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**RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“The Act”): J. HORSFIELD v SOUTH AFRICAN RETIREMENT ANNUITY FUND (“the fund”) & OLD MUTUAL LIFE ASSURANCE COMPANY SOUTH AFRICA LTD (“Old Mutual”)**

Introduction

[1] Having considered the complaint that was received by this office on 23 March 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.

The complaint

[2] Your complaint concerns the calculation of the value of your retirement benefit, which was reduced as a consequence of your failure to continue paying the contributions stipulated in terms of the underlying policy backing your benefit in the fund. Your total contributions amounted to R18 890 (R18 518 according to the fund) from December 1995 to December 2001, after which you had to cease payments due to changed financial circumstances. You were advised by Old Mutual that you could not “cash in” the policy, but that you could cease contributions and claim your benefit when you turned 55. In April 2004, having turned 55, you were eligible for a benefit from the fund, but were disappointed to find that the value was only R18 808. You are upset at what you perceive as a very poor return on your retirement savings, and have therefore approached this tribunal for assistance.

The responses

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

Office Manager: L Manuel

- [3] In its response, the fund raises the point that the Adjudicator lacks jurisdiction to investigate this complaint as it pertains to long-term insurance business.
- [4] On the merits, it explains that the reduction in your fund value was due to two factors. Firstly, the fact that your contributions ceased earlier than initially agreed meant that your underlying policy investment was made paid-up in terms of rule 3.4. This entitled you to reduced benefits as determined by Old Mutual. Secondly, you elected to retire on 1 May 2004 instead of 1 December 2010, thus shortening the period of your membership by six and a half years. In terms of clause 2 of Part 3 of the policy such an election is subject to the conditions imposed by Old Mutual at the time.
- [5] The response received from Old Mutual also indicates that a portion of those contributions was used to fund the cost of the risk benefits that you elected to include from inception of your membership of the fund. It is also apparent from a subsequent response filed by Old Mutual that the effect of making your policy paid-up on the premature cessation of contributions had the effect of reducing your "Accumulation Account" from its value of R22 133 at that time to R19 003. The Accumulation Account as described by Old Mutual is a notional account in terms of which it determines its liability to the member under the policy. This account therefore consists of credits (contributions and investment return) and debits (expenses and benefit charges). It appears that a further amount was debited in the Accumulation Account in respect of your election to retire earlier than initially indicated, since your final retirement payout was based on a figure of R18 808 less tax.
- [6] Despite specific questions directed to Old Mutual in an attempt to establish the date and scope of these debits or penalties, the response received has simply not dealt with this aspect directly. It is therefore difficult to establish with any precision what the extent of the reductions to the Accumulation Account have been.
- [7] The fund contends that the "Accumulation Account" does not constitute the "*Member's* Accumulation Account" but rather an account in which the insurer determines its liability in respect of that particular member by recording the credits and debits referred to in paragraph [5] above. It also contends that since the investment vehicle underlying the member's benefit is a life insurance product, the calculation of the value of that policy is determined by insurance and not pension law principles. In order to comply with the Long-term Insurance Act 52 of 1998, it argues, the value of the policies must be calculated in accordance with principles that are "actuarially sound". It appears that the fund, therefore, defers all determination of the value of the benefits to the insurer.

- [8] The fund relies on the following rules for authority to allow Old Mutual to effect the above “reductions” to the Accumulation Account held in respect of the member.

Rule 3.4(a) which reads as follows:

“On non-payment (in respect of any one ANNUITY POLICY issued to a MEMBER) of periodic contributions or instalments thereof to the FUND within the days of grace allowed by the UNDERWRITER, such MEMBER shall be deemed to have discontinued contributions and shall retain such paid-up reduced benefits under that ANNUITY POLICY as the UNDERWRITER shall determine.”

Rule 6.7 provides:

“All benefits payable by the FUND to MEMBER and LIVES ASSURED are fully secured by the UNDERWRITER by means of ANNUITY POLICIES or CEDED POLICIES. The FUND’s liability in respect of benefits payable at retirement, death, ill-health retirement or disability shall not exceed the amount or amounts payable in terms of the ANNUITY POLICIES...”

- [9] With regard to the terms and conditions set out in the policy document, the fund contends that the following clauses permit the debits to the Accumulation Account in respect of making the policy paid-up or advancing the retirement date:

Clause 10 of Part 3, which states:

“If the contributions are not paid within the one month period of grace allowed, the policy will, subject to the “lapse” clause below, be automatically converted to a paid-up policy for reduced benefits and in accordance with conditions which OLD MUTUAL will determine at the time.”

Clause 2 of Part 3, which reads:

“The Assured also has the option, subject to the Rules of the Fund, legislation in force at the time and the conditions imposed by OLD MUTUAL at the time, to change the date of the retirement.”

- [10] Consequently the fund and Old Mutual maintain that the debit adjustments to the Accumulation Account occasioned by your cessation of contributions as well as your advanced retirement date are authorized in terms of the fund rules and policy document.

Determination and reasons therefor

Jurisdiction

[11] There is no merit in the technical point raised by the fund. The crux of this complaint does not constitute long-term insurance business, but concerns a retirement annuity fund, which is a pension fund organization as defined in the Act. For the reasons more fully set out in *Louw v Central Retirement Annuity Fund and Another* [2005] 7 BPLR 622 (PFA)) at paragraphs [17] to [36], and authorities referred to therein, I cannot uphold the contention that this matter constitutes “long-term insurance business” over which I have no jurisdiction.

[12] Furthermore, Davis J (in whose judgment 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) (“the de Beer judgment”) 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 illusionary ‘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] I therefore cannot agree that I do not have the necessary jurisdiction to determine the complaint. In any event, given the purpose of the complaints procedure provided for in the Act, it is too formalistic to expect a lay complainant not trained in matters of litigation to craft his complaint in the meticulous manner that is to be expected of a lawyer. Davis J said the following in the de Beer judgment in this regard:

“Applicant’s contention regarding second respondent’s letter is based upon a very formalistic reading of the complaints procedure as provided for in the Act. On this reading, the letter generated by second respondent would not constitute a complaint as defined. But this submission ignores the purpose of the Act. The structure of chapter VA of the Act is aimed at ensuring an effective, inexpensive and expeditious resolution of pension complaints by members, many of whom may not be able to afford legal advice and would therefore be compelled to formulate their complaint without any legal assistance or a complete understanding of the intricacies of the legal relationship between the respective

parties, as in this case between Sanlam and applicant.

In my view, second respondent's letter contains sufficient averments (as described above) to fall within the definition of a complaint. To construe a complaint as urged upon us by applicant would be to run counter to the very purpose of the complaints procedure provided for in the Act."

- [14] The fund appears also to suggest that since you have not first lodged a complaint with it before approaching this tribunal, I have no power to determine the matter. I do not agree. This argument was dealt with fully in *Insurance and Banking Staff Association v Old Mutual Staff Retirement Fund* [2005] 3 BPLR 272 (PFA) at 275C – 278B.
- [15] The fund also seems to say this is not a complaint by reason of it having been "directed against Old Mutual". But the complaint is "directed against Old Mutual" clearly in its capacity as administrator of the fund and not in its capacity generally as an insurance company. This issue was also dealt with in *Louw* (above) at 625H – 626H and the authorities referred to therein.

### Merits

- [16] The rules pertaining to a paid-up benefit, or a benefit paid out at an advanced maturity date, quantify the benefit with reference to the determination of the insurer (Old Mutual). They are therefore unhelpful in themselves and one must accordingly look to the policy document to gain an insight into the methodology of determining the benefit.
- [17] The policy document referred to above contains a "Glossary of Terms" in Part 2, in which "Accumulation Account" is described as follows:

#### **"ACCUMULATION ACCOUNT**

Each policy is administered through its Accumulation Account which is increased by contributions and investment returns, *and reduced by expense and benefit charges.*" (my italics)

- [18] Expense and Benefit Charges are specifically set out in clauses 6 and 7 of Part 3. They read as follows:

#### **"EXPENSE CHARGE**

Each month an expense charge is deducted from the Accumulation Account. This charge is calculated as follows:

- 1) An amount which is set at R3,40 initially, plus
- 2) In the event that a premium payment is due, an amount which is set at R0,60 initially, plus

- 3) An amount of 3.00% of the debit order annual premium divided by twelve.

The first two items in the above calculation of the monthly expense charge may be varied each year. However, they will not be increased at a rate higher than the rate of inflation (As determined by OLD MUTUAL in its sole discretion, having regard to the change in the Consumer Price Index or any other commonly accepted method of measuring "inflation", as may apply at the time). The percentage referred to in the last item in the above calculation will not be varied.

The above expense charge is that applicable to this policy at the commencement date. Should the policy be changed, the charge will be adjusted so as to be in line with the level of charges applicable to new policies as at the date of change.

### **BENEFIT CHARGES**

- 1) Cost of Cover:

At the beginning of every month the Accumulation Account is reduced by the cost of life cover for that month, which is based on

- the Assured's age
- the required amount of life cover.

The required amount of life cover applicable for each month during the term of the policy is predetermined at the inception of the policy."

[19] Apart from the clauses set out in the responses above, there are no other provisions in the policy that deal in any way with the debiting of charges or expenses against the Accumulation Account. In an extensive explanatory response filed by Old Mutual, it contends that in the event of cessation of contributions, or advancement of retirement date, the member has ceased to abide by the conditions of the policy to which he initially agreed. For this reason his benefit has to be recalculated in accordance with the insurer's practice, in order to ensure that it remains actuarially sound. The actuarial principles involved are those pertaining to the regulatory framework governing long-term insurance business. The effect of this "recalculation" is to reduce the balance in the Accumulation Account. Although not specifically stated, the reduction is in effect a recovery of "unrecouped costs" of the insurer, which it would have regained through its administration charges had the contributions gone to full term.

[20] However, the right to recover those costs is nowhere set out in the policy document, unless it can be accommodated within the rubric "in accordance with conditions which Old Mutual will determine at the time". This, in my opinion, is far too vague in its formulation to be relied on as authorization for the recouping of undisclosed costs and expenses, or the general formulaic reduction of the benefit. A member can expect, when

the charges and expenses have been clearly set out in the policy document that that is an end to it. The above phrase empowering Old Mutual to determine the benefit “in accordance with [its] conditions” might, on a purposeful construction, suggest to the member that the benefit may be less than previous estimated final benefits on account of a cessation or reduction in contributions. It certainly would not convey to the unsuspecting member that costs and charges which have hitherto remained undisclosed will suddenly be accelerated and debited as a lump-sum against credits in the Accumulation Account held on his behalf by the insurer.

- [21] In this regard also, I must state that I find the argument that there is no “Member’s Accumulation Account”, only an “Accumulation Account” held by the insurer to determine its liability to the member somewhat disingenuous. If all that is being suggested is that the account is nominal and has not vested or concretized as a benefit, then it is no different from a “member’s share account” in a defined contribution fund, which is likewise nominal and has not vested, and may be adversely affected by negative market returns.
- [22] The calculation of the value of the Accumulation Account must be in accordance with the terms of the policy document which records the agreement between the fund as proposer and owner of the policy and the insurer in its capacity as underwriter. The fund and the insurer, in its capacity as administrator of the fund, and thus agent for the fund, must ensure that any benefit due to a member is calculated in accordance with these precepts.
- [23] I can find no authority in the rules or the policy document for the deduction of the amounts debited in the Accumulation Account in respect of either the premature cessation of contributions or the advancement of the retirement date of the complainant. The fund may only do what is set forth in its rules (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239 D). The trustees of the fund are, moreover, under a duty to ensure that the terms of any underlying contract taken out in respect of, and for the benefit of, a member are adhered to by the other contracting party. They may not simply wash their proverbial hands of all responsibility. In this regard the words of Davis, J in the *De Beer* case, quoted in paragraph 12 above are apposite.
- [24] For the above reasons, you are entitled to be placed in the position you would have been in had the deductions to your benefit not been effected.

## Relief

[25] I therefore make the following order:

- [25.1] It is hereby declared that the respondents were not entitled to deduct any amount from the Accumulation Account held to determine your benefit by reason only of your cessation of contributions or your early retirement.
- [25.2] The respondents are jointly and severally directed to calculate the retirement benefit which you would have received had the aforesaid deductions not been effected;
- [25.3] The fund is further ordered to pay to you, or transfer to an institution of your choice permitted by the applicable legislation, the amount in paragraph [25.2] less any payments made and any deductions permitted in terms of the Pension Funds Act, within six weeks of the date of this ruling;
- [25.4] The fund is ordered further to pay interest on the amount of the payment or transfer in paragraph [25.3] at the *mora* rate of 15,5% per annum reckoned from the date of this determination until date of transfer or payment.

**SIGNED IN CAPE TOWN ON THIS**

**DAY OF**

**2005**

Yours faithfully

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**VUYANI NGALWANA  
PENSION FUNDS ADJUDICATOR**

***SECTION 30M FILING: MAGISTRATES' COURT***