IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/KZN/304/99/SM

In the complaint between:

L J TUDOR **Complainant**

and

S.A.M.L.A.S. PENSION FUND **First Respondent**

OLD MUTUAL LIFE ASSURANCE COMPANY (S.A.) LTD **Second Respondent**

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

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1. This is a complaint lodged with the Pension Funds Adjudicator on 29 March 2000 in terms of section 30A (3) of the Pension Funds Act of 1956 ("the Act"), concerning the complainant's allegation that the refusal of the fund to allow him to fully commute his retirement benefits so that he could invest in a living annuity of his own choice was maladministration or an improper exercise of its powers.

2. The complainant is Lew J Tudor, who was employed by the second respondent as a sales intermediary from 1 January 1990 until his early retirement on 30 June 1999. He was a member of the first respondent for this entire period.

3. The first respondent is the South African Mutual Life Assurance Society Pension Fund, a hybrid scheme with a defined contribution arrangement, making provision for the calculation of the retirement benefit to be based on accumulated credit, but with all other benefits payable on exit from the fund calculated on a defined benefit basis. The second respondent is the employer, Old Mutual Life Assurance

Company S.A. Ltd. Separate responses were received in respect of the fund and the employer, both submitted by Mr Malcolm Rhodes, in his capacities as principal officer of the fund and human resources funds manager of the employer.

4. No hearing was held in this matter and in determining the complaint I have relied on the documentary evidence and submissions and on the investigation of the complaint by my senior investigator, Sue Myrdal.

5. Having completed my investigation I have determined the complaint as follows. These are my reasons.

6. The complainant wishes, in his own words, "to withdraw all his funds from the SAMLAS Pension Fund and to invest the proceeds in his…living annuity fund, as he can then have full control over his investments, which are considerably outperforming the SAMLAS Pension Fund." He maintains that it is only the fund's rules which prevent him from doing this, and that it is unfair to apply these rules when they disadvantage him. He maintains that the fund's disregard of his letter seeking commutation of "all" his funds (the fund paid him one third only and commenced paying a pension) constitutes maladministration since he did not sign for these terms.

7. Rule XVI 2 (c) (i) sets out the retirement benefit applicable to the complainant, a "section C" member, that is a whole time agent who became a contributor on or after 1 July 1989 (in terms of rule XV):

> "…the pension of a whole time agent who retires or is retired from the service of the Society in terms of section C of rule XV shall be the amount which can be purchased by his accumulated credit determined as at the date of his retirement. The annuity factors employed in calculating such pension shall be the same as those then in use for the purposes of subsection 7 of this rule."

8. Subsection 7 provides that the management committee may allow a retiring member, in its discretion, "to commute for a cash sum any portion, but not more than a third" of the pension payable, the amount to be determined by the chief actuary.

9. The fund has explained that while the retirement benefit is calculated on a defined contribution basis, all other benefits are calculated on a defined benefit basis; the spouse's pension payable on death after retirement, for example, being the 50% pension provided to a qualifying spouse in terms of the rules of the SAMLAS Spouse's Pension Fund. By way of background then the fund explains that

> "As the underlying benefits of the fund are those of a defined benefit fund, any pension purchased by the accumulated credit of a whole time agent is purchased within the fund. The fund retains the liability and the employer undertakes to ensure the soundness of the fund in terms of the underlying guarantees offered by a defined benefit fund."

10. It appears that in 1996, partly out of a recognition by the fund that more flexibility was desirable, members of the SAMLAS Pension Fund were offered the option to transfer to the Old Mutual Staff Retirement Fund, a true defined contribution fund, with effect from 1 January 1997. An enhancement was offered as encouragement to transfer, and detailed explanatory material was furnished to members. In terms of the rules of the transferee fund members were permitted more flexibility in that they could use their accumulated credit to purchase a pension of their choice from any registered insurer at retirement, the liability for the pension thus transferring from Old Mutual to the registered insurer.

11. However the complainant elected, for reasons which he has not indicated, to remain a member of the SAMLAS fund. The option form he signed contained the following printed statement, signed by him:

"I understand that once I have made my choice, I will not be able to change it at <u>any</u> stage. I confirm that I have made this choice freely and will not hold anybody else liable."

12. Over a year later the complainant requested that he be allowed to transfer after all. His request was turned down on the basis that the date for election had passed, this being conveyed to him by Mr Rhodes in a letter dated 24 March 1998.

13. Subsequent to the complainant's retirement in June 1999, however, the management committee and employer, in consideration of the changed working environment since the demutualisation of the employer, decided to allow members of the SAMLAS fund a second option to transfer to the Old Mutual Staff Retirement Fund on 1 August 1999. In terms of this offer a pensioner would receive a 27,5% increase in his pension on transfer and a with-profits annuity invested in the Platinum Pension Portfolio would be purchased through the chosen insurer (Old Mutual Employee Benefits), the liability for the pension thereby passing from the fund to the insurer. The complainant, by this stage a pensioner of the SAMLAS fund, took up this option. His present grievance relates to the fact that he could not transfer his entire retirement benefit to purchase a living annuity through another assurer of his choice – as he would have been able to do had he elected to transfer in 1997, and retired as a member under the rules of the Old Mutual Staff Retirement Fund.

14. It was explained in writing to the complainant both before and after his election to transfer as a pensioner to the Old Mutual Staff Retirement Fund in August 1999 that the restriction to a one third commutation of any pension was in terms of the Income Tax Act, not only the rules of the fund, and that his instruction to the fund on the notification of retirement to commute "all" his benefit was interpreted to mean the full one-third commutation, since he could have elected any lesser amount up to one third. He was also afforded the opportunity to change his mind and resign instead of retiring, in which case he could have received a cash withdrawal benefit

or a preserved benefit in terms of the rules, the latter carrying several options for preservation vehicles. The withdrawal benefit on resignation was however considerably lower than the value of the retirement benefit. The complainant did not respond to this offer, and the fund thereupon paid the complainant the maximum permissible amount of cash (the one-third commutation), in an attempt to meet his requirements as far as possible.

15. I am satisfied from an examination of the communication materials furnished to members at the time of the first offer to transfer that the options were clearly set out, and included easily understood comparisons of benefits. The complainant made his election as a fully-informed member, knowingly rejecting the flexibility he now seeks as to where to purchase a pension. He has recently elected to transfer as a pensioner to another fund on the basis that his pension is purchased from Old Mutual's Platinum Pension product range. The terms of this offer were also clearly set out on the option form in the block which he marked with a cross as follows:

> "I elect to transfer to the Old Mutual Staff Retirement Fund, where I will receive a Platinum Pension (Category A/Pro-elect growth) pension, with effect from 1 August 1999."

16. The complainant has no grounds for complaint, having in each instance freely exercised his election, and he is bound by the terms thereof. The management committee has correctly applied the rules of the fund and legislation in paying directly to him no more than the maximum amount which may be commuted.

17. Accordingly the complaint is dismissed.

DATED at CAPE TOWN this 18th day of SEPTEMBER 2000.

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JOHN MURPHY

PENSION FUNDS ADJUDICATOR