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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): WT WRIGHT (“complainant”) v MOTOR INDUSTRY PROVIDENT FUND (“first respondent”) AND MOTOR INDUSTRY FUND ADMINISTRATORS (PTY) LTD (“second respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the taxation of a death benefit received by a beneficiary from a provident fund.
- 1.2 The complaint was received by this Tribunal on 11 April 2011. On 9 May 2011, a letter acknowledging receipt thereof was sent to the complainant. On 10 May 2011, a letter was sent to the first respondent, giving it until 7 June 2011 to file a response. A response was received from the second respondent on 24 May 2011. The complainant filed her further submissions on 8 June 2011. A further response was received from the second respondent on 24 May 2013.

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- 1.3 On 29 November 2011, the complaint was referred to the conciliation service for hearing in order to afford the parties an opportunity to settle the matter. However, the parties were unable to resolve the matter, resulting in it being referred for adjudication. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complaint is lodged by a financial advisor, Mr RM Taylor on behalf of the complainant, who is the wife of the deceased. The deceased was a member of the first respondent. He passed away on 27 August 2010 and a death benefit became payable to his beneficiaries. She requested that the death benefit be paid into a living annuity. The death benefit was paid as a lump sum in terms of section 37C of the Act and as per the complainant's request. However, it was paid into a retirement annuity.

[3] COMPLAINT

- 3.1 The complainant submitted that she instructed the first respondent to pay the death benefit into a living annuity policy. The first respondent paid the death benefit as a lump sum into a retirement annuity. Tax was deducted prior to the payment. The complainant submitted that at no stage was she advised that the death benefit would be paid as a lump sum and that tax would be payable. She further submitted that as a result of the first respondent's unilateral decision to treat the pension as a lump sum benefit, a tax amount of R366 610.22 was deducted from the death benefit.
- 3.2 She further submitted that she earns R6 640.00 per month which means that she is in the lowest possible tax bracket of 18% and that her net average tax rate is approximately 5.0%. She submitted that the rules of the first respondent clearly provide for a lump sum payment on death but nowhere does it say that the beneficiary does not have the

right to request for the lump sum to be paid directly into either a conventional or living annuity. The complainant submitted that due to the second respondent's misinterpretation of the first respondent's rules regarding payments of death benefits, her income was prejudiced. She had to pay tax in the amount of R366 610.22.

3.2 The complainant requests this Tribunal to investigate the matter.

[4] RESPONSE

4.1 The second respondent filed a response on behalf of the first respondent and submitted that Mr Taylor's advice to the complainant may have been ill conceived and he is attempting to shift the blame to the fund for potential loss suffered as a result of this advice. It further submitted that because Mr Taylor refers to himself as the complainant in this matter, he does not qualify to be a complainant in terms of section 1 of the Act.

4.2 The second respondent in their second response submitted that the death benefit was transferred to Liberty Lifestyle Retirement Annuity Fund in accordance with the complainant's instruction dated 29 September 2010.

[5] REPLY

5.1 The complainant submitted that as a result of the second respondent paying a death benefit after tax deduction over to Liberty Life she now has an illegal policy. She further submitted that the second respondent was advised timeously of her intentions, it should have notified her then that the first respondent's rules only allow for an after tax lump sum benefit to be paid in which case the second respondent should not have paid the benefit to Liberty Life. The financial advisor advised her that she should purchase a living annuity which is a legally registered

product and can only be funded by compulsory money before tax proceeds from either a pension or provident fund and/or retirement annuity.

[6] DETERMINATION AND REASONS THEREFOR

6.1 The issue to be determined by this Tribunal is whether or not the first respondent was justified in submitting the complainant's share of the deceased's death benefit to the South African Revenue Service ("SARS") for tax purposes and thereafter paying a share of the deceased's death benefit as a lump sum to a retirement annuity.

Locus Standi

6.2 This Tribunal shall prior to addressing the merits of the complaint, determine whether or not it has jurisdiction to hear the complaint. The complaint relates to the mode of payment of a death benefit. The complaint was lodged by a financial advisor on behalf of the complainant. Section 1 of the Act defines a "complainant" as follows:

"complainant" means -

- "(a) any person who is, or who claims to be -
 - (i) a member or former member of a fund;
 - (ii) a beneficiary or former beneficiary of a fund;
 - (iii) an employer who participates in a fund;
- (b) any group of persons referred to in paragraph (a) (i), (ii) or (iii);
- (c) a board of a fund or member thereof; or
- (d) any person who has an interest in a complaint;"

6.3 Section 1 of the Act further defines a "complaint" as follows:

"complaint" "means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging –

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant;”

6.4 In terms of the definition of a complaint in section 1 of the Act a complaint must relate to a specific complainant. This Tribunal is bound in terms of the above definition to address this issue before it can deal with the merits of the matter. At the outset of the complaint, the financial advisor submitted that he is the complainant in this matter. However, the complainant provided a power of attorney in which she gave Mr Taylor the authority to deal with the matter on her behalf. Even though Mr Taylor said that he is the complainant in this matter, the actual complainant is Mrs Wright and not him. Therefore, this Tribunal is satisfied that this is a complaint as defined in section 1 of the Act and will also deal with the merits of the complaint.

Merits

6.5 The payment of any benefit that is due to a member of a fund is regulated by the fund’s rules (see *Tek Corporation Provident Fund & Another v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E) and section 13 of the Act).

6.6 The relevant portion of the first respondent’s rules which deals with payment of death benefits reads as follows:

“Payment of death benefit

- (8) Payment of the benefit referred to in sub-rule 7 shall be made in terms of Section 37C of the Act.”

6.7 Section 37C provides the different modes of payment of the death benefit to the identified dependants as follows:

(2)(a) For the purposes of this section, a payment by a registered fund for the benefit of a dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee, if payment is made to-

(i) a trustee contemplated in the Trust Property Control Act, 1988, nominated by-

(aa) the member;

(bb) a major dependant or nominee, subject to subparagraph (cc); or

(cc) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a minor dependant or nominee not able to manage his or her affairs or meet his daily care needs;

(ii) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a dependant or nominee; or

(iii) a beneficiary fund.”

6.8 The complainant requested that the death benefit be paid into a living annuity. She wanted the death benefit paid directly into the living annuity so that she is not charged tax. It appears that the complainant and her financial advisor are under the impression that if the first respondent pays the death benefit directly into a living annuity, tax would not be deducted from the benefit.

6.11 Section 37A of the Act prohibits the reduction of benefits by any means but is subject to certain exceptions contained in section 37D of the Act. In this regard, section 37D(1)(a) of the Act provides as follows:-

“(1) A registered fund may-

- (a) deduct any amount due on the benefit in question by the member in accordance with the Income Tax Act, 1962 (Act 58 of 1962).”

6.12 Paragraph 3 of the Second Schedule of the Income Tax Act, deems a lump-sum benefit payable on the death of a member to be taxable in the hands of that member as if it had accrued to him immediately prior to his death. The relevant portion provides that, any lump-sum benefit which becomes recoverable upon the death of a member of a fund shall be deemed to be a lump-sum benefit which accrued to such member immediately prior to his death.

6.13 *In casu*, the benefit allocated to the complainant as the beneficiary of the deceased was payable as a lump-sum benefit in terms of the rules of the fund, as per the complainant’s request and was accordingly taxable in the hands of the deceased. The fund was not only permitted but was obliged to effect the tax deduction in terms of the Income Tax Act.

6.14 In view of the above, there is no basis on which to order the relief sought by the complainant.

[7] **ORDER**

1. The complaint cannot succeed and is hereby dismissed.

DATED AT PRETORIA ON THIS 24TH DAY OF MAY 2013

MA LUKHAIMANE

DEPUTY PENSION FUNDS ADJUDICATOR