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The Secretary to Parliament
C/O Mr Bradley Viljoen
Per email: bviljoen@parliament.gov.za

09 May 2008

**RE: WRITTEN REPRESENTATIONS REGARDING THE GENERAL FINANCIAL SERVICES LAWS
AMENDMENT BILL**

1. I wish to make representations regarding the proposed amendment to section 37D of the Pension Funds Act, 1956 ("the PFA") contained in paragraph 14 of the Bill, in particular regarding paragraph 4(a)(i)(aa) which is currently worded the "the pension fund or pension funds *named* in the decree."
2. I propose an addition of the words "or identifiable from" after the words "named in", so that paragraph (aa) reads as follows: "the pension fund or pension funds named in or identifiable from the decree".
3. The reasons why I believe the suggested addition of these words is necessary and appropriate, are as follows: -

3.1. Although I agree that it is preferable, for the sake of clarity, to name the fund in a divorce order or consent paper and it is good practise to do so, there are practical reasons why this often does not happen.

3.2. Many people institute divorce proceedings in the Southern Divorce Courts, often without legal assistance. If the matter is defended but capable of settlement, the divorcing parties are often assisted by Court officials in concluding a consent paper. However, the standard provision in a pro forma consent paper given to the parties dealing with the division of pension interest(s), and which I have encountered many times, is the following: -

"That Plaintiff / Defendant be entitled to 50% of Defendant's / Plaintiff's pension or retirement fund interest / value as at date of divorce and that an endorsement be made in the records of the said fund that Plaintiff / Defendant is entitled to 50% of the aforesaid fund interest when it accrues to Defendant / Plaintiff."

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- 3.3. The consent paper is entered into by deleting the appropriate words in the options given in this clause. The reason why this is a general clause, (which is then made an order of Court) is because the member spouse will often not volunteer or give the necessary information regarding his or her pension fund.
- 3.4. In situations, typically also in the Southern Divorce Courts, where the divorce action is undefended, Magistrates grant orders containing the same general provision. Again the reason why the fund is not named is because the non-member spouse often does not know the exact name of the pension fund but knows that his or her spouse is a member of a fund or funds or has various retirement annuity policies. It goes without saying that where the non-member spouse is entitled to share in a pension interest, he or she should have an order granted to this effect, but this unfortunately is often granted without the fund being named. It must be accepted that for the non-member spouse, it may be difficult to obtain the necessary information, given that a divorce situation is often a very acrimonious time for the divorcing parties.
- 3.5. Pension funds and fund administrators have refused to endorse the fund's records if the fund is not named in the divorce order or consent paper and have required the amendment of the divorce order or consent paper to name the fund. Now that section 37D of the PFA has been amended to provide for payment or transfer of the non-member spouse's portion of the pension interest as at the date of divorce, non-member spouses are again faced with funds refusing to pay or transfer their portion of the pension interest if the fund is not named in the divorce order or consent paper. Non-member spouses are being told that they must seek an amendment of their divorce orders to have the fund named.
- 3.6. It should not be underestimated how difficult it can be for the non-member spouse to seek and obtain the amendment required. Not only is the cost and time involved significant, but there are often a host of practical difficulties. One only has to think of the problems in obtaining the agreement for the amendment, if necessary, from an ex-spouse, particularly if the relationship is acrimonious. Member ex-spouses may be deliberately difficult or worse, the member ex-spouse may not be contactable or his or her whereabouts unknown to the non-member spouse. Furthermore, many non-member spouses will not have sufficient funds to obtain legal assistance to have the order amended and the Court process necessary to obtain the amendment will often be daunting and difficult for an unassisted person.
- 3.7. I accept it is one thing if the completely incorrect name of a fund is stated in a divorce order or consent paper, in which case the name of the fund must be amended. However, although providing the name of the fund in a divorce order or consent paper is advisable and it is good practise to do as aforesaid, there are going to continue to be situations, in my view, where the divorce order or consent paper will contain a general provision to the effect that a

percentage of the member's pension interest is awarded in respect of any pension fund(s) to which the member belongs at the time of divorce.

- 3.8. In my view, either the fund must be identified (named) in the divorce order or consent paper or, if not named, the fund must be identifiable. In other words, if it can be ascertained or confirmed factually that a divorcing party was a member of the fund as at the date of the divorce order, then that the fund is capable of being identified and effect can be given to the court order. The same would apply for example where a consent paper contained a provision to the effect that funds in any bank account held in the name of one of the divorcing parties must be dealt with in a certain way. Similarly it is then a matter of establishing what bank accounts are held in that party's name at the date of divorce, and effect can be given to the order.
4. The legal reasoning on which I rely to motivate my submission to have paragraph (aa) amended in the way I have proposed, stems from the parole evidence rule. Put simply, the parole evidence rule means that it is generally not permissible to adduce extrinsic evidence of the terms of a transaction recorded in a document. Thus, when a transaction has been reduced to writing, the writing is regarded as the exclusive memorial of the transaction and no evidence may be given to contradict, alter, add to or vary its terms (see *Union Government v Gianni Ferro – Concrete Pipes (Pty) Ltd* 1941 AD 43).
5. However, it is possible in certain cases to lead extrinsic evidence in aid of the interpretation of a document. These cases are not regarded as exceptions to the parole evidence rule because there is no addition to, or variation of, the document. The purpose is rather to clarify what the document says. Hence it is possible to adduce evidence to identify the persons or objects referred to in a document (see *Trust Bank of Africa Ltd v Frysch* 1977 3 SA 562 (A)) or used generally to place the interpreter of the document "in the armchair of the author" by evidence of the facts of which the author was aware (see *Delmas Milling Co Ltd v Du Plessis* 1955 3SA 447(A)). It was stated in *Delmas* that this is evidence of an identificatory nature, being necessary to "apply the contract to the facts."
6. In my view there are no sound reasons for insisting on amending a divorce order or consent paper to name the fund when it is clear that the provisions relating to the division of the pension interest comply with section 7(8) of the Divorce Act and the fund is identifiable from evidence that the member spouse was a member of the fund at the date of the divorce order.
7. Funds should enforce court orders unless there are legitimate reasons why the order cannot be enforced, such as non-compliance with legislation but not for technical reasons. Not to do so will frustrate the rights of many non-member spouses who have entered into divorce orders or consent papers which comply in every respect with the provisions of section 7(8) of the Divorce Act, but

because the fund is not named, the order cannot be enforced without the added burden and expense of having the order amended.

8. It is submitted that if the parole evidence rules justifies a divorce order being given effect to in circumstances where the fund is not named but is identifiable due to facts proving that the member spouse was a member of the fund as at date of divorce, the practical implementation of the amendments to section 37D would be enhanced if it was legislated that the fund must either be named in or be identifiable from the decree.

Yours faithfully

EDWARD NATHAN SONNENBERGS INC



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