

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/GA/544/98/LS

In the complaint between:

C I Intaka	Complainant
and	
First National Bank (Pty) Ltd	First Respondent
First National Bank Group Pension Fund	Second Respondent
Sanlam Life Insurance Ltd	Third Respondent
Central Retirement Annuity Fund	Fourth Respondent

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

1. This is a complaint lodged with the Pension Funds Adjudicator relating to the investment of the complainant's withdrawal benefit in a retirement annuity fund on resignation from the first respondent. The complainant alleges that the third respondent's failure to inform her of her option to invest in a preservation fund on resignation constituted misrepresentation by omission and that on that account, she is entitled to cancel her retirement annuity policy with the third respondent, to have her funds released and to exercise her option again to invest in a preservation fund.
2. No hearings were conducted and I have relied solely on the documentary evidence and the report by my investigator, Lisa Shrosbree.
3. The complainant was employed by First National Bank (Pty) Ltd ("the bank") as a public relations officer from February 1981 to June 1996 and was simultaneously a member of the First National Bank Group Pension Fund ("the fund") for that period.

4. The complainant resigned from the bank on 27 June 1996.
5. Since the complainant had completed more than ten years service, her withdrawal benefit was calculated in terms of rule 7.1(b) which reads:

If a MEMBER leaves SERVICE after completing 10 years of SERVICE and is not entitled to benefits in terms of any other Rule, an amount equal to his total MEMBER'S SHARE, including premiums shall be due to him.

6. As at 26 June 1996, the complainant's member share was R90 130.76.
7. Rule 7.2 governed the investment options available to the complainant on withdrawal from the fund and reads:

(1) If a MEMBER, other than a DEFINED BENEFIT MEMBER, whose SERVICE exceeds 10 years, leaves SERVICE under the conditions described in Rule 7.1(1), his MEMBER'S Share at the time will be preserved:

(1) in the FUND in terms of Rule 7.2(2); or

(2) in an APPROVED RETIREMENT ANNUITY FUND of his choice, or an APPROVED PRESERVATION PENSION FUND in which the PRINCIPAL EMPLOYER agreed to participate.

8. The complainant indicated on her pension withdrawal notice dated 27 May 1996 that she wished to transfer the capital value of her pension to another recognized pension fund or retirement annuity fund.
9. In a letter dated 19 July 1996, the bank informed the human resources manager of the investment options available to the complainant including the possibility of investing in a preservation fund. The complainant received a copy of this letter as evidenced by her signature thereon acknowledging receipt.

10. In August 1996 the complainant met with an employee (“the broker”) of Sanlam to discuss the investment of her withdrawal. The broker advised her to invest in Sanlam’s Central Retirement Annuity Fund.
11. It is common cause that the broker never raised or discussed the option available to the complainant to invest in a preservation fund which, unlike the retirement annuity, would entitle her to a cash withdrawal prior to retirement age.
12. The broker states that his advice to the complainant to invest in a retirement annuity was based on the fact that investing in a retirement annuity was the most tax advantageous option and that Sanlam’s retirement annuity funds had an excellent performance record. The complainant would thereby attain optimal growth on her pension. However the broker also advised the complainant that if she invested in retirement annuity, she would have no access to the funds until the age of 56.
13. Pursuant to the broker’s advice, the complainant transferred her pension to the Central Retirement Annuity Fund at the end of 1996. On the broker’s recommendation, the complainant also agreed to pay an additional R100 per month into the annuity to ensure that it kept abreast with inflation.
14. In pursuance of her decision, the complainant addressed a letter to the bank’s pensions department instructing them to invest her benefit in the retirement annuity. The letter reads:

I hereby wish to avail myself of the Amount of R1 800.00.....to me tax free in terms of the income tax of 1963 [sec].

Kindly issue two cheques

- 1) I.F.O C.I Intaka @ R1800.00
- 2) Balance I.F.O Sanlam Policy No: 16007691x 5

@ R88330.76.....

15. However towards the end of 1998, the complainant was experiencing financial problems and needed access to her pension monies. However, since she had invested in an retirement annuity policy with Sanlam, she was not permitted access to the funds prior to the policy's maturity date, that is, until the age of 56.
16. Thus on 7 September 1998, the complainant contacted the broker requesting that her retirement annuity with the Central Retirement Annuity Fund be cancelled and her pension transferred to a preservation fund so that she could take advantage of the cash withdrawal option.
17. The broker however informed her that this was not possible as she was bound by the retirement annuity policy which prohibited any withdrawals.
18. The complainant also approached Sanlam directly who similarly advised her that her retirement annuity in the Central Retirement Annuity Fund could not be terminated, pledged or ceded.
19. The complainant's complaint is that the failure of the broker to inform her of her option to invest in a preservation fund at the time she exercised her option to invest in the Central Retirement Annuity Fund constituted misrepresentation by omission. She asserts that there was a duty on the broker to so inform her and his failure to do so entitles her to the remedies for breach of contract. The relief she seeks is cancellation of the contract, that is cancellation of the retirement annuity policy and restitution in the form of the opportunity to exercise her option again to invest her pension in a preservation fund.
20. Sanlam responds that the fact that the complainant was not informed of the possibility of investing in a preservation fund did not amount to misrepresentation or a misselling of the product in that there was no duty on it to

disclose that fact. Further that the complainant was properly advised; the retirement annuity was a prudent investment choice in that it was the most advantageous to the complainant from a taxation point of view as well being an investment yielding good returns. Further the policy of the South African Revenue Service that annuities may only be cancelled in the event of a misrepresentation. Since according to Sanlam, there was no misrepresentation when the complainant exercised her option in favour of the retirement annuity option, she is now bound by the policy with Sanlam and not permitted to cancel it.

21. The complainant also cites the bank as a respondent in her complaint. However, in its dealings with the complainant concerning her withdrawal benefit, it is clear that the bank acted as the fund's agent.
22. The extent of the duty owed by the fund to the complainant is contained in the Pension Fund Circular no. 86 under the heading "Withdrawal from service" and reads thus:

Preferably, each member will have all options in terms of the rules explained before a cash payment is selected. As a final fail safe mechanism, the letter enclosing any cash payment must refer to any benefits which may be forfeited as a result of the cash payment, including the elimination of liability for tax on transfer to another pension fund as defined in the Income Tax Act, 1962, preservation pension fund or retirement annuity.

23. The letter of 11 July 1996 from the bank's personnel manager to its human resources manager clearly stated that the complainant had the option to transfer her pension to a preservation fund. That letter reads in part:

As she has had more than 10 years service no cash is payable and her options are as follows:

- 1) To leave her capital balance in the fund and become a deferred

pensioner or

- 2) To transfer the balance to another pension fund which must be the pension fund of her new employers, or to a *Retirement Annuity Fund or Pension Preservation Fund*. [Emphasis supplied]

21. By her own admission, the complainant received a copy of that letter which she then handed to the broker. I am satisfied that this letter fulfilled the requirements of Circular 86 quoted above in so far as it revealed all the investment options available to the complainant on withdrawal from the fund.
20. I now turn to deal with the complainant's claim that she is entitled to cancel the retirement annuity policy with Sanlam on the grounds of misrepresentation by omission.
21. In general, silence does not by itself give rise to a remedy in law. Only if the complainant can show that there was a duty on the broker to disclose all her options including the option to invest in a preservation fund, will she be entitled to relief.
22. The law regarding contracts of sale expounds the duty of a seller to disclose the attributes of the corporeal thing offered for sale which are material to the contract. However, the duty does not extend further than this. In other words the law does not impose a duty on a seller to disclose facts which do not pertain to the object of the sale.
23. A useful analogy is that of the car salesman. Although the salesman will want to emphasize the attractive features of the car he is trying to sell to entice the prospective buyer to purchase it, the law also obliges him to disclose any defects in the car of which he is aware and which are material to the contract. For example the salesman would be obliged to disclose that the car has an

irreparable oil leak since that is material to the contract in so far as it goes to the mechanical efficiency of the car. However the law does not oblige him to inform the prospective buyer that for example another model of car would be a better buy since it does not have the same propensity to leak oil. Provided the salesman has disclosed all material facts with respect to the car he is selling, that is sufficient in law to comply with his duty to disclose all material facts.

24. The broker in the present case was similarly selling a product, namely, a Sanlam retirement annuity policy. Although he may have emphasized the benefits of investing in an annuity such as the tax advantages associated therewith in order to entice the complainant to choose that option, he also informed her of the disadvantages such as the fact that she would only be entitled to withdraw the funds at the age of 56. He also advised her that the annuity may not keep abreast with inflation.
25. However, as with the car salesman, I do not think his duty extended further to advise the complainant of all her other investment options including the possibility of investing in a preservation fund. Provided the complainant was informed of all material facts in respect of the retirement annuity policy itself, and I am satisfied that she was, the broker fulfilled his duty to her.
26. Since there was no duty on the broker to disclose to the complainant that in terms of the rules of the fund she had the option of investing in a preservation fund, his failure to do so did not amount to misrepresentation and the complainant is accordingly not entitled to cancel the policy on those grounds. The duty to inform her of the option rested with the fund and, as discussed, by virtue of the bank's letter of July 1996, the fund fulfilled that duty.
27. In any event, I think that the broker was entitled to assume that the complainant knew what her options were. The reasonable person in the occupation of a public relations officer of a financial institution can reasonably be expected to

have knowledge of her rights and options. Both the letter of July 1996 of which she received a copy and the fund=s rules revealed that she had the option to invest in a preservation fund.

28. The complainant has also referred to my previous determination in *Mgulwa v First National Bank Group Pension Fund PFA/WE/33/98* to support her claim that she is entitled to have the restriction on withdrawal of her monies in the Central Retirement Annuity Fund uplifted. However, that case concerned the imposition of a restriction on withdrawal from a preservation fund by the transferring pension fund which lacked the necessary authority to do so in terms of its rules and is therefore not relevant to the present case.

29. The complaint is accordingly dismissed.

DATED at CAPE TOWN this 27th DAY OF OCTOBER 1999

.....

JOHN MURPHY
PENSION FUNDS ADJUDICATOR