



Case law update – Divorce issues

This update discusses several recent judgements that have an impact on pension funds, in particular divorce matters.

A. **Maria Mahlako Tsebe v Nelson Magoge Tsebe (case number 39138/2014): High court – Forfeiture of pension interest in a divorce matter**

Mr Tsebe was employed by Toyota SA. In 2013 he was dismissed and received a pension benefit of R125 000. Mrs Tsebe was employed by the South African Post Office and was a member of the Post Office Retirement Fund.

Mr and Mrs Tsebe were in a relationship for seven years. In that time, Mrs Tsebe had an affair. However, the parties reconciled and got married in 2002. Two children were born of that marriage.

In 2013, Mr Tsebe moved out of the common home and went to stay in Limpopo after losing his job. He was responsible for bond payments and other expenses within the common home which Mrs Tsebe now became responsible for. Mrs Tsebe said that when Mr Tsebe got paid his pension money, he did not use it for the benefit of their joint estate, but rather for his own personal benefit. He started up a business which was not successful. Mr Tsebe claimed half of Mrs Tsebe's pension benefit in light of the fact that they are getting divorced. Mrs Tsebe felt that he should not be allowed to claim any part of her pension benefit and that he should forfeit that right.

Mrs Tsebe said that during the course of the marriage, Mr Tsebe had extra-marital affairs with various women and he fathered children with two of these women. When Mrs Tsebe confronted him about the affair with one of the women, he said that the woman was going to be his next wife. Mrs Tsebe further stated that Mr Tsebe never contributed to the maintenance of their children or the household expenses. Mr Tsebe argued that the reason for the breakdown of their marriage was that Mrs Tsebe never really ended the affair that she had before they got married.

After considering these facts, the court looked at section 9(1) of the Divorce Act, which states that when a decree of divorce is granted on the grounds of the irretrievable breakdown of the marriage, the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstance which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, was satisfied that, if the order for the forfeiture was not made, the one party will in relation to the other be unduly benefited.

In giving consideration to this, the court said that the presence of any one of the factors mentioned in section 9(1) of the Divorce Act is sufficient for the court to make an order for forfeiture; they do not need to be considered cumulatively.

Disclaimer:

Copyright reserved © MMI 2016

Conditions for use: The contents of this document may not be changed in any way. The document is for illustrative purposes only and does not constitute tax, legal, accounting or financial advice. The user relies on the contents at his sole discretion. A person should not act in terms of the information in this document without discussing it with an authorised financial adviser and should seek personal, legal and tax advice. MMI Holdings Limited, its subsidiaries, including MMI Group Limited, shall not be liable for any loss, damage (whether direct or consequential) or expenses of any nature which may be suffered as a result of or which may be attributable, directly or indirectly, to the use or reliance upon this publication.

MMI Group Limited (registration number: 1904/002186/06) is an authorised financial services and credit provider.

MMI Group Limited is a wholly owned subsidiary of MMI Holdings Limited.

Mrs Tsebe focused on the point that Mr Tsebe had used his full pension benefit purely for himself and not for the benefit of the joint estate. The court said that such action would amount to substantial misconduct. Based on the evidence provided, it was clear that Mr Tsebe did not consult with Mrs Tsebe about how the money should be used; instead he just informed her that he would be starting a business with that money. The court pointed out that there was a difference between consulting with someone and informing someone of something. The pension benefit belonged to the joint estate, and as such Mr Tsebe should have consulted with Mrs Tsebe, and not merely inform her of what he intended to do with the benefit.

Based on the facts and evidence put before the court, the court found that Mr Tsebe used the money exclusively for his own benefit, to the detriment of the joint estate and in particular Mrs Tsebe. That constituted substantial misconduct as mentioned in section 9(1) of the Divorce Act. The court found that Mr Tsebe would be unduly benefitted if the order for forfeiture was not granted.

The application was successful. Mr Tsebe was ordered to forfeit his claim to 50% of Mrs Tsebe's pension interest held in the Post Office Retirement Fund.

B. Ndaba v Ndaba (600/2015) [2016] ZASCA 162: Supreme Court of Appeal – Pension interest part of joint estate

Mr Ndaba and Ms Ndaba were married in community of property. They got divorced on 25 May 2012. The divorce order made it clear that the deed of settlement between the parties was an order of court. In the deed of settlement, the parties agreed that their joint estate would be divided equally between them. That clause was added in because the parties could not reach an agreement on the method of the division of the estate.

On 26 June 2013, Ms Ndaba instituted legal proceedings in the High court against Mr Ndaba in which she sought an order for the appointment of a liquidator. She also sought a declaratory order stating that both herself and Mr Ndaba were entitled to an amount equal to 50% of each other's pension interest and that each pension fund be directed to endorse their records to indicate the payments that are due as at date of divorce and that the payments be made by the funds when the pension benefits accrue. Mr Ndaba did not oppose the appointment of the liquidator. However, he opposed the remainder of the relief that Ms Ndaba had requested. Mr Ndaba said that Ms Ndaba had renounced her claim in relation to the pension interest in her divorce action. Mr Ndaba stated that the pension interest did not form part of Ms Ndaba's claim when she instituted divorce proceedings, that it did not form part of the deed of settlement and that no order was granted in terms of which it was deemed to be part of the assets in the joint estate in accordance with sections 7(7) and 7(8) of the Divorce Act (the Act).

The High Court

The court started off by asking two important questions:

1. Could it grant an order declaring the parties' respective pension interests to be part of the joint estate long after the dissolution of the marriage, even though no such order was made by the order granting the decree of divorce?
2. Was the court open to varying the divorce order by applying a blanket order relating to the division of the joint estate by inclusion of the parties' respective pension interests?

After reviewing several judgements, the court held that the Act contemplates that any order in terms of sections 7(7)(a) and 7(8) can only be granted by the court that grants the decree of divorce. Sections 7(7)(a) and section 7(8) cannot be invoked after the dissolution of the marriage. If the court order that was granted by the divorce court did not indicate that pension interest was part of the assets of the joint estate, then such pension interest did not form part of the joint estate. The court dismissed the application.

Supreme Court of Appeal

Ms Ndaba decided to appeal the matter. The key issue of the appeal was whether a non-member spouse who was married in community of property was entitled to a portion of the pension interest of the member spouse in circumstances where the court granting the divorce order did not make an order declaring that the pension interest should form part of the joint estate.

The court looked at various judgements that dealt with this matter.

In the case of *Sempapalele v Sempapalele & another 2001 (2) SA 306 (O)*, the court dealt with a claim by a former spouse for the payment of pension interest of the member spouse one year after the dissolution of their marriage. In the settlement agreement which was made an order of court, the joint estate was to be divided between them. The court in this case said that the non-member spouse failed to get a court order at the divorce hearing awarding the non-member spouse a share of the member spouse's pension interest in terms of section 7 of the Act. The court concluded that she could not get an order now, one year after the divorce had been granted.

In the case of *Maharaj v Maharaj and Others 2002 (2) SA 648 (D)*, the court was faced with the same situation as the *Sempapalele* case above. However, the court came to a different conclusion in this case. It stated that when the joint estate of spouses who were married in community of property was being divided, it was proper to take into account the value of the pension interest as an asset in the joint estate.

In the case of *Kotze v Kotze and Another (2013) JOL 30037 (WCC)*, the court had to determine whether or not a claim for pension interest could be made even after the division of the joint estate had already taken place. The wife in this case sought an order declaring that she was entitled to 50% of the husband's pension benefit that was payable to the husband years after they had actually been divorced. The court was of the view that where parties who were married in community of property did not deal with pension interest in divorce proceedings by way of a settlement agreement or by an order of forfeiture, both the member spouse and the non-member spouse remained entitled to share in the member spouse's pension interest, which must be determined as at the date of divorce as per section 7(7)(a) of the Act. The fact that the estate had already been divided, should not affect that entitlement.

After considering these judgements, the court held that the intention of the legislature by inserting section 7(7)(a) into the Act was to enhance the patrimonial benefits of the non-member spouse. The language in section 7(7)(a) was clear in that the pension interest of the member spouse vested in the joint estate for the purposes of determining the patrimonial benefit to which the parties were entitled to as at the date of divorce. The intention of section 7(7)(a) provided for the pension interest to automatically be deemed part of the joint estate where the parties were married in community of property. However, an order in terms of section 7(8) of the Act was necessary in order to create the mechanism which would then place an obligation on the fund to make the payment of the portion of pension interest directly to the non-member spouse. Where no such order was granted, the agreement was then binding between the parties only.

The appeal was upheld and Ms Ndaba was entitled to a portion of Mr Ndaba's pension interest as it automatically formed part of the joint estate.

**C. JN Koekemoer v ABSA Pension Fund and ABSA Consultants and Actuaries (Pty) Ltd
PFA/GP/00025359/2016/MD: PFA – Retirement and Pension Interest**

Mr Koekemoer was a member of the ABSA Pension Fund (the fund). The fund was administered by ABSA Consultants and Actuaries (the administrator). Mr and Mrs Koekemoer got divorced in September 2015. At the time of divorce, Mr Koekemoer had already retired from employment and was receiving a pension from the fund. The settlement agreement that was made an order of the court stated that Mrs Koekemoer should get 50% of Mr Koekemoer's pension interest in the fund. Due to the fact that Mr Koekemoer had already retired from employment at the date of divorce, based on the definition of pension interest in the Divorce Act, Mr Koekemoer no longer had any pension interest within the fund. Mr Koekemoer stated that Mrs Koekemoer should get 50% of the capital value of his pension as mentioned in section 37D of the Pension Funds Act (the Act).

The administrator explained to Mr Koekemoer that at the time of divorce he was already receiving a monthly pension from the fund. In terms of the definition of pension interest in the Divorce Act, the right of a former spouse to a portion of a pensioner's pension payments where such payments accrued to the pensioner prior to the date of divorce, does not constitute an entitlement. They further mentioned that section 37D of the Act is in contradiction of the definition of pension interest in the Divorce Act, and that any order that is made in terms of section 7(8) of the Divorce Act can only be enforced where there is pension interest.

The Pension Funds Adjudicator (PFA) had to determine whether the administrator was justified in its refusal to pay a share of the capital value of Mr Koekemoer's pension to Mrs Koekemoer following their divorce. The PFA pointed out that before 28 February 2014 the law did not allow for a non-member spouse to claim a share of the pension benefit of a member if the divorce did not take place before the payment of a retirement benefit. Once a member has gone on retirement, the non-member spouse could not claim the share of the pension benefit, as there was no pension interest available at the time. Since the Act was amended, the PFA was of the view that a positive interpretation to the legislation must be adopted, even though from a technical point of view the fund would not be able to implement the provision; the intention of the legislature and the defect or anomaly it sought to cure must be given effect to.

Based on the current wording of the settlement agreement, the PFA agreed that the administrator was justified in not giving effect to the order, as the order referred to pension interest and does not state that Mrs Koekemoer should receive 50% of the capital value of Mr Koekemoer's pension. Had the settlement agreement been correctly worded to reflect the intention of the parties, the PFA would have had to look at the problematic issue of the amendment being contradictory to the definition of pension interest in the Divorce Act and the actual intention of the amendment and what it sought to achieve.

The complaint was dismissed. The parties were advised to amend the divorce order to reflect their intention to pay a share of the capital value of Mr Koekemoer's pension to Mrs Koekemoer.

Shameer Chothia

Legal Specialist: Products

Retirement Fund Governance

MMI Investments and Savings: Retirement Solutions