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BY REGISTERED MAIL

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956: F AKOON v PPS RETIREMENT ANNUITY FUND & SANLAM LIFE INSURANCE LIMITED

INTRODUCTION

1. Having considered the complaint that was received by this office on 6 June 2005, as well as further written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.
2. As the background facts are well known to all parties, I shall not repeat them in any detail in this ruling but shall only traverse those that are pertinent to the issues.

THE FACTS

3. You became a member of the Professional Provident Society Retirement Annuity Fund (“the fund”), which is administered by Sanlam Life Insurance Limited (“the insurer”) from October 1997. The initial monthly contribution was R1 700, and the chosen retirement date was 1 October 2023. During November 1999 you decided to reduce your monthly contributions to R300, and in May 2002 you stopped making contributions to the fund. In April 2005, you informed the fund that you wished to resume making contributions, but wanted to switch portfolios to the Stratus Premier

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Office Manager: L Manuel

Retirement Annuity, another retirement annuity product administered by the same insurer. By that time your total contributions to the fund were R51 500. The insurer informed you that your fund value was R35 328.06.

4. Upon seeking an explanation, you were informed that when you reduced your monthly contributions in November 1999, a “premium reduction adjustment” of R23 693.76 was debited to your investment account, and that when you terminated your contributions in May 2002, an amount of R7 525.13 referred to as a “premium termination adjustment” was charged. According to you, you were never informed of the levying of the charges and only became aware thereof when you wanted to resume contributions.

THE COMPLAINT

5. You are concerned about the charging of the above-mentioned fees and cannot understand how the insurer can justify transferring only R35 328.06 from your total contributions of R51 500 whereas there was no appreciation in the fund in the 8 years over which you were its member. In your own words, you state:

“Sanlam’s actions amount to nothing short of robbing one of their retirement savings. Why should I pay such “costs” or “penalties” when my funds have been so badly managed? What service have I received and how has Sanlam assisted me in growing my retirement savings? They have actually reduced my capital so that almost 8 years later, only 68% of my contributions are available.”

THE RESPONSES

6. The fund has raised two technical points, the first of which is that this is not a “complaint” as defined in the Act, in that:

“the member’s grievance, in our *prima facie* view, is not about the execution of duties by the Fund (or administrator). It, in effect, is about the execution of duties by the insurer under the policy- namely about the internal operation of the policy, notably the operation and application of the actuarial rules of the policy, which constitute “long term insurance business” as defined in, and regulated under, the Long Term Insurance Act...”

7. The second point is that this complaint is not about the maladministration of the fund by the fund or the administrator, but is a grievance relating to a life policy, which constitutes part of the insurer’s long term insurance business.
8. On the merits, the fund and the insurer seek to rely on clause 8 of the policy document as authority for the charging of a “premium termination adjustment”. They argue that the fees charged are not penalties but were charged in accordance with that clause and is the amount with which the

benefits were reduced when you ceased making contributions. With regard to the “premium reduction adjustment”, they state as follows:

“Although the policy documents made no explicit provision for a reduction in premiums the fact that premiums can be stopped implies that, if both parties agree, part of the premiums can be stopped and that a pro rata premium reduction adjustment can be charged. Sanlam Life agreed to the premium reductions at the request of the member and charged a premium reduction adjustment calculated in the same way as a premium termination adjustment, but using the reduction in premium instead of the full premium in the calculation.”

9. They conclude by arguing that the fees were charged so as to recoup outstanding expenses that would have been recovered over the term of membership had you neither reduced nor terminated your contributions before the chosen retirement date.

DETERMINATION AND REASONS THEREFOR

Technical points

10. This complaint relates to a retirement annuity fund which is a pension fund organization as defined in the Act, and not to an insurance policy. For the reasons more fully set out in *Schwartz v Central Retirement Annuity Fund & Another* [2005] 5 BPLR 435 (PFA), at paragraphs [12] to [28] and in *Louw v Central Retirement Annuity Fund & Sanlam Life Insurance Limited*, an as yet unreported determination, Case No. PFA/GA/1811/2004/RM at paragraphs [18] to [36], the first technical point is dismissed.
11. The second technical point cannot be upheld, for the reason that this complaint does in fact relate to the maladministration of the fund by the insurer as its administrator. The decision in *Armaments Development Corporation of SA Ltd v Murphy NO & Others* [1999] 11 BPLR 227 (C) at 231C puts it beyond doubt that a complaint concerning the maladministration of the fund by the person administering it or performing any of the functions prescribed in the Act or rules for such person, is a complaint envisaged in the Act.
12. The second point is therefore dismissed.

The merits

13. The fund has not furnished this tribunal with the policy document containing clause 8 on which it relies to justify the charging by the insurer of a “premium reduction adjustment” fee and a “premium termination adjustment” fee. Only a page from the schedule to the policy document has been provided. I shall however, for present purposes accept that the clause has been accurately quoted in the response.

14. The clause provides as follows:

“8. PAID-UP POLICY

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 offers no further benefits. If the waiting period has already expired, the policy is converted into a paid-up policy with reduced benefits according to the practice of Sanlam.”

15. There is no reference whatsoever in this clause to the charging of either one of the fees that were charged by the insurer in this case. The rules also make no reference to them. Specifically, rule 11 refers to the recovery of “expenses in connection with the administration of the fund” from the fee allowed by the insurer, but there is no indication of what those fees cover and how they are made up. Rule 16.4, on the other hand, provides for the reinstatement of a member who has discontinued contributions prematurely, on payment of his current contributions to the fund and on fulfilling such conditions as may be determined by the board. (See *Sirkhot v Professional Provident Society Retirement Annuity Fund & Sanlam Life Insurance Limited*, an as yet unreported determination, Case No. PFA/GA/2736/05/JM at paragraphs [22] and [25] to [26]).

16. The Supreme Court of Appeal has held that if the rules are silent on a particular issue, there is no room for creativeness of the kind sought to be invoked by the insurer. The rules (subject to statutory provisions) are king: (See *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]; *Mostert NO v Old Mutual Life Assurance Company (SA) Ltd* [2001] 8 BPLR 2307 (CA) at paragraph [30]).

17. As the charging of the fees in question is not authorized by the rules of the fund, it cannot be lawfully sustained.

RELIEF

18. The order of this Tribunal is therefore this:

The Professional Provident Society Retirement Annuity Fund and Sanlam Life Insurance Limited are jointly and severally directed to, within four weeks of the date of this ruling, credit the complainant’s account(s) in the fund with the amounts of R23 693.76 and R7 525.13, plus interest thereon at 15.5% per annum, calculated from the date of this determination to the date of crediting thereof.

SIGNED IN CAPE TOWN ON THIS

DAY OF

2005

Yours faithfully

.....
VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR

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SECTION 30M FILING: MAGISTRATES' COURT