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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 (“the Act”) – HENDRINA VAN DER WATT v CENTRAL RETIREMENT ANNUITY FUND & SANLAM LIFE INSURANCE LIMITED

Introduction

1. Having considered the complaint that was received by this office on 24 March 2005 and further written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor are set out below.

The facts

2. On 1 August 1986 you became a member of the Central Retirement Annuity Fund (“the fund”). The fund is administered by Sanlam Life Insurance Limited which also invests its assets (“the insurer”). Your monthly recurring contributions of R100.00 were invested in a Sanlam policy (“the underlying policy”) with policy number 9321294X2. You chose not to increase your contributions. The policy matured on 1 August 2005.
3. In terms of the underlying policy the illustrative benefits that would become payable on retirement were:

“VOORDELE OP UITKEERDATUM

Minimum uitkeerbedrag	R27282
Illustratiewe uitkeerbedrag	
- insluitend inkomstebonusse	R67134
- uitsluitend inkomste – en kapitalbonusse	R96514

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

Die illustratiewe uitkeerbedrag van R96514 kan aangewend word vir:

'n jaarlikse pensioen van R18276

OF

'n kontantbedrag van R32171

plus 'n jaarlikse pensioen van R12168"

4. On 22 March 2005, after you requested a 'benefit statement', you were informed by the insurer that your fund value was R56 537. When the underlying policy matured on 1 August 2005 the retirement benefit which became payable was R58 133.63. You elected to take one-third (R19 377.91) thereof in cash and to receive the remainder as a monthly pension of R309.38 or an annual pension of R3 712.56.

The complaint

5. Your complaint is that annual pension of R3 712.56 is less than the annual pension quoted in the underlying policy.
6. You say:

"1 Aug 1986 het ek 'n uitree-annuiteit aangekoop om sodoende eendag my inkomste aan te vul. ... By intrede ... is ek 'n sorgvrye aftrede belowe met waardevolle pensioenvoordele. Op 22/03/05 het ek 'n staat van my voordele aangevra, dit is skokkend en onaanvaarbaar. So is ek ook mislei met Sanlam se wonderlike illustratiewe waardes. (sic)"

The response

7. The principal officer, Mrs Dorea Ozrovech, submitted a response. The fund's response also incorporated the insurer's response.

The fund's response

8. The fund has raised two technical points. The first is that what is at issue in this matter is "long-term insurance business" which is regulated by the Long-Term Insurance Act. The second is that your grievance does not constitute a complaint as defined in the Pension Funds Act and for this reason too falls outside my jurisdiction.
9. On the merits, Mrs Ozrovech argued that not all of your monthly contributions were used for investment towards your retirement benefits but that R2 680.12 of the total contributions received over the term of the policy were allocated for death cover (you enjoyed death cover of R49 469.00).

Sanlam's response

10. Regarding the illustrative values, it submits that it was calculated at a growth rate of 12% and 15% which resulted in maturity values of R67 134.00 and R96 514.00 respectively. It submits that the rates used were in line with the investment returns and the inflation rate at that stage. Furthermore it says the illustrative maturity value was not guaranteed but was based on illustrative bonus rates, annuity rates and inflation rates applicable at the time of the calculation.

11. Regarding the lower than expected retirement benefit which became payable in August 2005, it says, the benefit was lower because the actual bonuses were lower than the rates used in the illustrations. It says:

“During 1986 the illustrated rates of 15% and 12% were in line with investment returns earned and inflation rates at that stage. However, the actual declared bonuses were, on average, lower over the term of the policy than the rates used in illustrations. This had the effect that the premiums invested in the policy increased at a lower rate than illustrated. Consequently the actual values will be lower than the illustrated values.”

12. Mrs Ozrovech submits that the fund is satisfied that Sanlam has acted in accordance with the policy.

Determination and reasons therefor

Technical points

13. There is no merit in the technical points raised by the respondents. 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 Act. The provisions of that Act, including chapter VA (which confer jurisdiction on the Adjudicator to investigate and determine complaints against pension funds) therefore apply to it. For the reasons more fully set out in *Schwartz v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 435 (PFA) at paragraphs [12] to [28] and authorities referred to therein and *Louw v Central Retirement Annuity Fund and Another* [2005] 7 BPLR 622 (PFA) at paragraphs [17] to [36] I cannot uphold the contention that this matter constitutes “long-term insurance business” over which I have no jurisdiction.

14. 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), 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."

15. In so far as your complaint relates implicitly to the administration of the fund and/or the investment of its funds and alleges prejudice (in that you have been paid a lesser benefit than what you expected) in consequence of an alleged maladministration of the fund, your grievance constitutes a complaint as defined (see *Louw* at paragraphs [11] to [15]).

The merits

16. It is trite that a fund or the board of management of a pension fund organization, which a retirement annuity fund is, can only do that which is set forth in the rules (see section 13 of the Act and *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-F and *Mostert NO v Old Mutual Life Assurance Company (SA) Ltd* [2001] 8 BPLR 2307 (SCA) at paragraph [30]).

17. Part 8 rule 4 provides:

"Liability

The liability of the FUND is restricted to the values of the POLICIES and investments in UNIT TRUST SCHEMES held on behalf of a specific MEMBER."

18. It is clear from the underlying policy that not all of your total contributions (R22 800.00) over the term of the policy were used for retirement cover, but that R2 680.12 (11.75% of the total contributions) thereof were used to secure risk benefits. Furthermore, R540.36 was deducted, over the term of the policy, in respect of the monthly policy fee. In the circumstances only R21 072.14 of your total contributions over the term of the policy were used for retirement cover. This clearly had an effect on the total retirement benefit available at retirement.

19. Furthermore, the insurer calculated the illustrative values in 1986 on the

assumption that an annual bonus of 15% would be declared throughout the policy term. However, the actual bonuses declared between 1986 and 2005 varied between 17.5% in 1986 and 6.4% in 2004. The insurer has declared an interim bonus of 6.5% for 2005 until such time that the final bonus is declared. The average bonus declared between 1996 and 2004 was 12.26%.

20. I am satisfied that the illustrative values, calculated by the administering insurer in 1986, were not guaranteed and were depended on actual growth rates, annuity rates and inflation rates. This was stated in the underlying policy as follows:

“VOORBEHOUDE EN VERONDERSTELLINGS

Inligting in hierdie opgawe verstrek, is onderworpe aan die bepalings van die polis. Die werklike voordele wat die polis bied, sal bepaal word deur die werklike bonus koerse, kosteverhalings en berekeingsbassisse wat van tyd tot tyd geld.

Illustratiewe waardes in hierdie opgawe is onderworpe daaraan en berekken in die veronderstelling dat:

- Sanlam 'n beleggings bonus van 15.00 persent per jaar handhaaf wat bestaan uit
 - (a)
 - (b)
 -
 -
 -

Die illustratiewe waardes in hierdie opgawe word nie gewaarborg nie.”

(my underlining)

21. Furthermore, although you are aggrieved about the decrease in the retirement benefit value, you have not attacked the basis for the illustrative values nor have you shown that the fund was maladministered by the adoption of the illustrative values. While I accept that the so-called illustrative values are, at best, misleading (in being rooted in wholly unrealistic inflation benchmarks, for one thing) I can nevertheless not force the fund to pay you the illustrated values because you have not shown that all the conditions for the payment thereof have been met.

22. In the result, your complaint cannot succeed.

SIGNED AT CAPE TOWN ON THIS

DAY OF

2005

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator

Section 30M filing: High Court