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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”) – L MUNASUR v SOUTH AFRICAN RETIREMENT ANNUITY FUND & OLD MUTUAL

Introduction

- [1] Having considered the complaint received by this office on 25 April 2005, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

Facts

- [2] As the facts are well known to the parties, I shall not set them out in detail here.
- [3] When you became a member of the South African Retirement Annuity Fund (“the fund”), Old Mutual, the administrator thereof and investor of its assets, issued a policy of insurance (“policy A”) on your life which provided for a yearly premium of R260 and a policy maturity date of 1 March 2013.
- [4] On 1 March 1985 Old Mutual issued a second policy of insurance (“policy B”) which provided for a monthly premium of R30 and a policy maturity date of 1 February 2009.
- [5] There was also a death benefit payable in terms of both policy A and policy B for which a monthly premium was payable.
- [6] During 2003, on account of ill-health you were unable to continue paying contributions and requested the fund to pay you an early retirement benefit. You were 60 years old at the time. With respect to policy A you received R44 933.91 and with respect to policy B you received R34

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Office Manager: L Manuel

675.32. The total benefit received was R79 609.23.

Complaint

- [7] Your complaint is that the early retirement benefit which you received was 'grossly undervalued'. You contend that you were paid 40% less than you should have been due to the US dollar rand exchange rate and economic downturn in 2003.
- [8] You go on to say that now that the economic position has reversed itself, you would like to benefit therefrom. You request payment of an amount of R119 692 from the fund based on the calculation provided in your complaint as follows:

"R79 795/40 x 100/1 = R199 487	
LESS PAID in 2003	R79 795
DUE TO ME	R119 692"

- [9] I understand your calculation to be based on your contention that you received 40% of the benefit which you should have received hence the division by 40 and multiplication by 100.
- [10] I note that your reply pertains to policy 3694366x01 which is the policy issued by Sanlam when you joined the Central Retirement Annuity Fund. It therefore has no relevance to this claim against the South African Retirement Annuity Fund and Old Mutual.

Response

- [11] The fund has raised a technical point that your grievance concerns insurance business, namely, the insurance policies issued by Old Mutual to the fund and as such does not fall within the definition of a complaint as defined in the Pension Funds Act.
- [12] The insurer, Old Mutual, has responded to the merits of your complaint. It contends that your early retirement benefits were correctly determined in accordance with the applicable policy contracts, insurance legislation and actuarial rules. With regard to policy A, the total premiums paid were R5 980 and you received a benefit of R44 933.91. This represents a return on investment of 14.5% per annum. With regard to policy B, the total premiums paid were R23 480 and you received a benefit of R34 675.32. This represents a return on investment of 9.13% per annum. Old Mutual submits that you therefore enjoyed satisfactory returns and have no basis for your claim to additional benefits.

Determination and reasons therefor

[13] I am satisfied that, contrary to the fund's contention, your grievance is a complaint as defined in that it relates to the investment of the fund's funds and alleges an act of maladministration of the fund in that you received a retirement benefit which was 'undervalued'.

[14] 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), at page 9, confirmed the jurisdiction of this office over retirement annuity fund complaints 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."

[15] While you do not allege in precise terms that you have suffered prejudice by reason of maladministration of the fund by the fund and/or the administering insurer, this is implicit in your complaint. To expect a lay person in your position to couch his complaint in precise terms required by legislation in the circumstances of this case (where the mischief is clearly identifiable) would be to read the Act too formalistically and thus to defeat the purpose of the complaint procedure as provided for in the Act. The Cape High Court has recently ruled on such an approach in the *de Beer* judgment at page 9 and 10:

"Applicant's contention regarding [the complainant's] letter is based upon a 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 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 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 run counter to the very purpose

of the complaints procedure provided for in the Act.”

Merits

- [16] A member’s rights are derived from the rules of the fund (section 13 of the Pension Funds Act). In terms of rule 6.7, the benefit/s to which you are entitled are determinable in terms of the underlying policies. I shall deal with policy A and policy B separately.

Policy A

- [17] Clause 2 of Annexure SE3 of the policy contract provides as follows:

“On making written application, the Life Assured may elect to change the Normal Commencing Date to an earlier or later anniversary of such date, provided the altered date so elected conforms to the requirements of the Income Tax Act or Income Tax Ordinance applicable at the time and provided the application is received by the Head Office of OLD MUTUAL at least one month prior to the proposed altered date if the Normal Commencing Date is to be advanced, and at least one month prior to the Normal Commencing Date if such Commencing Date is to be deferred. The terms and conditions under which this change may be granted shall be quoted at the time of application.”

- [18] On your early retirement, Old Mutual charged a fee of R315 as part of ‘the terms and conditions’ pursuant to clause 2. A summary of how the benefit of R44 933.91 which you received in respect of this policy was calculated is provided below:

Total bonuses	R34 160.91
Basic guaranteed benefit	R10 733.00
Less fee	<u>R315</u>
Benefit payable	R44 933.91

- [19] Clause 2 permits a member to retire early by changing the retirement date to an earlier date. It also provides that ‘the terms and conditions under which this change may be granted will be quoted at the time of the application’. However it does not provide the nature of those conditions which Old Mutual may impose nor does it set out the method that will be applied in determining those conditions. For this reason my view is that clause 2 is simply too vague and imprecise to be legally enforceable and cannot be relied on as authority to deduct a fee on early retirement.

Policy B

- [20] Under the heading “General provisions” of policy B, the relevant part of clause 12 reads as follows:

“The following options are available, subject to the rules of the Fund, to the conditions imposed by Old Mutual and legislation in force at the time:

(i)an option to change the normal retirement date ...”

- [21] The insurer states that the condition imposed when you changed the normal retirement date was that a benefit reduction of R3 805.75 was applied. Clause 12(i) permits a member to retire early by changing the normal retirement date “subject to the conditions imposed by Old Mutual”.
- [22] Again, clause 12(i) does not provide the nature of those conditions which Old Mutual may impose nor does it set out the method that will be applied in determining those conditions. Therefore, for the same reasons as above, it cannot be relied on as authority to deduct a ‘benefit reduction fee’ on early retirement.
- [23] In so far as you received lesser benefits due to the deduction of the aforementioned fees (R315 in respect of policy A and R3 805.75 in respect of policy B), you are entitled to reimbursement thereof.
- [24] However you are not entitled to benefits based on a return on investment which you contend should have been earned on the underlying policies. Simply put, the better return on investment which you may have earned elsewhere is irrelevant. Your entitlement in this regard is set out in clause 1 of annexure SE3 of policy A and clause 2 under the heading “Explanatory notes” of policy B. Both clauses entitle you to the basic benefit (R10 773 in respect of policy A and R14 480 in respect of policy B) plus “performance profits” earned by *Old Mutual*. The nature of your investment in the fund was such that you bore the investment risk. This meant that while you would benefit in times of favourable market conditions, you would bear the brunt of unfavourable market conditions.

Relief

- [25] In the result I make the following order:
- [25.1] It is hereby declared that the respondents had no right to deduct any amount from your investment account by reason only of your early retirement.
- [25.2] The respondents are jointly and severally directed to calculate the retirement benefit which you would have received had the fee of R315 in respect of policy A and R3 805.75 in respect of policy B not been deducted from your investment account in the fund;
- [25.3] The respondents are further ordered to transfer the amount in paragraph [25.2] less any payments made and any deductions permitted in terms of the Pension Funds Act to

