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

Introduction

- [1] Having considered the complaint received by this office on 12 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”) on 1 December 2003 whereupon the fund took out a policy of insurance on your life with Sanlam Insurance Limited (“Sanlam”) for the purpose of funding its liability to pay you an annuity on retirement. Your chosen retirement date was 13 June 2032. At the inception of membership, your monthly contributions were R2250. On 1 April 2004 due to financial constraints, you reduced your contributions to R150 per month. As a result Sanlam charged you a premium reduction fee of R8055.52. (You state in your complaint that you were penalized with a fee of R7657. However on the fund’s version, the fee was in fact R8055.52).

Complaint

- [3] Your complaint is that the charge for reducing contributions was excessive and that although the policy document disclosed a fee payable for ceasing

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 Mbalu (Assistant Adjudicator), R Maharaj (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), Solomzi Gcelu (Assistant Adjudicator)

Office Manager: L Manuel

contributions, it failed to disclose any fee payable for reducing contributions.

The Responses

- [4] The respondents contend that your grievance constitutes long-term insurance business that is regulated by the Long-term Insurance Act and not the Pension Funds Act. In particular the respondents contend that your grievance is not a complaint as defined in the Pension Funds Act. On this basis the respondents argue that I do not have jurisdiction to determine the matter.
- [5] On the merits, the respondents explain that most of the policy expenses are incurred at its commencement and recovered piecemeal over the term of the policy. However when premiums are reduced, the portion of the policy expenses attributable to that reduced amount can no longer be recovered and are therefore recouped by charging a premium reduction fee.
- [6] The respondents state that the premium reduction fee was calculated in terms of the rules approved by its statutory actuary in compliance with sections 46 and 52(3) of the Long-term Insurance Act. I am also referred to various sections in the rules and policy document which, according to the respondents, authorized the charging of a premium reduction fee. (These are fully canvassed in the determination).
- [7] The respondents contend further that the policy documents disclosed to you that a fee would be payable in the event of a reduction in contributions.

Determination and reasons therefor

Technical points

- [8] With regard to the technical point raised by the respondents that I do not have jurisdiction, I am satisfied that the crux of your 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. For the reasons more fully set out in *Schwartz v Central Retirement Annuity Fund & Another* [2005] 5 BPLR 435 (PFA) at paragraphs [17] to [28] and the as yet unreported ruling in *Louw v Central Retirement Annuity Fund & Another* (Case no. PFA/GA/1811/2004/RM), I cannot uphold the contention that this matter constitutes “long term insurance business” over which I have no jurisdiction.
- [9] Furthermore in so far as your complaint relates to the investment of the

fund's funds and alleges that penalties not disclosed at the inception of the policy were unlawfully deducted from your contributions by Sanlam, the administrator of the fund, I am satisfied that it constitutes a complaint as defined in the Pension Funds Act.

Merits

[10] As the Supreme Court of Appeal stated in *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28], the trustees may only do with the fund's assets what is set forth in the rules. If what they propose to do is not within the powers conferred on them by the rules, they may not do it. That the rules of a fund are king is confirmed by section 13 of the Act.

[11] The respondents have referred me to part 7 of rule 1 which reads as follows:

“A MEMBER can decide what CONTRIBUTION he will make to the FUND, subject to a minimum determined by the ASSURER in accordance with his normal practice.

CONTRIBUTIONS commence on the date of commencement of membership and are payable after that as agreed between the MANAGEMENT COMMITTEE and the ASSURER. A MEMBER can change his CONTRIBUTION subject to such conditions as laid down by the ASSURER in consultation with the MANAGEMENT COMMITTEE.”

[12] The respondents state that the reduction in your contributions constituted a “change” of contributions as contemplated in the above rule. The insurer agreed to this contractual change to your policy and the condition was that the value of your policy be adjusted in accordance with the actuarial rules; in turn that the actuarial rules provide that ‘when a part of the premiums is stopped prematurely, a portion of the policy expenses that then already have been incurred, but which then have not yet been recouped under the policy, must be deducted when calculating an adjusted value for the policy’.

[13] However I do not think that the reference to “conditions” in the rule quoted contemplates, in any way, the application of a premium reduction fee as per the actuarial rules. It stands to reason that when the contribution rate is altered, the value of the policy will be affected either positively (in the case of an increase in contributions) or negatively (in the case of a decrease in contributions). The “conditions” referred to in part 7 of rule 1 simply enable the insurer to adjust the value of the policy to account for this and that is as far as the rule takes us. If the respondents wanted to apply a premium reduction fee as per the actuarial rules, then such should have been incorporated into the rules or the policy document.

[14] The respondents have also referred me to rule 2 of part 7 and rules 4 and

5 of part 8. However they fail to explain their relevance to the present dispute. These rules certainly do not authorize the deduction of a substantial fee on the reduction of contributions by a member.

[15] As far as the policy document goes, the respondents state as follows:

“The policy documents make no explicit provision for a reduction in contributions. However the fact that the contributions can be stopped implies that, if both parties agree, part of the contributions can be stopped and that a pro rata premium reduction fee can be charged. Sanlam Life agreed to the contribution reduction on 01/04/2004 at the request of the member and charged a premium reduction fee calculated in the same way as the premium termination fee, but using the reduction in premium instead of the full premium in the calculation ...”

[16] This type of reasoning was described by the Supreme Court of Appeal as “cynical” (see *Mostert NO v Old Mutual Life Assurance Company (SA) Ltd* [2001] 8 BPLR 2307 (SCA) at paragraphs [69] – [72]). What the trustees of a pension fund may or may not do is decreed by the rules (or other related documents). Where there is no provision for a particular scenario in the rules, it simply cannot be done. There is no room for being creative.

[17] Given the respondents’ concession that the policy documents do not expressly authorize the deduction of a fee on the reduction of contributions, it is unnecessary to canvass this aspect of the response further.

[18] It is clear from the above that the respondents unlawfully deducted R8055.52 from your contributions in the investment account and that you are entitled to repayment of this amount.

Relief

[19] In the result my order is as follows:

19.1 The Central Retirement Annuity Fund and Sanlam Life are jointly and severally (the one paying the other to be absolved) ordered forthwith to credit the complainant’s investment account in the fund with the amount of R8055.52.

19.2 The Central Retirement Annuity Fund and Sanlam Life are further ordered jointly and severally (the one paying the other to be absolved) to credit the complainant’s investment account in the fund with interest on R8055.52 at the rate of 15,5% per annum from the date of this determination until the date of final crediting

DATED AT CAPE TOWN ON THIS THE DAY OF 2005.

Yours faithfully

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR

Cc: Mr LP la Grange
Chairman: Management Committee
Central Retirement Annuity Fund
Per fax: 947 2653

Cc: Christo Bester
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Registered address of Fund

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