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Please quote our reference: PFA/KZN/4372/2005/NVC

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): B F Murray v South African Retirement Annuity Fund (“the fund”) and Old Mutual Life Assurance Company (South Africa) Limited (“Old Mutual” or “the insurer”)

Introduction

- [1] Your complaint concerns the amount deducted from your fund share on your cessation of contributions. The complaint was received on 13 July 2005. On 3 August 2005 a letter acknowledging receipt thereof was sent to you. On the same date letters were dispatched to the respondents requesting them to submit responses to your complaint by 25 August 2005. The respondents’ response dated 25 August 2005 was received on 1 September 2005. On 19 May 2006 the response was sent to you for a reply by 9 June 2006. A reply was received from you on 23 August 2006.
- [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,

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

on 23 August 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. As the facts are known to the parties I shall only repeat those facts that are pertinent to understanding this determination.

Factual Background

- [3] You commenced contributing annually to the fund when you were 56 on 1 February 1991 and elected to retire on 1 February 2005, at the age of 70. The first contribution was R1 000, escalating annually by 10% and you made several lump sum contributions over the period of the investment. You ceased paying contributions on 1 February 1998 and the policy became paid-up with effect from 1 February 1999 (when the next annual contribution was not paid). The total contributions amounted to R23 435.88. When you retired on 1 February 2005, the retirement value was R80 093.62, of which one third, R26 697.87, was paid to you in cash and the balance, R53 395.75 was transferred to your existing Living Annuity with Old Mutual.

Complaint

- [4] You state that the main reason for the “dismal” value of the investment is because the capital was invested, without your knowledge, in an offshore fund and that you were penalized for ceasing contributions prior to reaching your normal retirement date. You want this tribunal to intervene in this matter with the view of enhancing the final value of the policy.

The respondents’ response

Technical point

- [5] The fund raised a technical point, stating that your grievance concerns the policy value and, as such, constitutes insurance business which falls outside the definition of a complaint in the Act. In this regard it referred to the fact that the fund operates exclusively by way of individual insurance policies issued by Old Mutual to the fund and that the policies issued by Old Mutual in its capacity as long-term insurer are “life policies” as defined in the Long-term Insurance Act of 1998. It also states that the policies issued to the fund are regulated by the Long-Term Insurance Act, that the contributions paid by the members constitute the assets of Old Mutual for which the latter is liable to pay tax, and finally that the only assets of the fund are its claims against Old Mutual in respect of the policies issued to the fund.

Merits

- [6] Old Mutual states that you elected the performance profits equity investment portfolio at inception of the policy, invested almost exclusively in equities, with no exposure to offshore funds. Further, you signed the proposal form whereby you agreed to abide by the terms and conditions of the policy contract, which states that the benefit at retirement will be determined with reference to the performance of the assets accumulated within the Equity Portfolio.
- [7] Old Mutual avers that it has dealt with your retirement annuity in accordance with the applicable provisions of the policy contract, insurance legislation, actuarial rules and the legal consequences for deviation from the terms of the contract.
- [8] The insurer states that in terms of clause 2 of the policy contract, under “Payment of Benefits”, benefits shall not be paid unless all contributions had been paid to the fund. In your case you had undertaken to make payment until 1 February 2005.
- [9] Furthermore, the insurer states when a member requests a variation of the terms, the contract relating to the underlying policy is amended and the statutory actuary has a duty to ensure that the remaining members’ interests are protected in terms of the Long-Term Insurance Act, to which the insurer is bound. It adds that the insurer cannot benefit a member who does not comply with the terms of the contract at the expense of members who are adhering to the terms and conditions. The insurer must deal with a policy variation in terms of actuarial rules, which in turn have to comply with statutory requirements. The policy provides that if contributions cease, the policy will be converted into a paid-up policy for reduced benefits.
- [10] Old Mutual advises that the contributions in the fund had grown by an average annual return of 11.72% on gross premiums paid and 12.29 % on investments.
- [11] The insurer states that when your contributions prematurely ceased on 1 February 1999, the policy obtained a paid-up value, reduced by R626.24, in terms of the statutorily required and approved actuarial rules.

Determination and reasons therefor

Technical point

- [12] 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 South African 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.

- [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 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.”

- [14] The technical point is therefore dismissed.

Merits

- [15] In terms of the policy documents the retirement benefit is determined with reference to the assets accumulated within the Equity Portfolio. I am satisfied that you were subject to the market fluctuations of the portfolio in which you were invested during the period of your membership.
- [16] Although you are aggrieved about the poor investment, you have not suggested that the board was negligent in terms of the investment decisions taken, or that there was a failure to adopt specified investment strategies. In view of the above, you have failed to establish any entitlement to relief in respect of this aspect of your complaint.
- [17] According to the respondents the Equity Portfolio is invested almost exclusively in equities quoted on the South African Stock Exchange, dependent on the performance of this stock exchange and at no stage were you invested in an off-shore fund. Furthermore, the respondents state that they never received instructions from you to switch from this portfolio.
- [18] The next issue is whether the rules of the fund authorize the levying by the fund or Old Mutual of the amount of R626.24 when you prematurely

- ceased contributions to the fund, six years prior to your elected retirement date of 1 February 2005.
- [19] Section 3 of the rules deals with the payment of contributions to the fund but does not cover the cessation of contributions. The rules also do not provide for the deduction of expenses at cessation of contributions.
- [20] 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.
- [21] Clause 5 of the General Provisions of the policy states that if contributions are not paid within the period of grace the policy will be converted to a paid-up policy, but neither the rules nor the policy define "paid-up".
- [22] Clause 4 states that a policy fee, as set out in the schedule (which has not been provided to this office) and an investment expense charge of R15 per annum is payable. Further, a margin of 3% exists between the price at which assets are purchased by the contributions and the price at which assets are redeemed in the event of a claim, in order to cover investment transaction expenses.
- [23] Only the charges specifically set out and quantified in the policy document may be deducted. There is no basis for the deduction of expenses from your fund share other than those detailed in the policy. Since those appear to be regular charges that must have been levied on the annual contributions made, I can find no reason for their further deduction.
- [24] 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.
- [25] As Davis J stated in *Central Retirement Annuity Fund v Adjudicator of Pension Funds and Others* [2005] 8 BPLR 655 (C) 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."

- [26] 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 amount of R626.24 not been deducted from your fund share. Because this reduction of the benefit was effected by and for the benefit of Old Mutual in circumstances where the policy document does not allow therefor, the order in that regard must be directed at Old Mutual.

Relief

- [27] The order of this tribunal is as follows:

- [27.1] It is hereby declared that the respondents were not entitled to levy the charge of R626.24 on your investment value solely by reason of you ceasing contributions some six years prior to the maturity date;
- [27.2] Old Mutual is directed to pay to you, or transfer to an institution of your choice, in accordance with the applicable rules and legislation, the amount referred to in paragraph [27.1], within six weeks of the date of this ruling;
- [27.3] Old Mutual is further ordered to pay interest on the amount of the payment or transfer in paragraph [27.2] at the *mora* rate of 15,5% per annum reckoned from 1 February 1999 in respect of both policies until date of transfer or payment.

Dated at Cape Town on this the day of 2006.

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator