Case law update – divorce issues

This update discusses several recent judgements that have an impact on pension funds.

A. MCM v MRM and North West University Pension Fund (case number 129/2012): High Court – Divorce and pension interest

MCM was married to MRM in community of property. MRM was a member of the North West University Pension Fund (the fund). MRM's pension interest in the fund constituted an asset in the joint estate.

MCM instituted divorce proceedings against MRM in 2012. This was opposed by MRM. MRM retired from the fund at the end of February 2014. In that month, MCM sent a letter to the fund requesting that MRM's pension benefit be withheld pending the finalisation of the divorce proceedings. In April 2014, MCM made an application to the High Court to compel the fund to pay half of MRM's pension interest in the fund into her attorneys' trust account. The final decree of divorce was granted in July 2014.

A pension fund's right to make deductions from a member's pension benefit is dealt with in terms of section 37A and 37D of the Pension Funds Act. The Divorce Act defines pension interest as the benefit to which the member would have been entitled if his membership of the fund would have terminated on the date of divorce. Any entitlement that MCM could have had must have been derived from sections 7(7) and (8) of the Divorce Act which deals with pension benefits of a divorcing member of a pension fund. In order for the fund to pay any part of the member spouse's pension interest to the non-member spouse, the divorce order must have been granted before the member's termination of service.

MRM's membership in the fund came to an end when he retired at the end of February 2014. This was before the divorce order was finalised. His pension interest in the fund had already become payable to him at the time of his retirement, before the divorce order was granted. At the time of divorce, he no longer had any pension interest in the fund for purposes of sections 7(7) and (8) of the Divorce Act and section 37D(4)(a) of the Pension Funds Act. This was confirmed in *Eskom Pension and Provident Fund v Krugel and another 2012(6) SA 143 (SCA)* where the court stated that once a pension benefit has accrued to the member before the date of the divorce, the provisions of sections 7(7) and (8) of the Divorce Act were no longer applicable.

Due to the fact that MRM had retired, his pension interest in the fund ceased to exist on the date of his retirement, which date preceded the date of divorce. At the time of the divorce, MRM accordingly had no pension interest in the fund. MRM did however have a pension benefit and MCM was entitled to the amount agreed upon in the deed of settlement that was incorporated into the divorce order.

The court was of the view that the order applied for was not a competent order as at the time of making this application the respondent had already retired and his pension interest in the fund had ceased to exist.

The application was dismissed.

B. Gabriel Jakobus Petrus Vorster v Berdina Frederika Vorster (case number 68708/2013): High Court – Divorce and tax

Mrs Vorster was divorced from Mr Vorster. After the divorce an amount of R1 433 000 was paid from Mr Vorster's pension benefits to Mrs Vorster in terms of the settlement agreement. The settlement agreement stated that Mr Vorster should pay Mrs Vorster R2 000 000. Tax to the amount of R567 000 was deducted from the amount before it was paid to Mrs Vorster. Mrs Vorster now wanted Mr Vorster to pay her the amount of R567 000 as she was of the opinion that she should not be liable for the tax.

The judge confirmed that the settlement agreement indicated that R2 000 000 should be paid to Mrs Vorster and that the source from which the payment was made and any deductions of tax, should not alter Mr Vorster's liability. The Income Tax Act does not prohibit spouses to agree to pay each other a particular amount irrespective of the source of such payment. If the pension fund was obliged to make a deduction for tax on the R2 000 000, it was still the duty of Mr Vorster to make good the deficit in order to comply with his obligations under the settlement agreement. If it was the intention of the parties to make deductions for tax in respect of the R2 000 000 and pay Mrs Vorster that amount less the tax, then that should have been spelled out in the settlement agreement. The reason that this did not happen was because it was not the intention of the parties to make such deduction.

The fact that paragraph 2(1)(b) of the Second Schedule of the Income Tax Act makes it clear that a non-member spouse who receives a portion of the member's pension benefit in terms of a decree of divorce is liable for the tax on the benefit , does not outlaw the obligation of the one spouse to pay the other spouse a specified agreed amount. Mr Vorster's liability to pay R2 000 000 is not met when a deduction for tax is made. He still needs to make good the deficit which has arisen due to the deduction of the tax.

The court found that Mr Vorster was indebted to Mrs Vorster in the amount of R567 000 and ordered that he pays this amount with interest to Mrs Vorster.

C. Emilio Pietro Valfredo Montanari v Charmaine Helen Montanari (case number 26868/2014): High Court – Divorce and living annuities

Mr Montanari was married to Mrs Montanari out of community of property subject to the accrual system. They were in the process of getting divorced. The matter which the court had to determine was whether or not a living annuity, which was bought by Mr Montanari when he retired from the pension fund that he was a member of, should form part of the accrual in their estate upon divorce.

In July 2008, Mr Montanari used a portion of his pension benefit which arose out of his employment to purchase a living annuity. In November 2011 when he retired from employment he purchased a further living annuity. The living annuities were Mr Montanari's source of monthly income.

The court firstly looked at whether the living annuity is considered to be pension interest in terms of sections 7(7) and (8) of the Divorce Act. The court made reference to the *Eskom Pension and Provident Fund v Krugel and another 2012(6) SA 143 (SCA)* which confirmed that a pension interest terminated if it accrued to the member before the date of divorce. Therefore there was no pension interest in this case as the pension interest was used to purchase a living annuity when Mr Montanari had retired from the fund of which he was a member while they were still married.

In terms of General Notice 18 of the Second Schedule to the Income Tax Act, an individual annuitant never has a call on the capital in the annuity, but only a call on the income derived from the value of the

capital that has been invested with the insurer. The capital in the annuity will never accrue to the annuitant as capital, unless it reaches the amount as gazetted. In this instance, Mr Montanari was only entitled to periodical payments and not the capital amount that was in the annuity.

In this context, the court found that a living annuity does not form part of the estate for purposes of accrual; however, the monthly or periodical payments that Mr Montanari was getting, could be taken into account to assess the future maintenance needs of Mrs Montanari.

D. GGM v TAM and Stanlib Wealth Management Ltd (case number 230/2016): High Court – Divorce and living annuities

GGM was married to TAM in community of property. They got divorced in April 2015. GGM in her notice of motion sought relief to the extent that she should be entitled to 50% of TAM's capital in the living annuity, which was administered by Stanlib Wealth Management (the administrator), once the investment falls due to TAM or his estate. She further requested that until such time that the capital became due to TAM, she should receive 50% of all pay-outs, proceeds, interest, pensions, and drawdowns of whatever nature that is made to TAM. In the alternative, she requested that judgement be granted in her favour against TAM for payment of the amount of R1 070 021, 28 together with interest of 9% per annum.

The attorneys for the administrator pointed out to the court that section 37A(1) of the Pension Funds Act (the Act) provides protection to pension benefits and applies to both the capital amount and any monthly or periodical payments made by the fund. The court, in deciding whether GGM would be entitled to half of the monthly pay-outs, referred to section 37A(1) and said that in terms of section 37A(1) a benefit is defined as any amount payable to a member or beneficiary. The Act does not distinguish between capital amounts and monthly pay-outs or proceeds and it is therefore the view of the court that the term "any amount" is quite extensive to include both the capital and monthly pay-outs or proceeds, and as such is afforded the protection granted under section 37A(1). Any order directing the administrator to pay half of the monthly proceeds directly to GGM would amount to a reduction, transfer, execution or attachment and would be contrary to the purpose of the Act.

In the case of *Ehlers v Nedcor Defined Contribution Provident Fund and Another (2002) 3 BPLR 3141 (PFA),* the Pension Funds Adjudicator mentioned that any money paid into an account, loses its "pension status" and the protection granted by section 37A(1) of the Act would no longer apply, as the ownership would have passed from the fund to the bank where the account is held. The court considered this to be the correct view.

The court concluded that the protection that is granted to capital amounts in terms of section 37A(1) of the Act equally applies to monthly pay-outs or proceeds that is due to a member as long as the money is still under the control of the fund. Once the money is paid from the fund to the bank account, ownership passes to the bank and the provisions of section 37A(1) of the Act will no longer apply.

E. B.S.M v N.A.M (case number HCA18/2015): High Court – Divorce order wording

N.A.M instituted divorce proceedings against B.S.M in the regional court. N.A.M., in his particulars of claim, did not plead for payment of B.S.M's pension benefit. B.S.M, in her particulars of claim, also did not plead for payment of the N.A.M.'s pension benefit.

The issues that the court had to deal with were whether or not pension interest automatically forms part of the joint estate of the parties or if it is brought in by operation of law. The second issue was whether or not it is necessary to specifically mention the pension benefit in the divorce papers and whether or not an omission, by the court in divorce proceedings, of his/her spouse's pension interest amounts to an order of forfeiture by the non-member spouse of his/her member spouse's pension interest.

The court referred to the case of *Eskom Pension and Provident Fund v Krugel and another 2012(6) SA 143 (SCA)* and mentioned that although a pension interest of a member spouse is deemed to form part of the assets that constitute the patrimonial benefits of the marriage, the non-member spouse becomes entitled to a percentage of the pension interest only when it is assigned to him or her in terms of section 7(8)(a) of the Divorce Act. The court mentioned that where the parties are married in community of property, if a non-member spouse institutes a claim for pension benefits in terms of section 7(7) of the Divorce Act in divorce proceedings against a member spouse for 50% of their pension interest and in the absence of a forfeiture order, such an order will be granted by the court that is granting the decree of divorce in terms of section 7(8)(a)(i) of the Divorce Act. Without this order, the non-member spouse will not be able to enforce a claim for such pension interest against the pension fund concerned.

In addressing the issues in this case, the court came to the conclusion that the pension interest of a spouse who is married in community of property automatically falls into the joint estate upon divorce and does not have to be specifically mentioned in the order for it to be part of the joint estate under section 7(7) of the Divorce Act. Secondly, section 7(8)(a)(i) of the Divorce Act empowers the court that grants the order to make an order that any part of pension interest which is due or assigned to the non-member spouse must be paid to the non-member spouse by the fund when any pension benefit accrues to the member. Lastly, an omission by a court to award a non-member spouse 50% of his/her member spouse's pension interest does not amount to an order of forfeiture by the non-member spouse of his/her member spouse's pension interest.

In light of the above, even though the pension interest of a spouse who is married in community of property automatically falls into the joint estate upon divorce and does not have to be specifically mentioned in the order for it to be part of the joint estate, an order in terms of section 7(8)(a) of the Divorce Act is required in order to enable the non-member spouse to give effect to the order and compel the fund to pay the portion that is due to the non-member spouse. In the absence of an order in terms of section 7(8)(a), the fund would not pay any portion to the non-member spouse, as there would be no order against the fund to do so. In such a case, the non-member spouse would have to claim their share of the pension interest from the member personally.

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