



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. Domestic partnerships

A domestic partnership is where two people live together and possibly share household expenses but are not married. A domestic partnership does not enjoy the same legal protection as civil marriages, civil unions or customary marriages.

2. **N v N (HCA11/2017) [2018] ZALMPPHC 7 (16 February 2018) – Correct naming of fund in divorce order**

- A non-member spouse claimed payment against a member's pension and provident fund. The court found that since the divorce order only referred to an entitlement against the pension fund, the non-member spouse was not entitled to claim payment against the member's provident fund.
- Where a divorce order is granted against a member belonging to both the FundsAtWork Umbrella Pension and Provident Funds but only one of these two funds was referred to in the divorce order, the administrator will only make a deduction against the fund that is cited in the divorce order. If the order is not clear from which fund the pension interest should be paid, the administrator will request the member to confirm and the non-member spouse to agree in writing.. If the parties cannot agree, they will have to go back to court to amend the divorce order to make it clear from which fund the pension interest should be paid.

3. **BS v PS (2018) ZASCA 37 (28 March 2018) – Application of clean break rule to Government Employees Pension Fund (GEPF) benefit**

- The Supreme Court of Appeal confirmed the clean break principle in the GEPF, which ensures that a non-member spouse will receive payment of the pension interest that was awarded in a divorce order at the time of the divorce, and not only when the member's benefit accrues to him.
- The MMI Sponsor Funds will deal with the division of a member's pension interest when we receive a valid and binding divorce order and action the non-member spouse's election as to how the amount

allocated to him/her is dealt with within the prescribed period.

4. **SS v VV-S (2018) ZACC 5 – Failure to meet maintenance obligations**

- When the member did not meet his maintenance obligations, the High Court issued a warrant of execution against his movable assets. The member did not have any movable property. The High Court then issued a warrant of execution against the member's immovable property. The Constitutional Court confirmed the attachment of immovable property, on the basis that he continued to default on his maintenance obligations and had not complied with an earlier court order for the payment of maintenance.
- The MMI Sponsor Funds will comply with a valid court order for the payment of maintenance. The maintenance amount and the tax payable by the member will be deducted, where applicable, from the member's retirement savings account or his fund benefit.

5. **Ramuhovhi and Others v President of the Republic of South Africa and Others (2017) ZACC 41 – Polygamous customary marriages**

- The Constitutional Court confirmed the High Court's declaration of invalidity of section 7(1) of the Recognition of Customary Marriages Act, as it unfairly discriminated against wives who were in customary marriages before the Act came into effect.
- 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. The FundsAtWork insurance 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 fund and insurance related benefits.

B. Domestic partnerships

A domestic partnership is one where two people live together and possibly share household expenses but are not married. Domestic partnerships are also sometimes called common law marriages or cohabitation relationships.

In South Africa, only three types of unions are legally recognised. These are civil marriages, civil unions and customary marriages. Domestic partnerships are not legally recognised and do not enjoy the same legal protection when the partnership ends.

This means that a partner in a domestic partnership cannot claim maintenance from the other partner's estate when that partner passes away. A partner can also not inherit from that partner's estate if that partner passed away without a valid will (intestate succession), unlike a spouse in a civil marriage, civil union or customary marriage. While the right to inherit intestate has been extended to permanent same-sex partnerships, partners in permanent heterosexual partnerships do not have this right.

Parties to a marriage have a choice of being married either in or out of community of property. This determines what the property consequences will be if the marriage comes to an end. Domestic partnerships do not have such property consequences. Partners in domestic partnerships often enter into contracts to regulate the property consequences if the relationship comes to an end. The courts have shown a willingness to extend contract-based legal protection to partners in a domestic partnership. See [Legal Update 8 of 2017](#) for case law on universal partnerships.

C. Case law

1. **N v N (HCA11/2017) [2018] ZALMPPHC 7 (16 February 2018) – Correct naming of fund in divorce order**

MN and FN were married in community of property and were divorced on 6 December 2004. The settlement agreement, which was made an order of the court, stated that MN was entitled to 50% of FN's right and interest in the University of the North (now University of Limpopo) Pension Fund. The court ordered that payment must be made when the money became due and payable to FN.

The Divorce Act was amended in 2011 to allow for the payment of pension interest that was awarded in a divorce order without having to wait for the pension benefit to accrue to the member (the "clean break" principle). MN then approached the fund administrator and requested payment of the amount that was due to her. The administrator informed her that payment would be made from the pension fund only, as the court order was silent about the provident fund. MN approached the Regional Court to request that the divorce order be amended to state that she was entitled to 50% of FN's right and interest in the University of Limpopo Retirement Fund (Pension and Provident Section). The Regional Court dismissed the application.

On appeal to the High Court, it found that the divorce court had ordered the fund to pay according to what was agreed to by the parties in the settlement agreement, which was made an order of court. There was no indication or proof from MN that the order mistakenly only referred to the pension fund, instead of to both the pension and provident funds.

The appeal was dismissed.

Approach adopted by the FundsAtWork Umbrella Funds

Where a divorce order is granted against a member belonging to both the FundsAtWork Umbrella Pension and Provident Funds but only one of these two Funds was referred to in the divorce order, the administrator will only make a deduction against the Fund that is cited in the divorce order. If the order is not clear from which Fund the pension interest should be paid, the administrator will request the member to confirm and the non-member spouse to agree in writing. If the parties cannot agree, they will have to go back to court to amend the divorce order to make it clear from which Fund the pension interest should be paid. The requirements for a valid and binding divorce order are discussed in [Legal Update 5 of 2016](#).

2. **BS v PS (2018) ZASCA 37 (28 March 2018) – Application of clean break rule to GEPF benefit**

BS and PS were married out of community of property with accrual. Accrual is the sharing of profits generated during the marriage if the marriage comes to an end. The estate values are then determined separately and the larger estate must transfer half the net difference to the smaller estate. BS approached the High Court for a divorce order. The matrimonial property, which was registered in PS's name, had a net accrual of R866 000. He was also a member of the GEPF and his pension benefit at the time of the divorce was valued at R4 537 231. BS was entitled to 50% of the accrual of the matrimonial property as well as a portion of PS's pension benefit in the GEPF.

The High Court ordered that payment of the pension interest awarded to BS be deferred or postponed until PS's pension benefit accrued to him.

BS appealed to the Supreme Court of Appeal (SCA). The SCA looked at section 24A of the Government Employees Pension Law (GEPL), which allows for payment of the non-member spouse's pension interest, calculated at the date of divorce, without having to wait for the member spouse to exit the fund before they could be paid (the "clean break" rule). Section 10 of the GEPL also provides that a court can order that payment of a non-member spouse's pension interest be deferred to the date on which the

member's pension benefit accrues to the member.

The SCA found that the purpose of section 24A was to ensure that the non-member spouse would receive payment of the pension interest that was awarded in the divorce order without delay. Deferring payment to the non-member spouse would defeat this purpose.

The SCA set aside the High Court's order and ordered that the GEPL pay to BS 50% of PS's pension benefit calculated in terms of the rules of the fund, at the date of divorce.

Approach adopted by MMI Sponsor Funds

The MMI Sponsor Funds will deal with the division of a member's pension interest when we receive a valid and binding divorce order and will action the non-member spouse's election as to how the amount allocated to him/her is dealt with within the prescribed period.

3. SS v VV-S (2018) ZACC 5 – Failure to meet maintenance obligations

SS and VS were married in 2007 and had one child. In 2010 a divorce order was granted, which incorporated a settlement agreement also dealing with maintenance. The order provided that SS would pay R2 500 a month for basic maintenance. It also provided that SS would pay additional amounts for the child's education and medical expenses.

VS and the child temporarily moved to the United States. On their return, VS applied for a warrant of execution in the High Court against SS for R306 550.18 for arrear maintenance. The warrant of execution authorised the Sheriff of the court to attach SS's movable assets and sell them to settle the arrear maintenance. The Sheriff could not execute the warrant as SS did not have any movable assets. VS then applied to the High Court for a warrant of execution against SS's immovable property. The High Court granted the warrant and made reference to SS's "revolting attitude" towards VS and the child, as well as his efforts at avoiding his maintenance obligation.

SS unsuccessfully applied to both the High Court and the Supreme Court of Appeal for leave to appeal the warrant. He then approached the Constitutional Court (the CC) for leave to appeal. The matter was heard on 29 August 2017. During the hearing it was discovered that SS had not paid any maintenance since VS had returned from the United States right until the matter was heard by the CC. The CC then postponed the matter until 8 November 2017 and ordered that SS pay to VS's attorneys R150 000 for the benefit of the child. When the matter resumed in the CC on 8 November 2017, SS could not provide good enough reasons for why he had not paid the R150 000 as ordered by the CC.

When the CC handed down its judgment, it held that all court orders must be complied with diligently. This is especially important when the court order touches on interests that include the protection of the rights of children. The CC further held that when courts act as an upper guardian of a child, they do so to comply with section 28 of the Constitution of the Republic of South Africa, which provides that a child's best interests are of utmost importance in every matter concerning them. When those interests are not protected or when a parent does not meet any obligation towards the child, then the courts must interfere in a way that best protects those interests.

The CC went on to state that the interests of the child would not be best served and would be undermined if SS's appeal was allowed to continue. It would also send out the message that court orders could be ignored with no consequences. Beneficiaries of such orders would also be led to believe that their interests do not matter and the value and certainty that a court order brings, counts for little. Granting leave to appeal would be against the interests of justice, given SS's failure to respect the child's best interests by paying basic maintenance.

The application for leave to appeal was dismissed.

Approach adopted by the MMI Sponsor Funds

The Funds will comply with a valid court order for the payment of maintenance. The maintenance amount less the tax payable by the member will be deducted, where applicable, from the member's retirement savings account or his fund benefit.

4. Ramuhovhi and Others v President of the Republic of South Africa and Others (2017) ZACC 41 – Polygamous customary marriages

The High Court declared section 7(1) of the Recognition of Customary Marriages Act (the Act) unconstitutional and invalid. Section 7(1) of the Act provides that property consequences of polygamous marriages before the Act (pre-Act polygamous marriages) came into effect, would be governed by customary law. Certain customary laws such as Venda customary law are discriminatory in nature and exclude wives from having rights in marital property. Please refer to [Legal Update 8 of 2017](#) for more information.

After the High Court judgment, the matter was referred to the Constitutional Court (CC) to confirm the declaration of invalidity. The CC held that the consequence of section of 7(1) is to continue the equality between husbands and wives in pre-Act polygamous marriages. The section discriminated against women in such marriages on a number of grounds, including gender and marital status.

The CC confirmed the declaration of invalidity but did not limit how far back the declaration of invalidity applied, as wives in pre-Act polygamous marriages would continue to be unfairly discriminated against and would remain unable to own and control marital property which would leave them at the mercy of their husbands. The CC then ordered that until the legislation was amended to correct the defect, wives in pre-Act polygamous marriages would have equal rights of ownership and other rights relating to family property. A husband and each of his wives in each marriage would have similar rights for house property. This would not affect deceased estates that had already been wound up or the transfer of marital property that had already taken place.

Approach adopted by the MMI Funds

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. The FundsAtWork insurance 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 fund and insurance related benefits.

Dionne Nagan

Legal Specialist: Research
Retirement Fund & Product Governance
Momentum Investments: Product Solutions