



HEAD OFFICE
Johannesburg
1st Floor, Norfolk House
Cnr 5th Street & Norwich Close
Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town
2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 □ Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: PFA/WE/5032/2005/NVC

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): E M Brown 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 decrease in the value of your retirement benefit compared to the illustrative value provided to you before your retirement. The complaint was received by electronic mail on 23 August 2005 and an email acknowledging receipt thereof was sent to you on 25 August 2005. We confirmed receipt of your complaint by letter dated 12 September 2005. On the same date letters were dispatched to the respondents requesting them to submit responses to your complaint by 3 October 2005. The fund’s response was received on 3 October 2005. The fund wrote directly to you on 12 April 2006. Your reply was received on 25 April 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

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

complaint in the ordinary course. Many complaints were settled on this basis but the settlement terms were not divulged to this office. However, on 25 April 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. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below. I shall set out the facts as far as essential for understanding this determination.

Factual Background

- [3] You commenced contributing to the fund, in its Performance Profits Portfolio, at the monthly rate of R500 on 1 February 1988, when you were 43, and elected a maturity date of 1 February 2011. From time to time you escalated the contributions, which amounted to R1 200 per month by the time that you applied for (early) retirement benefits in 2005 at the age of 60. On 1 August 2005 you were paid R100 000 in cash, and the balance, R357 110.75, was used to purchase you a monthly pension of R2 690, which now amounts to R2 802.47.

Complaint

- [4] You are unhappy about the decrease in the value of your retirement benefit which you received in 2005 compared to the illustrative values that the respondents had provided to you during the course of your fund membership. You allege that the illustrative values provided to you in February 1996 indicate that the value at maturity would have been R1 088 844 at high inflation or R762 626 at low inflation, and in March 2005, the projected maturity value at high inflation was R837 509, and R649 606 at low inflation, with an estimated monthly pension of R6 607, before commutation and R4 394, after commutation. You received much less and allege that although the investment grew by an internal rate of return of 12.84%, the insurer states that the investment did not have the opportunity to achieve the illustrative values provided to you. You state that the insurer misrepresented the facts when the underlying policy was sold to you.

The 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 advises 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] On the merits, Old Mutual states that rule 4.2.1 provides that each member’s retirement capital is determined in terms of the annuity policy, in accordance with the provisions of the policy, which stipulates that contributions were payable until 1 January 2011, whereupon you would become entitled to purchase an annuity from the balance in your accumulation account.
- [7] Old Mutual contends that the policy would share in the performance profits of the underlying assets of the investment portfolio, and could fluctuate “considerably” from year to year. The policy offered a minimum guaranteed value provided the policy remained in force until the elected maturity date on 1 February 2011.
- [8] Old Mutual states that when the policy was taken out a fairly high inflation characterized the economic backdrop. The illustrative values were based on the rates prescribed at the time by the Life Offices Association. As inflation was managed downward over the years, the illustrative values were accordingly adjusted. Old Mutual concludes that the illustrative values are premised on the assumption that the policy will remain in force until maturity, and the value of your policy had to be adjusted when you retired about five years before the initially contracted date.
- [9] According to Old Mutual investment returns in general move with the inflation rate. In 1988 the illustrated rates of return of 15% and 12% were in line with investment returns earned and inflation rates at that time. It states the decline in the inflation rate from 1988 impacted adversely on investment returns.
- [10] The fund also states that given the limitation of its liability in terms of rule 6.7, and the underwriter’s conclusion that your fund value was correctly calculated, the fund has no further obligation to you.

Determination and reasons therefor

Technical point

- [11] With regard to the technical point raised by the fund, I am satisfied that although your grievance involves the application of long-term insurance principles, it also relates to a retirement annuity fund, namely, the South African Retirement Annuity Fund, which is a pension fund organization as defined in the Act. In this regard 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.”

- [12] In so far as your complaint implicitly relates to the administration of the fund and/or the investment of its funds and is implicit therein that you allege prejudice (in that you have been paid a lesser benefit than what you expected) in consequence of the perceived maladministration of the fund, your grievance constitutes a complaint as defined.
- [13] The technical point is therefore dismissed.

Merits

- [14] According to rule 4.2.1 a member’s retirement capital is applied for the purchase of annuity in terms of the underlying policy. The issue for determination is whether you are entitled to the benefits projected by Old Mutual at inception of the policy or at any other time. From the extracts of the policy document and other documents submitted, it is evident that you were advised on a number of occasions that the illustrative values were not guaranteed and were based on assumed growth rates. You were advised that favourable or adverse investment and market conditions, the non-payment of remaining premiums, and changes to the policy could significantly affect the values.
- [15] Once you decided to invest in a market-related portfolio, you carried the investment risk. This means that you benefited from a surge in the market and carried the loss in periods where the market was in decline. I am satisfied that the values were not guaranteed and depended on actual growth rates, annuity rates and inflation rates.

[16] Furthermore, although you are aggrieved about the decrease in the illustrated value to the value received at retirement, you have not suggested that the board was negligent in 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.

[17] In the result your complaint cannot succeed.

Dated at Cape Town on this the day of 2006.

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator