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RETIREMENT INSIGHTS

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TRANSFERS OF RETIREMENT FUND BENEFITS

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The transfer of benefits of members and pensioners of retirement funds to other retirement funds is allowed in certain circumstances, subject to the provisions of the Pension Funds Act and the Income Tax Act.

Transfers before retirement

(In an occupational retirement fund, the period before a member retires from employment. In a preservation fund or retirement annuity fund, the period before the age of 55.)

1. Active members of an occupational retirement fund

Any transfer of contributing members' benefits between two occupational retirement funds must comply with the provisions of section 14 of the Pension Funds Act and Conduct Standard 1/2019. No tax is payable in respect of these transfers.[1] The transfer of a portion of a member's pension interest to a non-member spouse's chosen fund does not fall within the ambit of section 14.[2]

2. Upon resignation of a member of an occupational retirement fund

Upon resignation, a member becomes entitled to a withdrawal benefit from their occupational pension or provident fund. The benefit may be preserved in the same fund, taken in cash, or transferred to another pension, provident, retirement annuity, pension preservation or provident preservation fund, with no tax payable at the point of transfer.[3] The member may also elect to take a portion of the benefit in cash and transfer the balance to a preservation fund. The amount taken in cash will not be regarded as the member's one-off withdrawal allowed in the preservation fund.[4]

Section 14 does not apply when a member exits a fund after resignation or retirement, or when beneficiaries purchase annuities following a member's death.

Since the withdrawal of SARS Practice Note RF 1 of 2012, members are allowed to split their withdrawal benefit by transferring to more than one preservation fund.[5]

With effect from 1 March 2021, no tax is payable on transfers from pension funds or pension preservation funds to provident funds or provident preservation funds.[6]

3. Members of a preservation fund and retirement annuity fund

- **Preservation funds**

A member of a preservation fund may transfer their preservation fund benefit to their new employer's occupational pension or provident fund, to another preservation fund or to a retirement annuity fund free of tax.[7] The transfer is subject to section 14.

- **Retirement annuity funds**

- *From a retirement annuity fund to an occupational retirement fund*

  Such a transfer is not allowed, as members may not transfer from a more restrictive retirement fund to a less restrictive retirement fund tax-wise. In a retirement annuity fund, members are not allowed to access their benefit before at least age 55. If they are allowed to transfer to an occupational retirement fund, those members will be able to access the benefit should they resign from employment. The Income Tax Act does not allow a tax deduction for such transfers either.[8]

1 Par 6(1)(a) of the Second Schedule to the Income Tax Act provides for the tax deduction on the benefit transferred.
2 FSRA Conduct Standard 1 of 2019 par 18(a).
3 Paragraph 6(1)(a) of the Second Schedule to the Income Tax Act provides for a tax deduction.
4 Par (c) of the definitions of pension/provident preservation funds in the Income Tax Act provides that one amount can be paid to the member during the period of membership of a preservation fund.
5 SARS Practice Note RF 1/2012 previously prohibited split transfers but this was withdrawn on 15 November 2021.
6 Section 40 of the Taxation Laws Amendment Act of 2022 amended the Taxation Laws Amendment Act of 2021 (which initially made provision for the tax-free transfers) to clarify that no tax will be payable on pre- and post-1 March 2021 contributions to a pension fund that are transferred to a provident fund.
7 Par 6(1)(a) of the Second Schedule to the Income Tax Act provides for the tax deduction on the benefit transferred.
8 The tax deduction allowed in par 6 of the Second Schedule is so much of the benefit as is paid or transferred for the benefit of the person from a (i) pension fund, pension preservation fund, provident fund or provident preservation fund into any pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund; or (ii) retirement annuity fund into any retirement annuity fund.

- *From a retirement annuity fund to another retirement annuity fund*

  Transfers between retirement annuity funds are allowed.[9] Transfers of separate contracts held by the same member in a retirement annuity fund to different retirement annuity funds are allowed with effect from 1 March 2023, provided that the value of the contract(s) being transferred to the other retirement annuity fund is more than R371 250, and if the individual is not transferring all existing contracts, the total value of the remaining contracts must be more than R371 250.

  No tax will be payable on the transfer,[10] and it is subject to section 14.

Transfers on or after retirement

(In an occupational retirement fund, the period after a member retires from employment. In a preservation fund or retirement annuity fund, the period after the age of 55.)

After retirement from employment, a member may preserve the retirement benefit in the same occupational retirement fund if the rules allow for such deferral. When a member elects to start receiving the retirement benefit, the member may take a portion of the retirement benefit in cash and purchase an annuity (pension) with the balance. The portion taken in cash will be taxed in accordance with the retirement tax tables and no tax will be payable on the amount used to provide the annuity.[11] The annuity payments will, however, be taxed as income.[12]

Alternatively, any time after retirement from employment, and if the rules of the member's fund allow this, the member may choose to transfer the deferred retirement benefit in their occupational retirement fund to:

- a retirement annuity fund (from 1 March 2018);[13] or
- a preservation fund (from 1 March 2019).[14]

No tax will be payable on these transfers,[15] and they are not subject to section 14.[16]

The retired member will not have the option of a one-off withdrawal from the preservation fund and the benefit will only be payable as a retirement benefit when the retired member elects to start receiving the retirement benefit from the preservation fund.[17]

No cash withdrawal is possible at the time of transfer. In terms of the Income Tax Act, only the full retirement interest (the full fund value on the date that the member elects to transfer from the retirement fund) may be transferred. In the same way, the member may not partially defer their retirement in their occupational retirement fund – only the full amount may be deferred.

After reaching the age of 55, a member of a preservation fund may transfer their retirement benefit to another preservation fund or a retirement annuity fund with no tax being payable.[18]

Legislation does not allow for a transfer of a retirement benefit after the age of 55 between retirement annuity funds or from a preservation fund to an occupational retirement fund.[19]

Transferring a deferred retirement member's benefit in an occupational retirement fund to another occupational retirement fund is not allowed either. The concern with allowing transfers between occupational retirement funds is that the transferor and transferee retirement funds may have different rules with regard to their respective normal retirement ages. This would enable a member to access retirement benefits (as a withdrawal benefit) that were not available in the retirement fund they transferred from. In the 2023 National Budget, it was announced that National Treasury is considering allowing such transfers, provided that a deferred retirement member may only use the benefit as a retirement benefit and may never take it as a withdrawal benefit.[20]

9 Definition of "retirement annuity" in die Income Tax Act, par (b)(xii).
10 Par 6(1)(a) of the Second Schedule to the Income Tax Act provides for the tax deduction on the benefit transferred.
11 Not included under the definition of "gross income" in the Income Tax Act.
12 Par (a) of the definition of "gross income" in the Income Tax Act.
13 Par 2(1)(c) read with par 6A of the Second Schedule to the Income Tax Act.
14 Par 2(1)(c) read with par 6A of the Second Schedule to the Income Tax Act.
15 Par 6A of the Second Schedule to the Income Tax Act.
16 Par 18(b) of Conduct Standard 1 of 2019 states that the following are not subject to s14: *"A transaction entailing a member who, on leaving the service of an employer or upon liquidation of a fund, is entitled to receive a benefit in cash* ***or is entitled to translocate the benefit to another fund****, including a preservation fund."*
17 *Par (c)((iii) of the definition of "pension preservation fund" and "provident preservation fund" in the Income Tax Act.*
18 *Par 6A of the Second Schedule to the Income Tax Act provides for the tax deduction.*
19 *Par 2(1)(c) read with 6A of the Second Schedule to the Income Tax Act.*
20 *Once the 2023 Tax Law Bills are published, more clarity will hopefully be gained on this proposal.*

Transfers of annuities

1. Living annuities

- *To an insurer*

  A pensioner in receipt of a living annuity from a retirement fund may, if the rules of the retirement fund allow this, transfer the living annuity to an insurer.[21] The liability to pay the annuity passes from the retirement fund to the insurer and, as a result, constitutes a transfer of business from the retirement fund to the insurer, and section 14 of the Pension Funds Act will be applicable.[22]

  Living annuitants may also transfer their annuity between insurers. The Prudential Authority has given standing approval in respect of transfers of living annuity policies between insurers and living annuity policies to conventional or life annuity policies, subject to certain conditions.[23]

- *From an insurer to an occupational retirement fund*

  There is no express provision in the Insurance Act dealing with the transfer of insurance business assets and liabilities from an insurer to a retirement fund. The Prudential Authority intends to propose an amendment to the Insurance Act to clarify any uncertainty in this regard.[24]

- *To another retirement fund*

  In terms of the definition of "living annuity" in the Income Tax Act, members' living annuities in an occupational retirement fund may be transferred to another occupational retirement fund as part of a group transfer. A fund with in-fund living annuitants will therefore be able to transfer members' benefits to an umbrella fund, including transferring living annuitants to the umbrella fund.

  No tax will be payable on the transfer of a living annuity, but the transfer is subject to section 14 of the Pension Funds Act.

2. Life annuities

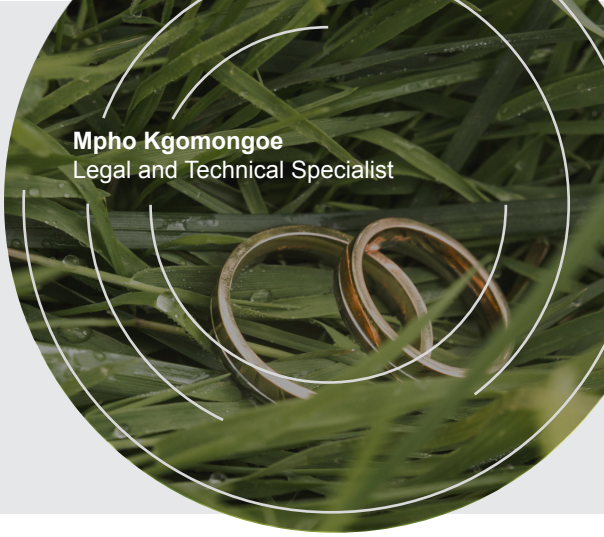
A transfer from a life annuity to another life annuity or a life annuity to a living annuity is not allowed.[25]

Death benefits

A beneficiary who received a death benefit in terms of section 37C, may purchase a pension with the benefit if allowed in the fund rules, in which case the death benefit will be considered not to accrue for tax purposes, so no tax will be payable on the portion used to purchase a pension. No such tax concession is available on transfers to preservation funds or retirement annuity funds, as the death benefit has already accrued in the name of the member.

21 Prudential Communication 1 of 2021.
22 Directive 135 read with amendment 1/2001.
23 Prudential Communication 1 of 2021, par 3.7.
24 Prudential Communication 1 of 2021, par 4.5.
25 *Prudential Communication 1 of 2021 confers standing approval in terms of section 50(1) of the Insurance Act only in respect of the replacement of a living annuity issued by one insurer with a living annuity issued by another insurer; and a living annuity issued by one insurer with a compulsory conventional annuity policy issued by another insurer.*

CUSTOMARY MARRIAGES CAN ONLY BE DISSOLVED BY A DECREE OF DIVORCE



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Section 37C of the Pension Funds Act 24 of 1956 ("the Act") prescribes how the board of management of a retirement fund must decide on an equitable distribution of a death benefit. A death benefit is a lump sum benefit payable by a retirement fund on the death of a member. This benefit does not form part of the deceased member's estate and must be disposed of by the board of management in an equitable manner.

Section 37C makes provision for three main duties of the board, namely the duty to identify beneficiaries, to allocate the death benefit in an equitable manner, and to pay the benefit to the identified beneficiaries. The primary purpose of section 37C is to protect those who were financially dependent on the deceased member during their lifetime. In terms of section 37C, retirement funds are granted 12 months from the date of the member's death to trace and identify dependants.

The Act defines beneficiaries as dependants and nominees. Nominees are those who were nominated by the deceased to receive a portion of the benefit as set out in the nomination of beneficiary form. There are three types of dependants, namely legal, factual, and future dependants. A legal dependant is a person in respect of whom the deceased member was legally liable for financial maintenance, like a child or spouse. The Act defines "spouse" as *a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act 68 of 1961, the Recognition of Customary Marriages Act 120 of 1998, or the Civil Union Act 17 of 2006, or the tenets of a religion.*

Prior to the Recognition of Customary Marriages Act 120 of 1998 ("RCMA") coming into operation, customary marriages were recognised for limited purposes – for instance, to permit polygamy – and the marriages were not solemnised in terms of the Marriage Act 25 of 1961.

The RCMA conferred full legal recognition on customary marriages, regardless of when the marriages were concluded. However, the requirements for and the consequences of customary marriages differed depending on whether they were entered into before or after the RCMA came into operation.

Customary marriages entered into before the RCMA came into operation preserve the old customs and consequences of a customary marriage, and the marriage is valid if it complies with the customary law requirements for a valid marriage.

For the majority of the customs, the requirements were as follows:

- Irrespective of the bride and groom's age, the parties and the bride's father had to consent to the marriage.
- The bride had to leave her family to live with her husband and lobola had to be paid to the bride's family.

The celebration of the marriage often occurred but this was not a requirement for the validity of the marriage to be recognised.

A customary marriage entered into before the commencement of the RCMA had to be registered at the Department of Home Affairs before 15 November 2002. However, the non-registration of these marriages does not affect the validity of the marriage.

The board of management of a fund has a duty to attempt to trace every possible customary spouse, whether the customary marriage is registered in terms of the RCMA or not.

The RCMA defines a "customary marriage" as *a marriage concluded in accordance with customary law*. According to the RCMA, a customary marriage is recognised as a marriage if it existed on 15 November 2000 (commencement date of the RCMA) and/or has been entered after 15 November 2000 and concluded in accordance with customary law – i.e., in accordance with *the customs and usages traditionally observed among the indigenous African people of South Africa and which form part of their culture.* This means that customary marriages could be entered into differently based on the different indigenous groups' customs.

Must the customary marriage be entered into or concluded?

The question that then arises for boards of management to consider is whether it is a customary marriage that was entered into or one that was concluded in accordance with the deceased member's culture. The definition of customary marriage refers to *concluded* in accordance with that culture, and section 3 of the RCMA refers to *negotiated* and *entered into or celebrated* in accordance with customary law. The issue is therefore whether a customary marriage has only been entered into (and not yet concluded) or whether it has been concluded (finalised) in accordance with customary law.

In the case of *Maluleke* [1], the court held that the terms "entered into" and "celebrated" are not defined in the RCMA. As a result of the evolution in customary practices and because the RCMA does not define *entered into*, courts will also have to look at other factors which might assist in determining whether the parties entered into a customary marriage. The term *entered into* is normally used to denote a contract, meaning an explicit or a tacit agreement between the parties that they are married.

Handing over of the bride

In the case of *Moropane* [2], the Supreme Court of Appeal ("SCA") found that the handing over of the bride to her in-laws is the most crucial part of a customary marriage (paragraph 40). It is through this symbolic customary practice that the *makoti* is finally welcomed and integrated into the groom's family, which becomes her new family. In other words, there will be no customary marriage if the handing over did not take place.

In the case of *M v K* [3], the High Court considered whether the handing over of the bride is an element to be taken into account when considering the validity of a customary marriage. The court held that the handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has formally and officially been handed over to the groom's family, there can be no valid customary marriage.

In the SCA's case of *Mbungela* [4], the husband to a customary marriage ("the husband") that was not registered at the Department of Home Affairs sought an order declaring that he and the deceased had concluded a valid customary marriage. The *court a quo* had dealt with the issue of whether the parties had entered into a valid customary marriage where the deceased's family did not *hand over* the deceased to the husband's family in accordance with their custom. The *court a quo* held that the parties had concluded a valid customary marriage although the deceased had not been handed over, and it is against this decision that an appeal was brought.

The deceased's family contended that a valid customary marriage had not been concluded because the deceased had not been *handed over* to the husband's family and lobola had not been paid in full. As a result, not all the requirements of section 3(1)(b) of the RCMA were met and thus no valid customary marriage was concluded. Lobola negotiations had taken place, a portion of the lobola was paid and there was an exchange of gifts between the two families. The deceased's family argued that the exchange of gifts *symbolised* the combination of a relationship between the bride and the groom and their families. Following the deceased's death, the husband obtained a letter from the tribal council confirming his marriage to the deceased, the exchange of gifts, and the outstanding lobola balance, as he had not paid lobola in full. The court considered that couples often postpone bridal handover because it is costly, that lobola was negotiated and that the parties already lived together and concluded that the bridal handover was condoned or waived by the parties. The SCA held that the importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal handover/transfer be denied. However, it must also be recognised that an inflexible rule stating that there is no valid customary marriage if only this one ritual of bridal handover has not been observed, could yield untenable results. The SCA held that the purpose of the ceremony of handing over a bride is to mark the beginning of a couple's marriage and introduce the bride to the groom's family. It is an important, but not necessarily a key determinant, of a valid customary marriage. Thus, it cannot be placed above the couple's clear will and intent. Therefore, the SCA held that a valid customary marriage had been concluded even though the bride was not handed over to the husband's family.

Negotiation and payment of lobola

In the case of *Sengadi* [5], the applicant lodged an urgent application seeking a declaratory order confirming that she was the customary law wife of the deceased. The lobola was negotiated and partially paid but not completed. On the day of the lobola negotiation there was a celebration, where the applicant was gifted by the deceased's family with her wedding dress. The respondent (the deceased's father) denied that the applicant and the deceased concluded a valid customary law marriage. The respondent submitted that the families still intended to have a subsequent meeting as part of the ongoing marriage process, but because the meeting did not take place, the marriage rituals, formalities, and procedures were not completed, and therefore the applicant was not recognised as the bride and as the deceased's customary spouse. The respondent held that the handing over of the bride to the deceased's family was the most crucial part of the customary law marriage and therefore because the applicant had not been handed over, no customary law marriage was concluded or came into existence between the deceased and the applicant.

The RCMA does not specify the formal requirements for the celebration of a customary marriage. The court held that customary law is not fixed and evolves as norms change. The custom of handing over the bride as an indispensable requirement to validating a customary law marriage cannot pass constitutional muster because it is inconsistent with the spirit, purport and objects of the Constitution. Thus, the court declared that the custom was not a lawful requirement for the existence of a

1 *Maluleke & others v Minister of Home Affairs & another* [2008] JOL 21827 (W)
2 *Moropane v Southon* [2014] JOL 32177 (SCA)
3 *M v K* (LP) (unreported case no 2017/2016, 7-11-2018)
4 *Mbungela & another v Mkabi & others* (820/2018) [2019] ZASCA 134 (30 September 2019)
5 *PSengadi v Tsambo; In re:* Tsambo [2019] 1 All SA 569 (GJ)

customary law marriage when section 3(1) of the RCMA had been complied with. The matter was taken on appeal and the SCA found that the custom of handing over the bride was an important element, but not a key determinant of a valid customary marriage. The court stated that rituals and customs have never been static or frozen in time, as they develop and change along with the society in which they are practised.

Dissolution of customary marriages

Could recognition as a spouse fall within the customs and usage traditionally observed among the indigenous African people of South Africa and, therefore, can a customary marriage be dissolved due to the lack of recognition?

In the matter of *Nkuna v Phalaborwa Pension Fund* [6], the complainant was customarily married to the deceased and there was no dispute about the lobola paid by the deceased for the complainant, but the complainant had since left the common household for a period of about four years prior to the deceased's death. Upon the deceased's death, his family informed the fund that the complainant had been at the deceased's funeral, but she was not *recognised* as the deceased's spouse. She attended as the mother of the deceased's child and not as the deceased's spouse. The Pension Funds Adjudicator ("the Adjudicator") agreed with the fund that the marriage appeared to have been dissolved, and not to include the complainant as a beneficiary in the distribution of the death benefit.

The Adjudicator dismissed the complaint and found that the board of management of the fund had considered all the relevant factors ignoring irrelevant ones and agreed that the complainant be excluded from the allocation of the death benefit.

The complainant took the matter to the Financial Services Tribunal ("the Tribunal") for reconsideration. The Tribunal held that section 8(1) of the RCMA is clear that a customary marriage may only be dissolved by a court by a decree of divorce on the ground of irretrievable breakdown of the marriage. In customary law, although it may appear as though leaving the matrimonial home is seen as a dissolution of marriage, the law of the land is clear and customary law cannot override an express statute that deals with the matter. The Tribunal concluded that the complainant was a spouse and therefore fell within the definition of dependant.

Conclusion

Negotiation and partial payment of lobola are sufficient to establish a customary marriage if the other requirements in terms of the RCMA have been met. In the case of *Mbungela* [7], the court held that a valid customary marriage can be concluded without the full payment of lobola in light of the evolution of customary law, if other requirements of a customary marriage are met.

Customary law marriages can only be dissolved by a court by a decree of divorce, in terms of section 8 of the RCMA.

The recognition of a marriage by families is not a legal requirement for a valid customary marriage and the lack thereof is not a requirement for the dissolution of a customary marriage either. In the case of *Sengadi* [8], the court held that courts are required not only to apply customary law but also to develop it. Perhaps aspects such as recognition need to be considered by the court as a requirement for a valid customary marriage, especially given that customary law is not static. This will mean that, where a spouse has left the marital home and the parties are technically separated, the spouse might be excluded from consideration and therefore not be a legal dependant. However, until such time that the law is made clear in this respect, customary marriages are valid if entered into in accordance with customary law and can only be dissolved by a court of law.

6 *Nkuna v Phalaborwa Pension Fund, Netcare Pension Fund and Sanlam Life Insurance Limited* PFA /LP/00081884/2021/NN
7 *Ibid 4*
8 *Ibid 5*