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**REGISTERED POST**

Dear Sirs,

**DETERMINATION IN TERMS OF SECTION 30A OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): SCORPION LEGAL PROTECTION OBO B MANDILOZA (“complainant”) v THE PRIVATE SECURITY SECTOR PROVIDENT FUND (“first respondent”) AND CGR PROTECTION SERVICES CC (“second respondent”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the failure by the second respondent to timeously register as a participating employer in the first respondent, register the complainant as a member of the first respondent and pay all provident fund contributions on his behalf, resulting in him not receiving a withdrawal benefit.
- 1.2 The complaint was received by this Tribunal on 8 July 2016. On 13 July 2016, a letter acknowledging receipt thereof was sent to the complainant. On the same date, a copy of the complaint was sent to the respondents requesting responses by 13 August 2016. A response

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was received from the first respondent on 8 August 2016. The second respondent forwarded documentation to this Tribunal on 22 July 2016. Further submissions were received from the complainant.

- 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 second respondent from January 2012 to 31 May 2016. He was not registered as a member of the first respondent. Provident fund deductions were made from the complainant's salary by the second respondent. The complainant submitted copies of his payslips reflecting provident fund deductions as follows:

2012/01/15	R122.65
2012/01/31	R122.26
2013/01/15	R144.54
2013/01/31	R135.71
2014/05/15	R152.72
2014/05/31	R142.90
2015/01/15	R172.76
2015/01/31	R159.12
2016/01/31	R116.25

- 2.2 Upon the termination of his employment, the complainant became entitled to a withdrawal benefit, however, to date he has not received any payment.

## **[3] COMPLAINT**

- 3.1 The complainant submitted that whilst in the employ of the second respondent, he contributed to a provident fund. Upon the termination of

his employment, he did not receive a withdrawal benefit. He submitted that the second respondent took all his payslips allegedly to calculate contributions deducted from his salary for the period of his employment. He submitted further that the second respondent undertook to pay him at the end of June 2016.

3.2 The complainant requests this Tribunal to investigate the matter.

*Further submissions*

3.3 On 10 October 2016, the complainant telephonically submitted that he received payment of R10 773.68 from the second respondent as a refund of the amount deducted from his salary for contributions to the provident fund. He further confirmed that he was not employed in the security sector prior to his employment with the second respondent.

**[4] RESPONSES**

*First respondent*

4.1 The first respondent submitted that the second respondent commenced participating in it on 1 September 2010 and is non-compliant in terms of section 13A of the Act. It submitted that contributions were received up to 31 August 2012 and no allocations have taken place.

4.2 It submitted that although the complainant claims to have been employed by the second respondent and being its member by virtue of his employment, he was never enrolled as such. It stated that the second respondent defaulted in respect of enrolling the complainant as its member as well as in respect of contributions required to have been paid and schedules required to have been submitted on behalf of the complainant from the commencement of employment to date. Such

default is in breach of Rules 3.2.1, 4.3.1 and 4.3.2, which provide as follows:

“3.2.1 Subject to RULE 3.2.7 below, each eligible employee shall, as a condition of employment, become a member of the fund with effect from commencement of the fund or the commencement of the employer’s business in the private security sector, whichever is the later.

4.3.1 The Member’s contribution in terms of Rule 4.1 shall be deducted by his Employer from his salary or wages and must together with the Employer’s contribution in terms of Rule 4.2, be paid to the Fund monthly in arrears.

4.3.2 The employer shall ensure that the contributions referred to in 4.3.1 are paid to the Fund within 7 days of the calendar month in respect of which contributions are payable. The EMPLOYER shall also ensure that the minimum information prescribed under Regulation 33(1) of the Act regarding payment of contributions is furnished to the FUND within 15 days after the end of the month in respect of which contributions are payable...”

4.3 The first respondent concludes that in terms of Rule 4.3.2(b) of its Rules, it can only pay so much that it has received on behalf of the complainant.

#### *Second respondent*

4.4 The second respondent submitted proof of payment in the amount of R10 773.68 paid to the complainant.

## **[5] DETERMINATION AND REASONS THEREFOR**

### *Introduction*

- 5.1 The issues for determination are whether or not the second respondent should be held accountable for failing to register the complainant as a member of the first respondent and paying all provident fund contributions due 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]).

*Registration as a participating employer and member of the fund*

- 5.3 The first respondent is a fund established in terms of the Sectoral Determination 6: Private Security Sector, South Africa issued by the Minister of Labour under the Basic Conditions of Employment Act, 75 of 1977 and registered as a pension fund in terms of the Act. Clause 1(1) of this sectoral determination reads as follows:

“(1) This determination shall apply in the Republic of South Africa to every employer in the Private Security Sector as defined in sub clause (2), and to all employees in that sector, except those employers and employees referred to in sub clause (3).

- 5.4 Clause 27(1) of the aforementioned sectoral determination relates to membership of the first respondent and reads as follows:

**“27. PRIVATE SECURITY SECTOR PROVIDENT FUND**

(1) Membership

- (a) Each employee, subject to the exclusions in clause 1(3) that falls within the definition of eligible employee as contained in the Fund Rules, shall, on or after the coming into operation of this Determination, become a member of the Private Security Sector Provident Fund.

(b) ...

(2) Contributions shall be made by employers and employees as from the date of coming into operation of this Determination ...”

5.5 It is clear that it is compulsory for all employers in the private security sector to participate in the first respondent as prescribed in the abovementioned sectoral determination except those that are exempted in terms of Rule 3.3. It is also compulsory for all employees in the private security sector to join the membership of the first respondent as *per* the sectoral determination mentioned above except those that are excluded in terms of clause 1(3). Therefore, employees of the second respondent should under all times have been members of the first respondent. To ensure compliance with the sectoral determination and the relevant rules of the first respondent, the first respondent and the Private Security Industry Regulatory Authority must take appropriate steps to ensure that the second respondent registers its qualifying employees with the first respondent.

5.6 The second respondent conducts business in the private security industry and is thus governed by the provisions of the Sectoral Determination 6: Private Security Sector. 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 3.2.7 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 RULE 3.2.7 below, each ELIGIBLE EMPLOYEE shall, as a condition of employment become a MEMBER of 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, an eligible employee is defined as:

**"ELIGIBLE EMPLOYEE"** means each person who is in the permanent employment of the FUND, or each person who is employed in the PRIVATE SECURITY SECTOR and who:-

- (a) is deemed to be an employee in terms of the SECTORAL DETERMINATION;
- (b) has not reached the NORMAL RETIREMENT DATE;
- (c) is not a member of another retirement fund providing retirement benefits which was set up in terms of an agreement under the Labour Relations Act, 1956 or in terms of a collective agreement concluded in council in terms of the Labour Relations Act (Act No.66 of 1995), but excludes any person who is employed by an employer who has been granted exemption to participate in the FUND in terms of Rule 3.3.

5.7 Rule 3.3 of the rules of the first respondent reads as follows:-

**"3.3 Exemption Criteria**

3.3.1 An EMPLOYER may apply for an exemption from the FUND provided that:-

- (a) An EMPLOYER who prior to the publication of Government Notice No.306 of 30 March 2001, had an existing pension or provident registered with the REGISTRAR covering employees for whom minimum wages are prescribed in SECTORAL DETERMINATION, as amended or replaced.

(b) An EMPLOYER who prior to the publication of Government Notice No. 306 of 30 March 2001, did not have an existing pension or provident fund registered with the REGISTRAR covering employees for whom minimum wages are prescribed in SECTORAL DETERMINATION No. 3, as amended or replaced, but before 30 March 2001, the EMPLOYER and its employees have consulted in writing to commence negotiations for the establishment of a pension or provident fund for such employees.”

5.8 According to the information obtained from the Companies and Intellectual Property Commission (CIPC) on 7 October 2016, the second respondent was registered on 3 September 2001 and is still in business. The first respondent commenced on 1 September 2002. According to the first respondent, the second respondent became a participating employer on 1 September 2010. The second respondent ought to have registered as a participating employer on 1 September 2002 as it was already in business when the first respondent commenced. Thus, the second respondent failed to timeously register as a participating employer in the first respondent, thereby contravening Rule 3.1 of the first respondent’s rules.

5.9 The complainant submitted that he was employed as a security officer by the second respondent, an employer in the private security sector. Therefore, the complainant is an eligible employee as defined in the rules of the first respondent. He provided this Tribunal with copies of his payslips, which indicate that the second respondent indeed deducted provident fund contributions from his salary. The complainant should have been registered as a member of the first respondent on 1 January 2012 when he commenced employment with the second respondent. However, the second respondent failed to timeously register as a participating employer in the first respondent and also register the complainant as a member of the first respondent. Therefore, the second respondent’s failure is in violation of Rules 3.1 and 3.2 of the rules of the first respondent as mentioned above.

Furthermore, it is undisputed that the second respondent did not apply for nor was it granted exemption from participating in the first respondent in terms of Rule 3.3 of the first respondent's rules as mentioned above. Therefore, the second respondent is not exempted from participating in the first respondent in terms of the abovementioned Rule 3.3 of the rules of the first respondent.

5.10 Rule 3.2.5 of the first respondent provides as follows:

“A MEMBER entering the PRIVATE SECURITY SECTOR for the first time or who has been out of the PRIVATE SECURITY SECTOR for more than 6 (six) months shall, for the first 4 (four) months of MEMBERSHIP, only be entitled to the RISK BENEFITS.”

Rule 3.2.6 goes on to provide as follows:

“After the MEMBER has been in the FUND for 4 (Four) months the other benefits of the FUND become payable and the contributions as per RULES 4.1.1 and 4.1.2 become payable in respect of that MEMBER.”

5.11 Therefore, where a member enters the private security sector for the first time or was previously employed in the private security sector and such employment terminated more than six months prior to his or her most recent employment in the sector, he or she shall be entitled to risk benefits only for the first four months of his or her membership. Put differently, in such an instance, the employer is not obliged to pay contributions towards his or her retirement funding for the first four months of his or her membership of the first respondent.

5.12 On 10 October 2016, the complainant confirmed telephonically that he was not employed in the security sector prior to his employment with the second respondent in January 2012. The complainant is therefore regarded as a first time employee in the private security sector. Therefore, rules 3.2.5 and 3.2.6 are applicable to him. The second

respondent was required to register him with the first respondent in January 2012 when he commenced employment with the second respondent and commenced deducting for risk benefits in January 2012 and commenced with provident fund contributions from May 2012, which is the date on which the four month waiting period would have lapsed. Therefore, the second respondent is in breach of rule 3.2.5 and 3.2.6 of the first respondent's rules.

### *Contributions*

5.13 Rule 4.1 of the first respondent's rules deals with the payment of contributions and provides as follows:

#### **"4 CONTRIBUTIONS**

##### **4.1 Contributions**

##### **4.1.1 Contributions by the MEMBER**

- (a) With effect from 1 September 2009, each MEMBER shall make a monthly contributions to the FUND at the rate of 6,5% (six comma five per cent) of his or her FUND SALARY towards his or her retirement benefit; provided that in respect of a MEMBER whose EMPLOYER'S monthly pay cycle ends during the month of September 2009, such MEMBER shall commence to contribute to the FUND at the rate of 6,5% (six comma five per cent) of his or her FUND SALARY with effect from 1 October 2009.
- (b) The monthly contributions shall rise to 7% (seven per cent) with effect from 1 September 2010 and shall rise further to 7,5% (seven comma five) per cent with effect from 1 September 2011; provided that where the monthly pay cycle ends during the month of September the higher rate shall apply with effect from 1 October of the applicable year.

- (c) The contributions by each MEMBER must be credited to his or her MEMBER SHARE ACCOUNT.

#### **4.1.2 Contributions by the EMPLOYER**

- (a) With effect from 1 September 2009, the EMPLOYER shall make a monthly contribution towards the retirement benefit funding of each MEMBER in its SERVICE at the rate of 6,5% (six comma five per cent) of the MEMBER'S FUND SALARY; provided that an EMPLOYER whose monthly pay cycle ends during the month of September shall commence to contribute at the rate of 6,5% (six comma five per cent) of the MEMBER'S FUND SALARY with effect from 1 October 2009.
- (b) The monthly contribution shall rise to 7% (seven per cent) with effect from 1 September 2010 and shall rise further to 7,5 (seven comma five per cent) with effect from 1 September 2011; provided that where the monthly pay cycle ends during the month of September the higher rate shall apply with effect from 1 October of the applicable year.
- (c) The contribution in RULE 4.1.2(a) shall include the premiums for the FUNERAL BENEFIT and any insured partial DISABILITY BENEFIT which premiums, together with so much as the TRUSTEES decide from time to time is required to meet the expenses of the FUND in terms of RULE 13.3.2, must be credited to the EXPENSE RESERVE ACCOUNT. In so deciding the TRUSTEES must take into account the amounts credited to the EXPENSE RESERVE ACCOUNT in terms of RULE 13.3.2(a). The TRUSTEES must also, on the advice of the ACTUARY, determine from time to time the proportion of the contributions in RULE 4.1.2(a) and (b) to be credited to the SELF INSURANCE RESERVE ACCOUNT in order to fund adequately the RISK BENEFITS."

5.14 The second 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 provident fund contributions and provide contribution schedules. 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.

- 5.15 The first respondent submitted that the complainant is not registered and no contributions were received on his behalf. The information before this Tribunal indicates that the second respondent is in default in respect of enrolling the complainant and with the provision of contribution schedules and provident fund contributions for the period May 2012 to 31 May 2016. The complainant submitted that the second respondent paid him a total amount of R10 773.68 as a refund of the amount deducted from his salary for contributions to the first respondent. The second respondent provided proof of payment of this amount. The fact that contributions were not submitted to the first respondent and the complainant was refunded the contributions by the second respondent is unlawful. This conduct also denies the complainant the benefit of the employer contributions that are owed by the second respondent. This conduct is in contravention with rules 4.3.1 and 4.3.2 of the first respondent and section 13A of the Act as the first respondent's rules require the second respondent to deduct contributions and submit them to the first respondent.
- 5.17 This Tribunal notes that the first respondent received contributions from the second respondent up to 31 August 2012. However, no contributions were allocated. The first respondent is required to allocate all contributions it received from the second respondent to establish whether or not there are any missing contributions and also to provide its members with proper records of their contributions. Therefore, the first respondent must be ordered to allocate all contributions it received from the second respondent until 31 August 2012 without any further delay.

5.18 The complainant is entitled to relief against the second respondent. The appropriate remedy is to put the complainant in the position he would have been had the second respondent registered him as a member of the first respondent and paid all provident fund contributions due (see *Orion Money Purchase Pension Fund (SA) v PFA and Others* [2002] BPLR 3830 (C) at 3839 F-G and *Mabale v Feedmix Provident Fund and Others* [2008]1 BPLR 29 at 37E-F).

**[6] ORDER**

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

6.1.1 The first respondent is ordered to register the second respondent as its participating employer with effect from 1 September 2002, within two weeks of this determination;

6.1.2 The first respondent is ordered to register the complainant as its member from January 2012 to 31 May 2016, within two weeks of this determination;

6.1.3 The first respondent is ordered to allocate contributions received from the second respondent up to 31 August 2012, within three weeks of the date of this determination;

6.1.4 The second respondent is ordered to submit all outstanding contribution schedules to the first respondent due in respect of the complainant for the period May 2012 to May 2016, in order to facilitate the computation of the complainant's withdrawal benefit within three weeks of this determination;

6.1.5 Should the second respondent fail to comply with paragraph 6.1.4, 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 second respondent's failure to submit the schedules;

- 6.1.6 The first respondent is ordered to compute the complainant's arrear contributions, together with late payment interest owed by the second respondent in terms of section 13A(7) of the Act, less the amount of R10 773.68 paid to the complainant as a refund of his contributions, within one week of receiving the contribution schedules in terms of either paragraphs 6.1.4 or 6.1.5 (whichever is applicable);
- 6.1.7 The first respondent is ordered to transmit to the second respondent its computations in paragraph 6.1.6 within three days of completing them;
- 6.1.8 The second respondent is ordered to pay the first respondent the complainant's outstanding contributions, together with late payment interest as computed in accordance with paragraph 6.1.6 *supra*, to the first respondent within two weeks of receiving the computations from the first respondent;
- 6.1.9 The first respondent is ordered to pay the complainant his withdrawal benefit received from the second respondent in terms of paragraph 6.1.8 within two weeks of receipt; and

6.1.10 The first respondent is ordered to provide the complainant with a breakdown of the payment made in accordance with paragraphs 6.1.8 and 6.1.9 above within two weeks of such payments.

**DATED AT PRETORIA ON THIS 19<sup>TH</sup> DAY OF OCTOBER 2016**

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

**Section 30M Filing: High Court**

*Parties: Unrepresented*