

PERSONAL FINANCE

Badly written divorce orders prevent access to pension assets

June 22 2014 at 12:25pm
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<http://www.iol.co.za/business/personal-finance>



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Many divorcees with a claim to a share of the retirement savings of their former spouses are having to return to court so that their divorce orders can be changed to bring them in line with the Divorce Act and the Pension Funds Act.

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A large proportion of divorcees are still battling to claim a portion of their former husband's or wife's retirement savings on divorce, despite the law making this "clean break" possible since 2007. The reason is that retirement funds cannot enforce badly drafted divorce orders.

Anton Swanepoel, the legal adviser at Sanlam Employee Benefits, says up to 60 percent of the divorce orders that the retirement fund administrator receives cannot be enforced by the relevant funds, because they do not comply with the law.

John Anderson, the managing director of research at Alexander Forbes, says funds administered by Alexander Forbes receive fewer divorce orders that are rejected – some 25 percent – but this is still a significant one in four.

The Association for Savings & Investment SA (Asisa) has taken up the issue and is preparing guidelines for legal practitioners and its member companies to ensure that a consistent approach is adopted when divorce orders are drafted and executed.

Lize de la Harpe, the legal adviser at Glacier by Sanlam, says if a divorce order does not adhere strictly to the requirements of the Divorce Act and the Pension Funds Act, it is not enforceable against a retirement fund.

Funds governed by the Pension Funds Act are strictly bound by it and have no discretion to implement a divorce order that does not comply with the law, she says.

Recent determinations by Muvhango Lukhaimane, the Pension Funds Adjudicator (PFA), have made it very clear that funds and their administrators must act with extreme caution and ensure that an order is valid before transferring or paying out money in terms of a divorce order, De la Harpe says.

Russell Anderson, a senior policy adviser at Asisa, says lawyers and retirement fund administrators have different interpretations of the legal requirements that must be fulfilled before pension benefits can be divided.

It will be in the interests of consumers if legal practitioners and Asisa members are consistent when wording and implementing divorce orders, he says.

Recent changes, such as amendments to the Pension Funds Act and the recognition of Muslim marriages, have complicated matters, Anderson says.

Once Asisa has formalised a standardised approach on how divorce orders must be worded and administered, the association will engage with the legal profession and Asisa members, and also ensure that consumers are informed.

Kobus Hanekom, the head of strategy, governance and compliance at Simeka Actuaries & Consultants, an affiliate of Sanlam Employee Benefits, says former spouses of retirement members whose divorce orders are unenforceable are being referred to the Law Society, which is directing attorneys to apply for variations of the divorce orders, free of charge.

Swanepoel says about 10 to 15 percent of divorce orders that Sanlam Employee Benefits has found to be non-compliant are subsequently amended when the parties return to court for a variation order.

Conditions that must be met

De la Harpe says the conditions that must be fulfilled before funds and administrators may split pension assets can be summarised as follows:

- * The divorce order must specifically state that the spouse who is not a member of the fund is entitled to a pension interest, as defined in the Divorce Act;
- * The divorce order must specify the non-member spouse's share of the pension interest as a percentage or rand amount;
- * The fund that has to deduct the share of the pension interest must be named or identifiable; and

* The fund must be expressly ordered to endorse its records and pay the share of the pension interest.

De la Harpe says that, among the many cases involving divorce orders that have come before the PFA is *Areias v Momentum Retirement Annuity Fund* and another. A woman wanted to rely on a divorce order that entitled her to 50 percent of her former husband's "policies, which shall continue to be paid by the member until maturity date, when the policies will be paid out in equal shares".

De la Harpe says the PFA found that the divorce order was not binding on the fund, because it did not name the fund or refer to the pension interest. The complaint was dismissed last year.

Hanekom says that if you are getting divorced, you need to determine how many retirement funds your spouse belongs to and identify each one from which you wish to claim a portion. The divorce order or settlement agreement should provide for the pension interest in each fund.

Sometimes, a spouse belongs to a pension and a provident fund. He or she may also belong to a preservation fund and/or a retirement annuity fund, he says.

Hanekom says in another case that came before the PFA last year, *Bowyer v Personal Portfolio Preservation Fund*, the PFA ruled that the fund could not pay a share of the pension interest to the non-member former spouse, because the divorce order did not expressly order the fund to make such a payment.

The PFA said it is not enough for the divorce order to state that the fund's records should be endorsed; the Divorce Act expressly requires that the fund must be ordered to make payment to the non-member former spouse.

For a divorce order to be enforceable, it must expressly order the fund to pay a defined percentage or amount of the member spouse's pension interest as defined by the Divorce Act and not some other value.

Hanekom says an order for the fund to pay the non-member spouse 50 percent of the benefit that will become payable to the member at retirement, for example, will not be enforceable against a fund.

He says a fund also cannot give effect to an order that restricts the meaning of pension interest.

Divorcing couples often agree to award the non-member spouse a portion of the member's pension interest calculated from the date of marriage to the date of divorce – in effect, excluding any value built up in the fund before the marriage. But this is in conflict with the definition of a pension interest in the Divorce Act, and such a divorce order is not enforceable against a fund, he says. This has been confirmed in determinations by the PFA.

Instead, spouses should base the divorce order on the pension interest (as defined in the Act) and then, when agreeing on the percentage or rand value, take into account that they are splitting only what was built up during the marriage. In other words, they can't change what is awarded, only how much of what is awarded.

A divorce order can be made for any portion of a member's pension interest – from nothing to all of it – as long as a percentage or rand value of the pension interest is clearly specified, Hanekom says.

Claim against your ex-spouse

De la Harpe says if your divorce order is found to be unenforceable against your former spouse's fund, you have not lost your claim to the pension interest; you still have a claim, but you will have to claim against your ex-spouse. In this case, she says, your options are to:

- * Sue your ex-spouse for the value of the pension interest to which you are entitled, and hope that he or she has enough money to make good your claim; or

- * Ask the court that issued the divorce order to amend the order to bring it in line with the Divorce Act and the Pension Funds Act.

"Unfortunately, both options involve further legal costs. Even if your ex-spouse confirms that he or she has no problem with the deduction of the pension interest awarded to you, it won't affect the unenforceability of the order against the fund," De la Harpe says.

TWO THINGS

- * A pension interest can be split at divorce only if you were divorced **on or after September 13, 2007**. If the divorce was granted before this date, the non-member spouse has to wait until the member spouse dies, withdraws his or her pension interest or retires in order to claim his or her share of the benefit.

From March 1, 2009, any tax payable on such an amount must be paid by the non-member spouse.

- * **Your priority should be to protect your retirement savings.** But if you cannot give your former spouse other assets in lieu of a share of your pension interest, you may have to split your pension.