

Divorce and Retirement Fund Benefits

If you are divorced, or are in the process of getting divorced, it is very important that you understand what you may be entitled to in respect of your ex-spouse's retirement fund benefits.

Retirement fund benefits include the benefits in a pension, provident, preservation and retirement annuity fund. A court granting an order of divorce may make an order with regard to the division of your assets. For this purpose, you or your spouse's pension interest in the retirement funds of which you are members will form part of your assets if you are married in community of property, or out of community but subject to the accrual system.

This means that on divorce, you may be entitled to a share of one another's pension interest. The amount or percentage of the pension interest awarded to you needs to be agreed to and may be set out in the divorce order or settlement agreement which must be incorporated in the final divorce order. Where there is no settlement agreement, the court can be requested to make an order in this regard. The amount awarded can range from 0% up to 100% of the pension interest. The party who is receiving the portion of the pension interest is liable for any tax that needs to be paid on that amount, so if you are stipulating a Rand value, be sure to take the tax into account when agreeing on a fixed amount. Previous divorce pension interest awards not yet paid will however have to be considered first.

Benefits that have already become due and payable (accrued) before the date of divorce cannot be included. e.g. Where the member has resigned or retired from the Retirement Fund, and the benefit has become due and payable (accrued) before the date of divorce, then pension interest cannot be awarded.

The term "pension interest" is given a specific meaning in our legislation.

In the case of a preservation fund, it is equal to the amount that the fund member (referred to as the member-spouse) would have been entitled to if membership of the fund would have been terminated on the date of divorce, and in respect of a pension or provident fund, if membership of the fund would have been terminated on the date of divorce on account of the member's resignation from employment.

In the case of a retirement annuity fund, it is the total of all contributions made to the fund up to the date of divorce plus annual simple interest (currently 15.5% p.a.), on those contributions up to the date of the divorce. Legislation however allows that a lesser interest rate may be used if the actual rate of return earned on the pension interest is less than 15.5%, i.e. the interest rate used to calculate the pension interest may not be more than the interest rate at which the investment grew. An example of how this is calculated is included at the end of the following section.

Retirement funds and their administrators are increasingly dealing with divorce orders that cannot be given effect to, either due to non-compliance with statutory provisions or for being vague. For this reason, there are certain essential elements that have to be present in a divorce order, without which the order risks being incapable of enforcement against the relevant retirement fund (i.e. the retirement fund will not be able to make any payment to the non-member spouse if these elements are not present).

1. The divorce order must be validly issued by a High court, regional court or divorce court;
2. The member must still be a member of the fund at the date on which the divorce order is granted;
3. The marriage or relationship that ended must be one that could be dissolved in terms of the legislative framework;
4. The fund must be correctly named or at least be identifiable and where the member belongs to more than one fund, it is important to mention each fund (if it is the parties' intention to obtain a section 7(8) order in respect of each of the funds);
5. The order must properly assign a portion (Rand value) or percentage of the pension interest, as at date of divorce, to the non-member spouse (the party who is not a member of the fund). Reference must be made to "pension interest". Phrases such as "pension benefit", "pension

fund”, “value”, “benefits”, “fund interest” or “interest in the fund” must be avoided at all costs because, as mentioned above, “pension interest” has a specific meaning in law and is the correct term. The parties can also agree to allocate a Rand amount of pension interest, provided that it does not exceed the value of the “pension interest”;

6. The fund, and not the member spouse, must be ordered to make payment to the non-member spouse (it is not sufficient for an order only to state that an endorsement must be made in the records of the fund).

It is therefore extremely important that lawyers with the correct experience and knowledge be consulted to assist divorcing parties with the drafting of divorce orders and settlement agreements to prevent unintended consequences, additional costs and time delays.

Below is a suggested simplified wording for inclusion in a binding divorce order:

1. The parties record that the defendant is a member of the XYZ Pension Fund (‘the fund’).
2. The parties agree that the plaintiff shall be entitled to % of the defendant’s pension interest in the fund as defined in Section 1 of the Divorce Act 70 of 1979. (Note: if the fund is a preservation fund then it should read ‘as defined in Section 1 of the Divorce Act, read with Section 37D(6) of the Pension Funds Act 24 of 1956’)
3. The fund must pay or transfer the assigned portion of the pension interest in terms of the provisions of Section 37D(4) of the Pension Funds Act 24 of 1956 to the non-member spouse or an approved fund on her behalf.

Once the order is granted, and provided that it is binding on the fund, the non-member spouse can elect to:

1. take the amount awarded in cash, subject to tax determined by the Receiver of Revenue, or
2. transfer the amount awarded to another approved retirement fund tax free (excluding a transfer from a pension fund to a provident fund).

This election can be made as soon as the divorce order is granted.

The above options are available in terms of current legislation which may change going forward as National Treasury have indicated that they may consider certain proposals which may have an impact on the options that are available to the non-member spouse. Below is an example of a pension interest calculation in a retirement annuity fund:

Date of Commencement	14-Aug-08
Date of Divorce	16-Oct-12
Pension Interest awarded to non-member spouse	50%

Interest rates

(A) Simple interest based on Prescribed Rate of Interest Act, 1975	15.5% p.a
(B) Actual Fund return earned on Pension Interest to date of divorce	9.9% p.a.

Transaction Date	Gross Contribution	Number of Days	Simple interest as at divorce date
2008/08/14	249 050.00	1524	161 069.38
2008/08/14	<u>43 950.00</u>	1524	<u>28 424.01</u>
	293 000.00		189 493.39
(A) Total gross contribution			293 000.00
Total simple interest based on Prescribed Rate of Interest Act, 1975			<u>189 493.39</u>
Total			482 493.39

(B)	Total gross contribution	293 000.00
	Total actual interest	<u>141 182.41</u>
	Total (Market Value as at date of divorce, i.e. 16/10/2012)	434 182.41

Gross pension interest available to non-member spouse*	217 091.21
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* This is subject to withholding tax as required in terms of the Income Tax Act and market value at date of processing.

Market Value as at:	2013/01/21	454 248.52
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