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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): J. BLOEM v CENTRAL RETIREMENT ANNUITY FUND (“the fund”) AND SANLAM LIFE INSURANCE LTD (“Sanlam”)

Introduction

[1] This matter concerns the calculation of your retirement benefit, in particular the application of a market value adjuster on the advancement of your retirement date. The complaint was received by this office on 19 May 2005 and a letter acknowledging receipt thereof sent to you on 30 May 2005. On 31 May 2005 a letter was dispatched to the respondents giving them until 21 June 2005 to file a response to the complaint. A response dated 25 October 2005 was received from both respondents. You were copied with the response. 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 insurers on the other, in terms of which the life insurers 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, all retirement annuity fund complaints (including this one) were nevertheless referred back to the management boards and life insurers administering these funds with a view to facilitating an amicable resolution of the complaint between the parties without the intervention of this office.

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

This matter was referred for settlement to the fund on 20 January 2006. The parties were given 30 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 17 June 2006 my assistant was informed telephonically that the parties in this complaint had failed to reach a settlement in this case. The details of disagreement were not communicated to me. It is with that brief background that I now determine this complaint in the ordinary course. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter.

The complaint

- [2] Your complaint concerns the value of your retirement benefit from the fund which was appreciably less than you expected. You commenced contributing in January 1983 with an agreed retirement date of 1 January 2012. Your monthly contributions commenced at R36,64. From June 2004 you ceased contributions and elected to receive an early retirement benefit. The benefit amounted to R28 062, one third of which you received in cash. You have asked me to ascertain whether this has been correctly calculated.

Response

- [3] The fund has raised a technical point that your grievance constitutes long-term insurance business that is regulated by the Long-Term Insurance Act and not the Pension Funds Act. It also alleges that your grievance does not amount to a "complaint" as defined in the Act. For these reasons it contends that I do not have jurisdiction to determine the matter.
- [4] On the merits, the respondents state that the policy underlying your fund benefit was a reversionary bonus policy. This is a form of "with-profit annuity". The workings of these types of policy are set out in some detail in the response. In summary, if the exit date is earlier than agreed, then the guaranteed retirement benefit, together with declared returns is reduced to reflect the present value of that sum. This involves the application of an actuarial formula which takes into account further contributions which have not been received as well as potential growth on the contributions and declared returns.
- [5] The fund sets out the following facts with regard to your contributions and the calculation of your benefit. Of your monthly contributions R7,43 was allocated to death and disability cover, leaving R29,21 available for investment. The total contributions received amounted to R9 416,48. The benefit, assuming you had stayed in the fund and continued to pay

contributions as scheduled, was R53 589,11. This represents the guaranteed benefit together with declared bonuses payable at maturity. A negative adjustment of R19 779 (37% of the total retirement benefit) was made to account for the present value of the benefit. A further deduction of R5 747,72 (17% of the total benefit) was made in accordance with the application of a “market adjustment factor” to reflect the underfunding position at the time of your exit.

- [6] For authority to make the deductions, the respondents point to clause 3 of the policy document governing the advancement or postponement of retirement benefits. The provision reads as follows:

“At the election of the assured, the benefits at maturity shall become available partially or in full

- on any date after the fifty-fifth and before the seventieth birthday of the assured, or
- at any time after the date of commencement of the policy if the assured can prove to the satisfaction of Sanlam that he suffers total and permanent disability

In the event of such an advancement or postponement the various sums and provisions of this policy will be amended as stipulated by Sanlam”

- [7] They therefore contend that you received your correct benefit.

Determination and reasons therefor

Jurisdiction

- [8] There is no merit to the preliminary point raised by the fund. The crux of this complaint does not constitute long term insurance business, but actually relates to a retirement annuity fund, which is a pension fund organization as defined in the Act. For the reasons more fully set out in *JJ Schwartz v Central Retirement Annuity Fund & Another* [2005] 5 BPLR 435 (PFA) at paragraphs [12] to [28] and *Louw v Central Retirement Annuity Fund & Another* BPLR [2005] 7 BPLR at paragraphs [17] to [36], I cannot uphold the contention that this matter constitutes “long term insurance business” over which I have no jurisdiction.

- [9] Furthermore, 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 basis of the complaint was that applicant [Central Retirement Annuity Fund]

as the holder of the policy on the life of a member, was neither obliged nor entitled simply to allow Sanlam Life [the insurer] to charge whatever costs and charges it chose to levy and to accept whatever investment bonuses that it chose to declare from time to time without first satisfying itself through its own management committee of the reasonableness or adequacy thereof.

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."

- [10] In addition, in so far as your complaint implicitly relates to the administration of the fund and/or the investment of its funds and it is implicit therein that you have suffered prejudice (in that your fund value has been reduced) in consequence of the maladministration of the fund (in the form of the levying of undisclosed charges), your grievance constitutes a complaint as defined. (See *Louw* at paragraphs [11] to [15].)

Merits

- [11] The reduction in your benefit to take account of the present day value of your fund share (in other words less future contributions and bonuses which will no longer be made) appears to be reasonable. The higher amount of R53 589,11 was based on the assumption that you would continue making contributions until the agreed date. Since you opted for an advancement of your retirement date, those contributions which were therefore not received by the fund, or the bonuses that could have been earned on them, could not form part of your total retirement benefit. This is what is represented by the deduction of R19 779, and I am satisfied that the insurer was entitled to reduce the benefit by that amount.
- [12] However, the same can not be said for the second deduction, the "market adjustment factor" of R5 747,72. This is otherwise known in the industry as a "market level indicator" or a "market value adjuster" ("MVA") and is applied to a fund share when its face value is higher than the market value of the underlying assets. The background and application of these "MVA's", as they are commonly referred to, particularly in the context of "with profit" annuities, was fully set out in a previous determination of this tribunal, *Mungal v Protektor Preservation Fund and Old Mutual*, as yet unreported, case no PFA/KZN/2658/05/KM, dated 29 May 2006, at paragraphs [21] to [31], a copy of which is attached to this ruling. The principles discussed in that determination apply with equal force to the issues arising in this case.

[13] In the present case, as in the *Mungal* matter, the sole issue for determination is whether the rules or the policy document in fact allow for such a deduction. The rules determine the benefit with reference to the amount calculated by the insurer. This is set out in Part [8] and reads as follows:

“Liability

4. The liability of the FUND is restricted to the values of the POLICIES and investments in UNIT TRUST SCHEMES held on behalf of a specific MEMBER.
5. The overall liability of the ASSURER is determined by the conditions of the POLICIES and the ASSURER is not restricted by these rules or any amendments to these rules.”

[14] The provisions of the policy document are therefore incorporated by reference into the rules and one must have regard to its provisions in determining the benefit payable. I express no opinion on the validity of clause 5 which states that the “Assurer” is not restricted by these rules, since it is not relevant to the disposal of the present complaint, which can be settled with reference to the policy document. The relevant provision in the policy document is that set out in para [6] above, which provision the respondents rely on for authority to make the deductions. The kernel of this clause is contained in the phrase “[i]n the event of such an advancement or postponement the various sums and provisions of this policy will be amended as stipulated by Sanlam”. The ambit of these “amendments” is nowhere stipulated. But that is not to say the value is to be left to the administering insurer’s untrammelled discretion, bereft of any considerations of reasonableness, good faith and fairness. Some reasonable standard must be met.

[15] So, what does the policy document tell us about the application of the MVA? Nothing. In its further response of 25 April 2006, Sanlam states that

“The second adjustment is to make sure that the sum assured plus bonuses less the first adjustment, for all similar RB policies, do not exceed the actual assets held for these policies, which would be to the detriment of remaining policyholders.

....

In late May 2004 the total sums assured plus bonuses, less the first adjustment , for all similar RB policies, was approximately 115% of the market value of the assets held for these policies. After we subtracted the second adjustment of 17%, the member therefore received 98% of the asset share of the policy.”

[16] Nothing in the policy document furnished to me by the respondents authorizes this deduction. It might also be questioned why, if the funding level was 15% underfunded, the complainant’s benefit was visited by a

