IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/GA/12/98/AS

In the complaint between:

Harrison Linda Mbambo Complainant

and

MPF Management Services (Pty) Ltd First Respondent

Mine Officials Pension Fund Second Respondent

__________________________________________________________

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

Introduction:

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956.

The complainant is Harrison Linda Mbambo an erstwhile member of the second respondent and an ex-employee of Western Deep Levels Ltd, a participating employer in the second respondent at the relevant times.

The first respondent is MPF Management Services (Pty) Ltd a company duly incorporated with limited liability according to the laws of the Republic of South Africa which company provides administrative and support services to the second respondent.

The second respondent is the Mine Officials Pension Fund, a pension fund duly registered in terms on the Pension Fund Act of 1956 and which has in terms of its rules as its object the provision of superannuation, incapacity, death and other benefits for and in respect of its members.

The complainant addressed the respondents raising his dissatisfaction relating to the
quantum paid to him by second respondent on his retrenchment, more specifically related to the taxable portion thereof as allegedly explained to him by the officials of second respondent. This resulted in numerous oral exchanges between complainant and officials of second respondent as well as correspondence including a written complaint to first respondent, in its capacity as administrator of second respondent, to which letter the respondents replied in writing within 30 days of receipt. The parties were unable to resolve the dispute and complainant duly lodged a written complaint with the Pension Funds Adjudicator under cover of a letter date 8 April 1998. It is common cause between the parties that the complainant has complied with the provisions of section 30A(1) requiring him to lodge a written complaint with the Pension Fund or the employer participating in the fund before lodging it with the Pension Funds Adjudicator. It is also common cause that the respondent has properly considered the complaint and has replied to it in writing as required by section 30A (2). The parties have both supplied supporting documentary evidence.

The complaint relates to the administration of the fund and alleges that the complainant has sustained prejudice in consequence of maladministration by the fund. More specifically the complainant alleges that the rules of the fund were not correctly explained to him in that he was not correctly informed of the tax implications of the two options available to him in terms of the rules of the second respondent on his retrenchment; these being early retirement or alternatively retrenchment benefits. The complainant alleges that he made his choice of option based on incorrect information and or inadequate information relating to the tax implications of the option chosen by him and states that if he had known of the tax implications he would not have chosen the option he did which was the retrenchment benefit but would rather have chosen the early retirement benefit.

No hearing was held in this matter, but a report was placed before me by Senior Investigator, Antonia Simmons. Accordingly, in determining this matter I have relied on the
documents and report placed before me and the exchange of correspondence. Having completed my investigation I have determined this complaint as follows and for the reasons set out herein.

**Background to the complaint**

The complainant was employed by Western Deep Levels Ltd from 25 July 1984 until his retrenchment on 19 December 1995. He was employed initially as Assistant Personnel Officer and then as Personnel Officer. Complainant was a member of second respondent with effect from 16 April 1984 arising from his employment as an assistant sampler at Western Areas Goldmine.

Prior to his retrenchment, the complainant attended the offices of the second respondent in order to establish his rights and the benefits to which he would become entitled on retrenchment.

The complainant alleges that he was given advice and information by the employees of the second respondent when he attended at the offices of the second respondent to the effect that:

1. he would, on retrenchment, qualify for either a retrenchment benefit or an early retirement benefit

2. there would be a tax exempt portion of R80 000.00 on both of the aforesaid benefits while the remainder of the benefit would be taxed at 41%, his normal rate of taxation.

3. in respect of the early retirement benefit the quantum would be R74 535.94 with a monthly pension of R993.29 and in respect of the retrenchment benefit the quantum would be between R100 000.00 and R120 000.00.
the early retirement benefit would be paid after a delay of three months while the retrenchment benefit would be paid after one month.

The complainant, who wished to purchase a franchise, and based on the above information supplied to him orally by the respondents, chose to request the retrenchment option. He states that he chose this option *inter alia* as the benefit would be payable sooner that the earlier retirement benefit and he required money for the purchase of the franchise in which he had become interested; but more importantly as he had been informed that in both instances the tax free portion of the benefit was the sum R80 000.00 which made the retrenchment benefit more attractive to him as he calculated that a substantial benefit would be paid within one month and this suited his particular needs.

The rules and definitions within the rules of the second respondent which are relevant to this complaint read as follows:

Retrenchment

36 (1) A member who satisfies the Board:

(a) That he was retired from the service of his last employer through no fault of his own owing to reorganisation or reduction of staff or to the abolition of his job and is in possession of a written statement by his last employer to that effect; and

(b) that he has not refused to accept employment with an employer which the Board considers suitable; and

(c) that he had made every reasonable endeavour to obtain employment with an employer;

shall, except for purposes of Rules 63 to 68 inclusive, be deemed whilst he is not in the employment of an employer to be a member in the service of an employer and employed upon the class of work upon which he was last
employed in the service of an employer. Any period whilst he is so deemed to be a member in the service of an employer shall not be included in the member's qualify service and no member's or employer's contributions shall be payable in respect thereof.

(2) A member who is deemed to be a member in terms of this Rule and who:

(b) has reached the pensionable age or, if he or she is a member referred to in paragraph (1) of Rule 28 bis, has reached an age twelve years younger than the pensionable age; or

(c) satisfies the Board that he or she is permanently unfit to resume the class or work upon which he or she is deemed to be employed;

shall, if he or she thereupon elects to cease to be a member, be deemed to have retired from the service of an employer for the purposes of Rule 28, 28 bis, 28 ter or 29, as the case may be.

“ACCUMULATED CONTRIBUTIONS" shall mean, for a member, the total of:

(a) the member's contributions, increased by three percent in respect of each complete period of twelve months during which he is or is deemed to be a member; and

(b) the member's additional contributions increased by three percent in respect of each complete period of twelve months from the date he commenced making additional contributions to the date of ceasing to be a member.

“EMPLOYER'S CONTRIBUTIONS"
shall mean, in relation to a member, the amounts paid or payable to the Fund in respect of him by employers in terms of these Rules other than Rules 63 or 84 bis exclusive of interest.

**EARLY RETIREMENT**

28 bis.

(1) A member (other than a female (55) member) who has not less than the 5 years qualifying service and who has attained an age twelve years younger than the pensionable age may in his discretion retire from the service of an employer before reaching the pensionable age. Such member shall be entitled on so retiring to a pension equal to the pension prescribed in Rule 32, reduced by one quarter of one percent for each month or part of a month of the period from the date of his retirement to the date on which he will attain the pensionable age............

The complainant was retrenched with effect from the 19th December 1995. He accordingly applied for the retrenchment benefit completing and submitting a form supplied by the first respondent. The written application was submitted on 23 January 1996. The application form supplied by the first respondent makes no reference whatsoever to the details of the tax liability of the member applying for the benefit.

In a letter dated 14 March 1996 from the first respondent to complainant, he was notified of the fact that he qualified for either the early retirement benefit or the retrenchment benefit. First respondent provided a calculation in respect of the retrenchment benefit and notified the complainant that he qualified for the sum of R112 094.22 which amount would be payable after 20 March 1996. The complainant was also notified, by means of what appears to be an annexure to the aforesaid letter, that his early retirement benefit would
be a lump sum payment of R80 960.45 and a monthly pension of R1 084.21. The letter also invited the complainant to approach the first respondent should he have any queries related to his benefits. This letter makes no reference whatsoever to the tax liability of claimant. No details regarding the calculation of tax applicable to the different options is supplied.

After receipt of the letter, the complainant confirmed that he elected the option of the retrenchment benefit. The election was made in writing, and telefaxed to the first respondent on 27 March 1996.

The first respondent, in accordance with the Income Tax Act, 1962, issued a Request for a Tax Directive to the South African Revenue Service. The SARS issued an IRP3 dated 4 April 1996 which instructed the second respondent to deduct an amount of R44 117.69 from the benefit of R112 094.22. The nett benefit of R69 193.78 was paid directly into the complainant's bank account by the second respondent and the complainant was notified of same by first respondent in a letter dated 23 April 1996.

On 24 June 1996 an amended IRP3 was issued in terms of which the SARS instructed second respondent to deduct an amount of R33 098.26 in respect of tax from the benefit and not the R44 117.68 (forty-four thousand one-hundred and seventeen rand and sixty-eight cents) directed in terms of the earlier IRP3. An amount of R11 029.62 was then paid into the complainant's banking account.

The tax liability of the complainant in terms of the Income Tax Act, therefore, was the sum of R33 098.26 on the retrenchment benefit of R112 094.22 and the complainant's resultant benefit was the sum of R78 996.96.

According to the annexure mentioned above, the early retirement benefit was a lump sum payment of R80 950.45 with a monthly pension of R1 084.21. The respondents have supplied me with calculations relating to the taxation of the lump sum payment of
R80 950,45. These calculations are based on certain assumptions made by respondents and have not been processed by the SARS. The taxable portion of the lump sum would have been R14 950,45. Assuming a taxation rate of 30% the sum of R4 485,13 would have been payable in tax. The complainant would have received a nett lump sum benefit of R76 465,32. While this would have been some R2 500.00 less than in the case of the retrenchment benefit the complainant would have received a continuing pension of R1 084,21 per month in addition to the nett lump sum benefit. The early retirement benefit would thus have been a substantially better benefit from the point of view of the complainant than the retrenchment benefit.

The complainant was informed orally by the employees of second respondent whom he approached at the front desk on the several occasions prior to his retrenchment, which employees were acting within the course and scope of their employment by second respondent and under circumstances when it was reasonable for complainant to presume that he could rely on the information given to him, that the tax exempt portion of both benefits to which he was entitled to was the sum of R80 000.00 whereas in fact the tax exempt portion of the retrenchment benefit was only R1800.00.

**The complaint**

The complaint, as stated, relates to the administration of the fund and alleges that the complainant has sustained prejudice in consequence of maladministration by the fund, more specifically in that the complainant had not been supplied with adequate information concerning the tax implications of his choice of option.

The complainant therefore prays that he be permitted to alter his choice of option and be granted the benefit due to him in terms of the early retirement benefit with interest on the lump sum and payment of monthly pension from the date on which the benefit would have been paid to him he made that choice of option initially until date of payment. The complainant also asks for damages in respect of pain and suffering and/or consequential
damages in that he was unable to purchase a franchise for which he was negotiating and as a direct result lost profits which he could have made.

The complainant submits that there was a duty on the respondents to disclose the tax implications of his benefit options and that failure to do so resulted in his choosing an option which caused him financial prejudice.

The respondents admit that the information relating to the tax payable on the two benefit options was not specifically provided, and confirm that the rules do not alert the members to the tax implications of the benefits due to them in terms of the rules.

A copy of a guide to the rules of the second respondent is supplied by both the respondents and the complainant. It is to be noted that in this booklet reference is made to the taxation of benefits due to members in terms of the rules of the fund. The complainant, however, makes it clear in his complaint that the guide to the rules was only given to him in May 1996 by a friend who had photocopied it. The complainant alleges that he did not know of the existence of this manual and had not had sight of the manual until May 1996 which was after he had exercised his option based on the information which had been given to him and which information had not included a copy of the said guide to the rules.

The Respondents advance three principal arguments.

(1) The complainant would not or could not have been given information which he alleges he was given by the employees of second respondent as the correct taxation position in terms of the second schedule to the Income Tax Act does not resemble the explanation allegedly given to the complainant. With copious use of the subjunctive but no concrete evidence the respondents seek to encourage me to draw negative inferences against the complainant's statements by detailing the correct procedure relating to taxation and requiring me therefore
The complainant should have known the tax implications of his decision for the following reasons:

(i) The respondents offer seminars to all employees. Substantial details relating to these presentations and or seminars at which information is said to be disseminated are enumerated by the respondent.

However, there exists no proof of the fact that the complainant was at any of these seminars or that these seminars were made available to him specifically. The complainant denies that these seminars and or presentations were available at the time when his retrenchment took place.

(ii) Tax experts are allegedly available as employees of the respondents and that these experts, on request, would have supplied all necessary information. In this regard the respondents allege that no specific request was made regarding the income tax implications of the options and that therefore there was no duty upon them to supply such information. The complainant, however, alleges that he specifically attended the offices of the second respondent to enquire about all the details of the benefits due to him and had been advised, that the tax exempt portion in both instances was R80 000.00.

(iii) It was in the nature of the complainant's job that he could have been expected, when resigning his employment, to ascertain or to have been aware of the tax implications of his choice of option. In this regard the respondents have referred to the matter of Van der Westhuizen v Sanlam Pension Fund (Field Staff) (PFA/WE/7/98), where this tribunal pointed out that the complainant in the matter, as an insurance broker, could be expected to have taken steps when resigning his employment to ascertain
what the applicable fund rules provided. The complainant in turn alleges that he had attempted to ascertain this and had been given incorrect information.

(3) The respondents cannot be held responsible for any tax liability of the complainant as this is a matter between the complainant, as a taxpayer, and the SARS and is based on income over which the second respondent and thus the first respondent has no control. The respondents in this connection state that the onus is on the complainant as a taxpayer to manage his own tax affairs. The respondents go on to submit that the provisions of Section 7D of the Pension Funds Act which impose a duty to ensure that adequate information is communicated to members, do not apply in this situation as the provisions relating to taxation arise from legislation and not from the pension fund rules. The respondents further submit that even if it could be argued that this section includes taxation, as this arises indirectly from the rules, the provisions of this section applied only from the 15th December 1998 and were not even promulgated in bill form at the time of the alleged act or omission.

Issues for Determination

In the cases of Tatiya and others v Liquor Catering Trade Cape Pension Scheme and others (PFA/WE/17/98), Caffin & Dooling v African Oxygen Limited Pension Fund (PFA/WE/14/98) and Euijen v The Nedcor Pension Fund (PFA/GA/27/98) this tribunal has determined that the failure by the trustees of the fund, without appropriate justification, to furnish information required by a complainant for the exercise of his or her rights constitutes failure by them to comply with their common law duty to act in good faith and an improper exercise of their powers. As such it constitutes maladministration as contemplated in the definition of “complaint”. The duty to disclose adequate relevant information is particularly strong when an individual faces an impending decision which may have adverse implications for him or her. It is clear that it is incumbent upon pension funds to ensure that members are placed in a position to make properly informed choices regarding the options available to them when confronted by the necessity of making such choice.
It is conceded, as argued by respondents that Section 7D of the Pension Funds Act was not enacted as at 19th December 1995, however this section merely codifies the common law and constitutional duties which were applicable and clearly established by and before 1995. Arising therefrom there existed a duty upon respondents to ensure full and adequate disclosure to the members.

It is, clearly, crucial for a member of a pension fund to be supplied with details and calculations relating to the effect of taxation upon the different options available to him in order for it to be said that the fiduciary duty towards him has been properly observed.

In the spirit of ensuring adequate disclosure the Financial Services Board produced a circular PF no. 86 which details the disclosure requirements to be observed by funds. Inter alia funds are required to provide to their members a statement of the benefits that become payable at retirement, death, disability and ill-health, early retirement and withdrawal. Regarding withdrawal the circular states:

Withdrawal from service

Preferably each member will have all options in terms of the rules explained before a cash payment is selected. As a final failsafe mechanism the letter enclosing any cash payment must refer to any benefits which may be forfeited as a result of a cash payment, including the elimination of liability for tax on transfer to another pension fund as defined in terms of the Income Tax Act, 1962, preservation fund or retirement annuity.

Despite the fact that this circular only took effect from the 1st of July 1996 it reflects, once again, good practice and the applicable standard to evaluate fund conduct.

I do not find the respondent's argument referring me to my decision in the determination of Van der Westhuizen vs Sanlam Pension Fund (Field Staff) PFA/WE/7/98 to be apposite in this context. In that matter I dealt primarily with the issue of prescription. I held it was relevant that the complainant in that matter was an insurance broker and that given his experience and level of knowledge it was reasonable to expect that when he resigned his
employment he would have taken steps to ascertain the date on which he would have become entitled to receive his pension benefit in terms of the rules. There is no evidence before me in this instance which indicates that the complainant was in a similar position to Van der Westhuizen. Nowhere does it appear that the complainant at any stage was involved with advising on the tax implications of benefits available to members of the pension fund. It is also clear from the evidence before me that the complainant commenced his career with the respondent as an assistant sampler at Western Areas gold mines. His background and training had clearly not prepared him for being an expert in matters of taxation. The mere fact that complainant chose an option which was so obviously substantially disadvantageous to him is an indication of his lack of proper understanding of the implications of his choice.

In this instance it is quite clear that the fiduciary duty of the respondents to supply adequate information has not been adhered to. None of the letters or documents sent to complainant indicate any reference to tax liability let alone supply adequate calculations to the complainant in order to enable him to be in a position to gauge his own future financial predicament. The rules of the fund also do not allude to the tax liability or the differentiation in connection therewith. The respondents, in fact, admit that the complainant was not alerted specifically to his tax liability but merely argue that he should or could have become aware of this, which for the reasons set out above I do not agree with. The argument that there is no duty on them to supply this information is clearly incorrect.

Under the circumstances I find that the respondents have failed in their duty towards complainant. It is, however, not competent for me to order that the complainant receive a double benefit of both the retrenchment benefit already paid to him as well as the early retirement benefit. I do, however, find that complainant is entitled to be given the options available to him in terms of the rules of the fund once placed in possession of adequate information with regard thereto.

I am not in a position to award the complainant sums in excess of the benefit due to him
as compensation for pain and suffering or as punitive damages or for consequential damages which might have been suffered as a result of his not pursuing his franchise option. It is doubtful whether the dispute concerning his pension benefit wrongfully caused him any damage.

The order of this tribunal is therefore as follows:

1. The complainant shall be given the option to re-exercise such options as were available to him at the time of his retrenchment within a period of six weeks of the date of this order.

2. In the event of the complainant choosing to accept the option of early retirement the second respondent shall place the complainant in the financial position which he would have been in had he exercised that option at the time of his retrenchment within fourteen days of him exercising his option.

3. The respondents shall effect all necessary re-adjustments in respect of taxation and liaise with the Receiver of Revenue in order to reverse earlier tax directives, recover any sums which were paid to the Receiver of Revenue and which in terms of the new option would not be due to the Receiver of Revenue and do all things necessary to ensure that proper taxation is effected on the benefit chosen by the complainant.

4. Respondents shall within two weeks of complying with this order submit a report to the adjudicator setting out the steps taken to give effect to the terms of this order.

DATED AT CAPE TOWN THIS 13th day of MAY 1999.
John Murphy
PENSION FUNDS ADJUDICATOR