IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)

REPORTABLE.
Case No. 3404/05

CENTRAL RETIREMENT ANNUITY FUND **Applicant**

and

ADJUDICATOR OF PENSION FUND **First Respondent**
FREDERICK EVANS DE BEER **Second Respondent**
THE EXECUTIVE OFFICER OF THE
FINANCIAL SERVICES BOARD **Intervening Party**

JUDGMENT: 20 October 2005

DAVIS J

Introduction.

Second Respondent became a member of applicant in 1987. As a result of contributions which he made in terms of his contract with applicant ('fund contribution') he became entitled at his retirement to certain benefits in terms of his contract with applicant ('fund benefits').

Upon reaching retirement age, second respondent elected to receive the fund benefits in full in the form of a life annuity payable on a monthly basis. In making this decision he declined to select the other alternative open to him, namely to take up to 1/3rd of the fund benefits in a lump sum.

He was, however, dissatisfied with the life annuity provided to him. In terms of section

30 A of the Pension Funds Act 24 of 1956 ('the Act'), he dispatched a letter to first respondent. Pursuant to this correspondence, first respondent treated the letter as a complaint, investigated the position and issued a determination on 15 March 2005. In his determination, he concluded that second respondent was entitled to the payment of a monthly equivalent of an annual pension of R24 883 from the date of his retirement on 1 November 2002. Furthermore, he ordered applicant to pay second respondent a monthly equivalent of an annual pension in the amount of R24 883 from 1 November 2002 until 1 April 2005 less any amounts that may already have been paid. Applicant was also ordered to pay second respondent such pension increases on the amount of R24 883 as the management board of applicant or Sanlam Life may have approved in terms of the Rules of the Fund from 1 November 2002 until 1 April 2005. In addition, applicant was ordered to pay interest on these amounts at the rate of 15,5% per annum from 1 November 2002 until the date of final payment of these amounts. The first respondent also ordered applicant to continue paying the complainant a monthly pension from 1 April 2005 until his death, taking into account such pension increases as may have been (or may in the future be) approved by the management board of applicant or Sanlam Life in terms of the Rules on the original pension fund amount to which the complainant was entitled.

It is against this order that applicant has appealed to this Court.

The Factual Background.

Applicant was established on 1 June 1960 as a retirement annuity fund defined in terms of section 1 of the Income Tax Act 58 of 1962 as amended. In terms of Regulation 1 of the Act, an insurer shall accept the responsibility to act as the administering insurer for a fund such as applicant. In the present case, Sanlam Life is the administrating insurer of applicant. In terms of the Rules of applicant, any person has the right to become a member, subject to the approval of the management committee and the insurer, in this case Sanlam Life. An application for membership takes place by means of the completion of a proposal form and ancillary documents provided by the insurer.

Applicant can decide what contribution he or she will make to the fund, subject to a minimum determined by the insurer in accordance with normal practice. Contributions are to be paid from the date of commencement of membership and are payable thereafter in a manner agreed between the management committee and the insurer. Applicant is a separate entity and legal person apart from its members and is the legal owner of its goods and has the capacity to enter into any liability in its own name and to proceed as claimant and defendant in legal court cases. The management committee carries out all the necessary legal actions for and on behalf of the Fund. (Part 5; clause 1 of the applicant's Rules)

Applicant is therefore controlled and managed by a management committee which consists of at least four members. The insurer appoints all the management committee members, except for the independent management committee member who is nominated

by other members of the management committee.

When a person joins the fund as a member, he or she chooses a particular policy which applicant is required to take out with the insurer. Applicant then takes out that policy on the life of the member in applicant's name. The policy provides applicant with a policy benefit which applicant in turn employs to provide the fund benefits to the member.

Second respondent, as a member of applicant, was entitled only to the fund's benefits derived from the policy taken out on his life. The policy to fund its liability of providing benefits to second respondent was taken out in 1987 in terms of the Insurance Act of 1943. In terms of section 34 of that Act the insurer could charge policy premiums and grant policy benefits only in accordance with a 'table or statement of the rates of premiums which he ordinarily charges and of the benefits which he ordinarily undertakes to grant', which table or statement, the insurer had to furnish to the Registrar'. This statement had to be prepared by a 'statutory actuary' of the insurer who had to approve that the premiums and related benefits were actuarily sound.

Viewed accordingly, applicant's assets consist solely of claims under policies taken out with the life insurer in favour of its members. In terms of Rule 5.7 of Part 5 of the applicant's Rules, the management committee arranges for contributions to be paid directly by its members to the insurer and for amounts payable by the insurer to be paid directly to the members. Accordingly, no money was paid by a member into applicant's bank account. Applicant does not have any bank account. When a policy matures, up to 1/3rd of the proceeds are available for the payment of a lump sum to the members and the balance is employed to provide an annuity. The member decides what amount (if any) he or she wishes to receive as a lump sum.

Second respondent joined the fund on 1 November 1987, a month after his fiftieth birthday. He elected to retire at 65 and his membership was therefore designed to continue for fifteen years until 1 November 2002. In terms of his complaint, second respondent averred that applicant had promised that he receive an annual retirement benefit at the end of the fifteen year period in the amount of R24 883, which translated to R2073 per month. On the eve of his retirement, Sanlam Life informed him that he would receive R892,31 per month which translated to an annual pension of R10 707,72. Applicant stated in his letter of 4 February 2003 'Soos u self kan sien is dit 'n geweldige verlaging van polis uitgeneem en vir my onaanvaarbaar."

The basis of this complaint turns on a document generated by Sanlam Life, apparently provided to second respondent at the inception date of the contract, namely 1 November 1987. It sets out the illustrative benefits on the retirement date as follows:

'VOORDELE OP UITKEERDATUM

Minimum uitkeerbedrag	R21 089
Illustratiewe uitkeerbedrag	
- insluitend inkomstebonusse	R113 498 (R44 695)

- insluitend inkomste – en kapitaalbonusse R140 219 (R59 227)
Die illustratiewe uitkeerbedrag van R140219 kan aangewend word vir:
'n jaarlikse pensioen van R24 883
OF
'n kontantbedrag van R48 740
Plus 'n jaarlikse pensioen van R16 572
Die bedrae tussen hakies is die illustratiewe uitkeerwaardes indien premies nie sou toeneem nie.'
With this background, it is now possible to examine the determination of first respondent.

The determination of the complaint by first respondent.
First respondent summarized the basis for his order as follows:

'[I] want to make it clear that the basis of this order is not rooted on misrepresentation; it is rather founded on the absence of a reasonable basis for the presumptions upon which Sanlam says payment of the annual pension amount R24 883 is based. As I have already shown, there is no reasonable basis for a 15% inflation presumption; there is no reasonable basis for a lesser payment founded on the 15% investment performance presumption; and there is no basis of any description for the myriad types of costs in the rules of the fund and in the terms and conditions as contained in the Sanlam document.'

First respondent sought to justify this finding by an examination of the reasons given by applicant for the benefit which amounted to an annual pension of R10707,72 as opposed to the illustrative amount of R24 883 per annum. First respondent analyzed the average annual inflation rate from 1988 to 2002 and concluded that 'the management board… must reasonably have come to the realization that a 15% interest rate was no longer a realistic bench mark as a presumption upon which retirement benefit amounts could be paid, especially in as much as the interest rate has since 1993 been in 'single-digit figures and was continuing downward'. Accordingly, 'even on the argument that this inflation presumption is a long-term presumption which cannot be changed for short-term convenience, I cannot accept that this presumption is a reasonable basis on which to pay the complainant less than the illustrative amount. In any event, fifteen years is hardly short-term even by retirement industry standards'.

First respondent conceded that 'the fund has overall performed very well' but then turned to 'up front' costs which 'range from as high as 35.89% of the 1995 gross contributions to 6.08% of the 2001 gross contributions and average 25.9% over the 15 year period.' First respondent then goes on to say that this constitutes 'a far cry' from the 3% referred to in the illustrative benefit document.

Evaluation.

Applicant raised two separate defences, firstly jurisdiction and secondly a merits

justification.

A.**Jurisdiction of the first respondent**.
Mr Burger, who appeared together with Mr Breitenbach on behalf of applicant, submitted that second respondent's complaint had been leveled against Sanlam Life and not against applicant. Applicant took no part in the investment decisions regarding second respondent's contributions nor in the calculation of the proceeds of the policy. In the result, Mr Burger submitted that second respondent's complaint did not fall within the definition of complaint in terms of section 1 of the Act. He submitted further that second respondent did not allege as required by section 30 D of the Act that in relation to applicant's administration, 'investments or rules that any decision which had been taken in terms of the Rules was an improper exercise of applicant's power or that there had been any maladministration of applicant or that any dispute of fact or law had arisen in relation to applicant.

Section 30 D of the Act provides that 'the main object of the Adjudicator shall be to dispose of complaints lodged in terms of section 30 A(3) of this Act in a procedurally fair, economical and expeditious manner.'

Complaint is defined in terms of section 1 of the Act as follows:
'Complaint means a complaint of the 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 the fund between the fund or any person and the complainant..'

As Mr van Schalkwyk, who appeared together with Mr Rogers on behalf of the intervening party, correctly noted, the essence of second respondent's complaint was that he obtained less than he should have received from his retirement annuity investment and he had not been informed during the investments of the constitutions that he would eventually receive substantially less than the projection which he had been initially provided. In essence, second respondent's complaint was that applicant had a duty to keep him informed of significant changes in the eventual projected pension and the reasons therefore so that he can consider his position, including whether to continue with his payment of contributions. The basis of the complaint was that applicant, as the holder of the policy on the life of a member, was neither obliged nor entitled simply to allow Sanlam Life to charge whatever costs and charges it chose to levy and to accept whatever investment bonuses that it chose to declare from time to time without first satisfying itself through its own management committee of the reasonableness or adequacy thereof.

The Rules of the Fund set out its essential purpose as being to provide benefits to members upon retirement. The fact that applicant may be exempt in terms of the applicable law from audit cannot exempt it from playing a role in the fulfillment of its purpose. In any event, applicant is a pension fund organization and has separate legal personality in terms of s51(a) of the Act. It cannot simply be treated as an illusionary 'go between' the members such as second respondent and Sanlam Life. It should be accountable to its members and hence be subject to the discipline of the Act's complaint mechanism.

Applicant's contention regarding second respondent's letter is based upon a very formalistic reading of the complaints procedure as provided for in the Act. On this reading, the letter generated by second respondent would not constitute a proper complaint as defined. But this submission ignores the purpose of the Act. The structure of chapter VA of the Act is aimed at ensuring an effective, inexpensive and expeditious resolution of pension complaints by members, many of whom may not be able to afford legal advice and would therefore be compelled to formulate their complaint without any legal assistance or a complete understanding of the intricacies of the legal relationship between the respective parties, as in this case between Sanlam and applicant.
In my view, second respondent's letter contains sufficient averments (as described above) to fall within the definition of complaint. To construe a complaint as urged upon us by applicant would be to run counter to the very purpose of the complaints procedure provided for in the Act.

For these reasons, the second respondent's letter is to be construed as a complaint in terms of the definition of section 1 of the Act and accordingly stood to be adjudicated upon by first respondent in terms of section 30 D of the Act.

B. The Merits.
The determination of the merits of this dispute by this Court are governed by section 30P of the Act which provides as follows:

'(1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the Supreme Court which has jurisdiction, for relief…

2) The division of the Supreme Court contemplated in subsection (1) shall have the power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit.'

As held in **Meyer v Iscor Pension Fund** 2003(2) SA 715 (SCA) at 725 I - 726 A

'From the wording of s30P(2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the adjudicator's determination was right or wrong. Neither is it confined to the evidence of the grounds upon which the adjudicator's determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court's jurisdiction is limited by s30(P)(2) to a consideration of 'the merits of the complaint in question'.

The present dispute must be considered as an appeal. The resolution turns on an interrogation of the reasons provided by applicant as to why the illustrated benefits of R24 883 per annum were not realized. To recapitulate, these reasons as provided by Mr La Grange in his founding affidavit are as follows:

1. The illustrative life annuity rates applicable in 1987 were not the same as those in 2002
2. The assumption that there would be a 15% annual inflation and hence a 15% annual premium growth over the term of the policy was not met because the average annual inflation over the term of the policy was 9.7%.
3. The assumption that there would be a 15% annual investment growth over the term of the policy was not met because the average annual investment growth over the terms of the policy was 11.4%, partly at least, as a result of the lower inflation rate.

In order to examine these reasons, it is necessary to analyse a further question, being the duties of applicant.

The Duties of Applicant.

Although applicant entered into a contract with the second respondent in terms of which the respondent would be entitled at his retirement to benefits in terms of the contract, this case does not turn holy on the underlying principles of the law of contract. The Act sets out the manner of administration as well as the powers of registered pension funds.

In terms of section 7C :

'(1) The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable law 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…;

(c) act with due care, diligence and good faith;

d) avoid conflicts of interest; …'

In terms of section 7D

'The duties of a board shall be to –

(b) ensure that proper control systems are employed by or on behalf of the board;

(c) ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund;…'

Whereas it may well have been open to applicant to contend that there is no principle of good faith which constitutes the residual basis in terms of which a contract of this nature is governed (see in particular **Brisley v Drotsky** 2002(4) SA 1 (SCA); **Afrox Health Care Ltd v Strydom** 2002(6) SA 21 (SCA)), in this case the legislation imposes obligations upon those parties in control of pension funds to ensure that all reasonable steps should be taken to ensure that the interests of the members in terms of the Rules of

the Fund are safeguarded and that all actions on behalf of members should be conducted with due skill and in good faith.

Applicants contend that it is a retirement annuity fund and is one of a group of pension funds which constitute an audit exempt fund as defined by Regulation 1 of Regulations issued under Government Notice Regulations 98 of January 1962 and promulgated in terms of the Act. The effect of this Regulation is that, in order to be exempted by the Registrar of Pension Funds from the provisions of section 9 and 15(1) (2) of the Act, the fund must comply with the following:

(i). The assets must consist **only** of claims against one or more insurers;

(ii) Every benefit in terms of the fund's Rules must be paid solely by one or more insurers;

iii) Contributions to the fund must not be paid into a bank account of the fund but directly into one or more insurers.

iv) One insurer must accept responsibility to act as administering insurer.

Having been so classified, as an exempt fund applicant's assets consist only of claims against one or more insurers, contributions by members are paid directly to the insurer and every benefit in terms of applicant's Rules must be paid by the insurers.

On the basis of this analysis, Mr Burger sought to restrict the role and duties of the management committee of applicant to that of an arranger of contributions to be paid directly by members to the insurer and to provide for amounts payable by the insurer to be paid directly to the members. Accordingly, no money was paid by member into applicant's bank account; indeed applicant on his account did not have any bank account. When the policy matures up to 1/3rd of the proceeds that are available for payment can be paid as a lump sum to a member and the balance is then employed to provide for an annuity. In short, the management committee was merely a conduit pipe between the members and the insurer, in this case Sanlam. On this interpretation there was really no ground to impose the stringent obligations as contained in section 7C of the Act or to find as first respondent had done in his determination, that applicant failed to perform so as to justify the order made.

On an examination of the Rules of the Fund, provision is made for the management

committee ito be in effective control of the Fund see Part 5; para 1 of the Rules. In terms of Part 5, para 6.8 of the Rules, the management committee is enjoined generally to ensure management and control of the Fund in accordance with the Rules and 'the relevant legal prescriptions to achieve the objectives of the Fund.

It appears that the management committee is not exempted from conducting itself in the fiduciary fashion as envisaged by section 7C of the Act nor has it no role to play in the promotion of the objectives of the fund, namely to provide retirement benefits to its members.

There are foundational principles of our legal system which also inform the duties of applicant. **Brand JA** in **South African Forestry Co Limited v York Timbers Limited** [2004] 4 ALL SA 168 (SCA) at para 27 held that '[a]bstract values such as good faith, reasonableness and fairness are fundamental to our law of contract. [T]hey do not constitute independent substantive rules that courts can employ to intervene in contractual relationships'. However, in paragraph 28 of his judgment, Brand JA concedes that these values should be employed to interpret obligations imposed by a contract on a particular party. Applying this approach to the present dispute, the provisions of the Act read together with the Rules of applicant, should be construed to promote principles of transparency, accountability and fairness to be implemented by the management committee of applicant in a manner which seeks to promote the objects of the fund as defined. This conclusion is fortified by the fact that the contract concluded by applicant with second respondent is the point of entry into the relationship between the two parties as well as Sanlam Life. Hence the values outlined above are important pro-pointers as to the duties of applicant.

It follows that the reasonableness of the total charges levied by the insurers from time to time in respect of the administration of the fund and the apportionment thereof among beneficiaries are considerations, of which account must be taken by applicant's management committee. Similarly, the reasonableness of investments effected and maintained by the insurer for the fund from time to time should be examined by the management committee, if the latter is to fulfill its fiduciary responsibilities to members. In addition, the adequacy of disclosure of information which is critical to the interests of members, such as an adequate and fair explanation as to the meaning of documents which provide illustrative values at the inception of the contract as well as the adequacy of disclosure by the insurer to members from time to time, must, in the light of the analysis advanced comprise part of the responsibilities of the management committee of applicant.

Application of these principles to the present dispute.

From a reading of his determination, it is clear that first respondent was concerned to ensure that applicant carry out its duties as I have outlined. For the purposes of the resolution of this dispute, the question arises as to whether, on the available evidence,

applicant discharged its duties and provided an adequate defence to the complaint of second respondent. First respondent was correct to conclude that there was a considerable gap between the 'promise' set out in the illustrative benefits given to second respondent when he entered into a contract with applicant on 1 November 1987. But on its own this is insufficient to find against applicant. The following facts are also critical: Between 1 November 1987 and 1 November 2002, the average rate of inflation was 9.7% per year. Consequently, the inflation linked premium increases which were contractually fixed in the policy and which were critical to the assumptions made in the initial illustrative benefit document fell well below 15% per year. Between 1 November 1987 and 1 November 2002, the average return including bonuses on the policy of second respondent's life was 11.4% per year as compared to an average inflation rate of 9.7%. First respondent himself correctly remarked that the fund had 'overall performed very well'.

Applicant, through Sanlam Life, communicated regularly with second respondent as to the progress of the policy. In terms of uncontested evidence, annual reports on policy values, as they then stood, were sent regularly to second respondent by Sanlam Life. In the example of a document which was provided to the Court, it was evident that from the mid 1990's the percentage for the upper range of the illustrative values decreased below 15% to between 9% (lower) to 12% (higher) from 1998.

It may well be that applicant should have explained the nature of the first illustrative benefits document more comprehensively to second respondent. In my view, it is incumbent upon the management committee of applicant to take reasonable steps to protect the interests of members of the Fund. Hence it is not open to applicant to contend that it was no more than a passive conduit between its members and Sanlam Life. It has a duty to act diligently to ensure that members' interests are protected and further that members are adequately informed about the progress of their investment. This general duty includes satisfying itself through its management committee, of the reasonableness of the investment and progress of members' funds. That an asset manager is owed deference as to how it carries out its mandate is as important as applicant being in a

position to monitor and then advise members as to the return on their investment.

In this case Sanlam Life continued to communicate with second respondent about benefits. As the returns began to decline from 1997 onwards, these decreases were reflected in documentation provided to second respondent by way of further illustrative values. In short, applicant is justified in its contention that second respondent was informed of investment progress.

Throughout the duration of the policy, only once did second respondent's contribution increase by 15% or more, being an increase of 15.2% in 1991 whereas the majority of the increases were significantly lower. For example, the percentage increase in 1998 was 5.1%. Had a 15% increase in premiums, compounded over the entire period been maintained, the contributions would have reached R884.00 per month in the final year of the policy, being 2001, as opposed to the actual amount paid of R491.00 per month.

The quantum of contributions is clearly a reason for a discrepancy between the final payout and the initial illustrative value. This point did not appear to have been adequately considered by first respondent as can be gleaned from the conclusion in his determination which follows upon an examination of the performance of the fund: '[T]he first five years' performance (which clearly exceeds expectations) was neutralized by up front costs of which the complainant was not clearly advised demonstrates, in my respectful view, that the complainant's interests were not foremost in the mind of the management board or fund. Having regard to this performance, it is not clear how this could possibly be reason for a 57% deduction in the promised pension amount and can thus not reasonably be accepted as a valid basis.'

Unfortunately, no mention is made in the determination, of the extent of the increases in contributions paid by second respondent or the further information regarding decreasing benefits provided by Sanlam Life to second respondent.

First respondent placed considerable emphasis on an increase in costs and, in particular, that between 1 November 1987 and 1 November 2002 the portion of second respondent's total contributions to the fund was R50 368 whereas the total amount of costs amounted to R11,782. What appears to have been omitted from consideration is the analysis that, of the amount of R11 782 R8523 constituted a risk premium from rider benefits and life and disability cover; that is the cost of additional cover for risks provided by Sanlam Life for the benefit of second respondent. These riders formed part of the initial contract and thus of the agreement entered into between second respondent and applicant. Only R3259 of the R11 702 comprised policy fees and administration costs; in short the amount of these costs were R3259 which constitutes less than 4% of the maturity value of R83 261.

In summary, the administration costs incurred by applicant as opposed to premiums which were paid for riders attached to the policy cannot, in any significant way, be taken

as a meaningful reason for the reduction of the benefits which second respondent received, as opposed to those which were contained in the initial illustrative benefit.

Conclusion.

That first respondent's approach to applicant's duties is correct is not sufficient to find against applicant. To confirm first respondent's determination, it is necessary to find, on the evidence, that there was no reasonable basis for the reduced benefits received by second respondent Unfortunately, this court was without the benefit of any submissions made on behalf of the second respondent who elected to abide the decision of the court. However, after a careful examination of all the evidence provided to first respondent and to this Court, I do not consider that the available evidence justifies the conclusion reached by first respondent, that there was no reasonable basis for a payment to second respondent of significantly less than R24 883.

It is therefore not necessary to deal with the reasons which underpin the award made by first respondent. However, it is significant that in his letter of complaint of 4 November 2002, second respondent wrote: 'As gevolg van die land se ekonomie kan ons aanvaar dat daar 'n vermindering in die maandelikse bedrag kan wees…'. In effect, second respondent conceded that there was a reasonable basis for his receipt of less than the first illustrative benefit.

Accordingly, the non fulfillment of the amount contained in the initial illustrative benefit document cannot be occasioned on the unreasonable acts or omissions on the part of applicant.
For these reasons, the determination and order of first respondent is set aside and first respondent's determination is substituted by the following: 'The complaint of second respondent is dismissed. There is no order as to costs'.

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DAVIS J

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I agree **LE GRANGE AJ**