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Please quote our reference: PFA/NC/6619/2005/NS

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): M VAN ROOY (“the complainant”) v SANLAM PRESERVATION PENSION FUND (“the first respondent”), SANLAM PRESERVATION PROVIDENT FUND (“the second respondent”) and SANLAM LIFE INSURANCE LIMITED (“the third respondent”)

1. Introduction

- 1.1 The complaint concerns the complainant’s dissatisfaction with the negative returns that were achieved by the portfolio in which his benefits were invested.
- 1.2 The complaint was received on 2 December 2005 and a letter acknowledging receipt thereof was sent to the complainant on 8 December 2005. On the same date letters were dispatched to the respondents requesting them to submit responses to the complaint by 29 December 2005. The responses were received on 18 January 2006. The respondents also copied to the complainant with the responses. The complainant’s reply was received on 5 May 2005.
- 1.3 After considering the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), M Qhali (Assistant Adjudicator),

Office Manager: L Manuel, Senior Accountant: F Mantsho

2. Factual Background

- 2.1 The complainant transferred her retirement benefits from both Sanlam Pension Fund and Sanlam Provident Fund respectively to the funds with effect from 1 August 1999. The funds are administered and underwritten by Sanlam.
- 2.2 At inception of the complainant's membership of both the first and second respondents, Sanlam Life issued two policies of insurance to the first and second respondents, namely policy no 17656946x5 ("policy A") and policy no 17656944x5 ("policy B"). The maturity date of the underlying policies was 1 August 2004. The complainant's once-off contributions in respect of policy A and policy B were R255 417.62 and R45 307.22 respectively. On 11 June 2004 Sanlam provided the complainant with illustrative maturity values. In respect of policy A the maturity value was estimated at R210 069.00 and in respect of policy B it was estimated at R36 701.00. However, on maturity date, the values were R197 007.53 and R34 419.33, substantially less than her initial investment.

3. Complaint

- 3.1 The complainant is dissatisfied with the negative returns that were achieved by the portfolio in which her benefits were invested. The complainant wants to be re-imbursed with the capital amounts that were paid as contributions to the first and second respondents at the commencement of her membership thereof.

4. The response

Preliminary points

- 4.1 The first and second respondents have raised two preliminary points in response to the complaint, and have also dealt with the merits. The first preliminary point is that this is not a "complaint" as defined in the Act as it is not about the execution of duties by the first and second respondents (or administrator). Instead, the first and second respondents contend that the dispute concerns the execution of duties by the insurer under the policy, notably the actuarial substructure of the policy, which constitutes long-term insurance business as defined in, and regulated under, the Long-Term Insurance Act.

- 4.2 The second preliminary point is that because this complaint is not about maladministration of the funds by the first and second respondents (or the administrator), it is not a “complaint” as defined in the Act.

Merits

- 4.3 On the merits, the first and second respondent ascribe the poor performance of the complainant’s investment to the selection of a high risk portfolio with exposure to global equities and currencies. They contend that the complainant confirmed when making application for membership of the funds that she understood and accepted the risks that were inherent in the offshore investment portfolio by signing a declaration that appeared on the application forms. The first and second respondents state that both underlying policies were invested in Sanlam Life’s Offshore Equity Fund and no investment guarantees were given. The first and second respondents contend that the fund in question is US dollar-denominated and the investment portfolio shares in the full market-related growth of the assets in the fund. They state further that the performance of both offshore markets and the Rand/ US Dollar exchange rate plays a vital role in the performance of this fund and therefore the investment returns on this portfolio are very volatile.
- 4.4 The first and second respondents advise that the composition of Sanlam Life’s Offshore Equity Fund is similar to that on which the MSCI World Index is based. They state that this index is used as a benchmark against which to measure the performance of the Offshore Equity Fund. The first and second respondents state that the performance of the offshore markets and the Rand/Dollar exchange rate has had a negative effect on the investment portfolio and illustrates this by using the following index:

Date	MSCI Index	Rand/US-Dollar exchange rate	MSCI,denominated In Rand	% Change
01/08/1999	1235.70	R 6.16	7611.91	
01/08/2000	1343	R 6.97	9360.71	+ 22.9%
01/08/2001	1076	R 8.25	8877.00	- 5.2%
01/08/2002	806	R10.29	8293.74	- 6.6%
01/08/2003	881	R 7.43	6545.83	- 21.1%
11/06/2004	1054	R 6.53	6869.56	+ 4.9%
01/08/2004	1027	R 6.32	6490.64	- 5.5%

- 4.5 With regard to the maturity values that were provided to the complainant on 11 June 2004, the first and second respondents state that those

maturity values were illustrative. They explain that the unit price for 1 August 2004 was unknown at the time of the projections, therefore the maturity values were based on the latest known unit price at that time. The first and second respondents state that the actual maturity values were recalculated on 1 August 2004 and consequently decreased to R197 007.53 and R34 419.33 respectively.

- 4.6 The first and second respondents conclude that they have acted in accordance with the rules of the first and second respondents and the provisions of the Act and have fulfilled their duties to the complainant.

5. Determination and reasons therefor

Technical points

- 5.1 There is no merit in the technical points raised by the respondents. The crux of this complaint does not constitute long-term insurance business, but actually relates to the preservation funds, which are pension funds organizations as defined in the Act. For the reasons more fully set out in *Schwartz v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 43 (PFA) at paragraphs [12] to [28] and authorities referred to therein and *Louw v Central Retirement Annuity Fund and Another* [2005] 7 BPLR 363 (PFA) at paragraphs [17] to [36] this tribunal cannot uphold the contention that this matter constitutes “long-term insurance business” over which it has no jurisdiction.

- 5.2 Furthermore, Davis J (in whose judgment Le Grange AJ concurred) in *Central Retirement Annuity Fund v Adjudicator of Pension Funds and Others* [2005] 8 BPLR 655 (C) at 660C - 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.”

- 5.3 In so far as the complaint implicitly relates to the administration of the first and second respondent and/or the investment of its funds and it is implicit therein that the complainant has suffered prejudice (in that her initial investment value has reduced) in consequence of the maladministration of the first and second respondents, the complainant’s grievance constitutes a complaint as defined.

5.4 Both technical points are therefore dismissed.

Merits

- 5.5 The issue for determination is whether the complainant is entitled to a reimbursement of her capital that was invested in the funds at the commencement of her underlying policies. It is clear from the application forms attached to the response that the complainant was aware of the risks inherent in the nature of the portfolio in which she chose to invest her benefits. The complainant also accepted same by signing the declarations contained in paragraph 9 of both application forms under the heading “Verklaring deur versekerde lewe” on 7 August 1999.
- 5.6 Moreover, under “Voorbehoude en Veronderstellings” in the underlying policies it is stated that the benefits will be determined by the actual bonus rates and calculation basis applicable from time to time. Once the complainant decided to invest in a market-related portfolio, she carried the investment risk. This means that she benefited from a surge in the market and carried the loss in periods where the market was in decline. This is the nature of a defined contribution fund. Contrary to a defined benefit fund, there is no underlying guarantee and the market effectively determines the value of the benefit.
- 5.7 Furthermore, although the complainant is aggrieved about the poor investment, she has not suggested that the boards of the first and second respondent were negligent in terms of the investment decisions taken, or that there was a failure to adopt specified investment strategies. In view of the above, the complainant has failed to establish any entitlement to the relief she seeks in this complaint.
- 5.8 It might be that the complaint stems from the failure on the part of an independent financial intermediary to furnish the complainant with proper advice regarding the investment of her benefits. If so, this tribunal would not have jurisdiction to investigate and adjudicate upon it. In such circumstances, it might be in the complainant’s interest to refer the matter to the Office of the Ombudsman for Financial Services (“the FAIS Ombud”), which was established in terms of Section 20 of the Financial Advisory and Intermediary Act 37 of 2002. The FAIS Ombudman’s contact details appear at the foot of this letter.

6. Relief

- 6.1 In the result, the complaint is dismissed.

Dated at Cape Town on this the day of 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR