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REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): J THAELE (“complainant”) v THE PRIVATE SECURITY SECTOR PROVIDENT FUND (“first respondent”), ABSA CONSULTANTS AND ACTUARIES (PTY) LTD (“second respondent”) AND CORPCLO 117 PROTECTION SERVICES CC (“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 resulting in the non-payment of his withdrawal benefit.
- 1.2 The complaint was received by this Tribunal on 8 February 2010. A letter acknowledging receipt thereof was sent to the complainant on 9 April 2010. On the same date, the complaint was dispatched to the first and second respondents to file their responses by 29 April 2010. On 19 August 2010, this complaint was dispatched to the third

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respondent requesting a response by 20 September 2010. A response dated 4 June 2010, was received from the first respondent on the same date. No response was received from the third 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 employed by the third respondent from 1 June 2007 until 1 June 2009 when his services were terminated. Provident fund contributions were deducted from his salary by the third respondent.

[3] COMPLAINT

- 3.1 The complainant seeks this Tribunal to investigate the reason for the failure of the third respondent to register him as a member of the first respondent and its failure to pay contributions to the first respondent on his behalf resulting in the non-payment of his withdrawal benefit, despite deducting provident fund contributions from his salary.

[4] RESPONSES

First and second respondents

- 4.1 The first respondent submitted that the third respondent joined it as a

participating employer on 1 June 2006. It further submitted that, it did not have the complainant as a registered member on its records.

Third respondent's response

- 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 and no response was received from it. 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 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, which has resulted in the non-payment of his withdrawal benefit.
- 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:-

"3.1 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 According to the information obtained from the Companies and Intellectual Property Commission (CIPC) on 20 August 2012, the third respondent commenced its business in the private security sector on 8 August 1997 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 June 2007.

5.6 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.

5.7 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.

5.8 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) and *Mabale v Feedmix Provident Fund and Others* [2008] 1 BPLR 29 at 37E-F).

[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 June 2007 to June 2009, within one week of this determination;

6.1.2 The third respondent is ordered to submit all outstanding contribution schedules 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 withdrawal benefit plus late payment interest owed by the third respondent 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 *supra* (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 withdrawal benefit plus late payment interest as computed in paragraph 6.1.4, within one week of receiving the computations from the first respondent; and
- 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.

DATED AT JOHANNESBURG ON THIS 31ST DAY OF AUGUST 2012

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR