Clean-break principle and the The Government Employees Pension Fund (the GEPF)

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In 2007, progressive amendments were made to the Pension Funds Act 24 of 1956 (the Act), which is the main statute regulating private pension funds. These amendments ensured that a non-member spouse was able to claim his or her share of his or her spouse's pension interest immediately on the date of divorce, thereby introducing the so called 'clean-break' principle.

Public pension funds such as the GEPF eventually also had to align their practice with the clean-break principle and the necessary amendments were made to the legislation regulating such funds in order to bring about the clean-break principle. The clean-break principle was introduced by the enactment of the Government Employees Pension Law [Amendment Act], 19 of 2011.

The GEPF is the only fund in South Africa which, when its members are divorcing, pays out the members' former spouses' divorce claims and creates 'divorce debts' for its members. Members are required to pay back to the fund when they exit the fund, which debts attract interest. Rule 14.10 of the GEPF rules generally assigns a share of a member's pension interest to his or her former spouse. What the fund ultimately pays to the former spouse is not an amount taken from the member's pension interest, but the fund itself pays this amount from its reserves and creates a 'debt', which the member is obliged to pay back to the fund.

If the amount paid to the former spouse was taken from the member's pension interest, there would not be a need for the former spouse to repay anything to the fund.

It is clear from this rule that, in actual fact, the GEPF is granting 'divorce loans' to its divorcing members in order to create the so-called 'divorce debt'. Unlike private pension funds mandated by s 19(5) of the Act, which are able to grant home loans to their members, it is well known that the GEPF rules do not empower it to grant any sort of loans to its members. While this 'divorce debt' is not referred to as a loan, it nonetheless has characteristics of a loan in the sense that the fund charges interest on it from the day the payment was made to the former spouse to the date the divorcing member would be exiting the fund.

On its website, the GEPF sought to clarify the position by stating among others that: 'The new rules state that on the date of payment of a divorce benefit GEPF will create a debt against the member that is equal to the amount payable to the non-member spouse. The debt amount will build up, with interest, until the member exits the Fund' The amount payable by the member when he or she would be exiting the fund would be determined by the fund's actuaries because it has accumulated interest.

There is a complexity in calculating how much is owed to the non-member spouse and this calculation could give rise to a debt owed by the member to the fund.

The amount paid to the non-member spouse is based on the stipulated share of the member's withdrawal benefit at the date of divorce. The problem comes in calculating exactly what that benefit is.

Prior to 2012, a GEPF member's withdrawal benefit was either a cash resignation benefit or what is considered "actuarial interest". From 2012, actuarial interest is payable regardless of the member's choice.

Actuarial interest is the estimated value of what the member's fund would be worth when they exit the fund. Since the fund trustees have no way of knowing when and how each member will exit the fund or what their salary will be at the date of exit, the actuarial interest calculation makes various assumptions about future economic conditions as well as the fund's membership profile. When the benefit is paid to the non-member spouse on divorce, however, the member's future benefit would be reduced. This is done by creating a "debt" which would be deducted against their benefit when they finally exited the fund.

In practice this means that if as a member of the GEPF you get divorced, any retirement benefit that you expect to receive in the future (either when you resign or retire) would still need to be reduced by the "debt" incurred by the fund when they paid out your ex-spouse. This debt also incurs interest.

This is problematic in the sense that the divorcing member is not provided an opportunity to decide whether he or she agrees to the 'divorce debt' or he or she is comfortable that, at the time of his or her divorce, the fund could reduce his or her pension interest as directed by the divorce order. Secondly, the precise percentage of interest attracted by the 'divorce debt' is not prescribed in the GEPF rules. This is disturbing because, in terms of rule 14.10.9(2) of the GEPF rules, the 'divorce debt' can exceed the benefit which the member should receive. If the interest is so high that it enables the fund to repay itself by taking a substantial amount of the divorcing member's pension benefits, this goes against the very reason why pension funds are established.

The GEPF rationale is that this is to achieve cost neutrality between the member and the fund. If no interest is charged, the member profits at the expense of the fund (and other members in the fund). If the interest charged on the debt is higher than the fund returns, the difference between the interest and the fund returns will profit the fund at the expense of the member. To achieve cost neutrality the interest needs to be equal to the fund returns. The Board of Trustees decided to apply the repo rate as the interest on this notional "debt" which is expected to be lower than fund returns.

I am of the opinion that r 14.10 of the GEPF rules in its entirety does not comply with s 7(8) of the Divorce Act, which specifically provides that:

'Notwithstanding the provisions of any other law or of the rules of any pension fund –

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that –

(i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member; …'

This provision of the Divorce Act simply entails that the portion of the pension interest due to the non-member spouse should be paid directly from the pension benefits of the member spouse, not from any other source, except if the member has agreed otherwise with the fund. This may be the case if the member has entered into an agreement with the fund not to pay from his or her benefits, but to provide him or her with a loan, which would be used to cover the non-member spouse's claim. But this has to be by agreement, and not something which is orchestrated by the fund without involving the member.

This opinion stipulates the current position. I am of the opinion that this could be constitutionally challenged on the basis of unfair differentiation in terms of s 9(1) of the Constitution as well as the divorcing member's right to have access to the social security guaranteed by s 27(1) of the Constitution.