



Case law update – Benefit related matters

This update discusses two recent determinations that relate to benefits and where relevant sets out the position adopted by the MMI Sponsor Funds.

A. Summary

1. Hylton Forge and Old Mutual Life Assurance Company South Africa Limited (Ombud for Financial Services Providers)

- A financial services provider has a duty to give correct advice to their client. When it fails to do so, it must take all steps to help the client to correct the mistake. A provider must always act in the best interests of its clients and is bound by the principles of Treating Customers Fairly.
- When members retire from an MMI Sponsor Fund, they are given advice based on the law that applies at the time. The Fund always acts in the best interests of its members and applies the TCF principles when assisting their members.

2. ES De Beer and Rand Executive Retirement Fund; Lifesense Financial Services (Pty) Ltd; FundsAtWork Umbrella Provident Fund; MMI Group Limited; Corporate Selection Umbrella Retirement Fund No 2 and Liberty Group Limited (PFA)

- A transferring fund is responsible for loss of investment returns to a former member if it transferred her benefit to the incorrect receiving fund.
- When the Fund is informed of a benefit that was incorrectly transferred to it, it will take all reasonable steps to repay the benefit to the fund that incorrectly transferred the benefit.

B. Case law

1. Hylton Forge and Old Mutual Life Assurance Company South Africa Limited (OMLACSA) (Case No. FAIS 03558/16-17 KZN 4): Ombud for Financial Services Providers - Duty to give correct financial advice

Mr Forge was a member of the South African Retirement Annuity Fund. In April 2016 he contacted Old Mutual's call centre to find out what his options were as he was nearing his retirement. He was sent the necessary forms to complete. His financial adviser told him that since his fund value was R220 000 he could take the entire amount as a cash pay-out. From March 2016, a person retiring from a pension or retirement annuity fund could take his full retirement benefit as a cash lump sum if it was less than R247 500. Mr Forge went to Old Mutual's offices and spoke to Mr Singh, a financial adviser, who told him that he could only take a maximum of one third of his benefit in

cash and had to buy a compulsory annuity with the balance. Based on the advice given by Mr Singh, Mr Forge took only a third of his benefit in cash and bought an annuity with the balance.

Mr Forge later found out that Mr Singh had given him incorrect advice and that he could have taken his full benefit as a cash lump sum. Mr Forge contacted Old Mutual and asked them to pay him the remainder of his benefit in cash. Old Mutual refused, saying that SARS was not willing to reverse the tax directive and that Mr Forge should have become familiar with the consequences of his choice. Mr Forge filed a complaint with the Ombud for Financial Services Providers (the Ombud) on the basis that Mr Singh gave him incorrect financial advice and Old Mutual was not willing to help him to receive the remaining balance of his benefit as a cash lump sum.

The Ombud found that Old Mutual had misrepresented the law to Mr Forge. It was reasonable for any person in Mr Forge's position to rely on the advice given by Mr Singh. The FAIS Act places an obligation on providers of financial services to give advice to clients so that they can make informed decisions when dealing with financial products. The Act demands that, at all times, a provider must act in the interests of the client when giving financial services.

As a financial services provider, Old Mutual is bound by the Treating Customers Fairly principles (TCF), which require that a provider delivers six outcomes. These include providing customers with clear information and keeping them informed before, during and after point of sale. If a financial services provider gives advice it should be suitable and take into account the customer's circumstances. The TCF principles are there to raise the standards in the way firms carry on their business by introducing changes that will benefit customers and increase their confidence in the financial services industry.

The Ombud found that even though Old Mutual admitted that Mr Singh had misled Mr Forge, it didn't refer him to the Ombud. Old Mutual passed the blame onto SARS and even blamed Mr Forge for not making sure of the income tax consequences of his choice. Old Mutual knew Mr Forge had been misled and instead of doing what is right, it blamed Mr Forge for its mistake.

The Ombud ordered Old Mutual to reverse the transaction, recalculate the tax and pay Mr Forge what was due to him after making the required deductions, together with interest at a rate of 10.25%.

Approach adopted by the MMI Sponsor Funds

When members retire from an MMI Sponsor Fund, they are given advice based on the law that applies at the time. The Fund always acts in the best interests of its members and applies the TCF principles when assisting its members.

2. ES De Beer and Rand Executive Retirement Fund; Lifesense Financial Services (Pty) Ltd; FundsAtWork Umbrella Provident Fund; MMI Group Limited; Corporate Selection Umbrella Retirement Fund No 2 and Liberty Group Limited (Case no. PFA/GP/00023715/2016/TD): Pension Adjudicator - Loss of investment returns due to transfer of withdrawal benefit to incorrect receiving fund.

Ms De Beer was a member of the Rand Executive Retirement Fund (the Rand Fund) through her employment. When she resigned, she asked for her benefit to be transferred to the Corporate Selection Umbrella Retirement Fund No. 2 (Corporate Fund). The Rand Fund transferred the benefit to the FundsAtWork Umbrella Provident Fund (FundsAtWork) instead of the Corporate Fund. When Ms De Beer discovered the mistake, she contacted the Rand Fund, which in turn contacted FundsAtWork, asking FundsAtWork to repay the benefit to it, which FundsAtWork did. The Rand Fund then transferred the benefit to the Corporate Fund.

Ms De Beer filed a complaint with the Pension Fund Adjudicator (PFA). She claimed that because the Rand Fund failed to transfer her benefit to the Corporate Fund within three months, she suffered a loss, which was the investment returns that her benefit would have earned.

The PFA found that Ms De Beer suffered a loss because of the incorrect transfer of her benefit from the Rand Fund to FundsAtWork. Any loss she suffered was because of fault on the part of the Rand Fund. The PFA ruled that the Rand Fund was responsible for any investment loss she may have suffered.

To determine the extent of the loss Ms De Beer suffered, the PFA used the services of an independent actuary. The actuary stated that to determine if Ms De Beer suffered a loss, it considered what her benefit would have been if it had been deposited into the correct account. It then compared the value in the Corporate Fund with the amount that was refunded by FundsAtWork. The actuary determined that Ms De Beer suffered a loss of R3 306.

The PFA ordered that the Rand Fund must transfer R3 306 to the Corporate Fund which then had to pay that amount to Ms De Beer.

Approach adopted by the MMI Sponsor Funds

When the Fund is notified of a benefit that was incorrectly transferred to it, it will take all reasonable steps to repay the benefit to the fund that incorrectly transferred the benefit.

Dionne Nagan

Legal Specialist: Research
Retirement Fund & Product Governance
Product Solutions
Momentum Investments