

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/WE/168/98/IM

In the complaint between:

PROF. FRANK HEINRICH SWART

Complainant

and

MR TREVOR WILLIAMS

First Respondent

LIBERTY LIFE ASSOCIATION OF AFRICA LIMITED

Second Respondent

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

Introduction:

This is a complaint lodged in terms of section 30A(3) of the Pension Funds Act of 1956.

In determining this complaint I have relied exclusively on documentary evidence and submissions and a report supplied by senior investigator, Ian McDonald.

The complainant is a retired member of the Associated Institutions Pension Fund (the "AIPF") who in 1995 exercised the option given to its pensioners by the AIPF to purchase their future pensions privately in the open market. This was achieved by transferring the assets held by the fund on behalf of the complainant into an annuity policy in the name of the complainant underwritten by the second respondent. At the time the option was exercised by the complainant, the first respondent, representing International Compensation (Pty) Ltd, acted as consultant and advisor to the complainant as regards the pros and cons of exercising the option, and in selecting the most suitable investment vehicle.

The complainant maintains that in discussions with the first respondent all the advantages of the option were spelled out but very little was said about disadvantages. When discussing the re-investment of the assets, the Linked Life Annuity of the second

respondent was put forward with little or no alternatives. The main point that was accentuated during discussions was that under this type of annuity contract the complainant could select to receive an income of between 2% and 20% of the assets each year, the amount taken could be reviewed each year according to his circumstances and on his death the capital remaining would remain in his family.

Since taking the advice of the first respondent and investing his pension fund assets with the second respondent the complainant's expectations have not been met, and, in fact, his assets have reduced in value considerably due, he says, to the fact that they were invested in the wrong type of contract for his needs.

Initially the complainant opted to take an income of 18% of his capital, then, in the second year he increased this to 20%. This provided him with an income which approximated to the amount he had been receiving as pension from the AIPF.

However, at the end of the third year he received a communication from the second respondent advising him that his capital asset had reduced in value by 28,91%, so that from his original investment of R873 384.00, only R44 0856,00 remained.

It was then that the complainant lodged his complaint with the respondents alleging that he had been misled by the first respondent as to the type of product his pension assets had been invested in and that the second respondent had failed to invest these assets where the capital would be safe and would earn a fixed interest rate.

As he has not received what he considers to be a satisfactory response from the respondents, the complainant has now lodged his complaint with this office, seeking relief in the form of:

1. An order on the first respondent requiring them to restore his full original investment plus

15% per annum compound interest, and

2. An order on the second respondent requiring them to cancel the existing contract and to re-invest the money in a safe, balanced and low risk fund.

Alternatively, the claimant would like consideration to be given to the possibility of reverting to the original fund. Effectively putting him back in the position he would have been had he elected to remain in the AIPF in 1995.

The issues for determination:

This is, unfortunately, a fairly common scenario, the likes of which one reads about in the press from time to time. The pensioner living off a fixed or limited income who, given the option to redirect his assets into an alternative investment medium, seeks advice from an independent third party then takes an irreversible action, only to find that things don't work out according to his expectations, or as he was "promised" at the time.

The problem is to determine where responsibility lies and to what degree. Was there misrepresentation by the consultant? Did the client simply make the wrong choice, or was he misled? Should the underwriter have accepted the terms of the application made, or do they have an obligation to question the reasonability of the instructions given to them by clients and intermediaries? It would seem appropriate that there must be some protection for the man in the street who puts his faith, or even his livelihood, in the hands of the "expert adviser". In the United Kingdom, for example, a requirement of "best advice" has been imposed on all financial consultants, whether independent intermediaries or employees of the institutions.

There the onus rests with the intermediary to prove that in all dealings with his client he has not only been acting in the best interest of the client but also that he has provided the best advice available at the time.

No such protection exists here in South Africa, as yet. Although it must be said that the Financial Services Board has recently issued a draft Financial Advisers Bill, which if and when enacted will seek to address this problem by legislating for the licencing and regulation of all intermediaries providing advice on any of the full spectrum of financial services.

Where, then, does the individual seek protection, and if necessary redress, in South Africa today? In this case the complainant has lodged his complaint with the Pension Funds Adjudicator, as it relates directly to the provision of his pension benefit.

In terms of the Pension Funds Act, a “complainant” means:-

- (a) any person who is, or who claims to be -
 - (i) a member or former member of a fund;
 - (ii) a beneficiary or former beneficiary of a fund;
 - (iii) an employer who participates in a fund;
- (b) any group of persons referred to in paragraph (a) (i), (ii) or (iii);
- (c) a board of a fund or member thereof; or
- (d) any person who has an interest in a complaint;

and a “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 its 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 power 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.

It is clear, therefore, that the complainant qualifies as a complainant in terms of (a)(i) of the definition of complainant. On the other hand although the complaint relates to the investment of funds of a fund to provide the pension due by the AIPF to the complainant, it does not, at first, appear to meet the other requirements of the definition, in that:-

- (a) it does not allege that a decision *of the fund* or any other person taken *in terms of the rules* was in excess of the powers of the fund or the person concerned, or that there was an improper exercise of powers,
- (b) it does not allege maladministration *of the fund* by the fund or any person, whether by act or omission,
- (c) it does not concern a dispute of fact or law *in relation to a fund*, and

- (d) it does not allege that the employer concerned has not fulfilled its duties in terms of the rules of the fund.

The complainant alleges incorrect or incomplete advice was given to him by a consultant acting as an intermediary between himself, the fund and the underwriter of the annuity policy, and improper investment of his funds by the underwriter selected by him on the grounds of this advice.

Section 30A of the Act reads:-

Submission and consideration of complaints

- (1) Notwithstanding the provisions of the rules of any fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participates in a fund.
- (2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.
- (3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint the complainant may lodge the complaint with the Adjudicator.

Here again the complainant at first sight does not appear to have any complaint against either the AIPF or his employer, the University of Vista, and has certainly not lodged a complaint with either. His problem is that the vehicle in which he invested has failed to meet his expectations. Such vehicle does not constitute a “fund” in terms of the Act.

So, it would appear that the Adjudicator does not have jurisdiction over this complaint in

terms of the Act. Perhaps this would change if the complainant alleged that for example, there was maladministration by the AIPF in introducing an independent intermediary, or in that it did not monitor the advice given and the actions taken properly.

For example, do the rules allow the fund to transfer its liability to an insurance contract. It could surely be argued that the fund must retain some responsibility in a defined benefit situation for ensuring that the lifetime security of the pension income is maintained under any external arrangement.

It would then be necessary for the complainant, in order to comply with the Act and bring the issue under my jurisdiction, to lodge such a complaint with the fund in terms of rule 30(A)(i). Only in these circumstances could I address the question of the degree of responsibility a fund has to ensure that its members are properly informed and advised in such situations.

Unfortunately, even in these circumstances, I would still not be in a position to adjudicate in this complaint as, in view of my finding in *The Retired University of Natal Staff Association v The Associated Institutions Pension Fund and others* (Case No. PFA/KZN/27/98), the Adjudicator does not have jurisdiction to determine complaints relating to that fund.

I have tried to find grounds on which to assume jurisdiction over this complaint, but have failed to do so. It is impossible, therefore, for me to rule on the allegations made by the complainant and to provide relief. This case does, however, serve to illustrate that there is perhaps a need to widen the scope of the Act to include the actions of all the peripheral parties, such as intermediaries and insurers, involved in the activities of pension funds and their members.

For the foregoing reasons, the complainant's complaint is dismissed.

