

**The clean break principle on sharing pension interest upon divorce in
South Africa is not as clean as a whistle**

by

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DECLARATION

I declare that the research titled 'The Clean Break Principle on Sharing Pension Interests upon Divorce in South Africa is not as Clean as a Whistle' is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references. I further declare that I submitted the dissertation to the appropriate originality detection system which is endorsed by Unisa and that it falls within the accepted requirements for originality. I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

SUMMARY

This study explores the historical treatment of pension benefits preceding the introduction of the clean break principle. It delves into the developments leading to the codification of this clean break principle concerning pension interest in divorce proceedings and examines court interpretations. The research evaluates the effectiveness of the legislation in granting divorce orders to non-member spouses for enforcement against pension funds. While the legislative intent is to provide a clean slate for non-member spouses after divorce, the Divorce Act amendment did not initially allow immediate pension interest claims. Subsequent changes to the Pension Funds Act addressed the claim for immediate payment. However, inconsistencies in interpreting the legislation persisted until the Supreme Court of Appeal clarified the issue of entitlement of the non-member spouse. Despite these advancements, unresolved legal questions create hardships for non-member spouses which highlights the need for legislative reform based on the conclusions and recommendations of this study.

KEY TERMS

Divorce Act, divorce action; pension interest; non-member spouse; member spouse; estate; clean break principle; pension fund; pension benefit; accrual; Pension Funds Act.

LIST OF ABBREVIATIONS

BCLR	Butterworths Constitutional Law Reports
BPLR	Butterworths Pension Law Reports
ECP	Eastern Cape High Court, Port Elizabeth
FB	Free State High Court Bloemfontein
GJ	South Gauteng High Court, Johannesburg
GNP	North Gauteng High Court, Pretoria
KZD	Kwazulu Natal Division of the High Court
PELJ	Potchefstroom Electronic Law Journal
SALC	South African Law Commission
SALRC	South African Law Reform Commission
SCA	Supreme Court of Appeal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
WCC	Western Cape High Court of Cape Town
ZALMPPHC	Limpopo High Court Polokwane
ZAFSHC	Free State High Court Bloemfontein
ZAGPHC	Gauteng Provincial Division of the High Court
ZANWHC	North West High Court Mafikeng

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CHAPTER 1: INTRODUCTION

1.1 Introduction

This research focuses on the clean break principle¹ and the development of jurisprudence in relation to pension interests in South African family law. The clean break principle in this regard is described as a right or the entitlement of the non-member spouse, to receive immediate payment or a transfer of a portion of the other spouse's pension interest when the couple divorces.² It should be noted that the Divorce Act 70 of 1979 states that a person married out of community of property before 1 November 1984 may be entitled to a portion of his or her spouse's pension interest. However, a person who married out of community of property without the accrual system on or after 1 November 1984 is excluded.³

The clean break principle applies in the event of a divorce and gives the non-member spouse a right to immediate payment of a portion of the pension interest allocated to the member spouse by his or her pension fund. Alternatively, the non-member spouse may elect to transfer a portion of the pension interest to an approved fund in his or her own name.⁴ According to the Pension Funds Act 24 of 1956 as amended a non-member spouse means a person who is no longer the spouse of that member due to the dissolution or confirmation of the dissolution of the relationship by court order and to whom the court ordering or confirming the dissolution of the relationship has granted a

¹ The clean break principle advocates for the division of the assets of spouses on divorce so that both spouses attain financial independence, neither spouse is responsible for the ongoing maintenance of the other and all financial ties between the spouses are severed on divorce. Jill Singer, 'The Clean Break principle' (LLM thesis University of South Africa 1996) 3; The then Appellate Division (now referred to as the Supreme Court of Appeal) has held that our courts will always bear in mind the possibility of using their powers under the new dispensation in such a way as to achieve a complete termination of the financial dependence of the one party on the other if circumstances permit. The clean break concept is not foreign to our law. If a clean break is to be achieved the amount of determination must be such that the spouse concerned will be in a financial position to maintain herself or himself. *Beaumont v Beaumont* [1987] 2 All SA 1 (A) 13-14; *Katz v Katz* [1989] 2 All SA 353 (A) 362.

² Clement Marumoogae, 'Breaking up is hard to do, or is it? The clean break principle explained' (2013) 535 *De Rebus* 38, 38.

³ Section 7(7)(c) of the Divorce Act 70 of 1979.

⁴ Section 37D(4)(a)(b)(ii)(cc) of the Pension Funds Act 24 of 1956; section 24A(2)(a)(f)(ii) of the Government Employees Pension Law Proclamation 21 of 1996; Jothi Chirkoot, 'GEPF and the Clean Break Principle' (2018) 33 *Income Tax, Insurance and Tax* para 2.

share of the member's pension interest in the fund.⁵ The non-member spouse does not wait for a long period after the divorce to be paid his or her share of the member's pension interest. The clean break principle in relation to pension interests was introduced to enable the non-member spouse to have an immediate claim to his or her share of the member spouse's pension benefits on the date of divorce.⁶

It is important to note that there is a distinction between a pension benefit and a pension interest. A pension benefit is a withdrawal benefit that has already accrued to a member spouse as an asset in his or her estate, as a consequence of the right to claim the benefit when he or she retires, resigns or is dismissed or retrenched during the subsistence of the marriage.⁷ A pension interest is an amount equal to the member's cash resignation benefit which would have become payable in terms of the rules of the fund had the member resigned on the date of the divorce.⁸ Initially, non-member spouses were not entitled to a portion of the member spouse's pension interest on divorce. A pension interest that has not accrued to a person is not an asset in his or her estate because the right to claim the benefit only vests in the person when the benefit accrues to him or her upon retirement, resignation, dismissal, or retrenchment.⁹ Therefore, an unaccrued pension benefit was not regarded as part of the joint estate of spouses married in community of property or of the separate estates of spouses married out of community of property.

Prior to August 1989, the amount held by a pension fund as provision for its future liability towards a member could not be considered in determining the value of the member's estate on divorce because the provision comprised of assets that belonged to the pension

⁵ Section 1 of the Pension Funds Act.

⁶ Clement Marumoagae, 'Can a Non-member Spouse Protect his or her Interest in the Member Spouse's accrued Pension Benefits before Divorce?' (2016) 37(2) *Obiter* 312, 312.

⁷ Jacqueline Heaton, 'The proprietary consequences of divorce' in Heaton J *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (1st edn, Juta 2014) 79-80.

⁸ Kobus Hanekom, 'Manual on Retirement Funds and Other Employee Benefits' (LexisNexis 2016) par 6.3.2.2.

⁹ Heaton, *The Law of Divorce and Dissolution of Life Partnerships* (Juta, Cape Town 2014) 74.

fund rather than to the member.¹⁰ This meant that when determining the patrimonial benefits their pension expectations were not taken into account when the spouses were getting divorced.¹¹ However, in terms of section 7(7)(a) and (c) of the Divorce Act as amended in 1989, a spouse's pension interest is now deemed to be part of his or her assets on divorce for purposes of determining the patrimonial benefits to which the spouses may be entitled, unless the spouses married on or after 1 November 1984 in terms of an antenuptial contract which provides for complete separation of property.

The amendment of the Divorce Act provided for a mechanism which opened up the possibility of the member spouse's pension interest being split or shared with the non-member spouse when the parties divorced. The Divorce Act as amended empowered the court, firstly, to make an order that any portion of the member's pension interest be paid to the non-member spouse. Secondly, it empowered the court to instruct the registrar of the court to inform the pension fund concerned to make such payment to the non-member spouse as a result of the parties' divorce.¹² Regrettably, these amendments were not conclusive for the non-member spouse to realize the clean break principle. The Registrar was entitled to notify the retirement fund to endorse the pension records of the member spouse and to assign a portion of the pension interest to the non-member spouse, but the fund would only pay the latter when the pension benefit accrued to the member spouse.¹³ Therefore, any portion awarded to the former spouse was payable when the benefits accrued to the member, that is, when the member was dismissed, retrenched, retired, withdrew from the fund or died, which could occur many years after the date of divorce.¹⁴ The non-member spouse had to wait indefinitely for an uncertain event to occur before he or she became entitled to receive payment.

¹⁰ Marumoagae, 'Breaking up is hard to do, or is it? 38-39.

¹¹ *Kirchner v Kirchner and Another* 2009 (4) SA 448 (W) SA 450.

¹² Section 7(8)(a)(i)(ii) of the Divorce Act.

¹³ Section 7(8)(a)(i) and (ii).

¹⁴ Clement Marumoagae, 'A non-member spouse's entitlement to the member's pension interest' 2014 *PELJ* (17) 6 2488, 2491.

In June 1999, the South African Law Commission recommended that the pension benefits be treated in accordance with what is described as the 'clean break' principle.¹⁵ Having regard to the recommendations made by the Commission, section 37D of the Pension Funds Act 24 of 1959 was duly amended by section 28 of the Pension Funds Amendment Act 11 of 2007 which came into effect on 13 September 2007.¹⁶ If the pension fund falls under the Pension Funds Act, the non-member's portion of the pension interest is deemed to accrue to the member on the date of the divorce, unless the spouses divorced before 13 September 2007. In the latter event, the non-member's portion is deemed to have accrued to the member on 13 September 2007. If the spouse is a member of the Government Employees Pension Fund, the non-member's portion is deemed to accrue to the member on the date of the divorce, unless the spouses divorced before 14 December 2011. In the latter event, the non-member's portion is deemed to have accrued to the member on 14 December 2011. If the spouse is a member of the Post Office Retirement Fund, the non-member's portion is deemed to accrue to the member on the date of the divorce, unless the spouses divorced before 27 January 2014. In the latter event, the non-member's portion is deemed to have accrued to the member on 27 January 2014.¹⁷ It should be noted some funds are not regulated by the Pension Funds Act thus the legislation in relation to the Government Employees Pension Fund and the Post Office Retirement Fund were subsequently amended in 2011 and 2014 respectively.¹⁸

1.2 Problem Statement

There is noteworthy jurisprudence on the clean break principle related to pension interests but there are inconsistent judicial interpretations of the provisions dealing with this as well as incoherent practical implementation of the clean break principle, including

¹⁵ South African Law Commission, (Project 112) *Sharing of Pension Benefits* (SALC 1999) 23; South African Law, Discussion Paper 77 (Project 112) *Sharing of Pension Benefits* (SALC 1998) 45-6.

¹⁶ Marumoagae, 'A non-member spouse's entitlement' 2492-3.

¹⁷ Jacqueline Heaton and Hanneretha Kruger, '*South African Family Law*' (4th edn, LexisNexis 2015) 134.

¹⁸ Government Employees Pension Law Amendment Act 19 of 2011; South African Post Office SOC Ltd Amendment Act 38 of 2013.

the accrual of a pension interest to the estate of the member spouse for the determination of patrimonial benefits in terms of the Divorce Act. There are divergent interpretations of sections 7(7)(a) and 7(8) of the Divorce Act in Supreme Court of Appeal and High Court decisions¹⁹ and by academic writers. These divergent interpretations raise more questions and therefore there is a need to achieve legal certainty.²⁰ The clean break principle was meant to provide a simplified practical solution to the question whether a non-member spouse can claim a pension interest and immediate payment thereof. However, it will be demonstrated that the clean break principle is still faced with problems in the form of prejudice or inconvenience experienced by non-member spouses in their quest to claim immediate payment of the pension interest. These issues, which will be enunciated below, require more scrutiny in so far as the effectiveness of the clean break principle is concerned.

The first issue relates to the non-member's right to claim a pension interest. In *Ndaba v Ndaba*,²¹ the Supreme Court of Appeal confirmed that an order regarding the right to claim a pension interest does not confer the right on the non-member spouse but is merely declaratory of the right which exists by operation of the law.²² The court rejected the view that the order conferred the right on the non-member spouse and was therefore constitutive; if the order was constitutive, this would mean that a non-member spouse must obtain a divorce decree in the court of first instance that defines his or her right to a portion of the member spouse's pension interest and that failure to do so would mean that the non-member spouse would be barred from claiming such a right.²³ Although the *Ndaba* decision is welcomed, nonetheless a non-member spouse should not be allowed to wait for unreasonably prolonged periods before they launch such applications and the

¹⁹ *Sempapalele v Sempapalele* 2001 2 SA 306 (O); *Maharaj v Maharaj* 2002 2 SA 648 (D); *Motsetse v Motsetse* [2015] 2 All SA 495 (FB); *Ndaba v Ndaba* [2017] 1 All SA 33 (SCA).

²⁰ Mothokoa Mamashela, 'A Review of the Problems encountered by a Non member Spouse in accessing their half share of the Pension Interest during Divorce in South Africa' (2018) 51(1) *De Jure* 17, 17; Marumoagae, 'A non-member spouse's entitlement' 2517; Johann Davey, 'Pension interest and divorce K v K and another a critique' (2013) 534 *De Rebus* 26, 28; Magdaleen De Klerk, 'Clarifying the term pension fund in the Divorce Act and the Pension Funds Act' [2020] *De Rebus* 25.

²¹ *Ndaba v Ndaba* 2017 (1) SA 342 (SCA).

²² *Ndaba v Ndaba* 2017 (1) SA 342 (SCA) 345H-346C.

²³ Mamashela, 'A Review of the Problems encountered by a Non-member Spouse' 19.

rules relating to prescription should be applicable to ensure certainty of the law.²⁴ The Supreme Court of Appeal decision has not answered all the questions relating to the interpretation of section 7(7)(a) and 7(8) of the Divorce Act. The questions which remain unanswered are: Can a court grant an order relating to a pension interest despite the papers being silent on the issue, or should the non-member pray and plead for such an order?²⁵ Therefore, there is a need to consider practical methods of ensuring that non-member spouses avoid the inconvenience of having to approach the court more than once for an order that allows them to claim their share of a pension interest.

The second problem is the inconvenience experienced by a non-member spouse when claiming their portion of the pension interest where the divorce order is not clear on the pension interest, as pension funds or fund administrators reject flawed divorce orders and settlement agreements. This has the result that the non-member spouse is required to seek a variation order.²⁶ This problem emanates from litigation proceedings where legal representatives or unrepresented parties are granted a divorce order that does not clearly reflect whether the pension interest must be shared between the member spouse and the non-member spouse. Where a divorce order incorporating a settlement agreement is disputed by the fund administrator or member spouse contending that the non-member spouse is not entitled to a portion of the member's pension interest, the non-member spouse is forced to approach the court to request a variation of such an order.²⁷ However, where the court granted an order without incorporating a settlement agreement, it should be noted that the Divorce Act does not permit variation or rescission of orders in respect of the proprietary consequences of divorce. Consequently, in so far as proprietary consequences are concerned the issues between the spouses are *res judicata* once the

²⁴ Clement Marumoagae, 'A Critical Discussion of a Pension Interest as an Asset in the Joint Estate of Parties Married in Community of Property' 2014 (1) *Speculum Juris* 55, 70; Marumoagae, 'A non-member spouse's entitlement' 2510 - 11.

²⁵ Mamashela, 'A Review of the Problems encountered by a Non-member Spouse' 24-25; Clement Marumoagae, 'The Law Regarding Pension Interest in South Africa has been settled! Or has it? With Reference to *Ndaba v Ndaba* (600/2015) [2016] ZASCA 162' (2017) 20 *PELJ* 1, 11.

²⁶ Mamashela, 'A Review of the Problem encountered by a Non-member Spouse' 23.

²⁷ Clement Marumoagae, 'Prejudice emanating from non payment of pension interests due to what is contained in or omitted from divorce decrees' (2018) 51(1) *De Jure* 102, 112.

divorce order has been made and the order cannot be varied or rescinded unless the ordinary rules for variation or rescission of an order of court permit this.²⁸ If the order incorporates a settlement agreement, the parties may agree to vary or rescind the terms of the settlement agreement that was made an order in term of section 7(1) of the Divorce Act, but the variation or rescission operates only as between the parties to the settlement agreement, it is enforceable as a contract. Therefore, the member spouse's pension fund would not be bound by the variation or rescission.²⁹

Another cause for seeking a variation of a divorce order is misunderstandings about the terms 'pension interest' and 'pension benefit'. The incorrect use of words in a divorce order and settlement agreement may cause unnecessary delays in giving effect to the clean break principle.³⁰ Parties have been forced to apply to court for costly amendments to divorce orders to comply with artificial definitions in the legislation.³¹ As alluded to above, a pension interest is an amount equal to the member's cash resignation benefit which would have become payable in terms of the rules of the fund had the member resigned on the date of the divorce.³² Section 7(7) and (8) relates only to a pension interest. A pension benefit is a withdrawal benefit that has already accrued to a member spouse as an asset in his or her estate, as a consequence of the right to claim the benefit when he or she retires, resigns, or is dismissed or retrenched during the subsistence of the marriage. A pension benefit that accrues to a spouse prior to marriage and during the subsistence of the marriage falls into his or her estate or into the joint estate if the spouses are married in community of property.³³ Therefore if the settlement agreement or divorce order mentions a pension benefit instead of a pension interest, the pension fund or pension administrator may refuse to pay the non-member spouse until the pension benefit accrues to the member spouse as defined.

²⁸ Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 107-8.

²⁹ Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 89.

³⁰ Chirkoot, 'GEPF and the Clean Break Principle' par 1.

³¹ Jenny Gordon, 'The sharing of retirement fund benefits on divorce – a progress report (1998) 13 *Income Tax Insurance and income tax* para B2.4.

³² Hanekom, *Manual on Retirement Funds* para 6.3.2.2

³³ Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 79-80.

Yet another problem arises if the court does not make an order in terms of section 7(8) of the Divorce Act. In terms of section 7(8)(a) of the Act, the court which grants the decree of divorce may make an order that any part of the pension interest of a member of a pension fund, which is due or assigned to the other party in terms of section 7(7) of that Act, be paid by that fund to the other party when any pension benefits accrue to the member of the fund.³⁴ In the absence of an order in terms of section 7(8)(a) the pension fund will not pay the non-member's portion of the pension interest to him or her, because the divorce order does not provide for sharing the pension interest. Therefore, the non-member spouse would have to claim his or her portion of the member's pension interest directly from the member spouse personally or arrive at some arrangement that takes into account the portion of the pension interest in dissolving the estate.³⁵ The non-member spouse usually bears the brunt of this legal uncertainty when they want to access their share of pension interest.³⁶

Lastly, another legal hurdle is caused by an overemphasis of one piece of legislation which is the Divorce Act instead of considering the provisions of the Pension Funds Act as well when the issue of a pension interest is disputed in our courts. The same approach is applied in our writers' critiques whilst the funds rely on the Board of Trustees' fiduciary duty to act with diligence and reasonable care in compliance with the Pension Funds Act. The trustees must uphold the rules of the fund and all applicable laws. Therefore, the funds would rely on either section 37D of the Pension Funds Act or section 24A of the Government Employees Pension Law Proclamation 21 of 1996 (or rules of other pension funds not regulated by the Pension Funds Act) when it gives effect to the court order, thus rejecting non-compliant divorce orders. According to these provisions, a written submission in the form of a court order issued in terms of section 7(8)(a) of the Divorce Act must state that the pension interest must be deducted from the member spouse and

³⁴ Piet Van Niekerk, 'A practical guide to patrimonial litigation in divorce Actions' (LexisNexis 2011) para 7.2.4.4.

³⁵ Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 78.

³⁶ Mamashela, 'A Review of the Problems encountered by a Non-member Spouse' 18.

paid to the non-member spouse by the pension fund(s) named or identifiable in the divorce decree. If the divorce order fails to name or identify the pension fund that must pay the pension interest, the claim will be rejected. The funds are attempting to play it safe in case their member were to challenge their decision to pay a portion of the pension interest to the non-member spouse.³⁷ Regrettably, this inconvenience compels the non-member spouse to obtain a variation of the divorce order or a declaratory order that he or she is entitled to a pension interest that must be paid by a specified or identified pension fund.

1.3 Scope and Purpose of the Study

This research will focus on the South African family law on divorce and pension interests. The study does not include a comparative study on similar laws in a foreign country. The purpose of the study is to understand the clean break principle in relation to the pension interest as defined when it was codified into legislation, and the purported intention of the legislature. I will further conduct a comprehensive analysis of the clean break principle in relation to the approach of the judiciary in its interpretation of issues of dispute brought before on reported and unreported court cases relating to pension interests upon divorce. This will also include opined analyses and criticism by academic writers on the court decisions and interpretation of the law.

The research will analyse the amendments made over the years to introduce the clean break principle in statutes such as the Divorce Act, the Pension Funds Act, Government Employees Pension Law, Post and Telecommunication-Related Matters Act 44 of 1958 and Transnet Pension Fund Act 62 of 1990. Lastly, the study will consider propositions for legislative amendments to the pension and divorce statutes in relation to enhance the application of the clean break principle. However, the research excludes the consideration of the Pension Funds Amendment Bill 3 of 2024 which was published on 30 January 2024 after the cut-off date of this study as it was finalised on 17 January 2024.

³⁷ Marumoagae, 'Prejudice emanating from non payment of pension interests' 112.

1.4 Research Question

The main question is whether the clean break principle is effective in enabling the non-member spouse to claim his or her share of the member spouse's pension interest and to obtain immediate payment thereof.

1.5 Methodology

This dissertation is a qualitative research study, based on a literature review of legislation, case law, books and journal articles on pension interests and divorce. I will use primary and secondary sources as a basis to answer the research questions in this study.

1.6 Outline of Chapters

Chapter 1 provides an introduction on the clean break principle in relation to pension interests upon divorce. It also outlines the problem statement, the scope of the study and research questions.

Chapter 2 provides a detailed overview of the historical background and legislative amendments in furtherance of the clean break principle in relation to pension interests.

Chapter 3 looks at the development of jurisprudence, the interpretation of the legislation and the courts' approach to the imposition of the clean break principle on pension interest matters.

Chapter 4 considers the writings of academics as well as criticism of the judiciary on the interpretation of the clean break principle in relation to pension interests.

To close, Chapter 5 provides a detailed conclusion in relation to the previous chapters and proposes recommendations on legislative amendments for ensuring that the clean break principle is enhanced and becomes more effective.

CHAPTER 2: HISTORICAL BACKGROUND AND THE LEGISLATION

2.1 Introduction

Generally, marriages in South Africa are concluded in community of property as a default matrimonial property system unless the spouses have concluded an antenuptial contract stating otherwise.³⁸ In accordance with common law, in a community of property marriage means that from the date of marriage the spouses' separate estates are combined into a unified joint estate for the duration of the marriage. The matrimonial property arrangement entails a universal community of property and the spouses jointly co-own an undivided and indivisible half-share of all assets and liabilities acquired at the time of marriage.³⁹ The effect of divorce on the division of the spouses' property hinges on the type of matrimonial property system, that is, either in community of property or out of community of property and, if the latter is applicable, whether the accrual system applies to the marriage. The nature of the matrimonial property system dictates the inclusion of assets and liabilities in the estate of each spouse or into the joint estate if the spouses married in community of property. In addition, when calculating the accrual in the estate of a spouse certain assets may be excluded in the antenuptial contract.⁴⁰ As a rule, only assets in which the spouse holds a vested right, title or interest are included in his or her estate or in the joint estate if the spouse is married in community of property.⁴¹ In terms of the legislation a distinction is made between different types of marriages for purposes of division of assets namely the marriage out of community of property without accrual concluded before 1 November 1984, a marriage out of the community of property without accrual concluded after 1 November 1984, a marriage out of community of property with the accrual system and a marriage in community of property.⁴²

³⁸ Clement Marumoagae, 'Can a Non-member Spouse Protect his or her Interest in the Member Spouse's accrued Pension Benefits before Divorce?' (2016) 37(2) *Obiter* 312, 314.

³⁹ Madelene De Jong and Walter Pintens, 'Default matrimonial property regimes and the principles of European family law – A European - South African comparison (part 2)' (2015) 3 *TSAR* 551, 552; Marumoagae, 'Can a Non-member Spouse Protect his or her Interest' 312.

⁴⁰ Jacqueline Heaton and Hanneretha Kruger, '*South African Family Law*' (4th edn, LexisNexis 2015) 129-130.

⁴¹ Jacqueline Heaton, 'The proprietary consequences of divorce' in Heaton J *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (1st edn, Juta 2014) 70.

⁴² Section 7(7)(c) of the Divorce Act 70 of 1979; Sections 2 and 14 of the Matrimonial Property Act 88 of 1984.

As discussed in the previous chapter, when a spouse is a member of a pension scheme, his or her interest is often a mere *spes* or an expectation as that interest is held by the fund as a future benefit. The entitlement to such benefit is governed by the rules of the fund.⁴³ The interest remains a prospective asset, it is not immediately accessible or tangible for the member spouse.⁴⁴ A member spouse only has a right to claim the pension benefit when it becomes due in terms of the rules of his or her fund.⁴⁵ A pension benefit that has not accrued to a person is not an asset in his or her estate. The right or claim of a benefit only becomes vested in the person when the benefit accrues to him or her occasioned by retirement or resignation or dismissal.⁴⁶ Following this principle, a pension benefit that has not accrued to the member spouse does not form part of the spouse's estate or the joint estate if the spouse was married in community of property. Thus, the non-member spouse could not claim part of the pension interest from the member upon divorce.⁴⁷ This Chapter will discuss the introduction of the clean break principle through the legislation to the effect that pension interest is regarded as part of the spouse's estate upon dissolution of marriages as well as the discretionary authority of the courts. The Chapter will also consider the nuances identified on what constitutes a pension interest based on the different descriptions of benefits payable from either a pension fund or a preservation fund or retirement annuity. The discussion will also include the adoption of the clean break principle by other pension funds that are not governed by the different legislation.

2.2 The Divorce Act

The position changed after the amendment of the Divorce Act 70 of 1979. The Divorce Amendment Act 7 of 1989 introduced into our law the concept of the sharing of pension

⁴³ See Chapter One para 1.1 and 1.2.

⁴⁴ Piet Van Niekerk, *A Practical Guide to Patrimonial Litigation in Divorce Actions* (LexisNexis 2011) para 7.2.4.

⁴⁵ Marumoagae, 'Can a Non-member Spouse Protect his or her Interest' 316.

⁴⁶ Heaton and Kruger, *South African Family Law* 130; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 70 and 74.

⁴⁷ Clement Marumoagae, 'Breaking up is hard to do, or is it? The clean break principle explained' (2013) 535 *De Rebus* 38, 39.

interests upon divorce where one of the spouses is a member of a pension or provident fund. The relevant legislation emanates from recommendations made by the South African Law Commission in its report issued in October 1986 titled, the *Investigation into The Possibility of Making Provision for a Divorced Woman to Share in The Pension Benefits of Her Former Husband*.⁴⁸ The Commission made an observation that ‘no provision existed in our law at the time in terms of which a divorced spouse had any claim to any portion of the retirement fund benefits of the spouse whom he or she divorced’. The Commission also recognised that the retirement fund benefits of a member of a retirement fund form an important part of the member’s assets.⁴⁹ The pension fund may be the largest asset in a divorce next to the marital home.⁵⁰

The Divorce Amendment Act came into operation on 1 August 1989. It introduced subsections (7) and (8) into section 7 of the Divorce Act. The Amendment deemed a member's pension interest as an asset in his or her estate or in the joint estate if married in community of property. Consequently, the pension interest became eligible for division in the event of a divorce.⁵¹ Sections 7(7) and 7(8) of the Divorce Act apply to the dissolution of all marriages entered into in community of property, marriages out of community of property entered into before 1 November 1984, and marriages out of community of property with the application of the accrual system. However, they do not apply to marriages entered into out of community of property without the accrual system (i.e. marriages subject to complete separation of property) concluded after 1 November 1984.⁵²

⁴⁸ South African Law Commission, *Discussion Paper 77 (Project 112) Sharing of Pension Benefits* (SALC 1998) 9 para 1.1.

⁴⁹ South African Law Commission, *Project 112 Sharing of Pension Benefits* (SALC 1999) para 1.1.

⁵⁰ South African Law Reform Commission, *Issue Paper 34 (Project 100E) Review of Aspects of Matrimonial Property Law* (SALRC 2018) 29.

⁵¹ Clement Marumoagae, ‘A non-member spouse's entitlement to the member's pension interest’ (2014) 17(6) *PELJ* 2488, 2491.

⁵² Section 7(7)(c) of the Divorce Act; Clement Marumoagae, ‘Prejudice emanating from non payment of pension interests due to what is contained in or omitted from divorce decrees’ (2018) 51(1) *De Jure* 102, 102-3.

Section 7(7) establishes a statutory mechanism allowing the division or sharing of the member spouse's pension interest when the member divorces. This provision transforms the pension interest into an asset in the estate of the member spouse even though it is typically not a patrimonial asset in the marriage by deeming it as such for divorce-related purposes.⁵³ This provision creates a legal fiction wherein a mere expectation or *spes* to a future asset is treated as an existing asset within a party's estate during divorce proceedings. Importantly, this treatment is applicable exclusively for determining the patrimonial consequences of the divorce.⁵⁴ Section 7(7)(a) and (c) of the Act explicitly states that a spouse's pension interest is deemed to be part of his or her assets for purposes of determining the patrimonial benefits to which the spouses may be entitled in the context of divorce unless the spouses married on or after 1 November 1984 with an antenuptial agreement specifying for complete separation of property.⁵⁵ In South African law, spouses have an option to enter into a settlement agreement, often known as a deed of settlement or consent paper, to govern the consequences of their divorce. This agreement may be made an order of court.⁵⁶ Therefore, in some instances, in terms of a settlement agreement, the pension interest is not divided between the spouses, but it is brought into account to determine the net value of the estate of the member spouse, in accordance with the relevant matrimonial property system. In lieu of a portion of the pension interest, the non-member spouse may receive compensating assets during the division of the assets.⁵⁷ If the spouses cannot reach agreement, the court has the authority to issue an order that any portion of the pension interest of the member spouse which is allocated to the non-member spouse to be paid by the pension fund when the pension becomes payable.⁵⁸

When the Commission put forward the changes to the legislation, it faced the challenging issue of determining how to establish the value of a member's pension interest at the date

⁵³ Marumoagae, 'Prejudice emanating from non payment of pension interests' 102.

⁵⁴ Van Niekerk, *A practical guide to patrimonial litigation* para 7.2.4.1

⁵⁵ Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 74.

⁵⁶ Section 7(1) of the Divorce Act; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 86.

⁵⁷ SALC, *Discussion Paper Sharing of Pension Benefits* 10 para 1.4

⁵⁸ Section 7(8) of the Divorce Act 70 of 1979.

of the divorce. The Commission recognised the complexity of this task and believed that devising a single formula to accurately assess the actual value of a pension interest before pension benefits become payable according to the fund's rules would be extremely difficult, if not impossible to implement.⁵⁹ In terms of the definition of 'pension interest' read with the definition of 'pension fund' in section 1 of the Divorce Act 70 of 1979, the amount that is deemed to be the spouse's pension interest is calculated as follows:

- (a) If the spouse is a member of a pension fund as defined in section 1 of the Pension Funds Act 24 of 1956, his or her pension is the benefit to which he or she would have been entitled had he or she terminated his or her membership of the fund on the date of the divorce by resigning from his or her employment.

- (b) If the spouse is a member of a retirement annuity fund his or her pension interest is equal to all contributions he or she made to the fund up to the date of the divorce together with annual simple interest on those contributions calculated at the rate prescribed in terms of the Prescribed Rate of Interest Act 55 of 1975, provided that such interest may not exceed the fund's return on the non-member spouse's portion of pension interest.⁶⁰

A distinction is made between the types of members mentioned in paragraphs (a) and (b) of that section. Paragraph (a) refers to a member of a pension fund excluding a retirement annuity fund, whilst paragraph (b) refers to a member of a retirement annuity fund which was genuinely established to provide life annuities for the members of the fund and qualifies as a pension fund.⁶¹

The courts have been granted discretionary powers under the Divorce Act as section 7(8)(a) provides that when making a divorce order, the court may make an order compelling the member spouse's pension fund to assign and pay any part of the pension

⁵⁹ SALC, *Discussion Paper Sharing of Pension Benefits* 9 para 1.2.

⁶⁰ Heaton and Kruger, *South African Family Law* 131; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 75.

⁶¹ Van Niekerk, *A Practical Guide to Patrimonial Litigation* para 7.2.4.2.

interest that is due to the non-member spouse directly to the non-member when the pension accrues to the member.⁶² The Act also empowers the court to direct the registrar of the court to notify the pension fund or retirement fund to make such payment to the non-member spouse as a result of the parties' divorce.⁶³ Furthermore, the section outlines an administrative procedure that the court registrar should notify the retirement fund to endorse the pension records of the member spouse, assign a portion of the pension interest to the non-member spouse, and require the fund to furnish written proof of such endorsement within one month of receipt of the notification.⁶⁴

The amended Divorce Act led to several challenges and uncertainties, prompting concerned individuals or groups to submit representations to the Department of Justice. Subsequently, these concerns were brought to the attention of the Commission for further examination and consideration.⁶⁵ Section 7(8)(a) of the Divorce Act did not effectively introduce the clean break principle through the immediate payment of a share of the pension interest to the non-member spouse after divorce as it was subject to a suspensive condition that the pension interest shall be payable when the pension benefit accrues to the member.⁶⁶ Ordinarily, this meant that the non-member spouse had to wait until such time as the member became entitled to the benefit.⁶⁷ A significant shortcoming of the Divorce Act amendments was the absence of provisions regarding the clean break principle and the immediate payment of a share of the pension interest to the non-member spouse.⁶⁸

⁶² Heaton and Kruger, *South African Family Law* 134; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 77; Marumoagae, 'Breaking up is hard to do, or is it?' 39.

⁶³ Marumoagae, 'Prejudice emanating from non payment of pension interests' 102.

⁶⁴ Section 7(8)(a)(i) and (ii) of the Divorce Act; Marumoagae, 'A non-member spouse's entitlement' 2494.

⁶⁵ SALC, *Discussion Paper Sharing of Pension Benefits* 14 para 1.6.

⁶⁶ Marumoagae, 'A non-member spouse's entitlement' 2491.

⁶⁷ Van Niekerk, *A Practical Guide to Patrimonial Litigation* para 7.2.4.3; Marumoagae, 'A non-member spouse's entitlement' 2489.

⁶⁸ Clement Marumoagae, 'A Critical Discussion of a Pension Interest as an Asset in the Joint Estate of Parties Married in Community of Property' (2014) 1 *Speculum Juris* 55, 64.

2.3 The Pension Funds Act

In June 1999, the South African Law Commission provided an investigation report titled 'Sharing Pension Benefits' and recommended that the pension benefits be treated in accordance with the 'clean break' principle. The Commission held a view that it is desirable to make provision for the division of pension interest in specific legislation, separate from the present property provisions of the Divorce Act.⁶⁹ The underlying principle of this legislation is that a pension interest accumulated in respect of a member of a pension fund during the member's marriage should be shared equally between the member and his or her spouse in the event of a divorce.⁷⁰ Despite this, spouses should retain the freedom to exchange other assets in lieu of a right to retirement fund benefits.⁷¹

Having regard to the recommendations made by the Commission, section 37D of the Pension Funds Act 24 of 1956 was duly amended by section 28 of the Pension Funds Amendment Act 11 of 1997 which came into effect on 13 September 2007. In terms of the amendments, a new paragraph (e) was added to section 37D of the Pension Funds Act. This paragraph includes, inter alia, a provision that the pension interest mentioned in section 7(8)(a) of the Divorce Act is deemed to be a pension benefit which accrues to the member on the date of the divorce order.⁷² This section effectively accelerates the date of accrual of the benefit to the member spouse and consequently, the date on which the divorce benefit accrues to the non-member spouse.⁷³ These amendments came into operation with effect from 13 September 2007. Thus, a non-member spouse with a divorce order could approach the fund for payment or transfer into their own fund held in their name without having to wait for the member spouse to exit the fund.⁷⁴ Section 37D(4) brings about the clean break arrangement between the divorcing spouses; it guarantees that the percentage of the pension interest awarded by the divorce court to the non-

⁶⁹ SALC, *Discussion Project Sharing of Pension Benefits* 44 para 4.1.

⁷⁰ SALC, *Discussion Project Sharing of Pension Benefits* 45 para 4.6.

⁷¹ SALC, *Discussion Project Sharing of Pension Benefits* 44 para 4.2.

⁷² Marumoagae, 'A non-member spouse's entitlement' 2492-3.

⁷³ Clement Marumoagae, 'A non-member spouse's entitlement to the member's pension interest' (2014) 17(6) *PELJ* 2487, 2493.

⁷⁴ Van Niekerk, *A practical guide to patrimonial litigation* para 7.2.4.3; Marumoagae, 'Prejudice emanating from non payment of pension interests' 103.

member spouse becomes immediately eligible for payment at the time of the divorce.⁷⁵ The non-member spouse will be entitled only to his or her part of the pension interest, subject to the marital regime applicable to the parties' marriage.⁷⁶

However, to address the confusion on whether these amendments had retrospective application, another amendment was introduced and became effective on 1 November 2008. The amendment explicitly affirmed that it has retrospective effect, clarifying the application of the changes.⁷⁷ In terms of section 16(c) of the Financial Services Laws General Amendment Act 22 of 2008, it is now deemed that, where parties were divorced prior to 13 September 2007, and for purposes of section 7(8) of the Divorce Act, the member of a pension fund has reached the date of membership termination or retirement on 13 September 2007. Consequently, a party to a divorce action granted before the amendments, who is entitled to a portion of his or her previous spouse's pension interest, may now claim payment accordingly.⁷⁸ Currently, section 37D(4)(a) of the Pension Funds Act provides that a deduction of a portion of the pension interest assigned to the non-member spouse shall be effected by the pension fund named in the order upon receipt of the order. The non-member spouse is entitled to request the pension scheme of his or her former spouse to make payment of the pension interest to him or her as per the divorce decree.⁷⁹ Section 37D(4) of the Pension Funds Act reads as follows:

- (a) For purposes of section 7 (8) (a) of the Divorce Act, 1979 (Act 70 of 1979), the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage is deemed to accrue to the member on the date on which the decree of divorce or decree for the dissolution of a customary marriage is granted, and, on the written submission of the court order by the non-member spouse-
 - (i) must be deducted by-
 - (aa) the pension fund or pension funds named in or identifiable from the decree;
 - (bb) the pension fund or pension funds to which the pension fund referred to in item (aa) transferred the pension interest referred to in the decree;

⁷⁵ Marumoagae, 'A non-member spouse's entitlement' 2497.

⁷⁶ Marumoagae, 'A non-member spouse's entitlement' 2493.

⁷⁷ Section 16(c) the Financial Services Laws General Amendment Act 22 of 2008.

⁷⁸ Van Niekerk, *A Practical Guide to Patrimonial Litigation* para 7.2.4.3

⁷⁹ Marumoagae, 'A non-member spouse's entitlement' 2497.

The Pension Fund must request the non-member spouse to elect if the amount to be deducted must be paid directly to him or her or be transferred to a pension fund on his or her behalf within 45 days after receipt of the submission of the court order by the non-member spouse. If the non-member spouse fails to make the election within 120 days of being requested to do so, the pension interest shall be deemed to be payable directly to him or her. The Pension Fund is then obligated to make payment to the non-member spouse's portion of the pension interest within 60 days of receiving his or her choice of payment.⁸⁰

Before the amendment of section 37D of the Pension Funds Act by the Financial Services Laws General Amendment Act of 2008, having a 'pension interest' in a preservation fund was not possible.⁸¹ Section 37D(6) of the Pension Funds Act inserted by the Financial Services Laws General Amendment Act 22 of 2008 and amended by the Financial Services Laws General Amendment Act 45 of 2013 specifically provides that despite paragraph (b) of the definition of 'pension interest' in section 1(1) of the Divorce Act:

the portion of the pension interest of a member or a deferred pensioner of a pension preservation fund or provident preservation fund, that is assigned to a non-member spouse, refers 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 fund terminated, or the member or the deferred pensioner retired on the date on which the decree was granted.

The amendments of the Financial Services Laws General Amendment Act 45 of 2013 came into operation on 28 February 2014. As a result of the amendments, it is now possible to have an order for the division of a member's pension interest under a preservation fund.⁸² If the member spouse's employment ceased before the divorce and the member transferred his or her accrued pension benefit to an approved pension preservation fund or provident preservation fund, the pension interest is equal to the benefits to which the spouse would have been entitled in terms of the rules of the

⁸⁰ Section 37D(4)(b)(i) to (iii) of the Pension Funds Act.

⁸¹ Kobus Hanekom, *Manual on Retirement Funds and Other Employee Benefits* (LexisNexis 2016) para 6.3.2.2(c).

⁸² Hanekom, *Manual on Retirement Funds* para 6.3.2.2(c).

preservation fund had his or her membership of the fund terminated on the date of the divorce.⁸³

The Pension Funds Amendment Act has brought relief in addressing one of the significant problems experienced by non-member spouses. Previously, they had to endure a waiting period until the member spouse became eligible to receive their pension benefits before receiving payment for their pension interest. It is important to note that this Act applies specifically to private pension funds.⁸⁴ Thus, the clean-break principle was mainly applicable to private sector retirement fund benefits on divorce. These legislative changes do not have a universal application to all pension funds as some public sector pension funds do not fall in its regulatory framework.⁸⁵ For instance, the Government Employees Pension Fund and the Post Office Retirement Fund are separate entities governed by specific legislation that differs from the Pension Funds Act. As a result, the pension interest of members belonging to these funds do not fall under the scope of the definition of pension interest as set out above.⁸⁶

2.4 Other Pension Funds

As alluded to, the clean-break amendments to the Pension Funds Act did not apply to public sector pension funds such as the Government Employees Pension Fund (GEPF), Transnet Pension Fund, Telkom Pension Fund and Post Office Pension Fund as well as the Temporary Employees Pension Fund, Associated Institutions Pension Fund (AIPF), and the Associated Institutions Provident Fund.⁸⁷ Consequently, spouses of members of these retirement funds could not share pension interests upon divorce. As a positive statement of intent by the legislature, section 14 of the Transnet Pension Fund Amendment Act 6 of 2007 amended section 13 of the Transnet Pension Fund Act 62 of 1990 to provide that the Registrar of Pension Funds may on request by the Transport

⁸³ Heaton and Kruger, *South African Family Law* 131-2.

⁸⁴ SALRC, *Issue Paper 34 (Project 100E) Review of Aspects of Matrimonial Property Law* 30.

⁸⁵ Marumoagae, 'Breaking up is hard to do, or is it?' 39.

⁸⁶ Heaton and Kruger, *South African Family Law* 132.

⁸⁷ Marumoagae, 'Breaking up is hard to do, or is it?' 39.

Pension Fund register the latter in terms of section 4 of the Pension Funds Act and the Transport Pension Fund shall be defined as a pension fund organisation as defined in section 1 of the Act. The implication of this amendment is that once the Transnet Pension fund is registered in terms of the Pension Funds Act, section 37D shall be applicable to the Fund and the non-member spouse will be entitled to claim pension interest in terms of the clean break principle. However, the Transport Pension Fund has not completed the registration process as required by the relevant section of the Pension Funds Act. Consequently, the clean break principle, which allows for immediate division of pension benefits upon divorce, does not apply to this fund.⁸⁸ The situation for Telkom employees was partially similar as a portion of its employees became members of the Telkom Retirement Fund established on 1 July 1995 and the fund is governed by the Pension Funds Act. Thus, the clean break principle was applicable to these members of the fund.⁸⁹ However, some other employees retained their membership with the Telkom Pension Fund,⁹⁰ which is a defined benefit fund that was created on 1 October 1991 in terms of the Post Office Amendment Act 85 of 1991 which is governed by the Post and Telecommunication-Related Matters Act 44 of 1958. Thus, section 37D of the Pension Funds Act is not applicable to the Telkom Pension Fund.⁹¹

The inequality arising from the distinction between spouses of members' funds as defined in the Pension Funds Act and spouses of members of the Government Employees Pension Fund and Post Office Retirement Fund was effectively challenged on constitutional grounds.⁹² In *Wiese v Government Employees Pension Fund*⁹³ the applicant was the former spouse of a member of the First respondent, a pension fund. In

⁸⁸ *Ndwandwe v Trustees of Transnet Retirement Fund and others* [2023] JOL 57931 (KZD) [16].

⁸⁹ Section 4(4)(i)-(v) of the Former States Posts and Telecommunications Reorganisation Act 5 of 1996; section 8A(2)(a) of the Post and Telecommunication-Related Matters Act 44 of 1958; Telkom, 'Annual Financial Statements' (21 May 2021) <<https://www.telkom-reports.co.za/reports/ar-2021/pdf/telkom-full-afs-2021.pdf>> accessed 5 July 2023 note 29 page 93.

⁹⁰ Telecommunications Pension Fund as defined in terms of section 9(1) of the Post and Telecommunication-Related Matters Act 44 of 1958.

⁹¹ Telkom, 'Annual Financial Statements' 91.

⁹² Heaton and Kruger, 'South African Family Law' 132; Heaton, 'The Law of Divorce and Dissolution of Life Partnerships' 76.

⁹³ [2012] 1 BPLR 1 (WCC).

March 2008, the Applicant was awarded a 25% share of her spouse's pension interest in the fund. The applicant was, however, unable to realise that interest, since the legislation governing the fund only allows for the realisation of such interest as and when an 'exit event' takes place in relation to the former spouse, such as resignation, termination of employment or death, and such had not occurred. The applicant sought an order asserting that the Government Employees Pension Law, Proclamation 21 of 1996, was inconsistent with section 9(1) of the Constitution of the Republic of South Africa, 1996, and was consequently invalid to that extent.⁹⁴ The High Court found that the failure of the law to provide for the application of the 'clean break' principle renders it to that extent inconsistent with section 9(1) of the Constitution inasmuch as it sanctions unequal treatment or differentiation of a class of persons, which differentiation bears no rational connection to a legitimate government purpose. Accordingly, the applicant is entitled to a declaration of constitutional invalidity and an appropriate remedy.⁹⁵ Furthermore, this matter of *Wiese v Government Employees Pension Fund*⁹⁶ was referred directly to the Constitutional Court for confirmation where the decision was affirmed, and it was held that the applicant had to approach the High Court to assert her right after unsuccessfully entreating the government to intervene. She successfully vindicated her constitutional right to equality and equal protection of the law when she challenged the validity of the Government Employees Pension Law. This law deprived her of capital growth on the portion of the pension interest allocated to the non-member spouse on divorce. The applicant was awarded a costs order even though the respondent had published the amended rules on the date of the hearing and there was no pronouncement on the validity of the fund rules.⁹⁷ In *Ngewu and another v Post Office Retirement Fund and others*⁹⁸ the Constitutional Court held that the provisions of section 10 of the Post Office Act dealing with the administrative and financial matters of the fund are unconstitutional because of the omission of the clean break principle. The court held that the differentiation between the fund and other funds on payment of divorce spouses' interest has no basis and does

⁹⁴ *Wiese v Government Employees Pension Fund and Others* [2012] 1 BPLR 1 (WCC) 2.

⁹⁵ *Wiese v Government Employees Pension Fund and Others* 7.

⁹⁶ 2012 (6) BCLR 599 (CC).

⁹⁷ *Wiese v Government Employees Pension Fund* 2012 (6) BCLR 599 (CC) 611.

⁹⁸ 2013 (4) BCLR 421 (CC).

not meet the requirements of equality before the law, equal protection and benefit of the law contained in section 9 of the Constitution. Furthermore, the declaration of invalidity was suspended for eight months to enable Parliament to cure the defect. If the constitutional defect was not remedied, section 24A of the Government Employees Pension Law, Proclamation 21 of 1996 would be read into the Post Office Act 44 of 1958 as section 10F thereof and would take effect.⁹⁹

As a result of the Constitutional Court triumph, the Pension Fund rules were amended to entitle spouses of members of the Government Employees Pension Fund and Post Office Retirement Fund to claim their share of their spouse's pension interest on divorce.¹⁰⁰ In 2011 and 2014 the rules of the Government Employees Pension Fund and Post Office Retirement Fund including the Telkom Retirement Fund were respectively amended to introduce the clean break principle in order to align the funds' rules with the private sector pension funds regulated by the Pension Funds Act.¹⁰¹ Section 24A(2) was inserted in the Government Employees Pension Law Proclamation 21 of 1996 by section 3 of the Government Employees Pension Law Amendment Act 19 of 2011. Likewise, the South African Post Office SOC Ltd Amendment Act 38 of 2013 inserted section 10F(2) into the Post and Telecommunication-Related Matters Act as amended. The provisions of section 24A and section 10F are similar to the provision of section 37D amendment of the Pension Funds Act in order to allow immediate payment for purposes of section 7(8) of the Divorce Act.¹⁰² If the spouse is a member of the Government Employees Pension Fund, the non-member's portion is deemed to accrue to the member on the date of the divorce, unless the spouses divorced before 14 December 2011, in which event the latter date shall be deemed as the date of accrual. If the spouse is a member of the Post Office Retirement Fund, the non-member's portion is deemed to accrue to the member on the date of the

⁹⁹ *Ngewu and another v Post Office Retirement Fund and others* 2013 (4) BCLR 421 (CC) 427.

¹⁰⁰ Heaton and Kruger, *South African Family Law* 132; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 76.

¹⁰¹ Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 79.

¹⁰² Van Niekerk, *A Practical Guide to Patrimonial Litigation* para 7.2.4.5; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 79.

divorce, unless the spouses divorced before 27 January 2014, in which event the latter date shall be deemed as the date of accrual.¹⁰³

The South African Law Reform Commission has confirmed that several pension funds do not apply the clean break principle due to unchanged legislative prescripts for such funds namely the Associated Institutions Pension Fund, Associated Institutions Provident Fund, Members of Statutory Bodies Pension Scheme, SA Public Library Pension Fund, Closed Pension Fund, Telkom Pension Fund, Transport Pension Fund, the Transnet Retirement Fund and the Transnet Second Defined Benefit Fund.¹⁰⁴ It is proposed that the legislature must include all public sector retirement funds in a new definition of retirement funds under the Pension Funds Act and the pension funds must be duly registered in terms of the Act in order for section 37D and the clean break principle to apply to all these funds.¹⁰⁵

2.5 Conclusion

The legislative amendment of the Divorce Act¹⁰⁶ introduced a provision in terms of section 7(7)(a) that a spouse's 'pension interest' is deemed to be part of his or her assets upon divorce for purposes of determining the patrimonial benefits to which the spouses may be entitled.¹⁰⁷ Furthermore, the courts are vested with discretionary powers in terms of the Divorce Act to make an order that a pension fund must assign and pay that part of the pension interest that is due to the non-member spouse directly to the non-member spouse.¹⁰⁸ However, the Divorce Act did not effectively introduce the clean break principle as the immediate payment of pension interest to the non-member spouse after divorce was not possible due to the suspensive condition that the pension interest was payable when the pension benefit accrued to the member.¹⁰⁹ The amendment of the Pension

¹⁰³ Heaton and Kruger, *South African Family Law* 133; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 79.

¹⁰⁴ South African Law Reform Commission, *Discussion Paper 160 (Project 100E) Review of Aspects of Matrimonial Property Law* (SALRC 2023) 229 para 9.167.

¹⁰⁵ SALRC, '*Discussion Project Review of Aspects of Matrimonial Property Law*' 230 para 9.169.

¹⁰⁶ The Divorce Amendment Act 7 of 1989

¹⁰⁷ Heaton and Kruger, *South African Family Law* 130.

¹⁰⁸ Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 77.

¹⁰⁹ Marumoagae, 'A non-member spouse's entitlement' 2491.

Funds Act through section 37D(4)(a) made the position more effective as it allows the non-member spouses of the members of the retirement fund to claim their share of the latter's pension interest at the date of divorce or immediately thereafter without any suspensive condition or contingencies provided in the retirement fund rules.¹¹⁰ This section allows the divorcing spouse to achieve a clean break arrangement and ensures that the percentage of the pension interest awarded to the non-member spouse becomes immediately payable at the time of divorce.¹¹¹ However, the Pension Funds Act is mostly applicable to private sector pension funds. Thus the clean break principle did not apply to other funds such as the Government Employees Pension Fund which were not governed by the Act.¹¹² The inequality caused by the differentiation between spouses of members of private sector funds as defined in the Pension Funds Act and spouses of members of the Government Employees Pension Fund and Post Office Retirement Fund was challenged on constitutional grounds and resolved through legislative amendments of the respective pension funds.¹¹³ These legislative changes have brought about the uniform application of the clean break principles in both the private and public sector pension funds save for several other pension funds that are yet to register under the Pension Funds Act.¹¹⁴

The next chapter looks at the development of case law, the interpretation of the legislation, and the approach of the courts in applying the 'clean break' principle on pension interest upon divorce.

¹¹⁰ Marumoagae, 'Prejudice emanating from non payment of pension interests' 103.

¹¹¹ Section 37D(4)(b)(i) to (iii) of the Pension Funds Act.

¹⁰⁹ Marumoagae, 'Breaking up is hard to do, or is it?' 39; Heaton and Kruger, *South African Family Law* 132.

¹¹³ Heaton and Kruger, *South African Family Law* 132-3; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 76-9.

¹¹⁴ SALC, 'Discussion Project Review of Aspects of Matrimonial Property Law' 229 para 9.167; *Ndwandwe v Trustees of Transnet Retirement Fund* [16].

CHAPTER 3: JURISPRUDENCE ON THE CLEAN BREAK PRINCIPLE

3.1 Introduction

This chapter aims to focus on the development of jurisprudence in relation to the interpretation of the legislation, and the approach taken by the courts regarding the implementation of the clean break principle in divorce cases. In South Africa, the judiciary has encountered numerous contentious issues seeking clarity on the interpretation of the legislation pertaining to the clean break principle concerning pension interests. These disputes brought before our courts have resulted in varying and contentious interpretations of sections 7(7) and 7(8) of the Divorce Act.¹¹⁵ This chapter will also assess the discretionary authority under the amended Divorce Act to issue an order directing the member spouse's pension fund to allocate and transfer a portion of the pension interest to the non-member spouse. The focus will be the extent of the court's discretion in making such orders in relation to the provisions of the Act.¹¹⁶

Previously, the judiciary had two dominant interpretations of section 7(7)(a) of the Divorce Act. Some courts held the view that non-member spouses can enjoy this benefit only if a court grants an order in respect of the pension interest as part of the divorce order. It was argued that a non-member spouse is forever excluded from sharing in the pension interest of a member spouse if the court pronouncing the divorce does not make an order under section 7(7)(a), as such an order is constitutive.¹¹⁷ The second view that was taken by other courts is that the order the court makes under the section is declaratory and therefore does not prevent a non-member spouse from subsequently claiming a portion of the member spouse's pension interest. The absence of a section 7(7)(a) order did not bar a non-member from sharing in the member's pension interest. The court does not establish a non-member's right to share in pension interest; it merely declares the right.¹¹⁸ Eventually, the Supreme Court of Appeal settled the argument on whether a non-member spouse is entitled to claim a portion of the member spouse's pension interest after the

¹¹⁵ Mothokoa Mamashela, 'A Review of the Problems encountered by a Non member Spouse in accessing their half share of the Pension Interest during Divorce in South Africa' (2018) 51(1) *De Jure* 17, 19.

¹¹⁶ Jacqueline Heaton, 'The proprietary consequences of divorce' in Heaton J *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (1st edn, Juta 2014) 77.

¹¹⁷ Mamashela, 'A Review of the Problems encountered by a Non member Spouse' 19.

¹¹⁸ Mamashela, 'A Review of the Problems encountered by a Non member Spouse' 20.

dissolution of the marriage.¹¹⁹ This Chapter will also deal with cases where a pension interest has been converted into a pension benefit that accrues to or becomes property of the spouse before the finalisation of divorce but during the subsistence of the marriage, which falls into his or her estate or into the joint estate if the spouses are married in community of property.¹²⁰

3.2 Jurisprudence on the Clean Break Principle

3.2.1 *The Discretion of the Courts*

Most of the rulings confirmed that the implementation of section 7(8)(a) of the Divorce Act grants the courts discretionary powers to issue an order concerning the pension interest, which directs the pension fund of the member spouse to make payment to the non-member spouse of a portion of the pension interest.¹²¹ In *JW v SW*¹²² the court held that section 7(8)(a) of the Divorce Act conferred a discretion on the court when contemplating an order based on this provision. This discretion must be exercised judiciously in consideration of all relevant factors, particularly fairness. Nevertheless, in *casu* the court found that it was fair and just, under the specific circumstances that no order be made in terms of section 7(8)(a) of the Act.¹²³ In another matter, *M v M*,¹²⁴ the court held that the purpose of section 7(8)(a)(i) is to empower the court to implement the division of the joint estate by ordering a pension fund to acknowledge that division and to pay or allocate a portion of the pension interest for the non-member spouse. The authority bestowed upon the court is extraordinary as it enables a court to issue a binding order on an entity or juristic person that is not directly involved in the legal proceedings, which is the pension

¹¹⁹ *Ndaba v Ndaba* 2017 (1) SA 342 (SCA).

¹²⁰ *De Kock v Jacobson and Another* 1999 (4) SA 346 (W); *Elesang v PPC Lime Limited and Others* (1076-2006) [2006] ZANHC 73 (15 December 2006); *Eskom Pension and Provident Fund v Krugel and Another* 2012 (6) SA 143 (SCA); Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 79-80.

¹²¹ *Sempapalele v Sempapalele and Another* 2001 (2) SA 306 (O); *Maharaj v Maharaj and Others* 2002 (2) SA 648 (D); *Chiloane v Chiloane* (27836-06) [2007] ZAGPHC 183 (7 September 2007); *JW v SW* 2011 (1) SA 545 (GNP); *Fritz v Fundsatwork Umbrella Pension Fund and Others* 2013 (4) SA 492 (ECP).

¹²² *JW v SW* 2011 (1) SA 545 (GNP).

¹²³ *JW v SW* 551G-J.

¹²⁴ *M v M* 2016 ZALMPPHC 2 (17 June 2016).

fund.¹²⁵ In the absence of such an order, the non-member spouse cannot enforce a claim for such pension interest against the pension fund concerned.¹²⁶ In *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer*,¹²⁷ the court described the discretionary powers of section 7(8)(a) of the Divorce Act. The court held that the definition of 'pension interest' not only defines what falls within the scope of the court's power under section 7(8)(a) but also restricts it. Once a portion of the pension interest of the member spouse becomes 'due' or 'is assigned' to the non-member spouse during the divorce proceedings, the court may order that such portion of the pension interest must be paid by the relevant pension fund to the non-member spouse when the pension benefits accrue. The court has a discretion to order that an endorsement be recorded in the pension fund's records, that the part of the pension interest thus allocated to the non-member spouse is 'so payable' to such spouse.¹²⁸

Our courts have demonstrated the importance of proper pleadings, well-drafted settlement agreements, and properly penned relief as per the ultimate order sought in the divorce action. In *ML v JL*¹²⁹ the parties were married in community of property. In response to the divorce action initiated by the plaintiff, the defendant sought a special order affirming his entitlement to a 50% share of what was described as the plaintiff's 'pension proceeds'.¹³⁰ The court held that the discretion entrusted to a divorce court in terms of subsection (8)(a) is strictly confined to a specific portion of a pension interest and its corresponding pension benefit.¹³¹ The court found that a significant practical challenge arose in this case, from the insufficient details provided regarding the pension interest. The pleadings, the pre-hearing minutes, and the actual hearing did not identify the specific pension or provident fund leaving a lack of crucial information.¹³² The court held that a discretion cannot be reasonably exercised in a state of nothingness where

¹²⁵ *M v M* [12].

¹²⁶ *M v M* [16].

¹²⁷ *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer* 2004 (5) SA 373 (SCA).

¹²⁸ *Old Mutual and Another v Swemmer* 386B-C.

¹²⁹ *ML v JL* (3981-20100 [2013] ZAFSHC 55 (25 April 2013).

¹³⁰ *ML v JL* [1-5].

¹³¹ *ML v JL* [23].

¹³² *ML v JL* [30].

essential information is absent or insufficient, particularly the details of the pension fund which must be placed before the court. Rampai J said: 'I find myself handicapped by the lamentable paucity of constructive information needed to craft an appropriate order in terms of section 7(8)'.¹³³ In *Swemmer* the Supreme Court of Appeal emphasised the importance of a well-drafted settlement agreement in compliance with subsections 7(7) and 7(8)(a) of the Divorce Act. In this case, the non-member spouse sought an enforcement order against the appellants to pay the proceeds of retirement annuity funds to her before they accrued to the member in terms of the fund rules.¹³⁴ The court held that this case cogently illustrates the critical importance of drafting deeds of settlement and divorce orders relating to pension interests with great care to ensure alignment with the provisions of subsections 7(7) and 7(8) of the Divorce Act. If this is done, the pension fund in question would only need to perform administrative functions to implement the order, without any adverse impact on the rights of the fund or the relationship between the fund and the member spouse. By meticulously crafting the documents, potential complications can be avoided; thus it would not be necessary to join the fund as a party to the divorce proceedings.¹³⁵

The Supreme Court of Appeal in *Ndaba v Ndaba*¹³⁶ reiterated that section 7(8) establishes a mechanism in terms of which the pension fund of the member spouse is statutorily obligated to make direct payment of that portion of the pension interest to the non-member spouse as at the date of divorce in accordance with section 37D(1)(d)(i) of the Pension Funds Act 24 of 1956. The non-member spouse is relieved of the duty to look to the member spouse for payment of their share of the pension interest with all its associated risks.¹³⁷ Nevertheless, the courts also provide the non-member spouses with a right to claim their portion of the pension interest directly against the member spouse where the divorce order or settlement agreement is not issued in accordance with section 7(8)(a) and it does not identify the pension fund in terms of section 37D(4)(a) of the

¹³³ *ML v JL* [33].

¹³⁴ *Old Mutual and Another v Swemmer* 379I-J.

¹³⁵ *Old Mutual and Another v Swemmer* 387C-E.

¹³⁶ *Ndaba v Ndaba* 2017 (1) SA 342 (SCA).

¹³⁷ *Ndaba v Ndaba* 352G - 353A.

Pension Funds Act. In *Macallister v Macallister*¹³⁸ the appellant and the respondent divorced in May 2004. Their settlement agreement, specifically clause 4.5, read that 'David [the respondent] has pension fund with his employer and agrees that Lynn [the appellant] will be entitled to 50% of the amount thereof, calculated as at the date of divorce'. Subsequently, on 31 August 2006, the respondent was medically boarded from his employment, and he was paid out his pension proceeds. The court ruled that the relevant clause in the settlement agreement imposed an obligation on the respondent to transfer to the appellant an amount equal to 50% of the respondent's pension interest as at the date of divorce when the benefit accrued to him. The respondent had failed to comply with this obligation as stated in the settlement agreement.¹³⁹

Notwithstanding other discretionary powers of the court in terms of the Divorce Act, section 7(1) encourages parties to negotiate a divorce settlement that must be reduced to a written agreement as this is aimed to provide a balance between the parties' autonomy and the state's interference in determining consequences of their intimate relationship.¹⁴⁰ However, the court cannot be compelled to grant an order in accordance with the terms of the settlement; instead, it has a discretion whether or not to grant a decree of divorce which incorporates the deed of settlement or consent papers with regards to the division of assets and payment of maintenance *inter partes*. The parties may agree to the division of their assets through a settlement which may be granted on condition the court is satisfied that it is not impossible, illegal, *contra bonos mores* or contrary to public policy.¹⁴¹ In *De Graaf NO v CS*¹⁴² the Supreme Court of Appeal found specific impugned clauses of a consent paper signed by the parties as settlement unambiguous and enforceable. The parties were married out of community of property without accrual in 1983 until they divorced on 2 August 1999. According to the terms of

¹³⁸ *Macallister v Macallister* [2013] JOL 30404 (KZD).

¹³⁹ *Macallister v Macallister* 9-10.

¹⁴⁰ South African Law Reform Commission, *Issue Paper 34 (Project 100E) Review of Aspects of Matrimonial Property Law* (SALRC 2018) 18 para 4.

¹⁴¹ Jacqueline Heaton and Hanneretha Kruger, '*South African Family Law*' (4th edn, LexisNexis 2015) 127; Jacqueline Heaton, 'The proprietary consequences of divorce' in Heaton J *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (1st edn, Juta 2014) 87.

¹⁴² 2023 (6) SA 374 (SCA).

the settlement the deceased member spouse agreed that the non-member spouse is entitled to 50% of the pension interest as at date of divorce from his pension fund and retirement annuity fund. In addition, the member spouse agreed to pay the non-member spouse an additional amount of 50% nett after tax of the retirement pension benefits from his pension fund and retirement annuity as at date of withdrawal.¹⁴³ The member spouse was substituted by the executor of the estate. However, a dispute between the non-member spouse and member spouse about the interpretation of clauses 9.4. and 9.7 and the additional payment was referred to court before the member spouse passed away on 24 December 2018.¹⁴⁴ On appeal the court held that in order to apply context to the agreement it is important to take into account the circumstances surrounding the terms of the consent papers. The parties divided their assets on a fifty-fifty basis and waived maintenance from each other despite their marriage regime. The court found that there is little doubt that the parties intended the respondent would be entitled to an additional amount over and above that which is provided for in the Divorce Act. The parties expressed their contractual intention in a language that is clear and unambiguous in light of all relevant facts and context of the consent papers. The deceased member spouse specifically agreed and undertook to payment of an additional amount to the non-member spouse at the time of his withdrawal from the fund in respect of his pension fund and retirement annuity fund.¹⁴⁵ The court held that, taking into account the language, context, and the purpose of the consent papers, it accords with the overall structure of clause 9. The contractual intention of the deceased and the respondent is clearly expressed and textually clear. The court held that the respondent is entitled to payment.¹⁴⁶ As indicated in the first chapter of this dissertation, section 7(7)(c) of the Divorce Act provides that a person married out of community of property before 1 November 1984 may be entitled to a portion of the member spouse's pension interest thus this settlement agreement is not impossible, it is lawful, and it is not contrary to public policy.¹⁴⁷

¹⁴³ *De Graaf NO v CS 2023 (6) SA 374 (SCA) 337-8.*

¹⁴⁴ *De Graaf NO v CS 337.*

¹⁴⁵ *De Graaf NO v CS 382.*

¹⁴⁶ *De Graaf NO v CS 383-4.*

¹⁴⁷ See Chapter One para 1.1.

3.2.2 *The Right to Claim a Portion of a Pension Interest*

As alluded to in the introduction, there is disjuncture in the decisions made by the High Courts. Some courts held the view that an order in terms of section 7(7)(a) is required as the order confers a right to a portion of the member spouse's pension interest on the non-member spouse. Because the order is constitutive, the non-member spouse must obtain a divorce decree in the court of first instance that defines his or her right to a portion of the member's spouse pension interest. Upon failure to do so, the non-member spouse will be barred from claiming such a right.¹⁴⁸ In the matter of *Sempapalele v Sempapalele*¹⁴⁹ the applicant and the first respondent were married in community of property but got divorced through a court order that incorporated a deed of settlement. The deed of settlement outlined a blanket division of their joint estate but did not list the assets nor specify how the assets should be shared. Sometime after the divorce, the applicant found a bank statement of the first respondent reflecting a substantial credit including pension benefits. The applicant then filed an application seeking half of the balance reflected in the statement.¹⁵⁰

The court in *Sempapalele* confirmed that before the introduction of section 7 of the Divorce Act, the prevailing legal position was that a pension interest was not considered as an asset of the spouse who is a member of a pension fund and hence it was not regarded as part of the joint estate of such member and his spouse.¹⁵¹ The court held that section 7 was introduced to enhance and refine the existing law. The section does not, however, abolish the existing law but creates a window of opportunity and a mechanism for parties involved in divorce proceedings to access the pension interest of either spouse to achieve an equitable distribution of their assets. It provides that the pension interest of a party shall be deemed to be an asset in his estate for that purpose. This means that while the pension interest is not generally treated as part of the joint estate during marriage, it is deemed to be part of the estate for the specific purpose of

¹⁴⁸ Mamashela, 'A Review of the Problems encountered by a Non member Spouse', 19.

¹⁴⁹ *Sempapalele v Sempapalele* 2001 (2) SA 306 (O).

¹⁵⁰ *Sempapalele v Sempapalele* 309H-310E.

¹⁵¹ *Sempapalele v Sempapalele* 310E-F.

division upon divorce.¹⁵² The court compared pension with maintenance and followed the decision in *Schutte v Schutte*¹⁵³ in relation to maintenance claim in terms of section 7(1). Musi J held that it is settled law that the spouse seeking maintenance from the other must do so during the divorce proceedings and obtain the necessary order. Timely action during divorce proceedings is essential; she or he cannot do it after the dissolution of the marriage. Similarly, a spouse claiming a share in the pension interest of the other spouse must apply for and obtain an appropriate court order during the divorce proceedings.¹⁵⁴ The court found that the applicant failed to secure an order during the divorce proceedings awarding her a share in the respondent's pension interest in terms of section 7 of the Divorce Act. Thus, she could not subsequently get such an order.¹⁵⁵

In *Lamb v Lamb*,¹⁵⁶ the applicant sought an order to be paid 50% of the annuity policies. An application was heard seven years after the divorce order was granted. The applicant did not contend that the Act grants the court the authority to make these orders at a later date. The court held that subsections 7(7) and 7(8) of the Divorce Act stipulate that these orders can only be made by the court granting the decree of divorce. Consequently, a court cannot make these orders after the divorce matter has been officially concluded and finalised.¹⁵⁷ In *Kgopane v Kgopane and Another*¹⁵⁸ the applicant and the first respondent divorced on 8 March 2001. The divorce order provided for the division of the joint estate. The parties were unable to agree on the division of the assets in the joint estate. On 9 July 2009, the court granted an order appointing a liquidator with the powers to realize the assets of the joint estate. The applicant sought an order substituting the liquidator and also directing the respondent's pension fund to pay 50% of the pension interest to the applicant.¹⁵⁹ The court found that the applicant did not claim payment of the first respondent's pension interest in the summons, and the liquidator that was appointed by

¹⁵² *Sempapalele v Sempapalele* 311A-B.

¹⁵³ *Schutte v Schutte* 1986 (1) SA 872 (A).

¹⁵⁴ *Sempapalele v Sempapalele* 312D-E.

¹⁵⁵ *Sempapalele v Sempapalele* 312F-H.

¹⁵⁶ *Lamb and Another v Lamb and Others* 2002 JDR 0463 (T).

¹⁵⁷ *Lamb v Lamb* [15].

¹⁵⁸ *Kgopane v Kgopane and Another* (1819-2011) [2012] ZANWHC 58 (16 August 2012).

¹⁵⁹ *Kgopane v Kgopane and Another* [3-4].

the court after the divorce lacked authority concerning the pension interest matter. The court held that on a strict interpretation of section 7(8)(a) of the Divorce Act, it is apparent that only the court granting a decree of divorce may make an order that a part of the pension interest be paid to a non-member. While this interpretation might be perceived as unfair in cases where such an order was not obtained during divorce proceedings, the court emphasised its inability to deviate from the literal meaning of section 7(8)(a) of the Divorce Act.¹⁶⁰

Contrary to the decisions mentioned above, most High Court rulings preferred the view that the non-member spouse has an *ex lege* right to share in the pension interest and that the court merely declares what is trite law and that any court of law may grant such an order.¹⁶¹ In *Maharaj v Maharaj*¹⁶² the applicant and first respondent had been married in community of property but divorced in December 1996. The divorce order did not deal with the joint estate. The estate as it had existed on divorce had to be divided equally. The first respondent had retired, and his pension fund was about to pay him the pension benefits due to him. The applicant urgently applied for an interdict to prevent the bank as the second respondent from allowing the first respondent to withdraw the funds until the court could determine her right to half of the pension proceeds. The first respondent argued that as the applicant had not obtained an order in terms of section 7(8)(a) of the Divorce Act at the time of the divorce, she was now barred from making any such claim.¹⁶³ The court recognised that before the introduction of section 7 into the Act, a pension interest was not considered part of the joint estate for spouses married in community of property. Magid J held that section 7(7)(a) was presumably inserted in the Act to rectify what may have been regarded as an injustice to the spouse who did not have the pension interest. It states quite unequivocally that a pension interest is deemed to be part of the assets of a party in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled. Therefore, when dividing the joint estate of spouses married in community of property, it is appropriate to take into account the value of a

¹⁶⁰ *Kgopane v Kgopane and Another* [11].

¹⁶¹ Mamashela, 'A Review of the Problems encountered by a Non member Spouse', 20.

¹⁶² *Maharaj v Maharaj* 2002 (2) SA 648 (D).

¹⁶³ *Maharaj v Maharaj* 649 - 650.

pension interest held by one of the spouses as an asset in the joint estate as of the date of divorce.¹⁶⁴ The court found that the facts in *casu* differed from the circumstances in the case of *Sempapalele*. The key difference was that the joint estate as it existed at the date of the divorce had never actually been divided.¹⁶⁵

In the matter of *Chiloane v Chiloane*¹⁶⁶ the parties divorced on 7 May 2004 and their divorce order did not make provision for a settlement agreement on the division of the joint estate nor any provision on pension interest. The respondent obtained a default order in her application for division of the joint estate and a claim for half of the pension interest. The applicant sought a rescission or variation of the order and contended that the respondent did not raise the matter of the pension interest during the divorce proceedings and that she was now barred from making such a claim by way of motion proceedings.¹⁶⁷ The court held that where a spouse seeking a share in the pension interest of the other spouse failed to apply for and obtain a court order during the divorce proceedings in terms of section 7(7)(a), the spouse may do so by initiating motion proceedings after the divorce decree has been granted. The court may then use its authority in terms of section 7(8) to award such an order.¹⁶⁸ The court further held that the approach of the judiciary should be innovative and aimed at alleviating hardships rather than exacerbating them. Some of these hardships are occasioned by complex trial procedures which hinder people from access to justice. The courts can enable parties to have access to justice without deviating from the court rules.¹⁶⁹

In the Western Cape High Court in the matter of *Kotze v Kotze and another*,¹⁷⁰ an appeal was lodged against a dismissed application for an order declaring that the appellant is

¹⁶⁴ *Maharaj v Maharaj* 651.

¹⁶⁵ *Maharaj v Maharaj* 652.

¹⁶⁶ *Chiloane v Chiloane* (27836-06) [2007] ZAGPHC 183 (7 September 2007).

¹⁶⁷ *Chiloane v Chiloane* [6].

¹⁶⁸ *Chiloane v Chiloane* [8].

¹⁶⁹ *Chiloane v Chiloane* [9].

¹⁷⁰ *Kotze v Kotze and another* [2013] JOL 30037 (WCC).

entitled to 50% of the respondent's pension fund valued as at the date of divorce. The parties divorced on 8 September 2005 and their divorce order made no mention of the pension interest. The respondent retired several years after the divorce and, on 23 July 2011, he received his lump sum pension benefit which he invested for a monthly income.¹⁷¹ The court stated that the primary question was whether by operation of law, the joint estate of the appellant and the first respondent at the time of the divorce included the pension interest and whether the appellant has a legitimate claim to a portion of the pension interest.¹⁷² The court held that in divorce proceedings where spouses were married in community of property, and they did not address the division of pension interest, either through a settlement agreement or forfeiture order, each spouse still maintains the entitlement to a share in the pension or provident fund of the other. The share is determined as of the date of divorce as prescribed in section 7(7)(a) of the Divorce Act. The appeal was upheld.¹⁷³ It should be noted that the court did not consider whether or not the joint estate had already been divided.

On the contrary in *Fritz v Fundsatwork Umbrella Pension Fund and Others*¹⁷⁴ the Eastern Cape High Court reached a different conclusion after it confirmed that the joint estate had already been divided *inter partes*. The applicant was married in community of property to the late Stephen Fritz (the deceased). On 17 October 1992, the marriage was dissolved by court order. In terms of the decree of divorce, a division of the joint estate was ordered. No order was made in respect of the pension interest, and such had not accrued to the deceased. The deceased subsequently married the third respondent and remained married to her until he died on 10 July 2009. The applicant sought a declaratory order that she was entitled to one half-share of the pension interest of the deceased as at the date of the granting of the decree of divorce, together with interest thereon from the date of divorce to the date of payment of such portion of the pension interest.¹⁷⁵ The court followed the view expressed by Magid J in the case of *Maharaj*, that until the joint estate

¹⁷¹ *Kotze v Kotze* [3-5].

¹⁷² *Kotze v Kotze* [7].

¹⁷³ *Kotze v Kotze* [17-18].

¹⁷⁴ *Fritz v Fundsatwork Umbrella Pension Fund and Others* 2013 (4) SA 492 (ECP).

¹⁷⁵ *Fritz v Fundsatwork* 493-494.

is in fact divided, whether by agreement or otherwise, it is open to a court to make an order as envisaged by section 7(7) of the Divorce Act. The court held that once a joint estate has been divided in a divorce action whether by agreement or otherwise, a court cannot subsequently grant an order in terms of section 7(7) of the Divorce Act. Where there is no longer a joint estate to be divided the court lacks the authority and competency to make an order that would deem a pension interest as part of that joint estate.¹⁷⁶

In *Motsetse v Motsetse*¹⁷⁷ the court had to decide whether a pension interest of a party forms part of the joint estate of the parties and whether it is necessary that a claim regarding such pension interest be specifically pleaded. The applicant applied for a rescission of the divorce order which provided for the joint estate of the parties to be divided with the exception of the house and car.¹⁷⁸ The court held that when parties reach a mutual agreement through a deed of settlement and agree to a blanket division of a joint estate or when a court orders division of a joint estate, any pension interest held by those parties will automatically be included in the division as part of the joint estate. The court highlighted the distinction between orders that define the rights of the parties and orders aimed at giving effect to such rights. Orders granting division of the joint estate and orders granting forfeiture to some extent are orders defining the right of the parties. Thereafter, if the parties cannot agree on the implementation of such orders defining their right, they can approach the court to grant an order either appointing a liquidator or deciding the issue as to the actual division of the estate. The latter types of orders do not necessarily need to be issued when the divorce decree is granted. The orders that a court is authorised and not obliged to make in terms of subsection 7(8) of the Divorce Act, are orders that are aimed at giving effect to the defined rights of the parties. The applicant was seeking an order to give effect to such right.¹⁷⁹ However, based on the facts, the court found that the appellant's application for rescission was premature as he failed to prove that a claim for a portion of the respondent's pension interest had been rejected by

¹⁷⁶ *Fritz v Fundsatwork* 497.

¹⁷⁷ *Motsetse v Motsetse* [2015] 2 All SA 495 (FB).

¹⁷⁸ *Motsetse v Motsetse* [2-5].

¹⁷⁹ *Motsetse v Motsetse* [21].

the pension fund.¹⁸⁰ In *M v M*¹⁸¹ the appellant appealed a decision of the Regional Court which granted a divorce order for a 'blanket division' of the joint estate. The appellant contended that the court *a quo* should have specifically ordered that the division of the joint estate shall include the parties' respective pension interests held in their respective pension funds.¹⁸² The court held that, in terms of sections 7(7) and 7(8), if a person is married in community of property the pension fund interest is an asset in the joint estate of which that person and the non-member spouse each has an undivided half share. This simply means that *ex lege* the spouses inherently possess an undivided half share in the pension interest of each other.¹⁸³ The court also affirmed that the law as set out earlier in *Sempapalele* was no longer good law. Instead, the court aligned itself with the ruling in *Maharaj* which established that a spouse is not precluded from claiming a share of the other spouse's pension interest simply because the divorce order does not expressly refer to such pension interest.¹⁸⁴ The court found that the blanket division order granted by the court *a quo* did not negate the appellant's right to pursue her right to claim her share of the pension interest against the respondent.¹⁸⁵

In *Ndaba v Ndaba*, the Supreme Court of Appeal confirmed that the right to claim a portion of the member spouse's pension interest is not conferred by the court; the right exists by operation of the law and the court simply makes a declaratory order in respect of the right. In this case, the appellant obtained a divorce order incorporating a deed of settlement, which had a heading on movable and immovables. Under this heading, the deed provided that the joint estate shall be divided equally between the parties. The deed did not specifically deal with pension interests. The parties failed to agree on the distribution of assets. Thus, the appellant applied for an order that appoints a liquidator and a declaratory order that the parties are entitled to 50% of each other's pension interest. The

¹⁸⁰ *Motsetse v Motsetse* [26].

¹⁸¹ *M v M* 2016 ZALMPPHC 2 (17 June 2016).

¹⁸² *M v M* [1].

¹⁸³ *M v M* [10-11].

¹⁸⁴ *M v M* [25].

¹⁸⁵ *M v M* [31].

High Court rejected the application and dismissed the matter.¹⁸⁶ However, the Supreme Court of Appeal held that section 7(7)(a) of the Divorce Act is self-contained, operates independently, and is not made subject to the condition of section 7(8) of the Act. It deems a pension interest to be part of the joint estate for the exclusive purpose of determining the patrimonial benefits to which the parties are entitled at the date of their divorce. The entitlement of the non-member spouse to a share of the member spouse's pension interest as defined in the Act is not reliant on section 7(8) of the Divorce Act.¹⁸⁷ In essence, section 7(7)(a) operates autonomously and does not depend on section 7(8) for its implementation.¹⁸⁸ Petse JA further stated that:

“It would be inimical to the scheme and purpose of section 7(7)(a) if it only applies to the court granting a divorce makes a declaration that in the determination of patrimonial benefits to which the parties to a divorce action may be entitled, the pension interest of a party shall be deemed to be part of his assets”.¹⁸⁹

The court further held that granting such a declaration would amount to no more than echoing what section 7(7) decrees. For the same reasons, it was not necessary for the parties in this case to mention in their settlement agreement what was obvious, namely that their respective pension interests are part of the joint estate upon divorce which is to be shared equally between them.¹⁹⁰

The courts have elucidated the legal position of an appointed liquidator of the joint estate in relation to the authority designated in common cause as the receiver and liquidator in terms of the empowering order and the liquidator's legal authority to act on behalf of the joint estate for purposes of claiming pension interest. In *JK v Swart and Others*¹⁹¹ the applicant and the second respondent were married in community of property until they divorced on 26 February 2016.¹⁹² The second respondent held a pension interest in a pension fund which was deemed to be part of his estate assets and thus the joint estate

¹⁸⁶ *Ndaba v Ndaba* 345H-346C.

¹⁸⁷ *Ndaba v Ndaba* 352A-B.

¹⁸⁸ *Ndaba v Ndaba* 352B-C.

¹⁸⁹ *Ndaba v Ndaba* 352C-D.

¹⁹⁰ *Ndaba v Ndaba* 352D-E.

¹⁹¹ 2023 (6) SA 500 GJ.

¹⁹² *JK v Swart and Others* 2023 (6) SA 500 (GJ) 504.

for the determination as provided in section 7(8) of the Divorce Act read with section 37D(1)(d) the Pension Funds Act. The applicant did not seek an order, in terms of section 7(8) before the court granting the divorce order, that part of the pension interest held on behalf of the second respondent must be paid by the fund to the applicant as the non-member spouse.¹⁹³ Instead, the agreed terms of divorce included the appointment of the first respondent to act as receiver and liquidator of the joint estate with powers to sell and transfer the assets of the joint estate and recover proceeds thereof to be split between the spouses as set out in annexure A to the divorce order. The central issue to this matter is that the liquidator does not have the power to litigate on behalf of the joint estate except to obtain delivery of assets vested in the joint estate, to collect debts due to the joint estate and defend proceedings brought against the joint estate.¹⁹⁴ The liquidator produced a final liquidation and distribution account duly accepted by the parties, which provided that they would share a net value of R13 653 660.67 after deductions.¹⁹⁵ The applicant made an about-turn from the accepted final liquidation report and obtained a court order against the liquidator for failing to pay cash instead of the agreed tax-free transfer of liquid assets valued at R940 498.31 to a preservation fund initially nominated by the applicant. The only remaining asset at the time of litigation was the second respondent's pension interest with ISelect Pension Fund. The applicant subsequently lodged a contempt order against the liquidator.¹⁹⁶ The court held that pension fund benefits are different from corporeal and incorporeal assets of the joint estate that may be realised in liquidation as they are statutorily regulated. They may not be attached, reduced, or transferred. In terms of section 37A of the Pension Funds Act read with section 7(7) of the Divorce Act, the pension interest of the spouse is not an actual asset but it is deemed to be part of the spouse's assets. As it is not an asset, it cannot be dealt with under the liquidator's powers of receiving and liquidation as set out in the divorce order. The only manner in which one spouse can become a beneficiary in the pension fund of the other spouse is provided in the legislative scheme created by sections 7(7) and 7(8) of the Divorce Act. Therefore, the question that arises is whether a receiver and liquidator in a divorce would have *locus*

¹⁹³ *JK v Swart and Others* 505.

¹⁹⁴ *JK v Swart and Others* 504-5.

¹⁹⁵ *JK v Swart and Others* 505.

¹⁹⁶ *JK v Swart and Others* 506-9.

standi to seek on his own behalf relief under the Act.¹⁹⁷ The court held that by sections 7(7) and 7(8) of the Divorce Act allow for spouses' pension interest to be taken into account in determining patrimonial benefits. This is achieved through a provision which notionally treats the benefit as an asset of the joint estate for purposes of allowing the non-member spouse a right to receive part of the benefit due to the member spouse when it is paid out in the normal course of the policy.¹⁹⁸ A third party such a receiver and liquidator would not have *locus standi* to bring an application under section 7 unless this was specifically catered for in the empowering order. On any construction of the Divorce Act and the Pension Funds Act, and the order appointing the liquidator, he or she does not have power to force a member spouse to withdraw funds from the pension fund or force the pension fund to release such funds against the wishes of its member.¹⁹⁹

3.2.3 *Accrual into the Estate*

In *Eskom Pension and Provident Fund v Krugel and Another*,²⁰⁰ the first respondent's husband resigned from Eskom in 1993 and chose to defer his pension benefits in the appellant pension fund, making him a deferred pensioner. In September 2001 he divorced his wife. The divorce decree stipulated that his wife was entitled to 25% of the husband's pension interest as calculated on the date of divorce. The pension fund refused to register an endorsement based on their interpretation of section 7(7) and section 7(8) of the Divorce Act, namely that there was no pension interest forming part of the husband's assets that could be assigned to the wife because the husband had already resigned at the date of divorce, and his pension was deferred which fell outside the scope of the provisions of the Divorce Act.²⁰¹ The Supreme Court of Appeal held that the benefit had accrued and that section 7(7) and (8) is not applicable to a pension benefit that has accrued to a member spouse. The Divorce Act provides a specific and limited definition of pension interest, as it refers to the value of the interest considered on the date of his

¹⁹⁷ *JK v Swart and Others* 510-11.

¹⁹⁸ *JK v Swart and Others* 511.

¹⁹⁹ *JK v Swart and Others* 511-12.

²⁰⁰ *Eskom Pension and Provident Fund v Krugel and Another* 2012 (6) SA 143 (SCA).

²⁰¹ *Eskom Pension Fund v Krugel* 146E-147C.

divorce, that a member of a pension fund has in the pension benefit that will accrue to him as a member of such fund at a certain future date.²⁰² Maya JA stated that:

“Once the pension benefit has accrued, beyond the date of divorce, at which time the pension interest converts into a pension benefit, the provisions of section 7(7) and section 7(8) are no longer applicable”.²⁰³

As discussed in the previous chapter,²⁰⁴ it should be noted that this decision was made before the amendment of the Pension Funds Act on 28 February 2014, which now makes it possible to have an order for the division of a member’s pension interest under a preservation fund.²⁰⁵

In *De Kock v Jacobson and Another*,²⁰⁶ the applicant was a former spouse of the second respondent to whom she had been married in community of property. The applicant had retired prior to the divorce and had thus ceased to be a member of the pension fund to which he had belonged, his pension interest having been converted upon his retirement into a right to a pension benefit in a form of a cash lump sum and a monthly pension annuity. In an application for a determination of whether the applicant's right to monthly pension payments was an asset in the joint estate, the court held that the applicant's right to the pension had accrued before the divorce, specifically a month after the applicant's retirement in July 1996. As such, section 7(7) of the Divorce Act did not apply to this situation since it only pertains to a pension interest and not to accrued rights. In other words, the pension interest had already been converted into a right.²⁰⁷ The court further held that there was no fundamental reason why the accrued right to a pension, held by one of the parties to a marriage in community of property should not be considered as part of the community of property existing between the parties before their divorce.²⁰⁸ In

²⁰² *Eskom Pension Fund v Krugel* 149B-C.

²⁰³ *Eskom Pension Fund v Krugel* 149C-D.

²⁰⁴ See Chapter Two para 2.3.

²⁰⁵ Kobus Hanekom, *Manual on Retirement Funds and Other Employee Benefits* (LexisNexis 2016) para 6.3.2.2(c); See Chapter Two para 2.3.

²⁰⁶ *De Kock v Jacobson and Another* 1999 (4) SA 346 (W).

²⁰⁷ *De Kock v Jacobson* 349A-C.

²⁰⁸ *De Kock v Jacobson* 349G-H.

other words, the accrued pension right should be regarded as an asset of the joint estate and be subject to division between the parties during the divorce proceedings.

In *Elesang v PPC Lime Limited and Others*,²⁰⁹ the applicant and the third respondent were married in community of property. The applicant sought an interdict, pending the finalisation of the divorce action, that directed the second respondent to pay half of the amount of the third respondent's pension interest into the trust account of the applicant's attorney.²¹⁰ The second respondent opposed the application on the basis that the pension benefit had already accrued to the first respondent before the divorce date and the applicant would not be entitled to the relief sought in terms of sections 7(7) and 7(8) of the Divorce Act.²¹¹ The court affirmed that these provisions solely apply to a pension interest that has not yet accrued as at the date of the divorce and is still held by a party who remains a member of the particular pension fund at the time of divorce. However, this does not imply that the applicant will not have any entitlement to any portion of the pension benefits that have already accrued to the third respondent.²¹² The court further emphasised that a distinction must be drawn between a pension interest that has not yet accrued and one which has accrued and been converted into a pension benefit. The fact is that, in principle at least, the applicant will be entitled to share the accrued pension benefit as one-half of the nett value of the joint estate.²¹³ The court granted an interdict on the basis that it is meant to secure part of the benefits to enable the court granting the divorce decree to make a determination.²¹⁴

Although there seems to be a solution for pension benefits that have accrued or have been paid to the member spouse, in the matter of *CNN v NN*,²¹⁵ the applicant took a different approach as opposed to an interdict application. The court dissolved the parties'

²⁰⁹ *Elesang v PPC Lime Limited and Others* (1076-2006) [2006] ZANCHC 73 (15 December 2006).

²¹⁰ *Elesang v PPC Limited* [1-4].

²¹¹ *Elesang v PPC Limited* [8].

²¹² *Elesang v PPC Limited* [18-19].

²¹³ *Elesang v PPC Limited* [21-22].

²¹⁴ *Elesang v PPC Limited* [43].

²¹⁵ *CNN v NN* [2023] 2 All SA 365 (GJ).

marriage on 14 October 2022 and the parties signed a deed of settlement agreement which was incorporated in the divorce order. The deed of settlement provided that the applicant was entitled to a portion of the respondent's pension interest. The respondent resigned from his employment within two months after being served with the divorce summons. He was served on 18 March 2021 and exited his retirement fund on 7 May 2021. At the time the court granted the divorce order, the respondent was not a member of a retirement fund, and he did not have a pension interest from which the applicant could be allocated a portion.²¹⁶ Apparently, when the divorce order was granted, the respondent's pension benefits were still held by the fund. The applicant pursued the fund to claim payment of 50% of the respondent's pension interest. The fund clarified that the respondent's pension benefit had accrued to him, and he was no longer a member of the fund. Thus, the divorce order fell short of the legislative requirements, and it could not be enforced.²¹⁷ The applicant was advised by the fund and maintenance officer to provide an order directing the fund to pay a portion of the pension benefits as opposed to the pension interest to her.²¹⁸ The applicant brought an application to amend the divorce order which incorporated the settlement agreement by amending the phrase 'pension interest' and replacing it with 'accrued pension benefit'.²¹⁹ The court lamented the prejudice suffered by non-member spouses where the member spouse resigned immediately after being served with a divorce summons. The court highlighted a significant social issue regarding member spouses who exit their funds whilst entangled in divorce proceedings. Particularly, when members cash in their benefits or instruct their funds to purchase annuities using their accrued retirement benefits. This poses challenges for non-member spouses to claim their entitled share of pension interest on divorce. Marumoagae AJ stated that 'this conduct appears to be prevalent in practice and those who are prejudiced do not have the financial resources to bring these cases to the courts for adjudication'.²²⁰ The court held that the applicant cannot claim pension benefits that accrued before the divorce was ordered because section 7(8) of the Divorce Act only

²¹⁶ *CNN v NN 367* [3].

²¹⁷ *CNN v NN 367* [4].

²¹⁸ *CNN v NN 368* [5].

²¹⁹ *CNN v NN 368* [6].

²²⁰ *CNN v NN 375* [32].

deals with a benefit that accrues to the member spouse as a result of divorce. The variation sought by the applicant will fly in the face of section 7(8) of the Divorce Act and it will not be enforceable.²²¹ The application was dismissed.

According to the Divorce Act, a pension interest of a member spouse shall be deemed to be part of his or her estate for purposes of determining patrimonial benefits in a divorce action.²²² Where parties are married out of community of property such marriage shall be subject to the accrual system unless the latter is expressly excluded in the antenuptial contract.²²³ If the pension benefit accrues to the estate of a member spouse who is married out of community of property with the accrual system before the dissolution of marriage, the benefit will fall into the estate of the member spouse and the determination of the accrual will include the value of the pension benefit unless the pension benefit has been excluded from the accrual system.²²⁴ If a spouse who is married subject to the accrual system has a pension interest on divorce, the value of the pension interest will be deemed to be part of his or her estate and the value of the pension interest will be included for purposes of calculating the accrual in his or her estate unless the pension interest has been excluded from the accrual system.

3.3 Conclusion

Our courts have established that the Divorce Act has conferred a discretion on the courts in considering an order sought in terms of section 7(8)(a) of the Act, whilst this discretion must be exercised in a fair and just manner.²²⁵ It was also discovered that our courts initially had two dominant views about the non-member's right to pension interest. Some courts adopted a strict interpretation of section 7(8)(a) of the Divorce Act, which was that only the court granting a decree of divorce may make an order that a part of the pension

²²¹ *CNN v NN* 376-7 [34].

²²² Section 7(7)(a) of the Divorce Act.

²²³ Section 2 Matrimonial Property Act 88 of 1984.

²²⁴ Section 4(1)(a) and (b)(ii) of the Matrimonial Property Act.

²²⁵ *W v W* 2011 (1) SA 545 (GNP) 551G-J.

interest be paid to a non-member.²²⁶ Ultimately, the Supreme Court of Appeal resolved this matter and provided a precedent which affirms that the non-member spouse has a right to claim a portion of the member spouse's pension interest. The court held that it would be detrimental to the scheme and purpose of section 7(7)(a) if it is only the court granting a divorce that makes a declaration in the determination of patrimonial benefits to which the parties to a divorce action may be entitled to pension interest.²²⁷ The judiciary also confirmed that the non-member spouse may still be entitled, in the divorce action, to any part of the pension benefits which have accrued to the member spouse.²²⁸ The courts have also demonstrated that in cases where the pension benefit has already accrued to the member spouse before the divorce date, the non-member spouse would not be entitled to the relief sought in terms of sections 7(7) and 7(8) of the Divorce Act.²²⁹ However, as a principle of law, the non-member spouse will be entitled to share the accrued pension benefit as one-half of the nett value of the joint estate if the spouses are married in community of property.²³⁰

The courts have also noted that challenges are still experienced by non-member spouses where the member spouses withdraw their pension benefits before the divorce is finalised.²³¹ It is also noted that where spouses are married out community with the accrual system, the pension interest of a member spouse shall be deemed to be part of his or her estate for purposes of determining patrimonial benefits in a divorce action. Thus the value of the pension interest will be included for purposes of calculating the accrual in his or her estate unless the pension interest has been excluded from the accrual system.²³²

²²⁶ *Kgopane v Kgopane and Another* [11].

²²⁷ *Ndaba v Ndaba* 352C-D.

²²⁸ *Elesang v PPC Limited* [18-19].

²²⁹ *Elesang v PPC Limited* [4&8].

²³⁰ *Elesang v PPC Limited* [21-22].

²³¹ *CNN v NN* 375 [32].

²³² Section 7(7)(a) of the Divorce Act; Section 4(1)(a)(b)(ii) of the Matrimonial Property Act.

The next chapter will discuss the perspectives, analysis, arguments, and critiques provided by academic experts regarding the existing state of legislation and the judicial interpretation of the law in relation to the clean break principle in respect of pension interests.

CHAPTER 4: CRITICAL ANALYSIS OF THE CLEAN BREAK PRINCIPLE

4.1 Introduction

This chapter reflects on opined analysis, arguments, and criticism from academics about the legislation in its current form as well as the judicial interpretation of law, particularly the clean break principle in relation to pension interests. This chapter will deliberate on the submissions made by legal writers which may be used by legal practitioners and presiding officers to avoid or mitigate the risk of obtaining or granting a divorce order that is flawed or may be rejected as non-compliant for purposes of the clean break principle. The chapter shall also consider propositions for legislative amendments as solutions meant to resolve the gaps identified in the divorce and pension statutes regarding the application of the clean break principle.

Section 7(7)(a) of the Divorce Act 70 of 1979 provides that when determining the patrimonial benefits to which parties involved in divorce litigation may be entitled, the pension interest of the party who is a member of the pension fund shall be deemed to be part of such a party's assets.²³³ Furthermore, in terms of section 37D(4)(a) of the Pension Funds Act 24 of 1956, the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce granted in accordance with section 7(8)(a) of the Divorce Act is deemed to accrue to the member on the date on which the decree of divorce is granted. However, despite these statutory provisions, which one might be inclined to argue are clear if interpreted literally, our courts have adopted confusing and inconsistent approaches regarding when the pension interest accrues to the member spouse's estate in an out of community of property marriage subject to the accrual system or into the joint estate if the spouses are married in community of property.²³⁴ The South African Law Reform Commission has acknowledged that sharing pension interests on divorce remains a controversial matter and it has recently been subject to intense

²³³ See Chapter Three para 3.2.2.

²³⁴ Clement Marumoagae, 'A Critical Discussion of a Pension Interest as an Asset in the Joint Estate of Parties Married in Community of Property' (2014) 1 *Speculum Juris* 55, 55-56; Clement Marumoagae, 'A non-member spouse's entitlement to the member's pension interest' (2014) 17(6) *PELJ* 2488, 2502-3; Sections 2 and 14 of the Matrimonial Property Act 88 of 1984.

litigation.²³⁵ Academics and commentators have raised several complex issues and questions regarding sharing pension interests. The concerns raised include the following: Does a pension interest automatically form part of the spouse's estate or is it necessary for the non-member spouse to claim it? Can a divorced spouse who did not claim their pension interest do so after the joint estate has been divided? Is there a need for legislation to safeguard the non-member spouse's interest in the pension benefits accrued to the member spouse before divorce?²³⁶ Thus, in 2018 the Commission posed a question of whether it is necessary to have comprehensive reform with regard to this matter.²³⁷ On 28 August 2018, the Commission issued a paper inviting commentators to point out specific problems that need clarity or statutory reform. A comprehensive research result was presented in the discussion paper following this issue paper. The discussion paper was published in June 2023.²³⁸

4.2 Critical Analysis of the Clean Break Principle

4.2.1 Pension Interest as an Asset of the Member Spouse's Estate

There are certain types of marriages wherein the courts may consider a claim of pension interest by a non-member spouse once it forms part of the member spouse's estate, namely the marriage out of community of property without accrual concluded before 1 November 1984, a marriage out of community of property with the accrual system and a marriage in community of property. It terms of the Divorce Act parties married out of community of property without accrual concluded after 1 November 1984 are excluded.²³⁹ On 10 October 2023 in *EB v ER NO and others and a related matter*²⁴⁰ the Constitutional

²³⁵ South African Law Reform Commission, *Issue Paper 34 (Project 100E) Review of Aspects of Matrimonial Property Act* (SALRC 2018) 30 para 8; Clement Marumoagae, 'Can a Non-member Spouse Protect his or her Interest in the Member Spouse's accrued Pension Benefits before Divorce?' (2016) 37(2) *Obiter* 313, 318.

²³⁶ SALRC, *Issue Paper 34 (Project 100E) Review of Aspects of Matrimonial Property Act* (SALC 2018) 30-31 para 8; See Chapter Three para 3.1.

²³⁷ SALRC, *Issue Paper 34 (Project 100E) Review of Aspects of Matrimonial Property Act* (SALC 2018) 31 para 8.

²³⁸ SALRC, *Issue Paper 34 (Project 100E) Review of Aspects of Matrimonial Property Act* (SALC 2018) 2; South African Law Reform Commission, *Discussion Paper 160 (Project 100E) Review of Aspects of Matrimonial Property Law* (SALC 2023) iv.

²³⁹ Section 7(7)(c) of the Divorce Act 70 of 1979.

²⁴⁰ *EB v ER NO and others and a related matter* [2023] JOL 61189 (CC).

Court declared section 7(3) of the Divorce Act inconsistent with the Constitution and invalid to the extent that it fails to include marriages concluded on or after the commencement of the Matrimonial Property Act. The declaration of invalidity was suspended for twenty-four months to enable Parliament to cure the constitutional defect.²⁴¹ Pending the remedial action, the Constitutional Court severed the wording in section 7(3)(a) by striking out the words ‘before the commencement of the Matrimonial Property Act’. Therefore, the striking out order does not have retrospective effect but applies to dissolution of marriage from the date of the court order until the constitutional defect is remedied by Parliament.²⁴² It was held that there was a differentiation in that women in the old antenuptial contract are treated differently from women in the new antenuptial contract. Whilst the differentiation is not directly based on gender, its practical effect in the case of new antenuptial contract marriages is to prejudice women and benefit men disproportionately.²⁴³ It was found that section 7(3) indirectly discriminates against spouses on the grounds of gender.²⁴⁴ Therefore, in relation to the marriage out of community of property without accrual concluded before and after 1 November 1984, when determining the assets of a party in an action where a claim is made for the transfer of assets in terms of section 7(3) of Divorce Act, the pension interest is also included to determine the financial means of the parties.²⁴⁵ The pension interest may be redistributed to the non-member spouse in terms of section 7(3), once the court is satisfied that it is equitable and just due to the fact that the party in whose favour the order is granted has contributed directly or indirectly to the maintenance or increase of the estate of the other party.²⁴⁶ For purposes of redistribution and determination of patrimonial benefits, the pension interest is deemed to form part of the asset of the spouse’s estate.²⁴⁷ Where parties are married out of community of property with the accrual system the pension interest forms part of the estate of the member spouse unless it is expressly excluded in

²⁴¹ *EB v ER NO and a related matter* [150].

²⁴² *EB v ER NO and a related matter* [150].

²⁴³ *EB v ER NO and a related matter* [127].

²⁴⁴ *EB v ER NO and a related matter* [128].

²⁴⁵ Piet Van Niekerk, *A Practical Guide to Patrimonial Litigation in Divorce Actions* (LexisNexis 2011) para 7.2.4.1.

²⁴⁶ Section 7(4) of the Divorce Act 70 of 1979.

²⁴⁷ Section 7(7)(a) of the Divorce Act 70 of 1979.

the antenuptial contract.²⁴⁸ Based on the wording of section 3(1) of the Matrimonial Property Act, the accrual claim is an amount equal to half of the difference between the accrual of the spouses' respective estates. The accrual sharing is applied by giving the spouse whose estate shows a small accrual or no accrual at all, a claim against the other spouse for an amount equal to half of the difference between the accrual of the respective estates.²⁴⁹ Furthermore, in terms of section 7(8) of the Divorce Act, the court may make an order that a portion of the member spouse's pension interest should be assigned to the non-member spouse as part of the division of the accrual. The deeming provision of section 7(7)(a) of the Divorce Act is cognitive of the marriage regimes discussed above as it expressly refers to the spouse's assets and is divisible from his or her estate. However, it will be noted in the discussions below that there is a debate raised about section 7(7)(a) in that it does expressly refer to the joint estate in instances of a marriage concluded in community of property and the implications thereof.

4.2.2 Pension Interest as an Asset of the Joint Estate

Where parties are married in community of property, the value of the pension interest is added to the value of other assets that fall in the joint estate for purposes of division of the estate.²⁵⁰ A crucial question has been whether a pension interest automatically forms part of the member spouse's estate or whether it must be claimed by the non-member spouse during divorce.²⁵¹ Section 7(7)(a) of the Divorce Act provides that the pension interest of a party shall be deemed to be part of his or her assets subject to paragraphs (b) and (c), in the determination of the patrimonial benefits to which the parties to any divorce action may be entitled. There are different views on the interpretation of the legislation. Marumoagae argues that section 7(7)(a) is ambiguous, leading to conflicting

²⁴⁸ Section 4(1)(b)(ii) of the Matrimonial Property Act 88 of 1984; Van Niekerk, *A Practical Guide to Patrimonial Litigation* at para 7.2.4.1.

²⁴⁹ Section 4(1)(a) of the Matrimonial Property Act; Heaton and Kruger, *South African Family Law* 94; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 65.

²⁵⁰ Van Niekerk, *A Practical Guide to Patrimonial Litigation* para 7.2.4.1.

²⁵¹ Merike Pienaar, 'Does a non-member spouse have a claim on pension interest' (2015) 559 *De Rebus*, 38, 38.

decisions from different divisions of the High Court in South Africa.²⁵² This provision needs to be amended to be able to properly guide our courts when making a ruling on these matters. Marumoagae is of the view that the deeming provision is problematic in the sense that it does not regard the pension interest to be an asset in the joint estate. This means that due to the fact that the pension interest first needs to be deemed to form part of the estate of the member spouse, it does not automatically fall within the joint estate if parties are married in community of property. The deeming provision only comes into operation during divorce proceedings.²⁵³ He supports this view with the decision of *Sempapalele v Sempapalele*²⁵⁴ where the court held that deeming the pension interest to be an asset in the member's estate meant that the interest was not ordinarily part of the joint estate but would be such for purposes of the divorce.²⁵⁵

Davey submits that this section merely provides that the pension interest of a member spouse is deemed to form part of the assets of the joint estate, which includes various types of assets such as immovable, movable property, and other incorporeal assets, which stand to be divided.²⁵⁶ Furthermore, if the legislature intended to automatically grant a non-member spouse a portion of a member spouse's pension interest, section 7(7) would have been worded differently and section 7(8) would not have included a provision that a court granting a decree of divorce may make an order that a percentage of a pension interest is assigned to a non-member spouse, subject to a forfeiture order or a renunciation of such a right by a settlement agreement.²⁵⁷ In *ML v JL*²⁵⁸ the court ruled that an individual's pension interest was never considered an asset in the joint estate of the spouses who were married in community of property both before and after the

²⁵² Marumoagae, 'A Critical Discussion of a Pension Interest as an Asset' 56; *Sempapalele v Sempapalele and Another* 2001 (2) SA 306 (O); *Maharaj v Maharaj and Others* 2002 (2) SA 648 (D); *Chiloane v Chiloane* (27836-06) [2007] ZAGPHC 183 (7 September 2007); *JW v SW* 2011 (1) SA 545 (GNP); *Fritz v Fundsatwork Umbrella Pension Fund and Others* 2013 (4) SA 492 (ECP); See Chapter Three para 3.2.2.

²⁵³ Marumoagae, 'Can a Non-member Spouse Protect his or her Interest' 318.

²⁵⁴ *Sempapalele v Sempapalele* 2001 (2) SA 306 (O).

²⁵⁵ *Sempapalele v Sempapalele* 310E-F; Clement Marumoagae 318; See Chapter Three para 3.2.2.

²⁵⁶ Johann Davey, 'Pension interest and divorce K v K and another a critique' (2013) 534 *De Rebus* 26, 27.

²⁵⁷ Davey, 'Pension interest and divorce K v K' 27.

²⁵⁸ *ML v JL* (3981-20100) [2013] ZAFSHC 55 (25 April 2013).

enactment of section 7(7)(a) of the Divorce Act, and an individual's pension interest is still not classified as an asset in the joint estate of spouses married in community of property.²⁵⁹ Davey further states that the interpretation of section 7(7)(a) does not imply that the parties must deal with a pension interest in a written settlement agreement. Thus, failure to do so means that 50% of a pension interest automatically accrues to the non-member spouse, in the absence of a forfeiture order. He concludes that while a pension interest of a member spouse is deemed to form part of the assets that constitute the patrimonial benefits of the marriage, a non-member spouse's entitlement to a percentage of the pension interest only occurs when it is officially assigned to him or her in accordance with section 7(8).²⁶⁰ In the same vein, Van Niekerk advocates the view that a practical approach to section 7(7)(a) of the Act is that parties in a divorce are not by right entitled to a part of the other's pension interest, but that the value of the pension interest should merely be taken into consideration when determining the value of the assets of the estate.²⁶¹ In *Ndaba v Ndaba*,²⁶² the Supreme Court of Appeal rejected Davey's view. The majority judgment by Petse JA stated that:

'Section 7(7)(a) is self-contained and not made subject to section 7(8). It deems a pension interest to be part of the joint estate for the limited purpose of determining the patrimonial benefits to which the parties are entitled as at the date of their divorce. The entitlement of the non-member spouse to a share of the member spouse's pension interest as defined in the Act is not dependent on section 7(8) ... By inserting section 7(7)(a) the legislature intended to enhance the patrimonial benefits of the nonmember spouse over that which, prior to its insertion, had been available under common law. The language of section 7(7)(a) is clear and unequivocal. It vests in the joint estate the pension interest of the member spouse for purposes of determining the patrimonial benefits to which the parties are entitled as at the date of their divorce.'²⁶³

Mamashela argues that Davey's interpretation stems from a misunderstanding of the fundamental common law principles which govern a marriage in community of property, their implications, and legal consequences. If the spouses are employed, their earnings

²⁵⁹ *ML v JL* [17].

²⁶⁰ Davey, 'Pension interest and divorce K v K' 28.

²⁶¹ Piet van Niekerk, *A Practical Guide to Patrimonial Litigation in Divorce Actions* (LexisNexis 2011) para 7.2.4.1; Pienaar, 'Does a non-member spouse have a claim on pension interest' 38.

²⁶² *Ndaba v Ndaba* 2017 (1) SA 342 (SCA).

²⁶³ *Ndaba v Ndaba* 352A-F.

form part of the joint estate. In the same vein, the pension interest is regarded as part of the earnings of the spouses, and it forms part of the joint estate. Consequently, both spouses are entitled to each other's pension interest by virtue of their marital regime. Accordingly, the amendment of the Divorce Act did not introduce a completely new legal framework. It only advanced the date of enjoyment or sharing of the pension interest, to the divorce date which was previously postponed until the member's resignation, retrenchment, or retirement before the insertion of section 7(7)(a). The accrual to the non-member was delayed, not denied. The writer affirms that this was the law that existed before 1989 but there was a misconception that the member's retirement benefits did not form part of the joint estate because they were not shared upon divorce.²⁶⁴ Mamashela's view is that the amendment sought to address the conflict between the common law principle that, in a marriage in community of property, the non-member spouse is automatically entitled to a half share of the member spouse's salary, earnings, and savings of his or her estate during the marriage and the provisions of section 37A(1) of the Pension Funds Act which prohibited interference with a member's pension benefits before the member's actual retirement. The Divorce Amendment Act 7 of 1989 was aimed at harmonising the existing legal framework; thus section 7(7)(a) deemed a member's pension interest to be an asset in his or her estate and section 7(8) empowered the courts to make an order to that effect.²⁶⁵ Section 7(7)(a) sought to correct a prior misconception by moving forward the time of accrual of the pension interest for the non-member spouse to the day of divorce.²⁶⁶

Section 7(7)(a) deems the 'pension interest' to be part of the assets of the member spouse, but this recognition occurs when the court assesses the patrimonial benefits 'to which parties to any divorce action may be entitled'. The quoted phrase seems to suggest that outside the context of divorce proceedings, pension interests are not eligible to be shared by the parties. Marumoagae contends that pension fund benefits should be

²⁶⁴ Mothokoa Mamashela, 'A review of the problems encountered by a non-member spouse in accessing their half share of the pension interest during divorce in South Africa' (2018) 51(1) *De Jure* 17, 21.

²⁶⁵ Mamashela, 'A review of the problems encountered by a non-member spouse' 22.

²⁶⁶ Mamashela, 'A review of the problems encountered by a non-member spouse' 23.

automatically recognised as patrimonial assets capable of being divided and shared between spouses married in community of property. To achieve this, Marumoagae suggested that section 7(7)(a) of the Divorce Act should be amended accordingly to grant our courts the authority to treat benefits issued by the pension funds schemes as a result of the member's contributions as patrimonial benefits that automatically belong to the joint estate. This means that such benefits need not be deemed to be assets in the member's separate estate, but they would naturally be considered part of the joint estate of parties married in community of property.²⁶⁷

Marumoagae submits that there is a need for an effective statutory mechanism to assist our courts when dealing with divorces which allows non-member spouses to be able to access the pension benefits or a part thereof of their member spouses who leave their employment during the subsistence of their marriage pending divorce, where there is a joint estate between the parties.²⁶⁸ He suggests that it might be more practical to deem the 'pension benefits', rather than the 'pension interest' which is derived from the pension benefits as an asset in the joint estate. If pension benefits are deemed as assets in the joint estate, it will not be necessary to deem the pension interest to be an asset in the estate of the member, as it would automatically be considered part of the joint estate of the parties if married in community of property.²⁶⁹

4.2.3 *Entitlement to the Pension Interest after Divorce*

One of the issues is whether the Divorce Act allows a non-member spouse to claim a portion of his or her former spouse's pension interest after a divorce decree has been granted. In *Kotze v Kotze and another*,²⁷⁰ the parties were married to each other in community of property but failed to deal with a pension or provident fund interest either by way of a settlement agreement or by an order of forfeiture. The decision of the court has been criticised because the court held that each spouse remains entitled to a share

²⁶⁷ Marumoagae, 'A Critical Discussion of a Pension Interest as an Asset' 61.

²⁶⁸ Clement Marumoagae, 'A non-member spouse's entitlement to the member's pension interest' (2014) 17(6) *PELJ* 2487, 2515; Marumoagae, 'A Critical Discussion of a Pension Interest as an Asset' 63.

²⁶⁹ Marumoagae, 'Can a Non-member Spouse Protect his or her Interest' 322.

²⁷⁰ *Kotze v Kotze and another* [2013] JOL 30037 (WCC).

in the pension or provident fund to which the other belonged and such share is to be determined as at the date of divorce by virtue of the provisions of section 7(7)(a) of the Divorce Act.²⁷¹ Davey is of the view that the judgment is incorrect as it effectively implies that former non-member spouses, who were married in community of property and who divorced after the introduction of section 7(7)(a) in 1989 have a preserved right to claim. They maintain their entitlement to a 50% of their former spouse's pension interest as at the date of the divorce, provided there is no forfeiture order or a settlement agreement in place, if they now wish to institute proceedings against their former spouses for payment of their 50% share of the pension interest.²⁷² According to Davey, the correct legal position is that, although a pension interest is deemed to be part of the assets that constitute the patrimonial benefits of a marriage, a non-member spouse only gains entitlement to a share of it as determined by the court in accordance with section 7(8) of the Divorce Act. Davey contends that if an order issued by the court granting the decree of divorce does not incorporate a section 7(8) order, another court cannot subsequently assign a percentage of the pension interest to a non-member spouse, except and unless the requirements for the variation of such a court order are met.²⁷³ However, as indicated above, the Supreme Court of Appeal rejected this view as it held that section 7(7)(a) is self-contained and it is not contingent or dependent on section 7(8). The provision deems a pension interest to be part of the joint estate, but this classification is for the limited purpose of determining the patrimonial benefits to which the parties are entitled, at the time of divorce.²⁷⁴ Marumoagae contends that the Supreme Court of Appeal correctly confirmed two key points. First, it recognised that the non-member spouse is entitled to a portion of his or her member spouse's pension interest. Second, it clarified that this entitlement is not subject to the discretion of the court, meaning that the entitlement does not arise because the court issues an order that the non-member spouse should receive a portion of his or her member spouse's pension interest in terms of section 7(8) of the

²⁷¹ *Kotze v Kotze* [17-18].

²⁷² Davey, 'Pension interest and divorce K v K' 28.

²⁷³ Davey, 'Pension interest and divorce K v K' 28.

²⁷⁴ Clement Marumoagae, 'The Law Regarding Pension Interest in South Africa has been settled! Or has it? With Reference to *Ndaba v Ndaba* (600/2015) [2016] ZASCA 162' (2017) 20 *PELJ* 1, 18; See para 4.2.2.

Divorce Act. He asserts that this entitlement is a fundamental aspect of the law.²⁷⁵ Therefore, this issue has been settled by the Supreme Court of Appeal.²⁷⁶ In other words, the non-member spouse married in community of property, and by extension where the accrual system is applicable, is entitled to claim a portion of his or her member spouse's pension interest as at the date of divorce.²⁷⁷ According to Marumoagae, the courts have a more permissive approach in their interpretation of the pension interest as an asset in the joint estate, by affirming that the pension interest can naturally be included in the joint estate by operation of the law. This signifies that if any of the parties neglect to explicitly request the court to make an order regarding a pension interest, such a party does not forfeit his or her entitlement thereto, because such a pension interest is part of his or her joint estate and can thus be claimed post-divorce.²⁷⁸ For instance, in *Peters v Peters*²⁷⁹ the court held that the applicant, as at the date of divorce, became entitled by operation of law to a half share in the pension interest vesting in the joint estate. The court's rationale was that the pension interest inherently fell within the joint estate as a result it was riven by operation of law, and thus the applicant became entitled to it.²⁸⁰ Although this decision was made earlier by the Western Cape High Court, the debate raged for nearly a decade until it was settled by a Superior Court in the *Ndaba* matter as discussed above.

In relation to the right to claim a portion of the member spouse's pension interest, Marumoagae is of the view that the non-member spouse should not be allowed to wait for unreasonably prolonged periods before filing such applications or claims. The rules relating to prescription should be applicable to ensure certainty of the law. In practical terms, if a claim is not initiated within three years it should generally be considered as prescribed, unless there are valid or justifiable reasons to extend the prescription period.

²⁷⁵ Marumoagae, 'The Law Regarding Pension Interest in South Africa' 5.

²⁷⁶ Marumoagae, 'The Law Regarding Pension Interest in South Africa' 9.

²⁷⁷ Marumoagae, 'The Law Regarding Pension Interest in South Africa' 10; See para 4.2.1.

²⁷⁸ Marumoagae, 'A non-member spouse's entitlement' 2506.

²⁷⁹ *Peters v Peters* (18272/2007) [2008] ZAWCHC 309 (2 December 2008).

²⁸⁰ *Peters v Peters* [11]; Marumoagae, 'A non-member spouse's entitlement' 2506.

Civil procedure rules relating to time limits as well as the normal rules regarding prescription should be applicable.²⁸¹

4.2.4 *Unsettled Issues on the Clean Break Principle*

Amid praise, the *Ndaba* decision has been criticised for not having answered some of the questions relating to the interpretation of sections 7(7)(a) and 7(8) of the Divorce Act. One of the questions left unanswered is: Can a court grant an order relating to a share of pension interest without a plea or prayer for such an order? The court missed a golden opportunity as it should have clarified what the position is when a person fails to make a case for sharing in his or her spouse's pension interest, and the role of the court thereto.²⁸² Mamashela points out that the Supreme Court of Appeal failed to settle once and for all, the interpretative confusion caused by conflating the common law rules governing a marriage in community of property and section 7(7)(a) of the Divorce Act. Consequently, the debate regarding the unanswered question is likely to persist.²⁸³ None of the courts provide the 'missing link', that is, how is 'his or her estate' converted into 'the joint estate' as contemplated in a marriage in community of property. Mamashela agrees with the missing link provided by Marumoagae, that section 7(7)(a) of the Divorce Act deems the pension interest to be an asset in the estate of the member spouse, thus this interpretation effectively converts the pension fund's commitment made to its member into a tangible asset value capable of being divided.²⁸⁴ She argues that the contributions towards the pension scheme came from the member's salary which ostensibly formed part of the patrimonial benefit of the marriage; thus there is no justification for post-divorce pension benefits not to be regarded as part of the joint estate as it existed before the divorce decree was granted. Therefore, the pension benefit disbursed after the divorce should be

²⁸¹ Marumoagae, 'A non-member spouse's entitlement' 2510 - 11.

²⁸² Mamashela, 'A review of the problems encountered by a non-member spouse' 24-25; Marumoagae, 'The Law Regarding Pension Interest in South Africa' 11.

²⁸³ Mamashela, 'A review of the problems encountered by a non-member' 18-19.

²⁸⁴ Marumoagae, 'A Critical Discussion of a Pension Interest as an Asset' 71; Mamashela, 'A review of the problems encountered by a non-member spouse' 20.

seen as having been part of the joint estate before its dissolution at the time of divorce and the calculation should be based on their value at the date of divorce.²⁸⁵

There is a pending discussion that relates to the unsettled issue whether a court can grant an order relating to a pension interest despite the divorce papers being silent on the issue and whether for the court to grant such an order, the party seeking such an order should first plead and pray for such an order. Marumoagae contends that it should not be obligatory for parties to formally plead or request to be awarded their portion of the pension interest. If there is no written agreement or the court has not granted a forfeiture of patrimonial benefits, the court should have no option but to decide that each party should receive a 50% share of the pension interest. The court should grant a default 50% split of the pension interest between the parties. This essentially means that the pension interest should be considered as automatically falling within the joint estate and treated in the same manner as other patrimonial benefits of the marriage.²⁸⁶ The failure to address this issue means that retirement funds can continue to impose an undue burden on non-member spouses who are in possession of what they consider a deficient divorce decree to seek a costly variation order or declaratory order. Furthermore, it suggests that the courts may still require non-member spouses to explicitly plead and assert a claim of pension interest before any related order can be made.²⁸⁷

The absence of an order in terms of section 7(8)(a) has far-reaching consequences in respect of claiming the non-member's portion of the member's pension interest. If the court does not make an order in terms of section 7(8)(a), the non-member spouse cannot claim any portion of the member's pension interest from the pension fund, because pension funds are, by legislation, only permitted to deduct specified amounts from a

²⁸⁵ Marumoagae, 'A non-member spouse's entitlement' 2510; Marumoagae, 'Can a Non-member Spouse Protect his or her Interest' 318.

²⁸⁶ Marumoagae, 'A Critical Discussion of a Pension Interest as an Asset' 70-71.

²⁸⁷ Marumoagae, 'The Law Regarding Pension Interest in South Africa' 11-12.

member's pension benefit and to pay same to another person other than the member.²⁸⁸ In the absence of an order in terms of section 7(8)(a) the pension fund will not pay the non-member's portion of the pension interest to him or her, because the divorce order does not provide for sharing the pension interest.²⁸⁹ Van Niekerk has also outlined the implications of the provisions of section 37D of the Pension Funds Act read with section 7(8) of the Divorce Act. Firstly, it is peremptory that the pension fund concerned must be named in the order or settlement agreement incorporated in the order. Secondly, the order or agreement must clearly specify the portion of the interest to be transferred to the non-member spouse. Van Niekerk suggests that it may be either a percentage of the pension interest on a specific date or a specified amount in *pecuniam*. Lastly, the obligation of any pension fund to comply with such an order of court is found in the wording of the provisions of section 7(8) of the Divorce Act. Therefore, it is not necessary to join the pension fund as a party to the divorce action.²⁹⁰ If the divorce order does not explicitly name or identify the pension fund responsible for making payment this payment, the pension funds will likely reject the claim.²⁹¹ These defective pleadings, settlement agreements, and divorce orders continue to create significant difficulties for non-member spouses when they try to claim their rightful share of the pension interest.²⁹²

4.2.5 Amendment of the Legislation

Marumoagae has pointed out a gap in the *Ndaba* judgment in that it has failed to definitively address the question of whether a member spouse's pension interest forms part of the joint estate. The provisions in section 7(7) of the Divorce Act establish that the pension interest is deemed to be within the estate of the member spouse. However, this section does not specify that the pension interest is part of the joint estate. Consequently, it remains unclear which formula or mechanism is utilised to transfer the member's

²⁸⁸ Jacqueline Heaton and Hanneretha Kruger, '*South African Family Law*' (4th edn, LexisNexis 2015) 134.

²⁸⁹ Jacqueline Heaton, 'The proprietary consequences of divorce' in Heaton J *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (1st edn, Juta 2014) 78.

²⁹⁰ Van Niekerk, '*A practical guide to patrimonial litigation*' para 7.2.4.4.

²⁹¹ Clement Marumoagae, 'Prejudice emanating from non payment of pension interests due to what is contained in or omitted from divorce decrees' (2018) 51(1) *De Jure* 102, 112.

²⁹² Mamashela, 'A Review of the Problems encountered by a Non-member Spouse' 23.

pension interest from their personal estate to the joint estate after it has been deemed an asset, facilitating the non-member spouse's claim to a portion of it. He suggests that the current deeming provision introduces unnecessary confusion that requires clarification, ideally through the legislature. It would be beneficial to amend section 7(7) of the Divorce Act to eliminate the deeming provision and explicitly state that the pension interest automatically falls within the parties' joint estate, irrespective of whether the parties are divorcing or still married. Such provision will automatically categorise a pension interest as an asset in the joint estate, making it appropriately assessable in instances of a 'blanket divorce' order.²⁹³ Conversely, Marumoagae submits that there is a need for an effective statutory mechanism to assist our courts when dealing with divorces which allows non-member spouses to be able to access the pension benefits or a part thereof of their member spouses who leave their employment during the subsistence of their marriage, where there is a joint estate between the parties.²⁹⁴ He suggests that it may be ideal then to deem the 'pension benefits', rather than the 'pension interest' which is derived from the pension benefits as an asset in the joint estate. If pension benefits are deemed as assets in the joint estate, it will not be necessary to deem the pension interest to be an asset in the estate of the member, but it can automatically fall within the joint estate of the parties if married in community of property.²⁹⁵

As indicated above the South African Law Reform Commission issued a paper in 2018 inviting commentators to point out specific problems with the current legislation and subsequently a discussion paper was issued in 2023 on matrimonial property with preliminary proposals whilst inviting the public to provide further commentary and propositions.²⁹⁶ As part of the Commission's preliminary proposals, it has been suggested that there must be a disclosure of pension fund information at an early stage of divorce proceedings. There should be a mandatory duty to disclose in order to protect the

²⁹³ Marumoagae, 'The Law Regarding Pension Interest in South Africa' 13-14.

²⁹⁴ Marumoagae, 'A non-member spouse's entitlement' 2515; Marumoagae, 'A Critical Discussion of a Pension Interest as an Asset' 63.

²⁹⁵ Marumoagae, 'Can a Non-member Spouse Protect his or her Interest' 322.

²⁹⁶ SALRC, *Discussion Paper 160 (Project 100E) Review of Aspects of Matrimonial Property Law* para 4.1.

financially vulnerable non-member spouses who often do not have adequate information regarding the pension fund details.²⁹⁷ Another proposal relates to the protection of non-member spouses where member spouses are dismissed or retrenched, or retire or resign before the divorce is finalised.²⁹⁸ The non-member spouse can be severely prejudiced as illustrated in the case of *CNN v NN*.²⁹⁹ It is proposed that where divorce proceedings are in process, any accrual of the pension benefit must be deemed to have occurred after the date of the divorce order. When the divorce summons is issued, the member spouse must notify the pension fund administrator and the latter must endorse the spouse's records to prevent payment until the divorce is finalised.³⁰⁰

The Commission further makes recommendations for purposes of protecting non-member spouses from instances where a member spouse would use an accrued pension fund payment to purchase a living annuity. Our courts have confirmed that a living annuity does not form part of a spouse's estate since the insurer, and not the annuitant, owns the capital. While the capital does not belong to the member spouse, the annuitant has a contractual right to the future income stream.³⁰¹ It is proposed that the legislation should provide for a valuation of the non-member's share of the right to a future income stream in the form of a lump sum payment, with a mechanism for an insurer to pay that amount directly into a retirement fund or living annuity, based on the election made by the non-member spouse. Alternatively, it is suggested that the living annuity should be fictitiously treated as a capital asset of the member spouse for division just as in the case of pension interest as a legal fiction or notional asset.³⁰² Lastly, it has been noted that several pension funds do not apply the clean break principle due to unchanged legislative prescripts for such funds.³⁰³ The Commission proposes that the legislature must include

²⁹⁷ SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* para 9.174.

²⁹⁸ SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* para 9.187-8.

²⁹⁹ *CNN v NN* [2023] 2 All SA 365 (GJ), see Chapter Three para 3.2.3.

³⁰⁰ SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* para 9.187.

³⁰¹ *ST v CT* [2018] 3 All SA 408 (SCA) 438-9; *CM v EM* [2020] 3 All SA 1 (SCA) 14; SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* para 9.175.

³⁰² SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* para 9.183-5.

³⁰³ SALRC, *Discussion Paper 160 (Project 100E) Review of Aspects of Matrimonial Property Law* para 9.167; See Chapter Two para 2.4.

all public sector retirement funds in a new definition of retirement funds under the Pension Funds Act and the pension funds must be duly registered in terms of the Act in order for section 37D and the clean break principle to apply to all these funds.³⁰⁴

4.3 Conclusion

There is no convincing argument to conclude that the Divorce Act and Pension Funds Act provide a literal interpretation that is crystal clear for the implementation of the clean break principle. However, there seem to be no disputes referred for litigation in the division of pension interest in relation to a redistribution in a marriage out of community of property concluded before and after 1 November 1984 as well as a marriage out of community of property with the accrual system.³⁰⁵ Instead, there still is confusion and inconsistent approaches by our courts and academic criticism as to when the pension interest ultimately accrues to the joint estate.³⁰⁶ Furthermore, we still have different views on whether a pension interest automatically forms part of the spouse's estate or if it must be actively claimed by the non-member spouse during divorce proceedings.³⁰⁷ The Supreme Court of Appeal decision in *Ndaba* has resolved the contention that if an order issued by the court granting the decree of divorce does not provide for an order in terms of section 7(8), another court cannot subsequently issue such an order.³⁰⁸ However, as some issues remain unsettled by the Supreme Court of Appeal, the court has been criticised for having missed an opportunity to provide clarity.³⁰⁹

Marumoagae has proposed that there is a need to amend section 7(7) to the effect that pension benefits are deemed as assets in the joint estate. If this were to be done, it would

³⁰⁴ SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* para 9.169; See Chapter Two para 2.4.

³⁰⁵ *EB v ER NO and others and a related matter* [2023] JOL 61189 (CC); Sections 7(3) and 7(7) of the Divorce Act 70 of 1979, Sections 3 and 4 of the Matrimonial Property Act 88 of 1984, Van Niekerk, *A Practical Guide to Patrimonial Litigation* para 7.2.4.1.

³⁰⁶ Marumoagae, 'A Critical Discussion of a Pension Interest as an Asset' 55-56; Marumoagae, 'A non-member spouse's entitlement' 2502-3.

³⁰⁷ Pienaar, 'Does a non-member spouse have a claim on pension interest' 38.

³⁰⁸ Davey, 'Pension interest and divorce K v K' 28.

³⁰⁹ Mamashela, 'A review of the problems encountered by a non-member spouse' 24-25; Marumoagae, 'The Law Regarding Pension Interest in South Africa' 11.

not be necessary to deem the pension interest to be an asset in the estate of the member.³¹⁰ Such a provision would automatically render a pension interest an asset in the joint estate which can properly be taken into account even in the so-called blanket divorce orders.³¹¹ In the recent investigation by the South African Law Reform Commission, commentators were requested to point out specific problems that need clarity or statutory reform.³¹² Based on the comments received, the Commission drafted preliminary proposals. From the comments and preliminary proposals, it is clear that there is a need for legislative amendment to resolve the gaps identified in the Divorce Act and the Pension Funds Act regarding the application of the clean break principle to pension interests.³¹³

The last chapter will offer a detailed conclusion providing a summary of the preceding chapters and put forth the recommendations for legislative amendments aimed at improving and solidifying an effective clean break principle in respect of pension interests.

³¹⁰ Marumoagae, 'Can a Non-member Spouse Protect his or her Interest' 322.

³¹¹ Marumoagae, 'The Law Regarding Pension Interest in South Africa' 13-14.

³¹² SALRC, *Issue Paper Review of Aspects of Matrimonial Property Act* 30-31 para 8.

³¹³ SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* 222 para 9.150-185.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This research has mainly focused on the clean break principle, the applicable legislative amendments, and the development of jurisprudence in relation to pension interests in South African family law. As outlined in Chapter One, the clean break principle is defined as a right or the entitlement of the non-member spouse, to receive immediate payment or a transfer of a portion of the other spouse's pension interest when the parties divorce.³¹⁴ It has also been established that prior to the amendment of the Divorce Act, non-member spouses were not entitled to a pension interest upon divorce because the right to claim the benefit only vests in the member spouse when the benefit accrues to him or her upon retirement, resignation, dismissal, or retrenchment.³¹⁵ An unaccrued pension benefit was not regarded as an asset in the estate of the member's spouse. The amendments to the Divorce Act introduced a method that allowed for a potential division or sharing of the member spouse's pension interest with the non-member spouse in the event of divorce. In terms of section 7(7)(a) and (c) of the Divorce Act as amended in 1989, a spouse's pension interest is deemed to be part of his or her assets on divorce for purposes of determining the patrimonial benefits to which the spouses may be entitled. The same provision applies to spouses married before and after 1 November 1984 in terms of an antenuptial contract which provides for complete separation of property.³¹⁶ Regrettably, these amendments failed to provide a conclusive transition for the non-member spouse seeking the clean break principle arrangement. Instead, the non-member spouse was required to wait for an unspecified period relying on an uncertain event, before he or she became entitled to receive payment.³¹⁷ In June 1999 the South African Law Commission proposed handling pension benefits in accordance with the clean break principle. Section 37D of the Pension Funds Act 24 of 1959 was amended by section 28 of the Pension Funds Amendment Act 11 of 2007 effective from 13 September 2007. This

³¹⁴ Clement Marumoagae, 'Breaking up is hard to do, or is it? The clean break principle explained' (2013) 535 *De Rebus* 38, 38.

³¹⁵ Jacqueline Heaton, 'The proprietary consequences of divorce' in Heaton J *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (1st edn, Juta 2014) 74.

³¹⁶ Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 74; *EB v ER NO and others and a related matter* [2023] JOL 61189 (CC).

³¹⁷ Clement Marumoagae, 'A non-member spouse's entitlement to the member's pension interest' (2014) 17(6) *PELJ* 2488, 2489.

amendment enabled non-member spouses to claim immediate payment of their portion of the member spouse's pension interest after divorce.³¹⁸

As indicated in Chapter One, the problem statement of this research revolves around the clean break principle which was introduced to offer a straightforward and pragmatic solution to the question of whether a non-member spouse can claim a pension interest and secure immediate payment. However, it has been established that the clean break principle still encounters challenges manifesting as prejudice or inconvenience experienced by non-member spouses in their efforts to claim immediate payment of the pension interest.³¹⁹ The initial deficiencies of the amended Divorce Act raised concerns that prompted closer scrutiny of the effectiveness of the clean break principle and whether the legislation offers sufficient guidelines to ensure consistency in its application. Amidst varying interpretations by the judiciary and critiques from scholars, even though some matters were settled, there is a pressing need to establish legal certainty and clarity on numerous issues. The first issue is the non-member's right to claim a pension interest. The second issue relates to the complications arising from a divorce order that does not specify a portion of the pension interest for the non-member spouse, causing them inconvenience in claiming their share.³²⁰ The third issue relates to the confusion that stems from the inappropriate use of terminology due to misunderstanding of the terms 'pension interest' and 'pension benefit', which causes delays in implementing the clean break principle.³²¹ The fourth issue emerges when the court does not make an order in terms of section 7(8) of the Divorce Act, hindering the pension fund's payment of pension interest. The last issue relates to the overreliance on the Divorce Act without considering the provisions of the Pension Funds Act in disputes relating to a pension interest, which

³¹⁸ South African Law Commission, (Project 112) *Sharing of Pension Benefits* (SALC 1999) 23; South African Law Commission, Discussion Paper 77 (Project 112) *Sharing of Pension Benefits* (SALC 1998) 45-6; Marumoagae, 'A non-member spouse's entitlement' 2492-3.

³¹⁹ See Chapter One para 1.2.

³²⁰ Mothokoa Mamashela, 'A Review of the Problems encountered by a Non member Spouse in accessing their half share of the Pension Interest during Divorce in South Africa' (2018) 51(1) *De Jure* 17, 23; See Chapter One para 1.2.

³²¹ Jothi Chirkoot, 'GEPF and the Clean Break Principle' (2018) 33 *Income Tax, Insurance and Tax* para 1; See Chapter One para 1.2.

can be problematic.³²² These questions provoked the probe into the legislative framework that governs the clean break principle in relation to pension interest. Consequently, the discussions in the preceding chapters of this research study led to the conclusions reached herein on the effectiveness of the legislation or the need to reform same.

5.2 Conclusions

I have been able to draw numerous conclusions that formulate a summary of the previous discussions. Consequently, I have identified salient points that provide clarity on the status quo of our law juxtaposed with the deficiencies and pertinent legal issues raised by academic commentators and disputes presented before the judiciary. It is therefore crucial to summarise these essential aspects of the research that were broadly ventilated in previous chapters on the application of the clean break principle in respect of a pension interest and the effectiveness thereof. A succinct survey of interrelated subheadings will assess whether the cause of prejudice suffered by non-member spouses has been eliminated or if there are gaps that necessitate further legislative amendments. The topics that have been canvassed below and duly discussed in the preceding chapters refer to the discretion of the courts,³²³ claiming payment of a portion of a pension interest,³²⁴ a clean break on pension or preservation funds and annuities,³²⁵ the member spouse's *spes* or contingent right to a pension interest,³²⁶ a non-member spouse's entitlement to a share of the pension Interest after divorce,³²⁷ accrual into the estate or joint estate of the member spouse,³²⁸ the application of sections 7(7) and 7(8) to pension benefits upon divorce,³²⁹ and the application of the clean break principle to pension funds.³³⁰ After providing a conclusion on these issues, I will make recommendations on the gaps identified and the prejudices.

³²² Sections 37A to 37D of the Pension Funds Act 24 of 1959; See Chapter One para 1.2.

³²³ See Chapter Two para 2.2; Chapter Three para 3.2.1.

³²⁴ See Chapter Two para 2.3; Chapter Four para 4.2.3.

³²⁵ See Chapter Two para 2.3.

³²⁶ See Chapter Two para 2.1.

³²⁷ See Chapter Three para 3.2.2; Chapter Four para 4.2.3.

³²⁸ See Chapter Four para 4.2.1 and 4.2.2.

³²⁹ See Chapter Three para 3.2.3.

³³⁰ See Chapter Two para 2.3; Chapter Four para 4.2.4.

5.2.1. *The Discretion of the Courts*

It is common cause that the courts have been given discretionary authority under the Divorce Act as prescribed by section 7(8)(a), which permits the court to make an order compelling the member spouse's pension fund to assign and pay any part of the pension interest to the non-member spouse.³³¹ The Act also empowers the court to instruct the registrar of the court to notify the pension fund to endorse payment to the non-member spouse, facilitating an administrative enforcement process.³³² This discretion must be exercised judiciously, taking into account all pertinent factors, with particular emphasis on fairness.³³³ Section 7(8)(a)(i) grants the court extraordinary authority which enables it to issue a binding order on a juristic person such as a pension fund even if that entity is not directly engaged in the legal proceedings.³³⁴ The Supreme Court of Appeal acknowledged that section 7(8) establishes a mechanism whereby the pension fund of the member spouse is statutorily obliged to make direct payment of that portion of the pension interest to the non-member spouse as at the date of divorce in compliance with section 37D(1)(d)(i) of the Pension Funds Act 24 of 1956.³³⁵ The definition of 'pension interest' defines what falls within the scope of the court's power under section 7(8)(a) and restricts it.³³⁶ Hence, the discretion entrusted to a divorce court in terms of subsection (8)(a) is narrowly confined to a specific portion of a pension interest and its corresponding pension benefit.³³⁷ Nevertheless, the courts have asserted that such discretion cannot be reasonably exercised in *vacuo* when crucial information is absent or insufficient, particularly the pertinent details of the pension fund which must be presented before the court.³³⁸ It is critically important that when drafting deeds of settlement and divorce orders concerning pension interests, great care is exercised to ensure alignment with the provisions of subsections 7(7) and 7(8) of the Divorce Act. If this is meticulously executed

³³¹ Jacqueline Heaton and Hanneretha Kruger, 'South African Family Law' (4th edn, LexisNexis 2015) 134; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 77; Marumoagae, 'Breaking up is hard to do, or is it?' 39.

³³² Clement Marumoagae, 'Prejudice emanating from non payment of pension interests due to what is contained in or omitted from divorce decrees' (2018) 51(1) *De Jure* 102, 102.

³³³ *JW v SW* 2011 (1) SA 545 (GNP) 551G-J.

³³⁴ *M v M* 2016 ZALMPPHC 2 (17 June 2016) [16].

³³⁵ *Ndaba v Ndaba* 2017 (1) SA 342 (SCA) 352G - 353A.

³³⁶ *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer* 2004 (5) SA 373 (SCA) 386B-C.

³³⁷ *ML v JL* (3981-20100 [2013] ZAFSHC 55 (25 April 2013) [23].

³³⁸ *ML v JL* [33].

with accurate information the pension fund in question would only need to undertake administrative functions to implement the order.³³⁹ Therefore, it is crucial that the parties involved in divorce proceedings or their legal representatives must plead or pray for a portion of the pension interest against the member spouse based on sufficient information and the divorce order should be granted in a judicious manner, capable of being implemented by the member spouse's pension fund. Apart from other discretionary powers conferred on the court by the Divorce Act, section 7(1) of the Act provides that the court may grant a divorce decree that incorporates the deed of settlement or consent papers but it is not compelled to grant such an order. However, the court may grant a settlement as part of the divorce order once it is satisfied that the agreement is not impossible, illegal or contrary to public policy.³⁴⁰ The Act promotes negotiations between the parties in the dissolution of their marriage based on their intimate and pecuniary circumstances of their relationship whilst it reduces the extent of the state's interference on the determination of patrimonial consequences.³⁴¹

5.2.2 Claiming Payment of a Portion of the Pension Interest

Section 37D(4) introduced the clean break arrangement between the divorcing spouses. It guarantees that a percentage or portion of the pension interest granted by the divorce court to the non-member spouse becomes immediately payable at the time of the divorce.³⁴² The non-member spouse will only be entitled to their specific portion of the pension interest, determined by the marital regime applicable to the parties' marriage.³⁴³ The non-member spouse becomes entitled to request his or her former spouse's pension scheme to make payment of the pension interest to him or her as per the divorce decree.³⁴⁴ Section 37D(4)(a) of the Pension Funds Act states that for purposes of section

³³⁹ *Old Mutual and Another v Swemmer* 387C-E.

³⁴⁰ Jacqueline Heaton and Hanneretha Kruger, 'South African Family Law' (4th edn, LexisNexis 2015) 127; Jacqueline Heaton, 'The proprietary consequences of divorce' in Heaton J *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (1st edn, Juta 2014) 87.

³⁴¹ South African Law Reform Commission, *Issue Paper 34 (Project 100E) Review of Aspects of Matrimonial Property Law* (SALRC 2018) 18 para 4.

³⁴² Marumoagae, 'A non-member spouse's entitlement' 2497.

³⁴³ Marumoagae, 'A non-member spouse's entitlement' 2493.

³⁴⁴ Marumoagae, 'A non-member spouse's entitlement' 2497.

7(8)(a) of the Divorce Act, the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce must be deducted by the pension fund or pension funds named in or identifiable from the decree and the pension fund must pay the non-member spouse's portion of the pension interest within 60 days of receipt of his or her choice of payment.³⁴⁵ Van Niekerk emphasises the importance of section 37D of the Pension Funds Act read with section 7(8) of the Divorce Act. Firstly, it is mandatory that the pension fund concerned must be named in the order or settlement agreement incorporated in the order. Secondly, the order or agreement must plainly state the portion of the interest to be transferred to the non-member spouse. Lastly, the obligation of any pension fund to comply with such an order is rooted in the language of the provisions of section 7(8) of the Divorce Act, obviating the need to join the pension fund as a party to the divorce action.³⁴⁶ If the divorce order does not explicitly name or identify the pension fund responsible for making this payment, the pension fund will likely reject the claim.³⁴⁷ Therefore, these provisions underscore the critical importance of meticulously drafted pleadings and settlement agreements. Consequently, defective pleadings, settlement agreements, and divorce orders will persist in presenting substantial challenges for non-member spouses when seeking to secure their rightful share of the pension interest.³⁴⁸ The pension funds are only authorised to deduct specified amounts from a member's pension fund benefit and pay the same amount to a non-member spouse as outlined in section 37D(4) of the Pension Funds Act in conjunction with section 7(8)(a) of the Divorce Act.³⁴⁹ It must also be noted that in *JK v Swart and Others*³⁵⁰ the court considered a crucial question whether a receiver and liquidator in a divorce has the *locus standi* to independently seek relief in terms of sections 7(7) and 7(8) of the Divorce Act.³⁵¹ The court's ruling confirmed that a third party such as a receiver and liquidator lacks the legal standing to initiate an application under section 7 unless expressly authorised by the

³⁴⁵ Section 37D(4)(b)(i) to (iii) of the Pension Funds Act 24 of 1959.

³⁴⁶ Piet Van Niekerk, *A Practical Guide to Patrimonial Litigation in Divorce Actions* (LexisNexis 2011) para 7.2.4.4.

³⁴⁷ Marumoagae, 'Prejudice emanating from non payment of pension interests' 112.

³⁴⁸ Mamashela, 'A Review of the Problems encountered by a Non-member Spouse' 23.

³⁴⁹ Jacqueline Heaton and Hanneretha Kruger, '*South African Family Law*' (4th edn, LexisNexis 2015) 134.

³⁵⁰ 2023 (6) SA 500 (GJ).

³⁵¹ *JK v Swart and Others* 2023 (6) SA 500 (GJ) 510-11.

empowering order. The liquidator does not possess the authority to compel a member spouse to withdraw funds from the pension fund or mandate the pension fund to release such funds contrary to the member's wishes.³⁵² The legislative framework established by sections 7(7) and 7(8) of the Act outlines an exclusive mechanism for the non-member spouse to claim and become a beneficiary in the member spouse's pension fund.

5.2.3 Clean Break in respect of a Pension Fund, Preservation Fund and Retirement Annuity

In terms of section 1 of the Divorce Act, a pension interest is defined as the member spouse's pension benefit to which he or she would have been entitled had he or she terminated his or her membership of the fund on the date of the divorce by resigning from his or her employment, if the spouse is a member of a pension fund as defined in section 1 of the Pension Funds Act. Furthermore, in relation to a retirement annuity, 'pension interest' is defined as an amount equal to all contributions the member spouse made to the fund up to the date of the divorce together with annual simple interest on those contributions calculated at a prescribed rate, provided that such interest rate may not exceed the fund's return on the non-member spouse's portion of pension interest.³⁵³ Section 37D of the Pension Funds Act was appropriately amended by section 28 of the Pension Funds Amendment Act 11 of 1997 which came into effect on 13 September 2007. This section expedited both the date of accrual and payment of the benefit to the member spouse subsequently advancing the date on which the divorce benefit accrues to the non-member spouse.³⁵⁴ Thereafter certain pension funds not regulated by the Pension Funds Act adopted a similar approach. Thus, section 24A(2) was inserted in the Government Employees Pension Law Proclamation 21 of 1996 by section 3 of the Government Employees Pension Law Amendment Act 19 of 2011, which came into effect on 14 December 2011. Similarly, the South African Post Office SOC Ltd Amendment Act 38 of

³⁵² *JK v Swart and Others* 511-12.

³⁵³ Heaton and Kruger, *South African Family Law* 131; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 75.

³⁵⁴ Marumoagae, 'A non-member spouse's entitlement' 2493.

2013 inserted section 10F(2) into the Post and Telecommunication-Related Matters Act and this law came into effect on 27 January 2014 as the date of accrual of the benefit.³⁵⁵

Prior to the amendment of section 37D of the Pension Funds Act by the Financial Services Laws General Amendment Act of 2008 and the Financial Services Laws General Amendment Act 45 of 2013, it was not feasible to have a 'pension interest' in a preservation fund.³⁵⁶ Since the law took effect on 28 February 2014, it is permissible to obtain an order for the division of a member's pension interest under a preservation fund.³⁵⁷ Henceforth, if the member spouse's employment terminates prior to the divorce and the member transfers his or her accrued pension benefit to an approved pension preservation fund or provident preservation fund, the pension interest is equivalent to the benefits the spouse would have been entitled under the rules of the preservation fund had his or her membership of the fund terminated on the date of the divorce.³⁵⁸ As amended, section 37D(6) of the Pension Funds Act provides that, notwithstanding the definition of 'pension interest' in section 1 of the Divorce Act, a portion of the pension interest of a member or a deferred pensioner of a preservation fund assigned to a non-member spouse, refers to the equivalent portion of the benefits a member would have been entitled to had his or her membership terminated on the date of divorce. Therefore, a non-member spouse who was involved in divorce proceedings granted an order before the amendments and who is entitled to a portion of his or her previous spouse's pension interest, is now eligible to claim payment of that share from the pension fund or preservation fund or retirement annuity.³⁵⁹ Although a clean break is realizable in respect of pension funds, preservation funds, and retirement annuities, it should be noted that a living annuity is not defined as a pension interest. Therefore, the non-member spouse cannot claim payment of a portion thereof until the legislation is amended to define such

³⁵⁵ Heaton and Kruger, *South African Family Law* 133; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 79.

³⁵⁶ Kobus Hanekom, *Manual on Retirement Funds and Other Employee Benefits* (LexisNexis 2016) para 6.3.2.2(c).

³⁵⁷ Hanekom, *Manual on Retirement Funds* para 6.3.2.2(c).

³⁵⁸ Heaton and Kruger, *South African Family Law* 131-2.

³⁵⁹ Van Niekerk, *A Practical Guide to Patrimonial Litigation* para 7.2.4.3.

as a pension interest. Our courts have confirmed that a living annuity is not considered part of a spouse's estate. In this context, the insurer retains ownership of the capital while the annuitant holds a contractual right to the future income stream.³⁶⁰

5.2.4 Member Spouse's Spes or Contingent Right to a Pension Interest

It is trite law that a member spouse possesses an interest in a pension scheme. This interest is a mere *spes* or an expectation held by the fund as a future benefit. The actual entitlement to such benefit is determined by the rules of the fund. This interest remains a prospective asset and is not immediately accessible or tangible for the member spouse.³⁶¹ A member spouse only has a right to claim such benefit when it accrues in terms of the fund rules.³⁶² A pension benefit that has not accrued to a person is not an asset in his or her estate because the right or claim to a benefit only becomes vested in the person when the benefit accrues to him or her upon retirement, resignation, or dismissal.³⁶³ This position is further affirmed by the protection of the pension interest and the subsequent pension benefit thereof from liability and insolvency of the member's estate. The member spouse's pension fund benefits are protected from creditors in that a benefit may not be attached in the hands of the fund, subject to a limited number of exceptions as provided in section 37A read with section 37D of the Pension Funds Act. In the event that the member spouse becomes insolvent, pension fund benefits are deemed not to form part of his or her estate. The fund is only allowed, under specific circumstances, to make deductions from the member's benefit in a limited manner.³⁶⁴ A registered pension fund organisation shall, pertaining to the business of the fund, be deemed to be the assets, rights, liabilities, or obligations of the fund to the exclusion of any other person.³⁶⁵ Therefore, it is the pension fund that owns the assets as a registered

³⁶⁰ *ST v CT* [2018] 3 All SA 408 (SCA) 438-9; *CM v EM* [2020] 3 All SA 1 (SCA) 14; South African Law Reform Commission, *Discussion Paper 160 (Project 100E) Review of Aspects of Matrimonial Property Law* (SALRC 2023) para 9.175.

³⁶¹ Van Niekerk, *A Practical Guide to Patrimonial Litigation* para 7.2.4.

³⁶² Clement Marumoagae, 'Can a Non-member Spouse Protect his or her Interest in the Member Spouse's accrued Pension Benefits before Divorce?' (2016) 37(2) *Obiter* 313, 316.

³⁶³ Heaton and Kruger, *South African Family Law* 130; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 70 and 74.

³⁶⁴ Section 37B of the Pension Funds Act; Kobus Hanekom, *Manual on Retirement Funds* para 4.14.2.

³⁶⁵ Section 5(1)(b) of the Pension Funds Act.

pension fund or juristic person and the pension fund members have a conditional right or *spes* to claim pension benefits upon occurrence of an event that terminates the employment service of the member. It is based on this rationale that the pension interest is deemed to form part of the member's estate only when there is a pending divorce action, not during the subsistence of marriage. Section 7(7) of the Divorce Act creates a fiction where the expectation of a future asset or a *spes* is treated as an asset that is already in existence within the member spouse's estate during divorce proceedings. However, it is important to note that this treatment is specifically applicable only for determining the patrimonial consequences of the divorce.³⁶⁶ In addition, the court decision in *JK v Swart and Others* emphasised the unique status of pension fund benefits based on the statutory regulation that prohibits attachment, reduction or transfer save to the extent permitted by the legislation. According to the conjunction of provisions, namely section 37A of the Pension Funds Act and section 7(7) of the Divorce Act, the pension benefit is treated as a notional asset that is deemed to be part of the spouse's estate. As it is not a tangible asset, it falls outside the purview of the liquidator's power for receiving and liquidation specified in divorce orders.³⁶⁷ This legal distinction underscores that pension benefits are subject to a different set of rules illustrating the complexity in dealing with a pension interest compared to other marital assets during divorce proceedings.

5.2.5 Non-member Spouse's Entitlement to Pension Interest after Divorce

As indicated, although the pension interest is typically not a patrimonial asset in the marriage, section 7(7)(a) turns the pension interest into an asset in the estate of the member spouse by deeming it as such for the purposes of divorce.³⁶⁸ An issue of contention before our courts is whether the Divorce Act allows a non-member spouse to claim a portion of his or her former spouse's pension interest after a divorce decree has been granted. In Chapter Three it is explained that there was disjuncture in the decisions made by the High Courts. Some courts held the view that an order in terms of section 7(7)(a) confers the right to a portion of the member spouse's pension interest on the non-

³⁶⁶ Van Niekerk, *A practical guide to patrimonial litigation* para 7.2.4.1

³⁶⁷ *JK v Swart and Others* 510-11.

³⁶⁸ Marumoagae, 'Prejudice emanating from non payment of pension interests' 102.

member spouse, which means a non-member spouse must obtain a divorce decree in the court of first instance that defines his or her right to a portion of the member's spouse pension interest. If the non-member spouse fails to do so, the non-member spouse will be barred from claiming the right to pension interest.³⁶⁹ Conversely, other High Court rulings preferred the view that the non-member spouse has an *ex lege* right to share in the pension interest, which implies that the court merely affirms what is trite law and that any court has the authority to grant such an order.³⁷⁰ In *Ndaba v Ndaba*,³⁷¹ the Supreme Court of Appeal settled the debate as it confirmed that the right to claim a portion of the member spouse's pension interest is not conferred by the court; the right exists by operation of the law and the court's order is merely declaratory. The court rejected Davey's view that although a pension interest is deemed to be part of the assets that constitute the patrimonial benefits of a marriage, a non-member spouse only becomes entitled to a share of it as determined by the court in accordance with section 7(8) of the Divorce Act.³⁷² The Supreme Court of Appeal held that section 7(7)(a) of the Divorce Act is self-contained, operates independently, and is not made subject to the condition of section 7(8) of the Act. It deems a pension interest to be part of the joint estate for the exclusive purpose of determining the patrimonial benefits to which the parties are entitled at the date of their divorce. The entitlement of the non-member spouse to a share of the member spouse's pension interest as defined in the Act is not reliant on section 7(8) of the Divorce Act.³⁷³ This decision implicitly differs from a submission by Van Niekerk that a pragmatic approach to section 7(7)(a) of the Act is that parties in a divorce are not by right entitled to a part of the other's pension interest, but that the value of the pension interest should merely be taken into consideration when determining the value of the assets of the estate.³⁷⁴ The emphasis of the judgment is that the pension interest is deemed to be part of the member spouse's estate or joint estate for determining the patrimonial benefits, instead of merely considering the value of the pension when

³⁶⁹ Mamashela, 'A Review of the Problems encountered by a Non member Spouse', 19.

³⁷⁰ Mamashela, 'A Review of the Problems encountered by a Non member Spouse', 20.

³⁷¹ *Ndaba v Ndaba* 2017 (1) SA 342 (SCA).

³⁷² Johann Davey, 'Pension interest and divorce K v K and another a critique' (2013) 534 *De Rebus* 26, 28.

³⁷³ *Ndaba v Ndaba* 352A-B.

³⁷⁴ Van Niekerk, *A Practical Guide to Patrimonial Litigation* para 7.2.4.1; Pienaar, 'Does a non-member spouse have a claim on pension interest' 38.

determining the value of the estate. I am of the view that the submissions by Davey and Van Niekerk are more appropriate to a marriage concluded out of community of property without accrual concluded before 1 November 1984 or a marriage out of community of property with the accrual system.³⁷⁵ The court decision in *Ndaba* was made based on the factual matrix that related to the division of the joint estate, where parties were married in community of property.³⁷⁶

5.2.6 Accrual into the Estate or Joint Estate of the Member Spouse

As indicated in the previous chapter, if the marriage was concluded out of community of property without accrual before and after 1 November 1984 the pension interest is also included to determine the financial means of the parties. The consideration applies when determining the assets of a party in a legal action where a claim is made for the transfer or redistribution of assets in terms of section 7(3) of the Divorce Act.³⁷⁷ In marriages where parties are married out of community of property with the accrual system, the pension interest forms part of the estate of the member spouse unless it is explicitly excluded in the antenuptial contract.³⁷⁸ If the parties married out of the community of property without accrual after 1 November 1984, their pension interests are excluded.³⁷⁹ According to section 3(1) of the Matrimonial Property Act 88 of 1984, the accrual claim is calculated as half of the difference between the accrual of the spouses' respective estates. If one spouse's estate shows a smaller accrual or no accrual at all, that spouse can claim against the other spouse an amount equal to half of the difference between the accrual of the respective estates.³⁸⁰ Where parties are married in community of property, the value of the pension interest is added to the value of other assets that fall in the joint estate for purposes of division of the estate.³⁸¹ The question arises as to whether a

³⁷⁵ Sections 3(1) and 4(1) of the Matrimonial Property Act 88 of 1984.

³⁷⁶ *Ndaba v Ndaba* 345F-J.

³⁷⁷ Van Niekerk, *A Practical Guide to Patrimonial Litigation* para 7.2.4.1; *EB v ER NO and others and a related matter* [2023] JOL 61189 (CC). See Chapter Four para 4.2.1.

³⁷⁸ Section 4(1)(b)(ii) of the Matrimonial Property Act; Van Niekerk, *A Practical Guide to Patrimonial Litigation* para 7.2.4.1.

³⁷⁹ Section 7(7)(c) of the Divorce Act 70 of 1979.

³⁸⁰ Section 4(1)(a) of the Matrimonial Property Act; Heaton and Kruger, *South African Family Law* 94; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 65.

³⁸¹ Van Niekerk, *A Practical Guide to Patrimonial Litigation* para 7.2.4.1.

pension interest automatically forms part of the member spouse's estate, or whether it must be claimed by the non-member spouse during divorce.³⁸² Section 7(7)(a) deems the 'pension interest' to be part of the assets of the member spouse. However, this recognition takes place when the court evaluates the patrimonial benefits to which parties to any divorce action may be entitled.³⁸³ This provision suggests that outside the context of a divorce action, pension interests are not eligible to be shared by the spouse. Therefore, a pension interest does not automatically form part of the member spouse's estate during the subsistence of marriage. As discussed above, a pension interest of a member spouse is a mere *spes* or an expectation as that interest is held by the fund as a future benefit. It remains a prospective asset and it is not immediately accessible or tangible for the member spouse.³⁸⁴

Marumoagae proposes that section 7(7) of the Divorce Act should be amended to eliminate the deeming provision and explicitly state that the pension interest automatically falls within the parties' joint estate, irrespective of whether the parties are divorcing or still married. Such provision will automatically categorise the pension interest as an asset in the joint estate, making it appropriately assessable in instances of a blanket divorce order.³⁸⁵ He further suggests that it may be prudent to deem the 'pension benefits', rather than the 'pension interest' which is derived from the pension benefits as an asset in the joint estate. It will not be necessary to refer to a pension interest; instead, a pension benefit will automatically fall within the joint estate of the parties if married in community of property.³⁸⁶ I submit that this suggestion goes against the fundamental principles that govern pension funds and the resultant pension benefits aimed for retirement, death, dismissal, or resignation. Although, at face value, this proposition seems to be a viable solution to challenges affecting the non-member spouses, this proposal does not consider

³⁸² Merike Pienaar, 'Does a non-member spouse have a claim on pension interest' 2015 (559) *De Rebus*, 38, 38.

³⁸³ Marumoagae, 'A Critical Discussion of a Pension Interest as an Asset' 61.

³⁸⁴ Van Niekerk, *A Practical Guide to Patrimonial Litigation* para 7.2.4, See para 5.2.4.

³⁸⁵ Clement Marumoagae, 'The Law Regarding Pension Interest in South Africa has been settled! Or has it? With Reference to *Ndaba v Ndaba* (600/2015) [2016] ZASCA 162' (2017) 20 *PELJ* 1, 13-14.

³⁸⁶ Marumoagae, 'Can a Non-member Spouse Protect his or her Interest' 322.

the rationale for deeming a pension interest to form part of the spouse's estate only upon divorce, not during the subsistence of marriage. The current position is that a pension value is an asset of the pension fund at all material times; thus a pension fund as a business is deemed to be the assets, rights, liabilities, or obligations of the fund to the exclusion of any other person.³⁸⁷ The obligations of a pension fund are legislative and contractual in nature between the pension fund and the members based on the provisions of the Pension Funds Act and the approved fund rules respectively.³⁸⁸ The member has the obligation to pay contributions and the fund has an obligation to pay pension benefits to the member or beneficiaries upon termination of service or cessation of the fund.³⁸⁹ Furthermore, a pension interest or pension benefit is protected from alienation through an attachment order or hypothec, or insolvency save for maintenance and divorce orders as provided in sections 37A, 37B, and 37D of the Pension Funds Act.³⁹⁰ Therefore, if the pension interest or pension benefit is deemed to form part of the patrimonial benefits or is deemed to be an asset of a matrimonial estate in terms of the different marriage regimes prescribed in the Matrimonial Property Act, it will be susceptible to execution through an attachment order or hypothec and insolvency. For instance, spouses married in community of property would have powers to dispose of their pension interests in a similar manner as the disposal of any asset, movables, or immovable property of the joint estate or even contract to a debt against pension interest as security.³⁹¹ The Pension Funds would not be in a position to fulfill their purported objective of providing social security to members of the Fund once they are no longer economically active or take care of their family when a member dies.

5.2.7 The Application of Sections 7(7) and 7(8) on Pension Benefits upon Divorce

In light of the distinction drawn between a pension benefit and a pension interest, it has been established that section 7(7) and section 7(8) do not apply to a pension benefit that

³⁸⁷ Section 5(1)(b) of the Pension Funds Act.

³⁸⁸ Sections 2 and 13 of the Pension Funds Act.

³⁸⁹ Sections 13A and 14A of the Pension Funds Act.

³⁹⁰ Section 37B of the Pension Funds Act; Hanekom, *Manual on Retirement Funds* para 4.14.2.

³⁹¹ Section 14 of the Matrimonial Property Act.

has accrued to a member spouse.³⁹² A pension benefit is characterised as a withdrawal benefit that has already accrued to a member spouse, thus constituting an asset in his or her estate. This accrual occurs as a consequence of the right to claim the benefit due to termination of service during the existence of marriage,³⁹³ whereas a pension interest is defined as an amount equal to the member's cash resignation benefit, which would have become payable according to the rules of the fund had the member resigned on the date of the divorce.³⁹⁴ The Divorce Act provides a specific and limited definition of 'pension interest', as it refers to the value of the interest considered on the date of divorce, that a member of a pension fund has in the pension benefit that will accrue to him or her as a member of such fund at a certain future date.³⁹⁵ While a pension benefit does not fall under the purview of section 7(7)(a) of the Divorce Act, the courts have asserted that there was no justification for not considering a pension benefit or an accrued right to a pension held by one of the parties to a marriage in community of property as part of the community of property existing between the parties before their divorce.³⁹⁶ In principle, the non-member spouse will be entitled to share the accrued pension benefit as one-half of the nett value of the joint estate.³⁹⁷ Incongruously, there are numerous instances where the pension benefits are alienated and disposed of by the member spouse unbeknown to the non-member spouse whilst there is a pending divorce action. In the matter of *CNN v NN*,³⁹⁸ the court highlighted the prejudice suffered by non-member spouses where the member spouse resigned immediately after being served with a divorce summons. This conduct appears to be prevalent in practice and those who are prejudiced do not have the financial resources to bring these cases to the courts for adjudication.³⁹⁹ The current legislation does not protect the non-member spouse by prohibiting members from alienating or disposing of pension benefits before the divorce is finalised save for limited

³⁹² *Eskom Pension and Provident Fund v Krugel and Another* 2012 (6) SA 143 (SCA) 149C-D.

³⁹³ Jacqueline Heaton, 'The proprietary consequences of divorce' in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta Cape Town 2014) 79-80.

³⁹⁴ Hanekom, *Manual on Retirement Funds* para 6.3.2.2.

³⁹⁵ *Eskom Pension Fund v Krugel* 149B-C.

³⁹⁶ *De Kock v Jacobson and Another* 1999 (4) SA 346 (W) 349G-H.

³⁹⁷ *Elesang v PPC Lime Limited and Others* (1076-2006) [2006] ZANCHC 73 (15 December 2006) [21-22].

³⁹⁸ *CNN v NN* [2023] 2 All SA 365 (GJ).

³⁹⁹ *CNN v NN* 375 [32].

cases where an interdict is granted after the non-member spouse is made aware of the withdrawn pension benefits.⁴⁰⁰

5.2.8 Application of the Clean Break Principle to Pension Fund Organisations

The Pension Funds Amendment Act has brought relief in addressing one of the main problems experienced by non-member spouses in that they had to endure waiting for an indefinite period to be paid their portion of pension interest. The introduction of section 37D of the Pension Funds Act enabled the non-member spouse holding a divorce order to directly approach the fund for payment or transfer into their own fund held in their names. This eliminated waiting for the member spouse to exit the fund.⁴⁰¹ However, this Act applies mainly to private pension funds.⁴⁰² These legislative changes do not have universal application to all Pension Fund organisations, as some public sector pension funds do not fall within its regulatory spectrum.⁴⁰³ The inequality occasioned by the differentiation between spouses of members' funds as defined in the Pension Funds Act and spouses of members of the Government Employees Pension Fund and Post Office Retirement Fund has been successfully challenged on constitutional grounds.⁴⁰⁴ Consequently, the Pension Fund rules were amended to entitle spouses of members of the Government Employees Pension Fund and Post Office Retirement Fund to claim their share of their spouse's pension interest on divorce.⁴⁰⁵

Although there has been positive progress in codifying the clean break principle, several pension funds still do not apply the clean break principle due to unchanged legislative

⁴⁰⁰ *Elesang v PPC Limited* [43].

⁴⁰¹ Van Niekerk, *A practical guide to patrimonial litigation* para 7.2.4.3; Marumoagae, 'Prejudice emanating from non payment of pension interests' 103.

⁴⁰² South African Law Reform Commission, *Issue Paper 34 (Project 100E) Review of Aspects of Matrimonial Property Law* (SALRC 2018) 30 para 8.

⁴⁰³ Marumoagae, 'Breaking up is hard to do, or is it?' 39.

⁴⁰⁴ *Wiese v Government Employees Pension Fund* 2012 (6) BCLR 599 (CC) 611; *Ngewu and another v Post Office Retirement Fund and others* 2013 (4) BCLR 421 (CC) 427; Heaton and Kruger, 'South African Family Law' 132; Heaton, 'The Law of Divorce and Dissolution of Life Partnerships' 76.

⁴⁰⁵ Heaton and Kruger, *South African Family Law* 132; Heaton, *The Law of Divorce and Dissolution of Life Partnerships* 76.

prescripts for such funds. The injustice and inequality occasioned by the differentiation between spouses of members that belong to funds regulated by the Pension Funds Act and amended legislation in comparison with spouses of members that belong to funds that are not regulated by the Pension Funds Act still persist. Therefore, spouses of member spouses who are members of the non-regulated funds namely the Associated Institutions Pension Fund, Associated Institutions Provident Fund, Members of Statutory Bodies Pension Scheme, SA Public Library Pension Fund, Closed Pension Fund, Telkom Pension Fund, Transport Pension Fund, the Transnet Retirement Fund and the Transnet Second Defined Benefit Fund are being prejudiced from claiming immediate payment of pension interest and they do not have resources to challenge these funds.⁴⁰⁶

5.3 Recommendations

There are significant achievements based on the legislative amendments effected thus far but there are still challenges that require further legislative reform. The positive impact of the legislation is found in the following milestones:

- a) A unanimous confirmation that section 7(8) of the Divorce Act empowers the courts with a discretion;
- b) The clean break principle is applicable to the apportionment of pension interests in a majority of pension funds, preservation funds, and retirement annuity funds;
- c) The non-member spouse has a right to claim his or her portion of the member's pension interest at any stage after the divorce order has been granted;
- d) The non-member spouse may claim immediate payment of his or her portion of the member's pension interest directly from pension funds subject to the application of section 37D(4) of the Pension Funds Act, section 24A of the Government Employees Pension Law and Post Office Retirement Fund section 10F(2) into the Post and Telecommunication-Related Matters Act as amended.

⁴⁰⁶ SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* para 9.167.

There are various challenges that demonstrate that the clean break principle is not as clean as a whistle in terms of its application and efficacy. Thus, there is a need for further legislative amendments to improve its effectiveness in the following key aspects:

- a) There must be sufficient information and accurate pleadings for the court to exercise its discretion.
- b) There must be well-drafted settlement agreements and accurate pleadings for the court to issue a divorce order that identifies the Pension Fund that must pay the non-member spouse.
- c) There is a need to amend the law to enable the non-member spouse to claim a portion of the pension interest from living annuities.
- d) There must be a prohibition on alienation of pension interests if the member spouse resigns immediately after being served with a divorce summons or before the finalisation of the divorce proceedings to the prejudice of the non-member spouse.
- e) There must be an extension of the application of the clean break principle to all pension funds that are not regulated by the Pension Funds Act.

In light of the gaps identified, I am inclined to agree with the recommendations recorded in the preliminary proposals published by the South African Law Reform Commission in a discussion paper issued in 2023 on matrimonial property subject to further engagement with the public to provide further commentary and supplementary propositions.⁴⁰⁷ There are several propositions on legislative amendments highlighted in *seriatim* below which may contribute to an effective clean break principle on pension interest:

- I. There must be a disclosure of pension fund information at an early stage of divorce proceedings. This mandatory duty to disclose is aimed at protecting the financially vulnerable non-member spouses who often do not have adequate information regarding the pension fund details.⁴⁰⁸

⁴⁰⁷ SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* para 4.1.

⁴⁰⁸ SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* para 9.174.

- II. In instances where divorce proceedings are in progress, any accrual of the pension benefit must be deemed to have occurred after the date of the divorce order. When the divorce summons is issued, the member spouse must notify the pension fund administrator and the latter must endorse the spouse's records to prevent payment until the divorce is finalised.⁴⁰⁹ This is still linked with the protection of non-member spouses where member spouses are dismissed or retrenched or retire or resign before the divorce is finalised.⁴¹⁰

- III. For purposes of protecting non-member spouses from instances where a member spouse would use an accrued pension fund payment to purchase a living annuity, it is proposed that the legislation should provide for a valuation of the non-member's share of the right to a future income stream in the form of a lump sum payment, with a mechanism for an insurer to pay that amount directly into a retirement fund or living annuity, based on the election made by the non-member spouse. Alternatively, it is suggested that the living annuity should be fictitiously treated as a capital asset of the member spouse for division just as in the case of pension interest as a legal fiction or notional asset.⁴¹¹

- IV. There are several pension funds that are not governed by the Pension Funds Act and the clean break principle does not apply due to unchanged legislative prescripts for such funds.⁴¹² It is proposed that the legislature must include all public sector retirement funds in a new definition of retirement funds under the Pension Funds Act and the pension funds must be duly registered in terms of the Act in order for section 37D and the clean break principle to apply to all these

⁴⁰⁹ SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* para 9.187.

⁴¹⁰ SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* para 9.187-8.

⁴¹¹ SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* para 9.183-5.

⁴¹² SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* para 9.167.

funds.⁴¹³ Alternatively, in view of the fact that the registration requirement in terms of the Pension Funds Act might be a laborious compliance process, I submit that the application of the Act as prescribed in section 2 must be amended to extend its application to pension funds that are not duly registered in terms of the Act for purposes of the application of section 37D and payment of pension interest to non-member spouses.

In conclusion, it is common cause that pension fund benefits are regarded as the greatest asset in a marriage next to the marital home.⁴¹⁴ Therefore, in light of the fact that sections 7(7) and 7(8) of the Divorce Act do not apply to a pension benefit that has accrued to the member spouse during the subsistence of marriage, we should also consider the potential prejudice suffered by non-member spouses when a member spouse withdraws his or her pension benefit without their spouses' knowledge during the subsistence of marriage.⁴¹⁵ It would be ideal for the sake of completeness to eliminate the risk or prejudice that may be suffered by non-member spouses because of member spouses who may alienate or dispose of a pension benefit without their spouses' knowledge during the subsistence of marriage. I submit that section 15(2) of the Matrimonial Property Act must be amended to make it peremptory that the alienation of a pension benefit requires the non-member spouse's written consent in marriages concluded in community of property. Henceforth, member spouses who are married in community of property or out of community of property with an accrual system should not be able to withdraw their pension benefits without seeking written consent from their non-member spouses as it is applicable to shares, debentures, bonds, mortgages, and investments unless it is excluded from the accrual system. Furthermore, as provided in section 25 of the Matrimonial Property Act, section 15 is only applicable to marriages concluded in community of property. Thus, section 4 of the Act which applies to marriages out of community must be amended with an insertion of a provision that where a pension fund interest or benefit has not been

⁴¹³ SALRC, *Discussion Project Review of Aspects of Matrimonial Property Law* para 9.169.

⁴¹⁴ SALRC, *Review of Aspects of Matrimonial Property Law* 29 para 8.

⁴¹⁵ *Eskom Pension Fund v Krugel* 149C-D.

excluded from the accrual system, the member spouse may not withdraw their pension benefits without seeking written consent from their non-member spouses as such benefit is subject to valuation upon dissolution of marriage.

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