Legal update

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Case law update – Matrimonial matters

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

A. Summary

1. Moosa and Others v Minister of Justice and Correctional Services and Others (2018) ZACC 19 (29 June 2018)

- Section 2C(1) of the Wills Act was declared invalid as the definition of spouse did not include spouses in polygamous Muslim marriages.
- Retirement benefits:

  The Pension Funds Act definition of spouse includes a permanent life partner or spouse or civil union partner of a member according to the Marriage Act, the Recognition of Customary Marriages Act or the Civil Union Act, or the tenets of a religion. A spouse in a Muslim marriage for that reason qualifies for retirement fund benefits.
- Insurance benefits:

  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. A spouse in a Muslim marriage also qualifies for insurance benefits under a FundsAtWork insurance benefit policy.

2. Moephuli v Government Employees Pension Fund and Another (2017) ZAGPPHC 505 (21 August 2017)

- The Government Employees Pension Fund chose to follow a second divorce order which entitled the non-member spouse to a portion of the member's pension interest, while there was a valid first divorce order which said that each party retained their pension interest.
- The MMI Sponsor Funds have not received any conflicting divorce orders yet. If the Funds receive conflicting orders, they will comply with the first order unless it is clear that the second order amends or substitutes the first one. The MMI Sponsor Funds have received vague orders or orders with ambiguities. In those cases, the parties have been asked to clarify the ambiguities, or where that could not be done to go back to court to get clear and valid divorce orders.

3. **ST v CT (2018) ZASCA 73 (30 May 2018)**

   - A living annuity should not be included in the accrual calculation during divorce proceedings. Having a living annuity does not result in an annuitant being a member of a 'pension fund organisation' as defined in the Pension Funds Act. The annuitant's status of being a member ends when his interests in his previous funds are used to buy the living annuity. The provisions in the Divorce Act dealing with a spouse's 'pension interest' do not apply.

4. **ED Page v Municipal Gratuity Fund and Sanlam Life Insurance Limited PFA/GP/00036463/2017/MD – Pension interest on divorce**

   - When people are married out of community of property there is no joining of the spouses' estates into one joint estate. Each spouse has a separate estate which is made up of its own assets and debts acquired during the marriage. Since the parties in this case did not have a joint estate, the pension interest could not be deemed to be part of a joint estate to be divided.
   - The Funds will comply with a valid and binding divorce order, provided the parties were married in community of property or out of community of property with accrual. The different marital regimes and their impact on retirement funds are discussed in Legal Update 5 of 2015.

B. Case law

1. **Moosa and Others v Minister of Justice and Correctional Services and Others (2018) ZACC 19 (29 June 2018) – Meaning of surviving spouse in the Will Act.**

   Mr Osman Harneker was married to Ms Amina Harneker (Amina) and Ms Farieda Harneker (Farieda) according to Islamic law. In 1982, Mr Harneker applied for a housing loan. Since Muslim marriages were not legally recognised, Mr Harneker formalised his marriage to Amina so that the housing loan could be approved. The deed of transfer for the house reflected Mr Harneker and Amina's names.

   Mr Harneker passed away in 2014 and his will, which referred to both marriages, stated that his estate would be distributed under Islamic law. The Muslim Judicial Council certified that Mr Harneker's estate would be divided in certain shares to his wives and children. His children renounced the benefits (refused their rights) and the executor of the estate specified that since the children renounced their benefits, the estate would be divided equally between Amina and Farieda. This was in line with section 2C(1) of the Wills Act, which entitles a surviving spouse to the benefit of a will if the testator's descendants renounce their rights to it.

   The executor tried to register Mr Harneker's half share in the house in both Amina and Farieda's names. The Registrar of Deeds approved the registration for Amina, but not the registration in Farieda's name. He reasoned that a surviving spouse in section 2C(1) only covers spouses formally recognised by law. Amina, Farieda and the executor applied to the High Court to declare section 2C(1) of the Wills Act invalid as it unfairly discriminated against Farieda by excluding her, because her marriage was in terms of Islamic law. It also did not give her the protection that is given to polygamous customary marriages. The High Court granted the order, saying that it infringed Farieda's right to equality. The High Court ordered that section 2C(1) is changed to include the words "For purposes of this sub-section, a surviving spouse includes every husband and wife of a monogamous and polygamous Muslim marriage solemnised under the religion of Islam". The matter was referred to the Constitutional Court (CC) to confirm the invalidity.

   The CC agreed with the High Court's decision and further added that Farieda's right to dignity was also infringed. The CC found that by not recognising Farieda as a surviving spouse together with denying her the right to inherit from her deceased husband's will struck at the heart of her marriage of 50 years. It told her that her marriage was and is not worthy of legal protection. This reduced her self-worth and increased her feeling of being vulnerable as a Muslim woman. This was even more so since there is no legislation that regulates Muslim marriages or their consequences.

   The CC confirmed the High Court's order.

Approach adopted by the MMI Sponsor Funds

Retirement benefits:

The Pension Funds Act definition of spouse includes a permanent life partner or spouse or civil union partner of a member according to the Marriage Act, the Recognition of Customary Marriages Act or the Civil Union Act, or the tenets of a religion. A spouse in a Muslim marriage for that reason qualifies for retirement fund benefits.

Insurance benefits:

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. A spouse in a Muslim marriage also qualifies for insurance benefits under a FundsAtWork insurance benefit policy.

2. **Moephuli v Government Employees Pension Fund and Another (2017) ZAGPPHC 505 (21 August 2017) – Conflicting divorce orders**

In November 2014, Ms Moephuli was granted a divorce order (first order) by the Mmabatho division of the High Court. The order provided that the each party would retain their own pension benefits. Ms Moephuli was a member of the Government Employees Pension Fund (GEPF) and after the divorce order was granted she went to their offices 7 times to ensure that the terms of the first order were properly recorded.

In the meantime, Ms Moephuli's ex-husband, Mr Tindisa, was granted a second divorce order (second order) in the Regional Division of Gauteng Pretoria. The second order provided that the GEPF must pay half of Ms Moephuli's pension interest to Mr Tindisa. When Ms Moephuli became aware of the second order, her legal representatives wrote a letter to Mr Tindisa's attorneys and to the GEPF advising them that the second order was not valid. Despite receiving the letter, the GEPF accepted the second order as valid and paid half of the pension interest to Mr Tindisa.

Ms Moephuli applied to the High Court for an order reinstating her benefit. The GEPF argued that it was entitled to ignore the letter sent to them and had to comply with the second order. The Court rejected this argument, saying that the GEPF failed to explain why it chose to comply with the second order and not the first order. The Court pointed out that the second order was invalid and made no mention of the first order. Additionally, the wording of the first order was very clear about pension interest. Even if the GEPF had believed both orders to be valid and binding, it should not have paid Mr Tindisa until the dispute over the two different court orders had been settled.

The Court went on to say that the GEPF has a duty of care to its members and must have been aware that if payments were incorrectly made from a particular member's pension fund credit, this would not only cause damages to the member concerned, but to the general membership. The Court found that even though the GEPF had been made aware of the invalidity of the second order, it negligently and recklessly proceeded with payment to Mr Tindisa.

The Court ordered the GEPF to amend their records to reflect the first order as being the only order governing Ms Moephuli's pension fund interest. It was also ordered to repay R229 338.93 plus interest that may have accrued.

Approach adopted by the MMI Sponsor Funds

The MMI Sponsor Funds have not received any conflicting divorce orders yet. If the Funds do receive conflicting orders, they will comply with the first order unless it is clear that the second order amends or substitutes the first order. The MMI Sponsor Funds have received vague orders or orders with ambiguities. In those cases, the parties have been asked to clarify the ambiguities, or where that could not be done, to go back to court to get clear and valid divorce orders.

3. ST v CT (2018) ZASCA 73 (30 May 2018) – Living annuity not included in accrual calculation

ST and CT were married out of community of property with accrual. CT filed for divorce in the High Court and claimed, amongst others, spousal maintenance, full particulars of ST's current assets and liabilities and half of the accrual. Accrual is the sharing of profits generated during the marriage when the marriage comes to an end. Put differently, what was yours before the marriage remains yours, and what you have earned during the marriage, belongs to both of you. The estate values are then determined separately and the larger estate must transfer half the net difference to the smaller estate.

To calculate the accrual, the High Court had to determine the value of each of the estates. It was accepted that CT's estate was insolvent. The High Court valued ST's estate at R22 259 702. ST did not agree with the value and when he appealed the matter to the Supreme Court of Appeal (SCA), one of his grounds of appeal was that the High Court incorrectly took into account a Sanlam Glacier living annuity, which was estimated to be worth R3 270 368.

The SCA looked at the definition of a living annuity in section 1 of the Income Tax Act, and the Government Notice 290 of 11 March 2009, and found that ST's living annuity met the requirements in that definition. The value of the living annuity was determined only by reference to the value of the assets specified in the contract. In other words, the amount of the annuity was not guaranteed. The assets themselves belonged to Sanlam, fluctuated with market conditions and reduced as the annuity was drawn down. The annual amount which ST could draw as an annuity was not less than 2.5% and not more than 17.5% of the current capital value. On ST's death, Sanlam would have to pay any remaining capital to ST's nominee as an annuity or lump sum. If ST had not completed a nomination, the capital would have to be paid as a lump sum into his estate.

A living annuity should not be included in the accrual calculation during divorce proceedings. Having a living annuity does not result in an annuitant being a member of a 'pension fund organisation' as defined in the Pension Funds Act. The annuitant's status of being a member ends when his interests in his previous funds are used to buy the living annuity. The provisions in the Divorce Act dealing with a spouse's 'pension interest' do not apply.

The SCA went on to say that the capital value of ST's living annuity could not be included as part of his accrual. The capital belonged to Sanlam and ST's only contractual right was to be paid an annuity in an amount selected by him within the permissible range specified by law. His right to receive any particular annuity payment is subject to the condition that he must be alive on the date on which the next annuity payment became payable. If he did not survive to the next date, what would happen to the capital depends on whether he nominated a beneficiary or not.

The SCA concluded that the High Court incorrectly included the living annuity as part of ST's accrual. It further found that the monthly income he received from the annuity forms part of his total income, which has a bearing on whether or not he could pay maintenance, if any, to CT.

4. **ED Page v Municipal Gratuity Fund and Sanlam Life Insurance Limited PFA/GP/00036463/2017/MD – Pension interest on divorce**

   Mr and Mrs Page were divorced in June 2017. They had been married out of community of property, without accrual. The divorce order stated that Mrs Page was entitled to R304 000 of Mr Page's retirement interest in the Municipal Gratuity Fund, of which he was a member. Mr Page asked the fund to pay Mrs Page the share of pension interest that was assigned to her, but the fund refused to pay.

   Mr Page submitted a complaint against the fund to the Pension Funds Adjudicator (PFA). He argued that sections 7(7) and 7(8) of the Divorce Act, which deal with pension interest on divorce, provide that when financial benefits are determined the pension interest is deemed to be included in the patrimonial benefits of a joint estate, if the parties were married in community of property. Mr Page also said that the sections do not apply if the parties were married out of community of property. They only apply if a court had to decide what patrimonial benefits must be included in the joint estate, if there is a dispute, and not where the parties agreed what they deem to form part of the matrimonial property. He further argued that if the parties have signed a written agreement, it should be executed.

   The PFA rejected Mr Page's argument, saying that when people are married out of community of property, there is no joining of the spouses' estates into one joint estate. Each spouse has a separate estate, which is made up of its own assets and debts acquired during the marriage. Since Mr and Mrs Page did not have a joint estate, the pension interest could not be deemed to be part of a joint estate to be divided. The PFA found that the divorce order was not binding on the fund, but was binding between Mr and Mrs Page (*inter partes*).

   The PFA dismissed the complaint.

   Approach adopted by the MMI Sponsor Funds

   The Funds will comply with a valid and binding divorce order, provided the parties were married in community of property or out of community of property with accrual. The different marital regimes and their impact on retirement funds are discussed in Legal Update 5 of 2015.

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