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Please quote our reference: PFA/WE/6847/2006/NVC

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): J Ratcliffe v South African Retirement Annuity Fund (“the fund”) and Old Mutual Life Assurance Company (South Africa) Limited (“Old Mutual” or “the insurer”)

Introduction

- [1] Your complaint concerns the amount deducted from your fund share on your reduction of contributions. The complaint was received on 29 June 2005 and a letter acknowledging receipt thereof was sent to you on 26 January 2006. On 27 June 2006 letters were dispatched to the respondents requesting them to submit responses to your complaint by 19 July 2006. The fund’s response dated 5 July 2006 was received on the same date. The fund copied you with its response. On 20 July 2006 the response was sent to you for a reply by 18 August 2006. No reply has been received from you.
- [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 on 26 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

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settlement terms were not divulged to this office. However, on 5 July 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. As the facts are known to the parties I shall only repeat those facts that are pertinent to understanding this determination.

Factual Background

- [3] You commenced contributing to the fund, in its Balanced Portfolio, on 1 March 1990, when you were 34, at the monthly rate of R250, electing to retire on 1 March 2017, at the age of 60. You opted to increase the contributions annually in March linked to the Consumer Price Index. Due to financial constraints you reduced the contributions to the fund from a monthly rate of R779.92 to R150.00 with effect from 1 April 2002. Old Mutual advised you that the penalty charged to you was R5 181.05. Your fund value was R132 891.03 before you reduced the contributions. As at 1 June 2006 you had contributed R79 036.65 to the fund.

Complaint

- [4] You are unhappy about the penalty of R5 181.05 charged by Old Mutual when you reduced the contributions. You want to be credited with this amount, with interest, and you want Old Mutual to disclose any other deductions it may have made.

The fund's response

- [5] The fund states that when a member requests a variation to the contributions that he pays, the contract relating to the underlying policy is amended and the statutory actuary has a duty to ensure that the remaining members' interests are protected in terms of the Long-Term Insurance Act. It adds that the insurer cannot benefit a member who does not comply with the terms of the contract at the expense of members who are adhering to the terms and conditions.
- [6] It states that when a proposal is made by a member the insurer issues a policy based on its expectations. When the terms are altered the statutory actuary must determine the amended value of the policy.
- [7] The fund states that the expenses incurred in setting up a policy are borrowed from the shareholders of the insurer at inception of the policy on the expectation that the contributions will continue to be paid as undertaken. In return, the member would receive investment growth on his policy until he reaches his retirement date. If contributions are reduced the expenses cannot be recouped over the elected period of the policy and

are charged against the member's accumulation account when the policy is amended.

- [8] The fund notes that there are four charges that are levied, being an administration fee, payment fee, premium levy, and commission.
- [9] The fund affirms that it informed you of the costs to be charged due to the reduction in contributions on 13 March 2002.

Determination and reasons therefor

- [10] The issue for determination is whether the fund or Old Mutual (in its capacity as administrator and/or insurer of the fund assets) is entitled to deduct an amount from your fund value by reason solely of your reducing the contributions. Its authority to do so must lie in the rules of the fund, the policy document, or applicable legislation.
- [11] Section 3 of the rules deals with the payment of contributions to the fund but does not cover the reduction of contributions. The rules also do not provide for the deduction of unrecouped expenses.
- [12] Section 13 of the Act confirms the binding force of the rules of a fund. As the Supreme Court of Appeal stated in *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28], 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.
- [13] In terms of the policy document the benefit payable at retirement is the balance in the accumulation account, with a minimum guaranteed amount of R201 447.00, for the purchase of an annuity, or R221 548.00 if the contributions are increased each year in accordance with the premium update facility. The policy documents also affirm at paragraph 2, under "General Provisions" that the member is entitled to the balance in the accumulation account, which is credited with contributions received, plus bonuses, and debited with the expense charges and the cost of life cover and supplementary benefits, if applicable. Paragraph 6 deals with the expense charges, including a monthly contribution charge of 01.25% of the premium payable, a policy fee of R2.40 per month plus a R0.60 contribution payment fee. Should the policy be changed, the level of the charges will be adjusted in line with the changed policy.
- [14] Only the charges specifically set out and quantified in the policy document may be deducted. There is nothing in the underlying policy allowing for an acceleration of future unrecouped costs upon the reduction of contributions.

- [15] In the result, there is no basis for the deduction of accelerated costs or any other expenses from your fund share other than those detailed in the policy. Since those appear to be monthly charges that must already have been levied on the monthly contributions already made, I can find no reason for their further deduction.
- [16] 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.
- [17] As Davis J stated in *Central Retirement Annuity Fund v Adjudicator of Pension Funds and Others* [2005] 8 BPLR 655 (C) 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."
- [18] 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. You are therefore entitled to be placed in the position you would have been in had the amount of R5 181.05 not been deducted from your fund share. Because this reduction of the benefit was effected by and for the benefit of Old Mutual in circumstances where the policy document does not allow therefor, the order in that regard must be directed at Old Mutual.

[19] In its letter dated 5 July 2006 Old Mutual has set out the applicable costs and therefore I need not order it to do so as requested by you in your complaint.

Relief

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

[20.1] It is hereby declared that the respondents were not authorized to levy the charge of R5 181.05 as a contribution reduction charge on your investment value solely by reason of your having reduced the contributions; and

[20.2] Old Mutual is ordered forthwith to re-calculate your fund value as if the amount of R5 181.05 had not been deducted when you reduced the contributions to the fund with effect from 1 April 2002, and to inform you of this value within three weeks of the date of this determination.

Dated at Cape Town on this the day of 2006.

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator