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Please quote our ref: PFA/GA/6474/2006/EMD

**RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): PJ BOSMAN (“the complainant”) v SOUTH AFRICAN RETIREMENT ANNUITY FUND (“the first respondent”) / OLD MUTUAL LIFE ASSURANCE (SA) LIMITED (“the second respondent”)**

1. Introduction

- 1.1 This complaint, received by this office on 15 March 2006, concerns the computation of the maturity value of a retirement annuity which matured on 1 February 2000.
- 1.2 On 19 May 2006, a letter acknowledging receipt was sent to the complainant. On the same day a copy of the complaint was sent to the first and second respondents, who responded on 26 May 2006. This response was forwarded to the complainant, who responded on 2 June 2006. Further reaction followed from the respondents 9 June 2006, who also pointed out that two of the complaints relate to endowment policies, which are beyond the jurisdiction of this Office. The complainant made further submissions on 11 and 16 June 2006, 25 August 2006, 12 and 26 September 2006, and 10 January 2007. Further correspondence was received from the respondents on 15 June 2006 and 3 October 2006. The complaint had been preceded by a request for investment advice, dated 14 November 2005, followed by a response on 25 November 2005 to the effect that advice should be sought from the Financial Services Board. Another letter was received on 15 March 2006, dated 16 December 2005.

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M Mohlala (Adjudicator), C Nkuhlu (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), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator)

Office Manager: L Manuel, Financial Manager: F Mantsho, Accountant: R Soldaat

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

1.4 As the background facts are well-known to all parties, these shall be repeated only to the extent that they are pertinent to the issues raised herein.

## 2. Facts in brief

The complainant is complaining about a retirement annuity policy No 4425481, which was apparently also the subject matter of a related complaint lodged with the Long-term Ombudsman for Life Assurance during 1997.

The policy matured on 1 February 1995, when the term was extended to 1 February 1997 and the investment portfolio changed from Performance Profits to the Stable Fund. On maturity date the period was once again extended, this time to 1 February 1999, then again to 1 February 2000. On 4 February 2000, the complainant signed an annuity option form to receive R120,000 of the proceeds in cash and the balance be paid to an Investment Frontiers Retirement Income Policy, Policy No 1236997, from which he is receiving a monthly annuity. The commutation payment of R120,000 was invested in another insurance product.

## 3. Complaint

The complainant is, according to his letter of 8 May 2006, not satisfied with the calculation of the maturity value in 2000, after the policy term had been extended, apparently without his consent.

## 4. Respondents' Response

4.1 On 30 May 2006, the second respondent, on behalf of both respondents, set out the facts as reflected above and stated that as the policy had a specific vesting date, a renegotiation of the contract term, i.e. an extension of the vesting date, would be an amendment of the contract that cannot be done unilaterally. As no request for an amendment had been received from the complainant, the respondents would only remain liable for the proceeds as at the original vesting date to be paid. In his own best interests, in order to ensure that the proceeds would grow, the portfolio was switched to a

more conservative fund so as to ensure that the vesting value was protected against possible adverse market conditions.

4.2 As the complainant had expressed his dissatisfaction during 1998, he was given the opportunity to switch back to the Performance Profits portfolio in 1998. However, the funds remained in the Stable Fund, indicating that he had apparently not accepted the invitation to switch.

5. Complainant's Answer

The complainant answered on 2 June 2006, denying that he had received notice of the maturity of the underlying policy, but admitting that he had received R120,000, which had been invested in an endowment policy. He states that the latter investment had been done without his signature.

6. Respondents' Response

On 9 June 2006, the respondents sent a letter to the complainant dealing with the issues, enclosing inter alia a copy of his application, signed on 1 November 2001, for the investment of R121, 214.97 in an endowment policy. The complainant had previously denied that this investment had been done with his consent. The respondents also gave an explanation of the costs debited (a total of R100 administration fee) when the investment periods were extended. An explanation was also given of the difference between the basic sum assured and the value of the policy upon maturity.

The letter further refers to correspondence from the complainant to the respondents in August 1998 and 17 January 2000.

7. Complainant's response

The complainant responded 11 June 2006. The response does not take the matter further.

8. Settlement

On 14 June 2006, the respondents advised that with regard to retirement annuity 4425481, the matter had been amicably settled and that the complaints regarding the other two policies, being endowment policies, fell beyond the jurisdiction of the Adjudicator.

9. Complainant's response

On 16 June 2006, the complainant advised that he had been made a provisional settlement offer of R15,000 which, according to the

complainant, related to investments in the Investment Frontiers portfolio since 2000. He did not accept the offer of settlement.

On 12 September 2006, the complainant forwarded copies of correspondence between him and the Long-term Ombudsman, and stated that, as everything was now clear as regards his complaint and claim, he now claimed payment of R581,831 as damages and a penalty.

#### 10. Respondents' further response

Upon being asked for further comment, the respondents answered on 3 October 2006 with a reiteration of the facts previously stated, as well as stating that the essence of the complainant's complaints remains that the underlying investment portfolio, during the period from 1995 to 2000, should have been in the Performance Profits (Balanced) Portfolio and not in the Stable Fund. The respondents further stated that as the complainant had referred to a figure of R9, 898.29 as representing the actual difference between the eventual vesting value of the policy and what it would have been if the respondents gave him the full benefit of the doubt. The initial settlement offer of R15,000 was therefore based on this figure, escalated by 6.5% over six years.

#### 11. Determination and reasons therefor

11.1 The policy underlying the complainant's membership of the first respondent, matured on 1 February 1995. The term was extended from time to time until the final extension to 1 February 2000, when R120,000 was commuted and the balance invested in an endowment policy.

11.2 The main object of the Adjudicator is to dispose of complaints, defined as complaints relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules. Such complaints should be disposed of in a procedurally fair, economical and expeditious manner (section 30D read with section 1(1) s.v. 'complaint'.)

11.3 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 in writing (section 30I(1)). This period may be extended and the Adjudicator may condone non-compliance with the period on good cause shown or on his or her own motion (section 30I(3)).

- 11.4 The act complained of in the present matter, would seem to relate to the investment performance, with hindsight, between two separate portfolios during the period 1995 to 2000. The complaint was received by this Office on 8 May 2006, some six years after the retirement annuity finally matured and the proceeds transferred to two different endowment policies.
- 11.5 Other complaints relating to the investment performance of the complainant's endowment policies after 1 February 2000 do not relate to any pension fund and therefore fall beyond the jurisdiction of this Office.
- 11.6 This Office is therefore called upon to decide upon a possible claim for damages when two different portfolios, the Stable Fund and the Performance Profits (Balanced) Portfolio are compared for the period from 1 February 1995 to 1 February 2000.
- 11.7 The actual growth in the Stable Fund, in which the proceeds were invested, over the period 1995 to 2000 was 13.29% per annum. Had the investment remained in the Performance Profits (Balanced) Portfolio, the return would have been 13.69%.
- 11.8 The complainant claims that the transfer was done without his knowledge or permission. He also claimed that he had no knowledge of the commutation of a part of the eventual amount paid out upon maturity.
- 11.9 A person claiming damages from another party has a duty to mitigate his damages in so far as is reasonably possible.
- 11.10 It is clear from the documents before me, and in particular a letter dated 12 March 1997 addressed by the second respondent to the Ombudsman for Long-term Insurance, that the complainant had already in 1997 questioned the transfer of his funds to the Stable Fund.
- 11.11 The complainant also submitted a copy of a letter dated 16 September 1997 from the respondents to him, requesting his instructions as to the extension of his annuity and the portfolio in which it had to be invested.
- 11.12 It is therefore clear that the complainant, during 1997 or 1998, was already aware, or should reasonably have been aware, of the portfolio in which his retirement annuity was invested. At that stage he could have requested a switch to the Performance Profits

