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Adjudicator case on pension sharing in a preservation fund on divorce

The new Pension Funds Adjudicator, Mr Charles Pillai, has made a ruling regarding the sharing of pension interest on divorce in the case of *Theron v Sanlam Preservation Pension Fund ('the fund')* and *Sanlam Life Insurance Limited ('the administrator')*.

Summary

- Divorce order not compliant with the Divorce Act and so the non member spouse could not share in the pension interest held in the preservation fund.
- The non member spouse approached the High Court and received a court order compelling the administrator to endorse the fund's records to reflect her 50 per cent share of the pension interest.
- The fund and administrator refused to give effect to the High Court order for various reasons and so the non member spouse lodged a complaint at the Adjudicator's office.
- Although the High Court had not ordered the fund to endorse its records, the Adjudicator said that the High Court's intention was clear and was able to be implemented by the fund.
- Amendments to the Pension Funds Act ('the Act') in 2008 specifically made the clean break approach on divorce apply retrospectively, that is, to divorce orders granted before 2007.
- The 2008 amendments to the Act specified that pension interest in relation to a preservation fund is the benefit the member would have been entitled to had membership of the preservation fund terminated on the date of divorce.

- The restriction of only being allowed to take one withdrawal from a preservation fund only applies to members of the preservation fund and not to the non member spouse.
- Fund rules must provide for payment or transfer of the pension interest to non member spouses in terms of a divorce order.
- As non member spouses can access cash out of the preservation fund, the Adjudicator recommended that legislation be amended to prevent this.

Divorce order not compliant with Divorce Act

The parties were divorced in 2003, but the section of the settlement agreement dealing with the sharing of the pension interest was specifically not made an order of court.

The Complainant, being the former spouse of the member, approached the Adjudicator's office, seeking an order to compel the fund to endorse its records. The complaint was dismissed as no order was made when they got divorced in respect of the pension interest.

The Complainant then went to the High Court and obtained a court order compelling the administrator to endorse the member's records to reflect a 50 per cent share of the pension interest in the Complainant's favour.

The fund and its administrator still declined to pay the Complainant her share of pension interest and so the



Complaint lodged another complaint at the Adjudicator's office.

Fund's refusal to pay out pension interest to the non member spouse

The fund refused to make payment to the Complainant in terms of the High Court order for the following reasons:

- The court order was made against the administrator, not the fund;
- The divorce order did not refer to the division of pension assets, so the fund could not endorse its records;
- The amendments in 2007 to the Pension Funds Act ('the Act') to introduce the clean break approach did not apply to divorce orders granted prior to 2007 (see On the Scales 23 of 2007);
- Pension interest is defined in relation to the value of the resignation benefit as at date of divorce. As there is no resignation benefit payable from a preservation fund, the value of pension interest is nil;
- The member had already made one withdrawal from the fund and no further withdrawals are permitted out of a preservation fund.

Adjudicator ruling in favour of the complainant

The Adjudicator said that the High Court order's intention was clear enough and it was able to be implemented by the fund. In fact the fund records had already been endorsed by the administrator and so that argument did not hold water.

Amendments to the Act in 2008 specifically made the clean break approach apply retrospectively, that is to divorce orders granted before 2007 (see On the Scales 23 of 2007). Therefore that argument fell away.

The 2008 amendments to the Act also rectified the situation pertaining to the definition of pension interest as it applies to preservation funds. The Act provides that pension interest in relation to a preservation fund

is the benefit the member would have been entitled to had membership of the preservation fund terminated on the date of divorce.

The final issue relates to the restriction on the number of withdrawals that may be made from a preservation fund, namely one withdrawal only. The Adjudicator said that this restriction only applies to the members of the preservation fund. The Complainant did not become a member of the preservation fund and so there is no restriction on her receiving her share of the pension interest in cash.

Fund rules must allow for payment of pension interest to non member spouses

The fund rules in this particular case had not been amended to allow for payments to non member spouses in terms of a divorce order. The Adjudicator ordered the fund to submit a rule amendment to the Financial Services Board to allow for the payment in cash or transfer of pension interest to a non member spouse.

Comment: many funds administered by Alexander Forbes have already amended their rules to allow for amounts due to non member spouses on divorce to be paid or transferred. However all trustees are urged to check their own rules to make sure this provision has been included in their rules.

Loophole in that non member spouses can access cash out of the preservation fund

Generally speaking members of preservation funds may not access their fund benefit out of a preservation fund before the earliest retirement age of 55. However there is nothing stopping a non member spouse from accessing their share of pension interest in cash. The Adjudicator has sent this determination to the Financial Services Board and National Treasury, with a recommendation that legislation be possibly amended to close this loophole.

If you need more information, please contact your consultant.
