



HEAD OFFICE
Johannesburg
1st Floor, Norfolk House
Cnr 5th Street & Norwich Close
Sandton, 2196
PO 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

Please quote our ref: PFA/GA/7147/2006/FM

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): G MILLER (“the complainant”) v LIFESTYLE RETIREMENT ANNUITY FUND (“the first respondent”)/ LIBERTY GROUP LIMITED (“the second respondent”)

1. Introduction

- 1.1 The complaint received by this office on 16 February 2006 concerns, in the first instance, the “actual expenses incurred” to be levied by the second respondent against the investment value of the complainant in the first respondent in the event of the complainant opting to make the underlying policy of insurance paid-up. Secondly, the complaint concerns the second respondent’s refusal to allow the complainant to have his investment value in the first respondent transferred to another retirement annuity fund.
- 1.2 In December 2005 an announcement was made of a Statement of Intent between the Minister of Finance, on the one hand, and the Life Offices Association and five large life assurers on the other, in terms of which the life assurers would commit themselves to certain minimum standards in respect of retirement annuity funds and endowment policies. Although the statement is not binding on this office, we nevertheless referred all retirement annuity fund complaints (including this one) back to the management boards and life assurers administering these funds with a view to facilitating an amicable resolution of the complaint between the parties without the intervention of this office. This matter was referred for settlement to the fund on 16 May 2006. The parties were given 30 days to settle the matter failing which this office would determine the complaint in the ordinary course. Many complaints were settled on this basis but the settlement terms were not divulged to this office. It appears

M Mohlala (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), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator)

Office Manager: L Manuel

that your complaint has not been resolved. It is with that brief background that we now determine this complaint in the ordinary course. After reviewing the written submissions before this tribunal, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefore appear below. As the background facts are well-known to the parties, these shall only be repeated to the extent that they are pertinent to the issues raised herein.

2. Facts in brief

2.1 The complainant is currently a member of the first respondent, which is a retirement annuity fund underwritten and administered by the second respondent. During 2005 the complainant contemplated making his underlying policy of insurance taken out with the second respondent paid-up and was quoted the value of his fund investment as it then existed and a paid-up value "after the deduction of outstanding expenses". The respective amounts were R840 622.99 and R752 724.49.

2.2 The fee for the early termination of fund contributions (this is what is referred to in the complaint as "actual expenses incurred") to be levied by the second respondent against the complainant's investment value in the first respondent was to be in the amount of R87 898.50.

3. Complaint

3.1 The complainant is aggrieved by the prospect of being charged a fee by the second respondent in the event of the complainant ceasing to make contributions to the first respondent prior to the complainant's selected retirement date. The complainant further avers that the second respondent has no right in law or contract to impose penalties on the complainant for the premature termination of his retirement annuity fund policy.

3.2 The complainant further contends that the second respondent has no right either in law or contract to prohibit the complainant from transferring his investment value in the first respondent to another retirement annuity fund where the complainant can potentially achieve the maximum investment return.

3.3 The complainant submits that he has suffered prejudice and will continue to suffer prejudice if he is made to keep his portfolio with the second respondent against his will.

3.4 The complainant accordingly seeks a declaratory order that the proposed imposition of monetary penalties for the early termination of his

fund contributions has no basis in law or contract; that no charges be levied on the complainant's investment value other than a "Portfolio Management Charge" as stipulated in the insurance contract; that the complainant be permitted to transfer his full investment value in the fund without any penalty charges to another retirement annuity fund of the complainant's own choice.

4. Response

- 4.1 The second respondent argues that the rules of the fund and the insurance policy entitle the second respondent to pay a member who has ceased contributing to the first respondent prior to the member's selected retirement date, at retirement, a paid-up benefit in an amount determined in relation to the actual contributions paid.
- 4.2 It is further averred by the second respondent that the contractual provisions of the policy documents authorise the second respondent to levy charges, over the full term of membership of the first respondent, against investment made by members so as to recover expenses incurred by the second respondent, which include commissions paid to intermediaries, marketing and distribution expenses, acquisition expenses and renewal expenses.
- 4.3 The second respondent then argues that the amount of R87 898.50 that would be levied in the event of the complainant making the policy paid-up falls within the parameters of the so-called Statement of Intent and is, on this basis, justifiable.
- 4.4 The respondents elect not to canvass the issue of transfer of the complainant's investment value in the first respondent to another retirement annuity fund. This issue shall be dealt with later in this determination.

5. Determination and reasons therefore

- 5.1 The complainant's policy is still in force; the complainant has further not terminated contributions to the fund and the respondent has not levied any penalties for the premature termination of fund contributions. This means that the situation about which the complainant is complaining has not eventuated but is at this stage merely hypothetical. The relief that the complainant seeks regarding this leg of his complaint is not so much a declaratory order on a legal principle. It is rather aimed at securing advice on the proper interpretation of the rules and the policy documents as regards the calculation of investment fund values and how they relate to retirement benefits paid by a fund. This tribunal cannot grant such a relief because the object of this tribunal is to investigate and determine

actual in contradistinction to hypothetical complaints. Neither is the object of this tribunal to give advice.

- 5.2 As regards the complainant's wishes to have his investment value in the fund transferred to another retirement annuity fund, the complainant is entitled to relief for the following reasons:
- 5.3 The question of the absence in a retirement annuity fund's rules of a right to transfer to another approved retirement annuity fund was recently fully canvassed in *Browne v South African Retirement Annuity Fund and Others* [2006] 4 BPLR 311 (PFA) at paragraphs [59] to [89]. When the Income Tax Act was amended in 1998 to allow for transfers between approved retirement annuity funds prior to age 55, the board of trustees of all such funds had a duty to consider whether the rules should be amended to allow for such transfers. When determining whether the rules should contain such a provision, the board of trustees must act in the best interests of the members of the fund. Now, there can be no doubt, in my view, that the absence of a rule allowing transfer prior to retirement, and instead locking in members until age 55 or chosen retirement date (whichever occurs last), is clearly in the interests not of members but of the underwriter of the fund. The implications of such a situation are that the trustees of the fund would be failing to comply with their fiduciary duties in terms of the Pension Funds Act which compel them to protect the interest of members. I shall therefore make provision in my order for remedial action by the trustees to rectify this unsatisfactory situation.

6. Relief

The order of this tribunal is as follows:

- 6.1 The complaint relating to the hypothetical imposition by the first and second respondents of "actual expenses incurred" against the complainant's investment value in the first respondent is hereby dismissed.
- 6.2 the board of trustees of the first respondent is hereby directed to submit a rule amendment to the Registrar of Pension Funds allowing for the transfer of members to other approved retirement annuity funds prior to retirement within four weeks of the date of this determination; and
- 6.3 Upon registration of the transfer rule referred to in paragraph 6.2 above, the first respondent is further ordered to transfer the complainant's total interest in the first respondent to another approved retirement annuity fund of the complainant's choice within

two weeks of the registration of the rule, should the complainant still wish to transfer.

DATED at JOHANNESBURG on this day of 2007

Yours faithfully

**MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR**