



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR  
HELD IN JOHANNESBURG**

CASE NO: PFA/WE/2913/05/KM

In the complaint between:

**D. STONE**

**Complainant**

and

**CENTRAL RETIREMENT ANNUITY FUND**

**First**

**Respondent**

**SANLAM LIFE ASSURANCE LIMITED**

**Second Respondent**

**UNILEVER SA PENSION FUND**

**Third Respondent**

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**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION  
FUNDS ACT 24 OF 1956 (“the Act”)**

## INTRODUCTION

[1] This complaint was received by this office on 3 April 2005 and a letter acknowledging receipt thereof was sent to the complainant on 19 April 2005 and, on that same day, a letter was dispatched to the first respondent (“CRAF”) giving it until 10 May 2005 to file a response to the complaint. The response from CRAF dated 3 May 2005 was received on 4 May 2005. On 12 May 2005 the response was sent to the complainant for a reply by 27 May 2005. A reply was received from the complainant on 16 May 2005. A response dated 23 December 2005 was also received from the third respondent (“the Unilever fund”) on the same day, which had been joined as a party to the proceedings. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination, together with reasons therefor, appears below.

## THE COMPLAINT

[2] The complaint is, in effect, that CRAF's management board (termed the "management committee" in CRAF's rules) acted in excess of its powers as contained in the rules. The complainant avers that CRAF's management committee refuses to comply with his request for a transfer of his retirement benefit from CRAF to the Unilever Fund of which he is a member. He wishes to consolidate his retirement investments in the Unilever Fund and now approaches this tribunal for a ruling directing "Sanlam" to comply with his request. He has been a member of CRAF for over 25 years. One of the underlying policies in which his contributions have been invested over these years matured in March 2005 and the other in October 2005. He receives a pension from the Unilever pension fund.

### THE RESPONSE

[3] CRAF contends in its response (citing rules 1.4.1 and 1.4.2 of Part 8 of its rules) that the request cannot be acceded to because CRAF rules stipulate that a pension can only be purchased from a registered insurer and Unilever is not a registered insurer. Moreover, CRAF contends, the rules are in line with GN9/95

which prohibits the transfer of monies upon retirement from pension and provident funds to retirement annuity funds. It says the converse applies “*by necessary implication*” to transfers of retirement benefits from retirement annuity funds to pension and provident funds”.

- [4] A response was also received from the Unilever Fund, which was joined as a party because of a direct and substantial interest it may have in the outcome of this complaint. It has drawn attention to rule 8.1 of the CRAF rules which reads as follows:

**“Payment under special circumstances**

8.1 If there are substantial reasons why the MANAGEMENT COMMITTEE should decide that it is not wise to pay a benefit in the way determined elsewhere in these rules, the MANAGEMENT COMMITTEE may pay it as follows according to discretion:

8.1.1 ...

8.1.2 ...

8.1.3 ...

8.1.4 in such a way as the MANAGEMENT COMMITTEE may determine for the benefit of the MEMBER or his DEPENDANTS.

8.2 Any decision of the MANAGEMENT COMMITTEE in terms of this may from time to time be amended according to discretion.”

[5] The Unilever Fund therefore contends that CRAF’s management committee has the discretion to transfer the retirement benefit in accordance with the complainant’s wishes. It has furthermore indicated its willingness to accept transfer of the retirement benefit in accordance with the provisions of rule 16(1) of its own rules, which allows for the transfer of such benefits from other pension and provident funds.

DETERMINATION AND REASONS THEREFOR

- [6] Rules 1.4.1 and 1.4.2 of Part 8 in CRAF rules provide for the purchase of a pension from a registered insurer in the event of a member reaching retirement age. Rule 1.4.1 deals with a situation where the fund is owner of the underlying policy and so provides that upon the member reaching retirement age, the fund as policyholder must purchase a pension from a registered insurer of its choice. Rule 1.4.2 deals with a situation where the member is the policyholder and it says the member must, upon reaching retirement age, purchase a pension from an insurer of his or her choice. The fund's role is simply to see to it that a pension is purchased but has no say in the choice of insurer.
- [7] The dispute in this complaint reduces itself to the exercise by CRAF's management committee of its discretion in terms of rule 8.1 read together with rules 8.1.4 and 8.2 of Part 8, on the one hand, and GN9/95 – a general note issued by the South African Revenue Service (“SARS”) – on the other. The proper exercise of that discretion in turn hinges, in part, on the proper interpretation of GN 9/95, the full text of which is this:

## General Notes - Second Schedule to the Income Tax Act

### General Note 9

**GENERAL SUBJECT:** DEFINITIONS OF PENSION AND PROVIDENT FUNDS

**SPECIFIC ASPECT:** PURCHASE OF ANNUITIES AND TRANSFER TO RETIREMENT ANNUITY FUND AT RETIREMENT

**STATUS:** DECISION

**BACKGROUND:** To confirm the Commissioner for Inland Revenue's policy of not allowing a pension fund or, if it provides annuities, a provident fund to purchase or insure a pension (annuity) at an institution or fund other than a South African registered insurer or to permit such a fund to transfer monies out of the fund for the benefit of a member who did not become entitled to a withdrawal benefit in terms of the rules of the fund.

**DECISION:** The definitions of "pension fund" and "provident fund" in section 1 of the Income Tax Act require such funds to provide the annuity (for life) to a member on retirement from employment. My office accepts that, to comply with the requirement to provide the annuity, the fund may purchase or insure a member's compulsory life annuity at a South African registered insurer.

The rules of some pension and provident funds provide, however, for a transfer of monies to a retirement annuity fund on a member's retirement from employment or before retirement from employment in circumstances other than when a member becomes entitled to a withdrawal benefit, which is not acceptable. Should such a fund transfer monies on this basis or on any other basis which is not directly related to a member's withdrawal from the fund as a result of resignation from or termination of service (other than on retirement from employment) or as a result of the winding up of the fund or in accordance with the provisions of section 19 of the Pension Funds Act or in accordance with the 14 September 1990 arrangement, the approval of the fund, notwithstanding its rules, will be withdrawn.

DISTRIBUTED BY THE OFFICE OF THE COMMISSIONER FOR INLAND REVENUE ON 20 JULY 1995

- [8] The purpose of this general note is clear. It was intended to put a stop to the practice of pension funds and provident funds in their rules allowing members upon retirement from employment (and consequential exit from such funds) to transfer their retirement benefits from such pension funds and provident funds to retirement annuity funds. The general note was considered necessary because the primary purpose of pension and provident funds is, according to definitions

of “*pension fund*” and “*provident fund*” in section 1 of the Income Tax Act, 58 of 1962, to provide annuities for employees upon retirement from employment. If upon retirement from employment members are allowed to transfer their retirement benefits to another retirement investment vehicle, the purpose of the pension and provident fund is lost. Thus, by GN9/95 SARS makes it clear that the only transfer that is permissible from pension and provident funds to another retirement investment vehicle is a withdrawal benefit payable upon resignation or other termination of employment prior to retirement age or upon liquidation of the fund. Once a member reaches retirement age in terms of the rules of a pension fund or provident fund, such fund must purchase annuities for that member and cannot transfer that obligation to another retirement fund.

- [9] The general note specifically forbids transfer of retirement benefits to retirement annuity funds. Why retirement annuity funds and not also pension funds and provident funds? For one thing, a retired member cannot transfer from one approved pension or provident fund to another because of the employer-employee relationship requirement of the Income Tax Act if such funds are to retain their tax approval status. It is thus not necessary specifically to forbid transfers of retirement benefits from one approved pension or

provident fund to another. For another, retirement annuity funds do not provide withdrawal benefits and so a member cannot – with a view to accessing his or her retirement funds – opt out of such funds before chosen retirement age without incurring financial penalties of one sort or another (assuming such penalties are permissible in terms of the rules or other agreement concluded with the investment house). Thus, it is not necessary for SARS specifically to issue a general note in respect of retirement annuity funds saying only withdrawal benefits may be transferred from a retirement annuity fund.

- [10] CRAF says GN9/95 applies “*by necessary implication*” to retirement annuity funds. In other words, it says transfers of retirement benefits from this retirement annuity fund to a pension fund are prohibited by the general note. One need only consider the mischief to which the general note is targeted to dismiss this submission. GN9/95 is expressly intended to prevent pension funds and provident funds from allowing retirement benefit transfers to retirement annuity funds. The reasons for this prohibition have already been highlighted in paragraph [9] above. Again, retirement annuity funds do not provide withdrawal benefits and so there would have been no need for SARS to make it clear (as it does through GN9/95) that only withdrawal benefits can be

transferred from one approved retirement fund to another. In the result, reliance on GN9/95 by CRAF is misplaced as it was clearly not intended to apply to transfers of retirement benefits from retirement annuity funds to pension funds.

[11] But do the rules of CRAF prohibit a transfer of the complainant's retirement benefit from CRAF to the Unilever Fund? For this submission, CRAF relies on rules 1.4.1 and 1.4.2 of Part 8. I have already discussed these rules in paragraph [6] above. On a consideration of rules 1.4.1 and 1.4.2 of Part 8 in isolation, the only method for payment of a retirement benefit from CRAF is purchase by CRAF of a life annuity from Sanlam, or by the complainant from any registered insurer of his choice.

[12] However, rule 8 of Part 8 makes provision for different methods of payment "under special circumstances". In terms of rule 8.1, read together with rule 8.1.4, the management committee has a discretion to pay the retirement benefit in such manner as it may determine for the benefit of the complainant. In the exercise of that discretion, the management committee is enjoined to consider three factors. The first is to consider whether there are "*substantial reasons*" to deviate from the method prescribed in rules 1.4.1 and 1.4.2. The second is to

consider whether “*it is not wise*” to pay the benefit in the manner prescribed in rule 1.4.1 or rule 1.4.2. The third factor is to consider whether it would be in the complainant’s best interests (rule 8.1.4) to pay the benefit in any other manner than that prescribed in rule 1.4.1 or rule 1.4.2. The management committee has considered none of these factors in its refusal to transfer the benefit to the Unilever Fund. In the result, it has failed to exercise its discretion under rule 8 of Part 8.

[13] My ruling, therefore, will be to order CRAF’s management committee to exercise its discretion properly in terms of its rules. GN9/95 does not further its cause in this case in my view.

### RELIEF

[14] My ruling is therefore as follows:

[14.1] It is declared that General Notice 9/95 does not prohibit CRAF’s management committee from effecting a transfer of the complainant’s

retirement benefit from CRAF to the Unilever pension fund;

[14.2] CRAF's management committee is directed to exercise its discretion properly in terms of rule 8.1 concerning the transfer of the complainant's retirement benefit to the Unilever Pension Fund, having regard to all the factors set out in the body of this determination;

[14.3] The discretion is to be exercised and communicated in writing to the complainant, the Unilever pension fund and this office within four weeks after the date of this determination, setting out the decision, all the factors taken into account, and the reasons for the decision.

[14.4] Should the management committee of CRAF fail to exercise its discretion properly and communicate its decision in the manner prescribed in [14.3] above by **12h00 on Thursday 22 June 2006**, this office will substitute its decision for that of the management committee.

DATED AT JOHANNESBURG ON THIS                      DAY OF                      2006.

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**VUYANI NGALWANA**  
**PENSION FUNDS ADJUDICATOR**