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**Our ref: PFA/WE/2760/05/VIA**

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 (“the Act”) – STEPHEN VALENTINE DANIELS v CENTRAL RETIREMENT ANNUITY FUND & SANLAM LIFE INSURANCE LIMITED**

Introduction

1. Having considered the complaint that was received by this office on 22 March 2005 and further written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor are set out below.
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 fund and administrator on 23 January 2006. The parties were given 30 ordinary 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 18 April 2006 you informed my assistant, Virgo Abrahams, that an offer to settle the matter was made but that it was not to your satisfaction. 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.

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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), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), R Maharaj (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator),

Office Manager: L Manuel

### The facts

3. On 1 April 1992 you became a member of the Central Retirement Annuity Fund (“the fund”). The fund is administered by Sanlam Life Insurance Limited (“the insurer”) which is also the investor of its funds. You made monthly recurring contributions to the fund of R100.00 which were invested in a Sanlam policy with policy number 12576204x7 (“Policy A”). Your chosen retirement date was 1 April 2018.
4. In December 2000 you commenced making additional monthly contributions of R515.00 to the fund which was to increase in line with inflation on 1 December 2001 and every succeeding year thereafter. These contributions were invested in a second Sanlam policy with policy number 040130883X8 (“Policy B”). In terms of it your chosen retirement date was 25 March 2019.
5. On 1 January 2001 policy A was made paid up by the insurer because you stopped your monthly contributions. At that stage you had already contributed R10 500.00 to the fund while your fund value was R6 703.87. Because the policy was made paid up the insurer charged you a “premium termination fee” of R2 154.99. Your fund value was consequently reduced to R4 548.88.
6. In September 2002 you commenced making further additional monthly recurring contributions of R500.00 to the fund which was to increase in line with inflation on 1 September 2003 and every succeeding year thereafter. These were invested in a third Sanlam policy with policy number policy 040419190X0 (“Policy C”). Your chosen retirement date was 25 March 2019.
7. In March 2004 you received the following summary of your fund values from the Sanlam (“the summary”):

Policy number	Fund value	Death Benefit	Disability Risk Benefit
12576204x7 [Policy A]	R5 502.21	R5 502.21	Will be calculated at disability
040130883X8 [Policy B]	R13 214.92	R13 214.92	Will be calculated at disability
040419190X0 [Policy C]	R8 307.71	R8 307.71	Will be calculated at disability

### The complaint

8. You are dissatisfied with the “premium termination fee” charged in respect of policy A. You request that I rule on the legality of the charges or costs that have been levied against your investment account as a result of you having ceased contributions in respect of policy A.
9. You are also dissatisfied that the fund values quoted to you in the summary are less than the monthly contributions that you made since the inception of

the respective policies.

### The response

10. Mr L P la Grange, the chairman of the board of management, and Mr P G Jonker of Sanlam submitted responses on behalf the fund and the insurer respectively.

### Preliminary points

11. Mr la Grange raised two technical points. Firstly, he says that I do not have jurisdiction to investigate and determine this complaint because it constitutes long term insurance business and not pension fund business. This is so, he says, because the complaint it is not about the execution of duties by the Fund but is about the execution of duties by the insurer under the policy (namely the internal operation of the policy, notably the operation and application of the actuarial rules of the policy) which constitutes “long-term insurance business” as defined in, and regulated under the Long Term Insurance Act 52 of 1998.

12. Secondly, he argues that this is not a “complaint” as defined in the Act, in particular, it is not about the maladministration of the fund by the fund or the administrator or an unlawful exercise of powers by the fund or the administrator or about a dispute of fact or law that has arisen between the fund or any person and you.

### The Merits

#### *Policy A*

13. Mr Jonker submits that your investment account in Policy A was debited with R2 154.99 when it was made paid-up in January 2001. This was done because of the early cessation of contributions and in accordance with the provisions of the underlying policy. The “premium termination fee” consisted of the un-recovered expenses of R1904.99 and administration charge of R250.00. The relevant provision, clause 9 of the policy document, reads:

#### **“OPBETAALDE POLIS**

Indien ‘n premie nie binne die respytdae betaal word nie, verander die polis in ‘n onbetaalde polis met vermindere voordele ooreenkomstig die praktyk van Sanlam.”

14. Regarding the un-recovered expenses he says:

“The **un-recovered expenses** are the total expenses that were allocated to the Policy with accumulated interest, **less** the expenses recovered under the Policy before the policy was made paid-up.

The **expenses recovered under the Policy before it was made paid up**, were the policy fee, the cost of administration, a percentage of the fund value, and a percentage of the cost of life and disability cover.(sic)"

15. Insofar as the difference between the total contributions that you paid and the fund values which were quoted he says that the insurer is entitled, in terms of clause 1 of the policy document, to recover an annual policy fee and other cost for additional benefits from the contributions. Clause 1 reads:

"Aan die begin van elke polisjaar word 'n beleggingsbedrag in 'n Beleggingsrekening vir hierdie polis belê. Die beleggingsbedrag gelyk aan die restant van die jaarlikse premie nadat voorsiening gemaak is, waar van toepassing, vir die polisgeld en die koste van byvoordele.

....

Sanlam verhaal elke jaar die koste van lewensdekking en ongeskiktheidspensioendekking, indien enige, van die Beleggingsrekening."

16. He submits further that R1245.19 was deducted in respect of the policy fee, the cost of rider benefits and for the cost of administration.
17. Mr la Grange submits further that your monthly contributions were not only used to secure retirement cover but that R5 569.88 (53%) of your total contributions was used to provide for death and disability cover. Furthermore, he says the portfolio ("the market-related investment fund") in which your fund value is invested also influenced the growth of your fund value.

### *Policy B*

18. Regarding this policy Mr Jonker submits that you elected to invest your fund value in equal proportions in Sanlam's market related Offshore Equity Fund and Offshore Balanced Fund. These portfolios do not make provision for any investment guarantees.
19. He submits further that your total monthly contribution was not in its entirety allocated to the provision of retirement cover but certain specified charges were deducted before it was invested. Furthermore, he says the underlying policy specifically entitles the insurer to deduct a policy charge of 45.44% from the monthly contributions for the first two years of the policy term.
20. He says that the charges which can be deducted in terms of the underlying are stated as follows:

#### **"Polisheffings**

#### **Wat is Sanlam Lewens se heffings, en hoe verhaal hulle dit?**

Hierdie heffings is die volgende:

- Ten opsigte van herhalende premies betaalbaar binne die eerste twee jaar sal Sanlam Lewens 'n bemarkings- en administrasieheffing van 45.44% van die herhalende premie, verhaal van elke herhalende premie voordat hulle dit belê. Elke keer as die premie verhoog sal 'n bemarkings- en administrasieheffing betaalbaar wees op elke verhoging in die premie....
- Sanlam sal algemene administrasieheffings van 5.0% van die herhalende premie minus die bogenoemde heffing aftrek van elke herhalende premie. Hulle kan hierdie persentasies van tyd tot tyd verander.
- Aan die begin van elke maand sal Sanlam Lewens 'n polisfooi van R5.00 verhaal. Hulle verhaal hierdie fooi deur eenhede ter waarde van die fooi te kanseleer. Hulle kan hierdie polisfooi van tyd tot tyd verander.
- Vir die duur van die polis sal Sanlam Lewens 'n jaarlikse diensfooi verhaal, tans 0.50% van die markwaarde van die bates in die fonds(e). ... Sanlam Lewens kan hierdie diensfooi van tyd tot tyd verander.
- Vir die duur van die polis sal Sanlam Lewens 'n jaarlikse fondsbestuurfooi verhaal. Hierdie fooi is tans gelyk aan die persentasies, hieronder aangedui, van die markwaarde van die bates in die onderskeie fondse:
 

Buitelandse Aandelefonds	:	2.00%
Buitelandse Gebalanseerde Fonds	:	2.00%

Hierdie fooie word bereken op 'n daaglikse basis .... Sanlam Lewens kan hierdie fondsbestuurfooi van tyd tot tyd verander.
- Sanlam Lewens verhaal alle statutêre beleggingsheffings ten opsigte van die bates of inkomste in die fonds(e), van die bates in die fonds(e). Hierdie heffings sluit 'n eenmalige belasting op verhandelbare effekte van 0.25% en aandelemakelaarsfooie, BTW ingesluit, van 0.45% in.
- Sanlam Lewens sal 'n prestasiefooi vir die batebestuurders verhaal as die beleggingsprestasie bo gemiddeld is."

21. Mr la Grange submits that the total charges since inception of the policy until 1 April 2005, amount to R7 295.18 (or 23.42%) of the total contribution of R31 147.62 while R23 852.44 (or 76.57%) thereof went towards your retirement investment.

### *Policy C*

22. Mr Jonker submits that you elected to invest your funds in Sanlam Life's market-related Multi Manager Balanced Fund and Offshore Hedge Fund. He submits further that your monthly contribution is invested in those portfolios after Sanlam has deducted its charges as prescribed in the underlying policy document. In terms of the underlying policy the following charges can be deducted:

## **“Policy charges**

### **What are these charges, and how are they recovered?**

These charges are:

- Sanlam Life will deduct a marketing and administration charge from each savings premium before they invest it. Currently they deduct 9.10% of the savings premium. They may change this percentage from time to time.
- Each month Sanlam Life will recover a policy fee by canceling units to the value of this fee. Currently they deduct R8.00 for the policy. They may change this amount from time to time.
- For the duration of the policy Sanlam Life will recover a yearly service fee, currently 0.50% of the market value of the assets in the investment funds. This fee is calculated on a daily basis...
- For the duration of the policy Sanlam Life will recover a fund management fee. This fee is currently equal to the percentages indicated below ....
 

Multi-Manager Balanced Fund	: 1.35%
Offshore Hedge Fund	: 2.00%
....	
- Before Sanlam Life calculates the daily prices of the units, they recover statutory charges, for example tax ....
- Sanlam Life will recover a performance fee for the fund manager if the investment return of an investment fund is in excess of the benchmark for that specific investment fund. ....”

23. Mr la Grange submits that in respect of policy C R1 570.60 (or 9.04%) was deducted for policy charges from the total contributions (R17 362.80) received while R15 792.20 (or 90.95%) was allocated towards your retirement investment.

24. He submits further that your contributions in respect of policy B and C are invested in portfolios which fluctuate according to market conditions. He says further that you acknowledge that you were aware and understood how the investment worked and the risk associated with the particular investment when you signed the ‘Declaration by the proposer’.

### Determination and reasons therefor

#### Technical points

25. 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 a retirement annuity fund, which is a pension fund organization as defined in the Act. The provisions of the Act, including chapter VA (which confers jurisdiction on the Adjudicator to investigate and determine complaints against pension funds) therefore apply to it. For the reasons more fully set out in *Schwartz v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 435 (PFA) at paragraphs [12] to [28] and authorities referred to therein and *Louw v Central Retirement Annuity Fund and Another* [2005] 7 BPLR 622 (PFA) at paragraphs [17] to [36] I cannot uphold the contention that this matter constitutes “long-term insurance business” over which I have no jurisdiction.

26. Furthermore, Davis J (in whose judgment Le Grange AJ concurred) in *Central Retirement Annuity Fund v Adjudicator of Pension Fund & others* (“the *de Beer* judgment”) [2005] 8 BPLR 655 (C) at 660C-E confirmed the jurisdiction of this office and stated:

“The basis of the complaint was that Applicant, [Central Retirement Annuity Fund] as the holder of the policy on the life of a member, was neither obliged nor entitled simply to allow Sanlam Life [the insurer] to charge whatever costs and charges it chose to levy and to accept whatever investment bonuses that it chose to declare from time to time without first satisfying itself through its own management committee of the reasonableness or adequacy thereof.

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 section [5(1)(a)] 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.” (emphasis supplied)

27. In so far as your complaints relates implicitly to the administration of the fund (and specifically conduct that falls outside the powers conferred on the fund or Sanlam by the rules) and as a result of which you have suffered financial loss, your grievance constitutes a complaint as defined.

### The merits

28. A pension fund organization can only do that which is set out in its rules (see section 13 of the Act) The binding effect of a fund’s rules was emphasized by the Supreme Court of Appeal in *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E. Put differently the fund can only do that which is provided for in the rules or any other document which is incorporated by reference into the rules.
29. I now turn to determine the first part of your complaint, namely, your dissatisfaction with the insurer’s deduction of a “premium termination fee”.

The fund and the insurer rely on clause 9 of the policy document for their “right” to charge a “premium termination fee”.

30. Clause 9 does not provide for the levying of a “premium termination fee” against a member’s investment account, but rather the payment of reduced benefits if premiums have not been paid within the period of grace. The reduced benefits only become due and payable when the member has died or retired.
31. The rules also make no provision for the deduction of a “premium termination fee” when a policy is made paid-up. However, part 7 of the rules deals with the effect when a member stops contributing to the fund.
32. Part 7 of the rules only goes so far as to provide for the conversion of the policy (provided it has a paid-up value) to a paid-up policy for reduced benefits if the contributions cease after the member has paid sufficient contributions to give the policy a paid-up value. This rule has the same effect as clause 9 to which Mr Jonker referred in his submission.
33. In the circumstances, it is clear that the fund and the insurer did not have the authority, either in terms of the rules or the policy document, to impose a “premium termination fee” of R2 154.99 when the policy was made paid-up.
34. The trustees of the fund are, moreover, under a duty to ensure that the terms of any underlying contract taken out in respect of, and for the benefit of, a member are adhered to by the other contracting party. They may not simply wash their proverbial hands of all responsibility. Section 7C of the Act codifies the common law fiduciary duty owed by trustees to the beneficiaries on behalf of whom they hold trust assets. In this sense members are in a similar position to trust beneficiaries.
35. Section 7C provides:

- “(1) The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.
- (2) In pursuing its object the board shall-
  - (a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;
  - (b) act with due care, diligence and good faith;

(c) avoid conflicts of interest;

(d) act with impartiality in respect of all members and beneficiaries.”

36. As Davis J stated in the *De Beer* judgment (at 660D-E), the fund cannot simply be treated as an illusory 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.”

37. For the above reasons, I am satisfied that the fund was not entitled to permit the above reduction to your benefit, since it was not authorized by the rules or by the terms of the policy between the fund and Sanlam.

38. I now turn to deal with the second leg of your complaint, namely, the discrepancy between the total contributions paid over the life of the respective policies and the fund value quoted in March 2004.

39. It is clear from the respective policy documents that you were liable for the cost specified in the policy and that the insurer was entitled to recover those policy charges from your monthly contributions. I say so because the various policy charges (for example: marketing and administration charges, policy fee, administration fee and a management fee) which the insurer can recover from your investment account is, unlike the “premium termination fee”, disclosed in each of the policy documents. The respective policy documents also specify the percentage of the contribution that the insurer can deduct from your monthly contributions.

40. In the circumstances it is clear that all of your contributions were not allocated towards the provision of retirement benefits but that a portion of your contribution in respect of policy A went towards the provision of death and disability benefits while certain policy charges were also deducted from the contributions that you made in respect of each policy. Furthermore, the type of portfolio you elected to invest your funds also influenced the growth thereof. I say so because you bear the risk in times of poor performance and reap the benefits in times of good performance.

Relief

41. In the result the order of this Tribunal is:

41.1 It is hereby declared that the respondents had no right in law to levy the charge of R2 154.99 as a “premium termination fee” on the complainant’s investment value solely by reason of him having ceased contributions before the maturity date of the underlying policy A.

41.2 Sanlam Life Insurance Limited (in its capacity as administrator and/or investor of the assets of the fund) is ordered forthwith to credit the complainant’s investment account in the fund in respect of policy 12576204x7 with R2 154.99 together with interest thereon calculated at 15.5% per annum, from the date of this determination until the date of the crediting.

41.3 The second leg of the complaint is dismissed.

SIGNED IN CAPE TOWN ON THIS      DAY OF      2006

Yours faithfully

**VUYANI NGALWANA**  
**PENSION FUNDS ADJUDICATOR**