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Please quote our reference: PFA/WE/3523/2005/nvc

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): Z Lupondwana v Lifestyle Retirement Annuity Fund (“the fund) and Liberty Group Limited (“Liberty” or “the insurer”)

Introduction

- [1] Your complaint concerns the amount deducted from your fund share on your reduction of contributions. The complaint was received by this office on 23 May 2005 and a letter acknowledging receipt thereof sent to you on 14 June 2005. On the same date letters were dispatched to the respondents giving them until 5 July 2005 to file responses to the complaint. The responses dated 11 July 2005 were received on 19 July 2005. The fund copied you with its response. No reply was 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 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 12 April 2006 we were informed that the parties in this complaint had

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Office Manager: L Manuel

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.

- [3] As the facts are known to the parties I shall only repeat those facts that are pertinent to understanding this determination.

Factual Background

- [4] You commenced contributing to the fund on 1 June 2000, when you were 32, at the monthly rate of R1 500 with an annual escalation of 10% on the policy's (number 0016777032) anniversary. In November 2000 you invested in an additional two underlying policies, one to provide pure retirement benefits, and the other to provide risk cover. In addition to these two new policies, you maintained the original policy (number 0016777032), at a monthly contribution rate of R1 350 to prevent it from lapsing. With effect from 6 August 2003, you switched the investment of the contributions applied to this policy (number 0016777032) from a Liberty investment product to Allan Gray's Balanced Fund.
- [5] Up to April 2004 you contributed to all three policies, but decided to cease paying contributions to the fund in respect of the original policy (number 0016777032) as it had come to your attention that the administration charges were "excessive". You subsequently requested Liberty to make the policy (number 0016777032) paid-up, with the intention of leaving the proceeds in the policy until you reached your retirement age at 55. In total you contributed R64 403.10 to the fund in respect of this policy.
- [6] At the time that the policy (number 0016777032) was made paid-up on 1 April 2004, the value in the investment account was R66 245.94. However, the value dropped to R43 722.33 after the "contribution cessation charge" of R22 523.61 was levied due to your ceasing to pay the contributions.

Complaint

- [7] Your complaint concerns the "contribution cessation fee" of R22 523.61 that the fund charged when you ceased to pay contributions with effect from 1 April 2004, in respect of policy number 0016777032.

Response by the fund

Technical point

- [8] The fund has raised a technical point namely that the value of the retirement benefit is determined with reference to the operations of the

policy, which is a life-policy as defined in the Long-Term Insurance Act, and not the rules of the fund. The operation of the policy, according to the fund, falls outside the Pension Funds Adjudicator's jurisdiction.

- [9] The fund contends that Liberty fulfils the role of administrator of the fund and is also the insurer of the policies issued to the fund in respect of benefits that the fund must provide to its members. There is no contractual *nexus* between the insurer and the member.

Merits

- [10] On the merits, the fund refers to clause 8 of the policy document, which states:

“ 8. Paid-up Benefits

Provided that the Contract has an Asset Values (sic) it may be paid-up. No further contributions shall then be payable, and all benefits otherwise payable shall be reduced accordingly. The reduced benefits shall continue to participate in the portfolio/s selected.”

- [11] The fund also states that rule 5.2, which reads as follows, applies:

“If a MEMBER prematurely discontinues his CONTRIBUTIONS to the Fund, then provided CONTRIBUTIONS have been paid for the minimum period required in terms of the assurance on the MEMBER'S life he will be entitled to paid-up BENEFITS under the Fund for an amount determined in relation to the actual CONTRIBUTIONS paid.”

- [12] The fund says the insurer recovers its expenses over the expected life of the policy from the charges and fees levied under the contract and in terms of the rules approved by the statutory actuary. Where a policy is discontinued prematurely, the insurer is unable to do so, compelling it to recover the costs from the policy's investment value. Without the ability to recover its expenses, it says, the insurer's financial soundness will be compromised, which will prejudice its ability to issue actuarially sound policies.

- [13] The specified details of the expenses incurred on policy number 0016777032 are given as follows by the fund:

“Commission plus VAT	R14 309.62
Distribution plus marketing costs	R 3 577.41
Acquisition costs	R 2 000.00
Ongoing renewal costs	R 1 050.00
Finance costs on outstanding expenses less recoveries	R 6 764.40
Less Commission Claw back	R 896.26
Less Expenses Recovered to date via the charges	R 3 564.88
Outstanding expenses as at 30/11/2004	R 23 240.29”

- [14] The fund states that the recovery of expenses was based on a contractual term of 23 years, up to age 60, but contributions were paid for only 42 months. (According to the policy documents your elected retirement date is 1 November 2023, at the age of 55.) The fund adds that the actual charge effected due to your early cessation of contributions at 30 April 2004 was R22 523.61.

Liberty's response

- [15] Liberty states that the points raised by the fund in its response has addressed all the issues.

Determination and reasons therefor

Technical point

- [16] With regard to the technical point raised by the fund, I am satisfied that the complaint does not concern long-term insurance business but actually relates to a retirement annuity fund, namely, the Lifestyle 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 435 (PFA) at paragraphs [17] to [28] and authorities referred to therein and *Louw v Central Retirement Annuity Fund and Another* [2005] 7 BPLR 622 (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.
- [17] 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) (the “*de Beer* judgment”) at 660C - E 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 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.”

- [18] The technical point is dismissed.

Merits

- [19] The issue for determination is whether the fund and/or Liberty (in its capacity as administrator and/or insurer of the fund assets) are entitled to

- deduct an amount from your fund share by reason solely of your ceasing to pay contributions. The answer must lie in the rules of the fund. There is no provision authorizing such a deduction in the rules.
- [20] Rule 5.2 set out in paragraph [11] provides for paid-up benefits that will be paid to the member but does not set out what method will be followed in determining the amount. What is clear, however, is that it does not provide for the deduction of charges in the form of unrecouped expenses when contributions cease prior to the contractual retirement date.
- [21] 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.
- [22] Mention of charges in the policy document occurs in paragraph 3: Investment Account, which refers to a R12 policy fee and a recurring contribution charge of 4% of the net amount and "any applicable guarantee charges". There is also mention of a management fee of 0.16% of the value in the Investment Account if the contributions are invested in the Guard Bank Money Market Fund. Only the charges set out specifically may be deducted.
- [23] There is nothing in the underlying policy allowing a charging of future management or administration fees upon early termination of contributions. From the evidence, monthly management and administration fees have already been deducted from your monthly contributions and there is no reason for further deduction by reason solely of termination of contributions.
- [24] 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.
- [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.

[26] The section further provides as follows:

“(2) In pursuing its object the board shall-

- (a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;
- (b) act with due care, diligence and good faith;
- (c) avoid conflicts of interest;
- (d) act with impartiality in respect of all members and beneficiaries”.

[27] As Davis J stated in the *De Beer* 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.”

[28] 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 deduction from your fund share not been effected. According to the fund R22 523.61 was deducted on 30 April 2004 in respect of outstanding expenses when you ceased to pay contributions prior to your contractual retirement date. Because this reduction of the investment account was effected by and for the benefit of Liberty in

