

**WHAT
YOU
SHOULD
KNOW.**



An eBook on Family Law

DIVORCE AND REIREMENT FUNDS

Written by Bertus Preller - A Family Law
Attorney

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Bertus Preller
Maurice Phillips Wisenberg
20th Floor, 2 Long Street
Cape Town
8000
Tel: 021 419 7115
<http://www.divorceattorney.co.za>
<http://www.divorcelaws.co.za>
<http://onlinemediations.co.za>





DIVORCE AND

RETIREMENT FUNDS

**By Bertus Preller
Family Law Attorney**



The term 'pension fund' is both a generic name for all types of retirement funds that fall within the scope of the Pension Funds Act, and a descriptor of a specific type of pension fund, one in which at least two-thirds of the retirement benefit must be taken as an annuity.

Other types of pension funds are provident funds, where the member may take the entire retirement benefit in cash, retirement annuity funds for retirement plans outside of the occupational/workplace environment, and preservation funds, to which benefits from previous funds can be transferred.

The relevant provisions that control the allocation of unaccrued pension benefits to a non-member spouse upon divorce are contained in the Divorce Act and in the Pension Funds Act 24 of 1956.

A claim under the Divorce Act can only be brought where the husband/wife or a partner in a civil union is still a member of the fund. Once he/she exits from the fund, usually on retirement or as a result of an early withdrawal, the benefit accrues to him/her, and there is no longer any 'pension interest' or unaccrued benefit. If the benefit accrues before the date of divorce, it must be dealt with as any other asset in the separate or joint estate.

Where couples are married or in a civil union in community of property, one partner will have a claim against the other's pension fund. The claim will be for half of the pension interest on the date of divorce.



MAKE SURE YOUR SETTLEMENT AGREEMENT IS DRAFTED CORRECTLY..

Where couples are married out of community of property with the accrual, the spouse's pension fund value will be taken into consideration in order to determine the value of his/her estate for purposes of the accrual calculation only. Where couples are married out of community of property without the accrual, a spouse has no claim against the other spouse's pension or retirement funds.

One should never rush into dividing up pension and/or retirement funds in a divorce settlement. It frequently happens in divorce cases that pension fund administrators reject settlement agreements on the basis that the clauses dealing with the pension interest payout to a non-member spouse are drafted incorrectly. It is therefore of the utmost importance that the clauses dealing with pension payouts be drafted properly. If not drafted properly, application will have to be made to the court at great cost to amend or vary the settlement agreement.



THE CLEAN BREAK

PRINCIPLE

The Pension Funds Amendment Act, 2007, introduced the so-called clean-break principle for the treatment of retirement fund benefits upon the granting of a divorce decree. The Act allows retirement funds to deduct an amount or percentage upon divorce from a member's benefit and pay it to the non-member spouse or to a retirement fund of his/her choice.

The clean-break principle allows a non-member former spouse to access an agreed or court-ordered share of the member spouse's retirement savings on divorce.

Any assigned amount may be paid from the member's pension fund to a non-member spouse in terms of a divorce order granted under the Divorce Act, irrespective of the date of divorce, but may not be more than 100 per cent of the value of the member's withdrawal benefit at the date of divorce.

In order for the fund to make the deduction and payment to the non-member spouse, the fund must be ordered to endorse its records (make a note on the system) to such effect and/or to make payment to the non-member spouse. The non-member spouse can elect to receive a cash lump sum or to have the money transferred to an approved pension fund.

A fund is not allowed to deduct and pay over interest on the amount assigned to the non-member spouse (except where the fund does not pay the non-member spouse within the time frames stipulated in the Act).



Pension interest

'Pension interest' is defined in the Divorce Act for every type of fund except a preservation fund. According to the Pension Funds Act, 'pension interest' is:

1. Pension and provident fund The benefits to which a member would have been entitled to in terms of the rules of the fund if his/her membership had terminated, due to resignation, at the date of the divorce.
2. Retirement annuity The sum of the member's contributions to the fund up to the date of divorce plus simple annual interest at the prescribed rate.
3. Preservation fund The benefit a fund member would receive if his/her membership were notionally to terminate on the date of divorce.

THE CLEAN BREAK PRINCIPLE

It is possible to assign a rand value to a non-member spouse instead of a percentage of the pension interest, provided that the amount does not exceed the value of the pension interest. It is not fit to award interest on the pension interest allocated to the non-member spouse as this is statutorily regulated in the Act, which provides for growth on the allocated portion. Interest only commences running a few months after the date of divorce, if the allocated pension interest is not paid over within the statutorily prescribed time limits.

It is very important to know exactly what is meant by the term 'pension interest' in a divorce settlement that involves handing over retirement savings, whether the savings are:

- in a pension fund or in a provident fund sponsored by an employer, a trade union or an industry association; or
- a retirement annuity fund or a preservation fund sponsored by a financial services company.

The reason why it is so important is that pension interest applies only to the aforementioned funds and not to an annuity (a pension) bought at retirement, or to a former fund member's retirement savings that are held in the fund until the former member retires.

In terms of the Pension Funds Act, a pension/retirement fund is obliged to give the non-member spouse the right to decide how the pension interest award should be paid out, i.e. as a lump sum in cash or reinvested into another retirement fund. On presentation of a valid divorce order, the fund normally has 45 days to request the non-member spouse to decide how the pension interest due to him/her must be paid. The non-member spouse has 120 days in which to make a decision.

When it comes to the pension interest claim, the following needs to be considered:

- Is the fund a preservation fund or not?
- Should the non-member take his/her award in cash or transfer it to another fund?
- If taken in cash, how will it be invested?

Pension interest can be excluded in an ANC. If marrying out of community of property with the accrual, the member spouse will need to expressly exclude the value of the retirement annuity or pension fund as at the date of marriage when drawing up the ANC.

DIVORCE SETTLEMENT AGREEMENTS

Citing the fund in the divorce settlement agreement

Citing the fund in the divorce settlement agreement
It is of vital importance that the correct name of the retirement fund is used at all times. Uncertainty as to which fund is intended may result in a situation where the fund will not pay out.

Divorce settlement agreements are frequently drafted using the name of the insurance company that manages the pension fund instead of the fund itself. It is not sufficient to refer to the administrator (e.g. Old Mutual or Liberty pension fund), as these financial organisations usually operate numerous retirement funds.

Taxation of pension interest allocations

The non-member ex-spouse will pay the tax on the pension interest if he/she takes the benefit in cash. If it is transferred to another retirement fund, the transfer will be tax-free.

This is a very difficult area, according to the Pension Lawyers Association of South Africa, especially when the pension interest is considerable. Parties are therefore advised to obtain professional advice.

The situation has changed several times in the past few years, leading to much confusion. At present, the pension interest deduction is taxable in the hands of the non-member spouse. However, the tax dispensation may vary for divorces already obtained, depending on the date of the divorce and on the date of election in terms of section 37D(4)(b).

It is important that the settlement agreement clearly address the tax issue.

How much tax must be deducted?

Taxable income (R)	Rate of tax (R)
0–22 500	0% of taxable income
22 501–600 000	18% of taxable income above 22 500
600 001–900 000	103 950 + 27% of taxable income above 600 000
900 001 and above	184 950 + 36% of taxable income above 900 000

Example of a pension fund clause in a divorce settlement agreement

1. Plaintiff shall be paid an amount equal to a 50 per cent share of the pension interest of Defendant in the LUCA Retirement Fund, number 23858225.
2. The fund shall deduct the aforesaid percentage from Defendant's benefit or minimum individual reserve, as the case may be, and transfer the percentage interest in terms of Section 37D(1)(e)(iii) of the Pension Funds Act, 24 of 1956, as amended, to an approved pension fund of Plaintiff's choice or pay the amount to Plaintiff in cash on his/her behalf within 60 days of the Plaintiff notifying the fund of the name of the approved fund or his/her election to be paid in cash. Plaintiff shall notify the fund regarding his/her aforesaid choice within 60 days of the granting of the divorce order.
3. Defendant consents to the granting of an order in terms of Section 7(8) of the Divorce Act, 70 of 1979, as amended, in terms whereof the Registrar of the Court shall forthwith notify the fund that the endorsements shall be made in the records of the fund that the respective portions of Defendant's pension interest set out herein are payable as provided for herein and the administrators of the fund shall furnish proof of such endorsement to the Registrar, in writing, within one month of receipt of such notification.

ATTACHING BENEFITS OF A PENSION FUND FOR ARREAR MAINTENANCE

A pension fund has a right to keep back or deduct amounts from pension benefits in order to pay maintenance to dependants. South African courts also have a legal obligation to enforce orders including future maintenance of dependants. The attachment of pension benefits is a very effective instrument, given the large number of maintenance non-payers in South Africa.

The applicant can request either to attach the savings or a portion to be ceded to pay outstanding maintenance. If a fund is making on-going payments to a pensioner, for example, one can seek a court order directing the fund to deduct what is due for maintenance and to pay it over to the effected party. However, when a maintenance defaulter is still an active member of a fund, the fund cannot make any deductions for outstanding maintenance payments until the member's benefit in the fund accrues. This will occur when the member retires, resigns or is retrenched, in which case the fund will pay out a retirement or withdrawal benefit.

Lodging a claim for maintenance

Before you can apply to attach a member's pension fund benefits you must be in possession of a valid maintenance court order. The fund and the defaulting member should be clearly identified to facilitate easy payment. If a fund is not cited correctly or the amount is not clear, the fund has no way of knowing what maintenance payments have been made and what is outstanding.

To get the order attaching pension fund benefits, one will have to demonstrate that the member has a history of failing to pay maintenance. A major problem to the attachment of pension benefits is that many funds are presented with a maintenance order too late to give effect to it, since the member has already left the fund. Once the pension benefit has been paid to the member, the benefit is no longer under control of the pension fund and cannot be attached. One will then have to pursue an action against the defaulting member and his/her bank. So, if you do know that a defaulting parent is going to leave his/her fund, ask the fund to withhold the benefit while you finalise a claim for arrear maintenance.

A pension fund has a duty to inform a defaulting member before it pays a maintenance claim. Failure to notify the member that his/her benefits are being attached is infringing the common law principle of allowing the other side to be heard. In a previous case, the High Court set aside an order from a magistrate's court ordering the attachment of a member's pension benefit for arrear maintenance because the member had not received prior notice.

Before paying out a maintenance claim, a fund will first deduct any amount outstanding on any home loans that it granted to the member in terms of the Pension Funds Act.

FREQUENTLY ASKED QUESTIONS

Am I entitled to a portion of my spouse's interest in his/her pension fund on divorce?

Yes, when you are married in community of property and you divorce, you may claim half of your spouse's pension interest. If you are married out of community of property with accrual, the value of your spouse's retirement fund will be regarded as part of his/her net assets for purposes of determining the accrual. If married out of community of property without the accrual you will not be entitled to any pension interest.

Am I entitled to a portion of my spouse's pension interest after he/she has left the fund?

No. The definition of pension interest in the Divorce Act is such that, in order to calculate the pension interest, the member has to be in active employment and active fund membership at the date of divorce, so that it may be deemed that he/she has 'resigned' on the date of divorce and his/her former spouse is now entitled to a portion of the fund benefit as of that date.

If a member's employment (a condition for fund membership) has already been terminated at the date of divorce, then he/she cannot be deemed to have resigned at the date of divorce and a former spouse cannot be paid a portion of what would have been his/her fund benefit. The value of a spouses' pension fund will however be regarded as an asset and included in determining the net value of his/her estate.

Can a pension fund reject my claim for payment of a portion of my spouse's interest?

Yes, for a court order or settlement agreement to be enforceable it must meet all the requirements of the Divorce Act, namely:

- A specific reference to 'pension interest' must be made as defined in the Divorce Act. If the fund is a preservation fund the order must read 'pension interest' as defined in section 37D(6) of the Pension Funds Act. The following will generally not be binding: 'pension fund', 'pension benefits', 'joint estate', 'member's interest in the fund' or 'proceeds of the policy'.
- The name of the fund. Where the fund is not named, it must at least be possible to determine from the wording of the order which fund the parties had in mind. For example, the 'fund of the member spouse's employer' would be ascertainable, but the 'Liberty pension fund' is not ascertainable since financial institutions operate several funds.
- A specified percentage or amount of the pension interest must be provided. It must be clear from the order how much of the member's pension interest has been assigned to the non-member spouse.

The following will generally not be binding:

- An order that stipulates the pension interest be divided equally will not be considered binding as it does not indicate that 50 per cent of the pension interest has been awarded to the non-member spouse.
- Any debts incurred by the non-member spouse after the date of divorce must be deducted from the pension interest.

Am I entitled to interest if the fund pays out late?

In terms of legislation, no interest is payable in the first 120 days from the date of divorce to the date on which the non-member spouse decides what to do with his/her share of the benefit. Interest is added only for periods exceeding 120 days.

FREQUENTLY ASKED QUESTIONS

What can I do if my spouse is reluctant to cooperate in the payout of his/her pension benefit?

Often the member spouse is reluctant to cooperate, but the non-member spouse is entitled to ask the fund for the relevant information.

If the fund is not prepared to divulge the information, the non-member spouse may be entitled to it in terms of the Promotion of Access to Information Act.

What can I do if the fund reviews my divorce order and indicates that it is not binding on the fund?

- The parties can apply to court to amend the divorce order so as to make it compliant with the requirements of the Divorce Act (this is time consuming and costly); or
- the member spouse may decide to settle the benefits due to his/her former spouse independently, in terms of an additional agreement between the parties that takes place outside of the fund, with such an agreement having no impact on the fund.

If I am living with my partner and we are not married, will I have a claim against his/her pension when we separate?

No. Cohabitation is not a marriage or a civil union and cannot be ended by divorce; therefore the Divorce Act does not apply to its dissolution.