

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

CASE NO: PFA/FS/4206/05/CN

In the complaint between:

**Pheello J Nakalebe**

**Complainant**

and

**South African Retirement Annuity Fund**

**1<sup>st</sup> Respondent**

**Old Mutual Life Assurance Company (SA) Ltd**

**2<sup>nd</sup> Respondent**

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

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Introduction

[1] Having considered the complaint that was received by this Tribunal on 6 July 2005, as well as further written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

[2] Because the background facts are well known to the parties, I shall not burden this ruling by repeating all of them in great detail here, but will only set out the few that are pertinent to the issues raised in this ruling.

The facts

- [3] The complainant, who had been employed at Harmony Gold Mine and was a member of the Sentinel Mining Industry Retirement Fund (“the previous fund”), was retrenched from employment during October 2004. His membership of the previous fund consequently terminated and he received an undisclosed amount as a withdrawal benefit from the previous fund.
- [4] Before he had made up his mind about a suitable investment vehicle in which to invest a portion of the proceeds of his fund benefit (R50 000), he was approached by a financial advisor employed by Old Mutual Life Assurance Company (SA) Ltd (“Old Mutual”), Mr. JB Towa (“the financial advisor”), who volunteered to assist him with investing his money. According to the complainant, on 5 November 2004 he visited the financial advisor’s offices in Welkom where the two of them held discussions about different investment portfolios. The complainant states that he specifically informed the financial advisor that as he had no other source of income and would need to withdraw money from the investment whenever the need arose to meet his maintenance obligations towards his family, he would like to invest in a vehicle that would suit those specific needs. The financial advisor, the complainant states, recommended investing in a long-term portfolio, which according to him, was an annuity. The complainant further states that he did not take any decision at that point and delayed doing so for some time.

[5] On 10 December 2004 while the complainant was in Randfontein, the financial advisor phoned him and requested that he furnish him with a fax number to which the advisor could fax a document for signature by the complainant. The complainant states that the document that was faxed to him was a blank document captioned "Finalisor Declaration", whereon he was requested to affix his signature in a space marked with an "x". The document is attached to the complainant's letter of reply (dated 23 August 2005) as annexure "Ä".

[6] Having appended his signature, the complainant faxed the document back to the financial advisor on the same day. On 11 December 2004, the complainant visited the financial advisor at his office to find out more about the document that he had signed on the previous day. He states that he was presented with yet another document, captioned "Client Advice Record" (also annexed to the reply) which had already been completed, and was requested to sign the same on the pretext that the contents thereof were "the same product [he] talked about". On asking the financial advisor how the latter could take a final decision regarding the annuity without consulting him, the complainant states that the financial advisor informed him that the annuity would be helpful for the complainant in the future, that the portfolio was one of the best, and that he can "withdraw money as long as [he] wished".

[7] The complainant then signed the client advice record. According to him, it is only when he received the investment contract and related documents about a month thereafter that he realized that no money would be available to him before the date of retirement or earlier death or permanent disability. He thereupon contacted the financial advisor, who told him that that was a rule of the fund and that if he wanted to disinvest, he should inform the insurer accordingly in writing. The complainant's attempts to get the investment contract cancelled were in vain, hence the present complaint.

#### The complaint

[8] The crux of the complaint is that the terms and conditions relating to the investment, particularly the one regarding the inaccessibility of the funds were not explained to the complainant before he signed the contract. Furthermore, the complainant contends that at all material times, he intended to invest, and was led to believe that he had invested, in a financial product that would allow him easy and regular access to his funds.

[9] The requested relief is that I order the cancellation of the investment and the refunding of the capital amount of R50 000 to the complainant.

The response

[10] The fund contends that it cannot pay out the invested amount because its rules do not allow for membership to terminate before the age of 55 years, except under the circumstances set out in rule 2.3.

[11] It further states that although it has not found any clear proof of any misrepresentation on the part of the intermediary, there appears to be a possibility that no valid contract came into being as a result of a “possible misunderstanding” on the part of the complainant. It has endeavoured, in vain, to refund the capital amount to the previous fund so that the complainant can re-exercise his choice in accordance with the previous fund’s rules. The fund concludes by stating that should this Tribunal find that there was misrepresentation which entitles the complainant to a cancellation of the contract, it will abide that ruling.

Determination and reasons therefor

[12] The rules of the fund do not allow for the termination of membership prior to the member having reached the age of 55 years, except under the circumstances specified in rule 2.3, which are:

[12.1] The death of the member or life assured;

- [12.2] The winding up of the fund;
- [12.3] The payment of a benefit in commutation of the full amount of the annuity;
- [12.4] The transfer to an insurer in terms of rule 4.2.2 or to another approved retirement annuity fund in terms of rule 4.2.3;
- [12.5] The transfer of a member who is within 2 months of the annuity commencement date to another approved retirement annuity fund of his choice in accordance with the provisions of section 14 of the Pension Funds Act;
- [12.6] The cessation of contributions where as a result of such cessation no benefits are payable in terms of the annuity policy; or in the case of a life assured where premiums are not paid within the days of grace allowed by the underwriter.
- [13] Furthermore, in order for a retirement annuity fund to be approved as such in terms of the provisions of the Income Tax Act, its rules must, *inter alia*, provide that membership thereof shall not cease prior to a member reaching the age of 55 years. As none of the exceptions are applicable in the complainant's case, the fund is bound by both the rules and statute not to terminate his membership prior to him

reaching the age of 55 years.

[14] However, on the available evidence, it appears that the complainant never intended to invest his money in a financial product which would render the money inaccessible to him until he had reached the age of 55 years. What I have to determine therefore, is whether a valid contract came into being between him and the fund. In order for a valid contract to come into being, there must, *inter alia*, be a meeting of minds between the parties.

[15] The general rule with regard to a unilateral mistake is that if the mistake was not induced by a misrepresentation by the other party to the contract and that party was not aware at the time of the acceptance that its offer was being accepted under a misapprehension, then the party who was misled cannot seek to vitiate the contract unless the mistake was a *iustus error* (*George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471B-D). As Corbett JA said in *Trust Bank of Africa Limited v Frysch* 1977 (2) SA 562 (A) at 587D-E:

“It is trite, nevertheless, that not every error in the mind of a contracting party, even if induced by the other party, results in the vitiation of the contract on the ground of *dissensus*. To have this effect the error must, at least have played a material role in the decision of the mistaken party to enter into the contract.”

[16] The complainant has stated that as he had been retrenched and had no other source of income with which to fulfill his maintenance obligations to his family, he wanted to invest, and was under the impression that he was investing, in a financial product that would allow him regular access to the invested funds whenever he needed money. He has further stated that the document captioned “Finalisor Declaration” was blank when he signed it on 9 December 2004. Further according to him, when he signed the already completed document titled “Client Advice Record” on the following day, the contents thereof were neither explained nor read to him, and the financial advisor reassured him that it “[was] the same product [he] talked about”.

[17] Upon perusal of both documents, there is no indication thereon that there are any restrictions to access to the invested funds. Thus, even if he had read the documents before signing them, he would not have been the wiser regarding the restrictions that are placed on access to the funds. Furthermore, as appears from the “Client Advice Record”, the financial advisor also did not do an analysis of the complainant’s specific needs before the contract was entered into. All these facts point to a possibility that the financial advisor did not explain the inaccessibility of the funds before the age of 55 years. That, coupled with the financial advisor’s assurance that it was the same product that the complainant had talked about, indicates that there was no negligence on the complainant’s part in relying on the financial advisor’s assurances.

[18] In the circumstances, the complainant's mistake was both material and reasonable, and that effectively shows that there was no meeting of minds between him and the fund. Because agreement is so lacking by reason of fundamental error, it is impossible to say that any contract came into being between the parties. Thus the contract is void *ab initio*. In the result, the complainant should be placed in the position he would have been in had he never joined the fund, which means that the fund must pay his capital amount back to him. As regards any action against the intermediary, this tribunal has no jurisdiction and the complainant may, if he so wishes, pursue the matter with the FAIS Ombud whose contact details are:

P.O. Box 74571

LYNNWOOD RIDGE

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FAX: 012-348 3447

### Relief

[19] In order to restore the complainant to the *status quo ante*, the appropriate order is to order the fund to transfer the invested amount back to the previous fund. The complainant must then approach that fund and exercise his election regarding payment in accordance with its rules. But restoring the status quo ante cannot

simply be a refund of the complainant's R50 000. Interest at the average inflation rate prevailing during the period December 2004 until November 2005 must surely be added.

[20] The order of this Tribunal is therefore the following:

The South African Retirement Annuity Fund is directed to transfer to the Sentinel Mining Industry Retirement Fund on behalf of the complainant, within 2 weeks of the date of this ruling, the amount of R50 000, together with interest thereon at 3.2% per annum or the average inflation rate for the period December 2004 and December 2005, whichever is the greater, calculated from 11 December 2004 until date of final payment which must, in any event, be no later than Friday 2 December 2005.

DATED AT CAPE TOWN THIS        DAY OF        2005.

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**VUYANI NGALWANA**  
**PENSION FUNDS ADJUDICATOR**

Appearances

All parties not represented

cc: The Principal Officer  
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***SECTION 30M FILING: MAGISTRATES' COURT***