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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): J. KRUGER v SANLAM RETIREMENT FUND A (OFFICE STAFF – PENSION FUND) (“the pension fund”) and SANLAM RETIREMENT FUND B (OFFICE STAFF – PROVIDENT FUND) (“the provident fund”)

Introduction

[1] This matter concerns the refusal of the above funds to allow you to revoke your previous election in respect of your withdrawal benefits. The complaint was received by this office on 27 July 2005. On 5 August 2005 a letter was dispatched to the respondents giving them until 26 August 2005 to file a response to the complaint. The response dated 23 August 2005 was received on the same day. The response was copied to you by the respondents. No further submissions were received from you. I consider it unnecessary to hold a hearing in this matter. My determination, together with reasons therefor, is set out below.

Complaint

[2] Your complaint concerns the refusal of the above funds to reverse the transaction that occurred in 2003 when you were paid withdrawal benefits from both funds. You wish now to refund the payments and transfer your benefits instead to preservation funds, since your election to take your withdrawal benefits in cash has placed you in an unfavourable tax situation.

[3] You commenced employment with Sanlam Life Insurance Ltd on 1

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January 1982 and left the company after accepting a voluntary severance package on 31 May 2003. You were a member of the above funds as a consequence of your employment and accordingly became entitled to a withdrawal benefit from each fund on termination of your employment.

- [4] You state that “[t]he problem was caused by a mistake I made by not seeking professional financial advice on my retrenchment”. At the time of termination of your employment, you sought to acquire sufficient financial resources to start your own business venture by consolidating all amounts due to you in cash. For this reason you elected to take the cash withdrawal benefit from both funds, rather than preserving your pension interests. It appears that you were under the misapprehension that any business loss sustained by you in the first financial year of your new venture could be reclaimed from the tax you would pay on your pension benefits.
- [5] However, it transpired that this was not the case, and you subsequently discovered (it is not clear when, but seemingly after the 2003-4 financial year) that your decision to take your benefits in cash had in fact been extremely disadvantageous to you from a tax perspective. You therefore approached the funds with a view to reversing the original transactions by repaying the benefits to the funds, and electing to preserve them instead.
- [6] The funds have refused to agree to this, stating that they do not have the authority under their respective rules to implement such an arrangement. You have therefore approached this tribunal requesting that these “corrective actions” be permitted under this office’s supervision.

Response

- [7] The funds do not dispute any of the facts set out in your complaint, but persist in their view that the reversal of your original election in respect of each benefit is not possible.
- [8] In this regard the funds allege that prior to your withdrawal you were provided with a quotation of the withdrawal benefits to which you were entitled under the two funds. In the quotation it was expressly stated that you ought to seek professional financial advice before exercising an option with regard to your withdrawal benefits. It was also expressly indicated in bold print on the quotation that your choice would be irrevocable.
- [9] In addition, the funds claim that the rules of the funds also provide that a member’s choice is irrevocable. For this reason, they claim, there is no authority in the rules for the trustees of the fund to exercise their discretion to grant your request to re-exercise your option.

- [10] Moreover, such a re-exercise would in all probability be futile according to the funds, since General Note 35 as issued by the South African Revenue Services would most likely have the effect of not allowing you to transfer your withdrawal benefit tax-free to a preservation fund. This is because more than six months have already elapsed since the accrual of your benefits.

Determination and reasons therefor

- [11] I have examined the rules of both funds. Rule 7.4(1) of the pension fund reads as follows:

“Enige opsie wat kragtens hierdie Deel gekies word is onherroeplik.”

- [12] The equivalent rule in the provident fund is Rule 7.4(2) which employs identical wording.
- [13] From a point of view of equity and fairness, there is nothing unreasonable about this provision. There is a need for certainty and finality in the transactions of a financial institution. In addition, should members be permitted to revoke elections, particularly some time after the obligation of the fund to the member has been discharged, it would place an undue administrative burden on that fund.
- [14] In any event, this tribunal does not enjoy an equity jurisdiction and is bound to uphold the legal relations and consequences flowing from the empowering legislation, and the rules of the fund. In the present case the rules do not permit the funds to accept repayments of benefits in order to reverse transactions made in pursuit of irrevocable elections. The trustees may only do what is set forth in the rules (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D). The funds are therefore correct in refusing to allow a reversal of the benefit payments and a re-exercise of your options in respect of preservation of your benefits.

Relief

- [15] For the above reasons the complaint cannot succeed.

DATED AT CAPE TOWN ON THIS THE DAY OF 2006.

Yours faithfully

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR