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BY REGISTERED POST

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Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 of 1956 (“the Act”): H M VAN DER BERG (“complainant”) v JOHANNESBURG MUNICIPAL PENSION FUND (“first respondent”), NMG CONSULTANTS & ACTUARIES (PTY) LTD (“second respondent”) AND CITY OF JOHANNESBURG (“third respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the discrepancy between the complainant’s pensionable emoluments and the actual rate of contributions that were deducted from her salary, which affected her fund value in the first respondent.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act No. 24 of 1956

-The service offered by the Pension Funds Adjudicator is free to members of the public-

- 1.2 The complaint was received by this tribunal on 11 March 2009. A letter acknowledging receipt thereof was sent to the complainant on 26 March 2009. On 27 March 2009 a letter was dispatched to the first and second respondents giving them until 27 April 2009 to file a response. A response on behalf of the first respondent was received from the second respondent on 24 April 2009. This tribunal also received a response on behalf of the third respondent on 6 August 2009 from Bowman Gilfillan Incorporated, the third respondent's legal representative. On 1 June 2009 this tribunal received further submissions from the complainant.
- 1.3 Having considered the written submissions, it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties, only those facts that are pertinent to the issues raised herein will be repeated. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant was employed by the third respondent from 4 January 1986 until she resigned on 1 October 2008. The complainant was a member of the first respondent by virtue of her employment from 4 January 1986 until she withdrew from the fund on 30 September 2008. The first respondent is a pension fund organisation registered in terms of the Act and is administered by the second respondent.
- 2.2 During 2001 the third respondent introduced new uniform retirement fund arrangements for its employees in order to eliminate racial disparities and to introduce a single fund for all employees. In November 2001 the third respondent issued a notice to terminate its participation in the first respondent and its "sister" fund, the City of Johannesburg Pension Fund ("CJPF"). However, the third respondent's participation in the first respondent and the CJPF could not be finalised as a result of a dispute

relating to the funding position of both funds. The funds took the view that the third respondent was obliged to fund certain substantial unfunded benefits in the funds, while the third respondent disputed that it was obliged to do so.

- 2.3 While negotiations were ongoing in order to settle the dispute, the funds' liabilities continued to outgrow their assets, *inter alia*, as a result of annual salary increases. During 2003 the first respondent agreed with the third respondent that pensionable emoluments for the purposes of the first respondent's rules would increase in future only by the general level of salary increase granted by the Council from time to time to all employees across the board. This meant that higher salary increases granted to employees would not be taken into account for the purposes of determining their pensionable emoluments.
- 2.4 However, an administrative error occurred in the implementation of the salary increase policy agreed upon by the first and third respondents. This administrative error, which affected some members including the complainant, resulted in the third respondent granting some employees an increase in salary that is higher than the general salary increase and it deducted and paid contributions to the first respondent on this higher salary level. In order to resolve this issue, the third and the first respondents offered to refund the affected members the amounts of contributions that they overpaid to the fund as a result of their salary increases, plus interest. The refund of the overpaid contributions now forms the basis of this complaint.
- 2.5 The funds and the third respondent concluded a settlement agreement in November 2005 that resolved their dispute relating to shortfalls in funding and the restructuring of the funds. In April 2006 the settlement agreement was approved by the majority of members of both funds and the parties are in the process of implementing the agreement.

[3] COMPLAINT

- 3.1 The complainant submits that her pensionable emoluments do not reflect the actual rate of contributions that were deducted by the third respondent while she was still employed. She submits that monthly contributions were deducted from her salary on the basis of her annual pensionable emoluments.
- 3.2 She states that she requested benefit statements from the first respondent throughout 2008 in order to assist her in planning her finances properly. She was provided with a benefit statement dated 31 March 2008, which reflects her fund value as R3 382 194.60. A further benefit statement dated 22 August 2008 reflected her fund value as R3 764 448.78. Her final benefit statement dated 1 October 2008 reflects her benefit as R3 787 195.00.
- 3.3 However, she asserts that she was subsequently advised in November 2008 that a recalculation of her pensionable emoluments will be done on a restricted salary and her final benefit will be more or less than R2 850 000.00. She states that she never received any communication relating to the fact that her salary will be restricted and she was not refunded the contributions that she overpaid to the first respondent. Further, she avers that she based her financial planning on the benefit value of R3 764 448.78 as reflected on her benefit statement of August 2008.
- 3.4 The complainant requests this tribunal to investigate this matter and resolve her dispute with the respondents regarding the value of her benefit and the refund of her overpaid contributions to the first respondent.

[4] **RESPONSES**

Response on behalf of the first respondent

- 4.1 The second respondent filed a response on behalf of the first respondent in its capacity as the administrator. It submits that the policy of restricting increases in pensionable salary has been in existence since 2003 and was adopted in terms of the first respondent's rules. It provided the reasons and the background that necessitated this policy.
- 4.2 It confirmed that the third respondent advised the first respondent of its intention to terminate its participation in the fund, which it rejected on the basis that it had to fund a shortfall that existed in the first respondent. The first respondent had to take legal action against the third respondent in order to force it to continue paying contributions to the fund and also to continue funding certain benefit entitlements of the fund, which were in dispute. It indicated that the third respondent had also taken a unilateral decision to pay a lower rate of contribution on behalf of members to an alternative defined contribution fund.
- 4.3 Parallel to the legal action between the parties, there was also a process of trying to reach a negotiated settlement relating to the rights of members and the fund's liabilities. The objective of the first respondent during the negotiation was to ensure that the first respondent has sufficient assets to meet its accrued liabilities as a closed fund without any further funding from the third respondent. However, while the negotiations were ongoing, the first respondent's liabilities were growing with annual salary increases and other changes to pensionable emoluments. This led to the conclusion of an agreement between the first and the third respondents which provides that members' pensionable emoluments would in future increase by the general level of salary increase granted by the Council from time to

time, to all its employees. This policy was communicated to members in various forms of communication as well in benefit statements that were issued to them.

- 4.4 The second reason which necessitated the introduction of a restriction on pensionable salary increases is that the third respondent implemented a programme which resulted in members moving from a basic salary structure to a total cost to employer package structure. The cost to employer package structure had adverse implications for the financial well-being of the first respondent as it was open to manipulation by employees in relation to the pensionable salary component.
- 4.5 It confirmed that there were administrative errors in the implementation of the policy on the restriction of pensionable salary increases, which occurred after the third respondent granted certain employees, including the complainant, an increase in salary that was higher than the general salary increase. The first respondent's administrators, on the other hand, identified only a portion of the total salary increase as pensionable in terms of the salary increase policy. It emphasised that the reverse side of the benefit statement that was issued to the complainant referred to the restriction on pensionable salary increases. It submitted a breakdown of increases in pensionable salary in terms of the policy, which reflects a pensionable salary increase of 10.50% in July 2003 to 8.30% in July 2008.
- 4.6 The complainant's pensionable salary in June 2003 was R16 186.50 per month, which increased to R25 482.37 per month by September 2008 in terms of the salary increase policy. It indicates that the outstanding issue is to refund the complainant and other similarly affected members their overpaid contributions as a result of the incorrect salary increases being used. An audit exercise was completed and the first respondent returned

all overpaid contributions relating to current members as at 30 September 2008 to the third respondent for onward payment to the affected members.

Third respondent's response

- 4.7 Bowman Gilfillan Incorporated filed a response on behalf of the third respondent. It confirmed that the third respondent notified the first respondent of its wish to terminate its participation in the fund, which resulted in a legal dispute relating to the funding position of the fund and certain unfunded benefits. It also confirmed that the dispute was compounded by the fact that the first respondent and the CJPF's liabilities were outgrowing their assets as a result of annual salary increases while attempts were being made to reach a negotiated settlement.
- 4.8 The definition of "pensionable emoluments" in rule 1, read with rule 30(1)(a) of the first respondent's rules give the fund the right to limit annual increases in pensionable emoluments if it exceeds inflation. The above rule is important for a defined benefit fund such as the first respondent since increases in pensionable salary can place onerous additional liabilities on the fund. The risk to the funding level of the first respondent is acute in circumstances where the fund is likely to terminate or to become a closed fund. As result of the risk involved, it was agreed that pensionable emoluments for the purposes of the first respondent's rules would increase only by the percentage of the general salary increases granted to employees who were members of the fund. It noted that the amount of the general salary increases by which pensionable emoluments were increased during the preceding years exceeded inflation each year.
- 4.9 The third respondent and the funds concluded a settlement agreement, which resolved all outstanding issues in relation to shortfalls in funding and the restructuring of the funds. The agreement required the third

respondent to make a capital payment to the funds in an amount of R400 million, which was later increased to R620 million. The agreement was approved by members in April 2006. Members had already been informed of the restriction on increases in pensionable emoluments in 2003.

- 4.10 The first respondent decided to refund the overpaid contributions to the third respondent. However, it submits that this offer is clearly unacceptable to the complainant as she seeks an order that she be entitled to a benefit calculated on the basis of pensionable emoluments that are higher than the pensionable emoluments set out in the first respondent's rules. It contends that the complainant is not entitled to be paid benefits that are not provided for in the first respondent's rules and which are in excess of the amounts held in the fund for her benefit.
- 4.11 It avers that the decision to refund the overpaid contributions is just and equitable and it was followed in the matter of *Pienaar JJ* (PFA/GA/29201/08), which was settled at a conciliation hearing after Mr Pienaar accepted a refund of the overpaid contributions. It also referred to the matter of *Veldman v Cape Joint Pension Fund* [2008] 1 BPLR 80 (PFA), where this tribunal held that the question that needs to be determined is whether or not the fund should have large liabilities imposed on it without its consent in circumstances where its remaining members and other participating employers will be prejudiced by having to subsidise unfunded benefits.
- 4.12 It asserts that the complainant was informed of the restriction on salary increases in a communication that was sent to her by the first respondent and the CJPF in 2003. It indicates that the complainant's reliance on a benefit statement which reflects an amount of R3, 787,195.00 is based on her misunderstanding of the actual contents of the benefit statement. The benefit statement states the following:

“This document is not a legal document. The data shown above is what is held in the Fund’s administration record. If any of this information is incorrect, you must advise the Fund’s administrators. It is important that any changes are notified and recorded as soon as possible since chances (sic) can alter the benefit entitlement that has been quoted in this statement. All data is in any event verified on your exit from the Fund.”

- 4.13 Thus, it asserts that the above statement explained clearly that the amount quoted was subject to change if any information on the benefit statement was incorrect. Further, it submits that note 1 on the reverse side of the benefit statement states that increases in annual pensionable emoluments have been restricted for the past five years to the Council general increase. It also indicates that the figure on a member’s benefit statement assumes that she received an increase of 8,3% in July 2008, being the general Council increase at that date. The note further stressed that in the event that a member received a salary increase that is outside the general increase prescribed by the Council, the member’s benefit entitlement would be altered accordingly.
- 4.14 In this matter, the complainant received an increase on her annual pensionable emoluments that was in excess of the general increase prescribed by the Council. It appears that an administrative error in this regard, which resulted in overpayment of contributions, was only detected when her benefit was computed. The complainant’s benefit had to be recalculated in order to be in line with the prescribed general increase.
- 4.15 In conclusion, it submits that the restriction of increases in pensionable emoluments was part of the settlement agreement that was voted and approved by the members and the first respondent. As result, the complainant cannot be allowed to receive a benefit that is in breach of the agreement and the first respondent’s rules.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

- 5.1 The issue that falls for determination is whether or not the complainant is entitled to have her pensionable emoluments in the first respondent computed on the basis of her actual salary, which was in excess of the general pensionable salary increases as agreed between the first and the third respondents.
- 5.2 The complainant asserts that monthly deductions from her salary were based on her increased pensionable salary and she was not informed of any restriction on increases in salary. In order to determine this issue it is necessary to refer to the rules of the first respondent and other relevant policy provisions.

The fund's rules

- 5.3 Rule 1 of the first respondent's rules defines "pensionable emoluments" as follows:

"Pensionable emoluments" means a member's salary and –

- (a) such allowance as are specifically declared to be pensionable by his employer; and
- (b) the rental value of any quarters which his employer specifically allows him to occupy free of rental as a portion of his pensionable emoluments or where his employer grants an allowance in lieu thereof as a portion of his pensionable emoluments: Provided that for the purposes of these rules no such amount shall exceed one-sixth of his basic salary;

Provided further that, if the pensionable emoluments as contemplated are increased

by a percentage greater than the percentage referred to in rule 30(1)(a), the Committee, after consulting the employer, the Council and an actuary, may determine his pensionable emoluments for the purposes of these rules.”

5.4 Rule 30(1)(a) and (b) provide as follows:

“30(1) In each year the Committee shall-

- (a) note the percentage increase in the Consumer Price Index for the Witwatersrand for the previous calendar year.
- (b) if the net rate of interest earned during the previous financial year as determined in accordance with rule 48(2) is less than 9,5 per cent, determine the percentage shortfall for that financial year.”

5.5 Thus, from the definition of “pensionable emoluments” read together with Rule 30(1) of the first respondent’s rules, the board of management may determine the limit of increases in annual pensionable emoluments. The board exercises this power in consultation with the employer, the Council and an Actuary and having regard to the Consumer Price Index (“CPI”) for Witwatersrand. The power to determine pensionable emoluments includes the right to prescribe restrictions on annual increases in pensionable salary if these exceed inflation. Put differently, if pensionable emoluments increase by an amount that exceeds inflation, the board is entitled to determine the amount of pensionable emoluments for the purposes of the first respondent’s rules.

5.6 It is common cause that the first respondent was concerned about being under-funded and during 2003 the board of the first respondent, after consulting the relevant parties, agreed that pensionable emoluments for the purposes of the rules would increase in future only by the percentage of the general salary increases granted to employees who were members of the first respondent, which increases were aligned to CPI. The agreed

policy on increases in pensionable emoluments operates in such a way that any higher salary increase that is more than the prescribed percentage would not be taken into account for the purposes of calculating a member's pensionable emoluments. The general annual percentage increase in July 2003 was 10.5%, in July 2004 it was 7.85%, in July 2005 it was 6%, in July 2006 it was 6%, in January 2007 it was 2%, in July 2007 it was 6.43% and in July 2008 it was 8.3%.

- 5.7 This tribunal is satisfied that there was a rational basis for the restriction on increases in pensionable emoluments. Firstly, the limitation on increases in pensionable emoluments had to be implemented in order to deal with the increasing liabilities of the first respondent as a result of annual salary increases that were granted to employees while the parties were negotiating a settlement. Secondly, the restriction was important as the first respondent is a defined benefit fund and as a result any large increases in pensionable salary would place additional future liabilities on the fund, which it may not be able to honour.
- 5.8 In this matter the complainant's pensionable salary increased from R16 186.50 per month in June 2003 to R25 482.37 per month in September 2008. The actual increases in her salary were higher than the prescribed general salary increase. The first respondent, in conformity with its rules, applied only the portion of the complainant's total salary to her pensionable emoluments in terms of the salary increase policy. The first respondent acted properly in terms of its rules and the agreed policy on increases in pensionable emoluments in restricting the complainant's pensionable emoluments for fund purposes.
- 5.9 The complainant did not suffer any loss or financial prejudice as she was not entitled to have her pensionable emoluments computed on the basis of increases to her pensionable emoluments that were higher than the

agreed percentage. Further, for the respondents to grant the complainant the relief she seeks will be contrary to the first respondent's rules (Rule 30(1)) and the policy on increases in pensionable emoluments.

Communication to members

5.10 The submissions indicate that all members were informed in 2003 of the restriction on increases in pensionable emoluments. The second respondent attached a letter that was sent to members in 2003, which reads as follows:

“Any member for whom pensionable emoluments increased after 30 June 2003 by more than the general increase of 10.5% in July 2003 will be restricted to an increase of 10.5% unless his employer undertakes to fund the additional liability relating to the excess increase. The fact that the member may have paid contributions to the Fund based on the higher pensionable emoluments does not detract from this principle and does not mean that the member is entitled to benefits based on the higher pensionable emoluments. Excess member contributions paid on the higher pensionable emoluments will be refunded to members when the problems relating to pensionable emoluments have been resolved.”

5.11 Members were also provided with benefit statements which advise that increases in annual pensionable emoluments have been restricted since 2003 to the Council general salary increase. The October 2008 benefit statement also states that the figure reflected on the benefit statements assume that a member received an increase of 8.3% in July 2008, being the general Council increase at that date.

5.12 The benefit statements that were provided to the complainant also explained the restriction on increases in pensionable emoluments. They also confirm that the benefit entitlement may be altered if it is based on incorrect information such as a member's pensionable emoluments.

Therefore, the complainant was adequately informed of the restriction on increases in annual pensionable emoluments. It follows that the first respondent complied with its duties in section 7D(c) of the Act by providing the complainant with adequate and appropriate information relating to changes in increases on pensionable emoluments.

- 5.13 The complainant made bare allegations that she was not informed of the restriction on pensionable emoluments. The respondents, on the other hand, provided this tribunal with documentary evidence which corroborates their submissions in this regard.

The refund of the overpaid contributions

- 5.14 The agreement that was concluded by the first and third respondents provides for a refund of any member contributions that were higher than the prescribed percentage. Thus, a refund of the complainant's excess contributions is the only solution as she cannot be entitled to a benefit which is not provided in the first respondent's rules or that will be contrary to the rules. As set out in section 13 of the Act read together with the ruling in the matter of *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA), a fund is bound to pay benefits in terms of its rules.
- 5.15 The respondents have confirmed they will refund excess contributions plus interest. In terms of the first respondent's rules and the policy on increases in pensionable emoluments, the complainant is not entitled to a benefit based on pensionable emoluments that are higher than the prescribed general salary increases that applies to all members.

[6] **ORDER**

1. In the result, the complaint is dismissed.

DATED AT JOHANNESBURG ON THIS 17th DAY OF JANUARY 2011

Dr E M DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

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