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CASES UPDATE

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1. Supreme Court of Appeal case: living annuities and divorce

The issue

In the case of *Montanari v Montanari (1086/2018) [2020] ZASCA 48 (5 May 2020)* the Supreme Court of Appeal (SCA) recently looked at whether, on divorce, the right to future income from living annuities must be taken into account as an asset in the estate when calculating accrual.

The accrual calculation

When you are married with an antenuptial contract (out of community of property) and the accrual system applies, the accrual calculation will be performed if you get divorced or if one of you dies. The accrual system is a formula that is used to calculate how much the spouse with the **larger estate** must pay the smaller estate when the marriage comes to an end. Only property acquired during the marriage may be considered when calculating the accrual. Thus, the larger your accrual, the greater the possibility that you will have to pay your spouse and the larger the amount you will have to pay them. So, it is important what is taken into account for the accrual calculation.

Background

The Montenaris were married in December 1999, out of community of property and subject to the accrual system. Mr Montenari purchased three living annuities, two of which were purchased as a result of his benefit from his occupational pension fund. All of the living annuities were purchased in his name and on his life. Mr Montenari sought maintenance from Ms Montanari and a declaratory order that the living annuities were not assets in his estate and not subject to her accrual claim. She lodged a counterclaim and she argued that the living annuities did form part of his estate for accrual purposes. The High Court considered the question of whether the living annuities acquired by him form part of his estate for purposes of calculating the accrual and came to the conclusion that they did not. The matter went on appeal to the SCA.

Both parties agreed that living annuities were not "pension interest" and they were not arguing about a division of the annuities.

SCA's reasoning and findings

- The SCA looked at the definition of living annuity in the Income Tax Act, among other things. The court recognised that living annuities are non-commutable, payable for and based on the lifetime of the retiring member and may not be transferred, assigned, reduced, hypothecated or attached by creditors as contemplated by sections 37A and 37B of the Pension Funds Act read with South African Revenue Services' General Note 18.

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- As living annuities are not pension interest an annuitant cannot *give* part or all of the living annuities to an ex-spouse in terms of a divorce order or agree to *split* the annuity income with the ex-spouse.
- The insurer's relationship with annuitant is purely contractual, not "trust property" and no fiduciary relationship exists between the two.
- The annuitant has a clear right to the investment returns yielded by the capital re-investment with the insurer, in the form of *future annuity income* which the annuitant draws from the agreement.
- Such annuity income is an asset *which can be valued*, as was testified to by the actuary in the High Court proceedings (subject to assumptions]).
- The value of Mr Montenari's right to future annuity payments under the living annuities **is an asset in his estate** for purposes of **calculating the accrual** in his estate.
- The SCA remitted the matter back to the trial court for the admission of evidence on the *value* of his right to receive future payments from the insurer in respect of the living annuities. It will be interesting to see how the the actuary values the future annuity payments. In the alternative, the parties could just agree on this amount.

Conclusions

- *Future annuity income* from a living annuity must now be taken into account *when calculating accrual*.
- The calculation is not done by the fund or the insurer – the parties to the divorce or their lawyers must sort this out when calculating accrual.
- Payment of the living annuity income is still paid to the annuitant.
- Financial advisers and consultants may be requested to assist clients by providing them with information about annuities, for example, the capital value of the living annuity in order that this calculation can be done. Actuaries may be requested to assist with calculations.
- It is arguable that the same principles apply to other annuity types, for example, guaranteed annuities and we will have to see how this develops.

2. High Court decision that a section 37C decision is administrative action

Recently, the issue of whether or not a section 37C allocation decision is administrative action was again considered by the High Court. The High Court has, in the past, come to varying and seemingly contradictory decisions on this question.

In the recent case of *Mbatha v Transport Sector Retirement Fund and Another* when 0016223/19) [2020 ZAGP JHC 18] the High Court found that a section 37C death benefit decision by the Fund is an administrative action under the Promotion of Administrative Justice Act (PAJA). In this case the High Court stated that the view that section 37C is administrative action for the purposes of PAJA is the "generally accepted view".

If this is the case, this gives rise to administrative law considerations for funds. The provisions of PAJA will need to be applied when making section 37C decisions, including regard to procedural fairness, action being lawful and reasonable, consultation with beneficiaries and provision of reasons. This will need to be weighed against other rights, such as rights to privacy of personal information and arguments around when and if boards may change death benefit allocation decisions (for example, if they receive new information).

Exhaustion of internal remedies

Before someone can ask a court to review an administrative action, there is a rule in PAJA that must be complied with. The exhaustion of internal remedies rule requires that where the law sets out procedures allowing someone to review or appeal a decision of the administration body, these must be used before the person may approach a court. A person may only ask for judicial review as a last resort.

In the *Mbatha* case the SCA found that:

> "[t]he applicant did not attack the decision of the board by way of review in terms of PAJA or by way of a legality review nor did she exhaust the internal remedies provided in the PFA [Pension Funds Act] or apply for an exemption from the duty to exhaust internal remedies in terms of s 7(2)(c) of PAJA".

Thus, the court dismissed the application, as a result of this finding.

This decision means that persons affected by a fund's section 37C decision must first approach the Pension Funds Adjudicator before they may approach a court (unless they apply for exemption).

3. Financial Services Tribunal cases: death benefits - only one dependant

In a section 37C lump sum death benefit investigation, if there is only one dependant, who was the spouse of the deceased, and no other dependants or nominees - does the fund need to investigate whether the spouse was financially dependent on the deceased or not?

As a reminder, section 37C(1)(c) provides that:

> "If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the fund, to one of such dependants or in proportions to some of or all such dependants." (Own emphasis.)

There appear to be two conflicting Financial Services Tribunal cases as regards section 37C(1)(c):

1. *Krean Naidoo v Coca Cola Shanduka Beverage Provident Fund, Pension Fund Adjudicator and others* PFA 53/2019, 23 September 2019.

2. *Momentum Retirement Annuity Fund v VR Krzus and the Pension Funds Adjudicator* PFA 52/2019, 9 March 2020.

We subscribe to the reasoning of the Tribunal in the *Krzus* decision.

In our view, a spouse is not required to be financially dependent in order to be considered by the board for an allocation if they have been identified as the only dependant and there are no nominees. The board does not have a discretion, under the Pension Funds Act, to exclude the spouse and is not required to consider if the spouse was financially dependent on the deceased. The same reasoning applies if the only dependant was a child and there were no nominees. The board would only have a discretion and need to consider if the spouse (or child) was financially dependent, if there was more than one dependant or nominee in addition to the spouse (or the child).