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Please quote our ref: PFA/KZN/10338/06/KM

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): S RAWAT (“the complainant”) v SOUTH AFRICAN RETIREMENT ANNUITY FUND (“the respondent”)

1. Introduction

- 1.1 The complaint concerns the payment of portion of a death benefit in terms of section 37C of the Act by the respondent pension fund in the form of an annuity instead of a lump sum.
- 1.2 The complaint was received by this office on 21 August 2006 and a letter acknowledging receipt of the complaint was sent to the complainant on 28 September 2006. A letter was dispatched to the respondent enclosing the complaint on the same date. The complainant replied to the response on 7 November 2006.
- 1.3 Having reviewed all the submissions filed of record in this matter, I consider it unnecessary to hold a hearing. My determination, together with reasons for arriving at the finding, is set out hereunder.

2. Complaint

- 2.1 The complainant is the ex-spouse of Mr A H Jazbhay (“the deceased”), who passed away on 3 June 2005. He was a member of the respondent, and as a consequence of his death a benefit in an amount of

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator), AP Lehana (Assistant Adjudicator), S Mokgara (Assistant adjudicator), L Molete (Assistant Adjudicator), T Nawane (Assistant Adjudicator)

Financial Manager: F Mantsho, Accountant: R Soldaat

approximately R300 000 became payable to his beneficiaries. The board of trustees of the respondent, in accordance with its duties in terms of section 37C of the Act distributed the benefit in the following manner:

Mrs T Jazbhay (surviving spouse and nominee)	40%
The complainant (factual dependant and nominee)	10%
NM Jazbhay (child of the deceased)	15%
WM Jazbhay (child of the deceased)	15%
AM Jazbhay (child of the deceased)	20%

- 2.2 The complainant is the mother of the deceased's three children who benefitted from the distribution. She does not place the allocation of the benefit at issue. The complaint as initially formulated was that, despite an elapse of 14 months, the respondent had still not allocated or paid the benefit to the complainant. The respondent subsequently allocated the benefit as described above.
- 2.3 The complainant amended her complaint in an e-mail of 12 September 2007 to this office. She now challenges the "partial re-investment" of a portion of the benefit with Old Mutual Life Assurance Company South Africa Ltd ("Old Mutual"), the administrator and underwriter of the respondent. She claims that she is entitled to a lump sum payment of the outstanding funds. She adds that she wishes to sever all financial ties with Old Mutual. In addition, she confirms that she and her children are of the Muslim faith, and that their religious obligations only allow them to invest in restricted ways.

3. **Response**

- 3.1 The respondent claims that there is no question of re-investment of funds. In accordance with its rules, in particular rule 5.1 and 5.6, only a portion of the benefit may be paid in cash, the balance having to be taken as an annuity. The respondent states that the maximum cash allowance was paid to the complainant and her children, and it is only the balance as required by the rules that has been preserved in the form of a monthly annuity.
- 3.2 The respondent also records that the complainant was assisted by a financial advisor, Taryn Visser of Sirius Financial Navigation, with regard to the election of where to place the funds that had to be paid as an annuity. The respondent confirms that the complainant was entitled to transfer the proceeds to another company to purchase a compulsory investment.
- 3.3 Finally, concerning the complainant's desire to invest in a manner

consistent with her faith, Old Mutual, presumably in its capacity as a financial institution rather than the respondent's administrator, states that in line with its regard for religious freedom and opinion, it has several Shariah-compliant funds.

4. Determination and reasons therefor

- 4.1 The payment of a death benefit arising from a pension fund organization as defined in section 1 of the Act is regulated by section 37C of the said Act, which establishes a mandatory scheme in terms of which a death benefit has to be distributed. Since the allocation by the board of trustees of the fund is not at issue here, it will not be dealt with further.
- 4.2 The heart of the present dispute is whether the complainant is entitled to a cash payment of the whole benefit, or whether, as contended by the fund, she is obliged to accept a portion of it as a monthly annuity.
- 4.3 Section 13 of the Act states that the rules of a registered fund are binding on the fund's members, shareholders and officers thereof, and any person claiming under the rules, or whose claim is derived from a person so claiming. Furthermore, the trustees' powers are circumscribed by the rules of the fund (see *Tek Corporation Provident Fund and Others v Lorentz* [2002] 3 BPLR 227 (SCA) at 239 D-H). The fund's authority to perform any action, through its board of management, therefore needs to be determined with reference to the fund's rules.
- 4.4 I have been referred to rule 5.1 and 5.6 by the respondent. They read as follows:

"5.1 DEATH OF A MEMBER BEFORE THE RETIREMENT DATE

In the event of the death of the member before the retirement date as defined in the ANNUITY POLICY, and provided such MEMBER is not drawing, in terms of the ANNUITY POLICY, an ill-health retirement annuity or a disability annuity, as the case may be, the following shall, subject to the provisions of the ANNUITY POLICY, be payable in respect of each ANNUITY POLICY issued to the MEMBER:

- (a) a capital sum not exceeding the lesser of:
- (i) a return of contributions paid together with interest thereon at the rate stated in the ANNUITY POLICY
 - or
 - (ii) the capitalized value of the retirement annuity as determined in accordance with the provisions of the ANNUITY POLICY

or

- (b) an annuity payable in terms of the ANNUITY POLICY
- or
- (c) both such capital sum and the annuity payable in terms of such ANNUITY POLICY.”

5.6 COMMUNICATION

“A person to whom an annuity in terms of Rule 5.1. or Rule 5.2. is payable, shall have the option to commute for a single payment not more than one-third of such annuity, provided that such option is exercised within six months following the date of the death of the MEMBER or LIFE ASSURED and before the date on which the first instalment of such annuity is paid. Once such option is exercised it shall be irrevocable.

Where, however, the aggregate of all annuities payable to such person arising from the death of any one MEMBER or LIFE ASSURED in terms of this Rule is equal to or less than the amount prescribed by legislation from time to time, such person shall be entitled to commute the whole of such annuities.”

- 4.5 It is evident from a reading of these two sub-rules that only a portion of the benefit payable on death can be taken as a lump sum. I must therefore agree with the submissions made by the respondent that the complainant is only entitled to receive as a cash amount the contributions paid together with interest thereon, as well as a further one-third of the annuity to which she becomes entitled. Any balance over and above that must be paid as an annuity.
- 4.6 Retirement annuity funds, such as the respondent, frame their rules in this way in order to comply with the provisions contained in the Income Tax Act 58 of 1962, which prescribe that certain conditions (such as preservation of a benefit by means of annuity payments) must be met if the fund in question is to retain its favourable tax status. This aspect of the complaint therefore cannot succeed.
- 4.7 I have perused the e-mail sent by Ms Andrea Ras of Old Mutual to the complainant which has been forwarded by the respondent. In this communication she states as follows:
 - “As mentioned you are able to remove the full proceeds of the childrens’ money from Old Mutual and have it invested in another compulsory investment with another company.”
- 4.8 It is clear from the above that the complainant was not forced to “re-invest” with Old Mutual as she claims, and that she was apprised of this fact. Since she was assisted by a financial adviser in electing to purchase an annuity from Old Mutual, any claim which might lie for erroneous

advice must be taken up with the financial advisor or the FAIS Ombud, whose details appear at the foot of this letter. This tribunal does not have jurisdiction to investigate complaints that relate primarily to advice given by a financial intermediary.

4.9 For the reasons set out above, there is no basis on which to order relief.

5. Relief

5.1 The complaint is dismissed.

DATED AT CAPE TOWN ON THIS THE DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR