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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 ("the Act") – OTTO GEORGE LOW v SOUTH AFRICAN RETIREMENT ANNUITY FUND & OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED

Introduction

1. Having considered the complaint that was received by this office on 11 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. On 1 October 1977 you became a member of the South African Retirement Annuity Fund ("the fund"), which is administered by Old Mutual Life Assurance Company (SA) Limited ("the administering insurer"). You made recurring monthly contributions of R29.52 which were invested in an Old Mutual policy ("Policy A") with policy number 3165129. You elected as your chosen retirement date 1 October 2013 (also the date on which the underlying policy was due to mature).

3. On 1 April 1978 you commenced making additional monthly contributions of R42.82. These contributions were invested in a second Old Mutual policy ("Policy B") with policy number 3260938. In terms of it your chosen retirement date was 1 April 2018 (also the date on which the underlying policy was due to mature).

4. The administering insurer informed you on 5 February 2005 that the death value on Policy A and B respectively were R72 617.75 and R109 631.57. In March 2005 your broker (Mrs Marina Visser), after she enquired about changing your retirement date on both policies to 1 April 2005, allegedly

informed you that Old Mutual advised her that your policy values will reduce, to R58 206.60 and R75 785.21 ("the early retiral value") on policy A and B respectively.

5. The difference between the death value and early retiral value is R14 411.15 and R33 846. 36 for policies A and B respectively.

The complaint

6. You are dissatisfied with the difference between the death benefit and the early retiral value of your respective policies. Your complaint is essentially that you will sustain prejudice because of the unreasonable reduction of the retiral value.

7. You essentially submit that the cost to effect the change is unreasonable and unacceptably high. Furthermore, if the policies are terminated early the administering insurer will not incur any further administrative cost as it would not render any administrative function in respect of your particular policies.

8. You essentially request that I order the administering insurer to limit its cost to R3000.00 in respect of policy A and R5000.00 in respect of policy B.

The response

9. Notwithstanding my office requesting a response from the administering insurer, by 6 June 2005, no response had been received. To date, no response has been received from the administering insurer.

10. Ms Juelle Phillips in her capacity as trustee of the fund submitted a response on behalf of the fund.

11. The fund has raised two preliminary points. The first is that I do not have jurisdiction to investigate and determine the complaint, because your grievance does not constitute a complaint as defined in the Pension Funds Act. The second is that what is at issue in this matter is "long-term insurance business" which is regulated by the Long-Term Insurance Act.
12. On the merits, Ms Phillips essentially submits that the early retiral values, provided by the administering insurer, are in accordance with the provisions of the contract and the applicable actuarial rules. Furthermore, the board of management can find no reason why you should be entitled to more than the retiral values which were quoted by the administering insurer.

13. Ms Phillips also submitted a copy of memorandum which was prepared for the fund's board by the administering insurer's actuarial services department. It is clear from her submission that she has treated this as part of her submission to this Tribunal. In the circumstances I shall treat it as such.

14. It is essentially stated therein that the reduced early retiral value was not as a result of the insurer deducting costs for unrecovered expenses. It is submitted that the difference between the death benefit and early retiral value is because:

> "The basic benefit payable on death includes a risk benefit purchased by part of the premium. The early retiral benefit, on the other hand, is effectively an accumulation of premiums paid, less expenses and cost of cover, plus investment growth, adjusted by the actuarial rules applying to the early retiral variation.
>
> … the death benefit at the start of the term is very high in relation to the premiums paid to date, and grows throughout the term to the maturity date.
>
> The early retiral benefit on the other hand starts from zero and grows (at a faster rate), throughout the term to the maturity date.
>
> The difference between the two has nothing to do with any costs of change."

15. It is furthermore confirmed that the quoted retiral values were determined in accordance with the underlying policy document, the applicable insurance legislation and the applicable actuarial rules.

Determination and reasons therefor

Technical points

16. There is no merit in the technical points raised by the respondent. 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 435 (PFA) at paragraphs [12] to [28] and authorities referred to therein, I cannot uphold the contention that this matter constitutes "long-term insurance business" over which I have no jurisdiction.

17. 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."

18. In so far as your complaint relates to the administration of the fund and/or the investment of its funds and it is implicit therein that you have suffered prejudice in consequence of the maladministration of the fund (in the form of reducing the benefit by the levying of undisclosed charges), your grievance constitutes a complaint as defined, contrary to the respondents' contention. This much is clear from your submission that:

> "dit is duidelik dat die pensioenfonds nie reg bestuur word en/of toekomstige koste van die polis en/of die koste van die verandering nie reg bereken word nie."

19. In any event, that you do not in precise terms allege maladministration by the fund or administering insurer is no reason by itself for a conclusion that the complaint is not a complaint as defined. Such an approach would be unduly formalistic and defeat the purpose of the Act. The Cape High Court has recently pronounced on such approach in the de Beer judgment as follows:

> "Applicant's contention regarding [the complainant'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 [the complainant] would not constitute a proper 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 the case between Sanlam and the applicant."

The merits

20. It is trite that a fund or the 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]*)*.

21. There is nothing in the rules which provides that a member may change his chosen retirement age ("Aanvangsdatum") to an earlier date, provided the date is not in conflict with any legislation applicable to the fund. However the underlying policy documents do contain a clause which makes provision for you to change your chosen retirement date in annexure SA1. Clause 2 reads:

> **"VERANDERING VAN DIE NORMALE AANVANGSDATUM**
>
> Indien daarom skriftelik aansoek gedoen word, kan die Versekerde Lewe kies om die Normale Aanvangsdatum na 'n vroeër of tot 'n later verjaardag van sodanige datum te verander, met dien verstande dat die veranderde datum wat aldus gekies word, voldoen aan die vereistes van die Inkomstebelastingwet of die Inkomstebelastingordonnansie wat op daardie tydstip van toepassing is, en met dien verstande dat die aansoek die Hoofkantoor van OU MUTUAL minstens een maand voor die voorgestelde veranderde datum bereik as die Normale Aanvangsdatum vervroeg moet word, en minstens een maand voor die Normale Aanvangsdatum as sodanige Aanvangsdatum uitgestel moet word. Die bepalinge en voorwaardes waarop hierdie verandering toegestaan kan word, word ten tyde van die aansoek verstrek."

22. While the underlying policy documents do allow you to change your chosen retirement date to an earlier or later date provided it does not contravene the Income Tax Act or any other ordinances, it does not specify what charges, if any, may be imposed. To the extent that rule 6.7 of the fund rules limits the fund's liability to its members to the terms of the policies afforded by the administering insurer, it is arguable that this clause can be taken as having been incorporated by reference in the rules of the fund.

23. However, you have not, at the time of submitting this complaint, instructed the fund and/or the administering insurer to change your chosen retirement date to 1 April 2005 or any other date. In the circumstances, it is clear that the relief which you are seeking from this Tribunal is aimed more at securing the assistance of this Tribunal to persuade the fund and/or administering insurer to limit its reduction of the retiral value to that proposed by you. I cannot grant such relief because the object of the adjudicator is to investigate actual complaints and rule on them and not to act as a negotiator for either party to a complaint.

24. In the result, our file in this matter is closed.

SIGNED IN CAPE TOWN ON THIS DAY OF 2005

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator

cc Principal Officer: South African Retirement Annuity Fund

% Ms Juelle Phillips
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Section 30M filing: Magistrate's Court