



## IMPACT OF THE PENSION FUNDS AMENDMENT BILL ON DIVORCE MATTERS

Certain of the divorce-related changes in the Pension Funds Amendment Bill ('PFAB') have been approved by Parliament. The PFAB is currently waiting for the President's signature before becoming law.

On 26 March 2024, Treasury addressed the possible contradictions between the Pension Funds Act and the Divorce Act. Its view was that the Pension Funds Act (PFA) would apply whenever there was a conflict between the Divorce Act and the PFA, which both contain provisions dealing with pension interest and laws that pension funds would ultimately have to apply.

### THE CURRENT POSITION

Divorce orders that are enforceable against retirement funds must comply with the definition of 'pension interest' in the Divorce Act to allow for a share of a member's benefit to be paid to a non-member spouse.

The Divorce Act defines 'pension interest' 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 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.*

This definition allows for a divorce order to be enforceable against the fund where the date of divorce is before the member leaves the fund. The member must still be entitled to a resignation benefit from the fund.

### THE POSITION UNDER THE PFAB

A new definition of 'pension interest' has been included in the PFAB, which provides that:

*'pension interest', in relation to a court order granted under section 7(8)(a) of the Divorce Act or a court order granted in respect of the division of assets of a marriage according to the tenets of a religion, means, in relation to a party who is a member of a fund, that member's individual account or minimum individual reserve, as the case may be, determined in terms of the rules of that fund, on the date of the court order.*

This definition proposes the pension interest to be the member's share of the value of the fund, determined in terms of the rules of that fund, on the date of the court order.

This means that, regardless of the membership status, if a member has a benefit in the fund, the divorce order can be enforced. This includes active, unpaid and preserved members, as well as deferred retirees and pensioners.

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### THE DIFFERENT DEFINITIONS OF 'PENSION INTEREST'

Concerns were raised about the two definitions of pension interest, one in the Divorce Act and one in the PFAB because retirement funds would now have to decide which definition takes precedence.

As a result of these concerns, a further clause was inserted into the PFAB which says:

*In the event of a conflict between the provisions of this Act and the Divorce Act, the provisions of this Act prevail.*

Despite the insertion of the above provision, funds are still left with two conflicting definitions of 'pension interest'. As things currently stand, funds will have to rely on the above provision in giving effect to divorce orders that meet the requirements of the definition of 'pension interest' in the PFAB.

### HOW WILL DIVORCE PAYMENTS BE DEDUCTED FROM THE VARIOUS COMPONENTS?

From 1 September 2024 onwards, members may have

- a vested pot, and
- a retirement pot and
- a savings pot

in the fund.

For enforceable divorce orders granted on or after 1 September 2024, this means that each of the member's pots will proportionally reduce in value. Take, as an example, the following scenario:

**A valid divorce order is granted for the payment of R 600,000 to the non-member spouse**

#### Member's current values:

Vested pot R700 000  
Savings pot R200 000  
Retirement pot R300 000

#### Values after payment of divorce claim:

Vested pot R350 000  
Savings pot R100 000  
Retirement pot R150 000

### HOW WILL IT IMPACT ON DEFINED BENEFIT FUNDS?

Deductions from pensionable service will be made for any reduction in any of the pots to cater for a divorce order. This means that the components are not proportionally reduced by a Rand amount, but the pensionable service in the components will be reduced.

### IMPACT ON SAVINGS WITHDRAWAL BENEFITS

At any time prior to retirement, members will be entitled to access a withdrawal of up to 100% of the amount that has been accumulated in the savings component. This "savings withdrawal benefit" (SWB) will be limited to one withdrawal per tax year. The maximum amount available for a SWB will be the amount that has accumulated in the savings component (contributions plus growth, less any costs) at the date of the withdrawal.

Where a member is getting divorced, this will limit that member's claim to a SWB.

Once a divorce claim is received by the fund administrator, the administrator should establish whether there is any divorce order, final or pending, logged on the member's record.

- If there is no divorce order loaded on the member's record, then the fund's administrator will continue with the SWB claim;
- If there is a valid final divorce order logged, the administrator will settle that divorce order from the member's fund credit and then pay the member a SWB based on what is left after settling the divorce order.
- If there is a pending (unfinalised) divorce order, then the administrator must –
  - pend the claim for a SWB;
  - get consent from the non-member spouse for a SWB claim to continue (if the consent form is received and non-member spouse does not give consent then the SWB request must be denied);
  - if the non-member spouse gives consent, process the SWB claim to the member.

The prohibition on paying out a SWB will apply until finalisation of the divorce or until a court order is issued.

**EFFECT ON WITHDRAWAL ON RETIREMENT BENEFITS**

All resignation, dismissal, retrenchment or retirement benefits must be paid to members where there is no divorce order in place, unless the fund receives an interdict, stopping them from paying out the benefit.

Once the fund receives a valid divorce order, payment to the non-member spouse will be settled by reducing each component (pot) proportionately and any balance left in the fund will be subject to the fund's existing rules on exit or retirement.

**IN-FUND PENSIONERS**

The PFAB says that any deduction to be made in respect of a pensioner for a divorce order must be made from the capital value of the pensioner's pension after retirement.

The impact and correct interpretation of this provision is unclear and will have to be clarified for funds that have in-fund pensions.

**SUMMARY OF THE NEW PROVISIONS**

- The PFAB definition of 'pension interest' extends enforceable divorce orders to benefits in the fund after leaving service.
- The deduction of an amount payable in terms of a valid divorce order will reduce each of the vested, retirement and savings components (pots) proportionately.
- If there is a pending divorce, the non-member spouse must consent to the member claiming a SWB.