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By Registered Mail

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS  
ACT 24, OF 1956 (“the Act”) – L OWEN v LIFESTYLE RETIREMENT  
ANNUITY FUND & LIBERTY LIFE**

Introduction

[1] Having considered the complaint received by this office on 4 April 2005, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

Complaint

[2] You became a member of the Lifestyle Retirement Annuity Fund (“the fund”) on 1 October 2002. In terms of the policy of insurance with Liberty Life, taken out by the fund on your life, your chosen retirement date was 1 October 2005. However due to financial constraints, you decided to cease contributions to the fund and retire early (aged 59) with effect from 1 April 2005. The fund then deducted a “withdrawal charge” of R24 818.51 from your contributions in the investment account because you ceased contributions some 6 years before your chosen retirement age of 65. Although you were initially advised that a “withdrawal charge” of R26 414.22 would be deducted, the actual charge was R24 818.51. This forms the basis your complaint. You fail to understand how such a high percentage of the value of the underlying policy can be retained by Liberty Life as a “withdrawal charge”. You would also like to know in terms of

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

Office Manager: L Manuel

which clause in the policy Liberty is entitled to deduct such a charge.

### Response

- [3] Liberty Life has responded on behalf of the board of the fund. A letter dated 25 August 2005 was addressed to Liberty Life directly so as to give it the opportunity to respond to the complaint in its capacity as insurer. However no response was received to that letter.
- [4] Essentially Liberty Life's contention is that this matter falls outside the jurisdiction of my office in that it relates to the operation of a life policy concluded between the fund and Liberty Life.
- [5] Liberty Life also contends that since the only assets of the fund comprise claims against Liberty Life as insurer under the policies of insurance issued to the fund in respect of its members, any ruling would have to be directed against Liberty Life as insurer over which, according to Liberty Life I have no jurisdiction.
- [6] On the merits, Liberty Life explains that, since you ceased contributions prior to the maturity date of the underlying policy, the expenses already incurred by it with respect to your policy and which would otherwise have been recouped over the full term of the policy had to be deducted from your contributions in the investment account. Furthermore, according to Liberty Life, it was authorized in terms of the policy document to deduct these 'unrecouped' expenses.

### Determination and reasons therefor

- [7] The Lifestyle Retirement Annuity Fund is a pension fund as defined in the Pension Funds Act, 24 of 1956. The provisions of that Act, including chapter VA (which confers jurisdiction on the Adjudicator to investigate and determine complaints against pension funds) therefore apply to it. That its assets consist wholly of insurance policies does not alter the position. Therefore Liberty Life's argument that the matter concerns the "operation of a life policy" which excludes my jurisdiction cannot be sustained. (See *Du Plessis v Lifestyle Retirement Annuity Fund & Another* [2005] 5 BPLR 383 (PFA); *Gagiano v Lifestyle Retirement Annuity Fund & Another* [2005] 6 BPLR 474 (PFA); *Geldenhuis v Lifestyle Retirement Annuity Fund and Another* [2005] 5 BPLR 394 (PFA) and the authorities referred to therein).
- [8] As authority to deduct an early termination fee, Liberty Life relies on three clauses in the policy document. The first is clause 2 under the heading "Terms and Conditions". It reads as follows:

"If the Member retires before the Selected Retirement Date, the Asset Value is

payable as an annuity. The Asset Value is the value of the Investment Account, reduced by any applicable early retirement charges and an amount in respect of unrecouped expenses, determined by the Actuary of the Administrator.”

- [9] The second is clause 7 under the same heading which provides as follows:

“The Asset Value is the value of the Investment Account reduced by any applicable Non-Forfeiture charges and an amount in respect of any unrecouped expenses determined by Liberty’s Actuary. “

- [10] The third is clause 2 under the heading “Additional information about your Retirement Annuity” which provides as follows:

“It is important to note that if you claim your retirement benefits earlier than your original Selected Retirement Date, Liberty may need to recover expenses that would otherwise have been recovered over the full term of the Retirement Annuity.”

- [11] The first paragraph of clause 7 makes it clear that it governs the situation where a member ceases contributions prematurely and the policy is then made paid-up. You *in fact* retired, (albeit early) so the issue of making his policy paid-up on cessation of contributions never arose. Clause 7 therefore has no application to you.

- [12] Clause 2 under the heading “Terms and Conditions” dealing with retirement “before the Selected Retirement Date” is applicable to you. The clause refers to “*applicable early retirement charges*” and “*an amount in respect of unrecouped expenses*”. There is nothing to indicate what these charges and expenses comprise or how they are calculated. Without any specific disclosure of these in the rules or policy documents, they cannot be levied. For this reason, the respondents can also not rely on this clause 2 as authority to deduct an early termination fee.

- [13] Similarly Clause 2 under the heading “Additional information about your Retirement Annuity” deals with retirement “before the Selected Retirement Date” and is consequently also applicable to you. The clause refers to the recovery of expenses which would otherwise have been recovered over the full term. Again, this is hopelessly lacking in specificity. What do these expenses comprise? How are they calculated? This clause can therefore also not be relied upon as authority to deduct an early termination fee. Moreover, the clause authorizes recovery of expenses over the full term. There is no provision for the acceleration of such recovery in the event of the policy not running to full term.

- [14] Where there is no provision for a particular scenario in the rules (or other related documents) it simply cannot be done (see *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]).

[15] In its letter dated 1 September 2005, Liberty Life states that it will pay you an additional amount of R10 979.89 by crediting such to the Linked Life Annuity which you purchased. It then states that “[T]his change will be with effect 19 June 2002, commencement date of the Linked Life Annuity”. Given that you were not even a member of the fund at this date, my assistant contacted the relevant person at Liberty Life who confirmed that the reference to “19 June 2002” was a typographical error and should read “19 June 2005”. Any amount paid to you in terms of this undertaking in addition to the retirement benefit already received by you must therefore be taken into account in the final relief.

### Relief

[16] In the result I make the following order:

- 16.1 The Lifestyle Retirement Annuity Fund is ordered forthwith to recalculate the amount of the retirement benefit that would have been paid to you had the amount of R24 818.51 not been debited from your investment account in the fund.
- 16.2 The Lifestyle Retirement Annuity Fund and Liberty Life (the one paying, the other to be absolved) are ordered forthwith to transfer the amount of the benefit as calculated in 16.1, less any amounts already paid to you and transferred on your behalf and further less any deductions that are provided for in the Pension Funds Act to your investment account in the Liberty Life Linked Life Annuity, within six weeks of the date of this ruling.
- 16.3 The Lifestyle Retirement Annuity Fund and Liberty Life (the one paying, the other to be absolved) are ordered further to pay interest on the amount of the transfer in paragraph 16.2 above at the *mora* rate of 15,5% per annum reckoned from 19 June 2005 until the date of transfer.

DATED AT CAPE TOWN ON THIS THE 11<sup>th</sup> DAY OF OCTOBER 2005.

Yours faithfully

**VUYANI NGALWANA**  
PENSION FUNDS ADJUDICATOR

Cc: Joe Wolmarans

Principal Officer  
Lifestyle Retirement Annuity Fund  
Per fax: 011 408 2109

**Registered address of Fund**

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