

Does a non-member spouse have a claim on pension interest?

By Merike Pienaar

Section 7(7)(a) of the Divorce Act 70 of 1979 (the Act) stipulates that a pension interest of any party to a divorce action shall be deemed to be an asset of such a person's estate.

Section 7(8)(a) of the Act further stipulates that a court granting the divorce order may make an order that any part of the pension interest of such a member spouse is due or assigned to the non-member spouse when such an interest accrues in respect of the member spouse. Section 37D(4) of the Pension Fund's Act 24 of 1956 stipulates that the date of accrual of the pension interest is deemed to be the date of divorce.

The emanating question is whether a pension interest automatically forms part of the spouse's estate or whether it must be claimed by the non-member spouse during divorce? Conflicting judgments on this issue suggest that the courts struggle with the interpretation and application of the relevant statutory provisions. This article will briefly engage with some of these judgments and propose a way forward for the interpretation of the provisions.

Case law

The parties in *S v S and Another* 2001 (2) SA 306 (O) were divorced and a settlement agreement was entered into, which contained a blanket order that the joint estate of the parties should be divided. No specific provision was made for the division of the pension fund. Shortly after divorce and prior to the division of the joint estate, it came to the attention of the applicant that the respondent had resigned (at the time of divorce, the respondent was still a member of the pension fund (at para 4)) and that his pension fund had consequently accrued and been paid out.

Musi J held that a pension interest does not ordinarily form part of the assets but that it must be taken into account on divorce. Further, the court compared s 7(8)(a) of the Act to maintenance relief claimed in a divorce in terms of subs 7(1) and 7(2) of the Act and found that, as in the case of maintenance, the party seeking a share of the other's pension interest must claim so during the course of the divorce proceedings as it does not automatically form part of the estate.

The divorce order in *M v M and Others* 2002 (2) SA 648 (D) did not specifically deal with the division of the joint estate and at the date of the application the joint estate was yet to be divided. The court rejected the view expressed by Musi J in the *S v S* case, that the non-member is forever precluded from claiming a share of the member spouse's pension interest if such a claim is not made at date of divorce. Magid J held that s

7(7)(a) of the Act is applicable even after the divorce order has been granted and no order in terms of s 7(8)(a) of the Act was made at divorce.

In *Fritz v Fundsatwork Umbrella Pension Fund and Others* 2013 (4) SA 492 (ECP) the court was confronted with a scenario where the husband passed away after the joint estate had already been divided and no provisions were made for the division of his pension interest. The court referred to the *M v M* case and interpreted the judgment in *M v M* to mean that an order in terms of s 7(8)(a) of the Act can be sought where the joint estate has not yet been divided, even after divorce. Relief was, however, not granted to the applicant in this case as the estate had already been divided.

The divorce order in *YG v Executor, Estate Late CGM* 2013 (4) SA 387 (WCC) did not specifically make provision for the division of the husband's pension fund. On date of death of the husband, the joint estate had already been divided. The court held that a claim for a part of pension interest can only be granted on divorce.

The joint estate of the parties in *N v N* (GP) (unreported case no 39356/2013, 15-1-2015) (Kgomo J) had not been divided at the time of the application being heard. The court followed a strict interpretation of the words 'the court granting a decree of divorce' in s 7(8)(a) of the Act and found that spousal maintenance and claims for part of the other spouse's pension interest must be dealt with by the court finalising the decree of divorce. The court consequently held that the other party is forever precluded from seeking relief on these issues after the divorce, thus effectively supporting the decisions in the *YG* and *S v S* cases.

Application

It is clear from the contrasting decisions mentioned above that there is currently no certainty regarding a non-member spouse's entitlement to a pension interest where the issue has not been dealt with in the divorce order. As the Supreme Court of Appeal is yet to make a ruling on this issue, litigants find themselves in the position of being left with only the conflicting decisions of the High Courts.

PA van Niekerk *A practical guide to patrimonial litigation in divorce Actions* (Durban: LexisNexis 2011)) at para 7.2.4 advocates a practical approach to s 7(7)(a) of the Act and argues that parties in a divorce are not by right entitled to a part of the other's pension interest, but that the value of the pension interest should merely be taken into consideration when determining the value of the assets of the estate.

The courts in *S v S* and *N v N* – compared the division of a pension interest in terms of s 7(8)(a) of the Act to that of spousal maintenance in terms of subs 7(1) and 7(2) of the Act which, according to Van Schalkwyk, is a questionable comparison. LN van

Schalkwyk 'Wanneer vind artikel 7(7) van die Wet op Egskeiding, 70 van 1979, toepassing?' (2013) 46(3) *De Jure* 849 correctly points out that the Act grants the court a discretion to order spousal maintenance in subs 7(1) and 7(2). This discretion is not present in s 7(7)(a) of the Act, where it is clear that a pension interest is deemed to be an asset of the member spouse's estate. The discretion granted to the court in s 7(8)(a) of the Act is not the same as the discretion in subs 7(1) and 7(2) of the Act. The purpose of the discretion in s 7(8)(a) of the Act comes into play where a court may, on the grounds of fairness, order that a party is not entitled to share in the pension interest for whatever reason, which could, *inter alia*, include substantial misconduct on the part of the non-member spouse.

Conclusion

It seems to be clear from the wording of s 7(7)(a) of the Act that the legislature intended that a member spouse's pension interest should form part of his or her estate on divorce. Although we can only speculate as to the reasons why s 7(7)(a) of the Act was promulgated, one of the reasons could have been an attempt to address the social dynamics characterising the predominant marital arrangement pre-1984. The husband was usually the breadwinner while the wife took on child-rearing and household duties, effectively depriving her of the opportunity to build an estate of her own. The nest egg in the form of the husband's pension interest consequently had to cover both parties' needs in their old age, as per the primary purpose of a pension fund. This is in my opinion the rationale behind the statutory provision. To limit the relief to be claimed by a non-member spouse on a narrow interpretation of the Act, as in the cases of *S v S*, *N v N* and *YG*, surely cannot be in line with the intention of the legislature.

The unfortunate effect of these judgments is that it is the less fortunate party seeking a divorce and who does not have the financial capacity to employ legal representation who is adversely affected. In the majority of divorces in South Africa the plaintiff will issue a divorce summons in the regional court and obtain a divorce order on *viva voce* evidence. As laymen, these litigants are unaware that they will forever be precluded from seeking a part in the member spouse's pension interest if a specific claim is not instituted at divorce. It needs to be borne in mind that, unlike in the case of maintenance where the presiding magistrates and judges specifically inform the plaintiff that an order (for maintenance) can only be sought at divorce, the plaintiff is not informed accordingly with regards to a pension interest. Thousands of divorce orders are made which contain only a blanket order regarding the division of the joint estate, without any mention regarding the division of the pension interest. These non-member spouses will, according to some of the authority listed above, never be entitled to share in the pension interest of their ex-spouse.

We consequently have to ask whether a non-member spouse who did not obtain an order with specific mention to a pension interest at divorce is now in the same boat as a non-member spouse pre the introduction of s 7(7)(a) of the Act in 1989? If this question is to be answered in the positive, as some authority would seem to support, a serious injustice is being done. This is in my opinion the result of a problematic narrow interpretation by the courts that neither reflects the intention of the legislature, nor affects an equitable outcome.

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