

5. Order in respect of pension interest in the case of marriages in community of property

Section 7(7) of the Divorce Act provides that in the determination of the patrimonial benefits to which parties to a divorce are entitled, the pension interest of a member is deemed to be part of his/her assets. Section 7(8) goes further to provide that a court granting a decree of divorce may make an order for a retirement fund to pay a portion of the pension interest of a member to his/her spouse and may further order the fund to make an endorsement in its records to reflect such order. The enabling provision in the Pension Funds Act is section 37D(4)(a)(i)(aa), which provides that a fund may make a deduction from a member's pension interest in the fund mentioned in, or identifiable from, the divorce order.

The Supreme Court of Appeal in 2016 in the case of *Ndaba v Ndaba* held that, in the case of marriages in community of property, the pension interest is automatically included in the division of the joint estate. A common misinterpretation of this judgement is that there is, in the case of marriages in community of property, no need for a fund to be specifically ordered to pay a portion of the member's pension interest to the non-member spouse. In the recent case of *Masike v SALA Pension Fund [2021] JOL 51320 (GJ)*, the Johannesburg Division of the High Court however confirmed that the mere fact that parties are married in community of property, does not in itself enable the relevant fund to pay a portion of the member's pension interest to his/her former spouse.

The court in *Masike* held that although section 7(7) of the Divorce Act deems the pension interest of a member to be part of his/her assets, and the pension interest thus, in the case of marriages in community of property, automatically forms part of the joint estate, an order in terms of section 7(8) is still required before the fund can make payment to the non-member spouse. In the absence of such an order, the non-member spouse's only option is to claim his/her portion of the pension interest directly from the member.

The *Masike* judgment once again highlights the importance of compliance with the applicable legislative provisions when drafting divorce orders and/or settlement agreements. The fund must be correctly identified, and must be ordered to make payment of a specified percentage, or amount, of the member's pension interest to the non-member spouse. If the order does not meet these requirements, the fund is not able to give effect thereto.