

Legal update 7 of 2022: Death benefits - marriage in community of property

Introduction

This update focuses on whether marriage in community of property entitles a non-member spouse to half of a pension benefit at the death of the member spouse, or a half share of a life policy on the life of the deceased spouse. It also deals with the rights of a spouse who was the premium payer on a retirement annuity policy to a portion of the death benefit. Below is a summary and more details about three cases dealing with this.

Summary

Case 1: *Motsioa and Others v eJoburg Retirement Fund and Others* (43479/20) [2022] ZAGPJHC 454 (6 July 2022)

- **The finding:** Marriage in community of property does not entitle a non-member spouse to 50% or any portion of the death benefit solely because of the marriage and marital regime entered into with the deceased member. The court reiterated the provisions of section 37C of the Pension Funds Act (the Act) that legal and financial dependency on the deceased member at the time of his death or at a future time is one of the most important factors for consideration under this section. Allocation cannot be based solely on marriage.
- **Practical application**
The trustees of a retirement fund may not allocate a death benefit on the sole basis of a dependant being married in community of property to the deceased member. The dependency and extent of such must be considered when allocating the benefit to potential beneficiaries.

Case 2: *Maqubela and Another v The Master of the Gauteng Local Division Johannesburg and Others* (2018/40955) [2022] ZAGPJHC 346 (19 May 2022)

- **The finding:** The death of a spouse terminates a marriage in community of property and the consequences thereof. Life policies therefore do not form part of the joint estate and the surviving spouse is not entitled to a portion of the benefit by virtue of the marriage.
- **Practical application:** The proceeds of a life policy on the life of a deceased spouse may not be paid to the surviving spouse solely based on marriage in community of property.

Case 3: *Barnard v Momentum Retirement Annuity Fund and Others* PFA/GP/00080145/2021/MM (5 May 2022)

- **The finding:** A death benefit payable from a retirement fund at the death of a fund member does not fall in the deceased member's estate. A non-member spouse who was the premium payer on a retirement annuity policy is not entitled to a part of the benefit in that fund. The death benefit must be dealt with in terms of the

provisions of section 37C of the Pension Funds Act.

- **Practical application:** A death benefit allocation must always be done in terms of the provisions of section

37C of the Act. The marital status of the deceased member is not relevant in deciding what portion of the benefit should be allocated to a surviving spouse.

More details on Case 1

Case: Motsioa and Others v eJoburg Retirement Fund and Others (43479/20) [2022] ZAGPJHC 454 (6 July 2022)

- **The facts:** When Mr J Motsioa (the Deceased) passed away on 30 July 2020, the board of trustees of the eJoburg Retirement Fund (the Fund), of which the Deceased was a member, allocated the death benefit to the Deceased's beneficiaries, which included Mrs M, who he was married to in terms of civil law, and Ms R, who claimed to be his customary wife.

When Mrs M inquired about the death benefit payable from the Fund, she was advised that R1 246 000 of the total benefit of R8 311 422 was payable to her. She qualified as a dependant because she was legally married to the Deceased, even though they were estranged.

In response to Mrs M's query on why Ms R was included in the allocation, the Fund said that Ms R was the Deceased's customary wife as confirmed by her as well as the Deceased's brother in affidavits submitted to the Fund.

The court found that the affidavits were not sufficient evidence to prove that a customary marriage did in fact exist between Ms R and the Deceased. The customary marriage was also not registered. The court added that the son of the Deceased who resided with him before his passing, confirmed that Ms R was a helper who periodically came to the Deceased's home to assist with housework. He confirmed that the Deceased and Ms R did not have an intimate relationship.

- **The finding:** The court confirmed that even when presented with such damaging evidence against her, Ms R did not respond or deny the allegations that she was not the customary wife of the Deceased as she

alleged in her affidavit. The court further confirmed that since Ms R was married to another person, she could not have been married to the Deceased as well.

The provisions of the Recognition of Customary Marriages Act of 1998 require that a man must receive consent from his civil marriage spouse before concluding a customary marriage with another woman. The Deceased did not obtain such consent from Mrs M and thus the marriage could not have existed.

The Fund alleged that their allocation to Ms R was based on her financial dependence on the Deceased. The court found this to be disingenuous and irrational on the part of the Fund. A helper cannot be a dependant of a deceased member as they offer a service in exchange for the remuneration they receive from that person.

The court went on to address the basis of the allocation to Mrs M being that she is legally married to the Deceased. It found that Mrs M and the Deceased were indeed still legally married. However, they have been separated since 2007. Mrs M is employed, she was not nominated to receive the benefit and strictly speaking, she was not financially dependent on the Deceased.

The court confirmed that as a death benefit does not form part of a deceased member's joint estate, Mrs M was not entitled to 50% of the benefit as claimed. This was confirmed in *Danielz NO v De Wet* 2009 (6) SA 42 C) at par 41 to 43.

The court allowed Mrs M to retain her benefit allocation but redistributed the allocation to Ms R to the two sons of the Deceased and Mrs M as they were financially dependent on the Deceased and were still completing their studies.

More details on Case 2

Case: *Maqubela and Another v The Master of the Gauteng Local Division Johannesburg and Others* (2018/40955) [2022] ZAGPJHC 346 (19 May 2022)

- **The facts:** Mr PN Maqubela (the Deceased) and his spouse, Mrs M, were married in community of property. The Deceased took out a life policy on his life and requested that the distribution of the insured benefit be in terms of his will. He later changed his mind and nominated his estate as the beneficiary of the policy.

After the Deceased's passing, the executor of his estate (the Executor) drew up a liquidation and distribution account and included the life policy in the Deceased's estate and not the joint estate. The Master of the High Court (the Master) upheld this decision and instructed the Executor to record the policy as an asset in the estate. The Executor went ahead with the change and added that the spouse was entitled to a half share of the policy by virtue of marriage in community of property.

The children of the Deceased applied to court for an order to prevent the Master from deeming a life policy an asset in the joint estate of the Deceased and Mrs M. They further asked that Mrs M be declared unfit to inherit any benefit stemming from the Deceased's passing for various reasons.

- **The finding:** The court found that community of property comes to an end when a marriage is terminated. The death of a spouse terminates a marriage in community of property and thus terminates the consequences of marriage.

This was confirmed in *Danielz NO v De Wet* 2009 (6) SA 42 C) at par 41 to 43:

"[41] Prior to the death of the deceased, the proceeds of the policies did not exist or fall into the joint estate.

Until the death of the deceased, there was no certainty that a claim would be made at the time of his death. He could, for example, have surrendered the policies on the day before his death.

*[42] Upon his death the joint estate terminated. This occurs ex lege. (See *Grimbeek v The Master* 1926 CPD 183 at 185; *Joseph v Joseph* 1951 (3) SA 776 (N) at 779G – H; *Hahlo Husband and Wife* 5 ed at 174 – 6).*

[43] It is only after the death of the deceased that the rights in respect of the death benefits arise. The joint estate will therefore not have a claim to an asset that arose after the joint estate had been terminated by the death of the deceased.

The court concluded that the Master was irrational and committed a material error of law in failing to distinguish between a surviving spouse's entitlement to one-half of the joint estate and a right to inherit, assuming the proceeds of the policy formed part of the joint estate and failing to have regard for legal principles and past case law.

In deciding whether to declare Mrs M unfit to inherit, the court found that she was convicted of forgery and fraud arising from the falsification of the purported will of the Deceased.

She was also convicted of the murder of the Deceased, a decision which was later overturned by the Supreme Court of Appeal.

The question was whether this court could consider the conviction decided upon by the criminal court. Section 42 of the Civil Proceedings Evidence Act of 1965 encompasses the rule dealt with in *Hollington v F Hewthorn & Company Ltd* [1943] KB 587 (CA) ([1943] 2 All ER 35, which states that a conviction

in a criminal court is not admissible in subsequent civil proceedings as evidence that the accused committed the offence of which she was convicted.

The court stated that public policy would require that a person who was convicted for the forgery of a will of the Deceased should not be permitted to inherit in terms of

succession. However, the rule remains a part of our law and must be followed.

The court found that this rule requires it to treat the conviction as merely the irrelevant opinion of another court. The application to declare Mrs M unfit to inherit was therefore dismissed.

More details on Case 3

Case 3: *Barnard v Momentum Retirement Annuity Fund and Others* PFA/GP/00080145/2021/MM (5 May 2022)

- **The facts:** When Mr Barnard (the Deceased), a member of the Momentum Retirement Annuity Fund (the Fund), passed away, the fund identified his life partner (Ms Y), his former spouse (Ms B) to whom he was married in community of property, as well as his two major sons as the potential beneficiaries of the death benefit payable by the fund. The trustees of the Fund decided to allocate 100% of the benefit to Ms Y.

Ms B lodged a complaint with the Pension Funds Adjudicator, complaining that the Deceased had difficulty maintaining credit and did not always ensure that their debts were settled. This resulted in her being the premium payer of the retirement annuity policy, which was issued to the Deceased. The agreement was that she would receive the proceeds of that policy upon its maturity.

This agreement was incorporated in their divorce order. The intention was that it would be used for the benefit of their two sons. The Deceased stipulated this in his will and also nominated Ms B as the beneficiary of this policy.

Ms B added that she was unaware that the benefit would be distributed in terms of section 37C of the Act. She claimed that if she had known that the benefit

would be paid to someone else, she would not have paid the premiums.

- **The finding:** The Pension Funds Adjudicator (the PFA) found that a death benefit payable at the passing of a member of a retirement fund is governed by the provisions of section 37C of the Act and not does form part of the deceased's estate. She confirmed that the trustees of a fund are not bound by the will of the Deceased or by the beneficiary nomination form; these merely serve as a guide to assist the trustees in the exercise of their discretion.

The fact that a person is nominated to receive the benefit does not automatically give them a right to receive a portion of the benefit. After considering who qualifies as a beneficiary in respect of a death benefit, the fund must then decide who should receive a share and to what extent. If the fund strictly adheres to the beneficiary nomination form or the will of the Deceased, then it cannot be said that they exercised their discretion equitably; they would then have fettered their discretion.

The Fund submitted that although the Deceased and Ms B were married in community of property for 21 years before getting divorced, she was not financially dependent on the Deceased at the date of his death. The Fund emphasised that dependency on the

Deceased at the time of his passing or at a future stage must be the determining factor for the allocation of the benefit.

The PFA agreed with the Fund and dismissed the complaint.

Nobuhle Hadebe

Legal - Wealth & Retirement Fund Products

The information used to prepare this document includes information from third-party sources and is for information purposes only. Although reasonable steps have been taken to ensure the validity and accuracy of the information contained herein, Momentum Metropolitan Life Limited does not guarantee the accuracy, content, completeness, legality or reliability of the information contained herein and no warranties and/or representations of any kind, expressed or implied, are given to the nature, standard, accuracy or otherwise of the information provided.

Neither Momentum Metropolitan Life Limited, its affiliates, directors, officers, employees, representatives or agents (the Momentum Parties) have any liability to any persons or entities receiving the information made available herein for any claim, damages, loss or expense, including, without limitation, any direct, indirect, special, incidental, punitive or consequential cost, loss or damages, whether in contract or in delict, arising out of or in connection with information made available herein and you agree to indemnify the Momentum Parties accordingly. For further information, please visit us at momentum.co.za. Momentum Investments is part of Momentum Metropolitan Life Limited, an authorised financial services and registered credit provider, and rated B-BBEE level 1.