

30 August 2013

Mr S E Kholwane, MP  
Chairperson: Portfolio Committee on Communications  
Parliament of the Republic of South Africa  
P O Box 15  
Cape Town

**Attention: Mr Thembiskosi Ngoma**  
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**We deliver, whatever it takes.**  
SOUTH AFRICAN POST OFFICE (SOC)  
LIMITED

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Dear Mr Kholwane

**IN RE: THE SOUTH AFRICAN POST OFFICE SOC LTD AMENDMENT BILL [B24-2013];  
WRITTEN SUBMISSIONS OF THE SOUTH AFRICAN POST OFFICE SOC LTD AND OF THE  
POST OFFICE RETIREMENT FUND ON THE BILL**

**INTRODUCTION**

1. The main purposes of the South African Post Office SOC Ltd Amendment Bill (the Bill) are fourfold. The first is to update the South African Post Office SOC Ltd Act, 22 of 2011. The second is to transfer pension related provisions from the Post and Telecommunication Related Matters Act, 44 of 1958 to the said South African Post Office SOC Ltd Act. The third is to enable the payment of a pension interest to a former spouse of a member upon divorce or the dissolution of a customary marriage (the "clean break principle") by amending the South African Post Office SOC Ltd Act. The fourth concerns the governance of the Post Office by making certain other amendments to the last mentioned Act.
2. As the name of the Post and Telecommunication Related Matters Act previously was the "Post Office Act" and to avoid confusion between it and the South African Post Office SOC Act, the former is referred to as the "1958 Act" and the latter as the "2011 Act".
3. To further avoid confusion, "Post Office" herein refers to the legal entity known as the South African Post Office SOC Ltd. These representations also concern the South African Post Office Retirement Fund, which is a separate legal entity. It was previously known as the Pension Fund. It is called "the Fund" herein.

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Directors

HN Manzini (Acting Chairperson), CJ Hlekane\* (Group Chief Executive Officer), K Mzozoyana\* (Chief Financial Officer), S Adam\* (Acting MD: Postbank), BE Yafele\* (Acting Chief Operations Officer)

N Kela, N Mthethwa, MS Patel, G Simelane, R Sishuba (\*Executive Directors)

Company Secretary: BS Bulunga

South African Post Office Limited

Registration No 1991/005477/06

FSP No. 43462

4. These representations are made by both the Post Office and the Fund.
5. The Post Office and the Fund in general support the Bill. The support is, however, subject to two important caveats. The first is that a fundamentally important guarantee that was given by the State to the Post Office and which is contained in the 1958 Act has been omitted from inclusion in the 2011 Act. This is referred to as the "guarantee issue" below. The second caveat is that, as presently worded, the Bill may give rise to uncertainty concerning the exact extent of the obligation of the Fund to pay interest to former spouses (or partners in customary marriages, for purposes of ease of reading, these representations only speak of "spouses" which must be taken to include partners in customary marriages) on the amounts that have to be paid to them under the clean break principle. It is called the "interest issue" below.

#### **URGENCY AND PUBLIC PARTICIPATION**

6. Before turning to the two caveats it should be noted that although the introduction of the clean break principle is very urgent (the background to this issue is set out below) the same urgency does not apply to the balance of the provisions of the Bill and specifically to the guarantee issue. There is no need for the guarantee issue to be rushed through Parliament, and it requires mature reflection.
7. A further point that has to be made in this regard is that no public participation as contemplated in sections 72(1)(a) and 118(1)(a) of the Constitution of the Republic of South Africa, 1996 is required for the introduction of the clean break principle into the 2011 Act. This is because the Constitutional Court has ordered the introduction of the principle into the legislation. (The background to this issue is also dealt with below). But, this consideration does not apply to the guarantee issue at all. Parliament is under no obligation to remove the guarantee from the body of legislation pertaining to the Fund and the ordinary rules of public participation in the legislative process must apply to the guarantee issue. The loss of the guarantee is a matter of great concern to the Post Office, the Fund, the employees of the Post Office, the members of the Fund and the Pensioners of the Fund. Moreover, the omission (which is in effect the cancellation of the guarantee) has far-reaching and unprecedented constitutional consequences. Parliament is obliged to afford effective and meaningful public participation in the legislative process, as has been repeatedly held by the Constitutional Court, see, e.g. *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC). Parliament has to achieve a balanced relationship between representative and participatory democracy.
8. Given the very short period after the publication of the Bill in its present form (15 July 2013) and the invitation to submit written comments on the Bill on the one side and the closing date for such comments on the other (30 August 2013), a period of only one and a half months, it is respectfully submitted that there has not been adequate time to prepare a comprehensive response to the guarantee issue and that only the clean break principle should at this stage be enacted.

## THE GUARANTEE ISSUE

9. Section 10A of the 1958 Act deals with the actuarial valuation of the Fund. The section reads as follows:

"(1) The postal pension fund and the telecommunications pension fund shall each be valued by an actuary, appointed by the Minister, within three years from the date on which the fund concerned was established, and thereafter each fund shall be valued by such actuary at intervals not exceeding three years, as the Minister may determine.

(2) The report of the actuary shall comply with the requirements of section 16(7) of the Pension Funds Act, 1956 (Act 24 of 1956), and shall be submitted by the actuary to the Minister and to the Minister of Finance.

(3) A copy of the report shall be submitted by the actuary to the employer concerned.

(4) 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 report, what amounts are necessary to maintain the pension fund concerned in a sound financial position.

(5) The postal employer shall guarantee the financial obligations of the postal pension fund.

(6) The State shall guarantee the obligations of the postal employer in terms of subsection (5).

(7) (a) The guarantee of the State in terms of subsection (6) shall be limited to the difference between the amount paid in terms of section 8(5)(e) to the postal pension fund and the amount of the actuarial liability, on the date of employment of an officer or employee by the postal employer, of the pension fund referred to in section 8(5)(c) in respect of those officers or employees of the department who in terms of section 8(5)(d) become members of the postal pension fund, plus interest on that amount calculated at the rate which shall, subject to paragraph (c), from time to time be determined by the chief actuary.

(b) For the purposes of paragraph (a) 'actuarial liability' shall have the meaning assigned to it in section 8(6)(a).

(c) The rate referred to in paragraph (a) shall not be less than 12 per cent per annum on the outstanding balance.

(d) The guarantee of the State in terms of subsection (6) shall decrease to the extent to which the postal company pays the amounts plus interest referred to in paragraph (a) to the postal pension fund, in terms of its obligations under subsection (5) and shall be extinguished when the obligations have been fully discharged."

10. The first aim of the Bill is to transfer section 10A (together with other sections that are not relevant to these representations) from the 1958 Act to the 2011 Act as section 21C. The proposed new section 21C currently reads as follows:

"21C (1) The Post Office Retirement Fund appoints an actuary in terms of the rules.

(2) The Post Office Retirement Fund must be valued by an actuary at intervals not exceeding three years.

(3) The actuary referred to in subsection (1) must submit a report that complies with the requirements set out in section 16(7) of the Pension Fund Act, 1956 (Act No. 24 of 1956), to the Minister and Minister of Finance.

(4) A copy of the report referred to in subsection (3) must be submitted by the actuary to the Post Office.

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

- (6) The Post Office guarantees the financial obligations of the Post Office Retirement Fund.
11. It is immediately obvious that the subsections (1) to (5) of the 1958 Act are substantially the same as the proposed subsections (1) to (6) of the new section 21C of the 2011 Act. Subsections (6) and (7) of the 1958 Act are obviously omitted from the new regime.
  12. The existing section 10A provides for two guarantees. The first is in section 10A(5) where the Post Office is obliged to guarantee the financial obligations of the Fund. In subsection (6) the State is obliged to guarantee the obligations of the Post Office and subsection (7) contains some detailed provisions in this regard. The proposed section 21C provides for only one guarantee namely the Post Office guarantee but the guarantee of the State contained in the present subsections (6) and (7) of the 1958 Act is absent.
  13. In order to appreciate the importance of the two guarantees in the constitution of the PO Retirement Fund, it is necessary to give some background information.
  14. Until 1991 the Post Office was part of the civil service. It was commercialised in 1991 and the Post Office was created as a legal entity separate from the State.
  15. The erstwhile officials of the Post Office when it was a department of State were members of the Government Employees Pension Fund ("GEPF"). When the Post Office was separated from the State, it was necessary to create a pension fund outside the GEPF for the Post Office employees, and so the Fund was created.
  16. The Fund had to be funded. In order to determine the level of its funding actuarial calculations were performed. The idea was that the Fund would be funded by the transfer of assets from the GEPF.
  17. However, the GEPF could not transfer adequate assets for the Fund to be fully funded, and an actuarial deficit of R595 million was reflected in the books of account of the Fund. This created an untenable position that was exacerbated by the Fund being a defined benefit fund at the time.
  18. In order to cater for the problem of the underfunding, the legislature introduced the two guarantees into the legislation. The first guarantee was given by the new Post Office to the new Fund. The State gave the second guarantee. The Post Office guarantee is unlimited and means that the Post Office will ensure that the defined benefits are paid to the members of the Fund. The guarantee of the State is, however, limited to the extent of the actuarial deficit as determined on 1 October 1991, less any payments made by the Post Office, plus interest calculated on the outstanding balance from time to time.
  19. Quite outside the legislation and apart from any statutory obligation of the Post Office to do so, Cabinet decided in 1992 that the Post Office should reduce the actuarial deficit over a period of 15 years by way of monthly payments of R7,7 million. This would take until 30 September 2006 to achieve.
  20. These payments carried on until 31 March 1997 when they were stopped. The effect of this is that the actuarial deficit as it was in 1991 grew over time to about R2,3 billion as at the end of March 2013.

21. Both the Post Office guarantee and the State guarantee were contained in previous incarnations of the Bill and neither the Post Office nor the Fund had any inkling that the State guarantee would be omitted from the final Bill. The present Bill was published just more than a month ago on 15 July 2013. The omission appeared for the first time from this Bill.
22. It is remarkable that the omission is not explained in the clause-by-clause analysis that forms part of the memorandum on the objects of the Bill (which was published together with the Bill). All that is stated in paragraph 3.5.3 at page 20 concerning the actuarial valuation of the Fund is:  
"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."
23. The omission of the State guarantee fundamentally affects the financial position of the SAPO. Up to now it had, in its notional liabilities column, a contingent debt owing to the Fund of some R2,3 billion. This exposure was created by the Post Office guarantee and still exists. However, this exposure is balanced by the State guarantee which is a credit in its notional assets column. This asset is now to be removed from the estate of the Post Office.
24. It is submitted that the legislature does not have the power unilaterally and for no given reason to dispossess a commercial entity such as the Post Office of a substantial asset and that the omission is unconstitutional and therefore unlawful.
25. It is submitted that subsections 10A(6) and (7) of the 1958 Act should be included in the 2011 Act and that the old section 10A(6) should become the new section 21C(7) and the old section 10A(7) should become the new section 21C(8).
26. Apart from the fact that the omission in effect dispossesses the Post Office of a valuable asset which affects its balance sheet and consequently its ability to raise funds on local and international markets, the Fund, all its defined benefit members and its Pensioners are extremely exposed. If, for whatever reason, the Post Office cannot make good on its guarantee, the Fund and its members no longer have any recourse to the State.
27. It must be recalled that the Post Office was created as a separate legal entity on the strict understanding that its employees would not be prejudiced by having to join a much smaller retirement or pension fund than the GEPF that they left. It would simply be unconscionable for the State to unilaterally withdraw the guarantee that was one of the organising principles of its creation.
28. To summarise: the omission of the State guarantee is extremely serious. It leaves the Post Office and the Fund in a perilous position. It has a constitutional implication and effectively entails that the State is going back on its word. As a matter of law it is not possible for a guarantor to unilaterally revoke a guarantee that it has given because a guarantee is usually accessory in nature and remains in place as long as the principal debt remains in place. A guarantor cannot in law release himself whilst the principal debt remains extant. This is a consequence of the accessory nature of a guarantee. If, however, the guarantee is seen as a principal obligation (an intercessio) the State as guarantor cannot withdraw at all without the consent of the ultimate creditor, viz the Fund. (On the nature of a surety ship and a guarantee, see (F Foresyth & J T Pretorius Caney's The Law of Surety ship 6 ed 28 and 32.) and the

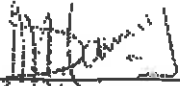
State should not be allowed to do so by amending legislation. To allow this to happen would probably found to be violating a number of the constitutional values that underpin the State, in particular the principle of legality.

## THE INTEREST ISSUE

29. In order to contextualise the interest issue it is necessary to give some background.
30. The generally accepted position in pension funds used to be that divorced spouses of members did not have any immediate right to any part of the member's interest in the pension fund whilst the member remained a member of the fund. The effect of this was that if the spouse of a member was awarded say 50% of the member's pension fund interest as at date of divorce, that amount would not be paid out to the spouse at that point but would be retained in the fund and be paid out to the spouse only once the member would him or herself become entitled to a payment from the fund. This entailed that spouses who were awarded percentages of the pension fund interests of members sometimes had to wait years, if not decades, before those amounts would be paid to them. The inequity of this position is self-evident.
31. Some pension funds changed this arrangement and amended their rules to allow for the payment to such a spouse immediately upon divorce.
32. The right of a divorced spouse immediately to claim his or her share of the pension of the member at the time of divorce is generally known as the "clean break principle".
33. In *Ngewu v Post Office Retirement Fund* 2013 4 BCLR 421 (CC) the clean break principle was considered with reference to the Fund. The applicant in that case was married to a member of the Fund. They divorced and the applicant was awarded 50% of the member's pension interest. She was, however, unable to claim payment and she challenged the constitutionality of parts of the 1958 Act for failing to make provision for the clean break principle. The case was initially set down for argument in the High Court but the Constitutional Court became seized with a similar issue in another case and the applicant brought an application for direct access for her case to be heard together with the other case. The two cases were set down for hearing on the same day in February 2012. However, the legislation pertaining to the other matter was amended before the hearing and the court held that the issue had become moot. In *Ngewu's* case the respondent sought a twelve month postponement to amend the 1958 Act. The postponement (to February 2013) was granted, but the Act was not amended. Close to the hearing a further postponement was sought to finalise the amendments. The applicant opposed the application for a postponement and argued that the proposed amendment did not in fact incorporate the clean-break principle. By the time of the hearing the parties had agreed to an order that declared the omission of the clean-break principle to be unconstitutional, suspended the order for eight months and created an extensive "reading in" should new legislation not be passed within that period. The Constitutional Court held that it was in the first place not bound by the agreement between the parties and that it remains the responsibility of the Constitutional Court to be satisfied that legislation is indeed inconsistent with the Constitution and invalid before declaring it to be so. However, the court found that there was no rational justification for distinguishing between spouses under different governmental pension schemes and the Constitutional Court declared the omission of the clean-break principle to be unconstitutional. However, the court suspended the effect of its order to afford Parliament the opportunity to amend the 1958 Act to provide for the clean break

principle. The judgment of the court was handed down on 7 March 2013 which means that the new legislation must be adopted before 7 November 2013. Hence the urgency of importing the clean-break principle into the relevant legislation.

34. The problem that the Fund foresees with the proposed legislation as it is presently couched concerns the question of calculation of interest to be paid by the Fund to the non-member spouse upon the court order affording him or her rights in the member's pension.
35. The problem is this: There have, over the years, been many court orders that afforded spouses rights to the pensions of members. Those orders have all been noted by the Fund and the relevant funds were allocated for the spouses. If, for example, a member divorced in 2003 and had a pension interest of say R100 000,00 at that time and the court awarded the non-member spouse 50% of that interest, the Fund allocated R50 000,00 to the non-member spouse which it kept aside for the non-member spouse until such time as the member would cease to be a member either by retirement or by him or her leaving the employment of the Post Office. That might still be ten years in the future. The legislation importing the clean-break principle would thus become effective halfway between the time that the R50 000,00 was allocated for the non-member spouse and the time when the R50 000,00 would be paid to the spouse under the old arrangement. It is understood that immediately upon the enactment of the clean-break principle all spouses who have been awarded rights to the pension funds of members will be entitled to payment. The question that has arisen is whether the Fund is obliged to pay interest to those spouses from the time of the divorce orders (in the example above, 2003) to the date of payment (in the example above a period of ten years) or whether interest will only start running from the time that the new legislation becomes effective so that the Fund will not be obliged to pay any interest if it pays immediately.
36. The Fund is of the view that it cannot be found that it was in default of any of its obligations vis-à-vis the non-member spouse by not paying any amount to that spouse before the amendment of the legislation. The spouse can thus not have a claim for interest against the Fund going back in time. His or her claim will arise only once the clean-break principle is enacted. If it were otherwise, the Fund would be punished for something that it did not do wrong: It is a creature of statute and operated legally within the very rules that created it.
37. It is submitted that the following be added at the end of section 21I to avoid any uncertainty of the legal position:  
"The Post Office Retirement Fund is not liable to pay interest to a member's former spouse where the entitlement arose before the promulgation of this section 21I between the date that the entitlement arose and the promulgation of this section but shall pay interest, which must be calculated in accordance with the rules, from the date of the promulgation hereof to date of payment. The Post Office Retirement Fund will furthermore pay interest to spouses in respect of entitlements that arise after the promulgation hereof from the date of the Post Office Retirement Fund being notified of the entitlement to the date of payment, which interest must also be calculated in accordance with the rules."



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**Mr. C. Hlekane**  
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**Ms. K. Mzozoyana**  
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AMENDMENT 12/12