

SOUTH AFRICA / JUDGMENT

Old Mutual Life Assurance Co. SA. Ltd v Pensions fund Adjudicator and Others, Old Mutual Life Assurance Co. SA. Ltd v Pensions fund Adjudicator and Others (7248/06, 7343/06) [2008] ZAKZHC 76 (15 October 2008) [2008] ZAKZHC 76

COURT

High Courts - Kwazulu Natal

BEFORE

Sishi

CASE / FILE NUMBER

7248/06, 7343/06

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**IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION
CASE NO. 7248/06**

In the matter between:

OLD MUTUAL LIFE ASSURANCE CO. SA. LTD
APPLICANT
and
THE PENSIONS FUND ADJUDICATOR 1ST
RESPONDENT
RAJWANATHA SOOKHDEO MUNGAL 2ND
RESPONDENT
THE REGISTRAR OF PENSION FUNDS 3RD
RESPONDENT
THE PROTEKTOR PRESERVATION PROVIDENT FUND 4TH
RESPONDENT
THE REGISTRAR OF LONG TERM INSURANCE 5TH
RESPONDENT
CASE NO. 7343/06
OLD MUTUAL LIFE ASSURANCE CO. SA. LTD APPLICANT
THE PENSIONS FUND ADJUDICATOR 1ST
RESPONDENT
TREVOR VERNON FREEMAN 2ND
RESPONDENT
S.A. RETIREMENT ANNUITY FUND 4TH
RESPONDENT
THE REGISTRAR OF LONG TERM INSURANCE 5TH
RESPONDENT

JUDGMENT

SISHI J

Introduction

The Applicant brought two applications before this Court in terms of Section 30P of the Pensions Funds Act No.24 of 1956 as amended ("the Pension Funds Act"). In respect of both

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applications, the Applicant seeks the setting aside in terms of the Pension Funds Act of the determinations made by the Pension Funds Adjudicator. It appears that both cases raise the same issue, namely, the entitlement of the Insurer to apply a Marketed Level Adjustor in determining the surrender value of an insurance policy held by a Pension Fund where the member of the Fund withdraws from the Fund before the original contractual maturity date, either by seeking the surrender of the policy and by advancing the retirement date. In view of the similarities of the facts and the issues involved in respect of both matters, it is appropriate to deal with both matters at the same time in this judgment.

In this judgment, Case No.7248/06 will be referred to as "the Mungal matter" and case No.7343/06 will be referred to as "the Freeman matter".

Relief sought in the Mungal matter

2. In the Mungal Application, the Applicant seeks an order:
 - (a) Setting aside the determination of the 1st Respondent dated 31st May 2006, under case No. PFA/KZN/2658/05/KN in terms of Section 30 P of the Pension Funds Act;
 - (b) Declaring that in the determination of the surrender value of Policy No.11356493, issued by Applicant to 4th Respondent on 22 January 1998 ("The Endowment Policy"), it was competent for Applicant to apply the Market Level Adjustor;
 - (c) Declaring that the method of assessing the surrender value of Policy No.11356493 did not give rise to a complaint within the meaning of that expression in Section 1 of the Pension Funds Act 24 of 1956;
 - (d) Granting such further and/or alternative relief as to the Honourable Court seems meet and;
 - (e) In the event of any of the Respondents opposing the relief sought herein, an order directing that such Respondent pay the costs

occasioned by their opposition, such costs to include those consequent upon the employment of two Counsel.

Relief sought in the Freeman matter

3. In the Freeman application, the Applicant seeks an order:

(a) Setting aside the determination of the 1st Respondent dated 31 May 2006 under

Case No. PFA/KZKN/2799/2005/KM/ch in terms of Section 30 P of Act 24 of 1956;

(b) Declaring that, in the determination of the early retirement value of Policy No.9317075, issued by Applicant to 4th Respondent in 1994, it was competent for Applicant to apply the Market Level Adjustor;

(c) Declaring that the method of assessing the early retirement value of Policy No.9317075 did not give rise to a complaint with the meaning of that expression Section 1 of the Pension Funds Act 24 of 1956;

(d) Granting such further and/or alternative relief as the Honourable Court seems meet;

and;

(e) In the event of any of the Respondents opposing the relief sought herein, an order directing that such Respondent's pay the costs occasioned by their opposition, such costs to include those consequent upon the employment of two Counsel.

4. In both applications, the relief sought is opposed by the 2nd Respondents, namely Mr Mungal and Mr Freeman. It is not opposed by the Pension Funds Adjudicator, and the respective Registrars have indicated that they abide the decision of this Court.

5. It is appropriate to first deal with the undesirable conduct of the Pension Funds Adjudicator of filing opposing affidavits in respect of both matters. In the Mungal matter, the Pension Funds Adjudicator has filed a Notice of Intention to Oppose accompanied by a 32 page opposing affidavit. In the Freeman matter, the Pension Funds Adjudicator has filed a Notice of Opposition accompanied by a 37 page answering affidavit. The reading of these affidavits, reveals nothing more than an attempt by the Adjudicator to defend his own determinations. The Pension Funds Adjudicator has been warned in a number of cases not to file opposing affidavits, such conduct by the Adjudicator is undesirable. (See *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others* [2002] 9 BPLR 3830 (c) at 3831I – 3832D; *Pretoria Portland Cement Co. Ltd and Another v Competition Commission & Others* 2003 (2) SA 385 (SCA) at 402G – 403B).

The facts relevant to the Mungal application

6. Protektor Preservation Provident Fund ("the Protektor") is the Pension Fund of the type known as an underwritten fund in that its assets only consists of claims against one or more insurers arising from the insurance policies taken out by the Fund. In the case of Protektor,

the policies are underwritten by Old Mutual, which also administers the Fund. Mungal was formerly a member of Protektor. A contract of insurance was concluded between Old Mutual and Protektor, in respect of insurance benefits payable to Mungal. Mungal was the life assured under the policy Protektor, the policy holder and beneficiary. Upon the policy maturing, Old Mutual was obliged to pay the proceeds thereof to Protektor, which would use such proceeds to pay Mungal, the benefits due to him under the rules of Protektor.

7. Protektor rules provide for the payment of benefits in three circumstances, namely, upon the member reaching retirement age, upon the death of the member and upon the member withdrawing from the Fund. Withdrawals from the Fund are governed by rule 6, read together with paragraph (A) of the definition of “accumulated credit” in rule 1 and rule 8(4) which deals with the policy options chosen by Mungal and provides that the cash value of the policy at the date of surrender will be the appropriate surrender value which will depend on the value as at the date of the underlying portfolio.
8. Upon a member’s withdrawal, the surrender value of the policy taken out in respect of that member is paid out by Old Mutual

to Protektor. Clause 5 of Part 3 of the policy contains the following provision relating to the determination of the surrender

value:

“The amount of surrender value will be determined by Old Mutual at the time of surrender, and will take into account disinvestment costs, recovery of un-recouped expenses, any debts against the policy and legal limits enforced”.

9. The amount of the surrender value is determined by Old Mutual at the time of surrender in accordance with such actuarial principle as may be applicable. It is not in dispute that it is necessary to make the valuation by using actuarial methods. The Applicant contends that this includes taking into account if appropriate a Market Level Adjustor. This is disputed by the 2nd Respondents.
10. It is evident from the founding affidavit in the Mungal application that on various occasions during the period 2000 to 2003,

Mr Mungal sought information regarding the value of his policy. The information was provided and it was repeatedly indicated that there was a difference between the “cash value” (or surrender value) of the policy and the fund value thereof. Mr Mungal queried one of these quotations, he was specifically informed that the difference between the two figures that had been furnished was due to the application of a Market Level Adjustor. The response from Old Mutual as appears from annexure “PDB14” of the founding affidavit reads as follows:

“The reason for the reduction was because there was a Market Level Indicator done as the market was doing badly, from 1 March 2003, 15%. Because the market was doing better from 1 March 2003 it changed to 10%”.

11. In March 2003, Mr Mungal submitted a withdrawal advice form to Protektor, advising of his intention to withdraw from the Fund. He was thereafter on three separate occasions furnished with quotations indicating the value of his policy. Correspondence was exchanged between the parties relating to Mr Mungal's proposed withdrawal. It is clear from these quotations and the correspondence

that Mungal was made aware that the value of the policy that would be paid to him, on surrender, would be lower than the cash value

thereof. Mr Mungal thereafter proceeded to withdraw as a member of the Fund. In June 2004, the surrender value in the amount of R230 384-62 was paid to him by Protektor.

In March 2005 Mungal referred the complaint to the adjudicator. The complaint was set out as follows:

- Old Mutual had applied a Market Level Adjustor which reduced the value of his policy;
- The value shown in the statement of 30 June 2003 was the same as that of the statement of 30 June 2002 - he contended that the former should have been higher than the latter.

The second part of the complaint is not relevant for the purposes of this application.

12. In May 2006 the Adjudicator issued a determination in terms of whereof he ordered that:

- Old Mutual was not entitled to apply the Market Level Adjustor, when determining the surrender value of the policy;
- The sum of R29 592,04 by which the surrender value had been reduced as a result of the application of the Market Level Adjustor was to be repaid to Mungal.

The facts relevant to the Freeman application

13. The 4th Respondent, the South African Retirement Annuity Fund (SARAF) is a Retirement Annuity Fund which operates exclusively by means of individual policies issued to it by Old Mutual in respect of each of its members, as contemplated in Regulation 28 (3) of the Pension Funds Act. During 1994, Mr Freeman became a member of SARAF and Old Mutual consequently issued a Flexi-Pension Policy to SARAF in respect of Mr Freeman being Policy No. 9317075. The aforesaid contract of insurance was concluded between Old Mutual and SARAF. Mr Freeman was the life assured. In terms of the policy contract, the policy benefits due to SARAF will become available to purchase an annuity for Mr Freeman subject to the rules of the Fund and the provisions of the Income Tax Act 1962, upon Mr Freeman's elected date of termination of membership in the Fund, a member is entitled to the payment of his or her retirement value. In terms of the said policy, the date of commencement was the 1st of November 1994. On a single contribution of R392 568,00 due on commencement, the guaranteed retirement value as specified in the policy was R908 385,00. It constitutes a guaranteed amount that will be paid to the member provided that the policy matures on the selected retirement date. Clause 2, Part 3 of the contract provides as follows:

Old Mutual undertakes to pay –

“... the benefits as described in part 1 of this contract to the persons entitled to receive them after being satisfied with regard to the age of the assured/annuitant and the validity of the claim, provided that the provisions set out in this contract have been complied with”.

The same clause also provides that the assured also has the option, subject to the rules of the Fund, legislation in force at the

time and the conditions imposed by Old Mutual at the time, to change the date of retirement. In the ordinary course, the benefits under the policy are paid out on the elected date of retirement or upon the death of the member. However, in terms of Clause 2 Part 3 of the policy, members are entitled to bring the retirement date forward by electing to terminate their membership in the Fund. Both parties are in agreement that the effect of a member wishing to retire earlier than the stipulated maturity date is the same as in the case of a surrender of a policy.

14. Mr Freeman who was a broker by profession had access to the policy quotation system operated by Old Mutual. He used such access

to obtain early retirement value quotations on his policy. Correspondence was exchanged between the parties regarding the early

retirement envisaged by Freeman. Such correspondence and quotations indicated the actual early retirement value that would apply at specific dates and indicated unequivocally that a Market Value Adjustor would be utilized in calculating such early retirement

value. Mr Freeman elected to exercise his option for early withdrawal and brought forward his retirement date. On 21 August 2003, Mr Freeman addressed two e-mails to Old Mutual changing his date of retirement and accepting the early retirement values which had previously been furnished to him. The Market Level Adjustor was thereafter decreased, resulting in an increase in the early

retirement value of a policy. This was communicated to Mr Freeman who accepted this amount which was higher than what he had previously

agreed to accept and the policy was accordingly terminated on those basis.

15. Mr Freeman was unhappy with the application of the Market Level Adjustor. In March 2005, he referred the complaint to the

Adjudicator. In May 2006, the Adjudicator issued a determination declaring that Old Mutual was not entitled to apply the Market Level Adjustor when determining the surrender value of the policy and ordered the sum of R46 634,41 being the amount by which the early retirement value had been reduced, to be repaid to Mr Freeman.

THE NATURE OF THE APPLICATIONS

16. In respect of both applications, Old Mutual seek to set aside the decisions of the Pension Fund Adjudicators' and has accordingly brought these applications in terms of Section 30P of the Pension Funds Act.

30 P (1)

"Any party who feels aggrieved by a determination of the Adjudicator may, within 6 weeks after the date of determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her

intention so to apply to the other parties to the complaint".

30 P (2)

"The division of the High Court contemplated in subsection

- (1) shall have the power to consider the merits of the complaint in question, to take evidence and may make any order it deems fit"
17. Both parties are in agreement that an application to Court under Section 30 P of the Pension Funds Act, is a complete re-hearing of, and a fresh determination on, the matter which was referred to the adjudicator. The relevant case in this regard is the case of Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at 725 I - 726 A where the following was stated:

"From the wording of Section 30 P (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 the decision whether the Adjudicator's determination was right or wrong. Neither is it confined to the evidence or 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 Section 30 P (2) to a consideration of "the merits of the complaint in question". The dispute submitted to the High Court for Adjudication must therefore still be a complaint as defined. Moreover, it must be substantially the same complaint as the one determined by the Adjudicator".

18. The key issue in both applications is whether Old Mutual was entitled to use the Market Level Adjustor in determining the termination values of the policies in each case. The argument of the 2nd Respondents relates entirely to the interpretation of the insurance policies that are in both applications. The Respondent simply joins issue with the Applicant on the proper construction of the two insurance policies in relation to the determination of the

surrender value (Mungal) or the early retirement value (Freeman). It would be convenient to first deal with the issue of the jurisdiction

of the 1st Respondents in both applications.

JURISDICTION OF THE 1ST REPONDENTS

19. In respect of paragraphs (c) of the Notices of Motion, in both applications, Applicant seeks an order declaring that the method of assessing the surrender value/early retirement value of the policies did not give rise to a complaint within the meaning of that expression in Section 1 of the Pension Funds Act. The Applicant challenges the jurisdiction of the Adjudicator in both applications to make the awards on the ground that what was referred to the Pension Funds Adjudicator did not amount to a complaint in terms of Section 1 of the Act. It is clear from the reading of both awards made by the adjudicator that the Applicant did not raise the issue of jurisdiction when these matters were dealt with by the Adjudicator. It seems that the Applicant simply submitted to the jurisdiction of the Adjudicator in both applications. The issue of jurisdiction is now being raised for the first time before this Court. As indicated above, since this is a re-hearing of and a fresh determination of the matter, referred to the Adjudicator, this Court has jurisdiction to deal with all aspects of the applications as raised by the parties. In any event this is a matter of law.
20. It is common cause between the parties that an application to Court under Section 30 P of the Pension Funds Act is a complete re-hearing of and a fresh determination on, the matter which was referred to the Adjudicator; (See paragraph 17 above). It is not the jurisdiction of this Court to hear these applications, that is being challenged by the Applicant, but that of the Pension Funds Adjudicator, to deal with the complaints referred to that office.
21. In the Mungal matter, the essence of the complaint referred to the Pension Funds Adjudicator is that the Applicant applied the Market Level Adjustor in calculating the surrender value of the endowment policy. In the Freeman application, the essence of the complaint referred to the Pension Funds Adjudicator, is that the Applicant also applied a Market Level Adjustor when calculating the early retiral value of the Retirement Annuity Policy. The 2nd Respondents in both applications contend that the Applicant was not entitled to apply the Market Level Adjustor in determining the termination values their policies.
22. Mr Wallis SC with whom Mr Oosthuizen SC appeared on behalf of the Applicant submitted that the Adjudicator is a statutory

functionary, whose jurisdiction is confined to the investigation of complaints in terms of Section 30A(3), (30B), (30E & 30H) of the Pension Funds Act. He also submitted that if somebody goes to the Pension Funds Adjudicator and complains, the Pension Funds Adjudicator has to look at the complaint the same way as the Court has to look at what has been said when there is a challenge to the Courts' Jurisdiction. He submitted that the Pension Funds Adjudicator is obliged to consider whether what is being said constitutes a complaint as defined in the Act. The term "complaint" is, in turn, defined in Section 1 of the Pension Funds Act 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 any 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”

23. Mr Wallis submitted correctly in my view that part (d) of the definition is clearly in applicable to Messrs Mungal and Freeman – the funds to which they belong had no participating employers, nor the rules seek to cast any duties on such employers. Mr Wallis submitted that to constitute a complaint within the meaning of paragraphs (a) and (b) of the definition, the decision or act complained of must be that of the fund or a person administering the fund or performing any of the functions prescribed in the Pension Funds Act. He referred to the case of *Armaments Development & Production Corporation of SA v Murphy* NO 1999 (4) SA 755C at 758 G –759B. He submitted that it must be a decision or Act by the person who is approved as an administrator of the fund in terms of Section 13 B of the Pension Funds Act and the decision or Act must be one in their capacity as such. The determination of the surrender/early retirement value of the policy of insurance is taken by the insurer acting as insurer and is not a decision or act of administration of a fund.
24. As regards to paragraph (c) of the definition, he submitted that the dispute of law or of fact forming the subject of the complaint

must not be one in which the pension aspect is “Only a minor or inconsequential feature of the dispute”. (See *Armaments Development & Production Corporation of SA v Murphy* NO, Supra, at 759J to 760B). He submitted further that in addition, it must be a dispute relating to the legal right of a person raising the dispute.

This flows from the fact that the role of the Adjudicator is to determine disputes that would otherwise be determined by a Court of law. The Adjudicator is not clothed with any equitable jurisdiction. (See *Shell & BP SA Petroleum Refineries (Pty) Ltd v Murphy* NO 2001 (3) SA 683 D at 690 F.

25. Mr Wallis submitted that a dispute pertaining to whether, in terms of an insurance policy, it is competent for the underwriter to

take the Market Level Adjustor into consideration in determining the surrender/early retirement value of the policy at the particular

date, is not a dispute within the meaning of paragraph (c) of the definition. The fact that the policies in question were issued to a pension fund constitute a minor and inconsequential feature of the dispute and does not render it one within the meaning of the definition of the term “complaint” as contained in Section 1 of the Pension Funds Act. The dispute is not “in relation to” the Fund but in relation to the proper valuation of the insurance policy. He then submitted that this is a question of Insurance as illustrated by comparing this case with the person who took out the identical policy of insurance without the intervention of the pension fund. Any dispute raised in regard to the surrender value of the policy would be referred to the Ombudsman for long term insurance and not to the Adjudicator. There is no reason why the same issue should come within the Adjudicator’s jurisdiction merely because the policy is issued to the person’s pension fund.

26. Mr Wallis submitted further that this is not a complaint relating to the administration of a Fund, it has nothing to do with

administration, it has to do solely and only with the amount payable by the insurer under the policy of insurance. It is no more a matter of the administration of a fund than a claim against the Fund arising out of the negligent driving of a motor vehicle by a person who administers a Fund. It is not a complaint about the investment of the Fund, it is simply a question of how much should have been paid out under these policies when they were terminated early. It is clearly not a complaint about the interpretation and application of the rules. Mr Wallis agrees with Mr Brassey who appeared for the 2nd Respondents, that this is a matter about the proper interpretation of the policies of insurance. He then submitted that disputes over the interpretation of policies of insurance are properly within the jurisdiction of the Ombudsman for long term insurances, they are not pension matters in any sense whatsoever. He finally submitted that the grievances raised by Messrs Mungal and Freeman did not constitute complaints as defined in Section 1 of the Pension Funds Act, and that the Adjudicator lacks jurisdiction to investigate and determine such grievances.

27. Mr Brassey with whom Ms Wood appeared, for the 2nd Respondents merely confined his argument to paragraph (c) of the definition of complaint and submitted that this is a dispute of fact and law. It is a dispute as to what is factual entitlement; a dispute of law as to whether it is sanctioned by the underlying

instruments that has arisen essentially between the complainant on the one hand and the Fund or any person, that is, Old Mutual as an Insurer, on the other hand and the result is that it is entirely competent and proper for the Pension Funds Adjudicator to say:

“If I properly construe the instruments, then by way of the Pension Fund pay out, Mr Mungal and Mr Freeman should have got X and what he actually got was X – 15% or 10% as the case may be, and that is the consequence of a short fall in payment”.

There is a dispute of fact and law in relation to that, that encompasses not only the Protektor Fund, but also encompasses Old

Mutual insurer and there is no reason why the Pension Funds Adjudicator should somehow lose jurisdiction in the circumstances.

The Adjudicator attains jurisdiction at the outset in relation to what should have been paid out by the Protektor Fund and he retains jurisdiction to consider all the ancillary instruments, the insurance policy in order to decide what the requisite payout should be.

28. Paragraphs (a), (b), (c) and (d) of the definition of complaint in the Pension Funds Act clearly sets out specific matters which may be alleged by the complainant in regard to the complaint lodged with the Adjudicator. Paragraph
- (c) of the definition states that a dispute of fact or law has arisen in relation to a fund, between the fund or any person and the complainant. In *Armaments Development & Production Corporation of South Africa v Murphy NO*, Supra, at 759 A, the Court pointed out that subparagraph (b) of the definition makes this distinction even more clearer by referring to the prejudice suffered by a complainant as a result of the administration of the fund by the fund or any person. Clearly this has to be a person administering the fund or performing any of the functions prescribed in the Act or the Rules for such person for example, an actuary. The phrase “any person” is also used in paragraph (c) of the definition. There is no doubt that the phrase “any person” as used in the definition, refers to Old Mutual for the purposes of the applications before this Court. With regard to the definition in paragraph (c), the dispute of law or of fact forming the subject matter of complaint must not be one in which the pension aspect is “only a minor or inconsequential feature of the dispute”. See *Armaments Development & Production Corporation of South Africa v Murphy NO*, Supra at 759J - 760B. It must however, be noted that in this case, a dispute arose between the Applicant and the 2nd Respondent as to whether he had left employment because of re-organization, restructuring or any other decision of the Applicant. The facts of that case are therefore distinguishable from the facts of the present case. I agree with the submissions made by

Mr Wallis that paragraphs (a) and (d) of the definition of “complaint” are not applicable in both cases, for the reasons advanced. In *Shell & BP SA Petroleum Refineries v Murphy NO* Supra at 690 D-E, Levinson J pointed out correctly in my view that, the complaint submitted to the Adjudicator must relate to one of three things, namely, the administration of the Fund, the investments of its Funds, and the application of its rules. This is also clear from the opening words of the definition of “complaint” in Section 1 of the Act. It is clear from the Respondents’ argument that the issue before this Court relates entirely to the interpretation of the two insurance policies in respect of both matters. This is common cause between the parties. The essence of the complaint in both matters is that they have as a result of an erroneous approach to the calculation of their benefits under the insurance policies received less than should have been the case. Mr Wallis correctly pointed out that, this is a question of Insurance not maladministration of a Pension Fund, or a dispute in relation to the Fund. The complaint in respect of both applications is a complaint arising from a difference in view as to the amounts payable which should have been referred to the Ombudsman for Long-term Insurance.

29. In *Central Retirement Annuity Fund v Adjudicator of Pension Fund and Others* [2005] 8 BPLR 665 C, the Court found that the Adjudicator had jurisdiction to deal with the complaint relating to reduced retirement benefits where payment received by the complainant was less than the illustrated benefit. The essence of the complaint in *Central Retirement Annuity Fund* case was that the complainant had obtained less than he should have received from his retirement annuity investment and had not been informed at the material time that he would eventually receive substantially less than the projection which he had been initially provided. His complaint was that the Applicant had a duty to keep him informed of the significant changes in the eventual projected Pension and reasons therefor. 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 through its own management committee of the reasonableness or adequacy thereof. The essence of the complaints

as outlined above in the present applications differs materially from the complaint in the *Central Retirement Annuity* case supra. The present applications deal with a dispute relating to the calculation of a surrender value before the maturity date (Mungal),

and the retirement annuity where in a date of retirement has been brought forward. (Freeman). As indicated above payment of reduced

benefits in terms of insurance policies are matters of insurance which have to be dealt with in terms of the Long-term Insurance Act and not matters falling within the definition of complaint. Such complaints should be referred to the Long-term Insurance Ombudman and not to the Pension Funds Adjudicator.

30. In *Old Mutual Life Assurance Company (SA) Ltd v Pension Funds Adjudicator & Others* [2007]1 BPLR117(c), the Court left open the issue of whether the Adjudicator, had jurisdiction to deal with matters relating to reduced benefits. The Court, however, simply assumed that it had such jurisdiction without specifically deciding the issue. The fact that the policies in question were issued out to a pension fund constitute a minor and an inconsequential feature of the dispute and does not render it one within the meaning of the definition of the term complaint as contained in section 1 of the Pension Fund Act. See *Armaments Development & Production Corporation of South Africa v Murphy NO, Supra*. The submission by Mr Wallis that these issues should have come before the Ombudsman, a Long-term Insurance and not the adjudicator is correct.
31. Having considered all arguments advanced in this regard, the evidence tendered and , the law applicable, I am satisfied that the Pension Funds Adjudicator had no jurisdiction to determine the complaints in respect of both applications. This finding should

bring both matters to rest. However, it is clear that the intention of the parties in both applications is to have the merits of the applications determined by this Court. I proceed to deal with the merits of the application.

THE MERITS

Whether Old Mutual was entitled to apply the Markert Level Adjustor

32. In the Mungal matter the policy clearly states that each policy is administered through its accumulation account which is increased

by premiums and investment returns and is reduced by expenses and benefit charges. Mr Wallis has referred to the accumulation account as an administrative provision. The parties are in agreement that the key clause as far as the Mungal matter is concerned is Clause 5 of Part 3 of the policy. This clause provides as follows:

“The amount of the surrender value will be determined by Old Mutual at the time of surrender and will take into account the investment costs, the recovery of unrecouped expenses, any debts against the policy and the legal limits in force”

It is the application of this clause and the interpretation thereof that is the sole focus of these cases as far as the merits are concerned. The parties are in agreement that the Applicant's entitlement under the policy to determine the surrender value clearly means that it must “fix”; “settle” or “establish” that value. This was the meaning given to the word “determine” in *Public Careers Association v Toll Road Concetionaries (Pty) Ltd* 1990 (1) SA 925 (A). Mr Brassey on behalf of the Respondent emphasized that the entitlement given to Old Mutual is no more than an entitlement to calculate the amount of the surrender value. The question is how was Old Mutual to go about determining the surrender value and what were the constraints and limitations imposed upon it in doing so. That is where the parties differ, and they differ on one issue, and that issue relates to the application of the Market Level Adjustor in respect of both matters.

The Nature of the Market Level Adjustor

33. Much has been said on the papers about the nature of the Market Level Adjustor, this concept is also referred to as the ‘Market Value Adjustor’ and it is necessary to first determine the nature of this concept as understood by the parties to this application. I have not been able to find a lucid definition of this concept on these papers or anywhere else, it is only defined in terms of its purpose and function. In the papers filed in both matters, Mr Vergeest, an Actuary employed by the Applicant as a Finance Actuary/Market Solutions, explains the Market Level Adjustor in his affidavit as follows:

When they determine a surrender value, they use the accumulation account of the policy as a convenient starting point for calculation

purposes. Adjustments are then made for unrecouped expenses and for market conditions. In this regard it is to be noted that when policy holders surrender their policies before the maturity date, their actions may greatly prejudice remaining policy holders of that particular policy Fund, if such early exiting policy holders were allowed to receive the full balance of their accumulation account in times when the markets are performing poorly. He made reference to the following example: Assume that two policy holders each took out a R100,00 endowment policy for a five

year period, i.e. one which would mature in 5 years time. The total portfolio would therefore be R200,00. In the first year, the market performs poorly and suffers a 30% depreciation in value. The total portfolio value at the end of that period would be R140,00 (the initial amount invested reduced by 30%) If policy holder A were, at the end of the year 1, allowed to withdraw the full amount initially invested by him, i.e. R100,00, there would only be R40,00 left for the benefit of policy holder B. This would most be unfair towards the latter. A further important factor is that if policy holders who exit prematurely, were to receive unfair or disproportionately large payout, this would be encouraging a run on particular investments when the market is down. The bonus moving mechanism is designed to deal with predictable withdrawals (i.e. maturity's and deaths), and not voluntary withdrawals.

Mr Vergeest goes on to say that the aim of the Market Level Adjustors is to ensure that the amount paid when the policy is surrendered does not exceed the value of the underlying assets in the portfolio. Where a policy holder wishes to exit at a date earlier than the maturity date and also at the time when the market is down, the adverse consequences to other policy holders as demonstrated earlier on are avoided by applying the Market Level Adjustor to the policy value to be paid to the said persons at their early exit. In such circumstances, and to prevent the adverse consequences referred to in the preceding paragraph, the surrender value paid out to persons exiting from the policy in these circumstances is adjusted by a percentage which is determined, from time to time, taking into account market conditions and the level of the bonus stabilization account. As finance actuary for the Flexi Smooth Bonus Portfolio, it is his responsibility to monitor the state of the market and the level of bonus stabilization account, and implement Market Level Adjustors when required. The Chief Actuary of Old Mutual is kept informed of the impact of Market Levels on the portfolio, and the Market Level Adjustors that are applied. The Market Level Adjustor is normally expressed as a percentage of the policy value. The Market Level Adjustor decided upon a particular time, will remain in force until changed conditions in the market necessitate the then applicable percentage being decreased "if the market recovers" or increased "if the market declines". He then states that at the time Mungal surrendered his policy, a Market Level Adjustor of 10% was applied.

34. Mr Vergeest further testified that in a strong and positive market, no Market Level Adjustor is applied to the sum paid to those wishing to exit from a policy before its maturity date, as the fund value of the policy will not exceed the value of the underlying assets in such markets circumstances. It is also not necessary to do this where the market is flat or slightly depressed for a brief period as the reserves in the bonus stabilization account are then sufficient to prevent the adverse consequences which the application of the Market Level Adjustor seeks to repress. The application of a Market Level Adjustor is therefore an exception rather than the rule.
35. In the Founding Affidavit, Mr G De Beyer, the Executive Director of Old Mutual states that a Market Level Adjustor is definitely not a charge imposed for breach of contract, nor is it a penalty for any withdrawal. The Market Level Adjustor, is part of the actuarial calculation process which is followed, in respect of a policy surrendered before the maturity date of that

policy, to ensure that the amount paid to the policy holder in such circumstances does not exceed the underlying value of assets in relation to that policy at the time of surrender to the detriment of other policy holders. In a document from Old Mutual dated 7 June 2005, submitted to the Adjudicator, the Market Value Adjustor is discussed in terms of its purpose and the document states that the purpose of the Market Value Adjustors is to give policy holders a fair investment value for their Market Related Investment Portfolios that are priced monthly, during times of dramatic and unforeseen movements.

36. Mr Jeremy Peter Andrew an Actuary with 25 years experience and former Chief Actuary of the Financial Services Board, together with Mr Chetty who deposed to an affidavits on behalf of the 2nd Respondents in both matters have not seriously challenged the description of and the application of the Market Level Adjustor as

described by Mr Vergeest and Mr De Beyer. Mr Andrew describes the Market Value Adjustor as an accepted technique for the discouragement

of early surrender, and has the effect that it denies the policy holder any benefit of the smooth bonus approach when markets are depressed and the policy holder surrenders the policy early. He testified that the Market Value Adjustor may only be used when the policy empowers the insurer to apply it. Specific provision must be included in the policy and marketing material supplied to the policy holder. The particular policy in respect of Mungal to the Protektor Preservation Provident Fund did not empower the insurer to apply a Market Value Adjustor. According to him there is no certain actuarial practice that makes it unnecessary to specify the Market Value Adjustor applies. On the contrary, actuarial guidance makes it clear that it may only be used if sanctioned by a policy. The same argument is advanced in the Freeman matter. As indicated above the parties have limited the issues in this matter to be interpretation of actual provisions of the policy in determining whether or not Old Mutual was entitled to apply the Market Level Adjustor in both matters.

Accumulation account

37. In the Mungal matter, Part 2 of the policy provides that each policy is administered through its accumulation account which is increased by premiums and investment returns and reduced by expenses and benefit charges. In explaining what smooth bonus portfolios are, Mr Vergeest for the Applicant in the Mungal matter in his affidavit stated that the policy premiums may be linked to a smooth bonus portfolio. Under smooth bonus portfolio, the aim is to ensure that a positive return is provided even if the markets are down. The smoothing process means that at maturity the benefits payable may be higher or lower than the actual value of the underlying assets.
38. In his unchallenged evidence, Mr Vergeest testified that the manner in which a smooth bonus portfolio is managed in order to

provide a steady investment growth is as follows:

- If in a given year, the market performs well and the value of the underlying investment increases, the value of the policy is increased by way of bonuses, subject to the provisions of Section 46 (c) of the Long Term Insurance Act. These bonuses are either vesting bonuses or non-vesting bonuses. Vesting bonuses are declared annually and added to the value of the policy. Vesting bonuses, once added, cannot be removed or deducted from the value of the policy.
 - In a smooth bonus portfolio, part of the investment growth experienced during the strong market is retained and not added to the value of the policy by way of a vesting bonus, but instead it is allocated to a bonus stabilization account. By holding back some of the growth during the time of the market growth, smooth bonus portfolios allow the life office to add additional growth during the time of poor market performance, thus smoothing market extremes.
 - In a market related portfolio, on the other hand, the entire growth will be added to the policy value during the good years but the value of the policy will again depreciate during the period when the market performs poorly, or experiences negative growth. In parity with the decrease in the value of underlying investment, he stresses that the bonus stabilization account is not a bank account into which cash representing a part of the growth in the value of the policy in a given year is paid. The assets underlying the policy remain invested in the various markets. What happened is that part of these assets (the bonus stabilization account) are not added, in the form of bonuses, to the policy value but retained for the purposes of the smoothing process.
 - Smooth bonus funds aim to deliver investment returns which exceed inflation without the volatility of equity markets, and are therefore appropriate for the policy holder who prefers stable returns. By aiming to achieve positive inflation beating growth and by using the smoothing process to achieve, these funds aim to grow the initial capital investment in a steady pace over the longer term.
39. According to Mr Vergeest, smooth portfolios are balanced funds that are used as the smoothing mechanism referred to previously to ensure a steady investment return. By holding back some of the growth during times of the strong market performance, the impact of a down turn in the market can be absorbed in that the Insurer can use some of the previously retained growth to counter act such down turn. In a Flexi Endowment Policy, the money paid to Old Mutual, whether by way of a lump sum payment of regular paid premiums, less any charges, is invested in the underlying portfolio and credited to the accumulation account of the policy. Bonuses declared are added and administration charges deducted from the accumulation account. As mentioned above bonuses are declared retrospectively once a year partly as non-vested bonuses. However, as policies mature throughout the year (and death benefits become payable throughout the year) interim bonuses are declared on a monthly basis and credited to the accumulation account of the policies. Both non-vesting bonuses and interim bonuses can be removed at any time (in adverse market conditions).

40. According to Mr Vergeest the accumulation account should not be viewed as belonging to the policy holder. It is simply a calculation

tool to determine the benefits payable at death or maturity. When they determine a surrender value, they use the accumulation account of the policy as a convenient starting point for calculation purposes. Adjustments are then made for unrecouped expenses and for market conditions. He testified that in this regard, it is to be noted that when policy holders surrender their policies before their maturity date, their actions may greatly prejudice the remaining policy holders of that particular policy fund, if such exiting policy holders were allowed to receive the full balance of the accumulation account in times when the markets are performing poorly. This evidence has not been seriously challenged by the Respondents.

41. Mr Vergeest states that it is important to distinguish between Pure Life and Endowment Policies. A Life Policy operates on the assumption that if during the currency of the policy, the assured dies then the particular amount will be paid out, otherwise nothing will be paid if the policy runs its course. In this case we are concerned with Endowment Policy because something is to be paid irrespective of death at termination on culmination of the operation of the policy. The Insured is endowed with money irrespective of death.
42. Mr Vergeest also stated that the point to be stressed in respect of the accumulation account is that it indicates the value payable on death or maturity, i.e. when, in terms of the policy, the benefits specified therein become payable. It does not indicate the amount due to the policy holder if he or she terminates the policy on some other occasion as occurs when it is surrendered, where, prior to death or maturity, the policy is prematurely terminated, the accumulation account does not play the same role. The amount of the surrender value is then determined by Old Mutual. Mr Brassey then refers to paragraph 21 of the Adjudicator's findings (Mungal matter) wherein he deals with how a smooth bonus endowment policy generally operates. The Adjudicator says that endowment policies generally fall into one of at least three categories:
- The first is "without profit" policy which on maturity offers a guaranteed and specified amount of money in exchange either for a single premium at the inception of the policy or regular premium payout throughout the policy term. The benefit to the policy holder is therefore unaffected by asset class returns over the policy term;
 - The second is a "unit linked" policy where premiums are used to buy units in pooled investment funds. The benefit to the policy holder depends on the performance of the underlying assets net of investment management costs and administration charges;
 - The third category is "with profit" policy which offers a specified sum assured at the end of the contract in exchange for either a single premium at policy inception or regular premium payments through out the policy term. The sum assured is enhanced

over the life of the policy with bonuses declared from time to time by the insurer, which are added to the sum assured. A smooth bonus policy is essentially a “with profit” and endowment policy.

Mr Brassey submits that what the Adjudicator says is that a smooth bonus policy aims to provide a smooth growth as opposed to a fixed pre-determined sum assured as a without profit policy. That is a conventional old style insurance policy in which one get out in the end what is stipulated in the policy, provided one remains faithful to the policy throughout its terms, or a potentially volatile sum assured as in the unit linked policy and these are the two contrasting situations. According to Mr Brassey what the Adjudicator says is that this is achieved by pulling investments risks across all policy holders, including those whose policies mature within 5, 10 or 15 years of each other. The stabilization account is therefore to compensate those policy holders whose policies become exposed to and mature later in years of negative returns.

43. Mr Brassey submits that what happens is that, in order to provide for the smooth bonus policy contemplates what one has to do is to retain certain investment profits in a stabilization account or a reserve account or a stabilization reserve as the Adjudicator puts it. That pool is effectively the pool of investment returns less costs, charges that the Insurer holds back in order to be effectuate the smoothing policy. What Mr Brassey submits, to use his words, is that the Insurer says, “this is a really good year, we will pay out say 60 to 70% by way of bonus. The balance will be kept back in the stabilization reserve”, secure in the knowledge, as every Insurer is, that for every good year, one may experience a subsequent bad year and that is precisely what the policy contemplates, is the notion of smoothing and it is precisely ample provision of the smoothing that the stabilization reserve is held in abeyance. Mr Brassey submits that what Mr Wallis seeks to commend in respect of this particular policy of Mr Mungal is a hybrid. What Mr Wallis says in effect according to Mr Brassey is that when the policy matures, either by death or by expiry of time, then it is a conventional “with profit” Endowment Policy. But when it expired in consequence to one or two events, in the case of Mr Mungal, in consequence of surrender, or in the case of Mr Freeman in consequence of the acceleration of the retirement date, when it does that, somehow it becomes a unit linked policy. The concern would be an underlying investment where before that, there was no particular concern at the culmination of the policy and that is why he says that what Mr Wallis postulates is that the policy undergoes a sea change in consequence of his argument. If that was the position, one would expect the policy to say so in words.
44. Mr Wallis has contended that the difference between the parties lies in determining the matter is what may be permissibly be taken into account in fixing the surrender value. There is little point in saying that the Applicant may “calculate” the surrender value unless the elements of that calculation are established. According to him it is here that the real dispute lies.
45. Mr Wallis in his Heads summarized the Respondent’s Arguments as follows:

- Whilst the policy is in existence the accumulation account reflects the premiums and the bonuses declared each year, both vested and claimed bonuses, unless and until the latter are withdrawn.
- The life assured is entitled under the policy to receive on maturity the greater of the accumulation account or the guaranteed

maturity value and on death before the maturity accumulation account.

These are therefore the benefits that the assured is entitled to on surrender of the policy subject only to the potential deduction of the amount referred to in Clause 5. The point is expressed as in the Respondent's Heads as follows:

"Under such regime, it would be remarkable if the structure of the policy under went a sea change at the moment of surrender. By surrendering the policy the assured naturally loses the guaranteed minimum payout, in addition he or she relinquishes the residual interest that might be enjoyed in the potential bonuses that might subsequently be paid out of the stabilization account. Finally, he or she may have to pay a disproportionate amount by way of expenses and charges because these costs are no longer recouped over the full term of the policy. But other than these the insured loses nothing".

What the Respondent contends according to Mr Wallis is that on surrender, the assured has an entitlement to the amount standing to the credit of the accumulation account less any "disinvestment costs, the recovery of unrecouped expenses, any debts against the policy and legal limits in force". According to Mr Wallis, the accumulation account is treated as constituting an obligation over and by the insurer to the beneficiary of the policy and apart from additions or deductions in the usual cause and in the extreme circumstances the removal of non-vesting bonuses, it cannot be altered and reflects the extent of the rights of the insured against the insurer. According to Mr Wallis, that approach equates that surrender value to the accumulation account subject to the possibility of it being reduced by the four factors mentioned in Clause 5, all set above.

In this regard, it is important to refer to the provisions of clause 2.1 of the policy in the Mungal matter. This clause deals with benefits payable and it provides that all benefits payable by Old Mutual are subject to the general provisions of Part 3.

- On surrender of the assured on 1 January 2010, the balance in the accumulation account is payable with the minimum guarantee of the amount of R319 076.00;
- On the death of the assured before 1 January 2010, the balance in the accumulation account is payable.

Neither of these two eventualities seems to have occurred in the Mungal matter, instead the policies have been surrendered prior to the expiration of the agreed period.

Surrender value/Cash value in the Mungal is dealt with in Part 3 of the policy and Clause 5 thereof provides as follows:

“The amount of the surrender value will be determined by Old Mutual at the time of surrender and will take into account disinvestment costs, the recovery of unrecovered expenses, any debts against the policy and legal limits in force”.

47. Mr Wallis submitted that the Respondents’ approach as postulated above equates the surrender value to the accumulation

account subject to the possibility of it being reduced by four factors mentioned in Clause 5, that contention is contrary to the

language of Clause 5. If the surrender value is equivalent to the accumulation account, the reference to the surrender value being

“determined” is meaningless. Mr Wallis contends that the amount of the accumulation account at the given point in time is a matter of record being the total of the premiums and bonuses allocated to the account less expense and benefit charges. He further contends that if the starting point is the accumulation account there will be nothing to be determined or calculated by the insurer. It will simply look at this record and then adjust for the specific factors mentioned in Clause 5 of the policy, which relate to the matters other than the value of the policy holders’ interest in the underlying portfolio of assets relating to the policy. According to Mr Wallis the language, makes it clear that the initial value before making those adjustments is itself a matter for determination.

48. Mr Brassey has submitted that it is important to first ascertain the meaning of the phrase -

“When the amount of the surrender value is being considered on behalf of the Applicant the starting point for the determination of the surrender value is the accumulation account”.

According to Mr Brassey this means that the starting point for the determination of the surrender value is the value that stands to the credit in notional terms in the accumulation account in the case of Mr Mungal. What one then does in terms of Clause 5 of the policy is to reduce it by the items mentioned therein. Mr Wallis submitted correctly in my view that this contention flies in the face of the evidence that the determination of the surrender value takes place in accordance with the application of actuarial principles and referred to in the evidence of De Beyer in the Founding Affidavit, wherein he stated that the amount of the surrender value is to be determined by Old Mutual at the time of surrender in accordance with the applicable actuarial principles. This involves an actuarial determination of the surrender value taking into account, if appropriate, a Market Level Adjustor. These allegations have been admitted on behalf of the 2nd Respondent, save that the 2nd Respondent disputed that the actual determination of the surrender value involves taking into account a Market Level Adjustor.

49. Mr De Beyer on behalf the Applicant also testified that some confusion appear to have arisen in regard to that part of the clause that commences with the words “and will take into account”. He points out that this is not a statement of the elements of the actuarial determination of the surrender value, but identifies certain matters that will be taken into account apart from and in addition to that calculation. This is most apparent if one looks at the last two items mentioned, namely debts and legal limits. Those have nothing to do with

determination of the surrender value of the policy, but relates to borrowings against the security of the policy or any limitations imposed by law on the amount that may be paid on surrender of the policy. This evidence has been admitted, and has not been disputed by the Respondents.

50. In the light of the foregoing, I am of the view that the correct interpretation of Clause 5 of Part 3 of the policy in the Mungal matter dealing with the surrender value is that the amount of surrender value must be calculated or fixed by Old Mutual and thereafter reduced by the disinvestment costs or recovery of unrecouped expenses as these are limits in force as set out in Clause 5, Part 3 of the policy. There is undisputed evidence that this must be done in accordance with applicable actuarial principles. Mr Wallis has submitted correctly in my view that the four items referred to in Clause 5 Part 3 of the policy being the deductions to be made are not matters of actuarial calculation.
51. Mr Wallis further argues that the Respondents argument in this regard gives the accumulation account at status that it does not enjoy. He points out that it must be remembered that the insured's right to receive that amount is dependent on the claim being made at maturity or after the insured's death. Accordingly the entitlement to the accumulation account is reciprocal on one or the other of those milestones being reached. When they are not reached because the insured chooses to exit the policy prematurely, it is not open to the insured to claim that which is dependent on the policy enduring for a particular period. This is conceded by the Respondents in regard to the guaranteed maturity value but it is equally applicable to the accumulation account. In terms of the policy, the only two occasions where one gets the accumulation account are when one survives to the termination date or if one dies before that date. Those are the only two occasions where one gets the balance of the accumulation account. No where else in the policy does it refer to the accumulation account as a basis for payment. This is supported by the evidence of Mr Vergeest referred to earlier on in this judgment dealing with the accumulation account. This argument is in my view correct if the policy document is read as a whole.
52. In dealing with the interpretation of Clause 5 of the policy in the Mungal matter dealing with the determination of the surrender

value by Old Mutual, Mr Brassey submitted that in determining questions of the investment costs or the recovery of unrecouped expenses if they were to be brought into account, the Actuary's involvement would be required, and it was in that sense that the Respondents conceded the intervention of the Actuary within the limits prescribed, without conceding that the amount payable may be reduced by the Market Level Adjustor. Mr Wallis correctly pointed out that this interpretation goes against the evidence of Mr De Beyers, who stated in his affidavit that the initial value before you take disinvestment costs, the recovery of unrecouped expenses, debts against the policy and legal limits in force into account, it is a matter of actuarial assessment and that Mr Chetty who deposed to an affidavit on behalf for the 2nd Respondent in the Mungal matter agreed to this. He also correctly pointed out that none of those four facts mentioned in paragraph 5 are matters of actuarial calculation. It was in this context that Mr Wallis submitted

that it is not correct to say that the accumulation account is something other than the means through which the policy is administered and has some separate independent and immutable existence. According to Mr Wallis the policy is one of a number of policies issued in similar terms for a variety of individuals. It is underpinned by a portfolio of assets. Those assets should be sufficient to meet the liabilities under the policy at any given time but fluctuate in value as market rises or falls. The accumulation account is a record of the amount of premium paid by policy holder plus bonuses and as such is a record of what may be become payable to the policy holder on the maturity of it. Apart from this accounting function it has no other existence. It is not a record of what it is owing to the policy holder at any given time because the policy holder only becomes entitled only to the amount standing to the credit of the accumulation account on maturity or death. It simply reflects the present accumulation towards those future possibilities. That it why it is said that the policy is “administered through” the accumulation account. It is an administrative device not a record to absolute right. These submissions are supported by the evidence of both Mr De Beyer and Mr Vergeest. The argument by Mr Brassey referred to above can therefore not be correct in the light of what is set out above.

53. Mr Wallis correctly pointed out that the only thing that can be a matter of actuarial calculation in the Mungal policy is the initial assessment of the surrender value, and that it where the actuarial technique of the Market Level Adjustor comes into play. This appears to be the correct interpretation of Clause 5 of this policy dealing with the determination of the surrender value. The following experts, Mr De Beyer, Mr Vergeest, Mr Andrew who was the former Chief Actuary to the Financial Services Board and Mr Boyed, the Deputy Registrar of Pension Fund on the advice of the current Chief Actuary all agree that the way in which an Insurance Company can deal with fluctuation in the market, that is declines in the market that causes the value of underlining portfolio to be significantly below the total value of accumulation account and the stabilization reserve, so that there is a risk, if people are allowed to surrender their policies or withdraw early, the full amount of the accumulation account that it is a proper actuarial technique to apply a Market Level Adjustor. But Mr Andrew’s view is that the application of the Market Level Adjustor in such circumstances must be authorized by the policy. Mr Andrew is also of the view that the application of the Market Level Adjustor is possible only if such action is not in conflict with the policy holder’s right of reasonable expectations. According to

Mr Andrew, the Insurer who has the facility to use a Market Level Adjustor is able to reduce the capital required to operate a smooth bonus portfolio because its patented management action will include an option to apply a Market Level Adjustor and this reduces the risk to the shareholders following such a market lose. Mr Wallis correctly pointed out that Mr Andrew’s conclusion in this regard is unsupported by any reference to any principle of law, and unsupported by any reference to a provision of the policy. There is indeed nothing in his affidavit to support this conclusion.

54. It has not been the Respondents case in both applications that at the time these policies were issued, there was a statutory obligation to make mention of a Market Level Adjustor. Mr Wallis submitted correctly in my view, that there is now legislation in place governing disclosure in the form of the Financial Advisory and Intermediary Services Act 37 of 2002 and the policy holder's roles issued in terms of Section 62 of the Long Term Insurance Act. The question before this Court is not one of disclosure but one of the contractual rights and obligations of Old Mutual under the respective policies of insurance and their entitlement in calculating the surrender/early retirement values to make use of a Market Level Adjustor. In the light of the above, the argument that the policy must specifically mention that the insurance would apply a Market Level Adjustor cannot be correct. This argument goes against the weight of the expert evidence tendered in these proceedings.
55. The main issue in these matters is whether Old Mutual was entitled to make use of the Market Level Adjustor which had the effect of reducing the amounts payable to both 2nd Respondents in this matter.
56. Using the Pension Funds Adjudicator's explanation of the nature of the industry, Mr Brassey submitted that the Applicant's

case involves the conversion of a straightforward 'with profit policy' into a unit linked policy which seems to be founded on the proposition that there is no underlying specific portfolio of assets relating to this policy. Mr Wallis correctly submitted that this is clearly wrong and pointed out that both policies specifically say that the funds received will be invested in a particular portfolio of assets. There is a particular portfolio of asserts that underpins all the policies in this particular type. That is required by the Long Term Insurance Act. One cannot run a business otherwise without being able to say that under the Act these are the assets that relate to those policies.

57. Mr Freeman's policy is a Flexi-Pension Pure Investment. The investment portfolio is a smooth bonus portfolio. It is the same portfolio as that in the Mungal policy. The date of commencement in terms of the policy is 1 November 1994 and the date of retirement is 1 November 2012, so the policy is expected to run for a period of 18 years. The guaranteed retirement value is R908 385-00 and the single premium contribution is R392 568-50. The policy is also administered through an accumulation account which is increased by contribution and investment returns, and reduced by expenses and benefit charges. A lump sum is payable at the expiry of this policy, certain options are made available in terms of this policy which are not necessarily relevant for the purposes of this case but they distinguish it from the Mungal policy.
58. Clause 5 of the policy dealing with the investment portfolio provides that the single premium under this policy is invested with smooth bonus portfolio. Old Mutual will declare annual vesting and claim bonuses which will be added to the balance in the accumulation account. The vesting bonus, once declared can never be removed. The claim bonus may be reduced or removed altogether at anytime before it becomes due as part of the benefit

payable under this policy. A guarantee growth rate of 0.39% per month on maturity, death or disablement provided that premiums were paid when due.

Clause 7 of the policy deals with the surrender value/cash value. Unlike in Mungal's case, it provides as follows:

"No benefits under this policy or any portion thereof may be surrendered or as signed or pledged as security for a loan"

59. Clause 2 of the policy deals with payment of benefits. It provides that Old Mutual as underwriter of the South African Retirement Annuity Fund undertakes to pay the benefits to the persons entitled to receive them after being satisfied with regard to the age

of the assured/annuitant and the validity of the claim, provided that the provisions set out in this contract have been complied with. It also provides that the assured also has the option subject of the Fund, legislation in force at the time and conditions imposed by Old Mutual at the time to change the date of the retirement.

As Mr Freeman did, it was open to him in terms of this clause to make the date of retirement to be earlier than 2012. Unlike the Mungal policy which makes provision for the surrender on the policy, in the Freeman policy no provision is made for the surrender of the policy. What Mr Freeman's policy provides is a change in the date when the policy will pay out benefits and Mr Freeman's case is concerned with the payment out earlier than 2012, and this works the same way as the surrender of policy on the Mungal case.

60. Mr Wallis argued that if the assured says that he wants to take the benefits under the policy, in the Freeman case, earlier than 2012, it has the same effects as in the case of surrender of the policy in the Mungal matter and that disrupts the actuarial model, and accordingly it is necessary for the underwriter to look at what the position is if this person is permitted to retire early and it is for that reason that the underwriter is entitled to propose conditions on that election. The insured is not bound to accept those conditions. In the present case Mr Freeman, himself was a broker, he sought a number of quotation electronically,

correspondence was exchanged between Old Mutual and Mr Freeman and he was advised that the Market Level Adjustor was also applicable on the policy if early retired due to the lower actuarial growth and the Market Level Adjustor being applied the early retiral value had reduced. Annexed to an email, which informs Mr Freeman that the Market Level Adjustor would be applicable to the smooth portfolio when the policy is retired early, is the document which explains the Market Level Adjustor. It is explained that the Market Level Adjustor is imposed for disinvestment from various funds and the JSE has not been performing as well as hoped for and the document states that it is important to note that the Market Level Adjustor is not a charge and that no product provider benefits from the introduction of Market Level Adjustor.

61. Mr Freeman was informed beforehand that a Market Level Adjustor would be applicable if he brings his retirement date forward.

Despite that Mr Freeman opted to take early retirement. It was perfectly proper from an actuarial point of view to value his

interest by applying the Market Level Adjustor and that Old Mutual is entitled to impose conditions. It was made clear to Mr Freeman that this was a condition that Old Mutual would impose if he retired early. He went ahead and accepted the condition. It was then not open to Mr Freeman thereafter to go to the Adjudicator as he did and go and complain about the condition that was imposed.

But Mr Brassey on the other hand argued that Old Mutual can only impose that condition if it was legitimate and within the ambit of the clause. According to Mr Brassey the condition that pertains to the reduction of the amount payable must be lawful and legitimate, within the contemplation of the policy. According to Mr Brassey the condition could not within the compass of the structure of the Act and the contemplation of what conditions must be, in relation to this, it could not have meant that there could be a condition in its extended elaborate meaning that postulated the notion that Old Mutual takes 10% off or 15% off the top of the policy. According to Mr Brassey that was not what was contemplated by the condition in terms of the clause. But what was contemplated is the date of payment, the place or mode of payment and the deduction of any outstanding expenses. This argument cannot be correct in the light of the evidence that the Market Level Adjustor is not a charge and that no product provider benefits from the introduction of Market Level Adjustor (Freeman Application). It is not a fee or revenue paid by the insured to Old Mutual. The circumstances under which Old Mutual applied the Market Level Adjustor have been dealt with elsewhere in this judgment. Considering the evidence as a whole in this matter, it is clear that Old Mutual was in fact entitled to apply a Market Level Adjustor in respect of both policies in determining the termination values.

DETERMINATIONS BY ADJUDICATORS

63. Both parties in their argument did not deal much with the correctness of the findings of the Adjudicator save to deal with the application of the Market Level Adjustor in respect of both applications.

I must point out that it is unfortunate that the expert evidence of the Actuaries placed before this Court in support of the parties'

cases was not placed before the Adjudicator when determinations were made. The Adjudicator in respect of both matters made determinations

without the guidance of the expert evidence tendered during these proceedings. In any event, as indicated above, these are proceedings

de novo, this Court in considering these matters is not confined to what was placed before the Adjudicator.

The Adjudicator's decision in respect of both matters is merely based on the ground that Old Mutual was not entitled to apply the Market Level Adjustor as it was not sanctioned by the policies. A finding has already been made that Old Mutual was indeed entitled to apply the Market Level Adjustor in respect of both policies. In the Mungal matter, expert evidence has demonstrated that the application of a Market Level Adjustor to calculate the surrender values when the market is down, is part of the actuarial process applicable to such policies and an important component of the actuarial basis of such policy. The same applies in the Freeman matter wherein the Market Level Adjustor was applied as a condition imposed by Old Mutual in determining the early retirement value. The evidence of Mr De Beyer and Mr France Vergeest, Old Mutual's Actuaries specifically deals with the flaws in the Adjudicator's determinations in respect of both applications. Mr Chetty who deposed to an affidavit on behalf of both Respondents did not see any need to make submissions on the correctness or otherwise of the reasoning of the Adjudicator in respect of both matters. Save for the denials of the evidence of Mr De Beyer and Mr France Vergeest as referred to below and denying that Old Mutual was entitled to apply the Market Level Adjustor, he did not challenge the evidence of both Mr De Beer and Mr France Vergeest specifically dealing with the flaws in the Adjudicator's decision in respect of both matters. The same applies to Mr Andrew, save that Mr Andrew stated that the application of the Market Level Adjustor should be authorized by the policy.

In the light of the findings made in this judgment, I do not find it necessary to deal with the reasons underpinning the findings of the Adjudicator in both matters. I am satisfied that both determinations should be set aside in both matters.

In the result, the following order is made:

MUNGAL APPLICATION (Case No. 7248/2006)

The complaint of the 2nd Respondent is dismissed.

An order in terms of paragraphs (a), (b), and (c) of the Notice of Motion is granted;

No order as to costs is made.

FREEMAN APPLICATION (Case No. 7343/2006)

(a) The complaint of the 2nd Respondent is dismissed.

(b) An order in terms of paragraphs (a), (b) and (c) of the Notice of Motion is granted.

(c) No order as to costs is made.

Date of hearing : 01 February 2008

Date of Judgment : 15 October 2008

Applicant's Attorney : Cliffe Dekker Inc. Cape Town

Locally represented by

Garlicke & Bousfield Incorporated

Applicant's Counsel : Adv D J Wallis SC & Adv A C Oosthuizen SC

Respondents' Attorneys: Legal Resources Centre - Durban

Respondents' Counsel : Adv Brassey SC & Ms Wood

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Prepared on 13 October 2026 · Esheria