Case law update – Matrimonial and divorce issues

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

A. Ramuhovhi and Another v The President of the Republic of South Africa and Others (Case number: 412/2015) - High Court: Polygamous customary marriages

Mr Ramuhovhi and Ms Netshituka approached the High Court for an order declaring section 7(1) of the Recognition of Customary Marriages Act (the Act) unconstitutional and invalid. Section 7(1) provides that the patrimonial consequences of polygamous customary marriages entered into before the Act came into effect are regulated by customary law. Polygamous refers to the custom of having more than one spouse at the same time. A customary marriage is one that is "negotiated, celebrated or concluded according to any of the systems of indigenous African customary law which exist in South Africa". Mr Ramuhovhi and Ms Netshituka argued that the Act unfairly discriminated against old polygamous customary marriages because the effect of section 7(1) of the Act and Venda customary law was that both Mr Ramuhovhi and Ms Netshituka's mothers could not own the assets that their deceased father had accumulated.

The court looked at the case of *Gumede v President of Republic of South Africa and Others 2009 (3) SA 152 (CC)*, where the Constitutional Court found section 7(1) of the Act to be unconstitutional in respect of monogamous customary marriages. In that decision, the Constitutional Court ruled that such marriages would be in community of property unless excluded by an ante-nuptial contract, regardless of whether the marriage was entered into before or after the Act came into effect. This decision did not change the position of old polygamous marriages which were still regulated by section 7(1) of the Act.

The court found that since old polygamous marriages were regulated by customary law, this meant that wives were excluded from participating in, managing and controlling the marital property. Wives would continue to be excluded because their marriages were entered into before the Act came into effect and because they entered into polygamous marriages. The court further found that under Venda customary law, women did not have rights in managing and controlling marital property. The effect was that section 7(1) of the Act excluded wives in old polygamous marriages from such rights.

The court declared section 7(1) of the Act unconstitutional and invalid insofar as it unfairly discriminated against old polygamous marriages. The court ordered that wives who are parties to old polygamous marriages will have equal rights of management and control over marital property to their husbands. Any rights to own, manage or control property that a wife in a polygamous marriage may have under

customary law would not be affected by the court order. The court order would apply retrospectively. It would not apply to customary marriages that ended by death or divorce before the date of the order. The court order would not affect the legal consequences of any act, omission or fact that existed in relation to a polygamous customary marriage made before the court order.

The court granted the application to declare section 7(1) unconstitutional and invalid as it unfairly discriminated against wives in old polygamous customary marriages.

Approach adopted by the MMI Sponsor Funds

The Pension Funds Act definition of spouse includes a permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, the Recognition of Customary Marriages Act or the Civil Union Act, or the tenets of a religion.

The FundsAtWork insurance benefit policies define a spouse as a person who is married to the member under any law or custom, including customary marriage, Asiatic religions and permanent life partnerships that have been in existence for more than six months.

The MMI Sponsor Funds recognise customary marriages for purposes of fund and insurance related benefits.

B. R.C. v M.S.P. (Case number: 1009/2016): High Court – Requirements for a valid customary marriage

Ms C filed for divorce in the High Court to end a customary marriage she claimed she had entered into with Mr P. Mr P opposed the divorce on the basis that he and Ms C were never married as Ms C had never been formally handed over to his family in terms of customary law. The parties agreed that the court had to first determine whether there was a valid customary marriage before it could grant the divorce order.

The court found that the handing over of a bride to the groom's family does not require a formal ceremony. As Ms C continued to live with Mr P after lobola had been paid and with the knowledge of her mother, this was sufficient to show that Ms C had in fact been handed over to Mr P's family. The court also found that since Ms C and Mr P lived together after the lobola had been paid, this would also be seen as constructive delivery. The formal ceremony of handing over Ms C to Mr P's family would have then just been a gesture and would not have had any negative effect on the validity of the customary marriage.

The court ordered that a valid customary marriage existed between Ms C and Mr P.

Approach adopted by the MMI Sponsor Funds

If a member is married in a customary marriage and would like to claim a death benefit as a spouse, such member must provide the Fund / insurer with proof of the customary marriage, such as a lobola letter or a signed letter from the tribal chief confirming the marriage.

C. Labuschagne v Labuschagne and Others (Appeal number: A9.2015): High Court – Access to information

Mr and Mrs Labuschagne were married in community of property on 20 September 2000. The marriage ended and a divorce order was granted on 14 October 2008. The order provided that Mrs Labuschagne was entitled to 50% of Mr Labuschagne's pension benefit at the date of payment of the pension benefit.

Mr Labuschagne's pension benefit accrued to him in September 2012. Mrs Labuschagne then attempted to get payment of the 50% that she was entitled to. Mr Labuschagne transferred an amount of R156 634.79 to Mrs Labuschagne's attorney's trust account but Mrs Labuschagne was not certain

that the amount he paid was in fact the amount she was entitled to. She unsuccessfully tried to get more information and documents from Mr Labuschagne that would show how much his pension benefit was and how much she was entitled to.

Mrs Labuschagne then wrote several letters to Metropolitan Retirement Administrators (MRA) who administered and managed the Transnet Retirement Fund to which Mr Labuschagne was a member, requesting information that would allow her to correctly determine what the exact value of Mr Labuschagne's pension benefit was and how much she was entitled to. Mrs Labuschagne never got a reply to those letters. She then applied to the High Court for an order against Mr Labuschagne and MRA for the information to be given to her. The court granted this order.

Mr Labuschagne appealed the decision on the basis that; (1) the court order named Transwerk Pensioenfonds, a pension fund that he was never a member of; (2) he did not have any of the documents that Mrs Labuschagne had asked for; and (3) the court had effectively granted an order for the discovery of documents when there were no ongoing legal proceedings and this should not have been allowed. The case of *Krygkor Pensioenfonds v Smith 1993 (3) SA 459 (A)* was referred to.In this case, the Appeal Court found that while a court has inherent power to depart from its own procedures, it could only do so when exceptional circumstances exist and where the requirements of justice demand it.

The court dismissed Mr Labuschagne's argument regarding the name of the pension fund in the court order. It found that at all relevant times Mr Labuschagne was a member of the same fund, which merely underwent a name change from *Transwerk Pensioenfonds* to *Transnet Retirement Fund*; it was still the same legal entity. It found that this could not be a ground for the court to have refused the application.

The court also found that exceptional circumstances existed in this case, which justified its decision to depart from its own procedures. There was no clear indication from Mr Labuschagne as to what the exact value of his pension benefit was. Without this information, Mrs Labuschagne would have had to speculate as to whether she had a valid claim or not and how much money she was entitled to from such a claim.

Mr Labuschagne admitted that he had no documents which he would be able to provide to Mrs Labuschagne. The court found that the conduct of Mr Labuschagne was obstructive in nature and he was very uncooperative, with the intention of frustrating Mrs Labuschagne's attempts to get the necessary information in order to claim further payments from him.

The court dismissed the appeal.

Approach adopted by the MMI Sponsor Funds

Where the divorce proceedings between the member and non-member spouse have not yet been finalised (i.e.: a court order has not yet been issued), the MMI Sponsor Funds will disclose a member's pension interest to an attorney acting for the non-member spouse where the attorney requires the value of the member's pension interest to accurately assess the value of the joint estate, on the attorney's written request. Refer to paragraph 5 of Legal Update 6 of 2015 for more information on this topic. .

D. Vermeulen v Marx (Case number: 19398/2014): High Court – Universal partnerships

Ms Vermeulen approached the High Court for an order declaring that a universal partnership had existed between her and Mr Marx. Ms Vermeulen was of the view that she and Mr Marx had equal shares in the partnership, and as such she was entitled to an equal share of the assets accumulated during the course of the partnership. Ms Vermeulen said that she and Mr Marx had lived as husband and wife for 18 years and it was always her understanding that they would grow old together so they accumulated property together for their retirement. Ms Vermeulen and Mr Marx entered into a

relationship in 1992. They jointly bought a house and agreed to share living expenses such as buying groceries and home maintenance. Mr Marx ended the relationship in October 2013.

The court looked at the case of *Pezzuto v Dreyer and Others 1992 (3) SA 379 (A)* which held that in order for a universal partnership to have existed, it must be shown that: (1) each of the parties brought something into the partnership, whether it was money, labour or skill; (2) the partnership was carried on for the joint benefit of the parties; (3) the object was to make money; and (4) the contract must have been a legitimate one.

The court stated that a universal partnership can be express or tacit (derived from the conduct of the parties). Where more than one conclusion can be reached based on the conduct of the parties, the test for whether a tacit (unspoken) universal partnership existed is whether it is more probable than not that a tacit agreement had been reached.

The court looked at the conduct of the parties to determine if a universal partnership had existed. The parties had lived together and contributed to household expenses and food together, without following strict rules on how they contributed. Mr Marx had nominated Ms Vermeulen as the sole beneficiary of his death benefits. He had also left his entire estate to Ms Vermeulen in his will, despite him having a close relationship with his family, some of whom were not doing well financially. There was no evidence to show that he had ever amended his will or nominated a new beneficiary for his death benefits. Ms Vermeulen was still a dependant on Mr Marx's medical aid at the time that the court proceedings were instituted. Mr Marx also paid Ms Vermeulen a monthly amount of R16 000, which he had stopped paying on advice from his attorneys. Mr Marx admitted that if the relationship had not ended, Ms Vermeulen would have continued to receive the payments.

In light of the above, the court found that a universal partnership had existed between the parties and ordered that Ms Vermeulen had a 33% share in the partnership. The court further ordered that the parties were to appoint a liquidator to release the universal partnership assets, sell them and pay 33% of the net proceeds to Ms Vermeulen.

Approach adopted by the MMI Sponsor Funds

The definition of "spouse" in the FundsAtWork insurance benefit policies does not include a partner in a universal partnership *per se*. It does however include permanent life partnerships that have been in existence for more than six months. Accordingly, a partner in a universal partnership for more than six months would qualify as a spouse. As far as death benefits payable by the MMI Sponsor Funds are concerned, a partner in a universal partnership will qualify as a dependant based on factual dependency.

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