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Please quote our ref: PFA/WE/5007/05/NS

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): R SWAN (Late GHC SWAN) v SOUTH AFRICAN RETIREMENT ANNUITY FUND (“the fund”) / OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED (“the insurer”)

Introduction

- [1] Your complaint concerns the value of the death benefit that became payable by the fund to you upon the death of your husband.
- [2] The complaint was received by this office on 23 August 2005, and a letter acknowledging receipt thereof was sent to you on 25 August 2005. On the same date a letter was dispatched to the respondents requesting them to submit a response to the complaint by no later than 15 September 2005. The response of the fund dated 13 September 2005 was received on 15 September 2005. A further response from the fund dated 12 October 2005 was received on the same day. Copies of the responses were sent to you on 7 December 2005 for a reply by 16 December 2006. No reply was received from you.
- [3] After considering all the written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor are set out below.

The complaint

- [4] You are aggrieved by the amount of the death benefit that was paid out to you as a beneficiary of the late GHC Swan (“the deceased”), from policy number 10674448 which was issued by Old Mutual Life Assurance Company (SA) Limited (“the insurer”) to the South African Retirement

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

Annuity Fund (“the fund”) on the life of the deceased, a member of the fund.

The response

Technical points

- [5] The fund states firstly that this is not “a complaint” as defined in the Act in that you do not make any of the allegations set out in the definition of a complaint contained in section 1 of the Act. Secondly, the fund submits that because your complaint pertains to the benefit paid by the insurer upon the death of your husband, it pertains to “insurance business”, and for that reason is not a complaint over which I have jurisdiction.

The merits

- [6] On the merits, the fund refers to various provisions in its rules, which, it submits, bear out its contention that the fund’s liability to you is limited to the amount payable in terms of the annuity policy entered into between it and the insurer for the purpose of providing benefits under the fund to its members.
- [7] In a memorandum from the Actuarial Services of the insurer dated 12 September 2005 addressed to the fund, it is stated that the benefits payable in terms of the policy under consideration are expressly recorded in clause 2 of Part 1 of the policy as being :

Basic Benefit

“**On survival** of the Assured to **1 January 2010** the balance in the Accumulation Account, with a minimum guaranteed amount of **R25 544.00** becomes available to purchase an annuity.

On the death of the Assured before **1 January 2010** the balance in the Accumulation Account becomes available to purchase an annuity.”

- [8] The insurer states further that in its endorsement which is annexed to its letter dated 15 March 2000 addressed to the deceased, the policy was subsequently amended to provide that “ ... *a minimum guaranteed amount of R39 807.00*” *would be available to purchase an annuity “On survival of the Assured to 1 May 2010.”*

The endorsement also stated that “**On the death of the Assured before 1 May 2010** the balance in the Accumulation account becomes available to purchase an annuity.”

- [9] The insurer contends that the “minimum guaranteed amount” provided for in terms of the policy only applies if a life assured survives until the maturity date, and pays premiums until then.
- [10] It states further that upon your husband death on 24 July 2004, the balance in the accumulation account, which amounted to R24 127.83 became payable. The said amount was paid to you in full and final settlement of the death benefit that was due and payable to you as result of your husband death.

Determination and reasons therefor

Technical points

- [11] There is no merit in the technical points raised by the respondent. The crux of this complaint does not constitute long-term insurance business, but actually relates to a retirement annuity fund, which a pension fund organization is as defined in the Act. For the reasons more fully set out in *Louw v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 622 (PFA) at paragraphs [17] to [36] and the authorities referred to therein, I cannot uphold the contention that this matter constitutes “long-term insurance business” over which I have no jurisdiction.
- [8] Furthermore, Davis J (in whose judgment Le Grange AJ concurred) in *Central Retirement Annuity Fund v Adjudicator of Pension Funds & Another*, [2005] 8 BPLR 655 (C), (“the *de Beer* judgment”), at 660D-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 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.”

- [11] In so far as your complaint implicitly relates to the interpretation and application of the rules of the fund, and it is implicit therein that a dispute of law has arisen in relation to the fund between you and the insurer and the fund (regarding the computation of the death benefit payable in terms of section 37C of the Act to you), your grievance constitutes a complaint as defined (See *Louw* (cited above) at paragraphs [11] to [15]).
- [12] The respondent’s contention that this matter falls outside my jurisdiction flies in the face of clause 15 of the policy document, which provides:

“APPOINTMENT OF A NOMINEE

...

The payment of the benefit on the death of a member is regulated by the Pension Funds Act (emphasis supplied) which may be amended from time to time. The Act provides that a death benefit from a retirement annuity falls outside the estate of the deceased. It cannot be bequeathed by will, nor can it be ceded. Unlike a life policy, the nominated beneficiary does not obtain a claim to receive (all of) the death benefit.

In the absence of Dependants and Nominees the benefit becomes due to the estate of the member.

Neither dependants nor Nominee(s) acquire a right to the death benefit which is *awarded as may be deemed equitable by the Trustees (emphasis supplied).*”

- [13] The applicable provision of the Act is section 37C, which vests the board of trustees of a fund with the discretion to distribute the benefit as it deems equitable. Disputes relating to decisions taken by the board in the distribution of the benefit, which can range from challenges to the equitability of the decision itself, to the computation of the death benefit, fall under my jurisdiction. This complaint being one relating to the computation of a death benefit in accordance with the provisions of the Act thus falls under my jurisdiction.
- [14] While your letter of complaint does not make the allegations as required in the Act in the precise terms as would otherwise have been expected of a lawyer (which I gather you are not), it is clear that you are unhappy about the computation of the death benefit payable upon the death of your husband. In the circumstances, it would be unduly formalistic to dismiss the complaint by reason solely of your failure to allege in precise terms as required by the Act.
- [15] The Cape High Court in the *de Beer* judgment said the following in this regard (at 660E-G):

“Applicant’s contention regarding [the complainant’s] letter is based upon a very formalistic reading of the complaints procedure as provided for in the Act. On this reading, the letter generated by [the complainant] would not constitute a proper complaint as defined. But this submission ignores the purpose of the Act. The structure of chapter VA of the Act is aimed at ensuring an effective, inexpensive and expeditious resolution of pension complaints by members, many of whom may not be able to afford legal advice and would therefore be compelled to formulate their complaint without any legal assistance or a complete understanding of the intricacies of the legal relationship between the respective parties, as in this case between Sanlam and applicant”.

- [14] The technical points are dismissed.

The merits

- [15] Rule 6.7 provides that 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 or ceded policies. Clause 2.1 of the policy document as set out in paragraph 7 above and the insurer's endorsement as out in paragraph 8 above, prescribe the minimum guaranteed amount provided for in terms of the policy only if the life assured (your late husband) survives until the maturity date and provided that the premium is paid until the maturity date.
- [16] If the deceased had survived up to 1 May 2010, a retirement benefit of R39 807.00, as set out in the endorsement annexed to a letter dated 15 March 2005 addressed to the deceased, would have been available for him to purchase an annuity. However, because he died before 1 May 2010, only the balance in the accumulation account was available for his beneficiary (you) to purchase an annuity.
- [17] According to the insurer, the amount that was available in the policy's accumulation account at the time of the deceased's death was R24 127.83. That is the amount which the fund decided to pay out to you in full.
- [18] The fund being a registered fund is bound by its rules in the same way as the members, officials, shareholders and beneficiaries of the fund are. The fund may only pay out the benefits that are set out in its rules.
- [19] In the result, I am satisfied that you received your correct benefit entitlement in terms of the rules and the provisions of the policy document. The complaint is dismissed.

SIGNED IN CAPE TOWN ON THIS DAY OF 2006

Yours faithfully

.....
VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR