

**The non-member spouses' right to claim
retirement benefits during divorce: A call for law
reform**

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ABSTRACT

This dissertation discusses the South African legal position regarding the sharing of the member spouse's retirement benefits during divorce. It investigates whether the current law regulating the sharing of member spouses' retirement benefits adequately addresses the non-member spouses' rights to benefit from member spouse's accrued retirement benefits during divorce. Traditionally, the non-member spouses' rights to benefit from the member spouses' retirement benefits during divorce was not recognised in our law. This dissertation highlights the practical plight that is encountered by non-member spouses' whom their husbands are members of retirement funds that are subject to the PFA and the GEPL.

Before, 1989, non-member spouses would only benefit from their member spouses' retirement benefits once they have accrued. These retirement benefits would only accrue once the member spouse has resigned, retired, been retrenched, reached certain age and been dismissed. Irrespective of the applicable matrimonial principles governing the spouses' marriage, retirement benefits were not regarded as assets forming part of the member spouse's estate, or joint estate when married in community of property.

Our courts have timeously failed to adequately protect the existing interplay between pension law, matrimonial law and the divorce law in order to protect the rights of non-member spouses *vis-à-vis* the sharing of their member spouses' accrued retirement benefits during divorce. In most cases, our courts disregarded the impact of matrimonial principles for purposes of the inclusion of retirement benefits during the division of the spouses' matrimonial assets during divorce. However, after the introduction of the concept "pension interest" and sections 7 (7) and 7 (8) in the *Divorce Act*, it is now possible for the courts to deem the member spouses' pension interest as an asset of the member spouses' estate and/or joint estate respectively. Non-member spouses had to wait for long before they could access claimed portions of their member spouses' retirement benefits. To curb this challenge, the legislature amended the PFA in 2007 by introducing the clean-break principle in the PFA through section 37D. Later in 2011, the clean-break principle was introduced in the GEPL through section 24A. Recently, it has emerged that member spouses are using their accrued retirement benefits to purchase

living annuities without the non-member spouse's written consent. This practice clearly results in the deprivation of the non-member spouses' rights to claim and receive portions which they may be entitled to during divorce. This dissertation argues that the legislature should consider amending the PFA, GEPL or the *Divorce Act* to statutorily protect and recognise the non-member spouses' rights to claim the member spouses' accrued retirement benefits during a divorce. Alternatively, the legislature should consider enacting specific legislation that will curb these challenges during divorce.

KEY WORDS: Retirement benefits; Pension Interest; accrued retirement benefits, Matrimonial principles; Divorce proceedings; living annuities; Retirement funds; Non-member spouses; Member spouses

LIST OF ABBREVIATIONS

DA	DIVORCE ACT
GEPLAA	GOVERNMENT EMPLOYEES PENSION LAW AMENDMENT ACT
GEPL	GOVERNMENT EMPLOYEES PENSION LAW
GEPF	GOVERNMENT EMPLOYEES PENSION FUND
JAL	JOURNAL OF AFRICAN LAW
MAA	MATRIMONIAL AFFAIRS ACT
MPA	MATRIMONIAL PROPERTY ACT
LDD	LAW, DEMOCRACY & DEVELOPMENT
PFAA	PENSION FUNDS AMENDMENT ACT
PFA	PENSION FUND ACT
SA MERC LJ	SOUTH AFRICAN MERCANTILE LAW JOURNAL
SALJ	SOUTH AFRICAN LAW JOURNAL
SCA	SUPREME COURT OF APPEAL
TRM	TELECOMMUNICATION-RELATED MATTER

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Chapter 1: Introduction

The sharing of the member spouse's retirement benefits during divorce proceedings has attracted attention of many legal commentators in South Africa.¹ This is the case because the law regulating this area of law has raised concerns over the years. This problem might have been triggered by the conflicting or inconsistent statutory provisions of the matrimonial law, pension law and divorce law. For instance, sections 37A (1) of the *Pension Funds Act* 24 of 1956, (hereinafter the PFA) and 24A (1) of the *Government Employees Pension Law*, 1996 (hereinafter the GEPL) provide that, no benefit provided for in the rules of a registered fund shall be capable of being reduced or transferred. In practice, on the one hand; sections 37A (1) of the PFA and 21 (1) of the GEPL have been interpreted and applied in a manner that trumps the rules of the matrimonial property system dealing with the division of the spouses' assets during divorce. On the other hand, the *Divorce Act* 70 of 1979 (hereinafter the *Divorce Act*) was silent and, as a result, there were no provisions regulating the sharing of the member spouse's retirement benefits during a divorce. In particular, the highlighted hindrance resulted in the deprivation of the non-member spouse's right to claim a share or portion of the member spouse's retirement benefit during a divorce. Be that as it may, traditionally, the non-member spouse's right² to claim a portion of a member spouse's retirement benefit³ during divorce proceedings was not statutorily regulated.⁴ Thus, the absence of adequate statutory provisions to provide clear practical guidelines on how the non-member spouse could go about in claiming the member spouse's retirement benefits during divorce resulted in inconsistent approaches.⁵ This was and is still a major problem, despite the available matrimonial principles in place. Retirement benefits of a member spouse were previously

¹ In this case, the courts normally rely upon the principle of pension interest which is statutorily designed to resolve issues relating to the sharing of a member spouse's pension interest which have not yet accrued but accrue at the time of divorce.

² The term *non-member spouse* refers to a spouse who is not a member of a retirement fund, but a spouse of a member of a retirement fund when they divorce. The argument advanced by this dissertation relate to the prejudice encountered by women/wives in practice.

³ For purposes of this dissertation the term **retirement benefits/pension benefits** will be used interchangeably when advancing arguments that the non-member spouses should be able to claim a share of the member spouses' accrued retirement benefits when the spouses divorce. Furthermore, the term **pension interest** will be used when making reference to the current legal position regarding a member spouse's pension interest being regarded as an asset at the date of divorce.

⁴ Marumoagae 2018 SA Merc LJ 284.

⁵ See *Maharaj v Maharaj* 2002 2 All SA 34 (D); *Sempapalele v Sempapalele* 2001 2 SA 306 (O).

not deemed to form part of the spouses' joint estate where their marriage was in community of property.⁶ With this in mind, it was and is still a general principle that a retirement benefit of a member spouse is not regarded as an asset of the member spouse's estate.⁷ The member spouse could only have a legal right to claim his retirement benefits once they have accrued to him.⁸ Normally, the member spouse's right to claim his retirement benefits vest in him when an exit event has occurred. The exit events referred to are, reaching a specific age, retirement, dismissal, or retrenchment.⁹ This, therefore, forced the non-member spouse to wait for years before she can receive payment of any portion or share of the member spouse's retirement benefits during divorce proceedings.

The above legal position triggered the legislature to effect the necessary amendments, firstly, in the *Divorce Act* by introducing the phrase "pension interest" and sections 7(7) and 7(8) respectively. Secondly, the legislature effected amendments to the PFA through section 16(c) of the *Financial Services Law General Amendment Act 22 of 2008*. The legislature further effected essential amendments in the GEPL in 2011.¹⁰ The purpose of these amendments was to introduce the clean-break principle to enable the non-member spouse to claim immediate payment from the member spouse's retirement fund during divorce proceedings.¹¹ Consequently, the other trending challenge that gives rise to a deprivation of the non-member spouse's right to claim or reach a member spouse's retirement benefit is the purchasing of living annuities during divorce proceedings.¹² This deprivation occurs when a member spouse unilaterally uses his accrued retirement benefits to purchase living annuities. It is clear that once a living annuity is purchased, the non-member spouse cannot claim any portion from it, because it belongs to the

⁶ *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388; *De Wet v Jurgens* 1970 3 SA 38 (A), in these cases, the courts clearly indicated that spouses who are married in community of property are regarded as co-owners of their assets and liabilities.

⁷ Heaton and Kruger *South African Family Law* 130.

⁸ See *De Kock v Jacobson and Another* 1999 4 SA 346 (W); *Elesang v PPC Lime Limited and Others* 2007 6 SA 328 (NC); see also *Ngweu and Another v Post Office and Others* (CCT 117/11) 2013 ZACC 4; 2013 4 BCLR 421 (CC) (7 March 2013); *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC).

⁹ Heaton and Kruger *South African Family Law* 130.

¹⁰ Section 24A of the GEPL.

¹¹ Section 37D of the PFA & 24A of the GEPL.

¹² See *CM v EM* 2020 3 All SA 1 (SCA); *Marumoagae* 2020 *Without Prejudice*; *Marumoagae* 2021 *THRHR* for detailed discussion.

insurance company and a member spouse will only be entitled to monthly income in terms of the contract thereof.¹³ Although there are matrimonial principles in place, it has not been entirely clear, whether the rules of matrimonial principles would have a pivotal role in such circumstances.¹⁴ This plight, in the future, will mostly be encountered by non-member spouses,¹⁵ particularly those who will be married out of community of property with the accrual system.¹⁶

This dissertation calls for urgent law reform. The recommended law reform requires the legislature to effectively recognise and protect the non-member spouse's right to claim a share of the member spouse's accrued retirement benefit during a divorce.¹⁷ This dissertation argues that there is a need to insert the necessary statutory provisions in the PFA, GEPL, or the *Divorce Act* to adequately address the rights of the non-member spouse especially when retirement benefits of the member spouse have accrued to him before divorce proceedings. This will prohibit the member spouse from depriving the non-member spouse of the right or entitlement to claim a portion of such accrued retirement benefits. This dissertation further endeavours to demonstrate that there is an integral interplay and/or interrelationship of matrimonial property law, pension fund law; and divorce law in South Africa.¹⁸ It does so with a view to evaluating the current legal principles regulating the sharing of the member spouse's pension interest and accrued retirement benefits during a divorce.

¹³ See *ST v CT* 2018 5 SA 479 (SCA) para 39; *CM v EM* 2020 3 All SA 1 (SCA) paras 3-6.

¹⁴ In *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388; *De Wet v Jurgens* 1970 3 SA 38 (A), the court clearly indicated that spouses who are married in community of property are regarded as co-owners of their assets and liabilities.

¹⁵ The non-member spouses, who mostly suffer from this prejudice are women, who in practice are financially weaker.

¹⁶ In South Africa, our courts have not gotten the opportunity to pronounce on the issue relating to the sharing of a member spouse's accrued retirement benefit during divorce where spouses are married out of community of property with the accrual system.

¹⁷ The current legal principle is that, at the date of divorce, a member spouse's pension interest is regarded as an asset. Therefore, the court granting a decree of divorce is empowered in terms of the provisions of section 7(8) of the *Divorce Act* to consider a member spouse's pension interest when determining patrimonial benefits to which the spouses may be entitled to.

¹⁸ S 7(7) and s 7(8) of the *Divorce Act*.

1.1 Problem statement

In practice there are underlying challenges relating to the sharing of the member spouse's accrued retirement benefits during divorce proceedings.¹⁹ Ordinarily, parties to a divorce action ought to incorporate a clause in their settlement agreement²⁰ outlining their pension fund interest and/or any entitlement thereto.²¹ This is because the court order plays a determining role in relation to the non-member spouse's entitlement to the member spouse's retirement benefits during a divorce.²²

Generally, a pension benefit is not an asset in the member spouse's estate.²³ A retirement fund member's right to claim this benefit only vests upon them when the benefits accrue to them.²⁴ Normally, this occurs when the member spouse's reach certain age, retires, resigns or faces dismissal.²⁵ However, divorce has also been made an exit event that will lead to the accrual of retirement benefits. Due to divorce, a member's pension interest is deemed to be part of his estate upon divorce in order to determine the patrimonial benefits to which the parties may be entitled to.²⁶ Consequently, spouses who seek to claim shares in the pension interest of the other spouse, must apply for and obtain a decree of divorce.²⁷ This gives the impression that when claiming a pension interest

¹⁹ This dissertation will focus on this part, as the underlying challenge is mostly faced by non-member spouses (specifically women) whom in practice are vulnerable and financially weak. However, this study will be conducted hand in hand with the position where divorce order has been granted.

²⁰ See Marumoagae 2018 *De Jure* 108; see also Davey J 2013 *De Rebus* 28.

²¹ *Maqubela v Municipal Employees Pension Fund* 2012 1 BPLR 65 (PFA) para 5.2; In *Blom v FNB Pension Fund And Another* 2010 3 BPLR 257 (PFA) the parties to a divorce action incorporated in their settlement agreement a clause allowing non-member spouse entitlement to the growth of his portion of the pension interest. Considering this, the Pension Fund Adjudicator held that the complainant is not entitled to any investment returns or growth on his portion of the pension interest after date of divorce.

²² Marumoagae 2017 *PER/PELJ* 2; See also Mamashela 2018 *De Jure* 18; *Muller v Sentinel Retirement Fund* 2019 2 BPLR 499 (PFA) para 5.8; *Mosala v Superfund Pension Fund* 2019 1 BPLR 198 (PFA) para 2.2; *Mogoje v Mineworkers Provident Fund* 2019 3 BPLR 775 (PFA) para 5.9; Marumoagae 2018 *De Jure* 106.

²³ *Eskom Pension and Provident Fund v Krugel and Another* 2012 6 SA 143 SCA.

²⁴ Heaton and Kruger *South African Family Law* (ed) 130; Nevondwe 2009 *LDD*. In *Kirchner v Kirchner and Another* (20358/08) 2008 ZAGPHC 415 (5 November 2008) para 7 the court indicated that the interest which a member of a pension fund might have in the pension interest that have not yet accrued, was generally not regarded as an asset qualifying to form part of the estate, or joint estate where the marriage was in community of property.

²⁵ Heaton and Kruger *South African Family Law* 130.

²⁶ Heaton and Kruger *South African Family Law* 130; section 7(8) (a) (i) of the *Divorce Act* 70 of 1979.

²⁷ In *Maqubela v Municipal Employees Pension Fund* 2012 1 BPLR 65 (PFA) para 5.5, the Pension Funds Adjudicator explicitly stated that deeds of settlement and divorce orders relating to pension interests must be formulated carefully in order to ensure that they fall within the ambit of section 7(7) and 7(8)

during divorce proceedings, the non-member spouse must specifically plead the necessary facts in order to succeed with the claim.²⁸

There have been different approaches regarding retirement benefits during a divorce. However, the right of the non-member spouse to benefit from the member spouse's retirement benefits that have already accrued; before the finalisation of divorce has not yet been judicially tested and the legislature has also not attended to the possible future problem.²⁹ Actually, the legislature's failure to ensure adequate statutory recognition and protection of the non-member spouse's right to claim any portion she may be entitled to will amount to a clear prejudice against the non-member spouse in the future.

Furthermore, the recent trend is that member spouses hide their accrued retirement benefits by purchasing living annuities with the object of depriving the non-member spouse of the right or entitlement to claim any share thereof during divorce proceedings.³⁰ It is important to also note that, currently there is no specific legislation;³¹ that adequately addresses the legal position regarding the member spouse when using the accrued retirement benefits to purchase living annuities during a divorce. Notably the *Income Tax Act* 58 of 1962, merely provides a definition of the term "living annuity" it does not necessarily regulate the position relating to this aspect. These challenges pose a great threat of seeing the non-member spouse, during divorce, being deprived of the right to claim a share of the member spouse's accrued retirement benefits from retirement funds to which their divorcing husbands are members.³²

of the *Divorce Act*. From this assertions, one may develop a perception that, a non-member spouses' right to claim a share of a member spouses' pension interest may fall away in the event that the spouses, during divorce proceedings, did not expressly deal with their pension interest in their deed of settlement and the divorce order on the other side is silent; See also Mamashela 2018 *De Jure* 20-21; See also *Brownley v Sanlam Life Assurance Limited* 2020 3 BPLR 670 (PFA) para 4.3-44.

²⁸ *ML v JL* (unreported case no 3981/2010) [2013] ZAFSHC 25-4-2013 para 43; see also Davey 2013 *De Rebus* 28.

²⁹ See Marumoagae 2016 *Obiter* 313.

³⁰ Kgole and Marumoagae 2020 *De Rebus* 18-19; see also *CM V EM* 2020 3 *All SA* 1 (SCA) paras 3-24; see also The court in *ST v CT* 2018 5 SA 479 (SCA) stated that living annuities do not form part of member spouses' estates for purposes of divorce; see also Marumoagae 2021 (84) *THRHR* 39; 42; *M v M* (14/26868) 2016 ZAGPJHC 387 (10 August 2016) para 29-30.

³¹ Section 1 of the *Income Tax Act* 58 of 1962 provides a definition for the term 'Living Annuity'.

³² The Pension Funds Adjudicator in *Andrews v IBM SA 1994 Provident Fund and Others* 2012 1 BPLR 13 (PFA), alluded that, it is possible for divorcing spouses to agree to share pension interest held in a retirement fund of the member spouse. The only challenge where non-member spouses could not

Failure to legislatively regulate this issue will continue to prevent and deprive the non-member spouse of the right to claim a share of their member spouse's retirement benefits during divorce proceedings.³³ In practice, the most vulnerable spouses who are confronted by these challenges are women, who are often in the financially weaker position.³⁴ This practice amount to the member spouse's retirement benefits being locked in insurers that sell them living annuities thus hinder non-member spouses from claiming what would ordinarily have been their entitled portions of member spouse's accrued retirement benefits.³⁵

1.2 Background of the study

Prior to the coming into operation of the *Matrimonial Property Act* 88 of 1984 on 1 November 1984, (Hereinafter referred to as the MPA) our law only recognised two main matrimonial property systems namely, a marriage in community of property and a marriage out of community of property with the exclusion of community of profit and loss.³⁶ Apart from this, the coming into operation of the MPA resulted in the recognition of three main matrimonial systems namely, a marriage in community of property;³⁷ a marriage out of community of property with the accrual system;³⁸ and a marriage out of community of property with the exclusion of the accrual system.

In principle, spouses who are married in community of property are required to share equally in the joint estate.³⁹ Robinson,⁴⁰ describe the nature and legal consequences of the marriage in community of property in the following manner "all the assets and

claim any early payment of a portion of a pension interest, was applicable prior to the *Pension Funds Amendment Act* of 13 September 2007, where the payment of pension interest assigned to the non-member spouse was deferred in the fund until the benefit accrued to the member.

³³ See Marumoagae 2016 *Obiter* 313.

³⁴ Even in recent times, women are still the most vulnerable spouses exposed to weak financial position and also suffer great prejudice when trying to claim their shares of their member spouses' retirement benefits; See South African Law Reform Commission project 100E.

³⁵ Marumoagae 2014 *Speculum Juris* 64.

³⁶ See Heaton *South African Family Law* 90.

³⁷ Section 14 of the MPA provide for equal powers of spouses married in community of property; S 15 of the MPA provides for the powers of spouses in a marriage.

³⁸ Section 3 of the MPA envisages the provisions regulating a marriage out of community of property with the accrual system.

³⁹ Section 1 of the MPA define the term 'joint estate' as the joint estate of a husband and a wife married in community of property.

⁴⁰ Robinson 2007 *PER/PELJ* 71.

liabilities of the spouses are merged in a joint estate where both hold equal". It must be noted that a spouse may lose a claim in respect of the spouses' joint estate in instances where a court orders forfeiture of benefits.⁴¹

For instance, the spouse whom the court has ordered forfeiture of benefits against⁴² shall only receive the assets he brought into the joint estate.⁴³ In addition to this, where one of the spouse's conduct prejudices or potentially threatens the interest of the other spouse in the joint estate, the prejudiced or likely to be prejudiced spouse may make an application to the court in terms of section 20 of the MPA to seek an immediate division of the joint estate.⁴⁴ In principle, when the joint estate is divided, the court will also consider a member's pension interest for purposes of the division thereof. An order will be made by the court, directing a member spouse's retirement fund to effect payment of a certain portion to the non-member spouse.⁴⁵

With regard to a marriage out of community of property with the accrual system, the spouses are expected to share in the growth that their estates show.⁴⁶ The position in this respect becomes slightly different when spouses in their antenuptial contract have expressly excluded certain assets from being shared during a divorce.⁴⁷ This, therefore, allows the spouses to deviate from certain stringent common law and statutory rules governing the matrimonial property consequences of their marriage.⁴⁸ In essence, where

⁴¹ See section 9 of the *Divorce Act*; Heaton *South African Family Law* 131.

⁴² Section 9(1) of the *Divorce Act* empowers the court to order total or partial forfeiture of benefits, but in making such an order, the court will consider (1) the duration of the marriage, (2) the circumstance which led to the breakdown of the marriage, and (3) any substantial misconduct on the part of either spouse.

⁴³ Heaton *South African Family Law* 131.

⁴⁴ See also Heaton *South African Family Law* 81; see also *Leeb v Leeb* 1999 2 All SA 588 (N), in this case the court clearly pointed out that in such a situation, the court will determine the basis on which the joint estate is to be divided taking into account factors such as the duration of the marriage, the assets each spouse brought into the marriage.

⁴⁵ *Ndaba v Ndaba* 2017 1 All SA 33 (SCA) para 70.

⁴⁶ In relation to this form of marital regime, our courts have not been approached to pronounce on whether the member spouse's accrued retirement benefit, in a marriage out of community of property with the accruals system, shall be considered an asset that a member spouse have accumulated during the subsistence of the marriage. As such, in line with the accrual principles, whether should the accrued retirement benefit be shared with a non-member spouse during divorce? Importantly, the Supreme Court of Appeal was called on to pronounce on the issue of living annuities to a marriage out of community of property in *CM v EM* 2020 3 All SA 1 (SCA).

⁴⁷ Heaton *South African Family Law* 90-91.

⁴⁸ Heaton *South African Family Law* 85.

the spouses did not expressly exclude the application of the accrual system in their antenuptial contract, it will normally be assumed that the accrual rules or principles are applicable to the spouses' accrued assets during divorce. Significantly, the true essence of an antenuptial contract is to provide a direction relating to the financial consequences of the spouses during divorce.⁴⁹

Moreover, it also implies that neither spouse will have certain rights over the other spouse's assets during divorce.⁵⁰ In fact, retirement benefits that would have already accrued to a member spouse would not be considered during the division of the spouses' patrimonial assets during a divorce unless the spouses would have indicated otherwise in their antenuptial contract. It must also be noted that, the manner in which how the spouses' assets will be distributed during divorce proceedings, must clearly be set out in either a settlement agreement or an antenuptial contract.⁵¹ This also include the sharing of pension interests as at the date of divorce.⁵² Importantly, a decree of divorce will reflect or entail the agreement settlement between the divorcing spouses, hence it is essential that the clauses contained therein are unambiguous.

Shifting attention to the development of pension law and divorce law in South Africa over the years, it is well established that, before 1989 there was no specific statutory provisions in South African pension law and divorce law that granted the non-member spouse the right to claim a portion of the member spouse's retirement benefits during a divorce.⁵³ As a result, the non-member spouse was unable to exercise any right against the member spouse's retirement fund to effect payment of an assigned portion at the time of divorce.⁵⁴ This was the situation, unless the retirement benefits had already accrued to the member spouse before divorce proceedings.⁵⁵ The legal position was set out as follows:

⁴⁹ Anon date unknown "Marriage out of Community of Property Excluding Accrual" <https://www.divorcelaws>.

⁵⁰ Anon date unknown "Marriage Out of Community of Property Without Accrual" <https://www.vandeventers.law>.

⁵¹ *Maqubela v Municipal Employees Pension Fund* 2012 1 BPLR 65 (PFA) para 5.5.

⁵² *Andrews v IBM SA 1994 Provident Fund and Others* 2012 1 BPLR 13 (PFA).

⁵³ *Marumoagae* 2018 SA Merc LJ 284; *Old Mutual Life Assurance Co (SA) (Pty) Ltd and Another v Swemmer* 2004 5 SA 373 (SCA); *Ndaba v Ndaba* 2017 1 All SA 33 (SCA) para 51.

⁵⁴ See *Marumoagae* 2014 *PER/PELJ* 2491.

⁵⁵ *Marumoagae* 2014 *PER/PELJ* 2491.

The generally accepted position in pension funds used to be that divorced spouses of members did not have any immediate right to any part of the member's interest in the pension fund whilst the member remained a member of the fund.⁵⁶

The previous legal principles regulating the sharing of retirement benefits during divorce did not strike a balance between the divorcing spouses' financial interests in their marital assets.⁵⁷ Upon divorce, the non-member spouse was unable to claim any part or portion,⁵⁸ of a member spouse's retirement benefits whilst a member spouse was still a member of the retirement fund.⁵⁹ This adopted approach might have been influenced by the general principle that a "pension benefit is not an asset in a person's estate, because the right to claim the benefit only vests to the spouse when the benefit accrues to him".⁶⁰ In particular, this could only occur when a member spouse reach a specific age or during; retirement; resignation; dismissal and retrenchment from work.⁶¹ Accordingly, this legal position encouraged the introduction of the concept "pension interest" to specifically deem the member spouse's pension interest as an asset in his estate.

The other challenge that was faced by the non-member spouse was that the amount of a member spouse's retirement benefit remained locked in the member spouse's retirement fund and could not be touched or considered when determining the value of the spouse's estate during divorce.⁶² In principle, during the determination of the patrimonial benefits to which the spouses to a divorce action were entitled to, the pension

⁵⁶ Anon 2013 "The South African Post Office Soc Ltd Amendment Bill" 6. In the paper it is outlined that, the effect of the erstwhile legal position was that if the spouse of a member was awarded say 50% of the member's pension fund interest as at date of divorce, that amount would not be paid out to the spouse at that point of time but would be retained in the fund and be paid out to the spouse only once the member would himself or herself become entitled to the a payment of the from the fund; see also Nevondwe 2009 *LLD* 2.

⁵⁷ It is no secret that, in practice, the most financially weaker spouses in marriages are women. And, more importantly, women play a fundamental role in protecting the dignity of the family by raising children and take care of other home chores.

⁵⁸ See Marumoagae 2013 *De Rebus* 38, who expound that in the past, the pension interest of a member of a pension fund was not regarded as an asset in the joint estate; in *Ndaba v Ndaba* 2017 1 All SA 33 (SCA) para 51, Makgoka AJA asserted that the traditional legal position prior the 1989 amendment was that the pension interest did not form part of the assets of the parties.

⁵⁹ *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC) para 6.

⁶⁰ Heaton and Kruger *South African Family Law* 130; See also Marumoagae 2016 *Obiter* 312. It was also affirmed by the Constitutional Court in *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC) para 5.

⁶¹ See *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC) para 6; Marumoagae 2016 *Obiter* 316; see also Heaton "The Proprietary Consequences of Divorce" (ed) 74.

⁶² See Marumoagae 2013 *De Rebus* 39.

expectations of the member spouse were not taken into account during a divorce.⁶³ Moving forward, there was a great need for judicial and legislative intervention in order to cure the above highlighted practical challenges that relate to the sharing of a member spouse's retirement benefits during divorce.⁶⁴

Notably, the legislature's trajectory of improving the South African law regulating the sharing of retirement benefits during divorce resulted to significant changes in practice. Accordingly, the legislature effected amendments that resulted to the insertion of sections 7(7) and 7(8) together with the concept "pension interest" through the *Divorce Amendment Act*.⁶⁵ The purpose of these insertions was/is to do away with the erstwhile legal principle that required the non-member spouse to wait for years before she could claim a portion of a member spouse's retirement benefits.⁶⁶ Such a portion in practice, ought to be awarded by the court granting a decree of divorce.⁶⁷ Normally, this will occur when the pension benefit has accrued to the member of a retirement fund.⁶⁸ It was further established that a pension interest that had not yet accrued to a member spouse;⁶⁹ will not be considered as an asset of such a member spouse's estate at the time of divorce.⁷⁰ This practice serves as a clear demonstration that the rules governing the matrimonial property system, at the time, were inadequate and inefficient.

⁶³ *Old Mutual Life Assurance Co (SA) (Pty) Ltd and Another v Swimmer* 2004 5 SA 373 (SCA) para 1; see also Marumoagae 2013 *De Rebus*.

⁶⁴ See *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC) paras 1-4; *Maharaj v Maharaj* 2002 2 All SA 34 (D); *Sempapalele v Sempapalele* 2001 2 SA 306 (O); *Kotze v Kotze* 2013 JOL 30037 (WCC).

⁶⁵ 7 of 1989. In terms of s 1 of the *Divorce Act*, pension interest in relation to a party to a divorce action who- (a) is a member of a pension fund [.....], means 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 office, (b) is a member of a retirement annuity fund which was bona fide established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party's contributions to the fund up to that date,[.....].

⁶⁶ Marumoagae 2014 PER/PELJ 2492; *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC) para 5.

⁶⁷ See *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC) para 5.

⁶⁸ Marumoagae 2014 PER/PELJ 2492-2493.

⁶⁹ See Nevondwe 2009 LDD 2-4.

⁷⁰ *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC) para 5; Nevondwe 2009 LDD 2-4; Davey J 2013 *De Rebus* 26-28; Marumoagae 2018 *De Jure* 105.

To improve the law, sections 7(7)⁷¹ and 7(8) of the *Divorce Act*,⁷² came into effect. The fundamental reason for the introduction of both section 7(7) and section 7(8) in the *Divorce Act* is to allow the member spouse's pension interest, as at the date of divorce, to be regarded as an asset.⁷³ The purpose of so doing is to ensure that the pension interests as well as other assets will be considered for purposes of the division of the joint estate to the extent that the non-member spouse would be able to claim a portion thereof. Evidently, the SCA in *GN v JN* 2017 1 SA 342 (SCA) found that, in terms of section 7(7) of the *Divorce Act*, the pension interest of both parties' falls automatically into the joint estate for the purpose of determining the patrimonial benefits to which the parties are entitled to on divorce.⁷⁴

To properly understand the principle of retirement benefits, pension interest is in short described as the value of the interest which a member of a retirement fund has in the pension benefit on the date of divorce.⁷⁵ Put differently, it is also described as a member spouse's withdrawal benefit, had he notionally withdrawn from the fund on the date of divorce.⁷⁶ These definitions clearly indicate that there is a great difference between pension interest and pension fund. In contrast, a pension fund as defined in section 1 of the PFA is a "pension fund organisation". Additionally, the court in *Nailana v Nailana* (unreported case no 714/2018, 3-12-2019) (SCA) pointed out that reference to a 'pension fund' in the *Divorce Act* includes both pension and provident funds.⁷⁷

⁷¹ According to the South African Law Commission 'Project 112 – Sharing of Pension Benefits' Report June 1998, it is clearly highlighted that, the only substantive provision in our law which provides for the division of pension benefits is s 7(7) of the *Divorce Act*.

⁷² See *Kapot v Liberty Group LTD* 2012 1 BPLR 41 (PFA) para 5.2; *Ndaba v Ndaba* 2017 1 All SA 3 (SCA); *De Beer v Tshwane Municipal Provident Fund* 2012 1 BPLR 23 (PFA) para 5.2; Marumoagae 2017 *PER/PELJ* 4; Mamashela 2018 *De Jure* 17-34; *Olivier v Motor Industry Provident Fund* 2019 3 BPLR 819 (PFA) para 5.6-5.7; *Muller v Sentinel Retirement Fund* 2019 2 BPLR 499 (PFA) para 5.6-5.7.

⁷³ Marumoagae 2013 *De Rebus* 39.

⁷⁴ De Klerk 2020 *De Rebus* 25, 26; *Kirchner v Kirchner and Another* (20358/08) [2008] ZAGPHC 415 (5 November 2008) para 8; see Nevondwe 2009 *LDD* 2-4; see also *De Kock v Jacobson and Another* 1999 4 SA 346 (W).

⁷⁵ *Eskom Pension and Provident Fund v Krugel and Another* 2012 6 SA 143 (SCA) (31 May) para 8; In *Government Employees Pension Fund v Naidoo* 2006 6 SA 304 (SCA) para 1, the court stated that the relevant statutory provisions regarding pension law and divorce law is an award to a non-member spouse of any part of the interest, in the nature, when the pension benefit accrues to the member spouse.

⁷⁶ *Andrews v IBM SA 1994 Provident Fund* 2012 BPLR 13 (PFA) para 5.4.

⁷⁷ *Nailana v Nailana* (unreported case no 714/2018 3-12-2019); See also De Klerk 2020 *De Rebus* 25.

The purpose of differentiating between the pension fund and pension interest is to enable the spouses to include unambiguous provisions in their settlement agreement regarding the name of the member's retirement fund.⁷⁸ More importantly, "in South Africa it is accepted practice to regulate the consequences of divorce by means of agreement".⁷⁹ The parties may include any provision in their respective settlement agreement as long as it is lawful. The spouses may set out in their settlement agreement whether they opt to include or exclude the right to benefit from each other's retirement benefits during a divorce.⁸⁰

On the other hand, section 7(8) (a) (i) of the *Divorce Act* empowers the court, granting a decree of divorce against a member spouse, to order:

.Any part of the pension interest of the member which or that is due or assigned to a non-member spouse, is to be paid by that fund to the non-member spouse.⁸¹

In *GN v GJ*,⁸² the court illustrated that the first hurdle that the non-member spouse ought to bypass in order to access a member spouse's retirement benefit is a court order in terms of section 7(8) (a) (i) of the *Divorce Act*. According to Jeram;⁸³ section 7(8) provides a mechanism to co-opt the fund concerned to pay any allocation of a pension interest to the non-member spouse. The author further submits that; the payment by the fund to a non-member spouse can only occur once a court order has been granted in terms of section 7(8).⁸⁴ Marumoagae,⁸⁵ articulates the following regarding the actual intention of section 7(8):

..[t]he current legal position is indeed that in order for retirement funds to make payment of portions of their member's pension interest to non-member spouses, they should be served with court orders, which direct them to make such payment.

The above views and/or submissions by the two authors are noteworthy for practical purposes and are also helpful for proper understanding of the true application of section

⁷⁸ *Maqubela v Municipal Employees Pension Fund* 2012 1 BPLR 65 (PFA) para 5.2.

⁷⁹ Heaton *South African Family Law* 123.

⁸⁰ *Maqubela v Municipal Employees Pension Fund* 2012 1 BPLR 65 (PFA) para 5.2; see also *Blom v FNB Pension Fund And Another* 2010 3 BPLR 257 (PFA).

⁸¹ See Marumoagae 2017 *De Rebus* 34-36; see also Jeram 2017 *De Rebus* 28-32.

⁸² 2017 1 SA 342 (SCA).

⁸³ Jeram 2017 *De Rebus* 29.

⁸⁴ Jeram 2017 *De Rebus* 29.

⁸⁵ Marumoagae 2017 *De Rebus* 35.

7(8) of the *Divorce Act*. This is important where a retirement fund is expected to make a payment of a determined and/or assigned portion to a non-member spouse.⁸⁶

In light of the above-indicated amendments to the *Divorce Act*, the legislature further amended the *Pension Funds Act* with a view to balancing the interplay between pension law and divorce law.⁸⁷ These amendments were effected through the promulgation of the *Pension Funds Amendment Act* and the *Financial Services Laws General Amendment Act*.⁸⁸ These amendments saw the introduction of the clean-break principle to the PFA.⁸⁹ Marumoagae⁹⁰ is of the view that the 'clean-break principle' can best be described as:

A right or, at the very least, the entitlement of the non-member spouse who is married in community of property to receive immediate payment or transfer of the portion of the other spouse's pension interest allocated to him or her when the couple divorces.

The given definition of the 'clean-break principle' is noteworthy; however, it is submitted that it ought to also cover the non-member spouses who are married out of community of property with the accrual system. The purpose of the clean-break principle is to cure the challenges that were previously confronted by the non-member spouses regarding immediate payment of a portion of the member spouses' retirement benefits during a divorce. The fundamental issue was the actual time period in terms of which the retirement fund had to effect payment of an assigned portion by the court to the non-member spouse.⁹¹ Among other challenges, retirement funds were and are still restricted by their own rules when required to make payment to the non-member spouse where the benefits have not accrued to the member of the fund.⁹² These practical challenges affected the efficiency of the litigation and also affect the need to expedite the whole process of sharing of a member spouse's retirement benefits during divorce proceedings.⁹³ This prejudice gave rise to the need for urgent legislative reform which

⁸⁶ Du Preez *Pension Interest at Divorce* 17.

⁸⁷ *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC) paras 4-9.

⁸⁸ See Nevondwe 2010 *Pension: International Journal* 289.

⁸⁹ See Marumoagae 2013 *De Rebus* 38.

⁹⁰ Marumoagae 2013 *De Rebus* 38.

⁹¹ Du Preez *Pension Interest at Divorce* 25.

⁹² Du Preez *Pension Interest at Divorce* 25.

⁹³ The clean-break principle was firstly introduced in the PFA through section 37D (4); and later in the GEPL through the insertion of section 24A and then section 10F of the TRM; see also Marumoagae 2018 *De Jure* 103-104.

will allow the non-member spouse to receive an immediate payment of the assigned portion of the member's retirement benefits.⁹⁴

In 2007 the legislature introduced the 'clean-break principle' in the PFA.⁹⁵ This significant amendment resulted to the insertion of section 37D (4) in the PFA, which became operational from 1 November 2008.⁹⁶ At first, the clean-break principle only applied to members of retirement funds that were regulated by the PFA.⁹⁷ In particular, it did not extend its application to public pension funds.⁹⁸ This position gave rise to the issue of discrimination that triggered constitutional intervention to allow the extension of the clean-break principle to members of the GEPL.⁹⁹

The inapplicability of the clean-break principle to members of the GEPL deprived the non-member spouse of the right to claim immediate payments or transfers of their members' retirement benefits after the court have granted a decree of divorce.¹⁰⁰ The legislature had to intervene and amend the GEPL to allow the clean-break principle to extend its application to members of the GEPL in a manner that would enable the non-member spouse to claim and receive immediate payment from the GEPF.¹⁰¹ The impact of this amendment is to enable the non-member spouse to be able to access their member spouse's retirement benefits during divorce proceedings.

In 2014 section 24A was inserted in the GEPL.¹⁰² Section 3 of the GEPLAA gave birth to the clean-break principle,¹⁰³ through inserting section 24A to the GEPL. This amendment saves the non-member spouses from having to wait for the member's exit event to occur before they can receive payment of their entitled portion. In summary, prior to the

⁹⁴ Nevondwe *et al* 2012 *Pensions* 95.

⁹⁵ *Pension Funds Amendment Act* 11 of 2007 and the *Financial Services Laws General Amendment Act* 22 of 2008.

⁹⁶ 24 of 1956.

⁹⁷ See Marumoagae 2013 *De Rebus* 39; De Klerk 2020 *De Rebus* 25.

⁹⁸ *Government Employees Pension Fund, Transnet Pension Fund, Telkom Pension Fund and Post Office Pension Fund*.

⁹⁹ *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC) paras 3, 13 and 16; *Ngewu and Another v Post Office Retirement Fund and Others* 2013 4 BCLR 421 (CC) para 3, 4 and 3.

¹⁰⁰ See Nevondwe *et al* 2012 *Pensions* 95.

¹⁰¹ See Marumoagae *Obiter* 2016.

¹⁰² *Government Employees Pension Law*, 1996.

¹⁰³ See Marumoagae 2013 *De Rebus* 38; Marumoagae 2021 *THRHR* 38.

enactment of sections 7(7) and 7(8) of the *Divorce Act* and later section 37D (4), the non-member spouse had no common law or statutory legal right to claim a share of the member spouse's retirement savings, unless it was evident that the member's retirement benefits had accrued before divorce.¹⁰⁴

With the above legislative background, it is important to also address the recent trending development that relates to the purchasing of living annuities during divorce proceedings. Section 1 of the *Income Tax Act* defines the term 'living annuity' as a right of a member or former member of a pension fund, preservation fund, provident fund, provident preservation fund or retirement annuity fund, or his or her dependant or nominee or any subsequent nominee to an annuity purchased from a person or provided by that fund on or after retirement date of that member. The *Income Tax Act* merely provides the definition for the concept of living annuity - it does not necessarily regulate the legal position regarding living annuities during divorce proceedings.

This development is detected when the member spouse hides his accrued retirement benefits by purchasing living annuities during divorce proceedings.¹⁰⁵ This problem shows that there is a need for more stringent legislative provisions in the PFA, DA and GEPL to restrict the member spouses from tempering their accrued retirement benefits during divorce proceedings. The essence of practicalizing these robust submissions would contribute immensely to resolving the plight that is faced by the non-member spouse during divorce proceedings.

For practical purposes, if the legislature can consider to pass the recommended stringent statutory provisions, the non-member spouses would be able to reach out their member spouse's accrued retirement benefits during divorce without apparent prejudice.¹⁰⁶ However, for as long as there is no legislation that regulates the status of living annuities,

¹⁰⁴ *De Kock v Jacobson and Another* 1999 4 SA 346 (W), In this case the court was called to pronounce on the issue relating to whether or not, in relation to a marriage in community of property, a retirement benefit consisting of a lump sum and a pension for the member, which accrued to a member spouse before the divorce date, formed part of the joint estate. And, significantly so, the court held that there was logical or there is no legal reason why the retirement benefit should not ordinarily form part of the spouses' joint estate.

¹⁰⁵ Kgole and Marumoagae 2020 *De Rebus* 18-19; See also *CM v EM* 2020 3 All SA 1 (SCA); *ST v CT* 2018 5 SA 479.

¹⁰⁶ See Kgole and Marumoagae 2020 *De Rebus* 18.

the non-member spouses will continue to be subjected to the deprivation of the right to claim and receive an awarded share of the member spouse's accrued retirement benefits before the member spouse could purchase living annuities. On the other hand, retirement funds also serve as barriers that prevent the non-member spouse from successfully claiming and receiving a portion of the member spouse's retirement benefits through presenting administrative hurdles and technical issues when required to honour court orders in terms of section 7(8) of the *Divorce Act*.¹⁰⁷

In light of the above, contentious multiple practical questions arise as follows: *firstly*, does the joint estate automatically include the husband's retirement benefits during divorce? *Secondly*, does a non-member spouse to a marriage out of community of property with the accrual system have the right to share in the wealth of the other spouse *vis-a-vis* accrued retirement benefits? *Thirdly*, do non-member spouses automatically have the legally recognised and protected rights which enables them to access the accrued retirement benefits of their member spouses' during divorce proceedings?¹⁰⁸ *Fourthly*, does failure to plead and pray for the division of retirement benefits in divorce papers automatically prevent non-member spouses' from claiming a portion of a member spouse's accrued retirement benefits?¹⁰⁹ *Fifthly*, does the law regulating the sharing of retirement benefits adequately address the non-member spouses' rights to benefit from their member spouses' accrued retirement benefits during divorce proceedings?

1.3 Rationale and justification

This dissertation is significant and essential for both practice and academia. It is clearly demonstrated above that previously pension interests did not form part of the spouses' joint estate. As a result, during divorce, the member spouses' retirement benefits did not form part of the joint estate. This was the legal position, irrespective of the impact of matrimonial property laws thereof. Currently, through the necessary amendments in the *Divorce Act*, *PFA* and *GEPL* pension interests are regarded as an asset in the spouses' estate(s) for purposes of the determination of patrimonial benefits to which the parties

¹⁰⁷ Mamashela 2018 *De Jure* 18; see also *Ramutovholwa v Soweto City Council Pension Funds* 2019 2 BPLR 535 (PFA) paras 5.1-5.10.

¹⁰⁸ Mamashela 2018 *De Jure* 17.

¹⁰⁹ Marumoagae 2014 *PER/PELJ* 2488; Mamashela 2018 *De Jure* 18.

to a divorce action may be entitled to. It must be noted that thus far our courts have not been approached to pronounce on the issue of the sharing of accrued retirement benefits by spouses who are married out of community of property with the accrual system. It is therefore assumed that, if such spouses did not expressly exclude the sharing of their retirement benefits in their antenuptial contract or settlement agreement; such benefits will be shared in accordance with the matrimonial principles governing the spouses' marital regime.

This dissertation calls for law reform, simply because in practice; the law as it is currently applied on this troubling issue;¹¹⁰ does not adequately address the non-member spouses' rights to claim their member spouses' accrued retirement benefits during divorce proceedings. Moreover, this dissertation make arguments for urgent legislative intervention to *firstly*, restrict the member spouses from using their accrued retirement benefits to purchase 'living annuities' with the object of depriving their non-member spouses the right to benefit from such accrued retirement benefits during divorce proceedings. *Secondly*, it further calls for the legislature's attention to strive for statutory recognition and protection of the non-member spouses' rights to claim their member spouses' accrued retirement benefits during divorce proceedings.¹¹¹ More essentially, all the recommendations expressed herein, if put into place, shall contribute immensely to the financially weaker spouses, who in practice are women.

1.4 Research question

Does the law regulating the sharing of retirement benefits, adequately address the non-member spouses' rights to benefit from the accrued retirement benefits of a member spouse during divorce proceedings?¹¹²

¹¹⁰ The sharing of accrued retirement benefits of a member spouse during divorce, specifically, to a marriage out of community of property with the accrual system.

¹¹¹ A statutory recognition and protection of non-member spouses' rights to claim a portion of a member spouse's accrued retirement benefits which in terms of the matrimonial principles, may be entitled to such a share.

¹¹² With regard to a marriage in community of property and out of community of property with the accrual system.

1.5 Research aims and objectives

This study aims to answer the formulated research question by addressing the following issues.

- The rules for the division of assets according to matrimonial property system during divorce.
- Critically discuss the development of the inclusion of retirement benefits with reference to the legislation and case law.
- Highlighting the issue of living annuities and the problems it creates in practice.
- Finding solutions for the lacunae and make recommendations for law reform.

1.6 Assumptions and hypothesis

1.6.1 Assumptions

- The Matrimonial Property System in South Africa determines the division of the spouses' joint estate where spouses are married in community of property.
- Retirement benefits form part of the division unless they are expressly excluded in the spouses' antenuptial contract or settlement agreement.

1.6.2 Hypothesis

- Purchasing of living annuities during divorce proceedings creates a lacuna *vis-a-vis* the sharing of accrued retirement benefits.
- Hiding of assets is in contravention of the matrimonial property system elected by the spouses.

1.7 Research Methodology

This dissertation is conducted through literature review. It is conducted through reviewing and consulting the primary sources which consist of legislation and case law. It also reviews and consults secondary sources which consist of textbooks, journal articles, academic publications, thesis, newspaper article, and South African law reform commission papers.

1.8 Framework of the study

Chapter one: it is an introductory chapter entailing building blocks that serve to provide the purpose and direction of this dissertation. The building blocks are the research question, background of the study, problem statement, scope and limitations of the study, rationale and justification, aims, and objections.

Chapter two: This dissertation will provide a discussion on the rules of the division and the development of South Africa's matrimonial property system. The nature of the legally recognised marital regimes in South Africa since the coming into effect of the Matrimonial Property Act will be provided. A discussion relating to the role of matrimonial property system principles *vis-à-vis* the sharing of retirement benefits.

Chapter three: This dissertation will critically discuss the development of the inclusion of retirement benefits in light of the problems arising thereto under the legislation and case-law. This dissertation will further demonstrate the reflection of the PFA and GEPL on issues relating to the payment of awarded pension interest to the non-member spouse during divorce.

Chapter four: This dissertation will also examine the legal position relating to the current law on the issue of purchasing 'living annuities' by member spouses during divorce proceedings. The discussion will provide the definition and the created jurisprudence to living annuities in South Africa. It will also be demonstrated that the member spouse's conduct of purchasing living annuities deprives the non-member spouse of the right to claim a share thereof.

Chapter five: will provide the proposed recommendations and concluding remarks. In particular, this dissertation will make recommendations relating to the need for statutory recognition and protection of the non-member spouse's right to claim a share of the member's retirement benefits. It further calls for the need to statutorily restrict the member spouses' from using their accrued retirement benefits to purchase living annuities during divorce proceedings.

1.9 Relevance to the research unit theme

This dissertation falls under the theme of justice in practice. It vouches that justice must reach non-member spouses, specifically women, in respect of the retirement benefits of member spouses during divorce. This dissertation is influenced by the current practical lacuna of not having specific legislation that addresses the rights of non-member spouses in respect of the member spouses' retirement benefits that have accrued before divorce proceedings. This dissertation essentially covers the fundamental principles of the pension law, matrimonial property law, and divorce law in trying to detect answers to the research question. This dissertation can potentially contribute significantly to the area of pension law by relaxing the strict rules regulating the benefits of member spouses that are contained in their retirement funds and divorce law during the dissolution of marriage by virtue of allowing the non-member spouses to claim adequate shares from their member spouses accrued retirement benefits.

1.10 Statement regarding ethics

Please find attached herewith the completed ethics checklist.

1.11 Scope and limitation of the study

This dissertation seeks to address the issue of the member spouse's retirement benefits and the reflection of the law in circumstances when the spouses are divorcing. To achieve the object of this dissertation, this dissertation will only focus on marriages in community of property and marriages out of community of property with the accrual system. Aspects of civil unions will not be discussed in this dissertation. This dissertation further investigates how the courts have developed the jurisprudence of these aspects of the law over the years. Only certain specific principles of matrimonial law, pension law and divorce law regulating the position of retirement benefits that have accrued to the member spouse and those that have not accrued to the member spouse at the time of divorce are discussed. The different types of retirement funds such as preservation fund, provident preservation fund or retirement annuity, are beyond the scope of this dissertation and they will not be discussed.

Chapter 2: The rules of the division of assets and the development of South Africa's matrimonial property system

2.1 Introduction

The primary objective of this chapter is to discuss the nature and the development of the rules governing matrimonial property law in South Africa. It does so with a view to detect whether matrimonial rules had and still have an integral role to play on issues relating to the sharing of the member spouse's retirement benefits during divorce or only the rules of the registered pension funds were and are applied in isolation thereto. This chapter will not deal with the legal position of retirement benefits in-depth, simply because chapter three and four will extensively cover the developments and the legal position of retirement benefits and the implications of using accrued retirement benefits to purchase living annuities in South Africa.

In essence, prior to 1984, there were two main recognised matrimonial property regimes: namely, a marriage in community of property with the marital power;¹¹³ and a marriage out of community of property with the exclusion of both community of profit and loss and the husbands' marital power. Post 1984, the accrual system was introduced in the MPA, hence our law currently recognises the three matrimonial property regimes, namely: Marriage in community of property, marriage out of community of property with the accrual system and Marriage out of community of property with the exclusion of both community of profit and loss.¹¹⁴ These matrimonial property systems play a fundamental role in respect of the patrimonial consequences of the marriage upon divorce. In light of this backdrop, this chapter will further investigate whether, in practice, matrimonial principles have a significant role to play in recognising and protecting the rights of the non-member spouse to enable her to claim a portion of the member spouse's pension interest or accrued retirement benefits during divorce proceedings.

¹¹³ Smith *The Development of South African Matrimonial Law* 72.

¹¹⁴ This dissertation will only cover the two main marital regimes, namely, marriages in community of property and marriages out of community of property with the accrual system.

2.2 A brief overview of the legal position of the matrimonial property regime in South Africa prior 1984

2.2.1 General

South Africa inherited the Roman-Dutch Legal System,¹¹⁵ which embraced the principle that the parties that enter into a marriage may contract by concluding an antenuptial contract.¹¹⁶ Prior to 1984 the parties to a civil marriage had to elect one of the two main recognised marital regimes to govern their marriage.¹¹⁷ With this in mind, where spouses had not concluded a valid antenuptial contract;¹¹⁸ the spouses' marriage was to be automatically in community of property. As a result, the wife was subjected to adverse marital power that the husband enjoyed at the time.¹¹⁹ Accordingly, because of the marital power that the husband had over the wife, all the assets that formed part of the joint estate were administered unilaterally by the husband. Although the wife was subject to severe marital power, it was trite that all the assets of the spouses in a marriage in community of property which they have acquired before marriage and during the subsistence of the marriage were merged to form the joint estate.¹²⁰

The husband had the power to incur debts, to make transactions, to sell and pledge unilaterally at the expense of the joint estate,¹²¹ and to the prejudice of the wife. The effect of the marital power was that the wife's capacity to act and litigate was restricted.¹²² Nonetheless, it is important to also note that, there were essential advantages that emanated from civil marriages in community of property during divorce.¹²³ Among others, the wife was entitled to an undivided half share of the estate

¹¹⁵ Lowndes *The Need for a Flexible and Discretionary system of Marital Property Distribution* 8.

¹¹⁶ With this in mind, in terms of section 22(6) of the *Black Administration Act* 38 of 1927 marriages concluded between black persons were automatically regarded as being out of community of property unless an antenuptial contract providing otherwise or unless both of the parties to the marriage had in writing declared a contrary intention to a magistrate, commissioner or marriage office. This legislation treated marriages between black persons in a diametrically opposite way as those entered between all other race groups.

¹¹⁷ Lowndes *The Need for a Flexible and Discretionary system of Marital Property Distribution* 8.

¹¹⁸ Heaton *South African Family Law* 85.

¹¹⁹ Heaton *South African Family Law* 74.

¹²⁰ Robinson, Human and Boshoff *Introduction to South African Family Law* 25.

¹²¹ Heaton *South African Family Law* 74.

¹²² Heaton *South African Family Law* 74; see also *Godfrey v Campbell* 1997 1 SA 570 (C).

¹²³ Sonnekus "Matrimonial Property" 3.

of the husband during divorce.¹²⁴ This legal position is still applicable in the current legal system in respect of spouses who are married in community of property.

Furthermore, where spouses have concluded a valid antenuptial contract before entering a marriage, the spouses' marriage would be out of community of property and they would also exclude certain assets or benefits from joint ownership.¹²⁵ In support of this, the court in *Brummund v Brummund's Estate*,¹²⁶ expounded that "a marriage is in community of property and profit and loss where spouses did not conclude a valid antenuptial contract". As such, where the marriage was out of community of property, the parties would exercise their rights freely and independently with regard to their estates.¹²⁷

The wife to a marriage out of community of property was not subjected to the marital power of the husband.¹²⁸ A wife had the capacity to enter into contracts with third parties without the presence of or interference by the husband as opposed to the marriage in community of property. In contrast, one of the most notable disadvantages that were encountered by the wife was that; the wife was not entitled to share in the wealth that the husband had accumulated during marriage.¹²⁹ This unfortunate event attracted attention for legislative amendment and judicial intervention to curb these severe prejudices and inequalities that were confronted by women.¹³⁰

In an attempt to curb the above stated challenges, common law and *Matrimonial Affairs Act 37 of 1953* (hereinafter referred to as the MAA) endeavoured to put in place measures with the object of trying to combat the above-highlighted challenges. The purpose of these legal mechanisms was to protect women from the potential prejudice, absolute

¹²⁴ This principle is still applicable to marriages entered in community of property.

¹²⁵ Heaton *South African Family Law* 85.

¹²⁶ 1993 1 ALL SA 298 (NM) 301.

¹²⁷ De Jong and Pintens 2015 *TSAR* 557.

¹²⁸ Heaton *South African Family Law* 74.

¹²⁹ Wiid *An Evaluation of the Parametric Amendments of Legislation* 3. The author makes a lucid argument by correctly pointing out that, women going through divorce when they have been confined to a domestic role during the subsistence of their marriages should be rewarded for the role they have played in their families at the expense of their careers and therefore at the expense of adequate retirement savings. The law should adequately take such spouses interests into account during divorce and permit them to also benefit from the wealth the state of their spouses shows at the time.

¹³⁰ Spitz *A Comparative Analysis of the Equalization of Pension Benefits* 8.

power and control that was enjoyed by the husband.¹³¹ In a quest of trying to achieve equal control and administration of matrimonial assets, both the common law and the MAA were not adequately effective to curb the predicament faced by women.¹³² This, therefore, required extra efforts to establish more stringent statutory provisions which will abate the marital power to enable the wife to have equal powers as the husband in relation to the assets forming part of the marriage.

In summary, both the legislation and common law prior to 1984 were silent on whether during divorce proceedings, the non-member spouse would be entitled to claim a share of the member spouse's retirement benefits during a divorce. With all this in mind, it is submitted that the previous marital power that was afforded the husbands had contributed negatively to the legislature's failure to recognise and protect the non-member spouse's right to the member's retirement benefits during divorce proceedings, more especially, accrued retirement benefits. This detected failure resulted in a clear economic inequality between the spouses during the subsistence of a marriage and during the division of the patrimonial assets at the time of divorce.

2.3 The position of the matrimonial property regime post 1984

2.3.1 General

1 November 1984 the MPA came into effect. This piece of legislation brought significant changes in South African matrimonial law. The MPA did not abolish the two main recognised matrimonial property systems which were most common prior 1984.¹³³ The most notable significance of the coming into effect of the MPA, is the introduction of the accrual system and the abolition of marital power.¹³⁴ This enactment, resulted in the

¹³¹ Roxanne and Veldsman 2018 *De Rebus* 30.

¹³² See Heaton *South African Family Law* 74, the author provides an explanation that, the common law and the *Matrimonial Affairs Act* 37 of 1953 granted a degree of protection to the wife, but the protection came nowhere near eliminating the objections to the marital power.

¹³³ See Heaton *South African Family Law* 65.

¹³⁴ This abolition was very significant in practice and specifically for women as this amendment practically relieved the wife from being treated like a minor who is under guardianship of the father (although it cannot be argued that there is a great equality in real life situation as this is the case in theory); see also Roxanne and Veldsman 2018 *De Rebus* 30-32.

inception of the three current recognised marital regimes;¹³⁵ as opposed to the two most common matrimonial property regimes prior to 1984.¹³⁶

The current three main recognised marital regimes are: a marriage in community of property; a marriage out of community of property with the application of the accrual system and a marriage out of community of property and community of profit and loss with the exclusion of the accrual system.¹³⁷ Below this dissertation provides an exposition of the two main matrimonial property systems in South Africa.¹³⁸ These marital systems are discussed with a view of attempting to illustrate how the assets may be shared between the divorcing spouses. Also, how the abolition of the marital power partially eradicated the inequalities between the spouses in respect of the administration and the sharing of matrimonial assets during divorce.¹³⁹ Furthermore, a brief exposition relating to how the current divorce law and matrimonial law principles reflect and/or intersect *vis-a-vis* the sharing of the member spouse's retirement benefits during a divorce.

2.3.2 Marital power between spouses

2.3.2.1 The abolition of the common law principle of marital power¹⁴⁰

The common law rule which conferred unprecedented marital power to the husband¹⁴¹ over the person and property of his wife¹⁴² was repealed by the provisions of section 11 of the MPA.¹⁴³ The provisions of section 11 of the MPA stretch further to provide that any

¹³⁵ Marriage in community of property, marriage out of community of property with the accrual system and marriage out of community of property with both profit and loss and accrual system.

¹³⁶ a marriage in community of property with the marital power and a marriage out of community of property with the exclusion of both community of profit and loss and the husband's marital power.

¹³⁷ For purposes of this dissertation, marriage out of community of property with the exclusion of both community of profit and loss and the exclusion of the accrual system will not be discussed because there is no sharing taking place under that matrimonial property system; see also Heaton *The Law of Divorce* 59.

¹³⁸ For the purposes of this dissertation, only two main matrimonial property systems will be covered, namely, marriage in community of property and marriage out of community of property with the application of the accrual system. The rationale for the selection of these two marital regimes is that, in practice, the inevitable lacuna arises in these two matrimonial property systems.

¹³⁹ Heaton *The Law of Divorce* 70. The author alluded that, it is generally accepted that only assets to which a spouse has a vested right will fall into the joint estate or the separate estate on divorce.

¹⁴⁰ See section 11 (1)-(4) of the MPA.

¹⁴¹ For purposes of this dissertation, the words 'husbands' and 'men' are used interchangeably.

¹⁴² For purposes of this dissertation, the words 'wife' and 'women' are used interchangeably.

¹⁴³ See section 11 (1) of the MPA.

marital power which a husband enjoyed over the person and property of his wife prior to the coming into effect of the MPA is also abolished.¹⁴⁴ Undoubtedly, the introduction of the MPA brought significant changes in practice, specifically for the purposes of ensuring that women will now have the necessary capacity and power to conclude transactions and to also make decisions relating to anything that is in the interests of both spouses. The introduction of section 11(1) of the MPA, amounted to the repealing of the marital power that permitted the husband in a marriage in community of property to alienate assets forming part of the spouses' joint estate, which quite significantly, resulted to the prejudice of the wife.¹⁴⁵

2.3.2.2 Effects of the abolition of the marital power¹⁴⁶

The fundamental effect of the provisions of section 12 of the MPA is to abolish the common law principle of the marital power which was afforded to the husband. The said common law principle conferred unjustifiable limitations to a wife by restricting her to have the necessary capacity to contract or litigate.¹⁴⁷ However, it is my submission that this current provision does not adequately curb the adverse treatment, particularly that of financial inequality. This is the case, as most husbands in practice still, indirectly, enjoy the benefit of this common-law marital power by secretly using their accrued retirement benefits to purchase living annuities with the object of depriving their non-member spouses of the right to share from such accrued retirement benefits during a divorce.

For practical purposes, it must be noted that, as long as there is no express statutory provision recognising and protecting the rights of the non-member spouse, there will never be justice in protecting the rights of the non-member spouses. This issue requires special legislative attention and there is also a great need for rigid legal principles to be put in place to minimise lengthy legal battles relating to the sharing of the member spouse's accrued retirement benefits during divorce proceedings.

¹⁴⁴ See section 11(2) of the MPA.

¹⁴⁵ Veldsman and Roxanne 2018 *De Rebus* 30.

¹⁴⁶ See section 12 of the MPA.

¹⁴⁷ See Smith *The Development of South African Matrimonial Law* 72.

2.3.2.3 Equal powers of spouses married in community of property¹⁴⁸

Section 14 of the MPA enshrines essential provisions that deal with equal powers of the spouses married in community of property.¹⁴⁹ This section significantly conveys the legal recognition of the marital power(s) afforded the wife to a marriage in community of property as opposed to the previous legal common-law marital power which was only conferred the husband at the expense and prejudice of the wife. Moreover, in terms of the provisions of section 14 of the MPA, a wife has the recognised legal capacity to dispose the assets of the joint estate, contracting debts that shall also lie against the joint estate, and the capacity in respect of the management of the joint estate respectively.¹⁵⁰ In light of this principle, and also taking into cognisance the case of *Ndaba v Ndaba*,¹⁵¹ it is now established that spouses who are married in community of property are entitled to share equally in all the assets that form part of the joint estate including a member spouses' retirement benefits. It must be borne in mind that both spouses ought to benefit equally from matrimonial assets and that any transaction concerning their joint estate should be consented to or authorised by both spouses.

2.4 Marriage in community of property

In South Africa, a marriage in community of property is regarded as the most common matrimonial system.¹⁵² The nature of this marital regime requires spouses to have equal control and benefit of all the assets forming part of the joint estate.¹⁵³ According to Robinson,¹⁵⁴ a marriage in community of property is described as:

¹⁴⁸ Section 14 of the MPA.

¹⁴⁹ Marumoagae 2021 *JAL* 13.

¹⁵⁰ Marumoagae 2021 *JAL* 13.

¹⁵¹ *Ndaba v Ndaba* 2017 1 All SA 33 (SCA).

¹⁵² See Makola *A Comparative Legal Analysis of the Effects of Divorce on Marital Property*.

¹⁵³ De Jong and Pintens 2015 *TSAR* 552-554.

¹⁵⁴ Robinson 2007 *PER/PELJ* 71; Heaton *South African Family Law* 66 further articulates that upon marriage, the spouses' separate estates are automatically merged into one joint estate for the duration of the marriage. In *Ndaba v Ndaba* 2017 1 All SA 33 (SCA) para 11, the court was approached to determine whether a non-member spouse in a marriage in community of property, is entitled to the pension interest of a member spouse in circumstances where the court granting the decree of divorce did not make an order declaring such pension interest to be part of the joint estate. This is a leading case in relation to the issue of pension interest in marriages in community of property in South Africa.

..[a] universal economic partnership of the spouses in which all their assets and liabilities are merged in a joint estate in which both spouses, irrespective of the value of their contributions, hold equal.

In South Africa, this matrimonial regime is regarded as the primary matrimonial property system.¹⁵⁵ This marital regime entails that the spouses become tied co-owners in undivided and indivisible half-share of all the assets¹⁵⁶ and liabilities they have accumulated prior and during the subsistence of the marriage.¹⁵⁷ Consequently, this form of matrimonial property system may be avoided when the spouses opt to conclude a valid antenuptial contract before they could enter into a marriage.¹⁵⁸ The purpose of so doing is to exclude community of property and community of profit and loss.¹⁵⁹ In contrast, where the spouses do not conclude a valid antenuptial contract,¹⁶⁰ before marriage, the spouses' marriage would automatically be in community of property and profit and loss.¹⁶¹ Furthermore, where it is evident that there is an existing valid postnuptial notarial contract that excludes both community of property and community of profit and loss,¹⁶² the marriage in community of property will fall away under the circumstance.¹⁶³

In *Estate Sayle v Commissioner for Inland Revenue*,¹⁶⁴ the court reaffirmed the above legal position. It explicitly stated that, upon the dissolution of the spouses' marriage in community of property, all the liabilities will be settled from the joint estate and thereafter

¹⁵⁵ Heaton *South African Family Law* 65; De Jong and Pintens 2015 *TSAR* 551.

¹⁵⁶ Heaton *South African Family Law* 67, the author provide a list of what constitutes an 'assets' and in the list the following are included: immovable property; share-block interests; motor vehicles; boats; loan accounts in companies or partnership policies that have a cash or surrender value and pension benefits that have already accrued to one of the spouses; In *Olley v Maasdorp* 1948 4 SA 657 (A), the court emphasised that spouses in a marriage in community of property are also jointly and severally liable for all debts incurred in acquiring households necessities against creditors.

¹⁵⁷ See Heaton *South African Family Law* 66; see also Robinson JA *PER/PELJ* 2007 72 who states that the general rule relating to marriage in community of property is that all assets that the spouses had before the marriage as well as assets they accumulate after entering into the marriage fall into the joint estate.

¹⁵⁸ Makola *A comparative Legal Analysis of the Effects of Divorce on Marital Property* 11-13; De Jong and Pintens 2015 *TSAR* 551.

¹⁵⁹ Heaton *South African Family Law* 65.

¹⁶⁰ In *Brummond v Brummond's Estate* 1993 1 All SA 298 (NM) 301, Levy J clearly provided that a marriage is in community of property and profit and loss in the absence of an antenuptial contract and every marriage is presumed to be in community of property until the contrary is proven; see also Hahlo *The South African Law of Husband and Wife* 258.

¹⁶¹ Robinson 2007 *PER/PELJ* 71.

¹⁶² Heaton *South African Family Law* 65.

¹⁶³ See Makola *A comparative Legal Analysis of the Effects of Divorce on Marital Property* 11.

¹⁶⁴ 1945 AD 388; the principles were also adopted and reaffirmed in *De Wet v Jurgens* 1970 3 SA 38 (A).

the remaining balance of the joint estate will be distributed in equal shares between the spouses.¹⁶⁵ Furthermore, in *Du Plessis v Pienaar No*¹⁶⁶ it was held that spouses who are married in community of property have the obligation of ensuring that their separate estates are merged into one joint estate for the duration of their marriage. In essence, the spouses' joint estate would only be divided upon divorce.¹⁶⁷

In determining whether the member spouse's retirement benefits will be taken into account during the division of the spouses' joint estate, the court in *Maharaj v Maharaj*,¹⁶⁸ eloquently pointed out that "retirement savings indeed form part of the distributable matrimonial assets at divorce".¹⁶⁹ As such, the object of the trajectory of developing this area of law was to ensure that the "pension interest" of the member spouse is regarded as an asset that forms part of the member spouse's estate on divorce.¹⁷⁰ This would allow the non-member spouse to be awarded a share of such pension interest in terms of a decree of divorce granted by the court.¹⁷¹ There is no justifiable reason whatsoever why the member spouse's retirement benefits would not be regarded as assets forming part of the spouses' joint estate. In addition, the essence of including such retirement benefits into the spouses' joint estate is to satisfy the common law principle providing that spouses in a universal community of property share everything upon the dissolution of marriage.¹⁷²

In light of the above, it may be assumed that a member spouse's retirement benefits would, by operation of law, form part of the joint estate and be considered for equal division during divorce proceedings. In support thereof, the court in *Clark v Clark*,¹⁷³ clearly stated that a member spouse's interest in the retirement benefits which had not yet accrued and the pension right which has accrued forms part of community estate.

¹⁶⁵ See Robinson 2007 *PER/PELJ* 72; see also Visser *The Nature of Financial Protection of an Individual* 10; see also Heaton *South Africa Family Law* 66.

¹⁶⁶ 2002 4 All SA 311 (SCA) para 312g.

¹⁶⁷ See Visser *The Nature of Financial Protection of an Individual* 10

¹⁶⁸ 2002 2 All SA 34 (D).

¹⁶⁹ This troubling issue was firstly brought before the attention of the court in *Ndaba v Ndaba* 2017 1 All SA 33 (SCA); See also Marumoagae 2014 *PER/PELJ* 2490.

¹⁷⁰ See *De Kock v Jacobson* 1999 4 SA 346 (W); *Clark v Clark* 1949 3 SA 226 (D).

¹⁷¹ *De Beer v Tshwane Municipal Provident Fund* 2012 1 BPLR 23 (PFA) para 5.2.

¹⁷² De Jong and Pintens 2015 *TSAR* 552.

¹⁷³ 1949 3 SA 226 (D).

Apart from that, existing literature and case law illustrate that; until the amendment of the *Divorce Act* retirement savings were not considered to form part of the spouses' matrimonial assets available for the division during divorce.¹⁷⁴ This clearly proved that the matrimonial rules dealing with the division of the spouses' assets during divorce were not adequate. More importantly, both the courts and academic commentators have failed to adequately provide sound arguments relating to the necessary interplay between matrimonial law, divorce law, and pension law during a divorce. In short, it may be pointed out that the plight that was previously encountered by the non-member spouse, during divorce, was rooted in the historical law that allowed the husband to have the right to autonomously alienate property that formed part of the joint estate.¹⁷⁵

Significantly, to improve the jurisprudence of the status of a member spouse's pension interest, during divorce, when spouses are married in community of property, the SCA in *Ndaba v Ndaba*¹⁷⁶ laid down a landmark judgment. At first, the court *a quo* held that there is no existing court order that declares the member spouse's pension interest to form part of the joint estate. This reasoning, incorrectly, influenced the court to find that pension interest does not form part of the joint estate. This decision encouraged the appellant to approach the SCA to overturn the court *a quo*'s decision. Correctly so, the SCA held that the member spouse's pension interest forms an integral part of the spouses' joint estate *ex lege*.¹⁷⁷

Given that, it is important to note that prior the *Ndaba v Ndaba*,¹⁷⁸ the apparent historical lacuna that resulted to the prejudice of financially weaker spouses by not protecting their rights adequately to benefit in the pension interest of their member spouses which in principle had to form part of the joint estate was problematic.¹⁷⁹ In the same fashion, hence our courts have over the past been struggling to properly set out sound precedent in respect of the apparent interplay between the matrimonial laws principles, pension law principles and the divorce law principles when expected to consider the inclusion of the

¹⁷⁴ Wiid *An Evaluation of the Parametric Amendments of Legislation 7*; see also Marumoagae 2014 *Speculum Juris* 55.

¹⁷⁵ Roxanne and Veldsman 2018 *De Rebus* 30.

¹⁷⁶ 2017 1 All SA 33 (SCA).

¹⁷⁷ *Ndaba v Ndaba* 2017 1 All SA 33 (SCA) para 35.

¹⁷⁸ 2017 1 All SA 33 (SCA).

¹⁷⁹ Marumoagae 2014 *Speculum Juris* 55.

member spouse's retirement benefits. In support of the above, the following was highlighted:¹⁸⁰

A divorce terminates any expectation which a non-member spouse may have of benefiting from the member spouse's pension in terms of the rules of the fund concerned. It is for this reason that it was found necessary to make statutory provision that a non-member spouse may share in the pension benefits that have accumulated before the date of divorce.¹⁸¹

Above all, the legislature has not to date considered to enact legislation that will enable the non-member spouse to claim a share of the member spouse's retirement benefits that accrued before the date of divorce.¹⁸² The importance of having such legislation is to protect and recognise the rights of the non-member spouse with regard to the member spouse's accrued retirement benefits during divorce.¹⁸³ This will prevent member spouse's from purchasing living annuities with the object of depriving their non-member spouse the right to benefit in their accrued retirement benefits. However, unless in certain circumstances the spouses have excluded the prospects of benefitting from each other's retirement benefits in their settlement agreement, or antenuptial contract when married out of community of property with the accrual system.¹⁸⁴ Essentially, the clauses contained therein must not be contrary to the law and must further be unambiguous.¹⁸⁵

Moreover, it is submitted that, when dealing with the issue of retirement benefits during divorce, the legal practitioners drafting settlement agreements and/or the summonses must take full cognisance of the marital regime governing the spouses' marriage. Thereafter, a proper consideration of the relevant matrimonial principles must be

¹⁸⁰ In *Corporate Liquidators (Pty) Ltd v Wiggill* 2006 4 All SA 439 (T), the court eloquently stated that one of the natural legal consequences of a marriage in community of property is that both spouses immediately become co-owners of their previously separate estate; which becomes their joint estate, irrespective of in whose name these assets are held.

¹⁸¹ South African Law Commission project 112 "Sharing of Pension Benefits" 1998 31.

¹⁸² See Marumoagae 2016 *Obiter* 320.

¹⁸³ Marumoagae 2016 *Obiter* 320. The author's submission is for the protection of the non-member spouse's right against the member spouse's accrued retirement benefits where the spouses are married in community of property. Marumoagae argues that there should be a legislative provision which empowers the non-member spouses to claim part of their spouses' pension benefits when they accrue during the subsistence of their marriages.

¹⁸⁴ *MN v FN* (714/2018) 2019 ZASCA 185 (3 December 2019) para 2.

¹⁸⁵ See *Blom v FNB Pension Fund and Another* 2010 3 BPLR 257 (PFA) para 5.5.

interpreted in a manner that interplay with the PFA and the *Divorce Act*.¹⁸⁶ This approach will help the courts to make sound and consistent decisions when adjudicating over a dispute involving the sharing of the retirement benefits when dividing patrimonial assets during divorce proceedings. One of the prospective challenges in this area of law, is not having adequate statutory guidelines aimed to regulate the position of a member spouse's retirement benefits that have accrued before the date of divorce.¹⁸⁷

According to the rules governing the division of matrimonial principles during divorce, the retirement benefits of the member spouse, must, in principle, be included when determining the patrimonial benefits to which the spouses may be entitled to. In this case if the spouses are married in community of property and they do not have a settlement agreement,¹⁸⁸ the court will divide the joint estate into two equal shares.¹⁸⁹ Additionally, in the event that the spouses have a settlement agreement where they set out that a non-member spouse should receive half of the member spouse's retirement benefits, among other matrimonial assets, then the court order will include the terms agreed upon by the spouses when granting a decree of divorce.¹⁹⁰

If they are married out of community of property with the accrual system, the court will determine the value of the estate of the spouse that is greater than the other spouse and further assign a portion that a non-member spouse would be entitled to. Moreover, if the spouses in their settlement agreement, agreed that neither spouse will have an accrual claim against the other, then the court order will expressly reflect such clauses.¹⁹¹ In terms of this approach, each spouse will therefore retain his or her separate assets during divorce.

¹⁸⁶ South African Law Reform Commission project 100E "Review of Aspects of Matrimonial Property Law" 43.

¹⁸⁷ Marumoagae 2016 *Obiter* 320.

¹⁸⁸ See Heaton *South African Family Law* 123. The author provides that the spouses in their settlement agreement regulating matters relating to the division of their assets.

¹⁸⁹ Wiid *An Evaluation of the Parametric Amendments of Legislation* 24.

¹⁹⁰ *Prins v Eskom Pension and Provident Fund* 2013 3 BPLR 407 (PFA) 3.1.

¹⁹¹ Heaton *South African Family Law* 123.

2.4.1 *The need to acquire another spouse's written consent prior to concluding certain transactions*¹⁹²

Spouses who are married in community of property are legally required to jointly participate in the decision-making of certain agreements or transactions concerning their joint estate.¹⁹³ Put differently, spouses have equal independent powers regarding control and administration of the joint estate, this further places the legal obligation on the spouses to obtain each other's consent in respect of certain important transactions.¹⁹⁴ Section 15(2) (a) to (d) of the MPA enclose a list of different kinds of assets that are regarded as forming part of the spouses' joint estate.¹⁹⁵

In terms of the law, these assets cannot be alienated or encumbered without the necessary written consent of the other spouse.¹⁹⁶ This, therefore, implies that, in practice, a written consent of the other spouse is required for a legal transaction to be processed. The importance of obtaining the written consent of the other spouse is to avoid a concluded transaction to be declared null and void.¹⁹⁷ In a different fashion, section 15 (9) (b) of the MPA provides that an agreement or transaction that has been entered into without the written consent of the other spouse shall be valid and binding on the other spouse.¹⁹⁸

The court can protect the right of a third party who contracted with one spouse in the absence of the other spouse's written consent.¹⁹⁹ In such circumstances, a court would

¹⁹² See section 15 of the MPA.

¹⁹³ See De Jong and Pientens 2015 *TSAR* 553.

¹⁹⁴ See De Jong and Pientens 2015 *TSAR* 553.

¹⁹⁵ Veldsman and Roxanne 2018 *De Rebus* 31.

¹⁹⁶ Veldsman and Roxanne 2018 *De Rebus* 31.

¹⁹⁷ See *Visser v Hull and Others* 2010 1 SA 521 (WCC).

¹⁹⁸ S 15 (9) of the MPA stipulates that, when a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and – **(a)** that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be: **(b)** that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3), or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate.

¹⁹⁹ *Vukeya v Ntshane and Others* (SCA) (unreported case no: 518/2019, 11-12-2020).

reason that, if the purchaser was unaware or was not reasonably expected to have known that the written consent of the other spouse was needed in order to conclude a valid transaction; such transaction should stand and be regarded as lawful.²⁰⁰ Accordingly, the legislature through section 15(2) (a) and (b) of the MPA provides the legal position in respect of immovable property where no transaction shall be legally valid and/or lawful if there is no other spouse's written consent for the purposes of concluding a valid transaction.²⁰¹

With the above emphasis in mind, controversial judgments regarding the application of section 15 (2) have been handed down by the courts. Among others, in *Vukeya v Ntshane and Others* (SCA),²⁰² the spouses were married to each other in community of property. At the same time, the spouses were not living together as husband and wife. The Respondent moved to another province leaving the husband in their house. The husband died and the Respondent was appointed the executor. During the process of winding-up the estate, the Respondent became aware that the deceased had sold their home without her consent.

What transpired in the above case seems to be contrary to the true intention of the provisions of section 15 (2) (a) of the MPA. Firstly, the surviving spouse approached the High Court for an order cancelling the transaction and she was successful. Secondly, the purchaser appealed the court a *quo's* decision and the SCA overturned the High Court's decision by ruling in favour of the purchaser. With this judgment in mind, it seems that the statutory requirement for the acquisition of the other spouse's consent before a spouse can conclude any agreement is not absolute. This is the reason because the SCA ruled that a non-consenting spouse is deemed to have consented to the sale if the purchaser was unaware that there was a need for the other spouse's consent.²⁰³

Be that as it may, section 15(2) (c) of the MPA caters for the restriction of one spouse from making or taking a decision in the absence of the other spouse.²⁰⁴ Moreover, section

²⁰⁰ *Vukeya v Ntshane and Others* (SCA) (unreported case no: 518/2019, 11-12-2020).

²⁰¹ Veldsman and Roxanne 2018 *De Rebus* 31.

²⁰² unreported case no: 518/2019 para 11-12.

²⁰³ See Robertson and Robertson 2021 *De Rebus* 23; see also De Jong and Pientens 2015 *TSAR* 54.

²⁰⁴ See *Ostensibly Naidoo v Discovery Life Limited and Others* (SCA) (unreported case no 202/2017, 31-5-2018); see also Veldsman and Roxanne 2018 *De Rebus* 31.

15(2) (d) of the MPA further restricts a spouse from making an autonomous decision regarding any corporeal or material objects held as investments,²⁰⁵ but mainly for the benefit of both spouses in an undivided share. The provision of section 15(2) (c) of the MPA clearly establishes that a spouse shall not without the written consent of the other spouse, alienate, cede or pledge any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposit or any similar assets, or any investment by or on behalf of the spouse in a financial institution, forming part of the joint estate. In accordance with this statutory provision, it is submitted that, in the absence of such written consent of the other spouse, the prejudiced spouse may approach the court to seek a declaratory order or any other competent court order that may set aside the validity of any transaction or agreement that has been concluded by a spouse at the expense of the other.²⁰⁶

However, the statutory provisions of section 15 (2) (C) of the MPA do not expressly mention that there is a need for a member spouse to obtain a written consent from the non-member spouse when contemplating to invest his retirement benefits. It is required that the provisions of section 15 (2) (c) of MPA must be interpreted in a broader manner in such circumstances. There is a significant need that the non-member spouse should be legally permissible to first obtain a share of the member spouse's accrued retirement benefits before purchasing living annuities. In such a case, if the provisions of section 15(2) (c) of the MPA are properly interpreted it should be competent to present that a member spouse should not be allowed to alienate or make an investment or transfer any portion of his retirement benefits to any financial/insurance institution without the written consent of the non-member spouse.²⁰⁷ In practice, such conduct would result in transactions being regarded void.²⁰⁸ In support of this argument, Kgole and Marumoagae argue that:²⁰⁹

²⁰⁵ Veldsman and Roxanne 2018 *De Rebus* 31.

²⁰⁶ See De Jong and Pientens 2015 *TSAR* 554.

²⁰⁷ See *CM v EM* 2020 3 All SA 1 (SCA).

²⁰⁸ Kgole and Maramoagae 2020 *De Rebus* 19; see also *Amalgamated Bank of South Africa Bpk v Lydenburg Passasierdienste BK* 1995 3 SA 314 (T); *Bopape v Moloto* 2000 1 SA 383 (T).

²⁰⁹ Kgole and Marumoagae 2020 *De Rebus* 18; see also *Van den Berg v Van den Berg* 2004 JOL 12404 (T) para 10.

The accrued retirement benefits that have been used to purchase a living annuity, the capital value thereof is owned by either the insurance company or retirement fund that has sold the living annuity to the member spouse. This is notwithstanding, any right that the non-member spouses may have had to the member spouses accrued retirement benefits immediately before living annuities were purchased.²¹⁰

The rule governing spouses married in community of property is that all the assets of the spouses are merged together into one and forms part of the joint estate. Interestingly, in *De Kock v Jacobson*,²¹¹ the court expressed the view that “there is no reason in principle, why the accrued right to the pension should not form part of the community of property”. Therefore, it is sound to infer that, the non-member spouse becomes entitled to a portion of the member spouse’s accrued retirement benefits as soon as such retirement benefits accrue to a member spouse.

Additionally, a member spouse would need the non-member spouse’s written consent for any investment a member spouse would consider undertaking. The court granting a decree of divorce shall order the division of assets together with the member’s retirement benefits in accordance with the provisions of section 7(7) (a) and section 7(8) (a) (i) of the *Divorce Act*.²¹² In that case, as soon as the retirement benefits have accrued to the member spouse, the respective benefits shall, by operation of law, fall into the spouses’ joint estate.²¹³

In *Old Mutual Life Assurance Co (SA) Ltd & Another v Swemmer*,²¹⁴ the court clearly indicated that when a retirement fund member is divorcing and the patrimonial benefits of his marriage are determined, his pension interest shall be regarded as forming part of the spouses’ joint estate respectively.²¹⁵ Furthermore, in *Naidoo v Discovery Limited and*

²¹⁰ In *De Kock v Jacobson* 1999 4 SA 346 (W) at 349G-H, the court held that there was no reason in principle why the accrued right to the pension should not form part of the community of property existing between the parties prior to their divorce. The court in *Chiloane v Chiloane* (27836/06) 2007 ZAGPHC 183 agreed to the Labe J in the judgment of De Kock.

²¹¹ 1999 4 SA 346 (W) para 349G-H.

²¹² See chapter 3 below for more extensive discussion.

²¹³ See Marumoagae 2020 *Without Prejudice* 50. The author explain the position as that, as much as a non-member spouse become entitled to the accrued retirement benefits of member spouse, the respective non-member spouse shall only be legally entitled to enforce a claim once the court has made an order directing the retirement fund to make such a payment to him or her in terms of section 7(8) of the *Divorce Act*; see also *M v M* (HCA18/2015) 2016 ZALMPPHC 2 17 June 2016 para 12.

²¹⁴ 2004 5 SA 373 (SCA) para 18.

²¹⁵ *Old Mutual Life Assurance Co (SA) Ltd & Another v Swemmer* 2004 5 SA 373 (SCA) para 18.

Others,²¹⁶ the court correctly held that section 15(2) (c) of the MPA creates the exception to the general rule by prohibiting a spouse married in community of property from alienating an asset in the joint estate without the written consent of the other spouse.²¹⁷ The above case laws provide clear guidance in that a pension interest form part of the joint estate is susceptible to be considered for purposes of determining the patrimonial benefits that the spouses may be entitled to.²¹⁸

In light of the above precedent, it is important to bear in mind that as soon as the member's retirement benefits accrue into the joint estate, the member spouse cannot unilaterally and independently decide to use such accrued retirement benefits to purchase a living annuity or any insurance product thereof.²¹⁹ The member spouse must first acquire the other spouse's written consent in order to enter into a valid transaction. The significance of the provisions of section 15(2) of the MPA is to try to protect the one spouse against the illicit selling or alienation of property that forms part of the joint estate by the other spouse.²²⁰ In support of this argument, the assets forming part of the joint estate requires joint and/or equal administration of the spouses prior to concluding any transaction.

In summary, it ought to be borne in mind that, any asset that forms part of the joint estate requires equal administration and decision-making by both spouses. It is logic to argue that such assets ought to also include retirement savings. The provisions of section 15 (2) (c) of the MPA are clear in that, any transaction, cession, pledge, or transfer of any assets among others including insurance policies of the joint estate must be undertaken through a joint consent of both spouses who are married in community of property. Failing to acquire such a pre-requisite written consent from the other spouse will then result in the nullification of the transaction or agreement that has been concluded unilaterally.

²¹⁶ 2018 JOL 39960 (SCA) para 16.

²¹⁷ *Naidoo v Discovery Limited and Others* 2018 JOL 39960 (SCA) para 16.

²¹⁸ *Kirchner v Kirchner and Another* (20358/08) ZAGPHC 415 (5 November 2008) para 8.

²¹⁹ *Marumoagae* 2020 *Without Prejudice* 50; see also *Naidoo v Discovery Limited and Others* 2018 JOL 39960 (SCA) para 16.

²²⁰ *Kgole and Maramuagae* 2020 *De Rebus* 19; see also *Visser v Hull and Others* 2010 1 SA 521 (WCC) para 5.

2.5 Marriage out of community of property with the application of the accrual system

2.5.1 Relevant statutory provisions of the MPA

The accrual system is provided in section 3 of the MPA. In terms of the provisions of section 2 of the MPA, every marriage out of community of property, in terms of an antenuptial contract, where community of property and community of profit and loss are excluded and also where such a marriage is entered into after the commencement of the MPA the particular marriage shall be subject to the accrual system. However, provided that such an accrual system is expressly excluded by the valid antenuptial contract, then the marriage shall not be subject to the principles of the accrual system as provided for in the MPA.

Furthermore, in terms of section 3(1) of the MPA, it is established law that, at the dissolution of a marriage subject to the accrual system, the spouse whose estate shows no accrual or shows small accrual than the estate of the other spouse shall be entitled to a claim against the estate of the other spouse for an amount equal to half of the difference between the accrual of their respective estates.²²¹ In light hereof, I am of the view that this provision may be invoked by a non-member spouse, especially for the purpose of exercising a right against a member spouse for a share of his retirement benefits during a divorce. This provision does play a significant role in protecting the non-member spouse's right to claim a share of the member spouse's retirement benefits. Moreover, section 4 provides a method of determining the accrual of spouses' estate during divorce.

Furthermore, it is submitted that where the retirement benefits of the member spouse have accrued prior to the date of divorce and the non-member spouse suspects that the member spouse contemplates purchasing an insurance product or living annuity; the non-member spouse would possibly approach the court by making an application in terms of section 8 (1) of the MPA. Section 8 (1) of the MPA provides that:

²²¹ See Sinclair "Marriage" 202; in *Reeder v Softline* 2000 4 All SA 105 (W), the court clarified the principle governing accrual claim as that a spouse will not succeed on a claim for specific assets in lieu of an accrual claim, because the claim does not lie against specific assets.

A court may on the application of a spouse whose marriage is subject to the accrual system and who satisfies the court that his right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other person will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provisions of this chapter or on such other basis as the court may deem just.

With the above statutory provisions in mind, it is sound to argue that when a court considers all the assets that the husband had accumulated during the subsistence of the marriage, the accrued retirement benefits must also be considered as part of the accrued assets. This approach would put a non-member spouse in a better position of being entitled to a portion thereof. Traditionally, this consideration can suffice when the member spouse has exited employment in accordance with the rules of the retirement fund prior to the divorce proceedings.²²² However, the provisions of section 8(1) of the MPA ought to enable a non-member spouse to approach a court for immediate division of the accrual and further receive a share of the member spouse's accrued retirement benefits.²²³

In this case, Marumoagae,²²⁴ significantly submits that the introduction of a specific statutory provision that will permit the sharing of retirement benefits that have accrued during the subsistence of the marriage will be of assistance in practice. I support the author's view, because if there will be such statutory provisions then the right of the non-member spouse would be protected and recognised by the law. This will also protect the non-member spouse from any possible prejudice as a result of the member spouse's intention to purchase living annuities or other insurance products during divorce proceedings.²²⁵

Therefore, where the spouses did not, in their antenuptial contract, exclude retirement benefits from being shared during divorce, the prejudiced spouse should approach the court in terms of section 8 (1) of the MPA for an order that should also include the

²²² Marumoagae 2016 *Obiter* 323.

²²³ See Marumoagae 2016 *Obiter* 323. The author is of the view that, the provisions of section 8 (1) of the MPA would enable the non-member spouse to approach the court for relief regarding the division of the spouses' assets while their marriage is still on, especially when the spouses do not contemplate divorce.

²²⁴ Marumoagae 2016 *Obiter* 322.

²²⁵ *CM v EM* 2020 3 All SA 1 (SCA) paras 1-23.

awarding a portion of the member spouse's retirement benefits. In line with these statutory provisions, the rights of the non-member spouse would be safely protected and safeguarded if the legislature can consider passing a statute that will further enable the non-member spouse to claim from accrued retirement benefits of the member spouse while their marriage still subsists but contemplating to divorce.

In summary, for a non-member spouse to successfully claim a portion of the member spouse's retirement benefits, the retirement benefits must have accrued to the member spouse. Accordingly, the provisions of section 3 (1) of the MPA may enhance the chance of the non-member spouse to claim such a portion from the member spouse's retirement benefits. More essentially, the clauses that are inserted into the spouses' settlement agreement or antenuptial contract would significantly contribute towards whether a non-member spouse, in law, stands a chance of claiming a portion thereof.

2.6 Conclusion

Before 1984 the South African matrimonial law recognised two main matrimonial systems. The two matrimonial systems referred to are a marriage in community of property with the marital power and marriage out of community of property with the exclusion of both community of profit and loss and the husbands' marital power. Normally, where spouses were married in community of property the husband would have absolute power over the joint estate while the wife had no role to play with regard to the decision concerning the joint estate. With regard to a marriage out of community of property, the spouse whose estate was less than the other was not allowed to claim any share of the other's greater estate.

However, post-1984 the MPA was enacted, and the marital power was abolished while the accrual system was introduced. There were three matrimonial systems in practice, namely, Marriage in community of property, marriage out of community of property with the accrual system, and Marriage out of community of property with the exclusion of both community of profit and loss. Therefore, regarding a marriage in community of property the assets of both spouses formed part of the joint estate. All the assets accumulated before and during the subsistence of the marriage. Regarding a marriage out of community of property, the spouses had to conclude a valid antenuptial contract and

register it through a notary. In terms of the antenuptial contract, the spouses could set out the assets that will be shared during divorce and those assets that will not be shared.

Since the coming into effect of the MPA, the spouses have equal powers with regard to the administration of the joint estate. Although, the law did not recognise the spouses' retirement benefits to form part of the joint estate, the court in *Clark v Clark*²²⁶ stated that a member spouse's interest in the retirement benefits which had not yet accrue and the pension right which has accrued forms part of the community estate. In the following chapter, this study will set out the legal position of the member spouses' retirement benefits during divorce and the right of the non-member spouse to share in the member's retirement benefits.

²²⁶ 1949 3 SA 226 (D).

Chapter 3: Critical discussion of the development of the inclusion of retirement benefits during divorce proceedings

3.1 Introduction

The purpose of this chapter is to discuss the developments of the law regulating the sharing of the member spouses' retirement benefits during a divorce. This is done by investigating how the law reflects on the rights of the non-member spouse in respect of their member spouse's retirement benefits during divorce proceedings. Firstly, this chapter will provide a legislative background prior to 1989 and proceed to provide the legal position post-1989. Secondly, the legal position since the amendment of the PFA in 2007 and the GEPL in 2011 to enable the non-member spouse to receive an immediate payment of a portion of the member spouse's retirement benefits after the court has granted a decree of divorce.

Moreover, this chapter will further demonstrate the significant role that the settlement agreement and the court order play in respect of enabling the retirement fund of the member spouse to effect the necessary payment of an assigned portion to the non-member spouse. It will also highlight the need to contain a clear and unambiguous clause in settlement agreements when making reference to the sharing of the member spouse's retirement benefits during divorce proceedings. This chapter will advance arguments relating to the sharing of the member spouse's retirement benefits through "pension interest" being deemed as an asset at the time of divorce and "accrued retirement benefits/pension benefits" where the benefits have already accrued before divorce proceedings.

3.2 Retirement benefits of a member spouse during divorce: the legal position prior to the 1989 amendment to the Divorce Act

On the one hand, the South African *Pension Fund Act* has been promulgated into law in 1956.²²⁷ On the other hand, the *Government Employees Pension Law* has been enacted in 1996. Prior to the coming into operation of sections 7(7) and 7(8) of the *Divorce Act*,

²²⁷ Nevondwe 2010 *Pensions: International Journal* 287.

a spouse of the member of a retirement fund did not have a legally recognised right to share in the member spouse's retirement savings during divorce proceedings.²²⁸ This was due to the fact that there was no recognised statutory provision in our law that conferred a non-member spouse with the necessary right to claim a share of the member spouse's retirement benefits during a divorce.²²⁹ Notably, this lacuna was apparent under both the PFA and the GEPL. With this in mind, a pension interest that a non-member spouse would be entitled to, during divorce, was not regarded as an asset forming part of the spouses' accrued estate,²³⁰ or joint estate where their marriage was in community of property.²³¹ Moving forward, the court in *Clark v Clark*²³² unequivocally stated that:

The interest of the member spouse in the retirement benefits which had not yet accrued and the pension right which has already accrued to the member forms part of the community estate and it should be for the benefit of both spouses.

With this insightful precedent in mind, various divisions of the High Court continued to be inconsistent by disregarding the matrimonial law principles when adjudicating over a matter concerning the sharing of the member spouse's retirement benefits.²³³ Important to note, there was a great uncertainty on whether the non-member spouse, under the matrimonial law principles, would be entitled to claim a portion of the member spouse's pension interest when the benefits had already accrued to the member of a retirement fund before divorce.²³⁴ Thus, the court in *Old Mutual Life Assurance Co (SA) (Pty) Ltd and Another v Swemmer*²³⁵ pointed out that prior to 1 August 1989, the interest which a spouse who was a member of a retirement fund had in respect of a pension benefit, which had not yet accrued, was generally not regarded as an asset of his estate

²²⁸ Nevondwe 2009 LDD 2.

²²⁹ See South African Law Commission project 112 "Sharing of Pension Benefits" 1998 1.

²³⁰ When the spouses were married out of community of property with the accrual system.

²³¹ Marumoagae C 2013 *De Rebus* 39; see also *Gugu v Zongwana* 2014 1 All SA 203 (ECM).

²³² 1949 3 SA 226 (D).

²³³ *Maharaj v Maharaj* 2002 2 All SA 34 (D); *Kotze v Kotze* 2013 JOL 30037 (WCC); *Motsetse v Motsetse* 2015 2 All SA 495 (FB) and *Sempapalele v Sempapalele* 2001 2 SA 306 (O).

²³⁴ See *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC) para 5; see also *De Kock v Jacobson and Another* 1999 4 SA 346 (W) para 350G; *Mcintosh v McIntosh* 2011 ZAFSHC 111 paras 19-22; *Elesang v PPC Lime Limited and Others* 2007 6 SA 328 (NC) para 20; *Kirkland v Kirkland* 2006 6 SA 144 (C) para 82, 83; *Government Employees Pension Fund v Naidoo* 2006 6 SA 304 (SCA).

²³⁵ 2004 (5) SA 373 (SCA).

or joint estate where he was married in community of property. This expression was also supported by Esterhuizen *et al*²³⁶ in the following manner:

prior to August 1989, the amount held by a fund as provision for its future liability towards a member could not be taken into account in determining the value of the member's estate on divorce because the provision comprised assets that belonged to the fund rather than to the member.

In light of the above, it is clear that, prior to August 1989, the non-member spouse did not have a legal right that she could exercise to claim a share of the member spouse's retirement benefits during divorce proceedings.²³⁷ This was simply because our law did not regard the member spouse's retirement benefits as assets that formed part of his estate, or joint estate when married in community of property.²³⁸ Moreover, matrimonial principles were seldom applied effectively to such an extent that the non-member spouse would be entitled to claim a portion of a member spouse's pension interest during a divorce.²³⁹ This predicament left the non-member spouse exposed to unfair treatment during the sharing of matrimonial assets during divorce.

The above-highlighted problem contributed immensely to prejudicing the non-member spouse's direct right and interest in the retirement benefits of the member spouse.²⁴⁰ In essence, it is noteworthy that, the rules of the retirement funds have always enjoyed absolute authority in determining the sharing of the member spouse's retirement benefits during divorce proceedings. In support of this emphasis, Marumoagae,²⁴¹ correctly expresses the view that the court's failure to adequately take into account the matrimonial property principles when applying financial statutes, in practice, gives rise to injustice. This highlighted injustice refers to depriving the non-member spouse of the right to claim and/or receive a share of the member spouse's retirement benefits during a divorce.

In instances where there was a need for the division of the spouses' assets during divorce proceedings, the value of the retirement benefits of the member spouse was not

²³⁶ Esterhuizen *et al* *The Pension Funds Act: A Commentary* 725.

²³⁷ Nevondwe 2009 *LDD* 2.

²³⁸ Marumoagae 2018 *SA Merc LJ* 284; see also Marumoagae 2013 *De Rebus* 39.

²³⁹ See South African Law Reform Commission issue paper 41 "Review of Aspects of Matrimonial Property Law" 42-45.

²⁴⁰ Marumoagae 2021 *THRHR* 42.

²⁴¹ Marumoagae 2021 *THRHR* 42.

considered.²⁴² The consideration of the member spouse's retirement benefits was only to occur when the benefits had accrued to him through, retirement, reaching a certain stage, resignation, dismissal or retrenchment as well as divorce.²⁴³ To remedy this unreasonable lengthy wait that the non-member spouse had to endure, the South African Law Commission recommended that there should be a clear method to calculate the value of the pension interest and to see the actual amount that would have been available to the member had he exited employment at the time of divorce.²⁴⁴

As a result of this, during the amendment of the *Divorce Act* the legislature took into account the recommendations made by the South African Law Commission.²⁴⁵ Notably, the applicable pension law principles, clearly proved that the matrimonial right that the non-member spouse would derive through matrimonial principles was not safeguarded by the courts.²⁴⁶ The judicial shortfall to adequately protect these rights of the non-member spouse during the division of the spouses' patrimonial assets resulted to a clear practical prejudice that saw the non-member spouse lose an equitable share of matrimonial assets thereof.

According to existing case law,²⁴⁷ it is apparent that the above challenges were mostly experienced by the non-member spouse, who in practice are women who are in a financially weaker position and who were married in community of property.²⁴⁸ Apart from this, the other challenge and long route that the non-member spouse had to conform to before receiving payment of a share of the member spouse's pension interest; was to wait for the pension interest to firstly accrue to the member spouse.²⁴⁹ This was the case

²⁴² South African Law Commission project 112 "Sharing of Pension Benefits" 1998 3.

²⁴³ See Marumoagae 2014 *PER/PELJ* 2492; *Wise v Government Employees Pension Fund and Others* 2012 6 BCLR 599 (CC) para 6.

²⁴⁴ Section 7 (7) (a) of the *Divorce Act*; see also South African Law Commission project 112 "Sharing of Pension Benefits" 1998 3.

²⁴⁵ Section 7 (7) (b) of the *Divorce Act*.

²⁴⁶ Marumoagae 2021 *THRHR* 41-42.

²⁴⁷ *De Kock v Jacobson and Another* 1999 4 SA 346 (W).

²⁴⁸ See *Collatz v Johnson Provident Fund and Others* 2013 3 BPLR 331 (PFA) para 5.10; see also *Eskom Pension and Provident Fund v Krugel and Another* 2012 6 SA 143 (SCA).

²⁴⁹ Nevondwe 2009 *LDD* 1.

because the clean-break principle was not yet in effect and the pension interest of the member spouse would only accrue upon the exit event from employment.²⁵⁰

While waiting for the exit event to occur, for the non-member spouse to receive a share of the member spouse's pension interest; a portion that the court awarded a non-member spouse would be deferred to the fund of the member spouse until such a time a member spouse exit employment.²⁵¹ Therefore, the purpose of these amendments was to allow the non-member spouse to claim and receive an immediate payment of a portion of the member spouse's pension interest during divorce proceedings.²⁵² However, the application of the pension law on issues of the member spouse's retirement benefits during divorce has always been applied in a manner that gives rise to severe practical challenges. Hence there was a great need to improve and remedy the lengthy wait that the non-member spouse was expected to endure before she could claim and access a portion of the member's retirement benefits during a divorce.²⁵³

Furthermore, with respect to a marriage out of community of property with the accrual system, our courts have not yet been approached to pronounce on the issue of the sharing of a member spouse's retirement benefits during divorce proceedings. The only issue that sought judicial attention thus far, is the purchasing of living annuities through accrued retirement benefits.²⁵⁴ Usually, this form of practice would leave the non-member spouse prejudiced in the sense that she would not in any way be able to claim any portion thereof.

As a result of the above, it is not clear whether the courts were to apply the rules regulating the division of matrimonial assets, specifically accrual principles, in line with the rules governing retirement funds to attain proper calculations of the pension interest of the member spouse at the date of divorce. More significantly, it is important to note that, the legislature's failure to statutorily regulate the rights of the non-member spouse to claim accrued retirement benefits of the member spouses would lead to serious

²⁵⁰ *Wise v Government Employees Pension Fund and Others* 2012 6 BCLR 599 (CC) para 6.

²⁵¹ *Prins v Eskom Pension and Provident Fund* 2013 3 BPLR 407 (PFA) para 4.4-4.5.

²⁵² Heaton and Kruger *South African Family Law* 133.

²⁵³ See *Andrews v IBM SA 1994 Provident Fund and Others* 2012 1 BPLR 13 (PFA) para 5.2.

²⁵⁴ See *ST V CT* 2018 3 All SA 408 (SCA); *CM v EM* 2020 3 All SA 1 (SCA).

practical challenges in the future.²⁵⁵ It is also not entirely clear how the courts would deal with legal disputes of this nature to set a sound guiding precedent for future reference. Whether the courts would import the principle applied to marriages in community of property,²⁵⁶ is not entirely clear.

In consideration of the above, the South African Law Commission in its report "Investigation into the possibility of making provision for a divorced woman to share in the pension benefits of her former husband,"²⁵⁷ proposed the much-needed recommendations which sought to enable the non-member spouse to claim a share of the member spouse's retirement benefits during divorce proceedings. Among other recommendations, the commission proposed that the right which a member of a pension fund has to receive his pension benefits, in terms of the rules of the fund, should be deemed to form part of the spouses' assets even before the pension becomes payable.²⁵⁸ In light of the commission's report, the said right was deemed as the member's "pension interest" since the amendment of the *Divorce Act* in 1989.

In a quest of trying to remedy these impediments that were previously incurred by the non-member spouse; the legislature effectively inserted significant amendments to both the PFA and GEPL.²⁵⁹ Firstly, the PFA was amended on 13 September 2007 by introducing the clean-break principle through section 37D (4) (a). Secondly, the GEPL was amended on 14 December 2011 through section 24A (2) (a) to introduce the clean-break principle.²⁶⁰

Below, this dissertation attempts to illustrate how the pension interest together with sections 7(7) and 7(8) was introduced in the *Divorce Act* and further highlight their

²⁵⁵ See also *ST v CT* 2018 3 ALL SA 408 (SCA); *CM v EM* 2020 3 ALL SA 1 (SCA). These cases concern the issue of the division of living annuities when spouses are married out of community of property with the application of the accrual system. Importantly, our courts have only been approached to pronounce on the issue relating to the division of living annuities not accrued retirement benefits of the member spouse during divorce proceedings.

²⁵⁶ *De Kock v Jacobson and Another* 1999 4 SA 346 (W).

²⁵⁷ This report was brought out during August 1987.

²⁵⁸ See *Clark v Clark* 1949 3 SA 226 (D); South African Law Commission project 112 "Sharing of Pension Benefits" 1998 9; see also *De Kock v Jacobson and Another* 1999 4 SA 346 (W).

²⁵⁹ Heaton and Kruger *South African Family Law* 133.

²⁶⁰ A discussion of the clean-break principle is provided on para 3.3.4.

significant contribution to curbing the challenges that were confronted by the non-member spouse during divorce *vis-a-vis* a member spouse's retirement benefits during a divorce.

3.3 The legal position of the sharing of the member spouses' retirement benefits post the amendment of the Divorce Act in 1989

3.3.1 The impact of case law and the effects of legislative developments

In *De Kock v Jacobson and Another*²⁶¹ the court expounded that, there is no legal reason why a retirement benefit consisting of a lump sum and a pension benefit which have accrued prior to the divorce date cannot ordinarily form part of the joint estate.²⁶² The logic of these expressions by the court, can only be attained through effective consideration of both accrual system principles and in community of property principles. Moreover, this emphasis effectively corresponds with the findings of *Clark v Clark*.²⁶³ In light of *De Kock v Jacobson and Another*,²⁶⁴ one would submit that it is settled law with regard to a marriage in community of property that,²⁶⁵ a retirement benefit which consist of a lump sum and an accrued pension benefit forms part of the spouse's joint estate *ex lege*.²⁶⁶

Additionally, the SCA in *Ndaba v Ndaba*²⁶⁷ reiterated that a member spouse's pension interest forms an integral part of the spouses' joint estate.²⁶⁸ The impact of this precedent, result to the abatement of the traditionally accepted legal approach that did not recognise the non-member spouse's immediate right to any part of the member spouse's pension interest.²⁶⁹ Moreover, Petse JA in *Ndaba v Ndaba* correctly pointed out

²⁶¹ 1999 4 SA 346 (W).

²⁶² In *Costain & Partners v Godden NO* 1960 4 SA 456 (SR), with regard to the sharing of half of the joint estate after all the legal obligations and liabilities of the joint estate have been discharged, the court correctly held that it is only the half of the net balance of the estate of the deceased which vests in the survivor; see also *Hitzeroth v Brooks* 1965 3 SA 444 (A) at 452.

²⁶³ 1949 3 SA 226 (D).

²⁶⁴ 1999 4 SA 346 (W).

²⁶⁵ See *Ndaba v Ndaba* 2017 1 All SA 33 (SCA). This is the leading case law in relation to settling the law relating to the sharing of a member spouse's retirement benefits.

²⁶⁶ See *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC).

²⁶⁷ 2017 1 All SA 33 (SCA).

²⁶⁸ *Ndaba v Ndaba* 2017 1 All SA 33 (SCA) para 34-35.

²⁶⁹ See *Kotze v Kotze* 2013 JOL 30037 (WCC); see also Anon 2013 "The South African Post Office Soc Ltd Amendment Bill" 6.

that, for as long as there is no forfeiture of benefits order or express agreement between the spouses providing otherwise, each spouse would be entitled to a half-share of the joint estate and whatever it entails.²⁷⁰ According to these assertions, it is submitted that once the court have ordered partial forfeiture of benefits against the member spouse, then the member spouse would potentially forfeit portion of his estate including retirement benefits as per the order.²⁷¹

In the alternative, although the non-member spouse would place reliance on the right she derives from the matrimonial principles when claiming a portion of the member's retirement benefits, the rules of retirement funds, would always play a determining role in blocking the non-member spouse from claiming a portion of the member's retirement benefits expeditiously.²⁷² In particular, on the one hand, section 21 (1) of the GEPL stipulates that neither the retirement benefit nor the right to the benefit may be transferred, pledged or ceded to any third party.²⁷³ On the other hand, section 37A (1) of the PFA further prevents any possible transfer of the benefits or the right to the benefits to any third party.²⁷⁴

With the above in mind, it must be noted that there are exceptions under which the right to the pension benefit or the pension benefit itself may be transferred and/or considered to be shared between the spouses on divorce. To achieve the object of these exceptions, section 37A (1) of the PFA and 21 (1) of the GEPL must be read in conjunction with sections 7 (7) and 7 (8) of the *Divorce Act*.²⁷⁵ The essence of interpreting and applying these sections jointly is to enable the court to make an order in terms of which a portion of the member spouse's pension interest to be paid to the non-member spouse during divorce. Normally, the court will deem a member spouse's pension interest as an asset of his estate or joint estate accordingly. In terms of the provisions of section 37D (1) (a)

²⁷⁰ *Ndaba v Ndaba* 2017 1 All SA 33 (SCA) para 33.

²⁷¹ See section 9 (1) of the *Divorce Act*.

²⁷² See Mamashela 2018 *De Jure* 18; see also Marumoagae 2018 *SA MERC LJ* 281. The author opines that the inconsistencies that emanated from various divisions of the courts contributed immensely in unclear law regulating the sharing of the member spouse's retirement benefits during divorce.

²⁷³ Marumoagae 2018 *SA Merc LJ* 283.

²⁷⁴ Marumoagae 2018 *SA Merc LJ* 283.

²⁷⁵ *Arendse v Motor Industry Provident Fund* 2019 3 BPLR 660 (PFA) para 5.8.

of the PFA and 24A (1) of the GEPL a registered fund will be required to deduct any amount that the court assigned or awarded to the non-member spouse.

In practice sections 37A (1) of the PFA and 21 (1) of the GEPL are interpreted in a manner that leads to inconsistencies and delays in respect of the payment of a certain portion from the member spouse's retirement benefits to the non-member spouse during a divorce.²⁷⁶ It is therefore competent to submit that, the provisions of section 37A (1) of the PFA and 21 (1) of the GEPL contribute immensely to causing problems in practice with regard to enabling a non-member spouse to expeditiously and successfully receive a portion of the member spouse's retirement benefits during divorce proceedings.²⁷⁷ This is the case because our courts tend to struggle to consistently interpret, apply and protect the interplay of the provisions of the matrimonial law principles, divorce law principles, and pension law principles.²⁷⁸ This normally arises when the courts, during divorce proceedings, are tasked to determine the division of the divorcing spouses' joint estate when married in community of property and for accrual calculations when married out of community of property with the accrual system.

3.3.2 The birth of the pension interest and its role during divorce

It is of great importance to take note of the fundamental difference between "pension interest" and "pension benefit". The essence of noting the difference is to demonstrate that only "pension interest" is statutorily regulated and accrued retirement benefits are not statutorily regulated.²⁷⁹ On the one hand, Heaton and Kruger²⁸⁰ note that a pension interest is an interest that has not yet accrued to the member spouse at the time of divorce. The learned authors emphasise that a pension interest normally excludes a withdrawal benefit that accrues to the member spouse before the date of divorce.²⁸¹ As a consequence, the provisions of sections 7(7) (a) and 7(8) (a) (i) of the *Divorce Act* only

²⁷⁶ A non-member spouse was expected to wait for an exit event to occur before accessing a portion of a member spouse's retirement benefits. The exit event would normally occur through retirement, reaching certain age, retrenchment, dismissal and resignation.

²⁷⁷ Mamashela 2018 *De Jure* 22.

²⁷⁸ Pienaar 2015 *De Rebus* 38.

²⁷⁹ See sections 7 (7), 7 (8) of the *Divorce Act*; 37D (4) of the PFA and 24A of the GEPL.

²⁸⁰ Heaton and Kruger *South African Family Law* 132; See also Mamashela 2018 *De Jure* 22.

²⁸¹ Heaton and Kruger *South African Family Law* 132.

applies to a pension interest and not to the already accrued retirement benefits at the time of divorce.²⁸² In support of this, the SCA in *CM v EM*²⁸³ stated that as soon as the member spouse resigns from employment the pension interest terminates and the provisions of sections 7 (7) and 7 (8) of the *Divorce Act* are no longer applicable. This implies that there will be no pension interest in the picture but rather pension benefits.

Moreover, the aspect of pension benefits requires adequate legislative attention that will effectively protect and recognise the rights of the non-member spouse *vis-à-vis* the member spouse's accrued retirement benefits prior divorce.²⁸⁴ On the other hand, the authors point out that pension benefit is a benefit that has already accrued to the member spouse as at the time of divorce.²⁸⁵ With this in mind, a more detailed description is that of Marumoagae,²⁸⁶ who articulates that a pension benefit refers to the benefit which is due to the member spouse as a result of the contributions he made to such a retirement fund, but can only claim it in accordance with the rules of the retirement fund.²⁸⁷

The legislature ought to ensure that there are robust legal mechanisms that will ensure that there are no challenges when claiming a portion of the member spouse's accrued retirement benefits during divorce. The essence of so doing is to show clear protection of the non-member spouse's rights during divorce proceedings. This will proscribe the member spouse to unilaterally purchase insurance products and/or living annuities through accrued retirement benefits during divorce proceedings. Essentially, the impact of the legislature's effort to enact such legislation, could result to the non-member spouse's rights being statutorily protected against any illicit conduct of the member spouse when expected to share the retirement benefits during divorce.

²⁸² *Kirchner v Kirchner and Another* (20358/08) 2008 ZAGPHC (5 November 2008).

²⁸³ 2020 3 All SA 1 (SCA).

²⁸⁴ See also Marumoagae 2016 *Obiter*; South African Law Reform Commission issue paper 41 "Review of Aspects of Matrimonial Property Law".

²⁸⁵ Heaton and Kruger *South African Family Law* 133; see also *Eskom Pension and Provident Fund v Krugel and Another* 2012 6 SA 143 (SCA) (31 May 2011); Marumoagae 2016 *Obiter*.

²⁸⁶ Marumoagae 2016 *Obiter* 317.

²⁸⁷ Among other factors, reach certain age, resignation, retrenchment, dismissal and retirement; see also *De Beer v Tshwane Municipal Provident Fund* 2012 1 BPLR 23 (PFA) para 5.

Importantly, section 1 of the *Divorce Act* defines “pension interest” in the following manner:

Pension interest in relation to a party to a divorce action who –

- (a) is a member of a pension fund (excluding a retirement annuity fund), means 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;
- (b) is a member of a retirement annuity fund which was *bona fide* established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party’s contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by minister of justice in terms of section 1(2) of the Prescribed Rate of Interest Act 55 of 1975.

In summary, the court in *Eskom Pension and Provident Fund v Krugel* concisely described “pension interest” as follows:

Pension interest refers to the value of the interest which a member of a pension fund, on the date of his divorce, has in the pension benefits that will accrue to him as a member of such fund at a certain future date.

Therefore, the effect of the introduction of pension interest in the *Divorce Act*, is to enable the non-member spouse to be entitled to a share in the interest of the member spouse’s retirement benefits at the time of divorce.²⁸⁸ In particular, at the time of divorce the pension interest of the member spouse would be considered by the courts for the purpose of division of the divorcing spouses’ patrimonial assets even if they are not yet payable. This will normally materialise through the deeming provision of section 7 (7) (a) of the *Divorce Act*. In *Sempapalele v Sempapalele* 2001 2 SA 306 (O) the court held a different view regarding pension interest during divorce, by stating that a “pension interest must be dealt with expressly at the time of divorce, as it does not ordinarily and automatically

²⁸⁸ South African Law Reform Commission issue paper 41 “Review of Aspects of Matrimonial Property Law” 42.

fall into the joint estate". This approach has been disregarded by various divisions of the High Courts.²⁸⁹ More recently, it was disregarded in *Ndaba v Ndaba*.²⁹⁰

In particular, the court in *Maharaj v Maharaj*²⁹¹ overturned the approach adopted in *Sempapalele v Sempapalele*, by correctly asserting that during the determination of patrimonial benefits to which the spouses married in community of property may be entitled to, a pension interest of the member spouse is deemed to be part of the member spouse's assets which falls into the joint estate.²⁹² The court further held that, "the value of the pension interest is automatically included for purposes of determining the proprietary consequences of the divorce". This is a clear emphasis, more especially in that, the non-member spouse's right to claim a share of the member's pension interest does not necessarily rely on section 7 (8) of the *Divorce Act*,²⁹³ but, to enable the non-member spouse to receive payment of a portion she may be entitled to. Furthermore, the member spouse's retirement fund must be ordered by the court granting a decree of divorce to make such payment to the non-member spouse respectively.²⁹⁴

Consequently, Marumoagae²⁹⁵ is of the view that pension benefits of the member who is married in community of property should not automatically form part of the joint estate, because such retirement benefits are mostly locked in the member spouses' retirement funds. It is submitted that, the author's submission is inconsistent with the matrimonial property rules regulating marriages in community of property when determining the patrimonial benefits to which the spouses in a marriage may be entitled to.²⁹⁶ Equally so, it is submitted that the author's view carries a threat that may potentially result in the deprivation of the non-member spouse's right to claim a portion of the member's retirement benefits during divorce, especially where spouses are married in community

²⁸⁹ *Maharaj v Maharaj* 2002 2 All SA 34 (D); *Ndaba v Ndaba* 2017 1 All SA 33 (SCA); Marumoagae 2017 *De Rebus* 38-39.

²⁹⁰ 2017 1 All SA 33 (SCA).

²⁹¹ 2002 2 All SA 34 (D).

²⁹² See Marumoagae 2014 *Speculum Juris* 60; Marumoagae 2016 *Obiter* 318; Marumoagae 2017 *De Rebus* 38.

²⁹³ Marumoagae 2017 *De Rebus* 38.

²⁹⁴ See *Rampa v Sentinel Mining Industry Retirement Fund* 2014 1 BPLR 106 (PFA).

²⁹⁵ Marumoagae 2016 *Obiter* 316.

²⁹⁶ See *Clark v Clark* 1949 3 SA 226 (D).

of property. Moreover, it also deviates from a sound dictum of *Clark v Clark* where the court held that:

The interest of the member spouse in the retirement benefits which had not yet accrued and the pension right which has already accrued to the member forms part of the community estate and it should be for the benefit of both spouses.

In essence, this pension interest can only be physically accessed by the non-member spouse through a court order that conforms to the provisions of the introduced sections 7 (7) and 7 (8) of the *Divorce Act*.²⁹⁷ Conversely, in the absence of a court order directing a retirement fund of the member spouse to make a payment of a portion of the pension interest that it awarded a non-member spouse, the non-member spouse would be barred from claiming such portion thereof.²⁹⁸

Normally, what will be subject for the division during divorce, is not the member spouse's accrued retirement benefits, but rather part of the pension interest of the member which he would be entitled to should his membership of the fund terminate.²⁹⁹ It is also important to that, at the time of divorce, the court will deem the pension interest of the member spouse to be part of his assets which ought to be taken into account during the division of matrimonial assets.³⁰⁰ In support of this submission, Mamashela³⁰¹ opines that "the pension interest forms part of the earnings of the spouses and is part of the joint estate". Therefore, it is submitted that in respect of a marriage out of community of property with the accrual the member spouse's pension interest should form part of the accrued assets when calculating the value of the spouses' separate estates for purposes of division.

This study support Mamashela's submission, because it conforms to the common law rules governing matrimonial regime of marriages in community of property and the

²⁹⁷ See South African Law Reform Commission issue paper 41 "Review of Aspects of Matrimonial Property Law" 42; see also *Du Plessis v British American Tobacco Pension Fund* 2015 1 BPLR 10 (PFA) para 5.4.

²⁹⁸ See Mamashela 2018 *De Jure* 20.

²⁹⁹ See Marumoagae 2016 *Obiter* 313. The author present that, what is divided at the time of divorce is not the member spouse's pension benefits per se, but that part thereof which the member would have been entitled to receive had he or she withdrawn from the fund, referred to as the pension interest.

³⁰⁰ Section 7 (7) (a) *Divorce Act*.

³⁰¹ Mamashela 2018 *De Jure* 21.

dictum in *Clark v Clark*.³⁰² It is important to note that, most legal commentators and case law in this area of law address the marital regime of a universal community of property. This might be due to the fact that our courts have not been approached to settle this burning issue in respect of a marriage out of community of property with the accrual system. However, it is therefore assumed that the rules of matrimonial law in that respect will be employed for purposes of guidance together with the relevant provisions of the PFA, GEPL and the *Divorce Act* in the circumstance.

3.3.3 *The functions of sections 7 (7) and 7 (8) of the Divorce Act*

A divorce order ought to clearly make a reference to the name of the member spouse's retirement fund when assigning a portion therefrom to a non-member spouse.³⁰³ A divorce order must further direct a member's retirement fund to make a payment of a determined and assigned portion to the non-member spouse.³⁰⁴ However, if it appears that the spouses did not expressly set out the status of their pension interest, in either a settlement agreement or antenuptial contract then the provisions of section 7 (7) (a) through an order of court in terms of section 7 (8) (a) (i) will suffice.³⁰⁵ This implies that, when a court determines the patrimonial benefits to which the spouses may be entitled, during divorce proceedings, the member spouse's pension interest would be deemed to form part of his assets.³⁰⁶

Interestingly, Petse JA in *Ndaba v Ndaba*, pointed out that it is not necessary for the spouses married in community of property to state in their settlement agreement that their pension interests forms part of the joint estate.³⁰⁷ It is therefore important to submit that, spouses who are married out of community of property with the accrual system

³⁰² 1949 3 SA 226 (D).

³⁰³ *Rampa v Sentinel Mining Industry Retirement Fund* 2014 1 BPLR 106 (PFA) para 5.10-5.11. In *Kapot v Liberty Group LTD* 2012 1 BPLR 41 (PFA) para 5.3, the PFA dismissed the claimant's claim for the member spouse's pension interest. The reason for the dismissal is that the divorce order is silent about the payment of pension interest by the Respondent or any other fund, to the complainant. It is also evident from the order that no fund is identified or identifiable in it, so it is impossible for the Respondent to pay pension interest to the complainant.

³⁰⁴ Section 7 (8) (a) (i) of the *Divorce Act*; *De Beer v Tshwane Municipal Provident Fund* 2012 1 BPLR 23 (PFA) para 5.2; see also the debate of Jeram 2017 *De Rebus* 32 and Marumoagae 2017 *De Rebus* 35.

³⁰⁵ See *Fransman v Samwu National Provident Fund* 2014 3 BPLR 365 (PFA) para 5.

³⁰⁶ *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer* 2004 5 SA 373 (SCA) para 18.

³⁰⁷ *Ndaba v Ndaba* 2017 1 All SA 33 (SCA) para 25.

would be expected to set out, in their antenuptial contract or settlement agreement, how their assets (including retirement benefits) would be distributed during divorce proceedings.³⁰⁸ This will also require a clear determination of the value of the pension interest when accrual is calculated.³⁰⁹ With this in mind, it is shown that matrimonial principles must be properly applied for purposes of noting a non-member spouse's entitlement or right to the member's pension interest.

Regarding a proper application of sections 7 (7) and 7 (8), Davey³¹⁰ is of the view that:

...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 becomes entitled to such a share thereof as a court may assign in terms of section 7(8).

Davey further opine that, a non-member spouse does not have any entitlement to a member spouse's pension interest until there is a court order that expressly assign a portion of the member's pension interest to the non-member spouse as at the time of divorce.³¹¹ This view, according to me, was correctly disregarded by the SCA in *Ndaba v Ndaba*, as the court pointed out that section 7 (7) (a) is self-contained and is not subject to section 7 (8).³¹² I submit that, in accordance with the relevant marital regime; a non-member spouse will always be entitled to the member's pension interest. It is important to point out that the only hurdle that will temporarily prevent a member spouse to access the actual portion is the absence of a court order granting a decree of divorce in terms of section 7 (8) of the *Divorce Act*.

Alternatively, a non-member spouse may further derive an entitlement to the member spouse's pension interest on the date on which a decree of divorce is granted.³¹³ This is a clear indication that the non-member spouse need not necessarily have to wait for the pension interest to accrue to the member spouse before she could claim a share

³⁰⁸ Heaton *South African Family Law* 84, 123.

³⁰⁹ Marumoagae 2018 *De Jure* 105.

³¹⁰ Davey 2013 *De Rebus* 27.

³¹¹ Davey 2013 *De Rebus* 27.

³¹² *Ndaba v Ndaba* 2017 1 All SA 33 (SCA) para 25.

³¹³ Section 37D (4) (a) of the PFA.

thereof.³¹⁴ In fact, in terms of section 7 (7) (a) of the *Divorce Act*, a court granting a decree of divorce shall deem such pension interest to be part of the member's assets.

More significantly, the SCA in *Eskom Pension and Provident Fund v Krugel* held that:

Once a pension benefit has accrued, ie beyond the date of divorce, the pension interest converts into a pension benefit and the provisions of sections 7 (7) and 7 (8) of the Divorce Act are no longer applicable.

Therefore, it is sound to submit that, where a member spouse had already resigned from his employment on the date of divorce, the court will not rely on the provisions of sections 7 (7) and 7 (8) simply because there is no pension interest. In such an instance, the member spouse would have accrued retirement benefits thereof. In terms of our law, pension interest only come to the picture on the date of divorce through the "deeming provision" in terms of section 7 (7) (a) of the *Divorce Act*. In addition, the spouses may also set out how the pension interest of the member spouse will be dealt with during divorce. Under this circumstance, such settlement agreement may be made an order of court and the terms contained therein will be effective.³¹⁵

Furthermore, it appears that the "deeming provision" for the purposes of determining patrimonial benefits, as provided by section 7 (7) (a) of the *Divorce Act* is not immune from criticism.³¹⁶ Marumoagae³¹⁷ is of the view that the removal of the deeming requirement will positively enable the member spouse's retirement benefits to fall automatically in the joint estate of the parties married in community of property. The author further argues that such practice would allow both spouses to lay a claim against each other's retirement benefits that accrued during the subsistence of the marriage.³¹⁸

Reflecting on Marumoagae's submissions, I am of the view that, with respect to a marriage out of community of property with the accrual system; the non-member spouse would have a legal right that will enable her to claim a share of the member's accrued

³¹⁴ Marumoagae 2018 *De Jure* 103.

³¹⁵ See *Andrews v IBM SA1994 Provident Fund* 2012 1 BPLR 13 (PFA) para 4.4.

³¹⁶ See Marumoagae 2016 *Obiter*.

³¹⁷ Marumoagae 2016 *Obiter* 319.

³¹⁸ Marumoagae 2016 *Obiter* 319.

retirement benefits through the provisions of section 3 (1) of the MPA read in conjunction with the provisions of section 37D of the PFA, 24A of the GEPL and sections 7 (7) and 7 (8) of the *Divorce Act*. The claim would only suffice if the spouses did not expressly exclude any possible benefit from each other's retirement benefits in their antenuptial contract and also if it is clear that the court through its discretionary powers did not make an order for forfeiture of benefits.³¹⁹ Furthermore, in the event a non-member spouse suspects that there is potential prejudice to her portion of the member spouse's retirement benefits, the non-member spouse may approach the court by invoking section 8 (1) of the MPA in terms of which the court will order the immediate division of the accrual concerned.³²⁰

In summary, where a member spouse's retirement benefits have accrued beyond the date of divorce, then sections 7 (7) and 7 (8) of the *Divorce Act* will not apply.

3.3.4 The coming into effect of the clean-break principle

Previously, the clean-break principle only applied to retirement funds that were falling within the ambit of the PFA. Accordingly, only a non-member spouse whose member spouse was a member of a retirement fund that was falling within the ambit of the PFA was able to rely upon the clean-break principle. The effect of this custom was to place the non-member spouse in a position that will allow her to successfully claim immediate payment of a share of the member spouse's pension interest at the time of divorce.³²¹ On the contrary, a non-member spouse whose member spouse was a member of the GEPL was not having any recognised right to claim immediate payment of a share of the member spouse's pension interest during divorce.³²²

Above all, prior to the GEPLAA a retirement benefit to which a non-member spouse would be entitled to, during divorce proceedings, was frozen until such a time as the retirement

³¹⁹ *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer* 2004 5 SA 373 (SCA) para 9.

³²⁰ See Marumoagae 2016 *Obiter* 323.

³²¹ S 37D of the PFA was effective from the 1st of November 2008. During that period, the clean-break principle was not recognised by the GEPL. It was only recognised in 2011 through section 24A of the GEPL; see Mothupi 2010 *SA Merc* 214.

³²² See *Wiese v Government Employees Pension Fund and Others* 2012 6 BCLR 599 (CC) para 11.

benefits have accrued to the member spouse.³²³ Essentially, the exclusion of the non-member spouse from claiming immediate payment of a share of the member of a Government Pension Fund was challenged on the basis of lack of equality by raising section 9 (1) of the Constitution.³²⁴

The sought remedy thereof was that a non-member spouse of the member of a Government Pension Fund, must be afforded the same rights and advantages that were afforded a non-member spouse whose member spouse was a member of the retirement fund that was subject to the PFA.³²⁵ Furthermore, to cure the severe prejudice that was suffered by the non-member spouse of the member of a Government Pension Fund, the legislature through section 3 of the GEPLAA introduced the clean-break principle by incorporating section 24A in the GEPL. In essence, both section 37D of the PFA and section 24A of the GEPL serve the same purpose of allowing non-member spouses to claim immediate payment of the shares of their member spouses' pension interests during divorce proceedings.³²⁶

During divorce proceedings, the court granting a decree of divorce will normally order a retirement fund of the member spouse to effect payment to a non-member spouse within a specific period.³²⁷ Put differently, a decree of divorce ought to order the member spouse's retirement fund to make an endorsement on its records indicating that the non-member spouse is entitled to a share of the pension interest.³²⁸ Clearly, the fundamental object of the introduction of the clean-break principle is to ensure that the non-member spouse receives payment of a portion awarded by the court from a member's pension interest.³²⁹ It is important to note that, in order for such a payment to be successfully made by the retirement fund concerned, it must be clearly set out in a decree of divorce granted by the court.³³⁰

³²³ *Wiese v Government Employees Pension Fund and Others* 2012 6 BCLR 599 (CC) para 2.

³²⁴ *Wiese v Government Employees Pension Fund and Others* 2012 6 BCLR 599 (CC) para 13.

³²⁵ *Wiese v Government Employees Pension Fund and Others* 2012 6 BCLR 599 (CC) para 3.

³²⁶ See *BS v PS* (291/2017) 2018 ZASCA 37 (28 March 2018) para 21.

³²⁷ Section 37D (4) (b) (i) of the PFA and S 24A (2) (e) of the GEPL.

³²⁸ *Oliver v Motor Industry Provident Fund* 2019 3 BPLR 819 (PFA) para 5.9.

³²⁹ See section 7 (7) (a) of the PFA and section 37D (4) of the PFA as well as section 24A (2) of the GEPL.

³³⁰ *BS v PS* (291/2017) 2018 ZASCA 37 (28 March 2018) para 22; *Brownley v Sanlam Life Assurance Limited* 2020 3 BPLR 670 (PFA) para 5.10.

Put differently, a court order that does not clearly state the name of the member spouse's retirement fund and also does not indicate the percentage a non-member spouse would be entitled to will not be enforceable.³³¹ Significantly, the purpose of sections 37D (4) (a) of the PFA and 24A (2) (a) of the GEPL is to deem accrual of the member spouse's pension interest to occur at the time of divorce.³³² These statutory provisions enable the non-member spouse to claim and receive payment of a portion of the member's pension interest at the time of divorce.

Furthermore, the provisions of section 37D (4) (b) (i) of the PFA and 24A (2) (e) (i) (ii) of the GEPL provide that after a non-member spouse has submitted a court order to the fund, a determined share of the member's pension interest must be paid, within 45 days, either directly to the non-member spouse or must be transferred to the retirement fund of a non-member spouse's choice by the respective fund. Additionally, a non-member spouse must, within 120 days, inform the fund as to where the awarded portion or share of the pension interest must be paid or transferred in terms of section 37D (4) (b) (i) of the PFA and section 24A (2) (f) of the GEPL.

The essence of having unambiguous clauses in court orders is to ensure that as soon as the retirement funds are served with court orders,³³³ payment will be effected accordingly and the non-member spouse would be protected against any possible prejudice that might arise from retirement funds through failing to make such payments. In support of the above emphasis, in *Du Plessis v British American Tobacco Pension Fund* 2015 1 BPLR 10 (PFA), the Adjudicator effectively asserted that:

The pension fund will only be obliged to effect the payment to the non-member spouse if the court order purporting to be made in terms of section 7 (7) and (8) of the Divorce Act strictly meets the express and implied requirements thereof without being open to varying interpretations. If the court order does not comply with the requirements of

³³¹ *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer* 2004 5 SA 373 (SCA) para 26.

³³² *BS v PS* (291/2017) 2018 ZASCA 37 (28 March 2018) para 25; see also Marumoagae 2017 *De Rebus* 39. The author opine assert that section 37D (4) (a) of the PFA compliments section 7 (8) of the Divorce Act through introducing the clean-break principle, in order to ensure that the non-member spouse is able to execute his or her claim regarding the pension interest against the member spouse s at the date of divorce.

³³³ *Du Plessis v British American Tobacco Pension Fund* 2015 1 BPLR 10 (PFA) para 5.6-5.7.

section 7 (7) and (8), a fund cannot effect an endorsement for, and/or make a payment to the non-member spouse.³³⁴

Moreover, the statutory provisions that play a pivotal role in pushing for the deduction of a portion the court awarded the non-member spouse emanate from section 37D (1) (d) (i) of the PFA.³³⁵ This section stipulates and authorises a registered pension fund to:

(d) deduct from a member's or deferred pensioner's benefit, member's interest or minimum individual reserve, or the capital value of a pensioner's pension after retirement, as the case may be-

(i) *any amount assigned* from such benefit or individual reserve *to a non-member spouse* in terms of a decree granted under section 7 (8) (a) of the Divorce Act or in terms of any order made by a court in respect of the division of assets of a marriage....

On the other hand, section 24A (1) of the GEPL, to the same effect entails that:

The board shall direct the Fund to reduce a member's pension interest by any amount assigned from the member's pension interest to the member's former spouse in terms of a decree of divorce granted under section 7 (8) (a) of the Divorce Act....

In summary, these statutory provisions allow the retirement funds, subject to the ambit of the PFA or GEPL to deduct a specific portion from a member spouse's pension interest that ought to be paid to the non-member spouse.³³⁶ Accordingly, at the time of divorce, when a court determines the spouses' patrimonial benefits in terms of section 7 (7) (a) of the *Divorce Act*, a member spouse's pension interest will be deemed to have accrued and the court will assign a portion to the non-member spouse.³³⁷ The provisions of sections 7 (7) and 7 (8) of the *Divorce Act* must be read in conjunction with section 37D (4) of the PFA and 24A (2) of the GEPL.³³⁸ The reason for this, is to protect the non-member spouse from any unfair prejudice flowing from a deprivation when supposed to claim a portion she may be entitled to during divorce proceedings.

³³⁴ See *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer* 2004 5 SA 373 (SCA) para 26.

³³⁵ See *Dakin v Southern Sun Retirement Fund* 1999 9 BPLR 22 (PFA).

³³⁶ See *Nevondwe et al* 2021 *Pensions* 97.

³³⁷ *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer* 2004 5 SA 373 (SCA) para 17; *Kirchner v Kirchner and Another* (20358/08) 2008 ZAGPHC (5 November 2008) para 8.

³³⁸ See 2013 4 BCLR 421 (CC).

3.4 Conclusion

This chapter provided the development of the law regulating the sharing of retirement benefits during divorce proceedings. The retirement benefits did not form part of the member spouse's estate or joint estate if married in community of property. This was the legal position irrespective of the common law matrimonial principles. According to the rules governing matrimonial property system, all the assets and liabilities of the spouses married in community of property form part of the joint estate and during the dissolution of the marriage each receives an equal share after all the liabilities have been paid.

The traditional law governing retirement funds was that the amount that was held by the retirement fund of the member spouse, was not able to be considered when the courts were tasked to determine the value of the members spouse's estate or joint estate for divorce purposes. The law was clear in that, the benefits, while the member spouse was still an active member of the fund, belonged to the retirement fund not the member spouse. This legal position required the non-member spouse to wait for the member spouse's exit event before she could receive an assigned portion of the member's retirement benefits.

The legislature's trajectory of improving this area of law resulted to the amendment of the *Divorce Act* by introducing the concept "pension interest" and further incorporate sections 7 (7) and 7 (8). The purpose of these sections is to deem the member spouse's pension interest as an asset of the member spouse at the time of divorce. Furthermore, to remedy the default of lengthy wait that the non-member spouse endured before receiving a portion of the member spouse's pension interest. The legislature in 2007 introduced the clean-break principle in the PFA by inserting section 37D.

In 2011, the legislature further introduced the clean-break principle in the GEPL by incorporating section 24A in the GEPL. These sections enabled the non-member spouses to receive an immediate payment of the member spouse's pension interest. Firstly, the registrar of the court had to notify the administrators of the fund to make an endorsement in their records that the non-member ought to be paid within 45 days after informing the fund whether the assigned portion should be paid directly to her or must be transferred to a retirement fund of her choice.

With all these statutory provisions in place, it is still not entirely clear, why the legislature is failing to entertain the need to urgently attend the current lacuna of not having specific statutory provisions dealing with the accrued retirement benefits that in certain circumstances member spouses use to purchase living annuities while in the process of divorce. The following chapter discusses the injustice that flows from the purchasing of living annuities by the member spouse through his accrued retirement benefits.

Chapter 4: Implications of purchasing living annuities during divorce proceedings and the underlying potential prejudice to be suffered by the non-member spouse

4.1 Introduction

The purpose of this chapter is to discuss the reflection of the law on the aspect of living annuities in South Africa during divorce proceedings. This chapter seeks to critically highlight the potential prejudice that is likely to be encountered by the non-member spouse in instances where the member spouse³³⁹ uses his accrued retirement benefits to purchase living annuities during divorce proceedings. This chapter will further attempt to demonstrate that there is an existing lacuna *vis-à-vis* the sharing of the member spouse's accrued retirement benefits during a divorce. It will also argue that purchasing living annuities during divorce proceedings contravenes the rules governing the matrimonial property system(s).³⁴⁰ In principle, a non-member spouse has an inherent right that flows from matrimonial law principles and common law principles that allow her to benefit equitably from the member's estate when married out of community of property with the accrual system and from the joint estate when married in community of property.³⁴¹

This chapter will further demonstrate that the absence of a legislation that ought to proscribe member spouses from using their accrued retirement benefits to purchase living annuities while in the process of divorce amounts to a deprivation of the non-member spouses' rights. In practice, this lacuna leads to a clear predicament in respect of the non-member spouses' rights to benefit. It is important to note that, the *Income Tax Act*, merely provide a definition for the term "Living Annuity" but it does not necessarily deal with the nature of living annuities during divorce. It is evident that there is a lacuna that

³³⁹ Once a member spouse has purchased living annuities, he is referred to as an ***annuitant spouse***. In this chapter, the term ***member spouse*** will be used throughout even where the spouse has purchased a living annuity. The purpose of so doing is to avoid confusion.

³⁴⁰ See South African Law Reform Commission issue paper 41 "Review of Aspects of Matrimonial Property Law" 35-36.

³⁴¹ See South African Law Reform Commission issue paper 41 "Review of Aspects of Matrimonial Property Law" 36-37. When spouses become aware that a divorce will soon take place, some may want to alienate or hide assets in order to prevent sharing these assets with the other spouse at divorce. Women are often disadvantaged by these practices, because they often leave the finances to their husbands and are thus unaware of financial matters; see also Van Aswegen 1987 *De Rebus* 63.

requires urgent legislative intervention in order to provide guidelines in practice through providing adequate statutory provisions that will regulate the instances under which a member spouse would be able to purchase living annuities without prejudicing the non-member spouse's right to benefit in the member's accrued retirement benefits. In South Africa, there are only two cases that have dealt with the issue of living annuities.

4.2 Statutory definition of the term living annuity

Section 1 of the *Income Tax Act* define "Living Annuity" in the following manner:

Is a right of a member or former member of a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund, or his or her dependant or nominee, or any subsequent nominee, to an annuity purchased from a person or provided by that fund on or after the retirement date of that member or former.....]

4.2.1 Outlining the nature and complications arising from living annuities during divorce

From a financial point of view, an annuity is a financial product that give rise to an insurance contract between the retirement fund or an insurance company and a member spouse who exit the retirement fund.³⁴² This contract between the two parties will normally contain certain terms and conditions which will bind the respective parties.³⁴³ Accordingly, in terms of the nature of annuities, member spouses are making future financial arrangements with either their retirement funds or insurance companies in respect of which;³⁴⁴ upon exiting employment they will continue to be entitled to a form of monthly income.³⁴⁵ In this case, a member spouse, after purchasing a living annuity, becomes unconditionally entitled to a living annuity.³⁴⁶ This implies that he derives the right to the annuity and not to the capital value.³⁴⁷

³⁴² *CM v EM* 2020 3 All SA 1 (SCA) para 33; see also Marumoagae 2021 *THRHR* 40. The author explains that, annuities play an important role in fighting poverty during old age by paying the beneficiaries a determinable constant amount either for a specific period of time or for as they are alive.

³⁴³ See *CM v EM* 2020 3 All SA 1 (SCA) paras 24 and 33; see also *ST v CT* 2018 5 SA 479 (SCA) para 106.

³⁴⁴ See *M v M* (26868/14) 2016 ZAGP JHC 387 (10 August 2016) para 5.

³⁴⁵ See Marumoagae 2021 *THRHR* 40.

³⁴⁶ *M v M* (26868/14) 2016 ZAGP JHC 387 (10 August 2016) para 6.

³⁴⁷ *M v M* (26868/14) 2016 ZAGP JHC 387 (10 August 2016) para 6; see also *ST v CT* 2018 5 SA 479 (SCA) para 110.

In particular, our courts have indicated that the capital of the purchased living annuity is inaccessible to the member.³⁴⁸ The legislature's intention to exclude living annuities to be used for security is to ensure that the benefits in the retirement funds are used to pay an income once a member is on retirement.³⁴⁹ Important to note that the living annuity can never, during the lifetime of the member spouse, accrue to him as capital.³⁵⁰ This implies that living annuities are protected by the provisions of section 37A (1) of the PFA and 21 (1) of the GEPL respectively. These provisions clearly indicates that:

No benefit provided for in the rules of a registered fund, including an annuity purchased or to be purchased by the said fund from an insurer for the member, or a right to such benefit.....] shall be capable of being reduced, transferred or ceded or being pledged or hypothecated or be liable to be attached...

Practically, according to the statutory definition of a living annuity,³⁵¹ a member spouse of a retirement fund will only have a legally recognised right to an annuity as soon as he purchases an annuity from an insurance company or financial institution after exiting a retirement fund concerned. It is critical to note that the definition of "pension interest" does not expressly incorporate a provision that recognises the taking into account of living annuities during a divorce.³⁵² This current position denotes that, when a court determines the patrimonial benefits to which the divorcing spouses may be entitled to, will not include the living annuities.

Currently, in South Africa, there is no recognised statutory provision that regulates living annuities.³⁵³ In practice, this lacuna gives rise to a fundamental challenge when our courts are expected to determine whether the living annuities form part of the member spouses' joint estate when married in community of property.³⁵⁴ On the one hand, the SCA in *ST v CT*³⁵⁵ stated that living annuities do not form part of the member spouse's estate for

³⁴⁸ See *M v M* (26868/14) 2016 ZAGP JHC 387 (10 August 2016) para 10; *ST v CT* 2018 5 SA 479 (SCA) para 108 and *CM v EM* 2020 3 All SA 1 (SCA) para 24.

³⁴⁹ See *M v M* (HCA18/2015) 2016 ZALMPPHC 2 (17 June 2016) para 13,

³⁵⁰ *M v M* (HCA18/2015) 2016 ZALMPPHC 2 (17 June 2016) para 15.

³⁵¹ Section 1 of the *Income Tax Act* 58 of 1962.

³⁵² See Marumoagae 2021 *THRHR* 39, who argues that the definition of pension interest does not include living annuities, which effectively means that living annuities cannot be taken into account when parties are divorcing.

³⁵³ Marumoagae 2020 *Without Prejudice* 51.

³⁵⁴ See Kgole and Marumoagae 2020 *De Rebus* 18.

³⁵⁵ 2018 5 SA 479 (SCA).

divorce purposes. On the other hand, the SCA in *CM v EM*, stated that the right to future annuity payments arising from purchased living annuities is regarded as an asset. Conversely, Kgole and Marumoagae,³⁵⁶ argue(s) that the SCA's decision in *ST v CT* created the impression that, the purchased living annuities will not be able to be reached by the non-member spouse during divorce.

Importantly, these living annuities are owned by insurance companies or retirement funds, but not by the member spouse.³⁵⁷ Regrettably, it is worth noting that the provisions of the PFA, GEPL, the *Divorce Act* and other financial statutes are not constructed in a manner that give adequate recognition of the matrimonial property law; more especially when the non-member spouse is expected to share in the member spouse's accrued retirement benefits among other assets. In practice, if there can be a clear recognised interplay between the abovementioned statutes, the rights of the non-member spouse would be adequately protected against a peril that emanates immediately after the member spouse purchases living annuities during divorce proceedings.³⁵⁸

The SCA in *ST v CT* tried to provide some hope to the right of the non-member spouse with regard to the member spouse's purchased living annuities. The court highlighted that, it may be possible during divorce proceedings, to consider the member spouses' conditional right to future annuity payment as an asset that can be quantified for the purpose of accrual calculations.³⁵⁹ This suggestion was adopted in *CM v EM*, where the SCA indicated unequivocally that the right to future annuity payments arising from the purchased living annuities is regarded as an asset. These pronouncements relate to marriages out of community of property with the accrual system.

In light of the above dictum, this study submits that it may also be possible to take a member spouse's right to an annuity into account for the purpose of equal division of the spouses' joint estate when married in community of property.³⁶⁰ Our courts have not been able to provide clear guidance on how a non-member spouse can best be protected from

³⁵⁶ Kgole and Marumoagae 2020 *De Rebus* 18.

³⁵⁷ *CM v EM* 2020 3 All SA 1 (SCA) para 38.

³⁵⁸ Marumoagae 2021 *THRHR* 41.

³⁵⁹ *ST v CT* 2018 5 SA 479 (SCA) para 110.

³⁶⁰ For the purpose of co-ownership and equal division of joint estate see *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388 395-396; *De Wet v Jurgens* 1970 3 SA 38 (A) 46.

a member spouse's intention or proposition to purchase living annuities while in the process of divorce.³⁶¹ It is also unfortunate that neither the PFA, GEPL nor the *Divorce Act* is able to provide more practical guidance in relation to the approach that can be adopted to prohibit the member spouses from the absolute power that enables them to use their accrued retirement benefits to purchase living annuities.

In showing that this aspect of the law requires serious urgent legislative intervention, Marumoagae³⁶² is of the view that:

This area of law continues to provide challenges that prejudices non-member spouses and which requires urgent legislative intervention as they have not been addressed adequately by the courts.

In light of this expression, it is clear that in the future most financially disadvantaged non-member spouses will encounter the plight of financial prejudice in respect of claiming a portion of the member spouse's accrued retirement benefits during a divorce. Hence, this study argues and call for urgent legislative intervention to resolve this possible future plight. The essence of enacting such legislation will contribute enormously to prohibiting the member spouses from purchasing living annuities by their accrued retirement benefits while in the process of divorce. The effect of having such legislation is that member spouses would not unilaterally purchase living annuities without considering their non-member spouses' rights to first receive a share in the accrued retirement benefits.

4.2.2 Living annuities purchased during divorce proceedings and the right of the non-member spouse to benefit in matrimonial assets

This part of chapter four attempts to provide a sound analysis of how purchasing living annuities results in the deprivation of the non-member spouse's matrimonial right to benefit in the member spouse's accrued retirement benefits during a divorce. In doing so, regarding accrued retirement benefits; the court in *Kirchner v Kirchner and Another*³⁶³, alluded that pension benefits accrue only when the member spouse's employment is

³⁶¹ See Kgole and Marumoagae 2020 *De Rebus* 18. In the article the authors argue that the South African law relating to the status of living annuities when spouses are divorcing is not entirely clear.

³⁶² Marumoagae 2021 *THRHR* 39.

³⁶³ (20358) 2008 ZAGPHC 415 (5 November 2008) para 10.

terminated, going to retirement or dies.³⁶⁴ However, since the introduction of the clean-break principle,³⁶⁵ it is now permissible for the non-member spouse to receive immediate payment of the member spouse's retirement benefits rather than having to wait for the member spouse's exit events to occur.

Importantly, Marumoagae³⁶⁶ is of the view that:

Spouses should understand what constitutes a joint estate and fully be aware of all the assets thereto so as to know their rights and how to protect them. This can be crucial more so when parties contemplate divorcing each other.

It is given that, section 7 (7) (a) of the *Divorce Act*, permits a member spouse's pension interest to be deemed as an asset when the court determines the patrimonial benefits to which the spouses to a divorce action may be entitled to.³⁶⁷ Therefore, where spouses are married in community of property, the member spouse's pension interest will be deemed to be an asset to the spouses' joint estate and the spouses will be expected to share equally.³⁶⁸ In light of this background of the law, it is sound to submit that the non-member spouse does have a right which, in principle, enables her to exercise when claiming fifty percent (50%) of the member spouse's pension interest at the time of divorce or any portion which the spouses may have agreed on in their settlement agreement.³⁶⁹ This is the case when the spouses are married in community of property.

Moreover, where spouses are married out of community of property with the accrual system, pension interest will be taken into account when calculating a member's estate.³⁷⁰ Unless the spouses have inserted clauses in their antenuptial contract or settlement agreement that exclude the sharing of retirement benefits on divorce. In consequence, a non-member spouse may be entitled to a fifty percent (50%) share of the member

³⁶⁴ See *Wiese v Government Employees Pension Fund and Others* 2012 6 BCLR 599 (CC) para 14.

³⁶⁵ See para 3.3.4 above.

³⁶⁶ Marumoagae 2014 *Speculum Juris* 55.

³⁶⁷ *Old Mutual Life Assurance Co (SA) Ltd & Another v Swemmer* 2004 5 SA 373 (SCA) para 18.

³⁶⁸ Marumoagae 2020 *Without Prejudice* 50; see also *GN v JN* 2017 1 SA 342 (SCA).

³⁶⁹ See *Ndaba v Ndaba* 2017 1 All SA 33 (SCA) para 26; see also Marumoagae 2014 *PER/PELJ*; *Brownley v Sanlam Life Assurance Limited* 2020 3 BPLR 670 (PFA); *Hendricks v Sanlam Umbrella Provident Fund* 2020 1 BPLR 83 (PFA) para 4.5.

³⁷⁰ *M v M* (4906/2016) 2018 ZAFSHC 161 (30 July 2018) para 86.

spouse's accrued assets including retirement benefits.³⁷¹ Therefore, a portion of a member spouse's pension interest will only be paid over to the non-member spouse once a court order, in terms of section 7 (8) of the *Divorce Act* has been issued. Furthermore, the order ought to direct the retirement fund of the member spouse to make such payment directly to the non-member spouse or transfer it to a retirement fund of the non-member spouse.³⁷² Important to note, in the event the retirement benefits of the member spouse have already accrued before divorce, section 7 (7) of the *Divorce Act* will not apply. Alternatively, the non-member spouse will have the option to possibly rely on the provisions of sections 3 (1), 4 (1) (b), and 8 (1) of the MPA when attempting to claim and receive a member spouse's accrued retirement benefits.

With the above in mind, as soon as the member spouse exits employment,³⁷³ his retirement fund membership terminates. In most cases, this event will normally occur before the spouses' divorces. This position is different to that when the court considers the member spouse's pension interest which is normally considered at the time of divorce proceedings.³⁷⁴ After exiting employment, the member spouse may elect to purchase a living annuity by using his accrued retirement benefits.³⁷⁵ This living annuity may be purchased from an insurance company, but it must also be noted that some retirement funds have in-fund annuity structures.³⁷⁶ Unfortunately, these living annuities are not regarded as assets.³⁷⁷

³⁷¹ *CM v EM* 2020 5 SA 49 (SCA) (5 May 2020) para 3. In this case, the applicant lodged a counterclaim seeking an order against the respondent for the payment of an amount equal to half of the difference in the accrual of the respective estate of the parties.

³⁷² *M v M* (HCA18/2015) 2016 ZALMPPHC 2 (17 June 2016) para 12; see also *Eskom Pension and Provident Fund v Krugel and Another* 2012 6 143 (SCA) (31 May 2011) para 3, what transpired in this case is that, the fund refused 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.

³⁷³ See *Prins v Eskom Pension and Provident Fund* 2013 3 BPLR 407 (PFA) para 5.3.

³⁷⁴ See *Eskom Pension and Provident Fund v Krugel and Another* 2012 6 143 (SCA) (31 May 2011) para 2, in this case, the respondent resigned from Eskom on 31 January 1993. Upon his resignation, he elected to defer his pension benefit in the fund in accordance with Rule 30 (20) of the fund's rules and thus became a deferred pensioner.

³⁷⁵ See *Marumoagae* 2020 *Without Prejudice* 50.

³⁷⁶ *Marumoagae* 2020 *Without Prejudice* 50.

³⁷⁷ *ST v CT* 2018 5 SA 479 (SCA) para 108.

Therefore, during divorce such living annuities will not be taken into account when determining the spouses' patrimonial benefits.³⁷⁸ Apart from this, the reason why the living annuities will not be taken into account when determining the patrimonial benefits of the divorcing spouses, is that the capital amount is owned by the insurance company and not by the member spouse.³⁷⁹ But also, it cannot be ignored that the moment the retirement benefits have accrued to the member spouse, the matrimonial principles ought to be invited and apply accordingly.³⁸⁰ The rationale for so doing, is to protect the non-member spouse from any potential financial prejudice to arise.

In *M v M*,³⁸¹ the court was called upon to provide clarity on the status of living annuities during a divorce. In this case, the parties were married out of community of property with the accrual system. During divorce proceedings, the crisp issue before the court, was whether an income producing asset like a living annuity that carries a notional capital value must be considered as an asset in the annuitant's estate. In this case, Mr Thyne who specialises with Pension Fund Law, was called to testify and he clearly testified that "a living annuity has a notional capital value and the capital is owned by the insurer".³⁸² It is, therefore, sound to submit that the living annuity does not form part of the member spouse's estate, because these living annuities are not regarded as assets forming part of the member spouse's estate. The member spouse merely has a right to the annuity in terms of which he will be entitled to receive monthly income.³⁸³

In conclusion, the court held that "the living annuity is not part of the plaintiff's estate for the purpose of accrual".³⁸⁴ Above all, this conclusion simply implies that there is no room to consider matrimonial principles for possible inclusion of the living annuities when determining the patrimonial benefits to which the spouses may be entitled to on divorce. Furthermore, the impression that is derived from the dictum in *M v M*, is that a non-member spouse does not have any recognised financial interest in respect of a member spouse's accrued retirement benefits before purchasing living annuities. Hence, the

³⁷⁸ See *ST v CT* 2018 5 SA 479 (SCA) para 108.

³⁷⁹ Marumoagae 2020 *Without Prejudice* 51; see also Kgole and Marumoagae 2020 *De Rebus*.

³⁸⁰ See Marumoagae 2021 *THRHR* 41.

³⁸¹ (14/26868) 2016 ZAGPJHC 387 (10 August 2016) para 2.

³⁸² *M v M* (26868/14) 2016 ZAGP JHC 387 (10 August 2016) para 6.

³⁸³ *ST v CT* 2018 3 All SA 408 (SCA) para 108.

³⁸⁴ *M v M* (26868/14) 2016 ZAGP JHC 387 (10 August 2016) para 30.

transaction of purchasing living annuities from the insurance company has not been judicially disapproved. This clearly gives rise to the potential financial prejudice to be suffered by the non-member spouse during divorce.³⁸⁵

With the above in mind, there is a great need for the legislature to enact a statute that will prohibit the member spouse from using accrued retirement benefits and purchasing living annuities before the finalisation of divorce.³⁸⁶ Alternatively, the legislature must consider amending the PFA, GEPL and the *Divorce Act*. The effect of this proposal is to statutorily protect the right of the non-member spouse in a manner that will enable her to firstly receive a share she may be entitled to *vis-à-vis* the accrued retirement benefits of a member spouse during a divorce. Subsequently, the proposed amendment must empower the courts to preserve the accrued retirement benefits until the finalisation of the divorce. This will protect the non-member spouse from being deprived of the right to share in the member spouses' accrued retirement benefits before purchasing living annuities.³⁸⁷

4.3 The need to adequately protect the non-member spouse's right to benefit in the member spouse's accrued retirement benefits during divorce

It is well established that, pension benefits are described as those benefits that have already accrued to the member spouse before the date of divorce.³⁸⁸ These accrued retirement benefits are not statutorily regulated, therefore it is assumed that matrimonial principles play an integral role in regard to the division of such accrued benefits. With this in mind, the court in *Clark v Clark*, eloquently stated that the member spouse's pension right which has already accrued to the member ought to form part of the community estate and it should be for the benefit of both spouses.³⁸⁹ Essentially, the matrimonial rules governing marriages in community of property provide unequivocally

³⁸⁵ Kgole and Marumoagae 2020 *De Rebus* 19.

³⁸⁶ See Marumoagae 2016 *Obiter* 324.

³⁸⁷ South African Law Reform Commission issue paper 41 "Review of Aspects of Matrimonial Property Law" 37.

³⁸⁸ *Eskom Pension and Provident Fund v Krugel and Another* 2012 6 SA 143 (SCA) (31 May 2011); see also Heaton and Kruger *South African Family Law* 133; South African Law Reform Commission issue paper 41 "Review of Aspects of Matrimonial Property Law" 43.

³⁸⁹ See *Kotze v Kotze and Another* 2013 JOL 30037 (WCC) para 17.

that the spouses are co-owners in undivided and indivisible half-share of all the assets they have acquired before and during their marriage.³⁹⁰

The nature of matrimonial rules governing marriages out of community of property with the accrual system, on the other hand, entails that the spouses ought to share equally in the accrual or growth that their estates show.³⁹¹ This denotes that, the value of all accrued assets including accrued retirement benefits will be calculated by the court when awarding a share to the non-member spouse during a divorce. Additionally, the SCA in *Eskom Pension and Provident Fund v Krugel*,³⁹² pronounced that as soon as a member spouse's pension benefit accrues to the member before the date of divorce, the provisions of sections 7 (7) and 7 (8) of the *Divorce Act* will not find application. This implies that pension interest will fall out of the equation and the member spouse will be entitled to his retirement benefits.

With these matrimonial principles in place, it is competent to submit that; the courts ought to effectively recognise and protect the non-member spouse's matrimonial rights that allow her to acquire a portion of the patrimonial assets she may be entitled to by operation of law.³⁹³ Our courts have a judicial duty to safeguard the non-member spouse's matrimonial right against a member spouse's absolute power of unilaterally deciding to purchase living annuities without obtaining the necessary written consent of the other spouse.³⁹⁴

³⁹⁰ See De Jong and Pintens 2015 *TSAR* 552; see also *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388 395-396; *De Wet v Jurgens* 1970 3 SA 38 (A) 46; *Zulu v Zulu* 2008 4 SA 12 (D); Marumoagae 2014 *Speculum Juris* 55. The author opines that, the spouses should understand what constitutes a joint estate and fully be aware of all the assets thereto so as to know their rights and how to protect them.

³⁹¹ De Jong and Pintens 2015 *TSAR* 557; see also *ND v MD* ZAGPJHC 228 2021 1 All SA 909 (GJ) (16 September 2020) paras 17 and 26; *BM v NM* ZAGPJHC 76 2010 3 SA 220 (GSJ) (25 August 2009) para 26.

³⁹² 2012 6 SA 143 (SCA).

³⁹³ See *V v V* (3389/2017) ZAGPPHC 154 (4 March 2020) paras 2-4. In this case, the court cited Hahlo, who set out the guiding principle relating to ownership of matrimonial assets. It well stated that community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, ***irrespective of the value of their financial contributions, hold equal shares.***

³⁹⁴ See section 15 (2) (c) of the MPA.

Therefore, the matrimonial assets owned by the spouses ought to include the member spouse's accrued retirement benefits before he could even purchase living annuities.³⁹⁵ The supporting reason for this entitlement, among other reasons, flows from the dictum in *GN v JN*, where the SCA clearly stated that in terms of section 7 (7) of the *Divorce Act*, the pension interest of both parties falls automatically into the joint estate for the purpose of determining the patrimonial benefits to which the parties may be entitled to on divorce.

Although the above case deals with "pension interest" at the time of divorce, there is no justifiable reason why a member spouse's accrued retirement benefits could not form part of the spouses' joint estate or estate of a member spouse when calculating the value of such a member's estate for accrual purposes during a divorce.³⁹⁶ In the same fashion, the court in *Commissioner for Inland Revenue v Nolan's Estate* stated that "the right to a pension is a right which vests in the spouses who are married in community of property in undivided shares".³⁹⁷ Furthermore, it was eloquently stated in *De Kock v Jacobson and Another* that, both the cash component and the accrued right to the pension should form part of the spouses' community of property existing prior to the divorce.³⁹⁸ The provided precedent proves that, it is pivotal for the courts to protect the non-member spouse's financial interest in the accrued retirement benefits of the member spouse.

As a result, failing to take into account the essential matrimonial rules governing the spouses' marital regime, in practice, clearly enables the member spouse to hide the accrued retirement benefits in insurance companies or retirement funds that offer annuities after retirement. It is therefore argued that this freedom that is enjoyed by the member spouse clearly contravenes the rules regulating the spouses' elected marital regime and further result to injustice in practice.³⁹⁹ With this in mind, Mamashela⁴⁰⁰ is of

³⁹⁵ See Kgole and Marumoagae 2020 *De Rebus* 19; see also Marumoagae 2014 *Speculum Juris* 60. The author explicitly opines that, if the parties are married in community of property and the member spouse had already been paid out his or her pension benefit during the course of the marriage, when the parties divorce, the value of such payment should fall into the joint estate and be regarded as an asset of the joint estate between the parties capable of being divided.

³⁹⁶ *Eskom Pension and Provident Fund v Krugel and Another* 2012 6 SA 143 (SCA) (31 May 2011) para 11.

³⁹⁷ *Commissioner for Inland Revenue v Nolan's Estate* 1962 1 SA 785 (A); *V v V* (3389/2017) 2020 ZAGPPHC 154 (4 March 2020) para 4.

³⁹⁸ 1999 4 SA 346 (W).

³⁹⁹ See Marumoagae 2021 *THRHR* 41.

⁴⁰⁰ Mamashela 2018 *De Jure* 21.

the view that the earnings that the spouses generate from employment should form part of their joint estate.

Mamashela's submission is sound in the sense that, both spouses ought to benefit in equal shares from all the assets that form part of the joint estate.⁴⁰¹ Unless the spouses in their settlement agreement have indicated otherwise in respect of sharing certain assets during divorce.⁴⁰² Therefore, once the accrued retirement benefits have fallen into the spouses' joint estate, in principle, the member spouse would need a non-member spouse's written consent before he could purchase living annuities.⁴⁰³

With regard to a marriage out of community of property with the accrual system, the provisions of section 3 (1) of the MPA ought to allow a member spouse's accrued retirement benefits as well as other accrued assets to be shared in accordance with the provisions of section 4 (1) (b) of the MPA.⁴⁰⁴ In addition, when determining the value of accrued assets; the member spouse would be statutorily required in terms of section 7 of the MPA to disclose all the necessary particulars to determine the value of the accrued retirement benefits.⁴⁰⁵ The purpose of this disclosure is to put a non-member spouse in a position that will enable her to claim fully all the benefits she may be entitled to during divorce.

In consequence, the above may only suffice in circumstances where the spouses in their antenuptial contract did not exclude retirement benefits from being shared during a divorce.⁴⁰⁶ With this in mind, it is submitted that before the member spouse could proceed to purchase the living annuity, a non-member spouse must firstly be awarded a portion of the accrued benefits or the court should order a retirement fund to preserve the

⁴⁰¹ *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388 395-396; *De Wet v Jurgens* 1970 3 SA 38 (A) 46; *Zulu v Zulu* 2008 4 SA 12 (D).

⁴⁰² *Eskom Pension and Provident Fund v Krugel and Another* 2012 6 143 (SCA) (31 May 2011) para 15, Maya JA stated that, [...it should be mentioned that this finding does not leave the first respondent without remedy. The divorce settlement between her and Krugel remains binding. It is therefore, open to her to claim her share of his deferred pension benefit when it is claimed by him after reaching the age of 55 years.

⁴⁰³ See Kgole and Marumoagae 2020 *De Rebus* 19.

⁴⁰⁴ See Marumoagae 2018 *De Jure* 105.

⁴⁰⁵ See *ST v CT* 2018 3 All SA 408 (SCA) paras 18, 35 and 36.

⁴⁰⁶ *ST v CT* 2018 3 All SA 408 (SCA) para 29; see also *MB v DB* 2013 6 SA 86 (KZD) para 39.

member spouse's retirement benefits until the finalisation of a divorce.⁴⁰⁷ It is further submitted that the PFA, GEPL, and the MPA complement each other and for practical purposes, they ought to be applied jointly in order to balance the financial interest of the spouses during divorce.⁴⁰⁸

4.3.1 The relevance of section 15 (2) (c) of the MPA prior to the purchasing of living annuities

Due to strict insurance law principles and the provisions of the *Income Tax Act*, the spouses are unable to deal with the status of the member spouse's living annuities in their settlement agreement.⁴⁰⁹ This challenge may derive from the definition of "pension interest" which does not expressly incorporate a provision that recognises the taking into account of living annuities during a divorce.⁴¹⁰ Nonetheless, the SCA in *CM v EM*, partly created room to enable the non-member spouse to claim some benefit from the purchased living annuities. To achieve this, the court stated that the member spouse's right to receive monthly payments is an asset that can be valued.⁴¹¹ Therefore, to be able to assign a portion of the value of that right, the member spouse's right to receive monthly payments will have to be quantified accordingly.

It has been clearly stated that living annuities are not assets of the member spouse and during divorce, they cannot be taken into account for the purpose of division.⁴¹² It is argued that the financial interest of the spouses married in community of property ought to trigger the application of section 15 (2) (c) of the MPA on any transaction involving their joint estate.⁴¹³ In principle, before the member spouse could proceed to use accrued

⁴⁰⁷ Marumoagae 2018 *SA Merc LJ* 287. The author expounds that, given the fact that at times retirement funds take time to pay withdrawal benefits to their members, the non-member spouse will have the rights to interdict the payment of such withdrawal benefits pending the finalisation of the divorce which is a separate trigger event which entitles that non-member spouse to receive a portion of the benefit that is due.

⁴⁰⁸ See Marumoagae 2021 *THRHR* 48-52.

⁴⁰⁹ *CM v EM* 2020 3 All SA 1 (SCA) para 22.

⁴¹⁰ *CM v EM* 2020 3 All SA 1 (SCA) para 7; see also Marumoagae 2021 *THRHR* 39.

⁴¹¹ *CM v EM* 2020 3 All SA 1 (SCA) paras 37, 38 and 39.

⁴¹² *CM v EM* 2020 3 All SA 1 (SCA) para 22, the court stated that an annuitant cannot give part or all of the living annuities to an ex-spouse in terms of a divorce order or agree to split annuity income with the ex-spouse; see also *Lubbe v Central Retirement Annuity Fund* 2015 1 BPLR 39 (PFA).

⁴¹³ See Kgole and Marumoagae 2020 *De Rebus* 19.

retirement benefits to purchase living annuities, it is required that written consent of the non-member spouse must first be obtained.⁴¹⁴

The purpose of this statutory provision is to protect the spouse who is likely to be prejudiced against the illicit selling or alienation of the property that forms part of the joint estate.⁴¹⁵ The provisions of section 15 (2) (c) of the MPA, make it clear that spouses who are married in community of property cannot alienate, cede, or pledge financial assets without the necessary written consent of the other spouse.⁴¹⁶ In light of this, the transaction of purchasing living annuities should in law be null and void due to non-compliance with the provisions of section 15 (2) (c) of the MPA.⁴¹⁷

Important to note that, once the member spouse has exited employment, the issue of pension interest will fall away and the member spouse's retirement benefits will accrue to his estate. In light of this emphasis, the said accrued retirement benefits will normally form part of the joint estate in order to benefit both spouses.⁴¹⁸ According to this principle, the member spouse would be legally required to seek written consent from the non-member spouse in order to conclude a valid transaction when purchasing a living annuity from an insurance company or a retirement fund.⁴¹⁹ It is therefore competent to conclude that, the provisions of section 15 (2) (c) of the MPA preclude a member spouse from unilaterally deciding to purchase living annuities while in the process of divorce.⁴²⁰

In respect of the above submission, it is first argued that the purchase of these living annuities by the member spouse, which normally occurs during divorce proceedings gives rise to a clear injustice that is suffered by the non-member spouse. Secondly, it is further argued that this transaction, deprives the non-member spouse of the right to claim a portion of the member spouse's accrued retirement benefits before they could be locked

⁴¹⁴ Marumoagae 2020 *Without Prejudice* 51.

⁴¹⁵ See *Visser v Hull and Others* 2010 1 SA 521 (WCC) para 5.

⁴¹⁶ *Visser v Hull and Others* 2010 1 SA 521 (WCC).

⁴¹⁷ See Marumoagae 2020 *Without Prejudice* 51.

⁴¹⁸ *Commissioner for Inland Revenue v Nolan's Estate* 1962 1 SA 785 (A) at 792C-E; see also *Clark v Clark* 1949 3 SA 226 (D).

⁴¹⁹ See *Van den Berg v Van den Berg* 2004 JOL 12404 (T) para 10. The court in this case stated that, spouses cannot without the written consent of the other spouse in a marriage in community of property alienate, cede or pledge financial assets forming part of the spouses' joint estate.

⁴²⁰ See Marumoagae 2020 *Without Prejudice* 51.

or hidden in insurance companies.⁴²¹ Therefore, this practice results in the contravention of the rules that regulate the spouses' elected marital regime.

To avoid this practical injustice, our courts ought to adequately safeguard the inherent matrimonial right that the non-member spouse has in respect of matrimonial assets.⁴²² In support of this, the court in *Naidoo v Discover Limited and Others* 2018 JOL 39960 (SCA) para 16, clearly stated that section 15 (2) (c) of the MPA creates an exception to the general rule by forbidding a spouse who is married in community of property from alienating assets which form part of the joint estate without obtaining the necessary written consent of the other spouse. In practice, this dictum should provide guidance in respect of ensuring that the non-member spouse's right to benefit in retirement benefits is adequately protected.⁴²³ The essence of this, is to enable the non-member spouse to benefit accordingly from the member spouse's accrued retirement benefits before he could proceed to purchase living annuities during divorce proceedings.

4.4 Conclusion

This chapter demonstrated that in South Africa, living annuities are not regarded as assets of the member spouse. Accordingly, during divorce proceedings, these living annuities will not be taken into account for purposes of the division of matrimonial assets. The purchased living annuities are legally owned by the insurance company or retirement fund that sell such living annuities and a member spouse will only have the right to receive monthly payments. The nature of the relationship between the member spouse and the insurance company or retirement fund which the member spouse has purchased living annuities from is contractual. Therefore, the member spouse would not be able to own the capital of the annuity. However, the underlying challenge to this is that, as soon as the retirement benefits have accrued to the member spouse, such accrued retirement benefits ought to trigger the application of matrimonial property law. In respect of this, where a member spouse is married in community of property it will therefore imply that

⁴²¹ Kgole and Marumoagae 2020 *De Rebus* 19.

⁴²² Marumoagae 2020 *Without Prejudice* 51. The author expresses the view that, a member spouse's accrued retirement benefits, when married in community of property, accrue directly into the spouses joint estate.

⁴²³ Marumoagae 2021 *THRHR* 49.

his accrued retirement benefits must form part of the spouses' joint estate. Where the member spouse is married out of community of property with the accrual system, upon divorce proceedings, the accrued retirement benefits and other accrued assets of the member spouse will be added to determine the actual value and if it exceeds the estate value of the non-member spouse then the value of the member spouse's estate will be divided into two equal shares.

This chapter further demonstrated that as soon as the member spouse's retirement benefits have accrued when the spouses are married in community of property; the non-member spouse's written consent will be required before the member spouse could purchase the living annuities. This clearly proves that the member spouse is statutorily bound to firstly obtain the non-member spouse's written consent before he could purchase living annuities. In terms of this analysis, in the event the member spouse proceeds to unilaterally decide to purchase living annuities, the respective transaction must have to be null and void due to the apparent non-compliance with the provisions of section 15 (2) (c) of the MPA.

Chapter 5: Conclusion and recommendations

5.1 Introduction

This chapter seeks to concisely outline the issues relating to the sharing of the member spouse's retirement benefits. This dissertation indicated that retirement savings of the member spouse do attract serious attention during the divorce proceedings. The primary objective of this chapter is to highlight certain practical challenges that arise in practice *vis-à-vis* the member spouse's retirement benefits during a divorce. Firstly, it endeavours to concisely indicate that; it is critical for our courts to ensure that the rules regulating the matrimonial property system are adequately protected and recognised during the division of the spouses' matrimonial assets. Secondly, it will endeavour to demonstrate that; it is critical to ensure that as soon as the member spouse's retirement benefits have accrued the right of the non-member spouse to benefit thereto should be adequately safeguarded.

Thirdly, it will illustrate that the current power that the member spouse enjoys to unilaterally decide to purchase living annuities by using accrued retirement benefits during divorce proceedings, does in practice require adequate judicial and legislative oversight. Lastly, it will provide recommendations regarding an urgent need to enact specific legislation that will adequately address or regulate the conduct of member spouses *vis-à-vis* the tendency of depriving the non-member spouse of the right to claim and receive a share of the member's accrued retirement benefits during a divorce. Alternatively, to amend the PFA, GEPL, and the *Divorce Act* by inserting specific statutory provisions that will provide the recommended restriction or prohibition on member spouses from freely using their accrued retirement benefits to unilaterally decide to purchase living annuities during divorce proceedings.⁴²⁴

⁴²⁴ See Marumoagae 2021 *THRHR*; Marumoagae 2020 *Without Prejudice*; Kgole and Marumoagae 2020 *De Rebus*; Marumoagae 2021 *Without Prejudice*.

5.2 Brief background to the study and context

The law regulating retirement benefits in South Africa has received a lot of scrutiny from legal commentators and/or legal scholars over the years.⁴²⁵ This is the case, especially in relation to a situation where the member spouse and the non-member spouse are going through a divorce. Firstly, chapter 2 illustrated that, before the coming into effect of the MPA, the husbands were enjoying absolute marital power over their wives *vis-à-vis* the administration and decision-making of their matrimonial assets. After the enactment of the MPA in 1984, section 11 of the MPA abolished the said marital power, and through section 14 of the MPA. The effect of section 14 of the MPA is that both spouses who are married in community of property have the same equal powers with regard to the administration and the decision-making of their matrimonial assets.⁴²⁶ Spouses are governed by the principles contained in the MPA. In particular, the courts are obliged to adhere to the matrimonial principles when dealing with the division of the spouses' matrimonial assets during divorce.

This dissertation further demonstrated that, when spouses are entering into a marriage relationship, they are expected to choose one of the three recognised matrimonial property regimes to govern their marriage.⁴²⁷ Furthermore, case law has set a precedent that indicates that spouses who are married in community of property have equal rights in relation to their matrimonial assets and liabilities that form part of their joint estate,⁴²⁸ but unfortunately these matrimonial principles are not adequately applied by the courts when dealing with the member spouse's accrued retirement benefits.⁴²⁹ Therefore, this dissertation argued that these rights the spouses have in their matrimonial assets ought to extend to the member spouse's accrued retirement benefits during divorce proceedings. In light of this, the member's accrued retirement benefits will also have to

⁴²⁵ See chapter 3 above.

⁴²⁶ *Vukeya v Ntshane and Others* (518/2019) 2020 ZASCA 167 (11 December 2020) para 32.

⁴²⁷ For purposes of this study, only two main matrimonial property regimes are discussed, namely, marriages in community of property and marriages out of community of property with the accrual system.

⁴²⁸ *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388; *De Wet v Jurgens* 1970 3 SA 38 (A); *V v V* (3389/2017) 2020 ZA-GPPHC 154 (4 March 2020) paras 4-5.

⁴²⁹ *CM v EM* 2020 3 All SA 1 (SCA); *ST v CT* 2018 5 SA 479 (SCA).

fall into the joint estate of the member spouse, which will allow the non-member spouse to receive a half share in terms of the applicable marital regime during a divorce.⁴³⁰

Therefore, during divorce proceedings, both spouses are expected to firstly discharge all their joint liabilities and thereafter share the residue of their joint estate in equal shares.⁴³¹ In light of this principle, retirement benefits are no exception from consideration for division purposes, because technically they form part of the spouse's joint estate for the purpose of equal division during divorce when they are married in community of property. In *Clark v Clark* the court clearly indicated that "a member spouse's interest in the retirement benefits which had not yet accrued and the pension right which has accrued forms part of the community estate".⁴³² In practice various divisions of the High Courts have adopted inconsistent approaches and these inconsistencies clearly prove that the courts have failed to seek proper guidance from the dictum of *Clark v Clark*.⁴³³ It is important to note that, most of the challenges that were experienced in practice occurred before the amendment of the *Divorce Act* in 1989, where the non-member spouse was unable to claim any benefit from the member spouse's retirement benefits until the member spouse had exited the fund, through either retirement, resignation, retrenchment or reach a certain age.⁴³⁴ The concept or term "pension interest" was not yet recognised in our law.⁴³⁵

Where the spouses are married out of community of property with the accrual system, the accrual principles will govern the calculation of the spouses' estates separately, in order to determine the amount that is greater than the estate of the other spouse to share equitably during divorce.⁴³⁶ Moreover, this dissertation argued that to prevent the member spouse from hiding his accrued retirement benefits, a non-member spouse

⁴³⁰ *V v V* (3389/2017 2020 ZA-GPPHC 154 (4 March 2020).

⁴³¹ *Commissioner for Inland Revenue v Nolan's Estate* 1962 1 SA 785 (A); *Clark v Clark* 1949 3 SA 226 (D).

⁴³² 1949 3 SA 226 (D).

⁴³³ *Maharaj v Maharaj* 2002 2 All SA 495 (FB); *Kotze v Kotze* 2013 JOL 30037 (WCC); *Motsetse v Motsetse* 2015 2 All SA 495 (FB); *Sempapalele v Sempapalele* 2001 2 SA 306 (O).

⁴³⁴ *Wiese v Government Employees Pension Fund and Others* 2012 6 BCLR 599 (CC).

⁴³⁵ South African Law Commission 'Project 112 – Sharing of Pension Benefits' Report June 1998.

⁴³⁶ See section 3 of the MPA; see also See South African Law Reform Commission issue paper 41 "Review of Aspects of Matrimonial Property Law" 36; see also *ND v MD* ZAGPJHC 228 2021 1 All SA 909 (GJ) (16 September 2020) paras 17 and 26; *BM v NM* ZAGPJHC 76 2010 3 SA 220 (GSJ) (25 August 2009) para 26.

should rely upon the provisions of section 7 of the MPA for a full disclosure of the necessary particulars relating to the value and the name of all the assets the member spouse owns.⁴³⁷ Therefore, as soon as a non-member spouse becomes aware of any potential financial prejudice to emanate from the investment or purchasing of living annuities, the non-member spouse could approach the court in terms of section 8 (1) of the MPA for immediate division of the accrual concerned. The significance of these statutory provisions will enable the non-member spouse to reach over the member spouse's accrued retirement benefits and claim a portion thereof before the member spouse could use them to purchase any insurance product or invest the benefits.

This dissertation further provided a discussion on the development of the law regulating the sharing of the member spouses' retirement benefits during divorce proceedings in chapter 3. This dissertation clearly indicated that in 1989, the legislature effected significant amendments to the *Divorce Act*. These amendments were influenced by the recommendations that were provided by the South African Law Commission (as it was then) that, during divorce, the non-member spouse should have a right to claim a share of the member spouse's pension interest.⁴³⁸ The essence of introducing pension interest in our law was to make it possible to deem it as an asset of the member spouse at the time of divorce.

Subsequent to the introduction of the pension interest, the non-member spouse became permissible to claim a portion of the member spouse's pension interest. The legislature further incorporated sections 7 (7) and 7 (8) in the *Divorce Act*. During divorce proceedings, a court granting a decree of divorce in terms of section 7 (8) of the *Divorce Act* will deem the member spouse's pension interest as an asset in terms of section 7 (7) (a) of the *Divorce Act*. Notably, before the insertion of these statutory provisions, a non-member spouse had to endure a lengthy wait for the member spouse to exit the employment and this was also stated in *Kirchner v Kirchner and Another*⁴³⁹.

⁴³⁷ South African Law Reform Commission issue paper 41 "Review of Aspects of Matrimonial Property Law" 36-37.

⁴³⁸ See South African Law Reform Commission issue paper 41 "Review of Aspects of Matrimonial Property Law" 42.

⁴³⁹ (20358) 2008 ZAGPHC 415 (5 November 2008) para 10.

Going forward, to cure the defect of disallowing the non-member spouse to claim and receive immediate payment of an awarded portion, in 2008 the legislature introduced the clean-break principle through section 37D (1) (i) of the PFA and in 2011, section 24A of the GEPL. The essence of these amendments is to allow the non-member spouses whose member spouses are members of retirement funds that are subject to the PFA and the GEPL to be able to successfully claim and receive the shares they may be entitled to without delay. The introduction of sections 37D and 24A serve the purpose of saving the non-member spouses from having to wait for years before they could receive shares of their member spouses' retirement benefits.⁴⁴⁰ This long wait was actually limiting the rights of the non-member spouse to access a portion of the member spouse's retirement benefits which she may be entitled to during divorce.

Currently, it is clear that only pension interest is statutorily regulated and the courts can simply seek guidance from the provisions of sections 1, 7 (7), 7 (8) of the *Divorce Act* and section 37D of the PFA and 24A of the GEPL in order to assign a portion of the member spouse's pension interest to the non-member spouse at the time of divorce. With this in mind, it is worth noting that, regarding pension benefits, there is no legislation that specifically regulates the member spouse's accrued retirement benefits. Hence in recent times, it has become a trend for the member spouses to use their accrued retirement benefits to unilaterally purchase living annuities without obtaining the written consent of the non-member spouse in terms of section 15 (2) (c) of the MPA.⁴⁴¹ In practice, purchasing of these living annuities deprives the non-member spouse the right to benefit accordingly in the member spouse's accrued retirement benefits.

In chapter 4, this dissertation highlighted the current lacuna in respect of the reflection of the law on living annuities in South Africa, especially, when spouses are going through a divorce. This lacuna requires urgent legislative intervention in order to restrict or proscribe the member spouses from using their accrued retirement benefits to purchase living annuities without having obtained the necessary statutory written consent of the non-member spouse in terms of section 15 (2) (c) of the MPA.⁴⁴² This form of practice

⁴⁴⁰ See Mothupi 2010 *SA Merc LJ* 214.

⁴⁴¹ See Marumoagae 2021 *Without Prejudice*.

⁴⁴² *Visser v Hull and Others* 2010 1 SA 521 (WCC) para 5; see also Marumoagae 2021 *Without Prejudice*.

normally occurs when spouses are married in community of property. This dissertation demonstrated that, the unavailability of specific legislation that should regulate living annuities, in practice, does result in the deprivation of the non-member spouse's rights to claim and receive their portions of the member spouse's accrued retirement benefits.⁴⁴³ Currently, living annuities are regulated by strict insurance and/or financial laws. In addition, the *Income Tax Act*, does not necessarily regulate the nature of living annuities.

Therefore, when the spouses are going through a divorce and they have to share their matrimonial assets in accordance with the relevant matrimonial property regime the member spouse's living annuities will not be considered. This dissertation demonstrated that these living annuities may also be protected by the provisions of sections 37A (1) of the PFA and 21 (1) of the GEPL. Accrued retirement benefits, in principle, form part of matrimonial assets, hence there is a right that the non-member spouse has in relation to the member's accrued benefits.⁴⁴⁴ Important to note that, our courts have not yet been approached to pronounce the issue of sharing of accrued retirement benefits, but rather living annuities. Therefore, the law as it currently stands is not entirely clear, because there is no guiding precedent.⁴⁴⁵

It is established that an annuity is a financial product that give rise to an insurance contract between the retirement fund or insurance company and the member spouse. This contract will normally occur once the member spouse has exited employment and proceed to make future financial arrangements which will enable him to receive monthly payments from either the insurance company or retirement fund he purchased the respective annuities. In *ST v CT* the court stated that living annuities do not form part of the spouses' estate for divorce purposes.⁴⁴⁶ The court indicated that the spouse who purchased living annuities does not have the right to the actual capital value of the annuity, but rather the right to receive monthly payments during retirement. This dictum creates the impression that the member spouse may proceed to use his accrued retirement benefits and purchase living annuities without having due regard to the

⁴⁴³ See Marumoagae 2021 *JAL* 2.

⁴⁴⁴ See Marumoagae 2021 *JAL* 2.

⁴⁴⁵ See Marumoagae 2021 *JAL* 2.

⁴⁴⁶ See Marumoagae 2021 *JAL* 2.

matrimonial rights that allow the non-member spouse to benefit therefrom; before the member spouse could invest or purchase any insurance product through his accrued retirement benefits. In *CM v EM*, the SCA partly afforded non-member spouses who are married out of community of property with the accrual system some hope regarding the purchased living annuities. The SCA stated that the right to future annuity payments arising from purchased living annuities is regarded as an asset.⁴⁴⁷

However, thus far this position is only applicable to spouses who are married out of community of property with the accrual system.⁴⁴⁸ South African courts have not yet pronounced the issue of living annuities where spouses are married in community of property. It is not entirely clear, how the courts will approach such a legal issue in the future. Hence this dissertation vouches that the legislature should consider to either enact a new statute that will address the above-highlighted plight or amend the PFA, GEPL and the *Divorce Act* to the extent that it statutorily recognise and protect the non-member spouse's rights to benefit accordingly from the member spouses' accrued retirement benefits during a divorce. From a practical point of view, it is only logical to assume that, a proper application of matrimonial rules to marriages in community of property will enable the non-member spouse to benefit equitably when the court determines the patrimonial benefits to which the spouses may be entitled to during divorce. Therefore, our courts have the legal duty to ensure that, once retirement benefits of the member spouse have accrued, matrimonial principles should be applied for the purpose of division of patrimonial assets between spouses before the member spouse could purchase living annuities.

5.3 Main findings

The main findings of the dissertation are:

1. Currently, in South Africa it is clear that only pension interest is statutorily regulated as entailed in section 1 of the *Divorce Act*. Accrued retirement benefits are not statutorily regulated.⁴⁴⁹ Therefore, during divorce proceedings, the courts

⁴⁴⁷ *CM v EM* 2020 3 All SA 1 (SCA); *ST v CT* 2018 5 SA 479 (SCA) 18.

⁴⁴⁸ *CM v EM* 2020 3 All SA 1 (SCA); *ST v CT* 2018 5 SA 479 (SCA) 18.

⁴⁴⁹ See para 3.3.2 above.

shall in terms of section 7 (7) (a) of the *Divorce Act* deem a member spouse's pension interest as an asset that should fall into the spouses' joint estate when married in community of property and to the estate of the member spouse when married out of community of property with the accrual system.⁴⁵⁰ More essentially, the decree of divorce, ought to be unambiguous and further contain a proper name of the member spouse's retirement fund and a specific portion or share that the respective retirement fund will have to pay either directly to the non-member spouse or to the retirement fund of her choice.⁴⁵¹

2. A decree of divorce by a court, in terms of section 7 (8) of the *Divorce Act*, ought to indicate unequivocally that, a certain part of the member spouse's pension interest, by virtue of section 7 (7), must be paid to the non-member spouse by the retirement fund in question when any pension benefits have accrued to the member spouse.⁴⁵² Essentially, the provisions of sections 37D (4) (a) of the PFA and 24A (2) (a) of the GEPL stipulate unequivocally that, the assigned portion to the non-member spouse shall be deemed to have accrued to the member spouse on the date on which a decree of divorce is granted.
3. Prior to the insertion of sections 7 (7) and 7 (8) of the *Divorce Act*, in 1989, it was not possible for the member spouse's retirement benefits to be deemed to have accrued to him on the date on which a decree of divorce was granted.⁴⁵³ According to the erstwhile legal position, the retirement benefits were only to accrue to the member spouse once he retires, reaches certain age, resigns, dismissal or retrenchment.⁴⁵⁴ Then, the non-member spouse would have to wait for the occurrence of a specific exit event before she could receive a portion she was entitled to.⁴⁵⁵

⁴⁵⁰ See para 3.3.2 above.

⁴⁵¹ See section 37D (4) (b) (i) of the PFA and section 24A (2) (e) (i) (ii) of the GEPL.

⁴⁵² See para 3.3.3 above.

⁴⁵³ See para 3.2 above.

⁴⁵⁴ See para 3.2 above.

⁴⁵⁵ See para 3.2 above.

4. This lengthy wait was a major problem, as it resulted to the prejudice of the non-member spouse to be able to access a portion of the member spouse's retirement benefits during a divorce. As a result, the legislature in 2007 amended the PFA and introduced the clean-break principle by inserting section 37D (1) (d) in the PFA.⁴⁵⁶ The provisions of this section allow and/or authorise a retirement fund to deduct any amount that the court assigned, from any benefit of the member spouse to the non-member spouse in terms of section 7 (8) (a) of the *Divorce Act*.⁴⁵⁷ The clean-break principle was only applicable to non-member spouses whose member spouses were members of retirement funds that were subject to the PFA. According to this, the non-member spouses whose member spouses were members of the GEPF were unable to rely upon the clean-break principle.⁴⁵⁸ In 2011, the legislature further amended the GEPL to introduce the clean-break principle through section 24A (1) of the GEPL. The essence of these statutory provisions is to safeguard the rights of the non-member spouse from having to wait for long before accessing the benefits of the member spouse.
5. Where spouses are married in community of property and also have a settlement agreement; an order of the court will assign to the non-member spouse 50% (fifty percent) of the member spouse's retirement benefits or any portion thereof in terms of the spouses' settlement agreement.⁴⁵⁹ The rules regulating this marital regime allow spouses to be co-owners of their joint estate in equal and undivided half share. This co-ownership should extend to the member spouse's accrued retirement benefits.
6. Where spouses are married out of community of property with the accrual system and the spouses have also concluded an antenuptial contract and a settlement agreement, the court would have to apply the accrual principles in order to properly calculate the value of the member spouse's estate and if it is greater than the estate of the non-member spouse, it will in accordance with the provisions of

⁴⁵⁶ *The Pension Funds Amendment Act 11 of 2007*.

⁴⁵⁷ See para 3.3.4 above.

⁴⁵⁸ See *Wiese v Government Employees Pension Fund and Others* 2012 6 BCLR 599 (CC).

⁴⁵⁹ See *Ndaba v Ndaba* 2017 1 All SA 33 (SCA).

section 3 (1) and section 4 (1) (b) of the MPA assign half of the member spouse's greater amount to the non-member spouse. In circumstances, where the non-member spouse suspects or becomes aware of the member spouse's intentions of investing his accrued retirement benefits, the non-member spouse would approach the court in terms of section 8 (1) of the MPA for immediate division of the accrual.⁴⁶⁰

7. The member spouse is statutorily bound to obtain the necessary written consent of the non-member spouse before purchasing living annuities when spouses are married in community of property in terms of section 15 (2) (c) of the MPA.⁴⁶¹ However, our courts are not adequately safeguarding the non-member spouse's matrimonial rights, as soon as the retirement benefits have accrued to the member spouse for the purposes of inclusion of the member's accrued retirement benefits. The courts ought to take cognisance of the matrimonial principles together with pension fund law principles when expected to divide the spouses estate, or joint estate.⁴⁶²
8. This dissertation further illustrated that, currently, member spouses are using their accrued retirement benefits to purchase living annuities without the necessary written consent of the non-member spouse.⁴⁶³ In light of this, this dissertation determined that, the absence of a specific legislation to adequately restrict and/or proscribe the member spouses' freedom to use the accrued retirement benefits to unilaterally purchase living annuities, while in the process of divorce, result to a deprivation of the non-member spouses' rights to claim and receive portions/shares of their member spouses' accrued retirement benefits.

⁴⁶⁰ See *ND v MD ZAGPJHC 228 2021 1 All SA 909 (GJ)* (16 September 2020); *BM v NM ZAGPJHC 76 2010 3 SA 220 (GSJ)* (25 August 2009).

⁴⁶¹ See para 4.3.1 above.

⁴⁶² See para 4.2.1 above.

⁴⁶³ See chapter 4 above.

5.4 Recommendations

In light of the above findings, this part of the dissertation seeks to make few recommendations that may contribute immensely in practice.

5.4.1 Enactment of a specific Act that will regulate the member spouse's accrued retirement benefits during divorce

This dissertation demonstrated that, the absence of specific legislation that ought to adequately address the issue relating to the freedom that the member spouse has in respect of purchasing living annuities through accrued retirement benefits during a divorce. The highlighted freedom and/or authority of the member spouse to independently purchase living annuities for his own benefit, in practice, results in the hiding of matrimonial assets and this practice contravenes the rules regulating matrimonial property system. It is therefore recommended that, before the member spouse could purchase living annuities during divorce proceedings, the courts should firstly, allow the non-member spouse to be awarded her portion in terms of the matrimonial property law. This recommendation will protect the non-member spouse from being deprived of the right to benefit from matrimonial assets. When spouses are married in community of property, the accrued retirement benefits should automatically fall into the spouses' joint estate and during the determination of patrimonial benefits, such accrued retirement benefits must be considered. This will, therefore, balance the financial interest of both spouses in their matrimonial assets.

5.4.2 Amending the PFA GEPL and the Divorce Act.

Alternatively, this dissertation recommends that the legislature should consider to amend the PFA, GEPL and *Divorce Act* to the extent that the rights of the non-member spouses to benefit from the member spouse's accrued retirement benefits become statutorily recognised and protected. The essence of this recommendation is to prohibit the member spouse from unjustly benefitting alone in matrimonial assets through hiding the accrued retirement benefits in insurance companies, financial institutions or retirement funds through purchasing living annuities without the non-member spouse's knowledge.

The legislature should further consider incorporating the deeming provision in relation to living annuities as the member spouse's asset during divorce or unequivocally indicate that the right to receive future annuity payments shall be deemed as assets of the member spouse for purposes of divorce. The term "pension interest" should also be rephrased to accommodate living annuities or the right to receive future payments flowing from purchased annuities. Significantly, the respective right to receive future annuity payment should qualify to be considered by the courts during the determination of the spouses' patrimonial benefits. These recommendations may contribute in practice, especially in striking an equitable financial balance between the spouses during divorce. This will further allow the spouses not to engage in lengthy legal battles regarding a potential financial prejudice to be suffered by the non-member spouse as a result of the court's adopting inconsistent approaches.

5.5 Conclusion

The purpose of this dissertation was to investigate whether the current law regulating the sharing of retirement benefits adequately addresses the non-member spouses' rights to benefit from the accrued retirement benefits of a member spouse during divorce proceedings. This dissertation firstly demonstrated that there is an interplay between the pension fund law principles, the matrimonial law principles, and the divorce law principles. However, in practice, our courts are not adequately protecting and promoting this interplay to be able to reach consistent and sound decisions in relation to the sharing of the member spouse's accrued retirement benefits during a divorce. In practice, the rules of matrimonial principles that regulate the spouses' marriage normally ought to play a determining role in relation to the sharing of matrimonial assets during divorce. However, the rules of retirement funds were always playing a determining role in conjunction with the statutory provisions of section 37A (1) of the PFA and section 21 (1) of the GEPL. Hence, during the division of the spouses' retirement benefits, traditionally our law did not permit these retirement benefits to form part of the member spouses' estate, or joint estate when married in community of property. In particular, all the matrimonial assets were shared except retirement benefits.

Therefore, this dissertation demonstrated that, after the amendment of the *Divorce Act*, the member spouses' pension interest started to be deemed to form part of the member spouses' assets, and thus during divorce, where spouses are married in community of property they would share equally fifty percent (50%) each of the pension interest. In the same way, the spouses who are married out of community of property would share in accordance with the accrual principles and in line with the provisions of section 3 (1) of the MPA. In the event that, the spouses did not set out the status of their retirement benefits during divorce in their settlement agreement, the courts will adhere to the provisions of sections 7 (7) and 7 (8) read in conjunction with section 37D of the PFA and 24A of the GEPL to enable the non-member spouse to receive her awarded share immediately and without any unreasonable delay.

With all this in mind, this dissertation further demonstrated that, upon accrual of retirement benefits before divorce, there is no statute that regulates same. Therefore, member spouses are using their accrued retirement benefits to purchase living annuities. In essence, in South Africa, there is no statute that further regulates living annuities. The *Income Tax Act*, merely defines the term living annuity does not necessarily regulate it. Case law has indicated that living annuities are not assets of the member spouse, thus, the member spouse merely has a right to receive future payments flowing from the purchased living annuities. These living annuities are legally owned by the insurance company or retirement fund where the living annuities are purchased. Currently, our law does not permit these living annuities to form part of the member's assets for the purpose of divorce. Hence, the member spouses use their accrued retirement benefits to purchase living annuities without the written consent of the other spouse in terms of section 15 (2) (c) of the MPA.

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