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Please quote our reference: **PFA/WC/00107922/2024/TAM**

Fund reference: **SALTEB-161411**

**PER REGISTERED POST**

Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): NK WYNGAARD (“complainant”) v PRIVATE SECURITY SECTOR PROVIDENT FUND (“fund”) AND VETUS SCHOLA BOLAND (PTY) LTD (“employer”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the failure of the employer to remit all provident fund contributions on the complainant’s behalf to the fund.
- 1.2 The complaint was received by the Adjudicator on 25 January 2024. On 30 January 2024, the Adjudicator submitted a letter to the complainant requesting further information. On 31 January 2024, a letter acknowledging receipt of the complaint was sent to the complainant. On the same date, letters were sent to the respondents to resolve the complaint by 28 February 2024. A response was received from the employer on 01 February 2024. A response was also received from the

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fund on 27 February 2024. No further submissions were received from the parties.

- 1.3 Having considered the written submissions, 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 commenced employment on 25 February 2019, as attested by a payslip, to 31 October 2023. She was registered with the fund under the participation of the employer.
- 2.2 As at 27 February 2024, the complainant had a fund credit of R5 343.54.

## **[3] COMPLAINT**

- 3.1 The complainant submitted that the employer deducted provident fund contributions from her salary without remitting same to the fund. She stated that the fund informed her that the employer made only 9 payments in 2019. She provided copies of her payslips, *inter alia*, for October 2023 which reflects a provident fund deduction of R345.35.
- 3.2 She requests the Adjudicator to investigate the matter.

### *Further submissions*

- 3.3 On 14 June 2024, the complainant confirmed that she entered the private security sector for the first time when she commenced employment with the employer. She confirmed that she left her employment on 31 October 2023 and became aware of the employer's non-compliance on 25 January 2024.

## [4] **RESPONSES**

### *Fund*

- 4.1 The fund submitted that the employer is not compliant in terms of section 13A of the Act. It submitted that section 13A letters have been issued to the employer and the matter has been reported to the Financial Sector Conduct Authority (“FSCA”) in line with statutory requirements.
- 4.2 The fund submitted that the complainant was registered as its member on 1 March 2019 by virtue of her employment with the employer. It stated that the complainant had a fund credit of R5 343.54 as at 27 February 2024 representing provident fund contributions for June 2019 to November 2019. The contribution schedule reflects the allocation of contributions to risk and administration expenses for March 2019 to May 2019.
- 4.3 The fund submitted that it does not have records of the complainant’s previous employment before February 2019. It submitted that on 30 January 2024, the complainant indicated that her employment with the employer was her first within the private security sector. Thus, it indicated that rules 3.2.5 and 3.2.6 of the fund are applicable to her. It submitted that the employer ought to have commenced paying contributions from July 2019, however, contributions commenced in June 2019 and in this regard, the employer is bound by the rules from June 2019.
- 4.4 The fund provided a computation which reflects an arrear amount of R39 477.18 for December 2019 to October 2023, plus late payment interest of R18 845.52 calculated up to 22 April 2024.

### *Employer*

- 4.5 On 01 February 2024, the employer submitted that all declarations of provident fund contributions have been made to the fund every month. It submitted that it is in arrears with its provident fund contributions due to an error by a third-party supplier, where submissions to the fund and deductions from the payroll were not correct causing a discrepancy in what was paid over.
- 4.6 It submitted that the fund is informing employees that they are not registered when this is in fact incorrect. It submitted that the fund indicated that it will not accept part payments, any payments made to the fund are allocated to the oldest outstanding contribution record and not to the members. It submitted that it relies on the Adjudicator to assist it in instructing the fund administrator to allocate specific funds to specific people to avoid any inconvenience to those members who have left service.

**[5] DETERMINATION AND REASONS THEREFOR**

*Introduction*

- 5.1 The issue that falls to be determined by the Adjudicator is whether or not the employer failed to pay all provident fund contributions due on the complainant's behalf to the fund.

### *Timeous registration*

5.2 The rules of a fund are supreme and binding on its officials, members, shareholders, beneficiaries, and anyone so claiming from the fund. In the Supreme Court of Appeal (SCA) matter of *Municipal Employees Pension Fund v Mongwaketse* (969/2019) [2020] ZASCA 181 (23 December 2020) at paragraphs [42] to [44], Wallis JA held that the rules of a fund are its constitution, and that the doctrine of *ultra vires* applies. If the rules of a fund do not afford a fund the legal power or capacity to do something, then such purported act by the fund is ultra vires and accordingly null and void. The Constitutional Court affirmed the SCA's findings in *Municipal Employees Pension Fund and Another v Mongwaketse* (CCT34/21) [2022] ZACC 9 at paragraph [39] where it stated that the application of the *ultra vires* doctrine to pension funds is consistent with the constitutional principle of legality.

5.3 Rule 3 of the fund deals with membership and provides as follows:

#### 3.2 **MEMBER Participation**

3.2.1 Subject to RULE 3.2.3 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 The complainant commenced employment on 25 February 2019 and was registered with the fund on 01 March 2019. The complainant was timeously registered with the fund in March 2019 as she commenced employment in late February 2019. Therefore, the employer is compliant with rule 3.2.1 above.

### *Payment of contributions*

5.5 Rules 3.2.5 and 3.2.6 read as follows:

“3.2.5 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.

And

“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 Clause 30(6) of the Main Collective Agreement reads as follows:

**“(6) Waiting period**

- (a) An employee entering the private security sector for the first time and an employee who has been out of the sector for more than six months shall be required to wait for a period of four months before joining the fund.
- (b) An employee with at least four months of uninterrupted service in the private security industry, not necessarily with the same employer, shall join the fund immediately upon joining a new employer.

5.7 Clause 30(7) of the Main Collective Agreement goes on to provide:

**“(7) Special provision during waiting period**

- (a) Every employee shall, during the waiting period set out in sub clause (6), enjoy risk cover in respect of death and disability benefits, as well as the fund funeral scheme, which contribution, totalling 5% (five percent) of the Fund Salary, per month shall be borne equally between the employer and employee.

- (b) This risk cover shall apply as from the first day of employment and shall be submitted to the fund administrators at the end of every month.

5.8 The submissions indicate that the complainant was entering the sector for the first time when she joined the employer on 25 February 2019. Therefore, rules 3.2.5 and 3.2.6 and clauses 30(6) and (7) of the main Collective Agreement are applicable to her. The employer ought to have paid contributions towards risk and administration expenses for March 2019 to June 2019 and provident fund contributions from July 2019. The submissions indicate that the employer commenced paying provident fund contributions in June 2019. Therefore, the employer is bound by the rules from June 2019.

5.9 Rule 4.1 of the fund 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 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."



5.10 The payment of retirement fund contributions in occupational funds is regulated by the provisions of section 13A of the Act read together with FSCA Conduct Standard 1 of 2022 (RF) (“Conduct Standard”). The Conduct Standard came into effect on 19 February 2023 and repealed Regulation 33 of Act. Contributions paid prior to 19 February 2023 are regulated by Regulation 33. In terms of section 13A read together with Regulation 33, an employer was required to pay contributions directly to the fund by the 7th of the month following the month for which the contributions were made, and submit contribution schedules by the 15th of the month following the month for which the contributions were made. Initial contribution statements were required to have the following information: the name and registration number of fund, contribution period, name and address or pay-point of the employer, responsible person to contact at the employer, identification details of the member, date of membership, percentage or amount of contributions split between member and employer as well as an indication of any additional voluntary contributions. Subsequent contribution statements were required to have all the information contained in the initial contribution statement (as updated) and a reconciliation with the contribution statement for the previous period showing any differences in the data. Regulation 33 assigned persons who were responsible for checking and monitoring the receipt of contributions and schedules from the employer with reporting duties to the board if there was any failure on the part of the employer. The board was then tasked with ensuring that the infringement is brought to the attention of the affected members by the monitoring person and to the attention of the FSCA informing the FSCA of any action taken. Such action included laying a criminal complaint against the employer in terms of section 37(1) of the Act within the period specified in Regulation 33(5). Regulation 33(7) also provided that compound interest would be payable at the rate prescribed in GN 397 as published in Government Gazette 33182 of 12 May 2010.

- 5.11 The Conduct Standard carried over most of the requirements contained in Regulation 33 subject to certain additions and amendments. In terms of the Conduct Standard, the contact person responsible at the employer or pay-point dealing with enquiries relating to contribution statements and payment of contributions must be added as well as the identity of persons who are to be held personally liable for contributions. Additional personal information relating to the member must be provided in the initial contribution statement including the employer pay or industry number; income tax number; contact number, including (where available) cellular phone number; electronic mail address (where available); postal address; residential address; and annual pensionable emoluments. Subsequent contribution statements must include all the information required in terms of the initial contribution statement, save that the name of the person personally liable for payment of contributions should only be provided if that has changed.
- 5.12 The fund submitted that the complainant had a fund credit of R5 343.54 as at 27 February 2024 representing provident fund contributions for June 2019 to November 2019. The employer submitted that it is in arrears with its provident fund contributions due to an error by a third-party supplier. The employer seeks assistance with the fund to allocate contributions to specific members first. However, this is an internal issue which does not absolve the employer of its duty to pay contributions. The fund provided a computation which reflects an arrear amount of R39 477.18 for December 2019 to October 2023, plus late payment interest of R18 845.52 calculated up to 22 April 2024, which date has passed. Therefore fund must recalculate the amount of the late payment interest due on the arrear amount.
- 5.13 The employer must be ordered to pay to the fund the arrear amount of R39 477.18 for December 2019 to October 2023. The fund must allocate this amount to the complainant's record and no one else irrespective of whether the employer owes for other members. If the fund wants outstanding contributions for all members, it must follow its rules

and the Act to recover these, instead of piggybacking on the complainant. The employer's default is in breach of rules 4.1.1 and 4.1.2 of the fund and the Main Collective Agreement.

*Payment of the complainant's fund credit*

5.14 The complainant exited the service of the employer on 31 October 2023 and is entitled to receive a lump sum benefit equal to her fund credit in terms of rule 7.1 of the fund. The rules define "fund credit" 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."

5.15 The facts indicate that the fund holds a fund credit in the amount of R5 343.54 representing provident fund contributions for June 2019 to November 2019. Therefore, the fund must pay the fund credit it holds for the complainant.

5.16 However, the fund administrator requires the complainant's withdrawal claim form signed by the complainant and stamped by the employer in order to pay the fund credit. It is the duty of the employer to submit the complainant's claim forms to the fund together with all supporting documents. This, in turn, allows the fund to determine which benefit is payable and to make payment accordingly (see *Rwexwana v Idaho Spur Provident Fund and Others* [2005] 7 BPLR 640 (PFA) at 642E-F). Thus, the complainant should submit the withdrawal claim form he completed to the fund, together with a copy of her identity document, income tax number, and a bank statement not older than three months. The fund should accept the complainant's withdrawal claim form without the employer's stamp or signature.

## *Conclusion*

5.17 The appropriate remedy is to put the complainant in the position he would have been had the employer registered him with the fund and paid all provident fund contributions due on his behalf (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 instance, the order of the Adjudicator is as follows:

6.1.1 The employer is ordered to pay to the fund the amount of R39 477.18 representing arrear contributions for December 2019 to October 2023, within three weeks of this determination;

6.1.2 The fund is ordered to compute the amount of late payment interest due on the arrear amount in paragraph 6.1.1 above in terms of section 13A(7) of the Act and provide same to the employer for payment;

6.1.3 The complainant is directed to submit a withdrawal claim form together with a copy of her identity document, tax number, and a bank statement not older than three months to the fund through electronic mail at [psspf.exit@salteb.co.za](mailto:psspf.exit@salteb.co.za) or facsimile number (086) 644 4328, within four weeks of this determination;

6.1.4 The fund is ordered to pay the complainant the fund credit of R5 343.54 representing provident fund contributions for June 2019 to November 2019, within two weeks of receiving the complainant's claim documentation in paragraph 6.1.3 above;

- 6.1.5 The fund is ordered to pay the complainant her outstanding withdrawal benefit which consists of the arrear contributions remitted by the employer in paragraph 6.1.1 above, less any deductions allowed in terms of the Act, within two weeks of receiving payment from the employer; and
- 6.1.6 The fund is ordered to provide the complainant with a breakdown of the withdrawal benefit paid in paragraphs 6.1.4 and 6.1.5 above, within one week of effecting such payment.

**DATED AT PRETORIA ON THIS 21<sup>ST</sup> DAY OF JUNE 2024**

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

**Section 30M Filing: High Court**

*Parties unrepresented*

