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

1. Introduction

- 1.1 The complaint concerns an alleged misrepresentation made by the complainant’s financial adviser concerning the accessibility of his retirement benefit which is invested in the respondent, a registered pension fund.
- 1.2 The complaint was received on 4 June 2007. A letter acknowledging receipt thereof was sent to the complainant on 22 June 2007. On the same date a letter was dispatched to the respondent giving it until 23 July 2007 to file its response to the complaint. The response was received on 12 November 2007. A copy of the response was forwarded to the complainant. No reply was received from the complainant.
- 1.3 After reviewing the written submissions, I consider it unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

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

2. Factual Background

- 2.1 The complainant became a member of the respondent on 1 January 2002 on the advice of his financial advisor, Mr Cobus Basson of BOE Bank Limited, when he transferred his benefit of R306 230.33 from the Argus Provident Fund ("the fund") to the respondent fund as a once-off contribution.
- 2.2 The respondent is administered and underwritten by Old Mutual Life Assurance Company (South Africa) Limited ("Old Mutual"). The respondent was requested to purchase a compulsory joint survivorship annuity that would provide the complainant and his wife with an income for life. The complainant's once-off contribution was invested in an Old Mutual policy ("the policy") with certificate number 12941531.

3. Complaint

- 3.1 The complainant is aggrieved by his inability to access his entire benefit which is invested in the respondent. He contends that he did not understand the nature of the retirement annuity fund when he was advised by Mr Basson to transfer his benefit from the Argus Provident Fund to the respondent.
- 3.2 The complainant states that he was under the impression that he would have immediate access to his retirement benefit. However, his request to gain access to his retirement benefit has been ignored. He accordingly requests this tribunal to intervene and make an order directing the respondent to make his benefit available to enable him to pay his creditors.

4. The response

- 4.1 The respondent states that the cancellation of the underlying contract would only be possible if the full purchase price amount is returned to the fund. It states that the complainant has already received annuities for the past five years and would not be able to refund the amount that he has received from Old Mutual.
- 4.2 The respondent contends that due to the lapse of time it could not be expected of the trustees of the fund to accept the reversal of the amount invested into the respondent.
- 4.3 The respondent submits that the complainant is required to receive an income in the form of an annuity in terms of the Act and the Income Tax

Act 58 of 1962 and the respondent is therefore precluded from refunding the balance to the complainant.

5. Determination and reasons therefor

5.1 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* [2000] 3 BPLR 227 (SCA) at 239 D-H).

5.2 The issue for determination is whether the complainant is entitled to receive his entire benefit while in receipt of a monthly annuity.

5.3 Rule 4.2 of the respondent's rules reads as follows:

"ANNUITY IN RESPECT OF A MEMBER

4.2.1 Each MEMBER'S retirement capital determined in terms of the ANNUITY POLICY shall be applied in purchasing a retirement annuity on such MEMBER'S life in accordance with the provisions of the ANNUITY POLICY".

4.2.2 Transfers to an INSURER(S)

Subject to the provisions of the ANNUITY POLICY, each MEMBER may request in writing that his annuity be purchased from one or more INSURER(S). The MEMBER(S) annuity shall be purchased in his name and shall be in full and final settlement of the benefit payable in terms of these Rules. The annuity shall be compulsory, non-commutable, non-assignable annuity payable for the lifetime of the MEMBER or the joint lifetime of the MEMBER and a nominated beneficiary, underwritten by the INSURER(S). The purchase of the annuity and the transfer of liability in respect thereof, is subject to such conditions and the requirements as the REGISTRAR and the REVENUE AUTHORITY shall require from time to time. Once liability for the payment of the annuity has been transferred to the INSURER(S), the provisions of these Rules and the Act shall cease to apply. In the event of death of the MEMBER any benefits payable shall be in terms of the annuity policy or policies issued to the MEMBER by the INSURER(S)."

5.4 In the instant, the respondent has discharged its obligation by purchasing an annuity in the name of the complainant from Old Mutual in terms of its rules. It seems that such annuity policy is an insurance product which is not related to a pension fund and, as such, this tribunal does not have jurisdiction to investigate and adjudicate complaints arising from such insurance products. However, insofar as the complaint is directed against the respondent requiring it to reverse the transaction between it and the

- insurer, this tribunal has the necessary jurisdiction to investigate and adjudicate upon such issue. In my view, the respondent has correctly rejected such a request because it acted in accordance with its rules.
- 5.5 The complainant is not entitled to receive his benefit in any manner other than that set forth in the rules, and I accordingly do not have the authority to direct the respondent to reverse the election made by the complainant. In no circumstances was the complainant ever entitled under the rules to a cash benefit. In light of the above, the complaint cannot succeed.
- 5.6 Concerning the alleged misrepresentation made by the complainant's financial advisor or intermediary, such misrepresentation cannot be imputed to the respondent because it had no knowledge of the complainant's understanding or lack thereof of the investment vehicle of the respondent. It seems that this complaint stems from the failure on the part of an independent financial intermediary to furnish the complainant with proper advice regarding the investment of his benefit. If so, the Adjudicator would not have jurisdiction to investigate and adjudicate upon it. In such circumstances, it might be in the complainant's interest to refer the matter to the Office of the Ombud for Financial Services ("the FAIS Ombud") which was established in terms of Section 20 of the Financial Advisory and Intermediary Act 37 of 2002. The FAIS Ombud's contact details appear at the foot of this letter.

6. Relief

- 6.1 The complaint is dismissed.

DATED AT CAPE TOWN ON THIS THE DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR