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**REGISTERED POST**

Dear Sir,

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

**[1] INTRODUCTION**

- 1.1 The complaint concerns the non-payment of a death benefit.
- 1.2 The complaint was received by this Tribunal on 10 March 2016. An acknowledgement letter was sent to the complainant on 16 March 2016. On the same date, letters were sent to the respondents informing them about the complaint and giving them until 16 April 2016 to submit responses. Follow-up response letters were sent to the respondents on 20 April 2016 giving them until 4 May 2016 to submit their responses. A response was received from the first

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respondent on 11 May 2016. The second respondent failed to submit a response. The complainant made further submissions during a telephone conversation with this Tribunal on 2 September 2016.

- 1.3 Having considered the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are well-known to the parties, these shall be repeated only to the extent that they are pertinent to the issues raised herein. The determination and reasons therefor appear below.

## **[2] FACTUAL BACKGROUND**

- 2.1 The deceased, Zukisani Zongo, passed away on 8 January 2016. The complainant is the deceased's brother. The deceased was employed by the second respondent from 26 March 2014 until his death and was a member of the first respondent. The complainant submitted two copies of the deceased's payslips dated November 2015 and December 2015 reflecting a provident fund deduction in the amount of R215.55 made from his salary.
- 2.2 Following the death of the deceased, a death benefit became due and payable to his beneficiaries. However, no death benefit was paid.

## **[3] COMPLAINT**

- 3.1 The complainant is aggrieved with the delay in the payment of the death benefit following the death of his brother. He submitted that he is in debt due to having to arrange for the deceased body to be transported to the Eastern Cape and arranging the funeral.

*Further submissions*

- 3.2 The complainant submitted that the deceased was employed by Van Tonder Security and immediately thereafter he joined the second respondent on 26 March 2014. He further stated that when the deceased passed away, he was still in the employ of the second respondent.
- 3.3 The complainant requests this Tribunal to investigate the matter.

#### **[4] RESPONSE**

- 4.1 The first respondent submitted that the second respondent became a participating employer in it on 1 May 2005 and is non-compliant in terms of section 13A of the Act. Provident fund contributions were received up to 29 May 2015 and allocated up to May 2014.
- 4.2 The first respondent submitted that the deceased was registered as a member of the fund from May 2014 and has a fund credit in the amount of R244.09 which represents provident fund contributions received from the second respondent on his behalf for the period May 2014.
- 4.3 The records provided by the administrator indicate that the deceased appears in contribution schedules received from the second respondent for the period June 2014 to January 2015. Although the second respondent provided contribution schedules, it only provided corresponding contribution payments for the period June 2014 which is an underpayment.
- 4.4 Further, the first respondent submitted that if the deceased was employed from 26 March 2014 until his death, then the second respondent is in default with provident fund contributions on his behalf for the period March 2014 to April 2014 and July 2014 to January 2016. The second respondent's failure to pay full provident fund contributions on behalf of the deceased is in breach of Rules 4.3.1 and 4.3.2 which

require the deduction of provident fund contributions from a member's salary and payment thereof to the first respondent. Further, the second respondent's failure to pay provident fund contributions on behalf of the deceased is in breach of section 13A of the Act which requires an employer to pay provident fund contributions on behalf of its employees to a fund.

- 4.5 It submitted that in terms of Rule 4.3.2(b) of its rules, it can only pay so much that it received on behalf of the complainant from the second respondent. The first respondent further submitted that the second respondent is in criminal litigation in terms of S13A(8) and (9) read with S37 of the Act.

*Second respondent*

- 4.6 The second respondent was afforded an opportunity to comment on the allegations made against it as required in terms of section 30F of the Act. However, no response was received from it. In the circumstances, this Tribunal will dispose of the matter on the basis of the available facts.

**[5] DETERMINATION AND REASONS THEREFOR**

- 5.1 The issues which fall for determination by this Tribunal are whether or not the second respondent should be held accountable for having failed to pay contributions on behalf of the deceased, resulting in the non-payment of the death benefit to his beneficiaries.
- 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 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.”

- 5.4 According to the information obtained from the Companies and Intellectual Property Commission (CIPC) on 2 September 2016, the second respondent commenced its business in the private security sector on 11 April 2002. The first respondent commenced on 1 September 2002. According to the first respondent, the second respondent became its participating employer on 1 May 2005. The second respondent ought to have registered as a participating employer in the first respondent on 1 September 2002, as it was already in business when the latter commenced. The second respondent failed to register itself timeously as a participating employer in the first respondent. Therefore, the second respondent is in breach of rule 3.1 of the first respondent's rules. The deceased was employed by the second respondent on 26 March 2014. The first respondent submitted that he was registered as its member in May 2014. The second respondent ought to have registered the deceased as a

member of the first respondent in March 2014 when he commenced employment. Thus, the second respondent failed to timeously register the deceased as a member of thereof.

5.5 Rule 3.2.5 of the first respondent's rules provides as follows:

"3.2.5 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 in turn provides as follows:

"3.2.6 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."

5.6 The complainant informed this Tribunal that the deceased was initially employed by Van Tonder Security and immediately thereafter he joined the second respondent on 26 March 2014. Therefore, the deceased was employed in the private security sector within the six month period and rules 3.2.5 and 3.2.6 are not applicable to him. The second respondent ought to have commenced deducting provident fund contributions from his salary from April 2014, considering the short period of employment in March 2014.

5.7 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.”

- 5.8 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.
- 5.9 The first respondent confirmed its intention to institute legal proceedings against the second respondent for outstanding contributions in the Pretoria High Court. However, this does not preclude this Tribunal from holding the second respondent liable for payment of outstanding contributions as legal proceedings have not yet been instituted in a court of law.
- 5.10 According to the first respondent, the deceased has a fund credit in the amount of R244.09 which represents provident fund contributions received from the second respondent for the period May 2014. Further,

the second respondent provided contribution payments for the period June 2014 however, payment received is an underpayment. From the submissions before this Tribunal, the second respondent failed to pay provident fund contributions on behalf of the deceased for the period April 2014 to December 2015 owing to the short period of employment in March 2014 and the fact that the contributions received by the first respondent for June 2014 is an underpayment.

*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 his death.

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 an insured portion of two and a half times the member's fund salary is payable.

5.14 In *casu*, the deceased died on 8 January 2016 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 his death. It is this Tribunal's finding that the deceased's dependants should be put in the position they would have been in had the second respondent registered the deceased timeously with the first respondent and paid his contributions in full. The second respondent must pay the deceased's outstanding contributions to the first respondent in order for the latter 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. 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 fund credit. The first respondent must pay the deceased's fund credit in accordance with section 37C of the Act.

- 5.15 In the event that the first respondent is not able to pay the death benefit as a result of arrear contributions and late notification by the second respondent, the deceased's dependants and or beneficiaries should be put in the position they would have been in had the second respondent paid all the deceased's contributions timeously. In *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 235 it was held that the employer in a pension fund at the very least owes a duty of good faith to its employees. The second respondent would be liable for the payment of a death benefit which includes the deceased's fund credit at the date of death plus two and a half times his fund salary at the date of his death in terms of rule 6.1.1 of the first respondent's rules.
- 5.16 The first respondent submitted that fund contributions were received up to May 2015 and allocated in May 2014. This Tribunal notes with concern the practice of the first respondent of not allocating

contributions received from employers. The conduct of the first respondent is in breach of section 13B(5) of the Act. The first respondent must allocate contributions received up to 29 May 2015 in order to establish whether there are further missing contributions due by the second respondent.

- 5.17 The appropriate remedy is for the second respondent to register itself as a participating employer of the first respondent timeously and pay all outstanding contributions due on his behalf (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 second respondent is ordered to register as a participating employer in the first respondent from 1 September 2002, within two weeks of this determination;
- 6.1.2 The first respondent is ordered to allocate all contributions received from the second respondent up to May 2015 and update its records, within three weeks of the date of this determination;
- 6.1.3 The second respondent is ordered to register the deceased as a member of the first respondent from March 2014 to January 2016, within two weeks of this determination;
- 6.1.4 The second respondent is ordered to submit all outstanding contribution schedules to the first respondent for the period April 2014 to December 2015 including the underpayment in

order to facilitate the computation of the deceased's contributions, 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 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;
- 6.1.6 The first respondent is ordered to compute the deceased's outstanding contributions plus 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 paragraph 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 deceased's outstanding contributions, plus late payment interest as computed in paragraph 6.1.6 within two weeks of receiving the computations from the first respondent;
- 6.1.9 The first respondent is ordered to calculate the amount of the death benefit that would have been payable to the deceased's beneficiaries in terms of Rule 6.1.1, including the insured portion within one week of receiving the contribution schedules in terms of either paragraph 6.1.4 or 6.1.5 (whichever is applicable);

- 6.1.10 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;
- 6.1.11 The first respondent is directed to pay the death benefit to the deceased's identified beneficiaries within two weeks of completion of its exercise in paragraph 6.1.10 above;
- 6.1.12 In the event that the first respondent is unable to pay the insured portion of the deceased's death benefit to the beneficiaries as calculated in paragraph 6.1.9 above, the first respondent must notify the second respondent of the reason for not paying the insured portion, provide it with the names of the deceased's beneficiaries as established in paragraph 6.1.10 and the amount computed in paragraph 6.1.9 above that it is liable to pay to the deceased's beneficiaries above within four weeks of reaching its decision in paragraph 6.1.10 above;
- 6.1.13 The first respondent is directed to pay the identified beneficiaries the deceased's fund credit that it is currently holding for the period May 2014 to June 2014, within four weeks of completion of its exercise in paragraph 6.1.10 above;
- 6.1.14 The second respondent is directed to pay the amount provided by the first respondent in paragraph 6.1.9 above less the amount paid in paragraph 6.1.13 above to the deceased's beneficiaries as identified in paragraph 6.1.10, within two weeks of receipt of the information in paragraph 6.1.9; and
- 6.1.15 The first respondent is ordered to provide the complainant with the breakdown of the death benefit within twelve weeks of this determination.

**DATED AT PRETORIA ON THIS 04<sup>TH</sup> DAY OF OCTOBER 2016**

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**MA LUKHAIMANE  
PENSION FUNDS ADJUDICATOR**

**Section 30M filling: High Court**

*Parties unrepresented*