

Divorce orders: issues for pension funds

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Divorce orders: issues for public sector pension funds

What are public sector pension funds?

- Government Employees Pension Fund (GEPF)
- Transnet Pension Fund
- Telkom Pension Fund
- Post Office Pension Fund
- Temporary Employees Pension Fund
- Associated Institutions Pension Fund
- Association Institutions Provident Fund
- Funds that have been established by collective agreements concluded by councils in terms of the LRA. The DOL supervise these funds.



Legislations regulating public sector pension funds

Most of these funds are regulated by their own legislations:

- Government Employees Pension Law, 1996.
- Transnet Pension Fund Amendment Act, 41 of 2000.
- South African Post Office SOC Ltd Amendment Act, 38 of 2013.
- Post and Telecommunications Related Matters Act, 1958
- Temporary Employees Pension Fund Act, 1979 (Act 75 of 1979).
- Associated Institutions Pension Fund Act No. 41 of 1963.



What is a pension interest?

'Pension interest' is defined in the Divorce Act as follows:

- (a)** “pension interest, in relation to a party to a divorce action who –is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of the fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office;



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(b) is a member of a retirement annuity fund which was bona fide established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of the party's contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at the date by the Minister of Justice in terms of section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), for the purpose of the Act" (Section 1 of the Divorce Act, 70 of 1979)".



Disclosure of information by funds to non-member spouses

- In *Smith v Smith en 'n Ander* [2004] 2 BPLR 5431 (SCA) the non-member spouse had been allocated a portion of the member-spouse's pension interest in terms of the divorce order. The fund however, refused to disclose any information in regard to its value to the non-member spouse relying on what it saw as the member's right to privacy. The court however, ordered the fund to provide the information requested as it was required by the non-member spouse for the enforcement of his/rights. In fulfilling their duty of good faith, funds are obliged to disclose to members and other persons such information as is reasonable for the exercise and protection of their rights. The failure or refusal to do so without appropriate justification would amount to an improper exercise of the fund's powers. Therefore the non-member spouse has a right to access of information relevant to the amount due to him/her including how the amount is calculated, and the terms and conditions governing payment of the benefits.



Joinder

In *Swemmer case* [2004] 2 BPLR 5431 (SCA, the Supreme Court of Appeal stated that the fund need not be joined as a party to the divorce proceedings. The reason for this is that the fund has no direct or substantial interest in the matter.



Giving effect to the divorce order

- The effect of an order in terms of section 7(8) of the Divorce Act, 1979 is that the non-member spouse acquires a claim against the fund subject to the conditions that-
 - a) The court has ordered the payment of the benefit by the fund; and
 - b) It is notified of the court order.



Introduction of the clean-break principle in the public sector pension funds

- The clean-break principle was introduced in the private sector pension funds on 1 November 2008 by the introduction of the Pension Funds Amendment Act, 11 of 2007 and Financial Services Laws General Amendment Act. These two pieces of legislations amended section 7(8)(a) (i) of the Divorce Act which provides that a non-member spouse of a member of a retirement fund on divorce could be awarded by a court a portion of benefits that the member would have received had he or she resigned on the date of divorce. However, in terms of the Divorce Act read with the Pension Funds Act, the non-member spouse was only entitled to receive that share when the member became entitled to a benefit in terms of the Rules of the fund, that is, on his or her latter retirement or termination of membership which could be many years after the date of divorce. Post amendments provides that a benefit is deemed to accrue to the principal member on the date a decree of divorce is granted by a court.



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- In the public sector pension funds, the clean-break principle was introduced by the enactment of the Government Employees Pension Law, 19 of 2011 (section 24A), South African Post Office SOC Ltd Act, 38 of 2013 and the amendment of the Transnet Pension Fund Rules. These legal prescripts provides that a pension interest accrue to the non-member spouse on the date of divorce in terms of the decree of divorce granted under section 7(8)(a) of the Divorce Act or a decree for the dissolution of a customary marriage under the Recognition of Customary Marriages Act.



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- Any portion of a member's pension interest assigned to a non-member spouse in terms of a decree of divorce or a decree for the dissolution of a customary marriage granted prior to the enactment of these legislations shall, for purposes of any law other than the Income Tax Act, 1962 (Act No. 58 of 1962), including, but not limited to, section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), be deemed to have accrued to the member on the date of enactment of these legislations, and must be paid directly to the non-member spouse or transferred to an approved pension fund which has been elected by the non-member spouse.



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- In terms of these amendments, these funds shall within forty-five days of the submission of the court order by the non-member spouse, request him or her to elect whether the amount to be deducted must be paid directly to the non-member spouse or transferred to an approved retirement fund on his or her behalf. The non-member spouse shall, within a period of one hundred and twenty days of being requested to make a choice, inform the fund of the manner in which the fund must be dealt with or if the non-member spouse chooses that the amount must be paid to him or her directly, provide these funds with the details that the amount must be transferred to an approved pension fund on his or her behalf, provide the fund with details of that approved retirement fund.



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- These funds shall pay or transfer the amount within sixty days of being informed of the manner in which the amount shall be dealt with in accordance with the non-member spouse's choice.
- In the event that the non-member spouse fails to make a choice or identify the approved retirement fund to which the amount should be transferred within the period of one hundred and twenty days, these funds shall pay the amount directly to the non-member spouse within the period of thirty days . In the event that these funds cannot reasonably ascertain the manner in which the payment to the non-member spouse shall be effected, these funds shall retain the amount plus the interest as determined by the Board of Trustees in these funds, until such time as details of the manner in which that payment shall be effected is made available to these funds by the member, the non-member spouse or any other person whom these funds are satisfied that have the necessary authority and capacity to instruct these funds in that respect.



Recent judgements

***Wiese v Government Employees Pension Fund and Others* [2011] 4 All SA 280 (WCC)/ CCT111/11/2012/ZACC 5 (30 March 2012).**

- This case deals with the application of the clean-break principle in the GEPF. The applicant in this matter was the former spouse of a member of GEPF. The applicant argued that the differential treatment of a non-member spouse of a GEP Law member to that of a non-member spouse of a member of a pension fund governed by the Pension Funds Act violates section 9(1) of the Constitution which provides equal protection and benefit of the law to everyone.



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- More particularly, it was contended that the applicant's right of access to social security as entrenched in section 27(1)(c) of the Constitution was violated. The parties conceded that the applicant's right to enjoy protection and benefit of the law was infringed; however the difference between the parties was with the type of remedy which the court must order. At paragraph 16, the court passed the following remarks:

"In the present matter it seems clear that the differentiation is between non-member spouses of funds governed by the PFA ('private pensions funds') and non-member spouses of members of the Fund (and other pension funds not governed by the PFA). The differentiation arises out of the legislature's failure to apply the 'clean break' principle on divorce to the latter class of persons. Neither the Fund nor the Minister sought to contend that the differentiation in question bears a rational connection to a legitimate government purpose and there is none which readily occurs to me (para 11 of the judgement)"



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- The Court found that the GEP Law was indeed inconsistent with the constitution insofar as it fails to afford to former spouses of members of the GEPF the same rights and advantages as are afforded to former spouses of members of funds subject to the Pension Funds Act, more particularly those contained in section 37D(1)(d), (3) (4) and (5), and is invalid to the extent of that inconsistency.
- The government was directed to submit amending legislation to Parliament to bring the country's biggest retirement fund, the GEPF, into line with the clean-break principle that applies to private sector occupational retirement funds and retirement annuity funds.



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- The clean-break principle means that a former spouse can receive their share of the pension interest shortly after divorce. With the clean-break amendment to the GEP Law and related changes to GEPF rules, former spouses do not have to wait to receive their portion of the pension interest if certain requirements are adequately met.
- It appears that the intention of the legislature when amending the GEP law was to remedy the problems experienced by non-member spouse of the GEPF member regarding their opportunity to be put almost in the same position they were under prior divorce. This step can also be said to equality and dignity of non-member spouse, which rights are regarded as the core values of the Constitution.



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Ngewu v Post Office Retirement Fund (CCT 117/11) [2013] ZACC 4

- This is the second wherein ***Ngewu*** challenged the validity of the Post and Telecommunications Related Matters Act, 1958 which was not having provisions which supports the clean-break principle and the arguments were supposed by the Wiese judgement. This matter addresses the anomaly arising from the failure to afford divorcees of members of the Post Office Retirement Fund (Fund) similar rights and advantages afforded to former spouses of members of funds subject to the Pension Funds Act and the GEPL. It has been demonstrated that divorced spouses of members of the pension funds regulated by these statutes can claim their share of their former spouse's pension interest at the time of divorce. This is referred to as the "clean break" principle. However, divorcees of members of the POPF cannot claim the interest that they are entitled to at the time of divorce.



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- The applicant, Ms Ngewu and Mr Ngewu, were married in community of property in October 1980. Mr Ngewu was at all relevant times employed by the Post Office and by virtue of his employment, he was a member of the Post Office Retirement Fund (the Fund). When they divorced on 27 July 2007, Ms Ngewu was awarded a 50% share of Mr Ngewu's pension interest, but she is only entitled to payment of that share when the benefit accrues to him. This is because the Post Office Retirement Fund Rules (Rules of the Fund), read with the Pension Funds Act and the Divorce Act, do not make any provision for a pension benefit in the Fund to be deemed to accrue on divorce, so that the divorcee's share can be paid on the date of divorce.



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- During the proceedings in January 2012, the Fund sought postponement for 12 months to enable Parliament to amend the Post Office Act to incorporate the “clean break” principle. The parties eventually reached a settlement agreement which included a suspended declaration of invalidity of the omission of the “clean break” principle from the Post Office Act. In addition, an extensive reading-in of section 24A of the GEPL embodying the “clean break” principle into the Post Office Act was proposed. The reading-in would be triggered only if, after eight months, the legislature failed to amend the Post Office Act to remedy the defect.



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- The Ngewu judgment indeed is a clear indication that the pension funds in the public sector must adopt the “clean break” principles which ensure that there is equal protection and benefit of the law for everyone as contained in section 9(1) of the Constitution. The Ngewu judgement is welcomed and it would be prudent for funds such the TRF to also adopt the “clear break” principle and not wait until provisions which preclude the payment of pension interest to a non-member on the date of divorce are challenged before our courts. By taking this prudent step, such funds will save costs and state resources.



Taxation of divorce benefits

The tax implications of the implementation of the clean-break principle are as follows:

- If an amount becomes payable by a retirement fund on or after 1 March 2012 to a non-member ex-spouse, that person (and not the member ex-spouse) will need to pay tax on that amount.
- No tax will be payable on any amount that becomes payable on or after 1 March 2012 in terms of a divorce order that was issued before 13 September 2007.



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- It is however important to note that the exemptions above only applied if the non-member ex-spouse claimed the benefit on or after 1 March 2009. The purpose of the exemption was to shield non-member ex-spouses from unanticipated tax consequences that would result if the non-member ex-spouse was suddenly subject to tax on his/her portion of the lump sum benefit. The effect of the transitional rules extended so that any amount that becomes payable on or after 1 March 2012 in terms of a divorce order that was issued before 13 September 2007 will be free from tax. The principle will apply regardless of the timing of the payment to the non-member ex-spouse, and regardless of whether the retirement fund from which the amount became payable has implemented the “clean-break” principle.



Divorce benefits and preservation funds

- From 13 September 2007 it is possible for non-member spouses to have access to the pension interest or portion thereof of the member spouse, if such an award is made in terms of a divorce order by a Court. Legislation has, however, been made to act retrospectively, i.e. to also apply to such divorce orders granted before 13 September 2007.



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It is important that the divorce order must contain the following information

- in order to be a valid and enforceable order:
- specific reference must be made to the “pension” interest (of the member
- in the fund); and
- a specified percentage or amount of the “pension” interest must be
- specified; and
- the name of the fund must be specified, or if the name is not specified it must be possible from the wording of the order to determine which fund is being referred to.



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- The term “pension interest” with regards to preservation funds is defined as the benefit that the member spouse would have been entitled to if he or she resigned from the fund on the date of divorce.
- Accrual on fund return in respect of the amount awarded in terms of the divorce order (i.e. after date of divorce) would only be payable in two instances:
 - where the specific preservation fund was cited as a respondent in a divorce action and the court awarded interest on the amount accruing to the non-member, and the fund did not successfully oppose this; and
 - if payment is made after expiry of 120 days from the date on which the non-member spouse was requested by the fund to make an election of how his or her pension interest must be dealt with. Should this occur, the non-member will be entitled to the accrual of fund return on the said amount from expiry of the above 120 days to date of payment.



Conclusions and recommendations

- The introduction of the clean-break principle was long overdue in the public sector pension funds. The **Ngewu** and **Wiese** judgements have precedent which pave a way for the application of the clean-break principle to all public sector pension funds.
- There is a need to incorporate all pension funds into one single fund as proposed by Social Security and Retirement Reforms (2007), since these will address the inconsistencies in retirement funds legislations.



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- This paper recommend that there is a need for the members of the pension funds to be educated about divorce benefits.
- This paper further recommend that the payments of divorce benefits should not be paid to the non-member spouse directly if the non-member spouse is employed, it needs to be transferred to an approved pension of his or her choice since pension benefits are meant for retirement.
- ❖ The paper further recommend that the court must not grant the decree of divorce which does not clarify the issue of pension **interest**.



Thank you



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