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Please quote our ref: PFA/WE/5528/05/CN

**RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): EM BOY v SOUTH AFRICAN RETIREMENT ANNUITY FUND & OLD MUTUAL LIFE ASSURANCE CO (SA) LIMITED**

Introduction

- [1] This complaint concerns the value of the retirement benefit payable to a member of a retirement annuity fund vis-à-vis the amount of the recurring contributions made by the member to the fund, as well as an alleged lack of ongoing investment advice from the fund's or the insurer's financial intermediary.
- [2] The complaint was received by this office on 13 September 2005 and a letter acknowledging receipt thereof sent to you on 23 September 2005. On the same date a letter was dispatched to the respondents requesting them to submit their responses to the complaint by no later than 14 October 2005. The responses, dated 14 October 2005 were received on 14 October 2005 and were subsequently forwarded to you for a reply. Your reply was received on 27 February 2006.
- [3] After considering all the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and the reasons therefor are set out below.

The complaint

- [4] You are not satisfied with the value of the retirement benefit of R365 086

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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), R Maharaj (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

that became available to you at the extended contractual retirement date, and are contending that the growth of just R21 268 over the period of nine years is poor and unacceptable and is “a disgrace” in comparison with what other life companies would have paid out.

- [5] Your further contention is that you received no advice from anybody representing the insurer regarding how you should diversify and not invest 100% offshore.

#### The responses

##### Technical point

- [6] It is submitted on behalf of the South African Retirement Annuity Fund (“the fund”) that the issues raised by you deal with “insurance business” and thus do not constitute a “complaint” as defined in the Act.

##### The merits

- [7] The respondents submit that since you were assisted by an independent bank broker in applying for the retirement annuity policy during 1997, Old Mutual Life Assurance Company (SA) Limited (“the insurer”) is not privy to the discussions, communications and/or advice that may have taken place between the two of you and is not in a position to comment thereon.
- [8] They further state that you requested the assistance of the insurer’s financial advisor for the first time during 2002. The respondents state that you were given advice regarding, inter alia, that investment exposure need not only be offshore, pursuant to which you decided to monitor your investments and to take a decision regarding a portfolio switch once the fund value was more or less equal to the premiums paid. According to them, you then effected a switch to the Stable Fund, from the Worldwide Balanced Fund, in early 2004.
- [9] On the issue of the value of your retirement benefit, the respondents state that no unstipulated costs were deducted from the value of the policy, and that the value was affected by the performance of the underlying policy which you had chosen. The respondents conclude that the only costs that were deducted were the expense charges referred to in Part 3 Clause 6 of the policy document, as well as a once-off amount of R990 which was charged when you effected an investment switch.

#### Determination and reasons therefor

##### Technical point

- [10] 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 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 *Louw v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 622 (PFA) at paragraphs [17] to [36] and the authorities referred to therein, I cannot uphold the contention that this matter constitutes “long-term insurance business” over which I have no jurisdiction.

- [11] Furthermore, Davis J (in whose judgment Le Grange AJ concurred) in *Central Retirement Annuity Fund v Adjudicator of Pension Funds & Another*, [2005] 8 BPLR 655 (C) at 660D-E confirmed the jurisdiction of this office and stated:

“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.”

- [12] The technical point is therefore dismissed.

#### The merits

- [13] Neither the fund, nor the insurer can be held liable for the failure of your initial financial advisor to give you adequate advice on investment matters such as asset exposure and portfolio switches. This is because the financial advisor was an independent intermediary who was not acting as the agent of either the insurer or the fund.
- [14] It appears from the available evidence that there is no specific clause in the policy contract that places a duty on the insurer to advise you on the performance of the portfolios or of market changes. However the information in question was made available on the insurer’s website and could also be furnished to you upon request. You have not gainsaid the respondents’ contention that the insurer’s financial advisor, whom you only consulted in early 2004, duly gave you the advice that you asked for at the time. Thus I cannot uphold your contention that no advice whatsoever was given to you by any representative or agent of the insurer.
- [15] The costs that were deducted from your contributions prior to the funds’ being invested are expressly provided for in the policy contract and also form part of the disclosures contained in a document titled “Statutory Notice to Long Term Insurance Policyholders”, under a section headed “Expense Charges”. The document is attached as the last annexure to the response. The relevant portion of the document reads:

“EXPENSE CHARGES

This section summarises the expense charge Old Mutual will apply to the quoted policy change.

Administration Fee	R7.15 (Monthly)
Premium Levy	R197.73 (4.50%)
Cost of Change	R990.00
Charges against the investment portfolio	2.40% p.a. of the fund value”.

- [16] The document bears your signature on the penultimate page, so it can be implied thereby that you were aware of the contents of the document to which you were appending your signature. The insurer was thus authorized to deduct the contractual charges that were disclosed in the contract which you agreed to be bound by.
- [17] The value of your investment was in any case not adversely affected by the deduction of the contractual charges, but rather by the performance of the underlying investments. The fact that actual benefits will depend on actual portfolio performance was disclosed to you in the quotation dated 31 January 2002, under a section titled “Assumptions”.
- [18] The insurer has also explained to you in a letter dated 25 July 2005 that due to the ongoing market volatility caused by such factors as changes in the interest rates, analysts’ market predictions, political activities, equities (in which you were fully invested up to early 2004) tend to be subject to substantial fluctuations. In that letter the insurer also gives two specific examples of market movements that had a negative effect on equities, namely the severe market corrections that occurred in October 1998 and September 2001. The sustained strengthening of the local currency relative to major currencies is also given as one of the factors that had an adverse effect on offshore equities.
- [19] You have not furnished any documentary or factual basis for your contention that the insurer’s investment performance was unsatisfactory compared to that of other life companies. Nor have you proved that there was any negligence or recklessness on the part of the insurer that caused you to suffer loss that you otherwise would not have suffered.
- [20] In the result, the complaint cannot succeed.

**SIGNED IN CAPE TOWN ON THIS**

**DAY OF**

**2007**

Yours faithfully

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**VUYANI NGALWANA**  
**PENSION FUNDS ADJUDICATOR**