Dear Sir,


[1] INTRODUCTION

1.1 This complaint concerns the failure by the first respondent to pay a withdrawal benefit to the complainant, which is ascribed to the third respondent’s alleged failure to pay all contributions to the first respondent on behalf of the complainant.

1.2 The complaint was received by this Tribunal on 21 February 2013. A letter acknowledging receipt thereof was sent to the complainant on 20 March 2013. On the same date, the complaint was dispatched to the respondents giving them until 23 April 2013 to file their responses. On 16 April 2013, a response was received from the third respondent. On 14 May 2013, a
response was received from the first respondent. No further submissions were received.

1.3 Having considered 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 was in the employ of the third respondent from 1 September 2011 until the termination of his services on 30 November 2012. He was a member of the first respondent by virtue of his employment.

2.2 Following the termination of the complainant’s services, a withdrawal benefit became payable to him.

[3] COMPLAINT

3.1 The complainant is aggrieved by the delay in the payment of his withdrawal benefit. He submits that following the termination of his services, he was informed by the second respondent that he was never registered as a member of the first respondent.

3.2 The complainant requests this Tribunal to compel the respondents to pay his withdrawal benefit.

[4] RESPONSES

First respondent
4.1 The first respondent submits that it has the third respondent on its records as a participating employer, having joined as such on 30 April 2007. The first respondent further submits that the third respondent is non-compliant with its obligations under the Act and its rules. As a result of the third respondent's non-compliance, provident fund contributions were last received in March 2013 and were allocated up to March 2011. The first respondent submits that the complainant is not registered as its member as no contributions were received on his behalf. Accordingly, the first respondent submits that there is no withdrawal benefit payable to him.

Third respondent

4.2 The third respondent submits that the complainant was in its employ from September 2011. He became a member of the first respondent with effect from December 2011 until the termination of his services in December 2012. During this period the complainant paid provident fund contributions in the amount of R2 560.24. The third respondent further submits that it paid employer contributions on behalf of the complainant totalling the same amount.

4.3 In support of its submissions, the third respondent has provided an extract of its payroll indicating the deductions made from the complainant’s salary.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue which falls for determination is whether or not the third respondent failed to pay contributions on behalf of the complainant, resulting in the first respondent being unable to pay him a withdrawal benefit.

5.2 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 &
5.3 Rule 3 of the first respondent’s rules dealing with membership of a fund provides 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.

5.4 The third respondent has 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. 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 According to the Companies and Intellectual Property Commission (CIPC) website as at 2 June 2013, the third respondent commenced its business in the private security sector on 5 May 2006 and is still in business. The
commencement date of the first respondent is 1 September 2002. Thus, the complainant ought to have been registered by the third respondent as a member of the first respondent from the commencement of his employment, i.e. September 2011.

5.6 In the instant case, the payment of provident fund contributions on behalf of the complainant by the third respondent is in dispute. In examining the first and the third respondents’ conflicting versions, regard must be had to the latter’s submission in paragraph 4.1 above. The first respondent submits that the third respondent last paid contributions in March 2013 and its record has been updated by the second respondent up to March 2011. On 31 May 2013, this Tribunal had a telephonic discussion with the first respondent wherein the latter set out to elaborate on this point.

5.7 It appears that the second respondent’s membership data system is set up in such a manner as to prevent the upload of current provident fund contributions for any given month if the employer is in arrears for the preceding months or years, as the case may be. To circumvent this, the second respondent uses the current contributions to offset the arrears in order to bring the employer up-to-date, as it were. Hence the submission that contributions from the third respondent were last received in March 2013 but its record has been updated up to March 2011.

5.8 Owing to the high staff turnover in the private security industry, the foregoing practice is almost always to the prejudice of the new employees. In that, the second respondent credits the current contributions towards the individual accounts of those employees in respect of whom the employer is in arrears and not necessarily those whose names appear on the contribution schedules. As a result, a new employee may not get registered as a member of the fund as there may be no contributions left to allocate after the offset. If the employee’s services are terminated before the employer’s record is fully updated, as was the case in this complaint, no benefit will be payable to him.
5.9 This practice flies in the face of the very idea of retirement funding. It is a gross violation of section 13A of the Act and the rules of the first respondent, and must to be strongly discouraged. Accordingly, this Tribunal enjoins the trustees of the first respondent, in pursuance of their statutory obligations as outlined below, to prevent what appears to be a case of expediency trumping the law.

5.10 Section 7D of the Act outlines the duties of trustees of a fund. Of relevance to this matter is sub-sections (d) and (f) which read as follows:

\[
7D. \quad \text{Duties of board}
\]

The duties of a board shall be to -

(d) take all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act;

(e) ....

(f) ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001), and all other applicable laws.

5.11 Furthermore, principle 12 of PF Circular 130 of the Financial Services Board is instructive in this regard and it provides thus:

APPROVED SERVICES PROVIDERS

71. Boards are held accountable for any actions and decisions taken by their mandated sub-committees, agents, office bearers and duties outsourced to service providers. As such, the members of the board of the fund can be held jointly and severally liable for the actions of their mandated agents.
72. A fund should have clear written rules and control processes in place for the financial management and funding, investment management and the safeguarding of assets, delegation of duties, outsourcing of functions and the selection process to be followed in the evaluation and the appointment of services providers.

5.12 This Tribunal is therefore satisfied that barring the period September 2011 to November 2011, the first respondent is in receipt of the complainant’s provident fund contributions.

5.13 In the circumstances, the appropriate relief is that which has the effect of placing the complainant in the position he would have been in had the third respondent regularly paid all the contributions due and the first respondent paid the benefit it is holding on his behalf (see Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others [2002] 9 BPLR 3830 (C) at 3839F-G and Mabale v Feedmix Provident Fund and Others [2008] 1 BPLR 29 at 37E-F)

5.14 This determination will also be forwarded to the Registrar of Pension Funds to follow up on the second respondent’s manner of allocating contributions as the second respondent carries on business as an administrator of funds other than the first respondent.

[6] ORDER

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

6.1.1 The third respondent is ordered to register the complainant as a member of the first respondent with retrospective effect from September 2011 to December 2012, within two weeks of this determination;
6.1.2 The third respondent is ordered to submit all outstanding schedules from September 2011 to November 2011 to the first respondent in order to facilitate the computation of the complainant’s withdrawal 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 compute the complainant’s outstanding withdrawal benefit, together with late payment interest calculated in terms of section 13A(7) of the Act, within one week of receiving the contribution schedules in terms of either paragraphs 6.1.2 or 6.1.3 (whichever is applicable);

6.1.5 The first respondent is ordered to transmit to the third respondent its computations in paragraph 6.1.4, within three days of completing them;

6.1.6 The third respondent is ordered to pay the first respondent the complainant’s outstanding withdrawal benefit, together with late payment interest as computed in paragraph 6.1.4, within one week of receiving computations from the first respondent;

6.1.7 The first respondent is ordered to pay the complainant his withdrawal benefit, less any deductions permitted in terms of the Act, within one week of receiving payment from the third respondent;
6.1.8 The complainant is directed to submit to the respondents, a withdrawal claim form, a copy of his identity document and his recent banking details. The complainant is directed to send the above documentation to the following address, within two weeks of this determination;

ABSA Consultants and Actuaries (Pty) Ltd
P.O. Box 4167
FOURWAYS
2005

Fax No: 086 641 6494

6.1.9 The first respondent is directed to condone the absence of the employer’s signature and stamp on the complainant’s claim form; and

6.1.10 The first respondent is ordered to pay the complainant the benefit it is currently holding on his behalf, within two weeks of receipt of the documentation above.

DATED AT PRETORIA ON THIS 10TH DAY OF JUNE 2013

_____________________________________
MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

The Registrar of Pension Funds
Section 30M filing: Magistrate's Court
Parties: Unrepresented