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Please quote our reference: **PFA/GP/0023950/2016/BT**

REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30A OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): SG MASOMBUKA (“complainant”) v THE PRIVATE SECURITY SECTOR PROVIDENT FUND (“first respondent”) AND FREEDOM FIGHTERS SECURITY CC (IN DEREGISTRATION) (“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, timeously register the deceased as a member thereof and pay all provident fund contributions due; and the failure of the first respondent to pay a death benefit following the death of the member.
- 1.2 The complaint was received by this Tribunal on 29 February 2016. A letter acknowledging receipt thereof was sent to the complainant on 17 March 2016. On the same date, letters were forwarded to the respondents giving them until 17 April 2016 to file responses to the complaint. On 18 April 2016, follow-up letters were forwarded to the

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respondents requesting them to file responses by 2 May 2016. On 2 June 2016, a response was received from the first respondent. No response was received from the second respondent.

- 1.3 After reviewing 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 is the son of Ms JB Masombuka (“the deceased”) who passed away on 23 June 2012. The complainant submitted a copy of the deceased’s payslip for 10 July 2012 reflecting that a deduction for provident fund purposes in the amount of R163.74 was made from her salary.
- 2.2 Following the death of the deceased, the beneficiaries of the deceased expected to receive a death benefit. However, no death benefit was paid to the beneficiaries of the deceased.

[3] COMPLAINT

- 3.1 The complainant is dissatisfied with the non-payment of a death benefit by the first respondent. He submitted that he and his siblings have been waiting for payment of the death benefit since 2012, however no payment was made.
- 3.2 The complainant requests this Tribunal to investigate the matter and order the payment of the death benefit to the deceased’s beneficiaries.

[4] RESPONSE

First respondent

- 4.1 The first respondent submitted that the second respondent became its participating employer on 1 March 2003 and is non-compliant in terms of section 13A of the Act. It confirmed the complainant's membership in it from November 2010. It states that fund contributions were received up to 5 July 2013 and allocated up to August 2012.
- 4.2 The first respondent stated that the deceased has a fund credit of R3 832.01, which represents contributions received on her behalf for the period November 2010 to May 2012.
- 4.3 The first respondent further submitted that if the deceased was indeed employed as alleged then the second respondent defaulted in respect of contributions required to have been paid on her behalf for the period June 2005 to October 2010 and June 2012. The first respondent further submitted that such default by the second respondent is in breach of Rules 4.3.1 and 4.3.2 which enjoin the second respondent to deduct contributions and transmit them to it. It further submitted that where a participating employer fails to pay the contributions, Rule 4.3.2(b) of its rules provides that it can only be liable to pay a benefit in respect of contributions it has received on behalf of the member.

Second respondent

- 4.4 The second respondent was afforded an opportunity to comment on the allegations made against it, as required by section 30F of the Act. 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 available facts.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

- 5.1 The issue that falls for determination is whether or not the first respondent should be held accountable for not paying the death benefit to the deceased's beneficiaries and if the second respondent should be held liable for failing to pay all contributions to the first respondent on behalf of the deceased.

The deceased's membership with the fund

- 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 & Another v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E and section 13 of the Act).
- 5.3 Rule 3 of the first respondent's rules dealing with the membership of a fund provides as follows:-

“3.1 EMPLOYER Participation

- 3.1.1 Subject to 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 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."

On the other hand, at the time of the complainant's employment, the rules of the first respondent contained a provision defining **Fund Qualification Service** as follows:

" a qualifying period of 6 months continuous permanent employment with any of the employers within the PRIVATE SECURITY SECTOR, including any periods of probation, immediately prior to joining the Fund."

- 5.4 According to the information obtained from the Companies and Intellectual Property Commission ("CIPC") on 7 September 2016, the second respondent was registered with CIPC on 11 March 1997 and is in deregistration process. The investigator of this matter attempted to contact the second respondent in order to establish if it is still in business, however, his attempts did not yield any positive outcome. The commencement date of the first respondent is 1 September 2002. The first respondent confirmed that the second respondent joined it as a participating employer in March 2003. The second respondent ought to have registered as a participating employer in the first respondent on 1 September 2002 when the latter commenced business. Therefore, the second respondent failed to comply with the provisions of rule 3.1.1 of the first respondent's rules.
- 5.5 The complainant commenced her employment with the second respondent on 1 June 2005 and was registered as a member of the first respondent in November 2010. Prior to 1 September 2009, the *fund qualification service* provision as set out above required an employee to have been in service for a period of six continuous months of permanent employment with an employer within the private security sector, prior to the deduction of provident fund contributions. Therefore, the second respondent ought to have enrolled the complainant as a

member of the first respondent by December 2005. Therefore, the second respondent is non-compliant with the fund qualification service of the first respondent.

5.6 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."

5.7 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 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 no later than seven days after the end of that month for which contributions are payable.

- 5.8 The first respondent submitted that it received contributions from the second respondent on behalf of the deceased from November 2010 to May 2012 and has a fund credit amounting to R3 832.01. Therefore, this Tribunal finds that the period for which the second respondent failed to pay contributions is December 2005 to October 2010. Such default is in breach of Rules 4.3.1 and 4.3.2 of the Rules of the first respondent and section 13A of the Act.
- 5.9 In light of the fact that the second respondent is in deregistration and does not appear to be in business as confirmed by the CIPC, this Tribunal cannot issue an order against an entity that does not operate a viable business. As a result, the outstanding contributions which are due by this entity are no longer recoverable from it. Regardless, this does not mean that the complainant is out of legal remedies, should the complainant wish to pursue the members of second respondent in terms of section 26(4) and (5) of the Close Corporations Act 69, of 1984, which provides that debts of the close corporation are not extinguished by the deregistration of the close corporation and may be recovered from its members, he can do so by a civil action in a court of law.
- 5.10 It also appears from the first respondent's response that it has not finalised the allocation of contributions as no allocations were made although contributions were received up to July 2013. This Tribunal notes with concern the practice of the first respondent of not allocating contributions received from employers. The first respondent must allocate contributions received in order to establish whether there is any further benefit due to the complainant.

Payment of the death benefit

5.11 The submissions placed before this Tribunal indicate that the deceased was still a member of the first respondent at the time of her death in June 2012.

5.12 Rule 6.1 of the first respondent's rules dealing with death benefits provides as follows:

“6.1.1 Benefit

If a MEMBER dies while in SERVICE, the following lump sum benefit shall be payable from the FUND subject to the provisions of RULE 4.3.2;

(a) Subject to RULE 6.1.2, two and a half times the MEMBER'S FUND SALARY at the date of his death;

(b) The MEMBER's FUND CREDIT at the date of his death.”

5.13 Therefore, in the event of the death of a member of the first respondent, a death benefit comprising the deceased's fund credit as at date of death and insured portion of two and a half times the member's fund salary is payable. In *casu*, the deceased died on 23 June 2012 whilst still in employment. Therefore, the provisions of rule 6.1 of the first respondent's rules are applicable as the deceased was a member of the first respondent at the time of her death. The first respondent must be ordered to pay the outstanding death benefit to the deceased's beneficiaries in accordance with section 37C of the Act. Information Circular PF No. 2 of 2010 provides that the provisions of section 37C are only applicable to lump sum benefits which become payable by the fund in terms of its rules as a result of the death of a member. Contributions were paid for the deceased until May 2012 and she died in June 2012. Therefore the premiums for risk benefits were up to date and a death benefit is therefore payable. Further to this, the deceased was still a member of the first respondent at the time of death. As a result, the nature of the benefit does not change and the provisions of

section 37C of the Act are applicable to the deceased's benefit. The first respondent must pay the deceased's benefit in accordance with section 37C of the Act.

- 5.14 The appropriate remedy is for the first respondent to pay the deceased's beneficiaries the death benefit and fund credit available (see *Orion Money Purchase Pension Fund (SA) v PFA and Others* [2002] BPLR 3830 (C) at 3839 F-G and *Mabale 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 finalise the process of allocating contributions received from the second respondent up to July 2013, within two weeks of this determination;
- 6.1.2 The first respondent is directed to conduct an investigation in terms of section 37C of the Act, determine the beneficiaries and their benefit entitlement, within twelve weeks of the date of this determination;
- 6.1.3 The first respondent is directed to pay the death benefit comprising of the fund credit and insured portion of two and a half times the member's fund salary to the deceased's identified beneficiaries, within two weeks of completion of its exercise in paragraph 6.1.2 above
- 6.1.4 The first respondent is ordered to provide the complainant with the breakdown of the death benefit within eight weeks of this determination.

SIGNED IN PRETORIA ON THIS 15TH DAY OF SEPTEMBER 2016

**MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR**

Section 30M Filing: High Court

Parties: represented