Ground & 1st Floors
23 FREDMAN
Cnr. Fredman Drive & Sandown Valley Crescent
Sandown
SANDTON
2196

P.O. Box 651826, **BENMORE,** 2010
Tel: 087 942 2700; 011 783 4134 **Fax:** 087 942 2644
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 ("the Act"): M LETSOALO ("complainant") v THE PRIVATE SECURITY SECTOR PROVIDENT FUND ("first respondent"), ABSA CONSULTANTS AND ACTUARIES (PTY) LIMITED ("second respondent") AND BOPAPE SECURITY SERVICES CC ("third respondent")

[1] INTRODUCTION

1.1 The complaint concerns the non-payment of a death benefit following the death of the late Mr. M Letsoalo ("the deceased").

1.2 The complaint was received by this Tribunal on 4 September 2009. A letter acknowledging receipt thereof was sent to the complainant on 15 February 2010. On the same date, letters requesting responses to the complaint were sent to the first and third respondents, affording them the opportunity to submit responses to the complaint by 26 March 2010. No responses were received. On 8 April 2010, a follow-up request for a response was sent to the first respondent, affording it the

opportunity to submit a response to the complaint by 16 April 2010. No response was received. On 23 May 2012, a response was received from the first respondent. On 1 June 2012, a follow-up request for a response to the complaint was sent to the third respondent. No further submissions were received.

1.3 After reviewing the written submissions before this Tribunal, 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 is the deceased's (Mr. M Letsoalo) sister. The deceased was a member of the first respondent with effect from January 2007, by virtue of his employment with the third respondent. The deceased passed away on 18 December 2007.

[3] COMPLAINT

3.1 The complainant submitted that the deceased was employed by the third respondent until he passed away on 18 December 2007. The complainant submitted that the deceased was still in the employ of the third respondent when he passed away. The complainant submitted that subsequent to the deceased's death, there has been no payment of a death benefit.

3.2 The complainant requests this Tribunal to investigate the matter.

[4] RESPONSES

First respondent

4.1 The first respondent submitted that the third respondent has not complied with its statutory obligations, as well as the rules of the fund. The first respondent submitted that the last contribution received from the third respondent was in October 2007. The first respondent further submitted that the deceased has a fund credit in the amount of R1 179.29, representing contributions received from January 2007 until October 2007. The first respondent submitted that the assessment of the death claim will be delayed until the outstanding contributions are paid by the third respondent. The first respondent further submitted that upon the receipt of contributions, it would then make a benefit payment to the complainant in terms of its rules.

Third respondent

4.2 The third respondent was afforded the opportunity to comment on the allegations made against it, as is required by section 30F of the Act. No response was received from the third respondent. In the circumstances, this Tribunal has no other alternative but to dispose of the matter on the basis of the available facts.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue that falls for determination is whether or not the third respondent has failed to act in terms of its statutory obligations by not contributing to the first respondent.

5.2 The complainant submitted that the deceased was employed by the third respondent until his date of death. In a telephonic conversation with a representative of the third respondent's Human Resources Department on 14 September 2012, the representative submitted that the complainant was employed by the third respondent with effect from 1 July 2005. However, the first respondent submitted that contributions were received on behalf of the deceased with effect from January 2007 until October 2007. The third respondent was obliged to register the

deceased as a member of the first respondent, from the commencement of his employment. Rule 3 of the first respondent's rules makes provision for the participation of employers and the registration of employees as members of the first respondent. The relevant sub-rules of rule 3 of the first respondent's rules dealing with membership of a fund provide as follows:-

> "**3.1 Employer Participation**
>
> 3.1.1 Subject to rule 3.3 below, all Employers in the Private Security Sector shall participate in the Fund with effect from the commencement of the fund or the commencement of the Employer's business in the Private Security Sector, whichever is the later."

In turn sub-rule 3.2 stipulates that:-

> "**3.2 Member Participation**
>
> 3.2.1 Subject to 3.3 below, all Employees in the Private Security Sector shall participate in the Fund with effect from the commencement of the Fund or the commencement of the Employer's business in the Private Security Sector, whichever is the later."

5.3 According to the information obtained from the Companies and Intellectual Property Commission ("CIPC") on 14 September 2012, the third respondent was registered on 30 May 2001 and is still in business. The complainant commenced his employment with the third respondent on 1 July 2005. The first respondent's commencement date was on 1 September 2002. Thus, the complainant ought to have been registered as a member of the first respondent with effect from 1 July 2005.

5.4 The third respondent failed to make payment of contributions on behalf of the deceased in the period of July 2005 to December 2006. The former employer had a duty placed on it by the provisions of section 13A(1)(a) of the Act and the rules of the first respondent to pay

contributions and submit schedules to the first respondent indicating on whose behalf payment is being made, and the first respondent in turn has a duty to pay out benefits to the members. 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.

5.5 The payment of any benefit that is due to a member of a fund is regulated by the fund's rules (see *Tek Corporation Provident Fund & Another v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E) and section 13 of the Act).

5.6 Rule 6.1.1 of the first respondent's rules provides:

> "Benefit
>
> If a Member dies while in Service, on or before Normal Retirement Date, the following lump sum benefit shall be payable from the Fund:
>
> (a) subject to Rule 4.2.3 and Rule 6.1.2, twice the Member's Annual Fund Salary at the time of his death; plus
>
> (b) the Member's Fund Credit at the date of his death;
>
> provided that if a Member dies in Service after Normal Retirement Date, the benefit mentioned in (a) above shall not be payable."

5.7 Further Rule 6.1.3 of the first respondent's rules provides:

> "Notification of Period

> A formal, written claim in respect of the benefit referred to in Rule 6.1.1 together with all the information required by the Trustees or Administrators, shall be lodged with the Trustees within six months from the date of a Member's death and the relevant documentation or particulars required by the Trustees in respect of such claim shall be submitted to the Trustees within twelve months from the date of the Member's death, failing which the benefit shall not be payable."

5.8 The complainant submitted that at the time of the deceased's death, the complainant was still employed by the third respondent. The third respondent did not provide a response to the complaint, despite several requests by this Tribunal to do so. The first respondent has already submitted that the third respondent is in arrears for provident fund contributions that were due on behalf of its employees.

5.9 In *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 235, it was held that the employer in a pension fund at the very least owes a duty of good faith to its employees and to assist its employees in the submission of claims to the fund.

5.10 There is no evidence of the third respondent having submitted any death claim documentation. In the telephonic conversation with a representative of the third respondent's Human Resources Department on 14 September 2012, the representative assured this Tribunal that they would access their archives in order to provide this Tribunal with proof that all contribution payments were up to date, furthermore, that the death claim documentation had been lodged timeously with the first respondent's former administrator. In a follow-up telephonic conversation with an investigator in this Tribunal on the same day, the same representative of the third respondent stated that it would no longer submit a response to the complaint, as all information may be obtained from the second respondent. The third respondent has to date failed to provide this Tribunal with proof that all contributions were paid to the first respondent and that death claim documentation had been lodged with the first respondent.

5.11 This Tribunal takes judicial notice that the commencement date of contribution payments may be ascribed to the *eligibility criterion* which is set out in the first respondent's rules. The *eligibility criterion* requires an employee to have been in service for a period of six continuous months of permanent employment with an employer within the Private Security Sector, before commencing with provident fund contributions. Therefore, because the deceased's employment commenced in July 2005, the third respondent ought to have commenced with the payment of provident fund contributions to the first respondent with effect from January 2006.

5.12 In *Rwexwana v Idaho Spur Provident Fund and Others* [2005] 7 BPLR 640 (PFA) at 624, it was held that it is essential for the employer to complete a notification form indicating the cause of the termination of employment in order for the fund to determine which benefit is payable.

[6] <u>ORDER</u>

6.1 In the result, the order of this Tribunal is as follows:

6.1.1 The first respondent is ordered to register the complainant as a member with effect from January 2006 until 18 December 2007, within one week of this determination;

6.1.2 The third respondent is ordered to submit all outstanding contribution schedules to the first respondent due from January 2005 until 18 December 2007, in order to facilitate the computation of the complainant's benefit within two weeks of this determination;

6.1.3 Should the third respondent fail to comply with paragraph 6.1.2, the first respondent is ordered to reconstruct the complainant's contribution schedules based on the information already in its

possession, within two weeks of the third respondent's failure to submit the schedules;

6.1.4 The first respondent is ordered to calculate the amount of death benefit, that would have been payable to the deceased's beneficiaries in terms of section 37C of the Act, had the first respondent received contributions from the third respondent timeously, within one week of this determination;

6.1.5 The first respondent is ordered to inform the third respondent of the amount computed in paragraph 6.1.4 above, within one week of computation thereof;

6.1.6 The third respondent is ordered to pay to the first respondent the amount computed in terms of paragraph 6.1.4 above, within two weeks of receipt of the notification given in terms of paragraph 6.1.5 above;

6.1.7 The board of trustees of the first respondent is ordered to conduct its investigations and distribute the deceased's death benefit in terms of section 37C of the Act, within eight weeks of this determination; and

6.1.8 The board of trustees of the first respondent must notify the complainant, the third respondent and this Tribunal in writing of its decision in terms of paragraph 6.1.7 *supra,* within a week thereof.

DATED AT JOHANNESBURG ON THIS 19th DAY OF NOVEMBER 2012

MA LUKHAIMANE

DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M Filing: Magistrates' Court

Parties unrepresented