HEAD OFFICE
Johannesburg
1st Floor, Norfolk House
Cnr 5th Street & Norwich Close
Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town
2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: PFA/KZN/4419/05/CN

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): R MAISTRY v CENTRAL RETIREMENT ANNUITY FUND & SANLAM LIFE INSURANCE LIMITED

Introduction

1. This matter concerns the charging by an insurer of a "premium termination adjustment fee" when the member of a retirement annuity fund ceased paying contributions to the fund before the selected retirement date.

2. The complaint was received by this office on 19 July 2005 and a letter acknowledging receipt thereof sent to you on 1 August 2005. On 3 August 2005 a letter was dispatched to the respondents giving them until 24 August 2005 to file a response to the complaint. The response dated 22 August 2005 was received on 24 August 2005. On 29 August 2005 the response was sent to you for a reply by 12 September 2005. No reply was received from you. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter.

3. 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 ("the fund") and Sanlam Life Insurance Limited ("the insurer") on 19 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 16 February 2006, we were informed that the parties to this complaint had failed to reach a settlement in this case. The details of disagreement were not communicated to us.

4. It is with that brief background that we now determine this complaint in the ordinary course.

The complaint

5. This complaint concerns three inter-linked issues, namely the levying of a "premium termination adjustment fee" against the fund value of the underlying policy when you ceased contributing to the fund; the lowering of your minimum maturity value from R177 442 to R66 257, and the unavailability of the minimum maturity value prior to the contractual retirement date.

6. You are dissatisfied with the charging of the "premium termination adjustment fee" and with the lowering of your minimum maturity value, and also contend that the minimum maturity value should be paid out to you as an early retirement benefit and not be held in the fund until 1 August 2018, which is the contractual retirement date.

The responses

Technical points

7. The respondents have raised two technical points that this grievance is not about the execution of duties by the Fund (or the administrator), 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.

8. They further argue that this complaint does not constitute "a complaint" as defined in the Pension Funds Act, in that, in particular, it is not about the maladministration of the fund by the fund or the administrator.

The merits

9. On the merits, the respondents state, firstly, that the "premium termination

adjustment fee" of R16 154.76 was charged in accordance with what is stated in the policy documents and is the amount by which your benefits were reduced when you ceased paying contributions. According to them, the purpose of calculating the adjustment is to recover the expense of doing an alteration on the policy and to partly recover the loss, resulting from the alteration, of future policy charges which the insurer is required to pay for the initial expenses already incurred on the policy.

10. Secondly, the respondents state that the minimum maturity amount of R177 442 was based on an assumption that you would pay contributions, which would increase at regular intervals, until 1 August 2017. According to the respondents, when you prematurely ceased making contributions some 13 years' contributions were lost and premium increases no longer applied.

11. Thirdly, it is submitted by the respondents that the policy documents clearly state that the minimum maturity value is only available on the contractual retirement date, and that adjusted benefits would be available on early termination of the policy.

12. The respondents conclude that they have investigated this complaint with reference to the guidelines set out in the Statement of Intent, and have come to the conclusion that the adjustment and policy values were calculated correctly.

Determination and reasons therefor

Technical points

13. 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. For the reasons more fully set out in *Louw v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 622 (PFA) at paragraphs [17] to [36] and the authorities referred to therein, I cannot uphold the contention that this matter constitutes "long-term insurance business" over which I have no jurisdiction.

14. Furthermore, Davis J (in whose judgment Le Grange AJ concurred) in *Central Retirement Annuity Fund v Adjudicator of Pension Funds & Another*, [2005] 8 BPLR 655 (C), ("the *de Beer* judgment"), at 660D-E 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 illusionary '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."

15. 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 investment value has reduced) in consequence of the maladministration of the fund (in the form of reducing your investment value by the levying of undisclosed charges), your grievance constitutes a complaint as defined (See *Louw* (cited above) at paragraphs [11] to [15].

16. While your letter of complaint does not make the allegations as required in the Act in the precise terms as would otherwise have been expected of a lawyer (which I gather you are not), it is clear that you are unhappy about the charging of a fee without prior warning by reason only of your stopping contributions to the fund. In the circumstances, it would be unduly formalistic to dismiss the complaint by reason solely of failure to allege in precise terms as required by the Act.

17. The Cape High Court in the *de Beer* judgment said the following in this regard (at 660E-G):

> "Applicant's contention regarding [the complainant's] letter is based upon a very formalistic reading of the complaints procedure as provided for in the Act. On this reading, the letter generated by [the complainant] 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 this case between Sanlam and applicant".

18. The technical points are therefore dismissed.

<u>The merits</u>

19. The Statement of Intent is not binding on this tribunal as it was not a party thereto. Thus I still have to determine the legality or otherwise of the levying of the "premium termination adjustment fee" by referring to the provisions of the rules and the underlying policy.

20. The fund being a registered fund in terms of the Act is bound by its rules in the same way as its members, shareholders, officials and beneficiaries are. Consequently, the trustees of the fund may not do anything with the

fund's assets unless they are authorized to do it by the rules (see *Tek Corporation Provident Fund & Others v Lorentz* [2000] BPLR 227 (SCA) at paragraph [28]).

21. It is against this backdrop that I must determine whether the rules or the policy document entitle the insurer to levy the "premium termination adjustment fee". Rule 2 provides that if a member discontinues contributions prematurely and "the policy has a paid-up value in accordance with the practice of [the insurer]", the insurer shall convert the policy to a "paid-up policy" for reduced benefits. Clause 9 of the policy document contains a similar clause. However, neither the rules nor the policy document define what a "paid-up policy" is, or the method or basis that will be used to reduce the benefits. There is definitely no mention of the levying of a "premium termination adjustment fee" in the event of the premature discontinuation of contributions.

22. In any event, even if the applicable provisions of the rules and the policy contract can be read as meaning that the member's benefit falls to be reduced if he prematurely ceases paying contributions to the fund, that interpretation is not wide enough to allow the reduction of a member's fund value by the accelerated recovery of unrecouped expenses, which is achieved through the levying of a "premium termination adjustment fee". It is the eventual benefit, which is payable when a benefit becomes due and payable that may, on an application of the rule and policy clause in question, be reduced. No benefit is due to you at this stage, so there is no call for the reduction of your fund value.

23. Not only are the trustees of a fund obliged to act in accordance with the rules, but they are also 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. Section 7C provides that the object of a board shall be to direct, control and oversee the operations of the fund in accordance with the applicable laws and rules of the fund. There is nothing in the rules, the policy document or indeed the applicable legislation that allows for the charging of a "premium termination adjustment fee" only by reason of stopping of contributions before the chosen retirement date.

24. 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."

25. With regard to your minimum maturity value and the availability thereof prior to the contractual retirement date, the benefit statement which you have attached to your complaint clearly states, among other things, that "the benefits below are based on provisos and assumptions set out at the end of this statement". One of the assumptions is that the contributions would be paid until 1 August 2018 and would increase at the rate of 15% annually. When you ceased making contributions to the fund, some thirteen years' worth of contributions could no longer be received nor invested. There were also no further contribution increases. That had the effect of lowering your minimum maturity value.

26. The policy document provides for the advancement of the contractual retirement date to any date after the 55th birthday. You will turn 54 on 15 November 2006. Thus, if you wish to receive your benefit before 1 August 2018, you will have to wait until after you have reached the age of 55 years. Therefore I cannot order the insurer and the fund to pay you an early retirement benefit. That leg of the complaint and the one relating to your minimum maturity value are dismissed.

Relief

27. The order of this tribunal must be the reversal of the "premium termination adjustment fee". Since it is the insurer that levied this fee, it is against it in its capacity as administrator that such an order must be made.

    27.1. It is hereby declared that the respondents had no authority to levy a "premium termination adjustment fee" against the complainant's investment account, solely by reason of his having ceased contributing to the fund.

27.2. Sanlam Life Insurance Limited (in its capacity as administrator and/or investor of the assets of the fund) is ordered to, within 6 weeks of the date of this ruling, credit the complainant's investment account with the amount of R16 154.76 together with interest thereon at the rate of 15.5% per annum, to be reckoned from 1 May 2005 until the date of such crediting.

SIGNED IN CAPE TOWN ON THIS DAY OF 2006

Yours faithfully

……..
VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR