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Please quote our reference: PFA/GA/5294/2005/RM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 1956 (“THE ACT”) – M BESTER (“the complainant”) v CENTRAL RETIREMENT ANNUITY FUND (“first respondent”) AND SANLAM LIFE INSURANCE LIMITED (“second respondent”)

Introduction

- [1] The complaint concerns the payment of a cash benefit by the fund before you reach your chosen retirement date, or 55 years of age. It was submitted on 1 September 2005. A letter acknowledging receipt of the complaint was sent on 27 September 2005. On the same date letters were dispatched to the respondents, giving them until 18 October 2005 to respond to the complaint. A response, which was also forwarded to you, was received on 18 October 2005. Your reply was received on 7 November 2005. After considering the submissions before me I find it unnecessary to hold a hearing in this matter. The facts are known to the parties so they will not be repeated here, save for that which has a bearing on the outcome of my determination. My determination and reasons therefor appear below.

Factual background

- [2] You started contributing to the fund in February 1990. You ceased contributions in January 2002 because the business you owned was performing poorly. At the time your monthly contributions were R691.13. On enquiry Sanlam advised you that your fund benefit was only accessible from age 55 onwards. As you were

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), F Mtayi (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), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator)

Office Manager: L Manuel, Financial Manager: F Mantsho, Accountant: R Soldaat

only 43 years of age at the time Sanlam refused to give you any cash from your fund policy.

Complaint

- [3] You complain about not being permitted access to your fund benefit until the age of 55 because you urgently require the cash. You allege that the rule is unfair as you made contributions to the fund, but you are now barred from receiving your benefit, or a portion thereof, at a time when you most need it.

Response

- [4] The principal officer responded to your complaint. She advised that the definition of "retirement date" in the rules of the fund makes it clear that a member cannot retire from the fund before age 55. Further, the policy document which you received made it clear that the maturity date of the policy can only be between ages 55 and 70. she goes on to quote paragraphs 3 and 7 of the policy document, which substantiate her averment that benefits can only be paid out between the ages of 55 and 70 for fund members, except in the case where the member suffers total and permanent disability.

Determination and reasons therefor

- [5] The crisp issue for determination in this complaint is whether the rules of the fund and the law permit you to receive a cash withdrawal benefit, or any other benefit payment, prior to the age of 55 given the fact that you are not disabled and you were 43 years old when you approached the fund for a payment of a benefit.
- [6] The fund is a registered fund in terms of the provisions of the Act and it is bound by its rules in the same way as its members, officials, shareholders and persons claiming under the rules (see section 13 of the Act). By virtue of the binding nature of the rules, the trustees of the fund, the members, the employer and any service provider such as the administrator of the fund may only do that what is set forth in the rules (see *Tek Corporation Provident Fund & Another v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E). Therefore, the trustees' authority needs to be determined with reference to the fund rules.
- [7] In terms of sub-section (v) of the definition of a retirement annuity fund in section 1 of the Income Tax Act, 58 of 1962 ("the Income Tax Act"), a member of a retirement annuity fund, which you are, shall not be entitled to receive payment of a benefit before he attains the age of 55, unless he becomes permanently incapable through infirmity of mind or body of carrying on his occupation. In other words, a benefit from a retirement annuity fund will only be paid to a member before the age of 55 if he can prove to the fund's satisfaction that he is permanently disabled. If the fund pays a benefit to a member before the age of 55, other than in the event of the member being disabled, it would risk the withdrawal of its tax approval from the South African Revenue Service.

[8] In compliance with the Income Tax Act, the rules do not make provision for the payment of a benefit to you before the age of 55, except in the event of a member's total and permanent disability as defined in the rules, or death. Part 8 describes the benefits that the fund is permitted to pay. The relevant sections read as follows:

"1. The following benefits are available in terms of these rules:

- 1.1 A PENSION that commences on the MEMBER'S RETIREMENT DATE and which is payable at least until his death.
- 1.2 In the case of the death of the MEMBER before the RETIREMENT DATE and before the commencement of the PENSION stated in the preceding paragraph 1.1:
 - 1.2.1 Payment of the MEMBER'S CONTRIBUTIONS to the FUND with or without interest on it for payment in terms of paragraph 7.3 of Part 8; and
 - 1.2.2 A PENSION to the NOMINEE or DEPENDANT who must receive it in terms of paragraph 7.3 of Part 8.
- 1.3.1 Should the POLICY on the MEMBER'S life include a disability benefit and the MEMBER be declared disabled in terms of the definition of the POLICY, a PENSION which is paid at least until the death of the MEMBER.
- 1.3.2 Should the POLICY on the MEMBER'S life not include a disability benefit and the MEMBER, due to a mental or physical disability, becomes permanently disabled to perform his occupation and the POLICY has sufficient value, a PENSION which is paid at least until the death of the MEMBER."

[9] In turn, "retirement date" is defined in part 3 of the rules to mean the following:

"RETIREMENT DATE for a MEMBER is, ...the first practical day following the date on which the FUND receives the MEMBER'S choice with regard to which of the available retirement options the MEMBER prefers, provided that no MEMBER becomes entitled to payment of any life annuity after reaching the age of 70 years or, except in the case of a MEMBER who becomes physically permanently disabled to practice his occupation, before reaching the age of 55 years."

[10] You have not applied for a disability benefit from the fund. Thus, the fund can only pay a benefit to you on your chosen retirement date or at the earliest, when you turn 55 years of age (of which the maximum cash lump sum payable will be

one-third of the benefit and the remaining two-thirds must be used to purchase an annuity that will provide you with a monthly pension)

[11] Since the earliest event giving rise to the payment of a retirement benefit to you, namely attaining the age of 55, has not occurred because you were only 43 years old when you requested a cash payment from the fund, you do not qualify for the payment of a retirement benefit at this stage. You have also not placed any evidence before the fund to suggest that you qualify for a disability benefit. In the circumstances, neither the rules nor the law permit the fund to make any payment to you at present.

[12] In the result, your complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS DAY OF 2008

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR