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Dear Sir/Madam

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 (“the Act”): CITY OF CAPE TOWN MUNICIPALITY (“complainant”)
v SOUTH AFRICAN LOCAL AUTHORITIES PENSION FUND (“respondent”)**

[1] INTRODUCTION

- 1.1 The complaint concerns contribution rates to the respondent by participating employers.
- 1.2 The complaint was received by this office on 22 September 2010. A letter acknowledging receipt thereof was forwarded to the complainant on 24 November 2010. On 28 September 2010 a letter was dispatched to the respondent giving it until 28 October 2010 to file its response. A response was received from the respondent on 19 October 2010. The response was sent to the complainant on 24 November 2010. Further submissions were received from the complainant on 3 December 2010.

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.

Centralised Complaints Helpline for All Financial Ombud Schemes 0860 OMBUDS (086 066 2837)

- 1.3 After considering the submissions before this tribunal it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties they will 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 complainant is a municipality established in terms of section 12(1) of the Local Government: Municipal Structures Act, 117 of 1998 ("Municipal Act"). The respondent is a pension fund organisation duly registered as such in terms of the provisions of the Act. The complainant is a participating employer in the respondent.
- 2.2 The respondent is a defined benefit fund ("DB fund"). In 1999 the respondent's valuator determined that the respondent was not in a sound financial position. In accordance with section 18 of the Act, the respondent's trustees submitted a scheme of arrangement ("first scheme") to the Registrar of Pension Funds ("Registrar"), which was duly approved.
- 2.3 The first scheme envisaged changes to the respondent's benefit structure to restore its financial soundness. In June 2002 the respondent submitted its triennial valuation report to the Registrar. The provisions of the first scheme had become insufficient to restore the respondent's financial soundness. In October 2002 another scheme ("second scheme") was submitted to the Registrar aimed at restoring the respondent to its financial soundness. In terms of the second scheme it was recommended that participating employers, inclusive of the complainant, increase their contributions to the respondent by 2.71%. The complainant states that the increase was to endure for 5

years but the respondent states that no timeframe was attached to the increase.

- 2.4 The second scheme was approved by the Registrar. On 24 October 2003 the respondent proposed a rule amendment to the Registrar to have the increase in contributions reflected in the rules. The rule amendment was approved by the Registrar on 5 July 2006 with retrospective effect from 1 July 2003. The complainant paid the increased contributions until July 2008 whereupon it ceased paying them. Consequently, the respondent instituted proceedings in the Western Cape High Court of South Africa (“Court”) for an order directing the complainant to pay all outstanding increased contributions, in the amount of R7 650 150.78. The complainant does not consider itself indebted to the respondent for any contributions because in its view, the contribution increase arrangement was to endure for a maximum of 5 years.

[3] COMPLAINT

- 3.1 The complainant complains that the respondent claims payment of increased contributions despite the original intention of the second scheme being that such an arrangement would endure for a maximum of 5 years. It states that it had no knowledge that the respondent had proposed and secured the approval of a rule amendment providing for the increase of contributions without any time limit attached thereto. A resolution to propose the amendment was taken in its absence and was not communicated to it. It submits that the respondent is obliged to act with due care, diligence and good faith but this was not demonstrated in its conduct.
- 3.2 The respondent, having conducted itself in such manner, acted *ultra vires* and breached the terms of the second scheme, the terms of the

agreement with participating employers and its conduct is unreasonable and procedurally irregular.

- 3.3 The respondent seeks an order that it was only obliged to pay the increased contributions for a maximum period of five years as initially intended in the second scheme.

[4] RESPONSE

Points in limine

- 4.1 The respondent raised two points *in limine* by which it requests that the complaint be dismissed. In the first instance, it submits that in terms of section 30H(2) of the Act this tribunal cannot investigate a complaint if before its lodgement proceedings had been instituted in a civil court in respect of a matter which would constitute the subject-matter of the investigation. Legal proceedings have already been instituted in the Court and the complaint constitutes subject-matter currently before a civil court.
- 4.2 The respondent also states that the rule amendment providing for the contribution increments has been approved and registered by the Registrar. It is enforceable until such time that it is set aside.

Merits

- 4.3 The respondent submits that on 20 August 2003 a resolution was passed at a meeting of the board of management amending the rules so as to require participating employers to make an increased annual contribution to the fund of 2.71%. It was further resolved that the rule amendment would take effect as from 1 July 2003.

- 4.4 The amendment was submitted to the Registrar on 24 October 2003 and was approved on 5 July 2006 with retrospective effect from 1 July 2003. On approval of the amendment the complainant became liable to the respondent for the difference between the amount that it should have paid by reason of the retrospective operation of the rule amendment and the amount that was in fact paid. The complainant paid the increased contributions from 1 July 2003 up to and including 30 June 2008, whereupon such increased contributions were ceased.
- 4.5 Legal proceedings for the recovery of the outstanding increased contributions from 1 July 2008 to date have been instituted in the Court. The rate at which the complainant is required to contribute is determined by the valuator in order to meet the balance of costs of funding the benefits payable by the respondent in respect of all its members. For as long as the respondent is a defined benefit fund all participating employers must contribute such additional amounts as are necessary to ensure that it is able to pay the defined benefits as and when it is required to do so.
- 4.6 The board is, in terms of rule 2.3.1, vested with the general powers to amend the rules. The obligations of a participating employer are regulated by section 13A(1) of the Act. The valuation report for the respondent for the period to 1 July 1998 reflected a deficit in the funding in the amount of 29%. The deficit arose primarily because of the disparity between the actuarial assumption of the expectations of the performance of the fund's assets against the payment of its liabilities and the actual performance of those assets. The valuator noted a significant shortfall in the current employer contribution rate and future service benefits had to change significantly or the contribution rate had to be increased. In pursuance of the duties the board owes the respondent, it resolved to give effect to the rule amendment increasing the employers' contributions to the fund.

4.7 The complainant was informed of this but failed to respond thereto. In the absence of such a response the proposed amendment was approved by the Registrar and the complainant became liable to pay increased contributions in terms of the rules.

[5] **DETERMINATION AND REASONS THEREFOR**

Introduction

5.1 The complainant complains that the respondent requires it to pay increased premiums indefinitely despite the original intention in the second scheme that such contributions would be paid for a maximum period of 5 years. The respondent raised certain points *in limine* that must be addressed before determining the merits of the complaint.

Section 30H(2) of the Act

5.2 The respondent states that legal proceedings for the payment of the outstanding increased contributions have already been instituted in the Western Cape High Court. By virtue of section 30H(2) of the Act this tribunal would therefore be precluded from investigating and determining the complaint. In its response the complainant states that section 30H(2) does not apply to the present matter as its purpose is to prevent forum-shopping. It states that it has not instituted any proceedings in the High Court for the same relief as that sought in this tribunal. It also states that section 30H(2) does not prevent a litigant who has raised a defence in the High Court from lodging a complaint with this tribunal.

5.3 Section 30H(2) reads as follows:

“The Adjudicator shall not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation.”

- 5.4 What this tribunal is essentially requested to investigate and adjudicate is whether or not the complainant is obliged to pay increased contributions indefinitely. In its particulars of claim filed before the Court, the respondent alleges that the outstanding contributions in the amount of R7 650 150.78 are due and payable in terms of the amended rules. The complainant raises similar defences in the court proceedings submitted as a complaint to this tribunal.
- 5.5 The issues raised in the complaint and the court proceedings are similar in that they primarily require the determination of the complainant's liability to the respondent for the outstanding increased contributions. The difference is that in this tribunal it is the complainant that lodged the complaint and in the Court it is the respondent that instituted the proceedings. However, this does not alter the subject-matter of the proceedings. The matter in respect of which the proceedings in the Court were instituted constitutes the subject-matter of the investigations by this tribunal.
- 5.6 The complainant also contends that it has not instituted any proceedings in the Court for the relief sought from this tribunal and that section 30H(2) does not prevent a defendant in the proceedings from lodging a complaint with this tribunal. Section 30H(2) does not specify which party ought to have instituted proceedings in a civil court for it to find application. It is sufficient that proceedings have been instituted and the matter in respect of which it was instituted constitutes the subject-matter of this tribunal's investigation. To confine the application of section 30H(2) to forum-shopping by a single party would be to limit the intended purpose of the section, which generally seeks to avoid the duplication of the same issues in different forums by any of the parties.

5.7 The proceedings in the High Court constitute the subject matter of the investigation this Tribunal is asked to undertake. This tribunal therefore has no jurisdiction to investigate and determine the complaint.

[6] **ORDER**

1. In the result, the complaint cannot succeed and is dismissed due to lack of jurisdiction.

DATED AT JOHANNESBURG ON THIS 15th DAY OF NOVEMBER 2011

DR EM DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

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