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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – C FAIR v CENTRAL RETIREMENT ANNUITY FUND & SANLAM

Introduction

- [1] Having considered the complaint received by this office on 4 May 2005, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

Facts

- [2] You became a member of the Central Retirement Annuity Fund (“the fund”) with effect from 1 July 2000. The fund is administered by Sanlam Life which also invests its assets. At the inception of your membership Sanlam Life issued a policy of insurance to the fund on your life. Your chosen date of retirement was 1 July 2023. Your initial contribution was R1 546.39 per month which was to increase automatically every year by 15%.
- [3] You state that because you were not permitted to change the investment of the underlying policy, you decided, on the advice of an independent broker, to stop making contributions, thus making the policy ‘paid-up’ with effect from 1 March 2003.

Complaint

- [4] Your complaint is two-fold. Firstly you are aggrieved that you were not permitted to change the investment of your underlying policy. Secondly, you contend that the fees that were charged when you made the underlying policy ‘paid-up’ were excessive.

Response

V Ngalwana (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), R Maharaj (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), Solomzi Gcelu (Assistant Adjudicator)

Office Manager: L Manuel

- [5] The fund has raised a technical point that the complaint pertains to the policy of insurance between the fund and the insurer, Sanlam Life, and as such constitutes 'long-term insurance business' over which I do not have jurisdiction.
- [6] The fund also contends that the complaint does not fall within the definition of a 'complaint' in section 1 of the Pension Funds Act and for this reason too I am precluded from investigating and determining the matter.
- [7] On the merits, the fund states that prior to June 2001, there were a limited number of investment funds to choose from. However it states that since then a wide selection of investment funds have been made available to members.
- [8] With regard to your second grievance, the fund states that a 'premium termination fee' of R27 215.40 was deducted when you ceased contributions. This fee recovers the expenses already incurred in respect of the underlying policy that will now no longer be recovered on account of early cessation of contributions.

Determination and reasons therefor

Technical points

- [9] There is no merit in the technical points raised by the respondents because the crux of this complaint does not constitute long term insurance business, but actually relates to a retirement annuity fund, which is a pension fund organization as defined in the Pension Funds Act. For the reasons more fully set out in *JJ Schwartz v Central Retirement Annuity Fund & Another* [2005] 5 BPLR 435 (PFA) at paragraphs [12] to [28], I cannot uphold the contention that this matter constitutes "long term insurance business" over which I have no jurisdiction.
- [10] Furthermore in so far as your complaint implicitly relates to the administration of the fund and/or the investment of its funds and it is implicit therein that you have suffered prejudice (in that your fund value has been drastically reduced) in consequence of the maladministration of the fund (in the form of the levying of undisclosed charges), your grievance constitutes a complaint as defined.
- [11] Furthermore, Davis J (in whose judgment Le Grange AJ concurred) in the as yet unreported decision in *Central Retirement Annuity Fund v Adjudicator of Pension Funds, FE de Beer & Another*, Cape Of Good Hope Provincial Division Case No. 3404/05 (handed down on 20 October 2005) ("the de Beer judgment"), at page 9, confirmed the jurisdiction of this

office and stated:

“The basis of the complaint was that applicant [Central Retirement Annuity Fund] as the holder of the policy on the life of a member, was neither obliged nor entitled simply to allow Sanlam Life [the insurer] to charge whatever costs and charges it chose to levy and to accept whatever investment bonuses that it chose to declare from time to time without first satisfying itself through its own management committee of the reasonableness or adequacy thereof.

The Rules of the Fund set out its essential purpose as being to provide benefits to members upon retirement. The fact that applicant may be exempt in terms of the applicable law from audit cannot exempt it from playing a role in the fulfillment of its purpose. In any event, applicant is a pension fund organization and has separate legal personality in terms of s51(a) [sic] of the Act. It cannot simply be treated as an illusory ‘go between’ the members such as second respondent and Sanlam Life. It should be accountable to its members and hence be subject to the discipline of the Act’s complaint mechanism.”

- [12] In any event, that your letter of complaint does not, in precise terms, make the averments required to constitute a complaint as defined is no reason by itself for a dismissal thereof as not constituting a complaint. Such an approach would be too formalistic, thus ignoring the purpose of the Act. The Cape High Court said the following in this regard in the de Beer judgment at page 9 and 10 :

“Applicant’s contention regarding the second respondent’s letter is based upon a formalistic reading of the complaints procedure as provided for in the Act. On this reading, the letter generated by second respondent would not constitute a proper complaint as defined. But this submission ignores the purpose of the Act. The structure of chapter VA of the Act is aimed at ensuring an effective, inexpensive and expeditious resolution of pension complaints by members, many of whom may not be able to afford legal advice and would therefore be compelled to formulate their complaint without any legal assistance or a complete understanding of the intricacies of the legal relationship between the respective parties, as in the case between Sanlam and applicant. In my view, second respondent’s letter contains sufficient averments (as described above) to fall within the definition of a complaint. To construe a complaint as urged upon us by applicant would run counter to the very purpose of the complaints procedure provided for in the Act.”

Merits

- [13] What the trustees of a pension fund organisation may or may not do is decreed by the fund rules. If what they propose to do is not within the powers conferred upon them by the rules, they may not do it (*Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at para [28]).
- [14] The question for determination is whether in terms of the rules or related policy documents the respondents were authorised to deduct a ‘premium

termination fee' when you ceased your contributions to the fund.

- [15] In this regard the fund has referred me to rule 2 of part 7, the relevant part of which reads:

“Term of contributions

2. A MEMBER's CONTRIBUTIONS are payable during the period determined in the POLICY issued on his life.

If a MEMBER's CONTRIBUTIONS cease after he has already paid sufficient CONTRIBUTIONS so that the POLICY issued on his life has a paid-up value in accordance with the practice of the ASSURER, the ASSURER converts the POLICY to a paid-up POLICY for reduced benefits. The MEMBER will then have the right to apply for reinstatement of his benefits, partially or in full, and the MANAGEMENT COMMITTEE in consultation with the ASSURER will consider such a proposal on receipt of ...”

- [16] The rule allows the insurer to convert the “policy” to a “paid-up policy for reduced benefits” but neither defines what a “paid-up” policy is nor specifies how the benefits are to be reduced. It most certainly does not provide for the charging of a premium termination fee when a member discontinues contributions.

- [17] The fund has also referred me to clause 8 in the section titled “Description and provisions” of the policy document. Clause 8 reads:

“8. PAID-UP POLICY

If a premium is not paid within the period of grace, the policy is converted into a paid-up policy only if:

- the waiting period as indicated in the Schedule has already expired and
- the balance of the investment Account (built up at that stage and determined by Sanlam) is sufficient to maintain the policy for the duration of the remaining term.

When the policy is converted into a paid-up policy, the maturity benefits will be reduced and all other benefits will lapse. The balance of the Investment Account will be payable at death before maturity.

If a premium is not paid within the period of grace and the waiting period as indicated in the Schedule has not yet expired, the policy lapses.”

- [18] Nowhere in this clause is there a reference to a premium termination fee. It states that when the policy is converted to a paid-up policy, the maturity benefits will be reduced. It stands to reason that, given that contributions will no longer be received for the remainder of the policy term, a lesser benefit will be payable. The clause takes this into account by providing for reduced benefits. It certainly does not authorize the deduction of a substantial fee on early cessation of contributions.

- [19] In the absence of any authority either in the rules or the policy document to deduct a premium cessation fee, you are entitled to the crediting of your investment account therewith.
- [20] With respect to the other leg of your complaint, it is apparent from your email dated 10 November 2005 that when you talk about changing the investment of your policy, you in fact mean changing your investment in the Central Retirement Annuity Fund.
- [21] The rules of the Central Retirement Annuity Fund do not make provision for a member to transfer to another fund prior to the retirement date. Since the fund can only do what is set forth in the rules, it could not lawfully permit you to transfer to another fund. This, in my view, is an undesirable business practice as it forces members of the fund to remain members even when investment returns (or investment strategy) are much poorer than in other retirement funds. Perhaps you might wish to take this up with the Competition Commission. The contact details appear at the foot of this letter.

Relief

[22] In the result, the order of this tribunal is as follows:

- 22.1 It is hereby declared that the respondents had no right to deduct any amount from the complainant's investment account in the fund by reason only of his stopping contributions before his chosen retirement date.
- 22.2 The Central Retirement Annuity Fund and Sanlam Life (in its capacity as administrator and/or investor of the assets of the fund) are jointly and severally ordered forthwith to credit your investment account in the fund with R27 215.40 plus interest thereon at the rate of 15.5% per annum, from the date of this determination to the date of such crediting.

DATED AT CAPE TOWN ON THIS THE DAY OF 2005.

Yours faithfully

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR

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Section 30M Filing: Magistrate's Court