms of the agreement between the former employer and the current employer signed on 16 May 2007. In addition, the parties to the agreement agreed that the former employer will not contribute to any pension scheme. Thus, the issue for determination is whether or not the former employer had a duty to pay employer contributions on behalf of the complainant for the period starting from July 2007 to December 2009 in terms of the Act and the rules of the fund.
Pension fund contributions

5.2 An employer has a duty placed on it by the provisions of section 13A(1)(a) of the Act and the rules of the fund to pay contributions and submit schedules to the fund indicating on whose behalf payment is being made. Section 13A(3)(a)(i) states that such contributions must be paid directly into the fund’s account and section 13A(3)(a)(ii) states that the contributions must be paid directly to the fund in such a manner as to have the fund receive the contributions not later than seven days after the end of that month for which such contributions are payable.

5.3 The registered rules of a fund are binding on a fund and its members (see Section 13 of the Act; Tek Corporation Provident Fund and Others v Lorentz [2003] 3 BPLR 227 (SCA)). The rules of the first respondent provide that a participating employer has a duty to pay contributions to the fund on behalf of members of the fund who are its employees. So, the complainant’s employer, if it was admitted as a participating employer in the first respondent during the period starting from July 2007 to December 2009, had a duty to pay contributions to the fund on his behalf in terms of the Act and the rules.

5.4 The facts show that the complainant was the employee of the current employer, not the former employer, from July 2007 to December 2009. The complainant’s employment was terminated by the former employer at the end of 2006 and consequently he ceased to be a member of the first respondent. The complainant was not a member of the first respondent and the current employer was not yet accepted as a participating employer in it during this period. Nonetheless, the current employer, not the former employer, deducted pension fund contributions from the complainant’s salary during this same period in anticipation of a successful resolution of the dispute between it and the former employer in its favour. Subsequent to the resolution of the dispute, the current employer paid the money he
deducted from the complainant’s salary from July 2007 to December 2009 to the first respondent. The complainant was admitted to membership of the first respondent in January 2010, and it accepted his previously collected contributions as additional voluntary contributions in terms of its rules.

5.5 It follows that since the complainant was not employed by the former employer during July 2007 to December 2009 in terms of the agreement and it had not deducted pension fund contributions from his salary during the same period, it had no duty in terms of the Act and the rules of the first respondent to pay employer contributions on behalf of the complainant. Therefore, the complainant was not entitled to employer contributions from the former employer during the period from July 2007 to December 2009.

[6] ORDER

1. In the result, the complaint cannot succeed and is dismissed.

DATED AT JOHANNESBURG ON THIS 29TH DAY OF FEBRUARY 2012

________________________________________
DR E.M. DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

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Parties unrepresented