IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR
HELD IN JOHANNESBURG

CASE NO: PFA/FS/5271/05/CN

In the complaint between:

Hilton C Browne **Complainant**

and

South African Retirement Annuity Fund **First Respondent**

Old Mutual Life Assurance Co. (SA) Ltd **Second Respondent**

INVESTIGATION IN TERMS OF SECTION 30J OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act")

Introduction

[1] Section 30J of the Act confers on the adjudicator wide powers of procedure, including the powers of a commission of enquiry and inquisitorial procedures. The section also confers on the adjudicator a wide discretion to follow any procedure he considers appropriate in conducting an investigation.

[2] It is my considered judgment that as the question that arises in this complaint affects a wider range of people and institutions than just the parties herein, and its determination requires a convergence of views from various authorities, written submissions from those authorities must be solicited if a determinative answer is to be found to this question. The question to which I refer is this: Can an approved retirement annuity fund and/or its underwriter lawfully refuse to allow a member of such fund to transfer his or her total interest from such fund to another approved retirement annuity fund before reaching age 55 – or before reaching chosen retirement date as set out in the underlying policy – in circumstances where the rules of such fund make no provision for such transfer even though the Income Tax Act, 58 of 1962, provides that the rules of

an approved retirement annuity fund must contain such provision?

[3] As I consider the South African Revenue Service and the Competition Commission to have a direct and substantial interest in the determination of this question, I consider it appropriate that they be joined as parties to this complaint in terms of section 30G of the Act with a view that they be required formally to provide this tribunal with their respective views on the issue.

Salient Facts in Brief

[4] The complainant, who has been a member of the South African Retirement Annuity Fund ("SARAF") since December 1986, wants to transfer his member's interest in the fund to another approved retirement annuity fund of his choice. His stated reason for this wish is that he is not satisfied with what he alleges are poor investment returns that have been achieved by SARAF over these years.

[5] SARAF refuses to accede to the complainant's request on the ground that its

rules do not provide for a transfer except in those specific instances set out in the rules. Those instances are: the death of a member; the winding up of the fund; the cessation of contributions by the member where as a result of such cessation no benefits are payable in terms of the policy; the payment of the benefit in full commutation of the annuity; transfer of a vested retirement benefit to another insurer; transfer, subject to certain conditions in the rules, of a member who is within two months of the vesting date of his or her retirement benefit; and transfer of a member to another approved retirement annuity fund of his choice where the policy is no longer available for purposes of the fund.

The Law

[6] A registered retirement annuity fund is a pension fund organisation as defined in the Pension Funds Act (see *Central Retirement Annuity Fund v Adjudicator of Pension Fund and Others* [2005] 8 BPLR 655 (C) at 660D-E). As such, it is bound by its rules in the same way that its members, officials, shareholders and beneficiaries are bound (see section 13 of the Act). Such is the binding effect of the rules that the board of the fund may do with the fund's assets only what

is provided for in the rules (see *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]).

[7] A registered retirement annuity fund is, however, also governed by relevant legislation and the common law (see *Mostert NO v Old Mutual Life Assurance Company (South Africa) Limited* [2001] 8 BPLR 2307 (SCA) at paragraph [30]). The Income Tax Act, 58 of 1962, provides that the rules of a retirement annuity fund must make provision for the transfer of any member's total interest from one approved retirement annuity fund to another. This amendment to the Income Tax Act was introduced on 29 June 1998 by the Taxation Laws Amendment Act, 30 of 1998. This is one of the requirements for a tax approval status of a retirement annuity fund (see paragraph (b) (xii) (bb) of the definition of "*retirement annuity fund*").

[8] Another requirement for the tax approval status of a retirement annuity fund (among eleven others) is that its rules must contain a provision that a member upon retirement is permitted to commute up to one-third of his or her retirement benefit and that the balance must be used to purchase a life annuity. The retirement benefit can thus not be commuted in a lump sum.

[9] The questions that then arise, and which I require the South African Revenue Service to answer, are the following:

[9.1] Is it open to the discretion of an approved retirement annuity fund or its underwriter to decide which of the provisions for which paragraphs (b)(i) – (xiii) of the definition of "*retirement annuity fund*" in the Income Tax Act, 58 of 1962, it should include in (or exclude from) its rules?

[9.2] What is the effect, if any, on an approved retirement annuity fund if it should omit from its rules any of the provisions for which paragraphs (b)(i) – (xiii) make provision?

[9.3] Specifically, what is the effect on an approved retirement annuity fund if it should omit from its rules the provision for which paragraph (b)(ii) makes provision?

[9.4] Will the answer to question [9.3] above be different if an approved

retirement annuity fund should omit from its rules the provision for which paragraph (b)(xii)(bb)? Please give detailed reasons if the answer should be different.

[9.5] What is the South African Revenue Service's independent understanding of the plain meaning of paragraph (b)(xii)(bb)? Please give detailed reasons for the answer.

[9.6] Are there any other submissions that the South African Revenue Service wishes to make that could be of assistance to this tribunal in the determination of this matter?

[10] The Competition Act, 89 of 1998, contains various provisions prohibiting, among other things, conduct that has the effect of substantially preventing or lessening competition in a market, and abuse of dominance by dominant firms. The questions that arise and which I require the Competition Commission to answer are the following:

[10.1] Is the SARAF a "dominant firm" for purposes of chapter 2 of the

Competition Act, having regard both to the number of members and total amount of contributions made to it by members? Please give detailed reasons.

[10.2] Is Old Mutual in its capacity as underwriter of SARAF a "dominant firm" for purposes of chapter 2 of the Competition Act? Please give detailed reasons.

[10.3] Does the act of not allowing members of an approved retirement annuity fund (such as the SARAF) to transfer their total interests to other approved retirement annuity funds of their choice before reaching either age 55 or chosen retirement date as set out in the underlying policy constitute an "*exclusionary act*" within the meaning of chapter 1 read together with section 8(c) of the Competition Act? Please give detailed reasons.

[10.4] Are any of the above acts exempted from prohibition in terms of part C of the Competition Act? Please give detailed reasons.

[10.5] Are there any other submissions that the Competition Commission would like to make that could be of assistance to this tribunal in the determination of this matter?

Order

A. The South African Revenue Service and the Competition Commission are hereby joined in this complaint as third and fourth respondents in terms of section 30G of the Pension Funds Act, 24 of 1956, as amended.

B. The South African Revenue Service and the Competition Commission are both required to provide their respective written submissions in respect of the questions set out above to this tribunal by **no later than Wednesday 26 July 2006** and copy the other parties therewith.

C. The complainant and the first and second respondents may file further submissions only in response to the submissions made by the South African Revenue Services and the Competition Commission **within two weeks** of their

receipt thereof and in any event by no later than Friday 11 August 2006.

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VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR

Appearances
All parties not represented.

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SECTION 30M FILING: HIGH COURT