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Please quote our reference: PFA/WE/3857/2005/nvc

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): P Walsh 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 6 June 2005 and a letter acknowledging receipt thereof sent to you on 20 June 2005. On the same date letters were dispatched to the respondents giving them until 11 July 2005 to file responses to the complaint. The respondents requested an extension and the fund’s response dated 19 July 2005 was received on 4 August 2005 and Liberty’s response dated 20 July 2005 was received on the same date. The respondents copied you with their responses. On 6 December 2005 my assistant telephoned you, asking that you submit your reply to the responses. A reply was received from you on 31 January 2006. After making additional enquiries on 4 July 2006 this office received a further response from Liberty on 20 July 2006. Liberty copied you with this response. A letter dated 20 July 2006 was sent to you by this office, asking for your reply to Liberty’s further response, by 28 July 2006. Your reply was received on 7 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

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

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 31 January 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.

- [3] As the background facts are well known to all the parties, I shall only repeat those facts that are pertinent to the issues raised herein.

Factual Background

- [4] You commenced contributing to the fund when you were 44 on 1 October 2003 at the monthly rate of R2 000, with an annual escalation of 10%, up to your elected retirement age of 55, which you would reach on 30 December 2014. With effect from 1 November 2004, you reduced these contributions to a monthly rate of R600. During November 2004 Liberty deducted an amount of R5 962.45 from your investment account. You are currently still contributing to the fund.

Complaint

- [5] You are unhappy about:
- [5.1] The deduction of R5 962.45 levied against your investment account when you reduced your contributions to the fund. You want the amount of R5 962.45 debited against your fund share to be reinstated with growth, with effect from 1 November 2004; and
 - [5.2] You want Liberty to adhere to the portfolio management fee of 0, 16% it had set out in a quotation provided to you, for the remainder of the policy, and you want to be reimbursed with the overcharged portfolio management fee, with growth, from 1 November 2004.
- [6] In your letter dated 4 August 2006 in which you reply to Liberty's further response to your complaint, you raise some issues not previously raised in your complaint received by this office on 6 June 2005. In your letter of complaint you raised concerns as regards the capital costs deducted when

you reduced your contributions and specifically the recurring portfolio management fee. However, in your reply you refer to a number of concerns not previously raised. In your reply to the response(s), you are entitled to comment and respond to the various defences raised by the respondent(s). However, you are not permitted to raise a new issue, or a new cause of action or a new complaint that was not contained in the original complaint. The simple reason for this is that we would then have to give the respondent(s) another opportunity to respond to your new issue or complaint to which you must in turn reply. That would result in continual correspondence which would adversely affect the expedition with which complaints must be resolved. Should you wish to raise an issue or new complaint following your receipt of the response, you are welcome to lodge a new complaint and the turnaround time in respect of the resolution of that complaint will run from the date of lodgement of the new complaint.

Response by the fund

- [7] The fund states that the policy was structured based on your undertaking to pay specified contributions over a specified period of time. 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.
- [8] The fund points out that the policy document states that the investment account will be credited with the "Total Allocation", which is equal to the contributions, reduced by the monthly policy fee of R12.00, a contributions charge of 3.500% of this net amount, and other applicable charges. It adds that the management fee at a monthly rate of 0.16% of the value of the investment account is also levied.
- [9] The fund states that when the contributions were reduced by 73% in November 2004, 73% of the built-in expenses could no longer be recouped over the term of the contract and the fund therefore made the lump sum deduction from your investment account.
- [10] The specified details of the expenses incurred on your policy are given as follows by the fund:

"Commission plus VAT	R 9 271.64
Distribution plus marketing costs	R 2 317.91
Acquisition costs	R 2 000.00
Ongoing renewal costs	R 325.00
Finance costs on outstanding expenses less recoveries	R 1 320.39

Less Commission Claw back	R 485.63
Less Expenses Recovered to date via the charges	R 1 035.37
Outstanding expenses as at 30/11/2004	R13 713.94”

[11] The fund contends that the deduction of R5 962.45 is substantially less than the actual expenses of R13 713.94 incurred. It further states that the charge was based on the average calculation of all policies and the complaint should be dismissed.

Liberty's response

Technical point

[12] 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 insurer, falls outside the Pension Funds Adjudicator's jurisdiction.

[13] Liberty contends that it 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

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

[15] In its further response received by this office on 20 July 2006 Liberty states that when you reduced your contractual monthly contributions by 72.72% to R600 (from 1 November 2004) you unilaterally requested a novation of your membership with the effect that unrecouped costs were recoverable by Liberty.

[16] Liberty confirms that the monthly management fee is 0.16% of the accumulated investment value in the particular portfolio(s) in which the member is invested. It alleges that the information previously given to you on a spreadsheet, that the management fee deducted was a percentage of the contribution, was incorrect. The insurer also confirms that the contribution charge of 3.5% is based on the contribution, net of the monthly policy fee of R12.00 and once again it states that the spreadsheet contained inadequate information.

Determination and reasons therefor

Technical point

- [17] 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.
- [18] 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 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.”

- [19] The technical point is dismissed.

Merits

- [20] 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 value by reason solely of your reducing the contributions. In your submissions you raise your dissatisfaction that Liberty did not deduct the costs it had *quoted* to you a number of times. However, its authority to do so is not derived from quotations or spreadsheets issued to you, but must lie in the rules of the fund, the policy document or the Act.
- [21] Section 5 of the rules deals with the payment of contributions to the fund but does not cover the reduction of contributions. The rules also do not provide for the deduction of unrecouped expenses.
- [22] 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.

- [23] The quotation as at 19 September 2003 states that the “Charges and Fees” include a contribution charge of R69.58 on the recurring contributions, a monthly portfolio management fee of 0.16% and a monthly policy fee of R12.00. The policy document confirms these costs under paragraph 3: Investment Account and paragraph 4: Investment Portfolios. The policy also states that the standard commission payable to an independent financial advisor for this contract is a monthly amount of R684.00 for the first year and a monthly amount of R227.98 for the second year, recovered from the policy charges.
- [24] Only the charges specifically set out and quantified in the policy document may be deducted. There is nothing in the underlying policy allowing for an acceleration of future unrecouped costs upon the reduction of contributions. However, the portfolio management fee, which you specifically refer to in your complaint, is set out in the policy document as being 0.16% of the investment value, and may thus be charged. It appears that 0.16% is in fact being charged, despite erroneous information previously provided to you.
- [25] 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.
- [26] 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.
- [27] 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 illusionary 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 amount of R5 962.45 not been deducted from your fund share. Because this reduction of the benefit was effected by and for the benefit of Liberty in circumstances where the policy document does not allow therefor, the order in that regard must be directed at Liberty.

Relief

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

[29.1] It is hereby declared that the respondents were not authorized to levy the charge of R5 962.45 as a contribution reduction charge on your investment value solely by reason of your having reduced the contributions; and

[29.2] Liberty is ordered forthwith to re-calculate your fund value as if the amount of R5 962.45 had not been deducted when you reduced the contributions to the fund with effect from 1 November 2004, and to inform you of this value within three weeks of the date of this determination.

Dated at Cape Town on this the _____ day of _____ 2006.

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator