

**DIVORCE BENEFITS PAYABLE TO NON-MEMBER
SPOUSE UNDER SECTION 37D OF THE PENSION FUNDS
ACT 24 OF 1956.**

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**DIVORCE BENEFITS PAYABLE TO NON-MEMBER SPOUSE UNDER
SECTION 37D OF THE PENSION FUNDS ACT 24 OF 1956**

by

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2013

DECLARATION BY SUPERVISOR

I, **Adv. Lufuno Tokyo Nevondwe**, hereby declare that this mini-dissertation by **Nazia Carrim** for the degree of Master of Laws (LLM) in Labour Law be accepted for examination.

Signed-----

Date-----

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ABSTRACT

This mini dissertation relates to the payment of divorce benefits to a former spouse upon divorce and recent amendments that have taken place in the Pension Funds Act 24 of 1956. Particular reference is made to the amendment of Section 37D. This amendment has brought about changes that will contribute positively to the development of South African Retirement Law. The discussion below deals with the unfairness to non-member former spouses before 1st November 2008. An analysis of pension interest taking into account relevant statutory provisions and case law will be dealt with as well. A classification between a member spouse and a former spouse in order to determine who is responsible to pay tax upon divorce. In terms of the Divorce Act 70 of 1979 the former spouse of a retirement fund on divorce could be awarded by the court a portion of the benefits that the member would have received had she/he resigned on the date of divorce. The former spouse was only entitled to receive that share when the member became entitled to a benefit in terms of the rules of the fund which states on his/her retirement or termination of membership which could have been many years after the date of the divorce. Dissolution of Customary marriages will also be discussed and the benefit a divorced spouse has at the dissolution of marriage.

DECLARATION

I, **Nazia Carrim** declare that this mini-dissertation submitted to the University of Limpopo (Turfloop Campus) for the degree of Masters of Laws (LLM) in Labour Law has not been previously submitted by me for a degree at this university or any other university, that it is my own work and in design and execution all material contain herein has been dully acknowledged.

Nazia Carrim

16TH MAY 2013

DEDICATION

To my husband Muhammad Hussain for being such a wonderful husband and for his patience and understanding. Thank you.

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First of all, I am grateful to God, the Almighty, for giving me life, protecting me and blessing me so far. I will like to thank him for his grace and wonderful love he gave to me in order to complete my Master's degree and this mini-dissertation.

I wish to express my indebtedness to Adv. Lufuno Tokyo Nevondwe, my supervisor who kindly accepted to supervise my work despite a lot of lecturing, academic and writing commitments, Adv. Nevondwe found time to read and re-read drafts of this mini-dissertation that has very much improved, thanks to his invaluable comments and suggestions.

My husband to whom this work is dedicated due to all his sacrifices. I thank all my family as well for their support, encouragement and love.

I also wish to convey my gratitude to all my lecturers at the University of Limpopo that lectured me through my year of study at the University. Finally, I also benefited from my classmates and colleague and would like to thank each and every one of them.

LIST OF ABBREVIATIONS

CCMA	Commission for Conciliation, Mediation and Arbitration.
GEPF	Government Employees Pension Fund.
LRA	Labour Relations Act
PEPUDA	Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000.
PFA	Pension Funds Act, 24 1956

LIST OF INTERNATIONAL INSTRUMENTS

1. African Charter of Human and People's Rights (*"Banjul Charter"*), 27 June 1981.
2. Convention on the Rights of the Child, 20 November 1989.
3. European Social Charter, 18 October 1961.
4. Universal Declaration of Human Rights, 10 December 1948.
5. International Covenant on Economic, Social and Cultural Right, 16 December 1966.
6. International Labour Organisation's Social Security (Minimum Standards) Convention No. 102 of 1952.
7. International Labour Organization Convention No. 29 of 2000.

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1. Constitution of the Republic of South Africa Act 108 of 1996.
2. Government Employees Pension Law, Proclamation 21 of 1996.
3. Labour Relations Act, 66 of 1995.
4. Pension Funds Act, 24 of 1956.
5. Pension Funds Amendment Act 11, of 2007.
6. Prescription Act, 68 of 1969.
7. Promotion of Equality and the Prevention of Unfair Discrimination Act, 4 of 2000.
8. Transnet Pension Fund Act, 62 of 1990.
9. United Kingdom Pension Act of 2004.
10. White Paper for Social Welfare, 1997.

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1. *De Kock v Jacobson and Another* 1999 (4) SA 346 (W).
2. *D de Kwaadsteniet v Lifestyle Retirement Annuity Fund Group Limited* Unreported case no: 2 of 2010. (PFA).
3. *Derman v University of Cape Town Retirement Fund & Another* PFA/40794/2010/CMS (unreported).
4. *Eskom Pension and Provident Fund v EM Krugel and Another* Case no: 689/2010. This case is unreported and the judgment was delivered on 31 May 2011 by the Supreme Court of Appeal.
5. *Ex Parte Randles: in re King v King* (2002) 2 BPLR 3017 (D).
6. *Maharaj v Maharaj & Others* (2002) 2 BPLR 3030 (D).
7. *Mashilo v Basil Read Group Provident Fund*, case no: PFA/NP/3044/2001/NJ, dated 17 August 2001, an unreported determination of the Pension Fund Adjudicator.
8. *Mouton v Southern Staff Pension Fund* (2003) 4 BPLR 4581 (PFA).
9. *Old Mutual Life Insurance Company (SA) Limited & Another v Swemmer* (2004) 4 BPLR 5581 (SCA).
10. *Smith v Smith* (2004) 2 BPLR 5431 (SCA).
11. *Sempapalele v Sempapalele & Another* (2002) BPLR 3035 (O).
12. *Taljaard v Haggie Pension Fund & Others* (2004) 4 BPLR 6099 (PFA),
13. *Noordien v Metal Industries Provident Fund* (2002) 3 BPLR 3236 (PFA).
14. *Van der Berg v Oranje-Vrystaatse Gemeenskaplike Munisipale Pensioenfonds* (2001) 3 BPLR 1804 (PFA).

CHAPTER ONE: INTRODUCTION

1. Historical background to the study

Modern pension funds owe their existence largely to the industrial revolution and the social and technological advances that have since taken place. Although pensions had been paid in one form or another for hundreds of years prior to these advances, particularly in Europe,¹ employees tended to work throughout their lives, and in infirmity were cared for by their extended family unit or by the local community.²

The industrial revolution saw a major change in the nature of society and the start of mass urbanization. Industrial employers took over the role of work and sustenance provider, and the village and family unit was gradually broken down.³ As time went on, employers needed to strive for business efficiency and productivity which led to shorter effective working life, and it was not too long before the more socially conscious employers recognized a need to make provision for those employees who had given them good service but had become too old to keep up with the physical pressures of work in a factory. Later, as competition among employers for skilled employees were able to attract better and more qualified employees, so the provision of basic pension began to expand as a means of attracting and retaining good employees.⁴

¹ For example, retiring generals were often given gifts of land or cash by way of payment for long service, and the servants of landed gentry were often rewarded in a similar fashion when they were no longer able to carry out their duties effectively.

² See Ramabulana M “Seminar on Pension Law organised by the University of Limpopo Legal Aid Clinic. Presented by the Office of the Pension Fund Adjudicator,” 09 June 2006, University of Limpopo (Turfloop Campus).

³*Ibid.*

⁴*Ibid.*

In the early days, development in South Africa tended to follow that in the United Kingdom. Pensions were initially paid out of current earnings, but as their coverage widened and they were increasingly demanded by long service skilled employees, prudent employers started to look for ways of pre-funding these expectations. It is interesting to note that the internationally recognized normal retirement age of 65 was first introduced in Germany.⁵

Around the early 1920's, the governments also saw the advantage of encouraging more formal arrangements as society became more dependent on savings made during employment as a means of survival in old age, rather than reliance on the family or community unit. They also realized, however, that some form of control over how pensions were being provided was necessary, and so, with the introduction of tax incentives to encourage the growth of savings for old age, they used their respective tax legislation to establish rules regulating pension benefits. This resulted in a rapid increase in the number of employers providing properly funded and secure pension benefits.

Funds were set up either as private arrangements where the employer employed his own staff to manage the fund and invest its assets, or alternatively employers often purchased life insurance policies in the names of individual employees, and in that way removed the risk of the pension not being available should something untoward happen

⁵ Statistics at the time indicated that the average life span of a male worker was 66 years. The benevolent Germans decided, therefore, that all male employees (very few women worked full-time in those days, if at all) would retire on reaching age 65 so that they had one year remaining to enjoy themselves and put their personal affairs in order, before they died. Therefore, the cost of providing pensions was relatively low as those few who actually retired rarely survived much longer.

to the employer Group insured arrangements, where one master policy was issued to provide the benefits for all the employees of an employer were only introduced in the early 1950's.

The Pension Funds Act ⁶(hereinafter referred to as the Act") can be traced back right to 1956 when the South African Government had introduced this Act to regulate and control the business of pension funds in South Africa. This mini-dissertation is concerned about recent amendments of the Pension Fund Act. This amendment has brought changes, and will contribute positively to the development of the South African retirement law.⁷

The late 1950's and 1960's saw incredible economic growth among first World countries and with it the emergence of giant multinational corporations employing thousands of people. The growth in pension funds during this period, and the improvement in the benefits they provided, mirrored this increase in employment and prosperity.

Since then, with the incredible advances in information technology and the growth of available investment vehicles, including the opening of international investment channels, pension funds have become highly sophisticated.⁸This has led to a proliferation of new types of funds, including umbrella funds administered by professional sponsors and open to voluntary participation by any employer, on behalf of

⁶Act, 24 of 1956.

⁷ At that time, and for several years thereafter, other countries relied mainly on trust law and various other legal principles, including, of course, the very powerful conditions imposed in their income tax acts.

⁸*Ibid*fn2.

its employees, and preservation funds which cater for the “parking” of the retirement funding assets of individual members until they retire or decide to transfer them to another fund.

Currently, society world-wide, is on the move again, and employment patterns are changing even more rapidly. Naturally, with changes in social patterns and working conditions come changes in retirement provision, and it is likely that we will see the effects of these changes sooner rather than later pension funds. We may even find that the pension fund spawned by the industrial revolution gives way to something quite different, and is discarded into the history books. Meantime, attempts are being made by the South African Government, *inter alia*, to catch up with current social change and the ever increasing demands of consumer protection and good governance, by re-writing the Act in terms of today’s needs for tomorrow’s society.⁹

2. Statement of the research problem

The Government Employees Pension Law currently does not allow a former spouse of a member to claim a portion of a member’s interest, in terms of a divorce order or an order for the dissolution of a customary marriage, soon after the divorce order or the order for the dissolution of a customary marriage is granted. The former spouse can only receive a portion of the member’s interest after the exit of the member from the Government Employees Pension Fund (‘GEPF’).¹⁰ The member spouse can exit the GEPF either as a result of resignation, dismissal, retrenchment, employee becoming

⁹ See National Treasury *Retirement Fund Reform-a discussion paper* December 2004.

¹⁰ The Government Employees Pension Fund (‘GEPF’) was established in terms of the Government Employees Pension Law, 1996 (Proclamation No.21 of 1996).The GEPF was established with the object of providing pensions and certain other related benefits to members, pensioners and their beneficiaries.

disabled to such an extent that a service won't be able to be rendered to the employer, retirement or death.

Before the enactment of Section 7(7) and (8) of the Divorce Act¹¹, the spouse of a member of a retirement fund had no such right to a share of his or her retirement savings in that fund unless a benefit had accrued to the member¹² prior to the divorce. However the position was changed in 1989 with the insertion of Section 7(7) and 7(8) of the Divorce Act.

3. Literature review

According to Mothupi S, the Pension Fund Act has been amended because there are changes in the retirement industry.¹³ He argues that historically the member spouse's pension benefits could not be divided because they were not forming part of the members' matrimonial estate. According to section 37A of the Act, a member or beneficiary benefit may not be reduced, transferred, ceded, pledged hypothecated or attached save to the extent permitted by the Act, the Income Tax Act¹⁴ or the maintenance Act.¹⁵ This shows that the accrued pension of the member as at the date of divorce was not regarded as an asset in his estate or where the marriage was either community of property, as an asset in the joint estate of the parties being capable of deducted and transferred to the non-member spouse.

¹¹ Act 70 of 1979

¹² *De Kock v Jacobson and another* 1999 (4) SA 346 (W), where the issue for determination was whether a retirement benefit consisting of a lump sum and a pension for the member (which accrued prior to the divorce date) formed part of the joint estate. The court held that there was no logical or legal reason as to why both components of the retirement benefit should not ordinarily form part of the joint estate.

¹³ See Mothupi S "Some Practical Effects of the Financial Services Laws General Amendment Act 22 of 2008 on amending section 37D (4) of the Pension Funds Act" 22 *SA Merc LJ* 2007.

¹⁴ Act, 58 of 1962.

¹⁵ Act, 99 of 1998.

I concur with Mothupi because position has drastically changed when the South African Law Commission conducted an investigation in this regard and made recommendations that led to the promulgation of the Divorce Amendment Act.¹⁶ Section 7 (7) and (8) of the Divorce Act deems a member of spouse's pension interest to be an asset in his or her estate for the purpose of determining patrimonial benefits to which the parties to divorce may be entitled. This provision is fair and equitable, given the hardship to which spouses were subjected until then.

According to Nevondwe L, "a former spouse of a member of a retirement fund on divorce could be awarded by the court a portion of benefits that the member would have received had he or she resigned on the date of the divorce."¹⁷ He argues further that in terms of the Divorce Act¹⁸ read with the Pension Funds Act¹⁹ the former spouse was only entitled to receive that share when the member became entitled to a benefit in terms of the rules of the fund-that is, on his or her later retirement or termination of membership-which could have been many years after the date of divorce.²⁰

4. Aims and objectives of the study

The purpose of this study is to:

- Analyze the nature and effects of payment of benefits to former spouse at the time of divorce;

¹⁶ Act, 7 of 1989.

¹⁷ See Nevondwe L "The law regarding the division of the retirement fund member on his or her divorce with specific reference to *Cockcroft v Mine Employees' Pension Fund*, (2007) 3 BPLR 296 (PFA).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ The non-member spouse was not entitled to interest of her share of the returns earned by the fund on its investment during the period from the date of divorce to the date on which it was paid to her. Its value accordingly reduced in the interim.

- examine the previous legal implications before the amendment to the bill and the insertions in terms of Section 7 and 8 of the Divorce Act;
- examine the current legal position regarding after the amendments with regard to the payment of benefits to the former spouse on divorce;
- The definition of pension Interest
- Discussion of tax implications on pension interest;
- Lastly, this study stands to assist academics who have just begun to contend and investigate on the same literature because it may also bring insight on their programs and research efforts.

5. Research methodology

Basically, the research methodology to be adopted in this study is qualitative. Consequently, a combination of legal comparative and legal historical methods, based on jurisprudential analysis, is employed. Legal comparative method will be applied to find solutions, especially for the interpretation of section 37D.

The purpose of historical research method on the other hand, will be to establish the development of legal rules, the interaction between law and social justice, and also to propose solutions or amendments to the existing law or constitutional arrangement, based on practical or empirical and historical facts. Concepts will be analysed, arguments based on discourse analysis, developed. A literature and case law survey of the constitutional prescriptions and interpretation of statute will be made.

This research is library based and reliance is made of library materials like textbooks, reports, legislations, regulations, case laws, articles and papers presented on the subject in conferences.

6. Scope and limitations of the study

The study consists of five chapters. The first chapter deals with the introduction which lays down the foundation of the study. Chapter two deals with divorce benefits prior and post amendments to the Pension Funds Act. Chapter three focuses on case study: divorce benefits. Chapter four deals with the taxation of divorce benefits. The last chapter deals with conclusions and also provides the recommendations.

CHAPTER TWO: DIVORCE BENEFITS ON PENSION INTERESTS PRIOR AND POST THE AMENDMENT OF SECTION 37D OF THE PENSION FUNDS ACT.

2.1. Introduction

Prior to all divorce orders before 1 November 2008 a lot of confusion arose surrounding the pension interest that was awarded to a party. Two recent Pension Funds Adjudicator decisions helped eliminate this confusion.²¹ The confusion that occurs lies in determining the amount to which the party becomes entitled to on submission of a copy of a divorce order to the relevant fund.

Prior to the amendment of the Pension Funds Act by the Financial Services Laws General Amendment Act,²² the pension interest awarded to a non-member spouse on divorce would only accrue when it would have accrued to the member spouse. The disadvantage here would be that the non-member spouse would have to wait many years before being able to access any of these funds that rightfully belonged to the non-member spouse.

2.2. Divorce benefits prior to the amendment of the Act

Section 37D(4)(a) has been added to the Act in order to solve this problem faced by non-member spouses. As of the addition of Section 37D to the

²¹*De Cock v Jacobson & Another* 1999 (4) SA (W), where the issue for determination was whether a retirement benefit consisting of a lump sum and a pension for the member (which accrued prior to the date of divorce) formed part of the joint estate. The Court held that there was no logical or legal reason as to why both components of the retirement benefit should not ordinarily form part of the joint estate.

²² Act, 22 of 2008.

“Act”, the pension interest assigned to the non-member spouse in terms of a decree of divorce accrues to the member on the date on which the decree of divorce is granted.

Section 37D(4)(d) made the deeming provision fair. It provided any portion of pension interest assigned to a non-member spouse in terms of a decree of divorce before 13 September 2007, for the purposes of any law other than the Income tax Act, is deemed to have accrued to the member on 13 September 2007. The purpose is to enable a non-member spouse who was divorced before 13 September 2007 to submit the court order to the relevant fund for immediate payment, initially the non-member spouse would have only become entitled to the pension interest when the member had become entitled to it.

“Pension Interest” in a retirement annuity fund is defined in section 1 of the Divorce Act 70 of 1979 as follows:

“the total amount of that party’s contributions to the fund up to the date of divorce, together with a total amount of annual simple interest on those contributions up to that date....”

Section 37D (5) of the Act also creates a proviso to the definition of pension interest in a retirement annuity in the Divorce Act.

It provides that the *“..... total amount of annual simple interest payable in terms of the definition may not exceed the fund return on the pension interest assigned to a non-member spouse in terms of a decree granted in terms of section 7(8)(a) of the Divorce Act, 1979”*.

To explain the above, the proviso entitles the non-member spouse to claim the lower of either the annual simple interest (currently at an annual rate of 15.5%) or fund return on the pension interest allocated to the non-member in terms of the divorce order.

A practical example in order to clarify the above would be as follows: spouses A and B were divorced on 20 January 2000 and in terms of the decree of divorce spouse B was entitled to 50% of spouse A's pension interest. Spouse A had been a member of a retirement annuity fund since June 1998 and on becoming aware of the amendment to the Act, Spouse B submitted the decree of divorce to the retirement annuity fund in January 2010 for payment of her share of pension interest in terms of the decree of divorce. The fund return exceeded simple interest, so the Spouse B was entitled to 50% of Spouse A's contributions to the fund from June 1998 until 15 January 2000 together with the simple interest at a rate of 15.5% a year. Spouse A benefits from the difference between fund return and simple interest from June 1998 until 15 January 2000 and his fund credit is increasing accordingly.

What is the situation in the instance where a non-member spouse , who is entitled to receive 100% pension interest as at the date of divorce together with the fund return or simple interest ?

This instance was addressed in the following case law: "*D de Kwaadsteniet v Lifestyle Retirement Annuity Fund Group Limited*,²³"the former spouse of the complainant was a contributing member of a lifestyle Retirement Annuity Fund. The marriage between the complainant and the member was dissolved on 19 October 2001. In terms of the

²³ Unreported case no: 2 of 2010. (PFA).

settlement agreement, which was made an order of court, the complainant was awarded the member's entire pension interest in the Fund. The Complainant made enquiries as to the value of the policy in September 2009 and was advised that the value was more or less R 365 000.00. However she was only paid an after tax R 115 769.03.

The complainant lodged a complaint with the Adjudicator, arguing that she should have received R 365 000 less income tax. The Fund had responded by stating that the member's contributions up to the date of divorce together with the Fund's rate of return as the simple interest exceeded the fund's rate of return was R 141 181.74 before tax. The fund had informed that the complainant was only entitled to receive 100% pension interest at the date of divorce and not the current value of the policy.

The Adjudicator concluded that the complainant was wrongly under the impression that since she was entitled to the entire pension interest she was entitled to the entire proceeds' of the policy. The adjudicator confirmed that the complainant was only entitled to 100% of the pension interest, as defined, up to the date of divorce. The complainant was accordingly dismissed.

The definition of "pension interest" in a pension or provident fund differs from the definition in a retirement annuity fund. In the former it means the benefit to which the member would have been entitled in terms of the rules of the fund if the member's membership of the fund would have been terminated on the date of divorce. The non-member spouse is entitled only to the accrual of fund return on his/her share of pension interest from the non-member spouse has submitted the court order to the fund and has

made an election as to whether his/her share of the pension interest should be paid directly to him/her or transferred into another fund until the date of payment (section 37D(4)(c) (ii) of the Act).

In order to calculate a non-member spouse's "pension interest" determine the type of fund to which the member spouse belongs. If it is a retirement annuity fund, the pension interest is the total amount of the member's contributions until the date of divorce. In addition, the non-member is entitled to claim the lesser of the fund return or simple interest on the pension interest. If it is a pension or provident fund other than a retirement annuity fund, the pension interest is the benefit to which the member would become entitled in terms of the rules of the fund had the member's fund membership been terminated at the date of divorce. The only growth to which a non-member spouse is entitled is fund return on the pension interest from when the non-member spouse submits the divorce order to the fund and makes an election as to how his /her share of the pension interest should be dealt with until the date of payment.

The Pension Funds Amendment Act²⁴ introduced what has become the clean break principle. The clean break principle is 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 or her thereby effecting a clean break between the parties as far as the non-member's claim to a portion of the members pension interest is concerned. The former spouse does not have to wait until the member exits the pension fund.²⁵

²⁴ Act, 11 of 2007.

²⁵ The clean-break principle was first introduced in 2007 as a result of the Pension Funds Amendment Act, 11 of 2007. This principle was incorporated into section 37D (1) (d), (3) (b), (4) and (5).

A simpler explanation as to what is discussed above is that the non-member will not acquire the rights of a member or beneficiary in relation to the pension fund. The non-member shall be entitled to the accrual of interest on the assigned amount at the fund return from the expiry date of a period to date of interest.

When calculating the Pension Interest one must note that tax is an implication that in terms of section 37D (i)(d)(ii) allows the deduction of tax on any pension interest paid in respect of a non-member spouse in terms of a divorce order as contemplated in section 7 (8) of the Divorce Act.

In terms of Section 37D (1)(e) where a court orders the deduction of an amount from an active member's benefit in respect of a section 7(8) of the divorce order, the amount and tax thereon will be deemed to accrue to the member and therefore be taxed on the date of deduction.

Where a non-member spouse transfers the amount of pension interest allocated to him or her to a retirement fund, the transfer will not be tax free, but the amount will not be taxed upon retirement.

When claiming on behalf of a non-member spouse in terms of Section 7 (8) the following needs to be taken into account:

- 1) Identify all the retirement funds the member belongs to in order to ensure the relevant funds that are correctly identified by virtue of their employment. The court must clearly identify which funds are to be included.

- 2) Establish the value of the members spouse's pension interest. The pension interest can be no more than the (cash) resignation benefits as at the date of divorce in respect of pension and provident funds, In respect of Retirement Annuity Funds the pension interest is the aggregate of contributions plus 15.5% simple interest.
- 3) Previous divorces: Establish if any award was made to any previous divorce orders in which case such amount awarded does not form part of the pension interest available to be divided.
- 4) Factors to be taken into account when deciding on the basis on which the division should take place.

The "pension interest" defined in terms of the Divorce Act is the gross benefit. This amount may be subject to other deductions in terms of the rules of the fund.

When determining the net pension interest the following should be taken into account:

- Any existing house claims
- Pension backed securities provided by the fund in terms of Section 37D
- Any maintenance orders envisaged in Section 37A

A failure to take prior claims into account may result in a refusal by the fund to make payment on account of the fact that there are conflicting claims.

- 5) The Divorce order is to ensure that in terms of Section 7(8) of the Divorce Act, order the fund/s identified to make payments of a computable amount to the spouse in terms of Section 37D.

- 6) The order should be served on the fund in terms of Section 7(8). The former spouse must also advise if the amount allocated must be paid directly to him or her or be transferred to another fund.

It is clear from the provisions of the amended section 37D of the Act that it applies to divorce orders that were granted prior to 13th September 2007, which is the commencement date of the Pension Funds Amendment Act 11 of 2007, that had been raised by various stakeholders in the pension industry, including pension funds and administrators of funds, with regard to matters relating to divorce benefits.

2.3 Payment of pension benefits on divorce after the amendment of the Act²⁶

The Act introduces the “clean break principle”. The clean break principle allows for the former spouse to claim and receive a portion of the member’s interest that is assigned in terms of the divorce order or the order for the dissolution of a customary marriage, soon after the divorce order or the order for dissolution of the customary marriage has been granted. The former spouse does not have to wait until the member exits the pension fund.²⁷

²⁶ Section 24A (1) of the Bill provides that the Board shall direct the Fund to reduce a member’s pension interest by any amount assigned from the member’s pension interest assigned to the member’s former spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage is deemed to accrue to the member’s former spouse in terms of a decree of divorce granted under section 7(8) (a) of the Divorce Act or a decree for the dissolution of a customary marriage.

(2) (a) subject to paragraph (j), for purposes of section 7(8) of the Divorce Act, the portion of member’s pension interest assigned to the member’s former spouse in terms of a decree of divorce or decree for the dissolution of customary marriage is deemed to accrue to the member on the date of on which the decree of divorce or the decree for the dissolution of a customary marriage is granted.

(b) the amount of the member’s pension interest in the Fund shall be determined and the amount of the member’s pension interest that is assigned to the former spouse shall be calculated by the fund in accordance with the rules as at the date of the decree of divorce or the decree for the dissolution of a customary marriage.

²⁷ This clean break principle was first introduced in 2007 as a result of the Pension Funds Amendment Act, 11 of 2007. This principle was incorporated into section 37D (1) (d), (3) (b), (4) and (5).

Following the amended section 37D by the promulgation of the Financial Services Laws General Amendment Act²⁸ the Office of the Pension Fund Adjudicator was affected with many problems regarding claiming payment mainly from non-member spouses in a share of their former spouse's pension interests on divorce.²⁹

Section 37D of the Pension Funds Act states as follows:

- (1) A registered fund may-
 - (a) Deduct any amount due on the benefit in question by the member in accordance with the Income Tax Act, and any amount due to the fund in respect of-
 - (i) A loan granted to a member in terms of section 19(5); or
 - (ii) any amount for which the fund becomes liable under a guarantee furnished in respect of a member loan granted by some other person to the member in terms of section 19 (5), from –
 - (aa) the amount of the benefit to which the member or a beneficiary becomes entitled in terms of the rules of the fund; or
 - (bb) in the case of a transfer of the member to another fund, the amount of the benefit which the fund is so entitled to transfer, if the board of the transferor fund is satisfied that it is not otherwise reasonably possible to negotiate the repayment or to transfer the loan or the guarantee; or
 - (cc) in the case of default on the repayment of any such loan by the member concerned in circumstances where his or her membership of the fund is not terminated, the amount of the benefit which the member would have received on termination of membership on the date of default, if such a deduction is only effected as a last resort after the board of the fund is satisfied that no other arrangement for the required repayment can be made;

²⁸ 22 of 2008.

²⁹ Adv. M Ramabuluna of the OPFA confirmed that they received approximately 70 complaints involving this issue.

(b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of-

(i) (aa) a loan granted by the employer to the member for any purpose referred to in section 19(5) (a); or

(bb) any amount for which the employer is liable under a guarantee furnished in respect of a loan by some other person to the member for any purpose referred to in section 19(5)(a), to an amount not exceeding the amount which in terms of the Income Tax Act, may be taken to a member or beneficiary as a lump sum benefit as defined in Second Schedule to that Act; or

(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb) in respect of any damage cause to the employer by reason of any theft, dishonesty, fraud or misconduct by the member , in respect of which-

(aa) the member has in writing admitted liability to the employer; or

(bb) judgment has been obtained against the member in any court ,including a magistrate's court, from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned;

(c) deduct any amount which the fund has paid or will pay by arrangement with, and on behalf of, a member or a beneficiary in respect of-

(i) such member's or beneficiary's subscription to a medical scheme, registered otherwise than provisionally in terms of the medical scheme, registered otherwise than provisionally in terms of the Medical Schemes Act,

(ii) any insurance premium payable by such a member or beneficiary to an insurer registered in terms of the Insurance Act,

(iii) any purpose approved by the registrar, on the conditions determined by him, upon a request in writing from the fund, from the benefit to which the member or beneficiary is entitled in terms of the rules of the fund, and pay such amount, if due, to such medical scheme, insurer or person concerned, as the case may be.

(2) For the purposes of paragraph (a)(ii)(bb) and(cc) of subsection (1), the amounts so deducted shall be deemed to be a benefit to which the member becomes entitled on termination of his or her membership of the fund for reasons other than as a result of retirement or death arising at the date of the transfer or the default.

The amended Section 37D of the Pension Funds Act, 1956 (the Act) which came into effect on 13th September 2007 makes provision for the deduction from a member's benefit or minimum individual reserve, any amount assigned from his or her pension interest to a non-member spouse in terms of a decree granted under section 7(8)(a) of the Divorce Act, 1979. The intention of the amendments is to allow pension funds to deduct the amount due to a non-member spouse as a result of a divorce order from the date of the divorce order and no longer from the date the benefit accrues to the member as was the case prior to 13 September 2007.

From 1 November 2008 the Act provides that any pension interest allocated to a non-member spouse in terms of a divorce granted before 13 September 2007 is deemed to have accrued to the member on that date 13 September 2007. This in actual fact means that non-member spouses will be able to elect whether the amount is to be paid directly to him or her, or if it must be transferred to a pension fund on his or her behalf.

On submission of the court order, the pension fund(s) named or identifiable in the court order or the pension fund to which the pension interest of the member was transferred,

must deduct the portion of the pension interest allocated to the non-member spouse. The pension interest allocated must be deducted on the date on which an election is made or, if no election is made, at the expiry of the 120 day period referred to below. The member's accrued benefits or minimum individual reserve must be reduced at the date of the decree. The following procedure must be followed:

- The non-member must submit, in writing, the court order to the fund.
- The pension fund must, within 45 days of the submission of the court order by the non-member spouse, request the non-member spouse to elect if the amount to be deducted must be paid directly to him or her, or transferred to a pension fund on his or her behalf.
- The non-member spouse must, within 120 days, make an election.
- The pension fund must pay or transfer the amount within 60days of being informed, in accordance with the non-member spouse's election.
- Should the non-member spouse fail to make an election or identify the pension fund to which the amount should be transferred within the 120 day period, the pension fund must pay the amount directly to the non-member spouse within 30days of the expiry of the 120 day period.
- In the event that the pension fund cannot reasonably ascertain how the payment to the non-member spouse must be affected, the pension fund must retain the amount and any fund return, calculated from the expiry of the 120 day period, in the pension

fund until details of how that payment must be effected is made available to the Pension fund.

In the event that there is more than one court order assigning a portion of a member's interest in a fund to another person, the court orders must be given priority as follows:

- Any maintenance order
- Any decree of divorce or for the dissolution of a customary marriage.

Where a deduction must be made in respect of a maintenance order or divorce order, such deduction may only be made after the amount of the pension interest available has been reduced by the amount of any housing loan or guarantee granted prior to the granting of the court orders, irrespective of whether the loan or guarantee is due and payable or not. However the aggregate of all the amounts deducted may not exceed the member's pension interest available at any given time.

It is of importance to note that prior to 1 November 2008 pension interest was, as a general rule, not recorded in respect of preservation funds. Pension interest with regard to membership of a pension fund is defined in Section 1(1) of the Divorce Act, as the benefits to which the member would have been entitled in terms of the rules of the fund if his membership of the fund would have been terminated on the date of divorce due to his resignation.

The rules of most preservation funds do not provide for the payment of a withdrawal benefit when the member resigns from the employer.

The Act now states that, despite the definition of pension interest in section 1(1) of the Divorce Act, the portion of a member's pension interest in the case of a member of a preservation fund that is assigned to a non-member spouse, refers to the equivalent portion of the benefits to which that member would have been entitled in terms of the rules of the fund if his or her membership terminated on the date on which the decree of divorce was granted.

In the instances where divorce orders were granted before 13 September 2007, the member is liable for tax on the withdrawal benefit at his or her average rate. Further it is noted that depending on the agreement between the parties, the member might be able to recover the tax from the non-member spouse.

Divorce orders that were granted after 13 September 2007 state that the member is liable for tax on the withdrawal amount at his or her average rate. It is proposed that the pension-interest which accrues to a non-member spouse in terms of a court order granted after 13 September 2007 be taxed in the hands of the non-member spouse where the election by the non-member spouse occurs after 1 March 2009.

Divorce Orders granted after 1 March 2009 state that from 1 March 2009 tax on the pension interest is deemed to accrue to the non-member spouse. This should be applicable to elections on or after this date, even if the divorce order was granted before 1 March 2009 but after 13 September 2007. Where the full pension interest is transferred to another approved retirement fund it is proposed that such a transfer should be tax free.

A very important factor which needs to be discussed is the definition of “pension interest” which reads as follows:

“in relation to a member of the Fund who is a party to an action for divorce or for the dissolution of a customary marriage, means the benefits to which that member would have been entitled in terms of the rules of the Fund if the member’s membership of the Fund were to be terminated on the date of the divorce or the dissolution of a customary marriage on account of the member’s resignation from the service of the employer”

The above definition is in terms of the Government Employees Pension Law Amendment Bill, 2011.

The definition of ‘Pension Interest’ according of the Divorce Act is as follows:

(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 the fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office;

(b)Is a member of a retirement annuity fund which was bona fide established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of the party’s contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at the date by the Minister of Justice in terms of section 1(2) of the Prescribed Rate of Interest Act, for the purpose of the Act.

The pension interest of a member of a pension or provident fund ('an occupational retirement fund') is the withdrawal benefit to which the member spouse would have become entitled had he resigned from employment and terminated his membership of the fund on the date of divorce.

The pension interest of a member of a retirement annuity fund is defined to mean the total of the contributions to the fund up to the date of divorce plus simple interest thereon up to that date at the prescribed rate.

The "pension interest" is the maximum amount which may be assigned to the former spouse on divorce, the proportion allocated to the former spouse being dependent on the order of the court. It is not permissible to assign to her more than 100% of a member's pension interest.

This meant that the basis on which the 'pension interest' of a member was determined for divorce purposes was inequitable for former spouses, particularly as no provision was made in either the Divorce Act or the Pension Funds Act for the payment to the former spouse of interest on the amount of her share, or the returns earned by the fund on its investment before it was paid to her. The inequity is illustrated in the facts on which *Van der Berg v Oranje-Vrystaatse Gemeenskaplike Munisipale Pensioenfonds*³⁰ was determined by the Adjudicator. In that case, while only 7 months after the date of divorce, the member spouse received his full benefit of over R1000000, the former spouse received a meager R35 200.89.³¹

³⁰ (2001) 3 BPLR 1804 (PFA)

³¹ The new minimum withdrawal benefits legislation does not solve the problem to some extent.

In *Eskom Pension and Provident Fund v EM Krugel and Another*,³² the Supreme Court of Appeal (“the SCA”) had to decide whether a divorce order regarding the division of a member’s pension interest could be applicable to a member who resigned from employment before the date of divorce but chose to become a deferred member of the Eskom Pension and Provident Fund (“the Fund”).

The Fund appealed to the SCA after the High Court ordered the Fund to pay the former spouse of a deferred member of the Fund a share of the member spouse’s pension benefit on divorce. The divorce settlement agreement, which had been made an order of court, recorded that the husband had a “pension interest” in the Fund concerned and provided that the wife was entitled to 25% of that pension interest, payable to her as soon as the member became entitled to the pension benefits. The agreement further provided that the spouse’s attorneys would secure the registration of an endorsement against the records of the Fund-as provided for in the Divorce Act.

However, when approached, the Fund refused to register the required endorsement against its records on the basis that, at the time of the divorce, the husband, as a deferred member, no longer had a “pension interest” in the fund as contemplated in the Divorce Act. A complaint about this by the spouse to the Pension Funds Adjudicator was upheld. The Adjudicator held that, in terms of the legislation, the wife’s portion of the deferred benefit was deemed to have accrued. The Fund was ordered to pay the wife her portion of this benefit. The Fund appealed to the High Court, which dismissed its appeal. The Fund thereafter appealed to the Supreme Court of Appeal (SCA).

³² Case no: 689/2010. This case is unreported and the judgment was delivered on 31 May 2011 by the Supreme Court of Appeal.

The SCA held that the main issue on appeal was:

“...is whether the provisions of sections 7(7) and 7(8) of the Divorce Act 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 has resigned from his employment before the date of divorce but deferred his benefit in the pension fund.”

The Court held that the non-member spouse’s entitlement, if any, must derive from the provisions of section 7(7) and 7(8) of the Divorce Act, read with the definition of “pension interest” in that Act. The Court pointed out that “pension interest” is narrowly defined in the Divorce Act. In the portion of the definition which is applicable to a member of a pension fund, the definition is the following:

“...the benefits to which that party as such a member would have been entitled in terms of the rules of the Fund if his membership of the Fund would have been terminated on the date of the divorce on account of his resignation from his office.”

The SCA’s decision appears to be a correct interpretation. The relevant provisions in the Divorce Act were only intended to address a particular problem, namely that a pension benefit which has not yet accrued cannot be regarded as an asset in the relevant estate at the time of divorce. Where an employee has resigned from his employment and therefore has an accrued right to a pension benefit (albeit that the right is deferred, so as to enable the pension assets to grow and so as to gain tax advantages) the situation falls outside of the scope of the “mischief” addressed by the Divorce Act.

Secondly, the case emphasises the importance of the definition of “pension interest”. It is only this “pension interest” which is potentially subject to an order in terms of the Divorce Act. Where one is concerned with an ordinary occupational pension fund (and not e.g. a retirement annuity fund or a preservation fund) the “pension interest” means the benefits to which the member “would have been entitled in terms of the Rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office”. Where the resignation has taken place before the date of divorce, there is simply no scope for the application of this definition. There is also no need for the application of the Divorce Act provisions because the member’s entitlement against the Fund is no longer a contingent claim but a vested right (albeit that its value may be hard to compute). I will refer later to the fact that there are separate definitions of the term “pension interest” applicable to a preservation fund and to a retirement annuity fund.

Thirdly, though the decision is based on a strict application the wording of the relevant provisions, it highlights a point that is often overlooked, namely that parties can have rights inter se that are not based on s 7(7) and 7(8) of the Divorce Act; they are based on terms of a divorce settlement and/or order. It was open to the parties in this case to agree, as they did, that the wife would be granted a share of the pension payout when it was paid out. They could have agreed, instead, that the wife should be paid by the husband at some earlier date some amount to reflect the value of the husband’s entitlement to the pension payout. But what the parties cannot do by agreement is to invoke the statutory mechanisms under the Divorce Act in a situation to which that Act does not apply. This means, for example, that a non-member spouse cannot impose

obligations on a pension fund (rather than on the member spouse) in terms of the Divorce Act in a situation in which the Act does not apply.

2.4. The definition of pension interest

The definition of 'pension interest' according of the Divorce Act is as follows:

(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 the fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office;

(b) is a member of a retirement annuity fund which was bona fide established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of the party's contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at the date by the Minister of Justice in terms of section 1(2) of the Prescribed Rate of Interest Act, for the purpose of the Act.³³

Here the pension interest of a member of a pension fund is the withdrawal of benefit to which the member spouse would have notionally become entitled had he resigned from employment and terminated his membership of the fund on the date of divorce.³⁴ The pension interest of a member of a retirement annuity fund is defined to mean the total of

³³ Section 1 of the Divorce Act.

³⁴see Nevondwe L “ the law regarding the division of retirement savings of a retirement fund member on his or her divorce with specific reference to *Cockcroft v Mine Employees' Pension Fund*, (2007) 3 BPLR 296 (PFA), Law Democracy and Development, Vol.13, 2009 (1) p4.

the contributions to the fund up to the date of divorce plus simple interest thereon up to that date at the prescribed rate.

The 'pension interest' is the maximum amount which may be assigned to the non-member spouse on divorce, the proportion allocated being dependent on the order of the court. It is not permissible to transfer more than 100% of a member's 'pension interest'.³⁵

The rules of many funds give members option on withdrawal either to receive a cash benefit or to transfer to another fund with a greater benefit. The question is whether the definition of 'pension interest' is to be interpreted as encompassing only the benefit actually accruing to a member had he resigned on the date of divorce or whether it includes additional benefits of which the member could have availed himself. The High Court held in *Ex Parte Randles: in re King v King*³⁶ that it is what actually accrues to the member spouse on his notional resignation not what he (the member spouse) might thereafter choose to do with it. In the *Randles* case this resulted in particularly unfair consequences in that whereas the transfer benefit as at the date of divorce was calculated as an amount of R616000.00, the cash as at the date of divorce was calculated as the meager sum of R107 831.00. The non-member spouse was however condemned to the lesser value of the cash benefit.³⁷

³⁵*Old Mutual Life Insurance Company (SA) Limited & Another v Swemmer* (2004) 4 BPLR 5581 (SCA) at 5588A-E. In this matter the divorce order purported to transfer the entire proceeds of the retirement annuity benefit. In terms of the definition 'pension interest', the non-member spouse is only entitled to the total contributions to the fund up to the date of divorce plus simple interest thereon at the prescribed rate. See also *Mashilo v Basil Read Group Provident Fund*, case no: PFA/NP/3044/2001/NJ, dated 17 August 2001, an unreported determination of the Pension Fund Adjudicator.

³⁶ (2002) 2 BPLR 3017 (D).

³⁷ See also *Mouton v Southern Staff Pension Fund* (2003) 4 BPLR 4581 (PFA).

There have been cases where the fund has not been notified of the divorce order. When the benefit accrues to the member spouse and the portion of the pension interest allocated to the non-member spouse becomes payable, the fund, ignorant of the divorce order then pays the entire benefit to the member spouse. If no fault can be attributed to the fund there is no recourse against it.³⁸ However, if the fund is at fault, it may be liable for damages to the non-member spouse.

2.5. Assignment of the pension interest

Section 7(8) of the Divorce Act read as follows:

“(8) Notwithstanding the provisions of any other law or the rules of any pension fund-

- (a) The court granting a decree of divorce in respect of a member of such a fund, may make an order that-
 - (i) Any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension accrue in respect of that member;
 - (ii) An endorsement be made in the records of that fund that part of the pension interest concerned is so payable to that other party.

³⁸ See *Taljaard v Haggie Pension Fund & Others* (2004) 4 BPLR 6099 (PFA), where the complainant was entitled to 50% of her husband’s pension interest in terms of a court order. Subsequently, the member spouse moved to another pension fund in terms of section 14 transfers. However, the transferor fund failed to inform the transferee fund of the divorce liability. Consequently, it effected payment of the benefit to the member without deducting the divorce benefit. The Adjudicator held that since the transferor fund failed to inform the transferee fund of the divorce liability and the complainant suffered loss as a result of that omission, the transferor was liable to the non-member spouse.

(b) Any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply *mutatis mutandis* with regard to the right of that other party in respect of that part of the pension interest concerned.”

Section 7(8) provides that the court may make an order that the pension interest allocated be paid over to the non-member spouse when any pension benefits accrue to the member spouse and that an endorsement to that effect be made in the records of that fund. Note that an order to secure the allocation of a portion of pension interest to the non-member spouse must be contained in the divorce order itself. In other words, the pension interest does not fall automatically into the joint estate.³⁹

The effect of an order in terms of section 7(8) is that the non-member spouse acquires a claim against the fund. In terms of subsection (b), once such an order is made, the member spouse no longer has any entitlement to the pension interest so allocated. Its reference to the applicability *mutatis mutandis* of ‘any law which applies in relation to the reduction’ is a reference to, *inter alia*, section 37A of the Act prohibiting the alienation of pension benefits. The assigned pension interest is thereby afforded the same protection as any other pension benefit.

³⁹*Sempapalele v Sempapalele & Another* (2002) BPLR 3035 (O). Compare *Maharaj v Maharaj & Others* (2002) 2 BPLR 3030 (D).

2.6. Disclosure of information by funds to non-member spouse.

The majority of fund rules include confidentiality clauses, for the protection of the member's right to privacy. The rules may specify that no information considered to be of a private or confidential nature, including benefits payable to members, bank account details and banking instructions, may be given by any fund official to any person without the member's written consent.

However, in *Smith v Smith*⁴⁰ the non-member spouse had been allocated a portion of the member-spouse's pension interest in terms of the Divorce Order. The fund however, refused to disclose any information to the relying on the member's right to privacy. The Court however, ordered the fund to provide the information requested.

In fulfilling their duty of good faith, funds are obliged to disclose to members and beneficiaries such information as is reasonable for the exercise and protection of any right. The failure or refusal to do so without appropriate justification would amount to an improper exercise of the fund's powers.⁴¹ Therefore the non-member spouse has a right to access of information relevant to the amount due to him including how the amount is calculated, and the terms and conditions governing payment of the benefits.

2.7. Conclusion

If a member is unable to identify the correct pension fund, he/she must contact the Registrar of the fund concerned. Determine the value of 'pension interest' which is the notional withdrawal benefit of the member spouse as at date of divorce. It may be

⁴⁰ (2004) 2 BPLR 5431 (SCA).

⁴¹ See *Noordien v Metal Industries Provident Fund* (2002) 3 BPLR 3236 (PFA).

necessary to write to the fund to obtain this value. Ensure that the fund's records are endorsed at the time of the divorce, take active steps in this regard. Consider including a clause in the divorce order which provides that where the member spouse transfers from one fund to another, it is a duty incumbent on the member spouse to ensure that the transferee fund is made aware of the relevant provision contained in the divorce order. And finally, that the divorce order falls within the ambit of sections 7(7) and 7(8) of the Divorce Act. Failure to do so may render the order unenforceable.

CHAPTER THREE: CASE STUDY: DIVORCE BENEFITS

Recent amendments to the Pension Fund Act relating to divorce benefit, particularly the amendment section 37D, brought changes and will contribute positively to the development of South African retirement law. The allocation and payment of a share of a retirement fund members' retirement savings on divorce has been the subject of intense debate in the retirement funding community, especially in view of the unfairness to non-member former spouses (who are usually women) of the law in this regard before 1 November 2008.

In the case of *Derman v University of Cape Town Retirement Fund & Another*⁴² the complainant, Prof. Derman was married to Mrs. K.L Derman ("former spouse"). On 04 June 2002 the marriage between the parties was dissolved by a decree of divorce ("the court order") issued by the Cape Provincial Division of the High Court of South Africa.

Paragraph 17 of the Settlement Agreement, dealing with the pension consequences of the divorce, reads as follows:

"17.1 that for the purpose of this agreement, the Defendant's pension interest, as set out below, and as defined in section of the Divorce Act,⁴³ as amended (the Act) and such pension benefits as may accrue to the Defendant upon payment of such pension, shall be regarded as an asset, and form part of the estate of the Defendant, and the total amount of the Defendant's pension interest as at the date of divorce shall be taken into account in the calculation of the accrual of the Defendant's estate.

⁴² PFA/40794/2010/CMS (unreported).

⁴³ Ibid.

17.2 that in terms of section 7(8)(a)(i) of the Divorce Act as amended, the Plaintiff shall be entitled to payment of one half of the Defendant's net pension interest in the University of Cape Town Retirement Fund (registration number 31582/R) (the Pension Fund) of which the Defendant is a member under staff number 1067117, accruing to the Defendant for the period from 01 September 1993 to the date of the Decree of Divorce. The said half share of the Defendant's aforesaid pension interest shall bear interest at the prescribed legal rate of 15.5% per annum from the date of divorce to date of payment, and the half share of the Defendant's pension interest and interest thereon, shall be paid to the Plaintiff upon the accrual and payment of the pension benefits to which the Defendant may be entitled arising out of his membership of the aforementioned pension fund referred to above.

The former spouse informed the respondents (University of Cape Town Retirement Fund and Sanlam Life Insurance Limited) that she wished to transfer her 50% share of the pension interests to another approved pension fund, which was duly done.

Following the amendments to section 34D(4) of the Act brought about by the Pension Funds Amendment Act⁴⁴ (the Amendment Act), which came into effect on 13 September 2007, the former spouse claimed payment of the pension interest assigned to her in terms of the Court Order. The first respondent transferred the pension interest assigned to her to an approved pension fund, but it did not pay any interest as stipulated in the settlement agreement. The complainant was of the opinion that the former spouse was entitled to interest. The former spouse was threatening to institute legal action against him to compensate for the unpaid interest or fund return and he did

⁴⁴ 11 of 2007.

not have the funds to pay it. Therefore, the first respondent should pay interest as stipulated in the divorce settlement agreement.

The second respondent filed a response in its capacity as the administrator of first respondent. It advised that the Act does not allow for the payment of interest or fund returns on the pension interest assigned to former spouse. In terms of section 37D(4)(a) of the Act, a fund may only deduct from a member's pension benefit the portion of pension interest assigned to the non-member spouse in terms of the Court Order granted in terms of section 7(8) of the Divorce Act.

From the definition of pension interest in section 1 of the Divorce Act, it does not include any interest or growth which may accumulate after the date of divorce. Section 37D(4)(a) of the Act makes it clear that the Act does not make provision for the payment of fund interest after the date of divorce as contemplated in the parties' divorce order. In terms of section 37D(4)(c)(ii) of the Act interest will only be payable to a non-member spouse upon the expiry of 120 days after the fund has requested the non-member spouse to make an election for the mode of payment of her pension interest. The second respondent confirmed that it paid the former spouse her pension interest in terms of section 37D(4) of the Act and no further amounts are payable to her.

The issue for determination was whether or not the first respondent correctly refused to pay post-divorce interest on the pension interest assigned to the former spouse. The respondents contended that the former spouse is only entitled to pension interest as defined in section of the Divorce Act. Section 7(7) (a) of the Divorce Act reads as follows:

“in the determinations 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.”

A pension interest is defined in section 1 of the Divorce Act as follows:

- (a) Who 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 been terminated on the date of the divorce on account of his registration from his office.

Pension interest refers to the national benefit to which the member spouse would have become entitled had he resigned from employment and exited the fund on the date of divorce. It does not include any interest or fund returns that accrue to a member spouse after the date of divorce. This is confirmed by section 37D (4)(c)(ii) of the Act, which reads as follows:

- (c) A non-member spouse-
 - (i) Is not a member or beneficiary in relation to the pension fund; and
 - (ii) Is entitled to the accrual of fund return on the amount referred to in paragraph (a) at fund return from the expiry of the period referred to in paragraph (b) (ii) until or transfer thereof, but to any other interest or growth”

Therefore section 37D(c)(ii) only permits payment of interest or fund after the expiry of 120 days from the date the non-member spouse was requested to make an election regarding payment of pension interest. The fund that is contemplated is calculated from

the expiry of the 120 days period to date of payment or transfer to the non-member spouse, so it is not fund return from the date of divorce to the date of payment. In this matter the first respondent transferred the pension interest before the expiry of 120 days, so it is not liable to pay fund returns to the former spouse. Therefore, the former spouse is not entitled to any fund returns or interest on her pension interest from the date of divorce to the date of transfer.

The complainant wants the first respondent to pay interest at the rate of 15.5% per annum on the former spouse's pension interest from the date of divorce to the date of transfer. Section 37A (1) prohibits reduction, cession, hypothecation or attachment of pension benefits save to the extent permitted by the Act, the Income Tax Act⁴⁵ and the Maintenance Act⁴⁶. It reads as follows:

“save to the extent permitted by this Act, the Income Tax Act and the Maintenance Act, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member, shall, notwithstanding anything or right in respect of contributions made by or on behalf of a member, shall notwithstanding anything to the contrary contained in the rules of such fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrate Court Act⁴⁷ and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge, or hypothecate, such benefit or right, the fund concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in

⁴⁵*Ibid*fn4.

⁴⁶*Ibid*fn5.

⁴⁷ 32 of 1944.

pursuance of such contributions, or part thereof, to any one or more of the dependents of the member or beneficiary or to a guardian or trustee for the benefit of such dependent or dependents during such period as it may determine.”

Section 37A (1) precludes the payment of interest from the complainant’s pension benefit to the former spouse. The Adjudicator ruled that the respondents were correct in refusing the complainant’s request to pay interest at the rate of 15.5% per annum on the former spouse’s pension interest from the date of transfer. The former spouse has a personal right to claim interest from the complainant, but it cannot be paid by the first respondent. Finally, the adjudicator dismissed the complainant.

CHAPTER FOUR: TAXATION OF DIVORCE BENEFITS

4.1. Introduction

The latest amendments of the Income Tax and Pension Fund Act, determine that non-member spouse who are awarded pension benefits in terms of divorce order, can claim benefits before the member retires or withdraws from the fund.⁴⁸ Further, during 2008 Budget Speech, Finance Minister Trevor Manuel hinted that the South African Revenue Service (SARS) aims at taxing divorce settlements in the hands of non-member spouse in future.

4.2. Provisions of the Divorce Act

Section 7(8) of the Divorce Act determines that the court granting a divorce order in respect of member of a fund, may make the following:

- Any part of a pension interest that is assigned to the other party (non-member of a fund) to the divorce action, should be paid by the member of the fund to the other party when any benefits accrue to the member.
- The registrar of the court in question should notify the fund to make an endorsement in the records of that fund confirming the payment of the non-members interest to the member. Within one month of receipt of proof of such notification, the administrator of the pension fund is required to furnish proof of such endorsement to the registrar.

⁴⁸ See Wessels E “Taxation of Pension Fund benefits in divorce cases” 28 May, De Rebus p39-41.

The Divorce Act further provides that any law (such as Income Tax Legislation), which applies in relation to the reduction, assignment, transfer or cession of the pension benefits, or any right thereof, shall apply, subject to the necessary amendments, with regard to the right of the other party of the pension interest concerned.

In 1998 the Supreme Court of Appeal (SCA) confirmed on appeal in Tax Case that, under the circumstances set out in section 7(8) of the Divorce Act, a member spouse could be taxed only on part of the lump sum that accrues to him and further that there was no legislative authority to tax the non-member on the portion of the lump sum that accrued to him as a result of the divorce order.

In the matter before the court, it was made an order of the court in their divorce settlement that 50% of the taxpayer's (A's) interest in his pension fund should be awarded to B. The fund was subsequently required to do so and made the appropriate endorsement in its records.

When the taxpayer retired from his fund a number of years later, SARS taxed him on his total lump-sum benefit on the basis that the total lump-sum benefit accrued to him as the member. On appeal, the SCA held that A was not entitled to the amount awarded to B and could therefore not be taxed on it.

In terms of income tax legislation in place at the time, B could not be taxed on the amount she received either, as the amount did not accrue to her as the member of the fund, which was the only basis for taxing a benefit from the fund.

4.3. Other miscellaneous matters

When the abovementioned legislation was put into place, a concern was raised about the impracticalities related to the fact that the award to the former spouse remained fixed to the value of the member's benefit as at the date of divorce, without any regard to the growth accruing on the amount up to accrual taking place.

The Pension Fund Amendment Act which came into effect on 13 September 2007, addressed this inequity by introducing the 'clean break' principle into section 37D of the Pension Fund Act, the section addressing lump sum payments to non-members who were awarded benefits. For purposes of section 7(8)(a) of the Divorce Act, the pension benefit referred to in that section is deemed to accrue on the date of the court order, and not only when the interest accrues to the member.

This principle will apply only if the following requirements are met:

- The division of the benefit will be effected by the pension fund named in the court order;
- The deduction will have the effect of reducing the accrued benefit at the date of the deduction;
- The non-member spouse shall have the option to elect that the amount will be paid directly to him, or that it will be transferred to an approved pension fund on his behalf. Transfer of the payment must take place within 60 days of this election.

- The non-member spouse shall not acquire the rights the rights of a member or beneficiary in relation to the pension fund.
- The non-member spouse shall be entitled to interest on the assigned amount until transfer thereof, but not to any other interest or growth.

The retrospective application of this amendment is currently being interpreted in two ways. The then Pension Fund Adjudicator, Vuyani Ngalwana, interpreted the retrospective of the section to mean that non-member parties to all divorce orders made prior 13 September 2007, could claim payment by the relevant fund or request transfer of the benefit to another fund.⁴⁹

An opposing view is held by insurance companies such as Old Mutual. The interpretation of their legal advisers is that the amendment to the legislation does not extend to divorce orders made prior to 13 September 2007, when the amendments came into effect.⁵⁰

4.4. Conclusion

Within the current legislative context, non-member spouses have a number of options that they could exercise when awarded a pension benefit in terms of the divorce order. They may wish to save into another retirement fund and not pay any tax. Alternatively, the money can be withdrawn as non-taxable lump-sum and invested freely. From the discussion above, it becomes apparent that financial and tax advice, when making a decision, is imperative.

⁴⁹ See Personal Finance Section, Cape Argus, 06 October 2007.

⁵⁰ See Mail & Guardian. 7-13 March 2008.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

This is the concluding chapter of this mini-dissertation. The chapter includes the conclusions and recommendations.

This mini-dissertation is on divorce benefits payable to non-member spouse under section 34D of the Pension Funds Act.⁵¹ It deals with the introduction and backgrounds to the study. It discussed the problem statement, literature review, aims and objectives to the study, research methodology, scope and limitation to the study. This chapter has reflected on how pension funds are operating in South Africa and the developments which were made prior and post the Pension Funds Act amendments.⁵²

It also dealt with divorce benefits on pension interests prior and post the amendment of section 37D of the Pension Funds Act. This chapter has dealt with the issues on payments of divorce benefits on pension interests after the commencement of the Act. It analysed how pension benefits and interests have been paid to non-member spouse before and after the commencement of the Act. It also discussed various case laws which have been decided by the Office of the Pension Fund Adjudicator. It also defines the meaning of pension interests. It also dealt with determinations on divorce benefits and the taxation of pension benefits it also defined the definition of pension interests.

The Pension Funds Act is 52 years old, and has required significant amendment in recent years to reduce its inconsistencies with the values underpinning the Constitution, particularly with regard to the rights of women to equality and dignity. The 2007 and

⁵¹*Ibid.*

⁵²*Ibid.*

2008 amendments to the Pension Funds Act have been valuable in reducing the inequalities that the former spouses of pension fund members face on divorce. I welcome them since they promote fairness and reasonableness in our law.

The amendments to the Pension Funds Act and the Government Employees Pension Law, 1996 has brought some relief to divorcees who have to wait for member spouse to exit the fund which was a long process which was frustrating. Both former spouses from the public and private sector are treated equally and it will go a long way to reduce inequalities which existed when the amendments was done initially to the Pension Funds Act.

The “clean-break” principle has largely been entrenched in private sector funds through the application of the Pension Funds Act⁵³ and the Income Tax Act⁵⁴. However, if a non-member ex-spouse presents the divorce order to the private sector fund, he/she may occasionally fail to claim payment of the divorce award prior to the member ex-spouse exiting the fund. In this event, the effect might well be that the member ex-spouse remains liable for the tax on the portion of the pension interest assigned to the non-member ex-spouse. The pending changes ensure equal application of the “clean-break” principle regardless of the timing of the payment to the non-member ex-spouse.⁵⁵

⁵³ Act, 24 of 1956.

⁵⁴ Act, 58 of 1962.

⁵⁵ National Budget Review, 2012: Taxation of divorce order-related retirement benefits, media statement, 13 March 2012, National Treasury, www.treasury.gov.za, accessed on 14 April 2012.

Under current law, the “clean-break” principle has been introduced in private sector funds. The Government Employees Pension Fund (GEPF) which operate under the Government Employees Pension Law as amended⁵⁶ has introduced the “clean-break” principle for the division of pension benefits, and it is expected that other public sector funds like Transnet Pension Fund and Post Office Retirement Fund will soon follow. Given the regulatory changes, the tax regime as from 1 March 2012 effectively place all public sector fund members on equal footing with private sector fund members as regards to the application of the “clean-break” principle.⁵⁷

Transitional rules were implemented to exempt from tax amounts payable to a non-member ex-spouse by private sector funds under divorce orders issued before 13 September 2007. However, the exemption only applied if the non-member ex-spouse claimed the benefit on or after 1 March 2009.⁵⁸ The purpose of the exemption was to shield non-member ex-spouses from unanticipated tax consequences that would result if the non-member ex-spouse was suddenly subject to tax on his/her portion of the lump sum benefit. The effect of the transitional rules will be extended so that any amount that becomes payable on or after 1 March 2012 in terms of a divorce order that was issued before 13 September 2007 will be free from tax. The principle will apply regardless of the timing of the payment to the non-member ex-spouse, and regardless of whether the

⁵⁶ Proclamation 21 of 1996.

⁵⁷ Ibid. See also Nevondwe L and Rapatsa MJ, Payment of divorce benefits to the former spouse upon divorce and changes brought by the South African Government Employees Pension Law Amendment Bill, 2011, *Pensions an International Journal*, Vol. 17, No.2, May 2012, pages 94-102.

⁵⁸ Nevondwe L, Government Employees Pension Fund: payment to non-member spouse on divorce, *Insurance and Tax Journal*, Vol. 27 No.2, June 2012, pages 32-35.

retirement fund from which the amount became payable has implemented the “clean-break” principle.⁵⁹

The tax regime described below will apply to all amounts assigned in terms of a divorce order (granted under section 7(8)(a) of the Divorce Act, No. 70 of 1979): If an amount becomes payable by a retirement fund on or after 1 March 2012 to a non-member ex-spouse, that person (and not the member ex-spouse) will be subject to tax in respect of that amount. No tax will be payable on any amount that becomes payable on or after 1 March 2012 in terms of a divorce order that was issued before 13 September 2007. These changes will apply to all public and private sector funds, regardless of whether or not the fund at issue has introduced the “clean-break” principle.⁶⁰

⁵⁹ Ibid.

⁶⁰ Ibid.

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