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**REGISTERED POST**

Dear Madam

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): BO MASHEGO (“complainants”) v CITY OF JOHANNESBURG PENSION FUND (“first respondent”); JOHANNESBURG MUNICIPAL PENSION FUND (“second respondent”) AND NMG CONSULTANTS AND ACTUARIES (PTY) LTD (“third respondent”)**

**[1] INTRODUCTION**

1.1 This complaint concerns the quantum of a death benefit.

1.2 The complaint was received by this Tribunal on 13 May 2016. On 16 May 2014, a letter acknowledging receipt thereof was sent to the complainant. On the same date, the complaint was forwarded to the respondents, affording them an opportunity to file their responses by 17 June 2016. A response was received from the first respondent on 27 June 2016. The second respondent made further submissions on 9 September 2016. No further submissions were received from the parties.

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The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

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- 1.3 Having considered 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 Mr RS Mashego (“the deceased”) was a member of the first and second respondents. He retired on 31 July 2013. The deceased passed away on 22 October 2013. The complainant is the spouse of the deceased.
- 2.2 Prior to 1 October 2008, both the first and second respondents were defined benefit funds. With effect from 1 October 2008, the first respondent became a defined contribution fund whilst the second respondent remained a closed defined benefit fund. As at 1 October 2008, all members in service were provided with an opportunity to choose to retain their benefits accrued up to 1 October 2008 in the second respondent as a deferred pension or to transfer their fund credits to the first respondent.

**[3] COMPLAINT**

- 3.1 The complainant submitted that the deceased retired in July 2013 due to ill-health. In August 2013, he received payment in the amount of R264 809.48. He passed away in October 2013. Subsequently, a further benefit in the amount of R118 190.20 was paid to the complainant. The complainant submitted that she is in receipt of a monthly pension in the amount of R1 899.77 and an amount of R794.87 on behalf TT Mashego, a minor child. The complainant submitted that the amount that was paid does not correspond with the 37 years of service of the deceased. The complainant wants a benefit

statement for the year ending 2013 to establish if the deceased's full benefit was paid.

3.2 The complainant requests this Tribunal to investigate this matter.

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

##### *First and second respondents*

4.1 The third respondent submitted a response on behalf of the first and second respondents. The third respondent submitted that on retirement, the deceased was a member of the first and second respondents.

##### *Response in respect of the second respondent – JMPF*

4.2 The third respondent submitted that the deceased's final average emoluments as at 1 October 2008, was calculated as his restricted average salary over the 12 months before 1 October 2008. The restricted salary is defined as his June 2003 salary increased each year by the council general salary increased, with no allowance for promotional or other special increase. This was agreed upon between the first and second respondents and was implemented for all members.

4.3 The third respondent submitted that the deceased's pensionable service is calculated according to the table below. Although he commenced employment on 27 July 1976, he only became a member of the second respondent on 1 February 1990. Therefore, his benefits in the second respondent are calculated as from his membership date as at 1 February 1990:

Normal service (1990/02/01 – 2008/10/01)	18 years 8 months
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Purchased service (member)	0 years
Purchased service (employer)	0 years
Total service before bonus service	18 years 8 months
Bonus service	3 years 9 months
Total service with bonus service	22 years 5 months

4.4 The third respondent submitted that the deceased's deferred pension as at 1 October 2008 was then calculated as 2.0108% multiplied by 22.40 (service) multiplied by his final average emoluments as at 1 October 2008 in the amount of R67 536.84. This equals a pension in the amount of R30 419.89 per annum. The deceased opted to take an early payment lump sum equal to 12 years and 9 months (12.75 years). On 2 September 2008, he received payment in the amount of R63 324.01, less tax in the amount of R6 675.99. The third respondent submitted that taking the early lump sum payment resulted in the lump sum being calculated as 7% multiplied by 9.65 (22.40-12.75) multiplied by his final average emoluments of R67 536.84 which was an amount of R45 621.13 as at 1 October 2008.

4.5 The third respondent submitted that the table below shows how the deceased's annual pension and deferred lump sum have increased since 1 October 2008:

Date of increase	Increase granted	Deferred annual pension	Deferred lump sum
1 October 2008	-	R30 419.89	R45 621.13
1 July 2009	6.00%	R32 245.08	R48 358.40
1 July 2010	4.60%	R33 728.35	R50 582.89
1 July 2011	4.60%	R35 279.85	R52 909.70
1 July 2012	5.70%	R37 290.80	R55 925.55
1 July 2013	5.60%	R39 379.08	R59 057.38

4.6 The table below shows the annual pension adjustment to allow for early retirement as at 31 July 2013:

Annual pension as at 1 July 2013 based on accrual for a 63 year old	R39 379.08
Annual pension adjusted to allow for early retirement at age 60	R32 997.60
<b>Monthly pension payable by the second respondent as at 2013/07/31</b>	<b>R 2 749.80</b>

The table below shows the lump sum adjustment to allow for early retirement and payment on 31 July 2013:

Deferred lump sum as at 1 July 2013	R59 057.38
Lump sum adjusted for early retirement and payment as at 2013/07/31	R53 422.13

- 4.7 The third respondent submitted that the retirement option form provides members with options to take a larger lump sum and receive a reduced pension. As the deceased passed away before completing the retirement form, his retirement benefit was processed in accordance with the Rules of the second respondent. The pension and lump sum aforementioned were therefore, due to him. The second respondent has a spouse's and children benefit available on the passing of the pensioner. The spouse's reversion is 64.81% of the pensioner's pension and the child pension is calculated as 40% of the spouse's pension. The table below shows how the pension now being paid to the complainant and her minor daughter were calculated:

<b>Date of increase</b>	<b>Spouse's pension</b>	<b>Child pension</b>
Pension paid from 2013/11/01	R1 782.15	R712.86
Pension paid from 2014/07/01	R1 899.77	R759.91
Pension paid from 2015/07/01	R1 987.16	R794.87

The third respondent submitted that the child pension will continue to be paid until the child reaches age 18 or until age 23 if the child is in full time study. Further, that an amount of R53 700.77 was paid to the estate late account of 17 December 2014. This was the lump sum

amount of R53 422.09 with interest to date of payment. An additional amount of R8 249.40 was paid to the complainant as part of the first pension she received for the pensions that should have been paid to the deceased before his death between 1 August 2013 and 31 October 2013.

*Third respondent's response in respect of the first respondent - CJPF*

4.8 The third respondent submitted that the deceased retired from the first respondent as at 31 July 2013. As at this date, his fund credit was in the amount of R131 300.35. He passed away before advising the first respondent as to his retirement options. The first respondent could not pay the full benefit out to the estate late account as the deceased had retired and was therefore, obliged to purchase an annuity with at least two thirds of his fund credit. The third respondent submitted that the first respondent did not have a default retirement option for members and therefore, a rule amendment was submitted to make the default option in the in-fund living annuity for two thirds of the benefit. This Rule amendment was approved on 17 December 2014. The process should have been that the first respondent proceed with a section 37C investigation to allocate and distribute the benefit that was transferred into the in-fund living annuity and pay out the one third benefit. The third respondent advised that an amount of R64 489.43 was paid to the estate late account on 22 December 2014. This amount was the one third benefit in the amount of R57 100 with interest and less tax. The process to allocate and distribute the remaining benefit did not continue.

*Further submissions*

4.9 On 9 September 2016, the third respondent provided this Tribunal with a copy of the board resolution dated 6 September 2016. The board of

the first respondent resolved to allocate the deceased's remaining death benefit (two-thirds) in the amount of R114 200.23 as follows:-

BO Mashego (complainant)	Spouse	55	50%
ML Mathebula	Daughter	31	5%
MT Mashego	Son	34	5%
MT Mashego	Daughter	29	5%
T Mashego (minor)	Daughter	16	35%

## [5] **DETERMINATION AND REASONS THEREFOR**

- 5.1 The issues to be determined are whether or not the first and second respondents paid the correct benefit to the beneficiaries of the deceased.
- 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]).

### *Benefit payable in respect of the second respondent - JMPF*

- 5.3 Rule 25 of the Rules of the second respondent provides for the death of a pensioner leaving a surviving spouse or eligible child and reads as follows:

**“25 Death of a pensioner leaving a surviving spouse or eligible child:**

- (3) Subject to the provisions of rule 20(3)(d) sub-rule (8) and rule 28(3), if a pensioner dies and leaves a surviving spouse, such spouse shall be granted a pension equal to the percentage specified below and opposite the age of retirement of the pension then in payment to the deceased pensioner in terms of these rules, calculated for the purposes

of this sub-rule as if not part of his retiring benefit had been commuted:

<b>Exact age at retirement</b>	<b>Percentage</b>
60 years or under	64.8
61	64.4
62	64
63	63.4
64	63
65	62.6
66	62.6
67	62.6

- (a) At the sole discretion of the Trustees, where there is more than one(1) person qualifying as SPOUSE of a PENSIONER, any benefit shall be distributed among the SPOUSE at the discretion of the TRUSTEES and the total benefit payable to such SPOUSES shall be equal to the benefit which would have been payable to one (1) SPOUSE, in the event of the death of any SPOUSE, the benefit payable to such SPOUSE or SPOUSES shall cease to be payable and the benefit payable to the remaining SPOUSE or SPOUSES shall not be re-calculated.
- (b) If the pensioner's age at retirement was not an exact number of years, a portion of a month shall be ignored and the percentage applicable shall be calculated on the basis of 12 months being equal to the difference between the percentages applicable to the ages in years, specified above, immediately preceding and succeeding the actual age at retirement.
- (c) ....
- (d) If the pensioner became entitled to a retiring benefit in terms of rule 21 or 22(1), the period specified in rule 21(1)(a) or (b) or 21(1)(b) shall be deemed to be included in his period of pensionable service; Provided further that if the pensioner became entitled to a retiring benefit in terms of rule 21 and his pension has been reduced or suspended in terms of rule 21(4), the pension payable to his surviving spouse shall also be

reduced in the same proportions as the pension of the pensioner was reduced.

(e) ...

(f) If the pensioner was entitled to a supplementary pension or to a Council's special increase or to both as at 30 June 1973, a pension equal to one-half of the member's supplementary pension or to one-half of both, as the case may be, shall be added to the pension granted to the surviving spouse in terms of this sub-rule.

(4) Subject to the provisions of sub-rule (8) and rule 28(3), if a pensioner dies and leaves eligible children, a pension shall be granted according to the number of eligible children from time to time, equal to the percentage specified below of the pension then in payment to the surviving spouse, excluding any part of that pension arising from a supplementary pension or a Council's special increase:

<b>Number of eligible children</b>	<b>Percentage</b>
1	40
2	60
3	80
4 or more	100

Provided that if there is no surviving spouse, the pension be granted in respect of the eligible children shall be double that which would have been granted in respect of them had there been a surviving spouse.

The aforementioned Rule provides for the payment of a spouse's pension and children's pension from the second respondent.

5.4 The third respondent submitted that the retirement option form provides members with options to take a larger lump sum and receive a reduced pension. As the deceased passed away before completing the retirement form, his retirement benefit was processed in accordance with the Rules of the second respondent. The second respondent provides for a spouse's and children benefit on the passing of a pensioner. The spouse's pension is calculated as 64.81% of the

pensioner's pension and the child pension is calculated as 40% of the spouse's pension. The third respondent further submitted that the child pension will continue to be paid until the child reaches age 18 or until age 23 if the child is in full time study. Further, that an amount of R53 700.77 was paid to the estate late account of 17 December 2014. This was the lump sum amount of R53 422.09 with interest to the date of payment. An additional amount of R8 249.40 was paid to the complainant as part of the first pension she received from the pensions that should have been paid to the deceased before his death between 1 August 2013 and 31 October 2013.

- 5.5 The deceased's benefit in respect of the second respondent was paid according to its Rules. The complainant and minor child are in receipt of a spouse's pension and children's pension. A lump sum benefit in the amount of R53 422.09 was paid to the estate late account on 17 December 2014.

*Benefit payable in respect of the first respondent CJPF*

- 5.6 Rule 5 of the Rules of the first respondent provides for retirement benefits and reads as follows:-

"5.1.1 On his retirement in terms of Rule 5.2, a Member shall become entitled to an annuity of such amount as can be purchased by his Fund Credit at the date of his retirement, provided that the Member may elect to have his Fund Credit transferred to a Previous Fund of which he has remained a member, subject to the rules of such fund, and may further elect to commute up to one-third of his fund credit for a lump sum, except where the annual amount of such annuity of annuities does not exceed the amount determined by the Minister of Finance from time to time in terms of paragraph (c)(ii)(dd) of the definition of "pension fund" in section 1 of the Income Tax Act, 58 of 1962, he may commute the full amount of his Fund Credit."

The aforementioned Rule provides that a member becomes entitled to purchase an annuity upon retirement. A member may commute one-third of his fund credit as a lump sum. The deceased retired on 31 July 2013. He passed away on 22 October 2013 before advising the first respondent as to his retirement options.

5.7 As at his date of death, the deceased's fund credit was in the amount of R131 300.35. The first respondent could not pay the full benefit out to the estate late account as the deceased had retired and was therefore obliged to purchase an annuity with at least two thirds of his fund credit. The third respondent submitted that the first respondent did not have a default retirement option for members and therefore a rule amendment was submitted to make the default option in the in-fund living annuity for two thirds of the benefit. This Rule amendment was approved on 17 December 2014.

5.8 The rules of the first respondent have been amended and Rule 5.1.3 was inserted with effect from 1 March 2015, to provide for the default retirement option to be a flexible annuity and reads as follows:

“5.1.3 Should a Member who has chosen to retire not have provided the Administrator with details of their selected Registered Insurer six (6) months after having reached Normal Retirement Date his benefit shall be a one third commutation amount and a Flexible Annuity in terms of Rule 5.1.2.3.”

The deceased passed away on 22 October 2013. The aforementioned Rule was inserted with effect from 1 March 2015, seventeen months after the death of the deceased. Therefore, this rule does not apply to the complainant.

5.9 The third respondent submitted that the process should have been that the first respondent proceeds with a section 37C investigation to allocate and distribute the benefit that was transferred into the in-fund

living annuity and pay out the one third benefit. The third respondent advised that an amount of R64 489.43 was paid to the estate late account on 22 December 2014. This amount was the one-third benefit in the amount of R57 100 with interest and less tax. The third respondent submitted that the process to allocate and distribute the remaining benefit in terms of section 37C of the Act did not continue. On 9 September 2016, the third respondent provided this Tribunal with a copy of the board resolution dated 6 September 2016. The board resolved to allocate the deceased's remaining death benefit from the first respondent in the amount of R114 200.23 (two-thirds), as follows:-

BO Mashego (complainant)	Spouse	55	50%
ML Mathebula	Daughter	31	5%
MT Mashego	Son	34	5%
MT Mashego	Daughter	29	5%
T Mashego (minor)	Daughter	16	35%

5.10 The third respondent submitted that the first respondent did not have a default retirement option for members and therefore, a rule amendment was submitted to make the default option in the in-fund living annuity for two thirds of the benefit. This Rule amendment was approved on 17 December 2014. However, the deceased passed away on 22 October 2013, more than a year before the rule amendment was approved. Therefore, this Rule amendment could not apply to him.

5.11 The deceased retired on 31 July 2013. He passed away on 22 October 2013 before advising the first respondent as to his retirement options. Information circular PF No. 2 of 2010 issued by the Registrar of Pension Funds ("Registrar") at the Financial Services Board provides as follows:

"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, retrenchment or retirement the relevant withdrawal or retirement

benefit accrues in terms of the rules of a fund. Should the member die after the date of accrual of the withdrawal or retirement benefit, but before the benefit can be paid or before the member could make an election for the benefit to be transferred to another fund, the legal nature of the benefit does not change and the provision of section 37C of the Act is therefore not applicable.”

The aforementioned circular issued by the Registrar provides that if a member dies after the date of accrual of a benefit but before the benefit can be paid or before the member could make an election, the benefit will be not paid in terms of section 37C of the Act and will instead be paid to the estate late account.

- 5.12 The third respondent submitted that the deceased’s one-third benefit was paid to the estate late and the remaining two-thirds is payable in terms of section 37C of the Act. However, as the deceased passed away before he could make an election as to his retirement options, the above circular applies and the deceased’s full death benefit in the first respondent should be paid to his estate late. Therefore, the first respondent should pay the remaining benefit in the amount of R114 200.23 to the estate late account.

## **[6] ORDER**

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

- 6.1.1 The first respondent is ordered to pay the remaining two thirds death benefit in the amount of R114 200.23 to the estate late account, within three weeks from the date of this determination,

DATED AT PRETORIA ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2016

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

**Section 30M filing: High Court**

*Complainant represented by Mtembu Nkuna Attorneys*

*Respondents unrepresented*