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Please quote our ref: PFA/FS/5273/05/CN

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): HC BROWNE v PRUDENT RETIREMENT ANNUITY FUND & LIBERTY GROUP LIMITED

Introduction

- [1] This complaint concerns the refusal of a retirement annuity fund to permit its member to transfer his fund value from the fund to another retirement annuity fund of his choice.
- [2] The complaint was received by this office on 21 August 2005, and a letter acknowledging receipt thereof sent to you on 12 September 2005. On 6 October 2005, a letter was sent to the respondents requesting them to submit a response to the complaint by no later than 27 October 2005. The responses, which were copied to you, were received on 1 November 2005. Your reply was received on 6 December 2005.
- [3] 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 Prudent Retirement Annuity Fund (“the fund”) and Liberty

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

Group Limited (“the administrator”) on 19 January 2006. The parties were given 30 ordinary 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 9 March 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.

- [4] It is with that brief background that we now determine this complaint in the ordinary course.

The complaint

- [5] You are dissatisfied with the performance of the investment portfolios in which the fund has invested its assets, and have requested it to transfer your investment to another retirement annuity fund (namely, the Allan Gray Retirement Annuity Fund) which you opine will yield higher returns than the fund. The fund has not acceded to your request.

The responses

Technical points

- [6] The respondents submit, firstly, that this matter falls outside the jurisdiction of the Pension Funds Adjudicator, for the reason that it concerns the operation of a life policy. They contend that the matter should have been brought before the Ombudsman for Long Term Insurance. Secondly, the insurer seems to submit that since, in its view, your complaint concerns the determination of the value of your investment when you ceased making contributions on 1 January 1992, the said determination is the act to which your complaint relates. It therefore submits that as your complaint dates back to 13 years prior to the receipt by this office of the written complaint, Section 30I(1) precludes me from investigating and adjudicating upon it.

The merits

- [7] On the merits, the respondents contend that the fund’s current rules do not allow for the transfer of a member’s fund value to another approved fund. They conclude that although the rules were in the process of being amended so as to allow for such transfers, the amendment process has not been completed, so no approval has yet been sought from the Registrar of Pension Funds.

Determination and reasons therefor

Technical points

Section 30I(1)

- [8] The insurer has misconstrued the actual crux of this complaint by submitting that it is the determination of the value of your investment. In fact, what you have alleged in the complaint is that because you have received “very poor returns” from this fund, you would like to have your investment transferred to the Allan Gray Retirement Annuity Fund. You further state that you are not satisfied with being forced to wait until you are 55 years old before you can transfer your investment to the fund of your choice. Nowhere in the written complaint do you state that you are challenging the determination of the value of your investment after you ceased making contributions to the fund. Even in your reply to the response, while expressing dissatisfaction with the value of your investment “after 13 years and 10 months, you specifically state that the relief asked for is to “exercise [your] option to place [the] money that [you] have paid” with Allan Gray Retirement Annuity Fund and to “sever Prudential/Liberty Life’s “finger in the investment”(sic).
- [9] Your request to have your investment transferred having only been made and rejected in August 2005, the cause for complaint only arose at that stage. As this complaint was received within the prescribed three-year period, the provisions of section 30I(1) are not applicable to it.
- [10] The first technical point is dismissed.

Adjudicator’s jurisdiction

- [11] With regard to the second 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 Prudent 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 interpretation and application of the rules of the fund and it is implicit therein that you allege prejudice (in that you have been precluded from transferring your

investment from the perceived poorly-performing fund to another fund of your choice) as a consequence of the trustees' failure to comply with their fiduciary duty to effect a rule amendment allowing such transfer, your grievance constitutes a complaint as defined.

[13] The second technical point is therefore dismissed.

The merits

[14] The question of the absence in a retirement annuity fund's rules of a right to transfer to another approved retirement annuity fund was recently fully canvassed in *H C Browne v South African Retirement Annuity Fund and 3 Others* PFA/FS/5271/CN dated 19 October 2006 at paragraphs [59] to [89]. The principles that arise in that case are of equal application here. When the Income Tax Act was amended in 1998 to allow for transfers between approved retirement annuity funds prior to age 55, the board of trustees of all such funds had a duty to consider whether the rules should be amended to allow for such transfers. When determining whether the rules should contain such a provision, the board of trustees must act in the best interests of the members of the fund. Now, there can be no doubt in my view that the absence of a rule allowing transfer prior to retirement, and instead locking in members until age 55 or chosen retirement date (whichever occurs *last*), is clearly in the interests not of members but of the underwriter of the fund. The implications of such a situation are that the trustees of the fund would be failing to comply with their fiduciary duties in terms of the Pension Funds Act which compel them to protect the interests of members. I shall therefore make provision in my order for remedial action by the trustees to rectify this unsatisfactory situation.

Relief

[15] The order of this tribunal is as follows:

[15.1] The board of trustees of the Prudent Retirement Annuity Fund ("the fund") is hereby directed to submit a rule amendment in terms of rule 18) to the Registrar of Pension Funds allowing for the transfer of members to other approved retirement annuity funds prior to retirement, within six weeks of the date of this determination.

[15.2] Upon registration of the transfer rule referred to in paragraph [15.1.], the fund is further ordered to transfer the complainant's total interest in the fund to another approved retirement annuity fund of his choice, within two weeks of the registration of the rule amendment (should the complainant still wish to transfer).

SIGNED IN CAPE TOWN ON THIS DAY OF 2007

Yours faithfully

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VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR