IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/201/98/NJ

In the complaint between:

J.D.N. Barnard  Complainant

and

Investec Investment Management Services  Respondent

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

Introduction

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956. The complaint concerns the administration of a linked life annuity policy by the respondent.

After an exchange of correspondence between the complainant and the respondent consisting of a number of letters and other documentation, the complainant lodged a complaint at my office on 15 June 1998. No hearing was held in this matter. Accordingly, I have relied exclusively on the documentary evidence, arguments put to me in writing and a report placed before me by my investigator, Naleen Jeram.

After the complainant lodged a written complaint at my office there was an exchange of a series of correspondence between the complainant, the respondent and my office. The complainant addressed 13 separate letters to my office and the respondent containing further submissions in respect of his initial complaint. Hereafter, my investigator requested
the complainant to cease with his written submissions, so that this matter may be finalised. At this point let me stress that there is an increasing tendency amongst representatives of parties to overburden our office with irrelevant documentation not directly relevant to the determination of a complaint. Thus, I again use this opportunity to appeal to representatives of all parties not to submit irrelevant documentation, which leads to a delay in the processing of complaints and an increase in the backlog of cases.

**Background to complaint**

The complainant is John Desmond Nico Barnard, a pensioner, of Club View, Pretoria. The respondent is Investec Investment Management Services, a division of Investec Bank Limited, registration number 69/04763/06. The respondent is represented by Mr Gary Buisansky and Mr Brett Ullman.

In January 1996 the complainant entered into a link life annuity contract (hereinafter ILLA) with the respondent (hereinafter Investec) in terms of which he transferred a lump sum of R378,661.37 to Investec. The bulk of this amount emanated from the proceeds of an Old Mutual retirement annuity policy, taken out by the complainant. The material terms of the contract read as follows:

**DEFINITIONS**

“Underwriter” shall mean Fedlife Assurance Limited.

“Administrator” shall mean Investec Investment Management Services.

**INVESTMENT LINKED ANNUITY FUND**

The underwriter shall set up a separate Investment Linked Annuity Fund to hold the assets purchased by the annuitant’s Annuity Purchase Money. Such fund shall comprise of units held in unit Trust funds and other securities agreed by the underwriter and the administrator.
The underwriter shall invest such portion of the Annuity Purchase Money as agreed by the annuitant (in terms of the proposal document) in the Investment Linked Life Annuity Fund for the purchase of annuity benefits.

The administrator shall pay to the annuitant, or upon death of the annuitant, to the nominated dependant or beneficiary of the annuitant, an annuity benefit as specified in the Schedule hereto, in a manner as indicated herein for as long as the annuitant or his dependant or beneficiary has a beneficial interest in the Annuity Fund.

The annuitant's beneficial interest in the Investment Linked Annuity Fund shall be his equitable share of the Fund net of expenses occurring to the Fund.

The annuitant may nominate the underlying investment portfolios that the annuity Purchase Money should be applied to after the deduction of all management expenses and commission. Such nomination is not irrevocable and may be altered from time to time subject to the administrator's discretion.

The annuitant must nominate, in writing, a beneficiary to receive payment of the annuity benefit in the event of the annuitant's death. Such beneficiary nominations may be changed or cancelled upon written notice to the administrator.

Any benefit payable to an annuitant's dependant or beneficiary may, at the option of the recipient, be paid over a minimum period of 5 (five) years.

ANNUAL REVIEW

Each investment linked life annuity will be reviewed on contract anniversary date. The administrators shall review the annuity level by taking into consideration the following factors:

1. The current fund value
2. The rate of withdrawal elected by the annuitant
3. The annuitant's life expectancy
An annual review letter shall be sent to the annuitant on each contract anniversary specifying the current fund value, the maximum withdrawal parameters and any change to the annuity level which may be required in order to bring it within such maximum and minimum parameters.

Notwithstanding the annual review, the administrator shall review the level of the annuity payment at any time should such annuity payment exceed the maximum parameters.

The administrators have the discretion to adjust the amount of the annuity in between annual reviews should circumstances influencing the investment linked life annuity fund change, and which, in their opinion necessitates such adjustment.

GUARANTEED ANNUITY FUND

The annuitant shall also receive (in terms of a choice exercised in the proposal document) an annuity benefit purchased from the Guaranteed Annuity fund with a portion (to a maximum of 25%) of the gross Annuity Purchase Money.

Such benefits are specified in the Schedule hereto.

In the event of the annuitant's death, the benefits from the Guaranteed Annuity Fund shall cease to be payable unless a joint annuity for the benefit of the annuitant and his/her spouse was purchased, in which case the benefit shall continue until the spouse's death.

GENERAL

The benefit payable to the annuitant from both the Investment Linked and Guaranteed Annuity Funds shall be an annual gross annuity payment equal to not less than 1% of the Annuity Purchase Money.
The maximum monthly annuity emanating from the Investment Linked portion shall be
determined by the amortization of each individual annuitant’s share of the Investment
Linked portion of the investment portfolio (as determined upon review from time to time),
assuming a 20% (twenty percent) internal rate of return.

The nomination of any beneficiary shall be subject to the application of Section 37C of the
Pension Funds Act No. 24 of 1956, for which purposes the administrators shall apply the
conditions of th Act on behalf of the Trustees of the Originating Fund.

The proposal document, incorporated as part of the contract, sets out the fees and levies
to be charged by Investec. In addition, the complainant selected five unit trusts in which
his lump sum payment was invested.

The complainant in essence is arguing that Investec have maladministered the ILLA
contract and makes various allegations to substantiate this argument.

The respondent has raised a point in limine contesting whether I have jurisdiction to
determine this matter.

Issue of Jurisdiction

Any complaint lodged at my office must fall within the definition of complaint as set out in
section one of the Pension Funds Act of 1956, which reads:

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 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;

Accordingly, a complaint must relate to the administration of a fund, the interpretation and application of its rules, or its investment strategy.

Fund is defined as:

"Fund" means a pension fund organisation

"Pension fund organisation" means -

(a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching their retirement dates, or for the dependants of such members or former members upon the death of such members or former members; or

(b) any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been
established, when they reach their retirement dates or for dependants of such persons upon the death of those persons, and includes any such association or business which in addition to carrying on business in connection with any of the objects specified in paragraph (a) or (b) also carries on business in connection with any of the objects for which a friendly society may be established, as specified in section 2 of the Friendly Societies Act, 1956, or which is or may become liable for the payment of any benefits provided for in its rules, whether or not it continues to admit, or to collect contributions from or on behalf of, members.

The issue in law is whether the individual arrangement between the complainant and the respondent amounts to a pension fund organisation.

Mr Ullman of the respondent, initially argued that since ILLA was not a registered fund in terms of the Pension Funds Act, I do not have jurisdiction to determine this matter. However, the mere fact that the fund is not registered does not \textit{ipso facto} preclude it from falling within the ambit of my jurisdiction. The test is always whether the fund fulfills the criteria of a pension fund organisation as defined in the Act. Nothing in Chapter VA of the Act, or the definition of a complaint, requires that the fund to which a complaint relates should be registered.

The definition of pension fund organisation creates two types of schemes. The contractual arrangement between the complainant and the respondent clearly does not fall within paragraph (a) of the definition which requires an “association of persons” to be the beneficiaries. The use of the word “association” implies that the legislature intended a group of persons to be part of this scheme. Further, the use of the word “members” in its plural form (six times) reflects the legislature’s intention to regulate schemes with more than one member. Member is defined in the Act as follows:

“member” means, in relation to-
(a) a fund referred to in paragraph (a) of the definition of “pension fund organisation”, any member or former member of the association by which such fund has been established;

(b) a fund referred to in paragraph (b) of that definition, a person who belongs or belonged to a class of persons for whose benefit that fund has been established,

but does not include any such member or former member or person who has received all the benefits which may be due to him from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund;

From the definition of member it is quite clear that the legislature is referring to an association of members. In this matter the complainant is the sole beneficiary in the scheme or arrangement with no possibility of the class of beneficiaries being extended. From the contract between the parties it is clear that a separate fund is established to hold exclusively the assets of the annuitant (the complainant), and such assets are invested with his agreement. The only beneficiary of the annuity is the annuitant. In the event of death his dependants or nominee shall be the beneficiaries of a distribution in accordance with section 37C of the Pension Funds Act, which applies to the distribution of any death benefit payable by a pension fund organisation. However, the incorporation of section 37C by reference does not of itself constitute the arrangement as a pension fund. The incorporation of section 37C is simply a mechanism for distributing the benefit in the event of such annuitant’s death. The arrangement does not fall within paragraph (a) of the definition because it does not involve an association of members to whom annuities shall be paid. It is an individual annuity contract.

The next question is whether the contractual arrangement between the complainant and Investec falls within paragraph (b), which has the following constituent requirements:

- any business carried on under a scheme or arrangement;
The contractual arrangement between the parties was clearly a business carried on under an arrangement whereby the respondent earned (in addition to the cost of investment), a management fee based on a sliding scale depending on the amount of the investment. The complainant in turn received a monthly annuity. Further, upon the death of the complainant a benefit shall accrue to the nominated dependant or beneficiary. As mentioned, the contact provides that a distribution of any benefit as a result of the death of a complainant shall be subject to section 37C of the Pension Funds Act. However, the mere fact that the parties elected that section 37C should apply to the distribution of the death benefit does not ipso facto make this arrangement a pension fund organisation as defined by the Act. The term incorporating the application of section 37C is merely a deeming provision and does not determine whether the scheme amounts to a pension fund organisation.

Be that as it may, it is clear that the arrangement between the parties fulfills the first and second requirements of paragraph (b). The material enquiry is whether the contractual arrangement provides benefits for persons who belong or belonged to a class of persons for whose benefit that scheme or arrangement has been established. The question is what is meant by “class of persons”. The Oxford Concise English Dictionary defines “class” as:

a set or category of things having some property in common and differentiated from others by kind or
quality....... a system that divides members of a society into sets based on perceived social or economic status.

The word class is clearly used in paragraph (b) as a noun. A class of persons must have some distinct or unique quality or attribute which distinguishes it from another. Although the legislature uses the word “persons” in its plural form, this need not necessarily be the case as a class of a thing or group can constitute one thing or person only. Adopting a purposive approach in interpreting pension fund organisation, it is evident that the legislature’s intention was for a paragraph (b) fund to constitute a class of persons consisting of a group of members and former members including pensioners in terms of which they receive pension benefits upon attaining normal retirement age. On the facts of this matter there appears to be no class at all. A careful inspection of the terms of the contract reveals that there are no special requirements to enter into this arrangement with Investec other than making a lump sum payment. Thus, in the absence of a class of persons the third constitutive criterion of a pension fund organisation is not fulfilled. Consequently this arrangement does not qualify as a pension fund organisation and I therefore lack jurisdiction to determine this complaint.

Accordingly, the complaint is dismissed.

Dated at CAPE TOWN this 23rd day of August 1999.

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John Murphy
Pension Funds Adjudicator