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Please quote reference: PFA/KZN/2836/2005/nvc

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): N Baalbergen v Central Retirement Annuity Fund (“the fund”) and Sanlam Life Insurance Limited (“Sanlam” or “the insurer”)**

Introduction

[1] Having considered the complaint received by this office on 23 March 2005 and further written submissions, I consider it unnecessary to hold a hearing in this matter. 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 18 January 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. However, on 1 February 2006 we were informed that the parties in this complaint had failed to reach a settlement in this case. The details of disagreement were not communicated to us. It is with that brief background that we now determine this complaint in the ordinary course. My determination and reasons therefor appear below. I shall set out the facts as far as essential for understanding this determination.

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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), Solomzi Gcelu (Assistant Adjudicator) T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

### Factual Background

- [2] Your membership of the fund commenced in October 1987 at which time you invested in the Stable Investment Fund. In October 1997 you elected to change your investment portfolio to a market-related portfolio, the Equity Focus Fund, at which time the contribution to the fund amounted to an annual amount of R5 076.97 escalating at the annual rate of 15% as at 1 February each year. You are currently still a member of the fund.
- [3] Sanlam advised you that the only cost to you at conversion was R803.

### Complaint

- [4] Your complaint concerns:
- [4.1] It was not to your advantage to change portfolios in 1997 and Sanlam does not take responsibility for the loss that you have suffered;
  - [4.2] You question if Sanlam levies a cost each time that your contribution increases and you are in fact not clear what costs are levied against the benefit;
  - [4.3] The performance of the underlying portfolio is not used to illustrate the value of the policy. You are unhappy about the decrease in the illustrative value of your investment subsequent to the conversion to the market-related portfolio; and
  - [4.4] You are generally not satisfied with the conflicting and inconsistent information provided by the fund and Sanlam. You want the fund and/or Sanlam to confirm information pertaining to:
    - [4.4.1] Your current fund value and its value at the date of conversion to the new policy with effect from 24 October 1997;
    - [4.4.2] Details of all the costs recovered in respect of both policies;
    - [4.4.3] Details of the amounts that are allocated to retirement funding; and
    - [4.4.4] The investment performance details of the portfolio(s) in which you were/are invested.

### Response by the fund and Sanlam

- [5] With regard to [4.2], Sanlam Life responds that the charges are set out on the policy's "Description and Provisions" as follows:

"1. INVESTMENT ACCOUNT

At the beginning of each policy year an investment amount shall be invested in an Investment Account for this policy. The investment amount shall represent the balance of the annual premium after provision has been made, where applicable, for the policy fee and the cost of cover, rider benefits and administration.

An investment amount shall also be invested in the Investment Account for this policy on receipt of a single premium. This investment amount shall be equal to the single premium less the policy fee.

Investment growth (see PROFIT SHARING) shall be added to the investment amounts in the Investment Account.

## 2. PROFIT SHARING

This policy shares in profits by means of non-vesting investment growth. This is added to the Investment Account. The growth rate is expressed as a percentage of the balance of the Investment Account. The fact that the growth is non-vesting underlines the market-related nature of this policy.”

[6] The respondents state that the policy charges also apply to the annual premium increases and are taken into account in all illustrative benefit projections.

[7] They further say that the only cost involved in converting a portfolio is R803, being the “policy conversion fee”. When the conversion was done in 1997, the situation was as follows:

“Net fund value carried over R36 732.18

This can be divided into:

Fund value carried over: R53 401.92  
Costs carried over R16 669.74”

[8] According to the fund, the amount of R16 669.74 noted in paragraph [7] above, “will have no direct impact on the fund value of the policy” but “provided that the member does not terminate the policy or the premiums prior to the contractual maturity date.”

[9] According to Sanlam your fund value as at 9 June 2005 was as follows:

“Value carried over with the conversion	R 53 401.92
Total premiums paid in up to 09/06/2005	R 70 522.71
Less: Total policy fees and administration charges	R 4 529.35
Equals: Total premiums available for investment	R119 395.28
Plus: Investment Return	R 61 595.48
Equals: Fund value on 09/06/2005	R180 990.76”

[10] In respect to your complaint as set out in paragraph [4.3], Sanlam’s response is that the illustrative value of a policy is calculated by multiplying

accumulated units by the latest available unit price which fluctuates depending on market conditions. Therefore the illustrative values fluctuate in terms of market conditions and not due to costs incurred.

- [11] The respondents further state that as the portfolio's past performance is not necessarily repeated, it is not used to illustrate the future value of the policy. Sanlam Life, as other insurers, use illustration rates that seem reasonable given the level of inflation and general investment returns at the time that the illustration is done.
- [12] In reply to your last grievance, as set out in [4.4], Sanlam advises that performance figures are always available on Sanlam's website and may be provided on request. It says that a statement was sent to you on 16 May 2005.

#### Determination and reasons therefor

- [13] Although Sanlam has not raised it, it is of concern to me that you submitted your complaint (in 2005) eight years after the cost of R803 was levied when you changed your investment portfolio (in 1997).

- [14] Section 30I of the Pension Funds Act reads:

“(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.

(2) If the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.

(3) The Adjudicator may on good cause shown or of his or her own motion -

- (a) either before or after expiry of any period prescribed by this Chapter, extend such period; [or]  
 (b) condone non compliance with any time limit prescribed by this Chapter.”

- [15] It is clear from the complaint that the events to which it relates occurred substantially more than three years before this complaint was lodged or received by this office on 23 March 2005.

- [16] There is good reason for a limit to be imposed on the time during which litigation may be launched and the Constitutional Court has pronounced on this. In *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) the Court said (at paragraph [11]):

“Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can be obtained have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken.”

[17] However, that the complaint was lodged outside the three year time period in terms of section 30I of the Act is not the end of the matter as I still have discretion to extend the three year time period or to condone non-compliance therewith.

[18] The Supreme Court of Appeal (or Appellate Division as it was then known) has pronounced upon the standard that must be met for condonation to be granted in circumstances like these. In *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) the court said (at 532B-E):

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has discretion, to be exercised judicially upon a consideration of all facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant is the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked.”

[19] Although it is clear that you have been unhappy with the manner in which Sanlam has generally dealt with your policy over a period of time, your complaint is time-barred. You have not provided reasons for its late submission and the prospects of succeeding in all aspects of your complaint are not good.

[20] Once you decided to invest in a market-related portfolio, you carried the investment risk. This means that you benefited from a surge in the market and carried the loss in periods where the market was in decline.

[21] I am satisfied that the fact that the illustrative values are not guaranteed and depend on actual growth rates, annuity rates and inflation rates as set out in the policy documents, as follows:

“Actual amounts payable will depend on actual investment returns credited to and

policy charges against the policy. Actual benefits will be reduced by any debt or unpaid premiums. The level of inflation during the policy term also impacts the investment return. Usually, the higher the rate of inflation over a specific period, the higher the investment returns. The ultimate value of the policy benefits will depend on the buying power of money when the policy benefits are paid.”

[22] If the conditions, on which an illustrative value is based, are achieved, then only should the illustrative value become payable. From the evidence, the value of the investment continually varies as a result of market and exchange rate fluctuations. The strengthening of the rand against the dollar, from R4.81 to the US dollar in November 1997 to R6.11 to the US dollar in November 2004, adversely affected the value in your investment account. Further, the drop in world markets, measured in terms of the MSCI World Index, from 1791 in November 1997 to 1076 in November 2004, also impacted negatively on your investment value.

[23] According to Sanlam’s letter dated 12 May 2005, addressed to you, it appears that, after taking all relevant factors into account which affect the value, your investment has grown as follows:

“ 1 November 1998	R 50 942.28
1 November 1999	R 64 930.97
1 November 2000	R 82 203.33
1 November 2001	R 90 209.78
1 November 2002	R 94 850.68
1 November 2003	R107 661.46
1 November 2004	R140 132.68”

and from the table set out in paragraph [9] the value was R180 990.76 as at 9 June 2005.

[24] The “costs carried over” of R16 669.74 at conversion from the Stable Investment Fund to the Equity Focus Fund apparently will not be levied if the policy runs its term, according to Sanlam, that also states that the only cost at conversion was R803. It appears that the cost of R16 669.74 is not relevant at this stage as the policy is still in operation.

[25] Further, you require Sanlam to provide you with details of the costs deducted from your investment value and what amounts are placed in retirement funding. You have also detected inconsistencies in the information provided to you by Sanlam and you need the fund and/or Sanlam to clarify and confirm certain information. Although you are entitled to receive information pertaining to your benefit, your request to be furnished with information from the date of the conversion of the portfolio, 24 October 1997, is not reasonable in view of the complaint being time-barred.

[26] In the result the complaint cannot succeed.

Dated at Cape Town on this the                      day of                      2006.

Yours faithfully

**Vuyani Ngalwana**  
**Pension Funds Adjudicator**