

EXPLANATORY MEMORANDUM ON THE OBJECTS OF THE POSTAL SERVICES AMENDMENT BILL, 2018

1. OBJECTS OF THE BILL

- The objects of the Bill is to amend the Postal Services Act, 1998 (Act No 124 of 1998), so as to align the Act with the National Integrated ICT Policy White Paper approved by Cabinet on 28 September 2016 and to provide as follows:
- to provide for the regulation of the sector, particularly the private operators and Extra-territorial Offices of Exchange (ETOE);
- to ensure the contribution of private operators to the universal postal services; to provide for a new licensing framework for the sector that encourages participation by SMMEs;
- to provide for the repositioning of South African Post Office(SAPO), to take advantage of the new opportunities imposed by digital technologies,
- to provide for the contribution by SAPO to e-Government by providing services for different governments Departments and e-commerce platform;
- to provide for the national addressing policy approach for the assignment of physical addresses to rural and traditional communities and the development and maintenance of national address database for the Republic;
- to provide for a clear process for the approval of annual and commemorative stamps;
- to provide for a clear process for the development of philatelic products; and
- to provide for matters connected therewith.

2. SUMMARY OF THE BILL

Clause 1

The definitions contained in the Bill are amended, repealed or inserted for better understanding and interpretation as follows:

"Address"

A new definition of "address" is inserted to "an unambiguous specification of a point of service delivery as defined in the South African National Standards (SANS) 1883-1". This is to distinguish between post box address which is currently part of the reserved area and physical address. This is in line with the National Address initiative to ensure that all household and businesses have formal physical addresses. This is in line with the definition provided in the SANS 1883.

"Authority"

A new definition of "Authority" is inserted to mean "the Independent Communications Authority of South Africa established by section (3) of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000)". The Postal services Act previously referred to the regulator but the ICASA Act makes reference to the Authority as opposed to regulator and this is to ensure alignment.

"courier services"

"courier services" definition is repealed in line with new licencing framework to distinguish only the reserved and unreserved postal services. The expression "courier services" is defined as part of the two categories of postal services (the reserved and the unreserved).

" Committee"

The definition of " 'Committee' is inserted to mean Stamp Advisory Committee of the postal company. This definition is included in order to clarify the reference to Committee in section 29A.

"days"

The definition of "days" is inserted to mean "any day excluding public holidays and weekends. This is to provide clarity that it only counts working days excluding weekends and holidays.

"Department"

The definition of "Department" is amended to mean the Department **[of Communications]** responsible for telecommunications and postal services" This is to give effect to the proclamation issued by the President establishing the new Department of Telecommunications and Postal Services and moving of the function to administer this Act from the Department of Communications. It is defined in this way to align the definition to the function of the Department not the name of the Department. In this way if the name of the Department is changed at any point there will not be a need for an amendment of the definition.

"designated operator"

The definition of 'designated operator' is inserted to mean "an operator determined by the Minister in consultation with the Authority to provide universal postal services in terms of section 24A ".

The term is defined to ensure that there is a designated operator to provide universal postal services in the country. Currently SAPO is the universal postal service provider. The term is used to also allow the Minister with the Authority to designate any operator to provide universal postal services.

"extra-territorial offices of exchange"

New definition of extra-territorial offices of exchange is inserted to mean "an office or facility established and operated by a licenced foreign operator in the Republic".

This is defined in line with the new provisions on the regulation of extra-territorial offices of exchange as provided for in the Integrated ICT White Paper. The definition is aligned to the UPU definition.

"foreign operator"

The definition of "foreign operator" is inserted to mean "any duly constituted postal operator of any foreign country or place". The term has been used in the body of the proposed amendments and replaced the term "postal authority".

"licence"

The definition of "licence" is inserted to mean "licence to provide reserved or unreserved postal services issued by the Authority under this Act". This is in line with the new licencing framework and the abolishing of registration regime where unreserved operators were not effectively regulated.

"money order"

The definition of "money order" is amended to mean "money order issued in terms of this Act or by any **[postal authority]** designated operator for payment of in terms of this Act". The amendment replaces the words "postal authority" with "designated operator" so as to align the use of terminology in the Universal Postal Union and the Act.

"National Address Database"

The definition of "National Address Database" is inserted to mean "data sets as defined in the Spatial Infrastructure Act, 2003 (Act No.54 of 2003); ". This is in line with the new section 46A dealing with national address system. It is defined to mean an official database repository for all addresses in the Republic"

"National Savings Certificate"

Definition of "National Savings Certificate" is repealed as is longer necessary and section dealing with Savings certificates has been deleted from this Act and all issues of savings are dealt with in the Postbank Act

"person"

The definition of person is inserted to mean "a natural or juristic person". The word is defined as it is used in the Bill to ensure that it includes both natural and juristic person and is aligned to definition provided in other legislation such as the Electronic Communications Act, 2005 (Act No 36 of 2005) (ECA).

"postal company"

The definition of postal company is amended **to mean "the [postal company contemplated in section 3(1) of the Post Office Act, 1958 (Act No. 44 of 1958)] South African Post Office SOC Ltd contemplated to in section 3(1) of the South African Post Office SOC Ltd Act, 2011"**. This is to align it to the South African Post Office SOC Ltd Act, 2011 to ensure consistency.

"postal service"

The definition of "postal services" is amended to mean a reserved postal service or an unreserved postal service as **[contemplated in Schedule 1 and Schedule 2 respectively] defined in this Act;**

This is in line with the repeal of the Schedules and thus the reference to the Schedules becomes obsolete. The reserved postal services and unreserved postal services have already been defined in the Act.

"postal service operator"

The definition of postal services operator is inserted to mean "any person licenced in terms of Chapter (III) to provide reserved or unreserved postal services". The definition is inserted in line with the new licensing framework.

"Post Office"

The definition of "Post Office is amended to mean the Post Office as defined in the South African Post Office SOC Ltd Act, 2011(Act No 22 of 2011) . This is to align it to the definition provided in the South African Post Office SOC Ltd Act, 2011.

"Post Office Act"

The definition of "Post Office Act" is amended to mean Post and Telecommunications Related Matters Act, 1958 (Act No 58 of 1958). The definition is amended to align it to the definition provided for in the South African Post Office SOC Ltd Act, 2011(Act No 22 of 2011).

"reserved postal services"

The definition of "reserved postal services" is amended to mean "those services that can only be provided by the designated postal operator as determined by the Minister through *Gazette*". Postal sector is rapidly and constantly changing and some terms need to be defined in line with those new developments.

The definition is a result of the proposed deletion of the Schedules which are prescriptive in terms of what constitute the reserved postal services and to change will require legislative amendments. What constitute reserved postal services will be determined by the Minister in consultation with the Authority.

"underserviced area"

The definition of underserviced area is inserted to mean "the geographically identified areas prescribed by the Authority in accordance with this Act.";

This is aligned to other legislation such as the ECA. This is in line with the current practice where underserviced areas are determined by the Authority and appear in the licence of the South African Post Office.

"unreserved postal operator"

The definition of "unreserved postal operator" is inserted in line with new section 20A that deals with the new licensing framework providing for different categories of unreserved postal operators licences.

"universal postal services"

The definition of universal postal services is amended to mean "[**a universal services as defined in a licence issued in terms of section 16**] the equitable and accessible provision of minimum range of postal services to all citizens without discrimination and regardless of physical location as determined by the Authority in consultation with the Minister". Postal sector is rapidly and constantly changing and the term is defined in line with these developments. The definition allows the

Authority to constantly study the markets and determine in the licence what constitute postal services that should be provided universally regardless of physical location.

"unreserved postal services"

The definition is inserted to **[the services contemplated in Schedule 2]** include the delivery and or courier of all letters, postcards, printed matters, small parcels and other postal articles up to and including 30kg; The definition is amended in line with the proposed deletion of the Schedules in the Act which are prescriptive.

"value added services"

The definition of "Value Added Services" is inserted to mean "services contemplated under section 44A ". This is in line with the new provision on value added services to allow the Post Office to provide other services that are not traditional postal services as defined. This will allow the Post Office to create more revenue streams in line with development within the ICT sector.

"telecommunications company"

The definition is deleted as it is no longer necessary for the purposes of this Act.

"telecommunications line"

The definition is deleted as it is no longer necessary for the purposes of this Act.

Clause 2

Section 2 is amended to insert new objects that encourage the expansion of postal services and promote the use of ICTs by the Post office while encouraging the provision of government and value added services and to ensure the regulation of extra territorial offices of exchange. The clause also ensures the establishment of funding mechanism for the Universal Services Obligation.

This is in line with the ICT White Paper policy objectives for the sector where operators, in particular to encourage SAPO to ensure efficiency in its operations through the use of ICTs and develop new revenue streams to ensure sustainability and growth within the sector.

Clause 3

Section 15(3) is amended to delete reference to Schedules this is in line with the new definitions of the reserved and unreserved postal services. With the repeal of Schedules 1 and 2 the Minister will now be able to review the reserved and unreserved services without having to amend the law by going through Parliament in order to make such changes. There are limitations to the powers of the Minister in circumstances where he makes changes in the same section 15(3) of the Act.

Clause 4

Section 16 (7) is amended to replace "**areas and communities which are not serviced or adequately serviced by postal service**" with "underserviced areas".

This is in line with the new definition of underserviced area.

Clause 5

Amendment of section 20 to replace words "registered" with "licensed" and "Regulator" with "Authority", by deleting reference to Schedule 2. This is consequential amendment in line with the new licensing framework provided in this amendment.

Clause 6

Section 20A is inserted to provide for the categories of licences. The new licensing framework provides categorisation of licences to ensure that even small operators find space within the sector and ensure the development and participation of SMMEs.

Clause 7

Amendment of section 21 to substitute the word "registered" with "licensed" and "registration" with "licence". This is a consequential amendment in line with the new licensing framework. The amendment also includes provision dealing with circumstances where the Authority rejects an application for a licence. It further requires the company applying for a licence to comply with other pieces of legislation in the country such as registering under the Companies Act, 2008 (Act No 71 of 2008).

Clause 8

Amendment of section 22 to substitute the word "registered" with "licensed" which is a consequential amendment, in line with the new licensing framework. This clause

also amends section 22 of the Act by deleting reference to Schedule 2 and the words "courier services and unreserved courier service". The Integrated ICT White Paper and the existing legislation provide for two postal services categories (i.e. reserved and unreserved), therefore the terms have been deleted and incorporated as part of the unreserved postal services. It also deletes reference to timelines for delivery referred to. Section 22 further deals with the operators that are currently registered by deeming them licensed on condition that they within 120 days or such extended period by the Authority indicate under which category they wish to be licensed and to provide necessary documents as required by the Authority.

Clause 9

Section 22A is inserted to empower the Authority to determine licence fees and conditions for each of the categories and for such to be published in the *Government Gazette*.

Section 22B is inserted to provide for the exemptions that are not regarded as Postal services and are not subject to registration in terms of the Act. This includes—

- (a) delivery by an employee of the sender exclusively for the private affairs of the sender;
- (b) unaddressed mail;
- (c) the exchange or service of legal process, proceedings, pleadings, affidavits or depositions;
- (d) occasional letters delivered by an individual not in the business of delivering letters;

- (e) trade announcements, circulars, printed extracts from newspapers, or advertisements which are not addressed to any person;
- (f) newspapers and periodicals.

Section 22C is inserted to provide for the regulation of ETOEs. The provision prohibits the establishment of ETOEs by any foreign operator without authorisation by the Authority. It further requires the foreign operator to apply to the Authority before establishing an ETOE in the country and to deal with ETOEs accordingly through regulations. The provision also empowers SAPO to enter into agreement with any foreign operator with regard to the distribution of mail items emanating from an ETOE. The provision further requires any ETOE established before the promulgation of this Act to apply within six months to the Authority for authorisation and empower the Authority to order any ETOE to cease operating if failed to apply or receive such permission to operate. The provision is inserted in line with the National ICT White Paper to regulate ETOEs as they are currently not regulated.

Section 22D is inserted to provide for requirements for ETOEs that have already established offices in the country.

Clause 10

Amendment of section 24 by deleting the words "registration certificate" this is in line with the new licensing framework which only makes reference to licences.

Clause 11

Section 24A is inserted to provide for the Minister in consultation with the Authority to designate operator/s responsible for the universal postal service provision.

This clause seeks to provide for the universal postal services to be funded from fund established by Minister or through Parliament. It further provides for all licensees to contribute to the universal services fund established by the Minister, in compliance with the legislation that empowers the imposition of the levies to fund universal services obligations and for the Minister to determine the amount to be contributed by licensees in consultation with the Authority. It also provides for the universal service provider to apply for funding in a manner prescribed by the fund. This is in line with the White Paper Policy to ensure that operators either pay or play as part of their universal services obligation.

Clause 12

Sections 29A and 29B dealing with the development of Philatelic products is inserted in line with the National Integrated ICT White paper and to provide clear process for the development of annual and commemorative stamps.

The provision empowers the postal company to be the custodian of Philatelic products in the country and to ensure that the postal company derive financial benefit in the development and printing of commemorative stamps which they currently do for organisations and individuals without guarantee that the stamps will

sell. The requesting party in terms of this provision will be required to buy a certain percentage of the commemorative stamps developed in their honour.

Clause 13

Amendment of section 30(5) is a consequential amendment in line with the deletion of courier services and the insertion of the definition of unreserved postal services.

Clause 14

Amendment of section 30A by replacing the word "may" with "must" and also replacing words "postal authority" with "foreign operator". This is to ensure that Postal operators are obliged to present and provide insurance option in line with the Short-Term Insurance Act, 1998 (Act No 53 of 1998) for customers valuables when posting to be protected against any loss or damage that may occur. The amendment is also in line with the deletion of the definition of "postal authority" and insertion of the new definition of the "foreign operator" as defined above.

Clause 15

New section 44A dealing with the provision of Value Added Services and infrastructure sharing by the postal company is inserted in line with the National Integrated ICT White Paper. The provision is aimed at empowering the postal company to expand its services offerings by providing value added services and create more revenue generating stream. This is also in line with the UPU resolutions that encourage designated postal operators to embrace technology and ensure the provision of 3 dimensions of postal services which include physical, electronic and financial services. The section further ensures that government departments comply

with the law by using the designated postal company for the reserved postal services.

Clause 16

Amendment of section 45 (1) by substituting the word "may" with "must". The current provision gives the postal company prerogative to choose whether or not to compensate. The amendment intends to protect consumers by compelling not only the postal company but also the unreserved postal operators to pay compensation for the loss of items posted.

Clause 17

New section 46A dealing with National Addressing is inserted in line with the National Integrated ICT White Paper Policy. An address is considered a '*basic human right*' and part of a person's identity by the Universal Postal Union Policy. There is currently a challenge with the assignment of addresses in the rural and underserved areas resulting in some household not having addresses while others having multiple addresses provided by different organisation for the purposes of delivering their services.

The provision gives SAPO the mandate to allocate address in rural and underserved areas on behalf of government. The provision also provides for the address assigned or confirmed by SAPO to be the official address for a particular household and for such addresses to be in line with international and national standards (SANS 1883).

The provision also empowers SAPO in line with the Spatial Infrastructure Act, 2003 (Act No 54 of 2003) as the data custodian of all address data sets in the Country.

This implies that SAPO will capture, manage, integrate, distribute, or use spatial information on behalf of government. This section further provides for the funding of the address assignment and development of database to be from the allocation by government and for SAPO to annually submit through the department the funding request.

Clause 18

The provision provides for the repeal of section 50 dealing with Money remitted through postal company in terms of the Post Office Act, 1958. Section 46 referred to in the provision was repealed by section 87 of the Postal Services Act, 1998 (Act No 124 of 1998). This was a transitional arrangement and the provision has since served its purpose and is no longer necessary.

Clause 19

This clause provides for the amendment of section 54 by substituting the word "postal authority" with "foreign operator" and by deleting "controlled by postal authority" to ensure that the account in which the money is to deposited does not have to be with the bank that is controlled by the postal operator. This is because some Postbanks, internationally are no longer controlled by the designated postal operators.

Clause 20

This clause provides for the repeal of sections 56 and 57, as the Post Office no longer uses savings certificate and savings issues are dealt with in the Postbank's Act.

Clause 21

This clause provides for the amendment of section 80 (1) and 2(c) to delete the words "registration certificate" in line with the new licensing framework.

Clause 22

This clause provides for the deletion of sections 81, 82, 83, 84, 85, 86 and 87. The sections are no longer necessary as the amendments have already been effected in the Law specified.

Clause 23**Schedule 1**

Schedule 1 is repealed and aligned with the definition of the reserved postal services. The postal sector environment is rapidly and constantly changing and the Act should not be prescriptive with regard to the services that are reserved. This will allow the Minister to determine and publish in the *Gazette* services that are reserved and the exclusivity period for such reserved services without having to amend the law.

Schedule 2

Schedule 2 is repealed and aligned with the definition of the unreserved postal services. This will allow the Minister to determine and publish in the *Gazette* services that are reserved and the exclusivity period for such reserved services without having to amend the law.

Clause 24 Short title and commencement

This Act is called Postal Services Amendment Act, 2018, and comes into operation on a date determined by the President by Proclamation in the *Gazette*.

3. PARTIES CONSULTED

3.1 During the process of developing the draft Postal Services Amendment Bill, preliminary consultations were done with National Treasury, Independent Communication Authority of South Africa (ICASA) and the South Africa Post Office (SAPO) as key stakeholder. The Bill was submitted to the Office of the Chief State Law Advisor in keeping with the Cabinet decision of 18 March 2009 and the provisional certification is attached.

3.2 Department of Monitoring Evaluation (DPME) has also been consulted in the development of SEIAS report and the provisional approval form is attached. The Bill was also finalised in consultation with the Economic Sectors, Employment and Infrastructure Development (ESEID) Cluster and approval was granted for the

Bill to be processed to Cabinet. Cabinet approved the Department's request to conduct public consultation on the 25 October 2017.

3.3 The Department published in the *Gazette* the Postal Services Amendment Bill to solicit public comments on the 10 November 2017.

Comments were received from AfriGis (Pty) Ltd, Afriforum, Anthony Cooper (CSIR), City of Johannesburg, Department of Development Planning, Committee for Spatial Planning (CSI), DHL International (Pty) Ltd, Falcon & Hume Attorneys INC (on behalf of Lightstone Proprietary Limited), Independent Communications Authority of South Africa (ICASA), South African Express Parcel Association (SAEPA), South African Post Office: Philatelic Services and TomTom Africa (Pty) Ltd.

3.4 Further consultation meeting with all stakeholders who submitted written comments was held on the 17 January 2018.

4. FINANCIAL IMPLICATIONS

The Department will be required to establish a Directorate responsible for Postal and ICTs Infrastructure Development to ensure the facilitation and coordination of SAPO Infrastructure development and digitization.

The cost of operationalisation of the Directorate will be provided for in the normal budgeting processes, as part of funding the new organisational structure, once approved.

5. CONSTITUTIONAL IMPLICATIONS

The draft Amendment Bill advances equality, human dignity through access information and to affordable postal, ICTs and government services by all citizens. This will further ensure that all citizens have an officially assigned physical address to be able to participate effectively in the socio-economic activities of the country.

6. PARLIAMENTARY PROCEDURE

6.1 The Department of Telecommunications and Postal Services and the State Law Advisers 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.

6.2 We have considered the tagging of the Bill in light of Chapter 4 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), which provides for procedures that Bills must follow in Parliament. Section 75 deals with ordinary Bills not affecting provinces.

6.3 The Constitutional Court judgement in the case of Stephen Segopotso Tongoane and Others v Minister for Agriculture and Land Affairs and Others CCT 100/9 2010J ZACC 10 at paragraphs 70 and 72, stated that—

"the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence. Whether a Bill is a section 76 Bill is determined in two ways. First by the explicit list of legislative matters in

section 76(3), and second by whether the provisions of a Bill in substantial measure fall within a concurrent legislative competence."

6.4 This test compels us to consider the substance, purpose and effect of the subject matter of the proposed Bill. This Bill seeks to amend the Postal Services Act, 1998, so as to align the Act with the National Integrated ICT Policy in order to provide for the regulation of the sector, particularly the private operators and ETOEs and the repositioning of SAPO to take advantage of the new opportunities imposed by digital technologies. These matters do not fall within any of the matters listed in section 76(3) of, or Schedule to, the Constitution. In our view this Bill is therefore an ordinary Bill not affecting the provinces as envisaged in section 75 of the Constitution.

6.5 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.