IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

CASE NO: FAIS 03558/16-17 KZN 4

In the matter between:

HYLTON FORGE **Complainant**

and

OLD MUTUAL LIFE ASSURANCE COMPANY

SOUTH AFRICA LIMITED (OMLACSA) **Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002 ('FAIS Act')

A. PARTIES

[1] Complainant is Mr Hylton Forge, an adult male retiree. His full details are on file with the Office.

[2] Respondent is Old Mutual Life Assurance Company South Africa Limited, (OMLACSA), a public company duly incorporated in terms of South African law, with its principal place of business noted in the regulator's records as Mutualpark, Jan Smuts Drive, Pinelands, 7405, Western Cape. OMLACSA is an authorised financial services provider as provided for in the FAIS Act with

licence number 703. The licence has been in force since 21 April 2004 and remains as such.

[3] At all material times hereto, complainant dealt with one Mr Roshan Singh, (Mr Singh) an employee of respondent who rendered the financial service to complainant.

[4] In this determination, reference to respondent and respondents must be read to mean the same thing.

B. COMPLAINT

[5] During September 2016, Complainant lodged a complaint with this Office in which he accused respondents of failing to appropriately advise him, with the result that complainant ended up withdrawing a third of his retirement fund value and purchasing a compulsory annuity with the remaining two thirds This despite that fact that complainant had intended to withdraw his entire fund value in order to resolve an urgent liquidity need he had at the time.

[6] As it stood at the time, the law allowed complainant to withdraw his full fund value, subject to payment of tax. Complainant later discovered that the law had been misrepresented to him and immediately lodged a complaint with respondents, seeking a reversal of the whole transaction and payment of what was originally due to him, minus legally permissible deductions. In his complaint to this Office, complainant accuses respondent of treating him poorly since the lodging of his complaint. He claimed that respondents, instead of resolving his complaint, raised multifarious excuses and ignored his concerns.

[7] For their part, respondent raised three defences; first, it blamed the South African Revenue Services, (SARS) for refusing to assist respondent with the reversal of the transaction; two, it claimed complainant failed to acquaint himself with the legal consequences of his election[1]; and finally, respondent claimed that, were it to pay complainant the full commutation amount, complainant would be unjustly enriched. It must be noted that respondent failed to justify these defences with reference to the facts and the law.

[8] Following a protracted exchange of letters with respondents and no result, complainant turned to this Office.

C. BACKGROUND

[9] Complainant was a member of the South African Retirement Annuity Fund[2] (SARAF) since 2000. During April 2016, and in anticipation of his retirement from the SARAF, complainant telephoned respondent's call centre to enquire about his options. He was sent the necessary documentation to make his election. Complainant discussed the matter with his financial advisor and was advised that since the fund value stood at R220 000, complainant could

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1 The word refers to the case of complainant electing (while completing the necessary form) to take a partial withdrawal, as opposed to the full withdrawal.

2 SARAF started as a retirement annuity fund in 1961. Old Mutual Life Assurance Company (South Africa) Limited (Old Mutual) is the sponsor and administrator of SARAF. SARAF operates as a separate legal entity from its sponsor, Old Mutual, and is managed by a Management Board, also known as a board of trustees. All benefits paid by SARAF are underwritten by policies issued by Old Mutual. As such, all the policies are owned by SARAF and not by the members of the SARAF. The policies that SARAF owns are used to provide the benefit payable in terms of its rules. https://www.oldmutual.co.za/personal/retirement-planning/saraf/about-saraf : accessed on 27 April 2017

commute the entire amount. Complainant's financial advisor further advised him to personally call at respondent's offices to submit the relevant documents.

[10] During the same month, complainant visited respondent's Musgrave branch in Durban to submit the documents. A financial advisor in the employ of respondent, by the name of Mr Singh, advised complainant in no uncertain terms that he would not be permitted to withdraw the full amount but one third of the fund value. Consequently, complainant would have to purchase a compulsory annuity[3] with the remaining two thirds. As Mr Singh did not prevaricate, complainant says he reluctantly agreed to the advice of withdrawing only one third (R70 000) because he had an urgent need for liquidity.

[11] Given that the whole transaction, including the contract to purchase the compulsory annuity, is now under attack, I shall not refer any further to the compulsory annuity. Save to say it is inextricably connected to the incorrect advice furnished by respondent.

[12] A few days later, complainant mentioned the issue again to his financial advisor[4] who was adamant that respondent had failed to appropriately advise complainant given the prevailing income tax laws[5] at the time. At the outset, it

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3 The details of the annuity have not been provided to this Office by either party.

4 Not Mr Singh

5 The correct legal position with regard to the Tax Treatment of lump sums paid by retirement funds since March 2016 is as follows :
'When you retire as a member of a pension fund, pension preservation fund or retirement annuity fund and you wish to take a portion of your retirement interest as a lump sum, you are allowed to take (commute) a lump sum equal to a maximum of one-third of the retirement interest in that fund, unless the entire value of the fund does not exceed R247 500 in which case you may take the full

must be noted that respondent's advice was incorrect in that, since 1 March 2016, the laws relating to the commutation of lump sums had changed such that it is permissible for members of retirement funds to commute the full fund value where the value is not more than R247 500. Following the advice, complainant was paid the amount of R48 000. According to complainant, tax in the amount of R17 000 was paid to SARS and the remainder of R5000 to respondent[6]. (Complainant did not provide the Office with the breakdown).

[13] Following the discussion with his financial advisor, complainant, on 1 June 2016, wrote to a Mr Pierre Schoon, respondent's area manager and expressed unhappiness with the advice provided by respondent. For a full month, complainant says he was not given any straight answers, with respondent merely advising that the matter was under investigation. On 5 July, complainant telephoned Mr Schoon who conceded that respondent had made a mistake but that the problem was with SARS who were unwilling to assist respondents. According to complainant, Schoon advised him that respondent at that stage had eight such cases where mistakes had been made by its employees in advising respondent's customers.

[14] It is important to note that despite respondent's concession that it had made the mistake in advising complainant, including its inability to resolve the problem, respondent can provide no evidence that it referred its client to this Office. In terms of rule 6(b) of the Rules on Proceedings of the Office of the Ombud for Financial Services Providers (the Rules), providers must refer their clients to

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retirement interest as a lump sum'. http://www.sars.gov.za/ClientSegments/Individuals/Tax-Stages/Pages/Tax-and-Retirement.aspx: Date accessed 2017/04/29

6 Complainant has not sought to challenge the amount paid to respondents.

this Office in the event they cannot resolve a dispute. Nonetheless, complainant eventually found his way to this Office. In his statement to the Ombud, complainant charges that respondent failed to appropriately advise him. He claims that had respondent done its work properly, he would have commuted his full fund value. Accordingly, complainant wants to be left out of respondent's problems but have his funds paid to him. His frustration is adequately expressed in his email of 9 September 2016 to respondent's internal arbitrator, where complainant wrote:

> *'I find it hard to believe that SARS won't sanction release of my funds - what are their reasons? If you say this happened on other occasions I ask the question - how many times? Reading between the lines this has obviously happened far too often for their liking and they are now putting their foot down to the detriment of individuals such as myself. Old Mutual are clearly not prepared to fight SARS on behalf of their customer or take the knock and pay what is due to me, so I am the person that has to suffer for your staff member's incompetence. This is not right, which I'm sure that someone with your intelligence will agree with. Would you be happy with this response if you were in my shoes? I think not. And all along OM have admitted their error but are not prepared to pay what I am due'* [own emphasis].

D. REFERRAL TO RESPONDENT

[15] In an email dated 9 September 2016, respondent, through its internal arbitrator, wrote to complainant and advised that SARS had refused to assist them in reversing the transaction. Respondents offered complainant an amount of R10

000 as compensation for the inconvenience. The offer was rejected by complainant.

[16] On 12 September 2016 respondent once again wrote to complainant. The letter is peculiar and warrants reproducing:

> '*Once a tax directive has been issued, it may not be cancelled by the Fund or Fund Administrator. Paragraph 4 (1) of the Second Schedule to the Income Tax Act provides that the lump sum benefit accrues to the member on the date on which an election is made in respect of the benefits. ….. **The obligation is on the member to ensure that he is aware of the income tax implications flowing from his election before an instruction is submitted to the Fund. Ignorance of the law is not an excuse for not making the correct election***' [own emphasis].

[17] This Office referred the complaint to respondent in terms of rule 6 (b) inviting respondent to resolve the complaint with its client.

[18] On 30 September 2016 respondent replied stating that it was unable to reverse the transaction without SARS' approval. Respondent further argued that if it were to pay the full commutation value, complainant would be unjustly enriched.

[19] On 27 October 2016, the FAIS Ombud issued a notice in terms of section 27 (4) of the Act, (notice) to respondent. The notice invited respondent to provide its full case, including supporting documents. It further warned, *inter alia*, that upon investigation, the complaint would be determined without further reference to respondents.

[20] In its response of 4 April 2017, respondent accepted that it had failed complainant. Respondent repeated that it was unable to reverse the transaction. It stated that it had offered complainant an amount of R10 000 which he rejected. Respondent sought guidance from this Office on how to deal with the matter.

E. RELIEF SOUGHT

[21] Complainant has made it clear that he seeks the full commutation value of his fund, less legally permissible deductions.

F. DETERMINATION

[22] The FAIS Act defines a complaint as: '*complaint means subject to section 26 (1) (a) (iii), a specific complaint relating to a financial service rendered by a financial services provider or representative to the complainant on or after the date of commencement of this Act, and in which complaint it is alleged that the provider or representative –*

(a) has contravened or failed to comply with a provision of this Act and that as a result thereof the complainant has suffered or is likely to suffer financial prejudice or damage;

(b) has wilfully or negligently rendered a financial service to the complainant which has caused prejudice of damage to the complainant or which is likely to result in such prejudice or damage; or

(c) has treated the complainant unfairly.

[23] Section 3 (1) (a) of the Code states:

(a) '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; and,

(iv) must be provided timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction' [own emphasis].

[24] Respondent's letter of 12 September 2016 amounts to misdirection as I shall show later in this determination. The last line however, calls for an immediate response. It reads: '*Ignorance of the law is no excuse*.' Properly construed in context of the entire e-mail and the circumstances of this case, the line conveys that complainant is the author of his own misfortune. Nothing could be further from the truth. Respondents' conduct makes a mockery of the FAIS Act and the "Treating Customers Fairly" principles (more on this later in this determination).

[25] There is no question whether respondent rendered financial services to complainant. Likewise, there is no dispute as to whether respondent contravened the provisions of the Code. It did, but it also blames complainant for failing to acquaint himself with the tax implications of his 'election'. In its response to the section 27 (4) notice, respondent acknowledged (unreservedly) that it had failed complainant but pointed to difficulties it had experienced with

SARS, which made it impossible for respondent to resolve the matter. Respondent sought this Office's counsel on how best to resolve the matter.

[26] The request made by respondent for guidance is disingenuous, inappropriate and amounts to misdirection. From the start, respondent demonstrated no interest in resolving the complaint. When the complaint came to this Office respondent provided no records to demonstrate the legal steps it had taken to resolve the matter. Respondent also failed to play open cards with this Office. It provided no details of what the mistake entailed, the circumstances around it, when exactly respondent realised it had made a mistake, including the steps it took to resolve the complaint.

[27] Notwithstanding the paucity of relevant information from respondent's version, I take respondent's acknowledgement to mean that it made an error in expressing what was legally permissible when withdrawing lump sums from the retirement fund. In simple terms, the law was misrepresented to complainant as a result of respondents' mistake.

[28] Complainant's uncontroverted statements are that he had always intended to commute his entire fund value. Long before he visited respondent's offices, complainant sought advice from his own financial advisor who had informed him that it was permissible to commute his fund value. Respondents however, advised complainant that it was not possible to commute the full amount, leading to complainant withdrawing a third of the fund value.

[29] There has been no challenge to complainant's statement that, had it not been for respondent's incorrect advice, he would have commuted his full fund value.

The mistake made by respondent was material to complainant's decision, which means respondent breached a statutory duty. It was respondent's duty to advise complainant of the material terms of the transaction[7] and confirm that complainant understood the advice in order to make an informed decision[8].

[30] Reference is made to section 4 (1) of the Second Schedule of the Income Tax Act (Act 58 of 1962), as amended, which provides:

'*Notwithstanding the rules of a pension fund, pension preservation fund, provident fund, provident preservation fund or retirment annuity fund, and subject to parapagraphs 3 and 3A, any lump sum benefit shall be deemed to have accrued to a person who is a member of such fund on the earliest date-*

(a) on which an election is made in respect of which the benefit becomes recoverable;

(b) on which any amount is deducted from the benefit in terms of section 37 (d) (1) (a) (b) (c) of the Pension Funds Act; ……..(e) and shall be assessed to tax in respect of the year of assessement during which such lump sum benefit is deemed to accrue.'

[31] On 15 October 2015, the Legal and Policy Division of SARS caused the letter set out below to be issued to the Institute of Retirement Funds:

'INCOME TAX: CANCELLATION OF TAX DIRECTIVES

[7] Sections, 3 (1) (a) and 7 (1) of the Code
[8] Section 8 (2)

'Paragraph 4 (1) of the Second Schedule to the Income Tax Act provides that a lump sum benefit accrues to a member on the date on which an election is made in respect of that benefit. The accrual date cannot be changed once a person has made the election and the person becomes unconditionally entitled to the benefit.

The application for a tax directive can only be made after an election has been made by a member.

The obligation is on the fund to ensure that a member is aware of the Income Tax implications flowing from his or her election before applying for a tax directive. *.....*

Caution should be exercised when cancelling a tax directive application as this negtively impacts on the aggregation priniciple applicable to lump sum benefit payments.

'The cancellation of a tax directive application will only be permitted ***in circumstances where a bona fide mistake has been made*** *such as:*

1. *The reason for tax directive application was incorrect, i.e. if withdrawal was ticked as opposed to retirement; or*
2. *The taxpayer details completed on the directive application form were incorrect, the tax directive was applied for in the name of the wrong spouse, in the case of a divorce. such as the taxpayer's identify number is incorrect'* [own emphasis].

[32] The legal principles applicable to the issue of misrepresentation are settled in our law and are briefly discussed hereunder. In *JZ Brink v Humphries and Jewel (Pty) Ltd*[9], the Court, citing *George v Fairmead (Pty) Limited*[10], raised and answered the question:

> *'When can an error be said to be iustus for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party — the one who is trying to resile — been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? ... If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound.'*

[33] A material misrepresentation renders the contract voidable at the instance of the misrepresentee[11]. See in this regard the court's remarks in *Ruslyn Mining & Plant Hire v Alexkor*[12]:

> *'The claim of the present appellant was based on misrepresentation. The law in this regard has long been established: Sampson v Union and Rhodesia Wholesale Ltd (in liquidation)* 1929 AD 468 at 479-80, (quoting first Jessel MR in *Redgrave v Hurd,* 1881, 20 Ch D 1 at 13):

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9 SCA 516/03 para 2

10 1958 (2) SA 465 (A) 470B-E.

11 See R H Christie The Law of Contract in South Africa 5 ed (2006) at 286ff.

12 Ruslyn Mining & Plant Hire v Alexkor (917/10) [2011] ZASCA 218 (29 November 2011) para 24

'*If a man is induced to enter into a contract by a false representation it is not sufficient answer to him to say 'if you had used due diligence you would have found out that the statement was untrue'. It makes no difference according to our law whether the person who induced the contract knew at the time when he made the representation that it was false. The defendant is entitled to succeed if he can establish that the representation of the plaintiff was a material one and that he entered into the contract on the faith of such representation – Viljoen v Hillier (1904 TS 312).*' Even where a misrepresentee has been foolish or negligent in relying on the fraudulent misrepresentation that does not in any way affect the liability of the misrepresentor[13].'

[34] The law in essence will allow a party to resile from a contract where misrepresentation was material, irrespective of whether the misrepresentation was innocent or fraudulent, provided the innocent party can show that he would not have contracted had the truth been known to him. But, is that all that is required? In Sonap Petroleum (SA) (Pty) Ltd formerly known as *Sonarep (SA) (Pty) Ltd v Pappadogianis*[14], Harms JA summarised the decisive question as:

'*In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? …To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention;*

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13 Sim Road Investments CC v Morgan Air Cargo (Pty) Ltd (024/10) [2010] ZASCA 081 (27 May 2011), para 24

14 1992(3) SA 234 (A) at 239I-240B

secondly, who made that representation; and thirdly, was the last party misled thereby?….The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled? Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd 1983(1) SA 978 (A) at 984D-H, 985G-H.'

[35] In the present case, the first two questions can be disposed of quite easily in that respondent has conceded that it erroneously misrepresented the law. Whether a reasonable person would have been misled is a question that requires some doing, regard being had to the nature of the transaction and the duties placed on respondent while rendering financial services to a client. In all circumstances one would expect a reasonable man to rely on the expertise of the professional advisor. A reasonable man would not of their own accord appreciate the complicated relationship between tax and retirement savings and the attendant delicate detail. One would expect complainant to accept the advice provided by respondent and act on it.

[36] The entire architecture and spirit of the Act recognises the intricacies of high finance, along with the asymmetry of knowledge between those who are meant to advise and consumers. Simply put, because of the complexities that are associated with financial products, which put such products beyond the reach of the ordinary man, the Act enjoins providers to advise clients so that clients make informed decisions in dealing with financial products. In providing advice, the provider is required to take into account the reasonably assumed knowledge or familiarity of the client with financial products. The Act goes as far as demanding that the provider, at all times, act in the interests of the client

when rendering financial services. The role of the provider is pivotal in the protection contemplated in the Act. The challenges faced by consumers when dealing with financial products are eloquently expressed in the minority judgement of *Barkhuizen v Napier*[15]:

> *'Standard form contracts are contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a "take-it-or-leave-it" basis, thus eliminating opportunity for arm's length negotiations. They contain a common stock of contract terms that tend to be weighted heavily in favour of the supplier and to operate to limit or exclude the consumer's normal contractual rights and the supplier's normal contractual obligations and liabilities. Not only is the consumer frequently unable to resist the terms in a standard form contract, but he or she is often unaware of their existence or unable to appreciate their import. Onerous terms are often couched in obscure legalese and incorporated as part of the "fine print" of the contract.*
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> *'It is appropriate at this stage to consider the relevance, if any, of the fact that the applicant was not a poor and illiterate person likely to be bamboozled by any complex legal document. Standard form contracts by their very nature have standard effects. The fact is that one-sided clauses, the existence or import of which the consumer is likely to be largely or totally unaware, hit the computer-literate owner of a relatively new BMW who buys online, with the same impact as they do the owner of the jalopy close to the scrap yard, who signs with a thumbprint. It is*

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15 (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007), para 135

not only the indigent and the illiterate who in practice remain ignorant of everything the document contains; the fact that consumer protection is especially important for the poor does not imply that it is irrelevant for the rich.'

[37] Having shown that a reasonable man would have been misled, it is plain from the circumstances of this case that complainant was indeed misled. In his complaint, complainant makes it plain that he reluctantly agreed to respondent's incorrect advice and withdrew only a third of his fund value instead of the intended full withdrawal. He did not know then that respondent was incorrect. It took advice from complainant's financial advisor for complainant to appreciate that he had been misled. The third question is thus answered positively. Complainant therefore, is not bound by the so-called 'election' and is entitled to resile from the entire transaction including the subsequent agreement involving the compulsory annuity.

[38] I note that apart from pointing the proverbial finger at complainant for failing to acquaint himself with the tax implications flowing from his 'election', respondent has not sought to explain their employee's (Mr Singh's) conduct, given his duty as a provider in terms of the Code. Whatever the reasons were for respondent's incorrect advice, it must have been clear to them that complainant was likely to accept his advice and act on it. Respondent after all, is the professional who had to guide complainant. These remarks by Hefer JA's[16] are apposite here:

'*In the present case, a material representation was made which was*

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16 See 3 supra, paragraph 27

calculated to induce the appellants to enter into the contract. There is evidence, which appears to be entirely credible, that the appellants were so induced. It seems to me that in these circumstances there arises a fair inference that this is in fact what happened. Mr Gordon who, with Mr Hewitt, appeared for the appellants, called our attention to one of the judgments delivered by the High Court of Australia in Gould and Another v Vaggelas and Others [1985] LRC (Comm) 497. The following remarks in the judgment of Wilson J (at 517d-f) appear to me to indicate the proper approach to the situation here under consideration:

"Where a plaintiff shows that a defendant has made false statements to him intending thereby to induce him to enter into a contract and those statements are of such a nature as would be likely to provide such inducement and the plaintiff did in fact enter into that contract and thereby suffered damage and nothing more appears, common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract. However, it is open to the defendant to obstruct the drawing of that natural inference of fact by showing that there were other relevant circumstances. Examples commonly given of such circumstances are that the plaintiff not only actually knew the true facts but knew them to be the truth or that the plaintiff either by his words or conduct disavowed any reliance on the fraudulent representations."

Treating Customers Fairly (TCF)

[39] As Financial Services Providers (FSPs) respondents are bound by the "Treating Customer Fairly" (TCF) principles, which have now been accepted within the

entire financial services industry. FSPs, in terms of the TCF principles, must deliver the following six outcomes to its customers or clients:

39.1 Customers can be confident they are dealing with firms where TCF is central to the corporate culture.

39.2 Products and services marketed and sold in the retail market are designed to meet the needs of identified customer groups and are targeted accordingly.

39.3 Customers are provided with clear information and kept appropriately informed before, during and after point of sale.

39.4 Where advice is given, it is suitable and takes account of customer circumstances.

39.5 Products perform as firms have led customers to expect, and service is of an acceptable standard and as they have been led to expect.

39.6 Customers do not face unreasonable post-sale barriers imposed by firms to change product, switch providers, submit a claim or make a complaint.

[40] The TCF principles aim to raise standards in the way firms carry on their business by introducing changes that will benefit consumers and increase their confidence in the financial services industry. TCF aims to, amongst others:

40.1 help customers fully understand the features, benefits, risks and costs of the financial products they buy; and

40.2 minimise the sale of unsuitable products by encouraging best practice before, during and after a sale.

[41] This brings me to the question of respondent's behaviour towards complainant, following the lodgement of the complaint. I have already mentioned that respondent, notwithstanding the concession in misleading complainant, failed to refer complainant to this Office, in violation of the Rules. Besides passing the buck to SARS, it appears from respondent's e-mail of 12 September 2016 that it was quoting from both the statute, (paragraph 4 (1) of the Second Schedule) and the SARS letter of the 15 October 2015, but for whatever reason, purposefully inserted the last line in case complainant missed respondent's intent to wash its hands off the matter. The relevant lines read: '***The obligation is on the member to ensure that he is aware of the income tax implications flowing from his election before an instruction is submitted to the Fund. Ignorance of the law is not an excuse for not making the correct election***' In terms of the Code, the duty rests with respondent, the provider of financial services, to appropriately advise its client. What makes respondent's conduct particularly objectionable is that it knew it had misled complainant. Instead of doing what is right, respondent blamed complainant for its mistake. Respondent's conduct toward complainant is manifestly unfair.

[42] It requires no genius to infer, upon looking at respondent's e-mail of 12 September 2016, that its intention was to fob complainant off in the hope that he would tire and abandon the issue, but he did not. Respondent's conduct is an affront to the Act and the TCF principles.

[43] In spite of the alleged fervent wish to resolve the complaint, respondent all but failed to provide this Office with its communication with SARS in which it owned the problem confronting complainant. As can be seen from respondent's e-mail of 12 September 2016, respondent was more concerned with obfuscation than it was with resolving the issue at hand. There is no reason why respondents could not ask SARS to assist them given that their mistake misled complainant, unless respondents knew that the mistake was not *bona fide*. Notwithstanding respondent's conduct, the mistake made by respondent pertained to a material part of the transaction and is sufficient to render the whole transaction void[17].

[44] One cannot help but express dismay at respondent's lack of interest in making things right by complainant. Respondent resorted to claims that complainant would be unjustly enriched in the event it was to pay the full commutation amount. Respondent failed to recognise that what has occurred here is its problem, not SARS's and not complainant's. Besides, complainant had never asked for anything more than what is due to him. Respondent must be condemned for the self-serving manner in which it has dealt with the complaint. Respondent's conduct breached the provisions of the Act and Code and is anathema to the TCF principles.

Unjustified enrichment

[45] Respondent has repeatedly adumbrated unjustified enrichment, claiming that complainant would be unjustly enriched if it was to pay him the full commutation

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17 See footnote 5 supra, paragraph 25

value. This is not supported by any fact or law. Complainant has only sought that which belongs to him and nothing more. It is not clear what respondent means by unjustified enrichment, which as I have already mentioned, has no place in this case.

[46] Respondent treated complainant unfairly.

G. ORDER

[45] In the premises, the following order is made:

1. The complaint is upheld.
2. Respondents are hereby ordered to take the steps necessary to reverse the transaction, recalculate the tax and pay complainant what is due to him less permissible deductions within seven (7) days from date of this order.
3. Respondents are ordered to pay interest which shall be calculated at the rate of 10.25 % on the commutation value (after permissible deduction) seven (7) days from date of this order to date of final payment.

DATED AT PRETORIA ON THIS THE 22nd MAY 2017

NOLUNTU N BAM
OMBUD FOR FINANCIAL SERVICES PROVIDERS