Original Article

Payment of divorce benefits to the former spouse upon divorce and changes brought by the South African government employees pension law amendment bill, 2011

Received (in revised form): 18th October 2011

Lufuno Nevondwe

is a Senior Lecturer, Department of Mercantile and Labour Law, School of Law, University of Limpopo (Turfloop Campus). He is also an LLM Coordinator for Labour Law Masters Programme. He holds an LLM and LLB from the University of Venda (Univen). His LLD is in view at North-West University (NWU). He is an Advocate of the High Court of South Africa. He had authored a book titled *Socio-Economic Rights and Financial Planning in South Africa*. He has published more than 40 articles in popular journals and presented more than 24 papers in national and international conferences.

Mashele Rapatsa

is a Lecturer, Department of Mercantile and Labour Law, School of Law, University of Limpopo (Turfloop Campus). He teaches Insurance and Labour Law. He holds LLM from the University of Cape Town (UCT) and LLB from the University of Limpopo. He is an LLD candidate at the University of South Africa (UNISA).

Nicholas Matloga

is a Part-Time Lecturer, Department of Legal Pluralism, Jurisprudence, Criminal law and Procedure, School of Law, University of Limpopo. He holds Diploma in Labour Law, LLB, and is a candidate for LLM in Labour Law (University of Limpopo). His areas of interests are pension and labour law.

ABSTRACT This article analyses the laws relating to the payment of divorce benefits to the former spouse upon divorce and recent amendments to the South African Government Employees Pension Law Amendment Bill. It will further evaluate the payment of divorce benefits before and after the Bill. It will further analyse the definition of pension interest with specific reference to relevant statutory provisions and case laws jurisprudence. It will also finally clarify whether between the member spouse and former spouse, who is responsible to pay tax upon divorce.

Pensions (2012) 17, 94–102. doi:10.1057/pm.2012.8

Keywords: divorce; spouse; pension interest; clean-break principle; pension fund and customary marriage

INTRODUCTION

This article analyses the recent amendments proposed in the South African Government Employment Pension Law Amendment Bill.¹

These amendments have been motivated by the decision of the court in the case of *Wiese v Government Employees Pension Fund* (GEPF), which was delivered on 1 July 2011 at the Western Cape High Court.² This case involves a women whose husband belonged to the GEPF. She wanted pension interest to be paid to her on the date of divorce as it was applicable to all members of private pensions regulated under the

Correspondence: Lufuno Nevondwe
Department of Mercantile and Labour Law, School of Law, University of Limpopo, PO Box 8170, Pretoria, 0001, South Africa
E-mail: lufuno3@mail.com

Pension Funds Act (PFA) by the Registrar of Pension Funds. The court ruled that PFA does not apply to her as her former husband was a member of the GEPPF. The court finally gave the legislature 12 months to enact new legislation, which allowed payment of divorce benefits on the date when the decree of divorce is granted by court. The amendments in the private pensions that are under the PFA were incorporated in the 2007 and 2008.³ Since then, the allocation and payment of a share of a retirement fund member's retirement savings on divorce has been the subject of intense debate in the retirement funding community, especially in view of the unfairness to former spouses (who are usually women).⁴ This Bill seeks to provide for the payment of a pension interest to a former spouse of a member on divorce or the dissolution of a customary marriage.

PAYMENT OF BENEFITS TO FORMER SPOUSE'S ON DIVORCE BEFORE THE BILL

The Government Employees Pension Law currently does not allow a former spouse of a member to claim a portion of a member's pension interest, in terms of a divorce order or an order for the dissolution of a customary marriage, soon after the divorce order or the order for the dissolution of a customary marriage is granted. The former spouse can only receive a portion of the member's interest after the exit of the member from the GEPPF.⁵ The member spouse can exit the GEPPF either as a result of resignation from the employer, dismissal, retrenchment, in case the member spouse became disabled to such an extent that a service cannot be rendered to the employer. The last instances will be either reaching the retirement date or death.

Before the enactment of Section 7(7) and (8) of the Divorce Act,⁶ the spouse of a member of a retirement fund had no right to a share of his or her retirement savings in that fund on divorce unless a benefit had accrued to the member⁷ before the divorce. An amendment made to the Divorce Act, however, in insertion of Sections 7(7) and 7(8) into the Divorce Act in 1989

changed the position. The relevant section is Section 7(7) and (8), which read as follows:

- (a) 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, subject to Paragraphs (b) and (c), be deemed to be part of his assets.
- (b) The amount so deemed to be part of the party's assets, shall be reduced by any amount of his pension interest which, by virtue of Paragraph (a), in a previous divorce –
 - (i) was paid over or awarded to another party; or
 - (ii) for the purposes of an agreement contemplated in Subsection (1) was accounted in favour of another party
- (c) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984 in terms of ante-nuptial contract by which community of property, community of profit and loss and the accrual system are excluded.

1. Notwithstanding the provisions of any other law or 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 1 month of receipt of such notification;

- (b) any law that applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply *mutatis mutandis* with regard to the right of that other party in respect of that part of the pension interest concerned.

The effect of Section 7(7) is to deem the pension interest of a party to the divorce action to be part of his assets for the purposes of the divorce. Section 7(8) then authorises the court to order that the former spouse be paid a share of the 'pension interest' when the member becomes entitled to a benefit in terms of the rules of this fund. The reference to 'any divorce action' in Subsection (a) indicates that the provision applies to all marriages. However, Section 7(7)(c) excludes from the ambit of the section marriages entered into on or after 1 November 1984, where the spouses have opted for a complete separation of their estates without the accrual system. The section thus applies to the three remaining marriage regimes in South African law, namely:

- marriages in community of property;
- marriages to which the accrual system applies; and
- marriages entered into before 1 November 1984 in terms of an ante-nuptial contract excluding community of property and community of profit and loss.

In so far, as the effect of Section 7(7) read with 7(8) is to render pension benefits capable of being assigned wholly or in part to another person, it constitutes an exception to the prohibition in Section 37A(1) of the Act.

THE DEFINITION OF PENSION INTEREST

The Bill has also inserted the new definition of pension interest. This definition reads as follows:

pension interest, in relation to a member of the Fund who is a party to an action for divorce or for the dissolution of a customary marriage, means

the benefits to which that member would have been entitled in terms of the rules of the Fund if the member's membership of the Fund were to be terminated on the date of the divorce or the dissolution of a customary marriage on account of the member's resignation from the service of the employer.

'Pension interest' is defined in the Divorce Act as follows:

'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 the 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 the 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 the 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 purpose of the Act' (Section 1 of the Divorce Act, 70 of 1979).⁸

The pension interest of a member of a pension or provident fund (an occupational retirement fund) is the withdrawal benefit to which the member spouse would have become entitled had he resigned from employment and terminated his membership of the fund on the date of divorce.⁹

The pension interest of a member of a retirement annuity fund is defined to mean the total of the contributions to the fund up to the date of divorce plus simple interest thereon up to that date at the prescribed rate.⁹

The 'pension interest' is the maximum amount that may be assigned to the former spouse on

divorce, the proportion allocated to the former spouse being dependent on the order of the court. It is not permissible to assign to her more than 100 per cent of a member's 'pension interest'.¹⁰

Before prescribed minimum benefits became payable by retirement funds registered in terms of the PFA on termination of membership before retirement, many paid only the equivalent of the contributions paid to the fund by the member (and not those paid by his employer) plus interest at a low rate.

This meant that the basis on which the 'pension interest' of a member was determined for divorce purposes was iniquitous for former spouses, particularly as no provision was made in either the Divorce Act or the PFA for the payment to the former spouse of interest on the amount of her share, or the returns earned by the fund on its investment before it was paid to her. The inequity is illustrated in the facts on which *Van der Berg v Oranje-Vrystaatse Gemeenskaplike Munisipale Pensioenfondse*¹¹ was determined by the Adjudicator. In that case, while only 7 months after the date of divorce, the member spouse received his full benefit of over R1000000, the former spouse received a meagre R35 200.89.

The case that defines pension interest is *Eskom Pension and Provident Fund v Krugel and Another*.¹² This case concerned an attempt by a non-member spouse to obtain payment on divorce of certain deferred benefits held by a pension fund to which her former husband belonged. Long before his divorce, the husband had resigned from his employment and elected to defer his pension benefit in the Fund. He had become a *deferred pensioner* in terms of a rule of the Fund. The divorce settlement agreement, which had been made an order of Court, recorded that the husband had a *pension interest* in the Fund concerned and provided that the wife was entitled to 25 per cent of that pension interest, payable to her as soon as the member became entitled to the pension benefits. The agreement further provided that the spouse's attorneys would secure the registration of an endorsement against the records of the Fund – as provided for in the Divorce Act.

However, when approached, the Fund refused to register the required endorsement against its records on the basis that, at the time of the divorce, the husband, as a deferred member, no longer had a *pension interest* in the fund as contemplated in the Divorce Act. A complaint about this by the spouse to the Pension Funds Adjudicator was upheld. The Adjudicator held that, in terms of the legislation, the wife's portion of the deferred benefit was deemed to have accrued. The Fund was ordered to pay the wife her portion of this benefit. The Fund appealed to the High Court, which dismissed its appeal. The Fund thereafter appealed to the Supreme Court of Appeal (SCA).

The SCA held that the crisp issue on appeal:

... is whether the provisions of sections 7(7) and 7(8) of the Divorce Act entitle a non-member spouse to receive benefits from a pension fund of which the other spouse is a member pursuant to a divorce order where the member spouse has resigned from his employment before the date of divorce but deferred his benefit in the pension fund.

The Court held that the non-member spouse's entitlement, if any, must derive from the provisions of Sections 7(7) and 7(8) of the Divorce Act, read with the definition of *pension interest* in that Act. The Court pointed out that *pension interest* is narrowly defined in the Divorce Act. In the portion of the definition that is applicable to a member of a pension fund, the definition is the following:

... the benefits to which that party as such a member would have been entitled in terms of the rules of the 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.

The SCA's decision appears to be a correct interpretation. The relevant provisions in the Divorce Act were only intended to address a particular problem, namely that a pension benefit that has not yet accrued cannot be regarded as an asset in the relevant estate at the time of divorce.

Where an employee has resigned from his employment and therefore has an accrued right to a pension benefit (although that the right is deferred, so as to enable the pension assets to grow and so as to gain tax advantages), the situation falls outside of the scope of the *mischief* addressed by the Divorce Act.¹³

Second, the case emphasises the importance of the definition of *pension interest*. It is only this *pension interest* that is potentially subject to an order in terms of the Divorce Act. Where one is concerned with an ordinary occupational pension fund (and not for example, a retirement annuity fund or a preservation fund) the *pension interest* means the benefits to which the 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*. Where the resignation has taken place before the date of divorce, there is simply no scope for the application of this definition. There is also no need for the application of the Divorce Act provisions because the member's entitlement against the Fund is no longer a contingent claim but a vested right (although that its value may be hard to compute). I will refer later to the fact that there are separate definitions of the term *pension interest* applicable to a preservation fund and to a retirement annuity fund.¹⁴

Third, though the decision is based on a strict application, the wording of the relevant provisions, it highlights a point that is often overlooked, namely that parties can have rights *inter se* that are not based on Sections 7(7) and 7(8) of the Divorce Act; they are based on terms of a divorce settlement and/or order. It was open to the parties in this case to agree, as they did, that the wife would be granted a share of the pension payout when it was paid out. They could have agreed, instead, that the wife should be paid by the husband at some earlier date some amount to reflect the value of the husband's entitlement to the pension payout. However, what the parties cannot do by agreement is to invoke the statutory mechanisms under the Divorce Act in a situation to which that Act does not apply. This means, for example, that a non-member spouse cannot impose obligations on a

pension fund (rather than on the member spouse) in terms of the Divorce Act in a situation in which the Act does not apply.¹⁵

The definition of a pension interest was also laid down in the case of *Protektor Preservation Pension Fund v Bellars and Others*.¹⁶ This case dealt with a question whether or not the statutory remedies are applicable to a situation in which the employment relationship had been terminated before the divorce. In this case, the member spouse had, before the divorce, transferred his pension payout from his original pension fund to a preservation fund. Of importance to be noted is that this case arose before the 2008 Amendment Act.¹⁷ This Act introduced a definition of 'pension interest' in a preservation fund. Section 37D(6) of the PFA was amended to insert the following definition:

Despite paragraph (b) of the definition of pension interest in s1(1) of the Divorce Act, 1979, [which defined 'pension interest' in relation to a member of a retirement annuity fund] the portion of the pension interest of a member of a pension preservation fund or provide preservation fund (as defined in the Income Tax Act, 1962) that is assigned to a non-member spouse, refer to the equivalent portion of the benefits to which that member would have been entitled to in terms of the rules of the fund if his or her membership of the terminated on the date on which the decree was granted.

However, that definition had no application in the Protector Preservation Fund case. At the time the only definitions of *pension interest* were those pertaining to a pension fund and to a retirement annuity fund.

In the Protektor Preservation Fund case, the Fund itself was the applicant to the High Court and its application was unopposed. The Fund sought two declaratory orders, the effect of which would be that it would be entitled to apply the statutory scheme in a situation not directly provided for in the Divorce Act as it then stood. The key order was a declarator that the definition of *pension interest* ... *be read to include the after tax withdrawal benefit (as defined in the applicant's rules) that would be payable to a*

member if he or she had opted to take a total withdrawal benefit as at the date of divorce. It is not very different from the subsequently introduced statutory definition. This may be contrasted with the actual wording of the statutory definition of pension interest as it then stood, which refers to the benefits payable to a member ... if his membership of the fund would have been terminated on the date of the date of divorce on account of his resignation from his office.

The Durban High Court granted the order sought. The Court noted that the statutory definition of *pension interest* spoke of a termination of membership of the Fund on account of *resignation from office*. The Court held that, having regard to this definition, *a serious anomaly arises when one views that definition in the context of a preservation fund operated by the applicant One cannot realistically visualise a situation where the employee would resign from his office in the context of a preservation fund. However, as pointed out by the applicant, this artificial relationship or link between the employee and employer ceases when the employee takes a total withdrawal benefit from the applicant's fund. The severing of this link equates, in my view, to the concept of resignation from office in the said Act.*

The correctness of this decision is open to doubt and its precedential value is not strong. As already referred to, this was an unopposed application where the issues were not fully argued. What is more, the Preservation Fund was the applicant wishing to assist its member (and his former spouse) in an application not opposed by either of them. What was sought was an equitable arrangement, which the Court sanctioned. Had a non-member spouse brought an application for such relief, opposed by the preservation fund concerned, the outcome might have been different.¹⁸

PAYMENT OF BENEFITS TO FORMER SPOUSE ON DIVORCE AFTER THE BILL¹⁹

The Bill introduces the 'clean-break principle'. The clean-break principle allows for the former spouse to claim and receive a portion of the member's interest that is assigned in terms of the divorce order or the order for the dissolution of

a customary marriage, soon after the divorce order or the order for the dissolution of the customary marriage has been granted. The former spouse does not have to wait until the member exits the pension fund.²⁰

In terms of Section 7(8)(a)(i) of the Divorce Act,⁶ the former spouse of a member of a retirement fund on divorce could be awarded by the court a portion of the benefits that the member would have received had he or she resigned on the date of divorce. However, in terms of the Divorce Act, read with the Government Employees Pension Law,²¹ the former spouse was only entitled to receive that share when the member became entitled to a benefit in terms of the rules of the fund, that is, on his or her latter retirement or termination of membership, which could have been many years after the date of the divorce.²²

In terms of the Bill, a benefit will be deemed to have been accruing to the principal member of the GEPPF on the date of divorce, thus allowing the former spouse the right to claim her share of it.²³ The GEPPF shall, within 45 days of the submission of the court order by the former spouse, request him or her to elect whether the amount to be deducted must be paid directly to the former spouse or transferred to an approved retirement fund on his or her behalf.²⁴

The former spouse shall, within 120 days of being requested to make a choice, inform the fund of the manner in which the fund must be dealt with or if the former spouse chooses that the amount must be paid to him or her directly, provide the GEPPF with the details that are necessary to effect the payment or if the former spouse chooses that the amount must be transferred to an approved pension fund on his or her behalf, provide the fund with the details of that approved retirement fund.²⁵

The GEPPF shall pay or transfer the amount within 60 days of being informed of the manner in which the amount shall be dealt with in accordance with the former spouse's choice.²⁶ In the event that the former spouse fails to make a choice or identity, the approved retirement fund to which the amount should be transferred

within the period of 120 days, the GEPF shall pay the amount directly to the former spouse within 30 days of the expiry of that period.²⁷

In the event that the GEPF cannot reasonably ascertain the manner in which the payment to the former spouse shall be effected, the GEPF shall retain the amount plus interest as determined by the Board in the GEPF, until such time as details of the manner in which that payment shall be effected is made available to the GEPF by the member, the former spouse or any other person whom the GEPF is satisfied has the necessary authority and capacity to instruct the GEPF in that respect.²⁸ Any portion of a member's pension interest assigned to a former spouse in terms of a decree of divorce or a decree for the dissolution of a customary marriage granted before the enactment of this Bill shall, for purposes of any law other than the Income Tax Act, including, but not limited to, Section 7(8)(a) of the Divorce Act, be deemed to have accrued to the member on the date of enactment of this Bill, and must be paid or transferred in accordance with the above provisions.

Subject to Section 24A, no benefit or right in respect of a benefit payable under this Bill shall be capable of being assigned or transferred or otherwise ceded or of being pledged or hypothecated or, save as is provided in Section 26 or 40 of the Maintenance Act,²⁹ and Section 7(8) of the Divorce Act³⁰ be liable to be attached or subjected to any form of execution under a judgment or order of a court of law.³¹

TAXATION OF PENSION INTEREST ALLOCATIONS

This is an extremely complex area, and particularly where the pension interest is substantial, parties are strongly urged to take advice on the impact of taxation. The position has changed several times in the past few years, leading to much confusion. At present, the pension interest deduction is taxable in the hands of the former spouse. However, the tax dispensation may vary for divorces already obtained, depending on the date of the divorce, and on the date of election in terms of Section 37D(4)(b) of the PFA.

It should be noted that pension funds will only act in accordance with the legislative and regulatory provisions and not in accordance with any *inter partes* agreement concluded between the parties in respect of the taxation of pension interest allocations. Such agreements will not be enforceable against the pension fund concerned.

*Russow v Reid and Another*³² dealt with income tax payable at the time that a share of a *pension interest* is paid out to a former spouse. The divorce order in this case was granted in August 2006. The parties agreed that the former spouse, the wife, would be entitled to 30 per cent of the husband's pension interest. The intention was that she would be paid her portion when the husband retired, in terms of the legislation as it then stood.

Once the legislation was amended to permit the wife to elect to have her portion paid to her, she did so. The Fund paid her share, which amounted to approximately R300 000. Pursuant to a tax directive, the Fund at the same time deducted a further approximate figure of R135 000 from the husband's pensionable interest (together with the R300 000). This directive was based on a provision in the Income Tax Act³³ making clear that when a former spouse's portion accrues, the member spouse is liable to pay the income tax thereon. However, the same legislation confers on the member spouse a right to recover the tax from the former spouse.

In this case, the member spouse, the husband, instituted an action against his former wife to recover the income tax that he had paid, effectively on her behalf. She disputed liability, contending that, on a proper interpretation of the consent agreement made an order of the Court, this was not permissible. Her defence failed and the former husband's claim succeeded. The Court held that the husband's right to recover the tax liability paid was not based on contract but arose *ex lege*, in terms of the legislation. The Court was not persuaded that, on a proper interpretation of the order, the husband had waived his statutory right of recovery. The Court in this case illustrated the importance of providing clarification on who is liable to pay tax between the member spouse and the former spouse.

CONCLUSION AND RECOMMENDATIONS

The Bill is a step towards addressing issues, which affect both the pensioners and the beneficiaries. The clarification on clean-break principle is long overdue. The payment of benefits on divorce to the former spouses on the date when the decree of divorce is a good thing as the former spouse does not have to wait for a member spouse to exit the fund. The payments of divorce benefits on the exit of the member spouse put the life of the former spouse in the difficult situations. More often, former spouses are unemployed and for them to wait for more years remain unfair, as if they got the money immediately they can be able to use it to address socio-economic problems they are confronted with. In some instances, the former spouses are breadwinners in their families; this will assist to curb poverty.

The Government Employees Pension Law was enacted into law in 1996. Since then, it requires amendments to be in line with other statutes. The clean-break principle was long introduced by other statutes and it was important for this principle to be applied to all the people of South Africa. This amendment is in line with the core values of the Constitution,³⁴ which includes, among others, human dignity³⁵ and equality.³⁶ These amendments reduce its inconsistencies with other statutes, particularly in regard to the rights of women to equality and dignity. The 2007 and 2008 amendments to the PFA have been valuable in reducing the inequalities the former spouses of pension fund members face on divorce. It is asserted that this approach will promote fairness and reasonableness in our law.³⁷

On the basis of the amendments, question that needs to be clarified will be what will happen to the investment preserved in the preservation fund or retirement annuity, as those rules made it clear that the benefit accrue on the date of retirement. This means that in case of divorce, the former spouse have to wait for the member spouse to retire for her benefit to accrue. These implications will mean that there is a need to amend the Income Tax Act³⁸ to be in line with the recent amendments. The amendment falls short of providing guidance on a question as to

who will be responsible to pay tax between the former spouse and the member spouse. It is hoped that the legislators will clarify this issue before the promulgation of this Bill into law. This question creates problems in the Pension Funds Amendment Act and this requires the Act to be further amended in 2008 to clarify this issue in the Financial Services Laws General Amendment Act.³⁹

REFERENCES AND NOTES

- 1 This Bill has been approved by parliament recently, and it has since been referred to the National Council of Provinces for approval. After approval, it will then been signed into law by the President.
- 2 Case no.: 16893/09. This case is not yet reported.
- 3 These amendments were incorporated in the Pension Funds Amendment Act, 11 of 2007 and Financial Services Laws General Amendment Act, 22 of 2008.
- 4 Nevondwe (2009) 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 and Development* 13(1): 1.
- 5 The GEPP was established in terms of the Government Employees Pension Law, 1996 (Proclamation no. 21 of 1996). The GEPP was established with the object of providing pensions and certain other related benefits to members, pensioners and their beneficiaries. It was established on 1 May 1996 through the amalgamation of a number of pension funds serving government employees and therefore in existence for 17 years, the GEPP is a juristic entity managed by a Board of Trustees. Its core functions include member admissions, contribution collections, members, roll maintenance, withdrawals (exits) and benefit payments, and the oversight of the investment of the Fund's assets to match future liabilities. The administration of the GEPP also administers benefits on behalf of the National Treasury, including medical subsidies, special pensions, military pensions and other sundry benefits. The government-owned Public Investment Corporation manages the investment of GEPP funds, which comprise 91.7 per cent of the total investments under its administration.
- 6 Act, 70 of 1979.
- 7 See *De Kock v Jacobson and Another* 1999 (4) SA 346 (W), where the issue for determination was whether a retirement benefit consisting of a lump sum and a pension for the member (which accrued before the divorce date) formed part of the joint estate. The court held that there was no logical or legal reason as to why both components of the retirement benefit should not ordinarily form part of the joint estate.
- 8 Section 1 of the Divorce Act, 70 of 1979.
- 9 Nevondwe (2009) 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 and Development* 13(1): 4.
- 10 *Old Mutual Life Assurance Company (SA) Limited and Another v Swemmer* [2004] 4 BPLR 5581 (SCA) at 5588A-E. In this matter, the divorce order purported to transfer the entire

- proceeds of the retirement annuity benefit. In terms of the definition of 'pension interest', the non-member spouse is only entitled to the total of the contributions to the fund up to the date of divorce plus simple interest thereon at the prescribed rate. See also *Mashilo v Basil Read Group Provident Fund*, Case no. PFA/NP/3044/2001/NJ, dated 17 August 2001, an unreported determination of the Pension Funds Adjudicator.
- 11 [2001] 3 BPLR 1804 (PFA).
 - 12 Case no.: 689/2010. This case is unreported and the judgment was delivered on 31 May 2011 by the Supreme Court of Appeal.
 - 13 Freund, A. (2011) Case Summary for Pension Lawyers Association, Breakfast Seminar Cape Region, 22 July, p. 6, <http://www.pensionlawyers.co.za>, accessed 11 October 2011.
 - 14 *ibid.*
 - 15 *ibid.*
 - 16 [2009] JOL 23621 (D).
 - 17 Financial Services Laws General Amendment Act, 22 of 2008.
 - 18 Freund, A.¹³ p. 9.
 - 19 Section 24A (1) of the Bill provides that the Board shall direct the Fund to reduce a member's pension interest by any amount assigned from the member's pension interest to the member's former spouse in terms of a decree of divorce granted under Section 7(8)(a) of the Divorce Act, 1979 (Act no. 70 of 1979), or a decree for the dissolution of a customary marriage.
 - 20 This clean-break principle was first introduced in 2007 as a result of the Pension Funds Amendment Act 11 of 2007. This principle was incorporated into Section 37D(1)(d), (3)(b), (4) and (5).
 - 21 Proclamation 21 of 1996.
 - 22 The non-member spouse was not entitled to interest in respect of her share of the returns earned by the fund on its investment during the period from the date of divorce to the date on which it was paid to her. Its value accordingly reduced in the interim.
 - 23 Section 24A(2)(b).
 - 24 Section 2(e)(i) and (ii).
 - 25 Section 2(f)(i), (ii) and (iii).
 - 26 Section 2(g).
 - 27 Section 2(h).
 - 28 Section 2(i).
 - 29 Act 99 of 1998.
 - 30 Act no. 70 of 1979.
 - 31 Section 21(1).
 - 32 Unreported decision of the South Gauteng High Court dated 4 February 2011, Case no: 50730/2007.
 - 33 Income Tax Act 58 of 1962.
 - 34 The Constitution of the Republic of South Africa, 1996.
 - 35 *ibid.*, s10.
 - 36 *ibid.*, s9.
 - 37 Lufuno Nevondwe, *Recent Amendments in the Pension Funds Act on Divorce and Death Benefits in the Financial Services Laws General Amendment Act*, De Rebus, March 2009, p 19.
 - 38 Act, 58 of 1962.
 - 39 Act, 22 of 2008.