HEAD OFFICE
Johannesburg
3rd Floor, Digital House
Cnr 5th Street & Park Lane
Sandton, 2196
P O Box 651826, Benmore, 2010
Tel (011) 884-8454 Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town
2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

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Dear Madam

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 ("the Act") – DELILA EDMUNDS v COLUMBIT PENSION FUND, OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED t/a PENCARE ANNUITY BUSINESS

Introduction

1. Having considered the complaint received by this Office on 15 September 2004 and further written submissions I consider it unnecessary to hold a hearing in this matter. My determination and the reasons therefor appear below.

2. You have cited Columbit Platinum Fund as the first respondent. The Columbit Platinum Fund does not exist. However during our investigation it became clear that your late husband was a member of the Columbit Pension Fund ("the fund"). I have accordingly treated the complaint as if it was directed against the fund.

The facts

3. Your late husband, Joseph Herold Edmunds, was employed by Columbit Holdings (Pty) Ltd until his death on 19 July 1983. By virtue of his employment he was a member of the Columbit Pension Fund until his death in 1983. At the time of his death your husband was 54 years old.

4. On the death of your husband you commenced receiving a pension from the fund.

5. With effect from 1 November 2000 the fund "outsourced" its pensioner liabilities to Old Mutual Life Assurance Company (South Africa) Limited t/a Pencare Annuity Business ("Pencare"). Consequently the pension was being paid to you by Pencare on behalf of the fund (the life annuities were in the name of the fund and continue to be in the name of the fund).

6. Your pension was increased in 2004 by 0.5%.

Complaint

7. Your complaint is essentially that the pension increase of 0.5% is not satisfactory because it is too little.

8. You request that I make an order directing the fund to increase your pension by 5.50%.

Responses

Response by Pencare

9. Mr Stanley Khumalo of Pencare submitted a response. For reasons that will become clear I will not deal with Mr Khumalo's submission at great length save to say that he confirmed that the fund purchased life annuities for its pensioners from Pencare.

Response by the fund

10. Mr K Dixon, the fund's principal officer, submits that the fund has discharged its liabilities to you (and pensioners in general) when it outsourced all pensioner liabilities within the fund to Old Mutual Life Assurance (SA) Company in 2000. He says that while the pension annuities purchased from Old Mutual should have been in the name of the member, this did not take place (with the result that the annuities are still in the name of the fund) because the transfer in terms of section 14 of the Act never occurred. He says:

> "The purchase of the annuity policy by the Fund therefore constituted the benefit payment …thereby putting the Fund in a position where it had fully discharged its obligations to pensioners. In accordance with the outsourcing arrangement, the Fund entered into a pension annuity policy with Old Mutual ("the Insurer"), in terms of which the Insurer became responsible for the payment of the Complainant's pension and pension increases thereto. The Complainant therefore had no further claims against the Fund. … the Fund is not in any way involved, nor does it have any discretion or authority to determine the increase.

> The outsourcing arrangement was carried out in terms of the Fund's rules. This meant that as far as the Fund was concerned, it had in terms of its rules discharged its obligations in respect of the Complainant. There was therefore no further liability on the Fund in respect of the Complainant's pension."

11. In conclusion he says:

> "While the Fund is sympathetic to the financial needs of the Complainant and her colleagues, and while accepting that an increase of 0.5% is low, the Fund is not in a position to determine, veto or top up increases granted by Old Mutual. …. The Fund cannot decide to top up the pensioner increases, as it has no basis or reserves to undertake such an exercise"

12. Mr Dixon requested that your complaint be dismissed.

Determination and the reasons therefor

13. I shall first deal with the fund's submission that it has discharged its liability to you (and pensioners in general) when it outsourced its pensioner liabilities to Pencare in 2000.

14. This submission by the fund is without merit. I say so because the fund admits that while the annuities purchased from Pencare should have been in your name this was never done. The annuity was bought in the name of the fund. Furthermore, the section 14 transfer was never submitted to the Registrar of Pension Funds ("the Registrar") to transfer the annuity to you.

15. Section 14 of the Act provides that no transfer of any business carried on by a registered fund to any other person shall be of force or effect unless the proposed scheme has been submitted to the Registrar and he accords full recognition to it. Until such recognition is granted by the Registrar the liability remains with the transferring fund.

16. The fund's failure to submit the section 14 transfer to the Registrar for approval means that the fund remains liable to you insofar as your pension is concerned. In the circumstances the fund's submission that it has discharged its liabilities when it outsourced its pensioner liabilities to Pencare cannot be upheld.

17. I now proceed to deal with the essence of your complaint namely that the increase given to pensioners in 2004 is too little. Because the fund was unable to provide me with a copy of the rules which were applicable at the time you commenced receiving a pension I am not able to determine whether the 1983 fund rules made provision for pension increases. However, that is not the end of the matter because the Act does contain a provision which deals with minimum pension increases. The new minimum benefit legislation enacted with a commencement date of 7 December 2001, provides for certain minimum pension increases to be paid by a pension fund organization as

defined in the Act. The minimum benefit requirements are couched in terms which are peremptory and therefore override anything to the contrary contained in the rules of a fund.

18. The provisions pertaining to minimum pension increases are contained in sections 14A and 14B.

19. In terms of section 14B(4) the minimum increase which a fund must give to its pensioners is the greater of the increase policy referred to in subsection (3), on the one hand, and the lesser of the two measures set out in subsection (4)(b) and (c) on the other. Section 14B(4) reads as follows:

> 14B. Determination of member's individual account, minimum individual reserve and minimum pension increase. –
>
> (1) …..
>
> (2) …..
>
> (3) (a) The board shall establish and implement a policy with regard to increases to be granted to pensioners and deferred pensioners, which policy must –
>
> (i) aim to award a percentage of the consumer price index, or some other measure of price inflation which is deemed suitable by the board; and
>
> (ii) set the frequency with which increases will be considered in line with the policy: Provided that increases should be considered each year, with comparison to the minimum pension increase at least once every three years.
>
> (b) The policy contemplated in paragraph (a) must be communicated to pensioners and deferred pensioners when it is established and whenever it is changed.
>
> (4) (a) In determining the minimum pension increase, the board shall increase pensions by a factor, P, where P is equal to the greater of the increase that the board would grant in terms of the pension increase policy established in terms of subsection (3) and –
>
> (i) the increase in paragraph (b), if the increase in paragraph (b) is less than the increase in paragraph (c); or
>
> (ii) the increase in paragraph (c), if the increase in paragraph (b) is greater than or equal to the increase in paragraph (c).
>
> (b) The board shall determine the increase that would result from –
>
> (i) Accumulating the liabilities for pensioners at their dates of retirement and deferred pensioners at their dates of termination of service, adjusted to an equivalent fair value of assets less –
>
> (aa) Pension payments;

(bb) Cash amounts paid on retirement; and

(cc) Those expenses that the board deems reasonable,

plus the liability in respect of any special increases that have been granted to pensioners which were funded otherwise than through the nett investment return earned by the fund on the assets backing pensioner and deferred pensioner liabilities instead of using gross investment return earned on the assets of the fund if such assets have been invested separately from the other assets of the fund; and

(ii) dividing the amount calculated in terms of subparagraph (i) by the present value of current and deferred pensions after making allowance for mortality, expenses and future pension increases at the rate determined by the board, adjusted to an equivalent fair value of assets.

(c) The board shall determine the increase required to each pension to the pension payable in the month following retirement, nett of the commutation of any portion of the pension for cash or the deferred pension at the date of termination of service, multiplied by the change in the consumer price index from the date of retirement in the case of a pensioner, or the date of termination of service in the case of a deferred pensioner, to the effective date of the calculation of the increase.

(d) Where the board finds it impractical to derive the increases in paragraphs (a), (b) and (c) for each individual pensioner or deferred pensioner, the board may use an approximated method which will preserve the broad principles behind paragraphs (a), (b) and (c)."

20. The import of the minimum pension increase provisions is the following. Every pension fund organization must establish and implement a minimum pension increase policy in terms of section 14B(3)(a). The board of management of a pension fund will have to establish and implement a policy with regard to minimum pension increases to be granted to pensioners (section 14B(3)(a)). The minimum pension increase policy must aim to award a percentage of the consumer price index (CPI) or some other measure of price inflation which is deemed suitable and also deal with how often the increases will be granted.

21. In terms of section 14B(3)(a), the beneficiaries of the minimum pension increases are all pensioners (and deferred pensioners) who receive a pension from a pension fund organization. Pensioner is defined in section 1 of the Act as:

> "**pensioner,** in relation to a fund, means a person who is in receipt of a pension from the fund"

22. After your husband passed away in July 1983 you commenced receiving a monthly pension (more commonly known as a surviving spouse's pension) from the fund. It is therefore clear that you are a pensioner as defined in section 1 of the Act.

23. Section 14A also regulates the commencement date of the of the minimum pension increase as follows:

> "14A. Minimum benefits.-(1) Every registered fund shall provide the following minimum benefits to a member:
>
> (a) …..
>
> (b) ….
>
> (c) ….
>
> (d) starting with the pension increase to be granted on the effective date of the first actuarial valuation following the commencement date, and at least once every three years thereafter, the pension increase to be granted to pensioners and deferred pensioners shall not be less than the minimum pension increase.
>
> 2) (a) ……
>
> (b) In respect of a fund which is registered prior to a date three months after the commencement date—
>
> (i) …..
>
> (ii) subsection (1) (b), (c) and (d) shall apply from the commencement date."

24. The section makes it clear that the minimum pension increase must be implemented from the date of the first valuation after the commencement date (7 December 2001). The fund which was registered prior to the commencement date completed its first statutory valuation (in terms of section 16 of the Act), after the commencement of the minimum benefit legislation, on 28 February 2003 (its next valuation is due on 28 February 2006). In the circumstances the fund is liable to implement the minimum pension increase on this date (28 February 2003).

25. You have requested that I order the fund to increase your monthly pension by 5.50%. In light of the aforementioned this Tribunal is not in a position to make such an order because pension increases (and whether it can be granted) is best determined by the fund.

<u>Relief</u>

26. In the result, the order of this Tribunal is:

26.1 The board of management of the Columbit Pension Fund is directed to establish and implement a policy in terms of section 14B(3) of the Act with regard to minimum pension increases, within 21 days from the date of this determination.

26.2 The board of management of the Columbit Pension Fund is further directed to inform this Tribunal, the Complainant and the Registrar of Pension Funds of its policy adopted in terms of paragraph 24.1, within 7 days of arriving at its decision.

DATED AT CAPE TOWN ON THIS THE DAY OF 2005

Yours faithfully,

Vuyani Ngalwana
Pension Funds Adjudicator

cc **Mr K Dixon**
Principal Officer: Columbit Retirement Fund
Fax no: 021 – 593 3179

Mr Stanley Khumalo
Client Relations Manager: Old Mutual Life Assurance Company (South Africa) Limited t/a Pencare Annuity Business
% Mrs Amanda Forbes
Fax no: 021 – 509 7306/7323

Mr Mustaq Parker
Senior Manager: Employee Benefits Legal & Tax Services
Metropolitan Holdings Limited
Fax no: 021 – 940 5678

Ms Lizzie Vambe
Alexander Forbes Group (Pty) Ltd t/a Alexander Forbes Financial Services
Fax no: 011 – 269 1063

Registrar of Pension Funds
Financial Services Board
Fax no: 021 – 347 0874

Registered address of fund

Maitland Park
733 Voortrekker Road
Maitland
7405

Section 30M filing: Magistrate's Court