

**IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]**

REPORTABLE

CASE NO: 7492/2006

In the matter between:

**OLD MUTUAL LIFE ASSURANCE COMPANY
(SOUTH AFRICA) LIMITED**

Applicant

and

THE PENSION FUNDS ADJUDICATOR

First Respondent

BELINDA MARIÉ HOLLOWAY

Second Respondent

THE REGISTRAR OF PENSION FUNDS

Third Respondent

**THE SOUTH AFRICAN RETIREMENT
ANNUITY FUND**

Fourth Respondent

**THE REGISTRAR OF LONG-TERM
INSURANCE**

Fifth Respondent

JUDGMENT DELIVERED ON THURSDAY 26 OCTOBER 2006

FOURIE, J:

INTRODUCTION

[1] Applicant, a registered long-term insurer as defined in the Long-Term Insurance Act No. 52 of 1998 (“the LTIA”), applied in terms of section 30P of the Pension Funds Act No. 24 of 1956 (“the PFA”), for the setting aside of a determination of first respondent made in terms of section 30M of the PFA.

[2] The application was unopposed, but first, third and fifth respondents filed affidavits with the aim of bringing certain aspects to the court's attention, which they considered could be of assistance to the court in the adjudication of the matter.

[3] At the hearing of the application on 31 August 2006, Adv Oosthuizen SC appeared on behalf of applicant, while Adv Golden represented first respondent, but announced that she only had a watching brief as first respondent did not oppose the application. At the conclusion of argument by Mr Oosthuizen on 31 August 2006, I postponed the matter *sine die*, to allow applicant time to place additional information before me. This the applicant did on 11 September 2006. However, on the same day, I was informed that first respondent had on 7 September 2006 filed a notice of intention to oppose the application, which was followed on 8 September 2006 by applicant's notice of intention to apply in terms of Rule 30 (2), for the setting aside of first respondent's notice of intention to defend as an irregular proceeding. I then met with Mr Oosthuizen and first respondent's newly appointed leading counsel, Adv Ntsebeza SC, assisted by Ms Golden, and it was decided to abridge the rules of court and to allow first respondent to bring an application on 13 October 2006, for condonation and leave to oppose the main application launched by applicant. To this end, a time-table was agreed upon for the filing of affidavits by first respondent and applicant.

[4] On 13 October 2006, I heard first respondent's application and thereafter made the following order, indicating that my reasons therefor would be furnished in the judgment in the main application:

“(a) First respondent's application for condonation and leave to oppose the main application, is refused.

(b) Each party is to pay its own costs.”

I thereupon reserved judgment in the main application.

REASONS FOR THE ORDER MADE ON 13 OCTOBER 2006

[5] First respondent is the statutory adjudicator appointed in terms of section 30C of the PFA, to discharge the various duties set out in sections 30B to 30O, and section 30Q, of the PFA. As set out more fully hereunder, first respondent was required to adjudicate upon a complaint lodged with him by second respondent in terms of section 30A of the PFA. This he did and handed down a written determination in terms of section 30M of the PFA.

[6] Section 30P (1) of the PFA, provides that any party who feels aggrieved by a determination of first respondent, may apply for relief to the division of the High Court which has jurisdiction. Sub-section (2) provides that the High Court:

“shall have the power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit.”

[7] As was said in Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at 725I-726A, the present application is in the nature of a *sui generis* appeal, which Brand JA described as follows:

“From the wording of section 30P(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 section 30P(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.”

[8] In the first affidavit which first respondent filed, he accepted that as he performs a judicial function in terms of the PFA, he “cannot properly file opposing papers” to defend his determination. As mentioned previously, first

respondent's declared intention in filing his first affidavit was merely to bring certain aspects to the court's attention which he considered could be of assistance in deciding the matter. In this first affidavit he referred to decisions confirming that it would be improper for him to appear in this application to defend his own determination. In particular, reference can be made to the decision by Nel, J in Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others [2002] 9 BPLR 3830 (C) and the decision of the Supreme Court of Appeal in Pretoria Portland Cement Company Ltd and Another v Competition Commission and Others 2003 (2) SA 385.

[9] In the Pretoria Portland Cement-case, it was emphasized that there are good reasons of policy why judges should not be joined as parties in appeal proceedings against their judgments. It was held that it would be improper for judges to participate in any stage subsequent to their judgments in order to defend their decisions, except in those rare cases where an obligation to provide information to the court of appeal arises. It was stressed by the Supreme Court of Appeal that it is not in the public interest that judges should become embroiled in disputes between parties who have appeared before them, as judges should be seen as impartial. In the Orion-case, Nel J frowned upon the conduct of first respondent in filing opposing papers in an application seeking to set aside his determination. The court stated that first respondent's function is to dispose of complaints lodged in terms of the PFA and after making his determination he has no further function to fulfil. I am in

full agreement with the sentiments expressed by Nel, J, save that it should be emphasized that there may be rare cases where first respondent may be required to file an affidavit in proceedings under section 30P of the PFA, to provide information which may assist the court in its adjudication of the matter.

[10] In the second affidavit filed by first respondent in support of his application for leave to oppose the main application, first respondent says that he was subsequently advised by his legal representatives that his initial view that he has no standing in a section 30P-application, was correct only to the extent that the parties seek recourse from him to reconsider his own determination. He was advised that under any other circumstances, as a *quasi* judicial functionary, he was not precluded from opposing an application brought to the High Court for the setting aside of his determination. He added that the advice obtained was to the effect that the judgment in the Orion-case is clearly wrong.

[11] The submissions advanced by Mr Ntsebeza on behalf of first respondent in seeking leave to oppose the main application, may conveniently be summarised as follows:

- a) As first respondent does not perform a judicial function in terms of the PFA, but merely a *quasi* judicial function, he is not

in the position of a judge seeking to “defend inappropriately” his own judgment. Consequently the *dictum* in the Pretoria Portland Cement-case is distinguishable.

- b) On a proper construction of the provisions of the various sub-sections of section 30 of the PFA, first respondent is afforded the right to oppose the relief sought by applicant.
- c) First respondent has a constitutional right, by virtue of the provisions of sections 34 and 38 of the Constitution, to participate in these proceedings. Alternatively, if he is not entitled to invoke the said provisions of the Constitution, the court should in terms of section 39 of the Constitution, develop the common law by affording first respondent the right to oppose the main application.

[12] The first enquiry is whether the function performed by first respondent in adjudicating upon a complaint in terms of the PFA, is a judicial function. If so, it is clear on the authority of the Pretoria Portland Cement-case that it would be improper for first respondent to appear in the main application to defend his determination. I am in agreement with Mr. Oosthuizen who submitted, with reference to section 34 of the Constitution, that a judicial function is performed by a functionary who resolves a dispute by the

application of law in a fair public hearing in a court or other independent and impartial forum. First respondent was required to resolve the dispute between applicant and second respondent in an independent and impartial manner and it is clear from his determination that he resolved same by the application of law. I am accordingly satisfied that he performed a judicial function proper and not merely a *quasi* judicial function (the meaning of which is in any event not clear – see Administrator, Transvaal and Others v Traub and Others, 1989 (4) SA 731 (A) at 763F.) The conclusion that first respondent performed a judicial function, is in my view confirmed by section 30 O of the PFA, which provides that first respondent's determination shall be deemed to be a civil judgment of any court of law, on the strength of which a warrant of execution may be issued.

[13] I am further of the view that on a proper construction of the various provisions of section 30 of the PFA, it is clear that the legislature did not intend to afford first respondent the right to become a party to a section 30 P application and to oppose same. If that was the intention of the legislature, I would have expected a clear indication thereof in section 30 of the PFA. On the contrary, the section clearly shows that first respondent is not a party to the complaint as defined in section 30 G, nor is he in terms of section 30 P(1) entitled to receive notice of an aggrieved party's intention to approach the High Court.

[14] In my view first respondent's reliance on the provisions of sections 34 and 38 of the Constitution, is misplaced. Section 34 affords the right to a party to have a dispute resolved. First respondent is not a party to the dispute between applicant and second respondent and is, in my opinion, not entitled to invoke the right enshrined in section 34 of the Constitution, to appear in the main application to defend his determination. Section 38 of the Constitution, which first respondent says, allows him to oppose the application in the public interest, only applies in the case of infringements, or threats of infringement, to the rights enumerated in chapter 2 of the Constitution. It provides that anyone listed in section 38 (which includes anyone acting in the public interest) has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, to seek appropriate relief. Nowhere in the affidavits of first respondent is it alleged that there has been an infringement of such a right or a threat of infringement, entitling first respondent to approach a court for relief. There is accordingly no basis upon which first respondent can rely upon section 38 of the Constitution to oppose the main application.

[15] As Mr Ntsebeza correctly pointed out, our courts have since Patz v Green 1907 TS 427, consistently refused to acknowledge that there is a common law right in terms of which anyone is entitled to act in the public interest. He accordingly urged me to develop the common law in terms of section 39 of the Constitution, by affording first respondent the right to appear

in the main application in the public interest. The difficulty that I have with this submission is that there is no need to develop the common law in a case where the Constitution already provides the necessary remedy. As I have mentioned, section 38 of the Constitution allows anyone acting in the public interest, to approach a competent court for relief, alleging that a right in the Bill of Rights has been infringed or threatened. There is accordingly no need to develop the common law in this instance.

[16] I accordingly concluded that first respondent has no standing in the main application. In fact, it would, in my view, have been highly improper to allow him to enter the fray in the main application as a party, as it is not in the public interest that he should become embroiled in the dispute between applicant and second respondent after he had already issued a determination in the same dispute. In the words of the Supreme Court of Appeal in the Pretoria Portland Cement-case, it is a matter of the utmost importance that he should be seen as impartial and, in the kinder sense, aloof. I am accordingly not persuaded that the judgment in the Orion-case is clearly wrong; on the contrary, subject to the *caveat* added in paragraph 9 above, I am in full agreement with the reasoning of Nel, J in regard to first respondent's lack of standing.

[17] First respondent also pointed to the fact that he has been cited as a respondent in the main application. However, his citing as a respondent

does not make him a party to the underlying dispute between applicant and second respondent. This is so as first respondent has no interest in the right which is the subject matter of the dispute between applicant and second respondent. Second respondent, who obviously has an interest in the outcome of her dispute with applicant, has not opposed the application. First respondent suggested that as financial constraints precluded her from appearing in this court, he should be allowed to take up the cudgels on her behalf. It may well be necessary for the legislature to consider measures to assist policy holders in opposing section 30 P applications, but, in my opinion, this should be achieved by means other than allowing first respondent the right of appearance as a party or to act on behalf of policy holders.

[18] In view of my finding that first respondent does not have the necessary standing to oppose the main application, it is not necessary for me to dwell on the other factors to be taken into account by a court considering an application for condonation.

[19] In regard to costs, I was not persuaded by the submission on behalf of applicant that a punitive costs order should be made against first respondent. He is a public functionary whose office is funded by public funds and a court should only in exceptional circumstances consider it necessary to mulct first respondent in costs. In addition, first respondent says that although he initially was of the view that he did not have the necessary *locus standi* to

oppose the application, he was subsequently convinced by his legal representatives that this view was wrong. This caused him to bring the application to intervene. In the circumstances I was not inclined to grant any order for costs against first respondent.

[20] It is for the above reasons that I refused first applicant's application and ordered each party to pay its own costs.

BACKGROUND TO THE MAIN APPLICATION

[21] Fourth respondent is a retirement annuity fund which operates exclusively by means of individual policies issued to it by applicant in respect of each of fourth respondent's members, as contemplated in Regulation 28 (3) of the PFA. During 1983, second respondent became a member of fourth respondent and applicant consequently issued a retirement annuity policy to fourth respondent, in respect of second respondent, being policy no. 4256627 ("the policy"). The resultant contract of insurance was accordingly concluded between applicant and fourth respondent, with second respondent being the life assured.

[22] In terms of this contract the policy benefits due to fourth respondent would become available to purchase an annuity for second respondent (and to pay her a cash amount if she elected to commute part of her pension

benefits) subject to the rules of fourth respondent and the provisions of the Income Tax Act, 1962, upon second respondent's elected "date of retirement", which was 1 September 2016 at the inception of the policy, but was subsequently extended to 1 September 2026. The policy contract, as amended, provided for payment of premiums until 1 September 2026. Second respondent, however, ceased payment of premiums on 1 September 2002. Due to the cessation of premiums applicant re-calculated the remaining or paid-up value of the policy, which resulted in a reduction of the fund value of the policy by R4591.52.

[23] Second respondent was dissatisfied with this reduction and submitted a written complaint with first respondent in terms of section 30A of the PFA. On considering the complaint and written submissions of fourth respondent and applicant, first respondent, on 9 June 2006, handed down his written determination in terms of section 30M of the PFA, in terms of which applicant was ordered to:

"...credit (second respondent's) investment value in the fund with the amount of R4591.52, together with interest thereon at 15.5% per annum, calculated from 1 September 2002 to the date of such crediting".

[24] The basis for this order was first respondent's finding that applicant

was not entitled to reduce second respondent's "investment value". Applicant does not accept this determination and accordingly seeks the setting aside thereof under section 30P of the PFA. It is accordingly necessary for this court to consider the merits of second respondent's complaint which she had lodged with first respondent and in so doing also to consider the reasons furnished by first respondent in his determination for upholding the complaint and making the order which he did.

APPLICANT'S CONTENTIONS

[25] Applicant contends that on the following grounds it is entitled to the relief sought in the notice of motion:

- (a) The complaint pertaining to the calculation of the paid-up value of the policy, is not a "complaint" as defined in the PFA, with the result that first respondent did not have the necessary jurisdiction to consider second respondent's complaint.
- (b) In arriving at his determination, first respondent misconstrued and/or overlooked the relevant provisions of fourth respondent's rules and the policy, and failed to have regard to the provisions of the LTIA which impose statutory measures to be applied and invoked in determining the paid-up value of the policy.

EVALUATION

[26] In view of my finding hereunder in regard to the merits of the application, it is not necessary for me to decide the jurisdictional issue raised by applicant. It would suffice to say that it appears to me that second respondent's complaint does relate to the alleged maladministration of a fund as defined in section 1 of the PFA, which she alleges has caused her financial prejudice. However, for purposes of this application I accept, without deciding, that second respondent's complaint constituted a "complaint" as defined in section 1 of the PFA.

[27] In considering the merits of the application, it is necessary to firstly have regard to the relevant rules of fourth respondent and the provisions of the policy. Thereafter I will deal with the provisions of the LTIA upon which applicant relies.

[28] Section 13 of the PFA stipulates that the rules of a registered fund (such as fourth respondent) shall be binding on the fund and its members (such as second respondent). Rule 3.4(a) of fourth respondent's rules deals with the consequences of non-payment of contributions, in the following terms:

“On non-payment (in respect of any one annuity policy issued in respect of a member) of periodic contributions or instalments thereof to the fund within the days of grace allowed by the underwriter, such member shall be deemed to have discontinued contributions and shall retain such fully paid-up reduced benefits under that annuity policy as the underwriter shall determine.”

For the sake of completeness I should mention that applicant is the underwriter referred to in the said rule, it having been appointed in terms of rule 6.9, to underwrite the benefits under the fund.

[29] In her written application for the policy, dated 21 July 1983, second respondent, *inter alia*, declared as follows:

“Ek doen hiermee aansoek om lidmaatskap van die Uittredingannuïteitfonds onderskryf deur Ou Mutual in die land en munt van toepassing op hierdie aansoek en ek stem in om gebind te word deur die reëls van die betrokke Fonds en die voorwaardes van die kontrak (albei soos van tyd tot tyd gewysig) tussen die trustees van die Fonds en Ou Mutual.”

[30] The policy provides for the payment by applicant of a “basiese voordeel” which the schedule to the policy fixes at R22374.00 plus certain

bonuses. In clause 2(c) of the “Algemene Voorwaardes” of the policy, non-payment of premiums is dealt with as follows:

“In die geval van nie-betaling van premies... word hierdie polis outomaties h opbetaalde versekering vir h verminderde basiese voordeel.”

It should be noted that while the policy provides for such “verminderde basiese voordeel” in the event of non-payment of premiums, it nowhere specifies the formula according to which the reduced benefit is to be calculated.

[31] As mentioned previously, applicant, upon cessation of premiums, recalculated the remaining or paid-up value of the policy, which resulted in a reduction of the fund value of the policy in an amount of R4591.52. In paragraph 19 of his determination, first respondent found that –

“as neither the rules (of fourth respondent) nor the provisions of the policy document authorise the insurer (applicant) to reduce your investment value, neither the fund nor the insurer may reduce it solely by reason of your stopping your contributions to the fund.”

[32] In paragraph 18 of his determination first respondent explains the *ratio*

underlying his finding, as follows:

“The rule (rule 3.4(a) of fourth respondent’s rules) provides for the payment of ‘paid up reduced benefits’ in the case where a member has prematurely ceased to make contributions. This can only refer to the basic benefit that will be payable when the member reaches the agreed retirement age since benefits are only payable upon retirement, death or disability. None of these events have occurred in your case, thus there can be no call for the insurer to reduce your investment value to recover unrecouped expenses. Likewise, clause 2(c) (of the policy) refers to a ‘verminderde basiese voordeel’. The same considerations apply insofar as the provisions of the policy document are concerned.”

For the sake of completeness I should mention that the amount of R4591.52 represents unrecouped up-front expenses that would otherwise have been recovered by applicant over the remaining term of the policy.

[33] In my view the reasoning of first respondent in paragraph 18 of the determination, is unsound. Firstly, he states that rule 3.4(a) of fourth respondent’s rules and clause 2(c) of the policy, provide for “the payment of paid-up reduced benefits” in the case where a member prematurely ceases his or her contributions. Rule 3.4(a) does not provide for “payment” of paid-up

reduced benefits, but for the retention thereof, while clause 2(c) stipulates that the policy “outomaties h opbetaalde versekering vir h verminderde basiese voordeel (word)”. This means that as the “basiese voordeel” stipulated in the policy, is due to the cessation of premiums no longer payable, applicant as underwriter has to calculate a paid-up reduced benefit. This reduced benefit is to be retained until such time as it becomes available to purchase an annuity, i.e. on second respondent’s agreed retirement date, death or disability.

[34] Secondly, first respondent was of the view that the paid-up reduced benefit referred to in rule 3.4(a) and clause 2(c) of the policy, can only refer to the basic benefit that will be payable when the member reaches the agreed retirement age, since benefits are only payable upon retirement, death or disability. He accordingly concluded that as “none of these events have occurred in your case, there can be no call for the insurer to reduce your investment value to recover unrecouped expenses.” In reaching this conclusion, first respondent overlooked the express provisions of rule 3.4(a) and clause 2(c) of the policy, which, upon cessation of premiums prior to the agreed retirement date, require the underwriter to calculate a reduced benefit payable in terms of the policy when it terminates on retirement, death or disability. In my view, first respondent erred in regarding the retirement, death or disability of second respondent as a pre-condition for a determination of a reduced paid-up benefit. The conclusion in paragraph 19 of first

respondent's determination that "as neither the rules nor the provisions of the policy document authorised the insurer to reduce your investment value, neither the fund nor the insurer may reduce it solely by reason of your stopping your contributions to the fund", is clearly wrong. On the contrary, applicant was contractually obliged to calculate a paid-up reduced benefit upon cessation of her premiums by second respondent.

[35] What remains to be determined is how this paid-up reduced benefit is to be calculated and whether the reduction of R4591.52 represented a reasonable basis for the determination thereof. The fact that the policy does not specify a formula according to which the paid-up reduced benefit is to be calculated, does not mean that applicant has an unfettered discretion to arbitrarily determine a value in a manner that is unfair, unreasonable or capricious. In this regard, I am in agreement with applicant's submission that the provisions of the LTIA, referred to hereunder, dictate that the paid-up reduced benefit to which second respondent is entitled, has to be calculated in accordance with generally accepted actuarial principles and practice.

[36] In terms of the policy, applicant undertakes to provide policy benefits upon and as a result of "life events" in return for a premium, with the result that the policy is a "life policy" as defined in section 1 of the LTIA. It is a long-term policy and as such part of the long-term insurance business of applicant and subject to the provisions of the LTIA. Section 29 of the LTIA, requires a

long-term insurer to maintain its business in a financially sound condition by, *inter alia*, conducting its business so as to be in a position to meet its liabilities and capital adequacy requirement at all times. To this end, applicant is obliged to have a statutory actuary who has to perform a number of important duties under the LTIA.

[37] A key provision of the LTIA aimed at ensuring that a long-term insurer, such as applicant, remains able to meet its commitments, is section 46 which provides as follows:

“A long-term insurer shall not –

- (a) enter into any particular kind of long-term policy unless the statutory actuary is satisfied that the premiums, benefits and other values thereof are actuarially sound;*
- (b) make a distinction between the premiums, benefits and other values of different long-term policies unless the statutory actuary is satisfied that the distinction is actuarially justified; or*
- (c) award a bonus or similar benefit to a policy-holder unless the statutory actuary is satisfied that it is actuarially sound and that a surplus is available for that purpose.”*

[38] Section 52 of the LTIA, prescribes the manner in which long-term

policies, such as the policy in question, are to be dealt with in the event of non-payment of premiums. Essentially, where premiums cease prematurely, it provides for the calculation of a remaining value and section 52(3) requires a long-term insurer to have rules approved by the statutory actuary prescribing a sound basis on which, and the methods by which, the remaining value of the policy is to be calculated. As submitted by applicant, these actuarially approved rules will, as with all other policies, have to adhere, *inter alia*, to the requirements of section 46. This means that the benefits and values attaching to such a prematurely terminated policy, and any distinctions between it and policies not prematurely terminated, will have to be actuarially sound.

[39] As appears from the supplementary affidavits of Messrs F.A. Vergeest and G.S. Palser, respectively an actuary and the statutory actuary employed by applicant, actuarially approved rules are utilised by applicant for the building up of the actuarial model on which any long-term insurance product is based. The actuarial basis of an individual policy sets out the assumptions that are made and underpin that policy regarding the risks undertaken by the insurer, the cost to the insurer of meeting the benefits covered thereby, and the costs incurred in setting up and implementing the policy. To ensure that the premiums, benefits and other values attached to the policy are actuarially sound, rules approved by the statutory actuary are applied to arrive at the actuarial specifications and formulae that constitute the actuarial basis of a

policy.

[40] The said actuaries have also alluded to the substantial expenses incurred by a long-term insurer in the development, issue, maintenance and implementation of these policies. The costs involve, *inter alia*, commission, administration costs and a number of other expenses. Initial costs are recovered by the insurer over the term of the policy by means of regular expense charges.

[41] In regard to the instant matter, the actuaries explained how the actuarial basis of the policy was calculated. They pointed out that each premium paid under the policy (after deduction of expense charges and costs of providing death cover) is utilised to purchase a number of units in the policy's fund. However, when the payment of premiums is prematurely discontinued, as is the case in this matter, the policy becomes paid-up in consequence thereof and it is necessary to re-value the units represented by the value of the policy. This is necessary in order to take account of the fact that the expenses incurred in regard to the policy, which would have been recouped over the unexpired period of the policy, will no longer be recouped over that period. The policy value therefore has to make allowance for such unrecouped expenses.

[42] The actuaries explained the manner in which the re-valuation of the

units represented by the value of the policy, took place, and demonstrated that the level of expenses being recouped (calculated at R33.00 per month) is consistent with the amounts that would have been paid had the premiums continued until maturity. This resulted in the total deduction of R4591.52 from the policy value, which is in accordance with the actuarially approved formulae for the calculation thereof. Having thus calculated the new value of the policy units, it was then possible to calculate the new paid-up sum assured in terms of the policy, namely R41944.00.

CONCLUSION

[43] In my view applicant has demonstrated that the calculation of the paid-up reduced benefit, and in particular the reduction of the paid-up value of the policy by R4591.52, took place in accordance with generally accepted actuarial principles. Put differently, there is in my view no basis for a finding that this reduction in value was arrived at in a manner that is unfair, unreasonable or capricious. In fact, on the evidence before this court, applicant has, in my view, shown that in calculating the paid-up reduced benefit of the policy, it acted in accordance with the relevant provisions of fourth respondent's rules, the provisions of the policy and the provisions of the LTIA. I accordingly find that the evidence does not justify the conclusion reached by first respondent in his determination, i.e. that applicant was not entitled to reduce the fund value of the policy in an amount of R4591.52.

[44] I should mention that in the first affidavit filed by first respondent, he, *inter alia*, says that “nowhere in their response to the complaint did either the fund (fourth respondent) or the applicant anchor their case (as the applicant now does) on the proposition that the deduction was based on the application of generally accepted actuarial principles.” He adds that this (whether the deduction was based on the application of generally accepted actuarial principles) was not the issue that he had to decide.

[45] If one has regard to the contents of the Actuarial Services memorandum placed before first respondent by applicant in reply to the complaint, it is clear that applicant expressly relied upon the proposition that the calculation of the paid-up reduced benefit value of the policy was based on the application of generally accepted actuarial principles. It appears that first respondent has overlooked this contention of applicant, in which first respondent’s attention was specifically directed to applicant’s actuarial rules and the relevant provisions of the LTIA.

[46] I accordingly conclude that applicant is entitled to have first respondent’s determination set aside. In paragraph (b) of the notice of motion, applicant seeks an order declaring that in the determination of the paid-up value of the policy, it was competent for applicant to apply the actuarial rules required in terms of section 52(3) of the LTIA. I have already

found that applicant correctly calculated the paid-up reduced benefit of the policy in accordance with the actuarial rules required by section 52(3) of the LTIA and there is, in my view, no need to grant a declaratory order to this effect. In paragraph (c) of the notice of motion, an order is sought declaring that the method of assessing the paid-up value of the policy did not give rise to a complaint within the meaning of that expression in section 1 of the PFA. As I have not made a finding on this issue, I decline the invitation to grant a declaratory order of this nature.

[47] In the result the following order is made:

- (a) The orders in paragraphs 25.1 and 25.2 of first respondent's determination dated 9 June 2006, under case no. PFA/WE/3896/05/CN, are set aside and the following substituted therefor:

"The complaint relating to the reduction of the fund value of complainant's policy no. 4256627, is dismissed".

- (b) No order as to costs is made.

.....
P.B. FOURIE, J