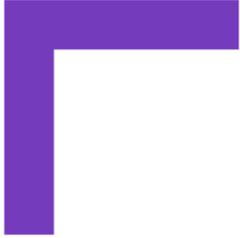




Financial Sector
Conduct Authority



COFI/PFA amendments – pension interest

**Zareena Camroodien: Head of Department: Fund Governance and
Trustee Conduct, Retirement Funds Supervision Division**

Pension Lawyers Association Conference

09 – 10 May 2022





COFI: PFA consequential amendments – pension interest

1. Aim

- The consequential amendments to the Pension Funds Act, 24 of 1956 (PFA) in the COFI Bill seek to close the gaps, to the extent possible, to advance a more inclusive mechanism for sharing pension interest and/or pension benefits.

2. Current Position

- The current position in relation to pension interest is, where members are active members of retirement funds or members of retirement annuity funds following any amount assigned pursuant to the dissolution of marriages in terms of section 7(7) and 7(8) of the Divorce Act, 70 of 1979 the

Current Position

fund may deduct such assigned amounts from the member's minimum individual reserve to be paid to the non-member spouse (to be paid to the NMS in cash or transferred to a fund of their choice).

- The 2013 amendments (Act 45 of 2013) which came into effect from 28 February 2014 extended pension interest to deferred members (following the SCA decision in *Eskom Pension and Provident Fund v Krugel and Another* [2011] ZASCA 96 which provided that pension interest does not arise in respect of deferred members) and to Islamic marriages where an order of court had been made in respect of the division of assets following the dissolution of an Islamic marriage (foll. *Tryon PFA*). It also extended pension interest to preservation fund members.



PFA Consequential amendments

- The consequential amendments to COFI (amendment of the PFA) seek to extend the sharing of pension interest and pension benefits even further.
- The amended section 37D(1)(d) of the PFA provides that the fund may deduct from a member's or deferred retiree's or paid-up member's individual reserve, despite the definition of "pension interest" in the Divorce Act, any amount assigned from the benefit or individual reserve to the non-member spouse in terms of a decree of divorce granted under section 7(8) of the Divorce Act or in terms of any order made by a court in respect of the division of assets of a marriage under the Marriage Act, 1961, the Recognition of Customary Marriages Act, 1998, or the Civil Union Act, 2006, or the tenets of a religion pursuant to its dissolution.

PFA Consequential amendments cont.

- These amended provisions to the PFA will extend the sharing of pension interest to marriages/unions entered into in terms of the Marriage Act, the Recognition of Customary Marriages Act, the Civil Union Act, and marriages concluded according to religious rites (such as Hindu or Jewish marriages) which were concluded without the conclusion of a civil marriage and which are subsequently dissolved as long as there is a court order in respect of the division of assets. Thus we see the explicit extension of the sharing of pension interest to various types of marriages (be it customary, same-sex or any type of marriage concluded in terms of the tenets of a religion).
- Previously this provision only extended to divorces granted under the Divorce Act and dissolved Muslim marriages in which a court order was obtained iro the division of assets.

Extension of categories of members

- The categories of members have also been extended, I shall deal with each one, in turn.
- “(D)eferred retiree” means a member who has reached retirement age or retired from employment and has not elected to withdraw his/her retirement benefit or a member who has reached retirement age or retired from employment and elected to remain in a retirement fund in terms of the retirement fund rules (amended section 1 of the PFA).
- Iro deferred retirees, the fund may pursuant to a Divorce Order in terms of section 7(8) of the Divorce Act or an Order of Court in respect of the division of assets of a marriage under the Marriage Act, ROCM Act, Civil Union Act or a marriage concluded in terms of religious rites deduct from the member’s minimum individual reserve the amount assigned in terms of the Divorce Order or Court Order.



Extension of categories of members cont.

- “Paid-up member” means a member who has not yet retired but has left the service of the employer concerned prior to normal retirement date, as defined in the rules, leaving in the retirement fund the member’s benefits as may be defined in the rules (amended section 1 of the PFA).
- “Paid-up member” replaces the term “deferred pensioner”.
- “Paid-up members” refer to the category of members created by the Default Regulations (2019) and it may further refer to members where rules had previously allowed members’ benefits to remain in the funds even though they may have already left the service of the employer (as is the case iro the Eskom rules).

Extension of categories of members cont.

- In respect of “paid-up members”, the fund may pursuant to a Divorce Order in terms of section 7(8) of the Divorce Act or an order of Court in respect of the division of assets of a marriage under the Marriage Act, Recognition of Customary Marriages Act, Civil Union Act or a marriage concluded in terms of religious rites deduct from the member’s minimum individual reserve the amount assigned in terms of the Divorce Order or Court Order.
- “Pensioner”, in relation to a fund, means a member who is in receipt of a pension paid from the fund. Pension interest is extended to pensioners who are in receipt of in-fund life and living annuities.



Extension of categories of Members cont.

- In respect of a pensioner, deductions which are assigned by a decree of divorce or an order of Court in respect of the division of assets of a marriage under the Marriage Act, Recognition of Customary Marriages Act, Civil Union Act or a marriage concluded in terms of the tenets of a religion must be made from the member's benefit payable monthly or annually, as the case may be.



Extension of categories of Members cont.

Annuities – accrual and sharing upon divorce

- In respect of a pensioner with an in-fund life or living annuity, the capital value cannot be shared but this provision allows the member spouse to pay a portion of his/her allocated pension to the non-member spouse on a monthly or annual basis. (*cf. de Kock v Jacobson* 1999 confirmed by the SCA in *Montanari v Montanari* 2020 ruled that the right to the income from a living annuity formed part of the assets of the joint estate for divorce purposes.)



Extension of categories of members cont.

- These amendments essentially create different categories of pension interest which includes a post-retirement annuity, which is a shift from the current position where spouses who divorce in terms of the Divorce Act are not able to share the value of an annuity between each other upon divorce.
- In respect of outsourced annuities (life and living) the FSCA has asked National Treasury to consider amending the Insurance Act so that non-member spouses may be allocated a portion of the annuity and are not financially prejudiced as a result of the member having outsourced the annuity as this cannot be regulated under the Pension Funds Act.

Public Sector Funds

- Section 4A of the COFI Bill contemplates that all public sector funds must be licensed in terms of the Pension Funds Act. In other words, all public sector funds will be brought under the purview of the PFA subject to exemptions granted and conditions imposed by the FSCA.
- It is therefore contemplated that all public sector funds would have to comply with the pension interest / divorce benefits provisions of the amended section 37D of the PFA.
- Objective is clear, even though it is not immediate, and public sector funds are currently regulated by their own Acts which deals with how pension interest matters ought to be regulated, this will change once they fall under the PFA.

Housing Loans

- The amendments provide that where the member has a housing loan granted by the fund or in respect of which the fund granted a guarantee, the member's pension interest would be reduced by the outstanding loan amount as at the date of divorce irrespective of whether the loan is due and payable.
- A reduction only applies if the loan was granted prior to the granting of the decree of divorce/court order.
- A fund may not grant a loan without the consent of the NMS if the fund is aware that the divorce action in respect of the member is pending, save where the member is married out of community of property without accrual.

Further Questions

- Is it still justified to exclude marriages that are out of community of property without accrual?
 - It still makes sense as parties deliberately choose to completely exclude patrimonial assets from their marriage.
- *Permanent life partners*
 - Since the CC has overturned *Volks NO v Robinson* [2005] ZACC 2 in the matter of *Bwanya v Master of the High Court, Cape Town and Others* [2021] ZACC 51 further amendments may have to be effected to the pension interest provisions in respect of permanent life partnerships, which has been flagged with National Treasury for its consideration.

THANK YOU