

# FINANCIAL MATTERS AMENDMENT BILL [B 1B-2019]

*Briefing to Select Committee on Finance, National  
Council of Provinces*

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**national treasury**

Department:  
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# Background

- Bill seeks to amend
  - Insolvency Act, 1936 to provide for a process when a creditor realises his/her security in terms of a master agreement and for a power for the Master to deal with disputes raised by trustee and other creditors regarding preference of that secured creditor
  - Military Pensions Act, 1976 by introducing gender neutrally and recognising various forms of legal marriages for purposes of benefits for all military staff in accordance with right to equality in section 9 of Constitution
  - Banks Act, 1990 to enable qualifying state-owned companies to apply for banking licences subject to executive approval
  - Government Employees Pension Law, 1996 by introducing principle of “service reduction approach” to ensure that member’s pension pay-outs to former spouses upon divorce are not converted to debt obligation as is case under current approach
- Bill (incl amendments to Auditing Profession Act) was published for public comment on 24 August 2018 with closing date of 14 September 2018
- Bill (incl amendments to Auditing Profession Act) was introduced in Parliament on 31 January 2019
- SCOF adopted Bill (excl amendments to Auditing Profession Act) on 7 March 2019
- NA passed Bill on 13 March 2019

# 1. Military Pensions Act

- According to section 9(1) and (3) of Constitution
  - everyone is equal before law and has right to equal protection and benefit of law
  - State may not unfairly discriminate directly or indirectly against anyone on any grounds such as gender, sex and sexual orientation
- Military Pensions Act
  - provides for, among others, pensions and gratuities for certain persons in respect of disability caused or aggravated by military services
  - recognises certain marriages and male gender for purposes of benefits in manner contrary to section 9 of Constitution e.g. section 1 defines "dependant" in relation to member, to be his wife or child
    - This definition assumes that members are only husbands in heterosexual relationships and furthermore perpetuates discriminatory stereotypes that only heterosexual relationship is acceptable

# 1. Military Pensions Act (cont..)

- Military Pensions Act disregards fact that military service comprises of both men and women who are in different types of relationships which are treated equally in terms of Constitution and recognised in other laws, such as Marriages Act, 1961 and Civil Union Act, 2006
- Bill proposes, among others, amendment of word "spouse" to include members in different types of relationships and deletion of definition of "wife" and "widow"
- To ensure gender neutrally, Bill also proposes replacing term "widow" for "spouse" and "marital state" for "spousal status"

# 2. Government Employees Pension Law

- GEP Law regulates Government Employee Pension Fund (GEPF)
- Non-member spouses of GEPF members
  - were denied their share of pension benefit immediately upon divorce or dissolution of customary marriage and
  - had to wait until their member former spouses became entitled to their own benefit
- Pension Funds Act, 1956 entitled non-members spouses to their pension interest in funds, governed by that Act, **upon** divorce or dissolution of customary marriage, so-called “clean-break principle”
- In *Wiese v GEPF* matter, Court declared
  - GEP Law inconsistent with section 9(1) of Constitution in so far as it fails to afford former spouses of GEPF members same rights and advantages as are afforded to former spouses of members of funds under Pension Funds Act

# 2. Government Employees Pension Law (cont...)

- To implement Court's order, Parliament amended GEP Law in 2011 by inserting section 24A to provide for "clean-break principle"
- Portion of member's pension interest assigned to non-member spouse is deemed to accrue as debt ('forced loan') to member on date on which decree of divorce or for dissolution of customary marriage is granted
- Amount paid to non-member spouse in giving effect to clean-break principle is regarded by GEPF rules as debt due by member ("the divorce debt approach") to GEPF
- Rules of GEPF (rule 14.10.9) require that divorce debt be created at time member divorces or at dissolution of customary marriage in respect of amount paid to former spouse
- Debt carries interest

# 2. Government Employees Pension Law (cont)

- Members have opportunity to settle portion or full debt over period of membership should they so wish, but if unsettled amount remains at time member exits GEPF, debt is deducted from benefit payable
- On retirement of member, in terms of current GEPF rules, divorce debt is offset against member's gratuity entitlement
- Should gratuity be less than outstanding divorce debt, balance of debt is recovered by reduction in annual pension. Then member will retire and not receive any cash on retirement

# 2. Government Employees Pension Law (cont)

- Most of pension funds under pension Funds Act steered away from debt principle and opted to adjust a member's pensionable service for divorce benefit purposes
- To address prejudice to GEPF members the Bill proposes replacement of debt approach with reduction of member's year of pensionable service ("the service reduction approach")
- A "clean break" is preferable
  - Upon divorce, years of service is adjusted and that is the end of it as opposed to "debt" potentially growing depending on how soon it is settled
- Bill has transitional measure allowing members whose amount of pension benefit is subject to reduction because of debt approach (immediately prior to amendment), to choose whether divorce debt approach **or** service reduction approach must be applied to benefit

# 3. Banks Act

- Under Companies Act, 2008, state-owned companies are no longer classified as public companies
- Currently, Banks Act only allows for public companies to establish a bank. As a result, state-owned companies meeting prudential and other requirements of Banks Act, are unable to apply for authorisation to establish bank
- To limit fiscal risks of state-owned banks which may, in terms of its founding legislation, be able continue to operate despite being not a going concern, it is proposed that only national state-owned companies that are financially sound may apply for authorisation to establish bank

# 3. Banks Act (cont)

- Bill proposes that—
  - national state-owned company must first obtain approval of Minister of Finance, acting with concurrence of Minister responsible for state-owned company to apply for authorisation to establish bank
  - assets of company, its holding company and, if applicable, holding company of its holding company, must exceed its liabilities
- Bill limits definition of “public company” in section 1 of Companies Act by—
  - allowing national state-owned-companies, only, to apply for authorisation to establish bank
  - excluding enterprise owned by municipality from qualifying to register as bank

# 4. Insolvency Act

- Rationale for amending Insolvency Act is to ensure that South Africa complies with its G-20 international obligations on exchange of margin
- G20 obligations require that collateral security of over-the-counter (OTC) derivatives must be easily and readily realisable upon default of one of the counterparties due to insolvency
- OTC derivatives are contracts that are traded (and privately negotiated) directly between parties (i.e. banks) without going through a security exchange or other intermediary
  - E.g. forward rate agreements are often trade in this way

# 4. Insolvency Act

- Proposed amendments to Insolvency Act
  - provide for a process when a creditor realises his/her security in terms of a master agreement and for a power for Master to deal with disputes raised by trustee and other creditors regarding preference of that secured creditor
  - allows a creditor who has realized his/her collateral security to retain proceeds of realisation for settlement of secured claim
  - empowers trustee or another creditor to raise a dispute on preference, and consequently, empowers Master to settle dispute
  - empowers trustee to approach a court if Master is of opinion that dispute of preference is well founded

***Thank you***