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Please quote our reference: PFA/KZN/9701/2006/NVC

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): J H Odendaal (“the complainant”) v Central Retirement Annuity Fund (“the first respondent”) and Sanlam Life Insurance Limited (“the second respondent”)**

**1. Introduction**

- 1.1 The complaint concerns the first respondent’s unilateral amendment of the complainant’s investment portfolio.
- 1.2 The reformulated complaint was received by this office on 21 July 2006. A letter acknowledging receipt thereof was sent to the complainant on 17 August 2006. On the same date letters were dispatched to the respondents, giving them until 19 September 2006 to file their responses to the complaint. The responses were received on 22 August 2006. The respondents had communicated directly with the complainant and on 25 August 2006 this office requested his reply to the responses by 8 September 2006. The complainant’s reply was received on 30 August 2006.
- 1.3 After reviewing the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

**2. Complaint**

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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

- 2.1 The complainant states that he commenced contributing to the first respondent in 1998, electing to retire on 1 December 2024, at the age of 58. He chose to invest exclusively in a portfolio with offshore exposure. The complainant states that he does not want to invest in any assets within South Africa. He is dissatisfied that the respondents unilaterally changed the portfolio, limiting the offshore exposure. He asserts that the legislation which restricts offshore investment came into effect after the inception of the underlying policy and should not be applied to his investment. He states that the respondents are guilty of breach of contract as he is now invested in a portfolio that he did not elect.
- 2.2 The complainant states that he was offered a number of different investment options by the respondents but these options would not serve his best interests but those of the respondents. He wants to withdraw his investment from the first respondent and to have the money he has paid into the fund returned to him accordingly.

### **3. Response**

- 3.1 The first respondent has submitted a copy of a letter from the second respondent dated 9 May 2006 addressed to the complainant as its response to this office. In the letter the second respondent states that it has to comply with Circular D427 issued by the South African Reserve Bank ("SARB"). In terms of this circular a retirement fund is compelled to limit its offshore exposure to a maximum of 15%. If the retirement fund has not complied with this limitation it has to submit quarterly reports to SARB on its action plan on how it is to ring-fence its offshore retirement fund assets to a maximum of 15%.
- 3.2 The second respondent states it was not its intention to unilaterally change the complainant's portfolio but it has no option but to comply with the circular. Failure of the fund to meet the terms of the circular, and more importantly the relevant regulation could result in it being penalized by SARB and the Financial Services Board. One such penalty could be that the first respondent would be compelled to repatriate the offshore assets and this would not serve in the best interests of the members of the fund.

### **4. Determination and reasons therefor**

- 4.1 Rule 6.8 of part 5 states:

"6. The duty of the MANAGEMENT COMMITTEE is to:

...

6.8 generally manage and control the FUND in accordance with these rules and the relevant legal prescriptions to achieve the objectives of the FUND;”

- 4.2 The investments of retirement funds are governed by Regulation 28 of the Act, which prescribes that not more than 15% of the aggregate fair value of the total assets of a fund may be invested offshore. SARB also issued Exchange Control Circular No D427, effective from 1 April 2004, which requires retirement funds to put measures in place to ensure that their offshore exposure never exceeds the 15% limitation. Further, a fund is required to submit quarterly reports to SARB on the arrangements in place to limit its foreign holdings to 15%. In order to comply with circular D427 and Regulation 28 the first respondent had to adjust the portfolios of those members, including the complainant, with offshore exposure and re-invest the assets in alternative portfolios held within South Africa.
- 4.3 A retirement fund must comply in its own capacity as an institutional investor, as set out in paragraph 2.3 of Circular D427, to the maximum 15% offshore exposure.
- 4.4 The first respondent is subject to legislative provisions and has to limit its foreign holdings to 15%. This necessitated the unilateral amendments to the complainant’s portfolio despite his initial investment elections.
- 4.5 The complainant’s request that he be allowed to withdraw from the first respondent and for the first respondent to return the monies he has paid in cannot succeed. In terms of the Income Tax Act, 1962, a member may not withdraw from a retirement annuity fund prior to the age of 55. This stipulation has been reflected in the definition of “retirement date” in rule 3 of part 3 of the first respondent’s rules which states:

“RETIREMENT DATE...provided 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 and permanently disabled to practice his occupation, before reaching the age of 55 years.”

- 4.6 I have examined the letters of exchange between the complainant and the respondents prior to his submission of the complaint to this office. The respondents explained to the complainant that they were obliged to comply with the requirements of the foreign exchange rulings. The complainant was offered a number of options, which included investment

in an international retirement annuity fund that is exclusively invested offshore. This would enable the complainant to make use of his personal offshore allowance as opposed to being subject to the first respondent's limitations. The complainant may reconsider these options available to him which accommodate his desire to be invested exclusively offshore.

**5. Relief**

5.1 The complaint is dismissed.

Dated at Cape Town on this the                      day of                      2008.

Yours faithfully

**Mamodupi Mohlala**  
**Pension Funds Adjudicator**