



HEAD OFFICE

Johannesburg

2nd Floor, Sandown House
Sandton Close 2, Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town

2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 □ Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our ref: PFA/GA/19592/2007/LN

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): A DU PLESSIS (“the complainant”) v PHALABORWA MINING PENSION FUND (“the first respondent”), SANLAM (“the second respondent”)

1. Introduction

- 1.1 The complaint concerns the question of whether the complainant is entitled to immediate payment (or transfer) by the fund of the pension interest allocated to her in terms of the divorce order handed down by the Witwatersrand Local Division on 27 November 1998.
- 1.2 The complaint was received by this office on 23 October 2007. A letter acknowledging receipt thereof was sent to the complainant on 18 December 2007. On the same date a letter was dispatched to the second respondent giving them until 18 January 2008 to file their response to the complaint. This office received a response from the second respondent on 26 February 2008. This response was forwarded to the complainant on 9 April 2008 for further submissions. The complainant furnished this office with a reply on 16 April 2008.
- 1.3 Having considered the written submissions filed before this office, it is unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.
- 1.4 As the background facts are well-known to all parties, these shall be repeated only to the extent that they are pertinent to the issues raised herein.

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator)

Office Manager: L Manuel, Financial Manager: F Mantsho, Accountant: R Soldaat

2 Factual background

- 2.1 The complainant is a former spouse of Mr. Johan Verster (“the former husband”) who is a member of the first respondent. The complainant and her former husband got divorced on 27 November 1998.
- 2.2 The parties’ Divorce order contains an order in terms of section 7(8) of the Divorce Act in terms of which the complainant was awarded 50% of the complainant’s former husband pension interest from date of marriage to date of divorce.
- 2.3 The complainant requests that the respondent should pay her 50% of the pension interest to which she became entitled in terms of the settlement agreement which was made an order of court on 12th November 2004.
- 2.4 The relevant section of the divorce settlement agreement, Clause 4.4, for the purposes of this determination, reads as follows:

“...is geregtig op die helfde van die Verweerder se pensioenbelang van die Phalaborwa mining company pension fund tot op datum van egskeiding ooreenkomstig Artikel 7(8)(A)(1) en (2) van die egskeidings Wet 79 van Wet 70 van 1997 soos gewysig en word sodanig reg as sulks op die voormelde pensioenfonds se records noteer”.

- 2.5 The complainant contends that she is entitled to immediate payment of the pension share as provided in the divorce settlement agreement. The respondent contends that the complainant will be entitled to payment of the pension interest share when same accrues to her former husband.

3. Complaint

- 3.1 Pursuant to the amendments in the Pension Funds Amendment Act 11 of 2007 (“the Amendment Act”), the complainant requested the respondent to payment of her share of the pension interest to her.
- 3.2 The complainant contends that the respondent is withholding her share unlawfully.

4. Responses

- 4.1 A response was received from Cheryl Steyn, the Legal advisor of Sanlam Life. The response gives a detailed background of the complaint, what follows therefore are aspects which relate to specific

issues raised in the complaint addressed to this office by the complainant.

- 4.2 Cheryl Steyn based the argument on behalf of the respondent on the opinion which was submitted by Advocate Rogers and summarised his submissions as follows:
 - 4.3.1 Common law provides that the amending legislation does not interfere with vested rights except where it (legislation) specifically provides for such interference.
 - 4.3.2 If section 37D of the Amendment Act was to apply retrospectively, the substantive law that governs the divorce orders would have to be amended to apply retrospectively. Further that the non-member spouse would be in a better position than the member spouse, in that the latter would forfeit any investment growth on the portion allocated and paid to the non-member spouse.
 - 4.3.3 Further that the date of accrual would then be uncertain as it has to be determined whether the benefit accrues prior or after the amendment.
 - 4.3.4 If the amendment applies retrospectively the funds would have to examine records from 19 years back and that confirmation of the retrospective application of the amendment would be prejudicial to the funds' financial affairs.
 - 4.3.5 When parties entered into the settlement agreement prior to 13 September 2007, they should have considered that the non-member spouse would not be receiving the members' pension interest prior the accrual date.
 - 4.3.6 There is no clear intention in the Amendment Act that section 37D should apply retrospectively therefore the retrospective application should not apply.
- 4.4 Cheryl Steyn stated that section 7C of the Act places the duty to take all reasonable steps to ensure that the interest of the members in terms of the rules a registered fund are protected on trustees of the fund. Further that section 37A of the Act provides that the pension benefits of members of the fund may not be reduced except as permitted by section 37D of the Act and therefore the complainant would be entitled to the divorce benefit at the time when it accrues to the member spouse.

- 4.5 Cheryl Steyn acknowledged that there are numerous complaints similar to the present matter. She requested that the complaint against the respondent should be held in abeyance until they approach the High Court for a declaratory order regarding the first respondent's obligations to former spouses of members in respect of divorce orders granted before 13 September 2007.

5. Determination and reasons therefor

Preliminary point

- 5.1 The respondents have requested that this complaint, and other similar complaints, be held over until finalisation of the yet to be instituted declaratory proceedings in the High Court concerning pension funds' obligations to non-member spouses in respect of divorce orders granted before 13 September 2007.
- 5.2 This tribunal was informed of the proposed declaratory proceedings on 22 January 2008. To date, the respondents have yet to institute any such proceedings. Section 30D describes the main object of the adjudicator, which is to dispose of complaints lodged in terms of section 30A(3) of the Act in a procedurally fair, economical and expeditious manner. As alluded to above, this tribunal has already ruled on non-member spouses' rights in respect of pension interest that accrued prior to the enactment of the new Act on 13 September 2007 in the matter of *Cockcroft v Mine Employees Pension Fund* PFA/WE/11234/06/LS (unreported) and the ruling has not subsequently been challenged in terms of section 30P of the Act. In the absence of any High Court ruling to the contrary, this tribunal has a duty to deal with similar complaints received from non-member spouses and it is bound to perform its function in an expeditious manner. Therefore, neither this complaint, nor any future matter, will be held in abeyance pending proposed legal proceedings which have not even been instituted, let alone been decided.

The merits

- 5.3 The complainant's complaint is that she has not been permitted access to her pension interest (either to take her pension interest in cash or to transfer it to another approved retirement fund) despite the fact that the amendment Act allows her to do so. The respondents do not dispute the complainant's entitlement to pension interest and the endorsement of the respondent fund's records, but contend that the complainant divorced her former husband prior to the amendment Act, so she is not entitled to do

- as she pleases with her portion of the pension interest and she has to wait until a benefit accrues to her former husband.
- 5.4 This issue has already been traversed by this tribunal in the as yet unreported determination of *Cockcroft*. The respondents should take cognizance of the fact that the respondent fund in the *Cockcroft* matter has not instituted section 30P proceedings and is abiding by this tribunal's determination. As regards the respondents' response in the instant complaint, they have not placed any new facts before this tribunal that warrants a shift from the position adopted in the *Cockcroft* matter.
- 5.5 In terms of section 7(8)(a)(i) of the Divorce Act 70 of 1979 ("the Divorce Act") a court granting a decree of divorce may make an order that the share of the pension interest allocated to the non-member spouse be paid by the fund to such spouse *when any pension benefits accrue in respect of the member spouse*. The import of the italicised phrase is that the non-member spouse will only receive payment of the pension interest allocation when a benefit accrues to the member spouse.
- 5.6 The right to a benefit generally depends on a contingent employment event such as retirement, resignation, retrenchment or dismissal. Unless the rules provide otherwise, this is the actual date of accrual of the benefit. Prior to the amendment Act, in respect of occupational pension and provident funds, this meant that the date on which the non-member spouse received payment depended entirely on whether, for example, the member spouse remained with the same employer through to retirement or whether the member spouse elected to resign or was dismissed or retrenched by the employer.
- 5.7 As numerous cases from the High Court and this tribunal reveal, this was an unsatisfactory state of affairs for the non-member spouse in that it undermined the clean break principle following divorce. (See *Mashilo v Basil Read Provident Fund* [2005] 1 BPLR 51 (PFA), *Mouton v Southern Staff Pension Fund* [2003] 4 BPLR 4581 (PFA), *Maharaj v Maharaj and Others* [2002] 2 BPLR 3030 (D), *Sempapalele v Sempapalele & Another* [2002] 2 BPLR 3035 (O) and *Schenk v Schenk* 1993 (2) SA 346 (E)).
- 5.8 The legislature sought to address the problem. The amendment Act was promulgated under Government Gazette no. 30297 on 13 September 2007. Thereafter section 4(b) of the Revenue Laws Amendment Act 35 of 2007 ("the Revenue Laws Amendment Act") again amended section 37D (a section dealing with permissible deductions from pension benefits) of the Pension Funds Act by *inter alia* the addition to sub-section (1) of the following paragraph:

“(e) For the purposes of section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), the pension benefit referred to in that section and the tax

referred to in paragraph *d(ii)* are deemed to accrue to the member on the date of the court order; ...”

- 5.9 In terms of section 7(8)(a)(i) of the Divorce Act the non-member spouse only becomes entitled to payment when the benefit accrues to the member. What the new section 37D(1)(e) does (by way of a deeming provision) is to notionally accelerate the date of accrual of the benefit to the member spouse and in turn the date on which the divorce benefit accrues to the non-member spouse.
- 5.10 By deeming the date of accrual of the benefit to be the date of divorce, the new section 37D (1) (e) overrides the actual date of accrual of the benefit which is determined by the event giving rise to the member’s entitlement. The result is that the divorce benefit accrues to the non-member spouse on the date of divorce (a fixed ascertainable date without any reference to other documents and no time delay implications), that is, without reference to the actual date of accrual of the benefit (invariably a future date at the time of the divorce with significant time delay implications).
- 5.11 Thus, the position of divorcing spouses’ pension interest after the coming into force of the amendment Act, i.e. after 13 September 2007, is clear. However, the crisp issue for determination that now arises is whether this new provision also applies to divorce orders granted prior to its effective date on 13 September 2007, the concern being whether this would amount to the retrospective application of a statutory amendment.
- 5.12 The amended section 37D (1) (e) of the Act determines the date of accrual of the divorce benefit awarded to the non-member spouse in terms of section 7(8) of the Divorce Act. On a plain reading of the section, that date is the date of the divorce order. So does the fact that such order existed prior to the amended section 37D (1) (e)’s enactment render it retrospective in operation? In this tribunal’s view, for the reasons that follow, it does not.
- 5.13 The new section 37D (1) (e) (v) of the Act clearly and unambiguously states that on the expiry of 60 days from the date of the non-member spouse’s election (to have the divorce benefit paid directly to him or her or to transfer it to another fund), the non-member spouse is entitled to fund return “*but not to any other interest or growth*”.
- 5.14 Therefore, section 28(b) of the amendment Act and section 4 of the Revenue Laws Amendment Act are not retrospective in operation but prospective. Put differently, it gives a different legal result to a set of transaction/s (the divorce order and related pension consequences) completed prior to 13 September 2007. However, it does not affect the underlying concluded transaction/s in any way. So, in practice what this

means is that for non-member spouses who divorced before 13 September 2007:

- 5.14.1 pension funds can now deduct from a member's benefit or minimum individual reserve any amount assigned from his or her pension interest to a non-member spouse in terms of a valid order made by a competent court. In addition, tax on the non-member spouse's share must also be deducted from the member's portion (see section 4 of the Revenue Laws Amendment Act);
 - 5.14.2 for purposes of section 7(8)(a) of the Divorce Act the pension benefit referred to in that section and the tax referred to in section 37D(1)(d)(ii) are deemed to accrue to the member on the date of the court order;
 - 5.14.3 the non-member spouse has the option to elect that the assigned amount be paid directly to him or her or to be transferred to an approved pension fund organisation. Such payment or transfer must take place within sixty days of the non-member spouse making an election (the new section 37D(1)(e)(iii) of the Act);
 - 5.14.4 if the fund takes longer than 60 days to effect the non-member spouse's election then interest at the fund's rate of return is payable from the expiry of the sixty day period until payment or transfer of the non-member spouse's pension interest in terms of his or her election.
- 5.15 Thus, there is no question of retrospectivity since the non-member spouse's pension interest is computed in the same manner as before and no fund returns or interest is paid by the fund (except in the event of the fund taking longer than sixty days to effect the non-member spouse's election). What does change is that the non-member spouse gets access to his or her pension interest relatively soon after a divorce rather than having to wait until any benefit actually accrues to the member spouse. This gives effect to the clean break principle in divorce matters.
- 5.16 The determination of whether or not legislation is 'retrospective' is usually a complex exercise. The issue has frequently been debated in our courts in relation to various pieces of legislation and the approach has been by no means consistent.
- 5.17 In this tribunal's view, the starting point should always be a consideration of the objection against retrospective legislation, namely that it may interfere with vested rights. So the question is do section 28(b) of the new

and section 4 of the Revenue Laws Amendment Act interfere with any vested rights?

- 5.18 Clearly the position of the non-member spouse is improved considerably by the legislative amendment in that, as explained, he or she can now receive payment (or transfer to another fund) without delay.
- 5.19 The effect on the retirement fund is that it can effect payment of the divorce benefit to the non-member spouse as soon as he or she has exercised the election to either receive a cash payment or to transfer to another fund. The fund therefore does not have the problem of keeping records and having to pay non-member spouses' pension interest many years after a member's divorce.
- 5.20 As far as the position of the member spouse goes, whereas prior to the enactment of section 28(b) of the amendment Act and section 4 of the Revenue Law Amendment Act, the member spouse stood to receive any investment growth that accrued on the non-member spouse's portion from the date of divorce to the date of accrual of the benefit; this is no longer the case. But the question is - did the member spouse have a *vested right* to that growth at the expense of the non-member spouse?
- 5.21 The right/entitlement of the member spouse depends on a contingent event. Until that contingency occurs, the member spouse has no quantifiable or ascertainable right to anything. At best, the member spouse has a '*spes*'. Certainly there can be no question of any right/s that has vested in the member spouse.
- 5.22 Therefore, the objection against retrospective legislation (that it interferes with vested rights) does not apply in this instance. Expressed differently, the new Act and the Revenue Laws Amendment Act prospectively attach new consequences to earlier events. Section 28(b) of the new Act and section 4 of the Revenue Laws Amendment Act must accordingly be seen as operating prospectively from their effective date of 13 September 2007 to all divorce orders, whether they were made prior to or subsequent to this date. Thus, only after the non-member spouse makes an election regarding the disposition of his or her pension interest does the fund need to give effect to such an election, which ought then to happen within sixty days of the fund receiving the non-member spouse's election.
- 5.23 But, even if this tribunal is wrong on this score, that does not necessarily lead to a different conclusion. As Thirion J stated in *Kruger v President Insurance Co. Ltd* 1994 (2) SA 495 (D) at page 503:

“However, strong though the presumption against retrospectivity may be, it is nothing more than an aid in interpretation and must yield to the intention of the legislature as it emerges from any particular statute ...”

5.24 Assuming that applying section 28(b) of the new Act and section 4 of the Revenue Laws Amendment Act to existing divorce orders does amount to ‘retrospective legislation’ in the objectionable sense (insofar as it interferes with vested rights acquired by the member spouse), the enquiry then becomes whether the legal presumption against retrospectivity prevails or whether the presumption is trumped by the intention of the legislature that the amendments be applied retrospectively.

5.25 In the *Kruger case (supra)*, Thirion J stated at page 503 as follows:

“The conclusion that a statute was intended to operate with retrospective effect may be more readily arrived at in a case where vested rights would not be affected by a retrospective operation and also where the intention of the legislature was clearly to bestow a benefit or to effect evenhandedness in the operation of the law.”

5.26 Applying the above, the question one must ask is whether the member spouse’s interest in growth on the investment at the expense of the non-member spouse is a protectable interest when weighed against the desire to promote simple justice between the parties.

5.27 The intention of the legislature was clearly to rectify the previously unfair position of the non-member spouse by effecting, in the words of Thirion J, ‘evenhandedness’ in the operation of section 7(8) of the Divorce Act in relation to the non-member spouse.

5.28 Therefore, assuming section 28(b) of the amendment Act and section 4 of the Revenue Laws Amendment Act do constitute ‘retrospective legislation’, this tribunal is satisfied that the legislature intended for it to apply ‘retrospectively’ to existing divorce orders and that the legal presumption against retrospectivity would thereby be discharged in any event.

5.29 In conclusion, notwithstanding the divorce order being issued prior to the commencement date of the amendment Act and the Revenue Laws Amendment Act (i.e. 13 September 2007), the amended section 37D of the Act is applicable to this complaint and the complainant is accordingly entitled to make her election in terms of section 37D(1)(e)(iii) of the Act.

6. Relief

6.1 In the result, the following order is made:

6.1.1 The complainant is directed to exercise her election in terms of section 37D(1)(e)(iii) and to notify the respondents of her election

in writing, within 14 days of the date of this ruling; and

- 6.1.2 The respondents are directed to implement the election opted for by the complainant in terms of the provisions of the amended section 37D of the Act within 60 days of receipt of the complainant's written notification in terms of paragraph 6.1.1 *supra*.

SIGNED IN JOHANNESBURG ON THIS DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR