

GOVERNMENT EMPLOYEES PENSION LAW AMENDMENT BILL, 2011

*Responses to Submissions Provided to the Standing Committee on Finance, and to
Queries from the Committee*

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national treasury

Department:
National Treasury
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COSTING OF THE REVISED NON-STATUTORY FORCES (“NSF”) PENSION DISPENSATION

- It is estimated (by the GEPF actuary) that the additional liability owed to the GEPF by the respective Departments and/or Institutions is R4, 735 billion as at 31 December 2010. In order to maintain the Fund’s funding requirements, the Board of the GEPF has requested that in respect of members who have already exited the Fund, a lump sum payment of R1, 378 billion be made (as per the actuary calculations).
- The GEPF will require a cash injection of R1, 378 billion for the payment of lump sums to members who have already exited.

Determination of Financial Implications

The costing of the financial implications relating to the implementation of the Revised NSF Pension Dispensation was done as follows:

The GEPF supplied data in respect of the 23 250 members. The details supplied for these members included:

- Pension number;
- Name and Initials;
- Date of birth;
- Date joined NSF (*“NSF date”*);
- Integration date;
- Date of appointment into the GEPF (*“Service date”*);
- Exit date (if applicable);
- Exit reason (if applicable);
- Employer code; and
- Average salary.

CALCULATION OF FINANCIAL IMPLICATIONS (CONT.)

- The cost is based on the current list of employers provided by the GPAA. The cost may change in the future as more members come forward who qualify for NSF service, or if the employer on record is incorrect.
- **METHODOLOGY:** Active members as at 31 December 2010
 - The cost involved in changing the dispensation was calculated as the difference between:
 - The Actuarial Interest a member receives based on his pensionable service including the additional NSF service the member is entitled to receive; and
 - The Actuarial Interest a member receives based on his pensionable service excluding any NSF service the member is entitled to receive.

CALCULATION OF FINANCIAL IMPLICATIONS (CONT.)

- **METHODOLOGY:** Exits as at 31 December 2010
 - The cost involved in changing the dispensation was calculated as the difference between:
 - The benefits a member receives (depending on the exit reason of the particular member) based on his pensionable service including the additional NSF service the member is entitled to receive; and
 - The benefits a member receives (depending on the exit reason of the particular member) based on his pensionable service excluding any NSF service the member is entitled to receive.
- The results have then been accumulated with interest, from the particular date of exit of each member to 31 December 2010.

CALCULATION OF FINANCIAL IMPLICATIONS (CONT.)

- Interest has been calculated as follows:
 - *Short-term interest*. The cost at the date of exit has been accumulated with late payment interest, in accordance with the late payment interest rate policy of the GEPF to 30 March 1998 (the earliest date at which the NPI is available);
 - *Market-related interest*. It was estimated that the funds backing the GEPF earned an investment return in line with the growth of the Notional Portfolio Index (“NPI”). The cost has then been accumulated with investment returns approximated by the NPI from 31 March 1998 until 30 September 2010, the latest date at which the NPI is available;
 - *Short-term interest*. Late payment interest, in accordance with the late payment interest rate policy of the GEPF, was then added from 1 October 2010 to 31 December 2010.

SUMMARY OF COSTS

The total cost as at **31 December 2010** for all departments, can be summarized as follows:

	Department Defence	of All other Departments	Total
Number of members 19 669 3 581 23 250	19 669	3 581	23 250
Cost for Exits as at 31 December 2010 (R' m)	2 727.72	989.70	3 717.42
Cost for Active members as at 31 December 2010 (R' m)	2 759.05	914.25	3 673.30
Total (R' m)	5 486.77	1 903.95	7 390.72
Less: Amount already paid by Employers (R' m)	492.59*	1 151.86**	1 644.45
Less: Reserve Account Balance for NSF Past Discriminatory Practices (R' m)	1 011.55***	-	1 011.55
Total (R' m)	3 982.63	752.09	4 734.72

ADDRESSING THE FINANCIAL IMPLICATIONS

- The National Treasury's position on the reimbursement of the GEPF for the additional liability arising out of the revised NSF pension dispensation is that it is dependent on the appropriation of funds for this purpose by Parliament. A submission will be made to the Ministers Committee on the budget this year, for inclusion of the required funding in the 2012 MTEF allocations.
- However, the National Treasury will need to conduct an appropriate actuarial diligence exercise to verify the costs. Documentation/information has been requested from the GEPF for this purpose.

SUBMISSION BY THE COMMISSION ON GENDER EQUALITY

- The Commission on Gender Equality proposes that a definition of “spouse” be included in the Government Employees Pension Law Amendment Bill (“the Bill”), in order to ensure that all types of relationships, including civil unions and religious marriages will be covered by the Bill, and will be able to have the benefit of the application of the “clean break” principle.
- A query relating to this concern that the “clean break” principle would be able to be applicable to the various types of relationships was earlier posed by a member of the Committee during the briefing to Committee on the Bill, and it was queried whether potentially the term “marriage” may need to be defined in the Bill.
- The Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996) (“the GEPL”) does not currently contain a definition of “spouse” or “marriage”.
- The Rules of the GEPF contain a definition of “spouse”.

SUBMISSION BY THE COMMISSION ON GENDER EQUALITY (CONT.)

- The Divorce Act, 1979 (Act No. 70 of 1979) (“the Divorce Act”), does not define “marriage”, although the Act does refer to the dissolution of marriage.
- Section 7 of the Divorce Act deals with the granting of a decree of divorce, and that section does not specifically refer to “marriage”.
- The Divorce Act also does not define the term “spouse”, although that term is used in the Act, including some of the subsections of section 7.

SUBMISSION BY THE COMMISSION ON GENDER EQUALITY (CONT.)

- In relation to civil unions, the Civil Union Act, 2006 (Act No. 17 of 2006) (“the Civil Union Act”) does not specifically address the dissolution of civil unions.
- Section 13 is important, as it addresses the legal consequences of a civil union. Section 13 provides as follows:
“**13. Legal consequences of civil union.**—(1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.
(2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to—
 - (a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
 - (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.

SUBMISSION OF THE COMMISSION ON GENDER EQUALITY (CONT.)

- Therefore, in the Divorce Act, references to the dissolution of a marriage would also include the dissolution of a civil union, and the procedures provided for in the Divorce Act in relation to the dissolution of marriages and the granting of decrees of divorce would also apply to the dissolution of civil unions.
- This interpretation was supported in the recent court case of *AS v CS* 2011 (2) SA 360 (WCC).
- The Court found that a same-sex marriage or same-sex partnership concluded under the Civil Union Act was capable of dissolution under section 3 of the Divorce Act. A same-sex union concluded under the act was fully recognizable as a marriage, whether the parties chose to call it a marriage or a civil partnership, and such a union was capable of dissolution under the Divorce Act.

SUBMISSION BY THE COMMISSION ON GENDER EQUALITY (CONT.)

- In relation to the dissolution of customary marriages, the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) (“the Recognition of Customary Marriages Act”) in section 8 deals with the dissolution of customary marriages, and makes the procedures provided for in the Divorce Act applicable in relation to the dissolution of customary marriages.

Dissolution of Customary Marriages

- 8. Dissolution of customary marriages.**—(1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.
- (2) A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.
- (3) The Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) and section 6 of the Divorce Act, 1979 (Act No. 70 of 1979), apply to the dissolution of a customary marriage.
- (4) A court granting a decree for the dissolution of a customary marriage—
- (a) has the powers contemplated in sections 7,8,9, and 10 of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984);
 - (b) must, in the case of a husband who is a spouse in more than one customary marriage, take into consideration all relevant factors including any contract, agreement or order made in terms of section 7(4), (5), (6) or (7) and must make any equitable order that it deems just;
 - (c) may order that any person who in the court’s opinion has a sufficient interest in the matter be joined in the proceedings;
 - (d) may make an order with regard to the custody or guardianship of any minor child of the marriage; and
 - (e) may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with customary law.
- (5) Nothing in this section may be construed as limiting the role, recognised in customary law, of any person, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by a court.”

Submission by the Commission on Gender Equality

- Therefore, in light of how the Civil Union Act and the Recognition of Customary Marriages Act provide for the application of the Divorce Act and the procedures relating to the granting of divorce orders to civil unions and customary marriages, the manner in which the Bill provides for the application of the “clean break” principle in relation to orders for divorce or for the dissolution of a customary marriage would apply in relation to civil unions and customary marriages.
- The one type of relationship which is not clearly dealt with in the Divorce Act or other legislation, and which the Commission on Gender Equality has highlighted in its submissions, is a spouse in terms of a religious marriage.

Submission by the Commission on Gender Equality (Cont.)

In this regard, it is notable that in the Pension Funds Act, 1956 (Act No. 24 of 1956), “spouse” is defined as follows:

“**spouse**” means a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act No. 68 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 68 of 1997), or the Civil Union Act, 2006 (Act No. 17 of 2006), or the tenets of a religion.

It is also notable that a similar definition is included in the Rules of the GEPF, where “spouse” is defined as follows:

“**spouse**”, shall mean the following for the purpose of eligibility to benefits: A person who is—

- a lawful husband or wife; or
- a life partner (including same sex life partner); or
- a husband or wife in terms of the Recognition of Customary Marriages Act, 1998 or the tenets of any religion, of the member or pensioner at the date of the member’s or pensioner’s death:

Provided that a member or pensioner—

- (a) should register with the Fund his or her spouse;
- (b) should register with the Fund all spouses in terms of the Recognition of Customary Marriages Act, 1998 or the tenets of any religion;
- (c) who has (a) spouse(s) in terms of the Recognition of Customary Marriages Act, 1998 or the Marriages Act, 1961, or the tenets of any religion may not register a life partner with the Fund.

Submission by the Commission on Gender Equality (Cont.)

- The National Treasury would support the inclusion of a definition of “spouse” in the Bill, for purposes of ensuring appropriate clarity.
- The Rules of the GEPF have already been crafted so as to apply appropriately to all of the various types of relationships.

Submission by the Cape Bar Council

- The Cape Bar Council proposes that the Bill could be improved by incorporating by reference, provisions of the Income Tax Act, 1962 (Act No. 58 of 1962) (“the Income Tax Act”), so that the question of the tax to be paid on any amount to be assigned to a non-member spouse from a member's benefit is dealt with as is set out in section 37D (1), d(ii), of the Pension Funds Act, 1956 (Act No. 24 of 1956). That provision provides as follows:
 - "(1) A registered fund may—
 - (d) deduct from a member’s benefit or minimum individual reserve, as the case may be—
 - (i) any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7 (8) (a) of the Divorce Act, 1979 (Act No. 70 of 1979);
 - (iA) any amount payable in terms of a maintenance order as defined in section 1 of the Maintenance Act, 1998 (Act No. 99 of 1998); and
 - (ii) employees’ tax required to be deducted or withheld in terms of the Fourth Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), as a result of the deduction referred to in subparagraph (i) or (iA);"

Submission by the Cape Bar Council (Cont.)

- It is also recommended that sections 2(1)(b)(iA), Section 2(2)(a) and Section 2B of the Second Schedule to the Income Tax Act be specifically incorporated by reference in the Bill.
- These provision provide as follows:
 - "2. (1) Subject to the provisions of section 9 (1) (g) and paragraphs 2A, 2B and 2C, the amount to be included in the gross income of any person in terms of paragraph (e) of the definition of “gross income” in section 1 shall be—
 - (b) any amount—
 - (iA) assigned in terms of a divorce order granted on or after 13 September 2007 under section 7 (8) (a) of the Divorce Act, 1979 (Act No. 70 of 1979), to the extent that the amount so assigned is deducted from the minimum individual reserve of that person’s former spouse in terms of section 37D (1) (d) (i) of the Pension Funds Act, 1956 (Act No. 24 of 1956), or is so deducted in terms of section 37D (1) (d) (ii) of that Act as a result of the deduction contemplated in section 37D (1) (d) (i) of that Act;

Submission by the Cape Bar Council (Cont.)

- "(2) An amount contemplated in subparagraph (1) (b) shall be deemed to accrue to a person—
(a) in the case of an amount contemplated in subparagraph (1) (b) (iA), on the date on which an election is made as contemplated in section 37D (4) (b) (ii) of the Pension Funds Act, 1956 (Act No. 24 of 1956), or on the date on which the amount is paid in terms of section 37D (4) (b) (iv) of that Act;"
- "2B. For the purposes of paragraphs 2 and 2A, where a court has made an order that any part of the pension interest of a member of a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund shall be paid to the former spouse of that member, as provided for in the Divorce Act, 1979 (Act No. 70 of 1979), the amount of that part is, to the extent that that amount is not deducted from the minimum individual reserve of that member in terms of section 37D (1) (d) (i) of the Pension Funds Act, 1956 (Act No. 24 of 1956), deemed to be an amount that accrues to that member on the date on which the pension interest, of which that amount forms part, accrues to that member: Provided that so much of any tax payable as is due to the inclusion in the income of such person of any amount in accordance with the provision of this paragraph, may be recovered by such person from the former spouse to whom or in whose favour the part in question is paid or becomes payable."

Submissions by the Cape Bar Council (Cont.)

- The current wording of these provisions does not appropriately cater for the GEPF, and amendments will need to be made to the Income Tax Act, to provide appropriately for the GEPL, as it will be amended by the Bill to provide for the "clean break" principle.
- It is important that the tax amendments should be addressed in the Taxation Laws Amendment Bill, and not in the GEPL Amendment Bill. It is not desirable that tax legislation be enacted through other mechanisms unless absolutely necessary.
- The required amendments will be drafted this year and will be included in the Taxation Laws Amendment Bill for 2012.
- To the extent deemed necessary, the amendments can apply retrospectively.

Submissions by the Cape Bar Council (Cont.)

- The amendments to the Income Tax Act will have to refer directly to the GEPL as it will be amended to provide for the implementation of the “clean break” principle, take into account the current position for members of other (non-GEPF) retirement funds from a parity perspective, and determine the application of Formula C (the pre-1998 tax free portion) in the case of former spouses of GEPF members.
- The Cape Bar Council expresses support for the proposed wording included in subclause (4) of the provisions that the Cape High Court indicated would be read in to section 24A of the GEPL if the GEPL was not appropriately amended to apply the "clean break" principle within the 12 month period of suspension of Constitutional Invalidity provided for in the court order of the Cape High Court. This subclause provides for the application of the provisions of the Income Tax Act noted above to be applicable *mutatis mutandis* in relation to the GEPF.

Submissions by the Cape Law Society

- It would not be desirable from legislative drafting perspective to provide that the above Income Tax Act provisions apply *mutatis mutandis* to the GEPF.
- A reference to provisions of the Income Tax Act applying *mutatis mutandis* to the GEPF would have the potential to introduce uncertainty and ambiguity regarding how the Income Tax Act will apply to the pension payments made in terms of the "clean break" principle, to the degree that the existing provisions of the Income Tax Act do not accurately apply to the GEPF.
- It would be preferable to effect appropriate amendments to the provisions in the Income Tax Act, to include specific appropriate references to the GEPF.
- This approach would avoid the potential unintended uncertainty or ambiguity arising regarding how the Income Tax will apply to the pension payments made in terms of the "clean break" principle.

Submission by Ms. Malefsane Anna Molefe

- Ms. Molefe submits that the GEPF should be guided by a Settlement Agreement that a former couple may have signed when their marriage was dissolved by the Court, provided that the member of the GEPF submitted a copy of the Settlement Agreement to their HR department.
- If the former couple agreed that the former spouse should not benefit from the pension interest, or should benefit only a specific percentage, that should be honoured.
- The GEPL should not specify the pension interest percentage to be paid to the former spouse or specify that the former spouse should benefit on the pension interest.

Submission by Ms. Malefsane Anna Molefe (Cont.)

- If an agreement is entered into between the former spouses, that agreement could be endorsed and made an order of court when a divorce order is granted in terms of the Divorce Act. If a settlement agreement is made part of the court order, that court order would determine whether and what percentage of the pension interest a former spouse would receive.
- The GEPF would be bound act in accordance with a settlement agreement that is made an order of court regarding how a pension interest must be dealt with on divorce, and whether any portion, and what portion, must be paid over to the former spouse.
- The Bill does not require the GEPF to determine a payment of a pension interest to a former spouse that would be contrary to what was agreed between the former spouses and made an order of court.
- The Bill stipulates how the GEPF must calculate the pension interest of a member and implement a court order that requires that a portion of the pension interest of a member must be paid over to the former spouse.

PRESERVATION

- ***What is preservation?***
- Preservation is the requirement that money saved for retirement through a pension fund or provident fund, should remain in such a fund until the person retires, or should be rolled over into another similar retirement savings vehicle (without incurring taxes or penalties) when a person changes jobs.

PRESERVATION (CONT.)

- ***Why is there a concern about lack of preservation?***
- Preservation is currently applicable in the retirement funding space but is voluntary and few people exercise this option. Recent statistics by the Sanlam Benchmark Survey show that out of 152 members who left retirement funds through resignation or retrenchment, 107 (70 per cent) members took the full benefit in cash.
- The lack of mandatory preservation results in leakages caused by payments to members leaving pension and provident funds upon job changes, retrenchment or to non-member spouses in the case of divorce order. This would ultimately translate to employees not having sufficient income upon retirement; lead to an increased social security burden and adversely affect long term economic growth.

PRESERVATION (CONT.)

- Due to lack of mandatory preservation for occupational pension funds, there are reported (anecdotal) cases of individuals resigning from their jobs or getting divorced to access their retirement savings from pension and provident funds.
- ***How does Government plan to address the issue of lack of preservation?***
- Government mooted in the 2011 Budget the introduction of mandatory preservation, which is common in the world. Introduction of such a system will mean that pension and provident funds members exiting their funds on the basis of retrenchment or when changing jobs, will not have access to the accumulated retirement savings. Non-member spouses entitled to a portion of the pension benefit at the instance a divorce order being issued will also be encouraged to preserve. This measure is proposed in recognition of the need to protect retirement savings from being squandered due to lack of foresight and long term planning when members leave employers prior to retirement or get divorced.

Implementation of Preservation

- National Treasury is examining and engaging on how to appropriately address preservation, and what would be appropriate preservation requirements for pension payments on divorce.
- Once this has been appropriately examined, considered, and engaged upon, the National Treasury will undertake consistent legislative reform that would be applicable to all pension funds, including the GEPF.
- If preservation is required in the GEPF, while that is not yet required for other Pension Funds regulated under section 37D of the PFA, which permits cash payments to former spouses, there quite likely will be court challenges that that is a discriminatory practice by former spouses, who urgently want access to their pension portion as cash.
- It is, therefore, important that preservation be implemented consistently for all pension funds, at the same time.

THANK YOU
QUESTIONS?