

## Divorce order vs Divorce Act: pension payouts when married out of community of property

A portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce may not be paid out when parties are married out of community of property, the Pension Funds Adjudicator has ruled.



Muvhango Lukhaimane, Pension Funds Adjudicator

Muvhango Lukhaimane has determined that there is no joining of the spouses' estates into one joint estate when parties are married out of community of property.

She said Section 7(1) of the Divorce Act, which provides for a signed written agreement between the parties with regards to the division of the assets and payment by one party to the other, only applies in cases where the parties were married in community of property. It excludes parties married out of community of property without accrual as there is no joint estate to be divided.

She had received a complaint concerning the refusal by Municipal Gratuity Fund (first respondent) to pay a portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce.

The husband said the marital bond between him and his former spouse was dissolved on 30 June 2017 in terms of the divorce order issued by the Gauteng Local Division of the High Court in Johannesburg. The parties had been married out of community of property.

During the divorce proceedings, the parties entered into a settlement agreement which made provision for payment of pension interest to the non-member spouse.

However, the first respondent refused to pay a share of the pension interest assigned to the former spouse in terms of the divorce order.

The complainant said Sanlam Life Insurance (second respondent) advised him that a court order did not have the power to order a percentage of the pension interest to be paid out to the non-member spouse where the parties were married out of community of property.

The second respondent stated that it is trite law that in order for the fund to be able to make payment of a portion of the member's "pension interest" to the non-member spouse, the divorce order must contain a valid order as contemplated in section 7(8), read with section 7(7) of the Divorce Act.

It submitted that there is an exception to the deeming provision. In terms of section 7(7)(c), if the parties were married out of community of property after 1 November 1984 in terms of an antenuptial contract which excludes community of property, community of profit and loss and the accrual system, the pension interest of such a member will not be deemed part of his assets upon divorce.

Therefore, it submitted that the non-member spouse was not entitled to and cannot be awarded a portion of the member's "pension interest" due to the parties' matrimonial property regime.

In her determination, Lukhaimane said the complainant contended that the Divorce Act imbued the court with the discretion to grant an order in accordance with the written agreement between the parties with regards to the division of the assets and payment by one party to the other, irrespective of whether or not the parties were married in or out of community of property with the exclusion of the accrual system.

Lukhaimane said it is evident that the Divorce Act applies in an instance where there is a division of joint assets.

"It is essential to note that when parties are married out of community of property, there is no joining of the spouses' estates into one joint estate. Each spouse has his/her own separate estate, consisting of his/her premarital assets and debts, and all the assets and debts he/she acquires during the marriage.

"The complainant's pension interest cannot be deemed to be part of a joint estate liable for division as there is no joint estate to speak of. Therefore, the complainant's interpretation of the provisions of section 7 of the Divorce Act is misplaced," said Lukhaimane while dismissing the complaint.