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BY REGISTERED POST

Mr. A.D.S. Watt
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Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 of 1956 ("the Act"): A D S WATT ("complainant") v SOUTH AFRICAN RETIREMENT ANNUITY FUND ("first respondent") AND OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED ("second respondent")

[1] INTRODUCTION

1.1 The complaint concerns the investment return achieved on the complainant's retirement annuity fund contract.

1.2 The complaint was received by this tribunal on 26 April 2010. A letter acknowledging receipt thereof was sent to the complainant on 17 May 2010. On the same date a letter was dispatched to the respondents giving them until 17 June 2010 to file a response. A response on behalf of the respondents, which was forwarded to the complainant, was

received on 25 May 2010. On 2 June 2010 this tribunal received further submissions from the complainant.

1.3 This matter was referred to conciliation on 24 June 2010 in order to afford the parties an opportunity to resolve the complaint. However, no resolution was reached and the matter was referred to adjudication. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

2.1 The complainant applied for and was admitted to the membership of the first respondent, which is a registered retirement annuity fund in terms of the Act, on 1 March 1988. His chosen maturity date was 1 March 2010. His retirement funds were invested in the second respondent's Smoothed Bonus Portfolio.

2.2 On 1 March 2010 the maturity value of the complainant's contract was R939 441.48.

[3] COMPLAINT

3.1 The complainant submits that a financial advisor advised him that the Flexipension product is a good investment. The financial advisor showed him an advertisement which reflected an illustration of the maturity value of another member who had invested in the Flexipension. This person received a return of 28.2% *per annum* after 14 years of membership.

3.2 The complainant contends that he became a member on the basis of the advertisement. He submits that he was aware that the returns on his policy would be determined by market conditions, but submits that it was reasonable for him to assume that the return would be 28.2% or just below 28.2%. His policy achieved a return of only 11.99%, which

he considers to be considerably less than the level of return that was indicated to him. The second respondent misled him by advertising a vesting value of 28.2% while it was aware that there was a high risk that it would not be achieved.

3.3 Further, the complainant contends that the advertisement created a reasonable expectation in his mind that his vesting value at maturity date would be 28.2%. He submits that the advertisement amounts to a misrepresentation on the part of the second respondent. Therefore, the second respondent has a contractual obligation to adjust his vesting value to be in line with the return of 28.2% that was indicated in the advertisement.

[4] RESPONSE

4.1 The second respondent indicates that it called the complainant on 12 March 2010 and explained the inflation scenario as it was in 1987. It avers that a comparison between two products is only possible if the contract data is exactly the same in all aspects, i.e. package type, investment portfolio, same contractual term, premiums, etc. The detail in the advertisement that was presented to the complainant was factual in relation to a policy that vested on 1 October 1987. The advertisement does not guarantee a return of 28.2% for future investments.

4.2 Further, it submits that the South African inflation rate has progressively been managed downwards with the result that nominal returns are generally lower when compared to the original illustrative assumptions. Thus, it asserts that over the years the life assurance industry adjusted these illustrative assumptions in line with the actual inflation rate. The Smoothed Bonus Portfolio comprises approximately 25% interest bearing assets, 65% equities and 10% property. Up to 15% of the overall portfolio may be invested in international assets. It further states

that bonuses are declared annually and these bonuses are influenced by the investment return on the underlying assets.

4.3 The Smoothed Bonus Portfolio is subject to an underlying guaranteed rate of return of 4.78% *per annum*. The complainant made total contributions of R463 410.85 and his policy was subject to a guaranteed vesting value of R584 692.00. The complainant received R939 441.48 at an internal rate of return of 11.99% *per annum.* The complainant increased his premiums quite substantially in 2002 and as a result he paid around 80% of the premiums during the last 7 years of the policy. The average bonus rate for the last ten years of the policy was around 11.5% while it was around 17% during the first ten years. During the years when the premiums were increased the policy had a lower bonus rate, resulting in the overall bonus rate being closer to the lower average for the last ten years.

4.4 Therefore, it submits that the complaint should be dismissed as the complainant's vesting value of R939 441.48 represents a true reflection of the value of the policy between 1988 until the maturity date. In conclusion, it submits that the complainant is not entitled to a return of 28.2% as it relates to a different policy and was an illustration.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

5.1 The issue is whether or not the actual vesting value of the complainant's retirement annuity fund policy is fair and reasonable and whether or not the respondents can be held to an illustrative value provided at inception.

5.2 It is trite law that any benefit that is due to a fund member is computed and payable in accordance with the fund's rules or the terms of any

policy contract (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-H and section 13 of the Act).

The vesting value

5.3 It is common cause that the actual vesting value of the complainant's policy was subject to the market performance of the underlying investment portfolio (i.e. the Smoothed Bonus Portfolio) during the term of the policy. The actual return of the policy is determined by the rate of bonuses declared on the policy, which is also influenced by the investment return on the underlying assets.

5.4 The complainant's policy was subject to a guaranteed return of 4,78% *per annum*. He paid total contributions of R463 410.85 and his guaranteed vesting value was R584 692.00. As at the vesting date on 1 March 2010, the maturity value was R939 441.48. This represented an internal rate of return of 11.99% *per annum,* which was higher than the guaranteed return.

5.5 The second respondent submitted a schedule which reflects the performance of the Smoothed Bonus Portfolio during the policy term. The facts indicate that the rate of bonuses declared during the last ten years of the policy amounted to 11.5% *per annum*. The final vesting value of the policy was affected by the rate of bonuses declared and the rate of inflation during the policy term.

5.6 The complainant was dissatisfied because an advertisement was presented to him before he became a member, which reflected a return of 28.2% *per annum* on a 14 year membership that ended in 1987. He ostensibly became a member on the basis of this advertisement, so he now expects a return close to 28.2% rather than 11.99%. However, it is clear that the advertisement that was provided to him was for

illustrative purposes only and the complainant was not guaranteed a similar return on his retirement. The underlying assumptions for the policy in the advertisement were different to the actual set of factors that produced a return of 11.99% on the complainant's investment. The policy was invested between 1973 and 1987 while the complainant's policy commenced on 1988 until 2010. He would have been informed of his policy values by means of annual benefit statements, so he cannot claim that he was not informed of the rates of return achieved on his investment. Therefore, a comparison between the two policies was not reasonable or justifiable and could not have created a legitimate expectation that the complainant would receive a 28.2% return.

5.7 In light of the submissions, this tribunal is satisfied that the actual vesting value paid to the complainant was fair and reasonable. Therefore, the complainant is not entitled to the illustrative maturity value that was provided to him at inception, or any other illustrative value that was quoted to him.

[6] <u>ORDER</u>

6.1 In the result, the complaint cannot be upheld and is dismissed.

DATED AT JOHANNESBURG ON THIS 23rd DAY OF JUNE 2011

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DR. E.M. DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

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Parties unrepresented