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## A NON-MEMBER SPOUSE'S ENTITLEMENT TO THE MEMBER'S PENSION INTEREST

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### 1 Introduction

South African law regulating the division of retirement benefits on divorce when a joint estate existed between divorcing spouses has undergone significant changes in recent years. These changes are reflected by the amendments which were made to the *Divorce Act* 70 of 1979 (hereinafter referred to as the "DA") in 1989 and the *Pension Funds Act* 24 of 1956 (hereinafter referred to as the "PFA") in 2007 and 2008 respectively. South African family law also saw the promulgation of the *Civil Union Act* 17 of 2006 (hereinafter referred to as the "CUA") which effectively accorded some of the legal consequences of civil and customary marriages to partners in a civil union.<sup>1</sup> Furthermore, there have been those who have advocated for domestic partnerships to be accorded certain legal consequences of civil and customary marriages.<sup>2</sup> Pension funds schemes have been brought before the office of the Pension Funds Adjudicator to accord same-sex couples and cohabitants or life partners the same rights as those accorded to heterosexual married couples with regard to pension benefits.<sup>3</sup>

Initially, only non-member spouses of members of pension funds regulated by the PFA were eligible to claim portions of their member spouses' pension fund benefits which were due to them immediately on the date of divorce. There were certain pension fund schemes which are regulated by their own legislation which did not

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<sup>1</sup> Section 13 of *Civil Union Act* (CUA).

<sup>2</sup> Anon date unknown <http://www.out.org.za/index.php/library/literature?download=10:advocating-for-the-legal-recognition-of-domestic-partnerships>.

<sup>3</sup> See *Van der Merwe v Southern Life Association* 2000 3 BPLR 321 (PFA) 330; *Martin v Beka Provident Fund* 2000 2 BPLR 196 (PFA) 213.

provide the same for non-member spouses of their members on the date of divorce.<sup>4</sup> Nonetheless, through judicial and legislative intervention the perceived unfairness regarding the allocation of the relevant portions of pension benefits to non-member spouses on the date of divorce were addressed.<sup>5</sup> A detailed discussion of discriminatory practices relating to the division of pension benefits in the context of divorce is beyond the scope of this article.<sup>6</sup>

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<sup>4</sup> See *Wiese v Government Employees Pension Fund* 2012 6 BCLR 599 (CC), in which the difficulties experienced by non-member spouses of the Government Employees Pension Fund, which is regulated by its own statute and not the PFA, were highlighted.

<sup>5</sup> *Wiese v Government Employees Pension Fund* 2011 4 All SA 280 (WCC) para 17, wherein it was stated that given that the "clean break" principle is now applied to the divorced spouses of private pension fund members, there appears to be no rational reason why this should be withheld from members of pension funds not regulated by the *Pension Funds Act* 24 of 1956 (the PFA). The court at the time was alerted to the fact that the irrationality and unfairness of the differentiation had been recognised by government and that the National Treasury had issued a public document to address the issue. The court held that "the failure of the law to provide for the application of the 'clean break principle' renders it to that extent inconsistent with s 9 (1) of the Constitution inasmuch as it sanctions unequal treatment or differentiation of a class of persons, which differentiation bears no rational connection to a legitimate government purpose" (para 24). The court held that it would be just and equitable to suspend the declaration of invalidity and leave the precise nature of the remedial provisions to the legislature (para 40). This case was referred to the Constitutional Court for confirmation; at that time the legislature had already begun to address the concerns raised in this case, in that the substantive issues between the parties had become moot. As such, the Constitutional Court held that it was not in the interest of justice to pronounce on the validity of Government Employees Pension Law or the appropriate constitutional remedy on appeal (see *Wiese v Government Employees Pension Fund* 2012 6 BCLR 599 (CC) para 24). Subsequent to this case, the *Government Employees Pension Law Amendment Act* 19 of 2011 was passed to introduce the "clean break" principle to members of the GEPF. Despite this, it was worrying that there were other retirement funds which still did not make provision for the "clean break" principle. In *Ngewu v Post Office Retirement Fund* 2013 4 BCLR 421 (CC), the Constitutional Court was once again called upon to address the anomaly arising from the failure to afford divorcees of members of the Post Office Retirement Fund rights and advantages similar to those afforded to former spouses of members of funds subject to the PFA and the Government Employees Pension Fund. The court found that the omission of the "clean break" principle from ss 10 and 10E of the *Post Office Act* 44 of 1958 renders those provisions invalid to the extent of this inequality (para 17). The court suspended the declaration of the invalidity for eight months to allow the Legislature to cure the defect (para 18). Also see Nevondwe 2012 *Insurance and Tax* as well as Marumoagae 2013 *De Rebus* 40, where it is submitted that "it is high time that all public pension funds that have not yet considered having their specific legislation that do not make provision for the clean-break principle amended, to submit them to parliament for them to be amended accordingly. Expensive litigation can be avoided in this regard because the Constitutional Court has shown that if a particular statute is not in line with s 9 of the Constitution it will be declared unconstitutional and invalid".

<sup>6</sup> It suffices however, to mention that in terms of s 37D(1)(d)(i) of the PFA, a pension fund may deduct an amount awarded to a non-member spouse upon divorce from a member's pension benefit and make payment thereof to the non-member spouse if the amount was awarded in terms of s 7(8)(a) of the *Divorce Act* (DA). The DA applies only to the dissolution of marriages concluded in terms of the *Marriage Act* 25 of 1961, civil unions concluded in terms of the CUA, and customary marriages concluded in terms of the *Recognition of Customary Marriages Act* 120

This article deals with the entitlement, if any, that the non-member spouse or former non-member spouse has in a pension interest of either his or her current spouse or former spouse who is or was a member of a retirement fund. This article will assess the challenges which may arise in relation to retirement benefits due to the member spouse in relation to the entitlement his or her spouse or former spouse may have thereto in three different contexts: pre-divorce, during the divorce, and post-divorce. This will be done by first providing a contextual understanding of what a "pension interest" is as an asset in the joint estate of spouses married in community of property, thus assessing if the joint estate of divorcing spouses at the time of divorce automatically includes a pension interest, as well as the extent of the entitlement (if any) which the non-member spouse may have in such a pension interest. Second, this article will assess if a failure to plead and pray for the division of the pension interest in the divorce papers should prevent a former non-member spouse post-divorce from claiming any portion of the pension benefits accorded or to be accorded to his or her former member spouse which otherwise would have been due to him or her. The discussion in this article will rely heavily on case law, thereby illustrating how inconsistent our courts have been when deciding on this issue.

## **2 Historical perspective**

Initially, a pension interest which a non-member spouse would be entitled to on the date of divorce was not regarded as forming part of the joint estate of spouses

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of 1998. The DA does not apply to marriages concluded only in terms of Islamic rites. However, the Pension Funds Adjudicator in *Tryon v Nedgroup Defined Contribution Pension and Provident Fund PFA/GA/8796/2011/TCM* held that it is possible for spouses married and divorced in terms of Islamic law only, to share in the other spouse's pension interest upon divorce, thereby ordering that the member spouse's retirement fund would have to make payment to the non-member spouse if the agreement reached between the spouses regarding the division of pension interest states as much and has been made an order of court. Because marriages under religious principles such as Islamic law are not yet recognised under South African law, when the parties divorce their divorce is not granted under the DA, as such retirement funds are not in the position to award non-member spouses of members of such retirement funds benefits which they would ordinarily receive if they were married either under civil law or customary law. Clearly, this position amounts to differentiation and such differentiation cannot be justified in a democratic society such as ours. The law in this regard therefore needs to be updated.

married in community of property.<sup>7</sup> Before August 1989 the amount held by a fund as a provision for its future liability towards a member could not be taken into account in determining the value of the member's estate on divorce, because the provision comprised assets that belonged to the fund rather than the member.<sup>8</sup> In 1989, through the promulgation of the *Divorce Amendment Act 7* of 1989, subsections 7(7) and 7(8) were inserted into the DA, which resulted in pension fund member spouse's pension interest being regarded as an asset in his or her estate and by extension his or her joint estate if married in community of property, making it eligible for division on divorce.<sup>9</sup> The cash lump sum was the only portion of the member's spouse's interest in the fund which was considered part of his or her distributable estate on divorce, this being the portion he or she would be entitled to if he or she resigned at the date of the divorce.<sup>10</sup> Any portion awarded to the former spouse was payable when the benefits accrued to the member, when the member was dismissed, retrenched, retired, withdrew from the fund or died.<sup>11</sup> This meant

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<sup>7</sup> See *Kotze v Kotze* 2013 JOL 30037 (WCC) para 19, where it was held that "it appeared that prior to the introduction of section 7 of the Divorce Act, the party whose spouse was a member of a pension fund did not have a recognised interest in the pension of such other spouse. Where such benefit had not yet accrued it was not generally regarded as an asset in such pension holder's estate where the marriage was in community of property and moreover neither was it regarded as an asset of the joint estate. In determining the patrimonial benefits in the joint estate the pension expectation was not taken into account. With the introduction of section 7(7)(a) the situation changed substantially". Also see *ML v JL* 2013 ZAFSHC 55 (25 April 2013) para 15.

<sup>8</sup> See *Hunter et al Pension Funds Act 725*, where it is stated that "the provision was, however, in many cases, the most valuable 'asset' in the member's estate and its exclusion from account in determining the value of the estate was prejudicial to the spouse from whom the member was divorced" (*Hunter et al Pension Funds Act 726*). Also see *Old Mutual Life Assurance Co (SA) (Pty) Ltd v Swemmer* 2004 5 SA 373 (SCA) para 17.

<sup>9</sup> See *De Kock v Jacobson* 1999 4 SA 346 (W) 349G-H, where it was held that "there was no reason in principle why the accrued right to a pension by one of the parties to a marriage in community of property should not form part of the community of property existing between the parties prior to their divorce". Also see *Nevondwe, Rapatsa and Ratloga* 2012 *Pensions* 96, where it is stated that "the effect of Section 7(7) is to deem the pension interest of a party to the divorce action to be part of his assets for the purposes of the divorce. Section 7(8) then authorises the court to order that the former spouse be paid a share of the 'pension interest' when the member becomes entitled to a benefit in terms of the rules of this fund".

<sup>10</sup> National Treasury 2004 <http://www.treasury.gov.za/public%20comments/Retirement%20Fund%20Reform%20A%20Discussion%20Paper.pdf> 3.17.1.

<sup>11</sup> See *Schenk v Schenk* 1993 2 SA 346 (E) and *Mouton v Southern Staff Pension Fund* 2003 4 BPLR 4581 (PFA), wherein this position was found to be unsatisfactory and thus undermined the clean break principle. Also see *Cockcroft v Mine Employees Pension Fund* 2007 3 BPLR 296 (PFA) para 14. This meant that in respect of occupational pension and provident funds, the date on which the non-member spouse received payment depended entirely on whether the member spouse

that a non-member spouse was entitled to share therein only when the member spouse of the pension fund became entitled to a benefit, which could occur many years after the date of divorce.<sup>12</sup> There was also neither a provision for interest nor benefit of returns earned by the fund on the investment of the amount of pension interest due to the non-member spouse from the date of divorce to the date on which it was paid to him or her.<sup>13</sup> Accordingly, while the member's benefits would increase with contributions and investment returns throughout the period of membership, this did not apply to the portion allocated to the non-member spouse, which remained static from the date of divorce to the date of payment.<sup>14</sup> This position was not appropriate, especially for non-member spouses, who often found themselves in a weak financial position on divorce and therefore vulnerable.

In 1999 the South African Law Commission (as it was referred to then)<sup>15</sup> recommended that the pension benefits be treated in accordance with what is described as the "clean break" principle.<sup>16</sup> This means that at the date of the divorce the pension benefits of the member and his/her spouse are determined and divided between the two parties.<sup>17</sup> The "clean break" principle refers to the entitlement of the non-member spouse to receive immediate payment or transfer of the portion of the member's pension interest allocated to him on the date of divorce.<sup>18</sup> Having regard to the recommendations made by the South African Law Commission, section 37D of the PFA was duly amended by section 28 of the *Pension Funds Amendment*

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remained with the same employer until retirement or elected to resign or was actually dismissed or retrenched by the employer.

<sup>12</sup> Hunter *et al Pension Funds Act 727*. See also *Mashilo v Basil Read Group Provident Fund* 2005 1 BPLR 51 (PFA).

<sup>13</sup> Hunter *et al Pension Funds Act 727*.

<sup>14</sup> See *Kirchner v Kirchner* 2009 4 SA 448 (W).

<sup>15</sup> It is now referred to as the South African Law Reform Commission.

<sup>16</sup> SALC 1999 [http://www.justice.gov.za/salrc/reports/r\\_prj112\\_pension\\_1999jun.pdf](http://www.justice.gov.za/salrc/reports/r_prj112_pension_1999jun.pdf) 23.

<sup>17</sup> National Treasury 2004 <http://www.treasury.gov.za/public%20comments/Retirement%20Fund%20Reform%20A%20Discussion%20Paper.pdf> 45.

<sup>18</sup> Anon date unknown [http://www.pension.co.za/employee\\_benefits\\_divorce.asp](http://www.pension.co.za/employee_benefits_divorce.asp). See also Nevondwe and Camroodien 2014 <http://www.pensionlawyers.co.za/resources/downloads/2014-downloads/> 16, where it is stated that "the clean-break principle means that a former spouse can receive their share of the pension interest shortly after divorce".

*Act 11 of 1997*, which came into effect on 13 September 2007. This section effectively accelerates the date of accrual of the benefit to the member spouse and in turn the date on which the divorce benefit accrues to the non-member spouse, which is effectively the date of divorce. It was determined in *JC Cockcroft v the Mine Employees Pension Fund* that:

By deeming the date of accrual of the benefit to be the date of divorce, the new section ... overrides the actual date of accrual of the benefit which is determined by the event giving rise to the member's entitlement. The result is that the divorce benefit accrues to the non member spouse on the date of divorce (a fixed ascertainable date without any reference to other documents and no time delay implications), that is, without reference to the actual date of accrual of the benefit (invariably a future date at the time of the divorce with significant time delay implications).<sup>19</sup>

These amendments introduced the "so called" clean break principle, in terms of which the non-member spouse is entitled to receive immediately on the date of divorce payment or transfer of the portion of the member's pension interest allocated to him or her, thereby effecting a clean break between the parties as far as the non-member spouse's claim to a portion of the members pension interest is concerned.<sup>20</sup> This effectively changed the date of accrual of the benefit of a non-member spouse, by deeming the benefit due to him or her to have accrued on the date which the court grants the divorce order. This does not mean that the non-member spouse inherits the rights of a member spouse in relation to his or her pension fund. The non-member spouse will be entitled only to his or her part of the pension interest, depending on the marital regime applicable to the parties' marriage. The legislature created a statutory formula for determining the value of the benefit to be accorded to the non-member spouse, known as the pension interest, and deemed it to be an asset in the joint estate capable of division at divorce. Currently, section 37D(4)(a) of the PFA provides that for the purposes of section 7(8)(a) of the DA, the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce is deemed to accrue to the member

<sup>19</sup> *Cockcroft v the Mine Employees Pension Fund* PFA/we/11234/06/LS para 19.

<sup>20</sup> Section 28(e) of the *Pension Funds Amendment Act* stipulates that, for the purposes of the DA, a benefit is deemed to accrue to the principal member on the date of divorce, thus allowing the non-member spouse the right to claim her share of it.

on the date on which the divorce is granted. As such, "a court, in issuing a decree of divorce, is empowered to allocate a portion of the pension interest to the non-member spouse".<sup>21</sup> In essence this section notionally accelerates the date of accrual of the benefit to the member spouse and in turn the date on which the divorce benefit accrues to the non-member spouse, which is the date of divorce.<sup>22</sup>

In terms of section 7(8)(a) of the DA, the court granting a decree of divorce in respect of a member of a pension fund may order the registrar of the court to notify the fund concerned to endorse its records for that part of the pension interest payable to the non-member spouse and the administrator of that pension fund to furnish proof of such endorsement to the registrar in writing within one month of receipt of such notification. This means that a retirement fund presented with such a divorce order must deduct from the member's pension benefit the amount of the pension interest allocated to the non-member spouse as indicated in the divorce decree and pay it directly to him or her if he or she so elects, or it can transfer it to another fund if he or she has requested the fund to do so. The fund cannot unilaterally transfer the non-member spouse's portion to another fund without express instructions from the non-member spouse.

It was worrying that the clean break principle initially applied only to pension funds registered with the PFA. The exclusion from the application of the clean break principle of some of the pension funds which were not governed by the PFA but regulated by their own statutes was both unfair and discriminatory.<sup>23</sup> The perceived unfairness related to the fact that former non-member spouses of members of public sector pension funds, most notably the Government Pension Fund, were not afforded the right to receive their share of the pension interest immediately on

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<sup>21</sup> Anon date unknown [http://www.pensionlawyers.co.za/downloads/2012/conference/Paul\\_Pretorius-Paper.pdf](http://www.pensionlawyers.co.za/downloads/2012/conference/Paul_Pretorius-Paper.pdf) 4.

<sup>22</sup> *Cockcroft v Mine Employees Pension Fund* 2007 3 BPLR 296 (PFA) paras 18-19. By deeming the date of accrual of the benefit to be the date of divorce, s 37D(4)(a) overrides the actual date of accrual of the benefit, which is determined to be the event giving rise to the member's entitlement. This effectively entails that the divorce benefit accrues to the non-member spouse on the date of divorce without reference to the actual date of accrual as provided for in the rules of the fund concerned.

<sup>23</sup> Nevondwe 2009 *LDD* 11.



divorce in the same way as non-member spouses of private retirement funds. The legislature undertook to address the issue by promulgating the *Government Employees Pension Law Amendment Act* 19 of 2011, which effectively introduced the clean break principle as far as members of the GEPF are concerned. The Constitutional Court in *Wiese v Government Employees Pension Fund*<sup>24</sup> also raised the difficulties experienced by non-member spouses of the Government Employees Pension Fund.<sup>25</sup> A detailed discussion in this regard is beyond the scope of this article, the main purpose of which is to highlight how various courts have dealt with the concept of "pension interest" when the spouses are either divorcing or have divorced and when members of pension funds received their benefits before they were divorced. Although the legislature has attempted to resolve the matter through the various amendments referred to above, this issue is still a major cause of conflict in South Africa.

### 3 Pension interest

The decree of divorce is instrumental in providing guidance to the pension fund scheme in relation to the amount or percentage of the pension interest which should be allocated to the non-member spouse. In certain instances where the parties concluded a settlement agreement, such an agreement may be made an order of court and the terms thereof may guide the pension fund scheme on how to deal with the pension interest.<sup>26</sup> The concept of the pension interest is in effect a mechanism which was created by the legislature to provide a statutory formula for determining the value of the right/benefit and to deem such as an asset in the

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<sup>24</sup> *Wiese v Government Employees Pension Fund* 2012 6 BCLR 599 (CC).

<sup>25</sup> See also *Ngewu v Post Office Retirement Fund* 2013 4 BCLR 421 (CC). Currently before Parliament, there is *South African Post Office SOC Ltd Amendment Bill* [B24-2013], which seeks to update and transfer pension-related provisions of the South African Post Office from the *Post and Telecommunication-related Matters Act* 44 of 1958 and enable the payment of a pension interest to a former spouse of a member on divorce or the dissolution of customary marriage.

<sup>26</sup> See *Andrews v IBM SA 1994 Contribution Pension and Alexandra Forbes Financial Services (Pty) Ltd* PFA/WE/4666/2011/GPM para 4.3. For the purposes of determining the pension interest, the correct formula is to look at the amount that the active member would have been entitled to had he resigned on the date on which the settlement agreement was made the order of court. Hence, any other interpretation or agreement contrary to the DA between the parties relating to when the retirement fund should pay out the pension interest in a settlement agreement incorporated in the decree of divorce would not be enforceable against the fund (para 4.4).

member's estate capable of division on divorce. The formula determines the amount of the total interest in the fund that can be divided and assigned as at the date of divorce. The legal definition of a pension interest is crucial in deciding when a non-member spouse becomes entitled to a share of a fund member's retirement savings. The term "pension interest" is defined in section 1 of the DA as follows:

'Pension interest', in relation to a party to a divorce action who- (a) is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have terminated on the date of the divorce on account of his resignation from office.<sup>27</sup>

If the phrase "pension interest" is interpreted literally, the wording of its definition seems to suggest that the member spouse should be in active employment and by extension in active fund membership at the date of divorce. Thus, if the parties divorce, the pension interest will be deemed to be an asset in the joint estate and the member spouse would be treated as having resigned on the date of divorce. The non-member spouse will then be entitled to immediately receive his or her portion of the pension interest on the date of divorce. The definition of this phrase can also be interpreted as suggesting that if the party a pension interest is claimed from is a former member of the fund, in that his or her employment was terminated before the date of the divorce, he or she cannot be deemed to have resigned on the date of divorce and the court cannot order that the former non-member spouse should be paid a portion of what would have been the former member's fund benefit as at the date of divorce. As illustrated below, this is because in these circumstances some courts have held that no amount of the pension interest could be deemed to be part

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<sup>27</sup> In Retirement Annuity Funds the pension interest is defined in s 1 of the DA, as "(b) ... the total amount of that party's contributions to the fund up to the date of divorce, together with the total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1 (2) of the Prescribed Rate of Interest Act ...". Also see  *Davids v Momentum Retirement Annuity Fund and Momentun Group Limited*  PFA/WE/35021/2009/LPM para 5.7. The non-member spouse is entitled to the percentage ordered in the decree of divorce, which amounts to the member spouse's withdrawal benefit. The pension interest can be explained as the member spouse's notional withdrawal benefit from his or her retirement fund had such a member withdrawn from such a fund on the date of divorce, which should be calculated as at the date of divorce.

of the joint estate at the date of the divorce, because the member's pension benefits had already accrued before the date of divorce.

Various divisions of the High Court in South Africa have been called upon to determine the issue of the pension interest which the non-member spouse or former non-member spouse is entitled to when the parties are either divorced or divorcing. The provisions dealing with the allocation of the pension interest in marriages in community of property when parties divorce in terms of the DA have given rise to difficult problems of interpretation and application.<sup>28</sup> Although the legislature has attempted to resolve this issue through numerous amendments, it is still a major cause of conflict between divorcing and divorced spouses.<sup>29</sup> The approaches adopted by the South African courts in this respect have been inconsistent, and it not clear what the correct legal position on this issue currently is in South Africa. There has been much controversy with regard to whether or not at the time of the dissolution of the marriage the pension interest becomes part of the joint estate. It was not entirely clear that the pension interest automatically falls within the terms of a blanket order for the division of the joint estate, more particularly where the pension interest was neither pleaded nor prayed for. As such, it was uncertain whether the non-member spouse needed to specifically plead and pray for his or her share of the pension interest in terms of section 7(7) and section 7(8) of the DA in order to be allocated his or her share. It has also been asked if it is possible for an already divorced spouse who did not claim pension interest during the divorce to claim the same after the divorce when the joint estate has already been divided and no provision has been made regarding the pension interest.

#### **4 Legislative framework**

Section 37D(4)(a) of the PFA provides that for the purposes of section 7(8)(a) of the DA the pension benefit referred to in that section is deemed to accrue to the member on the date of the court order, provided that such a deduction shall be

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<sup>28</sup> See Fick 1990 *TRW* 5; Sonnekus 1989 *TSAR* 326.

<sup>29</sup> *Chiloane v Chiloane* 2007 ZAGPHC 183 (7 September 2007) 9.

effected by the pension fund named in the order upon receipt of the order.<sup>30</sup> This section brings about the clean break arrangement between the divorcing spouses, so that they can dispose of whatever claim they have against each other with regard to the pension interest during the divorce proceedings. This ensures that whatever percentage of the pension interest awarded by the divorce court to the non-member spouse becomes eligible to be paid immediately at the time of the divorce. This entails that at any time after leaving the court room on the day which the divorce decree was granted, the non-member spouse becomes entitled to request his or her former spouse's pension scheme to make payment to him or her of the pension interest as per the divorce decree. This is because the pension interest was deemed to be part of his or her former spouse's estate and if they were married in community of property then became part of the joint estate in terms of section 7(7) of the DA. This section provides that "in the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets".<sup>31</sup>

In order for such a former non-member spouse to be able to receive any amount of the pension interest, the court must have directed the pension funds scheme of his or her former non-member spouse in terms of section 7(8) of the DA in the decree of divorce to endorse its records and effect payment to him or her. Section 7(8) of the DA empowers the divorce court to make an order that any part of the pension interest of the member of the pension fund which is due to or assigned to his or her non-member spouse is to be paid by such fund to the non-member spouse when any pension benefits accrue in respect of that member. It is important to note that in terms of the amendments referred to above, the date of accrual has been accelerated to the date of divorce in terms of section 37D(1)(a).<sup>32</sup>

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<sup>30</sup> See also Mothupi 2010 *SA Merc LJ* 218.

<sup>31</sup> Section 7(7)(a) of the DA.

<sup>32</sup> See also s 37D(1)(d)(i) of the PFA, which provides that a registered fund may deduct from a member's benefit or minimum individual reserve any amount assigned from his/her pension interest to a non-member spouse in terms of a valid court order.

## **5 Judicial approach**

### ***5.1 During divorce***

When spouses institute divorce proceedings, it is crucial for both parties to seek proper legal advice especially with regard to the assets falling within their joint estate. Over and above these assets it is also advisable that such spouses obtain sound legal advice with regard to any pension fund benefits either or both of them might have. In terms of the DA, the non-member spouse is entitled to the amount of the fund benefit that the member would be entitled to receive had his or her membership fund come to an end on the date of divorce. This is referred to as the pension interest. The court granting the divorce decree is empowered to order the fund of the member spouse to endorse its records and make payment to such a non-member spouse in accordance with the court order. It has been held that "in order for the payment of the pension interest to be effected to the non-member spouse, the divorce order must specifically provide for the non-member spouse's entitlement to a pension interest".<sup>33</sup> Most pension fund schemes will reject the claim if the decree of divorce does not comply with section 37D(4)(a) of the PFA as well as section 7(8) of the DA. As will be shown below, a pension fund scheme will make payment of the pension interest only if the member spouse withdrew from the fund on the date of divorce. Most funds maintain that if a member spouse withdraws from the fund before the divorce there can no longer be any "pension interest" or accrued benefit.

### ***5.2 Post-divorce scenario***

#### *5.2.1 Pension interest claimed post divorce*

More people in South Africa are becoming aware of their rights and entitlements with regard to pension fund benefits belonging to their member spouses. It is unfortunate that some become aware of such entitlements only when they have already divorced and their divorce decrees do not mention anything with regard to

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<sup>33</sup> *Budhoo v Sasol Pension Fund* PFA/GA/37937/LPM para 5.8.

such pension benefits. In some instances, divorcing spouses sign settlement agreements which are then made orders of court. However, these settlement agreements may also not deal adequately with the issues relating to pension interest or even fail to properly identify the relevant pension fund scheme leading to the pension fund rejecting the claim on the basis that such settlement agreements do not comply with section 7(8) of the DA. In *Sempapalele v Sempapalele*<sup>34</sup> pursuant to a settlement agreement a decree of divorce was granted providing for a blanket division of the joint estate. The parties had been married in community of property and divorced in 1998.<sup>35</sup> In or around 1999 the applicant learned that the respondent's pension benefits had accrued due to either his retirement or resignation post their divorce. The applicant then brought an application post-divorce to be allocated part of the respondent's "pension benefits". In this case, it was unfortunate that even though the applicant's particulars of claim attached to the summons during the divorce proceedings had a prayer for the payment of the respondent's pension interest apart from the division of the joint estate, the decree of divorce and the deed of settlement did not make provision for the pension interest.<sup>36</sup> The applicant argued that the pension interest was part the parties' joint estate and automatically fell to be shared in line with the order for the division of the joint estate.<sup>37</sup> The court was of the view that by deeming the pension interest to be an asset in the member's estate in terms of section 7(7) of the DA, this meant that the interest was not ordinarily part of the joint estate but would be such for the purposes of the divorce.<sup>38</sup> The court then had to decide whether the provisions of section 7 of the DA can be invoked after the dissolution of a marriage, as it was in

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<sup>34</sup> *Sempapalele v Sempapalele* 2001 2 SA 306 (O).

<sup>35</sup> In this case the parties were members of their respective pension funds, but the respondent was at the time of the divorce still a member of a pension fund, whereas the applicant had (apparently unknown to the respondent) resigned and her pension benefits had accrued but had not yet been paid.

<sup>36</sup> *Sempapalele v Sempapalele* 2001 2 SA 306 (O) 309I.

<sup>37</sup> *Sempapalele v Sempapalele* 2001 2 SA 306 (O) 309J. This argument raised the legal question of whether the respondent's pension interest was at the time of the dissolution of the marriage part of the joint estate so that it automatically fell within the terms of the blanket order for the division, or whether the applicant needed to obtain a court order awarding her a share of such interest in terms of s 7 of the DA.

<sup>38</sup> *Sempapalele v Sempapalele* 2001 2 SA 306 (O) 311A.

this case.<sup>39</sup> The court was of the opinion that a non-member spouse seeking a pension interest has to request such interest during the divorce proceedings, in that the phrase "in any divorce action" contained in section 7(7)(a) of the DA must mean any pending divorce action.<sup>40</sup> The court held that because the applicant had failed to obtain at the hearing of the divorce matter a court order awarding her a share in the respondent's pension interest in terms of section 7 of the DA, she could not now get such an order.<sup>41</sup>

*Sempapalele v Sempapalele* seems to suggest that "pension interest" can be claimed only during the divorce proceedings in order to allow the court granting the decree of divorce to order the pension fund concerned to endorse its records in terms of section 7(8) of the DA. If the non-member spouse fails to make such a claim during the divorce proceedings, such a non-member spouse will be precluded from making such a claim post-divorce. I am of the respectful view that the approach adopted in this case is not sound in law, and that it will lead to grave injustices. This is because, at times members of the public receive bad representation from unskilled legal practitioners, and such practitioners due to their lack of insight might lead the client to lose such benefits by not properly advising clients of their rights in this regard. On the other hand, a particular client might conduct the divorce himself and herself and fail to properly make out a claim for the pension interest due to a lack of legal training, especially in a specialised area of law like this one. Surely, under such circumstances, the law should provide post-divorce avenues to remedy whatever injustices might have occurred during the divorce by allowing such litigants upon proper legal representation to be able to claim such benefits. For instance, this could be done by making an application to vary the divorce decree to the court which granted such a divorce order within the prescribed time limits.

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<sup>39</sup> *Sempapalele v Sempapalele* 2001 2 SA 306 (O) 312D. The court was of the view that, just as the party seeking a spousal maintenance has to request such maintenance during the course of the divorce proceedings and obtain the necessary order in that she or he cannot do that post-divorce, similarly a spouse seeking a share in the pension interest of the other spouse must apply for and obtain an appropriate court order during the divorce proceedings.

<sup>40</sup> *Sempapalele v Sempapalele* 2001 2 SA 306 (O) 312F.

<sup>41</sup> *Sempapalele v Sempapalele* 2001 2 SA 306 (O) 312G. However, the ground upon which the applicant's application was dismissed was that she had failed to prove the value of the respondent's pension interest as at the date of divorce.

On the other hand, Magid J in *Maharaj v Maharaj*<sup>42</sup> found himself unable to agree with the conclusion reached in *Sempapalele v Sempapalele*. Magid J was of the view that if the court is *Sempapalele v Sempapalele* "... intended to hold that, if there is no reference to a spouse's pension benefit or interest in a divorce order, the other party to a marriage in community of property is forever precluded from claiming to be entitled, as his or her share of the joint estate, to a half share thereof, I am, with respect, unable to agree with that view".<sup>43</sup> As such, he concluded that "when the joint estate of spouses married in community of property is to be divided it is proper to take into account, as an asset in the joint estate, the value of a pension interest held by one of them as at the date of divorce".<sup>44</sup> In this case, because the joint estate as it existed at the date of divorce had not yet actually been divided, the court was of the view that the applicant was not entitled to the amount claimed until the joint estate was in fact divided.<sup>45</sup> In *Fritz v Fundsatwork Umbrella Pension Fund*<sup>46</sup> the court held that the effect of Magid J's comments was that "order may be sought in terms of subsection (7) even if a divorce order has already been granted". I am of the view that if indeed the divorce order had been granted but the joint estate had not yet been divided it is logical that if there was any amount due to the non-member spouse which was to be regarded as a pension interest had that amount been paid out at the time of the divorce, the non-member spouse should be able to claim a certain percentage of that amount.

Various divisions of South African High Courts have been very inconsistent in how they have approached the issue of the pension interest between divorcing spouses

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<sup>42</sup> *Maharaj v Maharaj* 2002 2 SA 648 (D&CLD). In this case parties were married to each other in community of property but divorced in December 1996. The divorce decree did not mention anything with regard to the joint estate. As such, the court (referring to *Gates v Gates* 1940 NPD 361, 363 and *Keyser v Keyser* 1979 4 SA 12 (T) 15F) held that the joint estate as it existed at the date of the divorce had to be divided equally between the parties. After learning that the respondent had retired from his employment and that his pension fund was about to pay into his bank account the amount due to him, the applicant launched an urgent application for an interdict restraining the bank at which the respondent held his bank account from allowing the respondent to draw on the account in a manner which could prejudice her.

<sup>43</sup> *Maharaj v Maharaj* 2002 2 SA 648 (D&CLD) 651A.

<sup>44</sup> *Maharaj v Maharaj* 2002 2 SA 648 (D&CLD) 651F.

<sup>45</sup> *Maharaj v Maharaj* 2002 2 SA 648 (D&CLD) 651F.

<sup>46</sup> *Fritz v Fundsatwork Umbrella Pension Fund* 2013 4 SA 492 (ECP) para 21.



or divorced ex-spouses. In *Lamb v Lamb*<sup>47</sup> the court held that it could not grant an order directing the pension fund to pay to a former non-member spouse part of the former member spouse's accrued pension benefits post-divorce as at the date of divorce, which had been claimed seven years after the divorce. The court held that section 7(8) of the DA gives the court the power to make such orders when granting a decree of divorce.<sup>48</sup> The court in *Lamb v Lamb* was also convinced that orders relating to pension interests can be made only during the divorce and not post-divorce. The court in *Kgopane v Kgopane*<sup>49</sup> also looked at section 7(8) of the DA and held that it was apparent from the said section that it was only the court that granted a decree of divorce which had the capacity to make an order that a part of the pension interest of a member spouse was to be paid to a non-member spouse.<sup>50</sup> Further it was stated that "this may be perceived to be unjust as it would deprive a party of their right to a member's pension interest if such an order was not obtained when the court granted the divorce, but the court cannot depart from the literal meaning of section (8)(a) of the Divorce Act".<sup>51</sup> In refusing the applicant's claim, the court further held that:

Hence only a court granting a decree of divorce can order the Pension Fund to pay a part of the member's interest on the date of divorce. Any other court order pursuant to the divorce which directs the pension fund to pay a non-member a part of a member's interest is in conflict with the section 37A of the Pension Funds Act and does not fall within the protective ambit of section 7 (8) (a) of the Divorce Act.<sup>52</sup>

<sup>47</sup> *Lamb v Lamb* 2002 JDR 0463 (T).

<sup>48</sup> *Lamb v Lamb* 2002 JDR 0463 (T) 13.

<sup>49</sup> *Kgopane v Kgopane* (NW) unreported case number 1819/2011 58 (16 August 2012). In this case the parties divorced in 2001 and the divorce decree included an order that the joint estate be divided. The parties could not agree on the division of the joint estate and a receiver and liquidator was appointed. The applicant applied to court for the substitution of the receiver and liquidator and also claimed 50% of the first respondent's pension interest after the divorce had been granted.

<sup>50</sup> *Kgopane v Kgopane* (NW) unreported case number 1819/2011 58 (16 August 2012) 11.

<sup>51</sup> *Kgopane v Kgopane* (NW) unreported case number 1819/2011 58 (16 August 2012) 11.

<sup>52</sup> *Kgopane v Kgopane* (NW) unreported case number 1819/2011 58 (16 August 2012) 14. The court emphasised that to enforce a claim for the pension interest the court order on the date of divorce must: reflect the name of the pension fund; clearly indicate which portion of the interest is to be transferred; direct the pension fund concerned to endorse its records with respect to the pension interest concerned; and indicate that such pension interest is payable to the non-member spouse (see paras 16, 17). The court further held that "where the parties after the date of divorce enter into an agreement concerning the pension interest or appoint a liquidator with the powers to determine the value of the pension interest for purposes of division, this is done at

In the midst of these inconsistent approaches it is encouraging that some courts appear to be of the view that it is indeed possible to award to a former non-member spouse the portion of the pension interest which such a non-member spouse is entitled to by virtue of the marital regime which was applicable to the marriage he or she was party to. In *Chiloane v Chiloane* the court was of the view that "a spouse seeking a share in the pension interest of the other spouse who had not, in terms of section 7(7)(a) applied for and obtained a court order during the divorce proceedings, may do so by way of motion proceedings after the divorce decree is granted. The court may then in terms of section 7(8) award such an order".<sup>53</sup> The court was of the view that even post-divorce, it was nonetheless competent in terms of section 7(8) of the DA to make an order on the "pension interest" of a member spouse, and it accordingly declared that the ex-wife was entitled to one half of the pension interest of her ex-husband.<sup>54</sup>

### *5.2.2 Pension interest as an automatic part of the joint estate*

Some courts have been very strict with their interpretation of the pension interest as an asset in the joint estate, thus holding that a pension interest can be deemed to be an asset only when a member spouse is still active in the fund as at the date of the divorce, in that a pension interest cannot automatically fall within the joint estate by operation of law when a non-member spouse has failed to specifically plead and ask for it. Further, that a pension interest can be deemed to be an asset only when the member spouse is still active in the fund. As discussed above,<sup>55</sup> the court in *Sempapalele v Sempapalele* was of the view that the pension interest is not

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the parties' own peril as it is in conflict with s 37A of the PFA in those circumstances where the pension fund refuses to give effect to an agreement after the divorce order was granted, the parties may seek recourse against each other" (see para 20).

<sup>53</sup> *Chiloane v Chiloane* 2007 ZAGPHC 183 (7 September 2007). In this case the parties were married in community of property but their marriage was dissolved in 2004. In the divorce decree there was neither a deed of settlement for the division of the joint estate, nor any provision as to how the "pension interest" might be dealt with. In this case the ex-wife post-divorce approached the court with an application claiming half of her ex-husband's pension interest. The ex-husband contended that the ex-wife had failed to raise this matter during the divorce proceedings and that she was now barred from making such a claim.

<sup>54</sup> *Chiloane v Chiloane* 2007 ZAGPHC 183 (7 September 2007) 12-13.

<sup>55</sup> *Sempapalele v Sempapalele* 2001 2 SA 306 (O).

ordinarily part of the joint estate between spouses but is considered to be part of such a joint estate after it has been deemed to be such in terms of section 7(7) of the DA for the purposes of the divorce. Similarly, in *ML v JL*<sup>56</sup> the court had to decide whether or not the husband in the divorce action was entitled to an order declaring him entitled to a 50% share of the wife's pension interest, calculated as at the date of the divorce. However, the husband in his papers had failed to identify the wife's pension fund and her employer, nor did his pleadings say anything about the pension interest.<sup>57</sup> The court held that "in order to properly decide whether the husband was entitled to have a proportionate share in the pension interest of the plaintiff, sufficient and accurate details of the pension interest of the pension fund have to be placed before the court".<sup>58</sup> The court emphasised that a pension benefit constituted a rather unique patrimonial benefit of a marriage in community of property. Thus "since 1989 it is deemed to be an asset but it is not immediately deliverable upon divorce as is the case with ordinary assets. It is specially protected by mean of a special statutory endorsement – subsection 8(a)(i). Such a special relief for such a unique asset requires special averments in the pleading of a non-member spouse".<sup>59</sup> The court held that "a spouse claiming an entitlement to the pension interest of another spouse has to plead the necessary facts on which such special relief is founded or can be said to be founded".<sup>60</sup> The court concluded that the pension interest does not automatically fall within the ambit of a customary division of the joint estate and further that a general order of the division of

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<sup>56</sup> *ML v JL* 2013 ZAFSHC 55 (25 April 2013). In this case, the parties were married in community of property in 2005. At the time of the divorce, the husband had already resigned from his employment and had received about R350 000 as a pay-out from his pension fund. However, the husband sought a special order declaring him to be entitled to 50% of what was referred to as the wife's "pension proceeds", which the court nonetheless understood to mean "pension interest". The wife argued that the husband had received his pension benefits but never shared them with her. She therefore wanted the husband to forfeit whatever share he might have been entitled to in respect of her pension proceeds.

<sup>57</sup> *ML v JL* 2013 ZAFSHC 55 (25 April 2013) para 30.

<sup>58</sup> *ML v JL* 2013 ZAFSHC 55 (25 April 2013) para 31.

<sup>59</sup> *ML v JL* 2013 ZAFSHC 55 (25 April 2013) para 42.

<sup>60</sup> *ML v JL* 2013 ZAFSHC 55 (25 April 2013) para 43. The court went on to express a view that "such a spouse would do well to aver facts relating to the other spouse's employer; the other spouse's occupation; the name of the pension fund; the administrator thereof; the underwriter thereof; the other spouse's membership number; the agreed retirement date of the spouse, being the date on which the pension benefits would in the normal course of events, accrue to the member spouse".

patrimonial benefits does not entitle the non-member spouse to a share in the member spouse's pension interest.<sup>61</sup>

However, there have been some divisions which have been more liberal in their interpretation of the pension interest as an asset in the joint estate, by holding that the pension interest can automatically become part of the joint estate by operation of law, meaning that should any of the parties fail to specifically request the court to make an order with regard to a pension interest, such a party does not lose his or her entitlement thereto, because such a pension interest is part of his or her joint estate and can thus be claimed post-divorce. For instance, in *Peters v Peters*<sup>62</sup> Counsel for the respondent conceded among other matters that the division of the joint estate constituted a determination of the patrimonial benefits to which the parties may be entitled and further that the deemed inclusion of the pension interest of the respondent at the time of the divorce in the joint estate also arises by operation of law. The court then held that "the applicant, as at the date of divorce, became entitled by operation of law to a half share in the pension interest vesting in the joint estate".<sup>63</sup> According to the court, the pension interest fell within the joint estate which was divided by operation of law, and thus the applicant became entitled to it.<sup>64</sup>

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<sup>61</sup> *ML v JL* 2013 ZAFSHC 55 (25 April 2013) para 57. Also see *Areias v Momentum Retirement Annuity Fund and Momentum Group Limited* PFA/KZN/11470/2012/AM, where it was held that if the fund is not named in the divorce order, the divorce order does not comply with s 37D(4)(a)(1)(aa). If the order does not mention the term pension interest it is not in compliance with s 7(7) and s 7(8) of the DA as well as the definition of pension interest in s 1 of the DA (paras 5.5-5.6).

<sup>62</sup> *Peters v Peters* 2008 ZAWCHC 309 (2 December 2008). In this case the parties were married to each other in community of property, but got divorced in 1996. The decree of divorce specified that the joint estate was divided. Nearly 12 years later the applicant applied to court for an order to be paid half the pension interest already paid out to the respondent in 1996. However, the claim was directed only to the respondent and not to the pension fund (see paras 8-10). It appeared that the applicant had actually notified the pension fund soon after the divorce but nothing had happened thereafter.

<sup>63</sup> *Peters v Peters* 2008 ZAWCHC 309 (2 December 2008) para 11.

<sup>64</sup> *Peters v Peters* 2008 ZAWCHC 309 (2 December 2008) para 16.

In *Kotze v Kotze*,<sup>65</sup> the court had to decide whether by operation of law the joint estate of the parties at the time of the divorce included the pension interest and whether or not the former wife had an entitlement to a share therein.<sup>66</sup> The *amicus curiae* in this case submitted that the particular significance of section 7(7) of the DA was that the pension interest is deemed to be an asset of the joint estate in the determination of the patrimonial benefits to which the parties to a divorce action are entitled. Further, that in the absence of a court order or for any other reason upon divorce each party to a marriage in community of property is entitled to one half of the pension interest as at the date of divorce.<sup>67</sup> The court expressed its preference for the approach adopted in *Maharaj v Maharaj* over that adopted in *Sempapalele v Sempapalele*. The *amicus curiae* further submitted that the pension interest at the date of divorce was not an asset in the joint estate in this case and that in the order of the court, reference to a division of the joint estate did not include the pension interest.<sup>68</sup> Nonetheless, the *amicus curiae* argued that the fact that the pension interest did not form part of the joint estate did not affect the right of the former wife to share in the proceeds thereof in terms of section 7(7)(a) of the DA by virtue

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<sup>65</sup> *Kotze v Kotze* 2013 JOL 30037 (WCC). In this case, the parties were married to each other in community of property in 1978, but divorced in 2005. The former husband retired several years after the divorce and in 2011 received approximately R1,5 million from his pension fund, which he invested and from which he receives a monthly income of about R10 000. The former wife claimed that she became aware that her former husband was a member of a pension fund only post-divorce and further that the attorneys who assisted her during the divorce failed to advise her of her rights with regard to her former husband's pension benefits. The divorce decree did not mention anything with regard to the pension interest. However, the former husband argued that the former wife had known that he had a pension fund but must have chosen not to claim it, because had she done so she would have been forced to disclose information regarding the business she was engaged in and would have had to deal with his claim to share therein. Further, he averred that had the former wife claimed the pension interest during the divorce he would have resisted the claim.

<sup>66</sup> *Kotze v Kotze* 2013 JOL 30037 (WCC) para 11.

<sup>67</sup> *Kotze v Kotze* 2013 JOL 30037 (WCC) para 18. The *amicus curiae*, submitted that "one must conclude that in the absence of a written agreement as provided for in section 7 (1) or an order of forfeiture of the patrimonial benefits of the marriage having been sought as provided for in section 9, it was not competent for a court to deal with the joint estate of the parties married in community of property other than on the basis that each party was entitled to a 50% share therein" (para 17).

<sup>68</sup> *Kotze v Kotze* 2013 JOL 30037 (WCC) para 27.

of the deeming provision, which argument the court agreed with.<sup>69</sup> The court ultimately held that:

I am of the view that where parties married to each other in community of property in subsequent divorce proceedings do not deal with a pension or provident fund interest which either or both of them may have had in separate pension or provident funds either by way of a settlement agreement or by an order of forfeiture, each of them nonetheless remain[s] entitled to a share in the pension or provident fund to which the other spouse belonged ... and such share is to be determined as at the date of divorce by virtue of the provisions of section 7 (7) (a) of the Divorce Act 70 of 1979.<sup>70</sup>

However, it has been argued that *Kotze v Kotze* "is erroneous and that the correct legal position is that, although a pension interest is deemed to be part of the assets that constitute the patrimonial benefits of a marriage, a non-member spouse only becomes entitled to such a share thereof as a court may assign in terms of s 7(8)".<sup>71</sup> I hold a different view, in that *Kotze v Kotze* was correctly decided, because the court looked beyond what can be perceived as a literal meaning of section 7(7)(a) of the DA. The court interpreted that subsection generously and purposively, in such a way as to prevent the prejudicial outcome which might arise from adopting a strict interpretation of that subsection. It was also held in *M v M*,<sup>72</sup> correctly in my view,

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<sup>69</sup> *Kotze v Kotze* 2013 JOL 30037 (WCC) para 28. It was argued on behalf of the former husband that "in so far as the court order had not specifically dealt with the pension interest and all other movables in the possession of the respective parties at the date of divorce, then the pension benefit, as well as movable items, not in the possession of the appellant should be regarded as having been forfeited by her" (para 29). In response to this argument, the court stated that "inasmuch as the parties were married in community of property none of them owned assets separately of the other and the notion that they would simply have forfeited assets not in their possession would defeat the very concept of the regime of an undivided joint estate that subsists by virtue of a marriage in community of property". The court was of the view that the claim of a forfeiture of the pension interest on such a basis was misconstrued.

<sup>70</sup> *Kotze v Kotze* 2013 JOL 30037 (WCC) para 32. The court held that the former wife was entitled to a 50% share of her former husband's pension and/or provident fund, valued at the date of divorce.

<sup>71</sup> *Davey* 2013 *De Rebus* 27. Davey further submits that "section 7 (7) does not provide any basis for the finding that if the spouses do not deal with a pension or provident fund interest, which either or both of them may have had in a separate pension or provident funds either by way of a settlement agreement or by an order of forfeiture, the non-member spouse automatically becomes entitled to 50% of the member's spouse's pension interest".

<sup>72</sup> *M v M* 2012 ZAKZDHC 17 (1 January 2012). In this case the parties divorced in 2004. Before their divorce the parties signed a settlement agreement which provided among other things, that the wife would be entitled to 50% of the husband's pension, calculated as at the date of divorce. However, the decree of divorce was silent on the issue of the pension interest. Further, the settlement agreement stated that the husband consented that the agreement be noted by his employer against its records relating to his rights to his pension. The husband was paid his

that "the fact that no order is made in terms of section 7(8)(a) of the Divorce Act at the time of the divorce, does not preclude the non-member spouse from later making a claim against the other former spouse for a portion of the pension proceeds".<sup>73</sup>

However, it has not yet been settled in South Africa whether or not a pension interest automatically becomes part of the joint estate by operation of law. The most important question which arises from the discussion of the above cases is if pension interest can legitimately be regarded as automatically falling within the joint estate of parties married in community of property. Given the language adopted in section 7(7)(a) of the DA,, which deems the pension interest to be an asset in the estate of the member spouse, I submit that this section is in effect converting the promise the pension fund made to its member into a realisable value capable of being divided. Now, due to the fact that the fund grants this particular promise only upon receipt of monthly premiums until the date of accrual, such premiums or part thereof are made directly from the salary of the member, which is in itself a patrimonial benefit of the marriage.<sup>74</sup> If parties are married in community of property, unless there is an identifiable separate estate ie where one of the parties received non-patrimonial benefits during the course of the marriage which fell solely in his or her personal estate, such parties have only one joint estate and share in its profits and losses. Thus, in my view the approach adopted in *Peters v Peters* seems to be more persuasive, in that the pension interest should automatically be regarded as part of the joint estate by operation of law.

If indeed it is accepted that the pension fund scheme of a member is built by contributions from the joint estate, it will not be devoid of sense to conclude that

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pension benefits post-divorce in 2006. It was only when the former wife instituted maintenance proceedings against the former husband that she discovered that his pension fund had paid him out. As a result, the former wife issued summons against the former husband for her 50% share of the pension proceeds.

<sup>73</sup> *M v M* 2012 ZAKZDHC 17 (1 January 2012) 9.

<sup>74</sup> See *ML v JL* 2013 ZAFSHC 55 (25 April 2013) para 24, wherein it was held that "before the divorce the pension interest of a member is like a nest feathered by the financial contributions which otherwise would have contributed towards the growth of the patrimonial benefits of the joint estate".

what the member would receive when he or she withdraws from the fund can legitimately fall automatically within the joint estate, because that benefit was created by the benefits of the joint estate anyway; ie, it was part of his or her salary. Furthermore, if it is accepted that it is possible for a pension interest by whatever name it is referred to, (perhaps as "pension proceeds") to fall automatically within the joint estate, this means that the non-member spouses are entitled to such benefits irrespective of when such benefits have accrued. Furthermore, if it is accepted that such benefits can automatically fall within the joint estate, then even if on the date of divorce the non-member spouse failed to plead and specifically ask to be awarded part of the pension interest, such a party will still be entitled to share therein if the court were to order the total division of the joint estate. However, retirement funds will refuse to pay out such benefits, relying on the provisions of section 37D of the PFA, which requires an order to be made by a court directing the fund to pay, and also identifying the relevant fund. Under these circumstances, the former non-member spouse can simply approach the court which granted the divorce for the decree of divorce to be varied to comply with the provisions of section 37D of the PFA.

If the pension interest was due on the date of divorce as per the clean break provisions in the PFA, I am of the view that in situations where a non-member former spouse has failed to claim the pension interest at the time of divorce which he or she was entitled to in terms of the marriage in community of property, such a former spouse should nonetheless remain entitled to salvage something, provided the joint estate has not yet been divided. I submit, however, that due to the fact that there should be certainty in law, there should be a time limit post-divorce within which all those who failed to claim the pension interest during the divorce proceedings can be allowed to claim such benefits. Such benefits could be claimed simply by bringing an application in the same court for a variation of the decree of divorce to incorporate the pension interest. Civil procedure rules relating to time limits as well as the normal rules regarding prescription should be applicable, in that



if the claim is not brought within three years, such a claim should prescribe, unless of course prescription is disturbed in some justifiable way.

### **5.3 Pre-divorce scenarios**

If both parties to a marriage in community of property are members of pension funds, it would seem to be fair that when either of them withdraws from a fund and is thus accorded pension benefits, the other party should also benefit from the amount which will be paid by the pension fund. In most instances when one of the parties receives pension benefits during the subsistence of the marriage, he or she will most likely regard such benefits as belonging entirely to him or her, and not necessarily to the joint estate. It will not be much of a problem if such money were to be either saved or invested, because under such circumstances should the parties divorce, the other party will be able to salvage something from such money. However, the reality is that most people do not save their money, hence it might be prejudicial to the other party when the parties divorce each other and money received from the pension fund is no longer available. Such prejudice will be more evident if the other party is also a member of a pension fund, particularly if during the divorce the party who did not share his or her pension fund benefits with the other now becomes eligible to share the pension interest on the pension fund of the party who is withdrawing from the fund due to the divorce in terms of section 37D(1)(a) of the PFA and sections 7(7) and (8) of the DA.

The reality is that people who experience these difficulties do not take these matters to courts. However, the court in *Elesang v PPC Lime Limited*<sup>75</sup> was confronted with a situation where after the wife had instituted divorce proceedings the husband

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<sup>75</sup> *Elesang v PPC Lime Limited* (NC) unreported case number 1076/2006 (15 December 2006). In this case, the parties were married in community of property. The husband had a pension fund, but left his employment after the divorce action has been instituted by the wife. The wife then approached the High Court and applied for an order, pending finalisation of the divorce action, that the fund should pay half of the member's pension interest into the trust account with her attorneys. The husband's fund opposed the application, arguing that the "pension interest" as envisaged in the DA could apply only if at the time of the divorce the husband was still a member of that fund. Further, that since the husband would not be a member when the parties marriage was dissolved, the non-member spouse would not be entitled to claim under s 7 of the DA (para 8).

resigned from his employment and thus became entitled to receive his withdrawal benefits from his pension fund.<sup>76</sup> The wife then approached the court for a provisional order to the effect that, pending finalisation of the divorce action, the husband's pension fund pay half of the amount of what was referred to as the husband's "pension interest" into the wife's attorney's trust account. Further, that in the event that the money had already been paid into the husband's bank account, then the bank which the husband was banking with be ordered to pay half of the "pension interest" into the wife's attorney's trust account.<sup>77</sup> The application was founded upon allegations that the wife was entitled to half of the money by virtue of the parties' marriage in community of property.<sup>78</sup> The court looked at the definition of the phrase "pension interest" in section 1 of the DA and held that this phrase appears to apply only where one of the spouses is a member of a pension fund at the date of the divorce; and not in this case because the husband will not be a member of the pension fund concerned if and when an order of divorce is granted, because he has already left his employment.<sup>79</sup> The court further held that:

In view of the fact that the third respondent has already become entitled to the benefits and has already left his employment, long before the date of the divorce, the formula based on benefits to which he 'would have been entitled' in the event of a resignation, can also strictly speaking no longer apply. It is clear that the hypothetical event upon which this formula was intended to be based is a resignation 'on the date of the divorce' and that the calculation was intended to be made on this basis when the pension benefits eventually accrued to the member at some time after the divorce.<sup>80</sup>

The court was of the view that the wife was not entitled to any relief in terms of the provisions of sections 7(7) and (8) of the DA. This was because these provisions according to the court, clearly applied only to a pension interest which had not yet accrued at the date of divorce and which belonged to the party who was still a

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<sup>76</sup> *Elesang v PPC Lime Limited* (NC) unreported case number 1076/2006 (15 December 2006) para 3.

<sup>77</sup> *Elesang v PPC Lime Limited* (NC) unreported case number 1076/2006 (15 December 2006) para 4.

<sup>78</sup> *Elesang v PPC Lime Limited* (NC) unreported case number 1076/2006 (15 December 2006) para 6.

<sup>79</sup> *Elesang v PPC Lime Limited* (NC) unreported case number 1076/2006 (15 December 2006) paras 9-10.

<sup>80</sup> *Elesang v PPC Lime Limited* (NC) unreported case number 1076/2006 (15 December 2006) para 11.

member of a pension fund at the date of divorce.<sup>81</sup> Nonetheless, the court held that the fact that where a member has terminated employment there is no pension interest to be apportioned between the parties as a pension benefit has already accrued does not mean that the non-member spouse will not be entitled, in the divorce action, to any part of the pension benefits.<sup>82</sup>

In *Eskom Pension and Provident Fund v Krugel*,<sup>83</sup> the court had to decide whether or not the provisions of section 7(7) and section 7(8) of the DA entitle a non-member spouse to receive benefits from a pension fund of which the other spouse is a member pursuant to a divorce order, where the member spouse had resigned from his employment before the date of divorce but deferred his benefit in the pension fund.<sup>84</sup> The court was of the view that the former wife's entitlement, if any, must derive from the provisions of section 7(7) and section 7(8) of the DA. The court then held that due to the fact that the former husband had already resigned long before the divorce, his pension interest had already become payable to him before the divorce. As such, he could not again be deemed to become entitled to a resignation benefit. The court concluded that the former husband simply no longer had a pension interest for the purposes of section 7(7) and section 7(8) of the DA.<sup>85</sup> Nonetheless, the court held that a settlement agreement between the parties

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<sup>81</sup> *Elesang v PPC Lime Limited* (NC) unreported case number 1076/2006 (15 December 2006) para 18. However, the court was of the view that in any case the pension benefit that had already accrued was going to be part of the joint estate and, in principle at least, the wife was going to be entitled to one half of the net value of that estate (para 21).

<sup>82</sup> *Elesang v PPC Lime Limited* (NC) unreported case number 1076/2006 (15 December 2006) para 19.

<sup>83</sup> *Eskom Pension and Provident Fund v Krugel* 2012 6 SA 143 (SCA). In this case, the husband resigned from his employment in 1993, and upon his resignation he elected to defer his pension in his fund thereby becoming a deferred pensioner. However, the parties divorced later on in 2001. The divorce decree incorporated a settlement agreement wherein it was agreed that the wife was entitled to 25% of the pension interest in the husband pension fund. The fund refused to endorse its records on the basis that the divorce was granted after the husband had already elected to become a deferred member and thus no longer had a pension interest in the fund as contemplated by the DA. The wife then launched a complaint with the Pension Funds Adjudicator, who upheld her complaint and ordered the fund to pay her or transfer her portion of the pension interest to a pension fund (depending on her election). The fund launched a review application to the High Court and the decision of the Pension Funds Adjudicator was upheld. The fund then appealed to the Supreme Court of Appeal, but the appeal was unopposed.

<sup>84</sup> *Eskom Pension and Provident Fund v Krugel* 2012 6 SA 143 (SCA) para 6.

<sup>85</sup> *Eskom Pension and Provident Fund v Krugel* 2012 6 SA 143 (SCA) para 12.

remained binding as between them, and the former wife could claim her share of the former husband's deferred pension benefit when it paid out.<sup>86</sup>

From the discussion of these two cases it is clear that the issue of "pension interest" cannot arise before the parties actually divorce. This means that none of the parties to the marriage can claim part of the pension benefits before the actual date of the divorce. In *Elesang v PPC Lime Limited* the problem arose immediately after the divorce proceedings were instituted, when the husband resigned and became entitled to receive his pension benefits. In *Eskom Pension and Provident Fund v Krugel*, the problem was that when the member resigned he did not share his pension benefits with his spouse but elected to defer such benefits to the fund, thus protecting those benefits against the provisions of the DA.

The office of the Pension Funds Adjudicator has also been called upon to determine cases where a member spouse withdrew from the fund before the divorce was granted. In *Saunders v Eskom Pension Fund and Provident Fund*<sup>87</sup> the husband resigned from his employment on 30 April 1995, and became entitled to his retirement benefits but deferred such benefits to the fund. The parties' marriage was dissolved on 06 January 2006. In dismissing the wife's complaint, the Adjudicator held that because the husband had already resigned from his employment on the date of divorce and on the proper interpretation of sections 7(7) and 7(8) of the DA, there was no pension interest which formed part of his assets which could be assigned to the wife.<sup>88</sup> Similarly, in *Williams v Alexander Forbes Retirement Fund*<sup>89</sup> the husband left his employment in or around March 2010, during which period the divorce proceeding were still underway. The wife obtained an interdict preventing the husband's pension fund from making payment of his pension benefits pending the finalisation of the divorce. However, the pension fund paid the husband his withdrawal benefit upon his exit from the fund. The retirement fund argued that the divorce order which directed it to pay the pension interest to the wife was not

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<sup>86</sup> *Eskom Pension and Provident Fund v Krugel* 2012 6 SA 143 (SCA) para 15.

<sup>87</sup> *Saunders v Eskom Pension Fund and Provident Fund* PFA/WE/8164/2006/TD.

<sup>88</sup> *Saunders v Eskom Pension Fund and Provident Fund* PFA/WE/8164/2006/TD para 5.5.

<sup>89</sup> *Williams v Alexander Forbes Retirement Fund* PFA/WE/6545/211/SM.

binding on it because it was obtained eight months after the husband has exited the fund.<sup>90</sup> In dismissing the wife's complaint, the Adjudicator held that the final divorce order that was issued on 29 November 2010 was not valid and enforceable against the retirement fund as at that time it held no pension interest in respect of the husband, because he had already exited the fund.<sup>91</sup>

Even though it might be argued that former spouses under these circumstances will have personal claims against each other, if for instance there was some sort of agreement between them to deal with the pension benefits, I am of the view that this position is unsatisfactory. It cannot be that a non-member spouse will not be accorded benefits to which he or she is entitled by virtue of the marital regime applicable to his or her marriage just because the member spouse decided to withdraw from his pension fund before the divorce. Now, the question is what would be the case when parties are not divorcing at the time when one of them is leaving his or her employment and the benefit is not deferred to the fund? Should there not be some form of protection for spouses of members of pension funds when such members withdraw from the fund before the date of divorce when such parties are married either in community of property or out of community of property with the application of the accrual system and the pension fund benefits are not excluded from the accrual?

Judging from the cases discussed above, it cannot be disputed that not having an effective statutory mechanism which allows non-member spouses to be able to access the pension benefits or a part thereof of their member spouses who leave their employment during the subsistence of their marriage, where there is a joint estate between the parties, is problematic. From a social security point of view, should the spouse who received pension benefits misuse the money where the other spouse is entirely dependent on him or her, this might bring about dire welfare consequences. From an equity point of view, it does not seem to be fair for the spouse who received his or her pension benefits and misused them during the

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<sup>90</sup> *Williams v Alexander Forbes Retirement Fund* PFA/WE/6545/211/SM para 4.

<sup>91</sup> *Williams v Alexander Forbes Retirement Fund* PFA/WE/6545/211/SM para 5.6.

subsistence of the marriage and did not share them with his or her spouse to receive a pension interest in the other spouse's pension fund when they divorce. I therefore submit that in these situations it is perhaps ideal to adopt the approach provided for by section 8(1) of the *Matrimonial Property Act* 88 of 1984 as far as marriages out of community of property with the application of the accrual are concerned. This section is meant to protect the spouse's interest to share in the accrual. In terms of this section, if during the subsistence of the marriage one spouse by his or her conduct seriously prejudices or will probably seriously prejudice the other spouse's right to share in the accrual at the dissolution of the marriage, the spouse who stands to be so prejudiced may apply to the High Court for the immediate division of the accrual.<sup>92</sup>

I am of the view that the same method can be employed when member spouses withdraw from their funds before the divorce, in that a similar legal mechanism can be created to allow a non-member spouse, immediately upon a retirement fund scheme paying out withdrawal benefits to its member, to approach a competent court for an order for the division of such a withdrawal benefit. This mechanism should be available to any marriage where there is a joint estate between the parties or where an accrual system is applicable. Any court which is competent to grant a divorce order should be accorded jurisdiction to hear such applications from spouses who stand to be prejudiced. The non-member spouse can choose whether to utilise this method or not, but at least the legislature would have provided a mechanism which is competent to protect his or her patrimonial interests. If, however, the non-member spouse chooses not to utilise this mechanism he or she cannot then, if the parties divorce, claim the pension interest on the date of divorce, because at that time whatever the member spouse would have received from his or her pension fund before the date of divorce would not constitute a pension interest.

It can be argued that there might not be a need for such a mechanism, in that once the pension interest of a member spouse has been paid out it crystallises into an asset in the joint estate, thus forming part of the assets that are divided when the

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<sup>92</sup> Heaton *South African Family Law* 99.

community is dissolved. Such a view would be misplaced, because it assumes that whatever amount is paid to the member spouse when he or she withdraws from the fund before the divorce will still be available for division when the parties divorce. This mechanism will be essential when the non-member spouse discovers that, after receipt of pension benefits, the member spouse is actually wasting and misusing money which should benefit the joint estate. Under such circumstances this mechanism will become an effective tool for non-member spouses to make applications to court to be awarded their portion of such money, before such money runs out. Furthermore, this mechanism will become handy when upon receipt of his or her pension benefits, the member spouse seeks to defer the entire benefit back into the fund, thus making it impossible for the non-member spouse to obtain a share thereto should the parties divorce, as was the position in some of the cases discussed above.<sup>93</sup> Under such circumstances, the non-member spouse can actually apply to court in terms of the proposed mechanism to immediately receive his or her share thereto, and allow the member spouse to defer the rest of the amount to his or her fund.

## **6 Conclusion**

I am of the view that the issue of the payment of the pension benefits of member spouses to non-member spouses will continue to trouble our courts, and thus we will continue to get conflicting decisions as far as the interpretation of the relevant provisions of the DA are concerned. However, hopefully, should either the Supreme Court of Appeal or even the Constitutional Court be called upon to determine on this issue, that court will be able not only to clarify the law but also to give us guidance as to how section 7(7)(a) and section 7(8) of the DA ought to be interpreted in a modern, democratic society. Until such time, one will also have to look at matrimonial principles, which I believe take account of pension entitlements that have already accrued to a spouse as assets in that spouse's estate, or in the joint estate if the parties are married in community of property. I am of the view that this

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<sup>93</sup> See *Eskom Pension and Provident Fund v Krugel* 2012 6 SA 143 (SCA) and *Saunders v Eskom Pension Fund and Provident Fund* PFA/WE/8164/2006/TD.

would include both a lump sum payment and the right to a monthly pension. As such, the non-member spouse is entitled to have the value of the pension assets included in a calculation aimed at dividing the joint estate, or the value of an accrual claim. However, in *Maria v Brian*<sup>94</sup> the court held that in terms of section 7 of the DA, a party's pension interest as at the date of divorce does not include future monthly pension payments due to a member and/or any other future right or interest which has not yet accrued. Such a pension interest constitutes an asset in the estate of such a member.<sup>95</sup> I am not convinced that this is the proper position if parties are married in community of property.

Finally, it is high time that divorce litigation is accorded the respect it deserves. This is a highly specialised area of our law, and if practitioners are not careful as to how they carry out their instructions, their lack of care could result in their clients losing substantial amounts relating to pension funds, thus being left in a financially vulnerable position. Practitioners need to be very careful when drafting documents, be they pleadings or settlement agreements, relating to the division of retirement benefits between spouses at the time of divorce. By so doing, practitioners will not only be saving their clients costs but also peace of mind post-divorce.

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<sup>94</sup> *Maria v Brian* 2008 ZAGPHC 317 (28 August 2008). In this case the parties were married out of community of property with the exclusion of the accrual in 1984 but divorced in 2006. The decree of divorce incorporated a settlement agreement wherein there was a redistribution clause in terms of s 7(3) of the DA, where it was agreed that the applicant would be paid 30% of the respondent's pensionable interest calculated as at the date of divorce. The records of the respondent's fund were endorsed and there was an amount which was paid to the applicant. The applicant brought an application alleging that the amount she received did not amount to 30% of the respondent's pensionable interest. It was argued on behalf of the applicant that the 30% the applicant was entitled to as per the settlement agreement also extended to the respondent's monthly pension payable to him by his fund. As such, the applicant sought an order directing the respondent to disclose information, including documentation which would allow her to determine the amounts due and payable to her. However, it was argued on behalf of the respondent that there was no obligation on the respondent to submit any statement of account to the applicant.

<sup>95</sup> *Maria v Brian* 2008 ZAGPHC 317 (28 August 2008) para 22.



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## LIST OF ABBREVIATIONS

CUA	Civil Union Act
DA	Divorce Act
GEPF	Government Employees Pension Fund
PFA	Pension Funds Act
LDD	Law, Democracy and Development
SALC	South African Law Commission
SALRC	South African Law Reform Commission
SA Merc LJ	South African Mercantile Law Journal
TRW	Tydskrif vir Regswetenskap
TSAR	Tydskrif van die Suid-Afrikaanse Reg
SA Merc LJ	South African Mercantile Law Journal