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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”) – AL KARSTENS v CENTRAL RETIREMENT ANNUITY FUND & SANLAM LIFE INSURANCE LTD

Introduction

- [1] This matter concerns the benefit which you received on your early retirement. The complaint was received by this office on 7 September 2005 and a letter acknowledging receipt thereof sent to the complainant on 16 September 2005. On 16 September 2005 a letter was dispatched to the respondents giving them until 7 October 2005 to file a response to the complaint. The response dated 7 October 2005 was received on 7 October 2005. A reply was received from the complainant on 7 November 2005. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter.
- [2] 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 Central Retirement Annuity Fund and Sanlam Life

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

Office Manager: L Manuel

Insurance Ltd on 20 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 14 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.

Facts

- [3] You became a member of the Central Retirement Annuity Fund (“the fund”) on 1 May 1985. The fund is administered and underwritten by Sanlam Life Insurance Limited (“Sanlam Life”). Your chosen date of retirement was 1 May 2016. Your monthly contribution was R72.64 which was to increase annually in line with inflation. You also elected the death and disability cover and the premium waiver at disability for which a monthly premium was payable. Further also the fund guaranteed a minimum benefit of R27 040 on your retirement.
- [4] On 1 June 2005 you elected to go on early retirement and received a benefit of R105 725.23 from the fund. You took one third of your retirement benefit in cash, an amount of R34 889.71, and the balance of R70 835.52 was used to purchase an annuity. You currently receive a monthly pension of R533.38.

Complaint

- [5] You state that your monthly pension is less than the monthly contribution which you were paying just before you retired. Your complaint is that you feel you were unfairly penalized for retiring early. You contend that the fund misled you by providing you with illustrative retirement benefit values which were inflated and out of kilter with the retirement benefit you received.

Response

- [6] The fund and the administering insurer have both submitted a response to your complaint. I shall deal with them together and refer to them collectively as “the respondents”.
- [7] The respondents have raised a technical point that the complaint pertains to the policy of insurance between the fund and the insurer, Sanlam Life, and as such constitutes ‘long-term insurance business’ which is regulated by the Long-Term Insurance Act.

- [8] The respondents also contend that the complaint does not fall within the definition of a 'complaint' in the Act. In particular, they contend that it is not about the maladministration of the fund by the fund or its administrator. For these reasons, according to the respondents, I do not have jurisdiction to determine the matter.
- [9] On the merits, the respondents state that taking into account the fact that a part of the contributions were applied to premiums payable in respect of death and disability cover, your early retirement benefit of R105 725.23 represents an annual rate of return of 9%.
- [10] The respondents also state that when you retired early, an 'early termination adjustment' of R8 856.60 was deducted from your fund value.
- [11] In explanation, the respondents state that most of the expenses with regard to the underlying policy are incurred at the commencement of the policy. In the normal course, these expenses are recovered piecemeal by means of fees which are charged over the term of the policy. However when contributions are discontinued prematurely, the insurer can no longer recover these costs from future charges. The 'early termination adjustment' is the means by which those unrecouped expenses are recovered.
- [12] According to the respondents the policy documents stated that the various sums and provisions of the policy would be amended if a member advanced his maturity date. In particular they refer to section 3 of the policy document under the heading "VEVROEGING OF UITSTEL VAN UITKEERVOORDELE" which reads:
- "Indien die versekerde dit verkies, kan die uitkeervoordele gedeeltelik of ten volle beskikbaar word
- a. op enige datum na die vyf-en-vyftigste en voor die sewentigste verjaardag van die versekerde.of
- b. ...
- By so 'n vevroeging of uitstel word die bedrae en bepalings van hierdie polis verander deur Sanlam bepaal."
- [13] Regarding your contention that you were misled by the illustrative values provided to you, the respondents state that they were calculated on the assumption that contributions would be received until your chosen retirement date on 1 May 2016. You retired some 10 years prior to this date which, according to the respondents, explains the discrepancy in values.

Determination and reasons therefor

- [14] There is no merit in the technical points raised by the respondents because the crux of this complaint does not constitute long term insurance business, but actually relates to a retirement annuity fund, which is a pension fund organization as defined in the Pension Funds Act. For the reasons more fully set out in *JJ Schwartz v Central Retirement Annuity Fund & Another* [2005] 5 BPLR 435 (PFA) at paragraphs [12] to [28] and *Louw v Central Retirement Annuity Fund & Another* BPLR [2005] 7 BPLR at paragraphs [17] to [36], I cannot uphold the contention that this matter constitutes “long term insurance business” over which I have no jurisdiction.
- [15] Furthermore, Davis J (in whose judgment Le Grange AJ concurred) in the as yet unreported decision in *Central Retirement Annuity Fund v Adjudicator of Pension Funds and others* [2005] 8 BPLR 655 (C) at 660C - E (handed down on 20 October 2005) (“the de Beer judgment”) 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.”
- [16] Furthermore in so far as your complaint implicitly relates to the administration of the fund and/or the investment of its funds and it is implicit therein that you have suffered prejudice (in that your fund value has been drastically reduced) in consequence of the perceived maladministration of the fund (in the form of levying undisclosed charges) your grievance constitutes a complaint as defined. (See *Louw* at paragraphs [11] to [15]).
- [17] In any event, that your letter of complaint does not, in precise terms, make the averments required to constitute a complaint as defined is no reason by itself for a dismissal thereof as not constituting a complaint. Such an approach would be too formalistic, thus ignoring the purpose of the Act. The Cape High Court said the following in this regard in the de Beer judgment (660E-H):

“Applicant’s contention regarding the second respondent’s letter is based upon a formalistic reading of the complaints procedure as provided for in the Act. On this reading, the letter generated by second respondent would not constitute a proper complaint as defined. But this submission ignores the purpose of the Act. The structure of chapter VA of the Act is aimed at ensuring an effective, inexpensive and expeditious resolution of pension complaints by members, many of whom may not be able to afford legal advice and would therefore be compelled to formulate their complaint without any legal assistance or a complete

understanding of the intricacies of the legal relationship between the respective parties, as in the case between Sanlam and applicant.

In my view, second respondent's letter contains sufficient averments (as described above) to fall within the definition of a complaint. To construe a complaint as urged upon us by applicant would run counter to the very purpose of the complaints procedure provided for in the Act."

Merits

Early termination adjustment

- [18] What the trustees of a pension fund organisation may or may not do is decreed by the fund rules. If what they propose to do is not within the powers conferred upon them by the rules, they may not do it (*Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at para [28]). That the rules of a fund are king is confirmed by section 13 of the Pension Funds Act.
- [19] The question for determination is whether in terms of the rules or related policy documents Sanlam were authorised to deduct an 'early termination adjustment'.
- [20] Section 3 to which the respondents refer (see paragraph 12) provides that when a member advances his retirement date, the benefits will change as determined by Sanlam.
- [21] This clause is far too vague to be construed as authority to levy an 'early termination adjustment'. All it says is that if a member retires before his chosen retirement date, he will receive a changed benefit. It certainly does not authorise the acceleration of so-called 'unrecouped' expenses when a member retires early.
- [22] As Davis J stated in the *De Beer* judgment (at 660D-E), the fund cannot simply be treated as an illusionary go-between between the members and the insurer. It should be accountable to its members and hence be subject to the discipline of the Act's complaint mechanism. On the issue of the charges levied by the insurer, Davis J stated as follows (at 663E-G):

"It follows that the reasonableness of the total charges levied by the insurers from time to time in respect of the administration of the fund and the apportionment thereof among beneficiaries are considerations of which account must be taken by Applicant's management committee. Similarly, the reasonableness of investments effected and maintained by the insurer for the fund from time to time should be examined by the management committee, if the latter is to fulfill its fiduciary responsibilities to members. In addition, the adequacy of disclosure of information which is critical to the interests of members, such as an adequate and fair explanation as to the meaning of documents which provide illustrative values at the inception of the contract as well as the adequacy of disclosure by the insurer to

members from time to time, must, in the light of the analysis advanced, comprise part of the responsibilities of the management committee of applicant.”

- [23] For the above reasons, I am satisfied that the respondents were not entitled to permit the above reduction of R8 856.60 to your benefit since it was not authorized by the rules or by the terms of the policy between the fund and the insurer. Because this fee was levied not by the fund but by Sanlam Life, the appropriate order for its reversal must be made against Sanlam Life in its capacity as administrator.
- [24] In terms of rule 3.1 of part 8 of the rules, you had the option to commute up to one-third of the pension to a lump sum. You are entitled to exercise this option in relation to the ‘early termination adjustment’ of R8 856.60 which Sanlam Life shall be ordered to repay.

Illustrative values

- [25] Regarding the illustrative values, as the respondents point out, these values were calculated on the assumption that you would retire on your initial chosen date of retirement on 1 May 2016 and that contributions would be paid until this date. It stands to reason, that since you retired some 11 years prior to this date, the benefit which you received was substantially lower than the illustrative values. You have also not challenged the basis of the calculation of the illustrative values. For this reason, there is no basis on which I can grant you relief on this score.

Relief

- [26] In the result, I make the following order:
- [26.1] It is hereby declared that the respondents were not entitled to deduct an ‘early termination adjustment’ of R8 856.60, solely by reason of you having retired earlier than your chosen date of retirement;
- [26.2] Sanlam Life Insurance Limited (in its capacity as administrator of the fund) is ordered forthwith to calculate the difference between the early retirement benefit of R105 725.23 you received and the amount that would have been available for the purchase of a pension, had the early termination adjustment of R8 856.60 not been deducted;
- [26.3] The complainant is directed to advise Sanlam Life Insurance Limited (in its capacity as administrator of the fund) whether or not he wishes to exercise the option in terms of rule 3.1 of part 8 in respect of the amount calculated in paragraph [26.2];

