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

CASE NO: PFA/EC/2898/05/CN

In the complaint between:

Joseph V Mgabisa **Complainant**

and

Central Retirement Annuity Fund **1st Respondent**

Sanlam Life Insurance Limited **2nd Respondent**

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956

Introduction

[1] This complaint concerns the payment of a retirement benefit by a retirement annuity fund, and particularly raises the issue of whether or not the complainant is entitled to receive payment of the whole benefit amount as a cash lump sum.

Factual background

[2] The complainant, an adult man born in 1945, became a member of the Central

Retirement Annuity Fund ("the fund") on 1 July 1990. The fund is administered by Sanlam Life Insurance Limited ("the insurer"). According to the policy contract that was issued to him when he joined the fund, his retirement date would be 1 July 2006. During July 2000 the complainant was apparently required by the insurer to indicate the manner of payment of his benefit when it becomes due, and was apparently informed that when the benefit becomes due he will be entitled to commute a maximum of one-third thereof for cash if it exceeds the amount of R25 000, with the balance being used to provide a compulsory annuity for him.

The complaint

[3] The complainant contends that at the inception of his membership of the fund, he was never informed that only one-third of the retirement benefit will be available to him as cash. He further contends that the policy contract does not provide for any restriction on the amount that he can take as a cash lump sum, and thus argues that the fund should be ordered to pay the entire benefit to him in cash when it falls due.

The response

[4] The fund states that it is bound by both its rules and the provisions of the policy contract to only pay out a maximum of one-third of the retirement benefit and to

purchase a pension with the remaining balance.

Determination and reasons therefor

[5] The fund is, with respect, quite correct. In addition, definition of a retirement annuity fund as contained in Section 1 of the Income Tax Act 58 of 1962 gives an insight into what conditions or limitations a retirement annuity fund must comply with in order for it to get approval from the Commissioner for Inland Revenue for income tax purposes. The effect of such approval is, among other things, that members' contributions to the fund are to an extent deductible from their income for purposes of calculating taxable income or assessed loss, as the case may be. For present purposes, the relevant portion of the definition is to the following effect:

> "**retirement annuity fund**" means any fund (other than a pension fund, provident fund or benefit fund) which is approved by the Commissioner in respect of the year of assessment in question and, in the case of any such fund established on or after 1 July 1986, is registered under the provisions of the Pension Funds Act, 1956 (Act No.24 of 1956): Provided that the Commissioner may approve a fund subject to such limitations or conditions as he may determine, and shall not approve any fund in respect of any year of assessment unless he is in respect of that year of assessment satisfied-
>
> (a)…
>
> (b) that the rules of the fund provide-

(i)…

(ii) that no more than one-third of the total value of any annuities to which any person becomes entitled, may be commuted for a single payment, except where the annual amount of such annuities does not exceed R1 800 or such other amount as the Minister of Finance may from time to time fix by notice in the *Gazette*;…"

[6] The relevant rule of the fund in this case is rule 3.1 and it provides as follows:

"**Commutation**

3.1 A maximum of one third of the PENSION referred to in paragraphs 1.1 and 1.2.2 may be commuted to a lump sum, but should the PENSION not exceed R1 800 per annum or any other amount which the Minister of Finance may determine and announce in the Government Gazette from time to time, the full PENSION may be commuted."

[7] This condition is repeated in the schedule to the policy documents under a section with the heading "Maturity Benefits", and it is clearly stated therein that:

"A maximum of one third of the available amount may be taken in cash. The balance must be taken in the form of a pension."

[8] Had the complainant read the policy contract document, he would not have missed this condition.

[9] The fund is a retirement annuity fund, and in order for it to reap the benefits of being approved as such, it has to comply with the provisions of the Income Tax Act, one of which is that its rules must provide for the payment of only up to a maximum of one-third of the value of the annuity payable to a member as cash, with the remainder being used to purchase a compulsory annuity. The fund has done just that as rule 3.1 is to that effect.

[10] Section 13 of the Pension Funds Act provides that the rules of a registered fund are binding on the fund, its members, shareholders and officers, and on any person who claims under the rules or whose claim is derived from a person so claiming. Because of the binding effect of the rules on the fund, the fund may only pay out to its members those benefits provided for in its rules. That much was emphasized by the Supreme Court of Appeal in *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA), at 239D-E, where Marais JA stated as follows:

> "What the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been asked to do) is not within the powers conferred upon them by the rules, they may not do it."

[11] The rules of the fund do not provide for the payment of a benefit in a single lump sum, but rather limit the amount that may be taken as cash to a maximum of one-third of the benefit amount. The complainant is therefore not entitled to receive his benefit in any manner other than as set forth in the rules, nor do I have the legal authority to order the fund to pay him a benefit other than what is provided for in its rules. If he had, perhaps, joined a provident fund, his entire benefit would have been available to him as a cash lump sum.

[12] The determination of the question whether or not the financial advisor or intermediary who assisted the complainant gave him proper advice regarding this investment vehicle lies outside my area of jurisdiction and more within the jurisdiction of the Ombud for Financial Services Providers ("the FAIS Ombud").

[13] In the result, the complaint is dismissed.

DATED AT CAPE TOWN THIS DAY OF 2005.

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VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR

Appearances
All parties not legally represented.

Cc: Mrs. Dorea Ozrovech
The Principal Officer
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SECTION 30M FILING: MAGISTRATES' COURT