

KENNISGEWING 913 VAN 2012**DEPARTMENT OF COMMUNICATIONS****SOUTH AFRICAN POST OFFICE SOC LTD AMENDMENT BILL, 2012**

I, Dina Pule, Minister of Communications, hereby publish the proposed South African Post Office SOC Ltd Amendment Bill, 2012.

Interested persons are invited to provide written comments on the proposed amendment Bill, within 30 working days from the date of publication of this notice at any of the following addresses:

Post: For Attention:
Mr. Willie Vukela
The Director: Postal Policy Development
ICT Policy Development
Department of Communications;
Private Bag x 860
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or deliver to: First Floor, Block A3
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Please note that comments received after the closing date may be disregarded. Please contact Ms Phendile Dlamini at 012 427 8169 for any enquiries.



MS DINA PULE, MP
MINISTER OF COMMUNICATIONS

DATE: 25.10.2012

REPUBLIC OF SOUTH AFRICA

**SOUTH AFRICAN POST OFFICE SOC
LTD AMENDMENT BILL**

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Gazette No. _____ of _____ 2012)
(The English text is the official text of the Bill)*

(MINISTER OF COMMUNICATIONS)

[B —2012]

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 South African Post Office SOC Ltd Act, 2011 (Act No. 22 of 2011), so as to update and transfer pension-related provisions of the South African Post Office from the Post and Telecommunication-related Matters Act, 1958 (Act No. 44 of 1958) to the South African Post Office SOC Ltd Act; to enable the payment of a pension interest to a former spouse of a member on divorce or the dissolution of a customary marriage; to improve governance provisions between the Boards of the South African Post Office SOC Ltd and the South African Postbank Limited; to ensure that members of the Board must be fit and proper persons; to repeal the Post and Telecommunication-related Matters Act, 1958; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 22 of 2011

1. Section 1 of the South African Post Office SOC Ltd Act, 2011 (Act No. 22 of 2011) (hereinafter referred to as the principal Act) is hereby amended—

- (a) by the insertion of the following definition after the definition of “Post Office Act”:
- “**Post Office Retirement Fund**’ means the Post Office Retirement Fund and the Postal Pension Fund, as established in terms of section 9 of the Post and Telecommunication-related Matters Act and ‘Fund’ is construed accordingly;”
- (b) by the insertion of the following definition after the definition of “Public Finance Management Act”:
- “**Rules**’ mean the Statutes or Rules of the Post Office Retirement Fund made under section 10 of the Post and Telecommunication-related Matters Act and that remain in force until amended or repealed in terms of this Act.”.

Amendment of section 8 of Act 22 of 2011

2. Section 8 of the principal Act is hereby amended—

- (a) by the substitution for paragraph (a) of subsection (2) of the following paragraph:
- “(a) not more than [11] 10 non-executive members appointed in terms of section 11[, **one of whom must be the managing director of the Postbank by virtue of his or her office**]; and”;
- (b) by the substitution for subsection (5) of the following subsection:
- “(5) The Board must upon invitation by the Minister nominate [**non-executive members of the Board**] persons for appointment to the Board of the Postbank, as contemplated in section 14(1)(b) of the Postbank Act.”;
- (c) by the substitution for subsection (6) of the following subsection:
- “(6) [**The**] If any non-executive members of the Board are appointed to the Board of the Postbank [**are**] such members are accountable to the Board of the [**Post Office**] Postbank in respect of their functions performed as Board members of the Postbank.”.

Amendment of section 11 of Act 22 of 2011

3. Section 11 of the principal Act is hereby amended by the substitution for paragraph (c) of subsection (4) of the following paragraph:

“(c) the requirement that [some] members of the Board must be fit and proper persons [to hold the office of a member of the Board of a banking institution,] as contemplated in section 44 of the Banks Act, 1990 (Act No. 94 of 1990)[, for purposes of section 8(5)]; and”.

Substitution of the words “Post Office Act” in Act 22 of 2011

4. The principal Act is hereby amended by the substitution for the words “Post Office Act” of the words “Post and Telecommunication-related Matters Act” in the definition of “Post Office Act”, in subsection 3(1) and in the second column of Schedule 2.

Insertion of sections 21A to 21H in Act 22 of 2011

5. The following sections are hereby inserted in the principal Act after section 21:

“Continued existence of Post Office Retirement Fund

21A. The Post Office Retirement Fund continues to exist, notwithstanding the repeal by the South African Post Office SOC Ltd Amendment Act, 2012 of provisions in the Post and Telecommunication-related Matters Act relating to such fund.

Rules of the Fund

21B. (1) The control and management of the Fund, the conditions for admission to and termination of membership, the amount and nature of contributions by members and contributions and other payments by the Post Office, the benefits due to members and other beneficiaries, and the manner in which the Rules may be amended, shall be governed by the Rules, subject to subsection (2).

(2) The Rules including any amendment, substitution or repeal thereof shall be made by the Post Office subject to the approval of the Minister granted with the concurrence of the Minister of Finance.

(3) Any amendment, substitution or repeal of the Rules shall be published in the Gazette within 30 days of approval as contemplated in subsection (2).

(4) The Rules shall be binding on the Fund, its members and beneficiaries as well as the Post Office.

Actuarial Valuation of the Fund

21C. (1) The Fund appoints an actuary in terms of the Rules.

(2) The Fund shall be valued by an actuary at intervals not exceeding three years.

(3) The report of the actuary shall comply with the requirements of section 16(7) of the Pension Funds Act, 1956 (Act No. 24 of 1956), and shall be submitted by the actuary to the Minister and to the Minister of Finance.

(4) A copy of the report shall be submitted by the actuary to the Post Office.

(5) In addition to complying with the requirements of section 16(7) of the Pension Funds Act, 1956, the actuary shall calculate, and mention in his/her report, what amounts are necessary to maintain the Fund in a sound financial position.

(6) The Post Office guarantees the financial obligations of the Fund.

(7) The State guarantees the obligations of the Post Office in terms of subsection (6).

(8) The guarantee of the State in terms of subsection (7) shall be limited as provided in section 10A(7) of the Post and Telecommunication-related Matters Act as it existed prior to its repeal by the South African Post Office SOC Ltd Amendment Act, 2012.

Prohibition against cession, encumbrance or attachment of pension benefits

21D. (1) No pension or lump sum from the Fund, or right to such a benefit, or right in respect of contributions made by, or on behalf of a member, may be ceded, pledged or hypothecated, or be attached or subjected to any form of execution under a judgment or order of a court of law, except in

terms of a court order made in accordance with the provisions of 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) In the event of a member or other beneficiary attempting to cede, pledge or hypothecate a benefit or right thereto, payment of the benefit may be withheld, suspended or entirely discontinued by the Fund in its discretion: Provided that the Fund may, during such period as it may determine, make payment of such benefit or of any benefit in pursuance of such contributions or part thereof to one or more of the dependants of a member or other beneficiary or to a curator for such dependant or dependants.

(3) Notwithstanding the provisions of subsections (1) and (2), the Fund may on the date of a member's retirement or the date on which he/she ceases to be a member of the fund, deduct—

(a) any amount due to the Fund in respect of a loan granted by the Fund in terms of its Rules to a member or beneficiary, from any benefit to which the member or beneficiary is entitled in terms of such Rules;

(b) any amount due by a member to his/her employer in respect of—

(i) any loan granted by the Post Office to such member at his/her request;

(ii) any amount for which the Post Office is liable in terms of a guarantee furnished in respect of a loan granted by some other person to the member for the purchase of land or a dwelling or the erection, alteration, improvement, maintenance or repair of a dwelling for occupation by the member or a dependant of the member;

(iii) compensation (including the legal costs recoverable from the member in a matter contemplated in subparagraph (ii)) in respect of any damage caused to the Post Office, by reason of any theft, dishonesty, fraud, misconduct or negligence by the member;

(iv) any other written agreement between the member and the Post Office in respect of a study bursary or training of the member;

(v) any other amounts due by a member to the Post Office,

from any benefit payable to the member or a beneficiary in terms of the rules of the Fund, and pay such amount to the Post Office;

(c) any amount which the Fund or the Post Office has paid or will pay by an arrangement with, or on behalf of, a member or beneficiary in respect of—

(i) such member's or beneficiary's subscription to a medical scheme registered otherwise than provisionally in terms of the Medical Schemes Act, 1967 (Act No. 72 of 1967); or

(ii) any insurance premium payable by such member or beneficiary to an insurer registered in terms of the Insurance Act, 1943 (Act No. 27 of 1943),

from any benefit to which the member or beneficiary is entitled in terms of the rules of the Fund and pay such amount, if due, to the Post Office, medical scheme or insurer, as the case may be.

Insolvency of a beneficiary

21E. (1) If the estate of any person (hereafter referred to as the beneficiary) in receipt of a benefit from the Fund is sequestrated or surrendered or assigned for the benefit of his or her creditors, payment of such benefit shall forthwith be discontinued, and shall thereafter in the discretion of the Fund in whole or in part be paid to or for the benefit of all or any of the following persons, namely, the beneficiary, his spouse (whether by statutory, customary or religious law), and including a life partner who is a person living with that person as if they were married to each other, or child, including an adopted child or a step-child or, failing a spouse or child, to any other family member dependent upon the beneficiary: Provided that if the payment is made to the beneficiary, it shall be for his/her own personal use and, notwithstanding anything to the contrary contained in any law relating to insolvency, such payment shall not in any way be attached or appropriated by the trustee of his/her insolvent estate or by his/her creditors.

(2) If payment of a benefit has been discontinued under this section, such pension shall revive on the rehabilitation of the beneficiary or on the sequestration of his/her estate being set aside or the claims of his/her creditors being satisfied, and he/she shall receive such benefit at the same rate and subject to the same conditions as before the sequestration, surrender or assignment, together with any arrears that may be due.

Registration of the Fund under the Pension Fund Act

21F. (1) The Registrar of Pension Funds may at the request of the Fund, subject to the approval of the Minister, after consultation with the Minister of Finance, register the Fund in terms of section 4 of the Pension Funds Act, 1956 (Act No. 24 of 1956), and may, for the purposes of such request, regard the Fund as a “pension fund organization” as defined in section 1 of the said Act.

(2) From the date of such registration—

(a) the whole of the Pension Funds Act, 1956, shall apply to the Fund;

(b) the provisions of sections 21C(1), (2), (3), (4) and (5), 21D and 21E of this Act shall cease to apply to the Fund; and

(c) the Fund, for the purposes of the Income Tax Act, 1962 (Act No. 58 of 1962), shall not be regarded as a pension fund as defined in paragraph (a) of the definition of “pension fund” in section 1 of the said Act.

Membership of employees of subsidiary companies

21G. (1) If the Post Office establishes a subsidiary, an employee of the Post Office who is transferred or seconded to such subsidiary company shall continue to enjoy membership of the Fund.

(2) Any employee employed by a subsidiary after the date of its establishment, shall become a member of the Fund or, if the subsidiary company makes use of another pension fund, then such fund.

Taxation

21H. Notwithstanding the repeal of section 8 of the Post and Telecommunication-related Matters Act by section 5 of the South African Post Office SOC Ltd Amendment Act, 2012, the following rights and benefits contemplated in subsection 8(4) continue to exist, as if those sections have not been repealed:

For the purposes of the provisions of the Income Tax Act, 1962 (Act 58 of 1962) (as amended from time to time), it shall be deemed that no change of employer took place when employment was taken up at the Post Office by officers and employees of the Department of Communications and that the position of the officers and employees in respect of the phasing in of any tax levied on benefits or advantages derived by reason of employment or the holding of office as contemplated in Schedule 7 to the Income Tax Act, 1962, shall remain unchanged.”

Repeal of laws

6. The law mentioned in Schedule 1 is hereby repealed to the extent set out in the third column of that Schedule.

Short title

7. This Act is called the South African Post Office SOC Ltd Amendment Act, 2012.

SCHEDULE 1
(Section 4)

LAWS REPEALED

Act No. and Year	Short Title	Extent of amendment or repeal
Act No. 44 of 1958	Post and Telecommunication-related Matters Act, 1958	The whole

**MEMORANDUM ON THE OBJECTS OF THE SOUTH AFRICAN
POST OFFICE SOC LTD AMENDMENT BILL, 2012**

1. BACKGROUND

1.1 The Post Office Pension Fund was established on 1 October 1991 in terms of section 9 of the Post and Telecommunication-related Matters Act, 1958 (Act No. 44 of 1958) ("the PTMA"). It was renamed the Post Office Retirement Fund (PORF) in 2005. It is a juristic person and is managed by a Board of Trustees as a separate legal entity. The PORF must act in accordance with pension-related provisions of the PTMA and is managed and controlled in accordance with pension statutes or rules promulgated under section 10 of the said Act.

1.2 It is necessary to transfer the pension-related provisions of the PTMA to the South African Post Office SOC Ltd Act, 2011 (Act No. 22 of 2011) ("the SAPOA") where it is more suitably placed. The South African Post Office SOC Ltd Amendment Bill, 2012 ("the Bill") will amend the SAPOA for this purpose.

1.3 The Rules of the PORF, 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 PORF.

1.4 The Rules of the PORF cannot be amended due to the provision in sections 10B of the PTMA that provides that "*10B.—(1) No pension or lump sum from a pension fund referred to in section 10, or right to such a benefit, or right in respect of contributions made by, or on behalf of, a member, may be ceded, pledged or hypothecated, or be attached or subjected to any form of execution under a judgment or order of a court of law...*"

1.5 The Bill will correct this prohibition in order to provide for the implementation of the "clean-break" principle.

1.6 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.

1.7 A new section 21D is inserted into the SAPOA, to enable the PORF to amend its Rules to give effect to the "clean-break" principle.

2. OBJECTS OF THE BILL

The Bill seeks to amend the SAPOA, to achieve the following objectives:

2.1 to update and transfer pension-related provisions of the South African Post Office from the PTMA to the SAPOA;

2.2 to enable 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 improve governance provisions between the Boards of the Post Office and Postbank in the context of the holding company and subsidiary relationship;

2.4 to ensure that members of the Board must be fit and proper persons as contemplated in the Banks Act; and

2.5 to repeal the PTMA.

3. CLAUSE BY CLAUSE ANALYSIS

The Bill contains the following clauses:

3.1 *Clause 1*

Clause 1 of the Bill seeks to insert new definitions for 'Post Office Retirement Fund' and 'Rules'.

3.2 *Clause 2*

Clause 2 seeks to amend section 8(2)(a) to remove the requirement that the managing director of the Postbank is one of the members of the Board by virtue of his or her office. The fiduciary duties of the managing director of the Postbank should not extend to the entire affairs of the holding company since his or her focus should be on the affairs of the Postbank. Even though the King Code of Governance Principles (King III), Chapter 2, paragraph 144 provides that it is acceptable for a CEO of a subsidiary company to be appointed a director on the holding company board, it also states that the fiduciary duties of the director are to the company to which he or she has been appointed. This amendment is necessary to avoid conflict of interest.

Clause 2 further seeks to amend section 8(5) by removing the requirement that the Board, when recommending persons for appointment to the Board of the Postbank, must nominate non-executive members of the Board of the Post Office. This amendment is required since the appointment criteria for members of the Boards of the Post Office and the Postbank respectively, are different. This is especially so in the context of the fit and proper requirement under the banking legislation that applies to members of the Postbank Board.

Clause 2 further seeks to amend section 8(6) by making it clear that if any non-executive members of the Board are appointed to the Board of the Postbank such members are accountable to the Board of the Postbank in respect of their functions performed as Board members of the Postbank. This amendment is made in line with King III, Chapter 2, paragraph 142 that provides as follows:

"The holding company must recognise the fiduciary duties of the subsidiary company's directors and particularly their duty to act in the best interest of the subsidiary company at all times whether or not the director is nominated to the board of the subsidiary company by the holding company."

3.3 *Clause 3*

Clause 3 of the Bill seeks to amend section 11(4)(c) to ensure that all members of the Board must be fit and proper persons to manage the affairs of the Post Office in its capacity of a controlling company of a bank, as contemplated in section 44 of the Banks Act, 1990 (Act No. 94 of 1990). This amendment is also a consequential amendment following the amendment of section 8(5).

3.4 *Clause 4*

Clause 4 of the Bill substitutes the 'Post Office Act' with the 'Post and Telecommunication-related Matters Act' wherever it appears in the Act. This amendment is necessary since the name of the 'Post Office Act' changed to 'Post and Telecommunication-related Matters Act' following the amendment of the Post Office Act by the SAPOA.

3.5 *Clause 5*

Clause 5 of the Bill seeks to insert the following provisions that are necessary to ensure the continued existence of the PORF and matters relevant thereto:

3.5.1 **Continued existence of Post Office Retirement Fund**

This clause seeks to provide for the continued existence of the PORF. The PORF refers to the retirement fund of the Post Office that was established on 1 October 1991 in terms of section 9 of the PTMA. It is a

juristic person and is administered and governed by a Board of Trustees. This clause is necessary to ensure the PORF's continued existence despite the repeal of section 9 of the said Act by this Bill.

3.5.2 Rules of the Fund

This clause, read with the definition of Rules seek to provide for the continued existence of the Statutes or Rules of the PORF made under section 10 of the PTMA, despite the repeal of that section by this Bill. It further provides for the control and management of the Fund, the conditions for admission to and termination of membership, the amount and nature of contributions by members and contributions and other payments by the Post Office, the benefits due to members and other beneficiaries, and the manner in which the Rules may be amended.

3.5.3 Actuarial Valuation of the Fund

This clause is necessary to ensure that the financial sustainability and feasibility of the PORF is adequately and properly measured and monitored. It directs how the required funding level is maintained. It further seeks to ensure that the State continues to guarantee the difference between the amount the State paid to the Fund in 1991 and the actuarial liability due to the Fund that the Post Office must pay until extinguished.

3.5.4 Prohibition against cession, encumbrance or attachment of pension benefits

This clause is similar to section 37D of the PFA and is necessary to preserve, protect and safeguard the benefits of the members of the PORF during their membership and when they exit the Fund. It also allows the PORF to make certain lawful and regular deductions from the benefits of the members, when such members cease to be members or when they exit the Fund upon retirement. This clause also enables the PORF to amend its Rules to give effect to the "clean-break" principle.

3.5.5 Insolvency of a beneficiary

This clause seeks to protect, preserve and safeguard the benefits of members of the PORF against claims of creditors. This provision ensures that pension benefits may not be attached if a beneficiary becomes insolvent, which benefits revive after rehabilitation, the sequestration being set aside or claims of creditors being satisfied.

3.5.6 Registration of the Fund under the Pension Fund Act

This clause is based on section 10D of the PTMA and is necessary to enable the PORF to convert to a private pension fund by registering as such under the PFA, subject to the approval of the Minister of Communication, after consultation with the Minister of Finance. This provision is required since it is foreseen that statutory funds may in future be required to become private funds in terms of the PFA.

3.5.7 Membership of employees of subsidiary companies

This clause enables members of the PORF to remain members despite being transferred or seconded to a subsidiary company of the Post Office. It further allows employees of the subsidiary to become members of the Fund if the subsidiary company does not make use of another pension fund.

3.5.8 Taxation

This clause ensures that the rights and benefits contemplated in subsection 8(4) of the PTMA in respect of tax continue to exist despite the repeal of that section by this Bill. The tax rights and benefits apply to officers and employees of the then Department of Posts and Telecommunications (now Communications) that were transferred to the Post Office and must continue until all such officers and employees have exited the PORF.

3.6 *Clause 6*

Clause 6 of the Bill provides for the repeal of the law mentioned in Schedule 1 to the Act.

3.7 *Clause 7*

Clause 7 of the Bill contains the short title.

5. ORGANISATIONS AND INSTITUTIONS CONSULTED

The Bill resulted from a consultative process between the Department of Communications, the South Africa Post Office SOC Ltd and the Post Office Retirement Fund.

6. FINANCIAL IMPLICATIONS

The implementation of the “clean-break” principle is not anticipated to have any new financial implications for government or the South Africa Post Office SOC Ltd.

7. 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 PORF 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 GEPP and others as well as the pending case of PRP Ngewu and the PORF. The Constitutional Court of South Africa postponed the Ngewu case to 07 February 2013 in view of an undertaking by the Minister of Communications to table the amendments contemplated in this Bill in Parliament in the 2012 Legislative Programme.

8. PARLIAMENTARY PROCEDURE

8.1. The State Law Advisers and the Department of Communications are of the opinion that the 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.

8.2. 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.
