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Please quote our reference: **PFA/WC/00004066/2013/TN**

**REGISTERED POST**

Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): W SLINGERS (“complainant”) v THE PRIVATE SECURITY SECTOR PROVIDENT FUND (“first respondent”) AND PHANGELA GROUP (PTY) LTD (“second respondent”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the payment of a withdrawal benefit instead of a death benefit.
- 1.2 The complaint was received by this Tribunal on 29 July 2013. On 2 August 2013, a letter acknowledging receipt of the complaint was sent to the complainant. On the same date, letters were forwarded to the respondents, requesting them to submit their responses by 28 August 2013. On 29 August 2013, a further response letter was forwarded to the second respondent, requesting it to submit its response by 16 September 2013. A response was received from the first

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respondent on 30 August 2013. No response was received from the second respondent and further submissions were received.

- 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 surviving spouse of the late, Mr A Slingers (“the deceased”) who passed away on 30 December 2012. The deceased was employed by the second respondent from 1 May 2004 until 1 August 2011 when his employment was terminated. He became a member of the first respondent by virtue of his employment.
- 2.2 Upon the termination of his employment, the deceased became eligible to receive a withdrawal benefit from the first respondent in terms of the rules. The deceased’s estate is yet to be paid his withdrawal benefit.

## **[3] COMPLAINT**

- 3.1 The complainant is dissatisfied with the non-payment of the deceased’s benefit. She submitted that the deceased had five children. The deceased worked for the second respondent for a number of years. She submits that she approached the first respondent to pay the deceased’s benefit, however, she is yet to receive any benefit from it.
- 3.2 The complainant seeks this Tribunal to compel the first respondent to pay the deceased’s benefit.

## **[4] RESPONSE**

*First respondent*

- 4.1 The first respondent submits that the second respondent registered as a participating employer on 10 September 2004 and is non-compliant in terms of section 13A of the Act. Monthly contributions were received from the second respondent up to August 2012 and allocated up to July 2008. It submits that the deceased was registered as a member from 31 May 2004 and has a fund credit of R4 200.94. This amount represents contributions received from the second respondent on behalf of the deceased for May 2004 to July 2008. Furthermore, the deceased's benefit cannot be processed as a death benefit as the deceased's employment was terminated on 1 August 2011 and he passed away on 30 December 2012. In terms of rule 6.1.1 a death benefit is only payable when a member dies in service.
- 4.2 The deceased appears in the unallocated monthly contribution schedules received from the second respondent from September 2008 to July 2009. It submits that the second respondent's records are being updated by its administrator, ABSA Consultants and Actuaries (Pty) Ltd ("ACA"). The first respondent further submitted that the second respondent's failure to make regular contributions for August 2008 to July 2011 in respect of the deceased is in breach of Rules 4.3.1 and 4.3.2 of its rules, which state as follows:
- "4.3.1 The MEMBER's contributions in terms of RULE 4.1 shall be deducted by his EMPLOYER from his salary or wages and must, together with the EMPLOYER'S contributions 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 RULE 4.3.1 are paid to the FUND within 7 days of the calendar month in respect of which the 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. Should the EMPLOYER fail to comply with the provision of this RULE, the following shall apply:

- (a) ...
- (b) where failure to pay contributions has continued for more than the period referred to in the opening paragraph of this RULE 4.3.2, the FUND shall not be liable for payment of any benefit payable in terms of these RULES which would have been secured by the contributions that were not paid to the FUND; provided that the TRUSTEES shall take all reasonable steps in ensuring that contributions are paid to the FUND and the interests of the MEMBERS are protected in terms of these RULES and the ACT, in particular Section 13A and Regulation 33 of the Act.”

4.3 The first respondent further submitted that not only is the second respondent in breach of its rules, but also in breach of section 13A of the Act, which provides amongst other things, that the employer of a member of a pension fund is required to pay to the fund in full any contribution, which in terms of the rules of the fund, is to be deducted from the member’s remuneration, and any contributions for which the employer is liable in terms of those rules.

4.4 The first respondent further submitted that, in light of the above, it can only pay what has been received on behalf of the deceased as mentioned above. Rule 4.3.2 (b) of its rules mentioned above makes it clear that it cannot pay that part of the deceased’s benefit that would have been secured by the contributions that should have been paid to it by the second respondent.

#### *Second respondent*

4.5 The second respondent was afforded an opportunity to comment on the allegations made against it, as required by section 30F of the Act and no response was received. 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**

### *Introduction*

5.1 The issue to be determined is whether or not the first respondent acted in accordance with the Act and the first respondent's rules in paying a withdrawal benefit instead of a death benefit in terms of Section 37C of the Act. Furthermore, this Tribunal will determine whether or not all the deceased's contributions were paid to the first respondent.

### *Benefit payable*

5.2 The registered rules of a fund are binding on a fund and its members (see *Section 13 of the Act; Tek Corporation Provident Fund and Others v Lorentz* [2003] 3 BPLR 227 (SCA)). The board's authority therefore needs to be determined with reference to the fund rules. Rule 6.1 of the first respondent's rules deals with events that should occur for a member's dependants and potential beneficiaries to be paid a death benefit and states as follows:

#### **6. DEATH AND DISABILITY BENEFITS**

##### **6.1. Death Benefit**

##### **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.

Provided that the benefit payable in terms of RULE 6.1.1(a) above shall be subject to a FREE-COVER LIMIT which may, upon application by the MEMBER, be waived subject to: -

- (a) the MEMBER providing the TRUSTEES with medical evidence of his good health; and
- (b) the assessment and approval of the MEMBER's application on such terms and conditions as shall be determined by the TRUSTEES from time to time.

5.3 Information Circular PF No.2 of 2010, provides clarity on the applicability of section 37C where a member became entitled to a withdrawal or retirement benefit and subsequently dies before payment or transfer of such withdrawal or retirement benefit. It 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. When a member exits the fund as a result of resignation, dismissal, retrenchments or retirement the relevant retirement or withdrawal benefit accrues in terms of the rules of a fund. Should the member die after date of accrual of a withdrawal benefit, but before the benefit is paid or before a member could make an election for the benefit to be transferred fund, the legal nature of the benefit does not change and the provisions of section 37C of the Act are therefore not applicable. As the deceased died after the termination of his employment, a withdrawal benefit is payable in this instance.

#### *Payment of monthly contributions*

5.4 Rule 3 of the first respondent's rules dealing with fund membership 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.

### **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.”

- 5.5 According to the information obtained from the Companies and Intellectual Property Commission (CIPC) website on 23 January 2014, the second respondent commenced its business on 21 February 2012 and is still in business. The commencement date of the first respondent is 1 September 2002. The first respondent submitted that the second respondent registered as a participating employer with it on 10 September 2004.
- 5.6 On the facts of the present case, the deceased was employed by the second respondent from 1 May 2004 to 1 August 2011. Prior to 1 September 2009, the *eligibility criterion* (as set out in the first respondent’s rules) 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. As a result thereof, the deceased should have been registered as a member of the first respondent after six months of commencement of his employment, being November 2004. The first respondent submitted that the deceased was registered as a member of the first respondent in 31 May 2004. As a result, the second respondent registered the deceased as a member of the first

respondent timeously. However, it failed to pay full contributions on behalf of the deceased from August 2008 to July 2011.

5.7 Rule 4.1 and 4.2 of the first respondent's revised rules dealing with the payment of contributions reads:-

**“4.1.1 Contributions by the MEMBER**

- (a) With effect from 1 September 2009, each MEMBER shall make a monthly contribution 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 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 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.

The contributions in RULE 4.1.2(a) and (b) 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 13.3.3(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.

- 5.8 The second respondent has a duty placed upon 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. 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.
- 5.9 Rule 7.1 of the rules of the first respondent regulates the payment of benefits in the event of termination of a member's employment for other reasons save for retirement and provides that such a member may elect to receive his or her benefit as a cash lump sum. Such a lump sum benefit must be equal to the member's fund credit. Fund credit is defined in Rule 2 as follows:

“**FUND CREDIT**” means in respect of each MEMBER the amount to the credit of his or her MEMBER SHARE ACCOUNT (including in respect of a DEFERRED PENSIONER) or to his or her credit in the UNCLAIMED

BENEFITS ACCOUNT, as the case may be, and includes where applicable the INSURED DEATH BENEFIT or the DISABILITY BENEFIT.”

5.10 Member share account is defined in Rule 2 as follows:

“**MEMBER SHARE ACCOUNT**” means the ACCOUNT referred to in RULE 4.8 and which relates to each MEMBER, including a DEFERRED PENSIONER but excluding a MEMBER whose FUND CREDIT has been transferred to the UNCLAIMED BENEFITS ACCOUNT.”

5.11 For the present purposes, Rule 4.8 provides that a member share account shall essentially comprise contributions, transfer values (if any), surplus apportionments (if any) and positive fund return thereon, less risk and administration costs.

5.12 In *casu*, the deceased left his employment in August 2011. As a result, he should have been paid his withdrawal benefit in terms of the rules of the first respondent. However, the deceased’s estate is yet to be paid a withdrawal benefit on his behalf. Furthermore, the first respondent failed to allocate all contributions received from the second respondent for September 2008 to July 2009. The first respondent submitted that its ACA is in the process of allocating these contributions. It follows that the first respondent has not discharged its liability towards the deceased’s estate. Therefore, the appropriate relief in the circumstances is to order the first respondent to recalculate contributions received on behalf of the complainant and pay his withdrawal benefit. Furthermore, the first respondent should provide the complainant with a breakdown of the deceased’s benefit.

5.13 The complainant is entitled to relief. The appropriate remedy is to put the deceased’s estate in the position it would have been had the second respondent paid all contributions on behalf of the deceased (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).

5.14 This complaint will also be referred to the Private Security Industry Regulatory Authority for investigation into the conduct of the second respondent.

**[6] ORDER**

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

- 6.1.1 The first respondent is ordered to complete its allocation process for the period September 2008 to July 2009 in respect of contributions received from the second respondent during that period, within two weeks of the date of this determination;
- 6.1.2 Should there be outstanding contributions, the second respondent is ordered to submit all outstanding contribution schedules to the first respondent for the period August 2008 to July 2011, in order to facilitate the computation of the deceased's withdrawal benefit, within three weeks of this determination;
- 6.1.3 Should the second respondent fail to comply with paragraph 6.1.2, the first respondent is ordered to reconstruct the deceased's contribution schedules based on the information already in its possession, within two weeks of the second respondent's failure to submit the schedules;
- 6.1.4 The first respondent is ordered to compute the deceased's outstanding withdrawal benefit, together with late payment interest owed by the second 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 (whichever is applicable);

- 6.1.5 The first respondent is ordered to transmit to the second respondent its computations in paragraph 6.1.4 within three days of completing them;
- 6.1.6 The second respondent is ordered to pay the deceased's outstanding 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 deceased's estate the outstanding withdrawal benefit, less any deductions permitted in terms of the Act, within two weeks of receiving payment from the second respondent;
- 6.1.8 The first respondent is ordered to process the deceased's withdrawal notification form attached to the complaint; and
- 6.1.9 The first respondent is ordered to provide the complainant with a copy of the deceased's last benefit statement, within eight weeks of the date of this determination.

**DATED AT PRETORIA ON THIS 30<sup>TH</sup> DAY OF JANUARY 2014**

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

**Section 30M Filing: High Court**

*Parties: Unrepresented*