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## INTRO TO CULTURAL PRACTICES

and retirement funds

## COHABITATION

and legal rights

## MARRIAGE, DIVORCE

and retirement benefits



## CULTURAL PRACTICES

VOL.6

**ALSO IN THIS ISSUE:** CUSTOMARY MARRIAGES & RETIREMENT | AN OVERVIEW OF SECTION 37C OF THE PENSION FUNDS ACT | TRANSLATED DEFINITIONS

This educational publication is funded by the ASISA Foundation and Old Mutual's On the Money



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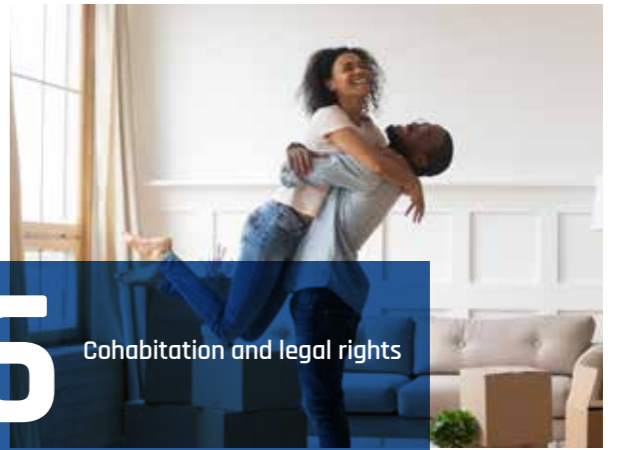
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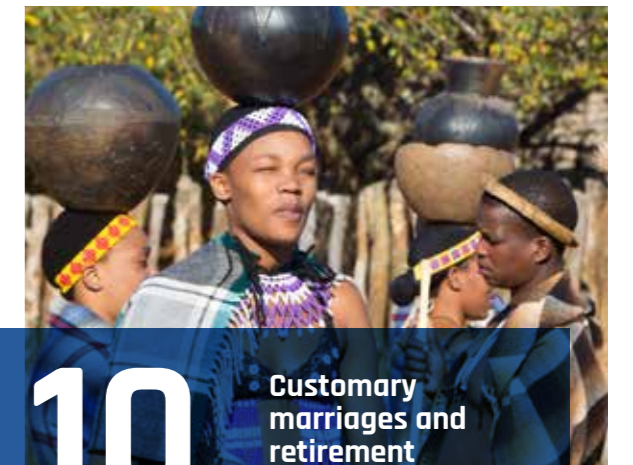
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# CULTURAL PRACTICES AND HOW THEY RELATE TO SOUTH AFRICAN RETIREMENT FUNDS

Ditlwaelo tsa botjhaba le kamoo di amang matlole a ho beha meja fatshe Afrika Borwa

## overview

Our 'Rainbow Nation' represents a rich tapestry of cultural diversity, with a wide variety of different practices when it comes to, for example, marriage, family and dependants. These practices have a significant impact on the way in which retirement funds serve their members when it comes both to saving and investing for retirement, but especially when it comes to distributing death and other benefits. This article, and the articles to follow in this publication, highlight how cultural practices have a significant influence on retirement funds and their distribution of member benefits.

'Rainbow Nation' ya habo rona ke letshwao le matla la sebopeho sa merabe e fapafapaneng ya setjhaba sa rona, moo re nang le meetlo e fapafapaneng ha re tla ho, ho etsa mohlala, lenyalo, lelapa le baphedisuwa. Ditlwaelo tsena di na le tshwaelo e kgolo hodima tsela eo matlole a ho beha meja fatshe a sebeletsang beng ba wona ha re tla ho bobedi dipolokelo le ho jala matsete bakeng sa ho beha meja fatshe, empa haholoholo ha re tla ho ho aba dihlapiso tsa ho shwa le tse ding. Sengolwa sena le dingolwa tse tla latela phatlalatsong ena, di hlakisa ka moo ditlwaelo tsa botjhaba di nang le tshusumetso e kgolo hodima matlole a ho beha meja fatshe le ho abeng ha bona ha dihlapiso ho ditho.

Retirement funds, given the broad-based composition of their membership base, are a true reflection of our beloved Rainbow Nation from a cultural diversity perspective. Retirement fund members represent South African society across various ethnicities and cultures, each with their own unique customs and social practices – especially when it comes to marriage, children, extended families and dependants. These differences are most clearly evident when it comes to the distribution of benefits by a retirement fund when necessitated by life events, such as marriage, divorce and death.

The COVID-19 pandemic has focused the minds of government, business and civil society for all stakeholders to play a more deliberate role in cultivating a more inclusive and equitable economy for all South Africans. This includes South Africa's retirement fund industry, given its influential role from both a capital allocation perspective and with respect to how it assists millions of employees to save and invest for retirement, but also with the provision of risk benefits, to assist employees when these benefits are needed.

For the cultivation of an inclusive retirement fund industry to take place, however, it requires the industry – and especially boards of trustees – to have an extensive understanding of different aspects of cultural practices; specifically, those that intersect with the retirement fund industry when it comes to retirement benefits. The traditional model of retirement is that a person saving for retirement is saving for themselves and their immediate dependants, such as their spouse and children. In addition, once a person reaches retirement, it's assumed their children will be out of the house and they will have eliminated any significant debt for assets, such as houses and cars. However, in reality this is not the case for most South Africans. A person saving for retirement often has to do so while providing for their family, aging parents or grown children, who have not left the home, and an extended family who may require regular financial support. How can we expect a person to save for retirement when they have such a wide lens of responsibility?

A well-known example of this increased lens of responsibility for a vast majority of South Africans is what is referred to as 'black tax'. Black tax refers to the responsibility placed on black employees to contribute financially, often on a monthly basis, towards people within their immediate and/or extended family who are in need of regular financial support. The black employee thus assumes financial responsibility for an extended family of dependants when compared to employees from other demographic groups in the country. Black tax demonstrates that the definition of family, and an individual's financial responsibility towards dependants, may differ greatly between any single retirement fund's membership base.

Approaches to marriage also differ across South Africa's various cultures and the legal recognition of marriage by means of civil marriages, customary marriages and civil unions is made possible by South African law. However, many 'married' couples requiring the distribution of a retirement benefit at the time of divorce or death find out too late that they are not in fact legally married as, for example, in the case of a customary marriage, where all requirements may not have been fulfilled in order for the marriage to be legally recognised in the Recognition of Customary Marriages Act.

The Pension Funds Act defines as dependant, the spouse of the member. S37C of the Pension Funds Act therefore requires the board of a retirement fund to discover dependants of the deceased fund member, in order to effect a fair and equitable allocation of the member's death benefit.

This publication explores some of these intersections between cultural practice and retirement funds in more detail. The articles cover issues such as 'vat en sit' or cohabitation, lobola, customary marriage and Section 37C of the Pension Funds Act as it relates to the distribution of death benefits.

Phatlalatsa ena e hlahloba tse ding tsa dikamano tsa ditlwaelo tsa botjhaba le matlole a ho beha meja fatshe ka botebo bo eketsehileng. Dingolwa di akaretse ditaba tse jwalo ka 'vat en sit' kapa ho phela hammoho ka ntle ho lenyalo, bohadi, lenyalo la setso le Karolo ya 37C ya Molao wa Matlole a Penshene (Section 37C of the Pension Funds Act) ka moo o amang kabo ya dihlapiso tsa kamora ho shwa.

Le mpapasho ihlola ukudibana phakathi kwenkcubeko nengxowa-mali yomhlala-phantsi ngokweenkcukacha ezingakumbi. La manqaku agubungela imiba efana "no-vat sit" okanye ukuhlalisana, ilobola, umtshato wesintu neCandelo 37C loMthetho weNgxowa-mali yoMhlala-phantsi njengoko libhekisela ekudluliselweni kweenzuzo emva kokufa.

Lo mbhalo uhlolisisa kabanzi okanye kwalokhu kuxhumana okukhona phakathi kwezinkambiso zamasiko nezikhwama zomhlalaphansi. Izindatshana zibukisisa izinkinga ezinjengo 'kukupita' noma umasihlalisanane, ilobolo, umshado wesintu kanye neSigaba 37C soMthetho Wezikhwama Zempesheni njengoba lokhu kuhlobene nokwabiwa kwemihlomulo yokufa.

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# MARRIAGE, DIVORCE AND RETIREMENT BENEFITS

Umtshato, uqhawulo-omtshato, neenzuzo zomhlala-phantsi



## overview

Legal decisions made by a couple before their wedding day hold significant influence for them in the event of divorce. The implications are determined by the Marriages Act, Recognition of Customary Marriages Act and the Civil Union Act. This article highlights the importance of an antenuptial contract before the wedding ceremony, as well as pension interest that may become due to a divorced spouse under the Divorce Act.

Izigqibo ezisemthethweni ezenziwa sisibini ngaphambi kokutshata kwaso ziba nempembelelo ebalulekileyo kuso xa kusibakho oswelekayo okanye xa kusibakho uqhawulo-omtshato. Iziphumo zixhomekeke kuMthetho weMitshato, uMthetho wokuGqalwa kweMitshato yeSintu noMthetho woManyano lokuZithandela lwaBesini esiFanayo. Eli nqaku liqaqambisa uku-baluleka kwekontrakti esayinwa phambi komsitho womtshato, kwakunye neenzuzo zomhlala-phantsi ezinokuba selungelweni leqabane eliqhawule umtshato ngaphantsi koMthetho woQhawulo-omtshato.

It is often said that "Marriage is made in heaven, but lived on earth". The reality of South Africa's divorce rate requires couples to consider the implications of divorce before entering into a marriage union. An area often neglected during the divorce process, for example, is the claim against a portion of a former spouse's retirement savings to which their spouse may be entitled.

In terms of the Divorce Act, the retirement benefit forms part of the fund member's assets and must be considered when dividing your marital assets. This is especially important in the

instance where one spouse, for example, has put their career on hold to take care of the children, and in doing so has not built up sufficient savings for their retirement.

However, if couples are living together as 'husband and wife' and not married under a legal Act of Parliament, such as the Marriages Act, Recognition of Customary Marriages Act and the Civil Union Act, there cannot be a pension interest transfer. Under these circumstances, there is no marriage capable of dissolution in terms of the Divorce Act, which usually enables the transfer of a pension interest benefit. However, the Pension

## 4 KEY REQUIREMENTS FOR A DIVORCE ORDER

Inclusions required in a divorce order, in terms of the Pension Funds Act, to facilitate an uncontested and timeous pay-out:

- 1 A divorcing party must still be a member of their particular retirement fund on the date of the divorce order.
- 2 The name of the fund must be in the divorce order, or the fund must be identifiable from the divorce order.
- 3 The divorce order must specify the amount that the former spouse should receive.
- 4 The divorce order must specifically order the fund, and not, for instance, the member, to pay a part of the pension interest to the former spouse.

Funds Act, which regulates all private funds, was fairly recently amended to allow for a pension interest transfer on the dissolution of an Islamic marriage by an order of court.

The legal terms of a marriage will determine the guidelines for financially exiting the union. In terms of the law, if you are married in community of property or out of community of property, with the accrual system, you may be entitled to a portion of your former spouse's pension interest. The benefit allocated to the non-member spouse is now payable from the date of divorce. This was not always the case. Before 2007, the non-member spouse had to wait until a benefit is accrued to the member before being able to access the divorce benefit assigned to them. The non-member spouse would therefore only be able to access the divorce benefit upon the member's exit from the fund due to either resignation or retirement.

With the introduction of the 'clean-break' approach in 2007, which applies to pension, provident, retirement annuity and preservation funds, the non-member spouse may immediately claim the portion of the member's pension interest and can elect to receive a cash benefit or transfer the benefit to another retirement fund. Where a person does decide to split their pension interest and claim payment from their retirement fund, they must remember that there are certain legal requirements that have to be met before their retirement fund can pay part of their benefit to their former spouse.

In a pension or provident fund, **pension interest** is the amount of money that a spouse would have received if they resigned on the date of the divorce. This does not mean that the retirement fund member needs to split their pension interest in half to pay their former spouse. They have the choice to pay the amount that the former spouse would have received from the retirement fund, or from other assets in the estate. Also, important to note is that the pension interest claim against a spouse is not limited to 50%. In terms of the law, parties can claim anything from 0.1% to 100% of the pension interest benefit of the former spouse.

**An antenuptial agreement** is entered into where couples do not want to get married in community of property and is concluded before marriage. An antenuptial agreement might be especially important for someone who already has assets (e.g. a business) or family obligations (e.g. children) from a previous marriage. The contract ensures that partners retain their own separate estates and are not liable for each other's debts, for instance, unless they have taken out the debt jointly or a spouse provided personal security for the debt of the other.

### Antenuptial agreement with or without accrual

Without accrual, partners keep what is theirs before marriage and also keep what becomes theirs after marriage.

If the agreement is with the accrual system, each party still retains their own estate, but the agreement determines how the growth in each partner's estate will be shared.

Accrual takes effect when the marriage ends due to divorce or death. Should the marriage end, the partner with the smaller accrual has a claim against the other. The claim is for the difference between 50% of the aggregate of the values of the two estates, and the lesser spouses estate or any percentage as agreed to by the parties in their antenuptial agreement.

### What if there's no 'prenup' agreement?

If no prenuptial contract is signed between the parties before they get married, they are automatically deemed to be married in community of property. This entails that all the assets and liabilities of both parties are added together and the estate is deemed to be a combined estate; the spouses' wealth is not seen separately. Should the couple divorce, or one spouse pass away, the joint estate will be divided equally between the parties.

In the event of the death of one spouse, the estate will be divided in accordance with a will that has been drafted, either jointly or separately by the two parties. If there's no will, the estate will be divided in accordance with the Intestate Succession Act, starting either with the children of the parties, or alternatively to the parents of the parties or alternatively to the siblings of the parties.

### In summary

Marriage is a valid and binding contract, which can only be dissolved by a regional or high court in South Africa. As with any contract, before entering into marriage, couples must carefully consider the legal implications thereof. From a financial standpoint, couples should consider how they would like to have their estates divided in the event of divorce in order to ensure their financial wellbeing.

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# 'VAT EN SIT': COHABITATION AND LEGAL RIGHTS UKUHLALISANA NAMALUNGELO ASEMTHETHWENI

**Vat en Sit:** A direct translation of the colloquial Afrikaans term "take and sit down", meaning to take a partner and settle down together without the formalities that come with marriage.

**Cohabitation:** Where two individuals live together but are not married.

**Universal partnership:** Instances where there is an express or, more often than not, a tacit agreement between two unmarried parties who live together for an extended period of time. Usually, these parties share similar responsibilities, duties and obligations as married couples, which often includes income, expenses and assets.

## overview

This article provides an overview of the legal rights of "vat en sit" or cohabitation. Cohabitation, where two individuals live together but are not married, is becoming increasingly popular in South Africa. Our law does not give parties to a cohabitation arrangement automatic legal rights and if one party wishes to claim from the other, they would need to prove that the cohabitation amounts to a universal partnership. A universal partnership requires an express or, more often than not, a tacit agreement between two unmarried parties who live together for an extended period of time and can be formalised by a cohabitation or domestic partnership agreement.

**Eli nqaku lishwankathela amalungelo asemthethweni "e-Vat en sit" okanye ukuhlalisana. Ukuhlalisana, apho abantu ababini behlala kunye kodwa bengatshatanga, kuya kuxhaphaka eMzantsi Afrika. Umthetho wethu awubaniki abo bahlalisanayo ilungelo elisemthethweni elizenzekelayo kwaye ukuba omnye wabo ufuna ukwenza ibango komnye, kuya kufuneka angqine ukuba ukuhlalisana oko kuyafana nobuqabane jikelele. Ubuqabane jikelele kufuneka ibe bobuvakalisiweyo okanye ubukhulu becala, ibe sisivumelwano esingathethwanga phakathi kwabantu ababini abangatshatanga abahlala kunye kangangethuba elide yaye sinokwenziwa samkeleke ngesivumelwano sokuhlalisana okanye isivumelwano sokuhlalisana kwabasini sinye.**



Cohabitation before marriage – or in place of marriage – has increasingly become a convenient arrangement for unmarried couples to share the costs of living while, for others, it's the perfect way to test a relationship before making a big commitment. A direct translation of the colloquial Afrikaans term "vat en sit" is "take and sit down", meaning to take a partner and settle down together without the formalities that come with marriage. With the financial costs of weddings today, many young couples live together before or after their engagement, or before or after lobola has been paid, or before the couple's union has been sealed in matrimony. There are, however, real financial risks with "vat en sit", given that cohabitation is not legally recognised as a form of marriage. For example, for many couples where lobola has been paid, there is a common misconception that the payment of lobola equates to the formalisation or legalisation of the marriage. This can lead to a considerable difference in the way assets are dealt with in the event of a death or divorce, given that couples in domestic partnerships are not afforded the same legal rights, duties and protection of an agreement in law, should they wish to separate.

If you are in a cohabitation relationship, there is a risk that your partner can evict you from their house, you cannot easily claim spousal maintenance from them and when they die, you can't easily inherit their assets unless they left a will and nominated you as a beneficiary. The deceased's family may also, for example, have a right to evict you from the house in which you've been living with your partner. It is therefore important to understand the legal rights as they relate to cohabitation versus a universal partnership.

### 'Vat en sit' including payment of lobola does not equal marriage

With customary marriages, a high number of people are still under the impression that payment of lobola alone will lead to a legally recognised customary marriage. This is not so and, sadly, if there is no handing over, the customary marriage will be declared to be a cohabitation relationship and not legally protected. When a man has paid lobola the family of the woman has to formally hand over their daughter to his family. This is a process that can involve *ukhuvuma abakhwenyana* or *ho hlabisa mahadi* (to welcome the groom to the bride's family) and if it is not done, in the eyes of the law, the process to enter into a customary marriage has not been finalised and the marriage will not be legally protected under the Recognition of Customary Marriages Act. Many couples who are living together like 'husband and wife' and share financial and family obligations and responsibilities – accumulating assets, such as houses, cars and pensions together – think they are regarded as married. However, in the eyes of the law, they are not married, but rather in a universal partnership.

## 4 FACTORS REQUIRED FOR UNIVERSAL PARTNERSHIP

The court in *Pezuto v Dreyer and Others 1992 (3) SA 379 (A)* set out four factors required for the existence of a universal partnership, namely that:

- 1 each partner should contribute to the partnership, including labour, skill or monetary contribution;
- 2 the partnership is carried out for the joint benefit of the parties;
- 3 the object of the partnership is profit; and
- 4 the agreement is valid.

At the heart of a universal partnership, is the agreement between the parties (tacit or otherwise) that they agree to put all their assets in a communal pot and that, should the partnership later dissolve, that the assets should be distributed between the parties in accordance with the agreement between them. This does not necessarily mean that you keep what you each brought into the relationship, and there exists the potential for your partner to share in assets that you have accumulated. Accordingly, if you are in a long-term relationship and have chosen not to enter into a civil marriage or formally regulate your relationship, it may be prudent to consider entering into a cohabitation agreement to control what will happen to your respective assets in the event that you and your partner decide to part ways.

A cohabitation agreement regulates the financial aspects as well as the well-being of the child or children born of the relationship between the parties, etc. So, it's not a marriage contract entered into when parties get married, but it carries similar legal protections to a marriage contract. The benefit of a cohabitation agreement is that it can be ended, and the relationship can be ended, without getting the courts involved. If no cohabitation agreement exists, partners would only be entitled to the assets

that are owned in their own name, and the portion of the property that they invested in if it can be proven that they contributed toward that asset.

Whereas if you get married, it is a valid and binding contract that you enter into. Only a competent court, which is a regional court in South Africa, or a high court, can dissolve a marriage contract. In other words, only they can issue you with the decree of divorce, which ends the marriage. Whereas with the cohabitation agreement for unmarried partners, the parties – should they separate – this separation will be governed by that agreement. And it's not necessary to obtain a court order in order to give effect to the agreement.

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# Simplifying common legal requirements for life events

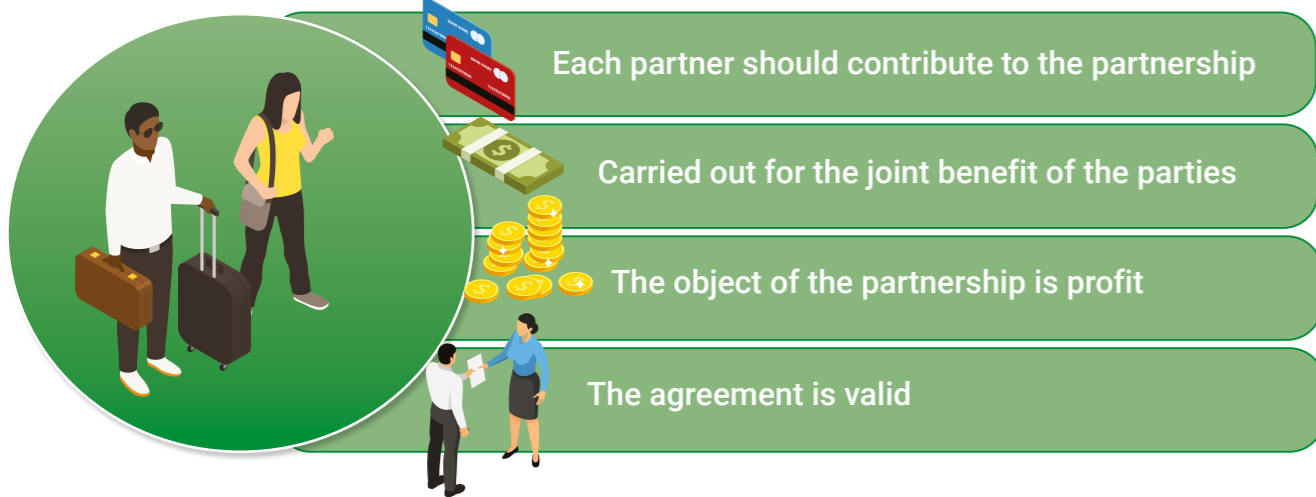
Reference: <https://www.oldmutual.co.za/personal/solutions/financial-education/on-the-money>



## 'Vat en Sit' / Cohabitation -Legal requirements for universal partnerships

Unmarried parties sharing similar **responsibilities, duties and obligations as married couples**, which often includes sharing **income, expenses and assets**.

### Requirements for universal partnerships:



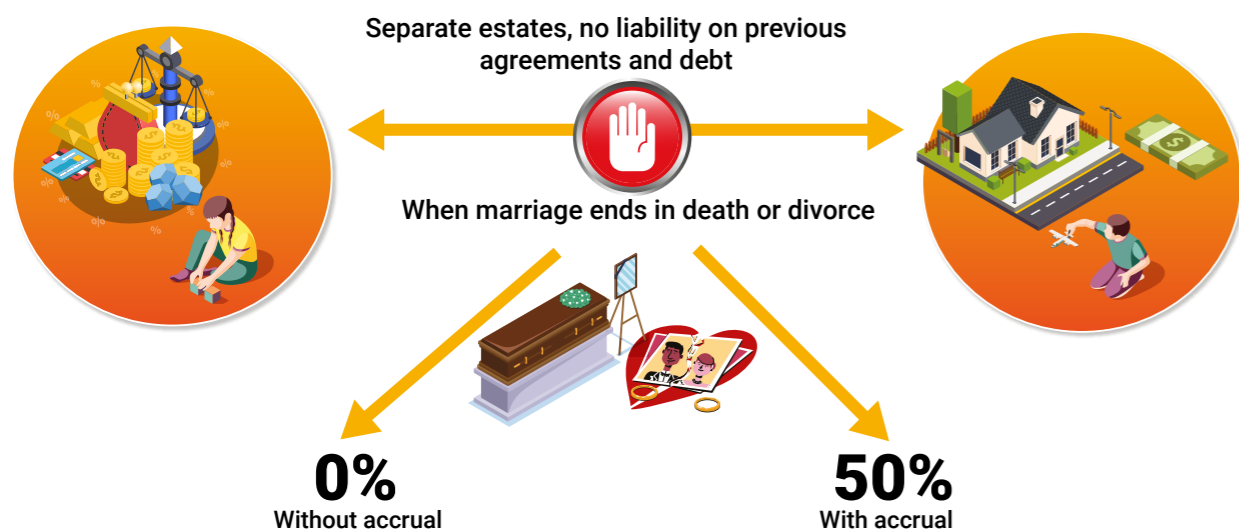
## Legal requirements for a customary marriage to be recognised as a legal marriage under the Recognition of Customary Marriages Act

### Requirements:



## Understanding antenuptial contracts (with and without accrual)

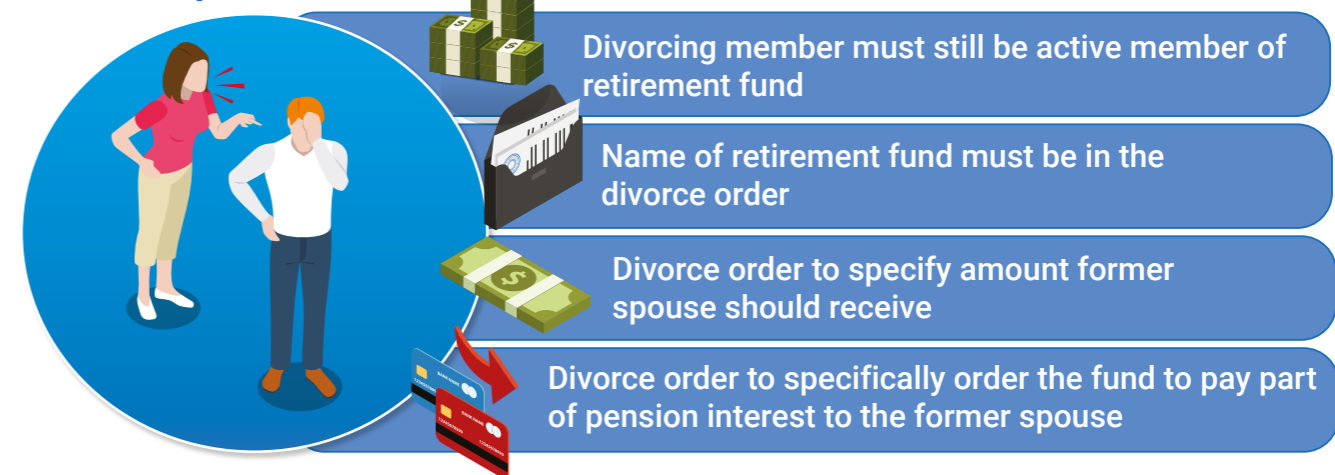
An antenuptial agreement is entered into where couples **do not want** to get married in community of property and is **concluded before marriage**.



## The 4 key requirements for a divorce order in terms of the Pension Funds Act

Inclusions required in a divorce order, in terms of the Pension Funds Act, to facilitate an uncontested and timeous pay-out:

### Requirements:





# CUSTOMARY MARRIAGES AND RETIREMENT

## MENYALO A SETSO LE HO BEHA MEJA FATSHE

Regulatory compliance and best practice principles

### overview

This article provides an overview of the Recognition of Customary Marriages Act, 1998. Many South Africans are married by means of customary law, which sets out the requirements for a customary marriage to be recognised under South African law. For example, for many couples where lobola has been paid, there is a common misconception that the payment of lobola equates to the formalisation or legalisation of the marriage. This can lead to a considerable difference in the way assets are dealt with in the event of a death or divorce etc. This article outlines the requirements for a Customary Marriage to be recognised in law.

**Sengolwa sena se o fa tjhebokakaretso ya Molao wa Kananelo ya Manyalo a Setso, wa 1988 (Recognition of Customary Marriages Act, 1998).**

**MaAfrika Borwa a mangata a nyalane ka molao wa lenyalo la setso, o tekang ditlhoko bakeng sa lenyalo la setso hore le ananelwe ho ya ka molao wa Afrika Borwa.**

**Ho etsa mohlala, bakeng sa banyalani ba bangata moo bohadi (lobola) bo lefilweng, ho na le mohopolo o fosahetseng o atileng wa hore tefo ya bohadi e lekana le tlhomamiso kapa kananelo ya molao ya lenyalo leo. Hona ho ka baka pherekano e kgolo ho ya kamoo thepa e sebetwang ka teng haeba e mong wa banyalani a hlokahale kapa ho ka ba le tlhalano, jj. Sengolwa sena se teka ditlhoko bakeng sa hore Lenyalo la Setso le ananelwe ka molao.**

The Recognition of Customary Marriages Act, 1998 (‘the Act’) stipulates the specific requirements for a customary marriage to be recognised under South African law. Customary marriages should also be registered. Customary marriages are in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract (before the customary ceremony), which regulates the matrimonial property system of their marriage.

**The Recognition of Customary Marriages Act, 1998 makes provision for the following aspects:**

- recognition of customary marriages;
- to specify the requirements for a valid customary marriage;
- to regulate the registration of customary marriages;
- to provide for the equal status and capacity of spouses in customary marriages;
- to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages;
- to regulate the dissolution of customary marriages.

**Customary law** means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.

**Customary marriage** means a marriage concluded in accordance with customary law.

**Lobola** means the property in cash or in kind, whether known as lobolo, bogadi, bohali, xuma, lumalo, takha, ikhazi, magadi, emabheka or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage.

## 3

### KEY REQUIREMENTS FOR CUSTOMARY MARRIAGES

For a customary marriage entered into after the commencement of the Recognition of Customary Marriages Act, 1998 to be valid, the prospective spouses:

- 1 must both be above the age of 18 years; and
- 2 must both consent to be married to each other under customary law; and
- 3 the marriage must be negotiated and entered into or celebrated in accordance with customary law.

**The recognition of customary marriages includes:**

- A marriage that is a valid marriage at customary law and existing at the commencement of the Act (1998) is for all purposes recorded as a marriage.
- A customary marriage entered into after the commencement of the Act (1998 onwards), which complies with the requirements of the Act, is for all purposes recognised as a marriage.
- If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of the Act are for all purposes recognised as marriages.
- If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of the Act, which comply with the provisions of the Act are for all purposes recognised as marriages.
- The above stipulated requirements for the legal recognition of a customary marriage is critically important – especially the requirement that “the marriage must be negotiated into or celebrated with customary law”. The reason for the importance of this aspect is that customary law will differ from culture to culture across South Africa’s diverse ethnic groups when it comes to marriage celebrations. For each customary marriage to be legally recognised under the Act, the marriage negotiations and celebrations must conform to the customary law requirements.

**Registration of customary marriages**

The spouses of a customary marriage have a duty to ensure that their marriage is registered. Either spouse may apply to the registering officer in the prescribed form for the registration of their customary marriage and must furnish the registering officer with the prescribed information and any additional information that the registering officer may require in order to satisfy them as to the existence of the marriage. Importantly, while there is a responsibility for spouses of a customary marriage to register their customary marriage, failure to register a customary marriage does not, however, affect the validity of that marriage.

**Equal status and capacity of spouses**

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity – including the capacity to acquire assets and to dispose of them – to enter into contracts and to litigate, in addition to any rights and powers that she might have in customary law.

**Proprietary consequences of customary marriages and contractual capacity of spouses**

The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law. A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract, which regulates the matrimonial property system of their marriage.

**In summary**

The Recognition of Customary Marriages Act, 1998 stipulates the requirements for a customary marriage to be recognised under South African law. It furthermore stipulates the need for a customary marriage to be registered, emphasises the equal capacity and status of both spouses under a customary marriage, as well as the proprietary and contracting consequences resulting from customary marriage and the dissolution thereof. Such information is important for retirement fund boards of trustees when considering the distribution of fund death benefits to a spouse and other dependants in the event of the death of the fund member when that member is in a customary marriage.

#### REFERENCES

Old Mutual | SA Government Gazette

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# SECTION 37C OF THE PENSION FUNDS ACT: THE IDENTIFICATION OF BENEFICIARIES AND DEPENDANTS

soMthetho Wezikhwama Zempesheni: Ukuhlonzwa kwabahlomuli/izindlalifa kanye nabantu abebondliwa ngumufi

## overview

South African family structures are diverse. This diversity may include, for example, more than one spouse under a customary marriage. Many families have dependants, who may include the children of deceased siblings, uncles, cousins etc. In some cases these dependants are not formal adoptions or guardianships, which can often be further complicated by remarriage after a divorce and children from previous spousal relationships are also introduced into the family dynamic. Given this context, trustees of retirement funds are oftentimes greatly challenged when it comes to the identification of dependants, and the fair and equitable distribution of death and/or other approved benefits. This article provides an overview of Section 37C of the Pension Funds Act to guide trustees in this important responsibility.

Isimo sokwakheka komndeni waseNingizimu Afrika siyahluhluka. Lokhu kwahlukahluka kungenzeka kubandakanye abesifazane abevile koyedwa abashade nomyeni oyedwa ngaphansi komshado wesintu, ukwenza nje isibonelo. Imindeni eminingi inabantu abondliwayo futhi abathembele kumondli wekhaya, okungenzeka babandakanye izingane zabafowabo nodadewabo bakamufi, omalume, abazala, njll. Kwezinye izimo laba bantu abondliwayo bangabantu abasuke bengafakwanga ngokusemthethweni ngaphansi kwesandla somondli wekhaya ukuze abakhulise futhi abondle ngokusemthethweni noma abe ngumnakekeli/umbheki wabo osemthethweni, okuyisimo esivamise ukwenziwa nzima kakhulu wukushada kabusha kwabashadikazi emva kokwehlukana kwabo nalabo abebeshade nabo ngaphambilini bese bengena emshadweni omusha nezingane zabo abazithole emishadweni yabo yangaphambilini. Ngenxa yesimo esinjengalesi-ke, abaphathiswa bezikhwama zomhlalaphansi esikhathini esiningi bavamise ukuhlangabezana nenselele enkulu ekuhlonzeni abahlomuli/izindlalifa kanye nabantu abebethembele kumufi, futhi bahlangabezana nobunzima maqondana nokwabiwa kwemihlomulo leyo ngendlela elungileyo, engenakho ukwenzelela nokuchema, futhi ngokulinganayo. Le ndatshana ihlinzeka ngolwazi olufingqiwe maqondana neSigaba 37C soMthetho Wezikhwama Zempesheni ngenhloso yokuhola nokuqondisa abaphathiswa kulo msebenzi osemqoka kangaka abethweswe wona.



The distribution of death benefits in terms of Section 37C of the Pension Funds Act is often tricky terrain for pension fund trustees. The primary objective of section 37C is to ensure that those persons who were dependant on the deceased member are not left destitute after their death.

### Death benefits payable in terms of the Pension Funds Act

When a member of a retirement fund dies before reaching retirement age (and if the rules of the particular fund permit), the benefit that becomes payable (death benefit) must be allocated and paid to the member's dependants and/or nominees. Section 37C investigations can be lengthy and complex and particularly challenging for a board of trustees when identifying dependants, especially given the geographic, social and cultural landscape in South Africa.

Section 37C accordingly imposes a duty on the board of trustees to conduct a proper investigation to determine all the dependants of the deceased member. Accordingly, trustees cannot merely follow the beneficiary nomination made by the member during their lifetime – the board must establish who the persons are who fall within the ambit of the deceased member's dependants as defined in the Act.

Once the board has identified all possible dependants, the next stage of the process would be to examine the type of each dependant in order to make an equitable distribution among them. Dependants can fall into one or more of three categories

of dependency – legal dependants, financial/factual dependant and future potential dependants. In doing so, the board has to consider all the relevant facts to the exclusion of irrelevant facts. Once the trustees have established the status and circumstance of each identified dependant, the death benefit is allocated and distributed accordingly.

### Section 37C(1) trumps other laws

Section 37C(1) specifically provides that, regardless of the provisions of any other law – including the common law – and notwithstanding the rules of a registered

- the law of intestate succession does not apply;
- death benefits are not subject to the law of marriages; and
- the common law (including law of contract) does not apply either.

### Factors influencing an equitable distribution to dependants

When making an equitable distribution among dependants, the board of trustees has to consider, among others, the following factors:

- the age of the dependants;
- the relationship with the deceased;
- the extent and nature of dependency;
- the wishes of the deceased placed either in the nomination form and/or their last will; and
- financial affairs of the dependants, including their future earning capacity potential.

### In summary

Section 37C of the Pension Funds Act is mandatory in the sense that any death benefit payable by a pension fund as defined in the Act shall not form part of the member's estate, but rather be dealt with in the manner prescribed in that section of the Act. The legislature has specifically prioritised this section by making the section applicable to any distribution of a death benefit *regardless of any other law* or the rules of the fund.

Section 37C therefore places a duty on the board of the fund to identify the beneficiaries of a deceased member and also vests the board with discretionary powers on the proportions and manner of distributing the proceeds of a death benefit. As with the exercise of any discretionary power, the board is required to give proper consideration to relevant factors and exclude irrelevant ones from consideration. The board may therefore not unduly fetter its discretion by following a rigid policy that takes no account of the personal circumstances of each identified dependant and of their prevailing situation.

### Section 37C imposes three primary duties on the board of trustees, namely to:

- 1 identify and trace 'dependants' (as defined in section 1 of the Act) and those persons, if any, who have been nominated by the deceased member;
- 2 make benefit allocations on a fair and equitable basis; and
- 3 determine an appropriate mode of payment of the death benefit.

### Spouse vs. permanent life partner

The status of permanent life partners and the legal debate around the definition of "spouse" is often a contentious issue for funds to navigate. In terms of the Pension Funds Act, a spouse is "a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriages Act, the Recognition of Customary Marriages Act, the Civil Union Act or the tenets of a religion". There is legal debate around whether permanent life partners are a category of spouse on their own or whether, to be a permanent life partner, the relationship must be recognised by one of the above acts or religion.

It can be argued that the words "permanent life partner, spouse or civil union partner" indicate that a permanent life partner is a category of spouse on its own (for the purposes of the Act) because persons married in terms of the Marriages Act, the Recognition of Customary Marriages Act, Civil Union Act or tenets of a religion already have legal recognition as spouse. Permanent life partners were included in the definition of spouse because without that, they would not be accorded that status and would not qualify for a spouse's pension.

Their inclusion in that definition therefore elevates their status to that of spouses for the purpose of pension-related benefits. The important point here for funds is that if the cohabitation is not in terms of any act (or religion or custom), the surviving person may still be regarded as a spouse if there was evidence of a permanent life partnership. And if not, it is highly unlikely that someone claiming status as a permanent life partner would not also at least qualify as a factual dependant on the basis of the mutual dependency they carried in a shared household. This would qualify one as a dependant for the purposes of section 37C but possibly not for a spouse's pension on death.

The principle was clarified in the Pension Fund Adjudicator's determination in *Chittenden v Escourt Butchery Provident Fund*, in which the Adjudicator formulated a two-part test for factual dependency in circumstances of unmarried cohabitants. The question was, firstly, whether the parties lived in a relationship of mutual dependence and secondly whether the parties ran a shared and common household. The requirement of mutual dependency must involve, among other things, an emotional and intimate or sexual bond.

### REFERENCES

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# TERMINOLOGY

## USEFUL TERMS TRANSLATED INTO ISIXHOSA, ISIZULU AND SESOTHO

### Imihlomulo yomshado, isehlukaniso kanye nokuthatha umhlalaphansi

Esikhwameni yempesheni noma esikhwameni sikadekle (*i-provident fund*), **inzalo yempesheni** iyisamba semali lowo oganene naye okumelele asithole uma lowo oganene naye esula emsebenzini ngosuku lwesehlukaniso somshado. Lokhu akuchazi ukuthi ilungu lesikhwama somhlalaphansi lidinga ukuhlukanisa inzalo yempesheni yalo phakathi ukuze likhokhele lowo ebeliganene naye ngaphambilini. Linalo ilungelo lokuzikhethelela ukukhokha isamba leso okumelele lowo elaliganene naye ngaphambilini asithole esikhwameni somhlalaphansi, noma kwenye ingcebo elinayo efeni lalo. Okunye, okubalulekile ukuthi ukuqaphele ukuthi isicelo senkokhelo senzalo yempesheni esifakwe maqondana nomuntu oganene naye asinawo umkhawulo ka-50%. Ngokomthetho, labo abathintekayo bangafaka isicelo senkokhelo sanoma yimalini kusuka ku-0.1% kuya ku-100% womhlomulo wenzalo yempesheni yalabo ababaganene nabo ngaphambilini.

**Isivumelwano esenziwa kungakashadwa** kungenwa kusona lapho abaganene bengafuni ukushada ngomshado ohlanganisa amafa futhi siphothulwa ngaphambi komshado. Isivumelwano esenziwa kungakashadwa singaba semqoka kakhulu ikakhulukazi kumuntu osenempahla nengcebo egameni lakhe kakade (isb. ibhizinisi) noma izibopho zomndeni (isb. izingane) azithola emshadweni wangaphambilini. Lesi sivumelwano siqinisekisa ukuthi laba abaganene bagcina amafa abo ngokwehlukana futhi abanaso isibophezelo sokuthwala izikweletu zomunye nomunye wabo, ukwenza isibonelo, ngaphandle-ke uma bethathe isikweletu ngokuhlanganyela noma uma oganene naye ehlinzeke ngesibambiso esiqondene naye siqu ngesikweletu esithathwe yilowo oganene naye.

### Isivumelwano esenziwa kungakashadwa esiqongelela impahla noma esingaqongeleli impahla

Esivumelwaneni esingaqongeleli impahla, abaganene bagcina lokho abanakho ngaphambi komshado baphinde futhi bagcine lokho ababa nakho ngemuva komshado. Uma isivumelwano sinohlelo lokuqongelela impahla, umuntu ngamunye kwabaganene usazogcina ifa lakhe, kodwa isivumelwano yisona esinquma ukuthi impahla eqongelelwa efeni lomlingani ngamunye kulabo abaganene izohlukaniswa kanjani ngokuhlanganyela.

Impahla eqongeleliwe ibhekelelwa lapho umshado uphela ngenxa yesehlukaniso noma ukufa. Uma kwenzeka umshado uphela, umlingani onempahla encane eqongeleliwe unelungelo lokufaka isicelo senkokhelo kulona omunye umlingani. Isicelo senkokhelo esika-50% womehluko phakathi kwempahla eqongelelele kumanani amafa omabili, nanoma yiliphi iphesenti njengoba kuvunyelwene ngalo yizinhlangothi zombili esivumelwaneni sabo esenziwa kungakashadwa.

### Manyalo a setso le ho beha meja fatshe

**Molao wa setso** o bolela meetlo le ditshebetso tse latelwang ka tlwaelo hara batho ba MaAfrika ba Afrika Borwa mme tse thehang karolo ya botjhaba ya batho bao.

### Lenyalo la setso le bolela lenyalo le phethilweng ho latela molao wa setso.

**Bohadi (Lobola)** bo bolela thepa kapa tjelete, ho sa natswe hore na bo tsejwa ka hore ke lobola, bogadi, bohali, xuma, lumalo, takha, ikhazi, magadi, emabheka kapa ka lebitso le leng lesele, boo monyadi ya nyalang kapa hlooho ya lelapa e itlamang ho fana ka yona ho hlooho ya lelapa la monyaduwa jwaloka tefo bakeng sa lenyalo la setso.

### Umuntu oganene naye uma eqhathaniswa nomlingani wakho impilo yonke

Isimo sabalingani bempilo yonke kanye nenkulumo-mpikiswano yezomthetho mayelana nencazelo "yomuntu oganene naye" kuvamise ukuba udaba olushisa ibunzi okuye kudingeke ukuba izikhwama zezimpesheni nezokuthatha umhlalaphansi zidlule kulo. NgokoMthetho Wezikhwama Zempesheni, umuntu oganene naye "ngumuntu owumlingani wakho impilo yonke noma umuntu oganene naye noma umlingani welungu elishade naye ngokomthetho kahulumeni ngokuhambelana noMthetho Wezemishado, uMthetho Wokwamukelwa Kwemishado Yesintu, uMthetho Wokushada Ngokukahulumeni noma ngokwemigomo yezimfundiso zenkolo". Kunenkulumo-mpikiswano yezomthetho mayelana nokuthi ngabe abalingani bempilo yonke bawumkhakha ozimele womuntu oganene naye noma ngabe, ukuba umlingani womuntu impilo yonke, ubudlelwane kufanele bamukelwe kumbe bugunyazwe omunye wale mithetho engenhla noma inkolo.

Sekungaqophiswana ngokuthi amagama athi "umlingani wakho impilo yonke, oganene naye noma umlingani oshade naye ngokukahulumeni" achaza ukuthi umlingani wakho impilo yonke uwumkhakha womuntu oganene naye ngokuzimele (ngokwezinhloso zoMthetho) ngoba abantu abashade ngokoMthetho Wezemishado, uMthetho Wokwamukelwa Kwemishado Yesintu, uMthetho Wokushada Ngokukahulumeni noma imigomo yezimfundiso zenkolo seabamukelwe kakade njengomuntu oganene naye ngokomthetho. Abalingani bempilo yonke bafakwa encazelweni yomuntu oganene naye ngenxa yokuthi ngaphandle kwalokho, bebengeke banikezwe leso sikhundla futhi bebengeke bafaneleke ukutho-la izimali zempesheni zabantu abaganene nabo.

Ukufakwa kwabo kuleyo ncazelo ngaleyo ndlela kukhuphulela isikhundla sabo kuleso somuntu oganene naye ngenhloso yemihlomulo ehlobene nemali yempesheni. Iphuzu elisemqoka lapha ezikhwameni zezimpesheni elokuthi uma umshado ungewona owanoma yimuphi uMthetho (noma inkolo kumbe usikompilo), umuntu usengathathwa njengomuntu oganene nelungu lesikhwama uma kunobufakazi bokuthi babe ngabalingani impilo yonke. Kanti uma kungenjalo, mancane amathuba okuthi umuntu othi ungumlingani wempilo yonke ngeke futhi afaneleke ngisho ukuba wumuntu okade ondlwa yilungu ngokweqiniso okungenani maqondana nokondlana kwabantu abaganene abebekwenza emzini wabo abebhelala kuwo ngokuhlanganyela. Lokhu kungenza umuntu afaneleke njengomuntu okade ondlwa yilungu ngezinhloso zesigaba 37C kodwa okuseqiniseni ngeke afaneleke ukutho-la izimali zempesheni zomuntu oganene naye lapho eshona lowo oganene naye.

### 'U-Vat en Sit': Ukuhlalisana namalungelo asemthethweni'

**UVat en Sit:** Inguqulelo ethe ngqo yale ntetho yesiAfrikaans ithi "thatha uhlele phantsi", okuthetha ukuthatha iqabane nize nihlele kunye ngaphandle kweemfaneleko ezihamba nomtshato.

**Ukuhlalisana:** Apho abantu ababini behlala kunye kodwa bengatshatanga.

**Ubuqabane jikelele:** Iimeko apho kuvakaliswa okanye ubukhulu becala kubekho isivumelwano esinesihlahla phakathi kwabantu ababini abangatshatanga abahlala kunye kangangethuba elide. Ngokuqhelekileyo, la maqabane abelana ngeemfaneleko, imisebenzi nezinyanzeliso ezifanayo njengezibini ezitshatelayo, zinto ezo ezisoloko ziquka umvuzo, iindleko neeaseti.

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**Please select the correct answer by marking the correct box below each question.**

**True or False? Cohabitation is where two individuals live together but are not married.**

- True  
 False

### Cultural practices and retirement funds

**Q1: Which section of the Pension Funds Act relates to the distribution of death benefits? Choose the correct answer.**

- A. Regulation 28  
 B. Section 37C  
 C. PF130  
 D. Section 42B

**Q2: True or False? In terms of the Divorce Act, in the event of divorce, your retirement benefit forms part of your assets and must be considered when dividing your marital assets.**

- A. True  
 B. False

**Q3: What is pension interest? Choose the correct answer.**

- A. Pension interest is the amount of money that you receive in addition to your pension if your retirement fund takes too long to pay out your pension at the time of your retirement.  
 B. Pension interest is any bank interest you earn on your monthly pension payment once it's paid into your bank account.  
 C. Pension interest is the amount of money that a spouse would have received if they resigned on the date of the divorce.  
 D. Pension interest is what is due to your dependants should you pass away prior to your retirement.

**Q4: True or False. An antenuptial agreement is only valid if it is contracted before the wedding?**

- A. True  
 B. False

**Q5: Which regulation change in 2007, applies to pension, provident, retirement annuity and preservation funds, which allows the divorcing non-member spouse to immediately claim the portion of the divorcing member's pension interest and can elect to receive a cash benefit or transfer the benefit to another retirement fund?**

- A. Divorce break principle  
 B. 'Vat en sit' principle  
 C. Clean break principle  
 D. Universal Partnership

**Q6: A spouse is defined by the Pension Funds Act as a person who is the permanent life partner or spouse or civil union partner of a fund member in accordance with which of the following requirements? Choose the correct answer.**

- A. Upon the payment of lobola under the Recognition of Traditional Marriages Act.  
 B. The Divorce Act, Recognition of Traditional Marriages Act, Civil Union Act or the doctrine of religion.  
 C. The Holy Matrimony Act, Recognition of Customary Marriages Act, Civil Union Act or a doctrine of faith.  
 D. The Marriage Act, Recognition of Customary Marriages Act, Civil Union Act or the doctrine of religion.

**Q7: True or False? The Recognition of Customary Marriages Act only requires the payment of lobola to legally recognise a customary marriage.**

- A. True  
 B. False

**Q8: Section 37C imposes a duty on the board of trustees to do which of the following? Choose the correct answer.**

- A. Place an advert in the newspaper notifying the deceased member's beneficiaries of his/her death  
 B. Pay out the death benefit exactly as per the deceased member's nomination form  
 C. Conduct a proper investigation to determine all the dependants of the deceased member before making payments to beneficiaries  
 D. Refer to the deceased member's Last Will & Testament to follow his/her wishes in terms of any inheritance payments to family members

**Q9: True or False? If you are unmarried and live together for an extended period of time, you are automatically considered to be married under the common law.**

- True  
 False

**Q10: In an antenuptial agreement without accrual... Choose the correct answer.**

- A. Partners keep what is theirs before marriage and also keep what becomes theirs after marriage  
 B. Partners share all assets 50/50  
 C. Partners are married in community of property  
 D. Partners can choose who gets what at the time of divorce

