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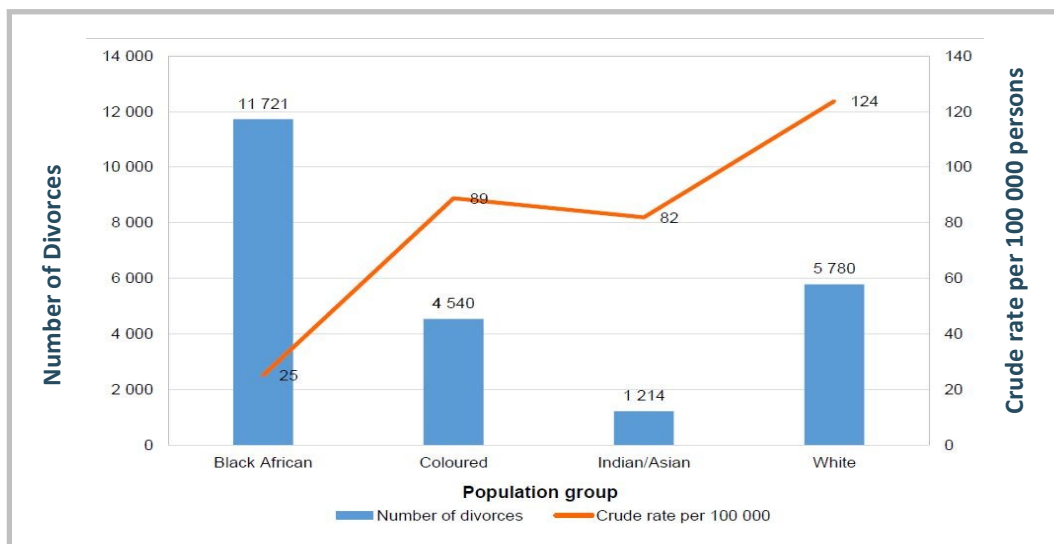
DIVORCE & RETIREMENT FUNDS

By Suzean Haumann, CFP® and head of Brenthurst Wealth Tygervally

Getting married requires careful consideration around joint finances. The same applies for when you get divorced, and is best navigated with the guidance of a professional financial planner. [Retirement funds](#) are especially important and often not approached to deliver a fair result.

More and more reports are appearing around a spike in the [divorce rate](#) as the tensions of lockdowns created matrimonial disharmony. Official divorce statistics show that only about four in 10 South African marriages get to celebrate the 10th anniversary. Once the latest numbers are updated this divorce rate is likely to be much higher.

NO. OF DIVORCES & CRUDE DIVORCE RATES BY POPULATION GROUP 2018



Divorce is a traumatic event that delivers a range of challenges and various matters to agree on and finalise. A critical issue is the separation and division of joint finances, especially regarding retirement and pension funds:

The [Divorce Act](#) was amended in 1989 to make provision for the division of 'pension interest' between parties of a divorce (excluding those married out of community of property without the accrual). At that time, the non-member spouse had to wait until the pension benefit accrued to the member before he/she could get their share (no growth accrued on that amount).

The 'clean break' was introduced in the [Pension Fund Act](#) through the amendment of Section 37D(1)(d) (effective 13 September 2007) to allow a retirement fund to deduct from the member's benefit or minimum individual reserve:

- ➡ **any amount assigned to a non-member spouse in terms of a divorce order granted under the Divorce Act, and**
- ➡ **employee's tax required to be deducted or withheld as per the Income Tax Act.**

A further amendment was made in 2008 to make the 'clean break' applicable to all divorce orders granted after 1989. The amount allocated to the non-member spouse has to be paid to that person or to an approved retirement fund of his/her choice.

Unsurprisingly, managing this 'break' requires due consideration as resolving the retirement funding matter can get rather technical.

As mentioned, it is possible to institute a claim against a retirement annuity fund, pension fund, a preservation fund and a living annuity but each has different rules and also tax implications. A 'pension interest' deduction allows a non-member spouse to be eligible for a pension benefit from the member spouse's pension from the date of divorce. It does not take into consideration the duration of the marriage or whether you were married when you first became a member of the retirement fund.

If a claim is for a share of a retirement annuity, the non-member spouse has access to the sum of contributions to the fund to date plus annual simple interest at the prescribed rate of 7% (current prescribed rate). For a claim against a preservation or provident fund, the non-member spouse has access to the full value.

However, if the non-member spouse selects to withdraw the money, he or she will be taxed in accordance with the retirement withdrawal table in their own hands. Meaning that they will be held liable for the tax payable upon withdrawal of their ex-spouse's pension interest.

Note that the non-member spouse cannot remain part of a company pension or provident fund, as an employer-employee relationship must be in place in this instance. The non-member spouse will be forced to transfer the claimed benefit to a preservation fund, which will be a tax-neutral event (if they do not withdraw any lump sums) Withdrawal tax implications illustrated further on.

As far as claims against living annuities (LA) are concerned it is not permitted to institute a claim against such an instrument in terms of the total funds invested, only a maintenance claim against the income withdrawn from the LA can be lodged.

If the couple were **married without an accrual agreement**, each person retains their own assets, and no claims can be instituted against the other's assets. If accrual is included the spouse with the larger estate must pay the difference between her/his estate and the estate of the spouse with the smaller estate.

THE LEGAL ASPECT

For a claim to be successful against a spouse's retirement fund, that spouse must be a member of the fund on the date of divorce. Therefore, where a spouse resigned from his/her employer prior to the date of divorce and their employment contract ceased, there can no longer be a claim against that spouse's pension or provident fund as they are no longer a member of the fund.

The Divorce Act clearly states that the pension interest is only included in the divisible assets when dealing with marriages in community of property and marriages that are out of community of property with the inclusion of the accrual. It does not provide for out of community of property where the accrual is not included and therefore divorce orders issued in respect of these marriage formalities cannot be actioned by the fund.

MEMBERS TO THE GOVERNMENT EMPLOYEE PENSION FUND:

The GEPP Law has been amended on 23 May 2019 and implemented on 1 August 2019, this brought an end to the divorce debt being created. Instead, the payment of a divorce benefit to a non-member spouse will result in a reduction of the member's years of pensionable service (remember the year's pensionable service has a direct impact on the benefit that the member is entitled to). This is being referred to as the service reduction model.

Members that had divorce debt had a choice of either remaining with the debt and interest model (pre 1 August 2019) or to move to the service adjustment model. They had until 22 May 2020 to make their choice, after which all those members that did not make a selection will automatically be moved to the service reduction model.

WHAT ARE THE TAX IMPLICATIONS?

If the divorce order was granted before **13 September 2007** and the benefit is deducted from the individual reserve **on or after 1 March 2009**, the amount will be totally tax-free. If the divorce order was granted **after 13 September 2007** and the benefit was deducted from the individual reserve:

- ➞ **before 1 March 2009**, the member was liable for the tax.
(He/she could claim it back from the non member spouse)
- ➞ **after 1 March 2009**, the non-member spouse is liable for the tax.
The non-member spouse can elect to have the amount transferred to another approved fund tax-free.

The retirement withdrawal tax tables will be applied as illustrated below.

LUMP SUMS ACCRUING BETWEEN 1 MARCH 2014 AND 28 FEB 2020

TAXABLE PORTION OF WITHDRAWAL	RATE OF TAX
R 0 - R 25 000	NIL
R 25 001 – R 660 000	18% of the amount over R 25 000
R 660 001 - R 990 000	R 114 300 + 27% of the amount over R 660 000
R 990 001 +	R 203 400 + 36% of the amount over R 990 000

An assessed loss cannot be set-off against the taxable lump sum

Where the funds are from the GEPPF, the pre-98 tax-free amount will apply to the non-member spouse's share of the benefit, proportionately.

Note that if a withdrawal is chosen by the non-member spouse the tax implications will also have an effect on their own personal retirement funds and possible future retirement withdrawals upon their own retirement.

THE IMPORTANCE OF WORDING IN THE DIVORCE ORDER:

Most attorneys (some say more than 70%) get the wording wrong with regards to the division of pension interest, which results in the order then not being binding on the fund. The non-member spouse then has to go back to court to get the divorce order amended in order to get their portion of the member's pension interest paid to them. **Attorneys should be encouraged to send their proposed wording on this part of the divorce settlement to the fund before going to court.** Most if not all funds will assist the attorney in getting the proper wording in place, thereby ensuring an order that is binding on the fund.

IMPORTANT PERIODS APPLICABLE WITH REGARDS TO DIVORCE ORDERS

Section 37D(4)(b) of the Pension Funds Act stipulates the following periods applicable to divorce orders:

- Within 45 days of the submission of the court order to the fund, the fund must request the non-member spouse to elect if the amount to be deducted must be paid directly to them or if it must be transferred to a pension fund on their behalf.
- Within 120 days of being requested to make an election, the non-member spouse must inform the fund of their election. If they elect that the amount must be paid to them directly, they must provide the fund with the details of how the payment must be made. If they elect that the amount must be transferred to a pension fund on their behalf, they must provide the fund with the details of that pension fund.
- If the non-member spouse makes an election, the fund must within 60 days of being informed of how the amount must be dealt with, pay, or transfer the amount.
- If the non-member spouse does not make an election, the fund must within 30 days of the expiry of the 120-day period, pay the amount directly to the non-member spouse.
- If the fund cannot reasonably ascertain how the payment to the non-member spouse must be affected, it must retain the amount and the fund return on the amount in the fund until details of how the payment must be affected is provided to the fund by the member, the non-member spouse or any other person.

The non-member spouse is only entitled to fund return (interest) on their benefit from the date of the deduction, which is the date on which an election is made or, if no election is made within the 120-day period referred to in paragraph 2 above, the date on which that 120-day period expires. The non-member spouse is not entitled to any other interest or growth.

THE PENSION FUNDS ADJUDICATOR'S HAS CONFIRMED THAT THE NON-MEMBER SPOUSE IS NOT ENTITLED TO ANY INVESTMENT RETURNS OR GROWTH ON THEIR PORTION OF THE PENSION INTEREST AFTER THE DATE OF THE DIVORCE.

WHAT HAPPENS IF THE MEMBER HAS EMIGRATED?

In the instance that a non-member spouse lodged a claim against an emigrated member in another country, such member must apply to a South African court to have the divorce order recognised and enforced in SA.

In 2011, the Pension Funds Adjudicator, in the case of Edgar v Momentum Retirement Annuity Fund and others, ruled that the place of residence plays an important role in deciding whether to recognise the judgement of the foreign court or not. This is because the 'common' law procedure to have such a judgement recognised and enforced in South Africa is to bring an action in a South African court to make the foreign judgement its own.

All aspects of a sound financial plan, also in the case of divorce, are best approached with the guidance of an experienced, accredited financial advisor. Research by global company Vanguard has found that using professional advice has proved to be beneficial over time.

Source: Momentum Investments Legal

CONTACT ANY OF OUR HIGHLY QUALIFIED FINANCIAL ADVISORS AT OUR OFFICES COUNTRY-WIDE TO DISCUSS YOUR INVESTMENT STRATEGY READ >> [BRENTHURST INVESTMENT](#)

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SUZEAN is head of the Tygervalley office. She is a CERTIFIED FINANCIAL PLANNER® and a registered member of the Financial Planning Institute of South Africa.

She has experience in various aspects of financial planning, focusing on investment and retirement planning. Suzean is also a qualified Foreign Exchange Consultant for the company with a wealth of knowledge in offshore investments.

Suzean joined Brenthurst Wealth in 2010 and is fully qualified to give advice on all investment matters.

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