

# **Divorce and the calculation of a non-member spouse's pension interest no longer a mystery**

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**By Simon Dodd**

Confusion surrounding pension interest awarded to a party in terms of a divorce order prior to 1 November 2008 has been largely eliminated, thanks to two recent Pension Funds Adjudicator decisions\*.

Source of the confusion has been determining the amount to which the party becomes entitled on submission of a copy of the divorce order to the relevant fund.

Prior to the amendment of the Pension Funds Act 24 of 1956 ("the Act") by the Financial Services Laws General Amendment Act 22 of 2008, the pension interest awarded to a non-member spouse on divorce would only accrue when it would have accrued to the member spouse.

Hence, the non-member spouse would often have to wait many years before being able to access the pension interest awarded to him/her in terms of a divorce order.

The addition of section 37D(4)(a) to the Act solved this problem by deeming the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce to accrue to the member on the date on which the decree of divorce is granted.

In addition, section 37D(4)(d) made the deeming provision retrospective. It provides that any portion of pension interest assigned to a non-member spouse in terms of a decree of divorce prior to 13 September 2007, for the purposes of any law other than the Income Tax Act, 1962, is deemed to have accrued to the member on 13 September 2007.

The effect is to enable a non-member spouse who was divorced prior to 13 September 2007 (and who would have only become entitled to the pension interest when the member became entitled to it) to submit the court order to the relevant fund for immediate payment.

“Pension interest” in a retirement annuity fund is defined in section 1 of the Divorce Act 70 of 1979 as “...*the total amount of that party’s contributions to the fund up to the date of divorce, together with a total amount of annual simple interest on those contributions up to that date....*”

Section 37D(5) of the Act creates a proviso to the definition of pension interest in a retirement annuity fund in the Divorce Act. It provides that the “...*total amount of annual simple interest payable in terms of the definition may not exceed the fund return on the pension interest assigned to a non-member spouse in terms of a decree granted in terms of section 7(8)(a) of the Divorce Act, 1979*”.

Put differently, the proviso entitles the non-member spouse to claim the lower of either annual simple interest (currently at an annual rate of 15,5%) or fund return on the pension interest allocated to the non-member in terms of the divorce order.

An example:

Spouses A and B were divorced on 15 January 2000 and in terms of the decree

of divorce spouse B was entitled to 50% of spouse A's pension interest. Spouse A had been a member of a retirement annuity fund since June 1998. On becoming aware of the amendment to the Act, Spouse B submitted the decree of divorce to the retirement annuity fund in January 2010 for payment of her share of pension interest in terms of the decree of divorce.

The fund return exceeded simple interest, so Spouse B was entitled to 50% of spouse A's contributions to the fund from June 1998 until 15 January 2000 together with simple interest at a rate of 15,5% a year. Spouse A benefits from the difference between fund return and simple interest from June 1998 until 15 January 2000 and his fund credit is increased accordingly.

Is a non-member spouse, who is entitled to receive 100% of the member spouse's pension interest in a retirement annuity fund in terms of a decree of divorce which was granted prior to 13 September 2007, entitled to receive the current value of the retirement annuity policy (as at the date the decree of divorce is submitted to the retirement annuity fund)?

Or is the non-member spouse only entitled to receive the 100% pension interest as at the date of divorce together with fund return or simple interest, as the case may be?

This issue was addressed by the Adjudicator in the recent determination of *D de Kwaadsteniet v Lifestyle Retirement Annuity Fund and Liberty Group Limited* (2 August 2010).

The former spouse of the Complainant was a contributing member of the Lifestyle Retirement Annuity Fund. The marriage between the Complainant and the member was dissolved on 19 October 2001.

In terms of the settlement agreement, which was made an order of court, the Complainant was awarded the member's entire pension interest in the Fund.

The Complainant made enquiries as to the value of the policy in September 2009 and was advised that the value was more or less R365 000. However, she was only paid an after tax R115 769,03.

The Complainant lodged a complaint with the Adjudicator, arguing that she should have received R365 000 less income tax. The Fund's response was that the member's contributions up to the date of divorce (19 October 2001), together with the Fund's rate of return (as simple interest exceeded the Fund's rate of return) was R141 181,74 before tax.

The Fund submitted that the Complainant was only entitled to receive 100% pension interest at the date of divorce and not the current value of the policy.

The Adjudicator concluded that the Complainant was wrongly under the impression that since she was entitled to the entire pension interest she was entitled to the policy's entire proceeds. The Adjudicator confirmed that the Complainant was only entitled to 100% of pension interest, as defined, up to the date of divorce. The complaint was accordingly dismissed.

The definition of "pension interest" in a pension or provident fund differs from the definition in a retirement annuity fund.

In the former it means the benefit to which the member would have been entitled in terms of the rules of the fund if the member's membership of the fund would have been terminated on the date of the divorce. The non-member spouse is entitled only to the accrual of fund return on his/ her share of pension interest from when the non-

member spouse has submitted the court order to the fund and has made an election as to whether his/her share of the pension interest should be paid directly to him/her or transferred into another fund until the date of payment (section 37D(4)(c)(ii) of the Act).

Assume, for example, that a non-member spouse is awarded 50% of the member's pension interest in a pension fund in terms of a divorce decree granted in 2001.

Assume, further, that the non-member submitted the divorce order to the fund in January 2010 and elected to have the amount transferred into a preservation fund and the transfer was effected in March 2010.

To calculate the amount to which the non-member would become entitled, one would take 50% of the amount to which the member would have become entitled had his/her membership of the fund terminated at the date of divorce (i.e. 50% of the amount as at the date of divorce) and then add fund return from January 2010 until March 2010.

The recent determination of the Adjudicator in *LJ Blom v FNB Pension Fund and Momentum Group Limited* (5 July 2010) deals with a non-member spouse's entitlement to growth on his portion of pension interest in the FNB Pension Fund.

The Complainant and the member of the FNB Fund were divorced on 2 June 2005. In terms of a settlement agreement incorporated into the divorce order, the Complainant was entitled to 264 611 units of the member's interest in the FNB Fund.

The settlement agreement recorded further that the FNB Fund administrators shall pay the Complainant "...the value plus growth on the mentioned units, when the said pension interest becomes due to or accrues to..." the Complainant.

When the Complainant submitted the divorce order to the FNB Fund he argued that he was entitled to growth on his portion of the pension interest as indicated in the settlement agreement; that he was entitled to the current value (at the time he submitted the divorce order to the FNB Fund) of the units versus the value of the units at the date of the divorce.

The Adjudicator, citing the definition of “pension interest” in the Divorce Act as well as the Act’s section 37D(4)(c)(ii), Adjudicator found that the definition did not include any amount accruing to a member spouse after divorce.

Insofar as the settlement agreement purported to give the non-member growth on his share of the pension interest after divorce, the Adjudicator found this to be contrary to the definition of “pension interest” in the Divorce Act; that this part of the divorce order was contrary to the law.

Although I agree with the Adjudicator’s view on the correct calculation of “pension interest”, I am not convinced that he has the power to declare that part of a divorce order is contrary to the law. The correct approach would be for the Fund to approach the court to have the divorce order varied in order to comply with the law.

In short, to calculate a non-member spouse’s “pension interest” determine the type of fund to which the member spouse belongs. If it is a retirement annuity fund, the pension interest is the total amount of the member’s contributions until the date of divorce. In addition, the non-member is entitled to claim the lesser of the fund return or simple interest on the pension interest.

If it is a pension or provident fund other than a retirement annuity fund, the pension interest is the benefit to which the member would become entitled in terms of the rules of the fund had the member’s fund membership been terminated at the date of

divorce.

The only growth to which the non-member spouse is entitled is fund return on the pension interest from when the non-member spouse submits the divorce order to the fund and makes an election as to how his/her share of the pension interest should be dealt with until the date of payment.

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*\*D de Kwaadsteniet v Lifestyle Retirement Annuity Fund and Liberty Group Limited* (2 August 2010) [available online at <http://www.pfa.org.za/sitesmart/uploads/files/481A2C40-CFD7-4B9C-B36F-966865C381D7.pdf>] and *LJ Blom v FNB Pension Fund and Momentum Group Limited* (5 July 2010) [available online at <http://www.pfa.org.za/sitesmart/uploads/files/EFBC6B55-FEAA-48DA-9E79-62FBBFD24C8A.pdf>]