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Please quote our reference: PFA/WE/3619/2005/nvc

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 ("the Act"): S H Burger v Central Retirement Annuity Fund ("the fund") and Sanlam Life Insurance Limited ("Sanlam" or "the insurer")

Introduction

[1] Having considered the complaint received by this office on 23 May 2005 and further written submissions, I consider it unnecessary to hold a hearing in this matter. 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 on 18 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 15 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. My determination and reasons therefor appear below.

[2] As the background facts are well known to all the parties, I shall only

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

repeat those facts that are pertinent to the issues raised herein.

Factual Background

[3] You commenced to contribute to the fund at the age of 60 on 1 September 1999 at the monthly rate of R200, escalating each year until the monthly contribution reached R280.92 in 2004. Having reached the age of 65 on 25 March 2004, you retired on 31 March 2004. On the advice of your financial advisor, you made the policy paid-up, with effect from 1 May 2004, on which date you ceased to pay contributions. In total you contributed R13 800 to the fund. Your initially elected retirement date was 1 September 2004.

[4] In December 2004 you requested Sanlam to make payment to you. The benefit which you received was R8 610.05 less tax of R 1 251.32, which then resulted in a net benefit of R7 358.73. An amount of R102.21 was deducted as a "premium termination adjustment".

Complaint

[5] You complain about receiving almost half of what you say you paid in. You want this tribunal to investigate your complaint that you received much less than what you contributed to the fund.

The fund's and Sanlam's response

Technical points

[6] The fund and the insurer have raised two technical points in response to the complaint, and have also dealt with the merits. The first technical point is that this is not a "complaint" as defined in the Act as it is not "about the execution of duties by the Fund (or administrator)" but is in effect "about the execution of duties by the insurer under the policy - namely about a matter domestic to the policy, notably the actuarial substructure of the policy, which constitutes "long-term insurance business" as defined in, and regulated under, the Long-Term Insurance Act.

[7] The second technical point is that because this complaint is "not about "maladministration of the Fund" by the fund (or the administrator), it is not a "complaint" as defined in the Act.

Merits

[8] On the merits the insurer states that you were invested in the Offshore Equity Fund and consequently there were no investment guarantees.

[9] The insurer refers to the policy documents that advise:

> "VOORBEHOUDE EN VERONDERSTELLINGS
>
> Inligting in hierdie opgawe verstrek, is onderworpe aan die bepalings van die polis. Die werklike voordele wat die polis bied, sal bepaal word deur die werklike groeikoerse, kosteverhalings en berekeningsbasisse wat van tyd tot tyd geld."

[10] The insurer states that the costs attached to this investment were as follows:

"Total paid-in premiums up to 30 April 2004	R13 080.12
Less: Total policy fees and administration charges	R 1 405.56
Equals: Amount available for investment	R11 674.56
Plus: Investment return up to 30/04/2004	- R 3 375.62
Value of policy on 01/05/2004 before being made paid-up	R 8 298.94
Less: Premium termination adjustment	R 102.21
Policy value on 01/05/2004 after being made paid-up	R 8 196.73
Plus: Investment return up to 31/08/2004	R 347.38
Maturity value on 1 September 2004	R 8 544.11"

[11] Sanlam concludes that you were "fully aware of the risks involved" in electing to invest in an offshore fund. It states that the fees and the maturity value were calculated according to sections 46 and 52(3) of the Long-Term Insurance Act, which in particular provide for the calculation of a policy value where the member reduces or prematurely discontinues the contributions.

<u>Determination and reasons therefor</u>

[12] 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 *Schwartz v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 43 (PFA) at paragraphs [12] to [28] and authorities referred to therein and *Louw v Central Retirement Annuity Fund and Another* [2005] 7 BPLR 363 (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.

[13] Furthermore, Davis J (in whose judgment Le Grange AJ concurred) in *Central Retirement Annuity Fund v Adjudicator of Pension Funds and Others* [2005] 8 BPLR 655 (C) at 660C - 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."

[14] 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 to much less than what you expected) 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]).

[15] Both technical points are therefore dismissed.

Merits

[16] The adverse impact on your fund benefit was caused by the negative return (R3 75.62) achieved in Sanlam Life's Offshore Equity Fund. Once you decided to invest in a market-related portfolio, you carried the investment risk. This means that you benefited from a surge in the market and carried the loss in periods where the market was in decline.

[17] I am satisfied that the values were not guaranteed and depended on actual growth rates, annuity rates and inflation rates as set out in the policy documents under "Voorbehoue en Veronderstellings".

[18] Sanlam states that as this fund is similar to that on which the "MSCI World Index" is based, this index is used as a benchmark against which the performance of the Offshore Equity Fund is measured. As you have not disputed Sanlam's submissions in this regard, this aspect of your complaint cannot succeed.

[19] However, the next issue is whether the rules of the fund authorize the levying by the fund or Sanlam of a "premium termination adjustment fee" in view of you electing to cease to pay contributions from May 2004, four months prior to your initially elected retirement date in September 2004.

[20] Rule 2 of part 7 provides:

> "Term of contributions
> 2. A MEMBER's CONTRIBUTIONS are payable during the period determined in the POLICY issued on his life.
>
> If a MEMBER's CONTRIBUTIONS cease after he has already paid sufficient CONTRIBUTIONS so that the POLICY issued on his life has a paid-up value in accordance with the practice of the ASSURER, the ASSURER converts the POLICY to a paid-up POLICY for reduced benefits. The MEMBER will then have

> the right to apply for reinstatement of his benefits, partially or in full, and the MANAGEMENT COMMITTEE in consultation with the ASSURER will consider such a proposal on receipt of……."

[21] There is no definition of what a "paid-up policy" is in the rules, and certainly no mention that in converting the policy to a paid-up policy for reduced benefits the insurer may charge a "premium termination adjustment fee". Clause 8 of the policy document deals with "paid-up policies" and provides that if premiums are not paid within the period of grace and there are sufficient contributions in the investment account the policy will become paid-up, but the maturity benefits will be reduced and all other benefits will lapse.

[22] From the evidence, neither the rules of the fund nor the policy documents provide for the levying of the "premium termination adjustment fee" of R102.21.

[23] Section 13 of the Act sets out the binding force of the rules. As the Supreme Court of Appeal stated in *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28] in this regard, the trustees may only do with the fund's assets what is set forth in the rules. Thus, if what they propose to do is not within the powers conferred on them by the rules, they may not do it. There is also no provision in the Act for the deduction of unrecouped expenses upon discontinuation of contributions to the fund.

[24] 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. 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. Nothing in the rules and the Act allows for the deduction of a "premium termination adjustment".

[25] 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."

[26] 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 the insurer.

Relief

[27] The order of this tribunal is as follows:

[27.1] It is hereby declared that the respondents had no right in law to levy the charge of R102.21 as a "premium termination adjustment fee" on your investment value solely by reason of your exiting the fund some four months earlier than your selected retirement date.

[27.2] The fund and Sanlam (in its capacity as administrator and/or investor of the assets of the fund) are jointly and severally ordered forthwith to calculate the amount that would have been available for the purchase of an annuity on your behalf had the amount of R102.21 not been levied against his investment value.

[27.3] Sanlam is further ordered to pay you or to transfer to an an institution of your choice in terms of the rules and applicable legislation, the amount referred to in paragraph [27.2] above, less any deductions permitted in terms of the Act, within 6 weeks of the date of this ruling.

[27.4] Sanlam is further directed to pay interest on the amount calculated in paragraph [27.3] above at the annual rate of 15.5% from 1 May 2004 to the date of payment or transfer.

Dated at Cape Town on this the day of 2006.

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator