

PENSION LAWYERS



A S S O C I A T I O N

TEMPLATES FOR THE ASSIGNMENT OF PENSION INTEREST IN DIVORCE MATTERS

Particulars of Claim

1. The defendant is a member of the XYZ Pension Fund ('the fund').
2. In terms of section 7(7) of the Divorce Act 70 of 1979 the defendant's pension interest as defined in section 1 of that Act is deemed to be an asset in his estate. *(Note: if the fund is a preservation fund then it should read 'as defined in section 37D(6) of the Pension Funds Act 24 of 1956'. Note also that the pension interest will be an asset in the joint estate if married in community of property).*
3. The plaintiff requests an order directing that% *(Note: or a specified rand amount – see discussion under 'pension interest' in the notes below)* of the defendant's pension interest be assigned to her, and that the fund be directed to endorse its records to reflect her entitlement, pending payment or transfer of her assigned portion of the pension interest in terms of the provisions of section 37D(4) of the Pension Funds Act.

Consent paper

1. The parties record that the defendant is a member of the XYZ Pension Fund ('the fund').
2. The parties agree that the plaintiff shall be entitled to % of the defendant's pension interest in the fund as defined in section 1 of the Divorce Act 70 of 1979. *(Note: if the fund is a preservation fund then it should read 'as defined in section 37D(6) of the Pension Funds Act 24 of 1956'.)*

3. The parties further agree that the fund be directed to endorse its records to reflect the plaintiff's entitlement pending payment or transfer to the plaintiff of her assigned portion of the pension interest in terms of the provisions of section 37D(4) of the Pension Funds Act 24 of 1956.

Draft order where there is no consent paper

1. The plaintiff is awarded % of the defendant's pension interest in the XYZ Pension Fund as defined in section 1 of the Divorce Act 70 of 1979. (*Note: if the fund is a preservation fund then it should read 'as defined in section 37D(6) of the Pension Funds Act 24 of 1956.'*)
2. The XYZ Pension Fund is hereby directed to endorse its records to reflect the plaintiff's entitlement pending payment or transfer to the plaintiff of her allocated portion of the pension interest in terms of the provisions of section 37D(4) of the Pension Funds Act 24 of 1956.

NOTES:

The relevant statutory provisions governing the allocation of unaccrued pension benefits to a non-member spouse on divorce are the following:

1. The Divorce Act 70 of 1979 (sections 1, 7(7) and 7(8));
2. The Pension Funds Act 24 of 1956 (section 37D(1) and (4) – (6));

When do the above provisions apply?

A claim under section 7(7) and 7(8) can only be brought for the allocation of an unaccrued benefit, in other words where the spouse is still a member of the fund concerned. Once he/she exits the fund (usually on retirement or early withdrawal) the benefit accrues to that spouse, and there is no longer a question of a 'pension interest' or unaccrued benefit. If the benefit accrues before the date of divorce, it must be treated like any other asset in the separate or joint estate.

Section 7(7) also states that the statutory provisions concerning pension interest do not apply to marriages out of community of property entered

into on or after 1 November 1984 where community of property, profit and loss and the accrual system are excluded.

Correct citation of the fund

The pension fund should be properly cited, although the Act does refer to the fund named *or identifiable* from the order. Orders are frequently obtained in which the insurance company which sponsors or administers the pension fund is mistakenly cited instead of the fund. It is not sufficient to refer to the sponsor or administrator (eg 'the Liberty pension fund'), as these financial institutions typically operate several funds.

The term 'pension fund' is both a generic name for all types of retirement funds which fall within the scope of the Pension Funds Act, and a descriptor of a specific type of pension fund – one in which at least two thirds of the retirement benefit must be taken as an annuity. Other types of pension funds are provident funds, where the member may take the entire retirement benefit in cash, retirement annuity funds for retirement plans outside of the occupational environment, and preservation funds, to which benefits from previous funds can be transferred.

Pension interest

'Pension interest' is defined in section 1 of the Divorce Act for every type of fund except a preservation fund, the definition of which is located in section 37D(6) of the Pension Funds Act. In each case it provides a method for calculating the rand value of the unaccrued benefit in the fund (the 'pension interest') with reference to the date of divorce.

It is therefore possible to allocate a rand value to a non-member spouse instead of a percentage of pension interest, provided that the amount does not exceed the value of the pension interest.

It is not competent to award interest on the pension interest allocated to the non-member spouse as this is statutorily regulated by section 37D(4), which provides for growth on the allocated portion. This only commences running several months after the date of divorce, if the assigned pension interest is not paid over within the statutorily prescribed time limits.

Allocations which exceed the amount of the pension interest will not be enforceable against the fund, but may found claims *inter partes*.

Presentation to the fund

On divorce a copy of the order should be presented to the fund which will then initiate the necessary process for payment / transfer of the interest to the non-member spouse.

Taxation of pension interest allocations

This is an extremely complex area, and, particularly where the pension interest is substantial, parties are strongly urged to take advice on the impact of taxation. The position has changed several times in the past few years, leading to much confusion. At present the pension interest deduction is taxable in the hands of the non-member spouse. However, the tax dispensation may vary for divorces already obtained, depending on the date of the divorce, and on the date of election in terms of section 37D(4)(b).

It should be noted that pension funds will only act in accordance with the legislative and regulatory provisions and not in accordance with any *inter partes* agreement concluded between the parties in respect of the taxation of pension interest allocations. Such agreements will not be enforceable against the pension fund concerned.