IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

(HELD IN JOHANNESBURG)

CASE NO: PFA/GA/1811/2004/RM

In the complaint between:

N J LOUW Complainant

and

CENTRAL RETIREMENT ANNUITY FUND **First Respondent**

SANLAM LIFE INSURANCE LIMITED **Second Respondent**

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

Introduction

[1] In his original complaint the complainant laments the poor investment returns (he uses the term "*powere opbrengs*") on his

investments in the first respondent over a 14 year period. He says over that period he contributed a total of R24 700 (Sanlam, the administrator, puts the total contributions at R24 699,03 but nothing turns on this 97 cents difference) while his investment value when he stopped making contributions as at 1 November 2004 was "R24 000" (R23 999,46 according to Sanlam) which he considers to be "*heeltemal te min*". He says he expected his investment value after 14 years to be "*ten minste*" more than his contributions. This is a common complaint to this tribunal by members of retirement annuity funds administered by life assurers. On its own without elaboration, however, it does not make out a proper case.

[2] But then in response to this, Sanlam introduced the issue of an "early termination charge" and the usual jurisdiction argument based on the submission that we are here dealing not with a pension fund organisation but with a long term insurance policy. This then enabled the complainant in reply to address the issue of the "early termination charge", so that the complaint is now no longer just about poor investment returns (which in my view would not, without more, have been sufficient to found relief under the provisions of the Act) but also about the maladministration of the

fund by Sanlam in levying charges about which the complainant had never been informed (in writing or otherwise) and as a result of which he says he has suffered prejudice. He says if he had been advised of this "early termination charge" he would not have stopped contributions.

The Facts

[3] The complainant joined the Central Retirement Annuity Fund ("the fund") at the age of 46 on 1 August 1990 and elected that his membership endure for 20 years until his chosen retirement age of 66 years in August 2010.[1] He paid monthly contributions totaling some R24 699,03[2] according to Sanlam until he decided to stop in November 2004 (his last contribution was made on 1 October 2004). He was 60 years old at the time he stopped contributions and was thus well within the retirement range (of 55 to 70) allowed by the rules of the fund (see definition of "RETIREMENT DATE"

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1 The reason for choosing a retirement age of 66 is unclear, especially since the policy document allows a member to choose a retirement age anywhere between 55 and 70 years. It is clear though, that the longer the complainant's membership of the fund endures, the greater the future charges will be for the insurer and broker.

2 R8 471,64 of this sum went toward risk cover according to Sanlam

in Part 3 Rule 3) and by the Income Tax Act, 58 of 1962, for retirement annuity fund purposes (see paragraph (b)(v) of the definition of "retirement annuity fund").

[4] Upon enquiry, Sanlam advised him that the value of his investment as at 1 November 2004 was R23 999.46. He then opted to use this full value to purchase a life annuity from Sanlam that now pays him a pension of R166.51 per month with effect from 30 November 2004. Sanlam, as administrator of the fund, levied what it calls an "early termination charge" in the amount of R3 854,10 for the cessation by the complainant of contributions prior to his 66th birthday or twentieth anniversary of his membership of the fund.

Complaint

[5] The complainant complains that the R23 999,46 that was according to Sanlam the value of his investment as at 1 November 2004 upon his cessation of contributions totaling R24 699,03 after 14 years was unacceptable. He also disputes the levying of an "early termination charge" (apparently by Sanlam and not the fund) and

says he was never informed that this charge would be levied if he stopped making contributions before 1 August 2010. He says if he had been so advised he would never have stopped contributions but would have toughed it out for the remaining six years of his agreed membership. He is also prepared, he says, to return the monthly pension of R166,51 he has been receiving from Sanlam as insurer since 30 November 2004 so as to avoid this "early termination charge".

Points *in limine*

[6] In her reply dated 31 March 2005 the principal officer of the fund, Mrs Ozrovech, raises two points *in limine.* Firstly, she submits on behalf of the fund that the complaint relates to so-called "long-term insurance business" and not to "pension fund business." For that reason, she says, the adjudicator does not have jurisdiction to adjudicate on this complaint.

[7] Her second preliminary point is that the complaint does not fall within the definition of a "complaint" as contemplated by the Act.

[8] I have in numerous previous determinations dealt with these points and I remain unpersuaded by them in this case. The principal officer does not even deign to explaining why this complaint is not a complaint as defined but simply contents herself with a bald allegation in that regard. On the nature of the business with which we are here concerned she says, with similar ellipsis, that the subject-matter of this complaint constitutes "long-term insurance business" and not "pension fund business". She appears to peg this submission on a policy issued by Sanlam so that, as I understand it, if a pension fund organisation registered under the Pension Funds Act (as she admits this to be the case here) provides in its rules for retirement benefits but then re-insures those benefits with a life company, a member who feels aggrieved in any way on the administration of the fund in relation to those benefits has recourse not to this tribunal (which was set up to deal expeditiously, procedurally fairly and without charge with all complaints involving pension fund organisations registered under the Act – such as the fund in this case) but to the "Registrar of Long Term Insurance or even . . . the High Court". This, in my view, is a cynical argument which calls for a cynical answer. I shall deal with it shortly.

[9] On the merits, the principal officer points to clause 7 of a document titled "BESKRYWING EN BEPALINGS" which she avers provides for this "early termination charge" now disputed by the complainant. The clause provides for nothing of the kind. Nevertheless, I shall deal with this in due course.

Determination and reasons therefor

[10] I have already pointed out that the fund raises two preliminary points with which I now deal.

Is it a complaint?

[11] A complaint is defined in section 1 of the Act as follows:

> ""**complaint**" means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging-

(a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;

(b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;

(c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or

(d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant;"

[12] The principal officer simply says this is not a complaint as defined but then omits to say why that should be so. Well, I shall explain why it is a complaint.

[13] Just as in *Schwartz v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 435 (PFA) and *De Beer v Central Retirement Annuity Fund and Another* [2005] 3 BPLR 257 (PFA), Sanlam is the administrator of this retirement annuity fund. Because the complaint relates to the levying of a charge about which the complainant alleges he had never been informed, the

issue is one of administration, to wit, proper communication and transparency. As a result of that maladministration by the administrator, the complainant has suffered prejudice at least in the amount of the "early termination charge". In *Armaments Development and Production Corporation of SA Ltd v Murphy NO and Others* [1999] 11 BPLR 227 (C) at 231C the Cape High Court held that the phrase "any person" in paragraph (b) of the definition of complaint refers to the person administering the business of the fund. In this case, that is clearly Sanlam. The court said the following in this regard:

> "Sub-paragraph (b) of the definition [of complaint] makes this distinction even clearer by referring to prejudice suffered by a Complainant as a result of the maladministration of the fund by the fund ***or any person***. Clearly this has to be a person administering the fund or performing any of the functions prescribed in the Act or rules for such person … ."
>
> (italics in original text)

[14] Moreover, to the extent that the complainant laments poor investment returns ("powere opbrengs") the matter of the investment of funds is clearly in issue. Whether a proper case has been made out on this ground is a different issue which does not

detract from the ground constituting a complaint as defined.

[15] Further, since the fund relies on a clause for the proposition that Sanlam is entitled to deduct "early termination charges" upon cessation of contributions before the chosen retirement date, and the complainant disputes this, there is clearly a dispute of law for purposes of paragraph (c) of the definition.

[16] I can thus not accept that this is not a complaint as defined.

Does the adjudicator have jurisdiction?

[17] Part 5 Rule 7 of the rules of the fund expressly gives jurisdiction to the pension funds adjudicator to deal with matters pertaining to the interpretation of the rules and administration of the fund. The rule reads as follows:

> "In a dispute regarding the interpretation of the rules or the administration of the FUND, the complainant must submit his complaint directly to the FUND in writing. The FUND must reply in writing within thirty days of the receipt of the complaint. If the

> complainant is not satisfied with the FUND's answers and the complaint is a complaint as intended in the ACT, the complainant can refer the complaint to the Pension Funds Adjudicator for a decision."

[18] This rule really does nothing more than incorporate the provisions of section 30A of the Pension Funds Act. It also, however, purports to circumscribe the adjudicator's reach by limiting his probe only to matters of interpretation of the rules and administration of the fund. Of course, the Act itself casts the net of the adjudicator's jurisdiction much wider than that to include matters of investment, application of fund rules, improper exercise *by any person* of powers conferred by the rules, dispute of fact or law in relation to the fund and prejudice resulting from maladministration either by the fund or by any person who administers the fund (see definition of "complaint"). It is thus surprising that the issue of the adjudicator's jurisdiction in a matter like this should be disputed by the fund.

[19] The fund says the subject-matter of this complaint constitutes "long-term insurance business" in contradistinction to "pension fund business". It says so by reason solely of an insurance policy that it says was issued by Sanlam to it on the complainant's life.

Even so, however, the fiduciary duties that the fund owes to its members are not at an end simply because its liabilities to its members have been re-insured with Sanlam. What is more, Sanlam as administrator of the fund's business cannot seek refuge behind an insurance business with the fund in the face of complaints by members of the fund relating to Sanlam's administration of their fund, investment of their funds and interpretation and application of the rules of their fund. The definition of "complaint" in the Act makes that clear.

[20] What the fund seeks to do is present a neat picture where there are two separate relationships: one between the complainant and the fund (in respect of which it says the adjudicator has jurisdiction); the other between the fund and Sanlam (in respect of which it says the Registrar of Long-Term Insurance or the High Court has jurisdiction).[3] There are a number of factors which in my respectful view point to the fallacy of this submission.

[21] The first, as has already been pointed out above, is that, notwithstanding the fund's insurance contract relationship with

[3] It would seem the fund itself is unsure where jurisdiction properly lies because in *Schwartz v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 435 (PFA) it said the Long-Term Insurance Ombudsman (not the registrar or the High Court as it now suggests) has jurisdiction.

Sanlam, members still have recourse against Sanlam in this tribunal for maladministration of their retirement fund, negligent or imprudent investment of their funds, and misinterpretation and misapplication of the rules of their retirement fund.

[22] Secondly, the nature of the complaint here in issue (as are all complaints with which this tribunal has dealt regarding so-called early termination charges in the retirement annuity fund context) does not sit comfortably with the general scheme of the Long-Term Insurance Act, 52 of 1998, under which the Registrar of Long-Term Insurance exercises his powers. That Act, as its long title and its provisions generally make clear, focuses on the regulation of the long-term insurance business of long-term insurance companies. It was never intended to regulate the administration by life companies of the business of pension fund organisations.

[23] Thirdly, while the High Court has inherent jurisdiction, the fund knows full well the prohibitive expense of litigating in the High Court. In numerous instances where the underwriting and administering insurer challenges this tribunal's determination in the High Court, there is invariably no opposition from the complainant, not because the complainant suddenly realises the folly of his or

her ways on the merits, but because he or she has no financial means to defend the insurer's application. Both the fund and Sanlam, the administrator, know this. Here, the complainant has lodged this complaint disputing the charging of R3 854,10. It is cynicism of the worst kind to suggest, as the fund does, that he should pursue his case in the High Court where he will have to expend much more than R3 854 to pursue the matter. This is the mischief at which establishment of this tribunal was targeted.

[24] The situation of the complainant being financially bullied out of court is exacerbated by the adjudicator being *functus officio* upon making a ruling and thus not having legal standing to oppose the insurer's application in the High Court. The Cape High Court said the following in this regard in the matter of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others* [2002] 9 BPLR 3830 (C) at 3831I – 3832D:

> "The Adjudicator opposed the applications by the fund, filed opposing affidavits and was represented by counsel. That is not the function of the Adjudicator. . . . [H]is function is to dispose of complaints lodged in terms of section 30A(3) in a procedurally fair, economical and expeditious manner and in doing so he may make an order which any court of law may make. After completion of his investigation a

> statement containing his determination and the reasons therefore (sic) are sent to all the parties concerned and to the clerk or registrar of the court which would have had jurisdiction had the matter been heard by a court. The Adjudicator has no further function to fulfil. If a party is dissatisfied and approaches the High Court, a *de novo* hearing is initiated which . . . is neither an appeal nor a review."

[25] The Supreme Court of Appeal in *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) at 402G-403B made the following remarks with regard to participation by a judge[4] in proceedings on appeal against his judgment:

> "There are good reasons of policy why Judges should not be joined. In the first place there is no need for it. Judges know perfectly well that their decisions may be upset by a higher Court on appeal, or even by another single Judge in the case of an *ex parte* order. If one's order is set aside one's vanity may be pricked but one's function is finished. Perhaps the Judge will be consoled by the reflection of Ulpian, contained in *Dig* 49.1.1, that an appeal sometimes alters a well-delivered judgment for the worse, as it is not necessarily the case that the last person to pronounce judgment judges better. It is not for Judges to participate in any stage subsequent to their judgments in

[4] I use this example only analogously as I do not pretend to be a High Court judge

> order to defend their decision. Indeed it would be improper to do so, except in those rare cases when an obligation to provide information arises. Secondly, on grounds of convenience, I do not think that the time of Judges should be wasted filing affidavits in support of their decisions. The place to explain a decision is in a judgment. Once given it is given . . . . Thirdly, and most importantly, it is not in the public interest that Judges should become embroiled in disputes between parties who have appeared before them. It is a matter of the utmost importance that Judges should be seen as impartial and, in the kinder sense, aloof."

[26] The simple point is that the fund's and Sanlam's argument that the High Court – and not the pension funds adjudicator – has jurisdiction to hear this matter concerning a princely sum of at least R3 854 is designed primarily to bully the complainant out of court and (in some instances) confidentially settle a matter with a financial enticement while sneaking out to court (having got the complainant's *pro amico* counsel out of the way and knowing the adjudicator to be firmly out of reckoning) to secure an unopposed order on the merits. This is an unfortunate reality of a fund administrator (eagerly aided by fund trustees who seem to owe their bread more to the administering insurer than to their fiduciary duties) motivated not so much by considerations of consumer

satisfaction but by profit margins.

[27] Fourthly, it appears that Sanlam readily dangles the carrot of the fund being a pension fund organisation when circumstances are suitable to it (namely, for income tax considerations and the attendant vast "premium income" from people keen to reduce their income tax liabilities) but just as rapidly hides behind a life insurance contract with the fund in its eagerness to evade the regulatory scheme of the Pension Funds Act. While I accept that there is in law a contractual relationship between the fund and Sanlam, a cursory consideration of the facts, however, demonstrates otherwise. For example, it is clear from section 2 of the proposal form that the life insured ("versekerde lewe") and the proposer ("aansoeker") are the same person, namely, the complainant. That section requires that it be completed only in the event of the proposer and the life insured being different persons. The fact that it has been left blank suggests on the facts that the complainant is the policyholder. But this is not an accurate reflection of the legal position. All it tends to do is confuse the various relationships so that Sanlam can fall back on whichever relationship suits the circumstances of its case.

[28] In the result, there is no merit in the fund's argument that the contractual nexus in this case between the fund, on the one hand, and Sanlam on the other, effectively shuts the door to the adjudicator's tribunal. If the fund's argument in this regard were to be upheld, then its members would have no recourse against Sanlam even in the High Court since Sanlam would doubtless raise lack of *locus standi* with reference to privity of contract between itself and the fund whose trustees and principal officer are in any event Sanlam employees. The legislature could never have intended such a handicap on members of the fund, effectively requiring Sanlam to sue itself on matters pertaining to the fund.

[29] As pointed out above, such a distinct relationship between the fund and Sanlam which excludes the complainant does not necessarily take a complaint by a member of the fund against Sanlam as administrator of the fund out of the range of the adjudicator's lens. An issue raised by a fund member relating to the administration of the fund by any person who administers the business of the fund, and which the member alleges has caused him prejudice, constitutes a complaint as defined and so falls to be determined by the adjudicator.

[30] Now, the fund's argument is tantamount to a submission that this matter concerns not whether a retirement annuity fund is in law a pension fund organisation but whether it is one in practice. That it has all the features of a pension fund organisation (except those from which retirement annuity funds are exempt under section 2(3)(a) and section 7B(1)(b)(ii) of the Act) is, the fund seems to suggest, inconsequential because in practice it has always been treated as an insurance policy regulated under the provisions of the Long-Term Insurance Act. This is the kind of argument that has firmly been dismissed by the Supreme Court of Appeal in *Mostert NO v Old Mutual Life Assurance Company (SA) Ltd* [2001] 8 BPLR 2307 (SCA) where the court said (at 2324E):

> "There is no basis whatever for contending that [legislative] provisions have been repealed or were entitled to be ignored because of some "practice"."

[31] The reality, however, is that a proper enquiry is not whether or not the fund in this case is a pension fund organisation (or an insurance policy, as the fund would have us believe) in practice. The proper enquiry is whether the fund is in law and, indeed, in fact a pension fund organisation. The answer lies in its own registered rules, the

Pension Funds Act and the Income Tax Act. The Pension Funds Act defines a pension fund organisation as:

> "*(a)* any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching their retirement dates, or for the dependants of such members or former members upon the death of such members or former members; or
>
> *(b)* any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons,
>
> and includes any such association or business which in addition to carrying on business in connection with any of the objects specified in paragraph *(a)* or *(b)* also carries on business in connection with any of the objects for which a friendly society may be established, as specified in section 2 of the Friendly Societies Act, 1956, or which is or may become liable for the payment of any benefits provided for in its rules, whether or not it continues to admit, or to collect

contributions from or on behalf of, members."

[32] The fund in this case is for all intents and purposes a pension fund organisation as defined in the paragraph (a) definition in the Pension Funds Act. This is made abundantly clear by its registered rules. For example,

[32.1] its primary purpose is to provide retirement benefits to its members upon their reaching retirement date (Part 4 Rule 1);

[32.2] it has a board of management whose duties include entering into written agreements with Sanlam for administration, investment and actuarial services (Part 5 Rule 6.1) and negotiating with Sanlam on behalf of its members on issues relating to the fund and policies issued by Sanlam (Part 5 Rule 6.4). Of course, the management board also has a statutory duty (as do all trustees of pension fund organisations) to ensure that "*adequate and appropriate information*" is communicated to members informing them of their "*rights, benefits and duties*" (see *section 7D(c) of the Act*). One of its objects (as is the object of all pension fund organisation trustees) is to take all reasonable steps to ensure

that "*the interests of members … are protected at all times*" (see *section 7C(2)(a) of the Act*);

[32.3] it has a principal officer who "*signs all documents on behalf of the* FUND" (Part 5 Rule 2);

[32.4] death benefits are payable expressly subject to the provisions of section 37C of the Pension Funds Act (Part 8 Rule 7.3);

[32.5] its rule amendments must first receive the sanction of the Registrar of Pension Funds to be of any effect (Part 10 Rule 4.3). This, of course, means that the provisions of section 12 of the Pension Funds Act must, except with the Registrar's permission, be complied with;

[32.6] its business may be amalgamated with that of another similar fund only if, among other things, the Registrar of Pension Funds agrees to such amalgamation (Part 10 Rule 2). This, of course, means the provisions of section 14 of the Pension Funds Act must be complied with;

[32.7] upon its voluntary dissolution, which can only be done with

the express permission of the Registrar of Pension Funds, the provisions of section 28 of the Pension Funds Act apply (Part 10 Rule 3);

[32.8] in the event of a dispute regarding the administration of the fund, the provisions of chapter VA of the Pension Funds Act apply (Part 5 Rule 7).

[33] The Income Tax Act, 58 of 1962, has a long definition of a retirement annuity fund. The definition has striking similarities with that of a pension fund organisation under the Pension Funds Act. Nevertheless, the Income Tax Act definition has essentially two main features. The first is that the fund must be approved by the Commissioner for Inland Revenue for income tax purposes. The effect of this approval is that, among other things, members' contributions are to an extent deductible from their income[5] for purposes of calculating taxable income or assessed loss as the case may be. The second (as regards those funds established after 1 July 1986) is that the fund must be registered in terms of the Pension Funds Act. This feature is for purposes of this case academic because, although the fund here in issue was established in June

5 Gross income less exempt income

1960, its rules are in any event registered by the Registrar of Pension Funds in terms of the Pension Funds Act.

[34] Before the Commissioner can approve a retirement annuity fund for income tax purposes, the Income Tax Act definition imposes certain requirements. Non-compliance will put the fund's tax approval status in jeopardy. Some of these requirements are that:

[34.1] the retirement annuity fund must be a permanent fund *bona fide* established for the sole purpose of providing life annuities for its members or, upon a member's death, his or her nominees or dependants. This is precisely what this fund does through part 4 of its rules (cf definition of "pension fund organisation" in the Pension Funds Act).

[34.2] the fund must comply with its rules. This is trite for all pension fund organisations as legislated under section 13 of the Pension Funds Act and emphasised by at least two Supreme Court of Appeal judgments in *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239 D-E and *Mostert NO v Old Mutual Life Assurance Company (SA) Limited* [2001] 8 BPLR 2307

(SCA) at 2313F-G (except, of course, those provisions pertaining to audits [sections 5(2), 9 and 9A] and management board composition [section 7B(1)(b)(ii)] from which retirement annuity funds are exempt).

[34.3] the rules of the fund must provide, *inter alia* –

(a) for member contributions (as in part 7 of the rules of the fund here in issue. Compare section 13A of the Pension Funds Act);

(b) that no benefits may be paid in a single cash lump sum (the first payment being limited to one-third of the total benefit) except where the annual amount of the benefit is less than R1 800 (as in part 8 rule 3.1 of the rules of this fund. This is standard for pension funds although not for provident funds);

(c) that no payment of annuities may be made to a member after age seventy or, except in instances of permanent disability, before fifty-five (as in definition of "retirement date" in part 3);

(d) that, except in certain clearly defined circumstances, no member's right to a benefit is capable of alienation, surrender or pledge as security for a loan (as in part 9. Compare section 37A of the Pension Funds Act);

(e) that a member who discontinues his contributions prematurely will be entitled either to an annuity (payable from the date on which he would have become entitled to the payment of an annuity if he had continued his contributions) determined in relation to his actual contributions, or to be reinstated as a full member under conditions prescribed in the rules of the fund (as in part 7 rule 2 which is a bad and inaccurate paraphrase of paragraph (b)(x) of the definition of "retirement annuity fund");

(f) that the Commissioner for Inland Revenue must be notified of all amendments of the rules (not accurately provided for but badly and inaccurately paraphrased in part 10 rule 4.2).

[35] There can thus be no doubt that the retirement annuity fund here in issue (and any other retirement annuity fund for that matter) is, for all intents and purposes, in fact and in law, a pension fund organisation and not an insurance policy. If it were an insurance policy and the Commissioner for Inland Revenue knew that this were so, I have no doubt that none of the members' contributions would be deductible for income tax purposes.

[36] Even on the fund's own submission that Sanlam issued a policy to it on behalf of the complainant, the fund does not thereby cease being a retirement annuity fund *qua* pension fund organisation which owes fiduciary duties to the complainant. Moreover, Sanlam does not cease being an administrator of the fund by reason solely of having issued an insurance policy to the fund. As administrator, Sanlam may rightly be hauled before the adjudicator by any member of the fund or by trustees of the fund on allegations of maladministration of the fund, misinterpretation or incorrect application of its rules, negligent or otherwise wanton investment of its funds, and conduct *ultra vires* the rules. Neither the fund nor Sanlam as administrator can lawfully dictate to a member to litigate in the High Court.

The Merits

[37] For the proposition that Sanlam is entitled to levy an "early termination charge" the fund points to clause 7 of one of the documents submitted by it (annexure 4 to its response). The document is titled "BESKRYWING EN BEPALINGS" and the clause on which the fund relies reads as follows:

> "**VERVROEGING OF UITSTEL VAN UITKEERVOORDELE**
>
> Indien die versekerde dit verkies, kan die uitkeervoordele gedeeltelik of ten volle beskikbaar word op enige datum na die vyf-en-vyftigste en voor die sewentigste verjaardag van die versekerde.
>
> …
>
> By 'n vervroeging of uitstel word die bedrae en bepalings van hierdie polis verander soos deur Sanlam bepaal."

[38] Nothing in this clause entitles Sanlam to levy an "early termination charge" or a charge of any description whatever. All it does in vague terms is provide for changed benefits as determined by Sanlam. Section 7D(c) of the Act enjoins the fund to "ensure that

adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund". There is even no indication of what this "early termination charge" comprises. The complainant is in the dark as regards whether it includes administration fees for the remaining six years (which in any event cannot possibly have been incurred since the fund has not yet been administered for those years), upfront commission already paid for the remaining six years, interest on the "loan account" created in the member's investment account from which upfront commission is paid (about which no member is ever told), and so forth. As a service provider that has been appointed by the trustees of the fund to provide, among other services, administrative services (although the relationship between Sanlam and the fund's management board is rather blurred so that one would be forgiven for thinking they are the same entity) it was incumbent upon Sanlam to advise the complainant of this charge (and the composition thereof) in terms of the section when he joined the fund or, at the latest, when he enquired about stopping contributions. Clause 7 of the document referred to above does not meet the test.

[39] A pension fund organisation or any person who administers its

business may not legally levy charges on members' investments that are not provided for in the rules of the fund or in any other documents detailing the terms and conditions of membership of the fund (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E; *Mostert NO v Old Mutual Life Assurance Company (SA) Limited* [2001] 8 BPLR 2307 (SCA) at 2314F-G). That it has been the practice of life companies administering the business of retirement annuity funds to do so in the event of early cessation of contributions by members before the costs incurred by life companies in advance have been recouped does not change the legal position.

[40] In the result, the fund must return the charge unlawfully levied on the complainant.

Relief

[41] I thus make the following order:

[41.1] The Central Retirement Annuity Fund is ordered forthwith to calculate the lump sum amount that would have been paid to

the complainant, as well as the amount of his life annuity that amount would have secured for him from 30 November 2004, had the amount of the early termination charge not been deducted.

[41.2] The Central Retirement Annuity Fund is further ordered, by no later than Friday 9 September 2005, to transfer the amounts in paragraph [41.1] above, less any amounts already paid and any deductions in terms of sections 37A and 37D of the Act (if any), to the registered insurer currently responsible for paying the complainant's pension.

[41.3] The Central Retirement Annuity Fund is ordered further to pay interest on the amount of the transfer in paragraph [41.2] above at the *mora* rate of 15,5% per annum reckoned from 30 November 2004 until date of transfer.

DATED AT JOHANNESBURG ON THIS DAY OF SEPTEMBER 2005.

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR

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