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 ref: PFA/WE/6136/05/SG(CN)

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 ("the Act"): HERMAN v LIFESTYLE RETIREMENT ANNUITY FUND & LIBERTY GROUP LIMITED

Introduction

[1] This complaint concerns the levying, by an insurer, of charges against the investment value of three retirement annuity policies issued to a member of the fund, by reason of the member's having stopped making contributions to the fund prior to the chosen retirement date.

[2] The complaint was received by this office on 23 March 2005, and a letter acknowledging receipt thereof was sent to you on 3 November 2005. On the same date a letter was dispatched to the respondents requesting them to submit a response to the complaint by no later than 17 November 2005.The response, dated 15 November 2005, was received on 9 January 2006. A copy of the same appears to have been sent to you by the respondents on 15 November 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.

[4] This matter was referred for settlement to the Lifestyle Retirement Annuity Fund and Liberty Group Limited on 20 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. On 28 March 2006, we were informed by the insurer that the parties to this complaint had failed to reach a settlement. It is with that brief background that we now determine this complaint in the ordinary course.

Factual background

[5] You first joined the Lifestyle Retirement Annuity Fund ("the fund"), which at the time was known as the VIP Retirement Annuity Fund, on 1 February 1985, and selected the age of 65 years as your retirement age. At the time you were 40 years old. The fund took out a policy (Policy No.181 639 26000) with Liberty Group Limited ("the insurer") to fund its liability to provide a retirement benefit to you at retirement. The agreed contribution to the fund was an amount of R3000 per annum. During January 1996, after having made contributions totaling R36 000, you ceased contributing to the fund. On 1 February 1997 the insurer levied a charge of R2 382.48 against the policy's investment account.

[6] On 1 February 1986, a second policy contract evidencing your membership of the fund was issued to you (Policy No. 570 017 18800). Again you selected the age of 65 years as your retirement age, and agreed to contribute an annual amount of R3000 to the fund. Subsequent to that you increased your annual contribution to R5000. With effect from January 1996, you ceased contributing to the fund, at which point you had contributed a total amount of R48 000. On 1 February 1997 the insurer levied a charge of R6 710.64

against the policy's investment account.

[7] A third policy (Policy No. 570 654 55800) was issued to you on 1 February 1990, with an agreed contractual period of membership of 16 years. You elected to contribute an amount of R4 000 per annum to the fund. With effect from 1 January 1996 you ceased making contributions to the fund, at which pont you had already contributed R37 948.28. On 1 February 1997, the insurer levied a charge of R4 885.22 against the policy's investment account.

The complaint

[8] You are aggrieved by the levying of the charges in question, and have requested me to order the insurer to credit your policies' investment accounts with the amounts of R2 382.42, R6 710.64 and R4 885.22 respectively.

The responses

Technical points

[9] The respondents contend, firstly, that since the cause for your complaint arose some eight years before you lodged this complaint, I am precluded by the provisions of section 30I(1) of the Act from investigating and adjudicating upon this matter.

[10] Secondly, the respondents submit that as this complaint relates primarily to the reduction of policy values that was effected as a result of the early termination of a member's contributions, it relates to the actions of Liberty Life acting as insurer. They conclude that for that reason I do not have the jurisdiction over the insurer or the operation of the life polices issued by it.

The merits

[11] The respondents submit that the charges levied were in respect of unrecouped expenses that are ordinarily recovered over the term of membership, but that can no longer be recovered as a result of the premature cessation of contributions. They further state that clauses 2 and

5 of the general conditions of membership as set out in the policy document authorise the levying of the charges in question.

Determination and reasons therefor

Time-barring

[12] Section 30I(1) of the Act is a peremptory time-barring provision that precludes me from investigating and adjudicating upon a complaint if the act or omission to which it relates occurred more than three years before the date on which the written complaint is received by me. There is good reason for a limit to be imposed on the time during which litigation may be launched and the Constitutional Court has pronounced on this. In *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) the Court said (at paragraph [11]):

> "Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainly of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can be obtained have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken."

[13] The acts to which this complaint relates occurred during February 1997, almost eight years before the date of the lodging of this complaint. Thus the complaint is time-barred. However, the matter does not end there as section 30I(2) vests me with the power to condone the late lodging of a complaint, or extend the three-year period, if good cause for condonation or extension is shown to exist, or I *mero motu* find that it does exist.

[14] There is no rule-of-thumb approach to deciding whether to grant condonation, but rather an exercise of discretion upon a consideration of all the facts. The Supreme Court of Appeal (or Appellate Division as it was then known) has pronounced upon the standard that must be met for condonation to be granted in circumstances like these. In *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) at page 532B-E, the court said:

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant is

> the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

[15] The delay of more than seven years before the lodging of this complaint is quite long. Although you have not proffered any explanation for the delay, that fact has to be weighed against your prospects of success on the merits, the public interest in having complaints of this nature resolved, as well as the likelihood of prejudice that the respondents might suffer if they are required to deal with this matter at this point in time. The prospects of success on the merits are more than favourable. Since you are still a member of the fund, the insurer still has all the relevant documents pertaining to your policies on its database, and has been able to file a response to the complaint. It has become a matter of great public interest to have complaints of this nature investigated and adjudicated upon by this tribunal.

[16] On a conspectus of all the above factors, I find that good cause exists for condoning the late lodging of this complaint. The first technical point is dismissed.

Adjudicator's jurisdiction

[17] There is no merit in the technical point in the technical point 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 625 (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.

[18] Furthermore, Davis J (in whose judgment Le Grange AJ concurred) in *Central Retirement Annuity Fund v Adjudicator of Pension Funds & Others* [2005] 8 BPLR 655 (C) ("the *de Beer* judgment"), at page 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."

[19] The technical point is dismissed.

The merits

[20] The insurer's authority to levy charges against a member's investment account in the event of a member's prematurely terminating his contributions to the fund should lie in either the rules of the fund, the applicable legislation, the common law, or the provisions of the underlying contract taken out in respect, or for the benefit, of the member.

[21] The respondents seek to rely firstly on Clause 2 of the document titled "Summary of General Conditions of membership", which reads as follows:

> **"CONTRIBUTIONS**
>
> **(a) Payment of contributions**
>
> The contributions specified in the Schedule of contributions are payable on the due dates shown thereon.
>
> If upon a claim arising, any contributions due or required to complete the full year of membership current are unpaid, the amount of such contributions shall be deducted from the Benefit payable.
>
> **(b) Days of grace**
>
> Thirty days of grace are allowed for the payment of each contribution.
>
> **(c) Lapse**
>
> In the event of the non-payment of each contribution within the Days of Grace, the Member shall thereupon cease to be a Member of the fund and no benefit shall accrue or be paid to or in respect of him, unless the Member is entitled to a Paid-Up Benefit in terms of Clause 5 below."

[22] Clause 5 in turn provides as follows:

> "**Paid-up Benefits**
>
> Provided the Contract has an Asset Value it may be made Paid-up, in terms of which:
>
> (a) no further contributions shall be payable, and
>
> (b) all benefits otherwise payable shall be reduced accordingly and
>
> (c) any right to Disability Benefits or other Supplementary Benefits shall cease.
>
> The reduced benefits shall continue to participate in surplus."

[23] Neither one of the clauses makes reference to the levying of a fee for the recovery of unrecouped expenses in circumstances like the present one. Clause 2 (a) covers the situation where a claim arises while there are some outstanding contributions. In that event, the insurer is authorised to deduct the unpaid contributions from the benefit payable. That clause is of no application in this case because no claim has arisen.

[24] Clause 5 sets out the effect of making a contract "paid-up". There is, however, no definition of the phrase anywhere in the policy document or the rules. Sub-paragraph (b) of the clause provides that when a contract has been made paid-up, all *the benefits otherwise payable* shall be reduced accordingly. The rules define a "benefit" as:

> "Any annuity…or any sum of money (including a return of Contributions, with or without interest) payable to a Member or to any person arising out of a Member's membership of the Fund."

[25] At the date when the deductions were effected up to the date of lodging of this complaint, no benefit was payable to you. Thus, no reduced benefit was payable to you. The rules of the fund are also silent on the issue of the levying of charges upon the premature termination of contributions. It is trite law that the rules of a fund are binding on the fund, its members, shareholders, officers and beneficiaries. Thus, whatever is not provided for in the rules may not be done (See *Tek Corporation Provident Fund & Others v Lorentz* [2000] BPLR 227 (SCA) at paragraph [28]).

[26] The trustees of a 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. There is nothing in the rules, the policy document or indeed the applicable legislation that allows for the charging of a "premium cessation fee" or any fee by reason only of stopping contributions prior to the chosen retirement date.

[27] 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.".

[28] Therefore, the insurer had no authority to make the deductions referred to above from the investment accounts of your policies. The appropriate order of this Tribunal is the reversal of the said deductions, and since it is the insurer that made them, it is against it in its capacity as the administrator that the order must be granted.

<u>Relief</u>

[29.1] It is hereby declared that the respondents had no authority in law to levy the amounts of R2 382.48, R6 710.64 and R4 885.22 against the complainant's investment accounts in the fund.

[29.2] Liberty Group Limited is hereby ordered forthwith to re-calculate your fund value as if the amounts of R2 382.48, R6 710.64 and R4 885.22

had not been deducted when you ceased making contributions to the fund with effect from 1 February 1997, and to inform you of this value within 3 weeks of the date of this determination.

SIGNED IN CAPE TOWN ON THIS DAY OF 2006

Yours faithfully,

……
VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR