



PFA PRACTICE NOTE 1/2017: IMPLICATIONS OF THE RULING IN THE MATTER OF NDABA V NDABA [2017] 1 ALL SA 33 (SCA)

The Supreme Court Appeal (“SCA”) issued a ruling that also clarifies some issues relating to the payment of pension interest following divorce in terms of section 37D(1)(d)(i) and Section 37D(4) of the Pension Funds Act 24 of 1956 (“the Act”) read with sections 7(7) and (8) of the Divorce Act 70 of 1979 (“the Divorce Act”). The facts briefly are as follows:

The appellant, Ms GH Ndaba and the respondent, Mr J Ndaba were married in community of property. On 25 May 2012, their marriage was dissolved by court and the divorce order incorporated a settlement agreement which provides, *inter alia*, that their joint estate would be divided equally between them. The appellant asserted that they incorporated this clause into their settlement agreement as at that stage they could not agree on the method of the division of the joint estate. The appellant subsequently instituted legal proceedings seeking, *inter alia*, an order directing a fund to make an endorsement in its records that a portion of the pension interest of the member spouse, as at the date of divorce, be payable to her when the pension benefit accrued. The respondent, as the member spouse, denied that the pension interest forms part of the assets in the joint estate or part of the settlement agreement. He indicated that no order was granted which deems the pension interest to be part of the joint estate in terms of section 7(7) and 7(8) of the Divorce Act.

The primary issue concerns the proper interpretation of section 7(7) and (8) of the Divorce Act. The issue was whether a non-member spouse in a marriage in community of property is entitled to the pension interest of a member spouse in circumstances where the court granting the decree of divorce did not make an order declaring such pension interest to be part of the joint estate.

The SCA had regard to a number of previous rulings relating to the interpretation of section 7(7) and (8) of the Divorce Act. It held that section 7(7)(a) of the Divorce Act is self-contained and not subject to section 7(8). It deems pension interest to be part of the joint estate for the limited purpose of determining the patrimonial benefits to which the parties are entitled as at the date of divorce. It was not necessary for the parties in this matter to mention in their settlement agreement what was obvious, namely, that their respective pension interests were part of the joint assets which they had agreed to share equally between them. The language of section 7(7)(a) is clear and vests in the joint estate the pension interest of the member spouse for the purpose of determining the patrimonial benefits to which the parties are entitled to as at the date of their divorce.

This Tribunal notes that there have been discussions in the pension industry relating to the implications of this judgement and therefore, provides this explanatory note. Some commentators have interpreted the judgment to mean that it is not necessary for the pension fund to be identified and ordered to pay the pension interest in order for such a fund to pay the non-member spouse.

This Tribunal would like to advise that its interpretation and approach would be that it is still necessary to obtain an order in terms of section 7(8) of the Divorce Act if the fund is to be bound to pay any assigned pension interest and the SCA ruling does not change this position. In the absence of a court order, any declaratory order in terms of section 7(7) remains enforceable only between the parties. This is for the simple reason that the fund is not a party to the divorce proceedings and is an independent third party subject to the Act and its rules. A fund that pays pension interest in the absence of a court order specifically directing it to do so will be contravening its rules. Whilst the pension interest forms part of the joint estate, the parties or the court may determine that only a portion of the benefit is assigned to the

non-member spouse. Further, the member spouse may belong to multiple funds and in the absence of any order, it will be unclear whether the order is directed against all or some of the funds. A fund must also be ordered to pay the pension interest assigned to the non-member spouse.

The requirements that there must be a valid and enforceable divorce order which directs a fund to endorse its records and pay the pension interest to a non-member spouse still remains. The fund must also be named in or be identifiable from the divorce order. It is not sufficient for parties to suggest that where the member spouse is employed will be an indicator of the fund to which he belongs as the provisions of section 7(8) of the Divorce Act are not only applicable to occupational funds but also to retirement annuity funds. These funds are bound by section 7(8) of the Divorce Act and sections 37D(1)(d)(i) and 37D(4) of the Act in paying pension interest.

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