

Legal update 3 of 2023: Case law on divorce orders and pension interest

Introduction

This update focuses on the importance of dealing with divorce orders and pension interest carefully and in line with the requirements of sections 7(7) and 7(8) of the Divorce Act and section 37D of the Pension Funds Act.

Summary

Case 1: *Bidvest South Africa Retirement Fund v Siphuma & Another* – Financial Services Tribunal (FST)

Can a pension fund refuse to comply with a court order for payment of a portion of a member's pension interest to a non-member spouse where the fund's name on the court order was incorrect, but the rest of the information about the policy was correct?

- The finding

No. The FST found that the classic rule of *falsa demonstratio non nocet*, which emphasises that the obvious incorrect citation of a fund's name does not invalidate a court order or the claim against that fund, is applicable in this matter.

- Practical application

A retirement fund must assess and interpret divorce orders dealing with pension interest carefully and in line with the requirements of sections 7(7) and 7(8) of the Divorce Act and section 37D(1)(d)(i) of the Pension Funds Act. Funds must not delay the payment of the allocated portion of a member's pension interest to a non-member spouse because of an obvious error in the naming of the fund when the rest of the information is correct.

Case 2: *M v SALA Pension Fund*. Gauteng High Court, Johannesburg (case no: 2021/5781) Unreported (31 August 2021) and Case 3: *Swartz v K & Another*. Gauteng High Court, Johannesburg (case no: A5036/2021) Unreported (15 December 2021)

Can deeds of settlement and divorce orders relating to pension interests which are not formulated in line with sections 7(7) and 7(8) of the Divorce Act read with section 37D of the Pension Funds Act be given effect to by pension funds?

- **The finding**

No. The High Court found that a divorce order in terms of sections 7(7) and 7(8) of the Divorce Act permits the amount stipulated on the order to be deducted from the retirement benefit of a member of that fund and be paid to his non-member spouse, in line with section 37D(4)(a)(i)(aa) of the Pension Funds Act. If these sections are not complied with, the order will not be binding on the fund.

- **Practical application**

Although retirement funds should not unnecessarily delay the payment of pension interest, a court order for payment of pension interest to a non-member spouse will only be binding on a fund if it complies with the criteria stipulated in sections 7(7) and 7(8) of the Divorce Act and section 37D of the Pension Funds Act. If it does not, a fund is not obligated to comply with the order and a non-member spouse must then claim this amount directly from the member spouse or from his estate if he already died.

More details on Case 1

Case 1: *Bidvest South Africa Retirement Fund v Siphuma & Another* – Financial Services Tribunal (FST)

- **The facts**

Mr Siphuma was a member of the Bidvest South Africa Retirement Fund (the Fund) as an employee of the Bidvest Group. He was married in community of property to Ms Siphuma until their divorce on 14 May 2018.

The divorce order provided that 50% of the member's pension interest as defined in section 1 of the Divorce Act, 70 of 1979 (the Act) had to be paid to the former spouse within 60 days. Although Mr Siphuma's fund number and employment number were correct on the order, the name of the fund was not; the order referred to the Bidvest Glasscock Provident Fund.

When Ms Siphuma attempted to claim her portion of the pension interest from the fund, it refused to do so because of the incorrect citation of its name on the order. The fund was apparently unaware of the rule of *falsa demonstratio non nocet* which is often used to correct an obvious error and means that a false description does not void a document, as long as the intent is clear. An obvious incorrect citation of the fund name should therefore not result in the order being invalid.

While Ms Siphuma was in the process of amending the order to comply with the fund's requirements, Mr Siphuma resigned and claimed his withdrawal benefit from the fund. When the fund refused to make payment to Mr Siphuma, claiming that it was waiting for the rectified order from Ms Siphuma, Mr Siphuma filed a complaint to the Pension Funds Adjudicator (PFA).

- **The finding**

The PFA ruled that the delay in payment was unreasonable and ordered the fund to pay Mr Siphuma the full amount of his benefit, leaving it to Ms Siphuma to reclaim her portion directly from Mr Siphuma.

Ms Siphuma referred the matter to the FST, who found that the divorce order has since been rectified and the fund would presumably act accordingly and payment in line with its terms within a reasonable time.

The FST also set aside the PFA determination and ordered it to either close the file or to order the fund to comply with the amended court order and pay the parties each their share within a given time.

More details on Case 2

Case 2: *M v SALA Pension Fund*. Gauteng High Court, Johannesburg (case no: 2021/5781) Unreported (31 August 2021)

- The facts

The applicant (Ms M) is the former spouse of Mr H who is now deceased (the deceased) and was a member of the South African Local Authorities' Pension Fund. Ms M claimed that she was entitled to 50% of the deceased's pension interest in terms of a divorce order dated 2 March 2000 and requested the fund to pay this amount to her.

Ms M and the deceased were married in community of property, which marriage was dissolved by decree of divorce. The settlement agreement entitled her to *50% (half) of the pension fund of the defendant accruing from the date of divorce to the date of payment*.

- The finding

The court referred to the definition of 'pension interest' in section 1, and sections 7(7)(a) and (8)(a) of the Divorce Act and section 37D(1)(d)(iA) of the Pension Funds Act and found that Ms M did not attempt to enforce her rights in terms of the divorce decree until the passing of the deceased, which was almost 20 years after the date of divorce. Ms M explained that the reason for this was that she and the deceased had agreed that she would only claim her portion of the pension interest when the deceased reaches retirement, which did not happen as he passed away before retiring.

Upon submission of the order, the fund notified Ms M that she must include the name of the fund on the order. Ms M approached the Family Court in Johannesburg on 5 August 2020 for assistance, which notified her that she would incur a large amount of debt if she tried to amend the court order to include the fund's name as the deceased had already passed away. On 22 December 2020, Ms M's new attorneys sent a letter of demand to the fund, who then responded that the order would not be enforceable as the benefit of the deceased was already distributed in terms of section 37C of the Pension Funds Act.

The fund held that since Ms M was neither a dependant nor a nominee at the time of the deceased's passing, she was not entitled to receive any benefits, and neither was she entitled to any information as requested in her letter of demand sent on 22 December 2020.

The fund further advised Ms M that for a court order to be binding on a fund, it must comply with the relevant provisions of the Divorce Act and the Pension Funds Act. Although Ms M and the deceased may have concluded a settlement agreement which was an order of court, it was not binding on the fund. Even after having been advised so, Ms M did not amend the court order to be in line with the requirements.

The fund was not allowed to make a deduction from the deceased's pension interest as allowed for under the Pension Funds Act. Section 37D(4)(a)(i)(aa) of that Act provides that a pension fund may make a deduction from a

member's pension interest if the pension fund is mentioned in or identifiable from the order, which was not the case here.

The fund stated that although it will prove difficult, Ms M must seek redress directly from the deceased's estate. The court agreed with the fund and dismissed the application.

More details on Case 3

Case 3: *Swartz v K & Another*. Gauteng High Court, Johannesburg (case no: A5036/2021) Unreported (15 December 2021)

- The facts

This appeal is brought by the receiver and liquidator appointed by the court in terms of the divorce order to divide the assets in the joint estate equally between the parties to a divorce.

Ms K and her former husband Mr K got divorced on 26 February 2016. The divorce order dissolved the marriage between the parties and appointed Mr Swartz as receiver and liquidator to divide the joint estate.

Two disputes arose between Ms K and Mr Swartz after the latter submitted his final report to Mr and Ms K. The first concerned the rate and scale of Ms Swartz' remuneration by the joint estate, which is not relevant here. The second concerned the amount to be distributed to Ms K as part of her share of the joint estate.

On 11 October 2017, Mr Swartz advised Mr and Ms K of the amount available for distribution, which both accepted. Ms K has been attempting to procure payment of the agreed amount from Mr Swartz to no avail.

Mr K did not want to realise or convert into cash any of his pension fund benefits and indicated that he would source the necessary monies himself to pay Ms K the monies due to her. Because of this, Mr Swartz prepared his accounting on the basis that Mr K will have to pay Ms K an amount of R1 432 316.75 and transfer an amount of R988 764.30 to a pension fund of her choice, in line with her request. This amounts to a total of R2 421 081.05.

The above was made clear on Mr Swartz' report, which was accepted by Mr K as well. However, regardless of this, Mr K opted to withdraw an amount of only R2 078 646.22 from his preservation fund. It seemed that this was the amount Mr K received after tax was deducted from the benefit.

- The finding

The court found that since all parties were bound by Mr Swartz' report, the fact that Mr K elected to source the funds from his preservation fund should not affect Ms K's right to the full amount of R2 421 081.05. Ms K was not now entitled to a lesser amount or responsible for the tax Mr K paid on withdrawal of the benefit. Mr Swartz could also not state that he realised and distributed the entire joint estate as he has not realised the pension funds mentioned in his report.

The court emphasised that all these problems could have been avoided if Mr and Ms K initially or Mr Swartz after his appointment, had approached the court to divide the pension benefits. The court referred to the Supreme Court of

Appeal's decision in *Old Mutual Life Assurance Co (SA) Ltd & Another v Swemmer* 2004 (5) SA 373 (SCA) which held:

- *This case cogently illustrates the importance of deeds of settlement and divorce orders relating to pension interests being formulated very carefully indeed in order to ensure that they fall within the ambit of ss 7(7) and 7(8) of the Act. If this is done, then all that would be required of the pension fund in question is to perform administrative functions to give effect to the order, without the rights of the fund or the relationship between the fund and the member spouse being affected in any way.*

The above was further emphasised in *GN v JN* 2017 (1) SA 342 (SCA) at para 27:

- *Section 7(8), on the other hand, creates a mechanism in terms of which the pension fund of the member spouse is statutorily bound to effect payment of that portion of the pension interest (as at the date of divorce) directly to the non-member spouse as provided for in s 37D(1)(d)(i) of the Pension Funds Act 24 of 1956 and s 21(1) of the Government Pension Law, 1996. This is as far as s 7(8) goes and no further. The non-member spouse is thereby relieved of the duty to look to the member spouse for the payment of his or her share of the pension interest with all its attendant risks.*

In this case, section 7(8) of the Divorce Act read with section 37D of the Pension Funds Act were not invoked and in turn, Ms K had to look to Mr K for payment, as she did. Additionally, the tax provisions that apply when a non-member spouse claims directly from a pension fund in terms of section 37D of the Pension Funds Act do not apply.

The court concluded that Ms K was entitled to receive the amount set out in Mr Swartz's report minus her share of Mr Swartz's fees and not all of his fees, as he contended.

The appeal was dismissed with costs.

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