



moment OF TRUTH

Legal update 1 of 2020: Case law on divorce and death matters

Introduction

There have been several recent cases relating to divorce and death benefits that affect retirement funds. Below are summaries of these cases and insight into how we handle these matters should they come across in claims 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 cases in the document.

Summaries

Case 1: Swart vs Pension Fund Adjudicator and Another (PFA1/2019) [2019] Financial Services Tribunal (16 July 2019) – calculation of pension fund interest and payment to non-member spouse.

- **The finding:** A non-member spouse is entitled to the accrual of the fund return from the date of the election to the date of the transfer of the pension interest.
- **How we deal with this:** When calculating the non-member spouse's pension interest, the funds restrict the non-member spouse's claim to the lower of annual simple interest or fund return on the pension interest allocated to the non-member spouse under the divorce order, as stipulated in section 37D(5) of the Pension Funds Act (PFA).

Case 2: Xozwa vs Administrator, Government Employees Pension Fund and Others [2019] 1 BPLR 57 (EC) – anti-dissipation order.

- **The finding:** Because the applicant did not provide facts to support a claim that the member would squander his pension and her allegations regarding her entitlement to half of the member's pension were incorrect, the court did not grant her application for an order to freeze the member's assets.

- **How we deal with this:** The funds can only execute an anti-dissipation order while the member is a member of the fund. When the member's membership comes to an end, the fund must pay the member his benefit if there isn't a valid and binding divorce order.

Case 3: Mbungela and another vs Mkabi and Others (820/2018) [2019] ZASCA 134 – requirements for a valid customary marriage.

- **The finding:** The Appeal Court held that the handing over ceremony of a bride is important but not a determining factor of a valid customary marriage. It cannot be placed above the couple's clear volition and intent where, as happened in this case, the couple's families, who came from different ethnic groups, were involved in, and acknowledged the formalisation of their marital partnership and did not specify that the marriage would be validated only upon bridal transfer.
- **How we deal with this:** The PFA defines a spouse as a permanent life partner or spouse of a member according to the Marriages Act and the Recognition of Customary Marriages Act. Therefore, a spouse in a customary marriage qualifies for retirement fund benefits.

Case 4: Krean Naidoo vs Coca Cola Shanduka Beverage Provident Fund, case number 48/2019 23 (FST)

– exercise of discretion to determine the appropriate beneficiary of a death benefit.

- **The finding:** The tribunal found that in terms of section 37C of the PFA, it is the fund's duty to take all

reasonable steps to trace and locate dependants of the deceased member.

- **How we deal with this:** When exercising their discretion under section 37C, the trustees will investigate all relevant factors and dependency when allocating a death benefit to a potential beneficiary.

More detail of the cases

Case 1: J Swart vs Pension Fund Adjudicator and Another (PFA1/2019) [2019] Financial Services Tribunal (16 July 2019) – calculation of pension fund interest and payment to a non-member spouse.

The applicant and the member spouse were married in community of property in terms of Islamic law. The Muslim clergy dissolved the marriage on 31 December 2011. In terms of the settlement agreement, the member agreed to assign 50% of her pension interest to the applicant. During April 2018, the Absa Pension Preservation Fund (second respondent) paid an amount of R790 924.57 to the applicant in terms of the settlement agreement. The division of the joint estate took six and a half years to finalise.

The applicant filed a complaint with the Pension Funds Adjudicator on the basis that the delay in finalising the division of the estate resulted in financial loss to him and that legislative reforms should be put in place to address the unfairness in the provisions of the PFA relating to divorce. The applicant contended that he was entitled to more money, as the payment was only made to him six and a half years after the divorce.

The adjudicator ruled in favour of the non-member spouse. The applicant then referred the matter to the Financial Services Tribunal (FST). In its determination, the FST referred to the definition of 'pension interest' in sections 37D(4)(a) and (c)(ii) of the PFA and determined as follows:

- The PFA and the Divorce Act do not provide for any other factor such as a delay in finalising divorce proceedings to be taken into account when calculating a return on the portion of pension interest payable to the non-member spouse.
- Section 37D(4)(c)(ii) of the PFA states that a non-member spouse is entitled to the accrual of the fund return from the date of the election to the date of the transfer of the pension interest.

Case 2: Xozwa vs Administrator, Government Employees Pension Fund and Others [2019] 1 BPLR 57 (EC) – anti-dissipation order.

The applicant and the member were married in community of property. Their marriage broke down and they ceased to live together as husband and wife. Despite that, at the time the application was brought, no divorce proceedings were pending. A summons and particulars of claim were drafted and the summons was issued on 31 January 2019, which was the day the application was heard.

The applicant launched this application after she was informed that the member had retired and that he had been paid a lump sum by the pension fund to which he had contributed.

The amended notice of motion was contradictory because it sought an order freezing the account of the member while, on the other hand, it sought an order directing the member to pay half of his pension to the applicant "pending finalisation of this application".

The court found that what the applicant sought was an order that she be paid half of the member's pension before the divorce. This goes much further than an order preserving an asset because of a reasonable apprehension that it will, before the finalisation of a divorce, be wasted. The court dismissed the application.

Case 3: Mbungela and another vs Mkabi and Others (820/2018) [2019] ZASCA 134 – requirements for a valid customary marriage.

Mr Mkabi sued Piet Mbungela, the deceased's elder brother and head of her family, Ms Mkhonza, the deceased member's daughter and executrix of her estate, and the Master of the High Court, Nelspruit, who issued the letter of executorship in the court *a quo*. He sought an order declaring that he and Ms Mbungela, the deceased member,

concluded a valid customary marriage and a further order compelling the second respondent, the Minister of Home Affairs, to register and issue a certificate of registration of that customary marriage. The court *a quo* granted the order.

The Minister and the Master abided the court *a quo*'s decision and only the appellants opposed the litigation. The appellants, the deceased member's daughter and brother, lodged an appeal. The basis of the appeal was that Mr Mkabi and the deceased member did not comply with section 3(1)(b) of the Recognition of Customary Marriages Act (the Act) when entering into a customary marriage, because the deceased member's family did not hand her over to Mr Mkabi's family in terms of their custom and the lobola was not paid in full. Accordingly, not all the requirements of section 3(1)(b) of the Act were met.

Mr Mkabi sent emissaries from his family to the deceased's home in Bushbuckridge to ask for her hand in marriage in terms of custom. The deceased member's brother led the deceased's representatives in the ensuing lobola negotiations. The proceedings were successful and the two families agreed that Mr Mkabi would pay lobola in the sum of R12 000 and a live cow.

He immediately paid R9 000, which was accompanied by various gifts for the deceased's family. The deceased's family also gifted the Mkabi emissaries. The exchange of gifts symbolised the combination of a relationship between the bride and the groom and their families. Mr Mkabi subsequently delivered the cow to the deceased's family.

The court found that the purpose of the handing over ceremony of a bride is to mark the beginning of a couple's customary marriage and introduce the bride to the groom's family. It is important but not key in determining a valid customary marriage. Thus, it cannot be placed above the couple's clear volition and intent where, as happened in this case, the couple's families, who came from different ethnic groups, were involved in and acknowledged the formalisation of their marital partnership, and did not specify that the marriage would be validated only upon bridal transfer. The Appeal Court was satisfied in all the circumstances that the essential requirements for a valid customary marriage were met. Therefore, the appeal failed.

Case 4: Krean Naidoo vs Coca Cola Shanduka Beverage Provident Fund Case No. 48/2019 23 (FST) – exercise of discretion to determine the appropriate beneficiary of a death benefit.

The applicant's wife was a member of the Coca Cola Shanduka Beverage Provident Fund (the Fund), until she passed away. At the time of her death, the applicant was still married to her.

The death benefit became due to her beneficiaries in terms of section 37C of the PFA. The board of the fund had decided to pay the death benefit into the member's estate.

The applicant lodged a complaint with the Pension Funds Adjudicator, claiming that he was legally entitled to the death benefit under the PFA. He submitted that even though he was not financially dependent on his wife, he was still a spouse and therefore entitled to her death benefit.

The fund advised that it had exercised its discretion under section 37C(1)(c) of the PFA correctly and was entitled to pay the death benefit into the deceased member's estate. The fund found that the deceased had no dependants, had not nominated a beneficiary and the fund could not identify any dependants within 12 months of the death of the member.

The fund further found that the deceased and the applicant were estranged at the time of her death and divorce proceedings had already commenced. The adjudicator agreed with the fund's investigation and dismissed the applicant's complaint. After the adjudicator issued her determination, several new factors came to light in that the divorce proceedings had been initiated due to family interference and not because the parties were estranged. The applicant then referred the matter to the Financial Sector Tribunal (FST).

The FST found that in terms of section 37C of the PFA, there is a duty on the fund to take all reasonable steps to trace and locate dependants of the deceased member.

Where the deceased was legally liable to maintain a person, such person is regarded as a dependant. This includes the reciprocal duty of support between spouses as a direct consequence of marriage.

The FST held that the adjudicator had not fully investigated the circumstances regarding the allegation that the parties were to reconcile.

The fund should have acknowledged the applicant as a legal dependant even though he is not automatically entitled to

any part of the death benefit. The FST as a result found that the matter had to be remitted to the adjudicator for reconsideration.

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