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Please quote our ref: **PFA/WE/6320/2011/PGM**

**REGISTERED POST**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): P RASI (“complainant”) v THE PRIVATE SECURITY SECTOR PROVIDENT FUND (“first respondent”); ABSA CONSULTANTS AND ACTUARIES (PTY) LTD (“second respondent”) AND PROEXEC SECURITY NETWORK (PTY) LTD (“third respondent”)**

**[1] INTRODUCTION**

- 1.1 This complaint concerns the failure by an employer to register an employee with the provident fund and therefore, failing to make contributions on his behalf.
- 1.2 The complaint was received by this Tribunal on 9 May 2011. On 23 August 2011, a letter acknowledging receipt thereof was sent to the complainant. On the same date, the complaint was dispatched to the first and third respondents requesting them to file their responses by 30 September 2011. There were no responses received by 30 September 2011. Further letters were dispatched to the first and

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The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

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third respondents on 1 October 2012, giving them until 1 November 2012 to file their responses. A response was received from the first respondent on 8 October 2012. There was still no response received from the third respondent by 1 November 2012. On the same date, a further letter was dispatched to the third respondent, giving it until 15 November 2012 to file its response. No response was received from the third respondent by 15 November 2012. No further submissions were received.

- 1.3 Having considered 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 employed by the third respondent from 1 January 2009 to 4 February 2011. Provident fund contributions were deducted from his salary by the third respondent from June 2009. However, the third respondent failed to pay these contributions over to the first respondent in respect of the complainant and to register him as a member of the first respondent.

**[3] COMPLAINT**

- 3.1 The complainant seeks this Tribunal to investigate the reason for the third respondent's failure to register him as a member of the first respondent and pay contributions on his behalf despite deducting provident fund contributions from his salary. The complainant attached a copy of his salary advice dated 31 October 2010, confirming a provident fund deduction in the amount of R164.12 by the third respondent.

**[4] RESPONSE**

- 4.1 The first respondent submitted that according to its records, the third respondent registered as a participating employer on 1 June 2004. The first respondent further submitted that the third respondent is, however, in breach of Rule 4.3 of its rules and section 13A of the Act by failing to make regular contributions in respect of the complainant despite deducting provident fund contributions from his salary. The first respondent further submitted that it has no record of the complainant as he was not registered by the third respondent.

**[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 complainant with a provident fund and invariably failing to pay contributions on his 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 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.”

- 5.4 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.”

- 5.5 The relevant sub-rule rule 3.3 referred to above, regulates the applications by employers in the security industry for an exemption from participating in the first respondent. Therefore, it is not applicable in this matter, because the third respondent is a registered participating employer in the first respondent.
- 5.6 According to the information obtained from the Companies and Intellectual Property Commission (CIPC) on 26 November 2012, there are no records of the third respondent being registered with CIPC. However, other search methods confirmed that the third respondent is still in operation. One of the directors of the third respondent and the complainant also confirmed same on 26 November 2012. The first respondent confirmed that the third respondent was registered as a participating employer on 1 June 2004. Provident fund contributions were deducted from the complainant’s salary from June 2009. However, the complainant ought to have been registered by the third respondent as a member of the first respondent from 1 January 2009, as this is the date upon which he commenced employment with the third respondent.
- 5.7 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.

- 5.8 According to the submissions of the complainant, the third respondent failed to register him as a member of the first respondent and to transmit contributions as stipulated in the Act.
- 5.9 The appropriate relief is that which has the effect of placing the complainant in the position he would have occupied had the third respondent regularly and timeously 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).
- 5.10 The extent of the first respondent's liability is limited to the amount by which the benefit in question has been funded. Therefore, if the third respondent did not pay all contributions to the first respondent, it cannot be held liable to pay the full withdrawal benefit to the complainant (see *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others* [2002] 9 BPLR 3830 (C) at 3839F-G). The third respondent must pay all contributions in arrears to the first respondent, so that it can pay the complainant his full withdrawal benefit.
- 5.11 This determination will also be forwarded to the Private Security Industry Regulatory Authority for them to consider the actions of the third respondent and to take the necessary steps in respect of the third respondent's unlawful conduct.

[6] **ORDER**

- 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 2009 to February 2011 within one week of this determination;
- 6.1.2 The third respondent is ordered to submit all outstanding schedules from January 2009 to February 2011 to the first respondent 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 arrear contributions due by the third respondent together with late payment interest calculated in accordance with section 13A(7) of the Act, within one week of receipt of the schedules referred to in paragraph 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; and
- 6.1.6 The third respondent is ordered to pay arrear contributions together with late payment interest as computed in accordance with paragraph 6.1.4 *supra*, to the first respondent, within one week of receiving the computations from the first respondent;
- 6.1.7 The first respondent is ordered to pay the complainant his withdrawal benefit, less any deductions permissible in terms of the Act, within one week of receiving payment from the third respondent;

DATED AT JOHANNESBURG ON THIS 27<sup>th</sup> DAY OF NOVEMBER 2012

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**MA LUKHAIMANE**  
**DEPUTY PENSION FUNDS ADJUDICATOR**

**Section 30M filing: Magistrate's Court**

*Parties: Unrepresented*