

Final

**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR
(HELD IN JOHANNESBURG)**

CASE NO: PFA/GA/1276/2004/RM

In the complaint between:

A J VAN LUIPEN

Complainant

and

INVESTMENT SOLUTIONS RETIREMENT ANNUITY FUND

First Respondent

INVESTMENT SOLUTIONS WEALTH ADMINISTRATORS

Second Respondent

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24
OF 1956 (“the Act”)**

Introduction

[1] The rules and related documents in this matter give a clear indication of how retirement annuity funds and their underwriting life insurance companies should properly disclose fees and other charges levied on members.

- [2] The complaint pertains to a retirement annuity fund, the Investment Solutions Retirement Annuity Fund (“the fund”), and its alleged deduction of unauthorised administration and management fees, which the complainant contends has resulted in a poor investment return since he joined the fund in February 2000. He also complains that there was an initial unaccounted shortfall of R1 130.92 between his fund values when he transferred to the fund and is free to take his money and run to another retirement annuity fund if this fund gives him less than expected investment returns.
- [3] The fund in this case is not one of those underwritten by a life insurance company. Another distinguishing feature is that the member has a wide range of investment options including unit trusts, endowments, multi-and single-manager share portfolios and guaranteed portfolios. Further, the member is not restricted to a single insurer but can choose between a host of different asset management companies and insurers. In this fund the member receives a membership certificate rather than a policy contract.

Facts

- [4] The complainant contributed a once-off lump sum amount of R68 926.63 in the fund (previously known as the MultiRand Retirement Annuity Fund) on 7

February 2000 after signing an application form on 13 July 1999. This was a transfer from another retirement annuity fund. He chose to invest in the Investment Solutions multi-manager portfolios and invested 30% of his contribution in the Investment Solutions Entrepreneur portfolio and 70% in the Investment Solutions Performer portfolio. This amount was then allocated to the portfolios of the complainant's choice in the splits indicated by him together with interest of R204.75 on 21 February 2000.

- [5] Numerous correspondences then ensued between the complainant and the second respondent beginning with a letter from the complainant dated 20 October 2002 in which he complained about low returns on his investment, and culminating in the lodging of this complaint in September 2004.

The Complaint

- [6] The thrust of the complaint, as I understand it, is that the respondents have levied charges not provided for in the rules and application form. The complainant further alleges that his investments have not shown the expected growth in value in line with the earnings and returns "as advertised" by the fund since he transferred his investment to it. This, he contends, is because the fund and the administrator have levied an additional 1.32% in administration and management fees, which is in addition to the "all-inclusive" administration fee of

1.25% to which he had agreed when he joined the fund in July 1999.

The Response

[7] In a no-frills-no-fuss response to the complaint, the second respondent's managing director submits that the fees levied are clearly set out in the application form signed by the complainant in July 1999. He maintains further that the portfolios chosen by the complainant are market related portfolios which do not provide for capital guarantees. He says because these portfolios are market-related and there is no capital guarantee in them their asset values tend to fluctuate as a result of market volatility. Thus, between 21 February 2000 and 28 February 2000 market fluctuations resulted in the complainant's investment decreasing in value by R1 335.67 to R67 795.71. Therefore, there was no unaccounted shortfall to speak of.

[8] Secondly, in relation to the alleged under-performance of the portfolios, it was noted that the complainant was not comparing the correct time periods and failed to take into account the gross returns published in newspapers as contrasted with net returns in investment statements sent to members, which take into account all fees and taxes.

[9] Regarding the alleged excessive administration and management fees charged, it is contended that the application form provides for two types of fees. The one is the administration fee of 1.25% *per annum* plus Value Added Tax (1.425% *per annum* inclusive of VAT). The other is the investment management fee of between 0.75% and 1.00% *per annum* plus VAT, depending on the member's investment choice. The complainant chose to invest in the Performer and Entrepreneur portfolios, both of which carry an investment management fee of 1% *per annum* plus VAT (1.14% *per annum* inclusive of VAT). The total fee thus charged was 2.57% (1.425% was rounded off to 1.43%).

Determination and reasons therefor

Investment returns

[10] It is clear from the response to the complaint that the reason for the decrease in the complainant's investment value in the fund between 21 February 2000 and 28 February 2000 was the decline in the value of the underlying assets in the portfolios in which he chose to invest. The investment statements provided to the complainant clearly indicate a negative investment return of R1 335.67 for the period 21 February 2000 to 28 February 2000. The complainant will have to bear the swings and roundabouts that inevitably occur once he decided to invest

in the market-related portfolios. This is the nature of a defined contribution fund such as the first respondent.

[11] Rule 11.1.9 allows each member an investment choice but then couples such choice with a responsibility. It provides:

“ . . . [A] Member may be allowed to choose to invest his contributions . . . or a part thereof, in an investment portfolio or any combination of investment portfolios approved by the Trustees. Whilst the Trustees shall take all reasonable steps to ensure that the interests of all Members are protected, the Trustees shall not be liable for any loss, damage or prejudice suffered by any Member as a result of or in connection with any investment choice made by the Member.”

[12] The responsibility borne by the member is balanced by his freedom in terms of rule 11.1.8 to transfer his investment to another retirement annuity fund if the fund is not performing as he wishes. This, in my view, is hugely commendable of this fund unlike some funds underwritten by some life insurers which charge members undisclosed fees and flatly refuse to allow transfer out of the fund even when their investment performance is materially below par.

[13] This leg of the complaint cannot succeed.

Unauthorised fees

[14] I now turn to consider the complaint about the alleged unauthorised fees deducted from the complainant's fund investment, which the complainant contends has resulted in a lower investment return since February 2000. It is trite law that whatever a fund and its board of management may, or may not, do must be stipulated in its rules and relevant legislation. Therefore, I turn firstly to consider the fund's rules in determining this leg of the complaint.

[15] The fund provides retirement, death and early termination benefits to its members. On the occurrence of events such as the stopping of payment of contributions to the fund (rule 7), the member becomes entitled to an annuity secured by his "fund credit" which is retained in the fund until the member reaches his chosen retirement date. (Upon enquiry, the administrator indicated that no "unrecouped expenses" or "penalty fees" or "premium alteration" fees or "premium cessation" fees are leviable upon stopping or reduction or alteration or transfer of contributions). "Fund Credit" is defined in rule 2 to mean:

- "(a) the Member's total contributions to the Fund in terms of Rule 4.1,
- (b) any amount transferred to the Fund in terms of Rule 8.1,

less any expenses incurred in administering such amounts, and increased or decreased by the Investment Return on the assets of the Fund until the Calculation Date.”

[16] “Investment Return” is defined as follows:

- “(a) any income (received and accrued) less an allowance for any tax and if applicable, part or all of any expenses (paid and accrued); and
- (b) any capital appreciation or depreciation (realised or unrealised).”

[17] Rule 11.2 deals with expenses. It provides as follows:

“Expenses

Except where otherwise provided, the whole of the expenses in connection with or incidental to the management or administration of the Fund, including any fees payable to consultants appointed in terms of Rule 10.7.4, and the investment thereof shall be paid by the Fund. The Administrator shall determine the administration fee to be levied under the Fund.”

[18] Pursuant to his decision to join the fund, the complainant completed its application form on 13 July 1999. This application form contains a section titled “Fees”, which has sub-sections headed “Initial Fees”, “Ongoing Fees” and “Exit Fees”. The administrator has advised that since the complainant was

basis of my participation in the Fund. I furthermore accept and bind myself to the terms and conditions of the registered rules of the Fund, as well as any conditions the Board of Trustees may formulate thereunder.

2. I hereby authorise the Fund to pay all charges specified herein and to deduct such charges from the investment.”

[20] The deduction of expenses from a member’s investment value is provided for in the definitions of “Fund Credit” and “Investment Return” in rule 2 of the rules. Further, rule 11.2 also expressly provides for the deduction of expenses.

[21] The terms and conditions stipulated in the application form are material to the complainant’s membership of the fund. In my view, and on a close reading of the “Ongoing Fees” section of the application form, there are two types of fees levied against members’ investment values at any stage. The first is an administration fee and the second is an investment management fee.

[22] The deduction of an administration fee is provided for in rule 11.2, but the quantum thereof is left to be determined by the administrator. In the application form completed by the complainant, who made a single contribution of less than R500 000 to the fund rather than recurring contributions, it is stipulated that the annual fund administration fee is 1.25% plus VAT (1.425% inclusive of VAT). In my view, the rules specifically provide for the deduction of an administration fee

and the quantum thereof is clearly disclosed in the application form that was signed by the complainant.

[23] The second type of fees is the investment management fee, or fund management fee, charged by the investment management company or unit trust management company selected by each member. Members have been given investment choices by the trustees of the fund. At the time the complainant became a member he had the option of choosing to invest part or all of his investment in any one or a combination of five broad investment categories. These were as follows:

[23.1] Investment Solutions Multi-Manager Multi-Profile Portfolios

[23.2] Investment Solutions Single Manager Balanced Portfolios

[23.3] Investment Solutions Pure Endowment

[23.4] Investment Solutions Fully Vesting Guaranteed Portfolios

[23.5] Unit Trusts

[24] The complainant decided to invest in two of the Investment Solutions Multi-Manager Multi-Profile Portfolios, which were branded as the Entrepreneur and Performer portfolios by the investment management company.

[25] Provision for the deduction of expenses is made in the definitions of "Fund Credit" and "Investment Return" in rule 2. However, there is no mention of the

quantum of such expenses. Rule 11.2 also provides for expenses. In terms of this rule the fund is liable to pay expenses, “*except where otherwise provided*”. Such “*otherwise*” provision is in my view made in the application form. The member application form stipulates the fees payable by the member, depending on the investment choice made by each member. The “Declaration” portion of the application form also authorises the fund to deduct all charges levied from the investment value of each member.

[26] On examining the “Ongoing Fees” section of the complainant’s application form, the third bullet point makes provision for an “*Annual Investment Management Fee of 0,75 to 1% plus VAT (deducted by the Investment Manager/unit Trust Management Company)*”. It may be argued that the investment management fee appears to be payable only in respect of recurring contributions because of the form in which it is set out in the application form. However, I prefer to look at the substance of the Fees section, and on a close reading it is clear that a distinction is made between the administration fees levied and the investment management fee that is charged, depending on the type of investment that is chosen (this is more so because members have a wide selection of investment options with a number of independent investment and asset management companies, which in all probability charge different investment management fees)

[27] The administrator has advised that the two portfolios in which the complainant is invested attract an investment management fee of 1% *per annum*, plus VAT (1.14% inclusive of VAT). Therefore, in total the complainant pays administration fees of 1.43% *per annum* (that is, 1.425% rounded off) and investment management fees of 1.14% *per annum*, resulting in total fees of 2.57% *per annum*. In my view, the deduction of these fees from the member's investment value is provided for in the rules read together with the application form signed by the complainant.

[28] Furthermore, as regards whether the fees charged by the fund are excessive or unreasonable, that is not an issue to be determined by this tribunal. Contrary to common belief, the purpose of this tribunal is simply to determine whether the fund had the authority to effect the deductions in respect of the variety of fees charged to the member's investment account. Insofar as the allegations concerning the excessive fees charged by fund, the appropriate authority to make any findings in this regard is the regulator of pension funds, which is the Financial Services Board.

Relief

[29] In the result, the complaint cannot succeed.

DATED at Johannesburg on this day of August 2005.

Vuyani Ngalwana

Pension Funds Adjudicator

Registered address of the fund:

Investment Solutions Office Park
63 Wierda Road East
Wierda Valley
Sandown

Section 30M filing: Magistrate's Court

Complainant and Respondents unrepresented