

Case law update – Divorce matters

This update discusses several recent determinations / judgements relating to divorce matters that have an impact on retirement funds, and where applicable, sets out the position adopted by the MMI Sponsor Funds.

A. Summary

1. N.C.M v V.T.M (2017) ZAECGHC 75

- The court found that for an applicant to successfully apply for an anti-dissipation order she must show that the respondent is getting rid of money or there is the likelihood of him doing so, with the intention of defeating creditors. An anti-dissipation order is a type of interdict that stops a person from freely dealing with his own property that another person does not have a claim to. Mrs M could not show that Mr M was getting rid of or was likely to get rid of his pension fund benefit with the intention of defeating her claims in the divorce proceedings.
- Where there is an anti-dissipation order, the Fund can only execute it while the member spouse remains a member of the Fund. When the member spouse's membership comes to an end, in the absence of a valid and binding divorce order, the Fund must pay the member his benefit.

2. C v C (2017) ZAGPPHC 524

- The court found that based on the wording of the clause in the parties' settlement agreement, the intention was that the 50% capital amount was the amount due to Mrs C, before any tax liability on the pension interest was deducted.
- When the Fund receives a valid and binding divorce order where the non-member spouse is entitled to receive a portion of the member's pension interest, the amount is treated as an amount before tax. The order must specify that the amount to be paid to the non-member spouse is an amount to be paid after tax or net of tax.

B. Case law

1. N.C.M v V.T.M and Another (2017) ZAECGHC 75 – High Court: Requirements for an anti-dissipation order

Mrs M and Mr M were married in community of property. Mr M was a member of the Evergreen Provident Fund. Mrs M started divorce proceedings and approached the High Court for an anti-dissipation order. This is a type of interdict that would have stopped Mr M from freely dealing with property which Mrs M had no claim to; in this case, it related to Mr M's retirement fund benefits.

The court found that for an applicant to succeed with an application for an anti-dissipation order, she would have to show that the respondent is getting rid of funds or there is the likelihood of him doing so, with the intention of defeating creditors. The court added that it may be in the best interests of justice in certain circumstances to have such a restriction or limitation on the respondent, if he is shown to be acting in bad faith. Despite that, there would not ordinarily be any justification to force a respondent to regulate his spending that is done in good faith in order to keep his retirement funds for the payment of a claim, especially a claim that is disputed.

On the facts, the court found that Mrs M would have to show, through credible evidence that Mr M was wasting or disposing of assets with the intention of defeating her claim in the divorce proceedings. Mrs M claimed that she had received information from Mr M's relatives that he was using his fund benefit in an extravagant or reckless manner.

The court identified two problems with Mrs M's claim. The first was that she did not disclose the identities of the relatives. This would have enabled Mr M to check with them the accuracy of the information that was supposedly given to Mrs M. The second was that unless Mrs M and Mr M agreed, Mrs M could not bring hearsay evidence, namely information she claimed to have received from the relatives, before the court without calling one of the relatives as a witness. Mrs M did not present any evidence to show that it would be in the interests of justice to allow the hearsay evidence. Mrs M had not placed any facts before the court to show that Mr M was getting rid of or was likely to get rid of the retirement fund benefit with the intention of defeating her claims in the divorce proceedings.

The court dismissed the application.

Approach adopted by the MMI Sponsor Funds

Where there is an anti-dissipation order, the Fund can only execute it while the member spouse remains a member of the Fund. When the member spouse's membership comes to an end, in the absence of a valid and binding divorce order, the Fund must pay the member his benefit. The requirements for a valid and binding divorce order are discussed in [Legal Update 5-2016](#)

2. C v C (2017) ZAGPPHC 524 – High Court: Calculation of non-member spouse's portion of pension interest

Mr and Mrs C were getting divorced. As part of their divorce settlement, they agreed that Mrs C would be entitled to receive 50% of Mr C's pension interests in two pension funds. R1.5 million would be transferred into a pension fund of Mrs C's choice and the balance would be paid directly to Mrs C. The parties agreed that Mr C would be responsible for any tax that may be payable on the amount paid directly to Mrs C. The parties did not have an agreement for the tax obligation on the R1.5 million, as they mistakenly believed that no tax would be payable on this amount.

Mr C was retrenched before the divorce was finalised. His retrenchment terminated his pension fund membership before the divorce settlement agreement had been finalised. His full pension

benefit became payable to him before they had finalised the settlement agreement, but they did not know this. As a result, the R1.5 million could no longer be paid in the way the parties had anticipated, that is to say a transfer from one pension fund to another. A dispute arose as to whether the 50% Mrs C was entitled to would be calculated on the gross or net of tax value of Mr C's pension interest.

The court first looked at the wording of the settlement agreement, specifically the clause that dealt with the payment of the balance of Mrs C's share of the pension interest. The clause stated that on the balance of the 50% of the pension interest payable, Mr C would ensure that Mrs C would receive the amount net of tax and Mr C would be responsible for any tax liability that would arise on that amount. The court found that based on the wording of that clause, the intention was that the 50% capital amount was the amount due to Mrs C before any tax liability on the pension interest was deducted.

The court then found that even though the R1.5 million could no longer be transferred from one pension fund to another, this only affected the manner in which the money was to be paid. All that happened was that the agreed manner of payment failed, but the obligation was still capable of being met, just in a different way. The purpose of paying the R1.5 million into another pension fund was to ensure that Mr's C's tax liability was postponed until she received the money from the pension fund into which the money was paid.

The court further found that since the manner in which the money would be paid had changed, the tax liability on the R1.5 million could no longer be postponed. Mrs C was responsible for the tax liability on the amount. This was regardless of the agreement between them on who was liable to pay the tax to SARS and of who actually paid it. If Mr C paid the tax to SARS, he would be entitled to recover it from Mrs C.

The court ruled that the calculation of the value of Mr C's pension interest in order to determine Mrs C's share would be done on the gross value, without taking into account any tax liability Mr C had on the pension interest. Mrs C would be liable to pay for any tax that may be payable on the R1.5 million.

Approach adopted by MMI Sponsor Funds

When the Fund receives a valid and binding divorce order where the non-member spouse is entitled to receive a portion of the member's pension interest, the amount is treated as an amount before tax. The order must specify that the amount to be paid to the non-member spouse is an amount to be paid after tax.

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