

## Beware pension split on divorce

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By Bruce Cameron

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Illustration: Colin Daniel

You need to be very careful about how retirement benefits are divided at divorce. Recent determinations by Pension Funds Adjudicator Muvhango Lukhaimane show that most parties are, all too often, getting it wrong, leaving non-member spouses, in particular, financially vulnerable.

Those getting it wrong are fund members, non-member former spouses, divorce lawyers and retirement fund trustees.

In one recent determination, Lukhaimane said her office had set aside countless complaints about divorce settlements because the settlements did not comply with the Divorce Act.

Lukhaimane upheld a complaint by Mr P, who alleged that Sentinel Retirement Fund, a mining industry fund, had paid his ex-wife, Ms M, her pension interest calculated from the date of his membership to the divorce date instead of from the date of their marriage to the divorce date.

Mr P, who married Ms M in November 2004, was a member of the Mine Employees Pension Fund from August 1995.

In February 2008, Mr P transferred to the Sentinel Mining Fund (note that the two mining funds have since merged under the name of the Sentinel Mining Fund).

An amount of R718 153 was transferred from the Mine Employees fund to the Sentinel fund in April 2008, with Mr P's membership backdated to February 2008.

In response to Mr P's complaint, the Sentinel fund argued that Ms M was entitled to a portion of the full pension interest, because the transfer had occurred after the marriage date. The calculation was

based on the period from Mr P transferring to the Sentinel fund, in February 2008, to the divorce date.

Lukhaimane says this was not what the divorce settlement agreement provided for. The settlement order stated that Ms P's pension interest should be calculated from the date of marriage to the date of divorce.

She says that, in addition, the settlement order was faulty. It did not comply with the definition of pension interest and therefore was not enforceable by the Sentinel fund, because it amounted to an unlawful reduction of a pension benefit.

"A pension interest is an amount equal to the member's cash resignation benefit, which would have become payable had the member resigned as at date of divorce, and has no bearing on the date of marriage as such.

"Therefore, it was incorrect of the Sentinel fund to interpret the settlement agreement to mean that Ms M was to be awarded 50 percent of the complainant's pension interest calculated from date of membership to date of divorce, when it expressly states something to the contrary."

Lukhaimane said the settlement agreement sought to define pension interest in a manner contrary to the requirements of the Divorce Act.

"The fund ought to have consulted the parties concerned when it was faced with this inconsistent settlement agreement in order to allow them an opportunity to approach the court with a view to amending the order, or [it should have] simply refused to enforce it by reason of its inconsistency and vagueness," she said.

Lukhaimane said that by calculating the pension interest as defined in the Divorce Act, the Sentinel fund even went against what Mr P and Ms M intended or agreed on in the settlement agreement, because they had intended the pension interest to be calculated from the marriage date.

Lukhaimane warns that retirement funds "should desist from carrying out settlement agreements that do not comply with the definition of pension interest.

"This tribunal has set aside countless settlement agreements that did not comply with the Divorce Act precisely because the conditions under which the reduction of a member's pension benefit is allowable should be strictly complied with."

She set aside the Sentinel fund's decision to pay 50 percent of Mr P's pension interest to Ms M and ordered the fund to repay the money to Mr P, leaving Ms M with nothing.

Maybe it is time for a few lax lawyers to be sued or at least reported to the Law Society by people who suffer the consequences of poorly drafted divorce settlements.

### **READER'S PENSION PLIGHT**

Reader Ms X faces a bleak financial future because she will not receive the benefits of an Old Mutual retirement annuity (RA) of her deceased husband to which she believed she was entitled in terms of her divorce settlement.

In terms of her divorce settlement in September 1997, the RA was to be endorsed so that:

\* She was to be a beneficiary of the policy when her former husband, Mr Y, retired or if he died before her;

\* Mr Y would continue to maintain the policy and the contributions; and

\* He should not "in any other way hypothecate, encumber or deal with the said policy".

Ms X says that Old Mutual adviser Johnny Haynes, who was adviser to both her and her former husband, was provided with a copy of the settlement agreement.

When Mr Y died last year and she tried to claim what she thought was her entitlement against the RA, she was informed by Haynes that her former husband had cancelled the RA and transferred the proceeds into a new RA, which had then matured and was used to purchase a pension for Mr Y.

Ms X says Old Mutual:

- \* Denied receiving a copy of the divorce settlement; and

- \* Stated that the divorce settlement was not enforceable because it was not compliant with legislation.

Old Mutual says section 37A of the Pension Funds Act provides for no cession, pledge, attachment or any form of execution of pension fund money except under the Income Tax Act or Maintenance Act. It says the order stated that Mr Y had to retain Ms X as a beneficiary. This was an obligation on Mr Y, not an obligation placed on the RA fund or Old Mutual.

- \* Stated that for the divorce settlement to be enforceable against the RA fund, “the parties would have had to deal with the division of pension interest between them as defined in the Divorce Act”.

A “pension interest” is the maximum amount that a non-member spouse is entitled to claim from a retirement fund.

Ms X took her complaint to the Pension Funds Adjudicator, but the adjudicator was unable to intervene because the complaint did not relate to a pension fund. The adjudicator argued that Mr Y was no longer a member of the RA fund at the time of his death because he had cashed in his RA to buy a pension.

Old Mutual told Ms X that her only remedy was to claim against her former spouse’s estate – but Ms X says there is no money in the estate

However, when Personal Finance pointed out that Haynes is an Old Mutual representative and that it was responsible for his action or lack of action in handing over the divorce settlement to the fund, it qualified its initial statement.

Piet Spreeuwenberg, Old Mutual’s client services manager, says Old Mutual accepts that, had this matter been dealt with appropriately and timeously, an amendment to the documentation could have been made, resulting in Ms X receiving the pension interest she was entitled to at the time of her ex-husband’s retirement from the fund.

“Our intention is to ensure that Ms X is treated fairly, and also that, as far as our representative is concerned, appropriate steps are taken following a thorough investigation,” Spreeuwenberg says.

### **NON-COMPLIANCE IS A RISK**

Non-compliant divorce settlements are, unfortunately, an issue faced by retirement fund administrators daily, says Piet Spreeuwenberg, client services manager at Old Mutual.

Spreeuwenberg says that to prevent divorce settlements on retirement annuity (RA) fund benefits being non-compliant and therefore unenforceable, divorcing couples and their lawyers need to take into account the following:

- \* The legal structure of a life assurance RA fund is such that when someone applies to the fund to become a member, the fund takes out a life assurance policy (the RA policy) for the benefit of the member. The policy therefore belongs to the fund; it is not owned by the member, and can therefore

not be dealt with as the “property” of the member. The member can therefore not decide to give the RA to his or her spouse in a divorce order, and the fund cannot give effect to such an order.

\* The member (and, subsequently, also the member’s spouse in the case of a divorce) does, however, have an “interest” in the fund. This concept of “interest”, referred to as “pension interest”, has been problematic for a number of years, Spreeuwenberg says.

“Pension interest” is defined as the member’s contributions including interest calculated at the statutory rate. In other words, the “pension interest” has nothing to do with the value of the policy, and it is this fact that is misunderstood or overlooked and which then invariably leads to post-divorce problems. Therefore, he says, as the law currently stands, a member cannot legally give the “value of the policy” to his spouse in terms of a divorce order, but only up to 100 percent of the pension interest, which is often far less than the policy value.

Old Mutual has made proposals via the legal committee of the industry organisation, the Association for Savings & Investment SA (Asisa), to change this definition to “a value akin to the net value of the policy if the member was allowed to surrender the policy at the date of the divorce”.

Spreeuwenberg says that in situations where Old Mutual is made aware of the divorce, it is possible to assist the couple to change the wording in order to make the divorce order compliant.

The introduction of the “clean-break principle” in 2009 eased matters, because the non-member spouse’s entitlement in terms of an enforceable divorce settlement is transferred or paid out immediately.

Before the introduction of the clean-break principle, the non-member spouse had to wait until a valid claim against the fund was instituted before a claim against the divorce order could be paid, Spreeuwenberg says.