

Legal Focus

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Newsletter of Sanlam Corporate: Legal

Number 117

Divorce Orders and Pension Interest

This document answers questions regarding the basic principles of section 7(8) of the Divorce Act, provides an example of wording that complies with the relevant legislative requirements and discusses common mistakes which result in the divorce order not being enforceable against the member's retirement fund.

1. If I get divorced, will my ex-spouse be able to claim a portion of my pension interest from my retirement fund?

Yes, if the divorce order contains an order in terms of section 7(8) of the Divorce Act and meets certain requirements.

2. What is an order in terms of section 7(8) of the Divorce Act?

Section 7(8) of the Divorce Act allows the court granting a divorce order to make an order which:

- Awards a specified portion of a spouse's (the member's) pension interest in a retirement fund to his/her ex-spouse; and
- Orders the relevant fund to make payment of the awarded portion of pension interest to the ex-spouse.

3. Is an order in terms of section 7(8) of the Divorce Act always possible?

No, a section 7(8) order cannot be granted if:

- The divorce action is in respect of a marriage out of community of property entered into on or after 1 November 1984 and in terms of which the antenuptial contract excludes community of property, community of profit and loss and the accrual system; or
- The member's service with his/her employer was terminated before the date on which the divorce order is granted (this is because the member will no longer have a "pension interest" to award as at date of divorce).

4. What are the requirements that must be met in order for my retirement fund to make payment to my ex-spouse?

The divorce order must meet the following requirements:

1	The relevant fund of which you were a member on the date of divorce must be named in or identifiable from the divorce order.
2	The portion of the “pension interest” awarded to your ex-spouse must be clear (either expressed as a percentage or a Rand value of pension interest, not exceeding 100%).
3	It must be clear that a portion of your “pension interest” is being awarded.
4	The relevant fund must be expressly ordered to: <ul style="list-style-type: none">- Pay over the awarded portion of your “pension interest” to your ex-spouse or a fund of your ex-spouse’s choice; and- Endorse its records accordingly.

5. What is “pension interest”?

In relation to a member of a pension or provident fund, it is defined in the Divorce Act as the benefits to which the member would have been entitled in terms of the rules of the fund if his/her membership had been terminated on the date of divorce as a result of his/her resignation. Simply put, it is the member’s resignation benefit as at the date of divorce.

6. Why must the divorce order specifically refer to “pension interest”?

In terms of legislation, a retirement fund can only make payment to an ex-spouse if section 7(8) of the Divorce Act has been complied with and in terms of section 7(8) the court can only award a portion of the member’s “pension interest” to the ex-spouse.

This means that if the divorce order awards anything other than a portion of the member’s “pension interest” to the ex-spouse, it will not be an order in terms of section 7(8) of the Divorce Act and the retirement fund will not be allowed to make payment to the ex-spouse.

7. How much of my pension interest can be awarded to my ex-spouse?

The court granting the divorce order has a discretion in this regard (or the parties can agree on this in a settlement agreement that can be made an order of court) and the portion of pension interest awarded to your ex-spouse can be any percentage between 0% and 100% (or a Rand amount not exceeding 100%) of your pension interest.

8. How will my spouse know what the value of my pension interest is?

A retirement fund has a duty to protect the personal information of its members and, unless required by law, may not provide such information to any person other than the member. It is therefore recommended that your spouse requests you, as member, to obtain the value from the fund.

Note that, as explained above, the value of your pension interest is equal to your resignation benefit on the divorce date and the exact value will therefore not be known before such date – so before the divorce date the fund will only be able to indicate the current value of your resignation benefit, which may differ from the value on the divorce date.

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9. What happens if my employment is terminated before the divorce order is granted?

Since “pension interest” is defined as the resignation benefit that would be payable in terms of the rules of the fund if you resigned on the date of divorce, there is no pension interest that can be awarded to your ex-spouse in terms of section 7(8) of the Divorce Act if your service is terminated before the date of divorce. This has been confirmed by the Supreme Court of Appeal in Eskom Pension and Provident Fund v Krugel.

10. What is an example of wording that complies with the requirements?

Example where the member belongs to one fund only:

The *[insert Plaintiff/Defendant*]* is a member of the *[insert registered name of retirement fund]* (hereinafter referred to as “the Fund”). The Fund is ordered to pay *[insert percentage or Rand value]* of the *[insert Plaintiff/Defendant*]*’s pension interest in the Fund to the *[insert Plaintiff/Defendant*]* or to a retirement fund elected by the *[insert Plaintiff/Defendant*]* and endorse its records accordingly.

* Delete which is not applicable.

If a portion of the member’s pension interest in more than one fund is awarded to the ex-spouse, a separate paragraph should be used for each fund to avoid any confusion or ambiguity. The following example is for illustrative purposes only (“Plaintiff” to be replaced by “Defendant”, as the case may be).

The Plaintiff is a member of the ABC Fund and the XYZ Fund and the court orders that the ex-spouse is entitled to 50% of the member’s pension interest in both funds. The following wording will comply with the requirements:

The Plaintiff is a member of the ABC Fund (hereinafter referred to as “the A Fund”). The A Fund is ordered to pay 50% of the Plaintiff’s pension interest in the A Fund to the Defendant or to a retirement fund elected by the Defendant and endorse its records accordingly.

The Plaintiff is a member of the XYZ Fund (hereinafter referred to as “the X Fund”). The X Fund is ordered to pay 50% of the Plaintiff’s pension interest in the X Fund to the Defendant or to a retirement fund elected by the Defendant and endorse its records accordingly.

11. What documentation should be submitted by an ex-spouse when claiming payment from a retirement fund?

- a. The administrator of the retirement fund’s completed application form;
- b. A certified copy of the ex-spouse’s identity document or passport;
- c. A certified copy of the marriage certificate;
- d. A certified copy of the divorce order and, if applicable, settlement agreement (each page stamped by the court);

- e. One of the following:
- (i) A certified copy of the antenuptial contract (if married out of community of property on or after 1 November 1984); or
 - (ii) Written confirmation by the parties as to the matrimonial property regime if married in community of property.

If the divorce order was previously submitted to the retirement fund, but did not meet the requirements of section 7(8) of the Divorce Act, the retirement fund would not have been able to make payment to the ex-spouse. Should the divorce order have been amended by the court to bring it in line with the legislative requirements, the following documents must be submitted to the retirement fund (in addition to the documents listed above):

- f. A certified copy of the application papers, being the notice of motion and supporting affidavits (each page stamped by the court);
- g. A certified copy of the variation order (each page stamped by the court).

12. What are some of the common issues regarding divorce orders which result in a retirement fund not being able to make payment to a member's ex-spouse?

The Supreme Court of Appeal has confirmed (in *Old Mutual and Sanlam v Swemmer*) that divorce orders must be worded very carefully to ensure that they comply with the requirements discussed above, failing which the order is not enforceable against the fund.

Some of the common reasons why divorce orders are found to not comply with the requirements are set out below.

Note: In the table below "Requirement" refers to the relevant requirement in paragraph 4 above.

Issue	Example(s)	Why is it problematic?
1. The member belongs to a pension fund and a provident fund and the divorce order does not make it clear whether the order is in respect of both funds or only one of them and, if so, which one.	<i>"The Plaintiff is a member of the A Fund and the B Fund. The Defendant is entitled to 50% of the Plaintiff's pension interest in the fund and the fund is ordered to make payment to the Defendant."</i>	If it is not clear which fund(s) has been ordered to make payment to the ex-spouse, Requirement 1 has not been met.
2. No retirement fund has been named in (nor is one identifiable from) the divorce order.	<i>"the Plaintiff's pension fund"</i>	If no fund has been named in (or if no fund is identifiable from) the divorce order, Requirement 1 has not been met.
	<i>"the fund to which the Plaintiff belongs"</i>	
3. The name of the fund stated in the divorce order is so vague that it may relate to any one of a number of funds.	<i>"Sanlam Provident Fund"</i>	If it is not clear which fund has been ordered to make payment to the ex-spouse, Requirement 1 has not been met.
	<i>"Sanlam Umbrella Fund"</i>	
4. The portion of pension interest awarded to the ex-spouse is not clear.	<i>"any portion"</i>	If the portion of pension interest awarded to the ex-spouse is not clear, Requirement 2 has not been met.
	<i>"50% or such portion as the court deems just"</i>	

Issue	Example(s)	Why is it problematic?	
5.	<p>It is not clear whether the intention of the parties was to award to the ex-spouse a portion of the member's pension interest (as defined in the Divorce Act) or a portion of some other value/benefit.</p>	<p><i>"Plaintiff's fund value"</i></p> <p><i>"Plaintiff's pension"</i></p> <p><i>"Plaintiff's pension interest calculated from date of marriage to date of divorce"</i></p> <p><i>"Plaintiff's pension fund interest"</i></p> <p><i>"Plaintiff's provident fund interest"</i></p> <p><i>"Plaintiff's provident interest"</i></p> <p><i>"Plaintiff's interest"</i></p> <p><i>"Plaintiff's pension benefit"</i></p> <p><i>"Plaintiff's fund number 123456"</i></p>	<p>If the divorce order awards something other than pension interest to the ex-spouse, Requirement 3 has not been met.</p>
6.	<p>It is not clear what has been awarded to the ex-spouse.</p>	<p><i>"50% net after tax of the Plaintiff's pension interest"</i></p> <p><i>"50% of the Plaintiff's pension interest, after tax"</i></p> <p><i>"50% of the Plaintiff's net pension interest"</i></p>	<p>The Pension Funds Adjudicator has confirmed in determinations that this type of wording is ambiguous. If it is not clear what has been awarded to the ex-spouse, Requirement 3 has not been met.</p>
7.	<p>The relevant fund has not been ordered to make payment to the ex-spouse.</p>	<p><i>"the Plaintiff will make payment to the Defendant"</i></p>	<p>If it is stated that the member is to make payment to the ex-spouse, Requirement 4 has not been met.</p>
8.	<p>It is not clear whether the member or the relevant fund is to make payment to the ex-spouse.</p>	<p><i>"to be paid to the defendant"</i></p> <p><i>"which is payable to the plaintiff"</i></p> <p><i>"must be paid directly to the plaintiff"</i></p>	<p>If it is clear that payment is to be made to the ex-spouse, but it is not stated that such payment must be made by the relevant fund, Requirement 4 has not been met.</p>
9.	<p>The relevant fund has been ordered to endorse its records, but has not been ordered to make payment to the ex-spouse.</p>	<p><i>"The fund is to make an endorsement to reflect the ex-spouse's entitlement."</i></p> <p><i>"The Plaintiff is ordered to submit a copy of the divorce order to the fund so that its records may be endorsed."</i></p>	<p>The Pension Funds Adjudicator has confirmed in determinations that an order for a fund to endorse its records is insufficient; the relevant fund must be ordered to make payment to the ex-spouse otherwise Requirement 4 has not been met.</p>