

DIVORCE BENEFITS

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Introduction

- Examine impact of the changes introduced by the Financial Services Laws General Amendment Act, 45 of 2013 (“the FSLGAA”), which came into effect on 28 February 2014, to the Pension Funds Act, 24 of 1956 (“the Act”) insofar as it relates to divorce benefits, as well as the unresolved problems arising from the legislation prior to the amendments.



Introduction

Focus:

- Deferred members, pensioners and preservation funds
- Islamic spouses
- Order of deductions where housing loans have been granted
- Non-member spouse's entitlement to information and interest
- Strict approach adopted in respect of the formulation of pension interest in divorce orders and the problems with rectification



Amendments to the Act: Deferred Members

Section 37D(1)(d)(i) now reads as follows:

- (A registered fund may)

“deduct from a member’s or deferred pensioner’s benefit, [or] member’s interest or minimum individual reserve, or the capital value of a pensioner’s pension after retirement, as the case may be —”



Deferred Members

- Prior to recent amendments, there was no express provision in Act, which allowed for deduction from deferred pensioners' benefit/"pension interest".



Deferred Members

Eskom Pension and Provident Fund v Krugel [2011] 3 BPLR 309
(SCA)

Mr Krugel resigned from Eskom on 31 January 1993 and elected to become a deferred pensioner. On 14 September 2001, Mr & Mrs K divorced. They concluded a settlement agreement, which was made an order of court. It provided that Mr K is a member of the Eskom P & P Fund and has a pension interest in fund. Parties agreed - 25% of Mr K's pension interest as calculated at date of divorce will be payable as soon as Mr K becomes entitled to his pension benefit. It further provided Mr Krugel's attorneys would secure registration of endorsement against fund's records.



Deferred Members

- Fund refused to register the endorsement against its records on the basis that the divorce was granted after Mr K had elected to become a deferred member & he no longer had a pension interest contemplated in terms of S7(7) and 7(8) of the Divorce Act read together with section 37D of the Act.
- This prompted the escalation of the matter to the OPFA.



Deferred Members

- *OPFA and HC*
- The PFA upheld complaint on basis of S37D(6) of the Act. She further held that ito S37D(4)(a) of the Act the benefit was deemed to have accrued to the member spouse and the fact that the benefit was deferred did not affect the NMS's right to obtain her share as at date of divorce. The HC upheld the PFA's determination.



Deferred Members

SCA

- The fund took the matter on appeal to the SCA.
- The SCA held that in terms of S7(7) & 7(8) of the Divorce Act, there was no pension interest which could be assigned as Mr K's pension interest became payable before the divorce.



Deferred Members

- It further stated that 'pension interest' is narrowly defined in the Divorce Act. It refers to the value of the interest which a member of a pension fund, on the date of his divorce, has in the pension benefit that will accrue to him at a certain future date. If pension benefit accrues, before the date of divorce, pension interest converts to a pension benefit and S7(7) and 7(8) no longer applies.



Deferred Members

- The SCA further held that the PFA's reliance on S37D(6) was misplaced as it referred to preservation funds but not to deferred members. It accordingly upheld the fund's appeal.
- The SCA mentioned that its decision did not leave Mrs K without a remedy. The divorce settlement agreement *inter se* remained binding. It was therefore open to her to claim her share of Mr K's deferred pension benefit when it is claimed by him after reaching the age of 55 years.



Deferred Members

- In *Saunders v Eskom Pension and Provident Fund* [2013] 2 BPLR 257 (PFA) and *Prins v Eskom Pension and Provident Fund* [2013] 3 BPLR 407 (PFA) the PFA followed *ratio* of *Krugel &* held where the member spouse had already resigned from employment prior to the DOD and became a deferred member, there was no pension interest that fell to be assigned to the NMS ito S7(7) and 7(8) of the Divorce Act. The complaints were accordingly dismissed.



Deferred Members

- The amendment supercedes *Krugel* and the aforementioned cases, and specifically allows for the deduction from the deferred pensioner's benefit or the member's interest or the deferred member's minimum individual reserve. Similarly deductions are also permitted from the capital value (ARV value in DB fund and full fund credit in DC fund) of a pensioner's pension after retirement.
- Noted - no reference to pension interest - deduction from a benefit is referred to.



Muslim Spouses

- Prior to the amendment it has been fiercely contested whether a NMS in a Muslim marriage can claim a share of the member-spouse's pension interest following the dissolution of the marriage ('fasagh').
- This issue was dealt with by the PFA in the matter of *Tryon v Nedgroup Defined Contribution Pension and Provident Fund and Another* [2012] 2 BPLR 236 (PFA).



Muslim Spouses

- *Tryon*

Parties were married and divorced according to tenets of Islamic law on 21 September 2007. Dissolution of marriage & s.a. was made an order of Court on 21 September 2011. The s.a. provided *inter alia* that NMS will be entitled to 50% of the value of the fund as at the termination of the marriage.



Muslim Spouses

- OPFA

Fund refused to pay complainant her share of pension interest ito s.a. on the basis that the divorce order did not constitute a divorce order ito S7(8) of Divorce Act & S 37D(1) of the Act.



Muslim Spouses

- PFA held treatment of Muslim NMS was discriminatory, referred to CC decisions of *Amod & Daniels* where full rights were accorded to Muslim spouses in those instances, Muslim spouses fell into the definition of spouse in the definitions section of the Act, and the s.a. complied with definition of “pension interest” ito S1 of the Divorce Act and S 37D(4) of Act. She granted relief and ordered the fund to pay the benefit.



Muslim Spouses

- This determination came under criticism from various quarters *inter alia* on the basis that NMS is narrowly defined & does not include persons married to Islamic law, S37D(1)(d)(ii) only authorizes deductions of a share of pension interest if ordered in divorce order granted in S7(8) of Divorce Act.



Muslim Spouses

- The amendment takes care of the *lacuna* that existed in our law in this regard in that section 37D(1)(d) now reads as follows:

“any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7(8) of the Divorce Act, 1979 (Act No.70 of 1979) or in terms of any order made by a court in respect of the division of assets of a marriage under Islamic law pursuant to its dissolution;”



Muslim Spouses

- Hence, the gap that existed in respect of the assignment of pension interest in Muslim marriages has been closed to an extent, as a court order dividing the assets of a marriage under Islamic law, which provides for such assignment should allow a fund to deduct the non-member spouse's portion of the pension interest in terms of the court order. The NMS's portion will be calculated as per the divorce order (see for eg *Tryon*).



Housing loans

- Housing loans rank above divorce order deductions regardless of whether housing loan is due and payable or not.

Section 37D(3)(a) of the Act now reads as follows:

“Any amount that may be deducted in terms of section (1)(d) or (6) may only be deducted after the amount of member’s or deferred pensioner’s benefit or minimum individual reserve available has been reduced by any loan amount or guarantee amount referred to in subsection (1)(a), where such a loan or guarantee was granted prior to the granting of the court orders, irrespective of the fact that that amount is due and payable or not”



Housing loans

- *Farrell v Cape Municipal Pension Fund and Another* [2011] 2 BPLR 189 (PFA)

The facts of this case was as follows: the complainant, NMS, was assigned 50% of the member-spouse's pension interest pursuant to obtaining a decree of divorce on 7 March 2003.



Housing loans

- The complainant was dissatisfied with the quantum of the pension interest paid to her. She was, more specifically, dissatisfied with deduction of outstanding housing loan from member spouse's pension interest.
- She disputed correctness of calculation of her share of pension interest as she contended that she should *inter alia* only be liable for 50% of outstanding housing loan & that the member spouse still pays installments for housing loan despite deduction of outstanding amount.



Housing loans

- She also sought interest on the fund credit once the loan was repaid as the outstanding housing loan was deducted from the pension interest. She was further dissatisfied tax deduction from member spouse's pension interest.



Housing loans

- The Adjudicator, correctly in my view, held that the fund was right in deducting the outstanding housing loan pursuant to section 37D(3)(a) of the Act, which provided that:

“Any amount that may be deducted in terms of subsection (1)(d) (deduction of pension interest assigned to the non-member spouse) may only be deducted after the amount of the pension interest available has been reduced by any loan amount or guarantee amount referred to in subsection (1)(a) (relates to the deduction of housing loans), where such a loan or guarantee was granted prior to the granting of the court orders, irrespective of the fact that the amount is payable or not: Provided that the aggregate of all amounts deducted in terms of this subsection may not exceed the member’s pension interest available at any given time.”



Housing loans

- prior to payment of 50% share of pension interest to NMS. PFA further held that complainant was not entitled to nature of interest claimed & S37D(1)(d)(ii) of the Act authorized tax deduction prior to payment of pension interest. In any event, in this case the tax was borne by member spouse.



Housing loans

- To the extent that there was any confusion about the order of deductions, the amendment makes it abundantly clear that housing loans rank above divorce order deductions regardless of whether the housing loan is due and payable or not.



Housing loans

- In *Zuze v Nampak Contributory Provident Fund and 2 Others* PFA/GA/31676/2009/MR the PFA also dealt with the issue of the deduction of housing loans from pension interest but on facts of this case she found that there were in fact no housing loans as fund had claimed, there were simply 12 loans taken over a period of 10 years, therefore, these amounts could not be deducted from benefit due to NMS.



Housing loans

- However, implicit in this determination is that if there were legitimate housing loans as contemplated in S19(5) of Act, the member's pension interest would have been reduced by the outstanding amount before paying NMS her portion of the pension interest assigned to her by the court order.



Interest

- According to the FSLGAA, fund return will be added onto NMS's portion of pension interest from date NMS makes election or failing which 120 days after being asked to make election, until date of payment or transfer but no other interest or growth will be added.



Interest

- Section 37D(4)(c)(ii) now reads as follows:

(A non-member spouse)

“is entitled to the accrual of fund return from the date of the deduction contemplated in paragraph (a)(ii) until payment or transfer thereof, but not to any other interest or growth;”



Interest

- The FSLGAA confirms the position previously adopted by PFA where she held that NMS is generally not entitled to any investment returns or growth on her/his portion of pension interest after DOD save as circumscribed by the Act. This issue was considered in *EW Derman v University of Cape Town Retirement Fund and Another* [2011] 3 BPLR 350 (PFA).



Interest

- The facts in that matter were as follows:

The complainant was married to Mrs KL Derman (“former spouse”). On 4 June 2002, the marriage between the parties was dissolved by divorce decree issued by HC. Following amendments to S37D(4) of Act brought about by the Pension Funds Amendment Act No. 11 of 2007, which came into effect on 13 September 2007, the former spouse claimed payment of pension interest assigned to her ito court order. Hereafter the FR transferred the pension interest assigned to her to an approved pension fund, but did not pay any interest as stipulated in the s.a.



Interest

- The PFA held S37D(4)(c)(ii) only permits payment of interest or fund returns after the expiry of 120 days from date NMS was requested to make an election regarding the payment of pension interest. Fund return contemplated is calculated from the expiry of the 120 day period to date of payment or transfer to NMS, so it is not fund return from the date of divorce to the date of payment. In this matter the first respondent transferred the pension interest before the expiry of 120 days, so it was not liable to pay fund returns to the former spouse. Therefore, the former spouse was not entitled to any fund returns or interest on her pension interest from DOD to date of transfer.



Interest

- Similarly the matter was again considered in *Farrell supra*. For the same reasons aforementioned it was held that the complainant was not a member of the fund and was only entitled to the pension interest assigned to her. Nature of interest claimed by complainant was not fund return which accrued during a delay in the payment of pension interest. She was thus not entitled to it (see also *Blom v FNB Pension Fund and Another* [2010] 3 BPLR 257 (PFA) and *Du Preez v Mine Employees Pension Fund and Another* [2011] 1 BPLR 37 (PFA)).



Assignment of pension interest in a preservation fund

- A recent case which dealt with the assignment of pension interest in a preservation fund was the (Western Cape) High Court case of *Gibson v Gibson and Another* (case no. 1293/2012 – as yet unreported judgment delivered on 8 November 2013 per Rogers J).



Assignment of pension interest in a preservation fund

- *The Facts*

The parties obtained a decree of divorce incorporating a consent paper (s.a.) on 27 May 2003. The s.a. provided for assignment of 50% of the member spouse's pension interest in the Sanlam Preservation Pension Fund ("the preservation fund") to NMS.



Assignment of pension interest in a preservation fund

- In March 2003, two months before the divorce, the member-spouse made a once-off withdrawal. 5 years later, on his selected retirement date, 19 June 2008, he used the full investment value to purchase an annuity. On that date he accordingly ceased to be a member of the preservation fund and became an annuity policy holder.



Assignment of pension interest in a preservation fund

- The parties took no steps to endorse the records of the preservation fund pursuant to the s.a. In March 2011, NMS's rep directed request to Sanlam. Sanlam responded - Act did not allow any deduction to be made from a life annuity, and that the terms of the s.a. applied *inter partes*.
- The NMS then launched an application to court.



Assignment of pension interest in a preservation fund

- *High Court*
- Judge noted that subsequent to divorce, wef 1 Nov 2008, S37D was amended & ss(6) altered the position, which previously existed i.e. that no pension interest as defined in S1(1) of the Divorce Act could be assigned to s7(8) of Divorce Act iro preservation funds as benefit had already accrued. Parties could, however, give effect to s.a. *inter se* following *Swemmer & Krugel*.



Assignment of pension interest in a preservation fund

- The court noted that ss6 was inserted into S37D wef from 1 Nov 2008, which indirectly modified the definition of ‘pension interest’ as contained in the Divorce Act, which reads as follows:
- *“Despite paragraph (b) of the definition of ‘pension interest’ in section 1(1) of the Divorce Act, 1979, the portion of the pension interest of a member of a pension preservation fund or provident preservation fund (as defined in the Income Tax Act, 1962), that is assigned to the non-member spouse, refers to the equivalent portion of the benefits to which that member would have been entitled to in terms of the rules of the fund if his or her membership of the fund terminated on the date on which the decree was granted.”*
(Court’s emphasis)



Assignment of pension interest in a preservation fund

- It further noted that this amendment was not in effect on DOD in 2003 nor when the member-spouse's interest in the preservation fund terminated in June 2008 nor did the amendment operate retrospectively. It further accepted that the fund cannot deduct from an annuity & pay NMS as this would breach S37A of the Act.



Assignment of pension interest in a preservation fund

- The court had difficulty in accepting that the agreement must be read as an obligation on the member to pay NMS 50% pension interest + interest (it was further difficult to reconcile the tax obligations in the agreement).
- The court further rejected the *ratio* in the matter of *Protektor Preservation Pension Fund v Bellars & Others* 2009 (4) SA 455 (D) in light of *Krugel*.



Assignment of pension interest in a preservation fund

- The court accordingly dismissed the application but expressed the hope that parties can reach an agreement by settlement otherwise a rectification application may be necessary.
- This case highlights the invidious position NMS of members of preservation funds find themselves in, where their divorces have been obtained before 1 November 2008.



Right to Information

- The question of NMS's right to information, held by a fund, of member spouses is also an issue which rears its head from time to time in pension interest matters. The PFA has dealt with matters of this nature on a number of occasions.



Right to Information

- In *Zuze supra* the issue arose as to whether or not the complainant is entitled to documentation relevant to the calculation of her claim. The PFA relying on the case of *Smith v Smith en 'n Ander* [2004] 2 BPLR 5431 (T) ruled that the fund must provide such information so requested. She held that a NMS has a right of access to information relevant to the amount due to her including how the amount is calculated, and the terms and conditions governing payment of benefits.



Right to Information

- In the earlier case of *Noordien v Metal Industries Provident Fund* [2002] 3 BPLR 3236 (PFA) the PFA also dealt with this issue. In this matter the parties divorced in 1996 & in the divorce decree the NMS became entitled to 50% of member spouse's pension interest. No one informed fund of divorce order & 2 yrs later, member left service & was paid his full benefit.



Right to Information

- The NMS requested fund to provide info relating to the amount paid to complainant as well as the bank account into which it was paid. The fund refused to provide this info as it alleged that this would breach the duty of confidentiality owed to the member. PFA held that test in law was whether person required the info to exercise or protect rights and whether there was any justification for refusing the information.



Right to Information

- PFA accepted that there was a duty owed to both parties. The question was which party's interest outweighed the other in this instance. The PFA held the complainant stood to be prejudiced far more than the member and the fund was ordered to provide the info.
- In essence the NMS has right to info for purposes of and to the extent of protecting/enforcing rights.



Wording of Pension Interest

- The challenges attendant to the wording of pension interest is evident in the recent PFA determinations of *Kubheka* and *Phago*. PFA has adopted a strict approach iro wording of pension interest.



Wording of Pension Interest

- In *Kubheka v Mineworkers Provident Fund* [2013] 2 BPLR 184 (PFA) the facts were as follows:
- Complainant married member spouse on 5 January 2002 & marriage dissolved by a decree of divorce on 20 April 2011. The decree, *inter alia*, provided that “50% of the defendant’s Provident Funds held and administered by *Momentum Mineworkers Provident Fund* be paid to the plaintiff when due and payable.”



Wording of Pension Interest

- Complainant was unhappy because despite decree of divorce providing that she receives 50% of the member spouse's "provident funds" & her making her election pursuant thereto she had not received payment from the fund. Hence she escalated her complaint to the OPFA.



Wording of Pension Interest

- OPFA
- The PFA held that the divorce order which provides “50% of the defendant’s Provident Funds” does not comply with the legislative requirements of S1 of the Divorce Act as it does not comply with the meaning of pension interest as contained therein and was therefore unenforceable for purposes of S7(7) and 7(8) of the Divorce Act. The complainant must therefore approach the court for a variation of the order.



Wording of Pension Interest

- In *Phago v Sentinel Mining Industry Retirement Fund and Another* PFA/LP/0000961/2012/VPM the divorce order stated that the NMS was entitled to 50% of the pension interest calculated from date of marriage to DOD. Fund accepted that the parties intended this to mean pension interest as at DOD. The member spouse was unhappy with the fund's construction and lodged a complaint with the OPFA.



Wording of Pension Interest

- PFA examined s.a., which was incorporated in the decree of divorce and held that whilst the fund's interpretation was in accordance with legislation, it was not what the parties intended.
- PFA held s.a. as it stands does not comply with the definition of pension interest in the Divorce Act and was therefore unenforceable by the fund as it would amount to an unlawful reduction of a pension benefit.



Wording of Pension Interest

- Pension interest she said is an amount equal to the member's cash notional resignation benefit as at date of divorce and has no bearing on the date of marriage. The s.a. was ambiguous hence the fund should have requested parties to amend the order. As it stood the decision to pay the complainant 50% of the pension was an unlawful reduction and the fund was ordered to credit the member's fund credit with amounts deducted plus interest that would have been earned.



Wording of Pension Interest

- As can be seen from the aforesaid cases the PFA has adopted a very strict approach to the wording of pension interest, which could visit significant hardship on NMSs as variations of divorce orders would be required to be sought in a number of instances which is a costly and cumbersome affair.



Wording of Pension Interest

- It may be prudent for lawyers to get the drafting of pension interest assignments correct from the get-go so that clients are not unnecessarily burdened afterwards. There is further a practice in the Pietermaritzburg and Durban High Courts that may be useful to be rolled out to other divisions. There the court, prior to granting the decree of divorce incorporating the s.a. requires the fund to provide a letter saying that the pension interest assignment in the s.a., if made an order of court, will be enforceable.



Wording of Pension Interest

- HC
- In *Kotze v Kotze and Another* [2013] JOL 30037 (WCC), which was an appeal from the court *a quo*, the parties were married in cop and subsequently divorced. No order as to the assignment of pension interest was made. Member retired and receives a pension from the fund.



Wording of Pension Interest

- He brought a variation application, which was rejected by the court. He appealed to the full bench of the High Court, which examined the law and specifically S7(7)(a) of the Divorce Act. The court ruled that pension interest automatically forms part of the joint estate hence even if there is no order as to assignment of pension interest, if there is a division of joint estate then the non-member spouse is entitled to 50% of the pension interest as at date of divorce from the member spouse. It made a declaratory order to this effect and granted relief.



Wording of Pension Interest

- This decision was clearly wrong in law as it would amongst other things render S7(8) of the Divorce Act nugatory. S7(8) clearly provides that the court *may* assign a part of the pension interest. It further does not take cognisance of the division of the joint estate in its entirety. In terms of a s.a. the parties to a divorce may agree to an assignment of pension interest from anything between 0 to 100%.



Wording of Pension Interest

- No pension interest further existed at the time of the divorce order as the former member spouse had retired and used his pension benefits to purchase an annuity (see article in *De Rebus* 2013 where Adv Davey criticises the ruling).



Conclusion

- The position of non-member spouses has improved considerably since the amendments passed in 2007 and 2008 and now in 2014 and NT should be commended for these changes. It may, however, be prudent to look at aligning the Divorce Act iro the amendments made to the Act.



Thank you



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