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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”) – A D D COCKCROFT v SOUTH AFRICAN RETIREMENT ANNUITY FUND & OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED

Introduction

- [1] This complaint concerns the penalty levied when you ceased contributions to the fund. The complaint was received by this office on 12 May 2005 and a letter acknowledging receipt thereof sent to the complainant on 19 May 2005. On 19 May 2005 a letter was dispatched to the respondent(s) giving them until 10 June 2005 to file a response to the complaint. The response dated 21 June 2005 was received on 1 July 2005. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter.
- [2] 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 assurers on the other, in terms of which the life assurers 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, we nevertheless referred all retirement annuity fund complaints (including this one) back to the management boards and life assurers administering these funds with a view to facilitating an amicable resolution of the complaint between the parties without the intervention of this office. This matter was referred for settlement to the South African Retirement Annuity Fund and Old Mutual Life Assurance Company (SA) Ltd on 19 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

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basis but the settlement terms were not divulged to this office. However, on 26 May 2006 we were informed that the parties in this complaint had failed to reach a settlement. The details of disagreement were not communicated to us. It is with that brief background that we now determine this complaint in the ordinary course.

Facts

- [3] You became a member of the South African Retirement Annuity Fund (“the fund”) on 1 August 1999 whereupon Old Mutual Life Assurance Company (SA) Limited (“Old Mutual”), both the administrator and the underwriter of the fund, issued a policy of insurance policy number 12048628 (policy A) to the fund on your life.
- [4] In terms of policy A you paid monthly contributions of R700. Your chosen date of retirement was 1 August 2009.
- [5] On 1 April 2001, Old Mutual issued a second policy of insurance policy number 12638214 (policy B) to the fund on your life. In terms of policy B you paid monthly contributions of R385 subject to an annual increase of 10%. Your chosen date of retirement in respect of policy B was 31 March 2006.
- [6] In respect of both policy A and policy B, a benefit equal to the value of the “Investment Plan” was payable in the event of your death.
- [7] With effect from 24 February 2003 you ceased contributions to the fund in respect of policy B. With effect from 1 April 2003 you ceased contributions in respect of policy A.

Complaint

- [8] Your complaint is that whereas you paid contributions to the amount of R29 400 (R22 220.81 according to the fund), in respect of policy A, your fund value when you ceased contributions dropped to R19 149.27 (R17 965.24 according to the fund).
- [9] In respect of policy B too, you state that whereas you paid contributions of R8 435, your fund value dropped to R5 872.97 when you ceased contributions. You contend that severe penalties were imposed and request that you be reimbursed by the fund.

Response

- [10] The fund and Old Mutual have responded to your complaint. I shall deal with their responses together and refer to them collectively as “the

respondents”.

[11] The respondents have raised a technical point that your grievance concerns insurance business which does not constitute a complaint in terms of the Act.

[12] On the merits, the respondents refer to clause 2 of part 1 of the policy which reads:

“All benefits payable by OLD MUTUAL are subject to the GENERAL PROVISIONS (Part 3) and the conditions as set out in the SUPPLEMENTARY BENEFITS (Part 4) and UPDATE FACILITIES (Part 5).”

[13] The respondents have also referred to clause 2 of part 3 under “General provisions” which provides that Old Mutual undertakes to pay the contracted benefits

“... after being satisfied with regard to the age of the Assured/Annuitant and the validity of the claim”; and

“provided that the provisions set out in this contract have been complied with.”

[14] According to the respondents one of the primary provisions of the contract is the provision in respect of contributions payable. In respect of policy A you undertook to pay monthly contributions of R700 until 1 July 2009. In respect of policy B you undertook to pay monthly contributions of R385 until 31 March 2006.

[15] The respondents explain that by ceasing contributions on 24 February 2003 and 1 April 2003 in respect of policy A and B respectively, Old Mutual’s undertaking in terms of clause 2 of part 1 became inapplicable and part 3 of clause 8 became applicable. The latter reads:

“If the contributions are not paid within the one month period of grace allowed, the policy will ... be automatically converted to a paid-up policy for reduced benefits and in accordance with conditions which OLD MUTUAL will determine at the time.”

[16] The respondents state that the “conditions” referred to are the conditions flowing from the actuarial rules applicable at the time.

[17] In terms of the actuarial rules, the respondents calculated that the benefit payable was “reducible” by an ‘early premium cessation’ fee of R4 255.57 in respect of policy A and R591.39 in respect of policy B. According to the respondents this amount represents the expenses which were incurred on the policies but which could no longer be recouped piecemeal from the contributions over the term of the policy on account of early cessation of contributions.

- [18] Apart from the application of the ‘early premium cessation fee’ the respondents state that the benefit you received was also affected by the adverse market conditions. According to the respondents in respect of policy A, of the 30% drop in value in the contributions paid, 23% was attributable to the market conditions and in respect of policy B, of the 36% drop in value in the contributions paid, 22% was attributable to market conditions.

Determination and reasons therefor

- [19] There is no merit in the technical points raised by the respondents because 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 Pension Funds 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.
- [20] 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 (handed down on 20 October 2005) (“the de Beer judgment”) confirmed the jurisdiction of this office and stated:

“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.”

- [21] Furthermore 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 undisclosed penalties were deducted from your fund value) in consequence of the perceived maladministration of the fund, your grievance constitutes a complaint as defined. (See *Louw* at paragraphs [11] to [15]).

Merits

- [22] What the trustees of a pension fund organisation may or may not do is decreed by the fund rules. If what they propose to do is not within the

- powers conferred upon them by the rules, they may not do it (*Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at para [28]). That the rules of a fund are king is confirmed by section 13 of the Pension Funds Act.
- [23] The question for determination is whether in terms of the rules or related policy documents the respondents were authorised to deduct an 'early premium cessation fee'.
- [24] Part 3 of clause 8 of the policy to which the respondents refer provides that when a member ceases contributions, the policy shall be made 'paid-up' for 'reduced benefits'. However nowhere is a paid-up policy defined. It is also not specified how the benefits are to be reduced. The rule certainly does not provide for the charging of an 'early premium cessation fee' when a member discontinues contributions.
- [25] Since you ceased contributions early, it stands to reason that a lesser benefit will be payable because contributions will no longer be received for the remainder of the policy term. Part 3 of clause 8 makes provision for this by providing for 'reduced benefits'. But that is as far as the clause takes us. I fail to see how it authorizes the deduction of as yet unrecouped expenses from a member's fund value.
- [26] The phrase "will ... be automatically converted to a paid-up policy for reduced benefits and in accordance with conditions which OLD MUTUAL will determine at the time" is also, in my opinion, too vague in its formulation to be relied upon as authority to accelerate unrecouped expenses and deduct them from a member's benefit on early cessation of contributions.
- [27] As Davis J stated in the *De Beer* judgment (at 660D-E), the fund cannot simply be treated as an illusory go-between between the members and the insurer. It should be accountable to its members and hence be subject to the discipline of the Act's complaint mechanism. On the issue of the charges levied by the insurer, Davis J stated as follows (at 663E-G):

"It follows that the reasonableness of the total charges levied by the insurers from time to time in respect of the administration of the fund and the apportionment thereof among beneficiaries are considerations of which account must be taken by Applicant's management committee. Similarly, the reasonableness of investments effected and maintained by the insurer for the fund from time to time should be examined by the management committee, if the latter is to fulfill its fiduciary responsibilities to members. In addition, the adequacy of disclosure of information which is critical to the interests of members, such as an adequate and fair explanation as to the meaning of documents which provide illustrative values at the inception of the contract as well as the adequacy of disclosure by the insurer to members from time to time, must, in the light of the analysis advanced, comprise part of the responsibilities of the management committee of applicant."

[28] For the above reasons, I am satisfied that Old Mutual was not authorized (and the fund had no power to allow) to deduct the amounts of R4 255,57 and R591,39. Since the amounts were deducted by Old Mutual, and not the fund, the appropriate order for its reversal must be made against Old Mutual.

[29] In the result I make the following order:

- 28.1 It is hereby declared that the respondents were not entitled to deduct any amount from the complainant's accumulation accounts, in respect of either policy A or policy B, by reason only of you stopping contributions to the fund before your chosen retirement date.
- 28.2 Old Mutual is directed to recalculate your fund value as if the amount of R4 255.57 in respect of policy A had not been deducted when you stopped contributions to the fund with effect from 1 April 2003, and to inform you of this value within three weeks of the date of this determination.
- 28.3 Old Mutual is further directed to recalculate your fund value as if the amount of R591.39 in respect of policy B had not been deducted when you stopped contributions to the fund with effect from 24 February 2003, and to inform you within three weeks of the date of this determination.

DATED AT CAPE TOWN ON THIS THE DAY OF 2006.

Yours faithfully

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR