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REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): AM HABIB ("complainant") v NAMPAK GROUP PENSION FUND ("first respondent"); SANLAM LIFE INSURANCE LIMITED ("second respondent") AND NAMPAK HOLDINGS (PTY) LTD ("third respondent")

[1] INTRODUCTION

1.1 This complaint concerns whether or not the first and second respondents acted negligently in their application for a tax directive before consulting the complainant and if any financial loss was incurred as a result thereof.

1.2 The complaint was received by this Tribunal on 12 February 2016 from the Ombudsman for Long-Term Insurance. A letter acknowledging receipt thereof was sent to the complainant on 17 February 2016. On the same date, letters were forwarded to the second and third

respondents giving them until 17 March 2016 to file responses to the complaint. On 6 April 2016, follow-up letters were sent to the second and third respondents requesting them to file responses by no later than 20 April 2016. On 6 April 2016, a response was received from the second respondent. No further submissions were received from the parties.

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

[2] FACTUAL BACKGROUND

2.1 The complainant was employed by the third respondent until 30 September 2015, at which stage his service was terminated. He became a member of the first respondent by virtue of his employment. The first respondent is administered by the second respondent.

[3] COMPLAINT

3.1 The complainant submits that he is dissatisfied with the fact that he was deprived of making a sound financial decision with regard to reducing his tax liability.

3.2 He avers that he was assisted by a financial planner from Nedbank Limited ("Nedbank"), Ms Ramjan, whom he informed that he was expecting a severance pay and a withdrawal benefit following the termination of his service. He states that he instructed the said financial planner that:

(a) He wants to receive a tax-free sum of R500 000.00;

(b) If there are tax implications, to stop the process so that he could apply his mind and make an informed financial decision; and

(c) To invest the remainder of the funds as agreed between them.

3.3 He avers that Nedbank started the process of submitting documents in November 2015 on his behalf to the second respondent. His financial planner sent an e-mail to the second respondent informing it that no action is to be taken if there were tax implications.

3.4 He submits that the second respondent failed to communicate to his financial planner and after some time informed her that an amount of R127 588.34 was deducted as per the tax directive issued by the South African Revenue Service ("SARS"). He states that he was shocked by these developments as this was contrary to his instructions.

3.5 He further submits that the second respondent shifts goalposts and refuses to take responsibility for its failure to communicate with his financial planner and inform her that there was a tax implication. He states that the second respondent distanced itself from the situation and attached a document from SARS containing a statement that reads as follows: *"The obligation is on the Fund to ensure that the member is aware of the income tax implications flowing from his or her election before applying for a tax directive."*

3.6 He contends that had he been informed of the tax implication, he would have revised the amounts due to him. He illustrates that the current situation is as follows:

> R500 000.00 less R127 588.34 (average rate per R100 000.00 = R25 517.00)

3.7 He submits that he would have opted for R300 000.00 less R25 517 x 3 = R76 511.00 and R200 000.00 moved for investment purposes.

3.8 He further illustrates the current scenario as follows:

Tax paid: R127 588.34

Reduced tax:	R 76 511.00
Tax overpaid:	R 51 037.34

3.9 He contends that he suffered a loss of R51 037.34 and requests this Tribunal to investigate the matter and compel the first and second respondents to reimburse him. He further states that he was deprived of his constitutionally enshrined right to access information before he could make an informed financial decision.

[4] RESPONSE

First and second respondents

4.1 The second respondent submitted a response in its capacity as the administrator of the first respondent.

4.2 The second respondent stated that on 4 December 2015, it informed the complainant of the following:

- In terms of paragraph 4 of the Second Schedule of the Income Tax Act, a lump sum benefit accrues to the member when that member informs the fund of his or her election on how the benefit must be paid. The income tax liability of that person is determined on that date;

- The complainant informed the first respondent of his election on 16 November 2015. The lump sum benefit payable in terms of the rules of the fund accrued on this date for tax purposes. SARS therefore issued a tax directive based on the accrual of the lump sum benefit on 16 November 2015;

- The first respondent can only advise the complainant of the tax implications of his election before such an election is made. Once the election is made by the member, any advice by the fund would be irrelevant as the benefit accrues on the election date;

- SARS does not allow funds to change the accrual date of a lump sum benefit on the basis that the fund advised the member of income tax implications after the election was made; and

- As per the attached SARS letter dated 15 October 2015, SARS only allows the cancellation of tax directive applications where a bona fide mistake has been made, for example where the reason for the tax directive application was incorrect or where the taxpayer details completed on the directive form was incorrect. In the case of the complainant, there was no bona fide mistake made that would have justified a successful cancellation of the tax directive application.

4.3 The second respondent submitted that the sequence of events that prevailed before the complaint was lodged with this Tribunal is as follows:

1. At the request of the third respondent's Human Resources department ("HR") on his behalf, the complainant's benefit statement was provided for his consideration on 28 September 2015;

2. The complainant's exit documents were submitted by his HR officials to Sanlam Employee Benefits for processing on 12 October 2015;

3. On his signed exit documents provided, the complainant elected a cash withdrawal benefit amount of R500 000.00;

4. The complainant's instruction to the first respondent was received on 14 September 2015;
5. The complainant's financial advisor was copied in the e-mail to Sanlam Employee Benefits on 14 September 2015;

6. A completed Recognition of Transfer for the transfer from the Nampak Group Pension Fund to Old Mutual Retirement Income option was received from the complainant's broker on 29 October 2015;

7. The complainant's broker informed Sanlam of the member's choice to change to a Preservation Fund and for claim to be processed urgently, in an e-mail dated 10 November 2015;

8. Based on the complainant's instruction, the benefit was referred to SARS on 18 November 2015;

9. A successful tax directive was received from SARS on 19 November 2015;

10. Payment of withdrawal benefit in cash and transfer was finalised on 19 November 2015;

11. Proof of payment, member's benefit Letter and IRP5 Tax certificate were submitted to broker via e-mail on 20 November 2015;

12. A tax query by the complainant's broker was received on 24 November 2015; and

13. SARS issued a letter dated 15 October 2015 in regard to the cancellation of tax directives.

4.4 It contends that it is clear from the information provided that once the complainant communicated his election to the first respondent on 16 November 2015 on the method in which his withdrawal benefit was to be paid, the benefit accrued on that date for tax purposes.

4.5 It submits that it and the first respondent were legally bound to request a tax directive from SARS as per the election on 16 November 2015. SARS could not allow the first respondent to request a tax directive on 16 November 2015, communicate the tax implications of that election (tax payable) to the complainant, give him a second opportunity to make an election that is more favourable from a tax perspective and then to apply for the cancellation of the first tax directive and the issuing of a second tax directive that is more favourable to him from a tax perspective.

4.6 The second respondent requests that the complaint be dismissed as the first respondent was not in a legal position to change the accrual

date of his benefit or to advise him on the tax implications of his election after the election date.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

5.1 The issue to be determined by this Tribunal is whether or not the first and second respondents acted negligently in their application for a tax directive before they could consult the consult the complainant and if any financial loss was incurred as a result thereof.

Merits

5.2 In terms of sub-section 9(3) of the fourth schedule to the Income Tax Act, the first respondent was required to first ascertain the income tax that is payable on the complainant's benefit before it could pay the withdrawal benefit to him. SARS's decision in this regard is final and if the first respondent paid the deceased contrary to a tax directive, it would be liable to pay a penalty to SARS. Subsection 9(3) reads as follows:

> "The amount to be deducted or withheld in respect of employees' tax from any lump sum to which paragraph (d) or (e) of the definition of "gross income" in section 1 of this Act or section 7A thereof applies, shall be ascertained by the employer from the Commissioner before paying out such lump sum and the Commissioner's determination of the amount to be so deducted or withheld shall be final: Provided that no amount shall be so deducted or withheld in respect of any lump sum benefit contemplated in paragraph (e) of that definition, which accrued to any person during any year of assessment if the taxable income (excluding any such benefit) of that person for the year of assessment immediately preceding that year does not exceed the tax threshold for that year."

5.3 It is with respect to the handling of the process of applying for a tax directive following the deceased's termination of service that the complainant submits that the respondents acted negligently. Any claim by the complainant for damages against the respondents on grounds as set out above is founded in delict. Therefore, all the elements of delictual liability must be proven in order for the complaint to succeed (see *Hooley v Haggie Pension Fund and Another* [2002] 1 BPLR 2939 (PFA) ("*Hooley*") at paras 20 and 21). The essential elements for delictual liability that need to be satisfied by the complainant are as follows:

- there must be an act or omission, which causes the damage or loss
- the act or omission must be wrongful
- there must be blameworthiness in the form of intention or negligence
- the complainant must have suffered loss or damage; and
- a causal link must exist between the wrongful act or omission and the loss or damage allegedly suffered.

5.4 In the first instance, the complainant assails the conduct of the respondents in applying for a tax directive and not advising him with respect to whether the tax implications were favourable to him which, according to him, caused him to incur financial loss. In summation, the complainant is of the view that after applying for a tax directive, the respondents owed him a duty to explain if the tax implications were positive or negative. If the tax implications were negative, he is of the view that he had a right to have the tax directive cancelled and abort the process of payment of his withdrawal benefit. In a nutshell, the complainant is of the view that this conduct is the one which entitles him to compensation.

5.5 From the onset, it is imperative to note that the parties' positions with respect to the matter at hand are diametrical. In response to the complainant's submission that the respondents acted negligently in handling his tax issue before the payment of his withdrawal benefit, the

second respondent countered that it did nothing wrong as upon receipt of claim documentation on 16 November 2015 with an election on how the complainant preferred to have his withdrawal benefit paid, it was bound to apply for a tax directive. It further explains that SARS does not allow a pension fund to apply for a tax directive, consult the member about the tax implications and possibly give him an opportunity to make an election that is more favourable from a tax perspective and then apply for cancellation of the first tax directive and apply for a second one. The second respondent submitted that the first respondent could only advise the complainant of the tax implications of his election before making an election. Once the election was made, any advice was irrelevant as the benefit accrues on the election date and therefore, it and the first respondent are not in the legal position to change the accrual date of his withdrawal benefit. It is noted that the second respondent mentioned that SARS issued a letter stating that it only allows the cancellation of tax directive applications where a *bona fide* mistake had been made, which was absent in the present matter.

5.6 Therefore, on receipt of the tax directive from SARS, the first respondent was compelled to pay the complainant's tax liability in terms of the SARS's tax directive and Income Tax Act, 58 of 1962 directly to SARS. The complainant's prior consent thereto was not required on the part of the first respondent. The first respondent is prohibited from cancelling a tax directive once it has been issued by SARS as explained by the second respondent. Therefore, the first respondent would still be unable to cancel the tax directive once it was issued by SARS even if it advised the complainant about his tax liability before making payment to SARS.

5.7 According to the letter SARS sent to the Executive Director of the Institute of Retirement Funds of South Africa on 15 October 2015, a tax directive may be cancelled on two reasons:

- When the reasons provided are incorrect; and
- When the taxpayer's details on the directive application form are incorrect.

5.8 This Tribunal noted that the aforementioned circumstances under which a tax directive may be cancelled by SARS are not applicable in this case. Therefore, the first respondent would have been unable to cancel the tax directive in respect of the complainant after it was issued by SARS. When the complainant signed his claim form and instructed the third respondent to submit his claim documentation, he signalled that he wanted his benefit to be paid as per his election therein.

5.9 Where a pension fund has acted in good faith on the information contained in the tax directive it received from SARS, there can be no question of negligence or liability for shortfall by the pension fund (see *Pietersen v PPC Retirement Fund* [2003] 9 BPLR 5127 (PFA) at 5130A). In the present case, the first respondent complied with the tax directive issued by SARS. Therefore, there can be no question of negligence and liability for the shortfall by the first respondent requiring it to compensate him for the tax liability.

5.10 Furthermore, the complainant signed the withdrawal application form, which confirms that the complainant elected to be paid an amount of R500 000.00 and there is a provision therein that the benefit will be subject to tax. There is no clause(s) in the withdrawal form that places an obligation on the respondents to disclose each step taken in processing the withdrawal claim. By signing the withdrawal application form, the complainant is presumed to have known its contents in terms of the *caveat subscriptor* rule. Therefore, he ought to have known that the respondents were not obliged to advise him of each step taken in processing his withdrawal claim and that once a tax directive is issued by SARS, it is binding and may not be cancelled.

5.11 It is imperative to note that the complainant was assisted by a financial advisor from Nedbank who it can be concluded knew or ought to have reasonably known that by assisting the complainant to make an election regarding how he wanted his benefit was to be paid and instructing the first respondent to continue with the application, there were tax implications involved. The first and second respondents would not have known the complainant's tax liability before the tax directive was applied for, however, his financial adviser could have advised him of the possible scenarios and implications for his election.

5.12 In light of the fact that there appears to be no evidence to point to any wrongful conduct on the part of the first and second respondents with regards to the handling of the application for the complainant's tax directive, this Tribunal is not satisfied that the critical delictual enquiry of ascertaining if a wrongful act was committed has been met.

5.13 Having found that no wrongful conduct can be imputed on the respondents, it can only be of academic significance to proceed with an enquiry to establish if other delictual elements are met. Therefore, the respondents cannot be held liable for loss (if any) that the complainant claims to have incurred.

[6] ORDER

1. In the result, the complaint is dismissed.

DATED AT PRETORIA ON THIS 15TH DAY OF JULY 2016

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MA LUKHAIMANE

PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Parties: Unrepresented