# A CRITICAL DISCUSSION OF A PENSION INTEREST AS AN ASSET IN THE JOINT ESTATE OF PARTIES MARRIED IN COMMUNITY OF PROPERTY

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## 1 INTRODUCTION

It is fundamentally important for persons married to each other to understand their rights and obligations in such a union, more particularly when they are married in community of property. Spouses should understand what constitutes a joint estate and fully be aware of all the assets thereto so as to know their rights and how to protect them. This can be crucial more so when parties contemplate divorcing each other. South African courts granting a decree of divorce have the power to make orders regarding assets of the marriage. As such, if there is no direction from the parties as to how the assets should be dealt with, as far as marriages in community of property are concerned, the court can order that the parties share the assets equally.[1] After the 1989 amendments to the Divorce Act 70 of 1979 (hereinafter referred to as DA), amounts either awarded or to be awarded by retirement funds to their members have proved to become important assets in marriages in community of property. Before these amendments, the pension interest which non-member spouses would be entitled to on divorces was not regarded as forming part of the joint estate of spouses married in community of property.

Section 7 (7) (a) of the DA 70 of 1979 provides that when determining patrimonial benefits to which parties involved in divorce litigation may be entitled to, the pension interest of the party who is a member of the pension fund shall be deemed to be part of such a party's assets. Furthermore, in terms of section 37D (4) (a) [2] of the Pension Funds Act 24 of 1956

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[1] See *Kotze v Kotze and another* [2013] JOL 30037 (WWC) para 17, where it was argued that "one must conclude that in the absence of a written agreement as provided for in section 7 (1) of the DA or an order of forfeiture of the patrimonial benefits of the marriage having been sought as provided for in section 9, it was not competent for a court to deal with the joint estate of parties married in community of property other than on the basis that each party was entitled to a 50% share therein."

[2] This section was a result of the amendments made to the PFA through the Pension Funds Amendment Act 11 of 2007, and thus brought the "so called" Clean Break Principle. See *Cockcroft v Mine Employees Pension Fund*, [2007] 3 BPLR 296 (PFA), *Mouton v Southern Staff Pension Fund* [2003] 4 BPLR.
4581 (PFA), *Wiese v Government Employees Pension Fund and Others* [2011] 4 All SA 280 (WCC) and *Ngewu and Another v Post Office Retirement Fund and Others* 2013 (4) BCLR 421 (CC). See also Nevondwe 'The law regarding the division of the retirement savings of a retirement fund member on his or her divorce with specific reference to Cockcroft v Mine Employees Pension Fund, [2007] 3 BPLR 296 (PFA)' *Law, Democracy & Development* 2009 (13) 1-12 and Marumoagae 'Breaking Up is Hard to Do, or is it? The Clean Break Principle

(hereinafter referred to as PFA), the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage granted in accordance with section 7 (8) (a) of the DA is deemed to accrue to the member on the date on which the decree of divorce or decree for the dissolution of a customary marriage is granted.[3] However, despite these statutory provisions, which one might be inclined to argue that they are clear if interpreted literally, nonetheless, there has been confusing and inconsistent approaches from our courts as to when does the pension interest accrue to the joint estate.[4] In this paper, I will be arguing that section 7 (7) (a) of the DA is ambiguous and has been a major source of conflicting decision from various divisions of the High Court in South Africa and thus needs to be amended to be able to properly guide our courts when adjudicating on this issue. Furthermore, I will be advancing an argument that a pension interest should not be deemed to be an asset in the member party's estate but rather should be regarded as an asset which falls automatically into the joint estate of parties married in community of property immediately when the marriage comes into being. This paper will however, not discuss tax implications and perceived discriminatory consequences which are likely to arise in the area of South African Divorce Law.

## 2 PENSION INTEREST

### 2 1 Pension Interest Definition

The DA defines "pension interest" as the amount that a member would receive from the fund in terms of the rules of that fund if he or she were to leave the fund as a result of the resignation from office. On the other hand, as far as retirement annuities are concerned, "pension interest" has been defined as the sum of the contributions made, together with

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Explained' *De Rebus* (September 2013) 38-40 for a detailed discussion regarding the clean break principle, which discussion is beyond the scope of this paper.

[3] Section 7 (8) (a) of the DA provides that: Notwithstanding the provisions of any other law or of the rules of any pension fund- a)The court granting a decree of divorce in respect of a member of such a fund, may make an order that-

i)any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;

ii) the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification.

[4] See conflicting approaches adopted in *Maharaj v Maharaj and Others* 2002 (2) SA 648 D&CLD and *Sempapalele v Sempapalele and Another* 2001 (2) SA 306.

simple interest.[5] It is thus important when calculating the "pension interest" due to the member to determine the type of fund to which the member spouse belongs to, i.e. whether it is a provident fund, pension fund or retirement annuity fund. Nevondwe defines "pension interest" as follows:

> "Pension interest is the maximum amount which may be assigned to the non-member spouse on divorce, the proportion allocated to the non-member spouse being dependent on the order of court. It is not permissible to assign to her more than 100% of a member's pension interest."[6]

There are those who have defined the pension interest as far as provident funds and pension funds are concerned as referring to the percentage of the member's fund value awarded to the non-member spouse. In that if the member's fund value is R1 000 000 and the non-member spouse is awarded 50% pension interest, then the non-member spouse is entitled to R500 000 of the fund value.[7] Alexander Forbes, a major administrator of pension fund schemes in South Africa understands pension interest in relation to pension funds and provident funds as referring to "the value of the member's benefit in terms of the rules of the fund, if his membership to the fund would have been terminated on date of divorce on account of his resignation from office".[8] I submit that, even with all these definitions of the phase "pension interest", it remains unclear as to what exactly this phrase entails.

The office of the Pension Fund Adjudicator has repeatedly determined that, "in terms of the Divorce Act, pension interest is the member's notional withdrawal benefit had he withdrawn

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[5] See Section 1 of the DA, "pension interest" in relation to a party to a divorce action who-
a) is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office;
b) is a member of a retirement annuity fund which was *bona fide* established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party's contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1 (2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), for the purposes of that Act.

[6] Nevondwe 'The law regarding the division of the retirement savings of a retirement fund member on his or her divorce with specific reference to *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA)' *Law, Democracy & Development* 2009 (13) 2.

[7] Legal update: Divorce and pension interest available at http://www.3bytwo.co.za/legal-update-divorce-pension-interest/(accessed 10 September 2013).

[8] Alexander Forbes Legal Services Department: Pension Interest on Divorce and some frequently asked questions (2010) available at http://www.fia.org.za/uploads/2010/08/OTS-4-2010.pdf (accessed 10 September 2013).

from the fund on the date of divorce."[9] It must be noted that even our courts have also not been helpful as far as the interpretation of the phrase "pension interest" is concerned. In *Eskom Pension and Provident Fund v Krugel and Another*, the court could only observe that "'pension interest" is narrowly defined in the Divorce Act and it refers to the value of the interest which a member of a pension fund on the date of his divorce, has in the pension benefit that will accrue to him as a member of such fund at a certain future date."[10]

It must be noted however, that the amendments made in 2007 to the PFA through Pension Funds Amendment Act 11 of 2007 (hereinafter referred to as PFAA) brought about the "clean break" principle when parties divorce. These amendments ensured that the pension benefit of the member of a pension fund who is divorcing accrues on the date of the divorce, in that the non-member spouse does not have to wait for a certain future date or event to occur to claim and receive his or her share. Section 28 (e) of the PFAA stipulates that, for the purposes of the DA, a benefit is deemed to accrue to the principal member on the date of divorce, thus allowing the non-member spouse the right to claim whatever share he or she is entitled to immediately on the date of divorce or soon thereafter.[11] After much controversy regarding lack of provision for immediate receipt of the pension benefits by non-member spouses of some of the pension funds schemes regulated by their own statutes[12] and not the PFA, our courts and the legislature have attempted to align such pension funds with the clean break principle.[13]

[9] See *Davids v Momentum Retirement Annuity Fund and Momentun Group Limited* PFA/WE/35021/2009/LPM par 5.7 and *Andrews v IBM SA 1994 Contribution Pension and Alexandra Forbes Financial Services (PTY)* LTD PFA/WE/4666/2011/GPM para 5.4.

[10] 2012 (6) SA 143 (SCA) para 11. The court went on to hold that "it is readily apparent from all these statutory provisions that what is contemplated is an award to the non-member spouse of any part of this interest (and no other amount held by the fund in respect of the member spouse) calculated as at the date of the divorce but with effect from a certain date in the future when the pension benefit accrues to the member spouse.
Once the pension benefit has accrued ie beyond the date of divorce at which time the pension interest converts into a pension benefit, the provisions of ss 7(7) and 7(8) are no longer applicable."

[11] This is now section 37D(4)(a) of the PFA. See also fn 6 2.

[12] The Government Employees Pension Fund and the Post Office Pension Fund are regulated by Government Employees Pension Law Amendment Act 19 of 2011 and Post Office Act 44 of 1958 respectively.

[13] This discussion is beyond the scope of this paper, however, see *Wiese v Government Employees Pension Fund and Others* [2011] 4 All SA 280 (WCC), *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC) and *Ngewu and Another v Post Office Retirement Fund and Others* 2013 (4) BCLR 421 (CC). See also Government Employees Pension Law Amendment Act 19 of 2011 and South African Post Office SOC Limited Amendment Bill, 2013. The discussion relating to concerns which were raised regarding the inequality and discriminatory effect of not providing clean break principle as far as retirement funds regulated by their own statutes are concerned as well as the efforts made to address such concerns is beyond the scope of this paper.

The definition of pension interest in the DA has been crafted in such a way as to suggest that there must be at least one party at the time the divorce is granted who is an active member of a pension fund. Thus, the amount provided by the fund is the amount the member party will be entitled to at the time of divorce, at which time he or she would be regarded as having had withdrawn from the fund as a result of the divorce order. Such a divorce order must direct the pension fund to pay to the non-member spouse a portion assigned to such non-member spouse in that order.[14] Strictly speaking, this entails that if the member party had left his or her employment way before the divorce is ordered, thereby already became entitled to his or her pension benefits (whatever it is called at that time), the court does not have the power to order that the non-member spouse should be granted any portion or percentage of the accrued pension benefits, as at the date of divorce. This is due to the fact that if the member spouse had already resigned long before the divorce, his pension interest had already become payable to him before the divorce. As such, he could not again be deemed to become entitled to a resignation benefit.[15]

I am of the view that the current approach has a potential of leading to unfair outcomes. Unfair consequences can result for instance if both parties are members of retirement funds at the commencement of their marriage but one of the parties withdraws from the fund before the parties divorce. In that the party who withdraws from the fund will be accorded his or her pension benefits before the divorce, and he or she will not be forced by the law to share such benefits with his or her spouse. I am well aware that it might be thought to be unnecessary for any sharing or division of pension benefits to be made when the parties are still married. Further that the clean break principle is not intended to address this situation and it only arises when the parties are actually divorcing. However, I am of the view that if one of the parties to the marriage in community of property is granted his or her pension benefits before the divorce, such benefits or part thereof should also be considered during the divorce proceedings. However, currently should the parties divorce, in accordance with the definition of the phrase "pension interest" in the DA, the court granting the divorce is not empowered to order such a party who received his or her benefits before the date of the divorce to share the benefits with his or her spouse, if they are married in community of property.[16] However, the same court will have the power to order the other party who will only be withdrawing from

[14] Section 7 (8) of the DA.
[15] See generally *Eskom Pension and Provident Fund v Krugel and Another* 2012 (6) SA 143 (SCA).
[16] *Ibid*.

the fund for the purposes of the divorce to share the benefits of his or her pension fund, in the form of a pension interest with his or her spouse, who had initially received the same benefits but did not share such benefits with him or her.[17] I submit that a better approach would be that if parties are married in community of property and the member spouse had already been paid out his or her pension benefit during the course of the marriage, when the parties divorce, the value of such payment should fall into the parties joint estate and be regarded as an asset of the joint estate between the parties capable of being divided.[18]

### 2 2 Section 7(7)(a) of the DA

Section 7 (7) (a) of the DA, provides that "in the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall [...] be deemed to be part of his assets." This section is meant to be invoked at the time when parties divorce. This section empowers the court to award whatever portion of the member's pension interest when it determines the patrimonial benefits of the marriage in community of property only after it has declared the pension interest to be part of the member's estate after it has deemed such portion to be an asset.

Section 7 (7) (a) of the DA has been drafted in such a way as to suggest that in a marriage in community of property there is a separate estate of a member party which patrimonial benefits can fall into. It must be noted that "the moment spouses enter into a marriage in community of property; they become co-owners of all the assets either of them owns.[19] Generally, all assets acquired by either spouse after marriage also become part of the joint estate."[20] However, it is well recognised that either spouse to a marriage might own separate property that is excluded from the joint estate.[21] Heaton lists circumstances which can result in the creation of a separate estate and she mentions the following: Assets excluded in an antenuptual contract, assets excluded by a will or deed of donation, assets subject to a fideicommissum or usufruct, engagement gifts, benefits under the Friendly Societies Act 25

[17] The same situation arose in the case of *M L v J L* Unreported case no 3981/2010 (25 April 2013) but the court did not discuss it at all.

[18] If however, it is found that at the time of divorce, the spouse who had already received his or her benefits from his or her pension fund does not have the entire amount which he or she received and that s/he used his or her benefits exclusively for himself or herself and the other spouse did not derive any benefit thereto, a proper redistribution can be made. Meaning that after the joint estate has been divided, such a member can be ordered to take a portion of what he has received from the joint estate and give it to the other spouse.

[19] See *Tomlin v London and Lancashire Insurance Co Ltd* 1962 (2) SA 30 (D) 33C-D and W v W [2010] ZAGPPHC 188; 2011 (1) SA 545 (GNP) para 17.

[20] Heaton J *South African Family Law* 3ed 67 (2010).

[21] See *Erasmus v Erasmus* 1942 AD 265 and *Cuming v Cuming and Others* 1945 AD 201.

of 1956, Non-patrimonial damages, damages as a result of personal injury inflicted by the other spouse, costs in a matrimonial action, proceeds excluded by the court in terms of Prevention of Organised Crime Act 121 of 1998.[22] Even though Heaton's comments cannot be taken as binding precedent, they are nonetheless persuasive. Notable absence from Heaton's list is parties' pension fund benefits.

As such, I am of the view that pension fund benefits should be automatically regarded as patrimonial assets capable of being divided and shared between spouses married in community of property. As such, it is desirable that Section 7 (7) (a) of the DA is amended accordingly to empower our courts to treat benefits issued by the pension funds schemes due to the member's contributions as patrimonial benefits which automatically falls within the joint estate. This entails that such benefits need not be deemed to be assets in the member's separate estate, but they should be taken as falling automatically within the joint estate of parties married in community of property. It must be noted that "community of property entails the pooling of all assets and liabilities of the spouses immediately on marriage, automatically and by operation of law."[23]

Furthermore, by deeming the "pension interest" to be part of the assets of the member spouse only when the court determines the patrimonial benefits "to which parties to any divorce action may be entitled" suggests that before or post-divorce, "pension interest" cannot be eligible to be shared by the parties. Such interpretation would lead to an argument that in order for a non-member spouse to be granted a portion of his or her member spouse's pension interest he or she must expressly request the court to award same during the divorce. In *Sempapalele v Sempapalele* it was held that "a spouse seeking a share in the pension interest of the other spouse must apply for and obtain an appropriate court order during the divorce proceedings."[24] The court was of the view that the phrase "any divorce action" in section 7

[22] Heaton J *South African Family Law* 3ed (2010) 67-70.
[23] See also June Sinclair "Marriage" Alfred Cockrell & Raylene Keightley (eds) in Boberg's Law of Persons and the Family 2 ed (1999) 185. Sinclair further currently states that 'a joint estate created by marriage in community of property is held by spouses in co-ownership, in equal, undivided shares'. See also *Du Plessis and Others v Pienaar NO and Others* [2002] 4 All SA 311 (SCA), where it is stated that "one of the ordinary consequences of marriage in community of property is that the property of the spouses is brought together in a joint estate that is owned by them in equal undivided shares" at par 1. See also Robinson "Matrimonial Property Regimes and Damages: The Far Reaches of the South African Constitution" (2007) 10 *PER* 70-88.
[24] 2001 (2) SA 306 at 312E.

(7) (a) of the DA must mean any pending divorce action.[25] This approach suggests that if the non-member spouse was unable to claim some benefits relating to the pension fund of his or her former spouse at the time of divorce, he or she will be precluded from claiming same post divorce. This strict interpretation can lead to divorce litigants losing the money which they either should have received or should receive. Such an approach does not take into account the fact that sometimes divorce litigants conduct their own divorces and can potentially act to their detriment due to their lack of expertise, or sometimes that they can be assisted by clerks of the court or even practitioners who lack the skill and expertise to properly discharge matters of this nature. Nonetheless, it was emphasised in *Elesang v PPC Lime Limited and Others,*[26]that it appears from the definition of "pension interest" in the DA that this phrase applies only where one of the spouses is a member of a pension fund at the date of the divorce.[27]

I submit further that, if only one of the parties was or is a member of a pension fund and the other party failed to claim the portion he or she was entitled to during the divorce, and thus precluded to make a claim post-divorce irrespective of whether the fund has or has not paid the member his or her benefits, such an approach does not seem to be reasonable. A different approach was adopted in *Chiloane v Chiloane,* were it was held that "where a spouse seeking a share in the pension interest of the other spouse who had not, in terms of section 7 (7) (a) applied for and obtained a court order during the divorce proceedings, may do so by way of motion proceedings after the divorce decree is granted. The court may then in terms of section 7 (8) award such an order.[28] In that such a spouse can actually launch an application

[25] *Ibid*, in this case the applicant was found to have failed to obtain at the hearing of the divorce matter a court order awarding her a share in the respondent's pension interest in terms of section 7 of the DA, as such, it was concluded that she could now get such an order (312G). See also *Lamb & Another v Lamb & Others* 2002 JDR 0463 (T) and *Kgopane v Kgopane and Another* (1819/2011) [2012] ZANWHC 58 (16 August 2012).

[26] (1076/2006) [2006] ZANCHC (15 December 2006). In this case, the parties were married in community of property. The husband had a pension fund, but left his employment after the divorce action has been instituted by the wife. The wife then approached the High Court and applied for an order, pending finalization of the divorce action, that the fund should pay half of the member's pension interest into the trust account with her attorneys. The husband's fund opposed the application on the arguing that the "pension interest" as envisaged in the DA, could only apply if, at the time of the divorce, the husband was still a member of that fund.. Further that since the husband would not be a member when the parties marriage is dissolved, the non-member spouse would not be entitled to claim under sections 7 of the Divorce Act (para 8).

[27] *Elesang v PPC Lime Limited and Others* par 9.

[28] (27836/06) [2007] ZAGPHC 183 (7 September 2007). See also *Maharaj v Maharaj and Others* 2002 (2) SA 648 D&CLD, wherein Magid J did not agree with the approach adopted in *Sempapalele v Sempapalele,*and stated *that* if the court in the said case "... intended to hold that, if there is no reference to a spouse's pension benefit or interest in a divorce order, the other party to a marriage in community of property is forever precluded from claiming to be entitled, as his or her share of the joint estate, to a half share thereof, I am, with respect, unable to agree with that view."

to the court which granted the divorce in order to vary the divorce decree. Such an application can be made in terms of Rule 42 of the Uniform Rules of Court in the High Court or Rule 49 of the Magistrates Court Rules if the order was granted by the Regional Magistrates Court. As such, it seems like the approach adopted *Sempapalele v Sempapalele* is ignorant of this path provided by South African civil procedure. Thus, I remain unconvinced that choice of words adopted by the legislature i.e. "pension interest" should be used to deny non-member spouses benefits which they ought to benefit from.

I submit further that in order to effectively assist our courts when dealing with divorces where pension fund benefits are at state, the definition of the phrase pension interest has to be altered. A pension interest should be viewed as the amount of the total benefits the member spouse is eligible to receive from his or her pension fund when he or she exits the fund as provided for in the rules of the fund concerned, which can also be due to a divorce. If viewed in this manner, it will not be necessary to deem the pension interest to be an asset in the estate of the member, but it can automatically fall within the joint estate of the parties if married in community of property. Such approach will be subject to the calculations of the actuaries of the fund, and whatever amount the member spouse is eligible to receive will be part of the joint estate.

### 2 3 Accrued Pension Interest

South African family law and pension law has undergone serious changes in recent years. It is well documented that before the 1989 amendments to the DA, the pension interest of the member of the pension fund did not form part of the joint estate of spouses married in community of property.[29] However, these amendments made it possible for the pension interest of the member spouse to fall in that member spouse's estate, and by implication if parties are married in community of property such pension interest to fall within the joint estate. The DA currently entitles "the court granting a decree of divorce" in respect of a member of a pension fund, to make an order that "any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits

[29] *Old Mutual Life Assurance Co (SA) (Pty) Ltd and Another v Swemmer* 2004 (5) SA 373 SCA. See also R. Hunter *et al The Pension Fund Act: A Commentary on the Act, Regulations, Selected notices, Directives and Circulars* (2010) 725, where it is stated that "the amount held by a fund as provision for its future liability towards a member could not be taken into account in determining the value of the member's estate upon divorce because the provision comprised assets that belonged to the fund rather than to the member." See also *ML v JL* (3981/2010) ZAFSHC 55 (25 April 2013) para 17.

accrue in respect of that member."[30] The notable deficiency of these amendments were that there was no provision for a clean break principle, in that payment of the allocation to the non-member spouse depended on the accrual of the benefit to the member spouse which will be sometime in the future. This resulted in the former spouses being financially tied up together for years following the divorce. This is because any portion awarded to the former spouse was payable when the benefits accrue to the member, either when the member is dismissed, retrenched, retires, withdrew funds or dies.[31] This position was not appropriate especially for non-member spouses who often found themselves in weak financial position on divorce and thereby vulnerable. In *Kirchner v Kirchner* the court held that:

> "Pension benefits will, in the normal course of events, accrue only when the member party's employment is terminated, or when he goes into retirement or dies. That may happen many years after the decree of divorce has been granted. In the interim, the non-member party gets no benefit from any growth of or interest on its assigned share of the pension fund. All growth and interest, also in respect of the assigned share, accumulates for the benefit of the member party. This was not a satisfactory position. It also did not correspond to the "clean break" principle insofar as it applies to divorce actions."[32]

After the 1998 recommendation by the South African Law Commission of the introduction of the clean break principle, the legislature remedied this position by effecting amendments to the PFA. This was done in 2007 by the insertion of a provision in the PFA which deemed the accrual of a benefit for the purposes of the DA on the date of divorce.[33] Section 37 D of the PFA was duly amended by section 28 of the Pension Funds Amendment Act 11 of 1997, which came into effect on 13 September 2007. This section effectively accelerates the date of accrual of the benefit to the member spouse and in turn the date on which the divorce benefit accrues to the non-member spouse. The adjudicator also had an opportunity to determine on this issue in *JC Cockcroft v the Mine Employees Pension Fund* and held that:

> "By deeming the date of accrual of the benefit to be the date of divorce, the new section … overrides the actual date of accrual of the benefit which is determined by the event giving rise to the member's entitlement. The result is

[30] Section 7(8)(a)(i). See also *Kirchner v Kirchner and Another* 2009 (4) SA 448 (W ) 9.
[31] See National Treasury Republic of South Africa: Retirement Fund Reform discussion paper (2004) 3.17.1, first discussion paper.
[32] *Kirchner v Kirchner and Another* 2009 (4) SA 448 (W) SA para 10.
[33] Hunter *et al The Pension Fund Act: A Commentary on the Act, Regulations, Selected notices, Directives and Circulars* (2010) 727.

> that the divorce benefit accrues to the non member spouse on the date of divorce (a fixed ascertainable date without any reference to other documents and no time delay implications), that is, without reference to the actual date of accrual of the benefit (invariably a future date at the time of the divorce with significant time delay implications)."[34]

This simply means that it does not matter what the date of accrual is as far as the rules of the fund are concerned, when it comes to divorces. Section 37D(4)(a) of the PFA effectively provides for the accrual of the pension interest on the date of divorce, meaning that such benefits accrues to the non-member spouse immediately when the court orders a divorce decree. As such, the non-member spouse is eligible to claim such benefits at any time from the time the court grants the decree of divorce. A non-member spouse does not have to wait to comply with the rules of the fund regarding withdrawal of such benefits by the member from the fund due to things like dismissal, resignation or retirement, which all can happen sometime in the future. By accelerating the date of accrual to the date of divorce, the legislature sought to allow divorcing parties to settle all the claims they have against each other on the date of divorce so that they can move on with their lives, thus providing for a clean break principle.

Before 2007 amendments to the PFA, the position was that sections 7 (7) (a) and 7 (8) of the DA applied only to a pension interest which had not yet accrued or rather which had not yet become due to be payable to the member spouse as at the date of the divorce, and pension interest which belongs to a party who is still a member of the particular fund as at the date of divorce.[35] This meant that the courts were of the view that they only had the power to order that the non-member spouse could receive a percentage of the member spouse's pension interest only if that member was an active member of the fund thus not having been paid his or her pension benefits by that fund. However, whatever percentage of the pension interest which was awarded by the court to the non-member spouse, such amount was only going to be received by that non-member spouse when such pension interest accrues to the member spouse in terms of the rules of the fund, which could be some time in the future upon the occurrence of some event i.e. retirement. It is surprising however, that even in post 2007 PFA

[34] Case No PFA/we/11234/06/LS para 19, available at *www.pfa.org.za* (accessed 10 June 2011).
[35] See *Elesang v PPC Lime Limited and Others* para 18, *De Kock v Jacobson* (349) and *Sempapalele v Sempapalele and Another* ( 311-312).

amendments providing for the clean break principle, there are some courts who hold that the non-member spouse will receive his or her portion of the pension interest when it accrues to the member spouse in terms of the rules of the fund.[36] It was also held in *ML v JL:*

> "By means of the deeming provisions of subsection (7)(a) read together with subsection (8)(a), the defendant, as a non-member spouse, would theoretically be able to secure a pre-divorce segment of the plaintiff's pension interest by virtue of those statutory provisions. Section 7(8)(a) defers the actual payment of part of a pension interest to a non-member spouse to a time when any pension benefits accrue in respect of that member. The provisions envisage that pending an accrual of pension benefits in the future, meaning sometime after the date of divorce, a non-member shall have a prospective entitlement; however it would not be instantly enforceable entitlement to have actual payment accelerated on the strength of the final decree of divorce. In this matter pension benefit is still expected to accrue to the plaintiff from her pension interest. It cannot be fast forwarded prior to its expected accrual date through retirement in the ordinary course of events."[37]

The court in *ML v JL* also failed to take into account the clean break principle provisions of the PFA, which accelerates that date of accrual of the pension interest to the date of divorce, thus misdirecting itself to hold that the non-member spouse could only receive her portion of the pension interest only when the pension interest accrues to the member in future. The court was of the view that "the pension interest of the plaintiff will mature sometime after her divorce. Upon her retirement or earlier resignation, whichever event shall occur first, she will be entitled to harvest the fruits thereof, termed pension benefits. The pension benefits can only accrue to the plaintiff from her pension interest either through retirement or resignation."[38] I respectively submit that this approach is incorrect, and the correct position is that the pension interest in a marriage in community of property accrues on the date of divorce, thus making the non-member spouse entitled to receive his or her share therefrom immediately on divorce or soon thereafter.[39]

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[36] *Eskom Pension and Provident Fund v Krugel and Another* [2011] ALL SA 1 (SCA) 1 para 11. The court did not take into account the provision of S37 D acceleration of the accrual date to the date of divorce, and still assumed that the non-member spouse would only be entitled to receive his or her share when the pension benefit accrues to the member at a certain future date.

[37] (3981/2010) [2013] ZAFSHC 55 (25 April 2013) para 29.

[38] *ML v JL* para 39. I respectfully submit that this view is totally ignorant of Section 37D(4)(a) of the PFA.

[39] See section 37D(4)(a) of the PFA.

## 2 4 Pension Interest as an Automatic Asset in the Joint Estate

There seem to be different approaches from our courts as to whether or not one spouse's interest in his or her pension forms part of the joint estate automatically by operation of law, irrespective of when it accrues. Section 7 (7)(a) of the DA allows the courts to deem a pension interest of a member spouse to fall in his or her pension interest when the court is granting the decree of divorce. I have already submitted that a strict reading of Section 7 (7)(a) of the DA may lead one to conclude that at the time of the parties marriage in community of property the issue of pension benefits does not arise, in that such an issue can only arise or be dealt with when the parties divorce, provided the member spouse is still an active member of the fund. Further that pension fund benefits are not ordinarily regarded as assets in the joint estate, but upon divorce such benefits are elevated to assets status by inserting them in the personal estate of the member spouse to make them eligible to be shared.

Furthermore, this suggests that if a pension fund was to pay its member by virtue of that member withdrawing from the fund before the date of divorce, such benefits or payments will not be taken as forming part of the joint estate and neither will they be deemed to be falling into the joint estate. In *De Kock v Jacobson*[40] the court held that "there was no reason in principle why the accrued right to the pension should not form part of the community of property existing between the parties prior to their divorce." The court in *Chiloane v Chiloane*[41] agreed with the views expressed by Labe J in *De Kock v Jacobson.* On the other hand Musi J in *Sempapalele v Sempapalele*[42] found himself unable to agree with the contention that the spouse's interest in a pension which had not accrued did indeed form part of the joint estate.[43] The court in *ML v JL* also held that "an individual's pension interest was never an asset in the joint estate of the spouses married in community of property prior to the enactment of [...] section 7. Notwithstanding comments or views to the contrary, even after the enactment of section 7, an individual's pension interest is still not an asset in the joint

[40] 1999 (4) SA 346 (W) at 349G – H.
[41] (27836/06) [2007] ZAGPHC 183, at 9. Raulinga J held that "I cannot agree more with Labe J, a right to a "pension interest" in a pension fund that has not yet accrued and a right to the pension which has accrued upon the retirement or resignation of one spouse, is like athletes who are competing in the comrades marathon, the one crossing the line a few seconds before the cut off time and the other crossing the line a few seconds after the cut off time. Whereas both have traversed the same distance at almost the same time, the one receives the accolades whereas the other becomes a loser."
[42] 2001(2) SA 306 (O).
[43] *Sempapalele v Sempapalele* 2001(2) SA 306 (O) at 310H.

estate of spouses married in community of property."[44] I submit that it should not matter as to whether the pension interest has accrued or not, such pension interest should be regarded as an asset in a marriage in community of property, thereby regarded as falling within such a joint estate by operation of law. I am not convinced that pension interest should be deemed to be an asset only in the personal estate of one of the parties, when such parties are married in community of property. I am of the view that pension interest or rather pension benefits generally are patrimonial benefits with real economic value, thus they should be regarded as automatically falling within the joint estate.

### 2 5 Pension Interest falling automatically within the Joint Estate

In *Sempapalele v Sempapalele* the applicant submitted that the pension interests were part of the joint estate and automatically fell to be shared in line with the order for division of the joint estate.[45] In this case, even though the applicant in her particulars of claim did claim to be awarded a share of the pension interest, the decree of divorce which incorporated the settlement agreement was silent on the issue of the pension interest.[46] The court had to decide whether the respondent's pension interest was at the time of the dissolution of the marriage part of the joint estate so that it automatically fell within the terms of the blanket order for the division of the joint estate or whether the applicant was supposed to obtain a specific order awarding her a share of the respondent's pension interest in terms of section 7 of the DA. [47] The court was of the view that because section 7 (7) (a) of the DA provides that the pension interest of a party shall be deemed to be an asset in his estate, this means that the interest is not ordinarily part of the joint estate but shall be such for the purpose of division upon divorce because it shall have not accrued yet.[48] The effect of this decision is that the pension interest due as a result of the member's membership of his or her pension fund does not automatically fall within the joint estate of spouses married in community of property. Such pension interest, in order for the non-member to receive a portion of it must be declared to be an asset in the estate of the member spouse in accordance with the deeming provisions of section 7 (7)(a) of the DA, on the day the court orders a divorce.

[44] *ML v JL* para 17. The court held that a pension interest "it is only an expectation of pension benefit yielded by a ripe pension interest which becomes an asset with real economic value."
[45] *Sempapalele v Sempapalele* 2001(2) SA 306 (O) at 307H.
[46] *Sempapalele v Sempapalele* at 309F.
[47] *Sempapalele v Sempapalele* at 309J. The applicant argued that "the respective pension interests of the parties to a marriage in community of property are assets in the joint estate and automatically fall to be shared equally upon accrual, even after divorce. ... One does not need a specific court order for that purpose; that an order in terms of s 7(8) of the Divorce Act is necessary only insofar as it is sought to bind a pension fund". at 310 B
[48] *Sempapalele v Sempapalele* at 311B.

One of the most contentious issues in this area of law is whether it is compulsory for a non-member spouse to plead and pray to be awarded his or her portion of the member's pension interest. In that if he or she failed to do so he or she should be forbidden in future to approach a court of law seeking such pension interest. According to *Sempapalele v Sempapalele* "a spouse seeking a share in the pension interest of the other spouse must apply for and obtain an appropriate Court order during divorce proceedings."[49] In this case the Court was of the view that because the applicant failed to obtain at the hearing of the divorce matter a Court order awarding her a share in the respondent's pension interest, she cannot now get such an order post-divorce.[50] However this view was correctly dismissed in *Maharaj v Maharaj* wherein it was held that:

> "If the learned Judge intended to hold that, if there is no reference to a spouse's pension benefit or interest in a divorce order, the other party to a marriage in community of property is forever precluded from claiming to be entitled, as his or her share of the joint estate, to a half share thereof, I am, with respect, unable to agree with that view."[51]

In *Kotze v Kotze* it was argued by the *amicus curie* that 'subsection 9 (7)(a) operated automatically without the need to plead it or o prove such a claim [...] by virtue of the divorce where parties were married in community of property a division of the joint estate automatically ensued."[52] However, relying on *Old Mutual Life Assurance Co (SA) Ltd and another v Swemmer*[53] the *amicus curie* further argued that the pension interest in this case

[49] *Sempapalele v Sempapalele* at 312 E, in reaching this conclusion the court used the maintenance analogy, wherein it stated that "it is settled law that the spouse seeking maintenance from the other must do so during the course of the divorce proceedings and obtain the necessary order."

[50] *Sempapalele v Sempapalele* at 312G-H. The court was of the view that it is mandatory for a non-member spouse to claim his or her portion of the pension interest during divorce proceedings, in that 'the phrase "any divorce action" must mean any pending divorce action.

[51] 2002 (2) SA 648 at 651 A. See also *M v M* (315/110 [2012] ZAKZNDHC 17 (1 January 2012) at 9, where the court held that 'the fact that no order is made in terms of section 7 (8)(a) of the Divorce Act at the time of the divorce, does not preclude the non-member spouse from later making a claim against the other former spouse for a portion of the pension proceeds'. The court further held that 'when the joint estate of the spouses married in community of property is to be divided it is proper to take into account, as an asset in the joint estate, the value of a pension interest held by one of them as at the date of divorce' (at 651E).

[52] [2013] JOL 30037 (WCC) para 22.

[53] 2004 (5) SA 373 (SCA) para 19, wherein it was held that ''... the necessary implications of the "deeming provision" in s 7 (7)(a) of the Divorce Act, read together with a relatively narrow definition of "pension interest" in s 1 (1), is that any other "right" or "interest" which the member spouse may have in respect of pension benefits which have not yet accrued is- at least after 1 August 1989 – not to be regarded as an asset in the estate of such of such member spouse in determining the patrimonial benefits to which the parties to the divorce action may be entitled'.

was not an asset in the joint estate because it had not yet accrued at the time the court ordered a divorce. However, the *amicus curie* submitted that "the fact that the pension did not form part of the joint estate did not affect the right of the appellant to share in the proceeds thereof in terms of section 7 (7)(a) by virtue of the deeming provision, which argument the court held to be correct."[54] The court ultimately held that:

> "I am of the view that where parties who were married to each other in community of property in subsequent divorce proceedings do not deal with a pension or provident fund interest which either or both of them may have had in separate pension or provident funds either by way of a settlement agreement or by an order of forfeiture, each of them nonetheless remain entitled to a share in the pension or provident fund to which the other spouse belonged to and such share is to be determined as at the date of divorce by virtue of the provisions of section 7 (7) (a) of the Divorce Act 70 of 1979".[55]

However, according to Davey *Kotze v Kotze* the "judgment is erroneous and the correct legal position is that, although a pension interest is deemed to be part of the assets that constitute the patrimonial benefits of a marriage, a non-member spouse only becomes entitled to such a share thereof as a court may assign in terms of s 7(8)."[56] I am afraid I am inclined to disagree with Davey's analysis of *Kotze v Kotze*. In my view his criticism is based on the inconvenience some practitioners will endure should former non-member spouses approach relevant courts to claim their shares of whatever is left of the pension benefits due to or even received by their former spouses. I am of the view that *Kotze v Kotze's* approach as far as former non-member spouses remaining entitled to their former spouse's pension benefits post-divorce is concerned is correct.

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[54] *Kotze v Kotze and another* para 28.
[55] *Kotze v Kotze and another* para *32*
[56] Davey J 'Pension Interest and Divorce K v K and Another- A Critique' *De Rebus* (September 2013) 26 – 28. Davey argues that "The consequence of the judgment, which effectively provides that former non-member spouses who were married in community of property and who divorced after the introduction of s 7(7)(*a*) in 1989, remain entitled to a 50% interest of their former spouse's pension interest (as at the date of the divorce) in the absence of a forfeiture order or a settlement agreement providing otherwise, may well be that many such non-member spouses may now wish to institute proceedings against their former spouses for payment of their 50% share of the pension interest. The judgment is likely to cause many former "member-spouses" (and their legal representatives) sleepless night" (27). Davey further submits that "s 7(7)(*a*) does not provide any basis for the finding that if the spouses "do not deal with a pension or provident fund interest, which either or both of them may have had in separate pension or provident funds either by way of a settlement agreement or by an order of forfeiture" the non-member spouse automatically becomes entitled to 50% of the member spouse's pension interest"(27).

Furthermore, I support the view that it should not be compulsory for parties to plead and pray to be awarded their portion of the pension interest, in that if there is no written agreement or the court has not granted a forfeiture of patrimonial benefits, the court should have no option but decide that each party should receive 50% share of that pension interest.[57] Meaning that the pension interest should be regarded as automatically falling within the joint estate and thus treated like any other patrimonial benefit of the marriage. However, I am unable to agree with the notion that if the pension fund has not yet paid the member any of the benefits which such a member is entitled to at the time of the divorce, and thus pay such benefits at some time after the divorce, such benefits should be treated as not falling within the joint estate.

I submit that since the contributions towards such benefits were made from the member's salary which ostensibly formed part of the patrimonial benefits of the marriage, there is no reason why post-divorce pension benefits cannot be regarded as forming part of the joint estate as it existed before it was dissolved when the decree of divorce was granted. In my view, pension benefits paid at some time after the divorce should be regarded as having had formed part of the dissolved joint estate and be calculated as at the date of divorce. Thus making such benefits to be seen as having had automatically fallen within the terms of the blanket division of the joint estate, more especially if the non-member spouse failed to plead and pray for such benefits during the divorce proceedings and if the court has ordered a blanked division of the joint estate. While I sympathise with the need for efficiency which is brought about by specifically pleading and praying for pension benefits by expressly naming pension fund schemes on the divorce papers for the court to be able to make appropriate orders, I do not believe that litigants should be penalised for failure to plead and pray for such benefits. In any event, if the divorce order was silent on the pension interest, the former non-member spouse could always resort to civil procedure and launch motion proceeding to get the order varied, in order to make provision for the pension interest which the court can then order that he or she should receive such benefits as at the date of divorce.[58] However, I submit that a spouse should nonetheless not be allowed to wait for unreasonably long periods before they launch such applications, and the rules relating to prescription should be applicable.

[57] *Kotze v Kotze and another* para 17.

[58] *Chiloane v Chiloane* (27836/06) [2007] ZAGPHC 183 (Unreported) at10, where the court was "of the view that where a spouse seeking a share in the pension interest of the other spouse who had not, in terms of section 7 (7)(a) applied for and obtained a court order during the divorce proceedings, may do so by way of motion proceedings after the divorce decree is granted. The court may then in terms of section 7 (8) award such an order."

## 3 CONCLUSION

Although the question of whether a person's pension benefits, or rather in the language of the DA, pension interest in cases of divorce forms part of his/her estate may be regarded as common knowledge by some, I have shown in this paper that it remains unclear as to what the acceptable legal position regarding this issue is. Throughout this paper, I omitted to contrast pension interest from pension benefit. Even though it has been held that "pension benefit is accrually derivative from a pension interest"[59] I have nonetheless used both terms interchangeable depending on the line of argument. This is because I am convinced that it is not clear as to what exactly the phrase "pension interest" means, despite this phrase having been defined in the DA.

I therefore recommend that the phrase "pension interest" should be removed from both the DA and PFA and be replaced with the phrase "pension benefits." Pension benefits should be regarded as the total amount which the member spouse is entitled to receive from his or her pension benefit provided for by the rules of the fund. This should include both the lump sum payment and the amount which will be used for monthly payments. I have argued in this paper that pension benefits should automatically fall within the joint estate of the parties married in community of property and thus be calculated from the day the member became the member of the pension fund concerned.

I am of the view that when parties are married in community of property it does not make any sense why the "pension interest" will be regarded as falling into the personal estate of the member, as if a "pension interest" is a non-patrimonial benefit. I am of the view that the pension benefit should reflect the entire pension policy value which would be available to be received by the member. This will be the total amount of all the contributions from both the employer (if applicable) and the member as well as all the interest thereto as a result of all the investment returns made by the trustees during the period of the member's membership. As far as marriages out of community of property with the application of the accrual system are concerned, should the parties divorce, a redistribution of assets should be done according to a prescribed formula[60], thereby allowing the spouse with a lesser accrual to receive a share from the pension benefits.

[59] *ML v JL* para 19.
[60] See section 3 of the Matrimonial Property Act 88 of 1984. As far as when and how accrual sharing takes place see generally Heaton J *South African Family Law* 3edition (2010) 94-100.

I therefore recommend that all the courts which are requested to determine the issue relating to section 7 (7)(a) and section 7(8) of the DA, they need to do so by taking into account the relevant provisions of section 37D(4)(a) of the PFA relating to the clean break principle. The courts should not craft their orders on the reasoning that the non-member spouse will only receive his or her portion of the "pension interest" when it accrues to the member spouse some-time in the future. I have shown in this paper that the amendments to the PFA in 2007 have accelerated the date which the pension interest accrue, thus allowing the pension interest to accrue on the date of divorce to allow the parties to break clean from their marriage.[61]

[61] See generally Nevondwe 'The law regarding the division of the retirement savings of a retirement fund member on his or her divorce with specific reference to *Cockcroft v Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA)' Law, Democracy & Development 2009 (13) 1-12. Before it was legislated, the clean break principle was initially proposed by the South African Law Commission in South African Law Commission Discussion Paper 77 (Project 112) *Report on Sharing of Pension Benefits* (1998) at 32 (para 2.3.1.2), available at *http://www.justice.gov.za/salrc/dpapers/dp77_prj112_1998.pdf* (accessed 05 June 2013), wherein the commission submitted that ''If one of the spouses to a marriage in community of property is a member of a pension fund, the value of the pension interest as at the date of the divorce is deemed to be an asset of the joint estate of the spouses for purposes of determining the share of the joint estate to which each spouse is entitled on divorce. It is the net value of the joint estate which is divided in equal shares between the spouses. The deeming of a pension interest as part of the assets of a joint estate means that the pension interest is thrown into the pool of assets against which the liabilities of the estate must be set off to arrive at a net value for purposes of the division of the estate. It follows that the extent to which the non-member spouse shares in the pension interest of the member spouse depends on the state of the joint estate. It is possible that the liabilities of the joint estate may exceed the assets, inclusive of the deemed asset of the pension interest. In such event the non-member spouse will in real terms derive no benefit from the member spouse's pension. The pension benefits will, however, remain intact for the member spouse or his or her dependants to enjoy when these benefits eventually become payable."