



moment OF TRUTH

Legal update 1 of 2021: Requirements to stop a retirement fund from paying a benefit pending divorce proceedings

Introduction

This update deals with a recent case decided by the North West High Court, Mahikeng, relating to a spouse in a marriage in community of property who applied to court for an interdict to stop the member spouse's retirement fund from paying a fund benefit to her during divorce proceedings in order for him to claim a portion of her fund benefit upon finalisation of the divorce. Below is a summary of the case and insight into how we deal with these issues 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.

Summary

Case: MWS vs NSS & Government Employees Pension Fund (DIV129/2019) [2020] Unreported (9 March 2020)

Can a non-member spouse obtain an interdict to stop a retirement fund from paying the member spouse a fund benefit where the parties are going through divorce proceedings and the non-member spouse wants to claim a portion of the member's pension interest when the divorce order is granted?

- **The finding:** A non-member spouse involved in divorce proceedings may apply to court for an interdict if they can prove, on a balance of probabilities, that the member spouse will dissipate the benefit once they receive it from the fund with the intention to deprive the non-member spouse of the right to benefit from the benefit which forms part of their joint estate. The Applicant failed to convince the court that his spouse resigned from employment and claimed her fund benefit

with the intention to deprive him of the right to receive a portion of her fund benefit upon divorce.

- **How we deal with this:** When it is brought to our attention that a member of our Fund has become entitled to a benefit and that they are involved in divorce proceedings, we do not withhold payment of the member's benefit merely on the request to do so by the non-member spouse or their legal representatives. The Fund may only withhold payment of a member's benefit if there is an interdict ordering the Fund to do so until finalisation of the divorce proceedings. Even though the Fund may be cited in the application for an interdict, the Fund will not enter the legal proceedings as that is for the member to do and for the court to decide the outcome. Should a valid interdict be served on the Fund, we will comply with it and withhold payment of the benefit, or a portion thereof, as directed in the court order.

More detail of the case

Case: MWS vs NSS & Government Employees Pension Fund (DIV129/2019) [2020] Unreported (9 March 2020)

Can a non-member spouse obtain an interdict to stop a retirement fund from paying the member spouse a fund benefit where the parties are going through divorce proceedings and the non-member spouse wants to claim a portion of the member's pension interest when the divorce order is granted?

This matter was heard in the North West High Court, Mahikeng, where an interdict was sought by the husband pending finalisation of divorce proceedings. The parties got married in 2012, in community of property, and their divorce proceedings commenced on 15 July 2019. In terms of their divorce pleadings, the husband wanted division of the joint estate, but his wife wanted the court to grant a forfeiture order against her husband. The wife had been employed as a teacher for over 30 years and she was a member of the Government Employees Pension Fund (GEPF) through her employment. She resigned with effect from December 2019 and had an estimated fund benefit of about R2 888 695 in the GEPF. The parties had assets other than the wife's fund benefit in the GEPF. However, the matter of the interdict sought by the husband related only to the fund benefit.

The husband's grounds for his application were that:

- He had a well-grounded apprehension that his wife was not prepared to share her pension interest with him as she was asking the court to grant an order for forfeiture of patrimonial benefits against him in the divorce action. He added that if the fund benefit is paid to his wife, she will take steps to dissipate the money and that he will be left without recourse in the final divorce.
- The divorce action would take some time to be finalised. As such, he is not protected by the provisions of the Matrimonial Property Act, especially since his wife is not open about her financial affairs.

The wife argued, amongst other things, the following in opposing her husband's application:

- The matter was not urgent as her husband alleged as he became aware of her resignation from employment

on 6 January 2020, but he only launched his application on 24 January 2020.

- Her husband was not entitled to an order that her entire fund benefit be withheld by the GEPF, as ordinarily he would only be entitled to 50% of her pension interest if the divorce court agrees with him and orders division of the joint estate upon divorce.

The court found the following:

- It is well-established in our law that in order to succeed in an application for an interdict, the applicant must show the following on a balance of probabilities:
 - A *prima facie* right;
 - A well-grounded fear of irreparable harm to himself if the order is not granted by the court;
 - An absence of a satisfactory alternative remedy; and
 - That the balance of convenience favours the grant of the remedy.
- Section 15 of the Matrimonial Property Act deals with the powers of a spouse in a marriage in community of property regarding the performance of juristic acts that relate to the joint estate, especially regarding the alienation or disposal thereof.
- The nature of an anti-dissipation interdict is that it restrains the respondent from disposing or dissipating assets which belong to him or her, to which the applicant can lay no special claim.
- In *NVC v VTM*, the court applied the principle restated in the *Carmel Trading*-case to an anti-dissipating application relating to pension interest in a pending divorce action. The court held that the applicant was required to satisfy the court, through credible evidence, that the respondent was wasting or secreting assets with the intention of defeating the applicant's claim in divorce proceedings.
- It is well-established in our law that the wife's fund benefit forms part of the joint estate of the parties and her husband also has a share of the pension interest upon dissolution of the marriage which was entered in community of property.
- The wife resigned from her employment before finalisation of the divorce and she is likely to be paid her benefit from the GEPF before the divorce is

finalised. While her husband is entitled to a portion of her pension interest, he cannot lay claim to it prior to finalisation of the divorce as only an order made by a court in terms of section 7(8) of the Divorce Act may confirm his entitlement to a portion of her pension interest.

- During the subsistence of a marriage, the pension interest that accrues to the member spouse, before the divorce, should be dealt with or protected in terms of section 15 of the Matrimonial Property Act.
- The husband did not adduce any evidence to substantiate his fear or concern that his wife will quickly alienate or dispose of the fund benefit with malicious intent. He did not even allege that his wife has a history of dissipating assets of the joint estate without his knowledge or consent during the subsistence of their marriage.
- The wife stated that she was suffering from serious health problems which led to her decision to resign

from employment as she could not continue discharging her duties as a teacher. The husband's allegation that his wife resigned from employment in order to deprive him of a portion of her pension interest is not supported by any facts.

- The wife stated that she needed her fund benefit in order to pay for her living expenses and some debt of the joint estate. The court cannot interdict the payment of her fund benefit without good cause for that. The husband's main concern was having her fund benefit withheld without offering an alternative solution as to how the medical bills of his wife would be paid.

In conclusion, the husband's application failed, and the court dismissed it.

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