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Please quote our ref: PFA/GA/5824/05/FM

RE: M MURRAY AND ANOTHER (“the complainants”) v CENTRAL RETIREMENT ANNUITY FUND (“the first respondent”) / SANLAM LIFE INSURANCE COMPANY LIMITED (“the second respondent”)

1. Introduction

[1.1] At issue in this complaint received by this office on 12 October 2005 is the question whether it is permissible at law, to access one’s investment in a retirement annuity fund prior to reaching the age of 55 years.

[1.2] 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 both the first and second respondents on 23 January 2006. The parties were given 30 ordinary days of the date of the letter 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 25 October 2006 we were

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 Nevondo (Assistant Adjudicator)

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

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. Having considered the written submissions before this tribunal, it is considered unnecessary to hold a hearing.

[1.3] As the background facts are well-known to all parties, I shall not burden this determination by restating same here.

2. Complaint

[2.1] The complainant and her husband took out five policies underwritten and administered by the second respondent bearing the following policy numbers: 17317242x0; 17301308x7; 17418863x1; 17301310x3; 18787198x3. Her bone of contention appears to stem from the second respondent's refusal to permit her and her husband to access their investment in the respective funds after having fallen on hard times. The complainant puts her averment in the following terms: "They took everything we owned... so all in all we lost about R150000-00 worth of things. We have been battling ever since. All the extra money we have made over the past few years we have tried to invest. But right now to make our business grow we need our money back".

[2.2] The complainant accordingly seeks that I investigate the state of affairs regarding their policies.

3. Response

[3.1] The first and second respondents (henceforth "the respondents") firstly point out that policies 18787198x3 and 17301308x7 are endowment policies and that complaints relating thereto should be referred to the Ombudsman for Long-Term Insurance.

[3.2] As regards the three retirement annuity fund policies, the respondents aver that the definition of "Retirement Date" in Part 3 of the rules of the first respondent explicitly provide that a member may not retire prior to attaining 55 years of age.

4. Determination and reasons therefor

[4.1] The purpose of this office is to dispose of complaints lodged by complainants against their respective pension funds and employers who participate in the funds. A fund is defined as a pension fund organization which is further defined in section 1 of the Act as follows:

- "(a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association

upon their reaching retirement dates, or for the dependants of such members or former members upon the death of such members or former members; or

- (b) any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons, and includes any such association or business which in addition to carrying on business in connection with any of the objects specified in paragraph (a) or (b) also carries on business in connection with any of the objects for which a friendly society may be established, as specified in section 2 of the Friendly Societies Act, 1956, or which is or may become liable for the payment of any benefits provided for in its rules, whether or not it continues to admit, or to collect contributions from or on behalf of, members.”

[4.2] The second respondent is an insurer and accordingly does not fall under the definition of a pension fund organization. Our jurisdiction over life insurers extends only to their capacity as administrators and/or asset managers of pension fund organizations. This complaint does not relate to the second respondent in its capacity as either an administrator of a pension fund or a manager of its funds.

[4.3] Further, as the complainants’ grievance relates to an endowment policy, it does not fall within the definition of a complaint as set out in the Act and consequently this tribunal does not have jurisdiction to deal therewith.

[4.4] I suggest the complainants refer the matter to the Ombudsman for Long-Term Insurance, who may have jurisdiction to hear the matter. His contact details are:

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Claremont
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Tel: (021) 657 5000
Fax: (021) 674 0951

[4.5] As the Supreme Court of Appeal stated in *Tek Corporation Provident Fund and others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28], the trustees may only do with the fund’s assets what is set forth in the rules. If what they propose to do is not within the powers conferred on them by the rules, they may not do it. That the rules of a fund are king is confirmed by section 13 of the Act which provides:

“Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.”

[4.6] The respondents refer to the definition of “Retirement Date” in Part 3 of the rules of the first respondent. The definition reads thus:

“RETIREMENT DATE for a MEMBER is, depending on the INSURER’S administrative system which administers the POLICY on the MEMBER’S life, the first practical day following the date on which the FUND receives the MEMBER’S choice with regard to which of the available options the MEMBER prefers, provided that no MEMBER becomes entitled to payment of any life annuity after reaching the age of 70 years or, except in the case of a MEMBER who becomes physically permanently disabled to practice his occupation, before reaching the age of 55 years” (my emphasis).

[4.7] Having regard to the wording of the definition of “retirement date” in the rules of the first respondent, the conclusion is, in my view, inescapable that the rules preclude a retirement annuity fund member from accessing her/his investment value in the fund prior to reaching the age of 55 years except in instances where the member becomes permanently incapable as a result of a permanent physical disability of carrying her/his occupation.

[4.8] What is more, retirement annuity funds, like occupational pension funds, are governed not only by their rules but also by relevant legislation and the common law (see *Tek Corporation Provident Fund and others v Lorentz* (supra)); *Mostert NO V Old Mutual Life Assurance Company (SA) Ltd* 2001 (4) SA 159 (SCA) at paragraph [30].

[4.9] In short, the provisions of the Income Tax Act 58, of 1962 and the regulatory requirements for tax approval preclude a retirement annuity fund from allowing a member access to monies invested in the fund until the member attains retirement age. Retirement is between 55 years and 70 years except in instances where the member becomes permanently incapable through infirmity of mind or body of carrying on his/her occupation. Expressed differently, retirement annuity funds do not permit the payment of withdrawal benefits or discontinuance prior to the age of 55 years. Accordingly, the retirement annuity fund cannot be ordered to cancel the complainant’s investment and refund part of her contributions. She will have to wait until the age of 55 years before she can access her investment, and even then, she would only be entitled to commute one-third of the total annuity for cash and will have to receive a life-long pension from the first respondent.

[4.10] In the alternative, the complainant can have the proceeds from the first respondent transferred to another retirement annuity fund. In this instance also, she shall access the proceeds from the transferee fund on attainment of retirement age.

[4.11] In the result, the complaint cannot succeed and our file in this matter is now closed.

