

**DRAFT**  
**FINANCIAL MATTERS AMENDMENT**  
**BILL**  
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*Briefing to Standing Committee on Finance*

Presented by  
Mr Langelihle Nkabinde & Adv Ailwei Mulaudzi

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**national treasury**

Department:  
National Treasury  
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# CONTENT

- Background
- Overview of Bill
  - amendments to Insolvency Act
  - amendments to Military Pensions Act
  - amendments to Banks Act
  - amendments to Government Employees Pension Law
  - amendments to Auditing Profession Act
- Process

# BACKGROUND

- Bill seeks to amend
  - Insolvency Act, 1936 by ensuring that government's international objectives for enabling over-the-counter (OTC) derivatives transactions with international counterparties (South Africa's compliance with its G-20 commitments)
  - Military Pensions Act, 1976 by introducing gender neutrality 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
  - Auditing Profession Act, 2005 to enhance regulatory powers of Independent Regulatory Board for Auditors
- Bill was published for comment on 24 August 2018 with closing date of 14 September 2018

# 1. Amendments to Insolvency Act

- To amend the Insolvency Act to ensure that South Africa complies with its G-20 international obligations on exchange of margin in accordance with the 2015 BCBS-IOSCO Margin Rules Framework
- To ensure that collateral exchanged as margin is easily and readily realisable upon default of one of the counterparties to an OTC Derivatives Transaction and is immediately available to the non-defaulting counterparty
- To alleviate the conflict of laws and align the Insolvency Act with the Draft Margin Notice (to be published in 2019)
- The Amendment further provides for a process to be followed when a master agreement creditor realizes his/her security in terms of the master agreement and for the Office of the Master to deal with disputes of preference under those agreements

# 2. Amendments to 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

## 2. Amendments to 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"

# 3. Amendments to 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 qualifying state-owned companies that are financially sound may apply for authorisation to establish bank
- Bill proposes that
  - 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

# 4. Amendments to 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

# 4. Amendments to 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 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 GEPP rules as debt due by member ("the divorce debt approach") to GEPP
- Rules of GEPP (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
- 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 GEPP, debt is deducted from benefit payable

# 4. Amendments to Government Employees Pension Law (cont)

- 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
- Divorce debt approach is subject of High Court application in *Crafford v GEPF* matter in which applicant is claiming that
  - divorce debt approach, which results in a "forced loan" infringes upon constitutional rights to equality and social security
  - this approach imposes unjustifiable burden on members of GEPF
- To address prejudice to members resulting from debt approach, Bill proposes replacement of debt approach with reduction of member's year of pensionable service ("the service reduction approach")
- 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

# 5. Amendments to Auditing Profession Act

- Auditing Profession Act provides for establishment of Independent Regulatory Board for Auditors (“IRBA”) and regulation of conduct of registered auditors and candidate auditors
- Section 4 of Act provides for general functions of IRBA and requires IRBA to take steps to promote integrity of auditing profession by, among others, investigating alleged improper conduct, conducting disciplinary hearings and imposing sanctions for improper conduct

# 5. Amendments to Auditing Profession Act (cont)

- Act currently empowers disciplinary committee to impose fine not exceeding amount calculated according to ratio for five years' imprisonment prescribed under Adjustment of Fines Act on registered auditor found guilty of improper conduct
  - Since this fine is inadequate deterrent, Bill proposes that Minister determines maximum amount
- To strengthen IRBA's independence, address conflict of interest of board members, prohibit registered auditors and candidate auditors from being appointed as board members and prohibit board members from
  - sharing directly or indirectly, in profits of registered auditor or candidate auditor
  - receiving payments from registered auditor or candidate auditor
  - conducting business with registered auditor or candidate auditor

# 5. Amendments to Auditing Profession Act (cont)

- To address challenges faced by IRBA during investigations into improper conduct by registered auditors, Bill proposes power for IRBA to subpoena people with information required to complete investigation
- To lessen burden on disciplinary committee to deal with cases, enabling IRBA to appoint as many members of disciplinary committee as it may determine
  - Then for each disciplinary case, panel must be appointed
- Proposed amendments also empower IRBA to, if considered appropriate, refer matter against registered auditor to accredited professional body for investigation
- Bill requires IRBA to take appropriate measures in respect of personal information in its possession or under its control

# PROCESS

- Process of revising Bill is complete and Bill was submitted to Cabinet for approval to introduce it in Parliament
- Prior to introduction, final certification by Office of Chief State Law Adviser must be obtained

***Ro livhuwa/ Thank you/Re a leboga/  
Dankie***