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REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): BS SWART ("complainant") v LIFESTYLE RETIREMENT ANNUITY FUND ("first respondent"); LIBERTY GROUP LTD ("second respondent") AND OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LTD ("third respondent")

[1] INTRODUCTION

1.1 The complaint concerns interest losses sustained on the complainant's living annuity, following an error occasioned by the first respondent.

1.2 The complaint was received by this Tribunal on 20 November 2012. On 4 December 2012, a letter acknowledging receipt thereof was sent to the complainant. On the same date, a copy of the complaint was dispatched to the first respondent, affording it an opportunity to submit a response to the complaint by 8 January 2013. On 9 January 2013, a response was received from the first respondent. On 17 May 2013, a

copy of the complaint was sent to the third respondent, affording it the opportunity to submit a response by 17 June 2013. On 24 June 2013, a response was received from the third respondent. No further submissions were received from the parties.

1.3 Having considered the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefore appear below.

[2] FACTUAL BACKGROUND

2.1 The complainant had two retirement annuity policies with the first respondent, both with a maturity date of 1 November 2010. In October 2010, the complainant instructed his broker to re-invest the full maturity values of both policies into one living annuity with the third respondent with effect from 1 November 2010.

2.2 The complainant's broker carried out his instructions accordingly, but the instructions were misinterpreted by the second respondent to mean that the complainant had intended to take up early retirement. The error was subsequently corrected and the full maturity values of the complainant's benefit were re-calculated, and payment made to the third respondent.

[3] COMPLAINT

3.1 The complainant submitted that subsequent to the re-investment of both his policies, the third respondent issued a Galaxy Underwritten Life Annuity for the full maturity value of the policies with a commencement date of 13 January 2011. He submitted that he is

dissatisfied that the only income he received from the third respondent up to 31 January 2011, was in the amount of R1 299.88, which he was informed was a pro-rata share of the monthly annuity for the period 13 January to 31 January 2011.

3.2 The complainant submitted that he received no income on the invested amount of R628 483.55 for the period 1 November 2010 to 13 January 2011, being a total of 74 days. In this regard, he submitted that he has instructed his broker to request an interest payment on the full amount of R628 483.55 by either the second or third respondents, at a rate calculated at 12% *per annum*, being the equivalent of the overdraft rate applicable to his current account. He submitted that in terms of his calculations, the applicable interest would be in the amount of R15 290.22.

3.3 The complainant further submitted that at the time of the lodgement of the complaint, the aforementioned interest payment had not been made to him and therefore, requested additional interest to be paid to his current account on the aforementioned R15 290.22, at a rate of 12% *per annum* for the period 14 January 2011 until the date of payment.

3.4 The complainant requests this Tribunal to investigate the matter.

[4] RESPONSES

Second respondent

4.1 The response was received from the second respondent on the first respondent's behalf, in its capacity as the administrator of the first respondent.

4.2 The second respondent submitted that the complainant's retirement annuity policies were issued on 1 November 1981, with the selected retirement date 1 November 2010. It submitted that the policies are not market related, but earn growth by way of bonuses credited to their respective death values each year on 31 December. The second respondent submitted that it received the complainant's request, *via* his broker, on 15 October 2010. It conceded to an error on its part, whereby values for early retirement were paid on 19 October 2010, instead of total maturity values on the complainant's policies. The second respondent included an illustration of the differences between the erroneous early retirement benefit paid and the maturity values that should have been transferred to the third respondent as follows:-

Policy number	60002809900	6002815900
Early retirement value	R300 792.08	R253 201.20
Maturity value on 1 November 2010	R339 745.44	R288 738.11

4.3 The second respondent submitted that the aforementioned error was corrected and the differences of the maturity values in the amount of R38 953.36 and R35 519.91 were paid to the third respondent on 30 December 2010 and 6 January 2011 respectively. It further submitted that the complainant's broker was informed on 28 January 2011 of the corrective step taken in paying the differences to the third respondent. The second respondent submitted that the complainant was offered interest on the deficit of the maturity values that were never paid from 15 October 2010. It submitted that the interest calculations were based on the prevailing repurchase rate (Repo rate), taking into account the management fee of 0.5%. It further submitted that the interest rate applicable up to 9 September 2010 was 6% and

5.5% on 19 November 2010, in the amounts of R421.31 and R384.18 respectively, totalling R805.49.

4.4 The second respondent submitted that it never received a response from the complainant's broker in respect of the aforementioned interest payment offered. The second respondent further submitted that as a gesture of good faith, it has calculated interest on the interest that applied at the date of the response, being 30 December 2012 to 27 December 2012 in the amounts of R464.37 and R423.45, totalling R887.82. It asked that the complainant make contact with it in order to arrange for payment of the aforementioned amounts to be made to him.

4.5 The second respondent provided this Tribunal with copies of the complainant's membership certificate, as well as a letter setting out additional information in relation to the complainant's policies. It submitted that the aforementioned documentation constitutes a record of the policy of insurance entered into with the complainant and the plan in respect of the complainant's benefits, containing the terms and conditions in respect of his policies. The second respondent submitted that the policy documentation provided should for all intents and purposes be regarded as part of the response.

Third respondent

4.6 The third respondent submitted that income from the Fairbairn Capital Retirement Income Plan (previously the Galaxy Underwritten Life Annuity) ("Fairbairn Capital"), is paid in the frequency as selected by the annuitant. It submitted that the percentage selected by the annuitant is paid over a 12 month period from one anniversary date to the next, as determined by the annuitant's retirement or withdrawal date from the transferring fund. The third respondent submitted that the complainant's withdrawal date was recorded as 28 December 2010,

necessitating that no shortfall income would be paid to him. It submitted that it may only allocate funds received to an investment, once confirmation of payment has been received. It provided an illustration of the dates on which funds were received as follows:-

Amount received	Payment date to Fairbairn Capital	Date confirmation of payment received by Fairbairn Capital
R300 792.08	19 October 2010	3 January 2011
R 38 953.36	30 December 2010	3 January 2011
R253 218.20	19 October 2010	3 January 2011
R 35 519.91	6 January 2011	13 January 2011

4.8 The third respondent submitted that Fairbairn Capital only received the first notification of payment ten days before the complainant's contract was finalised. It submitted that Fairbairn Capital can therefore, not be held liable for the interest on the complainant's current account for the period 1 November 2010 to 13 January 2011. It further submitted that interest has been added to the aforementioned amounts for the period in which the funds were in Fairbairn Capital's bank account. The third respondent submitted that interest was added to the complainant's investment when it was finalised on 13 January 2011 as follows:

Amount received	Interest added
R300 792.08	R3 316.95
R 38 953.36	R67.23
R253 218.20	R2 792.34
R 35 519.91	R30.65

4.9 The second respondent submitted that Fairbairn Capital issued the complainant's investment as and when the required documentation was received, with no delays in the processing of his investment by Fairbairn Capital. It submitted that all income due to the complainant, as per the documentation received, has been paid.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issues for determination are whether or not there was unreasonable delay in effecting payment of the complainant's investment to the third respondent during the period 1 November 2010 to January 2011. Secondly, whether or not the complainant is entitled to an interest payment on his investment for the aforementioned period.

The delay in effecting payment of the complainant's income and the quantum paid during the period 1 November 2010 to January 2011

Technical point

5.2 Section 1 of the Act further defines a complaint as follows:

> "**complaint**" means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of it rules, and alleging –
>
> (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
>
> (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
>
> (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
>
> (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund; but shall not include a complaint which does not relate to a specific complainant;"

5.3 The complainant's investment was to be transferred by the second respondent, to the third respondent and was invested in Fairbairn Capital. The latter is not a pension fund and does not provide a

pension benefit in terms of the Act. Therefore, the section of the complaint pertaining to a delay in effecting payment of the complainant's first annuity income and the quantum thereof does not qualify as a complaint in terms of the section 1 of the Act and can therefore, not be adjudicated upon by the Tribunal. In this regard, the complainant is referred to the Long-Term Insurance Ombudsman. A copy of the complaint and a copy of this determination will be forwarded to the Ombudsman for Long-Term Insurance, with a note that the complainant may expect to hear from that office.

5.4 This Tribunal, however, does have jurisdiction to adjudicate over other aspects of this complaint, namely the delay in effecting transfer of his investment to the third respondent and any interest payment that may be due to the complainant as a result of the delay. A fund, its legal status, and the rights and obligations of its members, are governed by the rules of the fund, relevant legislation and the common law (*Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) at 894 B-C ("Tek"); *and see section 13 of the Act*).

5.5 Sections 7C(2)(a) and (b) of the Act provides guidelines in the manner in which the Board of Trustees is to carry out its objective. The sections read as follows:

> "(2) In pursuing its object the board shall –
>
> (a) Take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;
>
> (b) Act with due care, diligence and good faith;''

In turn, section 7D(c), pertaining to the duties of the board of a fund stipulates that:-

> "**Duties of board**
>
> The duties of a board shall be to –
>
> (a)
>
> (b)
>
> (c) ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund;"

5.6 The second respondent received the complainant's instructions to invest his living annuity with the third respondent on 15 October 2010. The second respondent conceded its error in initially interpreting the complainant's instruction to invest his benefit as an early retirement benefit instead of a living annuity with the third respondent. The aforementioned error was corrected and the differences in the maturity values in the amount of R38 953.36 and R35 519.91 were paid to the third respondent on 30 December 2010 and 6 January 2011 respectively, being a period of a little over two months. The second respondent subsequently took further steps to inform the complainant's former broker of the aforementioned error and the subsequent payment of the difference in the maturity and early retirement values for both policies.

5.7 The complainant's dissatisfaction with the second respondent's error in effecting his instruction is not without merit. However, the second respondent took appropriate action in effecting payment of the maturity and early retirement values to the third respondent and subsequently informed the complainant's former broker of the same. In effect, the second respondent handled the matter in a transparent manner at all times and accounted to the complainant by informing his former broker of the error that had transpired and the measures taken to protect the complainant's interests in terms of its duties as stipulated in sections

7C(2) and 7D(c) of the Act.

5.8 This Tribunal therefore finds that inasmuch as transfer of the complainant's investment by the second respondent, to the third respondent may have been undue and occasioned by the second respondent's error, the time taken to effect transfer to the third respondent cannot be said to have been unreasonable. In addition, any interest owed to the complainant for the period 1 November 2010 to 13 January 2011, as a result of the delay, would have been compensated by the interest payment offer made to him by the second respondent.

Interest payment due on the complainant's investment during the period 1 November 2010 to January 2011

5.9 The aforementioned interest payment offer was based on the prevailing repurchase rate of 5.5% *per annum* on the total benefit. The complainant seems to have refused the offer and requests the interest be calculated at a rate of 12% *per annum* on the benefit total (based on his overdraft rate as applicable to his current account), amounting to R15 290.22.

5.10 This Tribunal engaged an independent actuary to assess the interest amount that should be paid to the complainant for the period 1 November 2010 to 13 January 2013. The actuary consulted the third respondent in order to obtain all necessary information in assessing the interest calculation amount that ought to be paid by the second respondent. The actuary found that although the third respondent did not receive transfer of the complainant's entire investment monies from the second respondent by 19 October 2010, the third respondent had kept the initial amount received in a default account earning interest in accordance with its policy and only invested the total amount once the full investment amount was received.

5.11 The actuary further found that if the complainant's entire investment monies had been received by the third respondent by 19 October 2010, the value of interest earned would have been lower as a result of the complainant's choice of investment portfolio in which his money was to be invested. The actuary's final finding is that the complainant's request for the interest to be calculated at 12% of the total investment amount has no merit and that the complainant ought to accept the interest payment offer made in the amount of R805.49.

5.12 The appropriate relief would be that which has the effect of placing the complainant in the position he would have occupied had the first respondent effected transfer of his benefit by 1 November 2010 (see *Cruz v Sentinel Mining Industry Retirement Fund and Another* [2009] 3 BPLR 267 (PFA)). This Tribunal takes into account that the second respondent has made an even more favourable interest offer to the complainant in the total amount of R887.82, which the complainant is encouraged to accept as the final settlement.

[6] ORDER

6.1 In the result, this Tribunal makes the following order:

6.1.1 The second respondent is ordered to credit the complainant's investment account held by the third respondent, with the interest amount offered in the amount of R887.82, within two weeks of this determination.

DATED AT PRETORIA ON 29TH AY OF JULY 2013

MA LUKHAIMANE

PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Parties: Unrepresented