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Circumventing section 7(8)*(a)*(i) of the Divorce Act 70 of 1979 and section 37d of the Pension Funds Act 24 of 1956 through strategic resignation: *CNN v NN* 2023 (5) SA 199 (GJ)

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I Introduction

Suppose that the High Court dissolved a couples' marriage on 14 October 2022 and incorporated the parties' signed settlement agreement in its order. Unbeknown to the divorce court and the wife, the husband had resigned from his employment and exited his retirement fund on 7 May 2021. This was roughly two months after being served with the divorce summons. For all practical purposes, when the court granted the divorce order, the husband was not a member of a retirement fund. Consequently, he did not have a pension interest from which the ex-wife could be allocated a portion (*CNN v NN* 2023 (5) SA 199 (GJ) para 4 ('*CNN*')). It transpired that at the time the divorce order was granted, the husband's pension benefits were still held by the fund. Following the divorce order that assigned her 50 per cent of the husband's pension interest, the ex-wife approached the fund with the aim of requesting payment of what she believed was due to her (*CNN* para 5). The fund advised her that the ex-husband's pension benefit had accrued to him and that he was no longer a member of the fund. Furthermore, the fund informed her that the divorce order did not comply with the legislative prescripts and could not be enforced. In turn, the fund's Divorce and Maintenance officer advised that for her to be

assisted, she needed to provide the fund with a divorce order directing it to pay a pension benefit as opposed to a pension interest. Accordingly, what the fund was holding on behalf of the husband was his accrued pension benefit and his pension interest was nil. As a result, the divorce order could not be enforced (*CNN* para 5). The contents of the letter from the fund caused the ex-wife to launch 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' (*CNN* para 6).

These were the precise issues which the High Court was confronted with in the recent case of *CNN*. This commentary focuses on *CNN* to examine pre-emptive/strategic/tactical resignation with collateral purpose of subverting the allocation of pension interest upon divorce. Sight however, must never be lost that marriage is not only a relationship of inestimable import to the parties concerned but a relationship that has public significance (*Dawood v Minister of Home Affairs* 2000 (8) BCLR 837 (CC) para 31; *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 63).

II The opportunism in the exit landscape from employment

To lend perspective to the issues arising from *CNN*, the opportunism prevalent in the exit landscape from employment can hardly be overlooked. It is trite that resignation is a unilateral and a final act that ends the employment relationship subject to the provisions of ss 37 and 38 of the Basic Conditions of Employment Act 75 of 1997 (*Lottering v Stellenbosch Municipality* 2010 ZALCCT 42 paras 12–15; see also Manamela '"To meet is to part": Resignation by SMS constitutes notice in writing as required by the Basic Conditions of Employment Act: *Mafika v SA Broadcasting Corporation Ltd*: case comment' 2011 *SAMLJ* 521; Le Roux 'Resignations – The final, unilateral act of an employee' 2010 *Contemporary Labour Law* 5). Further, once resignation has been communicated, it cannot be retracted unless the employer consents to such a withdrawal (*Monareng v Dr JS Moroka Municipality* 2022 (43) *ILJ* 1855 (LC) paras 10–16).

(a) Mutual separation agreement

Termination of contract by mutual agreement merits elaboration. One of the purposes of the Labour Relations Act 66 of 1995 ('LRA') is to provide ways in which labour disputes can be resolved (s 1 of the LRA).

It further empowers parties in a labour dispute to resolve the matter by mutual agreement (s 7(3) of the LRA). Acceptance by an employee of a sum of money in return for agreeing to terminate the employment contract constitutes a consensual termination of contract. In contractual terms, a settlement agreement is entered between an employer and a former employee settling all claims arising from the employment and the termination thereof may constitute a compromise which has the effect of *res judicata* which is an absolute defence to any action based on the employment relationship (*Van Staden v Busby Sawmills (Pty) Ltd* 1994 (9) BLLR 127 (IC)). Settlement agreement extinguishes all disputes between parties. In certain circumstances, mutual separation often allows the employee who has done wrong what may be called a soft exit (see eg *Van As v African Bank Ltd* 2005 (10) BLLR 959 (LC); *Straub v Barrow NO* 2001 (6) BLLR 679 (LC)).

In terms of s 142A of the LRA, the commissioner can make the settlement agreement an arbitration award. The Labour Court ('LC') is also empowered to make a settlement agreement order of court even though the agreement was concluded before the matter was referred in terms of the LRA (see *Greef v Consol Glass (Pty) Ltd* 2013 (34) *ILJ* 2385 (LAC) para 19). Where a settlement agreement is made an order of court, this enables an aggrieved party to institute contempt proceedings if the order of court is not complied with.

As a general proposition, acceptance of an offer of a sum of money in settlement of a dispute between parties is by and large considered as amounting to waiver by the employee of her right to litigate over the issue. Having said that, uncritical endorsement of this proposition may give rise to injustices (see *Trio Glass t/a The Glass Group v Molapo NO* 2013 (34) *ILJ* 2662 (LC)). For example, an illiterate, unrepresented employee in a tight financial situation is likely to be 'bought off' before launching legal proceedings with an offer of a sum of money in 'full and final settlement'. The Industrial Court has declined to accept the employer's contention that the employees had waived the right to pursue their action for their alleged unfair dismissal because they have accepted money 'in full and final settlement' of their claim (see *PPWWAU v Delma (Pty) Ltd* 1989 (10) *ILJ* 424 (IC); *Mdlalose v I E Laher & Sons (Pty) Ltd* 1988 (6) *ILJ* 350 (IC)). According to Grogan:

> If this approach were pressed too far no dismissal disputes could be settled before a matter comes before an arbitrator or court. This would clearly frustrate the purpose of statutory dispute resolution procedures. The courts should therefore be, and have been, willing to investigate whether disputes have really been settled — and whether such settlements

> constitute consensual terminations of the employment relationship on the terms contained in the deed of settlement (Grogan *Dismissal* (2002) 46).

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Likewise, if a settlement agreement is signed under duress (*Metcash Trading Africa (Pty) Ltd v Goddard* 2011 ZALAC 36, see also generally, Glover 'The test for duress in South African law of contract' 2006 *SALJ* 98 and 'The developing a test for economic duress in the South African law of contract: A comparative perspective' 2006 *SALJ* 285) or fraudulently induced (*NUMSA v Clear Creek Trading 167 (Pty) Ltd t/a Wireforce* 2018 ZALCJHB 340), it can be annulled (*Corruption Watch v President, RSA; Nxasana v Corruption Watch* 2018 (2) SACR 442 (CC)).

To constitute a waiver, the parties must have tendered to settle an existing dispute in full and final settlement. In that case none should be lightly released from an undertaking seriously and willingly embraced (*Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 28 and 60). This is especially so where the parties were operating from the necessary position of approximate equality of bargaining power (*Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd* 2016 (37) *ILJ* 2723 (CC) ('*Gbenga-Oluwatoye*')). Moreover, in *Gbenga–Oluwatoye*, the mutual separation agreement was for the benefit of the party seeking to escape the consequences of his own dishonest conduct. In that case an escape artist who obtained employment by misrepresentation sought to overturn a settlement agreement on the basis that it unduly infringed his right of access to courts. It is necessary to emphasise that the employee's dishonesty caused an irredeemable breakdown of the trust relationship, rendering continued employment intolerable (see eg, *Woolworths (Pty) Ltd v CCMA* 2022 (43) *ILJ* 839 (LAC); see generally, Okpaluba & Maloka 'The breakdown of the trust relationship and intolerability in the context of reinstatement in the modern law of unfair dismissal (1)' 2021 *Speculum Juris* 71 and 'The breakdown of trust relationship and intolerability in the context of reinstatement in the modern law of unfair dismissal (Part 2) 2022 *Speculum Juris* 7; Rycroft 'The intolerable employment relationship' 2013 *ILJ* 2271; Tshoose & Letjeku 'The breakdown of trust relationship between employer and employee as a ground for dismissal: Interpreting the Labour Appeal Court's decision in *Autozone*' 2020 *SAMLJ* 156; Newaj 'The impact of dishonesty on employment: *Edcon*, prior and beyond' 2016 *THRHR* 429).

In the settlement agreement, Mr Gbenga-Oluwatoye unconditionally waived his right to approach the Commission for Conciliation, Mediation and Arbitration ('CCMA') and/or any court for any relief against Reckitt in any dispute arising from his employment or from the

separation agreement (waiver provision). Even though Mr Gbenga-Oluwatoye waived his right in this regard, he still approached the Labour Court ('LC') on an urgent basis seeking declaratory relief. He challenged the validity of the separation agreement and alleged that the employer coerced him to sign the agreement. Alternatively, he said that because the waiver provision restricted his right to seek judicial redress, it was against public policy and therefore invalid.

The LC found that the separation agreement reflected a valid compromise between the parties. It was in full and final settlement of any disputes arising from their employment relationship. The Labour Appeal Court ('LAC') endorsed the LC's findings. In the same vein, the Constitutional Court ('CC') upheld the judgment of the courts below and noted that Mr Gbenga-Oluwatoye was a senior manager with prior work experience at a senior level and nothing indicated that he did not have bargaining power or that he did not understand the agreed waiver provision (*Gbenga–Oluwatoye* para 20). The CC further observed that the employee had confessed that he had no defence to the charge of misrepresentation (*Gbenga–Oluwatoye* para 23). It was after this that he had entered into the separation agreement to put a present dispute to bed. In short, the waiver provision was constitutionally compliant.

(b) Strategic resignation

Pre-emptive resignation in the face of disciplinary or incapacity inquiry followed by constructive dismissal claim, and strategic resignation with ostensible objective of evading accountability for workplace misconduct are the two sides of the same coin of employee opportunism. To illustrate, the employee in *Solidarity obo Van Tonder v Armaments Corporation of SA (SOC) Ltd* 2015 ZALCJHB 241 ('*Armaments Corporation of SA*') acted hastily in resigning. According to the LAC, the employee resigned before the grievance process had progressed beyond the first stage. The employee evinced that he had no confidence in the internal grievance process and preferred to resign and approach the CCMA even before step 5 of the process. He was too hasty in his decision to resign. In the LAC's view 'his conviction in the merit of his cause, fuelled by his obvious outrage and indignation, may well have been misplaced. His assumption that his superior's views about the performance contract outputs and appointments were wrong or unacceptable needed to be tested and there was a legitimate, prescribed remedy available for that very purpose, which he opted to pursue' (*Armaments Corporation of SA* para 46). The employee's resignation was 'petulant, premature and ill-considered', thus taking his dispute

completely outside the domain of constructive dismissal (*HC Heat Exchangers (Pty) Ltd v Araujo* 2019 ZALCJHB 275).

Subsequent to resignation with immediate effect but prior to imposition of sanction, the employee in *Mthimkhulu v Standard Banks of SA* 2021 (42) *ILJ* 158 (LC) ('*Mthimkhulu*') launched urgent proceedings to interdict the employer from finalising disciplinary proceedings. In the case under consideration, the employee was charged with gross dishonesty and fraudulent conduct. The presiding officer afforded the applicant and the Bank an opportunity to present mitigating and extenuating factors before he could determine an appropriate sanction. Mthimkhulu pre-emptively resigned as an employee with immediate effect. The Bank insisted that Mthimkhulu serve a 30 days' notice period. Later, a sanction dismissing Mthimkhulu from the Bank's employ was announced. Mthimkhulu vigorously resisted the announcement of the sanction on the basis that the Bank did not have jurisdiction over him anymore. He demanded that the employer must abandon and nullify the dismissal before close of business on 1 September 2020 (*Mthimkhulu* para 6). The demand was rejected by the Bank. The rebuff prompted Mthimkhulu to seek urgent relief. In dismissing the employee's application for urgent relief, the LC held that resignation before the announcement of a sanction of dismissal has no legal effect. Simply put, the employer was entitled to proceed with disciplinary proceedings to finality (see also *Standard Bank of SA Ltd v Chiloane* 2021 (42) *ILJ* 863 (LAC); *Naidoo v Standard Bank SA Ltd* 2019 (40) *ILJ* 2589 (LC)).

Opportunism was also at issue in *Saldanha Bay Municipality v SAMW obo Wilschut* 2015 (3) *ILJ* 1003 (LC) ('*Saldanha Bay Municipality*'), a case in which an employee assisted by the trade union in the midst of disciplinary proceedings concluded a dubious settlement agreement with the departing municipal manager. The employee had been summoned to appear before a disciplinary hearing to face allegation relating to dishonesty. He confessed to the misconduct. Before the chairperson could announce the sanction, the employee reached settlement with the municipal manager whereby he pleaded guilty to all the charges, tendering fulsome apology and showing remorse for bringing the municipality into disrepute. Furthermore, the employee accepted a final warning, repayment of the amount equal to R2 000 and relocation in terms of the collective agreement. The employee presented this settlement agreement to the presiding officer. Undeterred, the presiding officer continued with the disciplinary hearing and imposed a sanction. On the review to the LC, the arbitrator's award reinstating the

employee was set aside. The court found that reliance on the *Turquand* rule and estoppel to hold the municipality bound to a settlement agreement contravening both the Local Government: Municipal Systems Act as well as the South African Local Government Association's collective agreement was misplaced. The LC held that the municipal manager exceeded his powers and that the settlement agreement was therefore invalid. It also underscored the fact that 'there was nothing either in the collective agreement or the Systems Act to suggest that the power to enter into a settlement agreement, bypassing the disciplinary process was delegated to the municipal manager' (*Saldanha Bay Municipality* para 20; see also Maloka 'The *Turquand* rule, irregular appointments and bypassing the disciplinary process' 2017 *SAMLJ* 527 at 536–541).

III Variation of divorce orders

In the case at hand, the fundamental issue was whether it was competent to vary an order by replacing a statutorily prescribed phrase 'pension interest' with a phrase 'accrued benefit' which is not legislatively recognised. Importantly, the applicant contended that the expression 'pension interest' made it impossible for her to claim her entitled portion of the member's pension benefit. This afforded the court the opportunity to address the knotty issue of variation of divorce orders.

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The court's power to vary divorce orders derives from s 7(1) of the Divorce Act 70 of 1979 ('Divorce Act'). It reads as follows:

> [a] court granting a decree of divorce in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

However, the court's discretionary power to vary in appropriate circumstance divorce settlement agreements which were made orders is circumscribed (*Eke v Parsons* 2016 (3) SA 37 (CC) para 8; *AVW v SVW* 2022 ZAWCHC 74; *Le Grange v Le Grange* 2013 (6) SA 28 (ECG)). In *CCN*, it was common ground that an order was made by the court that was unaware of the ex-husband's fund membership status. The applicant only discovered that the member spouse exited his fund when she sought to enforce payment in terms of the divorce order. It is readily apparent from ss 7(1) and 7(8) of the Divorce Act that what is contemplated is an award to the non-member spouse of any part of the pension interest calculated as at the date of the divorce order (*CNN* para 17; see also *Government Employees Pension Fund v Naidoo* 2006 (6) SA 304 (SCA)

para 1). The order in respect of 'pension interest' was unenforceable because the ex-husband has strategically resigned from his employment before his divorce. In the circumstances of the instant case, even though the applicant only learnt that the former husband had resigned after the order was granted, at the time the order was granted the latter did not have a pension interest as defined in s 1 of the Divorce Act. This resulted in the court granting an unenforceable order, which unfortunately cannot be made enforceable even if it was to be varied (*CNN* para 18).

IV The law governing pension interests in South Africa

(a) Pension interest definition

It is essential to note that 'pension interest' is narrowly defined in s 1(1) of the Divorce Act. It refers to the value of the interest which a member of a pension fund on the date of his divorce, has in the pension benefit that will accrue to him as a member of such fund at a certain future date (*Old Mutual Life Assurance Co (SA) Ltd v Swemmer* 2004 (4) BPLR 5581 (SCA) para 19; *Eskom Pension and Provident Fund v Krugel* 2012 (6) SA 143 (SCA) para 11). Section 1 of the Divorce Act defines a pension interest regarding a pension fund in relation to a party to a divorce action who is a member of a pension fund (excluding a retirement annuity fund) as:

> the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office.

Section 7(7)*(a)* of the Divorce Act establishes a carefully defined statutory mechanism which opens up the pension interest of the member spouse to be split or shared when the member divorces. This section has been judicially branded a legislative fiction because 'the non-member spouse whose marital regime allows for sharing of assets will be entitled to claim a portion of the non-member spouse's pension interest. The entire pension interest will be part of the joint estate when the parties are married in community of property, or when the member's estate grows if parties are married with the application of the accrual system' (*CNN* para 27; *Ndaba v Ndaba* 2017 (1) SA 342 (SCA) para 26). The pension interest which a non-member spouse would have been entitled to on the date of divorce was previously not regarded as forming

part of the joint estate of the spouse married in community of property (*ML v JL* 2013 ZAFSHC 55 para 15). The insertion of subsecs 7(7) and 7(8) into the Divorce Amendment Act 7 of 1989 resulted in pension interest of the member spouse being regarded as an asset in his or her estate and by extension his or her joint estate if married in community of property, making it eligible for division upon divorce (*De Kock v Jacobson* 1999 (4) SA 346 (W) 349G-H; see generally, Marumoagae 'A Critical Discussion of a Pension Interest as an Asset in the Joint Estate of Parties Married in Community of Property' 2014 *Speculum Juris* 66).

Section 7(8) provides as follows:

> Notwithstanding the provisions of any other law or of the rules of any pension fund —
>
> *(a)* The court granting a decree of divorce in respect of a member of such a fund, may make an order that—
>
> (i) Any part of the pension interest of that member which, by virtue of subsection (7) is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;
>
> (ii) The registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnishes proof of such notification.

At this juncture, it is critical to set out the practical consequences of s 7(8). Foremost, the divorce court is conferred with a discretion to make an order that a portion of the member spouse's pension interest is due to the non-member spouse. Second, the court is authorised to make an order against the identified retirement fund which may or may not have been joined in the divorce proceedings as a party to pay the prescribed portion of the member's pension interest to the non-member spouse when the benefits accrue to the member spouse. Third, it empowers the court to direct the registrar of the court to notify the specified fund of the order for such a fund to endorse its records in respect of its members that a portion of that member's benefits will be paid to the non-member spouse. Lastly, the administrator of the identified fund is statutorily bound, once an endorsement in the records of the fund has been made, to provide proof of such endorsement to the court in writing (*Ndaba* para 27).

The drawback with the s 7(8) procedure is that in practice it is seldom followed. The short point is that the retirement funds and the courts' registrars honour the legislative procedure in breach. Typically,

non-member spouses or their legal representatives inform the funds of divorce orders and their obligation to pay non-member spouses, instead of court registrars. Similarly, retirement funds rarely report back on the endorsements of their clients' records (*CNN* para 29).

The statutory scheme for splitting up member spouse's pension interest upon divorce under s 7(7) of the Divorce Act must be understood in the light of the Pension Funds Act 24 of 1956 ('PFA'). Section 37D(4)(*a*) of the PFA encapsulates a trend in contemporary divorce law — the principle of 'clean break'. The mainstay of the no-fault divorce is that separation was simply the unfortunate rupture of a love relationship; once the marriage has irretrievably broken down, both parties should be free to put it behind them and move on (see eg *Schwartz v Schwartz* 1984 (4) SA 467 (A); *M v M* 2018 ZAFSHC 161 para 62). The clean break principle is not gender neutral — it addresses the problem of women's impoverishment upon divorce given 'the dominant family ecology entails an ideal-worker husband supported by a flow of domestic services from his wife' (Williams 'Is coverture dead? Beyond a new theory of alimony' 1994 *Georgetown LJ* 2227, 2229; Bonthuys 'Public policy and the enforcement of antenuptial contracts: *W v H*' 2018 *SALJ* 237; Robinson & Horsten 'The quantification of ''labour of love'': Reflections on the constitutionality of the discretion of a court to redistribute capital assets in terms of section 7(3)–(6) of the South African Divorce Act' 2010 *Speculum Juris* 96–117; see generally, *KRG v Minister of Home Affairs* 2022 (5) SA 478 (G) paras 12–14, 56–57 and 61). Section 37D (4)(*a*) of the PFA settles the issue of who will move on with what. It ensures the immediate release of benefits on the date of divorce in the form of pension interests (*MN v FN* 2020 (2) SA 410 (SCA) para 2; see also *Wiese v Government Employee Pension Fund* 2012 (6) BCLR 599 (CC); *Ngewu v Post Office Retirement Fund* 2013 (4) BCLR 421 (CC)). In *JC Cockcroft v The Mine Employees' Pension Fund* 2007 (3) BPLR 296 (PFA) at para 19 it was said:

> By deeming the date of accrual of the benefit to be date of divorce, the new section . . .overrides the actual date of accrual of the benefit which is determined by the event giving rise to the member's entitlement. The result is that the divorce benefit accrues to the non-member spouse on the date of divorce (a fixed ascertainable date without any reference to other documents and no time delay implications), that is without reference to the actual date of accrual of the benefit (invariably a future date at the time of the divorce with significant time delay implications. (See also Nevondwe 'The law regarding the division of the retirement savings of retirement fund member on his or her divorce with specific reference to *Cockcroft v Mine Employees' Pension Fund* 2007 (3) BPLR 296 (PFA)' 2009 *LDD* 1).

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Ordinarily, the divorcing non-member spouse had to wait until their spouse exited their retirement fund due to retirement, resignation, retrenchment, dismissal or even death. Otherwise, it can be years after divorce before non-member spouses are paid what is due to them.

This legal backdrop brings us to the challenge confronting the divorcing applicant in *CNN*. The applicant sought a clean break in terms of s 37D(4)(*a*) of the PFA and s 7(8)(*a*) of the Divorce Act by being paid a portion of the ex-husband's pension interest. The hurdle facing the applicant was that she would be entitled to claim the member's pension interest if that benefit did not accrue before divorce. The effect of the High Court's reliance on *Eskom Pension and Provident Fund v Krugel* 2012 (6) SA 143 (SCA) ('*Krugel*') and *Fourie v Vrystaat Munispale Pensionfond* 2022 ZAFSHC 98 ('*Fourie*') in which non-member spouses received a raw deal which explicitly obliterated the divorcing applicant's prospects of success in the case at bar. Thus, the law is against the applicant:

> She cannot claim pension benefits that accrued before the divorce was ordered because section 7(8) of the Divorce Act only deals with a benefit that accrues to the member spouse due to divorce. As such, 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. To the extent that the fund advised the applicant to approach the court to vary the divorce order with a view to direct the fund to pay her a portion of the respondent's ''accrued pension benefits'', the advice was misconceived, misplaced and legally flawed. The applicant ought to have challenged the current legal framework (*CNN* para 35).

In *Krugel*, the husband resigned from Eskom on 31 January 1993 and elected to defer his pension benefit in the fund in accordance with rule 30(2) of the fund and thus became a deferred pensioner. Following divorce on 14 September 2001, a settlement which was made an order of court provided that the non-member spouse was entitled to 25 per cent of the ex-husband's pension interest as soon as the member becomes entitled to the pension benefits. However, when approached, the fund declined to register the required endorsement against its records on the basis that the divorce was granted after Krugel had already elected to become a deferred member and no longer had a pension interest in the fund as contemplated in the ss 7(7) and 7(8) of the Divorce Act, read in conjunction with s 37D of the PFA. The Supreme Court of Appeal ('SCA') held that '[o]nce the pension benefit has accrued, that is, beyond the date of divorce at which time the pension interest converts into a pension benefit, the provisions of section 7(7) are no longer applicable'

(*Krugel* para 11). The SCA agreed with the fund's contention that there was no pension interest which formed part of Krugel's assets which could be assigned to the ex-wife because the former had already resigned from his office on the date of the divorce. As a result, his pension interest had become payable to him before the divorce and he was, furthermore, no longer a member of the fund (*Krugel* para 7).

Although the facts in *Fourie* were dissimilar to *Krugel*, a key determinant in this case was the fact that the member spouse and CEO of the fund had exited his retirement fund four months before the court granted a divorce order due to retirement. The fund was under curatorship due to misappropriation of funds attributed to the member spouse. In order to recover the misappropriated funds, the curator invoked s 37D(1)*(b)*(ii) of the PFA withholding the member spouse's pension benefit pending the determination of the civil claims in respect of the damage caused to the fund (*Fourie* para 4). Under the settlement agreement which was made an order of court, the non-member spouse was entitled to 12 million from the member spouse's interest. The crisp issue before the High Court was whether the non-member spouse was entitled to payment due to her by virtue of a decree of divorce incorporating a settlement agreement (*Fourie* para 2). The fund and the curator opposed the non-member's claim on the ground that it was nullity. First, at the time of the divorce, the member spouse did not have a pension interest which could be apportioned to the non-member spouse. Second, the member spouse retired and exited the fund before the divorce and his pension benefits which had accrued to him and was later withheld by the fund in terms of s 37D(1)*(b)*(ii) of the PFA (*Fourie* para 9.1). The court agreed with the fund and the curator and rejected the non-member spouse's claim. Consequently, it was held that ex-wife was not entitled to the payment of pension interest apportioned to her (*Fourie* para 21).

Adopting the reasoning in *Krugel* and *Fourie*, the High Court concluded that:

> Non-member spouses can only claim parts of their member spouses' contributions plus investments which will conveniently be referred to as pension interests for the purposes of divorce. This will be the case if member spouses were active members of such retirement funds as at the date of divorce. This means that non-member spouses' access to their member spouse's benefits is dependent, first on divorce, and secondly, on whether member spouses are active in their funds, even though these benefits are still held by these funds. This is the conundrum that the applicant is facing because at the time the divorce was granted, the respondent was not a member of a fund and there was no pension interest from which a portion could be allocated to her (*CNN* para 36).

Weighing statutory framework and the established precedents, the decision to dismiss the applicant's claim was fairly predictable.

V Conclusion

It is clear that the exit landscape from employment is rife with opportunism and the retirement industry is no exception (Marumoagae 'Retirement funds rivalry, voluntary withdrawal of membership, and transfer of assets during the period of employment' 2020 *SAMLJ* 205, see also generally, Mhango, Mhango-Dyani & Ndumo (eds) *Pension Law and Death Benefits: Law, Practice and Policy Harmonisation in the Southern Africa* (2022)). *CNN* illustrates that the opportunism which emerged in *Krugel* and *Fourie* remain unchecked, coincidentally, eliding the court's adjustive judicial power provided by s 7(8) of the Divorce Act. The carefully crafted legislative scheme aimed at mitigating grossly inequitable discrepancies in the financial position of spouses on divorce is negated by tactical exit from retirement fund before the granting of divorce order. While the court in *CNN* must be commended for bringing the lacuna in the retirement framework into sharp relief, with respect, Marumoagae AJ's decision unwittingly allowed an escapist ex-spouse to disappear into the sunset with all the retirement benefits. In short, a prototypical unscrupulous member spouse who sidesteps the applicable provisions of the Divorce Act by abruptly resigning from employment after being served with divorce summons stands to be rewarded, while the non-member spouse is left empty handed.

The obvious disparity and inequity that ensues when a divorcing member spouse strategically resigns from work before the finalisation of divorce proceedings with the ostensible purpose of rendering the court's order awarding non-member spouse pension interest unenforceable cannot be gainsaid. Given the unsatisfactory state of affairs for the non-member spouses, *CNN* reaffirms that the task beckoning for the legislature is straightforward: a reforming and remedial measure to close the legislative loophole is overdue. It is submitted that the narrow definition of 'pension interest' in s 1 of the Divorce Act can be widened to encompass the phrase 'accrued pension benefit'. In sum, the paradigm shift will foreclose non-member spouse impoverishment upon divorce in the likely situation of member spouse opportunistic exit from the retirement fund prior to the finalisation of divorce proceedings.

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