

## Divorce: binding the fund

*Why are many divorce orders dealing with the spouse's entitlement to a portion of the member's "pension interest" not binding on the retirement fund?* With thanks to Hettie Joubert and Anthea Mara, FAW

Section 7(8) of the Divorce Act provides that a court may make an order compelling the retirement fund in question to pay the spouse's entitlement directly to him / her. Despite this, many such court orders are not binding on the fund, leaving the spouse with no option but to wait for the benefits to eventually accrue to the member.

In order for the divorce order to be binding on the fund, it must meet three important requirements.

### **First requirement: division of pension interest**

It must be clear what **percentage of the pension interest** or what **amount** is due or assigned to the non-member spouse. If the divorce order states that the non-member spouse is entitled to 50% of the member's pension interest, this requirement will be met. However, if the order states that the non-member spouse is entitled to 50% of the member's *provident* interest or 50% of their pension *fund*, this requirement will not be met.

Where the divorce order entitles the non-member spouse to "50% of the member's pension interest, less the tax thereon", the fund must first obtain a tax directive on 50% of the member's pension interest and then deduct the amount on the tax directive from 50% of the member's pension interest. This is then the

amount the non-member spouse is entitled to. The first tax directive (which was only obtained for purposes of the calculation of the non-member spouse's entitlement) can then be cancelled. A tax directive should then be obtained on the amount due to the non-member spouse.

*It must meet three important requirements.*

Where a divorce order entitles a non-member spouse to 100% of a member's pension interest, the suggestion is that the fund must first obtain a tax directive for that amount and then pay the non-member spouse the difference between 100% of pension interest and the tax payable on that amount. The non-member spouse will then have a claim against the member for the balance of the amount due to them.

With regard to retirement annuity funds, in the case of *Edgar vs Momentum Retirement Annuity Fund* and others the Adjudicator ruled the term "maturity value" (instead of "pension interest") does not meet the requirements

of the Divorce Act. This is because "it is clear from the definition of "pension interest" that a non-member spouse is only entitled to a pension interest calculated as at the date of divorce, rather than on maturity".

### **Second requirement: identification of the fund**

The fund must be **named in or be identifiable from** the order. Where reference is made to "the funds to which the member belongs", this requirement will not be met. If however the divorce order refers to "the fund to which the member belongs as a result of their employment with ABC", then the fund may be identifiable.

Where the member belongs to more than one fund as a result of their employment with ABC, albeit a hybrid, it is suggested that the fund asks the member to confirm in writing which funds were intended.

### **Third requirement: fund ordered to pay**

It must be **specifically ordered** that the fund should pay the amount concerned to the non-member spouse.

This requirement is the one that is most problematic.

Where the member is ordered to make payment to the non-member spouse, the fund is not in a position to make a deduction in favour of the non-member spouse. Where no reference is made to payment,



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or no party is specifically ordered to make payment, one cannot make the deduction that it is implied that the fund has to effect payment. However, if the divorce order has a reference to the effect that payment has to be made in terms of the provisions of section 37D of the Pension Funds Act or section 7(8)(a) of the Divorce Act, or the fund is ordered to make an endorsement in its records in accordance with section 7(8)(a) of the Divorce Act, and provided the other two requirements referred to above have been met, the fund can make a deduction in favour of the non-member spouse. Refer in this regard to the determination of the Pension Funds Adjudicator in the matter of *Gericke RB v Billiton Pension Fund & Sentinel Mining Industry Retirement Fund*.

If the order is not binding to the fund, the member and/or the non-member spouse have to be advised accordingly. A defective court order cannot be amended by an agreement between the parties – they will have to go back to court to get an amended court order. The date of the amended order will

not have an influence on the amount due to the non-member spouse, but will determine when the benefit accrues to the non-member spouse. For example, if the parties got divorced on 22 September 2008, but the divorce order was defective and an amended order that is binding on the fund is only obtained on 1 May 2009, the pension interest to be divided will still be the member's resignation benefit as at 22 September 2008. Because the accrual date is only 1 May 2009 though, the non-member spouse will be liable for the tax on that amount.

### **Elesang vs Ppc Lime Ltd & Others**

In the case of *Elesang vs PPC Lime Ltd & others* [2007] JOL 18998 (NC), the member (M) left his employment after summons for a divorce were issued. He had not been paying maintenance for his one minor child. The couple were married in community of property and his wife (N) feared that her husband would squander the pension benefit which he was entitled to from his pension fund.



N applied for an order, pending finalisation of the divorce action, that the fund should pay half of M's "pension interest" into the trust account with her attorneys. The fund opposed on the grounds that M would no longer be a member of the fund on the day of his divorce and therefore N would not be entitled to claim under sections 7(7) and (8) of the Divorce Act.

Also, section 37A(1) of the Pension Funds Act did not allow for payment of any part of the member's benefit to a party "other than the member spouse".

It was held that section 7 of the Divorce Act referred to a "pension interest" which had not yet accrued and which belonged to a party who was still a member of the fund as at the date of the divorce. It went further by saying: "This did not mean that the [non-member spouse] would not be entitled to any part of the

"pension benefits" which had already accrued to her husband. The fact that the accrued right, the pension benefit, was going to be part of the joint estate, entitled her, in principle, to one half of the net value of that estate. Even if she was not going to be able to claim payment of half of the pension benefit on the basis of section 7(7) of the [Divorce] Act, she had a right to secure at least half of the pension benefit to protect her half interest in the joint estate".

As far as the provisions of section 37A(1) of the Pension Funds Act is concerned, it was held that this section contains the proviso that the fund may pay a member's benefit or any part thereof to the member's dependants. It was stated that any other interpretation of the provision would have rendered the provisions of section 7(7) and (8) of the Divorce Act meaningless.



The fund was accordingly ordered to pay the amount concerned into the attorney's trust account, and to pay the cost of the application.

## **R Budhoo vs Sasol Pension Fund and Alexander Forbes Financial Services Pty (Ltd)**

The non-member spouse (Mrs E Budhoo) was married to Mr R Budoo until their divorce in July of 2009. Upon their divorce the settlement agreement did not make provision for the non-member spouse's entitlement to a pension interest from the pension fund, nor did it specifically state the pension fund as the fund responsible for the payment of the pension interest. It merely provided that R68 000 be paid to Rishi's account after Elaine receives the pension fund money.

The fund administrator refused to effect the necessary endorsement and subsequent payment to the non-member spouse. They contended that the decree of divorce did not comply with section 7(8) of the Divorce Act.

Mr Budhoo submitted that he had no issue with the non-member spouse's claim for pension interest and on this basis, did not understand why they had to approach the court for amendment of the court order. He was therefore seeking an order that directed the fund to endorse its records to reflect that the non-member spouse was entitled to a pension interest and that the fund pay such pension interest to her.

The administrator refused to endorse its records because the decree of divorce did not make provision for the payment of the pension interest, and stated that because the fund was not named therein the order was unenforceable for purposes of the Divorce Act.

Although Mr Budhoo stated that he had no "issues" with the non-member spouse receiving 50% of his pension interest, the Adjudicator ruled that consent cannot be substituted for the unenforceability of the order. The Adjudicator therefore ruled that the fund that has to deduct the pension interest must be named in or identifiable from the order [section 37D(4)(a)(i)(aa)]. The Adjudicator also dismissed the complaint based on the court order not providing for the non-member spouse's entitlement to any pension interest.

### **Avoiding problems**

Instead of the long-winded provisions often found in divorce orders, it is suggested that where a member, non-member spouse or an attorney acting on behalf of either party requests assistance with the wording of a divorce order that is intended to be binding on the fund, the following wording be suggested to them:

*The non-member spouse is entitled to 50% of the member's pension interest in the ABC Provident Fund. The ABC Provident Fund is ordered to pay this amount to the non-member spouse.*



## Correction/Update

In the November 2010 issue of Leverage we discussed the new definition of "Severance Benefit", as introduced by the 2010 Taxation Laws Amendment Act. The wording of the piece implied that the person receiving the payment must always be at least 55 years old. This is not correct: the person must receive a payment connected with the relinquishment, termination, loss, repudiation, cancellation or variation of his employment and any of the following must apply:

- He must be at least 55 years old, or
- He must be retrenched, or
- His employer must have ceased carrying on the trade in respect of which he was employed, or
- He must be permanently incapable of being employed due to some form of disability or illness.

The "age 55" requirement is thus just one of the options; the payment can still qualify as a "severance benefit" under one of the other criteria.

Note that, as from 1 March 2011, severance benefits (as defined) are taxed using the tables for retirement lump sums. That means that the R315 000 tax-free threshold\* will apply to these payments. For tax purposes, they will be treated like any other lump sum retirement benefit received from a fund, even though they are received directly from the employer and not from a retirement fund. Keep in mind though, that such payments will be aggregated with any other amounts that are taxed according to the lump sum scales.

\* The tax rates applicable to retirement lump sums were revised with effect from 1 March 2011. Contact the legal BDM in your region (see back page) if you would like a copy of our handy lump sum tax calculator.

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