



4th Floor
Riverwalk Office Park
Block A, 41 Matroosberg Road
Ashlea Gardens, Extension 6
PRETORIA
SOUTH AFRICA
0181

P.O. Box 580, **MENLYN**, 0063
Tel: 012 346 1738 / 748 4000
Fax: 086 693 7472
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: **PFA/KN/0011296/2024/TAM**

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): V GYA (“complainant”) v OLD MUTUAL SUPERFUND PENSION FUND (“Superfund”); LIFESTYLE RETIREMENT ANNUITY FUND (“Lifestyle fund”) AND NEDGROUP LIFE ASSURANCE TRADING (“employer”)

[1] INTRODUCTION

1.1 The complaint concerns the refusal of the funds to pay the complainant’s retirement annuity benefit in a lump sum and the merger of her benefits in the two funds.

1.2 The complaint was received by the Adjudicator on 10 May 2024. On 05 June 2024, a notification of the complaint was sent to the

complainant informing her that the matter had been referred to the respondents for possible resolution. On the same date, letters were sent to the respondents informing them about the complaint and giving them until 04 July 2024 to resolve the complaint. A response was received from the Lifestyle fund on 24 June 2024. A response was also received from the Superfund on 05 July 2024. On 07 July 2024, a letter

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acknowledging receipt of the complaint was sent to the complainant. On 19 August 2024, the responses from the funds were sent to the complainant for her reply by 28 August 2024. Further submissions were received from the complainant on 21 August 2024.

- 1.3 After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant commenced employment from 01 June 2011 to 16 August 2023. She was initially a member of the Superfund from 1 June 2011 until her exit from service on 16 August 2023. On 7 September 2024, she was paid a withdrawal benefit of R331 762. 59 by the Superfund.
- 2.2 A retirement annuity policy was issued to the Lifestyle fund for the benefit of the complainant on 22 September 2011. The policy was subject to an initial premium of R250.00 per month with annual increases of 10%. The policy had a total investment value of R90 580.73 as at 12 June 2024. The policy was made paid-up on 12 June 2024 due to non-payment of premiums.

[3] COMPLAINT

- 3.1 The complainant stated that she is dissatisfied with multiple financial advisors, disadvantaged portfolio management, investment value, beneficiary nominee, access to funds only at the retirement age of 55, tax implications and intermediary services. She also requests a merger of the benefits in the two funds and access to her funds in terms of the two-pot retirement system.
- 3.2 The complainant requests the Adjudicator to investigate the matter.

[4] **RESPONSES**

Superfund

4.1 Superfund submitted that the complainant was employed with the employer, which is a participating employer in it. It submitted that it was a condition of her employment that she becomes its member.

4.2 Superfund confirmed that the complainant became its member on 1 June 2011. It submitted that on 25 August 2023, the employer notified its administrator through its payroll submission that the complainant's employment terminated effective 16 August 2023 and provided a payment instruction for full cash. It submitted that on 07 September 2023, an amount of R331 762.59, less tax, was paid into the complainant's bank account. It submitted that the amount was made as follows:

Benefit Calculation	
Accumulated credit as tax application	R398 225.09
Plus:	
Interest added after a tax application	R268.01
Less:	
Tax directive	R66 730.51
Total benefit paid	R331 762.59

4.3 Superfund submitted that the complainant's membership in it ceased upon her exit from service. It concluded that it cannot comment on the merger of her retirement benefits.

Lifestyle fund

Multiple advisers:

4.4 Lifestyle fund submitted that the complainant's retirement annuity policy commenced on 22 September 2011. It submitted that Mr Peggie

Naidoo was the financial adviser who sold the policy to the complainant and left the fund to become an independent broker, which resulted in another financial adviser taking over the policy. It submitted that Mr Pubalan Subramunier was the financial adviser who took over the complainant's policy from March 2021 until early 2023, when he retired. His successor was Ms Keshnee Subramunier who has been assisting the complainant with her requests and provided her with advice on her enquiries. It submitted that it does not have control over the financial advisers leaving the fund, but it will ensure that the complainant constantly has an adviser to assist her with her financial needs.

Investment value of the policy:

- 4.5 Lifestyle fund submitted that the complainant's retirement annuity builder is as follows:

Start Date	22/09/2011
Initial Premium	R250.00 per month
Annual Premium Updates	10%
Total Premiums paid	R68 076.13
Investment Value as at 12/06/2024	R90 580.73
Net Average Annual Rate of Return from Start Date to Current Date	5.17%

- 4.6 It submitted that the last premium was received on 22 January 2024. It stated that as no further premiums were received, the policy was automatically made paid-up on 12 March 2024. Lifestyle fund indicated that the ultimate value of any market related policy is dependent on the performance of the portfolios to which it is linked, and therefore, reflects the returns earned on the chosen portfolios. It submitted that returns can be both positive and negative. It indicated that portfolio performance is affected by the prevailing economic conditions. Portfolios are re-valued daily and therefore, the policy values change from day to day, increasing or decreasing, depending on the actual performance of the underlying assets.

- 4.7 The policy was initially invested fully in the Excelsior Managed portfolio. A letter dated 9 October 2021 was sent to the complainant explaining that the administrator has embarked on a process to both simplify and rationalise portfolios across all product ranges. The letter further explained that the Excelsior Single-Manager risk-profiled range of portfolios would be closed down and it will automatically switch the funds to a significantly enhanced new range of portfolios as from October 2021, unless an alternative portfolio was selected by the complainant. As no instruction was received from the complainant, the funds were automatically switched to the Multi-Strategy 4 Excelsior portfolio on 21 November 2021.

Merger of the benefits in the funds

- 4.8 Lifestyle fund stated that the complainant could combine her fund values in the funds by transferring her benefits from the Lifestyle fund to the Superfund or vice versa. It submitted that should the complainant choose to transfer her fund values, her Superfund financial adviser can assist her with the process. It submitted that combining the two retirement annuities does not mean that she will have access to the funds. It submitted that the retirement annuity legislative rules will still apply.

Inappropriate advice with regard to accessing retirement annuity funds:

- 4.9 Lifestyle fund submitted that due to legislative restrictions on retirement annuities, the value of the complainant's retirement annuity is more than the legislative limit of R15 000.00 in the Income Tax Act 58 of 1962 ("Income Tax Act") and, therefore, cannot be accessed until the retirement age of 55 years.
- 4.10 It stated that page one of the signed quotation under the heading: *The product offers the following features (access to the investment)*, states

that the complainant will have access to the retirement benefit after the policy anniversary at which she would have reached 55 years. The complainant can retire before the age of 55 if she has become disabled.

Beneficiary nomination

- 4.11 Lifestyle fund submitted that when the complainant's retirement annuity started in September 2011, her father Mr R Gya, was the nominated beneficiary as per her wishes and this was reflected in her policy document. It submitted that based on the beneficiary nomination forms, in October 2012, she nominated her sister Ms Veешaera Gya as her beneficiary and later in October 2015, she changed the beneficiary to her estate. It indicated that should the complainant wish to change her beneficiary, she should complete a beneficiary nomination form and sent same to its administrator for processing.

Two-pot system

- 4.12 Lifestyle fund stated that the Government has approved the two-pot system effective 1 September 2024 subject to any delays or change based on legislation. The new legislative system will allow members of pension, provident and retirement annuity funds access to some of their retirement savings before retirement age subject to tax at a member's marginal tax rate. It concluded that the complainant should contact her financial adviser for further information.

Employer

- 4.13 The employer was granted an opportunity to comment on the complaint as required in terms of section 30F of the Act. However, the employer failed to file a response. In the circumstances, the Adjudicator will dispose of the matter based on the available submissions.

[5] **DETERMINATION AND REASONS THEREFOR**

Preliminary issues

5.1 The complainant raises issues relating to multiple financial advisers, alleged inappropriate advice and tax implications on her retirement annuity policy.

5.2 The Act 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 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”.

5.3 The issues relating to financial advisers, alleged inappropriate advice, and tax implications do not fall within the definition of a “complaint” as defined above. The complainant may refer these issues to the Office of the Ombud for Financial Services Providers (“FAIS”) and the South African Revenue Service. (SARS). Therefore, the Adjudicator has no jurisdiction to deal with these issues.

Merits

- 5.4 The issues that fall to be determined relate to the merger of the complainant's benefits in the two funds, investment value on her retirement annuity policy, beneficiary nomination and access to her retirement annuity.

Merger of fund values

- 5.5 In the Supreme Court of Appeal ("SCA") matter of *Municipal Employees Pension Fund v Mongwaketse* (969/2019) [2020] ZASCA 181 (23 December 2020) at paragraphs [42] to [44], Wallis JA held that the rules of a fund are its constitution, and that the doctrine of *ultra vires* applies. If the rules of a fund do not afford a fund the legal power or capacity to do something, then such purported act by the fund is *ultra vires* and accordingly null and void. The Constitutional Court affirmed the SCA's findings in *Municipal Employees Pension Fund and Another v Mongwaketse* (CCT34/21) [2022] ZACC 9 at paragraph [39] where it stated that the application of the *ultra vires* doctrine to pension funds is consistent with the constitutional principle of legality.
- 5.6 The submissions indicate that Superfund paid the complainant a withdrawal benefit of R331 762.59 on 7 September 2023 following her exit from service on 16 August 2023. Rule 7.1 of the general rules of the Superfund deals with withdrawal benefits and reads as follows:

"7.1 RIGHT TO A WITHDRAWAL BENEFIT

- (1) In the case of a MEMBER, who is not a PRESERVER MEMBER or a DEFERRED RETIREE, such MEMBER is entitled to receive a withdrawal benefit-
- (a) when he ceases to be an ELIGIBLE EMPLOYEE for reasons other than those referred to elsewhere in the MASTER RULES, the

PARTICIPATING EMPLOYER notifies the FUND that he is no longer eligible, and the FUND receives an EXIT NOTIFICATION, and
 (b) when he is not eligible for any other benefit as described in the RULES...”

7.2 AMOUNT OF WITHDRAWAL BENEFIT

The withdrawal benefit of a MEMBER is the balance in the MEMBER’S ACCOUNT, PRESERVER MEMBER ACCOUNT and UNCLAIMED BENEFITS ACCOUNT at the DATE OF PAYMENT.”

- 5.7 Superfund provided a breakdown of the withdrawal benefit that was paid to the complainant as reflected in paragraph 4.2 above. Thus, Superfund does not hold any further benefit for the complainant that can be merged or transferred to the Lifestyle fund. Thus, no further benefit is due to the complainant as Superfund has discharged its liability to her.

Lifestyle fund

- 5.8 The complainant’s investment value in Lifestyle fund amounted to R90 580.73 when the policy was made paid-up on 12 March 2024. The net average annual rate of return from the inception date to the date the policy was made paid-up was 5.17%. The ultimate value of any market related policy is dependent on the performance of the portfolios to which it is linked, and therefore, reflects the returns earned on the chosen portfolios. Thus, the returns can be positive or negative. The fund indicated that portfolio performance is affected by the prevailing economic conditions. Portfolios are re-valued daily, and therefore, the policy values change from day to day, increasing or decreasing, depending on the actual performance of the underlying assets.
- 5.9 It is the responsibility of a member to choose an investment portfolio. In terms of clause 11 of the retirement annuity policy, a member can choose one or more investment portfolios. A member can also switch investment portfolios to cater for her financial needs. The complainant’s

policy was initially invested in the Excelsior Managed portfolio. A letter dated 9 October 2021 was sent to the complainant explaining that the administrator has embarked on a process to both simplify and rationalise portfolios across all product ranges. The letter further explained that the Excelsior Single-Manager risk-profiled range of portfolios would be closed down and it will automatically switch the funds to a significantly enhanced new range of portfolios as from October 2021, unless an alternative portfolio was selected by the complainant. As no instruction was received from the complainant, the funds were automatically switched to the Multi-Strategy 4 Excelsior portfolio on 21 November 2021.

- 5.10 Thus, the complainant did not submit anything which indicates that her current retirement value does not represent the correct value in her investment portfolio.

Access to retirement annuity fund

- 5.11 The complainant submitted that she is dissatisfied that Lifestyle fund refused her access to her retirement annuity fund.

- 5.12 Prior to 1 September 2024, the definition of “retirement annuity fund” in section 1 of the Income Tax Act prohibits a retirement annuity fund from paying any benefits to a member before the age of 55 years, except in the case of a member who becomes permanently incapable through infirmity of mind or body of carrying on his occupation or if the lump sum fund value is equal to or less than the prescribed amount. Part (b)(v) of the definition provides that:

“no member shall become entitled to the payment of any annuity or lump sum benefit prior to reaching normal retirement age”

- 5.13 Section 1 of the Income Tax Act defines “normal retirement age” as follows:

“normal retirement age” means-

- (b) in the case of a member of a retirement annuity fund, a pension preservation fund or a provident preservation fund, the date on which the member attains 55 years of age; or
- (c) in the case of a member of any fund contemplated in this definition, the date on which that member becomes permanently incapable of carrying on his or her occupation due to sickness, accident, injury or incapacity through infirmity of mind or body;.”

5.14 The complainant has not reached normal retirement age, nor is her claim based on disability. However, with effect from 1 September 2024, the Government approved the two-pot retirement system that allows members of pension, provident and retirement annuity funds access to some of their retirement savings before retirement age subject to tax at a member’s marginal tax rate. The Revenue Laws Amendment Act No 12 of 2024 amended the Income Tax Act to give effect to the two-pot retirement system. The rules of the Lifestyle fund were also amended effective 1 September 2024 to provide for the two-pot system. Rule 6.8 read as follows:

6.8 SAVINGS WITHDRAWAL BENEFIT

- 6.8.1 Before retirement a MEMBER may apply for a SAVINGS WITHDRAWAL BENEFIT from each POLICY held by the FUND, subject to the provisions of the ACT and the INCOME TAX ACT. The application will be in such manner and according to such terms and conditions determined by the INSURER and notified to MEMBERS from time to time.
- 6.8.2 The gross value of each SAVINGS WITHDRAWAL BENEFIT under each POLICY held by the FUND, before taking into account any charges or transactions costs, may not be less than two thousand Rand (R2,000) or such other amount as prescribed in the INCOME TAX ACT from time to time.

6.8.3 Only one SAVINGS WITHDRAWAL BENEFIT under each POLICY may be taken by a MEMBER during a year of tax assessment, unless upon termination of MEMBERSHIP within the same year of tax assessment, an amount of less than the minimum amount referred to 16 Revised Rules (2023) of the Lifestyle Retirement Annuity Fund – Amendment 1 in Rule 6.8.2 remains, in which case the MEMBER may take such the remaining balance as a second SAVINGS WITHDRAWAL BENEFIT.

6.8.4 A SAVINGS WITHDRAWAL BENEFIT may be limited, suspended or prohibited where a lawfully permitted amount may become deductible in terms of the ACT and the balance in the SAVINGS COMPONENT will be insufficient to cover the lien or amount to be deducted, subject to such time limitations for suspension, consents and other conditions prescribed in section 37D of the ACT.”

5.15 The two-pot retirement system provides for a vested component, savings component, and a retirement component. Generally, members’ contributions from 1 September 2024, will be split between the savings component and the retirement component. The vested component will consist of the member’s contributions in the fund up to 31 August 2024. From this component, 10% or R30 000, whichever is lower, will be utilised as a once-off seed capital amount in the savings component, which can be claimed from 01 September 2024. The vested component will be subject to existing retirement laws, allowing a member to claim a withdrawal benefit from this component when they resign from employment. The savings component will consist of the once-off seed capital amount and one-third of the member’s contributions in the fund from 01 September 2024, which can be accessed once every tax year by the member. It should be noted that the withdrawal amount will be taxed on the member’s marginal rates, and any amounts owed to SARS will be deducted before payment is made. The retirement component will consist of two-thirds of the member’s contributions from the implementation date and can only be accessed at retirement.

5.16 Thus, the complainant can access a portion of her fund value from the savings pot prior to reaching the retirement date of 55 years. The Lifestyle fund indicated that the complainant should contact her financial adviser for further information. However, the fund needs to do much more than referring the complainant to her financial adviser. Section 7C(1)(a) of the Act provides as follows:

(1) The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.

(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...”

5.17 Section 7D(1)(c), in turn, states as follows:

(1) The duties of a board shall be to –

(c) to ensure that adequate and appropriate information is communicated to the members and beneficiaries of the fund informing them of their rights, benefits and duties in terms of the rules of the fund, subject to such disclosure requirements as may be prescribed.”

5.18 Therefore, the Lifestyle fund must provide the complainant with adequate information relating to, *inter alia*, how to claim from the savings pot, the amount that can be claimed and a computation of same, the tax implications and long-term impact on her retirement investment.

Beneficiary nomination

5.19 The Lifestyle fund submitted that when the complainant's retirement annuity started in September 2011, her father Mr R Gya, was the

nominated beneficiary as per her wishes and this was reflected in her policy document. It submitted that based on the beneficiary nomination forms, in October 2012, she nominated her sister Ms Veешaera Gya as her beneficiary and later in October 2015, she changed the beneficiary to her estate. It indicated that should the complainant wish to change her beneficiary, she should complete a beneficiary nomination form and sent same to its administrator for processing.

5.20 Thus, it is the duty of the complainant to inform the fund if she wishes to change her beneficiary nomination by completing a beneficiary nomination form accordingly.

[6] ORDER

6.1 In the result, the order of the Adjudicator is as follows:

6.1.1 The Lifestyle fund is ordered to provide the complainant with adequate information regarding the process of claiming from her savings pot, and provide her with a computation of the accessible amount and the tax implications of making a withdrawal, within three weeks of this determination.

DATED AT PRETORIA ON THIS 04TH DAY OF OCTOBER 2024

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Parties unrepresented