

REPUBLIC OF SOUTH AFRICA

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

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*(As amended by the Portfolio Committee on Communications (National Assembly))  
(The English text is the official text of the Bill)*

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(MINISTER OF COMMUNICATIONS)

**[B 24B—2013]**

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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.

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## **BILL**

**To amend the South African Post Office SOC Ltd Act, 2011, so as to improve governance provisions between the Boards of the South African Post Office SOC Ltd and the South African Postbank Limited; to amend the Post and Telecommunication-related Matters Act, 1958, so as to provide for the payment of pension benefits to a former spouse of a member on divorce or the dissolution of a customary marriage; and to provide for matters connected therewith.**

**B**E 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— 5  
(a) by the substitution for the definition of “Post Office Act” of the following definition:

“**‘Post and Telecommunication-related Matters Act’** means Post and Telecommunication-related Matters Act, 1958 (Act No. 44 of 1958);”;

### **Amendment of section 3 of Act 22 of 2011** 10

2. Section 3 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:  
“(1) The South African Post Office SOC Ltd, the postal company contemplated in section 3 of the **[Post Office Act] Post and Telecommunication-related Matters Act**, continues to exist as a public company, notwithstanding the repeal by this Act 15 of provisions in the **[Post Office Act] Post and Telecommunication-related Matters Act** relating to the postal company.”.

### **Amendment of section 8 of Act 22 of 2011**

3. Section 8 of the principal Act is hereby amended—  
(a) by the substitution in subsection (2) for paragraph (a) of the following 20 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**;”;

(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.”; and

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(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.”.

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#### **Amendment of section 11 of Act 22 of 2011**

4. Section 11 of the principal Act is hereby amended by the substitution in subsection (4) for paragraph (c) 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(2)(d) of the Banks Act, 1990 (Act No. 94 of 1990)[, **for purposes of section 8(5)**]; and”.

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#### **Amendment of laws**

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

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#### **Short Title**

6. This Act is called the South African Post Office SOC Ltd Amendment Act, 2013.

## SCHEDULE

### LAWS AMENDED

Act No. and Year	Short Title	Extent of amendment or Repeal
Act No. 44 of 1958	Post and Tele-communication-related Matters Act, 1958	<p><b>1.</b> Amendment of section 10B by the substitution for subsection (1) of the following subsection:</p> <p>“<b>10B.</b> (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, <u>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</u>, and in the event of the 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 pension fund concerned in its discretion: Provided that the pension fund concerned 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 the beneficiary or to a curator for such dependant or dependants.”.</p> <p><b>2.</b> Insertion of the following section after section 10E:</p> <p><b><u>“Payment of pension interest upon divorce or dissolution of customary marriage.</u></b></p> <p><b>10F.</b> (1) <u>The pension fund concerned must 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 (a) of the Divorce Act, 1979 (Act No. 70 of 1979), or a decree for the dissolution of a customary marriage.</u></p> <p><u>(2) (a) Subject to (j) , for purposes of (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.</u></p>

Act No. and Year	Short Title	Extent of amendment or Repeal
		<p><u>(b) The amount of the member's pension interest in the pension fund concerned must be determined and the amount of the member's pension interest that is assigned to the former spouse must be calculated by the pension fund concerned in accordance with the statutes as at the date of the decree of divorce or the decree for the dissolution of a customary marriage.</u></p> <p><u>(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 (b) must first be reduced in accordance with the statutes 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.</u></p> <p><u>(d) The amount of any pension benefit that is subsequently payable to the member in terms of the statutes must be reduced by the equivalent of the amount of the share of the pension interest of the member which—</u></p> <p><u>(i) was deemed to accrue to the member as a benefit in advance of the benefit ordinarily payable in terms of the statutes; and</u></p> <p><u>(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 pension fund concerned from time to time, and accumulated over the period from the date on which payment to the former spouse or transfer to the approved retirement fund as referred to in (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 pension fund concerned from time to time deems appropriate.</u></p> <p><u>(e) The pension fund concerned must, 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—</u></p> <p><u>(i) paid directly to the former spouse; or</u></p> <p><u>(ii) transferred to an approved retirement fund on behalf of the former spouse.</u></p> <p><u>(f) The former spouse must, within 120 days of being requested to make a choice—</u></p> <p><u>(i) inform the pension fund concerned of the manner in which the amount referred to in (e) must be dealt with; and</u></p>

Act No. and Year	Short Title	Extent of amendment or Repeal
		<p><u>(ii) if the former spouse chooses that the amount must be paid to the former spouse directly, provide the pension fund concerned with the details that are necessary to effect the payment;</u> or</p> <p><u>(iii) if the former spouse chooses that the amount must be transferred to an approved pension fund on his or her behalf, provide the pension fund concerned with the details of that approved retirement fund.</u></p> <p><u>(g) The pension fund concerned must pay or transfer the amount—</u></p> <p><u>(i) in the circumstances contemplated in paragraph (f)(ii) within 30 days; or</u> <u>(ii) in the circumstances contemplated in paragraph (f)(iii) within 60 days,</u> <u>in accordance with the former spouse's choice, failing which interest becomes payable on such amount at a rate determined in the statutes.</u></p> <p><u>(h) In the event that the former spouse fails to make a choice or identify the approved retirement fund to which the amount must be transferred within the period referred to in paragraph (f), the pension fund concerned must pay the amount directly to the former spouse within 30 days of the expiry of that period, failing which interest becomes payable on such amount at a rate determined in the statutes.</u></p> <p><u>(i) Despite (h), in the event that the pension fund concerned cannot reasonably ascertain the manner in which the payment to the former spouse must be effected, the pension fund concerned must retain the amount plus interest as determined in the statutes in the pension fund concerned, until such time as details of the manner in which that payment must be effected is made available to the pension fund concerned by the member, the former spouse or any other person whom the pension fund concerned is satisfied has the necessary authority and capacity to instruct the pension fund concerned in that respect.</u></p> <p><u>(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 must, for purposes of any law other than the Income Tax Act, 1962 (Act No. 58 of 1962), including, but not limited to, (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 (a) to (i)."</u></p>

**MEMORANDUM ON THE OBJECTS OF THE SOUTH AFRICAN  
POST OFFICE SOC LTD AMENDMENT BILL, 2013**

**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, 2013 (“the Bill”), will amend the SAPOA for this purpose.
- 1.3 The rules of the PORF, currently, do 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 21I is inserted into the SAPOA to give effect to the “clean-break” principle and section 21D is inserted to enable the PORF to amend its rules accordingly.

**2. OBJECTS OF THE BILL**

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

- (a) to update and transfer pension-related provisions of the South African Post Office from the PTMA to the SAPOA;
- (b) to enable the payment of a pension interest to a former spouse of a member on divorce or the dissolution of a customary marriage;
- (c) to improve governance provisions between the Boards of the Post Office and Postbank in the context of the holding company and subsidiary relationship;

- (d) to ensure that members of the Board must be fit and proper persons as contemplated in the Banks Act; and
- (e) to amend 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 “child”, “Post and Telecommunication-related Matters Act”, “Post Office Retirement Fund” and “rules”.

#### 3.2 *Clause 2*

Clause 2 of the Bill seeks to amend section 3 of the Act by substituting Post Office Act for Post and Telecommunication-related Matters Act.

#### 3.3 *Clause 3*

Clause 3 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 3 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 3 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.”*

#### 3.4 *Clause 4*

Clause 4 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).

### 3.5 *Clause 5*

Clause 5 of the Bill provides for the repeal of the law mentioned in Schedule 1 to the Act.

### 3.6 *Clause 6*

Clause 6 of the Bill contains the short title.

## 4. **ORGANISATIONS AND INSTITUTIONS CONSULTED**

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

## 5. **FINANCIAL IMPLICATIONS**

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

## 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 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.

## 7. **PARLIAMENTARY PROCEDURE**

- 7.1. 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.
- 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.