



moment OF TRUTH

Legal update 15 of 2020: Case law on disposition of retirement benefits upon insolvency

Introduction

A recent case decided by the Supreme Court of Appeal relates to the effect of insolvency on the benefits of a member of a retirement fund. Below is a summary of the case and insight into how we deal with this matter should it come across on the Momentum Retirement Annuity Fund, the Momentum Pension Preservation Fund and the Momentum Provident Preservation Fund. We have also included more detail on the case in the document.

Summary

Case: M & Another vs Murray & Others (251/2019)
[2020] ZASCA 86 (9 July 2020)

Does the protection of fund benefits in terms of section 37B of the Pension Funds Act (the Act) apply where the benefit was paid to the member before sequestration?

- **The finding:** A retirement fund benefit is protected by section 37B of the Act while it is held by the retirement fund. Once the benefit is paid by the retirement fund to the member, it loses the protection of sections 37A and

37B of the Act.

- **How we deal with this:** We do not allow any creditor, including the trustee(s) of a member's sequestrated estate, to attach the member's fund benefit while it is held by the fund. However, once the benefit is paid to the member, we cannot assist the member in protecting the money from attachment by his or her creditors.

More detail of the case

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This matter was heard in the Supreme Court of Appeal (SCA) after judgment had been granted by the Gauteng High Court, Pretoria. The appellants were married but got

divorced after the husband's attempt to appeal against a judgment for a debt made against him failed. He received his fund benefit and transferred the lion's share into an attorney's trust account. That money was then transferred to a company linked to him and he transferred the balance of his fund benefit to his ex-wife. His estate was sequestrated by order of Court in 2011. The trustees of his insolvent estate applied to the High Court in terms of the Insolvency Act to have the stripping of his assets set aside as it prejudiced his creditors. The High Court ruled in favour

of the trustees of his insolvent estate and the divorced couple launched an application to the SCA to set aside the High Court's decision.

The appellants argued that the ex-husband's fund benefit was protected from attachment by his creditors under section 37A of the Act and from the trustees of his estate under section 37B of the Act. They also argued that the transfer of his fund benefit should not be set aside as the transfer of money from the ex-husband to the ex-wife was done in accordance with an order of Court upon divorce and that the transfer of the other portion to a company linked to them was in payment of a debt owed by the ex-husband to the ex-spouse.

The SCA found the following:

- The definition of 'benefit' in section 1 of the Act applies only to a member's benefit while it is in the retirement fund's possession. Once the benefit is paid to the member, it is no longer a benefit as contemplated in the Act.
- The definition of 'member' in the Act is restricted to persons who have not received their entire benefit from the fund. Once a member has received his or her entire benefit from the fund, he or she is no longer a member.
- The ex-husband received his entire benefit from the fund and dealt with it freely. He was no longer a member of the fund and the money he received from the fund was no longer a 'benefit', as contemplated in the Act, by the time that his estate was sequestered.

- The SCA therefore rejected the appellant's argument that the ex-husband's fund benefit was protected by section 37B of the Act, and that it did not form part of his estate.
- The SCA assessed the merits of the versions put to it regarding whether the transfer of monies from the ex-husband's fund benefit amounted to disposition which had to be set aside. The SCA found that:
 - The version of the trustees of the ex-husband's estate was more credible in that it appeared that there was collusion between the divorced couple to dispose of his assets in order to avoid paying his creditors;
 - The dissolution of their marriage appeared to be a sham as they instituted divorce proceedings a few days after his appeal regarding the judgment made against him failed, and they continued to live together after the divorce; and
 - The transfer of monies to the ex-wife and to the company qualifies as collusive dealings before sequestration, a form of disposition of assets which may be set aside in terms of the Insolvency Act.

For the above reasons, the SCA set aside the transfer of monies that were received by the ex-husband as his fund benefit and ordered both the ex-wife and the company to return the monies received from the ex-husband.

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