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Dionne Nagan
Legal Counsel

Securing your share of retirement savings after divorce

Dividing assets during a divorce can be complex – especially when retirement savings are involved. Recent legal changes, effective from 1 September 2024, now align the definition of pension interest across all types of retirement funds. While these changes bring clarity, the wording in your divorce order remains critical. A small legal misstep can delay payouts or make your claim unenforceable. Understanding your rights and the role of your marital property regime can help you secure what you're entitled to – and avoid unnecessary frustration down the line.

The impact of marital regimes on pension interest

South Africa recognises three matrimonial property regimes, each with implications for the division of pension interest on divorce.

- 1 In community of property:** All assets, including pension interest, are jointly owned and therefore divisible.
- 2 Out of community with accrual:** Spouses maintain separate estates but share in the growth of those estates during the marriage. Pension interest forms part of the accrual calculation.
- 3 Out of community without accrual:** Known as “cold exclusion”, there is no sharing of assets during or after the marriage. Pension interest cannot be claimed under this regime.

Unless a couple signs an ante-nuptial or post-nuptial agreement, the default regime is in community of property. This legal backdrop determines whether a claim to pension interest is even possible.

Defining pension interest: before and after 1 September 2024

Prior to 1 September 2024, pension interest was defined differently depending on the type of fund:

Pension, provident and preservation funds:

Pension interest was the benefit the member would have been entitled to under the rules of the fund, had their membership been terminated due to resignation on the date of divorce.

Retirement annuity funds:

Pension interest was calculated as the sum of contributions to the fund up to the date of divorce, plus accumulated simple interest, provided it does not exceed the fund return. The prescribed interest rate was the South African Reserve Bank's repo rate plus 3.5%.

This difference between fund types has now been removed, creating greater clarity and consistency for individuals and the professionals helping them manage the divorce process.

From 1 September 2024, a new definition in the Pension Funds Act brings uniformity. Pension interest is now calculated as the member's benefit in the fund – determined according to the fund's rules – on the date the divorce order is issued. This new definition applies to all retirement funds, including retirement annuity funds.

Although the older definition in the Divorce Act technically remains in place, the Pension Funds Act now overrides it for any divorce orders granted from 1 September 2024 onwards.

Why divorce order wording matters

While the way pension interest is defined has changed, the legal requirements for a valid divorce order remain the same. These conditions must be met for a retirement fund to act on the order:

- **The fund must be identified or identifiable:** Ideally, the fund name and policy number should be included. If a member has more than one policy, and no policy number is given, the pension interest will be split across all relevant policies in the fund. If the member belongs to more than one fund but only one fund is identified, the order is not binding on the other funds.
- **Pension interest must be explicitly awarded:** The order must refer specifically to "pension interest". References to "fund value" or "benefits" are insufficient. The order must state either a percentage or a rand amount of pension interest.

- **The fund must be instructed to pay:** The order must direct the fund to make the payment – not the member spouse. Simply endorsing the fund's records is not enough.

It is strongly recommended that parties submit a draft order to the fund for review before finalising it in court. If changes are needed, the pension interest will still be calculated using the original divorce date – not the date of the amended order.

Payment options for non-member spouses

Once a valid order is in place, the non-member spouse has two choices:

1. Lump sum: taxed in the non-member spouse's name, according to the withdrawal tax tables
2. Transfer to another approved fund: a tax-neutral option

Non-member spouses cannot mix options – they must choose one. If the order specifies a rand amount and a lump sum is chosen, the amount paid out will be after tax – the stated figure is a gross amount.

Withdrawals during pending divorce proceedings

Where the fund is notified (with proof) that divorce proceedings are under way, any instruction by the member spouse to withdraw from the Savings component cannot be processed without the written consent of the non-member spouse. This safeguard also applies in cases involving religious marriages and continues until the divorce is finalised.

What this means for those going through a divorce:

- Definition of pension interest is now standardised across fund types from 1 September 2024.
- Legal entitlement to pension interest depends on the matrimonial property regime.
- Order wording is critical – individuals should be aware of the legal requirements, and consultation with legal representatives is key to ensure the order can be enforced.
- Draft orders should be submitted for review to the relevant fund to avoid non-binding outcomes.
- Withdrawals during divorce are restricted to protect non-member spouses.

These changes aim to bring greater alignment across fund types, but the legal requirements for enforceable orders remain exacting. Understanding the updated framework and ensuring precise wording in divorce orders can help those going through divorce avoid delays and unintended outcomes. At a time when clarity and certainty are especially valuable, attention to detail can make a meaningful difference.

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Contact information

36 Hans Strijdom Avenue
Foreshore, Cape Town 8001

Telephone: +27 (0)219011000

Client service support: 0860 500 100

Email: clientservice@ninetyone.com

Please contact our Advisor Service Centre
on telephone: 0860 444 487

Alternatively, please contact your Ninety One
investment consultant.

www.ninetyone.com