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Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): C Coetzee v Central Retirement Annuity Fund (“the fund”) and Sanlam Life Insurance Limited (“Sanlam”)

Introduction

- [1] Having considered the complaint received by this office on 25 February 2005 and further written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.
- [2] As the background facts are well known to all parties, I shall only repeat those facts that are pertinent to the issues raised herein.

Factual Background

- [3] You became a member of the Central Retirement Annuity Fund (“the fund”) which is administered by Sanlam Life Insurance Limited (“the insurer”) on 1 April 2003. You paid monthly contributions of R1000. Due to financial difficulties you could not afford to pay the monthly contributions of R1000. In December 2004, you contacted the fund with a view to reducing your monthly contributions. However, you were advised that should you reduce your contributions, charges/costs would be levied on your investment. You then stopped paying monthly contributions and the policy was made fully paid-up on 28 December 2004. The fund value of the policy as at 28 December 2004 was R19 424,33. The “premium termination fee” of R20 732,78 was levied on your investment. The fund contends that the policy lapsed for the reason that it did not have the remaining value and could not be converted to a paid-up policy.

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 Mbalu (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 charging of the “premium termination fee” of R20 732,78 on your policy. You contend that when you signed the policy you were not advised that you could not cancel or reduce the contributions without incurring costs. You are of the view that the “premium termination fee” levied on your savings is exorbitant. You want the fund to pay back the amount levied on your savings.

The responses

- [6] The fund and the insurer have raised a technical point in response to the complaint, and have also dealt with the merits. The technical point is that the complaint does not concern the execution of duties by the Fund (or administrator)” but is in effect about the execution of duties by the insurer under the policy- namely about the internal operation of the policy, notably the operation and application of the rules of the policy, which constitute “long-term insurance business” as defined in, and regulated under, the Long Term Insurance Act, and thus I do not have jurisdiction to investigate and adjudicate upon the complaint.
- [7] On the merits, the fund contends that the policy was entered into on 1 April 2003 and that it was agreed that it would endure until 17 April 2032. You terminated the policy on 28 December 2004 prior to the agreed termination period. The premiums under the policy stopped prematurely, and as a result the policy lapsed. The policy lapsed for the reason that it did not have a remaining value, and therefore could not be converted to a paid-up policy for reduced benefits. The fund relies on the following provisions to advance its argument:

“Rule 2.4 of Part 6:

Membership of the FUND will be terminated if

2.1

2.2

2.3

2.4 a MEMBER ceases to make further contributions before the policy assuring the MEMBER’S benefits obtains a paid-up value, unless the FUND owns another POLICY on the MEMBER’S life.

“A MEMBER’S CONTRIBUTIONS are payable during the period determined in the POLICY issued on his life.

If a MEMBER’S CONTRIBUTION cease after he has already paid sufficient CONTRIBUTIONS so that the POLICY issued on his life has a paid-up value in accordance with the practice of the ASSURER, the ASSURER converts the POLICY to a paid-up POLICY for reduced benefits. The MEMBER will then have the right to apply for reinstatement of his benefits, partially or in full, and the MANAGEMENT COMMITTEE in consultation with the ASSURER will consider such proposal on receipt

of:

2.1 all arrear CONTRIBUTIONS together with interest at such rate as determined by the ASSURER from time to time.; and

2.2 satisfactory proof of assurability where the ASSURER requires such proof.

The fund also refers to Rules 4 and 5 of Part 8, which read:

“Liability

4 The liability of the FUND is restricted to the values of the POLICIES and investments in UNIT TRUST SCHEMES held on behalf of a specific member.

5 The overall liability of the ASSURER is determined by the conditions of the POLICIES and the ASSURER is not restricted by these rules or any amendments to these rules.”

[8] The fund contends that you were warned of the consequences that would follow, should you cancel the policy. It refers to the clause in the policy document which states:

“Can payment of recurring premiums be stopped?”

Yes. If the sum to which the value of the policy investment has grown at that stage, less a premium termination fee, exceeds the minimum of R 500.00, the policy will be maintained without further premium payments. This minimum will increase from time to time.

If payment of recurring premiums is stopped before the option date, this premium termination fee currently consists of the following:

- R 220.00 plus
- A percentage of the value of the policy investment at the time, plus
- A percentage of the savings premium at the time.

These percentages depend on the size of the savings premium, the amount of the negotiated commission, and when payment of recurring premiums is stopped. At present, if payment of recurring premiums is stopped on or after the option date, no premium termination fee will be charged. We may change this from time to time.”

[9] The fund also relies on the clause in the document it provided you which states:

“Non payment of contribution

If you stop contributions and the paid-up value (the value of the investment less the premium termination fee) is less than R575 00 (this minimum will increase from time to time), the policy will lapse. Otherwise, the policy will be made paid up.

[10] The fund contends that it was made clear to you that if the premiums are stopped what amount would be attributed towards fees by illustrating the policy investment value, at low and high inflation scenarios at specified dates.

Determination and reasons therefor

Technical point

- [11] There is no merit to the technical points raised by the respondents. The crux of this 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 and Another* [2005] 5 BPLR 43 (PFA) at paragraphs [12] to [28] and authorities referred to therein and *Louw v Central Retirement Annuity Fund and Another* [2005] 7 BPLR 622 (PFA) at paragraphs [17] to [36], I cannot uphold the contention that this matter constitutes “long-term insurance business” over which I have no jurisdiction.
- [12] Furthermore, Davis J (with whom Le Grange AJ concurred) in the as yet unreported decision in *Central Retirement Annuity Fund v Adjudicator of Pension Funds, FE de Beer & Another*, Cape Of Good Hope Provincial Division Case No. 3404/05 (handed down on 20 October 2005), at page 9, confirmed the jurisdiction of this office and stated:

“...The basis of the complaint was that applicant [Central Retirement Annuity Fund] as the holder of the policy on the life of a member, was neither obliged nor entitled simply to allow Sanlam Life [the insurer] to charge whatever costs and charges it chose to levy and to accept whatever investment bonuses that it chose to declare from time to time without first satisfying itself through its own management committee of the reasonableness or adequacy thereof.

The Rules of the Fund set out its essential purpose as being to provide benefits to members upon retirement. The fact that applicant may be exempt in terms of the applicable law from audit cannot exempt it from playing a role in the fulfillment of its purpose. In any event, applicant is a pension fund organization and has separate legal personality in terms of s51(a) [sic] of the Act. It cannot simply be treated as an illusory ‘go between’ the members such as second respondent and Sanlam Life. It should be accountable to its members and hence be subject to the discipline of the Act’s complaint mechanism.”

- [13] In so far as 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 you will be paid a lesser benefit than what you expected) in consequence of the maladministration of the fund (in the form of reducing the potential retirement benefit by the levying of undisclosed charges), your grievance constitutes a complaint as defined, contrary to the respondents’ contention (see *Louw supra* at paragraphs [11] - [15]).

The merits

- [14] At the heart of this complaint is the question whether the rules of the fund authorize the levying by the insurer of a “premium termination fee”. Nowhere in the rules is there mention of such a fee or of any other fee when contributions are terminated prematurely.
- [15] The rule that covers a situation where a member ceases paying monthly contributions is Rule 2 of Part 7 which provides:
- “Term of contributions
2. A MEMBER’s CONTRIBUTIONS are payable during the period determined in the POLICY issued on his life.
- If a MEMBER’s CONTRIBUTIONS cease after he has already paid sufficient CONTRIBUTIONS so that the POLICY issued on his life has a paid-up value in accordance with the practice of the ASSURER, the ASSURER converts the POLICY to a paid-up POLICY for reduced benefits. The MEMBER will then have the right to apply for reinstatement of his benefits, partially or in full, and the MANAGEMENT COMMITTEE in consultation with the ASSURER will consider such a proposal on receipt of.....”
- [16] There is no definition of what a “paid-up policy” is in the rules, and certainly no mention that in converting the policy to a paid-up policy for reduced benefits the insurer may charge a “premium termination adjustment” fee.
- [17] The summary document further includes a section on “Policy charges” whereby provision is made for the following additional costs to be recovered:
- “1. marketing and administration charge
2. policy fee
3. yearly service fee
4. yearly fund management fee
5. statutory charges, including tax and stockbroker fees
6. performance fee for the asset manager.”
- [18] The fund, being a registered pension fund organization, is bound by its rules, and can thus only do what it authorized in the rules. There being no reference in the rules to the charging of any fee upon the premature termination of contributions, neither the fund nor the insurer may charge it.
- [19] The clause in the policy document on which the insurer purports to rely provides that the “premium termination fee” consists of a sum of R220.00, plus an unspecified percentage of the value of the policy investment at the time, plus an unspecified percentage of the savings premium at the time. The charging of a “premium termination fee” which exceeds the R220-00 that is stated in the policy document not being provided for in the rules nor precisely set out in the policy document means that the insurer has no authority to charge it. As the Supreme Court of Appeal held in *Tek Corporation Provident Fund and others v Lorentz* [2000] 3 BPLR 227

(SCA) at paragraph [28], the trustees of a fund may do with the fund's assets what is set out in the rules.

Relief

[20] In the result, the order of this tribunal is as follows:

[20.1] It is hereby declared that the respondents have no right to deduct a premium termination fee from the complainant's account or contributions by reason alone of her stopping contributions before her chosen retirement date.

[20.2] Sanlam Life Insurance Limited is ordered, within 6 weeks of this ruling, to reinstate the complainant's policy 040503851x4 which was issued to the fund retrospectively from the date of lapsing.

[20.3] Both Sanlam Life Insurance Limited and the fund (the one paying, the other to be absolved) are jointly and severally ordered forthwith to credit the complainant's investment account in the fund with the R19 424,33 that was debited therefrom together with the return that would have been achieved on the complainant's chosen investment portfolios had the monies remained invested from the date of lapsing of the policy to the date of crediting.

SIGNED IN CAPE TOWN ON THIS DAY OF 2005

Yours faithfully

Vuyani Ngalwana
PENSION FUNDS ADJUDICATOR

SECTION 30M FILING: MAGISTRATES' COURT

