

Final

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

CASE NO: PFA/GA/1208/04/KM

In the complaint between:

T. P. SEIPOBI

Complainant

and

MOMENTUM RETIREMENT ANNUITY FUND

First Respondent

MOMENTUM LIFE ASSURERS LIMITED

Second Respondent

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

Introduction

[1] This complaint concerns the value of the complainant’s benefit in the respondent retirement annuity fund, which according to the fund is zero, since the benefit

lapsed after non-payment of further contributions. The complainant seeks an order directing the fund to transfer his “full benefit” to his current employer’s pension fund.

Factual background

[2] The Momentum Retirement Annuity fund (“the respondent fund”) is registered in terms of the Act as a pension fund organisation and administered and underwritten by Momentum Life Assurers Ltd (“Momentum Life”) which is a life insurance company.

[3] In or about July 1998 the complainant, on the advice of his broker, transferred his benefit in the Provisor Pension Fund (“the Provisor fund”) to the respondent fund. Some confusion appears to surround the circumstances of the transfer, and the ongoing obligation to pay contributions, and this will be dealt with in more detail in the paragraphs below. In summary, it appears that an amount of R6 295,73 (comprising an initial lump-sum payment of R6 080,98 in July 1998 and a later additional payment of R214,75 in February 2001) was paid by ABSA Consultants and Actuaries (Pty) Ltd (“ABSA”), the administrators of the Provisor fund, to Momentum Life on 1 July 1998, in respect of the complainant’s benefit.

[4] In his application for membership of the respondent fund, the complainant had indicated that he would be paying contributions of R150 per month by debit order. It seems that the deposit of R6 080,98 was unaccompanied by formal instructions as to the deployment of the funds, and Momentum Life therefore retained this amount in its own banking account over the next few years, drawing against it monthly the contributions the complainant had undertaken to pay. No interest received on this principal amount was credited to the complainant. In September 2001 the principal sum was exhausted and, since the complainant had failed to make provision for further payment of contributions, the underlying policy was made paid up.

[5] The fund then debited the complainant's fund value with the cost account it had maintained in its records in respect of his membership. The fund has supplied a breakdown of the costs account which I set out below:

Cost Account Policy 090694220

Date - Commission 1			Total 1st year comm	Breakdown of cost account	
1998/05	new business	R 641.25		Comm 1	R 2,648.13
1998/05	new business	R 641.26	R 2,648.13	Vat Comm 1	R 370.74
1998/12	premium increase	R 6.42		Comm 2	R 770.28
1998/12	premium increase	R 6.42		Vat Comm 2	R 107.84
1998/12	premium increase	R 427.58		Override	R 397.22
1998/12	premium increase	R 427.58		Interest and fees	R 2,673.91
1999/06	CPI renewal	R 160.32		Cost account (2000/08/01)	R 6,090.00
1999/06	CPI renewal	R 160.32			
2000/06	CPI renewal	R 176.10			

Date - Commission 2			Total 2nd year comm
1999/06	CPI renewal	R 213.75	R 770.28
1999/06	CPI renewal	R 213.75	
2000/01	CPI renewal	R 2.14	
2000/01	CPI renewal	R 2.14	
2000/01	CPI renewal	R 142.53	

Final		
2000/01	CPI renewal	R 142.53
2000/06	CPI renewal	R 53.44

Vat Com 1

1998/05		R 89.78
1998/05		R 89.78
1998/12		R 0.90
1998/12		R 0.90
1998/12		R 59.86
1998/12		R 59.86
1999/06		R 22.44
1999/06		R 22.44
2000/06		R 24.78

Total Vat comm 1

R 370.74

Vat Com 2

1999/06		R 29.93
1999/06		R 29.93
2000/01		R 0.30
2000/01		R 0.30
2000/01		R 19.95
2000/01		R 19.95
2000/06		R 7.48

Total Vat comm 2

107.84

Override R 397.22

Please note that the consultant commission is the override. Override equal 15% of 1st year commission

[6] The total of the cost account as at 1 August 2000 was R6 090,00. The value of the complainant's investment account (fund value) on the same date was R6 402,00. Presumably on account of the negligible residual fund value (less than R400), the underlying policy was deemed to have lapsed, meaning that the value of the complainant's interest in the fund was now zero.

The complaint

[7] The complainant states that on applying for membership of the fund, the recruiting broker explained to him that by investing in a retirement annuity he would be making a guaranteed investment. He was furthermore assured that if he stopped paying contributions, his invested money would not be affected, and instead the underlying policy would be made paid-up. He also states that Momentum Life failed to notify him of the consequences of cessation of contributions, nor did it advise him of alternative or more suitable investment vehicles. According to the complainant he was never sent the rules of the fund, and all he received was the summary of the policy which did not deal with the question of forfeiture or surrender penalties.

[8] In response to further enquiries from this office, the complainant stated that the recruiting broker was a Mr P. F. Le Roux. He was unable to say whether he was an independent broker, or acting in a representative capacity on behalf of the fund. Also in response to further information sought, the complainant submitted documentation clearly showing that the original deposits made into Momentum Life's account represented direct transfers from his previous fund with the specific intent of preserving the benefit by transferring the withdrawal benefit into an approved fund. In this regard I have seen two covering letters addressed to Mr Le Roux by the previous fund administrators dated 9 July 1998 and 22 February 2001 respectively, and referring to the two payments of R6 080,98 and R214,75. The first letter attaches a copy of the deposit slip in respect of the larger amount which was

filled out in favour of Momentum Life on 1 July 1998, and also makes reference to the “Recognition of Transfer” form, which was apparently attached for completion and return. The second letter encloses a “Recognition of Transfer” form in respect of the second payment, and the second paragraph of the letter reads as follows:

“Please fax me the signed and stamped recognition of transfer form, so that we can request a “nil tax directive”.”

[9] As indicated above, the complainant seeks restoration of his “full benefit” (presumably meaning the amount initially transferred), and further asks that he be allowed to transfer his benefit to another fund.

The Response

[10] A response was received from Momentum Life. It is unclear whether the response is on behalf of the fund or the insurer, and the overall tenor of the response indeed suggests a complete conflation between the two entities. Momentum Life has set out the following record of conversations and correspondence between the complainant and Momentum Life regarding the “premiums” on his policy:

“(a) 18/08/1998 – We received a telephone call from him enquiring about the lump sum payment we received. We confirmed that we did indeed receive an amount of R6 080,98 on 03/07/1998, but that we have received no formal instruction as to what the purpose of the payment was. He then

confirmed that he will go back to his broker to make the necessary arrangements.

- (b) 03/12/1998 – We received another telephonic call from him during which we confirmed that the lump sum is being used to pay the monthly premiums as the amount was still in credit and we had still not received any instruction relating to the payment. At that stage he also confirmed that he did not wish us to debit his account and we confirmed that the premiums will be paid until 01/09/2001, due to the credit amount.
- (c) 03/12/1998- We received his written instruction to increase the monthly premium to R250,00 and to add an annual premium update of 10%. This was done and the relevant endorsements were sent to him.
- (d) 25/05/2000 – We received a telephone call from him during which we confirmed the remaining credit as R330.98. This was only enough for one month's premium. The complainant stated that he will be paying his premiums via internet transfers.
- (e) We posted two lapse warning letters to the complainant dated, 29/06/2000 and 29/09/2000 respectively.”

[11] The response goes on to record that a welcome letter dated 12 May 1998 was posted to the complainant which included information about the consequences of cessation of contributions in the following terms:

“If your policy has a cash value and you do not pay premiums, we will keep your policy in force (in full or for reduced benefits) under the condition below:

Your policy will continue but we will cancel all the benefits you have, except the basic insured amount, which we will reduce, once you stop paying premiums. If your policy does not have a value and you do not pay a premium within 30 days of it becoming due, we will cancel your policy.”

[12] The fund therefore maintains that it acted correctly in making the benefit paid-up. In the initial response filed, Momentum Life (it is not certain whether in its capacity as insurer or fund administrator) offered to reinstate the complainant’s policy and reissue it as a single premium Retirement Annuity. The lump sum amount and the interest payment as well as the one premium of R330.26 apparently received, would be used to calculate the single premium after the values had been discounted to allow it to keep the inception date of the investment as 1 July 1998. The actuaries (once again it is not clear whether it was the fund’s actuary or the insurer’s actuary, although more than likely they are one and the same) apparently performed the relevant calculations and ascertained a fund value of R10 530,89 as at 1 December 2004 in the event that the complainant accepted this offer.

[13] However, in a further response filed several weeks later, this offer was revoked. The relevant portion of the response reads as follows:

“Please note that we cannot change this policy to a single premium policy as suggested in our letter dated 10/12/2004 as the deposit of R6 080,98 was made by the client to cover future premiums. If the amount of R6 080,98 however, had been transferred to Momentum from another Pension Fund we would have had no alternative but to alter the policy to a single premium retirement annuity.”

Determination and reasons therefor

[14] Three things are immediately apparent from the above facts. The first is that, had the lump sum amount been treated as a single lump sum contribution, the complainant would presently have a fund credit in excess of R10 000, with no further liability to contribute. Because it was structured as a recurring contribution, the same lump sum cash payment has been whittled away to nothing, eroded primarily by administration and commission costs, while the decreasing capital balance sat in Momentum Life’s bank account attracting interest for the benefit of the insurer.

[15] The second is that the total commission (including VAT) payable amounted to 70,6% of the lump sum benefit (R4 294,21 commission on R6 080,98 as at 10 August 2000). This is doubtless exacerbated by the structure of the recurring premiums, since the broker received additional commission in respect of premium increases and CPI renewals over the three year period.

Thirdly, there has been very little meeting of minds between the broker, the fund, the insurer and the complainant, and this seems largely to be a result of poor communication if not misrepresentation. This is the kindest interpretation I can place on the facts. The possibility of outright and deliberate exploitation certainly exists, but there is insufficient information before me to make a finding that this has been the case, as there are several disputes as to precisely what information the complainant was given. The net result is that of all available structuring options, the complainant has ended up with the worst possible alternative. This has been to his dire financial prejudice, while the insurer and the broker have been enriched at the complainant's expense. If the complainant had been unequivocally told that the insurer would have the benefit of the interest on his investment, while his broker would bag 70% of the capital, and the meagre remains would be further eroded by administration costs, it is inconceivable that he would have agreed to such an arrangement. In my view there appears to be little doubt that what was intended was a single lump-sum transfer from one fund to another as will be shown below.

[17] It is disturbing to say the least that such a situation can arise. That a mode of payment which is demonstrably so detrimental to the financial interests of the member can be put in place, much less continue over a period of years, is shocking, and I hope an isolated instance and not another "industry practice". It is not clear why, if Momentum Life was under the impression that it was a recurring contribution, it did not immediately refund the balance of the deposit to the complainant after deducting the initial contribution of R150.

[18] Where was the fund's board of management when this complainant's interests required protection? This complaint begs the question of where the fiduciary duty is to be found in retirement annuity funds on account of the unique structure of such funds, and the conflict of interest between the profit motives of the insurer and the interests of the members. The board members of a retirement annuity fund are invariably employees of the insurer, or persons with a close association with the insurer. In this case rules require that the board comprise at least four members, one of whom must be independent of Momentum Life (rule 3.1.2).

[19] In terms of the Financial Institutions (Investment of Funds) Act 39 of 1984 and its successor, the Financial Institutions (Protection of Funds) Act 28 of 2001, a pension fund is a "financial institution" as defined. Section 2 of the former Act (which was applicable at the time) sets forth very stringent requirements for persons in a trust relationship with financial institutions (such as a member of a board of management), stating as follows:

"A director, official, employee or agent of a financial institution or of a nominee company controlled by a financial institution who invests, keeps in safe custody or otherwise controls or administers any funds of the institution or any trust property held by or on behalf of the institution for any beneficiary or principal -

- (a) shall, in the making of an investment or in the safe custody, control or administration of those funds, observe the utmost good faith and exercise proper care and diligence;

- (b) shall, in the making of an investment or in the safe custody, control administration or alienation of the trust property, observe the utmost good faith and, subject to the terms of the instrument or agreement by which the trustee or agency concerned has been created, exercise the usual care and diligence required of a trustee in the performance or discharge of his powers and duties; and
- (c) shall not alienate, invest, pledge, hypothecate or otherwise encumber or make use of the funds or trust property or furnish any guarantee (whether or not, in the cases of an insurer, such guarantee is incorporated in a policy) in a manner calculated to gain directly or indirectly any improper advantage for himself or any other person at the expense of the institution, trust, beneficiary or principal concerned.”

[20] Section 7C of the Pension Funds Act codifies the common law fiduciary duty owed to a member by the board of management of a fund, and directs it, among other things, to

“take all reasonable steps to ensure that the interest of members in terms of the rules of the fund and the provisions of this Act are protected at all times...”

The section also enjoins the board to “act with due care, diligence and good faith” and also to “avoid conflicts of interest”. These duties appear to have been given scant regard on the facts of this case.

[21] Momentum Life was never entitled to hold, evidently on its own behalf and for its own account, the proceeds of a direct transfer from another approved fund. It is

evident from the documentation submitted that what was intended by the complainant was a transfer of his benefit to the respondent retirement annuity fund. This is why the payment was accompanied by an inter-fund transfer form in order that the complainant be exempted from taxation on the amount so transferred.

- [22] In terms of the Income Tax Act a retirement annuity fund may not operate a bank account. All payments and contributions must be received by the insurer or administrator who holds it on behalf of the fund. For this reason, the complainant's benefit in the Provisor fund was paid to Momentum Life in its capacity as receiving agent of the retirement annuity fund, and that benefit ought to have been received as a lump-sum contribution and credited directly to the complainant's individual account in the respondent fund. That transfer has not been given effect to. The seeming nonchalance with which the clear intentions of the complainant have been disregarded makes one wonder whether this has not become something of an "industry practice" requiring official investigation.

Appropriate Relief

- [23] The appropriate relief on the facts of this case is in my view to place the complainant in the position he would have been in had effect been given to his original election. That entails a direct credit to his member's account in the fund of the full amount of the capital transferred from the Provisor fund as at the date that it was received by Momentum Life. In this regard the initial offer by Momentum Life to

treat the receipt as a “once-off premium” and to credit his account would seem to be the most suitable remedy in the circumstances.

- [24] The complainant has also requested that his benefit be transferred to his present employer’s pension fund. Rule 4.5 permits the board in its sole discretion to allow a member to transfer all or part of his interest in the fund to another approved retirement annuity fund prior to retirement age, subject to such conditions as the board may determine. It is not clear whether the fund to which the complainant refers is a retirement annuity fund. But that is a factor the board may consider in the exercise of its discretion in terms of rule 4.5.

Order

- [25] The order of this tribunal is therefore as follows:

[25.1] The first and second respondents are directed (the one paying, the other to be absolved) forthwith to credit the complainant’s account in the fund with R6 295,73.

[25.2] The first and second respondents are further directed (the one paying, the other to be absolved), by no later than 12h00 noon on Friday 22 July 2005, to calculate the growth that would have accrued in favour of the complainant’s member account in the fund had the

capital amount received from the Provisor fund as an inter-fund transfer been treated as a once-off lump-sum contribution to the first respondent, such growth to be calculated

[25.2.1] for the period 3 July 1998 to 1 February 2001 on the lump-sum amount of R6 080,98, and

[25.2.2] for the period 2 February 2001 to date of final payment in respect of the sum comprising R6 295,73 and the amount of growth determined in [25.2.1] above.

[25.3] The first and second respondents are further directed, by no later than Wednesday 27 July 2005, to credit the complainant's member account in the fund with the fund growth determined in terms of the calculation in paragraph [25.2] above.

[25.4] The first and second respondents are further directed to advise the complainant and this tribunal in writing of the total sum credited to the complainant's member account in the fund, detailing in clear and unambiguous terms the method used in calculating the fund growth in paragraph [25.2] above, such written advice to be furnished by no later than Wednesday 27 July 2005.

[25.5] The first respondent's board of management is directed to consider, in its discretion vested in it by rule 4.5, the complainant's request for a transfer of his interest in the fund to another fund of his choice and, by no later than Wednesday 27 July 2005, advise the complainant and this tribunal on sworn affidavit of its decision, the reasons therefor and all the factors it took into account in the exercise of such discretion.

[25.6] Should the orders in [25.1] to [25.4] not be carried out within the stipulated periods, this tribunal will make any order it considers appropriate.

DATED at Cape Town this day of July 2005

Vuyani Ngalwana

Pension Funds Adjudicator

Registered address of the fund

268 West Avenue

Centurion

Section 30M filing: Magistrate's Court

Complainant unrepresented

Respondent unrepresented