Dear Sirs,


[1] INTRODUCTION

1.1 This complaint concerns the failure by an employer to register its employees with the provident fund, failing to make contributions on their behalf and the resultant failure to pay them their respective withdrawal benefits.

1.2 The complaint was received by this Tribunal on 1 April 2008. A letter acknowledging receipt thereof was sent to the complainants on 24 April 2008. On the same date, the complaint was dispatched to the first and third respondents, affording them the opportunity to submit responses to the complaint on or before 26 May 2008. No responses were
received from the respondents on the set date. On 7 June 2012, a request for information pertaining to the respective complainants’ records was sent to the second respondent. On 8 June 2012, the information pertaining to the complainants was received from the second respondent. No further submissions were received.

1.3 This complaint was referred to the conciliation service for hearing on 25 February 2009, in order to afford the parties an opportunity to settle the matter. However, the third respondent was absent from the hearing and could not be traced, resulting in the parties not reaching any settlement. The matter was referred for adjudication. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

2.1 The complainants submitted that they were employees of the third respondent with effect from March 2008 until the termination of their services within the same year. The complainants submitted that provident fund contributions were deducted from their salaries by the third respondent during the tenure of their employment.

[3] COMPLAINT

3.1 There are four complainants listed in this matter, each having been an employee of the third respondent within the following period:

- A Ndalambi 19 October 2004 – 3 September 2007
- EW Nevhunama 22 September 2004 – 3 September 2007
- SD Tshikhudo 22 October 2005 – 3 September 2007
- TJ Somo 2 August 2004 – 3 September 2007
3.2. The complainants submitted that following their consultation with the first respondent's former administrator, NBC Fund Administration Services (Pty) Ltd, they were informed that no records were held on their behalf, as they were never registered and no contributions were paid on their behalf. The complainants submitted that following the termination of their employment, they have not received payment of their withdrawal benefits from the first respondent.

3.3 The complainants seek this Tribunal to investigate the reason for the non-payment of their withdrawal benefits.

[4] RESPONSES

Second respondent

4.1 Information obtained from the second respondent confirmed that the third respondent was registered as a participating employer with the first respondent with effect from 1 July 2003. The information obtained, however, confirmed that none of the complainants have contribution records with respect to the third respondent and no benefit payments are due to them.

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 alternative but to dispose of the matter on the basis of the available facts.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue which falls for determination by this Tribunal is whether or not the third respondent should be held accountable for having failed to
register the complainants with the first respondent and invariably failing to pay contributions on their behalf.

5.2 The rules of a fund are supreme and binding on its officials, members, shareholders and beneficiaries and anyone so claiming from the fund (See Section 13 of the Act and Tek Corporation Provident Fund & Others v Lorentz [2000] 3 BPLR 227 (SCA) at paragraph [28]).

5.3 The relevant sub-rules of rule 3 of the first respondent’s rules dealing with membership of a fund provide as follows:

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 No information regarding the third respondent’s registration could be obtained from the Companies and Intellectual Property Commission (CIPC) on 26 June 2012. Further investigations revealed that the third respondent was already in liquidation as at September 2009. The commencement date of the first respondent is 1 September 2002. Thus, the complainants ought to have been registered by the third respondent as members of the first respondent with effect from the commencement of their individual employment until the termination of their services.

5.5 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, 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.

5.6 The appropriate relief would be that which has the effect of placing the complainants in the position they would have occupied had the third respondent registered the complainants from the commencement of their respective employment periods and regularly paid the contributions due (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).

5.7 However, the third respondent has been liquidated and is therefore no longer in business. This Tribunal cannot issue an order against an entity that is no longer in existence.

[6] ORDER

1. In the result, this matter cannot succeed and is hereby dismissed.

DATED AT JOHANNESBURG ON THIS 3RD DAY OF JULY 2012

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MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR