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Please quote our ref: PFA/EC/3417/05/KM

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“The Act”): J. BLOEM v SOUTH AFRICAN RETIREMENT ANNUITY FUND (“the fund”) & OLD MUTUAL LIFE ASSURANCE COMPANY SOUTH AFRICA LTD (“Old Mutual”)

Introduction

[1] Having considered the complaint that was received by this office on 19 May 2005, as well as further written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below. 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 23 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 19 April 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

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), N van Coller (Assistant Adjudicator), L Mballo (Assistant Adjudicator), R Maharaj (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), Solomzi Gcelu (Assistant Adjudicator)

Office Manager: L Manuel

background that we now determine this complaint in the ordinary course.

The complaint

- [2] Your complaint concerns the calculation of the value of your retirement benefit, which was reduced as a consequence of your election to advance your retirement date from 1 January 2007 to 1 August 2004. Two policies (“the fund policies”), policy no 488 4678 and 6841394, were taken out by the fund with Old Mutual in respect of its liability to fund your retirement benefit. You have also complained in respect of the yield on policy no 852524 taken out with Old Mutual. You have requested that this tribunal verify that you have received your due entitlement.

The response

- [3] A response was received from the fund, together with an explanatory note from Old Mutual.
- [4] The fund has raised a technical point that your grievance relates to long-term insurance business that is regulated by the Long-Term Insurance Act 52 of 1998 and not the Pension Funds Act. It avers therefore that your grievance does not amount to a complaint that falls within the definition set out in the (Pension Funds) Act. For this reason it states that I do not have jurisdiction to determine the matter.
- [5] The fund also claims that the first policy on which your complaint is based (policy no 8525242) was purchased directly from Old Mutual in your own name. It is therefore an insurance product according to the fund, as there is no pension fund involved. It is contended that I lack jurisdiction over this portion of your complaint on this ground as well.
- [6] The following information has been furnished with regard to the calculation of your benefit. Your total contributions amounted to R73 510 in respect of policy 4884678 and R39 000 in respect of policy 6841394. The reduction in your fund value was due to the fact that you elected to advance your retirement date. Since you took your retirement benefit at the time that you ceased contributions to the fund, the benefit was not made paid up, and no additional expenses were debited in this regard. However, due to the advancement of the retirement date, the accumulation account held on your behalf in respect of policy 4884678 was reduced from R132 631 to R128 019, and that of policy 6841394 from R66 042 to R59 454. The Accumulation Account as described by Old Mutual is a notional account in terms of which it determines its liability to the member under the policy. This account therefore consists of credits (contributions and investment

- return) and debits (expenses and benefit charges).
- [7] The fund contends that since the investment vehicle underlying your benefit is a life insurance product, the calculation of the value of that policy is determined by insurance and not pension law principles. In order to comply with the Long-term Insurance Act, it argues, the value of the policies must be calculated in accordance with principles that are “actuarially sound”. It appears that the fund, therefore, defers all determination of the value of the benefits to the insurer.
- [8] The fund relies on the following rule for authority to allow Old Mutual to effect the above “reductions” to the Accumulation Account held in respect of the member.

Rule 6.7 provides:

“All benefits payable by the FUND to MEMBER and LIVES ASSURED are fully secured by the UNDERWRITER by means of ANNUITY POLICIES or CEDED POLICIES. The FUND’s liability in respect of benefits payable at retirement, death, ill-health retirement or disability shall not exceed the amount or amounts payable in terms of the ANNUITY POLICIES”

- [9] With regard to the terms and conditions set out in the policy document, the fund contends that part 2 Clause 12 of policy no 4884678 and Part 2 Clause 13 of policy 6841394 both provide that an option to change the normal retirement date is available subject to the conditions imposed by Old Mutual at the time. Such conditions must comply with insurance law, resulting in a recalculation of your benefit to ensure that it is actuarially sound and does not make a distinction between withdrawing and remaining members. The fund submits that the above rule and policy clauses therefore authorize the debits to the Accumulation Account in respect of advancing the retirement date.

Determination and reasons therefor

Jurisdiction

- [10] There is no merit to the preliminary point raised by the fund. 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.

- [11] 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 (handed down on 20 October 2005) (“the de Beer judgment”) 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.”

- [12] Furthermore 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

- [13] The rules are silent on the question of the quantification of a retirement benefit in circumstances where the retirement date has been advanced. Rule 4.2.1 defines the retirement benefit in the following terms:

“Each MEMBER’S retirement capital determined in terms of the ANNUITY POLICY shall be applied in purchasing a retirement annuity on such MEMBER’S life in accordance with the provisions of the ANNUITY POLICY.”

- [14] It thus quantifies the benefit with reference to the determination of the insurer (Old Mutual). It is therefore unhelpful in itself and one must accordingly look to the policy document to gain an insight into the methodology of determining the benefit.

- [15] Both policy documents contain the same definition of Accumulation Account which reads

“An Accumulation Account is established for each policy. This account will be credited with contributions received from the Policyholder [the fund] and with bonuses added by Old Mutual. It will be debited with expense charges and the cost of life cover and Supplementary Benefits (if applicable).”

[16] Both policies contain a definition of expense charges, which although similar, differ slightly. They are therefore both reproduced below.

[17] Policy 4884678 contains the following definition:

“A Contribution Levy will be debited against the Accumulation Account whenever a contribution is paid. The amount of the Contribution Levy is [blank] % of the contribution paid.

A Policy Fee consisting of R1,50 per month plus R0,60 per payment will also be debited to the Accumulation Account.

The above charges are those applicable for this insurance plan at the commencement date. Should this plan subsequently be changed, the level of the charges applicable to the changed plan may be adjusted in line with the level pertaining to new plans at the date of such change.”

[18] Policy 6841394 states as follows with regard to expenses:

“At the beginning of every month a contribution levy will be debited against the Accumulation Account. The amount of this levy will be [blank] of the contractual premium payable as indicated in Part 1 (after the inclusion of the debit/stop order discount if applicable, and the deduction of the policy fee and rider benefit premiums).

A Policy Fee consisting of R2,40 per month plus R0,60 per contribution payment will also be debited against the Accumulation Account. However, if contributions are paid monthly in cash, a higher Policy Fee may be levied.

The above charges are those applicable for this insurance plan at the commencement date. Should this plan subsequently be changed, the level of the charges applicable to the changed plan may be adjusted in line with the level pertaining to new plans at the date of such change.”

[19] Apart from the clause referred to in the response permitting the member to advance his retirement date subject to “conditions imposed by Old Mutual”, there are no other provisions in the policy that deal in any way with the debiting of charges or expenses against the Accumulation Account. In an extensive explanatory response filed by Old Mutual, it contends that in the event of advancement of retirement date, the member has ceased to abide by the conditions of the policy to which he initially agreed. For this reason his benefit has to be recalculated in accordance with the insurer’s practice, in order to ensure that it remains actuarially sound. The actuarial principles involved are those pertaining to the regulatory framework governing long-term insurance business. The effect of this “recalculation” is to reduce the balance in the Accumulation Account. Although not specifically stated, the reduction is in effect a recovery of “unrecouped costs” of the insurer, which it would have regained through its administration charges had the contributions gone to full term.

- [20] However, the right to recover those costs is nowhere set out in the policy document, unless it can be accommodated within the rubric “subject to conditions imposed by Old Mutual”. This, in my opinion, is far too vague in its formulation to be relied on as authorization for the recoupment of undisclosed costs and expenses, or the general formulaic reduction of the benefit. A member can expect, when the charges and expenses have been clearly set out in the policy document, that that is an end to it. The above phrase empowering Old Mutual to determine the benefit in accordance with its conditions might, on a purposeful construction, suggest to the member that the benefit may be less than previous estimated final benefits on account of a cessation in contributions. It certainly would not convey to the unsuspecting member that costs and charges which have hitherto remained undisclosed will suddenly be accelerated and debited as a lump-sum against credits in the Accumulation Account held on his behalf by the insurer.
- [21] The calculation of the value of the Accumulation Account must be in accordance with the terms of the policy document which records the agreement between the fund as proposer and owner of the policy and the insurer in its capacity as underwriter. The fund and the insurer, in its capacity as administrator of the fund, and thus agent for the fund, must ensure that any benefit due to a member is calculated in accordance with these precepts.
- [22] I can find no authority in the rules or the policy document for the deduction of the amounts debited in the Accumulation Account in respect of the advancement of your the retirement date. The fund may only do what is set forth in its rules (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239 D). 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. As Davis J stated in the *Central Retirement Annuity Fund* decision (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.”

- [23] For the above reasons, I am satisfied that Old Mutual is not authorised (and the fund has no power to allow) to levy a fee solely by reason of the advancement of one’s retirement date without more. Because this fee was levied not by the fund but by Old Mutual, the appropriate order for its reversal must be made against Old Mutual in its capacity as administrator.
- [24] Policy 8525242 is an endowment policy in terms of an individual contract between an insurer and yourself. Since it does not relate to a pension fund, I have no jurisdiction to investigate this aspect of your grievance, since it does not fall within the definition of a complaint. The more appropriate course is for you to lodge your complaint with the Ombudsman for Long-term Insurance, who has jurisdiction over insurance schemes. His details are as follows:

Tel: (021) 657 5000
Fax: (021) 674 0951
Private Bag X45
Claremont
7735

Relief

- [25] I therefore make the following order:
- [25.1] The complaint concerning policy no 8525242 is dismissed.
- [25.2] It is hereby declared that the respondents were not entitled to deduct the amounts of R4 612 in respect of policy no 4884678 and R6 588 in respect of policy no 6841394.
- [25.3] Old Mutual (in its capacity as administrator of the fund) is directed to pay to you, or transfer to an institution of your choice permitted by the applicable rules and legislation, the amounts referred to in paragraph [25.2], within six weeks of the date of this ruling;
- [25.4] Old Mutual (in its capacity as administrator of the fund) is further ordered to pay interest on the amount of the payment or transfer in paragraph [25.3] at the *mora* rate of 15,5% per annum reckoned from the date of levy of the respective deductions until date of transfer or payment.

SIGNED IN CAPE TOWN ON THIS DAY OF 2006

Yours faithfully

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VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR