

**THE FINANCIAL SERVICES TRIBUNAL**

Case No. PFA73/2023

In the matter between:

**FLORENCE THEMBI MALABI**

Applicant

and

**OLD MUTUAL WEALTH PRESERVATION  
PROVIDENT FUND**

1<sup>st</sup> Respondent

**THE PENSIONS FUNDS ADJUDICATOR**

2<sup>nd</sup> Respondent

**Tribunal Panel:** Adv G Goedhart SC, Adv KD Magano and Ms Z Nkubungu-Shangisa

**Appearance for the applicant:** In Person

**Appearance for the first respondent:** Mr L Mbolekwa

**Date of hearing:** 8 May 2024

**Date of decision:** 19 June 2024

**Summary:** *Application for Reconsideration in terms of section 230 of the Financial Sector Regulation Act, 2017—application for reconsideration dismissed---Applicant retains the right to approach the FAIS Ombud.*

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## DECISION

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### **INTRODUCTION**

1. This is an application for the Tribunal to reconsider a determination made by the second respondent, the Pension Funds Adjudicator (*"the Adjudicator"*), on 18 August 2023 (*"The Determination"*).
2. This application is made in terms of section 230 of the Financial Sector Regulations Act 9 of 2017 (*"the FSR Act"*).
3. The Determination was made pursuant to a complaint lodged by the applicant, Florence Thembi Malabi (*"Ms. Malabi"*), to the Adjudicator in terms of section 30M of the Pension Funds Act 24 of 1956 (*"the Pension Funds Act"*).
4. At all material times, Ms. Malabi was a member of the first respondent, Old Mutual Wealth Preservation Fund (*"the Fund"*).
5. Ms. Malabi also seeks an order condoning the late filing of her application for reconsideration of the Determination. The Fund did not oppose the condonation application, and as a result, the Tribunal granted it.
6. The Fund opposes the relief sought by Ms. Malabi in this application for reconsideration of the Determination.

## **FACTUAL BACKGROUND AND CHRONOLOGY OF EVENTS**

### **a) Complaint to the Adjudicator**

7. On 1 February 2023, Ms. Malabi submitted her complaint to the Adjudicator concerning the quantum of the one-third cash lumpsum of her retirement benefits fund paid by the Fund.
8. Ms. Malabi alleges that on 1 September 2022, she received an email from a financial advisor employed by the Fund. The email claimed that Ms Malabi, having reached retirement age, was eligible for a one-third cash withdrawal from her retirement fund. Furthermore, the email stated that since her benefit was less than R500,000.00, the cash payout would be tax-free. The financial advisor allegedly informed Ms. Malabi that the payable amount was R373,584.51. The remaining R734,000.00 of her pension benefit would be paid out as an annuity. Alternatively, she could reinvest the remaining capital.
9. Ms. Malabi accepted the proposal, which included reinvesting the remaining two-thirds of her pension benefit in a tax-free savings account. The proposal she signed outlined a tax-free cash lump sum payment of one-third of the benefit, with the remaining capital to be reinvested.
10. Ms. Malabi contends that she received only R284,466.35, a shortfall of R89,118.16 from the anticipated amount of R373,584.51. The shortfall stems from the fact that the payout was subject to taxation, contrary to the advice provided by the financial advisor.
11. Following her receipt of the R284,466.35 payout, Ms. Malabi filed a complaint with the Adjudicator. In her complaint, she requested the Adjudicator to

investigate her complaint and make an order putting her in the position she would have been in had she not withdrawn her pension benefit. Upon receiving the complaint, the Adjudicator forwarded it to the Fund, requesting a response.

12. In its representations to the Adjudicator, the Fund acknowledged the financial advisor's wrong advice to Ms. Malabi. However, it argued that reversing the transaction and cancelling the tax directive was not feasible. It submitted that when completing and signing the retirement notification form, Ms Malabi elected not to use the SARS tax directive simulation option. The Fund explained that the purpose of the tax directive simulation was to receive a simulated response from SARS regarding the tax amount to be deducted from the lumpsum before processing the retirement request.
13. The Fund also submitted that the tax directive could not be cancelled as no error was made by the Administrator. The tax directive was issued in accordance with the complainant's signed option form. It also submitted that in terms of paragraph 4(1) of the Second Schedule to the Income Tax Act 58 of 1962 ("the Income Tax Act")<sup>1</sup>, a lump sum benefit accrues to a member on the date on which an election is made in respect of the benefit.

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<sup>1</sup> Paragraph 4(1) of the Second Schedule provides that the cancellation of a tax directive will only be permitted in circumstances where a bona fide mistake has been made, such as:

- "1. The reason for a tax directive reason was incorrect, i.e. If withdrawal is ticked as opposed to retirement;*
- 2. The taxpayer's details completed on the directive application form were incorrect, tax directive was applied for in the name of the wrong spouse, in the case of a divorce or the taxpayer's identity number is incorrect."*

14. The accrual date cannot be changed once a person has made an election and becomes unconditionally entitled to the benefit. In other words, once the election is made and a tax directive has been issued, it may not be cancelled by the Fund or Fund Administrator. Ms Malabi's election to withdraw a third of her pension benefit triggered the immediate accrual of the lump sum benefit.
15. The Fund further submitted that in an effort to resolve the dispute amicably, it offered to pay Ms. Malabi the shortfall of R89,119.00 to compensate her for the tax amount that was deducted. However, Ms. Malabi rejected it.
16. In reply to the Fund's response, Ms. Malabi stated that she did not intend to claim her retirement benefit. She only did so due to the financial advisor's misrepresentation that the cash lump sum would be tax-free. She also submitted that the Fund should have cancelled the payment as soon as it realised there would be tax implications on her one-third cash lump sum.
17. She also submitted that she was not aware of the SARS tax directive simulation. Although she appreciated the Fund's offer, she still insisted that she must be paid interest that would have accrued to the shortfall had she not withdrawn one-third of her pension fund benefit.

**b) Determination of the Adjudicator**

18. The Adjudicator dismissed Ms Malabi's complaint. In dismissing the complaint, the Adjudicator stated:

*"5.7 The facts indicate that the complainant completed a retirement notification form and submitted same to the fund requesting payment of her retirement benefit. In terms of the caveat subscriber principle,*

*the complainant is presumed to have known or understood the consequences of signing the claim form, which includes the tax implications thereof. Further, on the basis of the doctrine of quasi-mutual assent, the fund was reasonably entitled to assume that by signing the claim form, the complainant was signifying her intention to be bound by the terms and conditions thereof (See Mbokazi v Textile & Allied Workers Provident Fund and Another [2002] 3 BPLR 3200 (PFA) at 3206C-D).*

- 5.8 *The responsibility is on a member to make an election regarding the payment of a benefit. An application for tax directive can only be made after an election is made by a member. The fund indicated that the complainant elected not to utilise the SARS tax directive simulation option, which would have provided her with a simulated response in terms of the tax amount to be deducted from the lump sum amount before processing the retirement request. However, the fund cannot rely on this as it is irrelevant and may be misleading to members as the fund does not have the tax history of its members.*
- 5.9 *It is standard practice that once the tax directive is issued by SARS, the fund must deduct the amount of tax as stated on the tax directive and pay same to SARS before it pays a member her benefit. As stated above, cancellation of a tax directive is only possible if there was a bona fide error relating to, inter alia, the reason for the application of a tax directive is incorrect, or the details of a taxpayer on the application form are incorrect.*
- 5.10 *In this instance, it cannot be said that any bona fide error was made as the fund acted on the instruction provided in the complainant's retirement notification form. That the complainant completed the retirement notification form due to the incorrect advice by a financial advisor is not a bona fide error by the fund. It is only in those exceptional circumstances, as outlined above, that a tax directive can be cancelled. The facts indicate that the complainant does not meet the circumstances under which a tax directive can be cancelled."*

19. Based on the above, the Adjudicator found that she was satisfied that the Fund acted lawfully in terms of its rules and Ms. Malabi's instructions in the payment of one-third portion of the retirement benefit. She also found that the Fund acted lawfully in deducting the amount of tax from the complainant's one-third cash lump sum benefit in terms of a tax directive issued by SARS.
20. Having found that the Fund acted lawfully, the Adjudicator made the following comment in paragraph 5.13 of the ruling:

*"5.13 It is also noted that the fund submitted that its advisor's management offered the complainant a settlement amount of R89 119.00 to compensate her for the tax amount that was deducted. However, the complainant declined same pending finalisation of this complaint. As stated above, the fund did not act unlawfully in the payment of the one-third portion of the complainant's retirement benefit and the deduction of tax thereon. However, the advisor's management is at liberty to make any settlement offer for the conduct of the financial advisor in order to resolve any claims against the financial advisor."*

21. Ms. Malabi is unhappy with the determination and seeks to have it reconsidered and set it aside.

## **RECONSIDERATION APPLICATION**

### **a) Issues for reconsideration**

22. The issue before the Tribunal is whether the Adjudicator misdirected herself when she found that the Fund had acted in accordance with its Rules and dismissed Ms Malabi's complaint on the basis set out in her ruling.

### **b) Common cause facts**

23. The following facts are common cause between the parties:
- 23.1. The financial advisor gave Ms. Malabi incorrect financial advice regarding the tax implications of her election to withdraw a portion of her pension fund benefit;
  - 23.2. At all material times, the financial advisor was employed by the Fund;
  - 23.3. Email correspondence in the Tribunal record confirms that the advisor acknowledged providing Ms. Malabi with erroneous advice, leading to her subsequent election based on that advice;
  - 23.4. The financial advisor also requested the Fund to compensate Ms Malabi for the resulting shortfall and for him to bear personal responsibility for the error; and
  - 23.5. The Fund informed Ms. Malabi that the financial advisor's advice regarding the tax-free status of the cash payout was a *bona fide* error. It also offered to compensate Ms. Malabi for the R89,118.16 shortfall.
24. Ms Malabi's submission before this Tribunal is that she acknowledges and understands that the Rules of the Fund do not allow for a reversal of the entire transaction, with particular reference to the deduction of the tax component of the lump sum benefit due to her. However, the offer by the Fund was made to her six months later, and as a result, she lost interest in the shortfall. Her submission is that the Adjudicator focused exclusively on the tax benefit issue, but did not have regard to the full financial implications of the proposal made to her.



25. In her ruling, the Adjudicator also accepts in her ruling that Ms. Malabi was wrongly advised by the Fund and that she made her election based on that wrong advice. In paragraph 5.12 of the ruling, the Adjudicator found:

*“It appears that the complainant was not properly advised by her financial advisor who allegedly informed her that the one-third portion of her retirement benefit would not be subjected to tax. Thus, the complainant may lodge a complaint with the FAIS Ombud in the event that she is dissatisfied with the service provided by her financial advisor.”*

26. While the Adjudicator acknowledged the incorrect financial advice provided by the Fund's advisor, her focus remained on the Fund's adherence to its internal rules (Rule 8) regarding tax deductions. In reaching this conclusion, she cited the case of **Hylton Forge v Old Mutual Life Assurance Company South Africa Limited**<sup>2</sup> where the Ombud for Financial Services confirmed that once the election has been made, the accrual date cannot be changed and the Tax Directive cannot be cancelled.

27. While the office of the FAIS Ombudsman in the **Hylton Forge** case commented on the finality of an election, it also emphasised the importance of financial advisors adhering to the FAIS code of conduct. This code, as outlined in the Financial Advisory and Intermediary Services Act (FAIS), establishes ethical standards for advisors. It ensures they prioritise their client's best interests and avoid misleading or unsuitable advice. Considering the similarities in both cases, where the financial

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<sup>2</sup> FAIS 03558/16-17 KZN 4

advisor's actions might influence a client's decision, a closer examination of the financial advice provided in this case might be warranted.

28. In terms of section 3(1)(a) of the code:

*"Representations made and information provided to a client by the provider must be-*

*(i) Factually correct;*

*(ii) provided in plain language, avoid uncertainty or confusion and not be misleading;*

*(iii) must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client...."*

29. Furthermore, in the financial services industry, there are specific guidelines to ensure customers are treated properly ("TCF principles"). The TCF principle emphasises that customers should receive clear information, suitable advice, and fair treatment throughout their interactions with the financial service providers.

30. In this case, the Fund acknowledged that Ms Malabi was misled by a *bona fide* error on the part of its financial advisor. The Fund's advisor and the incorrect advice given by the advisor to Ms Malabi falls within the purview of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS) with due regard to the definitions of "advice" and "financial services provider" in FAIS.

31. However, the Adjudicator found that the advisor's error does not fall within what is considered an error in terms of Paragraph 4(1) of the Second Schedule (see footnote 1 above), such that it could result in a reversal of the transaction.
32. The Adjudicator found that the Fund had acted in accordance with the Fund rules<sup>3</sup> and that, consequently, the Adjudicator could not order either a reversal or reinstatement of the shortfall and interest.
33. While the Adjudicator primarily focused on the tax implications of Ms. Malabi's election, a closer examination of the record reveals a potential breach of the FAIS Act. The email correspondence clearly indicates that the financial advisor provided Ms. Malabi with incorrect information, which directly impacted her decision regarding her pension benefit withdrawal.
34. Given the potential breach of FAIS and the need for a comprehensive assessment under the FAIS Act's provisions, the Adjudicator was correct that this matter ought to be referred to the FAIS Ombud for their consideration. The FAIS Ombud is well-equipped to adjudicate disputes concerning financial advisor conduct, in particular, the nature of the financial advice provided and determine any potential FAIS contraventions.
35. There is no basis upon which this Tribunal can interfere with the Adjudicator's decision to dismiss Ms Malabi's complaint.

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<sup>3</sup> *Municipal Employees Pension Fund v Mongwaketse* (969/2019) [2020] ZASCA 181; [2021] 1 All SA 772 (SCA) (23 December 2020); 2020 JDR 2835 (SCA) at paras 42-44.


36. However, Ms Malabi retains the right to approach the FAIS Ombud as set out by the Adjudicator in the determination in paragraph 5.12.
37. The tax implications of Ms. Malabi's election are not in dispute. Ms Malabi accepts that the transaction cannot be reversed. However, she nonetheless wishes to be placed in the position she would have been in had the incorrect advice not been given to her.
38. The Tribunal notes that there ought to be no impediment to the Fund reinstating its settlement offer to Ms Malabi given that it does not dispute that its advisor made a bona fide error, but that is not a determination that this Tribunal can make in terms of section 234(1) of the FSR Act. Ms Malabi retains the right to approach the FAIS Ombud for the relief that she seeks.

**ORDER:**

39. The following order is made:

39.1. The application for reconsideration is dismissed.

Signed on behalf of the Tribunal on 19 June 2024.



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**KD MAGANO**