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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”) – JACOBUS KIRSTEN v CENTRAL RETIREMENT ANNUITY FUND & SANLAM LIFE INSURANCE LIMITED

Introduction

1. Having considered the complaint that was received by this office on 28 April 2005 and further written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor are set out below.

The facts

2. You became a member of the Central Retirement Annuity Fund (“the fund”), which is administered by Sanlam Life Insurance Limited (“the insurer”) on 1 December 1997. The fund invested your recurring monthly contribution of R145.00 in a Sanlam policy (policy number 16737690X4) (“the policy”). The monthly contribution automatically increased by 15% on 1 December each year.
3. On 30 December 2004 you notified the fund that you would be ceasing contributions. The policy was accordingly made paid-up with effect from 1 January 2005. At that stage you had already made contributions in the amount of R19 520.99 while your fund value was R21 763.61.
4. Between December 1997 and December 2004 a policy fee and administration charge of R1 491.93 was debited to your investment account. The insurer also charged you a “premium termination fee” of R7 320.72 when your policy was made paid-up in January 2005. Consequently, your fund value was reduced to R14 422.89.

The complaint

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

Office Manager: L Manuel

5. You are dissatisfied with the “premium termination fee”. You essentially request that I rule on the legality of the charges or costs that have been levied against your investment account as a result of your having ceased contributing to the fund.

The response

6. The principal officer of the fund, Mrs Dorea Ozrovech, submitted a response on behalf of the fund and Sanlam as the insurer. Sanlam’s response was incorporated in the fund’s response under the heading “Sanlam Life’s response”.
7. The fund has raised two technical points. The first is that what is at issue in this matter is “long-term insurance business” which is regulated by the Long-Term Insurance Act. The second is that your grievance does not constitute a complaint as defined in the Pension Funds Act and for this reason falls outside my jurisdiction.
8. Regarding the merits Sanlam argued that that charges which has been recovered when the policy was made paid-up was in accordance with the policy documents. Furthermore that the “premium termination fee” is not a penalty but the amount with which the benefits was reduced as a result of the policy being made paid-up.
9. In explanation, it states:

“Most of the expenses with respect to policies are incurred at the commencement of the policy (“upfront costs”) or when the contributions are increased and are recovered by means of fees, which are charged over the term of a policy. When the policy fees are calculated, it is assumed that the contractual premium will be paid up to the end of the policy term. Should the premium payments be discontinued (i.e. have the policy made paid-up) the insurer will no longer be able to recover these costs from future charges as these will now stop.

Sanlam reduces the benefits by charging a premium termination fee. Consequently, part of the premium termination fee recovers the expenses already incurred on the policy that will now not be recovered anymore, as future charges will be stopped.

This fee is calculated according to the rules that an insurer must have and apply, and which must be approved by its statutory actuary – as required by section 52(3) of the Insurance Act.”

10. Ms Ozrovech submits that Sanlam has acted in accordance with the policy document.

Determination and reasons therefor

Technical points

11. The first technical point cannot be upheld for the reason that this complaint is not about an insurance policy, but rather relates to a retirement annuity fund, which is a pension fund organization as defined. For the reasons more fully set out in *Central Retirement Annuity Fund v Adjudicator of Pension Fund and Others* case no 3404/05 (as yet unreported) and *Schwartz v Central Retirement Annuity Fund & Another* [2005] 5 BPLR 435 (PFA) at paragraphs [12] to [28] it is therefore dismissed.
12. The fund's second technical point can also not succeed. I say so, because your complaint relates to the administration of the fund and/or the investment of its funds and alleges that you have suffered prejudice (in that your fund value has been decreased) in consequence of the maladministration of the fund (in the form of the levying of undisclosed charges), your grievance constitutes a complaint as defined, contrary to the respondents' contention. The decision in *Armaments Development and Production Corporation of SA Ltd v Murphy NO & Others* [1999] 11 BPLR 227 (C) at 231C puts it beyond doubt that a complaint concerning the maladministration of the fund by the person administering it or performing any of the functions prescribed in the Act or rules for such person, is a complaint as envisaged in the Act.

The merits

13. It is trite that a fund or its board of management of a pension fund organization, which a retirement annuity fund is, can only do that which is set forth in the rules (see section 13 of the Act and *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-F and *Mostert NO v Old Mutual Life Assurance Company (SA) Ltd* [2001] 8 BPLR 2307 (SCA) at paragraph [30]). Furthermore in the case of the retirement annuity fund the policy document issued by the insurer is part of the rules (see *De Beer v Central Retirement Annuity Fund and Another* [2005] 3 BPLR 257 (PFA) at 260E-F).
14. The fund and Sanlam rely on the following clauses from the policy document in support for the charging of the "premium termination fee":

"BESKRYWING EN BEPALINGS

1. BELEGGINGSREKENING

Aan die begin van elke polisjaar word 'n beleggingsbedrag in 'n Beleggingsrekening vir hierdie polis belê. Die beleggingsbedrag is gelyk aan die restant jaarlikse premie nadat voorsiening gemaak is, waar van toepassing, vir die polisgeld en die koste van decking, byvoordele en administrasie.

'n Beleggingsbedrag word ook by ontvangs van 'n enkelpremie in die

Beleggingsrekening vir hierdie polis belê....

2. ...

3.

4.

5.

6.

7. PREMIES EN RESPYTDAE

.... Premies moet betaal word tot aan die einde van die polisjaar waarin die versekerde sterf of die opbrengs andersins beskikbaar word en onbetaalde premies vir daardie polisjaar sal van die beskikbare bedrag afgetrek word.

8. OPBETAALDE POLIS

Indien 'n premie nie binne die respytdae betaal word nie en die wagperiode, soos in die Uiteensetting aangedui, is nie reeds verstreke nie, bied die polis geen verdere voordele nie. Indien die wagperiode reeds verstreke is, verander die polis in 'n opbetaalde polis met verminderde voordele ooreenkomstig die praktyk van Sanlam”

15. Not a single one of the clauses quoted above refer to a “premium termination fee”. Clause 1 only mentions a “polis fooi”, the cost of a policy fee (polisgeld) and the cost to be recovered for the provision of cover, additional benefits and for administration services. These are the only cost in terms of clause 1 that may be levied against the investment account.
16. Clause 7 essentially provides that premiums shall be paid until the end of the policy year in which the assured dies or the proceeds become available, and that failure to do so will result in the deduction of the unpaid premiums for that year from the amount available. This clause is not applicable to the instant case, in that it covers the situation where unpaid premiums for the year during which a benefit becomes due and payable either as a result of the assured’s death (or in any of the instances when a benefit becomes due, namely, death and retirement), are deducted from the benefit. No benefit is yet due to you since none of the instances have occurred.
17. Insofar as clause 8 is concerned, it also does not provide for the levying of a “premium termination fee” against a member’s investment account, but rather to the payment of reduced benefits if premiums have not been paid within the period of grace. As indicated previously, benefits only become due and payable when the member has died or retired.
18. The rules also make no provision for the deduction of a “premium termination fee”. Part 7 of the rules only goes so far as to provide for the conversion of the policy (provided it has a paid-up value) to a paid-up

policy for reduced benefits if the contributions cease after the member has paid sufficient contributions to give the policy a paid-up value. This rule has the same effect as clause 8 of the policy document.

19. In the circumstances, it is clear that the fund and Sanlam do not have the authority, neither in terms of the rules or the policy document to impose a “premium termination fee” when the policy was made paid-up. As for the administration fee of R1 491.93 (which was recovered over the life of the policy) the insurer was entitled to recover it in terms of clause 1 of the policy.

Relief

20. In the result, both Sanlam Life Insurance Limited and the fund (the one paying, the other to be absolved) are ordered forthwith to credit your investment account in the fund with R7 320.72, together with interest thereon at 15.5% per annum, reckoned from the date of this determination until the date of the crediting of your investment account.

SIGNED IN CAPE TOWN ON THIS DAY OF 2005

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator

cc **Mrs. Dorea Ozrovech**
Principal Officer: Central Retirement Annuity Fund
Fax no: 021 – 957 1507

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2 Strand Road
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Section 30M filing: Magistrate’s Court