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Please quote our ref: PFA/WE/4561/05/KM

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): J. RETIEF v CENTRAL RETIREMENT ANNUITY FUND (“the fund”) and SANLAM LIFE INSURANCE LTD (“Sanlam” or “the insurer”)**

Introduction

[1] This matter concerns the calculation of your retirement benefit, in particular the reduction in value of your fund share due to the advancement of your retirement date. The complaint was received by this office on 12 July 2005 and a letter acknowledging receipt thereof sent to you on 3 August 2005. On 5 August 2005 letters were dispatched to the respondents giving them until 26 August 2005 to file a response to the complaint. Responses dated 25 August 2005 were received from both respondents on 26 August 2005, copies of which were forwarded to you. A reply dated 17 May 2006 was received from you on 22 May 2006. 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 insurers on the other, in terms of which the life insurers 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, all retirement annuity fund complaints (including this one) were nevertheless referred back to the management boards and life insurers 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 20 January 2006. The parties were given 30

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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), 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

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 September 2006 my assistant was informed telephonically that the parties in this complaint had failed to reach a settlement in this case. It is with that brief background that I now determine this complaint in the ordinary course. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter.

### The complaint

- [2] Your complaint is that the value of your retirement benefit from the fund was appreciably less than the fund value prior to advancing your retirement date. You commenced contributing in August 1986 with an agreed retirement date of 1 August 2014. Your monthly contributions commenced at R25,00, increasing to R75,00 on 1 February 2001, and again to R225,00 on 1 May 2001. From this date the contributions increased by 10% on each policy anniversary. From 1 February 2005 you ceased contributions and elected to receive an early retirement benefit. You were advised that Sanlam has a special formula which reduces the maturity value in the case of an early termination of the underlying policy. You were informed that your fund value would drop from R61 095 to R31 954. You state in your reply that the policy document and original quotation gave no indication of the “cost of the penalty” that you would pay on early maturity of the policy. You state that, had you been aware of this, you would probably not have taken out the policy or committed yourself to increases. You therefore feel there has been a complete lack of transparency, and you feel aggrieved at this. You have requested my assistance in investigating this matter.

### Responses

#### Point in limine

- [3] Both the fund and the insurer have raised a technical point that your grievance constitutes long-term insurance business that is regulated by the Long-Term Insurance Act and not the Pension Funds Act. They also allege that your grievance does not amount to a “complaint” as defined in the Act. For these reasons they contend that I do not have jurisdiction to determine the matter.

#### Merits

- [4] The fund states that Rules 4 and 5 of part 7 stipulate that the fund’s liability is restricted to the values in the policy held on behalf of the

member and the overall liability of the insurer is determined by the terms and conditions of the policy. It states that neither the fund nor the administrator can enhance a policy benefit. Apart from the fact that the fund, as policyholder, legally may not make adjustments to benefits and values under a policy, it in any event does not have funds with which to enhance a benefit or a value under any of its policies. Members' contributions are payable for the period determined in the policy and if the member ceases to pay contributions after he has paid sufficient contributions to the fund, the policy obtains a paid-up value, with reduced benefits being payable.

- [5] The insurer states that the policy documents provide for the amounts payable to be amended if the maturity date is advanced. The sum assured plus bonuses as allocated on 1 February 2005 were only payable on 1 August 2014, and the difference between this amount and the early retirement benefit of R31 954, according to the insurer, is due to the time value of money, as more than 9 years of the original policy term was still outstanding when you took your early retirement benefit. It therefore contends that the difference is not a deduction of fees, or due to costs, or even a penalty, but is simply due to discounting a value (the sum assured plus bonuses) payable on a future date (1 August 2014) to a current date (1 February 2005).
- [6] The insurer advises that at your request the contractual maturity date was advanced to 1 February 2005. The early retirement benefit on 1 February 2005 was R31 954,90. A lump sum amount was paid to you in an amount of R10 651,63, while the two thirds remainder of R21 303,27 was transferred to a Galaxy Living Annuity as requested by yourself. The following summary of your benefit was presented:

“Total paid-in premiums up to 1 February 2005	22 193,28
Sum assured plus bonuses payable on 1 August 2014 as allocated up to 1 February 2005	59 584,33
Early retirement benefit on February 2005	31 954,90”

- [7] The fund concludes that both Sanlam, as the administrator of the fund, and itself have acted in accordance with the rules of the fund, and that the fund has fulfilled its duties to you as a member.

#### Determination and reasons therefor

#### Jurisdiction

- [8] There is no merit to the preliminary 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 *JJ Schwartz v Central Retirement Annuity Fund & Another* [2005] 5 BPLR 435 (PFA) at paragraphs [12] to [28] and *Louw v Central Retirement Annuity Fund & Another* BPLR [2005] 7 BPLR at paragraphs [17] to [36], I cannot uphold the contention that this matter constitutes “long term insurance business” over which I have no jurisdiction.
- [9] 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 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 s51(a) [sic] 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.”

- [10] In addition, 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 fund value has been reduced) in consequence of the maladministration of the fund (in the form of the levying of undisclosed charges), your grievance constitutes a complaint as defined. (See *Louw* at paragraphs [11] to [15].)

### Merits

- [11] It is evident from the benefit summary given in paragraph [6] above that the reduction in value of your benefit is not simply a capital discount to allow for the present day value of the sum, as implied in the response. It is clear from the words “Sum assured plus bonuses payable on 1 August 2014 as allocated up to 1 February 2005” that the amount of R59 584,33 represented the amount standing to your credit as at 1 February 2005. This is further confirmed by the value of the death benefit appearing on the statement from Astute Financial Services Exchange annexed to your

complaint. This statement was requested on 14 January 2005, and indicated the values as at 1 January 2005. It showed the death benefit as R63 521,41 and reflected the Asset Value (current fund value) as R61 095,77. Furthermore, it included illustrative maturity values based on high and low growth scenarios of R149 299,04 and R132 561,00 respectively. (The disparity between the amount of R61 095,77 and R59 584,33, is presumably due to a negative return rate for the previous month, or the fine-tuning of the calculation.) My assistant established from your financial adviser that Astute Financial Services Exchange offers a service to which financial advisers can subscribe in order to access benefit values for their clients. These values are provided by the relevant funds or insurers. In any event, neither respondent took issue with the document in question, and I must assume that the information contained therein was not in dispute. I am therefore satisfied that the value of your fund share at the time that you advanced your retirement date was R59 584, 33 in present day terms.

- [12] I turn now to the question of whether the deduction of R27 629,43 that was effected on 1 February 2005 was authorized in terms of the rules of the fund or in the underlying policy document. Rule 2 of Part 7 reads, in part, as follows:

“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.”

- [13] The policy provision in question which regulates the computation of such a reduced benefit states

**“VERVROEGING OF UITSTEL VAN UITKEERVOORDELE**

- 3 Indien die versekerde dit verkies, kan die uitkeervoordele gedeeltelik of ten volle beskikbaar word
- op enige datum na die vyf-en-vyftigste en voor die sewentigste verjaardag van die versekerde, of
  - .....

By so ‘n vervoeging of uitstel word die bedrae en bepalings van hierdie polis verander soos deur Sanlam bepaal.”

- [14] The provisions of the policy document are therefore incorporated by reference into the rules and one must have regard to them in determining the benefit payable. The relevant clause in the policy document is that set out in para [13] above, which provision the respondents rely on for authority to make the deductions. The ambit of these “amendments” is nowhere stipulated. But that is not to say the value is to be left to the administering insurer’s untrammelled discretion, bereft of any considerations of reasonableness, good faith and fairness. Some

- reasonable standard must be met. Nothing in the policy document furnished to me by the respondents authorizes the deduction of almost half of the fund value, by reason merely of advancing the retirement date. The average reader of such a clause, not being privy to the secret and undisclosed “actuarial rules” for computation of such a reduced benefit, might reasonably conclude that the reduction would amount to no more than future contributions not paid, and future growth not attained.
- [15] 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] 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.
- [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 the *Central Retirement Annuity Fund* 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.”
- [18] For the above reasons, I am satisfied that the fund was not entitled to permit the above deduction of R27 629,43 to your benefit, since it was not

authorized by the rules or by the terms of the policy between the fund and the insurer. Because this reduction of the benefit was effected by and for the benefit of Sanlam in circumstances where the policy document does not allow therefor, the order in that regard must be directed at Sanlam.

Relief

[19] I therefore make the following order:

[19.1] It is hereby declared that the respondents were not entitled to effect the deduction of R27 629,43 from your fund share by reason only that you advanced your retirement date;

[19.2] Sanlam is ordered to pay to you, or transfer to an institution of your choice permitted by the applicable legislation, the amount of R27 629,43 less any deductions permitted in terms of the Pension Funds Act, within six weeks of the date of this ruling;

[19.3] Sanlam is ordered further to pay interest on the amount of R27 629,43 at the *mora* rate of 15,5% per annum reckoned from 1 February 2005 until date of final transfer or final payment.

DATED AT CAPE TOWN ON THIS THE                      DAY OF                      2006.

Yours faithfully

**VUYANI NGALWANA**  
PENSION FUNDS ADJUDICATOR