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Please quote reference: PFA/WE/3251/2005/nvc

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): G A Bicket v Central Retirement Annuity Fund (“the fund”) and Sanlam Life Insurance Limited (“Sanlam” or “the insurer”)

Introduction

[1] Having considered the complaint received by this office on 28 April 2005 and further written submissions, I consider it unnecessary to hold a hearing in this matter. 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 18 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 6 February 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. I shall set out the facts as far as essential for understanding this determination.

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), Solomzi Gcelu (Assistant Adjudicator) T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

Factual Background

- [2] You became a member of the fund on 1 April 1988, initially contributing at the monthly rate of R40.40 escalating by 15% annually on 1 April each year. In terms of the policy document, your elected retirement date is 1 April 2010, but due to your redundancy in 2004, you could no longer afford to pay the contributions and decided to advance the payment date to 1 April 2005. Your monthly contributions to the fund were R378.09 prior to retirement and your total contributions amounted to R34 722.76.
- [3] The fund value on 1 April 2005 was R66 175. 21 and from this amount you were paid a cash amount of R22 059 and the balance was utilized to buy a monthly pension currently at R320.87.
- [4] You were advised by Sanlam in its letter dated 12 March 1990 that it was estimated that your monthly pension would amount to R632 as at 1 January 2005 and R1 380 as at 1 January 2010.

Complaint

- [5] Your complaint concerns the decrease in the monthly pension in fact paid to you by the fund (R320.87) as opposed to the amount illustrated in Sanlam's letter dated 12 March 1990 (R632). You contend that the pension is your only income and you would have been "better off" if you qualified for a State Old Age Pension, or had saved your money yourself over the period. You want this tribunal to investigate this matter.

Response by the fund

Technical points

- [6] The fund has raised two technical points in response to the complaint and has also dealt with the merits. The technical point is that you have not submitted a "complaint" as defined in the Act as it is not "about the execution of duties by the Fund (or administrator)" but is in effect "about the execution of duties by the insurer under the policy - namely about the internal operation of the policy, notably the operation and application of the rules of the policy, which constitute "long-term insurance business" as defined in, and regulated under, the Long-Term Insurance Act."
- [7] The second technical point is that because this complaint is "not about "maladministration of the Fund" by the Fund (or the administrator), it is not a "complaint" as defined in the Act.

Merits

- [8] On the merits the fund argues that illustrative values are not guaranteed

and are based on bonus, annuity and inflation rates over the period. It was stated in the policy document that the illustrative values were based on a future annual growth of 15%. The purpose of the illustrations is merely to give an indication of the possible values if certain assumptions are met.

- [9] The fund states that the average internal rate of return on the premiums paid was 8.48% while the mainstream inflation index, over this period was 7.06%. It says that the policy therefore provided a return in excess of inflation.
- [10] The fund further advises that Sanlam confirmed that the advanced maturity value and the pension benefits were correctly calculated. However, as there was an early termination, the insurer was unable to recover its costs over the full term of the policy and compelled to recover unrecouped charges at early termination.
- [11] Described graphically, the calculation is as follows, according to the fund:

"Total premiums paid up to 31/03/2005	R34 722.76
Less: Total policy fees and administration charges	R 2 671.88
Equals: Amount available for investment	R32 050.88
Plus: Investment return up to 31/03/2005	R37 925.93
Equals: Fund value of policy on 01/04/2005 prior to early termination	R69 976.81
Less: Early termination adjustment	R 3 801.60
Equals: Early retirement benefit on 01/04/2005	R66 175.21"

Determination and reasons therefor

Technical points

- [12] There is no merit in the technical points 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 *Schwartz v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 43 (PFA) at paragraphs [12] to [28] and authorities referred to therein and *Louw v Central Retirement Annuity Fund and Another* [2005] 7 BPLR 363 (PFA) at paragraphs [17] to [36]. I cannot uphold the contention that this matter constitutes "long-term insurance business" over which I have no jurisdiction.
- [13] 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 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."

[14] 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 investment value has reduced to much less than what you expected) in consequence of the maladministration of the fund (in the form of reducing your investment value by the levying of undisclosed charges), your grievance constitutes a complaint as defined (See *Louw* (cited above) at paragraphs [11] to [15]).

[15] Both technical points are therefore dismissed.

Merits

[16] Rule 1 of Part 8 states that a pension is payable from the member's retirement date. "Pension" is defined as:

"PENSION shall mean a life annuity or a term annuity according to the context in which the word is used."

[17] Rule 2 of Part 7 states:

"A MEMBER's CONTRIBUTIONS are payable during the period determined in the POLICY issued on his life.

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."

[18] The rules of the fund thus cater for reduced benefits, when contributions are terminated, although its calculation is not set out. The policy documents also need to be consulted in order to ascertain the calculation of the pension. The policy document provides that the benefits are based on the "provisos and assumptions", which state:

"...

The actual benefits afforded by this policy shall be determined by the actual bonus rates and bases of calculation applicable from time to time.

On retirement before the contractual retirement date, Sanlam shall determine the available maturity value. This value may be less than the balance of the Investment account at the same time.

Illustrative values in this quotation are subject to the following, and calculated on the following assumptions

- The premium will be increased...
- Sanlam will maintain an investment bonus rate of 15.00 per cent per annum, consisting of
 - (a)...
 - (b)...
- The annual pension will be payable on a monthly basis...
- The basis for the allocation of benefits will remain unchanged in respect of additional premiums paid...
- Sanlam's current pension rates will remain unchanged

The illustrative values in this statement are not guaranteed. They are shown Inclusive and exclusive of capital bonuses to illustrate the effect of non-vesting bonuses.”

- [19] From the evidence the inflation rate declined from 15% in 1988 to 14.3% in 1990 to 1.4% in 2004 and with it, the investment return on your benefit. The declared bonus rate fell from 18% in 1990 to 6.5% in 2004. As the illustrative rate of return was not achieved, the benefits illustrated at those rates are not payable.
- [20] Furthermore, consideration must be given to the fact that the values given to you at the maturity date of April 2010 included contributions plus projected bonuses up to this date which could not be applied in April 2005. Having retired earlier meant that you would receive the benefit over a longer period, which also impacts on the calculation of the benefit prior to the initially elected maturity date.
- [21] The illustrative values do not permit you (nor do the rules or the policies in question) to receive a proportionate share of the value at the retirement date by virtue of retiring three or more years short of the date you selected for your retirement. Furthermore, although you are aggrieved about the decrease in the benefit value, you have not attacked the basis for the illustrative values nor have you shown that the fund was maladministered by the adoption of the illustrative values.
- [22] However, when it comes to the charging of fees, neither the rules of the fund nor the policy documents provide for the levying of the “early termination adjustment” of R3 801.60 shown in the above calculation in paragraph [11].
- [23] The fund, being a registered pension fund organization, is bound by its rules, and can thus only do what its rules authorize it to. There being no

reference in the rules to the charging of any fee upon the premature termination of contributions, neither the fund nor the insurer may charge it.

- [24] The binding force of the rules is confirmed in Section 13 of the Act. As the Supreme Court of Appeal held in *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28], the trustees of a fund may do with the fund's assets only what is set out in the rules.
- [25] 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. There is nothing in the rules, the policy documents or the Act that permits the charging of an "early termination adjustment" fee.
- [26] 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."

- [27] 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.

Relief

- [28] In the result I make the following order:

[28.1] It is hereby declared that the respondents had no right in law to levy the charge of R3 801.60 by way of "early termination

adjustment” on your investment value;

[28.2] The fund and Sanlam (in its capacity as administrator and/or investor of the assets of the fund) are jointly and severally ordered forthwith to calculate the amount that would have been available for the purchase of an annuity on your behalf had the amount of R3 801.60 not been levied against your investment value.

[28.3] Sanlam is further ordered to pay you, or to transfer to an institution of your choice in terms of the rules and applicable legislation, the amount referred to in paragraph [28.2] above, less any deductions permitted in terms of the Act, within six weeks of the date of this ruling.

[28.4] Sanlam is further directed to pay interest on the amount calculated in paragraph [28.3] above at the rate of 15.5% per annum, from the date of this ruling to the date of such payment or transfer.

Dated at Cape Town on this the day of 2006.

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator