

REPUBLIC OF SOUTH AFRICA

GOVERNMENT EMPLOYEES PENSION LAW AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75): explanatory summary of
the Bill published in Government Gazette No. 34391 of 24 June 2011)
(The English text is the official text of the Bill)*

(MINISTER OF FINANCE)

[B 15—2011]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Government Employees Pension Law, 1996, so as to amend a definition and insert a definition; to provide for the payment of a pension interest to a former spouse of a member on divorce or the dissolution of a customary marriage; to amend the powers of the Board to make rules; to amend the provisions providing for the recognition of pensionable service of former members of non-statutory forces or services; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the the Republic of South Africa, as follows:—

Amendment of section 1 of Proclamation 21 of 1996, as amended by section 1 of Act 35 of 2003 and section 1 of Act 21 of 2004

1. Section 1 of the Government Employees Pension Law, 1996 (hereinafter referred to as the Proclamation), is hereby amended— 5

(a) by the substitution for the definition of “employer” of the following definition:

“ ‘employer’ means—

(a) for purposes of the collection and payment to the Fund of the contributions referred to in section 17(1) and other amounts owing by members to the Fund, the payment to the Fund of the contributions referred to in section 17(2), the administration of membership matters and the payment of benefits to members and their beneficiaries[:];— 15

(i) a department or administration referred to in Schedule 1 or 2 of the Public Service Act, 1994 (Proclamation No. 103 of 1994), or [an organisational] a government component referred to in Schedule [2] 3 of that Act, or any other body or institution which employs persons referred to in section 8 of that Act; 20

(ii) the Public Service Commission established by section [209 of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993)] 196 of the Constitution of the Republic of South Africa, 1996; 25

(iii) a Provincial Service Commission established by a provincial legislature in terms of section 213 of the Constitution of the Republic of South Africa, 1993[,] (Act No. 200 of 1993),

- except where the legislation establishing such a commission specifically excludes its members from membership of the Fund;
- (iv) the Auditor-General referred to in **[section 191]** sections 181 and 188 of the Constitution of the Republic of South Africa, **[1993 (Act No. 200 of 1993)]** 1996;
 - (v) the Office of the Auditor-General **[established in terms of the Audit Arrangements Act, 1992 (Act No. 122 of 1992)]** contemplated in the Public Audit Act, 2004 (Act No. 25 of 2004); or
 - (vi) any other institution or body, determined by the Board as an employer for the purposes of this Law; and
- (b) for all other purposes of this Law in relation to members in the service of the departments, administrations, **[organisational]** government components, bodies and institutions referred to in paragraph (a), the Government;” and
- (b) by the insertion after the definition of “negotiations” of the following definition:
- “**‘pension interest’**, in relation to a member of the Fund who is a party to an action for divorce or for the dissolution of a customary marriage, means the benefits to which that member would have been entitled in terms of the rules of the Fund if the member’s membership of the Fund were to be terminated on the date of the divorce or the dissolution of a customary marriage on account of the member’s resignation from the service of the employer;”.

Amendment of section 21 of Proclamation 21 of 1996, as amended by section 45 of Act 99 of 1998 and section 2 of Act 21 of 2004

2. Section 21 of the Proclamation is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) Subject to section 24A, [No] no benefit or right in respect of a benefit payable under this Act shall be capable of being assigned or transferred or otherwise ceded or of being pledged or hypothecated or, save as is provided in section 26 or 40 of the Maintenance Act, 1998 and section 7(8) of the Divorce Act, 1979 (Act No. 70 of 1979), be liable to be attached or subjected to any form of execution under a judgment or order of a court of law.”.

Insertion of section 24A in Proclamation 21 of 1996

3. The following section is hereby inserted in the Proclamation after section 24:

“Payment of pension interest upon divorce or dissolution of customary marriage

24A. (1) The Board shall direct the Fund to reduce a member’s pension interest by any amount assigned from the member’s pension interest to the member’s former spouse in terms of a decree of divorce granted under section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), or a decree for the dissolution of a customary marriage.

(2) (a) Subject to paragraph (j), for purposes of section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), the portion of a member’s pension interest assigned to the member’s former spouse in terms of a decree of divorce or a decree for the dissolution of a customary marriage is deemed to accrue to the member on the date on which the decree of divorce or the decree for the dissolution of a customary marriage is granted.

(b) The amount of the member’s pension interest in the Fund shall be determined and the amount of the member’s pension interest that is assigned to the former spouse shall be calculated by the Fund in accordance with the rules as at the date of the decree of divorce or the decree for the dissolution of a customary marriage.

(c) Prior to determining the amount of the member’s pension interest that is assigned to the former spouse, the amount of the member’s pension

interest referred to in paragraph (b) shall first be reduced in accordance with the rules by any amount of the member's pension interest which, in a previous divorce or a previous dissolution of a customary marriage, was paid over or awarded to another party.

(d) The amount of any pension benefit that is subsequently payable to the member in terms of the rules will be reduced by the equivalent of the amount of the share of the pension interest of the member which—

- (i) was deemed to accrue to the member as a benefit in advance of the benefit ordinarily payable in terms of the rules; and
- (ii) was assigned to the member's former spouse, less the amount of any additional voluntary contributions, if any, paid by the member to the Fund from time to time, and accumulated over the period from the date on which payment to the former spouse or transfer to the approved fund as referred to in paragraph (e) took place to the date on which the member first became entitled to a part or the whole of the balance of the benefit, with interest as the Board from time to time deems appropriate.

(e) The Fund shall, within 45 days of the submission of the court order by the former spouse of a member, request the former spouse to elect whether the amount to be deducted must be—

- (i) paid directly to the former spouse; or
- (ii) transferred to an approved retirement fund on behalf of the former spouse.

(f) The former spouse shall, within 120 days of being requested to make a choice—

- (i) inform the Fund of the manner in which the amount referred to in paragraph (e) must be dealt with; and
- (ii) if the former spouse chooses that the amount must be paid to the former spouse directly, provide the Fund with the details that are necessary to effect the payment; or
- (iii) if the former spouse chooses that the amount must be transferred to an approved pension fund on his or her behalf, provide the Fund with the details of that approved retirement fund.

(g) The Fund shall pay or transfer the amount within 60 days of being informed of the manner in which the amount shall be dealt with in accordance with the former spouse's choice.

(h) In the event that the former spouse fails to make a choice or identify the approved retirement fund to which the amount should be transferred within the period referred to in paragraph (f), the Fund shall pay the amount directly to the former spouse within 30 days of the expiry of that period.

(i) Despite paragraph (h), in the event that the Fund cannot reasonably ascertain the manner in which the payment to the former spouse shall be effected, the Fund shall retain the amount plus interest as determined by the Board in the Fund, until such time as details of the manner in which that payment shall be effected is made available to the Fund by the member, the former spouse or any other person whom the Fund is satisfied has the necessary authority and capacity to instruct the Fund in that respect.

(j) Any portion of a member's pension interest assigned to a former spouse in terms of a decree of divorce or a decree for the dissolution of a customary marriage granted prior to the enactment of this subsection shall, for purposes of any law other than the Income Tax Act, 1962 (Act No. 58 of 1962), including, but not limited to, section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), be deemed to have accrued to the member on the date of enactment of this subsection, and must be paid or transferred in accordance with paragraphs (a) to (i)."

Amendment of section 29 of Proclamation 21 of 1996

4. Section 29 of the Proclamation is hereby amended by the substitution in subsection (2) for paragraph (g) of the following paragraph:

"(g) from time to time prescribe the benefits or other amounts payable from the Fund to members, their former spouses or their beneficiaries determined in the rules[, **in respect of the pensionable service of members**] in cases or classes

or categories of cases specified by the rules, and the manner in which such benefits or other amounts shall be calculated and the times at which and the manner in which such benefits or other amounts shall be paid;”.

Amendment of section 30A of Proclamation 21 of 1996, as inserted by section 2 of Act 35 of 2003 and amended by section 8 of Act 21 of 2004

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5. Section 30A of the Proclamation is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) If a person contemplated in subsection (1) receives or has received any benefit in terms of the Special Pensions Act, 1996 (Act No. 69 of 1996), or the Demobilisation Act, 1996 (Act No. 99 of 1996), other than a benefit received as a dependant[,]—

- (a) the benefit payable by the Fund shall not be reduced **[in accordance with the rules]** by the amount of any benefit that has been received in terms of the Special Pensions Act, 1996 (Act No. 69 of 1996), or the Demobilisation Act, 1996 (Act No. 99 of 1996); and
- (b) that person’s eligibility to receive any benefit in terms of the Special Pensions Act, 1996 (Act No. 69 of 1996) shall cease on exit from the Fund.”.

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Insertion of section 33A in Proclamation 21 of 1996

6. The following section is hereby inserted in the Proclamation after section 33: 20

“Transitional provision

33A. (1) Any claims, applications, or other matters to be dealt with, and any actions or decisions to be taken in terms of this Law, that were not finalised prior to the commencement of an amendment to this Law, shall be finalised in terms of this Law, as amended.

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(2) Any claims or applications that may have been previously rejected and finalised in terms of this Law prior to the commencement of an amendment of this Law, may be resubmitted for consideration in terms of this Law, as amended.”.

Amendment of laws

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7. The laws specified in the Schedule to this Act are hereby amended to the extent set out in the third column of that Schedule.

Short title and commencement

8. (1) This Act is the Government Employees Pension Law Amendment Act, 2011, and, subject to subsection (2), comes into operation on publication in the *Gazette*.

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(2) Sections 5 and 7 of this Act and the amendment of the laws listed in the Schedule to this Act are deemed to have come into operation with effect from 1 April 2011.

SCHEDULE

LAWS AMENDED

No. and year of Act	Short title	Extent of amendment
Act No. 69 of 1996	Special Pensions Act, 1996	Section 14(4) is hereby amended by the substitution for paragraph (a), of the following paragraph: (a) Subject to paragraph (b), any person's right to a pension in terms of <i>this Act</i> ceases on the day on which [that person's right to a pension]— (i) in terms of the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996), [is recognised as contemplated in section 30A of that Law] <u>that person exits the Government Employees Pension Fund; or</u> (ii) <u>that person's right to a pension is recognised in terms of the rules of any other employee pension or provident fund or scheme established by or under any pension law."</u>

MEMORANDUM ON THE OBJECTS OF THE GOVERNMENT EMPLOYEES PENSION LAW AMENDMENT BILL, 2011

1. BACKGROUND

- 1.1. The Government Employees Pension Fund (“the GEPF”) was established in terms of the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996) (“the GEPL”). The GEPF was established with the object of providing pensions and certain other related benefits to members, pensioners and their beneficiaries.
- 1.2. The GEPL, currently, does not allow a former spouse of a member to claim a portion of a member’s pension interest, in terms of a divorce order or an order for the dissolution of a customary marriage, soon after the divorce order or the order for the dissolution of a customary marriage is granted. The former spouse can only receive a portion of the member’s interest after the exit of the member from the GEPF.
- 1.3. The Government Employees Pension Law Amendment Bill, 2011 (“the Bill”) will amend the GEPL to provide for the implementation of the “clean-break” principle.
- 1.4. The Pension Funds Amendment Act, 2007 (Act No. 11 of 2007), incorporated the “clean-break” principle into the Pension Funds Act, 1956 (Act No. 24 of 1956) (“the PFA”), as section 37D(1)(d), (3)(b), (4) and (5). The “clean-break” principle allows for the non-member spouse to claim and receive a portion of the member’s interest that is assigned in terms of the divorce order or the order for the dissolution of a customary marriage, soon after the divorce order or the order for the dissolution of the customary marriage has been granted. The former spouse does not have to wait until the member exits the pension fund.
- 1.5. Clause 3 of the Bill provides for the insertion of a new section 24A into the GEPL, to provide for the implementation of the “clean-break” principle. The new section 24A will bring the GEPL in line with what is currently provided for in the PFA.
- 1.6. The Bill also contains amendments to enable the implementation of the Revised Non-Statutory Forces (“NSF”) Pension Dispensation.
- 1.7. On 15 April 2009 and 24 November 2010, Cabinet approved the revision of the NSF Pension dispensation by—
 - 1.7.1. abolishing the need for former NSF members to contribute to the funding of the recognition of their NSF Service by the GEPF;
 - 1.7.2. recognising the full period of NSF Service by all former NSF members who entered into an employment contract with all Government departments and institutions that contribute to the GEPF; and
 - 1.7.3. providing that Special Pension benefits paid to qualifying members who are still in service should cease at exit and that members should receive their full pension benefits in accordance with the GEPF Rules.
- 1.8. An amendment to section 30A(2) of the GEPL and a consequential amendment to section 14(4) of the Special Pensions Act, 1996 (Act No. 69 of 1996) (“the Special Pensions Act”), will give effect to the Revised NSF Pension Dispensation as approved by Cabinet.

2. OBJECTS OF BILL

The Bill seeks to amend the GEPL in order to achieve the following objectives:

- 2.1. to provide for the amendment of a definition and the insertion of a new definition;
- 2.2. to provide for the payment of a pension interest to a former spouse of a member on divorce or the dissolution of a customary marriage;
- 2.3. to amend the powers of the Board to make rules; and
- 2.4. to amend the provisions providing for the recognition of pensionable service of former members of non-statutory forces or services.

3. CLAUSE BY CLAUSE ANALYSIS

The Bill is divided into eight clauses, as follows:

3.1. *Clause 1*

Clause 1 of the Bill seeks to provide for the amendment of section 1 by amending the definition of “employer”, which is an important definition in relation to the application of the Revised NSF Pension Dispensation, and inserting a definition for “pension interest”, which is an important term that is used in the Bill.

3.2. *Clause 2*

Clause 2 of the Bill seeks to provide for the amendment of section 21 of the GEPL, to extend the potential for the assignment or transfer of benefits. This is achieved by making section 21 subject to the provisions of the proposed new section 24A that would be inserted into the GEPL through clause 3 of the Bill.

3.3. *Clause 3*

Clause 3 of the Bill seeks to provide for the insertion of a new section 24A into the GEPL, in order to provide for the implementation of the “clean-break” principle upon divorce or the dissolution of a customary marriage. Currently, the GEPL does not provide for the implementation of the “clean-break” principle.

3.4. *Clause 4*

Clause 4 of the Bill seeks to provide for the amendment of section 29(2)(g) of the GEPL, so as to enable the Board to make rules to provide for the appropriate implementation of the “clean-break” principle by the GEPL.

3.5. *Clause 5*

Clause 5 of the Bill seeks to provide for the amendment of section 30A(2) of the GEPL, in order to enable the implementation of the Revised NSF Pension Dispensation that was approved by Cabinet, as noted above.

3.6. *Clause 6*

Clause 6 of the Bill seeks to provide for a transitional provision.

3.7. *Clause 7 and Schedule*

Clause 7 and the Schedule to the Bill seek to provide for the consequential amendment of section 14(4) of the Special Pensions Act, which is necessary to

enable the implementation of the Revised NSF Pension Dispensation that was approved by Cabinet, as noted above.

3.8. *Clause 8*

Clause 8 of the Bill provides for the short title and commencement.

4. **ORGANISATIONS AND INSTITUTIONS CONSULTED**

The Bill resulted from a consultative process between the National Treasury, the GEPF, the Board of Trustees of the GEPF, and the Government Pensions Administration Agency.

5. **FINANCIAL IMPLICATIONS**

The implementation of the “clean-break” principle is not anticipated to have financial implications for government. It will be sought to implement the “clean-break” principle in a manner that will have, as far as possible, a “revenue neutral” effect for the GEPF.

The amendments relating to the provision of Special Pension benefits will have financial implications for government, in the region of R5.804 billion.

6. **CONSTITUTIONAL IMPLICATIONS**

The amendments in the Bill that seek to provide for the implementation of the “clean-break” principle will address the disparity regarding the implementation of the “clean-break” principle between the GEPF and other Pension Funds that are regulated in terms of the PFA. This has been the subject of a constitutional challenge in the High Court case of *Mathilda Wiese and the GEPF and others*.

7. **PARLIAMENTARY PROCEDURE**

7.1 The State Law Advisers and the National Treasury are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

7.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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