HEAD OFFICE
Johannesburg
2nd Floor, Sandown House
Sandton Close 2, 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 reference: PFA/GA/5068/2005/RM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 of 1956 ("The Act"): N WALLACE ("complainant") v SOUTH AFRICAN RETIREMENT ANNUITY FUND ("first respondent"); OLD MUTUAL LIFE ASSURANCE COMPANY (S.A.) LIMITED ("second respondent") AND K WRIGHT ("third respondent")

1.0. Introduction

1.1 The complaint concerns the request for cancellation of a retirement annuity fund membership due to an alleged misrepresentation, the payment of a benefit from a retirement annuity fund before the member reaches the age of 55 and the allegedly high costs that the second respondent levies in the event of a reduction of monthly contributions by the complainant.

1.2 The complaint was received by this office on 23 August 2005. A letter acknowledging receipt of the complaint was sent on 31 August 2005. On the same date letters were dispatched to the first and second respondents, giving them until 21 September 2005 to file a response to the complaint. A response letter was sent to the third respondent on 27 October 2005 and he was given until 14 November 2005 to respond to the complaint. Responses from the first and second respondents, which were also forwarded to the complainant, were received on 21 September 2005 and 5 July 2006. The third respondent sent a

response on 14 November 2005. A reply from the complainant was received on 10 October 2005.

1.3 After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

2.0 Factual Background

2.1 The complainant applied for and became a member of the first respondent, which is underwritten and administered by the second respondent, from February 2002. The third respondent was the complainant's broker at the time.

2.2 The complainant commenced paying monthly contributions of R1 500, which escalates annually at a rate of 9 percent. In February 2004 she approached the third respondent and asked him to make enquiries about reducing her contributions to R200 per month. The second respondent advised that it would charge an alteration fee of R18 452.46 if the complainant opted to reduce her contributions. The complainant was also advised that the earliest she could receive a cash payout is when she turns 55 years of age.

2.3 According to information provided by the second respondent the complainant is still paying monthly contributions of R1964.63 to the second respondent and no changes have been made on the policy.

3.0 Complaint

3.1 The complaint issues arising from the complainant's complaint are threefold, namely:

3.1.1 The complainant alleges that she approached the third respondent with a view to starting a "savings account" rather than becoming a member of a retirement annuity fund. She alleged that she informed the third respondent that she wanted an investment that permitted decreases in contributions and would pay out in cash any accumulated value because she would need it to buy a new house. She asks that the retirement annuity contract be cancelled since she never intended becoming a member of the first respondent.

3.1.2 The complainant also complains that she has to leave the accumulated fund value in the first respondent until the age of 55 years at the very earliest. She wants access to the monies

immediately so that she can use it towards reducing her home mortgage bond.

3.1.3 Lastly, the complainant complains about the R18 452.46 fee that the second respondent intends charging in the event that she reduces her monthly contributions to R200.

4.0 Responses

4.1 The second respondent responded to the complaint, alleging that the complainant's complaint does not constitute a complaint as defined in the Act because she complains about the third respondent giving her the wrong investment advice, in that she wished to invest in a "savings account" which would allow her access to her savings account at any time. The second respondent then attempts to substantiate this submission by stating that the complainant does not allege in her complaint that:

4.1.1 a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;

4.1.2 the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;

4.1.3 a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or

4.1.4 an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund.

4.2 In a second response dated 5 July 2006 the second respondent attaches a copy of the third respondent's response (see paragraph 4.3 *infra*) and states that considering these documents and the ones signed by the complainant there are no grounds to found a claim of misrepresentation by the third respondent. Therefore, the second respondent states that it is unable to accede to the complainant's request to cancel her retirement annuity fund contract. The second respondent also confirms that all monthly contributions, paid in full, have been received and no changes had been effected to the initial policy.

4.3 The third respondent was also afforded an opportunity to respond to the complaint. He was the complainant's broker when the retirement annuity contract was entered into with the first and second

respondents. The third respondent advised that during January 2002 he was approached by the complainant with a view to structuring her retirement funding provision emanating from her remuneration package because the employer did not have a pension fund. During their meeting on 7 January 2002 the third respondent explained the workings of retirement annuity funds to the complainant, as well as the tax relief she will receive. He alleges that he dealt with the structure of retirement annuity funds and the fact that she was compelled to leave all contributions in the fund until at least 55 years of age.

4.4 Aside from the basic investment explanation sheet that was provided to the complainant the third respondent also obtained a signed mandate form which outlined clearly the type of product and the term of the retirement annuity. So, the complainant was "fully aware" of the product type at the sales stage. Only when the complainant requested a reduction of contributions and she was informed of the cost associated with this did she allege that she did not want to be invested in a retirement annuity fund.

4.5 The third respondent avers that, aside from the fact that the complainant was fully informed about the operation of the retirement annuity at the sales stage, she also works in a financial management environment. The complainant contributed towards the first respondent for three years, she signed the statutory notice to the Long Term Insurance Act which clearly outlines the product type, she received a copy of the contract at inception which clearly detailed the type of investment she was making and she submitted her income tax returns over three years using her retirement annuity fund contributions as a tax deduction. Given these facts, the complainant was fully aware that she had become a member of a retirement annuity fund.

5.0 Determination and reasons therefor

5.1 The issues for determination in this complaint are the three issues summarised in paragraph 3.1 *supra*. However, the point *in limine* raised in response by the first respondent must be addressed before moving to the merits of the complaint.

Point in limine

5.2 The first respondent avers that the complaint does not constitute a valid complaint as defined in section 1 of the Act because it pertains to improper investment advice given to her by the third respondent.

5.3 However, as summarised in paragraph 3.1 supra, the complaint does not only relate to the third respondent's conduct. The complainant also

complains about the potential punitive costs that will be levied in the event that she reduces or ceases her monthly contributions and she also requests that she be allowed to make a cash withdrawal from the first respondent before she reaches the age of 55. These two issues raise questions about the administration of the first respondent as well as questions of law, which fall squarely within the definition of a complaint in section 1 of the Act. Further, if the complainant can prove that the retirement annuity fund contract was entered into based on fraudulent misrepresentation by the third respondent then the contract would be void *ab initio* and could potentially be null and void. Therefore, the complaint does constitute a valid complaint as defined in section 1 of the Act and the first respondent's preliminary point is dismissed.

5.4 In the event that the complainant wishes to complaint about the conduct of the third respondent she is advised that this tribunal does not have jurisdiction to adjudicate broker-related complaints. Therefore, she is referred to the Ombudsman for Long-term Insurance, whose details appears below, if she wishes to pursue that broker-related complaint further.

The merits

Misrepresentation

5.5 The complainant avers that she wanted to open a "savings account" rather than become a member of a retirement annuity fund. In essence she submits that she only entered membership of the first respondent through the misrepresentation of the third respondent. In response the third respondent submitted that before the complainant became a member of the first respondent he had met with her and discussed the operation of retirement annuity funds, she was given information about their operation, she signed a client instruction mandate which clearly stated the product type as well as the duration of the contract and she was provided with the policy documents. Further, she applied for and received tax deductions for her retirement annuity fund contributions for at least three years. Lastly, she is a financial manager and ought reasonably to have known about the operation of retirement annuity funds.

5.6 On reviewing the documents submitted by all the parties it is the view of this tribunal that the complainant was not misled when entering into membership of the first respondent. At the very least it is clear that she received pertinent written information about the nature of the contract she was entering into, i.e. it's duration, the contribution amounts, annual contribution escalations, investment choices and fund

membership. She also received a copy of the policy documents. Further, the third respondent submitted that he had verbally informed her about retirement annuity funds and the complainant signed the statutory disclosure notice form required in terms of the Long Term Insurance Act, 52 of 1998, in essence confirming that the third respondent had provided the requisite product information to her.

5.7 This tribunal also notes that the complainant ought reasonably to have known about the nature of the retirement fund she had entered firstly because she claimed back her retirement annuity fund contributions for tax purposes and secondly, it is noted that the complainant worked as a financial manager and ought to have been familiar with the concept of a retirement annuity fund. Therefore, the complainant's complaint that she was improperly induced into entering a retirement annuity fund contract through misrepresentation is dismissed.

Cash withdrawal

5.8 The complainant requests that the first respondent pay her a cash withdrawal benefit so that she can utilise the funds towards her home mortgage bond. She does not want to wait until she turns 55 years of age before she can access her retirement annuity fund benefit.

5.9 The relevant sections of the definition of a retirement annuity fund in section 1 of the Income Tax Act, for the purposes of this determination, are as follows:

"**'retirement annuity fund'** means any fund (other than a pension fund, provident fund or benefit fund) which is approved by the Commissioner in respect of the year of assessment in question and, in the case of any such fund established on or after 1 July 1986, is registered under the provisions of the Pension Funds Act, 1956 (Act 24 of 1956): Provided that the Commissioner may approve a fund subject to such limitations or conditions as he may determine, and shall not approve any fund in respect of any year of assessment unless he is in respect of that year of assessment satisfied-

(a) that the fund is a permanent fund *bona fide* established for the sole purpose of providing life annuities for the members of the fund or annuities for the dependants or nominees of deceased members; and

(b) that the rules of the fund provide-

(i) for contributions by the members, including contributions made by way of transfer of members' interests in approved

pension funds, provident funds or other retirement annuity funds;

(ii) that not more than one-third of the total value of any annuities to which any person becomes entitled, may be commuted for a single payment, except where the annual amount of such annuities does not exceed R1 800 or such other amount as the Minister of Finance may from time to time fix by notice in the *Gazette* ;

(iii) …

(iv) …

(v) that no member shall become entitled to the payment of any annuity after he reaches the age of seventy years or, except in the case of a member who becomes permanently incapable through infirmity of mind or body of carrying on his occupation, before he reaches the age of fifty-five years;

(vi) that where a member dies before he becomes entitled to the payment of an annuity, the benefits shall not exceed a refund to his estate or to his dependants or nominees of the sum of the amounts (with or without reasonable interest thereon) contributed by him and an annuity or annuities to his dependants or nominees;

(vii) …"

5.10 Thus, in terms of the definition, the Receiver will not approve a retirement annuity fund in any year of assessment unless he is satisfied, *inter alia*, that the rules provide that no member shall become entitled to the payment of a retirement benefit before the age of 55 years, except in the case of a member who becomes permanently incapable through infirmity of mind or body of carrying on his occupation. Aside from a retirement benefit that becomes payable at any time between the ages of 55 and 70 years depending on the member's election, or a disability benefit to qualifying members, retirement annuity funds will also pay a death benefit to a member's beneficiaries in the event of his passing away. Importantly, there is no provision for the payment of a withdrawal benefit from retirement annuity funds.

5.11 Pursuant to the requirements of the Income Tax Act, rule 4 provides for the payment of a retirement benefit as follows (the death benefit provision is not considered here because it is inapplicable for present purposes):

"4.1 RETIREMENT AGE

(a) In respect of a MEMBER:

The retirement age applicable to a MEMBER in terms of any ANNUITY POLICY shall be in accordance with the provisions of the INCOME TAX ACT.

(b) In respect of a LIFE ASSURED:
Should a CEDED POLICY not provide for a retirement annuity to be paid from a retirement age that is in accordance with the provisions of the INCOME TAX ACT, such policy shall be altered by the UNDERWRITER so to provide, and the UNDERWRITER shall determine the amended benefits payable as a result of such alteration."

5.12 The complainant was born on 31 March 1970. The complainant is presently 37 years of age. In terms of the definition of a retirement annuity fund in section 1 of the Income Tax Act a normal retirement benefit can only be paid, at the earliest, when the complainant turns 55 years of age. Thus, the complainant does not qualify for payment of a retirement benefit from the first respondent. Furthermore, the complainant has not made application to the fund for an early retirement benefit on the basis of ill health or disability, so she does not qualify for an early retirement benefit. In the result, the first respondent correctly refused to pay any cash benefit to the complainant at the present time because she has not reached the minimum retirement age of 55 years as stipulated in the Income Tax Act.

Charges on reduction of contributions

5.13 The complainant also complains about the charges that the second respondent intends levying in the event that she reduces her contributions to R200 per month. It is noted that the second respondent has advised that the complainant has not in fact reduced her contributions, so it has not levied any charges to date.

5.14 The Minister of Finance amended the regulations under the Long Term Insurance Act, 1998 on 1 December 2006 to the effect that maximum policy charges are now stipulated in the regulations in the event of,

inter alia, retirement annuity fund members reducing or stopping payment of their monthly contributions before their chosen retirement date. Thus, the second respondent would have to abide by the prescribed maximum limits set in the regulations in the event of the complainant deciding to reduce or cease her monthly contributions. Since the complainant has not altered her contributions as yet and no charges have been levied by the second respondent, there is no complaint to adjudicate at present.

6.0. Relief

6.1 The complaints against the respondents cannot succeed and are therefore dismissed.

Dated at Johannesburg on this the day of 2008

Yours faithfully

_____

Mamodupi Mohlala
Pension Funds Adjudicator