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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”) – JH MARTINDALE v SOUTH AFRICAN RETIREMENT ANNUITY FUND & OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED

Introduction

- [1] This matter concerns the fact that you have received no pension increases from the fund. The complaint was received by this office on 26 September 2005 and a letter acknowledging receipt thereof sent to the complainant on 21 October 2005. On 21 October 2005 a letter was dispatched to the respondents giving them until 14 November 2005 to file a response to the complaint. The response dated 11 November 2005 was received on 14 November 2005.
- [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 South African Retirement Annuity Fund and Old Mutual Life Assurance Company (SA) Ltd on 24 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,

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

on 2 March 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.

Facts

- [3] On 1 March 1989 you became a member of the South African Retirement Annuity Fund (“the fund”) which is both administered and underwritten by Old Mutual Life Assurance Company (SA) Limited (“Old Mutual”). On joining the fund Old Mutual issued two policies of insurance to the fund on your life, namely policy 6072310 (“policy A”) and policy 6079579 (“policy B”).
- [4] Your monthly contributions in respect of policy A were R809.87 and you paid a lump sum of R130 580 in respect of policy B. Your chosen date of retirement was 1 March 1993 and 1 March 1992 in respect of policy A and policy B respectively. Subsequently however you altered the date of your retirement in respect of policy B to 1 March 1993 so as to coincide with that of policy A.
- [5] On your retirement on 1 March 1993 you received a benefit of R330 388.13 in respect of both policies. You elected to receive R106 699.76 in cash and the balance of R223 680.37 was used to purchase a compulsory annuity in the name of the fund. You receive a monthly annuity of R3 300.21 in respect thereof of which R753.35 is allocated to fund the premiums payable in terms of a life assurance policy (Flexilife policy 8478573) which you purchased on account of having selected the so-called Capital Preservation Option.

Complaint

- [6] You have not received any increases in your annuity since you retired and for this reason request that the fund pay you inflation related increases backdated to 1 March 1993 when you retired.

Response

- [7] The fund and Old Mutual have both responded to your complaint. I shall refer to them collectively as “the respondents”.
- [8] The respondents state that the rules do not provide any form of annual increase other than what is provided for in the annuity policy purchased with the member’s retirement benefit. Your annuity policy is a so-called ‘non-escalating life annuity’ which does not provide for any increases. The

- respondents explain that had you selected a life annuity with annual income increases, you would have received an annuity substantially less than the R3 300.18 which you currently receive. The respondents state that in any event the option of an annually increasing annuity is not available to a member who selects the Capital Preservation Option.
- [9] The respondents contend that, in addition to this, you cannot rely on sections 14A and 14B of the Act which requires funds to implement certain minimum pension increases.
- [10] According to the respondents, sections 14A and 14B were promulgated to protect a certain class of persons, namely, *“those who, having rendered service to a particular employer for several years, were in a position of vulnerability and exposed to the ravages of inflation when they ceased employment”*. The respondents contend that the intention of the legislature was to impose an obligation on employer funds to protect such persons by imposing minimum pension increase requirements but that such was never intended for voluntary investments in private funds such as retirement annuity funds.
- [11] The respondents conclude that within the meaning of the terms contemplated in sections 14A and 14B the annuity income which you receive is not a “pension” and you are also not a “pensioner”. For this reason too you are not entitled to minimum pension increases in terms of its provisions.
- [12] The respondents state you would also, in any event not be entitled to any pension increase since despite its contention with regards to the applicability of sections 14A and 14B, a policy with regard to minimum benefit increases has nevertheless been adopted. Essentially the policy provides that the fund is not in a position to afford its annuitants benefit increases over and above those provided for by the annuity policies.

Determination and reasons therefor

- [13] Since the policy was purchased in the name of the fund, you continue to be a (pensioner) member of the fund and thus the fund (not Old Mutual from which the annuity was purchased) continues to be liable for your pension.
- [14] The Act prescribes that after the commencement of the new surplus legislation on 7 December 2001, within a certain period all funds must provide for minimum pension increases to pensioners.
- [15] Section 14A and 14B of the Act to which the respondents have referred essentially require that every pension fund organization must establish

and implement a minimum pension increase policy which must aim to award a percentage of the consumer price index (CPI) or some other measure of price inflation which is deemed suitable and also deal with how often the increases will be granted. The minimum pension increase is then, in simple terms, the minimum of inflation-related increases (as set out in the minimum pension increases policy aforementioned) and increases that can be afforded with reference to which is sometimes termed the “Notional Pensioner Accumulation Account”.

- [16] The implication for the fund is that it cannot rely on the fact that your chosen annuity is a level annuity and, as such, did not provide for built-in increases. The fund is obliged to comply with the minimum pension increase provisions contained in section 14A and 14B of the Act. If the fund’s investments have performed well in a reporting period, then the pensioners, including those who elected level annuities, may also benefit from the fund’s financial windfall. The Act requires the fund, at the very least, to ascertain whether it can afford to give its pensioners a pension increase during the year.
- [17] Sections 14A and 14B also do not distinguish between retirement annuity funds and other types of funds. Therefore the respondents’ argument that the said sections do not apply to retirement annuity funds cannot be sustained.
- [18] Given that the fund’s pensioner increase policy as it stands is based on an incorrect interpretation of the Act, the appropriate order is to declare the policy invalid and to remit the matter back to the board for a fresh decision as to the appropriate minimum pension increase policy to be adopted pursuant to the requirements of sections 14A and 14B.

Relief

- [19] In the result I make the following order:
- [19.1] The fund’s pensioner increase policy is hereby declared invalid.
- [19.2] The fund is ordered to establish and implement a pension increase policy as required in terms of section 14B(3) of the Act within 6 weeks of the date of this determination.
- [19.3] If the fund should fail to do this within the stipulated period, the complainant is free to approach the Registrar of Pension Funds on the same papers for relief.

